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## A Radical Proposal for Lifetime Professionalism The Fifth Annual Symposium on Legal Malpractice and Professional Responsibility: Essays.

Antonio Alvarado

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# ESSAYS

## A RADICAL PROPOSAL FOR LIFETIME PROFESSIONALISM

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I. Introduction .....	1054
II. Background.....	1055
A. The Genesis of the Profession.....	1055
B. The Economic Burdens on the Practice of Law... ..	1058
C. The Law Firm Structure .....	1059
D. A Safety Net to Catch Lawyers in the Middle ....	1063
III. Professionalism and the Public .....	1067
A. Definition of Professionalism.....	1067
B. Public Trust and Confidence: The Surveys .....	1070
C. Professionalism: The Public's Impressions.....	1072
D. Professionalism: The Leadership Message.....	1073
IV. Ethics Violations in Texas .....	1075
A. Statistical Reports .....	1075
B. Dissecting the Statistical Information .....	1077
C. Creating New Metrics .....	1079
V. Working Model .....	1080
A. The Participants .....	1081
B. The Process.....	1086
C. The Special Project(s) .....	1088
VI. Continuing the Ongoing Dialogue on Professionalism .....	1091
VII. Appendix A .....	1093

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VIII. Appendix B ..... 1095

I. INTRODUCTION

The thrust of this Essay presents a platform for future discussions on the agendas of those entities which focus on legal professionalism, whose missions include the education, licensing, regulation, and other related services for the legal profession in Texas. Although the idea is modest, many may view the approach as radical. This proposal seeks to connect all the key players in the legal "professionalism" field of Texas by adding a focused process to the ongoing dialogue of professionalism. The goals proposed in this Essay will enhance existing programs by instigating greater coordination among the parties involved. Specifically, the utilization of a clearinghouse approach to coordinate the programs and services provided to lawyers will avoid the duplication of efforts while simultaneously allocating the resources of currently existing programs where they are most needed. This coordination will be possible by forming what this Essay refers to as "professionalism consortium workgroups," which will implement certain pilot projects and facilitate the consolidation of all interested and necessary parties.

This Essay challenges those involved in ethics training and professionalism programs to consider different perspectives. By establishing an approach through the professionalism consortium workgroups, various entities can envision the big picture driving the legal profession. Undeniably, the economics of law practice motivates the profession and immerses lawyers into a new professionalism paradigm not fully addressed by existing programs and activities. Particularly vulnerable is the group of lawyers who incrementally enter the legal malpractice arena or the grievance and disciplinary system because of these pressures. Although economic influences do not provide the exclusive motivation for practicing law, they cannot be overlooked when considering the promotion of professionalism.

Linking professionalism to economic concerns might be considered heresy in some circles, yet now is the time to examine why the economic realities of practicing law sometimes cut short even the best aspirations for high standards of practice and ethics. This Essay establishes only a base point; certainly, many other considerations may factor into an approach for lifetime professionalism.

Accordingly, this Essay merely offers the “genesis” for an intended continuing dialogue on the subject.

Initially this Essay examines, with anecdotal evidence, the traditions of the legal profession. It continues by exposing the available empirical data to posit questions for future studies, surveys, and polls. Finally, it considers the potential for reallocating resources to better address the professionalism priorities that strike at the heart of today’s most pressing challenges, which include communications with clients, professionalism perceptions, and the economic realities of the practice of law. The objective is to lay the predicate for a consortium workgroup approach that links the key entities with a compelling vision for professionalism to a pragmatic process that advances needed projects with measurable objectives.

## II. BACKGROUND

### A. *The Genesis of the Profession*

Conventional wisdom holds that the origin of the term “profession” arose from the Middle Ages and continued developing through the Renaissance period when special recognition was accorded to the three earliest types of professionals: physicians; clergy; and lawyers.<sup>1</sup> Historically, members of these three groups possessed not just a higher level of knowledge and skill often unavailable to the public at large, but also something more distinct: these professional callings each developed a commitment to ethical standards. Moreover, these standards permitted the patient, the penitent, or the client to entrust his most important matters to these professionals without fear of having any confidences compromised.<sup>2</sup> Consequently, these professionals necessarily possess the competency to perform their avocations in strict adherence to their profession’s particular standards governing ethical conduct.<sup>3</sup>

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1. See Michael Sean Quinn with Evan Koch, *The Eleven Commandments of Professional Responsibility: Gallimaufry Secundum*, in THE ETHICS COURSE bk. 2, at 1, 32 (Tex. Ctr. for Legal Ethics & Professionalism ed., 6th ed. 2004), available at [http://www.txethics.org/resources\\_ethicsCourse.asp](http://www.txethics.org/resources_ethicsCourse.asp) (reviewing the history of the earliest professions and concluding that “the paradigm roles for professions were medicine, law, and the priesthood”).

2. Cf. *id.* at 163 (illustrating the fiduciary relationships that attorneys have with their clients and noting that the relationships “involve a high degree of trust and require a high degree of loyalty”).

3. See *id.* at 33 (asserting that “rules, principles, and commandments are enough to regulate the conduct of lawyers successfully”).

The American Bar Association (ABA), describing itself as “the largest voluntary professional association in the world,”<sup>4</sup> has delved extensively into questions concerning the practice of law and professionalism. The ABA encapsulates its vision through the Model Rules of Professional Conduct (Model Rules), which serve as a uniform reference and standard for the various states’ ethics codes for lawyers.<sup>5</sup> In order to maintain the current Model Rules, the ABA has appointed various commissions, which in turn issue numerous reports concerning interpretation, construction, and application of the rules. One of these reports defined the parameters for professional services with an emphasis on the multidisciplinary context.<sup>6</sup> The report stated that “the interests of the public would best be protected by defining ‘professional services’ to mean ‘services rendered by a member of a recognized profession or other discipline that is governed by ethical standards.’”<sup>7</sup> There are three

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4. See ABA, About the ABA, <http://www.abanet.org/about/home.html> (last visited Jan. 29, 2006) (claiming over 400,000 lawyer-members under the ABA motto of “Defending Liberty, Pursuing Justice”) (on file with the *St. Mary's Law Journal*). The ABA operates through a Board of Governors, House of Delegates, and numerous committees and sections. See generally American Bar Association, Constitution and Bylaws, <http://www.abanet.org/policy/cb0304.pdf> (last visited Jan. 29, 2006) (promulgating the structure and hierarchy of the ABA) (on file with the *St. Mary's Law Journal*). The ABA acts as the voice of the legal profession at the national level and seeks to advance the ethics and professionalism of lawyers. See *id.* § 1.2 (setting out the purposes of the ABA). The ABA carries out this role through various forums, seminars, and task forces that hold hearings, produce reports, and author many publications. See generally *id.* (empowering various divisions within the ABA to hold meetings and publish their findings).

5. MODEL RULES OF PROF'L CONDUCT (1983) (amended 2002). The old Model Code of Professional Responsibility is one of the accomplishments for which the ABA is best known and was the standard reference for ethical guidelines and codes governing lawyers' professional behavior. See generally MODEL CODE OF PROF'L RESPONSIBILITY (1980), available at <http://www.abanet.org/cpr/ethics/mcpr.pdf> (advancing model rules that assist lawyers in practicing ethically, and formatted so as to be easily adoptable by the various states); American Bar Association, Center for Professional Responsibility, Links to Other Legal Ethics and Professional Responsibility Pages, <http://www.abanet.org/cpr/links.html> (last visited Jan. 29, 2006) (providing links to “professionalism” resources and materials nationwide and by state) (on file with the *St. Mary's Law Journal*).

6. ABA COMM'N ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES (2000), <http://www.abanet.org/cpr/mdpfinalrep2000.html> (on file with the *St. Mary's Law Journal*).

7. ABA COMM'N ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES 4 (2000), <http://www.abanet.org/cpr/mdpfinalrep2000.html> (on file with the *St. Mary's Law Journal*); see also ABA COMM'N ON PROFESSIONALISM, “. . . In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism, REPORT OF THE COMMISSION ON PROFESSIONALISM TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, reprinted in 112 F.R.D. 243, 254 (1986)

grounds upon which “[l]awyers base their claim to professional status . . . first, special educational requirements; second, self governance; and third, a singular and collective responsibility to execute the duty of assisting members of the public to secure and protect available legal rights and benefits.”<sup>8</sup>

Similar to the ABA, the State Bar of Texas has also focused extensively on questions concerning the law and professionalism. The State Bar of Texas, a mandatory bar created both by statute and pursuant to the inherent authority of the Supreme Court of Texas, regulates the practice of law for the purpose of “aid[ing] the courts in carrying on and improving the administration of justice” and “advanc[ing] the quality of legal services to the public.”<sup>9</sup> Lawyers and the public entrust the state bar to advance the ethical core purposes of the practice of law. These core purposes include the lawyer’s qualified duty to protect confidential client information, exercise independent judgment, and avoid conflicts of interest.<sup>10</sup>

Today, consumers of legal services increasingly treat such services as a commodity subject to all the commercial practices and expectations of the business world.<sup>11</sup> Although the current consumer market supports an argument for greater access to such professional services by eliminating any impediments to the free flow of market forces, it has also placed additional pressures on lawyers

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(analyzing “what, if anything, can be done to improve both the reality and the perception of lawyer professionalism”).

8. W. Frank Newton, *Crisis in the Legal Profession*, 21 TEX. TECH L. REV. 897, 897 (1990).

9. See TEX. GOV’T CODE ANN. § 81.012 (Vernon 2005) (setting out the purposes of the state bar); TEX. R. DISCIPLINARY P. preamble, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005) (“The Supreme Court of Texas has the constitutional and statutory responsibility within the State [of Texas] for the lawyer discipline and disability system, and has inherent power to maintain appropriate standards of professional conduct . . . .”); see also *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (noting that the Supreme Court of Texas is vested with authority from the “constitution and State Bar Act . . . to decide issues concerning the State Bar and the practice of law”); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.7 (3d ed. Supp. 2004) (discussing the self-regulatory environment surrounding the legal profession).

10. Cf. ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES 3-6 (2000), <http://www.abanet.org/cpr/mdpfinalrep2000.html> (discussing the various ethical considerations that attorneys encounter in the practice of law) (on file with the *St. Mary’s Law Journal*).

11. Cf. SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 2 (1994) (accepting that many in the legal profession believe the practice of law operates like any other business).

that have often resulted in a sacrifice of the safeguards constituting the ethical underpinnings of the legal profession.<sup>12</sup> At times, clients may not understand the true costs of legal representation. This is especially the case following a widely held misconception that the legal profession only protects its own interests.<sup>13</sup>

### B. *The Economic Burdens on the Practice of Law*

Lawyers face significant economic burdens from several sources. First, information overload, driven by the expectations from a highly technological, Internet-driven society of instant messaging and the corresponding need for real-time answers, results in economic costs, further pressuring the practice of law to be quicker and cheaper. Ironically, technology does not always make the practice of law easier. Second, another source of economic burden stems from the competition from other professionals and quasi-professionals who offer seemingly more affordable and accessible forms-driven systems for a variety of legal services. These services may include wills and other estate planning documents, do-it-yourself divorces, business incorporations, representations in administrative forums such as the Internal Revenue Service and immigration tribunals, as well as a host of other legal services. Third, the evolving changes to the statutory framework and culture within which disputes are resolved in our society fosters another economic burden on lawyers. For example, tort reform, referral fee adjustments, increased use of arbitration mechanisms, and other similar alternatives continually evolve the legal landscape and thus require adaptation by even the most experienced practitioners. Finally, those entering the legal profession fresh out of law school are likely to feel yet another economic burden—the mounting college and law school debt which accompanies many as they begin to practice law.

For unwary lawyers, these increasing burdens can accelerate the potential for malpractice and disciplinary traps. Perhaps lawyers

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12. See TEX. DISCIPLINARY R. PROF'L CONDUCT 7.01-.07, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2005) (setting the advertising boundaries for lawyers).

13. See Deborah L. Rhode, *Ethics in Practice*, in ETHICS IN PRACTICE 13 (Deborah L. Rhode ed., 2000) (discussing the ability of the legal profession to regulate itself when its own interests are at stake).

practicing in the traditional law firm culture enjoy some advantages by relying on a relatively stable structure and efficient division of labor while coping with the need for accelerated learning curves. Additionally, these traditional law firm lawyers benefit from established and effective marketing programs. Still, even in the traditional firm structure, the influences of technology and “commoditization” threaten the viability of many law practices and may indirectly affect the ethical considerations that must support the practice of law. “If the market were the only regulator of those providing legal services, economic theory teaches that competency and ethics would be haphazard, and controlled principally on the basis of cost.”<sup>14</sup>

We must consider the economic realities of law practice when formulating any approach to legal professionalism. To fully comprehend the cause and effect of these economic burdens, it is important to look at the organizations and structures often used in practicing law. Within these basic institutions of practice we may discern at least some of the causes of the economic burdens facing the legal profession.

### C. *The Law Firm Structure*

The law firm structure served as the entity of choice for those in private law practice for most of the twentieth century. This structure provided an environment for learning how to practice law and offered both internship and mentoring programs for new associates under the watchful eyes of more experienced lawyers. Additionally, it efficiently allocated professional services and labor costs in a manner that best met the needs of clients. However, the twentieth century could not necessarily be called the “good old days” of professionalism considering the lack of diversity within the legal profession.<sup>15</sup> Another contribution of the law firm structure is the billable-hour approach.

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14. State Bar of Tex., Unauthorized Practice of Law Task Force, *Preliminary Recommendation of a New Statutory Definition for the “Practice of Law,”* 63 TEX. B.J. 543, 543 (2000).

15. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 291-94 (3d prtg. 1995) (discussing the effects of the increase in diversity in large law firms).



The changing economics of the legal profession may be addressed through two critical examinations of today's billable-hour-driven world. The first examination concerns client demands for legal services. For example, some legal professionals lament the passing of the days when the law was a helping profession focused on absolute loyalty to the client, and lawyers acting as officers of the court sought truth and justice.<sup>16</sup> Critics holding this viewpoint must first note that the evolution of the law firm structure was rendered by changes in client demands, particularly large corporate clients who are most interested in being told what they want to hear when carrying on competitive economic battles.<sup>17</sup> Accordingly, by following such client demands, large firms fueled by billable hours have experienced exponential growth leveraged with well-paid associates working exorbitant hours.<sup>18</sup> These changes in billable hours practices and the shifting focus of the legal profession arguably have influenced the nature of services offered by the legal profession for the sake of increased quantity of services provided.

The second examination concerns the effects of specialization. This view describes the passing of the "lawyer-statesman" profile; that is, the lawyer represents not simply an accomplished technician, but also "a person of prudence or practical wisdom as well."<sup>19</sup> Under this perspective, the increasing numbers of corporate in-house counsel have forced outside counsel to become more specialized and narrowly focused, which ultimately leaves little time for the development of a broader, common understanding of what the

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16. See SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 3, 10 (1994) (evaluating the changes occurring in the legal profession during the twentieth century).

17. See *id.* at 90 (pointing out how the legal profession can lose its way if lawyers simply tell their corporate clients what they want to hear and become a cog in the corporate machine).

18. See *id.* at 108 (crediting the exponential growth of large law firms to the "cost-plus fee structure under which clients [are] charged by the hour for the time the lawyers devoted to their matters").

19. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2-3 (3d prtg. 1995) (discussing the "demise of an older set of values" that once helped to define "the aspirations of American lawyers"). Kronman refers to this concept of the lawyer-statesman to "stress its roots in the past and the air of obsolescence that now surrounds it." *Id.*

legal profession offers.<sup>20</sup> In part, this perspective recognizes a failure to consider the inherent value of the law as a profession—not merely an efficient economic engine<sup>21</sup>—and may be a contributing factor to the decline in lawyers, especially new associates, pursuing community leadership.<sup>22</sup>

In Texas, approximately 70% of all lawyers practice in firms consisting of ten or fewer lawyers and approximately 60% practice in firms of five or fewer.<sup>23</sup> Even so, there has also been significant growth among the larger firms.<sup>24</sup> In the emerging global marketplace, large firms and foreign legal consultants now compete in re-

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20. See *id.* at 276 (discussing the causes of the increasing specialization of outside counsel leading to greater selectivity for corporate clients when choosing their outside counsel).

21. See *id.* at 276-77, 283-85 (further discussing and analyzing the circuitous nature of the in-house counsel sophistication and outside counsel specialization). Things that once would have seemed unprofessional, for example, a focus on money, may be commonplace in today's larger firms. *Id.* at 295.

This new openness about money is visible everywhere: in trade publications, like *The American Lawyer*, which have done so much to make the income of lawyers and firms a matter of public knowledge and whose unembarrassed fascination with moneymaking [sic] most large firms, after an initial period of resistance, now endorse and indeed help to sustain (by voluntarily providing these publications with much of the information they request concerning the firms' own internal finances); in the increased number and frequency of conferences designed for large firms and devoted entirely to questions of financial management; in the open use of advertising and other market-oriented techniques to boost firms revenue, and the employment of specialized consultants with training in these fields; and, above all, in the widespread adoption of new fee- and compensation-setting practices that link firm income to client profits and tie the compensation of individual lawyers more exclusively to economic performance than to seniority.

*Id.* at 295-96. Thus, the legal profession cannot merely generate wealth, but must also seek to restore the recognition of its intrinsic social value.

22. See SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 107 (1994) (sympathizing with the demands placed on new associates in large firms, and noting that the new associates "cannot play the piano or paint a picture or act in a church play because they simply don't have the time").

23. See STATE BAR OF TEX. DEP'T OF RESEARCH & ANALYSIS, *STATE BAR MEMBERS: ATTORNEY STATISTICAL PROFILE (2004-05) 2* (2005), available at [http://www.texasbar.com/Template.cfm?Section=Research\\_and\\_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908](http://www.texasbar.com/Template.cfm?Section=Research_and_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908) (indicating the percentage of lawyers who work in firms of varying sizes under the category "law firm size") (on file with the *St. Mary's Law Journal*).

24. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 275 (3d prt. 1995) (noting that large law firms are growing at an astonishing rate, both in size and location, while at the same time becoming more specialized).

gional, national, and international markets to remain viable.<sup>25</sup> These market forces have yielded an increase in mobility and lateral moves for lawyers, and legal headhunting now permeates professional life and strains traditional concepts of law firm loyalty.<sup>26</sup> Faced with greater economic challenges, including those previously illustrated, firms of every size may no longer train new lawyers in the careful manner that prevailed prior to the 1990s but instead favor new associates quickly generating fees for the firm.<sup>27</sup>

As the operational side of law practice becomes more prominent, the economic pressures generated by the business may significantly contribute to the marginalizing of legal professionalism. The business may also impede attempts to teach professionalism in what was once considered the traditional way.<sup>28</sup> In response to these developments, law schools and the organized bar have developed some alternatives to supplement law firm presented professionalism instruction. For instance, law schools may offer clinical programs in various practice areas and offer survey courses covering professional responsibility. The organized bar offers mentoring programs, professionalism courses, law practice management programs, and various continuing legal education seminars in a variety

25. See Carol M. Sánchez & Patrick E. Mears, *How the Mid-Sized Survive: Survey Shows a Path for Smaller Law Firms Amid the Giants*, 11 BUS. L. TODAY 45, 46 (2001) (discussing globalization and determining that “[t]he continued integration of the global economy has stimulated law firms, particularly English-speaking firms, to expand worldwide”).

26. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 277-78 (3d prtg. 1995) (describing the various factors that weaken the bonds and loyalties of lawyers to their respective law firms).

27. See SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 106-07 (1994) (recognizing that new associates are receiving less training and feeling pressured to produce work that will earn fees for the firm).

28. See *id.* 110-12 (discussing how new financial demands placed on law firms affects their ability to ethically carry out responsibilities while simultaneously meeting demands). For example, the authors describe the following situation:

[I]n cities where the big firms have branches and there are local firms with twenty-five lawyers and more, traditional lawyers can be squeezed between the commodity services corporate management wants to buy and the commodity services that are what is offered by most of the lawyer-advertisers who urge New Yorkers to dial 1-800-WHY-HURT . . . .

*Id.* at 111; see also Marc Galanter & Thomas Palay, *Implications of Evolving Firm Size and Structure*, in *THE LAW FIRM AND THE PUBLIC GOOD* 38-41 (Robert A. Katzmann ed., 1995) (addressing the apparent decline of civic virtue in the legal community brought about by the emergence of the large law firm).

of media formats. The network of lawyers active in law school alumni associations, state bar sections, committees and governance groups, and local or specialty bar associations provide valuable resources for lawyers seeking to resolve ethical dilemmas or law practice difficulties. Additionally, there are ethics hotlines and professionalism enhancement programs to complement the grievance, discipline, enforcement, and compliance mechanisms.

As the practice of law has rapidly evolved in response to the economic demands of clients, some important aspects have been lost, such as traditional practices of training and mentoring new attorneys. The bar and its affiliated organizations have responded with mentoring programs, professional courses, and hotlines, but these programs, while certainly beneficial, have not filled the shoes left vacant by the fading profiles of the legal profession. More must be done—more programs, greater coordination of programs, and a commitment to innovation within the profession must be present. Moreover, professional legal peers hold the key to sharing professionalism perspectives through traditional activities like Continuing Legal Education (CLE) and lawyer referral projects to pursuing specialization certification. Yet, before any solutions can be suggested, the regulatory environment facing the legal profession must first be understood.

#### D. *A Safety Net to Catch Lawyers in the Middle*

Funding limitations, demands on time of volunteers, administrative concerns, and institutional differences are some of the salient factors that may result in the duplication of effort, gaps in coverage, and lost opportunities in professionalism programs and activities. The driving forces in the professionalism arena can be roughly divided into three groups: the regulatory entities, the professionalism interest groups, and the law schools.

The regulatory environment in Texas includes the Supreme Court of Texas and its various court-appointed committees,<sup>29</sup> the

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29. See Texas Judiciary Online, Overview, <http://www.supreme.courts.state.tx.us/about/about.asp> (last visited Jan. 28, 2006) (providing a general discussion of the Supreme Court of Texas) (on file with the *St. Mary's Law Journal*). For a list of bar committees see State Bar of Tex., Sections & Committees, [http://www.texasbar.com/Content/NavigationMenu/Sections\\_and\\_Committees/Committees/Committees\\_List1/List\\_of\\_Committees.htm](http://www.texasbar.com/Content/NavigationMenu/Sections_and_Committees/Committees/Committees_List1/List_of_Committees.htm) (last visited Jan. 28, 2006) (providing links and short summaries of the various subgroups of the bar) (on file with the *St. Mary's Law Journal*).

Court of Criminal Appeals of Texas,<sup>30</sup> the State Bar of Texas,<sup>31</sup> the Commission for Lawyer Discipline (CFLD),<sup>32</sup> and the Office of the Chief Disciplinary Counsel.<sup>33</sup> The professionalism interest groups include, among others, the Texas Center for Legal Ethics & Professionalism (TCLEP)<sup>34</sup> and the Texas Young Lawyers Association (TYLA).<sup>35</sup> Additionally, there are nine ABA approved law schools in Texas. Without active participation, leadership, and interest from each of these groups, any efforts to effectuate a professionalism safety net for lawyers would face an uncertain future.

The formation of a professionalism consortium would provide greater clarity and coordination among existing programs and would increase their reach and impact. This consortium could emphasize and encourage programs focused on lawyers helping lawyers within the very institutions and groups that govern lawyers'

30. See Texas Judiciary Online, About the Court of Criminal Appeals, <http://www.cca.courts.state.tx.us/about/about.asp> (last visited Jan. 28, 2006) (providing a general discussion of the Court of Criminal Appeals of Texas) (on file with the *St. Mary's Law Journal*).

31. See State Bar of Tex., <http://www.texasbar.com> (last visited Feb. 21, 2006) (providing a portal to the State Bar of Texas and its many resources) (on file with the *St. Mary's Law Journal*); see also Anita Davis, *John Jones of El Paso Chairs Newly-Formed ATJ Commission*, 64 TEX. B.J. 630, 630 (2001) (describing the newly formed Texas Access to Justice Commission); The State Bar of Tex. and the Tex. Young Lawyers Association, 2005-2006 Volunteer and Staff Guide, available at [http://www.texasbar.com/Template.cfm?Section=Volunteer\\_and\\_staff\\_guide1&Template=/ContentDisplay.Cfm&ContentID=13493](http://www.texasbar.com/Template.cfm?Section=Volunteer_and_staff_guide1&Template=/ContentDisplay.Cfm&ContentID=13493) (providing a general list of committees) (on file with the *St. Mary's Law Journal*). Other related committees and programs include TxBarCLE, the Professionalism Committee, the Texas Disciplinary Rules of Professional Conduct Committee, the Advertising Review Committee, the Texas Lawyers' Assistance Program, the Client Attorney Assistance Program, and the Texas Lawyers Care Department (working with the Texas Access to Justice Commission, a separate entity created by the Supreme Court of Texas in 2001). *Id.*

32. See State Bar of Texas, Other Bar Groups, Texas Commission for Lawyer Discipline, [http://www.texasbar.com/Template.cfm?Section=Other\\_Bar\\_Groups&CONTENTID=13755&TEMPLATE=ContentManagement/ContentDisplay.cfm](http://www.texasbar.com/Template.cfm?Section=Other_Bar_Groups&CONTENTID=13755&TEMPLATE=ContentManagement/ContentDisplay.cfm) (last visited Jan. 28, 2006) (discussing the purpose of the Texas Commission for Lawyer Discipline) (on file with the *St. Mary's Law Journal*).

33. See State Bar of Texas, About the State Bar, Chief Disciplinary Counsel, [http://www.texasbar.com/Content/NavigationMenu/About\\_the\\_State\\_Bar/State\\_Bar\\_Departments/Chief\\_Disciplinary\\_Counsels\\_Office.htm](http://www.texasbar.com/Content/NavigationMenu/About_the_State_Bar/State_Bar_Departments/Chief_Disciplinary_Counsels_Office.htm) (last visited Jan. 28, 2006) (describing the purpose of the Chief Disciplinary Counsel) (on file with the *St. Mary's Law Journal*).

34. See The Texas Center for Legal Ethics and Professionalism, <http://www.txethics.org> (last visited Jan. 28, 2006) (explaining the purposes of the Texas Center for Legal Ethics and Professionalism) (on file with the *St. Mary's Law Journal*).

35. See TYLA, TYLA Overview, [http://www.tyla.org/about\\_us\\_overview.html](http://www.tyla.org/about_us_overview.html) (last visited Jan. 28, 2006) (describing the main purposes of the Texas Young Lawyers Association) (on file with the *St. Mary's Law Journal*).

professional lives at the local and state levels. It could foster smoother transitions so that new programs could better interface with existing programs. Examples of existing consortia models include the Professionalism Enhancement Program (PEP),<sup>36</sup> Law Practice Management activities,<sup>37</sup> various mentoring programs,<sup>38</sup> and the Client Attorney Assistance Program of the State Bar of Texas (CAAP).<sup>39</sup>

An estimated 40% to 50% of active members of the State Bar of Texas participate in such bar-sponsored activities.<sup>40</sup> Lawyers in

36. See Professional Enhancement Program (PEP), [http://www.texasbar.com/Content/ContentGroups/Programs\\_and\\_Services/Attorney\\_Assistance/Professionalism\\_Enhancement\\_Program/Introduction2/Professionalism\\_Enhancement\\_Program.htm](http://www.texasbar.com/Content/ContentGroups/Programs_and_Services/Attorney_Assistance/Professionalism_Enhancement_Program/Introduction2/Professionalism_Enhancement_Program.htm) (last visited Jan. 28, 2006) (explaining PEP and its services) (on file with the *St. Mary's Law Journal*).

37. Bob Burton, *Law Practice Management*, 68 TEX. B.J. 635, 635-36 (2005) (describing the various activities that the Law Practice Management Committee conducted during 2004-2005).

38. See TYLA, Ten Minute Mentor, <http://www.tenminutementor.com> (last visited Jan. 28, 2006) (providing a "collection of short instructional presentations for the busy lawyer") (on file with the *St. Mary's Law Journal*).

39. See Ralph Jones, *Professionalism*, 68 TEX. B.J. 639, 639 (2005) (discussing how the committee plans to focus on public education and address common misconceptions about lawyers).

40. See The State Bar of Tex. and the Tex. Young Lawyers Association, 2005-2006 Volunteer and Staff Guide, available at [http://www.texasbar.com/Template.cfm?Section=Volunteer\\_and\\_staff\\_guide1&Template=/ContentDisplay.Cfm&ContentID=13493](http://www.texasbar.com/Template.cfm?Section=Volunteer_and_staff_guide1&Template=/ContentDisplay.Cfm&ContentID=13493) (listing all the volunteer and staff for the State Bar of Texas and the Texas Young Lawyers Association) (on file with the *St. Mary's Law Journal*); see also STATE BAR OF TEX., DEP'T OF RESEARCH & ANALYSIS, STATE BAR MEMBERS: ATTORNEY STATISTICAL PROFILE (2004-05) (2005), available at [http://www.texasbar.com/Template.cfm?Section=Research\\_and\\_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908](http://www.texasbar.com/Template.cfm?Section=Research_and_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908) (providing a detailed list of active state bar members) (on file with the *St. Mary's Law Journal*). See generally The State Bar of Tex. and the Tex. Young Lawyers Association, 2005-2006 Volunteer and Staff Guide, available at [http://www.texasbar.com/Template.cfm?Section=Volunteer\\_and\\_staff\\_guide1&Template=/ContentDisplay.Cfm&ContentID=13493](http://www.texasbar.com/Template.cfm?Section=Volunteer_and_staff_guide1&Template=/ContentDisplay.Cfm&ContentID=13493) (on file with the *St. Mary's Law Journal*) (providing information regarding lawyers participating in bar activities, which do not include voting in bar elections, attending a seminar, or serving on ad hoc task forces). The figures, derived by extrapolation, include approximately thirty-eight standing committees of the State Bar of Texas, forty-five sections and divisions, and five Supreme Court appointed committees and boards. *Id.* at 24-42. State Bar of Texas standing committees are composed of about twenty-five members each. State Bar of Tex. Board of Directors Policy Manual § 6.01.03. Section memberships vary from 100 to 7400 members. STATE BAR OF TEX., DEP'T OF RESEARCH & ANALYSIS, STATE BAR MEMBERS: ATTORNEY STATISTICAL PROFILE (2004-05) 3-4 (2005), available at [http://www.texasbar.com/Template.cfm?Section=Research\\_and\\_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908](http://www.texasbar.com/Template.cfm?Section=Research_and_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908) (on file with the *St. Mary's Law Journal*). Some lawyers are members of one or more sections. *Id.* Approximately 22,000 lawyers voted in the 2005 State Bar President-Elect election. See *2005 Election Results, State Bar of Texas*

every type of law practice, from the mega-firms to solo practitioners, and government attorneys to those in public service, commendably serve their respective clients and uphold the integrity of the profession. While ethics and malpractice issues may and do arise in these practice areas, attorneys who have a viable economic base and a formal or informal peer network have a greater opportunity to resolve client concerns before the concerns become grievance complaints. Problems arise when lawyers, often for economic reasons, begin to cut corners and fail to have or consider available resources for appropriate assistance. Often, the public has no way of knowing or identifying the economic woes that may be facing their respective attorneys. Additionally, because lawyers generally do not fare well in the world of public opinion, the legal profession should protect and heal itself.

Any safety net or protective mechanism for the legal profession must not be a quick fix and instead must foster a long-term pursuit of lifetime professionalism. Admittedly, many challenges face the legal profession, including competence, ethical compliance, and professionalism. A failure in any one of the areas can lead to malpractice concerns when client expectations are not met.<sup>41</sup> Ethical

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*and Texas Young Lawyers Association*, 68 TEX. B.J. 500, 500 (2005) (detailing the number of votes cast for various district positions and in the president-elect elections for both the State Bar of Texas and the Texas Young Lawyers Association).

41. See *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989) (discussing how a legal malpractice action is typically based on negligence in Texas); cf. TEX. BUS. & COM. CODE ANN. §§ 17.11, 17.12 (Vernon 2002) (providing for sanctions against those who misrepresent certain business aspects to the public, such as the nature of the business, the ownership of the business, or deceptive advertising). Other provisions in the Texas Business and Commerce Code appropriately address the fact that:

Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

- (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
- (2) a failure to disclose information in violation of Section 17.46(b)(24) [which consists of information concerning goods and services that was known but not disclosed in an attempt to induce the consumer into the transaction];
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
- (5) a violation of Section 17.46(b)(26) [which discusses the sale or promotion of annuity contracts].

*Id.* § 17.49(c).

questions become imbedded in convoluted fact situations, communication breakdowns, and stressful situations that strain expectations of civility. Furthermore, lawyers' reputations suffer when they fail to take leadership roles in community issues, such as access to justice challenges. At a minimum, lifetime professionalism must encompass all of these scenarios to be successful.

### III. PROFESSIONALISM AND THE PUBLIC

#### A. *Definition of Professionalism*

Neither the State Bar Act nor the Texas Disciplinary Rules of Professional Conduct (TDRPC) specifically defines professionalism. One Texas appellate court aptly stated that, “[i]nherent in that high standard of conduct is compliance with both the spirit and express terms of established rules of conduct and procedure.”<sup>42</sup> The subject of professionalism can be found in several areas of regulation. Namely, the annual Minimum Continuing Legal Education (MCLE) requirement for Texas licensed lawyers<sup>43</sup>—the MCLE Rules, Regulations, and Accreditation Standards—define what is covered under ethics and professional responsibility:<sup>44</sup>

‘Legal ethics’ shall include programs that deal with usages and customs among members of the legal profession; involving their . . . legal and professional duties toward one another, toward clients and toward the courts.<sup>45</sup>

‘Legal professional responsibility’ shall include programs that deal with maintaining the integrity and competence of the Bar so that legal services are delivered with the highest degree of professional conduct.<sup>46</sup>

‘Legal Ethics and Legal Professional Responsibility’ . . . shall include, but not be limited to the accreditation of those topics involving disciplinary rules of professional conduct, rules of disciplinary

42. *In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ).

43. See Tex. Sup. Ct., Approval of Amendments to State Bar Rules, Art. XII (Minimum Continuing Legal Education), Misc. Docket No. 05-9011, at 8 (Jan. 27, 2005), available at <http://www.supreme.courts.state.tx.us/rules/059011.pdf> (last visited Jan. 28, 2006) (mandating that lawyers devote at least three hours each year to legal ethics or professional responsibility studies).

44. See *Accreditation Standards for CLE Activities*, 68 TEX. B.J. 250, 250 (2005) (containing the standards as amended and approved by the Board of Directors of the State Bar of Texas at its September 17, 2004 meeting).

45. *Id.* at 250 n.2.

46. *Id.* at 250 n.3.



procedure, and the use and availability of alternative dispute resolution and pro-bono legal services.<sup>47</sup>

'Legal Professional Responsibility' shall also include training in . . . skills and concepts that promote and/or assists a lawyers [sic] in the delivery of high quality legal services to clients such as managing risk and grievance/malpractice avoidance, effective and ethical client and case management, and trust account management.<sup>48</sup>

'Legal Ethics and Legal Professional Responsibility' shall not include programs or topics that deal with, government or business ethics, individual religious or moral responsibilities, training in personal organizational skills, general office skills, time management, leadership skills or stress management.<sup>49</sup>

One author, equating professionalism with the civility movement of the last twenty years, describes professionalism as "separate and distinct from 'ethics.'"<sup>50</sup> What separates ethics from professionalism may be summarized as what lawyers *must do* in order to avoid disciplinary consequences (ethics) from the higher standard of what lawyers *should do* to enhance the integrity of the legal profession (professionalism).<sup>51</sup> Professionalism also includes providing value-added advice to clients and focusing on substance over form when dealing with opposing parties and their legal counsel. Although the TDRPC does not specifically define professionalism, the preamble best states what constitutes professional behavior. Pointedly, it recognizes that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer[']s business and personal affairs."<sup>52</sup>

The Texas Lawyer's Creed initiates the aspirations of the legal profession with the oath: "My word is my bond." Further, the creed instills the attorney's commitment to professionalism with a

47. *Id.*

48. *Id.*

49. *Accreditation Standards for CLE Activities*, 68 TEX. B.J. 250, 250 n.3 (2005).

50. See Arnold J. Johnson, *Professionalism in the Energy Industry*, in STATE BAR OF TEX., 19TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE 20-1 (2001) (recognizing that the past two decades have seen the formation of a "professionalism or civility movement that is separate" from ethics).

51. See *id.* at 2-3 (discussing the concept of professionalism as related to ethics and providing some analysis on the matter performed by the Florida bar); see also Frank X. Neuner, Jr., *Professionalism: Charting a Different Course for the New Millennium*, 73 TUL. L. REV. 2041, 2042 (1999) (stating that professionals should follow the "Golden Rule" and noting that ethics is what one must do, while professionalism is what one should do).

52. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 4.

promise to “be courteous, civil, and prompt in oral and written communications” while “attain[ing] the highest degree of ethical and professional conduct.”<sup>53</sup> In addition to the Texas Lawyer’s Creed, the Supreme Court of Texas and the Court of Criminal Appeals<sup>54</sup> have issued comparable Standards for Appellate Conduct.<sup>55</sup> Similarly, the Supreme Court of Texas has adopted ethical guidelines for mediators in Texas.<sup>56</sup>

Of course there will always be limits to what can be proscribed by an ethical code and inherent difficulties in describing the full range of character that defines professionalism.<sup>57</sup> Also, tension always exists between the nobler aspects of the legal profession and the economics of the practice.<sup>58</sup> Consequently, some balance must be attained by engaging lawyers in a full range of professionalism activities to reinforce the positive aspects of this noble profession.<sup>59</sup> Despite differences between aspiration goals and codes that are subject to the enforcement of compliance mechanisms,<sup>60</sup> taken together, a broader definition of professionalism arises.<sup>61</sup>

53. The Supreme Court of Tex. and the Court of Criminal Appeals, *THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM* (Nov. 7, 1989), *reprinted in* 52 *TEX. B.J.* 1304, 1304-05 (1989).

54. *See* Tex. Sup. Ct., Standards for Appellate Conduct, Misc. Docket No. 99-9012 (Feb. 1, 1998), *reprinted in Order of the Supreme Court of Texas and the Court of Criminal Appeals*, 62 *TEX. B.J.* 399, 399 (1999) (promulgating standards for appellate conduct).

55. *Id.*

56. *See* Tex. Sup. Ct., Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107, preamble (June 13, 2005) (intending such guidelines “to promote public confidence in the mediation process and to be a general guide for mediator conduct”).

57. *See* *TEX. DISCIPLINARY R. PROF’L CONDUCT* preamble ¶ 11 (“The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.”).

58. *Cf.* ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 4-5 (1953) (noting the unfortunate link to financial pursuit that professional sports have given to the word “profession”). Pound goes on to define the calling of a profession as “pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may be a means of livelihood.” *Id.* at 5.

59. *Cf. id.* at 6 (listing the historical ideas of professionalism as “organization, learning . . . and a spirit of public service”).

60. *See* Arnold J. Johnson, *Professionalism in the Energy Industry*, in *STATE BAR OF TEX., 19TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE 20-1* (2001) (noting that while lawyers are subject to a code of ethics, the professionalism movement reaches beyond such regulations).

61. *See id.* at 3 (admitting that “[i]n practice, the distinction between ethics and professionalism is often subtle at best”); *see also* Frank X. Neuner, Jr., *Professionalism: Charting a Different Course for the New Millennium*, 73 *TUL. L. REV.* 2041, 2043 (1999) (“In the past, the definition of legal ethics encompassed much of what is currently defined as pro-

Lawyers must necessarily do two things: (1) study the law that applies to being a lawyer, and (2) practice professionalism. One without the other makes no sense. Regardless of the practitioner's experience, a periodic refresher course is essential. Yet, no matter how good the seminar or how helpful the professionalism network one has, difficult questions must occasionally be resolved by litigation.<sup>62</sup> Therefore, professionalism training should also incorporate a case study approach while addressing challenges in the public perception of professionalism.

### B. *Public Trust and Confidence: The Surveys*

The preamble to the Texas Disciplinary Rules of Professional Conduct recognizes that the rule of law belongs not just to lawyers and judges, but also to all citizens.<sup>63</sup> Indeed, "[t]he desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the [additional] incentive to attain the highest possible degree of ethical conduct."<sup>64</sup> The ultimate sanction can be described as the loss of public trust and confidence.<sup>65</sup> Thus, public opinion becomes an integral part of professionalism.<sup>66</sup>

A 1990 study concerning Texas courts and the legal profession revealed that the most important issue facing the legal profession,

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professionalism." Neuner begins his Essay by noting that professionalism "includes the elements of ethics and integrity, competence combined with independence, meaningful continuing learning, civility, obligations to the justice system and pro bono service." *Id.* at 2041.

62. *See, e.g.,* Delta Airlines, Inc. v. Cooke, 908 S.W.2d 632, 632-34 (Tex. App.—Waco 1995, orig. proceeding [leave denied]) (discussing the ethical and professional implications of the case and holding that a lawyer cannot concurrently represent and oppose the same client in unrelated cases unless both sides agree and exceptional circumstances exist). This case provides a good overview of the modern history of professionalism in Texas and a listing of leading essays. *Id.* at 634-35.

63. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 8 (asserting that the legal profession has a duty to assure that the regulations, under which it operates, work to further the public's interests).

64. *Id.* ¶ 9.

65. *Id.*

66. *But see* John W. Bickel II & William A. Brewer III, *Professionalism: A Byword for the Old Boy Network?*, TEX. LAW., Aug. 19, 1991, at 18 ("It has become popular in some circles to suggest that, not only are hardball litigators clogging our courthouses, they are engaging in conduct that holds the profession up to public scorn."). The critics acknowledge, of course, the "substantial evidence that lawyers have been, and always will be, in a love/hate relationship with their clients and the public." *Id.*

in the opinion of judges and court personnel, was the professionalism of lawyers.<sup>67</sup> The next most important issue, according to both groups, was the need to educate the public and the media about the legal system and to restore public confidence in the legal profession.<sup>68</sup> This study cited two factors causing a negative public image of lawyers: a lack of professionalism and a lack of training.<sup>69</sup> Only one-third of the participating judges in the study felt that lawyers were adequately prepared when appearing in their courts, and only 17% of the judges indicated that more than half of the lawyers appearing in their courts were highly skilled in the courtroom.<sup>70</sup> Other contributing factors included the cost of lawyers' services and a perception that many lawyers are motivated only by money.<sup>71</sup>

Another ABA sponsored study found that "lawyers are often perceived to be more concerned about their own interests than the public's or their clients' interests."<sup>72</sup> It also found that "lawyers are not considered as civic-minded as judges, and as a result, people do not have much confidence in them."<sup>73</sup> In fact, 42% of the respondents to the survey said they lacked confidence in lawyers.<sup>74</sup> According to this study, the participants' perceptions of lawyers varied based on their own experiences, and those having more positive past experiences with lawyers were "more likely to have positive perceptions of lawyers."<sup>75</sup> This study also identified several factors that might contribute to greater public confidence in the

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67. TEX. SUP. CT., STATE BAR OF TEX. & TEX. OFFICE OF COURT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE 28, 45 (1999); *see also* TEX. SUP. CT., TEX. OFFICE OF COURT ADMIN. & STATE BAR OF TEX., PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS 8 (1998) (providing "baseline information about how Texans feel about the courts and the legal profession in their state").

68. TEX. SUP. CT., STATE BAR OF TEX. & TEX. OFFICE OF COURT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE 28, 45 (1999).

69. *Id.* at 27-28, 44.

70. *Id.* at 27.

71. *Id.* at 28, 44.

72. ABA, DIVISION OF MEDIA RELATIONS AND PUBLIC AFFAIRS, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 12 (1999), <http://www.abanet.org/media/perception/perceptions.pdf> (on file with the *St. Mary's Law Journal*).

73. *Id.*

74. *Id.* at 49.

75. *Id.* at 12. Those with positive experiences in using lawyers are more likely to agree that lawyers try to serve the public's interests. *Id.* at 70.

judicial system: giving more people easier access to legal services and lawyers; disciplining lawyers who violate the rules; and increasing the perception that most lawyers do what is in their clients' best interests.<sup>76</sup>

### C. *Professionalism: The Public's Impressions*

Even though an attorney has complied with all ethical obligations, this fact does not prevent the lawyer from being labeled as unprofessional for a number of reasons. For example, the public focuses more on results, whereas lawyers and judges focus more on the process. Generally speaking, clients will have a higher opinion of their own lawyer than lawyers in general, which further clouds the professionalism issues involved. An overview of the various State Bar of Texas studies conducted from 1952 through 1997 shows that Texans hold conflicting attitudes toward the legal profession. Generally, respondents expressed negative opinions of lawyers, "seeing them as greedy and untrustworthy," while also viewing them as "useful and necessary in contemporary society."<sup>77</sup> Interestingly, these studies revealed another common theme: those who actually used lawyers in the past tended to look at the legal profession more positively than those who had never used a lawyer's services.<sup>78</sup>

Mass media coverage of sensational trials further skews the picture of the public's perceptions of lawyers, especially when the coverage involves allegations of heinous crimes. Due to the nature of the adversary system, lawyers cannot separate themselves from the emotions and notoriety that may be associated with their clients in controversial cases. This situation is further compounded when millions of dollars are spent on the trials of such cases. The media spotlight also catches lawyers, either as participants or as "expert"

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76. *See id.* at 82, 90 (suggesting other factors influence confidence in the U.S. justice system, such as improvement in lawyer discipline and lawyers who serve their clients' best interests).

77. STATE BAR OF TEX., DEP'T OF RESEARCH & ANALYSIS, THE PUBLIC IMAGE OF ATTORNEYS: WHAT THE POLLS TELL US, STATE BAR OF TEXAS RESEARCH MEASURING THE PUBLIC IMAGE OF ATTORNEYS IN TEXAS: 1952-1997, at 1, 4 (1998). Different methodologies and rates of error were used in the studies, so it is difficult to strictly harmonize the survey results. *Id.*

78. *See id.* at 2 (listing themes that were found to show both positive and negative opinions of lawyers).

commentators, who frequently appear on panels of popular talk show programs. This does not include the influence of the many popular television series that depict the legal profession and have immeasurable influence on the public's perceptions and expectations of lawyers. Today, this creates more occupational hazards for the legal profession through increasing media exposure. Thus, professionalism suffers not only from the egregious conduct associated with ethics violations, but also by how lawyers come cross in the media—fact or fiction.

#### D. *Professionalism: The Leadership Message*

Over the years, the State Bar of Texas has aggressively offered a variety of services and programs both for lawyers and the public. The extensive menu of services includes public protection; deterrence and sanctions afforded by the grievance and disciplinary process; public education exemplified by law-related education activities; school programs like Law Day; and other community functions such as public service pro bono and legal aid clinics. Texas has been a national leader, especially in the caliber and breadth of programs concerning professionalism offered to lawyers through the State Bar of Texas, law schools, and other bar affiliated groups and public service entities.

Another State Bar of Texas study reviewing professionalism, ethics and grievance matters, reported at least nineteen departments or bar-related groups involved in professionalism-related fields; twenty-five scheduled committee and division activities; twenty-four different CLE seminars and videotapes; and forty publications.<sup>79</sup> The MCLE department of the State Bar of Texas reported that for fiscal year 1999-2000, there were 1686 accredited sponsors offering 11,850 courses for a total of 73,264 CLE hours. The bar was by far the largest provider with approximately 23% of total course offerings including "Custom CLE" and the "Online Classroom" courses.<sup>80</sup> In 2001, the Professional Development Depart-

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79. See STATE BAR OF TEX., DEP'T OF RESEARCH & ANALYSIS, PROFESSIONALISM, ETHICS & GRIEVANCE ACTIVITIES INVENTORY 1994-1995, at 1-19 (1995) (listing Texas's state bar departments, committees, seminars, and publications).

80. See STATE BAR OF TEX., SELF EVALUATION REPORT TO THE SUNSET ADVISORY COMMISSION 70-72 (2001), available at [http://www.abanet.org/barserv/library/k/unified\\_bar/5675.pdf](http://www.abanet.org/barserv/library/k/unified_bar/5675.pdf) (evaluating the effectiveness of the state bar to provide continuing legal education programs on professionalism) (on file with the *St. Mary's Law Journal*).

ment of the State Bar of Texas (now known as TxBarCLE) reported almost seventy-five courses and institutes consisting of live speaker seminars, telephone conferences, and satellite broadcasts at numerous locations throughout Texas.<sup>81</sup> These figures pre-date the advent of the online audio- and video-streaming now offered through TxBarCLE, so today's total course offering numbers will most assuredly be even more impressive.

Although public perception concerning the professionalism of lawyers may have declined, this decline cannot be attributed to a lack of enforcement of ethics violations or a lack of seminars, programs, and training activities on ethics and professionalism. Due to the decline in public perception, however, leaders of the bar must continue to exemplify professionalism in the conduct of their personal and business engagements. Specifically, leaders must continue to be outspoken on these subjects and send a consistent message to the bar's membership that professionalism creates the cornerstones of the leadership agenda.<sup>82</sup>

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81. *Id.* at 208.

82. Every president of the State Bar of Texas, for whom the author served as executive director, placed a high priority on professionalism, and that tradition continues today. Each year the *Texas Bar Journal* devotes several pages of the president's opinion column to an aspect of ethics and professionalism. During the bar year, much of the president's time and talent focuses on leading activities and projects which directly influence professional responsibility in multiple ways. See Lynne Liberato, *MYTexasBar: Risky Business*, 64 TEX. B.J. 226, 226 (2001) (setting out how technology can be harnessed to create a portal for greater professionalism); Frank Newton, *Implementation of the State Bar Pro Bono Program*, 60 TEX. B.J. 728, 728 (1997) (explaining the infrastructure that must be in place to further a key element of professional responsibility, improving the delivery of legal services to the disadvantaged); Eduardo R. Rodriguez, *Role Models and Mentors: Will You Help?* 68 TEX. B.J. 474, 474 (2005) (calling on peer professionalism at its best); see also Charles Aycock, *Fill Out the Form*, 63 TEX. B.J. 326, 326 (2000) (encouraging lawyer involvement in pro bono services); David J. Beck, *Let's Clean Up Our Profession*, 58 TEX. B.J. 890, 890 (1995) (calling on lawyers to refrain from barratry); Jim Branton, *Lawyers Helping Lawyers Helps the Profession*, 58 TEX. B.J. 112, 112 (1995) (discussing a mentoring program implemented to teach young lawyers keys to professionalism); Kelly Frels, *Community Service: Lawyers on the Front Lines*, 68 TEX. B.J. 296, 296 (2005) (providing data on free legal services provided to the community in 2003); Guy Harrison, *Who Speaks for the Lawyers?*, 65 TEX. B.J. 962, 962 (2002) (praising the work of the legal community in volunteering pro bono hours and educating Texas youths of their rights as citizens); Kelley Jones King, *2005-2006 State Bar President Eduardo R. Rodriguez Takes Office*, 68 TEX. B.J. 495, 498 (2005) (discussing a platform of professionalism the current state bar president advocates that includes expanding public education and a commitment to pro bono activities); Colleen McHugh, *A Recipe for Professionalism*, 60 TEX. B.J. 202, 202 (1999) (detailing the accomplishments of the Professionalism Committee and the Texas Center for Legal Ethics and Professionalism); Richard Pena, *The State of Our Profession*, 62 TEX. B.J. 110, 110-11

## IV. ETHICS VIOLATIONS IN TEXAS

A. *Statistical Reports*

Lawyer grievance and discipline information collected by the State Bar of Texas Office of the Chief Disciplinary Counsel indicates that the fields of practice from which complaints most often arise and the number of final disciplinary sanctions have both remained relatively constant for several years.<sup>83</sup> In spite of the dramatic increase in the number of lawyers licensed in Texas,<sup>84</sup> the number of final disciplinary sanctions remained relatively level. A cursory review of these statistics<sup>85</sup> does not indicate a crisis in the making. Yet it does furnish sufficient data to allow those involved in developing ethics training and professionalism activities to concentrate on areas of repetitive ethics violations. For example, the changes to the disciplinary structure and procedures rendered by the 2003 Sunset Review aim to improve processing times and enhance communication between lawyers and clients when complaints are dismissed under the new summary disposition docket.<sup>86</sup> This review found neither a need for substantive changes in the

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(1997) (listing methods by which the state bar is working to develop professionalism and improve the Texas legal system for lawyers and clients); Broadus A. Spivey, *Learning the Four H's*, 65 TEX. B.J. 110, 110 (2002) (reiterating the need for an attorney to be "a good citizen, a good neighbor, and a respected member of the community"); Betsy Whitaker, *Liberty and Justice for All . . . A Story Worth Telling*, 67 TEX. B.J. 264, 264 (2004) (describing the accomplishments of several lawyers who exemplify outstanding professionalism).

83. See Appendix A (containing statistics provided by the State Bar of Texas Office of the Chief Disciplinary Counsel).

84. See STATE BAR OF TEX., DEP'T OF RESEARCH & ANALYSIS, STATE BAR MEMBERS: ATTORNEY STATISTICAL PROFILE (2004-2005) (2005), available at [http://www.texasbar.com/Template.cfm?Section=Research\\_and\\_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908](http://www.texasbar.com/Template.cfm?Section=Research_and_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11908) (reporting an increase of approximately 15,000 licensed attorneys in Texas in ten years) (on file with the *St. Mary's Law Journal*). There were 34,800 active members of the State Bar of Texas in 1980 and 74,675 active members in 2005. See Cynthia Spanhel, *Looking at Past and Current Demographics to Consider: Who, What, Where, and Why in the Future*, 63 TEX. B.J. 48, 48 (2000) (analyzing the expansion and development of the legal community in Texas since 1980). Approximately 1500 to 2000 new lawyers have been licensed annually in Texas from 1995-2005. See, e.g., The State of Texas, Texas Board of Law Examiners, July 2005 Texas Bar Examination Statistics, [http://www.ble.state.tx.us/Stats/stats\\_0705.htm](http://www.ble.state.tx.us/Stats/stats_0705.htm) (reporting that 2091 persons passed the July 2005 Texas bar examination) (on file with the *St. Mary's Law Journal*).

85. See Appendix A (containing statistics compiled by the State Bar of Texas, Office of the Chief Disciplinary Counsel).

86. See Dawn Miller & Daniel A. Naranjo, *Attorney Disciplinary Procedure in Texas: Competing Interests and Philosophies 1988-2004*, 36 ST. MARY'S L.J. 1045, 1065 (2005) (discussing changes made to better handle client complaints within Texas's grievance system).



grievance and disciplinary system resulting from increases in the number of complaints nor problems with detecting unethical conduct. Again, the State Bar of Texas Office of the Chief Disciplinary Counsel has compiled and provided numerous statistics concerning the attorney grievance system.<sup>87</sup> These statistics classify disciplinary actions and grievances by year, type, area of practice, and specific rules violated.<sup>88</sup> An overview of these statistics appears in Appendix A.<sup>89</sup>

CAAP, a client attorney assistance program of relatively recent vintage, also provides useful data regarding ethics and professionalism.<sup>90</sup> The 2004-2005 data compiled by CAAP<sup>91</sup> roughly coincides with the categorization statistics from the final disciplinary sanctions set out in the Office of the Chief Disciplinary Counsel statistics in Appendix A.<sup>92</sup> Based on 46,797 contacts with the CAAP office, the data revealed client concerns of which: 28% involved allegations of insufficient communication by a lawyer; 23% involved allegations of inattention, neglect, or both to the case by the lawyer; 16% involved problems with law office management; 14% concerned failure to safeguard client property; and 10% in-

87. See Appendix A (containing statistics of the attorney grievance system of Texas, compiled by the Office of the Chief Disciplinary Counsel). The Commission for Lawyer Discipline is required to report annually on the status of the lawyer disciplinary system. See TEX. GOV'T CODE ANN. § 81.076(h) (Vernon 2005) (requiring the commission to provide an annual analysis of the attorney discipline system every year).

88. See Appendix A (citing applicable statistics and charts).

89. *Id.*

90. See State Bar of Tex., Client-Attorney Assistance Program (CAAP), [http://www.texasbar.com/Template.cfm?Section=Client\\_Attorney\\_Assistance&CONTENTID=11604&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.texasbar.com/Template.cfm?Section=Client_Attorney_Assistance&CONTENTID=11604&TEMPLATE=/ContentManagement/ContentDisplay.cfm) (last visited Feb. 2, 2006) (providing the goals and functions of the program and listing typical situations in which the program can offer assistance) (on file with the *St. Mary's Law Journal*). The State Bar of Texas Board of Directors established CAAP as a pilot program in 1999 as a joint collaboration between the state bar and the Commission for Lawyer Discipline extending statewide in 2002. See Dawn Miller & Daniel A. Naranjo, *Attorney Disciplinary Procedure in Texas: Competing Interests and Philosophies 1988-2004*, 36 ST. MARY'S L.J. 1045, 1059 n.22 (2005) (discussing the origins of the program and noting the Sunset Review changes that affected CAAP). The CAAP functions as the principal intake hotline for grievances to be filed against attorneys. *Id.* Under the State Bar Act, the state bar is required to "establish a toll-free '800' telephone number for public access to the chief disciplinary counsel's office in Austin." TEX. GOV'T CODE ANN. § 81.079(a)(2) (Vernon 2005).

91. See Appendix B (containing statistics and charts compiled by CAAP).

92. Appendix A.

volved complaints that the lawyer lacked integrity.<sup>93</sup> The top three practice categories from which these client concerns arose were: 19% family law, 16% criminal law, and 15% personal injury law. None of these categories includes the 36% of client concerns classified as grievance actions.<sup>94</sup>

### B. *Dissecting the Statistical Information*

The correlation of lawyer grievance and discipline data to the teaching of ethics leads to a discussion of methodology and relevance. The author's conversations with several Texas law school deans regarding how grievance and disciplinary information could be presented to students and made more applicable to law school ethics courses were inconclusive.<sup>95</sup> Members of a professionalism consortium workgroup may be in a better position to determine how such data should be captured, allowing it to find greater applicability in academic settings and clinical programs during law school and programs after licensure. Indeed, law schools must take the initiative as key players in any effort to increase professionalism.

The collection of certain grievance and disciplinary information is confidential by rule and statute.<sup>96</sup> Yet, changing the format in

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93. See Appendix B (containing statistics and charts compiled by CAAP). The CAAP website lists more extensive information. State Bar of Texas, Client-Attorney Assistance Program (CAAP), [http://www.texasbar.com/Content/ContentGroups/Client\\_Attorney\\_Assistance1/Introduction/Client-Attorney\\_Assistance\\_Program.htm](http://www.texasbar.com/Content/ContentGroups/Client_Attorney_Assistance1/Introduction/Client-Attorney_Assistance_Program.htm) (last visited Jan. 21, 2006) (on file with the *St. Mary's Law Journal*).

94. *Id.*

95. The author contacted by letter the deans of the nine ABA approved law schools in Texas (Baylor University Law School, South Texas College of Law, Southern Methodist University Dedman School of Law, St. Mary's University School of Law, Texas Southern University Thurgood Marshall School of Law, Texas Tech University School of Law, Texas Wesleyan University School of Law, University of Houston Law Center, and the University of Texas School of Law), and inquired generally as to their views on ethics training courses for law students with the possibility of professionalism triage between the law schools, the organized bar, and the grievance disciplinary authorities. Based on conversations with five of the law school deans, the author appreciated the difficulty of responding to the inquiry without more empirical data to define the professionalism issues sought to be addressed. The author gratefully acknowledges the insights offered by the law school deans. No acquiescence or opinion by any law school dean to any part of this Essay was expressed and none should be implied.

96. See TEX. GOV'T CODE ANN. §§ 81.072(e-1), 81.0752 (Vernon 2005) (providing for the confidentiality of all proceedings regarding lawyer disciplinary actions occurring before a grievance committee, mediation panel, or alternative dispute resolution session).

which nonconfidential information is reported could yield a better understanding of the serious lapses in professionalism. Many questions will face a professionalism consortium workgroup concerning the grievance and disciplinary system. The following questions provide some examples from this grievance and disciplinary perspective and could easily be adapted to related concerns, such as malpractice claims, settlements, and verdicts.

- What information and statistics from the grievance and disciplinary system would be useful and relevant in the law school environment for law students entering the legal profession as well as for those who have been licensed for longer periods of time?
- Is there any commonality in final disciplinary sanctions by field of practice, geographic location, practice experience, or firm size that could provide a basis for different approaches to ethics training and professionalism programs?
- How can you integrate ethics and professionalism programs into more real-time experience settings similar to what the National Institute of Trial Advocacy does for trial seminars? Is this feasible in view of the long held generalization that but for the MCLE-mandated three hours of participatory ethics hours for non-exempt Texas lawyers, stand alone ethics and professionalism programs are not financially viable?<sup>97</sup>

Variations of the above questions could be focused toward improving the delivery of professionalism programs and ethics training by law schools, the organized bar, and other professionalism organizations. Although the confidentiality of MCLE information<sup>98</sup> might impede the performance of correlation studies for those subjected to final disciplinary sanctions, knowledge of other variables is instructive. For example, could the disciplinary and professionalism experience of groups carrying malpractice insurance disclose indicia of professionalism beyond the due diligence required by most malpractice carriers, such as the use of docket control systems? In other words, are lawyers who carry malprac-

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97. See TEX. STATE BAR R. art. XII, § 6 (B), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon 2005) (requiring an annual minimum of three hours of continuing legal education on the topic of legal ethics); *see also* TEX. GOV'T CODE ANN. § 81.113(b) (Vernon 2005) (providing that credit for completed continuing legal education hours requires satisfaction of instruction on legal ethics).

98. See TEX. STATE BAR R. art. XII, § 12 (stating that information regarding a state bar member's minimum continuing legal education compliance or noncompliance is confidential).

tice insurance more susceptible to final disciplinary sanctions than the larger group of practicing lawyers in the same field of practice, size of firm, years of practice, and geographic practice area, or is this more a matter of economics and market conditions?

Would review of the disciplinary record and malpractice claims for the practicing lawyers associated with certain groups indicate a higher level of ethics and professionalism training as a direct factor, or are other variables involved? For example, lawyers employed by legal services providers—grantees of the Legal Services Corporation<sup>99</sup>—are covered by malpractice insurance paid for by the State Bar of Texas through its Texas Lawyers Care department.<sup>100</sup> Similarly, lawyers who are members of ABA certified lawyer referral programs in Texas, operated through the various metropolitan bar associations, are also required to carry malpractice insurance.<sup>101</sup> This review is currently incomplete, but it should offer significant insight to any group seeking to understand the correlation between professionalism and the current disciplinary system.

### C. *Creating New Metrics*

This Essay challenges the current paradigms promoting professionalism and seeks to stimulate those in a professionalism consortium workgroup to test the efficacy of existing ethics and professionalism programs with new measurement tools. Perhaps this will result in a better interpretation of data and provide for increased efficiency among existing resources and more effective marketing of new programs and activities. As lawyers demand more productivity from themselves through the use of technology, trained staff, and the latest advanced seminar materials, they

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99. See generally Legal Services Corporation (LSC): What is LSC?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2006) (providing information about the Legal Services Corporation (LSC)) (on file with the *St. Mary's Law Journal*).

100. See generally STATE BAR OF TEX., TEXAS LAWYERS CARE, PRO BONO PUBLICO: AN ATTORNEY'S GUIDE TO PRO BONO OPPORTUNITIES IN TEXAS (1999), available at [http://www.texasbar.com/Content/ContentGroups/Publications3/Manuals\\_Guides\\_Directories/Attorneys\\_Guide\\_to\\_Pro\\_Bono\\_Opps/publico.pdf](http://www.texasbar.com/Content/ContentGroups/Publications3/Manuals_Guides_Directories/Attorneys_Guide_to_Pro_Bono_Opps/publico.pdf) (last visited Feb. 22, 2006) (supplying information to attorneys to assist them in completing pro bono hours) (on file with the *St. Mary's Law Journal*).

101. See American Bar Association, Meets ABA Standards: Model Supreme Court Rules Governing Lawyer Referral and Information Services, [http://www.abanet.org/legal\\_services/lris/meetsabastds.html](http://www.abanet.org/legal_services/lris/meetsabastds.html) (last visited Feb. 2, 2006) (listing the requirements to be a registered referral service with the ABA) (on file with the *St. Mary's Law Journal*).

should also demand that professionalism programs incorporate the tools they need to succeed. Initially, a professionalism primer for those in the legal field should include answers to the following questions:

- How do you measure the connection between mandated MCLE ethics requirements and the actual preventative impact?
- What performance measures should be recommended for ethics and professionalism programs and courses?
- What professionalism program outcomes should be adopted?
- Which learning environments exemplify the best practices?
- What are the most important factors in forming a solid foundation for lifetime professionalism?
- Using a cost-benefit analysis, what is the preferred model from among those presently in use (e.g., internships,<sup>102</sup> law clinic programs, mentoring projects, etc.) that closely approximates a hands-on professionalism experience?
- How feasible is undertaking any of the changes in light of management challenges, fiscal notes, and political realities?

## V. WORKING MODEL

Professionalism extends beyond mere grievance, disciplinary, and malpractice areas and also includes competence, civility, and professional responsibility. Professionalism is difficult to teach because it is inextricably intertwined with the complexities of a lawyer's daily work. Moreover, the distinct environments in which the canons of legal ethics are exemplified—the public protection goals of the grievance disciplinary system, the continuing legal education demands of active practitioners, the public service needs of communities served by lawyers, and the public's expectations for the

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102. The Board of Directors of the State Bar of Texas authorized the Professionalism Committee to investigate and recommend a future plan for the implementation and adoption of the committee's proposal requiring all newly licensed attorneys to participate in some form of mandatory supervised legal internship before being fully licensed. *See Annual Committee Reports*, 59 TEX. B.J. 678, 689 (1996) (discussing the committee's idea that new lawyers complete a mandatory internship before licensure). The proposal was not implemented. *See Charles Aycock, Taking Care of the Future*, 62 TEX. B.J. 1094, 1094 (explaining that a mandatory internship program was determined to be unfeasible). The administration, management, financial support, and unintended consequences of ambitious programs are formidable impediments. *See Bradley J.B. Toben, Thumbs Down on Mandatory Internships*, TEX. LAW., May 13, 1996, at 26 (discussing various reasons that a mandatory internship is not practical in the legal field).

rule of law—provide a better context for understanding professionalism.

### A. *The Participants*

Three sectors have traditionally fostered a strong commitment to the promotion of both ethics training and professionalism programs in the Texas legal community. These include the state bar, law schools, and other entities which either specifically monitor ethics compliance or voluntarily adopt a goal of professionalism in their mission statements.

The state bar's composition must be understood and respected in order to grasp the complexity of the organization—namely, its jurisdictional issues and cultural turfs. The mandatory nature of the State Bar of Texas provides both a blessing and a curse. This gives the bar a commanding role, but it also generates natural resentments that tend to stem from its top-down hierarchical approach. The Supreme Court of Texas vested the State Bar of Texas with the critical administrative responsibility of self-governance. Further, the Supreme Court of Texas has entrusted the bar with the obligation to fully support the CFLD—a permanent committee charged with the implementation of a complex grievance and disciplinary system. The State Bar of Texas devotes extensive resources to these endeavors, and although the commission exclusively deals with grievance and discipline, it does not have absolute control over professionalism issues. Many local, specialty, and minority bars—especially the more established metropolitan bars—play a critical role in the professional lives of Texas lawyers.

The Supreme Court of Texas plays a dominant role as well because it oversees the entire legal profession in Texas. Actually, the State Bar of Texas is an administrative agency of the Supreme Court of Texas.<sup>103</sup> The court must approve any changes to the Texas Disciplinary Rules of Professional Conduct and to the Texas Rules of Disciplinary Procedure as part of its inherent rulemaking powers.<sup>104</sup> Additionally, the court appoints six lawyers and six laypersons to serve as members on the Board of Disciplinary Ap-

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103. See TEX. GOV'T CODE ANN. § 81.011(a) (Vernon 2005) (“The state bar is . . . an administrative agency of the judicial department of government.”).

104. See *id.* §§ 81.024(b), 81.072(a) (establishing the court's rulemaking power in relation to disciplinary procedures).

peals (BODA), “an independent statewide judicial body with original and appellate jurisdiction over seven types of attorney discipline cases.”<sup>105</sup> BODA performs vital adjudicatory functions in certain grievance and disciplinary proceedings.<sup>106</sup> The Supreme Court of Texas has a significant impact on law license candidates in Texas law schools through the Texas Board of Law Examiners.<sup>107</sup> The court has also shaped legal professionalism by its court-appointed committees, such as the Grievance Oversight Committee<sup>108</sup> and the Professional Ethics Committee for the State Bar of Texas.<sup>109</sup> Moreover, without the court’s imprimatur through aspiration codes, such as the Texas Lawyer’s Creed,<sup>110</sup> professionalism would not receive the attention necessary to make it a focal point for attorneys.

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105. Dawn Miller, *The Board of Disciplinary Appeals: What Every Texas Attorney Needs to Know*, 65 TEX. B.J. 746, 747 (2002).

106. See TEX. R. DISCIPLINARY P. 7.08 (asserting the powers and duties of the Board of Disciplinary Appeals); Dawn Miller, *The Board of Disciplinary Appeals: What Every Texas Attorney Needs to Know*, 65 TEX. B.J. 746, 747-48 (2002) (discussing the history of BODA, its rules and procedures and providing answers to frequently asked questions); The Board of Disciplinary Appeals, Jurisdiction and Operations, <http://www.txboda.org/Active%20pages/Jurisdiction.html> (last visited Jan. 25, 2006) (supplying general information relating to BODA’s jurisdiction and operations) (on file with the *St. Mary's Law Journal*).

107. See Texas Board of Law Examiners, About the Texas Board of Law Examiners, [http://www.ble.state.tx.us/one/main\\_about.htm](http://www.ble.state.tx.us/one/main_about.htm) (last visited Jan 25, 2006) (providing information relating to the investigation of the character and fitness of law students) (on file with the *St. Mary's Law Journal*).

108. Although no longer mandated by the State Bar Act, the Supreme Court of Texas has opted to continue the work of the Grievance Oversight Committee, having reconstituted it by order. Tex. Sup. Ct., Grievance Oversight Committee, Misc. Docket No. 98-9122 (July 31, 1998); Tex. Sup. Ct., Grievance Oversight Committee, Misc. Docket No. 97-9066 (Apr. 2, 1997). It is a curious arrangement in light of the primacy given to the Commission for Lawyer Discipline regarding disciplinary matters under the State Bar Act.

109. See TEX. GOV’T CODE ANN. § 81.091 (Vernon 2005) (establishing the committee for professional ethics). An example of an ethics opinion issued by the Professional Ethics Committee for the State Bar of Texas is Opinion 555. See Professional Ethics Committee for the State Bar of Tex., *Opinion No. 555, December 2004*, 68 TEX. B. J. 228, 228 (2005) (presenting a fact situation where a lawyer owns a business interest in a chiropractor’s practice and such ownership violates the Texas Disciplinary Rules of Professional Conduct Rule 1.06(b) (conflict of interest) and Rule 2.01 (independent judgment) when the lawyer refers clients to the chiropractor for treatment). TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(b), 2.01, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

110. The Supreme Court of Tex. and the Court of Criminal Appeals, THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM (Nov. 7, 1989), *reprinted in* 52 TEX. B.J. 1304, 1304-05 (1989).

CFLD, a permanent standing committee of the State Bar of Texas,<sup>111</sup> is composed of six lawyers in good standing and six disinterested members of the public.<sup>112</sup> The Commission exercises authority over disciplinary and disability matters involving licensed Texas lawyers,<sup>113</sup> and it oversees the separate Office of the Chief Disciplinary Counsel. The CFLD maintains a semi-autonomous existence under the governing disciplinary rules because of the confidential nature of its position as the client in all grievance discipline cases.<sup>114</sup> Since its inception in 1992, after the second Sunset Review undergone by the State Bar of Texas that resulted in the “modern” disciplinary rules, CFLD has occupied a preeminent leadership position in grievance disciplinary matters.

TCLEP is one of the leading groups for the enhancement of legal ethics.<sup>115</sup> TCLEP maintains an inventory of professionalism resources while it functions as an economically self-sustaining entity. It sponsors symposia and seminars either independently or in partnership with other organizations. Also, TCLEP works closely with the State Bar of Texas and the CFLD to produce programs on legal ethics and professionalism for attorneys across Texas. Notably, it pioneered the mandatory four-hour course, “Basics to the Practice of Law,” which, since 1996, must be taken by all lawyers licensed to practice law in Texas.<sup>116</sup>

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111. See TEX. GOV'T CODE ANN. § 81.071 (Vernon 2005) (acknowledging “the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar”).

112. TEX. R. DISCIPLINARY P. 4.01.

113. *Id.*

114. See TEX. R. DISCIPLINARY P. 4.06 (stating the duties and authority of the CFLD).

115. The Texas Center for Legal Ethics and Professionalism, <http://www.txethics.org> (last visited Jan. 25, 2006) (on file with the *St. Mary's Law Journal*).

116. Annually, since at least 1995, various stakeholders in the grievance system have conducted and attended a grievance symposium, which includes: grievance committee and panel chairs, judges, the Commission for Lawyer Discipline, the State Bar Board of Directors, the Board of Disciplinary Appeals, Advertising Review Committee members, Texas Disciplinary Rules of Professional Conduct Committee members, respondents' bar, Supreme Court of Texas liaisons, and other pertinent individuals. See Jerry Secrest, *1995-96 Annual Report of the Texas Commission For Lawyer Discipline*, 60 TEX. B.J. 222, 226 (1997) (reviewing the annual grievances filed against attorneys). This grievance symposium is produced and sponsored by the Texas Center for Legal Ethics and Professionalism and by the Office of the Chief Disciplinary Counsel with funding from the Texas Bar Foundation and the State Bar of Texas. *Id.*



The Texas Bar Foundation (TBF)<sup>117</sup> and the College of the State Bar,<sup>118</sup> both separate entities, make significant contributions to improving the administration of justice by recognizing outstanding professionalism on the part of their members and by being sources of grant money for new programs. Some noteworthy grants provided by these entities include grants for the access-to-justice programs and grants allowing the less fortunate to gain greater access to civil legal services.<sup>119</sup>

A number of other organizations are involved in the ethics and professionalism arena. The recognition of the previously mentioned groups should encourage increased interaction in the legal community that has already promoted professionalism among lawyers. Notable achievements come to fruition because of the knowledge and experience of individuals who work through such organizations that have a commitment to the improvement of professionalism and ethical compliance.

As expected in established organizations, attempts to introduce a new paradigm into the professionalism equation will encounter preexisting institutional norms and rooted practices. The challenge of lifetime professionalism can be met by forging new collaborations with existing constituencies. To illustrate, collaborations of various kinds were involved in such notable achievements as the Texas Lawyer's Creed,<sup>120</sup> PEP,<sup>121</sup> and the Texas Lawyer's Assis-

117. Texas Bar Foundation, Advancing Justice in Texas, <http://www.txbf.org/site/pp.asp?c=HJIXK3OSG&b=13518> (last visited Feb. 21, 2006) (introducing the mission and purposes of the Foundation) (on file with the *St. Mary's Law Journal*).

118. College of the State Bar of Texas, Mission, <http://www.texasbarcollege.com/Mission.html> (last visited Feb. 21, 2006) (stating the mission of the College) (on file with the *St. Mary's Law Journal*).

119. Texas Bar Foundation, Texas Bar Foundation Grants Awarded After June 2003, <http://www.txbf.org/site/pp.asp?c=HJIXK3OSG&b=17796> (on file with the *St. Mary's Law Journal*).

120. See The Supreme Court of Tex. and the Court of Criminal Appeals, THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (Nov. 7, 1989), reprinted in 52 TEX. B.J. 1304, 1304-05 (1989) (stating that the Supreme Court of Texas and the Court of Criminal Appeals of Texas jointly promulgated the creed).

121. See Professionalism Enhancement Program (PEP), [http://www.texasbar.com/Content/ContentGroups/Programs\\_and\\_Services/Attorney\\_Assistance/Professionalism\\_Enhancement\\_Program/Introduction2/Professionalism\\_Enhancement\\_Program.htm](http://www.texasbar.com/Content/ContentGroups/Programs_and_Services/Attorney_Assistance/Professionalism_Enhancement_Program/Introduction2/Professionalism_Enhancement_Program.htm) (last visited Feb. 23, 2006) (answering questions concerning PEP) (on file with the *St. Mary's Law Journal*).

tance Program (TLAP).<sup>122</sup> These examples represent logical responses to recurring problems that required hard work but not a struggle between competing views.<sup>123</sup> However, even in situations where friction exists, collaboration has proven successful.

Particularly, CAAP<sup>124</sup> offers an example of collaboration between two organizations. CAAP was the product of the board of directors from the State Bar of Texas and the CFLD coordinating the formation of a new program that enhanced and supplemented the lawyer grievance and disciplinary system.<sup>125</sup> Initially, differences arose in the preliminary discussions between the two organizations concerning the nature of the compliance functions in addition to philosophical differences regarding any oversight responsibilities, but the leadership of both governing bodies prevailed with the eventual establishment of CAAP. One positive aspect of CAAP is a customer service module designed to address client concerns and to resolve situations that do not amount to allegations of disciplinary offenses. This collaboration also produced several other positive results. For instance, the reaffirmation of trust between the State Bar of Texas and CFLD that resulted from establishing new lines of communication and the fostering of a closer working relationship between these two important organizations that later aided in the internal reorganization of the Office of the Chief Disciplinary Counsel. A third positive result was the establishment of a program that later served as a pivotal step in preparing for the Sunset Review of 2003.<sup>126</sup> These examples show

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122. See Ann D. Foster, *TLAP: Past, Present, and Future*, 67 TEX. B.J. 522, 522-24 (2004) (providing a history and description of TLAP and its activities).

123. The July 2005 Professionalism Committee Report exemplifies a collaboration that took place within the organized bar. See *2004-2005 State Bar of Texas, Committee Reports*, 68 TEX. B.J. 632, 639 (2005) (“The committee chair met with the Public Affairs Committee and the Director of the Texas Center for Legal Ethics and Professionalism to discuss ways to maximize collaboration and avoid duplication of effort and established priorities for the coming year.”).

124. See State Bar of Texas, Client-Attorney Assistance Program (CAAP), [http://www.texasbar.com/Content/ContentGroups/Client\\_Attorney\\_Assistance1/Introduction/Client-Attorney\\_Assistance\\_Program.htm](http://www.texasbar.com/Content/ContentGroups/Client_Attorney_Assistance1/Introduction/Client-Attorney_Assistance_Program.htm) (last visited Feb. 21, 2006) (stating the offerings and purposes of the CAAP) (on file with the *St. Mary's Law Journal*).

125. *Id.*

126. CAAP streamlined the disposition of cases through the implementation of a voluntary mediation and dispute resolution procedure, which complemented the summary disposition docket established under the State Bar Act as part of the 2003 Sunset Review process set up by the 78th Texas Legislature. See TEX. GOV'T CODE ANN. §§ 81.072(e),

how collaboration paid dividends beyond the specific project behind the initial objective of the collaboration.

### B. *The Process*

Initially, the professionalism consortium workgroup approach should be viewed as a way for interested parties to network. With enhanced opportunities for coordination and open communication, even competitors who offer professionalism programs as a revenue stream for their respective organizations should be able to realize advantages. Some entities may utilize the consortium approach as a way to identify gaps in existing professionalism programs and services, while other entities may want to avoid duplicating unsuccessful programs by utilizing the approach to test the parameters of future programs. A need will always exist for the various professionalism sectors to discover what each segment is doing prior to expending valuable resources on projects that may eventually fall short of expectations. The impetus to join a professionalism consortium is that it provides a medium for the different organizations to gather input on the latest and most relevant data. In reality, all participants will not have the incentive and funds to undertake certain studies, surveys, and polls on their own, but they might be able to justify the expense if the costs of information gathering are shared among the participants.

The common objectives sought through the collaboration between organizations, which will benefit both lawyers and the public alike, aim to increase the overall lawyer compliance with ethical standards and to reduce instances of professionalism shortcomings. These objectives are met by welcoming a constructive analysis of the existing programs and the curricula for future programs. Additionally, participants in a professionalism consortium must realize that they have a fiduciary duty to their respective organizations and that in order to further their organization's interests, they must sponsor programs and activities that are financially viable and well produced.

The professionalism consortium workgroup approach will only succeed when there is a potential for mutual benefit among simi-

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81.074 (Vernon 2005) (establishing voluntary mediation and dispute resolution procedures as well as the chief disciplinary counsel's role in the process).

larly credentialed professional participants who share some elements of risk in the venture. However, the old proverb still applies: the whole is greater than the sum of its parts. No one participant will possess all of the necessary skills and experience to be able to define and create a sustainable professionalism and ethics compliance program that will cover the entire spectrum of potential pitfalls.

The immediate challenge rests in the fact that technology and the mass media have enabled others outside the traditional professionalism community to frame the issues. The professionalism consortium workgroup approach provides an opportunity for the professionalism community to once again take charge and lead the way with a renewed energy. One successful example of this approach is the TYLA, commonly referred to as the public service arm of the State Bar of Texas.<sup>127</sup>

TYLA has recently launched a project named Ten Minute Mentor, which is one of many outstanding projects that have garnered national attention for TYLA from the ABA.<sup>128</sup> In turn, the ABA has adopted TYLA programs for national and out-of-state distribution.<sup>129</sup> The Ten Minute Mentor program was created in partnership with the State Bar's TxBarCLE division and combines the best of the bar's professional traditions with the next generation in technology. The program provides more accessible and less time-consuming mentoring through the use of more than one hundred taped segments available online combined with a menu of topics presented by some of Texas's finest lawyers.<sup>130</sup> Further, the taped segments qualify for MCLE self-study credit.<sup>131</sup> Overall, this new

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127. See generally TYLA, <http://www.tyla.org> (last visited Jan. 25, 2006) (serving as the homepage for TYLA) (on file with the *St. Mary's Law Journal*).

128. See *Ten Minute Mentor*, 68 TEX. B.J. 236, 236 (2005) (discussing the new Ten Minute Mentor Program).

129. See, e.g., WE THE JURY, A JURY SERVICE PROJECT OF THE AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION, CURRICULUM GUIDE 1, available at <http://www.abanet.org/yld/wethejury/wethejury.pdf> (last visited Feb. 21, 2006) (noting in particular that the material, though presented by the ABA, is copyrighted by TYLA) (on file with the *St. Mary's Law Journal*).

130. See *Ten Minute Mentor*, 68 TEX. B.J. 236, 236 (2005) (noting that the program "features short video segments on topics useful to Texas lawyers"). This program is available online at the Ten Minute Mentor website. TYLA, Ten Minute Mentor, <http://www.tenminutementor.com> (last visited Feb. 6, 2006) (on file with the *St. Mary's Law Journal*).

131. TYLA, Ten Minute Mentor, <http://www.tenminutementor.com> (last visited Feb. 6, 2006) (on file with the *St. Mary's Law Journal*).

program may provide the roadmap for a revitalization of good projects from the past that have reached a stage of diminishing returns.

The Ten Minute Mentor project recognizes the economic reality of today's law practice environment—time away from the office adds another barrier to participating in or attending traditional programs. This program conveniently addresses the problem with its 24/7 approach made possible through the Internet. This readily accessible program acknowledges that professionalism questions do not always arise at convenient times or when mentors are readily available.

The next section identifies potential lodestars within the professionalism realm that will entice participants to join a professionalism workgroup consortium.

### C. *The Special Project(s)*

Embracing lifetime professionalism represents a journey, not a destination, for members of the legal community, and occasionally travelers must determine whether the headings on the compass must be re-adjusted. Poor public perception of the professionalism of lawyers does not cause ethical violations, and the harsh economics of practicing law are neither a defense nor an excuse for ethical shortcomings. Nevertheless, dealing directly with underlying symptoms can bring increased credibility to ethics training and professionalism courses, but it is difficult to do this in the traditional formats because it necessitates adjustments in a course's infrastructure.

One area for extended discussion that does not require the re-adjustment of an existing structure centers on how to link grievance disciplinary data to ethics training and professionalism programs. Looking at the available data, communications problems and negligent handling of client matters consistently rank at the top of the list of items triggering complaints against lawyers.<sup>132</sup> In the public's eyes, lawyers are failing to effectively communicate and persuade the community of the value they bring to society. Additionally, the affordability of lawyers and accessibility to the

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132. See Appendix A (compiling the statistics furnished by the Office of the Chief Disciplinary Counsel concerning the attorney grievance system).

justice system are recurring topics of interest at most bar association conferences.

Prior to entertaining special projects of any sort, there must be a consensus on how the dialogue begins, and the first item of business should be to formulate an agenda for the workgroup consortium. The agenda's necessary groundwork should consist of one or more of the following entries:

- Establish a clearinghouse of professionalism information;  
Objective: Undertake an environmental scan of programs, services, and entities at the local, state, and national level.
- Conduct a professionalism needs assessment;  
Objectives: Identify vulnerable constituencies (whether by practice area, age group, firm size, geographic location, or background profile) and gather input on how to most effectively market lifetime professionalism to today's lawyers, the majority of whom are not active in the organized bar.
- Gather data with crisp reporting;  
Objectives: Encourage the collection and dissemination of data and statistics on a regular basis with due regard for confidentiality and privacy; provide user-friendly data gathering templates in various media formats; and facilitate the exchange of non-confidential and non-proprietary public information by and between all professionalism entities.
- Adopt target goals;  
Objectives: Establish a timetable to track trends in the final disciplinary sanctions of the most serious categories of ethics violations and legal malpractice outcomes and set baseline metrics to measure the impact of professionalism programs.
- Initiate a new dynamic;  
Objectives: Seek out new insights for professionalism by expanding the dialogue with others, such as malpractice insurance carriers, providers of legal services to the poor, and focus-group participants of lawyers and clients from a wide variety of practice areas and backgrounds.

With a basic agenda set, the professionalism workgroup consortium can determine whether it is feasible to test its framework by allowing the participants to interact in a suitable pilot project. The criteria for the selection process should begin with a professional responsibility perspective, which then extends to other categories of professional development. A pilot project is likely to be engulfed with many contradictory observations due to the differences

among the constituencies represented, but this will give the group a real world context in which to address practical objectives.

One special area of professional responsibility is pro bono legal services.<sup>133</sup> Through pro bono work, law firms consider ways to contribute more to the legal service needs of the community.<sup>134</sup> This presents an interesting hypothetical to challenge a professionalism consortium to explore ways to interface professionalism with ongoing client work.

The need for affordable legal services presents an environment where a professionalism consortium workgroup could initiate a pilot project. Private attorney involvement programs of legal aid organizations usually have access to a panel of experienced practitioners who are available to assist private attorneys that elect to volunteer their time. In clinic settings, steep learning curves may be avoided with the use of an unbundled legal services approach. Using such an approach, lawyers unfamiliar with certain legal subjects are taught to interview clients, hand the information to others who draft the pleadings, and then, if necessary, appear in court with the more experienced lawyers. In effect, each lawyer fulfills part of the overall legal services provided to the client.<sup>135</sup> Throughout the entire process of unbundling, the lawyers work together under the guidance of a knowledgeable clinic coordinator. Such clinic projects expand available practice opportunities while reinforcing professionalism.

133. See TEX. STATE BAR R. art. XII, § 6(B) (requiring three hours of continuing education devoted to legal ethics and professional responsibility subjects).

134. SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 204-05 (1994).

[P]ro bono work on the civil side of legal aid cases is excellent training for young litigators, better than the warranties work for automobile companies it has replaced, the clients having taken such work in-house. Each year, moreover, the firm takes one of its most promising recruits, who has spent his first year out of law school as a judge's clerk, and assigns him to pro bono for his first year with the firm—at the full first-year salary, as a way *into* the firm, not as a way out of it. . . . [T]he experiences the young pro bono lawyers bring . . . from their assignments have changed even senior partners' views of the practice of law and what it involves, to the benefit of all.

*Id.*

135. See generally FORREST S. MOSTEN, *UNBUNDLING LEGAL SERVICES - A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE* 91 (2000) (providing solutions in order to avoid malpractice suits in the delivery of services). Such an approach generates ethical concerns, which may require careful disclosures and limited representation client agreements. *Id.*

Ultimately, lawyers act as the primary gatekeepers of the legal system, and they should be treated and trained accordingly to that privilege. Inherent in that privilege is a requirement to be ethical and competent. Further, the privilege carries an ongoing obligation to act with professionalism. Admittedly, difficulties arise when balancing these professional obligations with the need to remain financially viable and focused on the best interests of the client. Lifetime professionalism programs concentrate on providing attorneys with current, practical ethics training grounded in sound empirical data and metrics correlating the continued economic viability of the practice of law. A professionalism consortium workgroup, such as the one proposed in this Essay, can lead the way to positively influence the legal community.

#### VI. CONTINUING THE ONGOING DIALOGUE ON PROFESSIONALISM

This Essay paints a broad outline for an approach to lifetime professionalism. By building on the existing resources provided by various leaders and organizations in the field of professionalism, those that study, teach, and produce ethics training programs and professionalism activities are challenged to utilize a consortium workgroup concept to transcend the traditional approaches and create a new synergy. Arguably, this ideal may be successfully implemented through the collaboration among groups already involved in the compliance, education, and public service sectors of ethics and professionalism. Regulatory authorities, law schools, the organized bar, and related entities are powerful forces alone—but together, these groups comprise a potentially overwhelming force if focused on a common goal. The professionalism consortium workgroup approach can provide an additional environment that will foster interaction and candid discussions about formats, outcomes, and success in professionalism and ethics programs.

The comprehensive nature of lifetime professionalism requires those outside the professionalism community with certain expertise in such things as developing the metrics and performance objectives to be closely involved. Capturing the right data and implementing fresh thinking will eventually produce a new synergy and improve the efficiency and effectiveness of existing programs. Moreover, this will lay the predicate for bold and innovative changes to promote sustainable professionalism and ethics pro-



grams geared to meet the wide spectrum of lawyers' needs and the public's expectations.

This level of energy and enthusiasm cannot usually be sustained in the daily grind of the law practice. Nevertheless, it is fitting to recall each individual's obligation to professional responsibility as the first core competency that is mandated in the oath taken by all lawyers. Lifetime professionalism is addressed at new lawyer induction ceremonies each year when various distinguished speakers contribute to the dignity of the moment with inspiring remarks.

This special occasion can be synthesized into a motto for lifetime professionalism: *The law is a noble profession that is embraced by those who aspire to the highest levels of competence and ethics in serving clients, so that it is possible, with dedication, discipline, and hard work, to realize that commitment to live greatly in the law.*

2006]

## LIFETIME PROFESSIONALISM

1093

VII. APPENDIX A  
STATE BAR OF TEXAS ATTORNEY GRIEVANCE SYSTEM

	04-05	03-04	02-03	01-02	00-01	99-00	98-99	97-98	96-97	95-96	94-95
May 1 - April 30											
Grievances Filed	7,780	8,404	7,518	9,027	8,962	9,430	9,040	8,484	9,376	9,523	9,582
Classified as complaints	2,587	2,936	2,609	3,186	2,746	3,033	3,455	3,320	3,640	3,974	4,077
Dismissed as inquiries:	5,063	5,313	4,987	5,603	6,209	6,270	5,420	5,164	5,736	5,549	5,505
Total number of disciplines (final sanctions):	427	459	437	482	530	521	552	511	515	575	673
Disbarments	41	30	34	50	39	23	38	38	32	42	35
Resignations	11	14	11	20	24	22	20	15	15	23	26
Suspensions	134	113	126	161	185	162	154	148	188	205	201
Public Reprimands	53	60	68	70	76	83	89	72	95	107	170
Private Reprimands	170	188	145	142	159	184	191	168	175	189	235
Orders for Rehabilitation	18	54	53	39	47	44	58	64	n/a	n/a	n/a
Other	0	0	0	0	0	3	2	6	10	9	6
<hr/>											
Areas of Law											
Criminal	1,457	1,829	1,243	1,191	1,131	1,061	1,225	1,101	997	968	818
Family	745	949	674	760	772	714	810	775	797	876	840
Traffic	35	44	46	102	36	65	107	77	48	53	44
Personal Injury	473	626	428	555	513	608	783	778	873	959	966
Bankruptcy	87	125	76	96	71	76	83	85	80	73	95
Probate/Wills	124	183	122	131	131	113	175	157	151	141	159
Non-Client Relationship	259	350	225	386	261	189	228	149	168	124	73

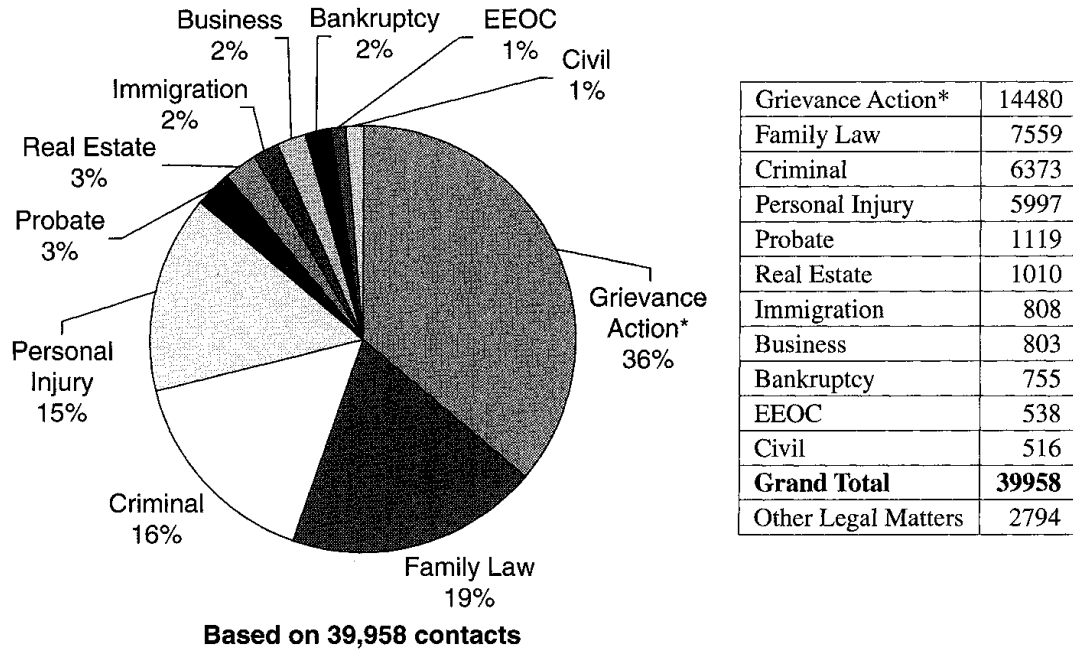
APPENDIX A (CONTINUED)

Rule Violations Alleged	04-05	03-04	02-03	01-02	00-01	99-00	98-99	97-98	96-97	95-96	94-95
Neglect	1,437	1,611	1,203	1,788	1,749	1,911	2,429	2,310	2,408	2,614	2,590
Fees	169	203	192	236	175	241	243	275	269	270	307
Confidentiality	51	65	39	50	44	41	51	74	60	79	92
Conflicts	102	116	100	126	103	83	111	113	134	149	190
Safeguard Property	320	375	251	413	329	369	505	562	609	667	766
Declining or terminating representation	502	598	421	450	367	436	545	479	553	546	492
Tribunals	77	97	58	94	68	75	116	110	125	157	139
Non-clients	60	76	73	110	56	62	87	103	116	125	131
Law firms	25	26	44	32	10	21	26	23	24	31	27
Advertising & Solicitation	35	60	65	52	17	41	43	55	70	200	190
Integrity	710	736	469	344	83	102	101	119	170	97	92
Communication	1,488	1,760	1,180	303							

Statistics provided by the State Bar of Texas Office of the Chief Disciplinary Counsel.

VIII. APPENDIX B

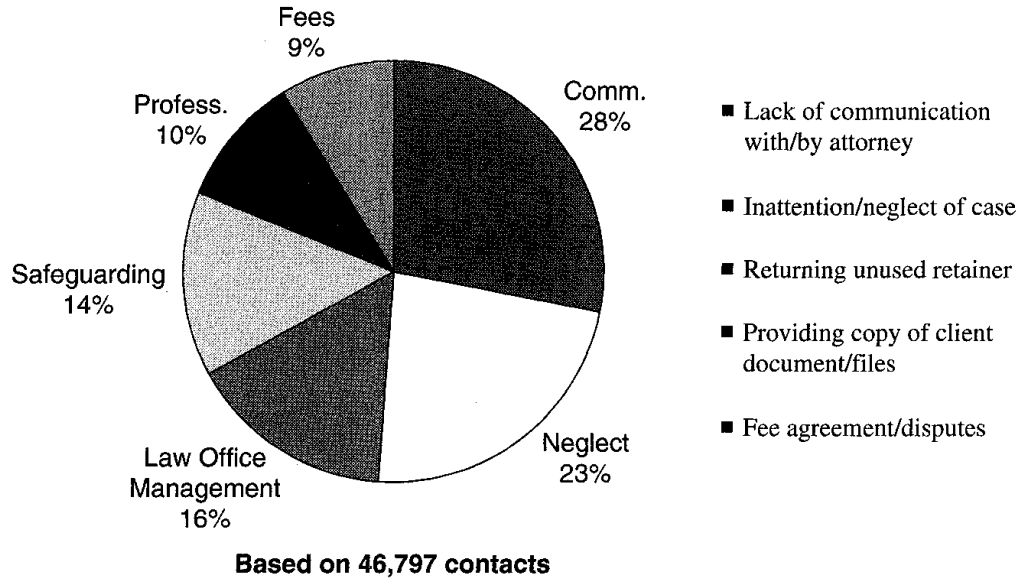
COMPLAINTS BY LEGAL MATTER



Source: Statistics provided by the State Bar of Texas Client Attorney Assistance Program.

APPENDIX B

CLIENT CONCERNS/COMPLAINTS



Source: Statistics provided by the State Bar of Texas Client Attorney Assistance Program.