St. Mary's Law Journal

Volume 35 | Number 4 Article 3

1-1-2004

Legal Malpractice: When the Legal System Turns on the Lawyer Third Annual Symposium on Legal Malpractice & Professional Responsibility: Essay.

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ESSAY

LEGAL MALPRACTICE: WHEN THE LEGAL SYSTEM TURNS ON THE LAWYER

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I. INTRODUCTION

Most are familiar with the public sentiment against the legal profession.[1] Yet how often do practicing lawyers stop to ponder why this sentiment exists and what, if anything, can be done about it? The problem seems intractable and outside of one's individual control, so most lawyers focus on the work always at hand and move

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1. *See* CATHERINE CRIER, THE CASE AGAINST LAWYERS 180-82 (2002) (surveying the historical advance of antagonism toward lawyers and characterizing lawyers as "legal locusts"); David J. Beck, *Legal Malpractice in Texas: Introduction*, 50 BAYLOR L. REV. 547, 548 (1998) (noting "[a] disturbing pattern" emerging in statistical analyses, which indicate that "disappointed clients" are much more willing "to second-guess their lawyers' performance" than ever before, and that "[a]ccordingly, the public has become more critical of lawyers' performance").

forward, ignoring the white elephant in the room. The routine functions of a legal practice—drafting pleadings and motions, responding to requests from opposing counsel, consulting with and advising clients—can all be done with relatively little intrusion from this well-known and seemingly ever-present public attitude toward the profession. However, when a lawyer becomes a defendant in a legal malpractice case, the public distrust of the legal profession suddenly comes into sharp focus. Plaintiffs' lawyers count on it, and some, when given an opportunity, even fuel it.[2]

Much has been written about the shortcomings of the adversary system as measured against its theoretical goals and assumptions.[3] One significant assumption underlying the adversary system is that there is an equal playing field among litigants. The reality of a legal malpractice case is at odds with this ideal. The prevailing cultural bias against lawyers as gatekeepers and beneficiaries of the legal system permeates every aspect of a legal malpractice case. One effect of this cultural bias is the lawyer-defendant's very per-

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2. *See* David J. Beck, *Legal Malpractice in Texas: Introduction*, 50 BAYLOR L. REV. 547, 549-50 (1998) (asserting that a significant recent trend indicating that lawyers are becoming increasingly more willing to represent malpractice claimants against fellow lawyers and are frequently threatening allegations that they "know are not covered by insurance" in seeking to "pressure the attorney [to] coerce settlement by the insurer," is likely to continue); Mary Flood & Janet Elliott, *Accountants, Lawyers Don't Share Same Fate / Texas Laws Easy on Enron Legal Advisers*, HOUS. CHRON., Dec. 15, 2001, at A11 (stating that Texas is one of only a very few states where a client cannot "sue a lawyer when harmed by malpractice" to a third party and characterizing this case-law-based privity rule as existing only to help lawyers in the form of "lawyers protecting other lawyers"), *available at* WESTLAW 12/15/01 HSTNCHRON 1. As the title of this article suggests, its message is that "Texas law protects lawyers far more than it does accountants." *Id.* Of course, these sentiments ignore the principal rationale for the privity rule, which is to avoid diluting the lawyer's duty to the client with competing duties to third parties. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578-79 (Tex. 1996) (applying a bright-line privity rule to protect clients).

3. *See* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5 (1996) (considering the need to re-examine the adversary system); *see also* Peter S. Chantilis, *The Dawning of a New Era: The New Legal System v. The Traditional Approach,* The New Age of Professionalism, AAM Online, *at* http://www.attorney-mediators.org/chantilis.html (1998) (identifying public distrust of lawyers and the adversary system as the impetus for the creation of a "new legal system" based on alternative dispute resolution as sanctioned by passage of the Texas Alternative Dispute Resolution Procedures Act in 1987) (on file with the *St. Mary's Law Journal*). Dissatisfaction with the adversary system is not limited to the U.S. *See generally* Ken J. Crispin, *Ethics and the Adversary System*, Zadok Paper S95 (1998) (providing a critique of the ethical underpinnings of the adversary system by an Australian Supreme Court Judge) (on file with the *St. Mary's Law Journal*).

sonal and disproportionate experience with the shortcomings of the adversary system in a legal malpractice case.

The adversary system has been described as civilized warfare.[4] The system eventually yields a decision, but one that usually falls short of the participants' respective perceptions of fairness and justice. The subjective nature of the concepts of fairness and justice is in contrast with the ideal of the adversary system that presupposes an objective standard of fairness and justice that will yield the one just and fair outcome upon a given set of facts and circumstances. In addition, the cost and time required to obtain the decision leave even the prevailing party less than fully satisfied with the overall result. In a legal malpractice case, the lawyer's story initially has less credibility due to its source alone. Thus, the time and cost of defense soar because of the need to develop the full context in which the underlying representation occurred.

II. CHANGE IS IN THE AIR

In the most recent legislative session, a large impetus behind the myriad changes imposed by tort reform was the perceived need to do something about the legal system.[5] The result is that the legislature is much more actively mandating the procedural rules that govern the adversary system. The long-term effects of these changes and the incentives and disincentives they create in practice remain to be seen. One result seems likely even at this early juncture: the system is becoming more complex and unpredictable, which increases the risk of malpractice claims and compounds the negative attitudes and perceptions already harbored by many clients and potential clients.

The Sunset Advisory Commission's most recent report on the State Bar concluded that the bar's existing grievance process was inefficient and did not provide sufficient public accountability.[6] This report resulted in a significant overhaul of the grievance pro-

4. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 148-49 (1993).

5. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.01, 2003 Tex. Gen. Laws 847 (to be codified as an addition to TEX. CIV. PRAC. & REM. CODE ANN. ch. 26) (legislating reform of tort recovery).

6. SUNSET ADVISORY COMM'N, STAFF REPORT ON THE STATE BAR OF TEXAS 24-25 (Mar. 2002), http://www.sunset.state.tx.us/78threports/bar/bar.pdf (on file with the *St. Mary's Law Journal*).

cess by statutory mandate.[7] As in tort reform, many of the procedural details that govern the grievance process are now prescribed by statute rather than by procedural rule.[8] These developments may reflect that public dissatisfaction with the legal system has reached the legislature as a mandate for change.

The purpose of this Essay is to focus in some detail on what happens when a lawyer becomes a defendant in a legal malpractice case. The focus is not on the legal theories or mechanics of assembling a defense, but on the collision that occurs in almost every case between the lawyer's previous experience as an insider to the legal system, and the lawyer's experience as a defendant in that system. Part III of this Essay considers the nature of the adversary system as lofty ideals conflict with realities. Part A examines the position of the individual lawyer-defendant as a lightning rod for negative public sentiment concerning the legal profession. This factor alone results in an unbalanced playing field, with the lawyer-defendant at a significant disadvantage. Part B investigates the story the individual lawyer faces from his former client that bears little resemblance to the lawyer's perception of the facts regarding the underlying representation. Like every litigant, the lawyer must come to understand that there is more than one way to interpret the facts of a case, and the client's version often, at least initially, has more credibility. But more importantly, the lawyer often learns for the first time that a discrepancy exists between what the client actually expected from the lawyer and the lawyer's perception of those desires. Part C discusses the vast discrepancy between what the adversary system promises and what it can actually deliver, as the lawyer faces the system as a party—usually for the first time. In the unforgiving glare of hindsight, the lawyer's professional integrity, competence, and judgment are called into question, and the lawyer's work and motives are scrutinized in minute detail with the accusation of self-interest and greed always hanging in the air. There, but by grace, go I—go all of us. Part IV offers a basis for fundamental change in the way that lawyers interact with clients. Through the use of Alternative Dispute Resolution and the Collaborative Law Model developed in the area of family law,

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7. *Id.* at 25.

8. *See* TEX. GOV'T CODE ANN. §§ 81.073-.0753 (Vernon Supp. 2004) (mandating new procedures for classification, disposition, and appeal of grievances filed).

clients are empowered to take on a more active role in managing their cases, which, in turn, appears to increase client satisfaction and reduce malpractice claims.

III. THE ADVERSARY SYSTEM: IDEALS V. REALITIES

A. *The Unequal Playing Field Created by Public Distrust*

Lawyers enjoy the privilege and prestige of being insiders who understand and can operate within the complexities of the legal system. Lawyers are well-compensated for that expertise. The adversary system comprises the foundation of the legal process. It finds its basis in the assumption that truth and justice will emerge from the clash of adversaries represented by zealous advocates who are dedicated solely to their own client's self-interest, practicing before an unbiased judge and jury. The adversary system is, in essence, civilized warfare. Lawyers are hired warriors. These assumptions are reflected in the ethical rules that govern our conduct as professionals, whether we handle lawsuits or transactions.

The average citizen is really an outsider to the legal system and has no way of understanding its inner workings or analyzing the impact of its underlying assumptions. Barring some unfortunate event, he will have had little experience with the system and its realities. Even when circumstances do arise that bring a person into contact with the system, he may not be able to afford to hire a lawyer to help him interact with and navigate within it.[9] Public perceptions and impressions of the legal system and profession are largely gained from popular culture—television shows and movies. However, it will be these same average citizens, with little or no personal exposure and only dramatized images to work from, who will likely serve on a jury in a legal malpractice case.

In simple terms, the genesis of legal malpractice claims lies in unfulfilled client expectations. When a client retains a lawyer, the client is often uninvolved in many of the detailed decisions made

9. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 287 (1988) (arguing that the inability to obtain legal representation excludes the poor from a "network of social practices"); David J. Beck, *Legal Malpractice in Texas: Introduction*, 50 BAYLOR L. REV. 547, 569 (1998) (indicating that "[i]n Texas, the median hourly rate charged by lawyers in 1996 was $150"); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 22-23 (1996) (asserting that "the unequal resources of the parties will often determine the hierarchy of opposition").

and actions taken in the course of the legal representation.[10] The client's perception is that the *lawyer* is in control. Most lawyers strive to create that impression in order to inspire client confidence. The client's expectation—often unstated—is that the lawyer is responsible for protecting the client's interest and for producing a good outcome for the client. This expectation is unwittingly fed by the lawyer who strives to anticipate future problems and addresses them in the agreements drafted and the legal strategies recommended. The client may expect the lawyer to anticipate and guard against all negative outcomes, and little is done to address the limitations on what the lawyer can realistically deliver. This context of unrealistic and largely unstated client expectations is the minefield in which lawyers attempt to navigate.

When a legal malpractice claim arises, the client's expectations assume labels of "fiduciary duty" and the standard of care of a "reasonably prudent attorney" in the hands of a skilled plaintiff's lawyer.[11] The fact that one or more of those expectations goes unfulfilled becomes a breach of those duties.[12]

As between the lawyer and the client, the jury is predisposed to see the case through the eyes of the client. The jury will likely see the client's unfulfilled expectations as evidence that the lawyer breached a duty to the client. Often the lawyer is in the position of having to explain the conduct in question by painting a much more complex picture than that presented by the client. The lawyer must consider the interplay of multiple ethical rules; the legal options actually available; the reasonably foreseeable facts; the level of inquiry and investigation the client was willing to pay the lawyer to provide; and the lines that exist between business advice, financial advice, and legal advice. The client talks about trust, faith, and reliance on the lawyer's expertise; the lawyer talks about legal com-

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10. The current ethical rules encourage this expectation by both lawyer and client. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt. 1 (stating that "[t]he lawyer should assume responsibility for the means by which the client's objectives are best achieved").

11. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) (stating that "[a] lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney"); Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 752 (2003) (noting that breach of fiduciary duty claims are arising more frequently as the bases of malpractice suits).

12. Richards v. Comm'n for Lawyer Discipline, 35 S.W.3d 243, 248-49 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding that a lawyer breached his duties when he failed to fulfill his client's expectations of being kept informed).

plexities. Which side is the jury more likely to understand and identify with—even without any underlying public sentiment against the profession?

The issue is that the lawyer's defense plays right into the sources of public distrust of the legal system and profession. Lawyers are blamed for the complexity and impenetrability of the legal system—the very reasons that clients need the services of a lawyer in the first place, and why our services are so expensive. To say that lawyers are not guarantors of good outcomes, that lawyers could not reasonably foresee a bad result and protect the client against it, or that lawyers are excused by some competing consideration (such as the client's desire to minimize expense or the other party's unwillingness to agree to what the client wanted), largely falls on deaf ears. In the jury's eyes, the attorney profits from the legal system's complexity and imperfections. As between the lawyer and the client, where should the loss fall? It may well seem only fair to the jury that the *lawyer* accept responsibility for the client's unrealized expectations. After all, someone must accept fault.

Consequently, if the jury is asked to choose between identifying with the client in a legal malpractice case or identifying with the lawyer, the client is at a distinct advantage and the lawyer a significant disadvantage. The same result occurs when the case turns on the competing credibility of the lawyer and the client. The jury is predisposed to identify with and believe the client, not the lawyer.

How does this strike a lawyer who has been sued by a client? In most cases, the lawyer has enjoyed and has come to expect the privilege and prestige that is associated with being a lawyer inside the profession. Most lawyers expect that their word will be taken at face value. They are not accustomed to having their credibility and integrity called into question. It is quite a shock to be confronted with the reality that the decision-makers in a legal malpractice case are outsiders to the profession, who often view lawyers with suspicion and distrust simply because they are lawyers. When a lawyer is sued by a client, the lawyer's battle for credibility is uphill from the start.

B. *The Client's Story v. The Lawyer's File*

In light of the credibility gap created by public distrust of the legal system and profession, the building blocks for the lawyer's defense in a legal malpractice case are found in the lawyer's file. In

the absence of a credible third party witness to corroborate the lawyer's testimony, the lawyer's version of events needs to find support in the documentary evidence.

In a legal malpractice case or a grievance proceeding, the lawyer is held to a standard of documentation that few actually meet in practice. As a result, the plaintiff's lawyer can almost always identify some record or billing entry that could have been created and was not.[13] Equally likely is that an internal file note, memo, or billing memo may give rise to an argument that the lawyer hid something from the client, thus failing to fully disclose all material facts or a potential conflict of interest.[14] The no-win situation in which lawyers find themselves becomes all too evident.

For the individual lawyer-defendant, the realization that the client's perception of the underlying facts and circumstances is radically different from the lawyer's perception of the same facts and circumstances often comes as a surprise. Lawyers take pride in possessing the powers of clarity, objectivity, and detached rational analysis. Yet a lawyer-defendant finds that, like any party to a lawsuit, there really is more than one story arising from the same set of facts and circumstances—and the judge and jury maintain the freedom to choose which one to believe. The difference for the lawyer, as opposed to any other litigant, is that the lawyer's version is given less credibility, simply because it comes from a person who is a lawyer. The popular idea that the legal system favors lawyers in legal malpractice cases[15] runs contrary to the experience of individual lawyer-defendants and their lawyers.

Frequently, it also comes as a shock to the lawyer-defendant that the client seems to really believe his own version of the events, and that the client ascribes self-interest, conflict of interest, greed, or

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13. *See* David J. Beck, *Legal Malpractice in Texas: Chapter II Fees and Billing*, 50 BAYLOR L. REV. 569, 580 n.42 (1998) (listing several cases in which plaintiffs prevailed on claims that their records or billing entries were insufficient).

14. *Cf.* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 738-40, 782 (2003) (asserting that an attorney's fiduciary obligation requires the disclosure of material facts, but that the level of candor required is still subject to interpretation).

15. *See* Mary Flood & Janet Elliott, *Accountants, Lawyers Don't Share Same Fate / Texas Laws Easy on Enron Legal Advisers*, HOUS. CHRON., Dec. 15, 2001, at A11 (recognized by "Texas' lawyer-friendly courts" suggesting that privity rules insulate lawyers from malpractice claims by anyone other than the client), *available at* WESTLAW 12/15/01 HSTNCHRON 1.

some other improper motive to the lawyer. In many cases, the work completed by the lawyer on behalf of the client exceeds what the lawyer received in compensation. The lawyer, as any person would be, is often tempted to argue the unjustness of the accusations made against her. Yet the more prudent course directs the lawyer to remain calm in the face of these often very personal attacks. The lawyer must walk the fine line between defending the case and attacking the client-plaintiff. Even though the lawyer is under attack, the jury may likely disfavor a lawyer who openly attacks a former client.

C. *The Glare of Hindsight and the Standard of Perfection*

A lawyer is held to the very high standard of a fiduciary.[16] This duty has been described in sweeping terms that find their way into most legal malpractice petitions.[17] These standards leave little room for the realities of daily law practice. A client may want zealous advocacy, defined as leaving no stone unturned, but may then be unhappy with the size of the legal bill incurred to sustain this high level of lawyer attention. Joint clients in a transaction may want to save costs by sharing the same lawyer when all believe there is general consensus, and mutual trust and good will initially appear high.[18] Yet, if the deal later turns sour, the lawyer's conflict of interest often looks glaringly obvious when viewed in hindsight.

The need to develop client trust and confidence is frequently at odds with the literal requirements of the disciplinary rules, particularly in situations involving multiple client representation. For instance, letters identifying potential future conflicts between co-clients, sent for the purpose of helping clients to be aware of problems that may arise as circumstances change over the course of representation, may be received poorly by a client who already has underlying concerns about the lawyer's motivation for identify-

16. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988). The fiduciary duties owed by lawyers to their clients include a duty of competence, loyalty, and confidentiality. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 2-3 (2000).

17. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 740 (2003) (stating that malpractice claims frequently allege that the lawyer failed in his or her duties to disclose information to the client).

18. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

ing such contentious issues.[19] It is no wonder that, as a group, lawyers are unpopular, since they are charged with the duty of pointing out how clients' interests may end up divergent,[20] at a time when clients only want to focus on their joint goals and common interests. Multiple client representation situations present lawyers with an immediate dilemma—under a strict interpretation of the rules, each party should have his own lawyer.[21] However, individual representation increases the cost of each transaction and generates more fees—an outcome that, when suggested by the one who stands to benefit from those increased costs, supports public dissatisfaction with lawyers. Thus, when a single lawyer accommodates the legitimate interests of multiple clients to save costs, the lawyer places herself at greater risk for a legal malpractice claim arising out of that representation due to the very nature of joint representation. When joint clients end up at odds, it is very likely that one or the other will imagine that the problem could have been avoided if only the aggrieved party had a lawyer devoted solely to promoting that party's best interests. A legal malpractice suit is a likely next step. Unfortunately, the lawyer's subsequent explanation that the clients wanted to share one lawyer in order to save costs sounds hollow when measured against the sweeping fiduciary duty of full disclosure, coupled with the specific disclosures required by the disciplinary rules for joint representation.[22]

All of this is not to paint a hopeless picture. Strategies exist to address each of these issues, and legal malpractice cases can be successfully defended.[23] But, for the lawyer accused of misconduct, there is no way to avoid the personal stress, pain, and hardship that comes with a legal malpractice claim. Though by no means an exhaustive analysis, this Essay draws on years in the trenches in an

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19. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07 cmt. 2. I am reminded of a talk I gave to a group of transactional lawyers some years ago. When I suggested that every joint representation should have a written disclosure and waiver of conflict letter, the audience just shook their heads and some said: "We just can't do that."

20. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(2); *id.* 1.07(a)(1).

21. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 3; *id.* 1.07 cmt. 4.

22. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(2); *id.* 1.07(a)(1).

23. *See generally* Steven McConnico & Robyn Bigelow, *Ethics/Legal Malpractice Update*, BAYLOR GEN. PRAC. INST., 28 (Apr. 25, 2003) (providing a framework of legal malpractice law and surveying recent developments including "'[t]he litigation privilege' as a defense") (on file with the *St. Mary's Law Journal*).

attempt to identify some of these forces and to show how they converge in a legal malpractice case.

IV. IMPETUS FOR CHANGE FROM WITHIN

The purpose of this Essay is not to engage in a torrent of collective self-pity for lawyers, but rather to use the legal malpractice field as an example of the need for perhaps fundamental changes in the way lawyers envision their function in serving clients' interests. Of course, as lawyers re-envision their roles as advisors, counselors, and advocates, clients should be involved in the process and their interests must continue to be served. The current system creates a number of conflicting incentives in the relationship between attorney and client that are not addressed by current practice methods in a satisfactory manner.

Out of both internal and external dissatisfaction with the current system, a number of reform movements are emerging from within the profession, most coming up from a "grass roots" level.[24] These include new methods of mediation, collaborative law, and creative problem-solving. How the ethical rules that govern lawyers' conduct need to be changed to accommodate these new roles is part of the discussion, but this area is by no means clearly defined.[25] The pioneers in each movement are creating new models and are to be commended for their creativity and courage.

These new approaches represent a fundamental change in how lawyers interact with clients. Generally, the goals are to empower clients to make their own informed decisions about how to proceed and how to develop their own creative solutions to disputes. The current system is viewed as just one of the many options available to clients for defining their rights with respect to each other and for resolving a dispute between them.

Clients will be more satisfied if they are given the information and power to control their choices and the outcome of a legal mat-

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24. *See* J. Kim Wright, *Visionary Law: New Approaches to Expanding our Choices in Law Practice* (surveying these new models, which include therapeutic jurisprudence, collaborative law, restorative justice, creative problem-solving, preventative law, and new methods of mediation), *at* http://www.iahl.org/articles/08_Visionary_lawyering.htm (2002) (on file with the *St. Mary's Law Journal*).

25. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 162-64 (2001) (discussing legal ethics in the context of collaborative law).

ter, rather than placing their fate in the hands of a lawyer and the legal system. However, defining the scope of the lawyer's duty to provide sufficient information to clients about their choices to opt out of the traditional system remains an issue. In addition, mechanisms must be in place to facilitate fulfillment of that duty. While these new models remain largely unknown outside the profession, one significant aspect of our duty to clients is to educate them about these new options. One obvious approach is to develop written materials and websites describing these new options and explaining how they compare to the traditional conception of the lawyer-client relationship. Though an important first step, this information alone is probably not sufficient. A one-on-one discussion between lawyer and client needs to be part of the educational and decision-making processes as well.

As a point of departure, the preamble to the Texas Disciplinary Rules of Professional Conduct describes the various functions a lawyer performs as a "representative of clients":

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, *a lawyer zealously asserts the client's position under the rules of the adversary system.* As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's affairs and reporting about them to the client or to others.[26]

Although the advocate function alone is tied directly to the adversary system, the preamble goes on to state: "In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."[27] Thus, the role of zealous advocate colors all of the other functions. The zealous advocate is the most well-known role and the one that clients most likely expect when they retain a lawyer. The advocate role and its associated duties form the basis for many legal malpractice claims.[28] Many of the current

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26. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2 (emphasis added).

27. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 3.

28. *See* David J. Beck, *Legal Malpractice in Texas: Introduction*, 50 BAYLOR L. REV. 547, 549 (1998) (noting that "[m]any unjustified claims are filed principally because of the

disciplinary rules are written in the context of the lawyer functioning as an advocate for the client in the adversary system.

Yet, it is the role of zealous advocate that gives rise to much of the public distaste and distrust for lawyers and the adversary system. The money-driven, win-at-any-cost stereotype of lawyers that yields so much public distrust arises largely out of this role.[29] Legal ethicists have identified this connection between the duty of zealous advocacy and negative public sentiment for lawyers, and have identified as its source the conflict between a lawyer's "role morality" and the "common morality" of society at large.[30] The public maintains a general awareness that a lawyer's duty to serve the client's interests as a zealous advocate often requires a lawyer to act in ways that violate common mores. Not surprisingly, many lawyers become disenchanted with the requirements of zealous advocacy. Ironically, in a legal malpractice case, the lawyer's conduct is most often critiqued solely against the perceived requirements of this role to the exclusion of the others.

The traditional role of zealous advocate of the client's position is at odds with the goals and methods of some of the new models of law practice and dispute resolution.[31] In order for a client to make an informed choice to opt out of the adversary system, a necessary corollary is that the client must understand the extent to which the lawyer will *not* act as a zealous advocate of the client's position under the rules of the alternative system. If the client wants to pursue an option other than the traditional model, one avenue is to define the lawyer's and client's respective roles and duties by written agreement. Texas Disciplinary Rule of Professional Conduct 1.02(b) provides for limited representation by agreement after con-

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erroneous perception of the client as to the nature and extent of the attorney's capabilities").

29. *See* CATHERINE CRIER, THE CASE AGAINST LAWYERS 188 (2002) (asserting the public view that "[t]raditionally, lawyers were officers of the court[s] who zealously represented clients within legal and ethical boundaries" and that "[a]ttorneys now regularly solicit clients, conjure up creative and nuisance filings, and delay the trial process, all to line their own pockets").

30. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 104-47 (1988) (detailing the conflict between "role morality" and "common morality").

31. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 23-24 (2001) (suggesting that the shift from the adversarial practice to the collaborative practice requires the undoing of a professional lifetime of habits).

sultation with the client: "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation."[32] Is this rule broad enough to allow lawyer and client to opt out of the traditional system and the lawyer's roles and duties as a zealous advocate for the client's position?

The Collaborative Law Model developed in the family law area is proceeding in just this manner. By the terms of the retention agreement, the client agrees that the lawyer will serve as settlement counsel only and will withdraw if the parties decide to pursue litigation.[33] Under the lawyer-client agreement, lawyer and client commit to voluntary disclosure of all relevant information to the other party, and to treat the other party and counsel with respect and dignity.[34] The client's failure to adhere to these requirements is grounds for lawyer withdrawal prior to resolution of the dispute.[35] According to one of the leading proponents of this model, no client has yet brought a claim for legal malpractice against a lawyer under a collaborative law engagement since the practice began more than ten years ago.[36]

In 2001, Texas became the first state to pass a statute specifically authorizing collaborative law representation in family law cases.[37] The Texas Alternative Dispute Resolution Act (ADR Act) declares that "[i]t is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures."[38] Section 154.003 of the ADR Act provides that all trial and appellate courts have the responsibility to carry out this policy.[39] One commentator has suggested that lawyers are, or should be, under an affirmative duty to inform clients of *all* dispute resolution options, including that the client may choose to opt out of the adversary system alto-

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32. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(b).

33. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 7 (2001).

34. *See id.* at 8 (listing the hallmarks of the collaborative process); *id.* at 137-42 (showing an example of a "Collaborative Law Retainer Agreement").

35. *See id.* 138-39 (giving an example provision concerning withdrawal for failure to abide by the collaborative process).

36. *Id.* at 166.

37. *Id.* at 163 (citing TEX. FAM. CODE ANN. § 6.630 (Vernon Supp. 2004) and TEX. FAM. CODE ANN. § 153.0072 (Vernon Supp. 2002)).

38. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997).

39. *Id.* § 154.003.

gether.[40] One of the leading proponents of collaborative law asserts that this alternative to the adversary system addresses some of the root causes of dissatisfaction with lawyers and the legal system that often lead to legal malpractice claims.[41] Carrying this suggestion one step further, as the legal profession attempts to address perceived problems with the current system through creating new models for dispute resolution and law practice, perhaps the public distrust of the profession that both leads to legal malpractice cases and makes them challenging to defend will begin to dissipate. If the legal profession were to develop and begin to promote a more widely available alternative method for resolving disputes that would minimize the issues contributing to the antagonism and discord that exists between clients and their own lawyers, and could educate the public about the availability of this alternative, perhaps improved relationships would develop and malpractice claims would decline. It seems a worthy effort.

40. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 58 & n.3 (2001) (noting a growing body of support for the premise that a lawyer should provide the client with alternative dispute resolution options).

41. *See id.* at 166, 168 (explaining how the collaborative approach avoids causes of malpractice litigation).