



A National Action Plan on Lawyer Conduct and Professionalism

A Report of the Working Group on Lawyer Conduct
and Professionalism

Adopted by the Conference of Chief Justices January 21, 1999

National Action Plan on Lawyer Conduct and Professionalism

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To provide the Committee with insight and expert advice on the professionalism initiatives that have developed around the country, the Committee appointed a 30-person Working Group of judges and attorneys. These individuals were assigned to one of six subcommittees – Bar Admission, Disciplinary Enforcement, Educational Initiatives, Lawyer Support, Litigation Reform, and Public Outreach. They assisted the project staff in designing the questionnaires on state professionalism initiatives, evaluated the survey responses, and proposed the recommendations that are included in the National Action Plan. An Executive Committee consisting of Chief Justice E. Norman Veasey (Chair of the CCJ Committee on Professionalism and Lawyer Competence) and the chairs of the Working Group subcommittees – Chief Judge Judith Kaye (NY) and Chief Justices Shirley Abrahamson (WI), Ernest Finney (SC), Burley Mitchell (NC), Gerald VandeWalle (ND), Michael Zimmerman (UT), and Thomas Zlaket (AZ) – met via teleconference on several occasions to coordinate the work of their respective subcommittees.

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CCJ National Study and Action Plan
On Lawyer Conduct and Professionalism

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EXECUTIVE SUMMARY

In response to concerns about a perceived decline in lawyer professionalism and its effect on public confidence in the legal profession and the justice system, the Conference of Chief Justices (CCJ) adopted Resolution VII at its 1996 Annual Meeting. This resolution called for a study of lawyer professionalism and the development of a National Action Plan to assist state appellate courts of highest jurisdiction in providing leadership and support for professionalism initiatives. With funding by the State Justice Institute and support from the National Center for State Courts (NCSC) and the American Bar Association Center for Professional Responsibility ("Center"), the CCJ Committee on Professionalism and Lawyer Competence ("Committee") carried out the resolution.

Under the direction of the Committee, the NCSC and the Center surveyed state courts, bar associations and other legal organizations, and ABA accredited law schools concerning professionalism and legal ethics programs in each state and solicited their opinions about the support that such programs need from state supreme courts. Summaries of the responses were provided to a Working Group of 30 judges and lawyers who made recommendations about specific initiatives that should be included in the National Action Plan. In August 1998, a draft of the National Action Plan was distributed to a wide variety of legal and judicial organizations and made available from the NCSC website for public review and comment. Based on comments received, the Working Group finalized the National Action Plan for submission to the CCJ for consideration at its 1999 Midyear Meeting.

The report consists of three sections. Section I contains a detailed description of the institutional and individual responsibilities of the bench, the bar, and the law schools in promoting lawyer ethics and professionalism. In the course of conducting the study, the Working Group recognized that different components of the legal community influence lawyer professionalism in unique ways. A sustained commitment and coordinated effort by all of them is needed to effect any meaningful change in the level of professionalism demonstrated by the legal community.

Section II contains the specific recommendations of the National Action Plan. The recommendations are organized in the familiar black letter and commentary format and address seven specific topics of lawyer ethics and professionalism: (A) Professionalism, Leadership and Coordination; (B) Improving Lawyer Competence; (C) Law School Education and Bar Admission; (D) Effective Lawyer Regulation; (E) Public Outreach Efforts; (F) Lawyer Professionalism in Court; and (G) Interstate Cooperation. The specific recommendations of the National Action Plan are:

A. Professionalism, Leadership, and Coordination

The appellate court of highest jurisdiction in each state should take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs. Specific efforts should include:

- **Establishing a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction;**

- Ensuring that judicial and legal education makes reference to broader social issues and their impact on professionalism and legal ethics;
- Increasing the dialogue among the law schools, the courts and the practicing bar through periodic meetings; and
- Correlating the needs of the legal profession – bench, bar, and law schools – to identify issues, assess trends and set a coherent and coordinated direction for the profession.

B. Improving Lawyer Competence

1. Continuing Legal Education (CLE)

Each state's appellate court of highest jurisdiction should encourage and support the development and implementation of a high-quality, comprehensive CLE program including substantive programs on professionalism and competence. An effective CLE program is one that:

- Requires lawyer participation in continuing legal education programs;
- Requires that a certain portion of the CLE focus on ethics and professionalism;
- Requires that all lawyers take the mandated professionalism course for new admittees;
- Monitors and enforces compliance with meaningful CLE requirements;
- Encourages innovative CLE in a variety of practice areas;
- Encourages cost-effective CLE formats;
- Encourages the integration of ethics and professionalism components in all CLE curricula;
- Encourages CLE components on legal practice and office management skills, including office management technology; and
- Teaches methods to prevent and avoid malpractice and unethical or unprofessional conduct and the consequences of failing to prevent and avoid such conduct.

2. Law Office Management

State bar programs should support efforts to improve law office efficiency.

Effective support includes:

- Establishing a law office management assistance program;
- Providing assistance with daily law office routines; and
- Providing monitoring services for lawyers referred from the disciplinary system.

3. Assistance with Ethics Questions

Lawyers should be provided with programs to assist in the compliance of ethical rules of conduct. State bar programs should:

- Establish an Ethics Hotline;

- Provide access to advisory opinions on the Web or a compact disc (CD); and
- Publish annotated volumes of professional conduct.

4. Assistance to lawyers with mental health or substance abuse problems

Lawyers need a forum to confront their mental health and substance abuse problems. State bar programs should:

- Create a Lawyer Assistance Program (LAP) if one does not exist;
- Fund the LAP through mandatory registration fees;
- Provide confidentiality for LAP programs;
- Establish intervention systems for disabilities and impairments other than substance abuse or expand existing LAPs to cover non-chemical dependency impairments;
- Provide monitoring services for lawyers referred from the disciplinary system; and
- Provide career counseling for lawyers in transition.

5. Lawyers Entering Practice for the First Time – Transitional Education

Judicial leadership should support the development and implementation of programs that address the practical needs of lawyers immediately after admission to the bar. Effective programs for newly admitted lawyers:

- Mandate a course for new admittees that covers the fundamentals of law practice;
- Emphasize professionalism;
- Increase emphasis on developing post-graduation skills; and
- Ensure the availability of CLE in office skills for different office settings.

6. Mentoring

Judicial leadership should promote mentoring programs for both new and established lawyers. Effective programs:

- Establish mentoring opportunities for new admittees;
- Establish mentoring opportunities for solo and small firm practitioners;
- Provide directories of lawyers who can respond to questions in different practice areas;
- Provide networking opportunities for solo and small firm lawyers; and
- Provide technology for exchange of information.

C. Law School Education and Bar Admission

1. Law School Curriculum

In preparing law students for legal practice, law schools should provide students with the fundamental principles of professionalism and basic skills for legal practice.

2. Bar Examination

The subject areas tested on the examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers.

3. Character and Fitness Evaluation

Law schools should assist bar admissions agencies by providing complete and accurate information about the character and fitness of law students who apply for bar admission.

4. Bar Admission Procedures

Bar admissions procedures should be designed to reveal instances of poor character and fitness. If appropriate, bar applicants may be admitted on a conditional basis.

D. Effective Lawyer Regulation

1. Complaint Handling

Information about the state's system of regulation should be easily accessible and presented to lawyers and the public in an understandable format. The disciplinary agency, or central intake office if separate, should review complaints expeditiously. Matters that do not fall under the jurisdiction of the disciplinary agency or do not state facts that, if true, would constitute a violation of the rules of professional conduct should be promptly referred to a more appropriate mechanism for resolution. Complainants should be kept informed about the status of complaints at all stages of proceedings, including explanations about substantive decisions made concerning the complaint.

2. Assistance to lawyers with ethics problems or "minor" misconduct (e.g., acts of lesser misconduct that do not warrant the imposition of a disciplinary sanction)

The state's system of lawyer regulation should include procedures for referring matters involving lesser misconduct to an appropriate remedial program. Such procedures may include:

- Required participation in a law office management program;
- Required participation in a lawyer assistance program;
- Enrollment in an "ethics school" or other mandatory CLE; and
- Participation in a fee arbitration or mediation program.

3. Disciplinary Sanctions

The range of disciplinary sanctions should be sufficiently broad to address the relative severity of lawyer misconduct, including conduct unrelated to the lawyer's legal practice. Disciplinary agencies should use available national standards to ensure interstate consistency of disciplinary sanctions. All public sanction should be reported to the National Lawyer Regulatory Databank of the American Bar Association.

4. Lawyers' Funds for Client Protection

The state's system of lawyer regulation should include a Lawyers' Fund for Client Protection to shield legal consumers from economic losses resulting from an attorney's misappropriation of law client and escrow money in the practice of law. Rules or policies of the appellate court of highest jurisdiction should:

- Provide for a statewide client protection fund;
- Require that the fund substantially reimburse losses resulting from dishonest conduct in the practice of law;
- Finance the fund through a mandatory assessment on lawyers;
- Designate the fund's assets to constitute a trust;
- Appoint a board of trustees, composed of lawyers and lay persons, to administer the fund; and
- Require the board of trustees to publicize the fund's existence and activities.

5. Other Public Protection Measures

The state's system of lawyer regulation should include other appropriate measures of public protection. Such measures that the Court should enact include:

- Mandating financial recordkeeping, trust account maintenance and overdraft notification;
- Establish a system of random audits of trust accounts;
- Requiring lawyers who seek court appointments to carry malpractice insurance;
- Collect annual information on lawyers' trust accounts;
- Studying the possibility of recertification;
- Providing for interim suspension for threat of harm; and
- Establishing a 30-day no contact rule.

6. Efficiency of the Disciplinary System

The state system of lawyer regulation should operate effectively and efficiently. The Court should enact procedures for improving the system's efficiency, including:

- Providing for discretionary rather than automatic review of hearing committee or board decisions by the Court;
- Providing for discipline on consent;

- Requiring respondents to disciplinary investigations to be reasonably cooperative with investigatory procedures;
- Establishing time standards for case processing;
- Periodically reviewing the system to increase efficiency where necessary;
- Eliminating duplicative review in the procedures for determining whether to file formal charges;
- Authorizing disciplinary counsel to dismiss complaints summarily or after investigation with limited right of complainants to seek review;
- Using professional disciplinary counsel and staff for investigation and prosecution and volunteers on boards and hearing committees;
- Providing appropriate training for all involved; and
- Incorporating disciplinary experiences in CLE curricula.

7. Public Accountability

The public should have access to information about the system of lawyer regulation including procedures, aggregate data concerning its operations, and lawyers' disciplinary records. Laypersons should be included on disciplinary hearing panels and boards. Other measures to ensure public accountability of the disciplinary agency include:

- Making written opinions available in all cases;
- Making formal disciplinary hearings open to the public;
- Collecting and making available information on lawyers' malpractice insurance; and
- Speaking about the disciplinary system at public gatherings.

E. Public Outreach Efforts

1. Public Education

Judges, lawyers and bar programs should provide more public understanding of lawyer professionalism and ethics by developing and implementing public education programs. Effective public education programs should:

- Emphasize lawyer professionalism in court communications with the public;
- Provide a "Public Liaison" office or officer to serve in a clearinghouse function;
- Distribute public education materials in places commonly accessible to the public;
- Include public speaking on the topic of professionalism on the agenda for bar association speaking bureaus;
- Encourage a more active role between educational institutions and organizations and the justice system; and
- Educate the legislative and executive branches of government about issues related to the legal profession and the justice system.

2. Public Participation

The participation of the public should be supported in all levels of court and bar institutional policy-making by judges, lawyers, and bar programs. Judges, lawyers, and bar programs should:

- Publicize the nomination and appointment process for public representatives on court and bar committees;
- Once appointed, provide lay members access to the tools necessary for effective participation; and
- Provide adequate funding on an ongoing basis.

3. Public Access to the Justice System

Judges, lawyers, and bar programs should encourage public access to the justice system through the coordination of pro bono programs. Effective coordination of pro bono programs should:

- Encourage judicial support and participation in lawyer recruitment efforts for pro bono programs;
- Provide institutional support within the court system for lawyer pro bono service;
- Establish an "Emeritus Lawyer" pro bono program;
- Provide institutional and in-kind support for the coordination of pro bono programs; and
- Explore funding alternatives to support pro bono programs.

4. Public Opinion

To gauge public opinion about the legal profession and the level of professionalism demonstrated by lawyers, the court and the bar should create regular opportunities for the public to voice complaints and make suggestions about judicial/legal institutions.

5. Practice Development, Marketing and Advertising

The judiciary, the organized bar and the law schools should work together to develop standards of professionalism in attorney marketing, practice development, solicitation and advertising. Such standards should:

- Recognize the need for lawyers to acquire clients and the benefit to the public of having truthful information about the availability of lawyers;
- Emphasize the ethical requirements for lawyer advertising and client solicitations;
- Emphasize the need to be truthful and not misleading; and
- Encourage lawyers to employ advertising and other marketing methods that enhance respect for the profession, the justice system and the participants in that system.

F. Lawyer Professionalism in Court

1. Alternative Dispute Resolution Programs

If appropriate for the resolution of a pending case, judges and lawyers should encourage clients to participate in Alternative Dispute Resolution (ADR) programs.

An effective ADR program should:

- Ensure that court-annexed ADR programs provide appropriate education for lawyers about different types of ADR (e.g., mediation, arbitration);
- Establish standards of ethics and professional conduct for ADR professionals;
- Require lawyers and parties to engage the services of ADR professionals who adhere to established standards of ethics and professional conduct;
- Encourage trial judges to implement and enforce compliance with ADR orders; and
- Educate clients and the public about the availability and desirability of ADR mechanisms.

2. Abusive or Unprofessional Litigation Tactics

To prevent unprofessional or abusive litigation tactics in the courtroom, the court and judges should:

- Encourage consistent enforcement of procedural and evidentiary rules;
- Encourage procedural consistency between local jurisdictions within states;
- Adopt court rules that promote lawyer cooperation in resolving disputes over frivolous filings, discovery, and other pretrial matters;
- Encourage judicial referrals to the disciplinary system;
- Educate trial judges about the necessary relationship between judicial involvement in pretrial management and effective enforcement of pretrial orders;
- Encourage increased judicial supervision of pretrial case management activities; and
- Establish clear expectations about lawyer conduct at the very first opportunity.

3. High Profile Cases

In high profile cases, lawyers should refrain from public comment that might compromise the rights of litigants or distort public perception about the justice system.

G. Interstate Cooperation

The appellate courts of highest jurisdiction should cooperate to ensure consistency among jurisdictions concerning lawyer regulation and professionalism and to pool resources as appropriate to fulfill their responsibilities. Specific efforts of interstate cooperation include:

- Continued reporting of public sanctions to ABA National Regulatory Data Bank;

- **Using the Westlaw Private File of the ABA National Regulatory Data Bank;**
- **Inquiring on the state's annual registration statement about licensure and public discipline in other jurisdictions;**
- **Providing reciprocal recognition of CLE;**
- **Establishing regional professionalism programs and efforts;**
- **Recognizing and implementing the International Standard Lawyer Numbering System created by Martindale-Hubble and the American Bar Association to improve reciprocal disciplinary enforcement; and**
- **Providing information about bar admission and admission on motion (including reciprocity) on the bar's website.**

Section III contains the briefing papers that were prepared for the Working Group based on the survey responses from the national study. There are eight briefing papers in all: (1) Professionalism; (2) Educational Initiatives; (3) Public Outreach; (4) Litigation Reform; (5) Bar Admission; (6) Lawyer Support; (7) Disciplinary Enforcement; and (8) Law School Education.

Appended to the report is Resolution VII adopted by the CCJ on August 1, 1996 and copies of the survey instruments that were sent to the courts, various legal organizations, and the deans of ABA accredited law schools.

INTRODUCTION

The vast majority of lawyers in this country are competent professionals. They are conscientious advocates of their clients' interests, honest in their representations to courts and to opposing counsel, civil to their legal colleagues, and generous contributors of their time and expertise to their communities. In short, they conduct themselves according to the highest dictates of the legal profession. Nevertheless, the unprofessional and unethical conduct of a small, but highly visible, proportion of lawyers taints the image of the entire legal community and fuels the perception that lawyer professionalism has declined precipitously in recent decades. The implications of this behavior for the American justice system are extremely serious in that the behavior contributes to decreased public confidence in legal and judicial institutions as well as heightened stress and decreased professional satisfaction for those lawyers who endeavor to practice in a professional manner.

In response to these concerns, the Conference of Chief Justices (CCJ) adopted a resolution at its 1996 Annual Meeting calling for a study of lawyer professionalism and the development of a National Action Plan to assist state appellate courts of highest jurisdiction to reverse this trend. With funding by the State Justice Institute, the National Center for State Courts (NCSC) in cooperation with the American Bar Association Center for Professional Responsibility undertook a national study to examine state professionalism initiatives. This report is the culmination of these coordinated efforts.

Successful efforts to improve lawyer conduct and enhance professionalism cannot be accomplished unilaterally. The objective of such efforts is a change in the very culture of the legal profession. Not only is it important to correct the behavior of lawyers who fail to live up to professional norms, it is critical that those lawyers who do conduct themselves professionally once again become the most visible members of the legal community. Success requires a sustained commitment from all segments of the bench, the bar, and the academy. Each plays a different role, both institutionally and individually, in their contributions to these efforts. Section I of this report describes these roles in detail.

Section II of this report consists of specific recommendations for state courts to improve lawyer conduct and enhance professionalism. These recommendations are based on the responses to the survey on professionalism initiatives conducted in the fall of 1997. The types of initiatives that have proven effective in the various jurisdictions cover a broad spectrum of ideas. Many of the recommendations concern programs that are not new, but were cited by a number of jurisdictions as being particularly effective in addressing lawyer conduct. These recommendations address all of the areas of professionalism that were identified by survey respondents in the national study. In addition, these recommendations recognize that judges must lead by example in demonstrating civility and other characteristics of professionalism. An effective system of lawyer regulation is a necessary base for any efforts to enhance lawyer professionalism. The obverse applies as well – enhancing lawyer professionalism should aid the goals of effective lawyer regulation. This report recognizes that each state's appellate court of highest jurisdiction has ultimate authority

and responsibility for ensuring that that base is sufficient to protect the public from lawyer misconduct of every degree – major and minor.

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

Section III of the National Action Plan consists of a series of briefing papers that were prepared for the CCJ Working Group on Lawyer Conduct and Professionalism. These briefing papers summarize the state responses to the CCJ Survey on Lawyer Professionalism Initiatives. They are included for illustration purposes to provide additional information about various programs that states have enacted to enhance lawyer professionalism.

SECTION I: INSTITUTIONAL AND INDIVIDUAL ROLES

Institutional Role of the Court

The promotion of professionalism should be a fundamental goal of the state judiciary and all agencies accountable to the Court.* To realize this objective, the Court should ensure that the institutional structure of the judiciary includes all of the necessary components for the sound and effective regulation of the profession. A hallmark of the Court's institutional support for professionalism should be an administrative mechanism (e.g., Commission on Professionalism), the sole objective of which is to promote professionalism in the legal profession and the judiciary.

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This mechanism can take many forms including that of an independent agency or a formal commission. Regardless of its structural form, it should have several distinguishing characteristics. It should be instituted as a permanent, rather than ad hoc, component of the judicial infrastructure. It should report directly to the Court and should be endowed with sufficient authority to carry out its designated responsibilities.

Its existence as an independent vehicle serves an important symbolic function – analogous to a cabinet position in the executive branch of government. It demonstrates the importance that the Court places on promoting professionalism in the legal profession and the judiciary. Equally as important as its symbolic value, this mechanism serves both in a leadership and a coordination capacity in regard to the agencies and organizations within the legal community that promote professionalism. Institutionalizing this function also promotes the ability to engage in consistent efforts to improve professionalism over a long period of time, thus avoiding exclusive dependence on the drive and charisma of a few individuals to accomplish this objective.

The creation of this mechanism should supplement and enhance, not supplant, the Court's existing system of lawyer regulation. Disciplinary agencies, lawyer support programs, continuing legal education boards, bar admissions boards, and other judicial agencies and bar programs are necessary for promoting professionalism within the legal community. The Court is responsible for providing these agencies and programs with funding, resources, staff, and procedural and administrative rules and policies necessary to function effectively.

Professionalism programs and initiatives are not only the province of formal judicial agencies and the unified bar, but also are undertaken by voluntary bar associations, law schools, and other public or private organizations that are not directly accountable to the Court. The Court should not preempt, usurp, or undermine these efforts, but should ensure that they do not contradict official Court policy or circumvent the Court's regulatory authority. Regular meetings among the Court, the bar (both unified and voluntary associations), bar admissions authorities, lawyer disciplinary agencies, law schools, pro bono programs and relevant public or private organizations

* Unless otherwise noted, the term 'Court' as used in this report refers to the appellate court of highest jurisdiction in every state.

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are necessary, both to coordinate professionalism initiatives and to avoid duplicative efforts. The Court should take the lead in arranging these meetings.

The Court should also provide strong support and guidance for these efforts, including the promulgation of court rules that promote competence and professionalism by judges, lawyers, and law students. One example of such court rules is the development of student practice rules for law school clinical programs that help law students develop practical legal skills. Procedural rules should encourage cooperation among opposing counsel and parties, and between the court and lawyers, in the fair and efficient resolution of their legal disputes.

Although the definition of professionalism has remained fairly stable, the specific context in which professional conduct is demonstrated can change with the social, political, technological, and economic climate of contemporary society. The Court should periodically assess the status of professionalism in the legal and judicial community to identify emerging problems and ensure that such problems are addressed appropriately. Judicial and legal education curricula should incorporate ethics and professionalism, including analyses of emerging problems and potential solutions.

As part of its assessment of the status of professionalism, the Court should provide appropriate opportunities for the public to participate in the development of or comment on policies governing the legal profession and the administration of justice. Public input is valuable both for self-evaluation purposes and for promoting public confidence in the justice system. These opportunities should not be provided in a vacuum, however, but should accompany educational efforts to inform the public about the role of the courts, the legal profession, and the justice system generally. The public also should be given information about specific public service initiatives undertaken voluntarily by individual lawyers and bar groups as well as programs designed to protect the public from unethical or unprofessional conduct by judges and lawyers.

Individual Role of Judges

Institutional support alone is insufficient to reverse the decline in professionalism and restore the legal profession to good standing in the eyes of the public. Every member of the bench, from the chief justice to the magistrates, has a personal responsibility to contribute to efforts to improve lawyer conduct and enhance professionalism. Because of their visibility within the legal community and in the larger community, judges are uniquely positioned to affect the level of professionalism in their respective jurisdictions.

Leadership by example has always been one of the most effective tools for changing society. Judges are natural role models for lawyers; lawyers look to judges for cues about how to conduct themselves both in and out of court. Judges who treat others with respect and courtesy, and insist that people appearing before them do likewise, experience far fewer problems with unprofessional behavior from lawyers than judges who contend that it is not their job to make lawyers adhere to ethical or professional norms. Judges should exemplify appropriate judicial demeanor in both

their personal behavior and their professional interactions with judicial colleagues, lawyers, litigants, witnesses, jurors, and the public. Only those who conduct themselves in a professional manner will have the credibility and respect to insist that others do the same.

It is far easier to maintain an acceptable level of professionalism by lawyers if the judge's expectations about appropriate behavior are made clear to the lawyers and litigants at the very beginning of their relationship, before problems develop. Judges should take the earliest opportunity to explain to lawyers that professionalism and ethical conduct are mandatory for practicing in their courts. Some judges include provisions to that effect in pretrial orders. Others give the lawyers a copy of one of the lawyer's creeds (e.g., Texas Lawyer's Creed; Delaware *pro hac vice* rules) and require the lawyers to certify that they have read it, understand it, and agree to abide by its tenets. In smaller jurisdictions, it may only be necessary to set these parameters on first meeting with a lawyer who has not previously practiced in that court. In larger jurisdictions, where the number of judges and lawyers makes it more difficult to establish the personal ties that encourage professionalism, judges may elect to establish these expectations with the lawyers at the commencement of every suit, regardless of whether the lawyers have practiced before that judge or not. Whichever technique is employed, there should be no question that the judge will not tolerate any unprofessional conduct.

Once the judge's expectations have been made clear, he or she should enforce them consistently. Generally, an oral admonition and concrete suggestions for behavior modification are sufficient to remind lawyers of their responsibilities. Repeated lapses, however, should be met with progressively more severe sanctions. Instances of lawyer misconduct should be referred to the disciplinary agency where warranted.

Judicial leadership in promoting professionalism should extend beyond the confines of individual courtrooms. Lack of professionalism and the need to cure it extend beyond litigation. It infects all aspects of law practice including transactional, government, public sector, non-profit, and in-house corporate and other organizational practices. Judges have numerous opportunities to educate and inspire current and prospective lawyers, as well as the general public, about the importance of professionalism in contemporary legal practice. Local and regional bar organizations welcome the participation of judges as speakers at conferences, as faculty at CLE classes and other educational events, as promoters for pro bono and community service programs, and as committee members on planning and policy development task forces on professionalism.

Law students also benefit from exposure to positive judicial role models. Judges should emphasize professionalism in all of their contacts with law students – as judges in moot court or other competitions, as adjunct faculty or invited speakers for classes, or as advisors to various law school organizations. Appellate judges should endeavor to visit each of the law schools in their respective jurisdictions at least once per year. Trial judges may be able to volunteer their time at local law schools on a more frequent and consistent basis.

Judges should also become involved with education efforts and activities that inform the public about professionalism, legal ethics, and the justice system. Community organizations, including philanthropic, educational, business and social organizations, offer many opportunities for judges to educate the public about the legitimate expectations that citizens may have of lawyers, judges and court staff. Similarly, public schools are grateful for individuals who are willing to teach students about the justice system from personal knowledge and experience. Rules of judicial conduct prohibit judges from commenting on specific cases pending or likely to be brought in their courts, but nothing prohibits judges from engaging in the types of public education activities described above. Judicial participation in such activities is one of the most effective means for providing the public with accurate information about the justice system.

Institutional Role of the Bar

The institutional bar is responsible for promoting professionalism in the legal community, educating lawyers about their ethical and professional obligations, and preventing instances of minor misconduct or unprofessional behavior from developing into more serious problems. A multifaceted approach is needed to fulfill these responsibilities. The bar should develop, implement, and administer – in coordination and cooperation with the courts and with local and specialty bar organizations – programs to promote lawyer professionalism and to enhance public confidence in the legal profession. At a minimum, the bar should establish and administer a system for responding to repeated instances of unprofessional conduct that do not rise to the level of sanctionable misconduct. It should support lawyers who need specialized assistance (e.g., in regard to substance abuse, mental health, or law office management assistance). And it should develop and administer programs for resolving disputes between lawyers and clients.

Education about ethics and professionalism is also an important function of the institutional bar. In addition to ensuring that CLE curricula include appropriate segments about lawyer professionalism and ethics, the bar should provide mentoring programs and "bridge-the-gap" CLE for new lawyers. It also should provide individual assistance to lawyers who have questions about their ethical or professional responsibilities in specific circumstances. The scope of such assistance should be broad enough to address both practical and civic aspects of lawyer ethics and professionalism, such as advertising, law office management, and pro bono and community service.

Finally, the bar and the courts should provide avenues for two-way communication with the public. They should employ various methods of educating the public about the legal profession, ethics and professionalism, and the justice system, and inform them about specific programs to protect the public, assist consumers of legal services, or provide services for those unable to afford them. They should invite public participation or provide some opportunity for public comment on bar programs related to lawyer ethics and professionalism. Inasmuch as the leaders of the institutional bar serve as role models for other lawyers and the public, their professional

demeanor and personal behavior should exemplify the highest standards of ethics and professionalism.

Individual Role of Lawyers

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

Each lawyer has an individual responsibility to be professional, to support the efforts of the Court, the bar and the law schools to provide opportunities for other lawyers to do likewise. Not only should they demonstrate professionalism themselves, they should ensure that their nonlawyer staff fully understand the concept and obligations of professionalism and act accordingly. They should not tolerate unethical or unprofessional conduct by their fellow lawyers. They should exemplify the ideal of the lawyer-statesman – that is, a professional who devotes his or her judgment and expertise to serving the public good, particularly through participation in pro bono and community service activities. Finally, they should endeavor to educate the public about professionalism by example, through concrete discussions with clients, and by participation in public education programs.

Institutional Role of Law Schools

Law school is, for most lawyers, the first exposure to the rigorous requirements of legal ethics and professionalism. All law schools currently offer courses in legal ethics to supplement the traditional curricula of substantive law. While these courses are a necessary knowledge base for new lawyers, they are insufficient alone to prepare law students for competent legal practice. The primary objective of law school should be broader than providing students with a solid intellectual underpinning and sufficient knowledge to pass a bar examination. It must be to prepare students to practice law. To do this, law schools must provide students with an appreciation for the broader concept of professionalism. A sufficient grounding in basic legal practice and office management skills such as legal research and drafting techniques, trust accounting methods, and tickler systems should be included in the basic law school curricula. Simulated law practice, clinical and pro bono programs, and internships offer invaluable opportunities to apply legal knowledge and skills under the direct supervision of experienced law faculty. These course offerings should be a staple of all law school curricula and, if not required for all law students, should be strongly encouraged for all

students contemplating admission to the bar. To be sure, many law schools aspire to these goals, but these criteria of a legal education must become the norm.

During the three years that most students are enrolled, the opportunity that law schools have to assess the character and integrity of prospective bar applicants is generally superior to that of bar admissions reviewers. Law schools should provide bar admissions agencies with complete and accurate information about students' character, including instances of non-academic misconduct. If students demonstrate through their performance in law school that they would find it difficult to comply with the basic requirements of legal ethics, law schools should counsel them to pursue a career that does not require admission to the bar.

Increasingly, new lawyers enter legal practice with substantial debt as a result of their law school education. The financial strain that this creates prompts some new lawyers to engage in risk-taking behavior such as accepting a larger and more complex caseload than competent practice would ordinarily permit. Although many of the expenses associated with law school are not directly controllable by the institutions themselves, the law schools should counsel students about debt management techniques. They should also establish financial assistance or scholarship funds for qualified students as well as loan forgiveness programs for students to pursue careers in less lucrative public or not-for-profit legal practice.

Preparing students to practice law is a significant undertaking and cannot be accomplished by the law schools alone. Law schools should not isolate themselves from the local legal community, but rather should invite the courts and the bar to participate in the education of law students. They should actively solicit judges and lawyers to supervise and mentor law students, provide opportunities for students to observe and participate in legal practice, and offer to share their practical expertise in the classroom. A much closer partnership between the courts, the bar, and the law schools would enhance the ability of all three institutions to improve lawyer professionalism and increase public confidence in the legal profession.

Individual Role of Law School Faculty

Just as the individual responsibilities of judges and lawyers differ from those of their respective institutions, so do the responsibilities of law school faculty differ from those of the law schools. Although the subjects of legal ethics and professionalism have attained significant status as topics of academic study, they cannot and should not be segregated from other academic subjects in the same way that torts can be segregated from contracts or criminal procedure. Rather, they are integral to all academic subjects and faculty should incorporate discussions about these topics and emphasize their importance in all academic classes.

In doing so, law faculty should always be mindful of their own status as role models. Law students who are consistently exposed to faculty who disparage legal practice and courts will assume these views themselves and translate them into disrespect and unprofessional conduct toward their legal colleagues and judges. Even when critiquing

particular judicial opinions or legal practices, faculty should instill in their students respect for the justice system and for the individuals who work in it.

SECTION II: RECOMMENDATIONS

Pursuant to Resolution VII (National Study and Action Plan Regarding Lawyer Conduct and Professionalism), adopted by the Conference of Chief Justices on August 1, 1996, the following recommendations are presented for consideration by state appellate courts of highest jurisdiction in their exercise of regulatory authority over the legal profession.

A. Professionalism, Leadership, and Coordination

The appellate court of highest jurisdiction in each state should take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs. Specific efforts should include:

- **Establishing a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction;**
- **Ensuring that judicial and legal education makes reference to broader social issues and their impact on professionalism and legal ethics;**
- **Increasing the dialogue among the law schools, the courts and the practicing bar through periodic meetings; and**
- **Correlating the needs of the legal profession – bench, bar, and law schools – to identify issues, assess trends and set a coherent and coordinated direction for the profession.**

Comment

The appellate court of highest jurisdiction in each state has ultimate authority and responsibility for maintaining the standards of professionalism and ethics for the legal community. As the state's chief policy maker in this regard, the Court should be proactive in evaluating the state's level of professionalism and the effectiveness of programs designed to promote professionalism, should enforce discipline and should coordinate the presentation of such programs by the bench, the bar, and the law schools. The Court is responsible for ensuring that regulatory restrictions on lawyers are meaningful and continue to be effective for the purpose intended.

As part of its leadership role, the Court should continually assess the social factors that affect the legal profession and its various institutions to maximize resources, publicize its positive attributes, and address its shortcomings and liabilities. It should marshal the wisdom of "the best and the brightest" of the judiciary, the law school faculty, and the practicing bar to facilitate problem solving in the 21st Century and to position the profession and the justice system to take advantage of favorable events and developments. In doing so, the Court should ensure that the full range of

the legal community, including government and public sector lawyers, transactional lawyers, and in-house lawyers, as well as public representatives are included in these discussions.

B. Improving Lawyer Competence

1. Continuing Legal Education (CLE)

Each state's appellate court of highest jurisdiction should encourage and support the development and implementation of a high-quality, comprehensive Continuing Legal Education (CLE) program including substantive programs on professionalism and competence. An effective CLE program is one that:

- **Requires lawyer participation in continuing legal education programs;**
- **Requires that a certain portion of the CLE focus on ethics and professionalism;**
- **Requires that all lawyers take the mandated professionalism course for new admittees;**
- **Monitors and enforces compliance with meaningful CLE requirements;**
- **Encourages innovative CLE in a variety of practice areas;**
- **Encourages cost-effective CLE formats;**
- **Encourages the integration of ethics and professionalism components in all CLE curricula;**
- **Encourages CLE components on legal practice and office management skills, including office management technology; and**
- **Teaches methods to prevent and avoid malpractice and unethical or unprofessional conduct and the consequences for failure to prevent and avoid such conduct.**

Comment

Requiring substantive coverage of competence and professionalism as part of a comprehensive CLE program is vital to developing those skills within the legal community. On the most basic level, educational programs should provide high-quality information delivered by a respected and knowledgeable educator. Our surveys demonstrated that programs can go beyond meeting these basic educational needs by being responsive to the lawyers they serve. Several states reported that breaking out of the traditional lecture format and developing more interactive means of delivering information is effective, particularly for programs dealing with professionalism. Technological innovations (e.g., teleconferencing, video/audio tapes, on-line conferences) have made it possible for many states to improve methods of CLE delivery, making programs more cost-effective and convenient. These factors are especially important for lawyers in rural areas or for those employed in government, public-sector, and non-profit organizations, for whom cost is often a significant obstacle to compliance with CLE requirements. Some of these innovations may make it possible

to include a testing component in CLE courses, thus permitting lawyers to evaluate how well they have understood the material and assisting the bench and bar to monitor compliance with CLE requirements.

In terms of developing professionalism in the legal community, an important collateral benefit to encouraging lawyers to attend CLE programs is the natural opportunity they provide for lawyers to interact in a collegial and informal atmosphere. Some CLE programs also promote pro bono service by providing incentives for volunteer attorneys (e.g., free or reduced cost CLE classes, CLE credit for pro bono service rendered through a recognized pro bono program).

2. Law Office Management

State bar programs should support efforts to improve law office efficiency.

Effective support includes:

- **Establishing a law office management assistance program;**
- **Providing assistance with daily law office routines; and**
- **Providing monitoring services for lawyers referred from the disciplinary system.**

Comment.

Law office management assistance programs (LOMAPs) should be designed to provide all lawyers, in large and small law firms as well as sole practitioners, educational resources on the business aspects of their law practice. State bar programs can play a clearinghouse role by offering on-site consultations, educating lawyers through certified CLE programs, distributing office management manuals, or providing referrals to private consultants and vendors. LOMAPs can provide education about technological changes, law office software, docket control, case monitoring, file management, separation and control of bank accounts, and other general office administrative systems. LOMAPs can also provide training in client communications and risk avoidance to paralegal and non-legal staff. To make these services readily available, LOMAPs use Internet sources, CD-ROM services, audiotapes, videotapes, and libraries. LOMAPs can also submit information to state bar journals or periodically publish newsletters pertaining to law office management.

In providing monitoring services for lawyers referred from the disciplinary system, bar programs can correct lawyer misconduct and retrain lawyers and their staff about law office management. For example, LOMAPs can provide on-site training for lawyers who have neglected cases or have failed to communicate with clients because of inadequate procedures for diarying and calendaring cases and deadlines.

3. Assistance with Ethics Questions

Lawyers should be provided with programs to assist in the compliance of ethical rules of conduct. State bar programs should:

- **Establish an Ethics Hotline;**
- **Provide access to advisory opinions on the Web or a compact disc (CD);**
and
- **Publish annotated volumes of professional conduct.**

Comment:

The vast majority of lawyers make a good faith effort to comply with state legal ethics rules. Services should be provided for those who choose to make a good faith effort to comply with state ethical rules of conduct. A hotline serves as a forum for lawyers to direct their ethical inquiries to members of the disciplinary counsel or other qualified bar personnel. State bar programs should use the most efficient services to comply with demand. For example, Florida has a hotline staff of eight (8) lawyers with an increasing demand to hire more personnel. Hawaii uses a toll free number to better serve the outer island members. To fund this service, New Jersey uses a 900 number. Ethics assistance programs should provide lawyers with access to information on jurisdictional interpretations of rules. For advisory opinions to be more readily accessible, suggestions include Internet sources, state bar web sites, and CD-ROM materials. States also may provide lawyers with annotations to state rules of professional conduct.

4. Assistance to lawyers with mental health or substance abuse problems

Lawyers need a forum to confront their mental health and substance abuse problems. State bar programs should:

- **Create a Lawyer Assistance Program (LAP) if one does not exist;**
- **Fund LAP through mandatory registration fees;**
- **Provide confidentiality for LAP programs;**
- **Expand existing LAPs to cover non-chemical dependency impairments;**
- **Establish intervention systems for disabilities and impairments other than substance abuse;**
- **Provide monitoring services for lawyers referred from the disciplinary system; and**
- **Provide career counseling for lawyers in transition.**

Comment:

Lawyer assistance programs have been very effective in offering lawyers support for alcoholism. But lawyers also need help with chemical dependency (e.g., cocaine, marijuana, heroin) and non-chemical dependency problems (e.g., eating disorders, depression and suicide, gambling, phobias). The use of mandatory registration fees is suggested to fund LAPs. Registration fee money can be used to solicit the services of experienced professional mental health providers.

As an incentive for lawyers to take advantage of bar-related programs, they should be entitled to the same type of immunity and confidentiality privileges that exist in other dependency programs. State bars are also in a position to intervene where outside mental health professionals are not able—LAPs can offer assistance for problems commonly associated with the practice of law.

Intervention, which entails lawyer confrontation, is essential for an effective LAP. If a lawyer has chemical dependency problems, for example, volunteers or other members of the local LAP may order the lawyer to clear out his or her desk, purse, or car to search for substances. Or a lawyer who is experiencing non-chemical dependency problems can be monitored by LAP members with periodic visits to the lawyer's office or home. In addition to intervention services, monitoring can be provided for lawyers referred from the disciplinary system to ensure compliance with judicial or agency orders.

LAPs also should offer career counseling for lawyers in transition. Career counseling can be given to assist lawyers with career changes to other professions less stressful than the practice of law. For those who no longer are members of the legal profession yet remain in need of assistance, counseling services still should be provided.

5. *Lawyers Entering Practice for the First Time — Transitional Education*

Judicial leadership should support the development and implementation of programs that address the practical needs of lawyers immediately after admission to the bar. Effective programs for newly admitted lawyers:

- **Mandate a course for new admittees that covers the fundamentals of law practice;**
- **Emphasize professionalism;**
- **Increase emphasis on developing post-graduation skills; and**
- **Ensure the availability of CLE in office skills for different office settings.**

Comment

Many young lawyers enter legal practice in need of basic lawyering skills, often without the support of a large firm to assist them during those first transitional years. This lack of education and support is exacerbated by a "Rambo" approach to lawyering that, to newly admitted lawyers, may appear to be the norm rather than the exception. Many states have addressed these problems by instituting a mandatory practical skills and professionalism program for every newly admitted lawyer. These states recognize the need for practical skills training that is proactive and is provided after admission rather than in response to an already existing disciplinary problem. The most useful practical skills programs also are tailored to the individual needs of different categories of law practice. In addition to teaching basic lawyering skills, these programs should provide an opportunity for new lawyers to interact with faculty recognized for a high

degree of professionalism. Making an investment in this type of educational program is essential to the success of new lawyers and to the image of the legal profession as a whole.

The vast majority of states offer "bridge-the-gap" classes for newly admitted lawyers, although the classes themselves vary extensively in the number of topics covered, the detail of information provided, and the required teaching skills of the faculty.* Several states have more extensive "apprenticeship" programs that are worthy of consideration. In Delaware, bar applicants must be vouched for by a lawyer with ten years or more practice experience, a five (5) month structured clerkship must be completed, and attendance to a pre-admission bar program is required. In addition, Delaware has a requirement that newly admitted lawyers must take fundamental courses in the first few years of practice. Vermont has a similar apprenticeship program that must be completed within two years of bar admission. Georgia has recently established a mandatory mentoring program that pairs newly admitted lawyers with seasoned lawyers for a two-year period in which the new lawyers must complete a series of exercises under the supervision of their mentors and attend a number of workshops.

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6. *Mentoring*

Judicial leadership should promote mentoring programs for both new and established lawyers. Effective programs:

- **Establish mentoring opportunities for new admittees;**
- **Establish mentoring opportunities for solo and small firm practitioners;**
- **Provide directories of lawyers who can respond to questions in different practice areas;**
- **Provide networking opportunities for solo and small firm lawyers; and**
- **Provide technology for exchange of information.**

Comment:

Mentoring is a highly effective and efficient way of passing professionalism on to other lawyers. The advice and counsel of veteran lawyers should be available to newer lawyers in the system as well as to experienced lawyers seeking to expand their areas of expertise.

Mentoring should provide lawyers with practical experience to deal with the realities of specialized areas within the practice of law. For example, mentoring can be provided for established lawyers who change firm size (from large firm to small firm, or small firm to solo practice); mentoring may even change by need—an established lawyer may seek to become more specialized and may need guidance on career expansion. A mentor can also educate on law office management systems, capital investment needed for sole practice, or debt management for new admittees.

* See generally AMERICAN BAR ASSOCIATION TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 285-304 (1992).

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Mentoring promotes collegiality among local and regional lawyers. It provides lawyers with a networking system for constant interaction with each other. With a networking system, lawyers are able to present comments and questions on legal issues to other members of the legal community. The American Inns of Court is a national organization with local chapters that often serves a mentoring role for new lawyers. Other programs provide opportunities for mentoring relationships to develop. In South Carolina, the Courthouse Keys program introduces new lawyers to judges and the courtroom. In Connecticut a solo and small firm networking breakfast is held monthly. Directories of CLE speakers, law professors, qualified lawyers, and other experts can also be provided for lawyers who are in need of substantive advice. In addition, electronic mail and list-servs on the Internet facilitate the exchange of information (ethical rules of conduct still apply). Although there may be no face-to-face contact in Internet usage, these services can be an invaluable method of accessing expert assistance.

C. Law School Education and Bar Admission

1. Law School Curriculum

In preparing law students for legal practice, law schools should provide students with the fundamental principles of professionalism and basic skills for legal practice.

Comment

Most lawyers get their first introduction to the basic concepts of legal ethics and professionalism during law school, but few students fully appreciate their importance or receive a sufficient grounding in practical legal skills for competent legal practice before being admitted to the profession. In addition to providing law students with substantive legal knowledge, law schools should ensure that students understand the importance of professionalism and have an adequate grasp of basic legal skills. Ethics and professionalism courses that include simulations of "real life" ethical and professional issues better prepare students for legal practice than traditional textbook approaches to this topic.* Such curricula should clarify the distinction between professionalism and overzealous advocacy and teach students about the real-life consequences of unprofessional and unethical conduct.

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Graduating law students should have acquired mastery of the basic tools of legal practice including office management skills (e.g., computer and other communication and research technology, trust accounting requirements, caseload and calendaring techniques). Clinical courses, pro bono programs, and internships often give students an opportunity to develop practical skills, but law schools should also provide formal and systemic exposure to these fundamentals of legal practice. Practical information

* The Keck Foundation (California) has funded the development and evaluation of simulation curricula in legal ethics and professionalism classes in law schools.

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about malpractice insurance, bond or other surety mechanisms, and other routine aspects of legal practice should be included.

2. **Bar Examination**

The subject areas tested on the examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers.

Comment

State bar examinations traditionally test bar applicants' knowledge of substantive legal principles, but rarely require more than a superficial demonstration of the applicants' understanding of legal ethics, professionalism, or basic practical skills.** Thus, they fail to provide an effective measure of basic competence of new lawyers. The format of the bar examination should be modified to increase the emphasis on the applicants' knowledge of applied practical skills, including office management skills. Performance testing methods should be used to evaluate applicants' writing, research, and organizational skills. An essay question format is preferred over a multiple choice format for testing ethics and professional responsibility. Essay questions should incorporate issues related to legal ethics and professionalism, including the consequences of unprofessional, unethical, and incompetent practice habits.

A passing score on the bar examination should be an indicator of basic competency to practice law. Scoring of the bar examination should be consistent within the jurisdiction. To the extent that interstate coordination is practical, the scoring should be consistent with neighboring jurisdictions.

3. **Character and Fitness Evaluation**

Law schools should assist bar admissions agencies by providing complete and accurate information about the character and fitness of law students who apply for bar admission.

Comment

The vast majority of lawyers obtain their legal education by completing formal studies at a law school approved in that jurisdiction.* Consequently, the opportunity that law school administration and faculty have to evaluate the character and fitness of

** The Multistate Professional Responsibility Examination (MPRE), required by many states for admission to the bar, tests the bar applicant's substantive knowledge of the rules of professional and judicial conduct. It does not require applicants to demonstrate their commitment to professional values or even to engage in extended analysis of questions that are legally uncertain under the professional codes.

* A few states still permit lawyers to apply for admission to the bar and take the bar examination after completing a formal apprenticeship program in lieu of completing formal study at an approved law school.

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law students is superior to that of bar admissions officials. Specific information concerning the character and fitness of each applicant – particularly that concerning instances of student misconduct – is generally more helpful to the bar admissions agency than a blanket certification from the dean that a student has the requisite character and fitness to practice law. The CCJ survey of law school deans found, for example, a wide variance in the scope of information provided by law schools in response to inquiries about student character and fitness certification for bar applicants. The ABA Character and Fitness Working Group has developed a model uniform questionnaire to be used by bar examiners in inquiries about law student character and fitness.

Because law school is the gateway to legal practice for most lawyers, law schools have an obligation to advise students of the character and fitness qualifications required for bar admittance and to inform bar admissions committees if law students show signs that they may lack the requisite character and fitness to practice law. Although law schools should ensure that any screening and certification procedures are sensitive to students' civil rights, both the legal community and the students themselves have legitimate expectations of candor from the law schools about the character and fitness qualifications of the students they graduate. Consistent with these concerns, the application for law school should include questions related to character and fitness. Students whose responses indicate questionable character should be advised before they have made a significant financial investment in their legal education that their background may prevent them from being admitted to the bar.** The law school application should include a blanket waiver permitting the school to provide any information pertaining to the student's character and fitness to bar admissions agencies.

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4. Bar Admission Procedures

Bar admissions procedures should be designed to reveal instances of poor character and fitness. If appropriate, bar applicants may be admitted on a conditional basis.

Persons with a demonstrated history of dishonesty, violence or neglect of important matters are likely to be poor candidates for admission to the legal profession. The bar admissions procedures should be designed to uncover such a history, if it exists. At a minimum, bar admission agencies should conduct a criminal background check of all applicants, inquire about disciplinary complaints or unprofessional conduct in other jurisdictions where the applicant may be admitted, require that applicants provide certified documentation or information that can be independently verified, and require applicants to provide fingerprints. Verified disclosure that spousal or child support orders are in compliance, that taxes have been paid, and that personal financial obligations are being met also may be required.

** A two-track curricula may be appropriate for law schools that graduate a substantial number of students who pursue non-legal practice careers.

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The application may inquire about substance abuse or mental health conditions that might affect the applicant's ability to practice in a competent and professional manner. Evidence that steps have been taken to address such problems (e.g., professional treatment or counseling) should weigh in the applicant's favor, although admission contingent on the applicant's compliance with certain requirements, such as continued treatment or participation in a peer review or mentoring program, may be used as appropriate.

Finally, the applicant should be required to sign an affidavit attesting that he or she has read the Rules of Professional Conduct and all pertinent rules concerning trust accounts. All information provided by the bar applicant should be reviewed by bar admissions personnel. Although many states rely on lawyer volunteers for this purpose, professional staff who have the time and expertise to conduct a thorough review are preferable.

D. Effective Lawyer Regulation

1. Complaint Handling

Information about the state's system of lawyer regulation should be easily accessible and presented to lawyers and the public in an understandable format. The disciplinary agency, or central intake office if separate, should review complaints expeditiously. Matters that do not fall under the jurisdiction of the disciplinary agency or do not state facts that, if true, would constitute a violation of the rules of professional conduct should be promptly referred to a more appropriate mechanism for resolution. Complainants should be kept informed about the status of complaints at all stages of proceedings, including explanations about substantive decisions made concerning the complaint.

Comment

Persons who wish to file a complaint about a lawyer should be able to do so quickly and without being subject to complex filing requirements. The state's system of lawyer regulation should be accessible by a toll-free number and informational brochures about the disciplinary system should be distributed in places accessible to both lawyers and the public, including the bar's and disciplinary agency's Internet website. Potential complainants should be able to discuss their complaint with an intake lawyer from the lawyer regulation agency to determine whether their problem should be addressed by the disciplinary agency or by another method of dispute resolution (e.g., fee arbitration, mediation). A public liaison or ombudsman also may be appropriate for this role. The disciplinary agency and central intake office, if separate, should have sufficient funding to permit complaints to be resolved promptly and appropriately.

Complaints involving matters not subject to the jurisdiction of the disciplinary agency or facts that, if true, would not constitute a violation of the rules of professional conduct (e.g., fee disputes or other lawyer-client communication problems) should be referred to an appropriate method of dispute resolution (e.g., fee arbitration, mediation). Complainants should be treated courteously at all times and should be provided with timely information about the status of the complaint. If the complaint is dismissed, the complainant should be given specific reasons for that action as well as information about procedures for appealing the dismissal, if any. "Gag rules" prohibiting complainants from publicly discussing the complaint have been found unconstitutional* and should never be imposed. Similarly, complainants should have absolute immunity from civil liability for complaints filed.

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* See, e.g., *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998).

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2. Assistance to lawyers with ethics problems or “minor” misconduct (e.g., acts of lesser misconduct that do not warrant the imposition of a disciplinary sanction)

The state's system of lawyer regulation should include procedures for referring matters involving lesser misconduct to an appropriate remedial program. Such procedures may include:

- Required participation in a law office management program;
- Required participation in a lawyer assistance program;
- Enrollment in an "ethics school" or other mandatory CLE; and
- Participation in a fee arbitration or mediation program.

Comment

Sanctions are necessary for some types of lawyer misconduct. Most complaints filed against lawyers, however, make allegations of lesser misconduct (e.g., administrative incompetence, neglect of a client's affairs, miscommunication) rather than deliberate or serious misconduct. In those cases, remedial measures that resolve disputes between the lawyer and client and that prevent future instances of such conduct are more appropriate than imposing disciplinary sanctions on the lawyer. The state's system of lawyer regulation should have such programs available for diversion of matters involving lesser misconduct from the disciplinary system and its administrative procedures should specify the criteria for diverting those complaints to alternatives to discipline programs.

3. Disciplinary Sanctions

The range of disciplinary sanctions should be sufficiently broad to address the relative severity of lawyer misconduct, including conduct unrelated to the lawyer's legal practice. Disciplinary agencies should use available national standards to ensure interstate consistency of disciplinary sanctions. All public sanctions should be reported to the National Lawyer Regulatory Databank of the American Bar Association.

Comment

The sanctions available to the Court and disciplinary agencies to address misconduct should extend beyond reprimands, suspensions or disbarment. The Court and disciplinary agency, when appropriate, should order the respondent lawyer to pay restitution to clients or other injured parties, to return files to the client, and to pay the costs associated with investigating and prosecuting the complaint. The Court should confer upon the disciplinary agency the authority to impose these additional sanctions. The disciplinary agency also should have the authority to order attendance at an ethics school or other CLE program, to retake the bar examination or the Multi-state Professional Responsibility Examination, or to place other restrictions or conditions on

the lawyer's ability to practice. Conduct that is unrelated to the lawyer's legal practice (e.g., nonpayment of spousal or child support, non-filing of tax returns or non-payment of taxes) should also be subject to the imposition of disciplinary sanctions.

Sanctions should be consistent with the severity of conduct both within the jurisdiction and across jurisdictions. The ABA Standards for Imposing Lawyer Sanctions provide criteria for evaluating the severity of conduct and imposing appropriate sanctions. Permanent disbarment should be an option for particularly egregious cases of lawyer misconduct. To ensure that other jurisdictions are informed about disciplinary sanctions imposed on lawyers, all instances of public discipline should be reported to the ABA National Lawyer Regulatory Databank.

4. *Lawyers' Funds for Client Protection*

The state's system of lawyer regulation should include a Lawyers' Fund for Client Protection to shield legal consumers from economic losses resulting from an attorney's misappropriation of law client and escrow money in the practice of law. Rules or policies of the appellate court of highest jurisdiction should:

- **Provide for a statewide client protection fund;**
- **Require that the fund substantially reimburse losses resulting from dishonest conduct in the practice of law;**
- **Finance the fund through a mandatory assessment on lawyers;**
- **Designate the fund's assets to constitute a trust;**
- **Appoint a board of trustees, composed of lawyers and lay person, to administer the fund; and**
- **Require the board of trustees to publicize the fund's existence and activities.**

Comment

An effective client protection fund provides a state court system and the legal profession with a unique opportunity to promote public confidence in the administration of justice and the integrity of the legal profession. Client protection funds cover losses that are not covered by malpractice insurance or individual restitution. They do not compensate for neglect or matters like fee disputes. Fund procedures should be uncomplicated and prompt, and should provide significant reimbursement to every eligible victim.

The key to a fund's effectiveness is a broad-based financing structure, and its administration under the aegis of the judiciary. To ensure adequate financing, the highest court of each state should provide for the administration of a client protection fund as a trust fund by a board of trustees appointed by the judges of the court. The fund should be financed by the legal profession through assessments on lawyers that are sufficient (based on the historical claims experience in that jurisdiction) to reimburse eligible claimants to the maximum extent feasible. The assessment should be fixed by court rule or, if local law requires, authorizing legislation. The trustees

should be required to coordinate its procedures with the state's lawyer discipline agencies, and to publicize the existence and operations of the fund in its efforts to protect legal consumers from dishonest conduct in the practice of law.

5. *Other Public Protection Measures*

The state's system of lawyer regulation should include other appropriate measures of public protection. Such measures that the Court should enact include:

- **Mandating financial recordkeeping, trust account maintenance and overdraft notification;**
- **Establishing a system of random audits of trust accounts;**
- **Requiring lawyers who seek court appointments to carry malpractice insurance;**
- **Collecting annual information on lawyers' trust accounts;**
- **Studying the possibility of recertification;**
- **Providing for interim suspension for threat of harm; and**
- **Establishing a 30-day no contact rule.**

Comment

Public protection measures may be designed as preventative as well as remedial or punitive measures. For example, random audits of lawyer trust accounts, mandatory notification to the disciplinary agency for instances of financial irregularities, and periodic certification that the lawyer is in compliance with established rules and procedures can be an effective deterrent and educational tool against lawyer misconduct as well as a method of investigation and enforcement. Other public protection measures, such as interim suspension or 30-day no contact rules, provide an opportunity for further investigation without the risk of further harm to clients.

6. *Efficiency of the Disciplinary System*

The state system of lawyer regulation should operate effectively and efficiently. The Court should enact procedures for improving the system's efficiency, including:

- **Providing for discretionary rather than automatic review of hearing committee or board decisions by the Court;**
- **Providing for discipline on consent;**
- **Requiring respondents to disciplinary investigations to be reasonably cooperative with investigatory procedures;**
- **Establishing time standards for case processing;**
- **Periodically reviewing the system to increase efficiency where necessary;**

- **Eliminating duplicative review in the procedures for determining whether to file formal charges;**
- Authorizing disciplinary counsel to dismiss complaints summarily or after investigation with limited right of complainants to seek review;
- Using professional disciplinary counsel and staff for investigation and prosecution and volunteers on boards and hearing committees;
- Providing appropriate training for all involved; and
- Incorporating disciplinary experiences in CLE curricula.

Comment

Inefficient procedures add time and expense to disciplinary proceedings. The court should periodically evaluate the system of lawyer regulation to eliminate duplicative or unnecessary review procedures, to provide disciplinary counsel with sufficient authority to fulfill their responsibilities, and to make effective use of professional and volunteer staff in the disciplinary agency.

7. Public Accountability

The public should have access to information about the system of lawyer regulation including procedures, aggregate data concerning its operations, and lawyers' disciplinary records. Laypersons should be included on disciplinary hearing panels and boards. Other measures to ensure public accountability of the disciplinary agency include:

- **Making written opinions available in all cases;**
- **Making formal disciplinary hearings open to the public;**
- **Collecting and making available information on lawyers' malpractice insurance; and**
- **Speaking about the disciplinary system at public gatherings.**

Comment

Public accountability is as much an integral component of the integrity of the state's disciplinary system as adequate funding, appropriate alternatives to discipline, and internal efficiency. The disciplinary system should provide for public access to information about the disciplinary agency's procedures and operations as well as information about the disciplinary history (complaints and dispositions) of individual lawyers.

E. Public Outreach Efforts
1. Public Education

Judges, lawyers and bar programs should provide more public understanding of lawyer professionalism and ethics by developing and implementing public education programs. Effective public education programs should:

- **Emphasize lawyer professionalism in court communications with the public;**
- **Provide a “Public Liaison” Office or Officer to serve in a clearinghouse function;**
- **Distribute public education materials in places commonly accessible to the public;**
- **Include public speaking on the topic of professionalism on the agenda for bar association speaking bureaus;**
- **Encourage a more active role between educational institutions and organizations and the justice system; and**
- **Educate the legislative and executive branches of government about issues related to the legal profession and the justice system.**

Comment:

Public education programs should fulfill the increasingly important role of educating the public about their justice system. If programs do not already exist, they should be created; if they already exist, they should be enhanced. In either event, the goal of public education should be to address and eliminate misconceptions about the legal profession. Judges and lawyers should inform the public that the “Rambo” lawyering tactics portrayed on television and in the media (as well as by unprofessional lawyers) are neither realistic nor appropriate courtroom behavior. They disserve the clients, undermine the overall effectiveness of legal representation, and are an abuse of the judicial system.

The court and the bar are both well-positioned to educate the public on three precise topics: specific programs, ethics and professionalism, and larger “justice system” issues. Because these topics exist at different levels, the methodology of each topic will differ.

Examples of specific programs include “Lawyers Helping Lawyers,” and lawyer disciplinary programs and proceedings. In addition to these existing programs, “Public Liaison” Offices (Officers) and public education brochures, should be endorsed. A “Public Liaison” Office, or Officer, would serve to provide answers to questions from the public about lawyers, to provide assistance, or to make referrals as appropriate. For maximum effectiveness, this Office and/or Officer should be easily accessible. Suggestions for availability include the implementation of 800-numbers, clear references in “Yellow/Blue Pages,” and bar association websites.

To promote bar programs and legal services, public education brochures should be placed in courthouses, public libraries, schools, government information kiosks, and other easily accessible locations.

Speakers' bureaus consist of lawyers who are willing to address the public at different types of community functions. Speaking engagements can address topics of lawyer ethics and professionalism. The survey revealed that the topics of these presentations were not necessarily focused on lawyer ethics and professionalism. In this type of situation, a lawyer may find it appropriate to incorporate a discussion of the types of behavior that a professional lawyer should exemplify. To illustrate: if the topic of discussion is one involving contentious juvenile and domestic relations cases, a lawyer can discuss proper and improper lawyer conduct, as well as alternatives to litigation where problems occur.

It is important for the public to understand the disciplinary aspect of lawyer ethics and what encompasses "ethics" and "professionalism." Independently, these terms may connote meanings that are out of context of the *intended* meanings. It is necessary that the public understand that the intended meanings of these terms specifically refer to lawyer demeanor and behavior in and out of court. Public speaking engagements can serve as a forum to communicate and educate as well as resolve the terminology differences between legal professionals and laypersons on lawyer ethics and professionalism.

Schools and non-profit organizations are "point sources" that play an essential role in the dissemination of information to the public; thus, they also should be used for the dissemination of educational programs on the justice system. By visiting courthouses, for example, the public can learn about the justice system in its entirety including the role of lawyers in society. During these visits, the public can observe actual court cases, and also speak with judges, lawyers, and court personnel to learn about how the justice system really works.

In turn, public educators can be encouraged to teach about the justice system at all levels of education—from elementary school through law school. Judges and lawyers also may serve an interactive role by visiting and speaking at educational institutions and organizations. Judges and lawyers can offer assistance with school curriculum development.

Further measures can be taken for the public to play a more active role in the judicial system. In Wisconsin, for example, to increase the level of public awareness of the judicial appellate process, the Supreme Court travels outside Madison and invites school classes to observe oral arguments of actual cases held both within and outside of Madison. The Florida Supreme Court has established regular interaction with public and private educational institutions and has provided ready access to arguments on television and the Internet.

2. *Public Participation*

The participation of the public should be supported in all levels of court and bar institutional policy-making by judges, lawyers, and bar programs. Judges, lawyers, and bar programs should:

- **Publicize the nomination and appointment process for public representatives on court and bar committees;**
- **Once appointed, provide lay members access to the tools necessary for effective participation; and**
- **Provide adequate funding on an ongoing basis.**

Comment:

The most common observation on the effect of public participation is that nonlawyers bring a fresh perspective and great deal of common sense to bar policy making and deliberations. Laypersons may also offer lawyers a tremendous education about public expectations of lawyers and of the bar as an institution. Lay participation lends credibility and inspires public confidence in bar organizations, particularly in the context of disciplinary proceedings. Lay participation in bar activities should not be confused with public education efforts.

The most common form of recruitment for lay representation is nomination by lawyers or judges and appointment by either the bar leadership or the state supreme court. The nomination and appointment process for public representatives should be publicized to encourage the broadest possible public involvement. Press releases, advertisements in local newspapers, and bar publications can inform the public of these opportunities. As appropriate, nominations should be sought from non-legal public and private organizations particularly if the court or bar committee would benefit from a specific expertise or perspective (e.g., nominations from a local mental health organization might be appropriate for soliciting lay representation on a "Lawyers Helping Lawyers" committee).

To maximize the benefits of lay representation, laypersons should be provided with all the tools necessary for their effective participation. These include, but are not limited to, appropriate training, relevant reference materials, and subscriptions to bar publications. Training and orientation for both lawyer and nonlawyer members should be provided to ensure that all committee members are aware of the mission and objectives of the committee, the obligations of committee members, and resources available to the committee for pursuing its activities.

3. *Public Access to the Justice System*

Judges, lawyers, and bar programs should encourage public access to the justice system through the coordination of pro bono programs. Effective coordination of pro bono programs should:

- **Encourage judicial support and participation in lawyer recruitment efforts for pro bono programs;**
- **Provide institutional support within the court system for lawyer pro bono service;**
- **Establish an “Emeritus Lawyer” pro bono program;**
- **Provide institutional and in-kind support for the coordination of pro bono programs; and**
- **Explore funding alternatives to support pro bono programs.**

Comment.

Many states now define pro bono as an affirmative professional obligation in their lawyer ethics rules or accompanying comments, Legal Ethics Opinions and Ethical Considerations. Traditionally, judicial involvement in pro bono programs was mainly in an exhortatory role. Recently, individual judges have become more active in recruiting and training lawyers for pro bono participation. They also serve in leadership roles in pro bono programs (e.g., governing boards, local circuit committees). A few states reported some novel approaches for the judiciary to assist in pro bono efforts. For example, Texas has created special court dockets in conjunction with pro bono clinics. Other states and legal organizations have considered how lawyers employed in areas other than private practice (e.g., government lawyers, in-house counsel) might participate in pro bono efforts.

Institutionally, the bar should provide in-kind assistance for pro bono programs. This includes publicity, administrative support, access to facilities for pro bono clinics, training for lawyers willing to perform pro bono representation (including CLE credit), mentors for young or inexperienced lawyers willing to perform pro bono services, and malpractice coverage. An “Emeritus Lawyer” program grants limited active licensure to retired, inactive-status, or out-of-state lawyers who participate in bar-sponsored pro bono programs.

The most difficult aspect of pro bono coordination for the states appears to be fulfilling a clearinghouse role—screening and referring clients—to lawyers who have indicated their willingness to provide pro bono legal services. In addition to the roles played by judges, lawyers, and bar programs, institutional support for the coordination of pro bono programs can be provided in cooperation with non-legal public service organizations. Lawyers can coordinate or contract with non-legal public service organizations to provide lawyer contact information and referrals to those seeking legal assistance.

Funding for programs and agencies that provide legal services to people who could not otherwise pay for such services has become more and more difficult to sustain. Federal funding for the Legal Services Corporation and state and local Legal Aid Offices has been reduced dramatically. Using the interest from lawyer trust accounts (IOLTA) to fund such programs may be problematic in the wake of *Phillips v. Washington Legal Foundation*.^{*} Alternative funding mechanisms must be developed,

^{*} *Phillips v. Washington Legal Foundation*, No. 96-1578 (U.S. June 15, 1998).

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such as Nebraska's "filing fee surcharge" which was established to provide funding for non-profit legal service providers.

4. Public Opinion

To gauge public opinion about the legal profession and the level of professionalism demonstrated by lawyers, the court and bar should create regular opportunities for the public to voice complaints and make suggestions about judicial/legal institutions.

Comment.

Public opinion polls can provide insight to public conceptions of the legal profession and the level of professionalism demonstrated by lawyers. Public opinion polls may take the form of periodic surveys, program evaluations, consumer hotlines, or local citizen advisory boards. Surveys distributed may focus specifically on a topic, such as the public views of lawyers or public trust in the legal profession, or exist as a component of a larger evaluation of the state's legal and judicial system. Some states have organized "Town Meetings" to generate this type of information. In Georgia, selected members of the public have been invited to comment on their expectations of how lawyers should conduct themselves with clients. Florida takes a similar approach, and invites selected members of the public to participate in focus groups about lawyer conduct and professionalism. These studies and the evaluation of the data from them are valuable, but the key is the action taken on the data and the implementation of remedial programs.

5. Practice Development, Marketing, and Advertising

The judiciary, the organized bar and the law schools should work together to develop standards of professionalism in attorney marketing, practice development, solicitation and advertising. Such standards should:

- **Recognize the need for lawyers to acquire clients and the benefit to the public of having truthful information about the availability of lawyers;**
- **Emphasize the ethical requirements for lawyer advertising and client solicitations;**
- **Emphasize the need to be truthful and not misleading; and**
- **Encourage lawyers to employ advertising and other marketing methods that enhance respect for the profession, the justice system and the participants in that system.**

Comment

The benefits of providing the public with truthful information about the availability of lawyers to meet the needs of the public for legal services has long been recognized. The U.S. Supreme Court has characterized lawyer advertising and solicitation as

“commercial speech” subject to certain constitutional protections, although it continues to struggle with the extent to which lawyer advertising and solicitation can be regulated and enforced through disciplinary procedures. However, it is in interest of the courts, the bar and the public that client acquisition efforts be conducted in a professional manner. The development and dissemination of aspirational standards that embody the concepts described above will improve communications between lawyers and the public and promote respect for both the justice system and lawyers. Useful starting points in this effort may be found in the *Aspirational Goals For Lawyer Advertising* developed by the ABA Commission on Advertising and adopted by the House of Delegates in 1988, and the *Statement of Principles in Marketing Legal Services* developed by the ABA’s Task Force on Lawyer Business Ethics in 1996. Education about such standards can take many forms including inclusion in law school courses on legal ethics, discussion in mandatory CLE programs on professionalism, adoption and publication by the state’s highest court, and advertisements by the organized bar educating the public on how to select a lawyer and what to look for in lawyer advertising and marketing communications.

F. Lawyer Professionalism in Court

1. Alternative Dispute Resolution Programs

If appropriate for the resolution of a pending case, judges and lawyers should encourage clients to participate in Alternative Dispute Resolution (ADR) programs. An effective ADR program should:

- **Ensure that court-annexed ADR programs provide appropriate education for lawyers about different types of ADR (e.g., mediation, arbitration);**
- **Establish standards of ethics and professional conduct for ADR professionals;**
- **Require lawyers and parties to engage the services of ADR professionals who adhere to established standards of ethics and professional conduct;**
- **Encourage trial judges to implement and enforce compliance with ADR orders; and**
- **Educate clients and the public about the availability and desirability of ADR mechanisms.**

Comment:

Alternative Dispute Resolution is used to resolve cases for the benefit of litigants. ADR is often faster, less expensive and has a more satisfactory result for the client, particular when resolutions are the result of negotiations between the parties and their clients. A lawyer’s professional obligation is to work in the best interests of the client, and to inform and facilitate these results by active participation in ADR.

It is generally recognized that lawyer participation in ADR programs tends to have a positive effect on professionalism. In addition to fostering a less combative relationship between opposing counsel, ADR allows lawyers to focus more quickly on

the disputed issues. As a result, a larger proportion of cases can be settled without trial. For cases that do not settle, subsequent trials can be conducted more efficiently. ADR programs also have a beneficial effect for lawyers. Lawyer-negotiating skills, both in the formal ADR programs and in their regular practice, tend to improve as a result of ADR program participation.

Lawyers should recognize ADR as an alternative to litigation, and not as an avenue for abuse. Participation in ADR can be ineffective for litigants and antagonistic for opposing counsel when lawyers fail to prepare adequately, fail to secure authorization to negotiate, or misuse the ADR process as a vehicle for discovery. Court-annexed ADR programs should provide appropriate education in terms of the role of lawyers in the ADR process and their responsibilities to the client, to opposing counsel, and to the court. Education generally alleviates lawyer reluctance to participate in ADR programs. It addresses issues such as the concern about the impact that ADR programs can have on professional practice and income, the difficulty in adjusting from an adversarial to a collaborative style of negotiation, the belief that the adversarial system is a superior method of dispute resolution, the concern that mandatory ADR will involve added expense and rigid formats, the failure to schedule ADR or submit court-ordered ADR plans in a timely manner, and other ways that lawyers have failed to cooperate in the ADR process.

In addition to education, the establishment of standards of ethics and professional conduct for ADR professionals by the court can enhance the credibility of ADR programs in the eyes of the local legal community. The best remedy for lawyer reluctance and lack of cooperation is to gain experience in the ADR programs. Lawyers who participate in ADR programs may find them helpful, and be willing to participate again. Standards of ethics and professional conduct for lawyers participating in ADR can be included as part of the state Rules of Professional Conduct, or in Legal Ethics Opinions, Ethical Considerations, or Lawyers' Creeds. These standards can examine critical issues such as whether a lawyer-mediator can provide legal advice in a matter in which he or she served as a mediator, or whether a lawyer has an *obligation* to inform clients of the availability of ADR as a method of dispute resolution.

Mediators and arbitrators have their own rules governing professional conduct. Judges should encourage lawyers to engage the services of only those ADR professionals who adhere to established standards of ethics and professional conduct. Generally, mediators and arbitrators are governed by state codes of ethics and professional conduct for mediators and arbitrators. In addition, ethics codes are promulgated by organizations of ADR professionals such as the Society of Professionals in Dispute Resolution (SPIDR), the Association of Family Mediators (AFM), and the American Arbitration Association (AAA).

The encouragement of trial judges to implement and enforce compliance with ADR orders can also effectively combat lawyer reluctance to participate in ADR programs. Trial judges are in the position to use, for example, early case management deadlines to promote practical and timely settlements. Early case management deadlines will avoid the evaporation of settlement incentives by dealing with problems well in advance of trial.

2. *Abusive or Unprofessional Litigation Tactics*

To prevent the use of unprofessional or abusive litigation tactics in the courtroom, the court and judges should:

- Encourage consistent enforcement of procedural and evidentiary rules;
- Encourage procedural consistency between local jurisdictions within states;
- Adopt court rules that promote lawyer cooperation in resolving disputes over frivolous filings, discovery, and other pretrial matters;
- Encourage judicial referrals to the disciplinary system;
- Educate trial judges about the necessary relationship between judicial involvement in pretrial management and effective enforcement of pretrial orders;
- Encourage increased judicial supervision of pretrial case management activities; and
- Establish clear expectations about lawyer conduct at the very first opportunity.

Comment.

Courts have at their disposal a wide array of remedies with which to sanction abusive litigation tactics when they occur. In reality, sanctions are often threatened, but seldom employed. The lack of effective enforcement encourages offending lawyers to continue in their use of improper conduct with no significant deterrent effect. Discovery disputes are perceived as more troublesome than those of frivolous filings, which are more often initiated by pro se litigants.¹ Problems include unwarranted objections, lack of full disclosure in response to discovery requests, and deliberate incivility during depositions. The most effective tools for minimizing abusive or unprofessional litigation practices are active judicial involvement in pretrial management, early and direct judicial availability to the attorneys if needed to resolve disputes, consistent and even-handed enforcement of existing court rules and pretrial orders, and the imposition of appropriate sanctions if necessary for deliberate or repeated lapses of professionalism by the lawyers.

Procedural consistency across jurisdictions is critical for lawyers to practice competently and effectively. Procedural variances across localities often make otherwise qualified lawyers practicing in an unfamiliar forum appear less competent than they really are. Modifications in courthouse administrative procedures, including pleading methods, pretrial requirements, and trial schedules, can reform procedural inconsistencies.

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¹ To curtail problems resulting from pro se filings, several states have enacted "vexatious litigant" legislation.

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The adoption of court rules that promote lawyer cooperation in resolving disputes can reduce the incidence of many frivolous filing and discovery disputes. For example, a “safe harbor” can be included that permits lawyers to modify or withdraw pleadings prior to the initiation of Rule 11 proceedings. Or a requirement that lawyers make a “good faith” effort to resolve discovery disputes before filing motions to compel discovery can be enacted. Judicial involvement in pretrial management has a very close relationship with effective enforcement of orders. Judges should closely supervise pretrial discovery activities. At the earliest possible opportunity (e.g., initial pretrial conference), judges should discuss with lawyers the type of conduct and demeanor permissible in their courtrooms. In turn, the conduct of lawyers will become more refined because of the constant interaction with supervising judges. Closer supervision over pretrial matters also places judges in a position to ensure that orders are followed, to inquire why deadlines may not be met, to investigate if delays occur because of legitimate or illegitimate reasons—and then to take the appropriate actions to correct any problems.

Judges should impose progressively more severe sanctions to discipline lawyers who consistently violate pretrial orders. A progressive approach allows judges to discipline lawyers by first warning of the problem. When the act is first committed, judges give an oral warning and make recommendations to correct the problem. Judges then proceed to impose formal sanctions (e.g., fines, contempt powers). The court can adopt rules to sanction abusive litigation tactics by awarding the costs and lawyers’ fees to the parties who were forced to defend against such tactics. Lawyers should be prohibited from passing the costs of court-imposed sanctions to their clients. Judicial referrals to the disciplinary system should be encouraged for repeated violations of procedural rules, as well as egregious conduct toward the bench or opposing counsel (e.g., deliberate misrepresentation of facts or law). For repeated behavioral problems before the same judge in a case, the judge may choose, for example, to exercise his or her contempt powers. For problems that occur as a result of continuous misconduct before several judges in multiple cases, disciplinary boards should be contacted.

It is recognized that trial judges are very busy – almost to the point of being overwhelmed with daily judicial duties. Proactive management by trial judges or lawyer conduct should be elevated to priority status because it will improve the entire system in the long run. State appellate courts of highest jurisdiction should encourage trial judges to assign priority status to this objective and should support their efforts to do so in appellate decisions unless those efforts are clearly an abuse of discretion.

3. High Profile Cases

In high profile cases, lawyers should refrain from public comment that might compromise the rights of litigants or distort public perception about the justice system.

High profile cases often influence public opinion about lawyers, judges, and the justice system. If these cases are not managed professionally by judges and lawyers,

rights of litigants can be compromised, public perception can be distorted and respect for the system seriously undermined. It is essential that judicial control of the proceedings be sensitive, firm and fair. "Trying the case in the media" is not appropriate. Lawyers who are serving as counsel in such cases have a special responsibility to handle media attention strictly in accordance with court orders and principles of professionalism. Moreover, lawyers not in the case who are asked to be commentators should be particularly circumspect and should restrict comments to procedure and process, refraining from predicting outcomes, evaluating performances or weighing evidence and court decisions. State supreme courts should work with trial judges and the bar to implement the recommendations of the publication of the National Center for State Courts (*Managing Notorious Cases*) and the Report of the American College of Trial Lawyers' Subcommittee (*Fair Trial of the High Profile Case*).

G. Interstate Cooperation

The appellate courts of highest jurisdiction should cooperate to ensure consistency among jurisdictions concerning lawyer regulation and professionalism and to pool resources as appropriate to fulfill their responsibilities. Specific efforts of interstate cooperation include:

- **Continued reporting of public sanctions to ABA National Regulatory Data Bank;**
- **Using the Westlaw Private File of the ABA National Regulatory Databank;**
- **Inquiring on the state's annual registration statement about licensure and public discipline in other jurisdictions;**
- **Providing reciprocal recognition of CLE;**
- **Establishing regional professionalism programs and efforts;**
- **Recognizing and implementing the International Standard Lawyer Numbering System created by Martindale-Hubbell and the American Bar Association to improve reciprocal disciplinary enforcement; and**
- **Providing information about bar admission and admission on motion (including reciprocity) on the bar's website.**

Comment

Successful efforts to improve lawyer conduct and professionalism require a national commitment. Legal practice in multiple jurisdictions increasingly is the rule rather than the exception, particularly given improvements in communication and transportation technology. The appellate courts of highest jurisdiction should not only provide leadership and coordination of professionalism and legal ethics programs within their own states, but also should encourage interstate cooperation, including pooled resources.

SECTION III: BRIEFING PAPERS

Briefing Paper on Professionalism

The Conference of Chief Justices, with funding by the State Justice Institute conducted a survey on October 1997 of its membership to investigate state initiatives to bolster attorney competence and professionalism. The specific areas of interest were Professionalism, Litigation Reform, Public Outreach, Lawyer Support, Disciplinary Enforcement, Bar Admission and Educational Initiatives. Thirty-three states have responded to the Professionalism survey. The following is a summary of the responses.

Significant Changes in the Promotion of Professionalism

Five states have implemented mentoring programs to assist in the promotion of professionalism within the legal profession. One state reported that its mentoring program is voluntary and extends to law schools, while other states indicated that their mentoring programs involve attorneys newly admitted to the bar. Five states also reported revisions to their state rules of professional conduct. One state indicated that its rules were rewritten to make them responsive to contemporary standards of professional conduct. Alaska requires a signed affidavit indicating that all bar members have read and are familiar with the Alaska Rules of Professional Conduct.

Five states reported already implemented or proposed professionalism courses and/or seminars for attorneys newly admitted to the bar. Four states indicated their use of conferences and seminars, approximately lasting three to four hours, as a forum to address professionalism issues.

Other states reported the use of professionalism handbooks, creation of a Commission on Professionalism, law office management programs, creation of a Standing Committee on Professionalism or other bar sections and seminars. Interestingly, 2 states indicated the creation of staff-run *centers* for professionalism to enhance the professionalism of law students, members of the bar, and the judiciary. Miscellaneous comments of systems used to promote professionalism included course additions to CLE, the use of grievance committees and task forces, Inns of Court programs, sections added to the bar, and non-CLE courses.

Plans or Proposals for Changes in the Promotion of Professionalism

The majority of states reported that there are no plans or proposals for changes in the way that professionalism is promoted (10 states). Three states reported changes or expansions in mandatory professionalism courses and another three states are considering formal mentoring programs. One respondent noted the importance of a Peer Review Program that handles issues that do not rise to the level of ethical violations. That program provides counseling and continuing advice on acceptable behavior as necessary. Miscellaneous proposals included legal education conclaves,

cooperative efforts from the bar, law schools and the judiciary, and the use of fewer law office management seminars to concentrate on office consultations. The Utah Bar Commission is currently evaluating different methods of licensing lawyers. Proposals include a three-year licensure instead of lifetime licensure as well as more CLE professionalism courses.

Changes to current systems of educating on professionalism are intended to remedy many instances of improper conduct and behavior exerted by attorneys. An Arizona respondent indicated that the bar needs to establish an appreciation for appropriate standards of civility and respect between lawyers, lawyers and their clients, and lawyers and the judiciary. A Colorado respondent commented that the expansion of professionalism training to all lawyers is intended to reach the limited number of attorneys that are believed to cause the most problems. Ohio commented that its initiatives are intended to address judges' failure to insist on professional behavior by attorneys, and law schools' failure to provide law students with adequate professional skills. Texas noted that changes needed to take place because of the rudeness, poor behavior and lack of manners exerted by legal professionals.

Programs Promoting Professionalism Among Transactional Lawyers

Most states reported that CLE professionalism requirements are applicable to ALL bar members. Three states offer professionalism courses with hypotheticals and scenarios for discussion relevant to transactional lawyers. One state indicated that these types of courses were offered to offset criticisms that all discussions have focused on litigators.

Four states indicated that programs and seminars were offered for transactional attorneys. States varied in the types of forums that offered seminars: one respondent indicated that the Center for Professionalism conducted seminars; another reported that certain sections of the bar regularly held professionalism seminars. Other states reported that mentoring and Inns of Court programs are used to promote professionalism among transactional lawyers.

Commissions on Professionalism

Although names vary across the states, most states have committees that specifically evaluate the use of professionalism among members of the bar, the public, and the judiciary (12 states). The Standing Committee on Professionalism in New Mexico conducts education programs, including an annual program, to promote professionalism. South Dakota describes the function of its committee as one to provide full integration of professionalism into part of the every day life of lawyers. Two states have committees that provide ethics and advisory opinions.

Four states have professionalism commissions that ensure the promotion of professionalism among legal professionals. Florida offers efforts that spread to law schools, local bar associations and the judiciary. The Georgia Chief Justice's

Commission on Professionalism recognizes that lawyers exist to solve problems on behalf of their clients while acting within public interests, that lawyers can use their talents and leadership to help better society, and that social conscience and devotion to the public interest are integral units to lawyer professionalism. The New Jersey commission emphasizes the spirit of professionalism; and the Ohio commission serves in a supervisory role in working with judicial organizations, bar associations, law schools, and other entities in emphasizing and enhancing professionalism.

Professionalism Conferences

Thirteen states indicated that conferences on professionalism had been held whether addressing professionalism directly or as an aspect of another topic. Four states indicated that bench-bar conferences were used to communicate professionalism issues. One state holds annual symposiums dealing with professionalism. Two states reported that meetings had been held to address professionalism, and one state held a retreat to focus on professionalism issues. Fourteen states indicated that their jurisdictions had not held any professionalism conferences.

Awards for Professionalism

Twenty respondents indicated that awards are given to reward professionalism. One respondent reported that its awards are presented to programs, rather than individuals, that promote professionalism. Award recipients varied among states: members of local bar associations, members of state bar associations, attorneys who practice in certain judicial districts, and pro bono workers. One state reported that awards for professionalism were not given, but were being considered.

Changes to the Lawyer's Oath

Three states reported that Lawyers' Creeds of Professionalism had been established to stress proper principles of conduct and behavior. Two states established Declarations of Client Commitment; one state altered the Lawyer Oath to promote dignity, civility and respect toward judges, court staff, clients, fellow professionals, and others. Twenty states indicated that no changes had been made to the Lawyer's Oath to stress principles of conduct and behavior.

State Definitions of Professionalism

By far, the most common definition of professionalism related to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors and the public. Other common definitions included an innate sense of morality and ethics, character, commitment, competence, fairness, integrity, civility, leadership, fidelity to the lawyer's role as officer of the court and respect for the rule of law. Lawyers should promote justice, stay consistent with the highest standards of practice, strictly observe ethical standards, and

ensure public access to the legal system. Lawyers should also have an understanding of the needs of their clients, remain prepared, and exert dedication and appreciation of the legal system.

Miscellaneous definitions of professionalism:

“Do unto others as you would have them do unto you.”

“An area often omitted from discourses on professionalism is inappropriate conduct involving bias due to gender, race or physical impairment.”

“Professionalism embraces more than simply complying with the minimal standards of professional conduct.”

“Love of the practice of law, grace, good humor, warm respect, recognition that being disagreeable with each other serves no real purpose, and that true professionals can rise above contention and still fully and fairly represent their clients.”

“Professionalism addresses the subject of what is expected of lawyers as opposed to what is required by our ethics rules.”

Constitutional Lawyer John W. Davis: “We build no bridges. We raise no towers. We construct no engines. We paint no pictures. But, we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men’s burdens and by our efforts, we make possible the peaceful life of men in a peaceful state.”

General Comments to Improve Lawyer Competence and Professionalism

A majority of respondents suggested changes and improvements to CLE education programs as a method of improving lawyer competence and professionalism. Suggestions included providing CLE programs several times a year, mandating existing CLE programs, and providing modest tuition rates for CLE. Respondents recommended new CLE topics in professionalism and law office management.

Five states recommended that law school education should emphasize professionalism through course topics beyond the requirements of legal ethics rules (e.g., professionalism, law office management, practical skills). Recommendations included a program for third year law students prior to entering practice, in addition to bridge the gap programs. Another respondent suggested the need to stop the encouragement of zealous advocacy without proper considerations to courtesy and respect.

Incompetent and unprofessional lawyers should not be setting the standards of state bar associations. Ongoing and sustained support of the bar, judiciary, and lawyers should be effective in promoting professionalism. Lawyer competence can be promoted through public speeches, bar publication columns, leadership meetings and

conferences; trial demonstrations of proper techniques to show what “to do” and what “not to do” can be presented by veteran lawyers; the court and bar can intervene more aggressively in situations where incompetence or lack of professionalism is observed.

Some respondents recommended ethics schools for lawyers, whether to educate on professionalism issues or as a mandatory program for lawyers with discipline problems. Other states mentioned the importance of mentoring programs and the use of awards as incentives. One respondent suggested the facilitation of lawyer performance discussions through questionnaires or focus groups directed to clients, lawyers and judges.

Briefing Paper on Educational Initiatives

The Conference of Chief Justices, with funding by the State Justice Institute, conducted a survey in October 1997 of its membership to investigate state initiatives to bolster attorney competence and professionalism. The specific areas of interest were Professionalism, Educational Initiatives, Litigation Reform, Public Outreach, Lawyer Support, Disciplinary Enforcement, and Bar Admission. As of the end of December, thirty states had responded to the Educational Initiatives section of the survey. The following is a draft summary of the responses.

Administration of CLE Programs

In terms of educational efforts to promote professionalism and ethics among attorneys, the most commonly reported means was enhancing continuing legal education requirements in this area. Fifteen states reported adopting or planning to adopt mandatory CLE ethics and/or professionalism requirements to supplement the existing CLE requirements. In two states, a professionalism/ethics requirement already existed and the number of credits required was increased. Seven states that provided reasons for making the change had similar objectives: to keep attorneys abreast of new requirements, to provide a forum for discussing and enhancing awareness of professionalism issues, to reduce complaints and malpractice, and to improve public perception of lawyers in general. Delaware reported another motivation—to keep current with educational program offerings in other states. Ohio indicated modifications made to offset inconsistencies of the enforcement of judges' requirements as compared to attorney requirements. Although several states indicated that it was too soon to evaluate the new requirements, four states mentioned that these courses have helped to increase awareness of professionalism issues and that they are generally supported by the bar. The only negative effect was reported in Delaware where there has been some dissatisfaction regarding a perceived over-regulation of the Bar, especially among out-of-state lawyers who have difficulty finding courses in their own state to comply with Delaware's separate professionalism requirement.

Four states reported that they had formed a committee to review mandatory continuing legal education. In two states, these committees are focused on the issue of whether to mandate CLE. Michigan's effort in this regard is rooted in the belief that CLE should be mandatory, particularly in the areas of professionalism and ethics. Delaware's committee is reviewing the MCLE program to recommend changes to improve the program or facilitate lawyer compliance. Wisconsin's Commission on Legal Education has made recommendations on how to improve legal education in law school and after graduation.

Instruction methods are another area in which states have sought to improve educational programs. Five states reported that they are attempting to enhance the quality of CLE programs by using innovative instruction methods. Recognizing that every individual has different learning styles, these states are expanding teaching methodologies to include structured discussion, case method, computer-interactive

seminars, video clips and other forms of technology to accommodate a wider variety of learning needs. North Carolina's addition of a "model law office" to their program for newly admitted lawyers (discussed below) was another innovative means of educating attorneys reported in the surveys. Several respondents felt professionalism topics lend themselves to the use of hypothetical or real case scenarios and discussion/debate between attendees regarding how these situations should be handled. The two states that commented on the success of these new methods reported that participants were enthusiastic about these changes.

The surveys also identified quality educational programs relating to professionalism that are well attended although they are offered for partial or no MCLE credit. North Carolina has instituted a "Complete Lawyer" program that focuses on improving professional competency and lawyer effectiveness. The seminar is intended to address practices, habits and attitudes affecting competence and professionalism as well as attorneys' quality of life outside work. The program extends beyond the usual professionalism topics to deal with issues many lawyers are facing: poor public image, lack of time, a high-stress work environment, competition, alcoholism, and suicide. Based on the program evaluations, the seminar has been well received and is accomplishing its objectives. Similar programs in Kansas have led the Kansas Bar Association to encourage the Commission on CLE and the Court to accredit or give more than partial credit to law office management courses to encourage lawyers to learn more in this area.

Monitoring and Enforcement

In the area of monitoring and enforcing CLE programs, less activity was reported. Two states reported adding noncompliance penalties. The Connecticut Bar Association reported providing an incentive to participate in CLE programs by granting membership in the Academy of Legal Education as an earned award. Three states have simplified the administrative procedures required to report and enforce MCLE.

Specialization and Certification

Two states reported adding specialization requirements to their MCLE programs. In New Jersey, attorneys can become certified in several areas once they meet eligibility requirements and attend the requisite number of CLE programs. This requirement is intended to improve the quality of legal services. It has provided an incentive to attend CLE programs and many attorneys attend more courses than required.

CLE Providers and Courses

A wide variety of changes were made in CLE courses and CLE providers. Nine states reported expanding the number and quality of course offerings. In the areas of professionalism and ethics, states added programs to the curriculum and supplemented independent courses with ethics/professionalism components. Programs were also

added to enhance attorney competence. These courses generally focus on law office management and practical lawyering skills and are usually targeted at newly admitted attorneys. However, two states reported adding programs aimed at improving attorney competence that assist older attorneys in learning about and using new technology.

Access to CLE

Although not directly related to initiatives in professionalism and ethics educational programs, the surveys revealed a clear movement in the states to respond to attorney concerns about access, affordability, and content in educational programs. One state is considering scholarships to assist attorneys with the costs of CLE. Many states reported that they are utilizing technological advances to offer attorneys greater flexibility and choice in selecting CLE courses. Twelve states are currently using or considering using audio/video tapes, interactive CD-ROM courses, telephone and video conferencing, online conferencing and/or websites to enhance their delivery of CLE programs. Most states cited affordability and accessibility as the major reasons for investigating or utilizing technology in course delivery; these innovations have been particularly useful in providing quality CLE programs to attorneys in remote areas, for whom complying with CLE requirements can be costly and cumbersome. In New Hampshire, satellite CLE programs have made it possible to offer more specialized and advanced courses.

The advantages of utilizing new technology to improve access were echoed by most states, but one state commented on the disadvantages. A Rhode Island subcommittee studying Internet delivery of CLE programs is weighing increased accessibility against the diminished ability of the court to monitor participation.

In addition to these new programs, several states have expanded the flexibility of CLE compliance methods. Five states reported that they allow or are considering allowing attorneys to participate in alternative programs for CLE credit. In two states this involved pro bono activities intended to underscore professional responsibility while assisting citizens of limited means. In Vermont, these alternative programs extend to activities such as service as an acting judge or review of small claims cases. Idaho and Montana now allow a portion of the CLE requirement to be self-taught, and Kansas and Montana allow attorneys to write law review articles to satisfy CLE requirements. Indiana offers "non-legal subject matter" courses for technical, medical, and managerial knowledge to accommodate lawyers who are not in the traditional practice of law (e.g., an Anatomy for Lawyers course, law firm management course).

Another means to enhance the quality and content of CLE programs has been to improve the skills of instructors and to assist program providers in improving curriculum development. In North Carolina, curriculum planning was done by six curriculum committees. Recently a special curriculum committee was established to handle programs outside the usual practice areas. These changes have improved "cross-pollination" among practice areas and new programs and helped to eliminate duplicate programs. South Carolina has started a series of faculty development seminars to

improve the quality of instruction. Another state reported that program providers have encountered confusion in instructing in the relatively undefined area of professionalism. The Commission on CLE has implemented rules, guidelines, and definitions to address confusion between an ethics and professionalism training requirement.

Programs for Newly Admitted Attorneys

Fourteen states have expanded or started programs for young lawyers. An additional three states reported that they are considering adopting similar programs. Of the seven states that provided reasons for implementing or expanding their young lawyer programs, five indicated it was done to provide newly admitted lawyers with the requisite practical skills and three cited an attempt to foster a sense of professionalism among young lawyers.

Three survey respondents described practical skills programs for young lawyers that were unique. South Dakota's program is slightly different from programs aimed at newly admitted attorneys. The state's law school and the bar have entered into a joint program to develop and teach a course on practical skills. Senior law students are required to perform actual skills projects including drafting complaints, discovery, and conducting direct and cross examination of witnesses.

Last year, the State Bar of Georgia developed a pilot project to test a transitional education program for newly admitted lawyers, which could replace Georgia's existing bridge the gap and trial practice programs. The transitional program has two components. A mentoring program gives each new lawyer access to professional guidance from an experienced lawyer. Supplementing this mentoring program is a practical skills training curriculum to be completed within two years of admission.

North Carolina's new lawyer program was supplemented in 1997 by a model law office, which was set up for the last two days of the course. It was intended to address basic law office management needs and to provide new lawyers with as much help as possible in opening their own practices. The office displayed sample files, book lists, information packets on the business of running a practice, an office handbook, computer systems and software, and substantive law packets. The office was staffed by a paralegal, a lawyer, and a computer expert. Program evaluations indicated that the model office was well received but comments from several participants made it clear that they had misunderstood the intent of the demonstration, thinking that it was a furniture display. Though successful, this first effort demonstrated the need to develop more materials and to advertise the purpose of innovative programs like the law office.

Other Recommendations

The Task Force on Education and Training of Lawyers in North Carolina recommends emphasizing fundamental lawyering skills through prelaw advising and counseling, law school programs, and during the period between graduation and

licensure. The New Jersey Commission on Professionalism and the Law has suggested a law school mentor program teaming second and third year law students with lawyer mentors. The individual comments of the survey respondents echo these recommendations. Of the 20 respondents who provided suggestions about improving lawyer education programs to promote lawyer competence and professionalism, five specifically address enhancing the practical skills of lawyers. Suggestions on accomplishing this objective covered practical education in law schools, professional licenses, internships, and mentoring. A respondent from Arizona recommends courses that go beyond practical skills to address problems lawyers face daily that contribute to the lack of professionalism in the legal community, including stress, competition, and economics.

Four respondents encouraged incorporating a professionalism/ethics component into every CLE course. Other suggestions related to providing a quality educational experience: encouraging audience interaction during courses, providing frequent, specific, and shorter CLE programs, testing program participants, providing meaningful written materials, and increasing the required number of hours.

When asked to go beyond lawyer education to identify programs or systems that should be implemented to promote attorney competence and professionalism, the most common suggestions were to institute a mentoring or internship program (six states) to build practical skills and to develop a peer review system (four states) to identify weaknesses and develop a means of improvement. Several states commented on the important role the court plays in providing attorneys with specific direction as to what constitutes acceptable behavior: "Judges must establish a climate of professionalism; if they do so, problems with lawyers must diminish."

Briefing Paper on Public Outreach Initiatives

The Conference of Chief Justices, with funding by the State Justice Institute, conducted a survey in October 1997 of its membership to investigate state initiatives to bolster attorney competence and professionalism. The specific areas of interest were Professionalism, Litigation Reform, Public Outreach, Lawyer Support, Disciplinary Enforcement, Bar Admission, and Educational Initiatives. To supplement this investigation, surveys on law school education were sent to the deans of all ABA-accredited law schools, and surveys on litigation reform were sent to representatives of the American College of Trial Lawyers, the Association of Trial Lawyers of America (ATLA), the International Association of Defense Counsel, the National Association of Criminal Defense Lawyers, and the National District Attorneys Association. Thirty-six members of the CCJ responded to the survey. The following is a summary of the responses concerning Public Outreach.

Public Opinion

Of the 29 states that responded to the survey on public outreach, 17 had made some effort to gauge public opinion about the legal profession, the level of professionalism demonstrated by lawyers, or specific programs or activities designed to promote lawyer professionalism. Nine states focused their efforts on survey research conducted by professional public research organizations. Three of these studies specifically focused on the public views of lawyers and public trust in the legal profession. Eight states conducted their surveys as a component of a larger evaluation of the state's legal and judicial system. Two states focused on public perceptions about lawyer advertising.

Other methods of gauging public opinion were also used in two states. As part of its "Town Meeting" series, for example, Georgia invited selected members of the public to comment on their expectations of how lawyers should conduct themselves with clients. Arizona, Florida, and New Mexico took a similar approach, inviting selected members of the public to participate in focus groups about lawyer conduct and professionalism.

Public Education

Twenty-three states reported efforts to educate the public about attorney ethics and professionalism, although the dominant focus of this education has been the disciplinary process. These states used a variety of approaches to communicate with the public, although none reported having formally evaluated these methods as a public education tool.

The single most popular medium for public education (13 states) was the publication and dissemination of brochures or pamphlets about various bar programs that are designed to assist clients or the public in their dealing with lawyers. All of the

reporting states using this method had brochures about their disciplinary system (e.g., procedure for filing complaints). Fee arbitration programs and Client Protection Fund procedures were also popular topics for brochures and pamphlets (7 states, 6 states respectively). A less popular topic (3 states), but perhaps more useful as public education material, were brochures that dealt with attorney-client relations, such as hiring lawyers and resolving problems with lawyers. Other brochure topics included the unauthorized practice of law, unlawful solicitation, and mediation as a form of dispute resolution.

Few of the states commented on the distribution systems they used for brochures. In most instances, they are mailed on request to interested persons and available in public libraries. Alaska and Connecticut also make them available in the state courthouses, where they are easily accessible to persons seeking legal assistance or dealing with lawyers. Other places include libraries (2 states), clerks' offices (1 state), and law offices (1 state).

Media and public speaking were the next favored forum for public education. Thirteen states reported that they regularly issue press releases announcing new bar programs and reporting on disciplinary actions taken by the bar. The survey respondents did not indicate, however, how often such press releases are used to generate stories in the media. Four states reported that they had established "speakers' bureaus" consisting of attorneys who are willing to address the public at different types of community functions. The topics of their presentation were not necessarily lawyer ethics and professionalism.

Six states had created a position or office within the state bar to answer questions by the public about lawyers or assist them with problems. The office was called by a variety of names (e.g., Consumer Assistance program, Public Liaison, Consumer Action Program), but generally was formed to fulfill a public information and assistance function.

The state respondents reported fewer instances of using new technology for public education purposes. Two states, New Jersey and Texas, reported making a toll-free telephone number available for members of the public to contact the bar with questions or problems. The New Jersey toll-free number is listed in the state government pages (Blue Pages) and Yellow Pages under "Lawyers." The Texas toll-free number was specifically established as a hotline to report improper solicitation for legal services. Arizona and Missouri were the only states that reported the creation of a website, although many states have done so.

Opportunities for Public Participation

All of the 29 states submitting responses to the Public Outreach survey reported that they provide opportunities for public participation in various bar activities. The extent of this participation varied considerably, both in the proportion of laypersons permitted to participate in those activities and the scope of permissible activity for nonlawyers. The proportion of lay representation on bar committees generally averaged between one quarter (1/4) and one third (1/3) of the total membership, with a high of one-half (1/2) on disciplinary hearing panels in Texas.

All of the states reported some lay representation in its disciplinary system, either on the local hearing panels or statewide disciplinary boards, or both. A number of states reported a wide variety of additional opportunities beyond those involved in the disciplinary process. Nine states reported that their governing boards included nonlawyer members, and three states had nonlawyer representation on all of the standing committees of the state bar. Other states reported lay participation on fee arbitration panels (5 states); client security fund boards (4 states); law related education committees (3 states); judicial qualification committees (3 states); judicial performance review committees (2 states); professionalism committees (2 states); unauthorized practice of law committees (2 states); character and fitness boards (2 states); community affairs committees (2 states); lawyer assistance committees (2 states); ethics committee (1 state); reasonable accommodations committee (1 state); state bar foundation (1 state), continuing legal education board (1 state), paralegal committee (1 state) and alternative dispute resolution committee (2 states). In Idaho, some of the state bar practice sections also offer membership to nonlawyers.

The most common form of recruitment reported for lay representation (7 states) was nomination by lawyers or judges and appointment by either the bar leadership or the state supreme court. Only five states reported that interested persons could submit applications to be considered for lay-member positions on bar committees or that vacancies for these were publicized. A respondent from Idaho noted that advertising for such positions was only a marginally successful method of recruitment. A respondent in Connecticut also commented that its nonlawyer positions generally were not well publicized and therefore the public was not fully aware of opportunities to participate in the profession.

In contrast to recruitment and nomination by members of the bench and bar, Iowa and Wisconsin reported that they request various public and private organizations to nominate one of their members to sit on bar committees. Appointment authority is shared with other branches of government in at least two states. In Maine, the governor and the Supreme Court jointly make appointments to the Maine Board of Bar Overseers. In North Carolina, local elected officials appoint lay members to local disciplinary panels.

The comments of survey respondents were overwhelming positive about the contributions that lay members bring to the bar. The most common remark was that nonlawyers bring a fresh perspective and great deal of common sense to bar policy making and deliberations. Laypersons also offered lawyers a tremendous education about public expectations of lawyers and the bar as an institution. A Utah respondent noted that to secure this benefit, however, the bar needed to ensure that its lay members were themselves consumers of legal services. Several respondents noted that lay participation tended to lend credibility and inspire public confidence in bar organizations, particularly in the context of disciplinary proceedings. An Arizona respondent reported that nonlawyers have written guest editorials and have spoken at legislative hearings. Over time, lay members also tended to become "good will ambassadors" for the bar. A couple of respondents cautioned, however, that lay participation in bar activities should not be confused with public education efforts.

None of the states reported any particular disadvantage associated with lay participation on bar committees, but several respondents offered advice about maximizing the benefits associated with lay participation. Providing the necessary tools for lay members to participate effectively was suggested by a Utah respondent. They discovered that their nonlawyer committee members were not automatically included on state bar mailing lists and consequently did not receive bar publications that were regularly the topic of the committee discussions. Training and orientation for both lawyer and nonlawyer members should also be provided to ensure that all committee members are aware of the mission and objectives of the committee, the obligations of committee members, and resources available to the committee for pursuing its activities. As noted above, public participation on bar committees is not a preferred vehicle for public education. Finally, recruitment for various types of bar activities should be done with a mind for the expertise characteristics desired for that function.

Pro Bono Programs

All of the responding states reported a great deal of activity in the area of pro bono programs, ostensibly as a result of cuts in the Legal Services Corporation budget and perceived increases in local needs. For the most part, these efforts were undertaken by the voluntary and local bar associations and Young Lawyers conferences. Historically, the institutional role of the state bar and judiciary tended to be limited to “cost-less” exhortations to lawyers to engage in pro bono representation. This role has expanded considerably in some states, however. Many states now define pro bono in their attorney ethics rules or accompanying comments, Legal Ethics Opinions and Ethical Considerations as an affirmative professional obligation, albeit an unenforceable in most jurisdictions. Increasingly, state bars also provide publicity for private and local pro bono efforts, including recognition in the form of annual awards for outstanding pro bono participation. Some states also provide in-kind assistance (e.g., administrative support, facilities for pro bono clinics and training); coordination among various pro bono programs and with non-legal public service organizations; training, including CLE credit, for attorneys willing to perform pro bono representation; and mentors for young or inexperienced lawyers willing to perform pro bono representation. Finally, some states have created “Emeritus Lawyer” programs that grant limited active licensure to retired or otherwise inactive-status lawyers while they are engaged in pro bono representation.

The most difficult aspect of pro bono coordination for the states appears to be fulfilling a clearinghouse role—screening and referring clients to attorneys who have indicated their willingness to provide pro bono legal services. Several states reported difficulty in matching clients and lawyers and maintaining the enthusiasm of lawyers who want to participate but whose services are never requested, both of which require greater staff resources than many state bars have immediately available.

Like formal state bar involvement in pro bono programs, judicial involvement has tended to be mainly an exhortatory role until very recently. Individual judges have become more active in recruiting and training lawyers for pro bono participation, as well as taking leadership roles in pro bono programs (e.g., governing boards, local circuit committees). In Michigan, Maine, and the District of Columbia, pro bono initiatives

have resulted from greater cooperation between the state and federal courts. A few states reported some novel approaches for the judiciary to assist in pro bono efforts. For example, a Texas respondent reported the creation of special court dockets in conjunction with pro bono clinics. A Nebraska respondent reported that funding for non-profit legal service providers had been established with a “filing fee surcharge.” A New Mexico respondent reported that in its “Lawyers Care” pro bono program, an annual fund raising event/dinner is held to raise money for legal services activities and to recognize lawyers who have made major contributions to the representation of the poor. This program is also strongly supported by judges.

General Comments

Nineteen states offered comments and suggestions about how public outreach initiatives could be used to foster lawyer competence and professionalism. The most frequent observation was that public education would help create a more informed base of clients that would expect and demand a higher level of professionalism from lawyers. Market competition for this client base ultimately would foster greater professionalism from lawyers. A second observation was that engaging in regular communication with the public would serve to identify problems in the justice system and ultimately improve access to justice. Some respondents viewed public outreach activities as a form of public relations that would combat the pervasive negative image of lawyers. Finally, a Colorado respondent noted that public outreach activities would provide lawyers with opportunities for greater community and civic involvement.

Florida and Utah respondents also recommended specific public outreach initiatives to improve attorney professionalism. Florida suggested it “Model Attorney-Client Communications Pledge Program” as a possible model for other states. This model program was developed to focus attention on consumer service aspects of legal practice and secure commitments from local lawyers to examine and improve their client communications and office management practices in this area. A Utah respondent recommended that the state bar develop a model “lawyer evaluation form” to be given to clients after the legal services are completed. These client evaluations could be shared with mentors or law office management consultants to identify areas in need of improvement and develop strategies to address problems.

In addition to public outreach activities, 18 states offered suggestions on other avenues for improving lawyer competence and professionalism, the most popular of which was education. Most respondents who raised this point indicated that lawyer education should take place “early and often,” beginning in law school (or even earlier, in elementary and secondary school civics and government classes). The emphasis on professionalism in CLE courses should be practical skills (“putting professionalism into practice”) rather than aspirational rhetoric. Utah suggested implementing a “limited licensure” for new lawyers with full licensure following an internship or probationary period (2 to 3 years) and a passing score on a second set of bar examinations. Other comments included a mandatory professionalism course for all, not just newly admitted, attorneys, mentoring of younger bar members by older bar members and stricter standards for admission to the bar. The New Mexico State Bar is creating a Lawyer

Peer Review program to address behavioral issues of lawyers that do not rise to the level of ethics violations. Complaints and counseling will take place by more distinguished members of the bar to raise the level of professionalism exerted by lawyers involved in this program.

Another frequent suggestion was greater intervention, including disciplinary measures, by both the bench and the bar when instances of unprofessional conduct are observed. A Connecticut respondent advocated greater public promotion about specific, identifiable (as opposed to generalized) examples of professionalism by lawyers. These would educate the public about the good that lawyers do, and inspire other lawyers to do likewise.

A New Mexico respondent suggested systematic data collection of comments from the clients of lawyers, similar to comment cards that are commonly used by businesses. These comments would serve to educate lawyers on their clients' experiences in court and in the office (the attorney *and* his/her staff). Depending on the feedback, this system can be implemented by ethical rule or court rule, or by a neutral and separate entity to generate more honest comments from clients.

Briefing Paper on Litigation Reform Initiatives

The Conference of Chief Justices, with funding by the State Justice Institute, conducted a survey in October 1997 of its membership to investigate state initiatives to bolster attorney competence and professionalism. The specific areas of interest were Professionalism, Litigation Reform, Public Outreach, Lawyer Support, Disciplinary Enforcement, Bar Admission, and Educational Initiatives. To supplement this investigation, surveys on law school education were sent to the deans of all ABA-accredited law schools, and surveys on litigation reform were sent to representatives of the American College of Trial Lawyers, the Association of Trial Lawyers of America (ATLA), the International Association of Defense Counsel, the National Association of Criminal Defense Lawyers, and the National District Attorneys Association. Thirty-three members of the CCJ and 10 state representatives of ATLA responded to the Litigation Reform. The following is a summary of the responses.

Issues in Alternative Dispute Resolution (ADR)

Thirty-eight states responded to the survey questions concerning lawyer professionalism in the context of ADR. Of those, 32 states had established court-annexed or court-sponsored ADR programs. Although none of the ADR program evaluations examined whether participation in ADR programs affected the relationship between opposing counsel, 22 states offered comments on this topic based on anecdotal information. Fifteen states reported that participation in ADR programs had some effect on the relationship between opposing counsel, but only two states indicated that it was significant. Generally, participation in ADR programs was believed to have a positive effect on lawyer professionalism. In addition to fostering a less combative relationship, survey respondents believed that lawyers focused more quickly on the disputed issues. As a result, a larger proportion of cases were settled without trial and, for those cases that did not settle, the subsequent trials were conducted more efficiently. Kansas also noted that participation in ADR programs tended to improve lawyers' negotiating skills, both in the formal ADR programs and in their regular practice. In Michigan, sanctions are imposed if the recommended mediation results from a mediation panel are not accepted and the party rejecting mediation does not recover at trial at least 10 percent more than the amount recommended by the mediators.

Only one survey respondent, a lawyer from the Montana chapter of ATLA, reported any negative effect on lawyer professionalism resulting from participation in ADR programs. She reported that in cases where lawyers fail to prepare adequately, fail to secure authorization to negotiate or misuse the ADR process as a vehicle for discovery, participation in ADR creates even more antagonistic relationships between opposing counsel.

The majority of survey respondents reported that lawyers were generally willing to participate in ADR programs, despite some reluctance in eleven states. This reluctance stemmed mainly from lawyers' unfamiliarity with ADR and beliefs that it would interfere with the attorney-client relationship. Other factors contributing to

lawyers' reluctance to participate in ADR were: (a) concern about the impact that ADR programs would have on professional practice and income; (b) difficulty in adjusting from an adversarial to a collaborative style of negotiation; (c) belief that the adversarial system is a superior method of dispute resolution and justice; and (d) concern that mandatory ADR would involve added expense and rigid formats. Evidence of this reluctance manifested itself by unsubstantiated claims for waiver of the ADR order; failure to schedule ADR or submit court-ordered ADR plans in a timely manner, use of untrained lawyers as ADR professionals (e.g., arbitrators, mediators), use of mediation without the proper authority to settle, reliance of mediation as a source of discovery, and generally failure to cooperate in the ADR process. Several respondents also noted that court-referred ADR is often ordered so late in the process – generally 60 to 90 days before trial and after discovery is completed – that any financial incentive to settle has nearly evaporated. One respondent noted the reluctance of judges in the use of ADR. Judges are willing to create ADR programs linked to court proceedings but not willing to conduct them (they are always conducted by someone *other than* judges). Most ADR sessions are also *not* held in the courthouse.

States reported several efforts to address these problems. The most popular approach was education about ADR programs for both the bench and the bar. Included in the educational programs was training for ADR professionals, which tended to enhance the credibility of the programs in the eyes of the local legal community. Four states, reporting that experience in the ADR programs was the best remedy for lawyer reluctance and lack of cooperativeness, indicated that the majority of lawyers who participated in ADR programs found them helpful and would participate again. Two states noted that judicial support, including clear procedural rules for referrals and case conferences to ensure compliance with ADR orders, was crucial to securing the acceptance of these programs in the legal community.

With respect to court rules governing ADR, ten states reported that the state Rules of Professional Conduct include specific reference to ADR, and four states are considering enacting rules. In most instances, the rules pertaining to ADR specify that an attorney has an obligation to inform clients of the availability of ADR as a method of dispute resolution. Georgia's Rules of Professional Conduct prohibit a lawyer-mediator from providing legal advice in matter in which he or she served as a mediator. Several states also mentioned that existing Legal Ethics Opinions, Ethical Considerations or aspirational Lawyers' Creeds addressed the use of ADR.

Codes of Ethics and Professional Conduct for Mediators and Arbitrators were the more common form of regulating ethics and professionalism for mediators and arbitrators. Thirteen states have adopted such codes, and two more are currently under consideration. A number of states relied on ethics codes promulgated by organizations of ADR professionals, such as the Society of Professionals in Dispute Resolution (SPIDR), the Association of Family Mediators (AFM), and the American Arbitration Association (AAA). Other states have specific statutes or court rules to govern training requirements or certification of neutrals.

The possibility of inconsistent or conflicting ethical codes does not appear to be a significant problem and thus has not received a great deal of attention. Only Kansas reported that it had established a task force of its Ethics Committee to study the interrelationship of various codes. A Florida statute addresses the existence of concurrent standards, but does not offer assistance in cases of conflict. In Texas, ADR is not considered part of the practice of law, and therefore the Texas Rules of Professional Conduct are inapplicable. In Tennessee, the ADR Commission and a state bar association committee are working together to ensure that the rules for mediators and the proposed rules for attorneys will not be in conflict.

Frivolous Filings

Thirty states responded to the questions concerning frivolous filings. Of those, only eight reported that they had amended their rules of civil or criminal procedure in the past decade. In most cases, the amendments made the state statutes more closely resemble Rule 11 of the Federal Rules of Civil Procedure. From the various responses to these questions, it appears that the volume of frivolous filings by lawyers was not perceived as a significant problem. Pro se filings were viewed as more problematic, and at least two states had enacted "vexatious litigant" legislation to address that issue. Because so few states had amended their rules, or the rules were amended so recently, none of the court respondents were able to determine whether the amendments had accomplished their objectives.

Although the volume of frivolous filings was not reported to be a serious problem, several survey respondents suggested possible factors that might contribute to the problem when it did arise. By far, the most common factor (cited by 5 states) was perceived to be dramatic increases in the number of lawyers competing for a finite number of meritorious claims. Systematic factors (e.g., short statutes of limitation, "fast-track" scheduling, and constraints on amending complaints) equaled strategic factors (e.g., negotiation tactics, fear of malpractice, and pressure from clients) for second place (4 states each). Inexperience, misunderstanding of "zealous representation," and inadequate investigation of facts or law comprised the third category of factors (4 states).

Most respondents reported that the courts had a wide array of remedies at their disposal with which to sanction frivolous filings when they occurred. These included awarding of costs and attorneys' fees, holding offending attorneys and clients in contempt, and striking claims and defenses. All of the states, however, claimed that sanctions were seldom, if ever, employed and there was dramatic split among the respondents concerning the relationship between the frequency with which sanctions were imposed and the effectiveness of those sanctions. About half of the respondents claimed that lack of effective enforcement encouraged offending attorneys to continue to pursue frivolous claims and defenses, as there was no significant deterrent. The other half claimed that lack of enforcement indicated the lack of a significant problem. Interestingly, most of the ATLA respondents also split along these lines. Two of the ATLA respondents also offered additional insights about the deterrent effect of Rule 11-

type sanctions: (a) it is very difficult to prove an absence of good faith in filings; and (b) attorneys proceeding under contingency fee agreements have little financial incentive to initiate Rule 11 proceedings, even if they might be warranted.

Discovery Disputes

Twenty-nine states responded to the survey questions concerning discovery disputes. In contrast to frivolous filings, discovery disputes were perceived as a more troublesome problem by both the court and the attorney respondents. Issues that were specifically cited by the ATLA state chapter respondents were unwarranted objections and lack of full disclosure in response to discovery requests, and deliberate incivility during depositions. As a result, eleven states had amended their procedural rules to address discovery problems and several more have proposed amendments under consideration. In most instances, the state amendments track those enacted for Rules 26 and 37 of the Federal Rules of Civil Procedure.

The majority of amendments were enacted too recently to be formally evaluated. Anecdotal information about the existing rules and amendments suggested mixed results. The majority of respondents believed that emerging procedural and practical trends for managing such disputes were effective. Forced preparation for case management conferences, greater court supervision over discovery schedules, and required attempts to resolve disputes before filing motions to compel discovery were repeatedly mentioned as improvements in discovery procedures. A Vermont respondent noted, however, that some attorneys, adhering more closely to the letter than the spirit of Rule 37. He explained that these lawyers document their compliance with the “good faith attempt to resolve a matter” with a brief letter to opposing counsel rather than communicate by telephone or in person before filing a motion to compel discovery.

A few survey respondents, in particular those from the ATLA state chapters, were less enthusiastic about the effectiveness of these provisions. Both the Connecticut and Minnesota respondents, for example, noted that existing procedures to resolve discovery disputes were unduly rigid, added layers of time and expense to motions to compel discovery, and created even more issues to litigate. The remedies under FRCP Rule 37 and corresponding state rules are similar to those mentioned for those under FRCP Rule 11. Although one respondent noted that judges appear more willing to impose sanctions for abuse of discovery than for frivolous filings, the use of sanctions was still perceived as infrequent. Only a few respondents offered any opinion about the effectiveness of sanctions, but those that did uniformly believed that, when imposed, they were very effective at preventing future disputes.

Other Recommendations

Nineteen states offered general comments about how changes in civil or criminal litigation might be used to improve lawyer competence and professionalism. By far, the

most frequent suggestion was greater judicial enforcement and imposition of sanctions for misconduct (10 states). These comments echoed the responses in other sections of the Litigation Reform survey that consistent enforcement of existing rules, including adequate judicial supervision during discovery, is necessary to establish baseline expectations of conduct and professionalism during litigation. Two respondents cautioned, however, that an overly rigid and mechanical approach to procedural compliance was counter-productive in that it provided additional vehicles for abuse. Another respondent indicated that rules do not improve professionalism, and “the imposition of more severe penalties would seem to slow down the system by creating more issues to be appealed.”

Three respondents noted that procedural consistency across jurisdictions was also critical for lawyers to practice competently and effectively. A Connecticut respondent said it succinctly: “Lack of uniformity between courts regarding pleading methods, pretrial requirements and trial schedule make out-of-town attorneys appear incompetent when they aren’t.” A North Carolina respondent also recommended that the judiciary secure exclusive control over the enactment of evidentiary and procedural rules, noting that it would permit the judiciary to use court rules more effectively to improve lawyer competence and professionalism.

Twenty-two states also commented on efforts other than litigation reform to improve lawyer competence and professionalism. Various forms of legal education were the most popular recommendations. These included more varied and more accessible CLE, increased emphasis on professionalism in law school curricula and judicial education, and greater mentoring activities for young lawyers (14 states). Changes in lawyer discipline were also popular. Recommendations included more prosecutions for incompetence, more active intervention by the bar and the bench in cases involving mental illness or substance abuse, greater use of referrals to “professionalism school” as sanctions for misconduct, and better technical support for disciplinary counsel (e.g., access to an integrated database).

Greater opportunities for informal and social interaction among lawyers received support from four respondents, three of which specifically recommended the American Inns of Court as a worthwhile model. Finally, among the miscellaneous recommendations were to provide instructions for lawyers on how to manage a trust account, to impose greater restrictions on lawyer advertising, and to allow mandatory malpractice insurance with premiums linked to an attorney’s disciplinary record.

Briefing Paper on Survey of Bar Admissions

General Overview

There were thirty-two jurisdictions that responded to the Bar Admission section of the Conference of Chief Justices, Professionalism and Lawyer Competence Committee survey. The most significant result was that the vast majority of the responding jurisdictions stated that in the past five years there had not been any significant changes in their law school curricula regarding professionalism.

Law School Curricula

Twenty-two of the responding thirty-two jurisdictions stated there had not been any significant changes in the law school curricula in their jurisdiction in the past five years. Two jurisdictions stated they have increased the number of courses being offered in law practice management and in practice skills. One jurisdiction reported that their law schools do not even offer a course in law practice management.

Two jurisdictions reported they have been very successful in implementing pilot mentoring projects where practicing lawyers are paired with law students to teach the students necessary practice skills.

One jurisdiction reported that their Supreme Court has adopted a Code of Civility and that study of the code has become part of the law school curricula.

Finally, one jurisdiction opined that law schools are graduating too many persons. The lack of jobs and fierce competition has created a number of problems including lawyers handling cases they are not competent to handle.

Bar Examination

Eleven of the thirty-two responding jurisdictions stated there had not been any significant changes in their bar examination process in the past five years.

Three jurisdictions reported they now require successful completion of the Multi-state Professional Responsibility Exam (MPRE) as part of the examination process. Three jurisdictions stated they have increased the pass/fail level of the MPRE. Two of the jurisdictions will now require an 80 as a passing score and two jurisdictions will require an 85. One jurisdiction will now allow applicants to substitute a grade of "C" or better in a Professional Responsibility course for the taking of the MPRE. One jurisdiction reported they will no longer allow applicants to substitute a Professional Responsibility course for the successful completion of the MPRE.

Three jurisdictions stated they have added topics to be tested on the written bar examination. One jurisdiction has added Family Law and Conflicts of Laws and a second has added Professional Responsibility and Unfair or Deceptive Practices. One jurisdiction reported they have eliminated certain topics to be tested: tax, bankruptcy, insurance and domestic relations. Two jurisdictions stated they have increased the passing score for their bar exams. One jurisdiction indicated that it reduced its passing score to that of its original passing score.

Nine jurisdictions reported that they have adopted, or are considering adopting, the Multi-state Performance Test as part of their bar examination. Another jurisdiction stated they have added two performance test items to their exam and one jurisdiction reported they are considering adopting the Multi-state Essay Examination (MEE) developed by the National Conference of Bar Examiners. Finally, one jurisdiction has changed the format of their bar exam from all essay to a combination essay, multiple choice and performance test.

Four jurisdictions have developed continuing education programs for recent admittees. One jurisdiction requires newly admitted lawyers to take a 3-day bridge-the-gap course. Another jurisdiction requires 30 hours of practice skills and values and a third requires lawyers to take a course on fundamentals of law practice. One jurisdiction reported they now have a mentor program for new admittees which lasts two years.

After three years of research and discussion among bar leaders and judges in Vermont, Maine and New Hampshire, the Tri-State Task Force on Bar Admissions voted to recommend that courts consider adopting a new process for the admission to the practice of law in those three states. The central concept of the plan is to replace the traditional bar exam with a comprehensive educational program designed to improve lawyer competence through in-depth skills training and evaluation. The Task Force recommended the establishment of a Tri-State Commission on Bar Admissions to formulate and administer a four-year pilot program.

Character and Fitness

Thirteen of the thirty-two responding jurisdictions stated there had not been any significant changes in their character and fitness process in the past five years.

Several jurisdictions reported changes in their character and fitness procedures which were implemented to make the screening of applications more thorough. One jurisdiction reported they now have a fingerprinting requirement for applicants and that they make inquiries of any other jurisdiction where the applicant is licensed to practice law.

Two jurisdictions stated they now begin the character and fitness process at the time a potential applicant applies to law school and one of those jurisdictions reported they are working with the law schools to have character and fitness questions placed on the law school application form. One jurisdiction proposes for its law students to register

during their first year of law school to effectuate a more thorough background check and allow the Board and the applicants to work on character and fitness matters well before the time for bar admission. One jurisdiction reported it had changed its application to comply with the Americans with Disabilities Act.

Six jurisdictions reported they have adopted or are considering the conditional admission of applicants with a history of substance abuse. The conditional admission would allow the monitoring of the conduct of those lawyers. One jurisdiction stated they are not considering conditional admission.

Two jurisdictions stated they are now searching for any outstanding child/spousal support orders that have been entered against an applicant and whether the applicant has been complying with the order.

One jurisdiction adopted a list of essential eligibility requirements for the practice of law that its state supreme court has adopted into the admissions rule. And another jurisdiction amended its attorney oath of office to include a civility provision.

One jurisdiction reported they have increased the use of outside counsel to investigate and assist at character and fitness hearings. Another jurisdiction stated that their rules have been changed to allow for the exchange of information between the Board of Bar Examiners and the Disciplinary Board. One jurisdiction reported their rules have been changed to provide that an applicant convicted of a felony is deemed to lack moral character and fitness.

A jurisdiction stated their Board of Bar Examiners revised and renamed as "Letters of Professional Guidance" letters to be sent to a bar applicant when his or her past conduct suggests difficulties in the areas of candor, fiscal responsibility, traffic violations or chemical abuse, yet the conduct does not rise to the level to warrant further proceedings at the time of the application.

Finally, one jurisdiction suggested that character and fitness officials should use the NCIC to check on every applicant's criminal background and that all lawyers should be required to purchase malpractice insurance.

Coordination

Twelve of the thirty-two responding jurisdictions stated there had not been any significant changes in the efforts between the bar association and the law schools to foster professionalism during the past five years.

Six jurisdictions reported that a member of the Board of Bar Examiners now speaks to the incoming class of their law schools about professionalism and the character and fitness application process. Three jurisdictions stated they now conduct meetings between the court, leaders of the bar and law school deans to coordinate professionalism initiatives.

One jurisdiction reported that its State Bar Board and State Bar Association have sponsored a half-day professionalism seminar on the day of the bar admission ceremony. In one jurisdiction, members of the State Board of Bar Examiners have been active in leadership roles in the State Bar Section on the Education of Lawyers (which is working with the State Bar Committee on Professionalism) to increase law student awareness of professionalism issues and to foster an emphasis on professionalism during law school.

One jurisdiction reported that their "student practice rule" has been revamped with an eye towards enhancing the practical skills of law school graduates. Another jurisdiction reported that its bar association had developed a series of six four-hour workshops focusing on professionalism and law practice management and the workshops were open to third year law students.

One jurisdiction suggested the area of increased student loan debt is ripe for review with respect to whether it affects lawyer professionalism and, if so, which education, mentoring, or loan forgiveness programs would be worthwhile. Another jurisdiction suggested that there needs to be greater coordination among the law schools, the board of bar examiners and the disciplinary board to make the admission process more efficient and credible. One jurisdiction reports that its state bar now works more closely with law schools. These efforts have increased the efficiency of the state bar's character and fitness process and has resulted in a significant decrease in the time necessary to complete a character and fitness investigation.

Briefing Paper on Survey of Lawyer Support Programs

Ethics Hotlines

Fourteen of the 30 states responding cited ethics hotline programs, several with no recent changes. Florida indicated that 8 lawyers and 5 support staff administer its hotline and is still unable to meet demand. Hawaii is about to add a toll free number to better serve the outer island members.

Wisconsin noted that it would like to expand its part-time program to full-time. New Jersey indicated that its program is funded through a 900 number. Several states pointed out that ethics questions are handled by the disciplinary counsel.

Rhode Island indicated that its program responds to written questions. Arkansas noted that it recently established a procedure for issuing ethics advisory opinions.

Five states mentioned the use of websites in connection with advisory opinions. The responses reflect the various levels of sophistication of internet usage, with two states ready to add opinions to its site, two states with opinions already on its site, and one state considering improving its site to make ethics opinions searchable. In a related area, one state reported that it had adopted the public domain citation rule, making it easier (and less expensive) for lawyers to do research.

Florida reported that it is planning to do an annotated Rules of Professional Conduct.

Two states also indicated that they have Ethics Schools designed to provide education for individuals referred by the disciplinary agency.

Lawyer Assistance Programs (LAPs)

Nine states cited an expansion of their LAPs to cover non-chemical dependency impairments, most notably depression and gambling. Florida indicated that 25 per cent of its calls are for non-chemical dependency impairments. Two states mentioned the need to provide career counseling for lawyers in transition. One state noted that it provides support meetings for lawyers with chemical dependency problems and plans to develop similar support meetings for those with non-chemical dependency impairments.

Several additional states cited the importance of their LAPs even though there have been no recent changes in their programs.

Idaho and Indiana indicated plans to create a LAP.

With respect to resources, Michigan reported the employment of a full-time director who coordinates efforts for substance abuse assistance. North Carolina reported hiring a full-time director and assistant to enhance and coordinate volunteer efforts. Another

state expressed the need to have professional staff to assist the volunteers. Two other states cited new funding methods: Massachusetts now funds its program in part with mandatory registration fees, making it possible to offer a full range of services, and Colorado and Tennessee have petitioned their Courts to fund programs in the same way.

With respect to confidentiality, one state reported adding a confidentiality rule and one state reported that its program does not currently have confidentiality or immunity protection.

One state noted the creation of a trust for lawyers experiencing physical or economic hardship. The trust distributes over \$150,000 per year.

Two states reported on involvement with the disciplinary system. One noted that by court order it provides monitoring for lawyers readmitted to practice. One cited referrals from the discipline system through a diversion system.

North Carolina cited the new Law School Substance Abuse/Chemical Dependency Curriculum Infusion Project which is supported by the law school deans.

Law Office Management Assistance Programs - LOMAP

Staffing of LOMAP programs was an important area of change. Georgia and South Carolina reported starting programs with full-time staff. Florida reported adding two additional staff members to its program - a technology advisor and an administrative secretary for its Solo and Small Firm Helpdesk - and indicated it hopes to add more staff due to the volume of requests for assistance. (The ABA reports that 13 states have full-time employees for LOMAP programs.) North Carolina reported that it is reevaluating the structure of its program which has been heavily subsidized by the bar and strongly oriented toward onsite services. Tennessee reported that it plans to implement a program where a professional counselor will provide assistance.

Several states indicated that they provide assistance through committees (e.g., Washington, Delaware, Montana, New Hampshire, New Mexico, Utah) or sections (e.g., Idaho, Michigan) of the bar. Delaware mentioned increasing the number of people on its committee to 52 to be able to provide increased assistance. One state, Arkansas, is considering the establishment of a LOMAP program.

Two states cited use of a Website to offer assistance. Montana maintains a bulletin board for the exchange of information. Wisconsin's Website includes recent Supreme Court and Appellate Court cases, discussion groups, and continuing legal education programming.

The greatest needs cited were for technology assistance and support for solo and small firm practitioners. Georgia indicated that 50 percent of its work is with solos. A number of states mentioned holding conferences or seminars on technology and the high

demand for assistance in this area. Wisconsin conducts an annual technology survey of law firms.

Several states mentioned that they have law office management lending or reference libraries. Tennessee's State Bar Standing Committee provides a manual for new lawyers that offers assistance with law office management.

Three states, Florida, Georgia, and North Carolina, reported that their LOMAP programs provide onsite observation and evaluation of law offices. New Hampshire indicated that a risk management program has been established through the bar-endorsed liability carrier. Florida also noted that its program handles cases referred from the disciplinary agency. A recommendation that New Hampshire's program handle such referrals is under consideration.

Delaware noted that its law office management program, which is run by its Committee on Professional Guidance, is confidential.

Georgia reported that it has a new mandatory practice skills course for new admittees.

Mentoring

Georgia reported that it has established a mandatory mentor program for new admittees with mentors appointed by the Supreme Court. Other states with mentor programs for new admittees include Montana, South Carolina, North Carolina, New Hampshire, Michigan, Tennessee, Colorado, and Idaho. Idaho is considering making its program mandatory. South Carolina's Courthouse Keys program introduces new lawyers to judges and the courthouse. Tennessee is proposing a mandatory transitional education program for new admittees with an interest in attorney competence and professionalism.

Several states (e.g., Connecticut, New Jersey, Wisconsin) provide directories of lawyers who can answer questions in different practice areas. Connecticut reported holding a monthly solo and small firm networking breakfast.

Maine and North Dakota are considering the establishment of a mentor program. Nebraska has adopted a program but has not implemented it yet.

New Mexico reported that its bar association is developing a webpage to help promote its mentoring program. New Mexico also plans to develop discussion groups to further enhance networking opportunities.

Several states noted that they have (Florida, Georgia, New Jersey) or plan to establish (Massachusetts) programs at the local level. Professionalism Commissions in Georgia and New Jersey assist state and local organizations in creating programs.

Georgia and New Jersey also reported having programs at the law schools. Massachusetts reported discussion with the law school deans regarding ways to help recent graduates.

Other states with programs include Delaware, Vermont, Utah (with a new small scale program) and Iowa, which reports that it is unable to meet demand for assistance.

Dispute Resolution

Three states cited methods of resolving disputes between lawyers and clients. Georgia has a consumer assistance program which provides informal resolution of complaints of minor violations or refers callers to appropriate programs (e.g., fee arbitration, mediation). New Jersey cited its lawyer/client mediation program. New Hampshire is considering a recommendation that it create more centralized intake of complaints and provide for diversion (including mediation) of minor conduct violations.

Several states noted programs to resolve disputes between lawyers, such as law firm dissolutions and lawyer fee disputes. These include New Jersey, North Carolina, Wisconsin, New Hampshire. New Hampshire's program provides advice, assistance, intervention and guidance regarding gender discrimination between professionals. It may expand the program to cover discrimination based on sexual orientation.

Suggestions

Hawaii - mandatory malpractice insurance; more prosecutions for incompetence

Delaware - CLE with testing (must pass for credit); ABA could provide computer graded materials

Arizona – Lawyer support programs should be available at reasonable cost to all attorneys and should be flexible to meet individual attorneys' needs. Support in obtaining or refining management skills should be provided at all stages of attorney's career. Including such training as part of law school curricula would lay a good foundation; that function would then pass to bar associations, courts or other entities after the attorney was licensed to practice.

New Mexico – Lawyer support programs nationally have proven to enhance competence and should be a number one priority for bar associations, legal educators, and courts. Georgia and Florida have active Commissions on Professionalism. The programs, endorsed by the states' supreme courts, require all active lawyers to complete one hour per year of CLE on the topic of professionalism—this is in addition to the ethical requirement.

Briefing Paper on Disciplinary Enforcement

The Conference of Chief Justices, with funding by the State Justice Institute conducted a survey on October 1997 of its membership to investigate states initiatives to bolster attorney competence and professionalism. The specific areas of interest were Professionalism, Litigation Reform, Public Outreach, Lawyer Support, Bar Admission, Educational Initiatives, and Disciplinary Enforcement. Twenty-six states responded to the Disciplinary Enforcement survey. The following is a summary of the responses.

Intake

To assist the public in filing complaints against lawyers, five states reported the use of a telephone service. Whether a hot line service, a toll free telephone number, or one manned by a staff attorney, respondents reported that these services reduce the number of frivolous complaints filed against attorneys. One state has added a public liaison to assist the public with questions about lawyers and the filing of complaints. Respondents indicated that lawyers (3 states), bar association counsel (3 states), and disciplinary boards (1 state) oversee the initial intake process as well. One respondent reported that its disciplinary counsel has the authority to summarily dismiss complaints for lack of jurisdiction, in addition to screening grievance complaints.

Four states print and distribute brochures to the public on the proper procedures for filing complaints against lawyers. Two states indicated the use of alternative dispute resolution techniques to resolve attorney and client disputes. One state reported that its bar counsel and board of bar overseers is creating a website.

To process cases quickly and reduce backlog, two states indicated that more staff were needed. One state is in the process of hiring more personnel. Another noted an increase in the number of persons sitting on its disciplinary counsel, as well as the addition of two professional investigators, a consumer affairs coordinator and assistance, and clerical staff.

Two states require complaints to be in writing to be processed. One state requires that lawyers notify clients of the grievance system on their billing statement. Another state noted that its judges are more frequently reporting lawyer misconduct. Two states indicated that no significant changes had been made to its intake system.

Interstate Cooperation

The most common method of reporting disciplined lawyers reported was through the ABA National Lawyer Regulatory Data Bank. States also forward records of discipline to states where lawyers are licensed. Some states notify other jurisdictions of lawyers disciplined in one state for purposes of reciprocal discipline. Three states reported involvement in a cooperative effort with the National Organization of Bar

Counsel Interstate Cooperation Committee due to the increased mobility of lawyers among states. One state requires *lawyers* to report disciplinary actions against themselves in other jurisdictions to the state bar disciplinary counsel.

Sanctions

Nine states reported that some type of sanction would be placed on attorneys for failure to pay child support payments. Although sanctioning techniques varied across jurisdictions, those states that have already implemented or are proposing this type of discipline place either temporary suspensions or revocation sanctions on lawyers who fail to pay their child support payments.

Six respondents indicated that the ABA Standards for Imposing Lawyer Sanctions are used by the states as a sanctioning guideline. One state reported that a policy and procedure manual was used as a method of achieving consistency in sanctioning.

Variations were reported of the number of entities involved in lawyer discipline and their respective authority to impose sanctions. In Massachusetts, the Supreme Judicial Court issues written opinions. Connecticut's Statewide Grievance Committee has been granted the power to order restitution, pay costs, return client files, order and participation in CLE fee arbitration, in addition lawyers reprimanding lawyers or dismissing complaints.

Four states publish opinions to work towards public access to the disciplinary process. One state is currently working to compile decisions in disciplinary cases. Tennessee issues press releases for lawyers who are publicly disciplined.

Other methods reported by states included admonitions, law office audits, the issuance of letters of caution, limitations on private reprimands, recidivism rules, and attendance to ethics schools as part of a sanction.

To protect clients, one state noted that maintaining malpractice insurance is a condition of practice.

Complaints Alleging "Minor" Misconduct

Nine states reported that diversion programs, or diversion-like programs, handle attorney misconduct that does not rise to the level of ethics violations. The scope of the diversion programs varies from state to state, however, most states incorporate fee arbitration, law office management assistance, mediation, or lawyer support programs as components of their programs.

Seven states reported that their courts have adopted special rules to handle "minor" attorney misconduct: alternative resolution techniques (4 states), deferral (1

state), letters of reprimand to replace private censure (1 state), and private reprimand without a hearing (1 state).

Three states indicated that special programs handle these types of issues. In Missouri, "minor" violations are handled by the Complaint Resolution Program; Texas had a Professional Enhancement Program; and in Utah, there is a Consumer Action Program Director who handles minor misconduct complaints.

Other methods to handle "minor" misconduct reported included ethics schools, admonitions, and peer review programs.

The state of Ohio has recently eliminated its designation of "colorable;" a colorable designation was similar to a private reprimand in other states, and could be resurrected if future misconduct occurred after the complaint was dismissed.

Unprofessional Conduct

States commonly reported that alternative dispute resolution programs (mediation and arbitration) had been implemented to resolve issues of unprofessional conduct. Three states have adopted codes of civility for lawyers to follow setting forth basic standards of conduct and behavior. Two states reported that Professionalism Counsel Programs handle unprofessional behavior, and one state reported that its peer review committee gathers facts and notifies lawyers of their obligations as professionals. One state reported that a center for professionalism had been devoted to correcting unprofessional conduct, and another handles misconduct through discipline.

Public Protection

A majority of states indicated public membership on disciplinary commissions and grievance boards. Some states require lawyers to pay designated amounts of money annually into a fund set aside for the protection of clients. States also reported that disciplinary proceedings are open to the public. The publication of complaints filed against lawyers was also reported. One state indicated the availability of individual lawyer disciplinary histories by computer in all state libraries.

Respondents to the survey also reported that notification to the state disciplinary counsel occurs automatically for overdrafts on lawyer trust accounts. One state indicated that a trust account notification rule is under consideration. Some states require written fee agreements for all clients that are not regularly represented by the lawyer as a condition of representation. Other states require malpractice insurance as a condition of practice.

Brochures, hot lines and bright line rules prohibiting sexual relations between attorney and client were also reported. One state has also adopted rules prohibiting

members of the House, Executive Council, bar officers and their partners from representing respondents in misconduct complaints.

Consumer Complaints

States commonly reported mediation and fee arbitration programs as avenues for resolving complaints. One state indicated that mediation is offered for complaints not involving attorney misconduct. One state indicated that a fee arbitration program is needed, and another reported that such programs are being discussed. Civility complaints, in one state, are reported to the state bar association. Utah has a Consumer Action Program that handles consumer complaints.

Annual Registration

State requirements for annual registration varied across the states. One state has amended its registration requirements to include the reporting of the existence of a trust account, the bank where it is held, and the account number. Another state is in the process of requiring trust account information. Other data reported for annual registration included race, gender, and home address. One respondent indicated that barcodes on registration forms speed processing. Other additions included amended forms to show discipline and convictions in other jurisdictions, a duty for lawyers to “promptly” advise the bar if disciplined elsewhere, and the addition of a question indicating whether lawyers have paid child support obligations.

Advertising

Seven states reported that either a review board, task force or special committee reviews existing advertising rules and monitors lawyer compliance. Six states indicated that a 30-day (or more) no-contact rule on written solicitation of accident victims has been implemented or is pending approval. Some states indicated that this rule was implemented as a result of the Went For It case. Three states provide lawyers a means to request ethics advice. Connecticut requires the labeling of “advertising material” in red ink for distinction and requires that any advertised fee agreements must be labeled “sample,” also in red ink, and printed in large print. Some states allow claims of specialization only under certain conditions and under certain restrictions.

Disciplinary Procedures

Various procedures for periodic communication between the court and bar regarding the operation of the disciplinary system were reported among the states. Some states require the submission of annual and/or quarterly reports. Respondents also noted regularly scheduled meetings, conferences, and/or joint training sessions of committees, the court, and the bar regarding disciplinary system policies, effectiveness, and recommended changes.

Briefing Paper on Survey of Law School Deans

The Conference of Chief Justices, with funding by the State Justice Institute, conducted a survey in October 1997 of its membership to investigate state initiatives to bolster attorney competence and professionalism. The specific areas of interest were Professionalism, Litigation Reform, Public Outreach, Lawyer Support, Disciplinary Enforcement, Bar Admission, and Educational Initiatives. To supplement this investigation, surveys on law school education were sent to the deans of all ABA-accredited law schools. Thirty-one deans have responded to the Law School Dean section of the survey. The following is a summary of the responses.

Role of the Appellate Court of the Highest Jurisdiction

Twenty-one law school deans indicated that the appropriate role of a state's highest court in promoting professionalism among law students is to encourage cooperative efforts. The court can encourage programs that bridge the gap for newly admitted attorneys to practice and also take a prominent role in promoting professionalism in conclaves of the academy, the bench, and the bar. The Courts can even encourage faculty members of law schools to seriously consider the concerns of the bar and the court in classroom discussions. Eight deans opined that the court can set a leadership example for law students because judges can set a high moral and ethical tone. These courts should ensure that meaningful disciplinary systems are in place, including fair, rigorous enforcement of the ethical standards. Courts can also set and communicate standards, for example, to ensure that mentors are good role models for law students.

Eleven deans commented that the state supreme court justices should participate in law school events. Many law school students present symposiums on various topics, hold trials and Moot Court programs, and other various informal and formal discussions in which the justices could actively participate. The involvement of justices in these programs has a greater impact on law students because of the realism involved in having a judge actively participate in student-run activities.

Seven law school deans indicated that the Court should only be able to make curriculum suggestions, with the law school as the primary entity to develop law school curricula. Three deans commented that the Court should assist in the development of curricula for mandatory professional responsibility courses. One dean opined that the Court should support schools in obtaining greater resources for expensive "skills" courses.

Thirteen deans indicated that the Court should establish requirements for bar admission. Respondents indicated that specific requirements should be kept to a minimum and that course requirements should include a required professional responsibility course. Respondents also suggested that an excessive number of bar examination topics may discourage students from taking clinical courses, which are an

effective way to learn professionalism. Three deans indicated that the Court could assist in the development of a proposal to require new bar admittees to take a professionalism course. One dean encouraged professionalism orientation programs at the beginning of law school.

Character and Fitness Certification Criteria

Eight deans reported that school certification for the character and fitness evaluation for bar admission is based on state criteria. Respondents reported that the responsibility of dean certification is taken very seriously and the criteria used are included in the dean's certification form.

Eighteen deans indicated that student applications to the bar are reviewed to determine if students have had any arrests, convictions, or academic dismissals. Respondents indicated that copies of information involving the conviction of a law student in honor code violations could only be sent if the student signs a release. Others opined that all information in the student files should be available to the bar examiners. Respondents check for financial responsibility and good conduct. The highest recommendations go to students who exceed minimal standards for achievement and who demonstrate leadership skills. Essentially, deans can certify if no violations are recorded in a student's record, and the faculty and/or administration raise no character issues. Deans can also certify where no violations of the honor code and no misconduct in the school admissions process have taken place.

Three deans believed that a school should not certify character, but only the school's institutional knowledge of a student. Respondents further believed that it should be the bar's responsibility to determine the character and fitness of a bar applicant. For those candidates who may have difficulty, respondents suggested that they should seek character and fitness review prior to law school entrance. Two deans reported that character is an essential aspect of the *law school* admission process.

Four deans indicated that there are no specific criteria used in the evaluation of the character and fitness of a bar applicant.

Role of Law Schools in Teaching Practical Skills

Sixteen deans stated that the broad role in teaching practical legal skills is through live-client clinics and simulation courses. In accord with the ABA MacCrate Report view of legal education, the bench and bar should provide classes in office management to students. Respondents noted that office management classes should not be required, but should be offered to law students, especially in schools where students tend to go into solo or small firm practice.

Four deans opined that practical skills should be part of the student's complete legal education and integrated into all courses. Six deans indicated that a variety of

offerings should be available, but noted that these courses do not fit well in the academic curriculum.

Three deans suggested that each law school needs to work with the bar to assess the needs of the student body in offering practical skills. To aid newly admitted attorneys to the bar, one dean suggested law school cooperative efforts with the bar on bridge the gap programs.

One dean stated that the teaching of practical skills is the role of the legal profession.

Promotion of Professionalism in Law Schools

The most common method of promoting professionalism reported was through a professionalism course (18 deans). Twelve respondents encouraged professors to integrate ethics into substantive courses, and then have students evaluate the effectiveness of the integration. Respondents also noted the use of guest lecturers during first year courses to promote a high level of sensitivity to ethical issues. Nine deans reported that opportunities are being provided for law students to learn practice skills.

Seven deans commented that law school course offerings served to promote professionalism. Respondents indicated that several electives were available, including new upper level courses. New classes in "skills" curriculum are also offered, as well as new lawyer skills courses for all students in their first and second years of law school.

Seven respondents reported using mentoring programs and mandatory pro bono programs to stress the obligation of law students to the unrepresented. Four deans reported that professionalism is covered in the orientation program for first year law students. One dean noted its use of a bulletin board devoted to ethics and professional responsibility.

Five deans noted the leadership and model roles of law school faculty. Respondents indicated the start of a professorship in Professional Responsibility.

Bar Admission Changes

One respondent recommended standardized entry level course requirements for the bar exam. Other suggestions included that bar examiners be more open to bar applicants and share model answers; that the bar examination should be evaluated for a correlation between success on the test and success in practice; and that the exam be evaluated for racial, ethnic and gender bias.

Four deans suggested that the bar examination should be eliminated altogether. In place of the bar examinations, respondents suggested mandatory course

requirements, the use of resources to assist students in the transition from school to practice, the use of resources for bridge the gap or apprenticeship programs, and even bar admission only for graduates of accredited schools.

Two respondents indicated that the use of multiple choice examinations in the Professional Responsibility examination is not an appropriate way to test students on ethics. One dean suggested that the Multi-State Professional Responsibility Examination should be extended to include a practical component that requires students to apply their knowledge.

To better the character and fitness evaluations of the bar, one dean recommended that more uniformity take place in character and fitness questions across the states. Another dean suggested a requirement for a full character and fitness report.

Because Bridge-the-Gap programs seem to be helpful, six states suggested that a post examination occur six to nine months after graduation. Respondents indicated the importance of a focus on office management and professional responsibility. One respondent opined that supervised work should be required for a substantial period of time prior to the issuance of an unrestricted license.

Fourteen deans opined that no changes to the bar admission process should be made because of state variation.

Recommended Changes in the Character and Fitness Screening Process

Sixteen respondents opined that there should be no changes to the character and fitness screening process, but stressed the need of a better way to deal with problems after a license is issued.

In terms of determination of character and fitness of an applicant, suggestions included the use of conditional admission, the withholding of admission based on character, providing comparable reviews as guidelines to candidates for character and fitness, informing students about criteria during their first year of law school.

Recommendations offered for changes in the character and fitness process included more procedural protections for candidates, making the process less intrusive on the candidate, shortening the process, increasing resources for Character and Fitness Committees to do thorough investigations, eliminating duplication, allowing the candidate to visit with a lawyer to discuss professionalism, measuring psychological stability of candidates, asking more specific questions, allowing for more uniformity among the states, requiring certification that the applicant is not delinquent in the payment of student loans.

Three deans suggested that the role of law schools should not be for the certification of the fitness of a candidate, but only to provide information for the bar to

make a determination. Other recommendations were to require all applicants to obtain a Dean's Certification from each undergraduate or graduate school attended and from any licensing agency with which the applicant has been associated; to interview deans on all candidates; and perhaps to add a question that permits the law school to speak to issues of good citizenship in the law school community and to report incidents of questionable conduct or lack of professionalism that do not rise to the level of a disciplinary action.

General Comments

Nine deans commented that schools should continue to develop clinical programs to teach practical lawyering skills. Students should be presented with an array of choices, be able to work with practicing lawyers, and learn professionalism in the context of, and through, experience. Four respondents recommended that professionalism activities of the law schools be supported with funds from the state bar and courts.

Generally, suggestions included increasing the teaching of practical legal skills in traditional courses, increasing course offerings in the area of professionalism and competence, increasing the screening of law school applicants, stricter enforcement of character and fitness requirements, broadening the Inns of Court program, involving local practitioners in the education process, encouraging bar members to support law school activities designed to improve competence and professionalism, mentoring, mandatory pro bono services to educate law students that law is a profession, replicating good programs, annual reporting from the law school to the Court, socializing entering students to the expectations of the profession (service to clients, civic responsibility, high ethical standards, high standards for work), reviewing the recommendations of the Character and Fitness Working Group of the ABA Standing Committee on Lawyer Competence.

Programs to Promote Competence and Professionalism

The most common recommendation of suggested programs to be implemented by the bench and bar was the encouragement of the profession and court to change their approach to lawyers who engage in unethical behavior, who are incompetent, or who demonstrate inadequate professional courtesy (5 deans). Other programs included adequate funding for the lawyer disciplinary system, and an efficient process to investigate, address and take action on attorney competence and professionalism. Two states suggested that the Court become more active in disciplining lawyer competence.

For professional education, eight deans recommended that professionalism be incorporated into mandatory CLE, including practical legal skills and knowledge. One of the eight states suggested a mandatory amount of hours of professionalism. Six respondents favored that mandatory CLE should be required and continued in their states. Two respondents noted the possible role of the bar in educating members

about substance abuse, stress management, office management, and the impact of poor communication.

Civility was also suggested. The court and bar could establish a code of professionalism that includes sanctions; promote opportunities for dialogue with lawyers; survey attorneys about such matters as courtesy in deposition taking or refusal to grant extensions; provide professionalism counseling; and promote opportunities for lawyers to speak with each other about civility. The court and bar can also find ways to address escalating aggressiveness in the practice, deal with the fact that what students face when they begin practice often undermines what they've learned in law school, set expectations, and place a greater emphasis on professional identity.

The court and bar can require professionalism and/or Bridge-the-Gap courses for new admittees to the bar after graduation. Other suggestions for post-graduates included a residency or internship in cooperation with the academy and profession, with no mandatory apprenticeships.

Eight respondents recommended mentoring programs. Mentoring programs can be certified for CLE credit and can be very beneficial for new solo practitioners.

The bench and bar can assist law schools in convincing universities and legislatures that teaching professionalism is labor-intensive, and that schools need greater resources and smaller student bodies. Simulated hearings for students can expedite understanding and the learning of professionalism.

Suggestions for the bar examination and certification included meaningful certification of lawyer specialists, a test for all lawyers on ethics, and the elimination of multiple choice exams.

Appendix A
Survey Forms

Professionalism

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled "A National Study and Action Plan on Lawyer Conduct and Professionalism." The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term 'professionalism' refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. To obtain a more accurate understanding of efforts to promote professionalism, we would appreciate your assistance in answering the following questions. Please use additional paper, if necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state's highest court.

1. Within the last three years, have you made any significant changes in your efforts to promote professionalism?
2. Are there currently any plans or proposals in the state for changes in this area?
3. If so, what are those plans or proposals? What problems are these changes intended to remedy?
4. To what extent do existing programs and activities promote professionalism among transactional lawyers (that is, lawyers who rarely or never engage in legal practice that would bring them into direct contact with the court)?
5. Do you have a commission (or other entity) that focuses specifically on professionalism? If so, what are its objectives?

6. Has your jurisdiction held a conference on professionalism?

7. Are awards or acknowledgments given to recognize professionalism?

8. Have changes been made to the Lawyer's Oath to stress principles of conduct and behavior?

9. How do you define professionalism?

10. What general suggestions would you make to improve lawyer competence and professionalism?

Name/Title of Respondent: _____

Phone Number: _____

Educational Initiatives

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled "A National Study and Action Plan on Lawyer Conduct and Professionalism." The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term 'professionalism' refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. Lawyer education is one of the areas that the CCJ is examining. To obtain a more accurate understanding of the role of lawyer education in promoting professionalism, we would appreciate your assistance in completing the following survey questions. Please use additional paper, if necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state's highest court.

For each of the four areas outlined in A through D below, please answer the following questions:

- A. *Administration of CLE Programs* (e.g., CLE funding mechanisms, curricula development, approved instruction methods)
 - B. *Monitoring and Enforcement of CLE Programs* (e.g., CLE reporting requirements, sanctions for non-compliance)
 - C. *CLE Providers and Courses* (e.g., provider certification, course approval, course offerings, evaluation mechanisms)
 - D. *Programs for Newly-Admitted Attorneys* (e.g., Professionalism Programs, "Bridge-the-Gap" programs, attendance requirements)
1. Within the last five years, have you made any significant changes in the lawyer education programs (CLE) in this state?

If so, why were these changes made? What problems were the changes intended to remedy?

What has been the result of these changes? Did they accomplish their intended objectives? Were there any unintended consequences as a result of these changes?

Are there currently any plans or proposals to change the CLE programs in this state?

If so, what are those plans or proposals? What problems are these changes intended to remedy?

2. What general suggestions would you make about lawyer education programs to improve lawyer competence and professionalism?

3. In addition to lawyer education, what programs or systems should be implemented to promote attorney competence and professionalism?

Name/Title of Respondent: _____

Phone Number: _____

Public Outreach

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled “A National Study and Action Plan on Lawyer Conduct and Professionalism.” The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term ‘professionalism’ refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. Public outreach is one of the areas that the CCJ is examining. To obtain a more accurate understanding of how public understanding and participation in the legal profession affects lawyer competence and professionalism, we would appreciate your assistance in completing the following survey questions. Please use additional paper, if necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state’s highest court.

1. Has your state taken any significant steps to gauge public opinion about the legal profession, the level of professionalism demonstrated by lawyers, or specific programs or activities designed to promote lawyer professionalism? If so, please describe these efforts.

2. What efforts has your state made to educate the public about attorney ethics and professionalism? Please include in your answer any efforts designed to inform the public about specific bar programs such as disciplinary enforcement, fee arbitration, client protection funds, etc.

Have these efforts been successful? Why or why not?

3. What opportunities are available for public participation and oversight of the legal profession in this state (e.g., lay participation on bar committees)?

How is the public informed about these opportunities? How are nonlawyers selected for these opportunities?

Please describe the effect, if any, that public participation and oversight has had on how the organized bar conducts its activities. Have there been any specific benefits or drawbacks?

4. What efforts has your state made to increase lawyer participation in pro bono activities?

Have these efforts been successful? Why or why not?

What role, if any, does the state judiciary play in promoting lawyer participation in pro bono activities?

5. What general comments or ideas do you have about how public outreach efforts might be used to improve lawyer competence and professionalism?

6. In addition to public outreach efforts, what programs or systems should be implemented to promote attorney competence and professionalism?

Name/Title of Respondent: _____

Phone Number: _____

Litigation Reform

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled "A National Study and Action Plan on Lawyer Conduct and Professionalism." The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term 'professionalism' refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. Litigation reform is one of the areas that the CCJ is examining. To obtain a more accurate understanding of the role of litigation reform in promoting professionalism, we would appreciate your assistance in completing the following survey questions. Please use additional paper, if necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state's highest court.

1. Does the state judiciary offer any form of Alternative Dispute Resolution (ADR) programs to assist litigants in resolving their cases? If so, please describe these programs.

What effect, if any, has participation in ADR programs had on the relationship between opposing counsel in litigation?

Have you experienced any reluctance on the part of lawyers practicing in your jurisdiction to participate in ADR? If so, please describe the problems you have encountered and any efforts you have made to address these problems.

Do the state rules of professional conduct address the topic of lawyers participating in ADR? If so, please provide the relevant citation or a copy of the rule.

2. Are ADR professionals (e.g., arbitrators, mediators) required to adhere to an ADR code of ethics and professional responsibility? If so, please attach a copy.

Do the state rules of professional conduct address the topic of lawyers serving as an ADR professional? If so, to what extent is the ADR code of ethics and professional responsibility consistent with the state rules of professional conduct? How have any inconsistencies been resolved?

3. Has this jurisdiction amended the rules of civil or criminal procedure within the past ten years to deter the filing of frivolous claims or defenses by lawyers? If so, did these amendments accomplish this objective? Please explain.

In your opinion, what is the primary cause of frivolous filings (e.g., inadequate investigation of facts or law, harassment of opposing party)?

What remedies are available to trial judges for sanctioning frivolous filings? How often are these remedies employed (e.g., always, frequently, seldom, never)? How effective are these remedies?

4. Has this jurisdiction amended the rules of civil or criminal procedure within the past ten years to curb the incidence of discovery disputes between opposing counsel? If so, did these amendments accomplish this objective? Please explain.

What remedies are available to trial judges for resolving discovery disputes? How often are these remedies employed (e.g., always, frequently, seldom, never)? How effective are these remedies?

5. What general comments or ideas do you have about how changes to the rules governing civil and criminal litigation might be used to improve lawyer competence and professionalism?
6. In addition to litigation reform, what programs or systems should be implemented to promote attorney competence and professionalism?
7. To what extent is the judiciary involved in routine oversight and administration of lawyer conduct and professionalism programs? Please describe both systemic involvement and individual involvement by state trial and appellate judges.
8. What education and training are provided for judges to address misconduct or unprofessionalism either by lawyers or by judges?
9. Has your state taken any significant steps to gauge public opinion about the justice system, the level of professionalism demonstrated by judges, or specific programs or activities designed to promote public confidence in the courts? If so, please describe these efforts.
10. What efforts has your state made to educate the public about judicial ethics and professionalism? Please include in your answer any efforts designed to inform the public about specific programs such as judicial discipline boards.

Have these efforts been successful? Why or why not?

Name/Title of Respondent: _____

Phone Number: _____

Bar Admission

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled "A National Study and Action Plan on Lawyer Conduct and Professionalism." The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term 'professionalism' refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. Bar admission is one of the areas that the CCJ is examining. To obtain a more accurate understanding of the role of bar admission in promoting professionalism, we would appreciate your assistance in answering the following questions. Please use additional paper, if necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state's highest court.

For each the four areas outlined in A through D below, please answer the following questions:

- A. *Law School Curricula* (e.g., required course in professionalism, required courts in law practice management, changes in requirements imposed by the bar admission authority, required pro bono service)
- B. *Bar Examination* (e.g., change in subjects tested, change in method of examination, inclusion of professionalism on the exam, mandatory transitional education prior to admission)
- C. *Character and fitness* (e.g., standards for character and fitness screening, resources devoted to character and fitness screening, standards for law school reporting of character and fitness issues, interview process, conditional admission)
- D. *Coordination* (e.g., efforts between the bar association and the law schools to foster professionalism during law school)

1. Within the last five years, have you made any significant changes in this area?

If so, why were these changes made? What problems were the changes intended to remedy?

What has been the result of these changes? Did they accomplish their intended objectives? Were there any unintended consequences as a result of these changes?

Disciplinary Enforcement

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled "A National Study and Action Plan on Lawyer Conduct and Professionalism." The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term 'professionalism' refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. Disciplinary enforcement is one of the areas that the CCJ is examining. To obtain a more accurate understanding of the role of disciplinary enforcement in promoting professionalism, we would appreciate your assistance in answering the following questions. Please use additional paper, as necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state's highest court.

For each of the ten areas outlined in A through J below, please answer the following questions:

- A. *Intake* (e.g., methods of obtaining information regarding lawyer misconduct, reporting of misconduct by lawyers and judges, providing assistance to grievants in making complaints, a toll-free number to call with questions or complaints about lawyers, a central place to call from which callers can be referred to appropriate programs)
- B. *Interstate Cooperation* (e.g., communication with other states in which a disciplined lawyer is licensed)
- C. *Sanctions* (e.g., written opinions in all cases of public discipline, use of sanction standards, range of sanctions, mandatory sanctions, standards for readmission, sanctions against law firms, sanctions for those who fail to pay child support)
- D. *Complaints Alleging "Minor" Misconduct* (e.g., procedures for handling "minor" misconduct, definition of minor misconduct, diversion programs, eligibility for diversion programs)
- E. *Unprofessional Conduct* (e.g., procedures for handling complaints of unprofessional conduct, methods for resolving disputes between lawyers)
- F. *Public Protection* (e.g., openness of disciplinary proceedings, public participation in the disciplinary process, fee agreements, malpractice insurance requirements, client protection mechanisms, information for the public on choosing and working with a lawyer)
- G. *Consumer Complaints* (e.g., methods for resolving non-fee disputes with lawyers, mediation or arbitration of fee disputes with lawyers, mandatory fee arbitration)
- H. *Annual Registration* (e.g., type of information that is requested annually, request for information about licensure and disciplinary sanctions in any other jurisdiction)
- I. *Advertising* (e.g., review of advertising rules, assistance for lawyers with questions about appropriate advertising)
- J. *Disciplinary Procedures* (e.g., procedure for periodic communication between the Court and the bar regarding the operation of the disciplinary system)

1. Within the last five years, have you made any significant changes in this area?

If so, why were these changes made? What problems were the changes intended to remedy?

What has been the result of these changes? Did they accomplish their intended objectives? Were there any unintended consequences as a result of these changes?

Are there currently any plans or proposals in the state for changes in this area? If so, what are those plans or proposals? What problems are these changes intended to remedy?

2. What would you recommend to others as the single most important aspect of your disciplinary system?

3. What are the major obstacles to effective operation of the disciplinary system?

4. What general suggestions would you make about disciplinary enforcement to improve lawyer competence and professionalism?

5. In addition to disciplinary enforcement, what programs or systems should be implemented to promote attorney competence and professionalism?

Name/Title of Respondent: _____

Phone Number: _____

Lawyer Support Programs

The Conference of Chief Justices (CCJ) is currently conducting a research project entitled "A National Study and Action Plan on Lawyer Conduct and Professionalism." The purpose of the project is to identify effective and appropriate ways for state supreme courts to encourage and support attorney professionalism. The term 'professionalism' refers not only to civility among members of the bench and the bar, but also to competence, integrity, respect for the rule of law and behavior by members of the legal profession that exceeds the minimum requirements. Lawyer support is one of the areas that the CCJ is examining. To obtain a more accurate understanding of the role of lawyer support programs in promoting professionalism, we would appreciate your assistance in answering the following questions. Please use additional paper, if necessary. When you have completed the survey, please return this sheet with your answers to the Chief Justice of your state's highest court.

For each of the five areas outlined in A through E below, please answer the following questions:

- A. *Lawyer Assistance* (e.g., addiction and mental health problems)
- B. *Law Office Management* (e.g., technology, office procedures, trust accounting, personnel, on-site or telephone advice, clearinghouse of materials, office audits)
- C. *Mentoring* (e.g., advice for new lawyers, hotlines for substantive assistance, networking)
- D. *Ethics Hotlines* (e.g., telephone assistance for ethics questions)
- E. *Other Lawyer Support Programs*

1. Within the last five years, have you made any significant changes in this area (including implementing new programs)?

If so, why were these changes made? What problems were the changes intended to remedy?

What has been the result of these changes? Did they accomplish their intended objectives? Were there any unintended consequences as a result of these changes?

Are there currently any plans or proposals in the state for changes in this area?

If so, what are these plans or proposals? What problems are these changes intended to remedy?

2. What general suggestions would you make about lawyer support programs to improve lawyer competence and professionalism?

3. In addition to lawyer support programs, what programs or systems should be implemented to promote attorney competence and professionalism?

Name/Title of Respondent: _____

Phone Number: _____

Appendix B
CCJ Resolution VII

CONFERENCE OF CHIEF JUSTICES

RESOLUTION VII

National Study and Action Plan Regarding Lawyer Conduct and Professionalism

WHEREAS, the public and all three branches of state and federal governments are concerned about the professionalism of lawyers and the effective administration of justice; and

WHEREAS, lawyers and judges have historically made and currently make significant and laudable contributions to society, professionalism and the administration of justice; and

WHEREAS, there is the perception and frequently the reality that some members of the bar do not consistently adhere to principles of professionalism and thereby sometimes impede the effective administration of justice; and

WHEREAS, the supreme courts of the various states have, and often exercise, the authority to address these concerns, but many supreme courts would benefit further from a study of the precise problems and the development of a unified plan, model rules or standards to make optimally effective the exercise of their authority; and

WHEREAS, the Conference of Chief Justices and the National Center for State Courts are appropriate institutions to conduct such a study and to make such recommendations for the consideration of state supreme courts in enhancing their efforts to address and deal effectively with these concerns;

NOW, THEREFORE, BE IT RESOLVED that:

- The Conference hereby commissions a study, on a state-by-state basis, of the foregoing concerns.
- The study will include an analysis of plans adopted or under consideration in the various states to deal with these concerns.
- The study will also include an analysis of the innumerable positive contributions of members of the bench and bar to society and to principles of professionalism.
- The study will be conducted by the Committee on Professionalism and Lawyer Competence of the Conference, acting through appropriate subcommittees.
- The study should draw upon the valuable and essential participation of members of the bar and bench, the organized bar, and members of the public.
- The Committee should use the services of the National Center to the extent appropriate and feasible. The manner of conducting the study and formulating the recommendations shall be in the discretion of the Committee.
- The Committee may seek financial assistance from appropriate sources in such amounts as the Committee deems necessary.

- The Committee shall make a report to the Conference, including a summary of the findings of the study and recommended plans, models and standards for consideration by state supreme courts in the exercise of their regulatory authority over members of the bar and their supervisory authority over the courts within their respective jurisdictions.
- If feasible, the Committee's preliminary report and recommendations should be presented at the 1997 summer meeting of the Conference and its final report should be presented at the 1998 mid-winter meeting of the Conference.

Adopted by the Conference of Chief Justices in Nashville, Tennessee, at the Forty-eighth Annual Meeting, on August 1, 1996.