

MATERIALS ON PROFESSIONAL RESPONSIBILITY

DEAN SUNI WINTER 2008

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INTRODUCTION

These materials are for use in the course on Professional Responsibility. This section is an introduction both to these materials and to the course.

The goals of the course are four-fold:

1. To introduce you to professional responsibility issues and to assist you in recognizing such issues in situations lawyers face in practice,
2. To provide the tools necessary to resolve these issues, which include both knowledge of existing standards and an understanding of the underlying policies and concerns,
3. To assist you in developing your own personal sense of identity and role as an attorney, so that you can resolve "ethical" dilemmas and critically evaluate the standards which have been adopted by the profession, and
4. To prepare you to successfully complete the Multistate Professional Responsibility Exam (MPRE).

The first two goals are similar to the goals in any substantive law school course. Accordingly, parts of this course and these materials will resemble any other course you have taken. But the third goal is somewhat different, because, unlike other courses where you learn material and skills to assist clients in the pursuit of their goals, in this course you must deal with your own goals apart from the client's needs or wishes. It is this difference that causes many students to approach this course with skepticism, assuming that such goals are personal and "ethics" can't be taught. But there is a difference between one's own personal sense of ethics and morality and the professional responsibilities of an attorney. The first chapter focuses on that difference, and what it means for us as attorneys.

The remainder of these materials address issues of professional conduct and regulation. The course focuses on the Model Rules of Professional Conduct to ensure that students have learned the relevant law by the time they have completed the course. A knowledge of these rules alone, however, is not enough. Throughout the course we will discuss how decisions about identity and role, coupled with suggested responses from the Rules and other relevant sources, can lead to resolution of professional responsibility problems that will not only avoid discipline but will also be acceptable to us as individuals and as attorneys. This is a major undertaking, but one of extreme importance.

LEARNING OBJECTIVES

The following, borrowed with minor changes from Professor Glesner Fines, is a good statement of learning objectives for the course:

At the end of the course, students should:

1. Master the law governing lawyers. You should understand the relationship between bar-generated disciplinary codes and other sources of law, such as cases, statutes and regulations. You should be able to identify the core issues and governing law in any troublesome situation and be able analyze complex professional responsibility problems in the core areas of concern for attorneys:

- the four C's of the attorney-client relationship
Competence, Communication, Confidentiality, and Conflict-free representation
- the three C's of the attorney-court relationship
Candor, Compliance, and Civility
- the FAIR rule for the attorney's relationship with everyone else in society
Fairness, Access, Integrity, Responsibility

Finally, you should be able to recognize the tensions among these concepts, which are inherent in the regulation of attorneys.

2. Be able to learn more. You will have the skills to research issues of professional responsibility and be aware of sources for additional help.
3. Have a clearer vision of your own professional identity and your stance on critical questions of professional role.
4. Be able to avoid getting yourself, your fellow attorneys, and your clients into trouble, by having learned some practical strategies for avoiding common professional pitfalls.
5. Have the information and skills to pass the MPRE with appropriate preparation.

CHAPTER I

THE LAWYER AS PROFESSIONAL: CONFLICTING OBLIGATIONS, CONFUSING ROLES

I. THE ROLE OF LAWYER: WHO ARE WE? WHO AM I?

Before reading the following materials, think briefly about why you chose to become a lawyer. What do you want from your professional career? What are your goals and expectations? Then think about what is expected of you. To whom do you have obligations, and what are they? Are all these obligations consistent, or do they conflict? As an attorney, what role do you play vis-a-vis your clients, the courts and the "system"? How will you and your role be perceived by non-lawyers, and are you prepared to deal with that image? Will being a lawyer impact your ability to be the person you want to be?

Consider the following excerpt from Monroe H. Freedman, *Lawyer and Client: Personal Responsibility In a Professional System* (in *Ethics and Advocacy, Final Report of the Earl Warren Conference*, The Roscoe Pound-American Trial Lawyers Foundation [1978], © Roscoe Pound Foundation, reprinted with permission) :

It is a singularly good thing, I think, that law students, and even some lawyers and law professors, are questioning with increasing frequency and intensity whether "professionalism" is incompatible with human decency - asking, that is, whether one can be a good lawyer and a good person at the same time.

Why should this be an issue? What is it about lawyering that might be inconsistent with being a "good" person? What is a good person? What is a good lawyer? These are complicated but important questions.

In his article, Freedman discusses an article by Professor Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, and continues:

Professor Wasserstrom holds that the core of the problem [as to whether one can be a good person and a good lawyer] is professionalism and its concomitant, role-differentiated behavior. Role differentiation refers, in this context, to situations in which one's moral response will vary depending upon whether one is acting in a personal capacity or in a professional, representative one. As Wasserstrom says, the "nature of role-differentiated behavior ... often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts - and especially various moral considerations - that would otherwise be relevant if not decisive."

An illustration of the "morally relevant considerations" that Wasserstrom has in mind is the case of a client who desires to make a will disinheriting her children because they opposed the war in Vietnam. [This article was written in the 70's. Substitute whatever conflict works best for you.] Professor Wasserstrom suggests that the lawyer should refuse to draft the will because the client's reason is a "bad" one. But is the lawyer's paternalism toward the client preferable - morally or otherwise - to the client's paternalism toward her children?

We might all be better served," says Wasserstrom, "if lawyers were to see themselves less as subject to role-differentiated behavior and more as subject to the demands of *the moral point of view*." Is it really that simple? What, for example, of the lawyer whose moral judgment is that disobedient and unpatriotic children should be disinherited? Should that lawyer refuse to draft a will leaving bequests to children who opposed the war in Vietnam?

If the response is that we would then have a desirable diversity, would it not be better to have that diversity as a reflection of the clients' viewpoints, rather than the lawyers'?

In another illustration, Wasserstrom suggests that a lawyer should refuse to advise a wealthy client of a tax loophole provided by the legislature for only a few wealthy taxpayers. If that case is to be generalized, it seems to mean that the profession can properly regard itself as an oligarchy whose duty is to nullify decisions made by the people's duly elected representatives. That is, if the lawyers believe that particular clients (wealthy or poor) should not have been given certain rights, the lawyers are morally bound to circumvent the legislative process and to forestall the judicial process by the simple device of keeping their clients in ignorance of tempting rights.

Nor is that a caricature of Wasserstrom's position. The role-differentiated amorality of the lawyer is valid, he says, "only if the enormous degree of trust and confidence in the institutions themselves [that is, the legislative and judicial processes] is itself justified." And we are today, he asserts, "certainly entitled to be quite skeptical both of the fairness and of the capacity for self-correction of our larger institutional mechanisms, including the legal system." If that is so, is it not a non sequitur to suggest that we are justified in placing that same trust and confidence in the morality of lawyers, individually or collectively?

There is "something quite seductive," adds Wasserstrom, about being able to turn aside so many ostensibly difficult moral dilemmas with the reply that my job is not to judge my client's cause, but to represent his or her interest.. Surely, however, it is at least as seductive to be able to say, "My moral judgment - or my professional responsibility - requires that I be your master. Therefore, you will conduct yourself as I direct you to."

1. Can a good lawyer be a good person? To what extent can (should) a lawyer put aside his or her own values in representing a client? Should a lawyer decline representation because he or she disagrees with the client? With the client's means? With procedures he or she must use to accomplish either?

Is it OK to be amoral as long as we're not immoral? Is it OK to pursue legal, but in your view immoral, ends of a client? Is there anything wrong in asking people with legal but (arguably) immoral aims to accomplish those aims themselves? Does it (should it) matter that there is likely to be less (or un-) ethical lawyers around to do the client's bidding, and if done by those with a better sense of ethics, at least there is some hope for a better (more just) result?

Are these even appropriate concerns? Should we discuss the morality or "rightness" of goals and means with the client, or are we to address only the legal aspects of a client's affairs? See MR. 2.1.

2. Is there a better way to think about what it means to be a "good lawyer"?

Consider the following:

THE GOOD LAWYER

Kevin F. Ryan, Director of Programs & Publications at the Vermont Bar Association
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Certainly one of the things we would like to imagine ourselves to be is a "good lawyer." But what does it mean to be such a creature? What makes a good lawyer? Surely professional competence constitutes part of the picture - but only a part. One can have all the professional competence in the world and use it for bad ends, use it in a mean-spirited way, or simply be a nasty person while using it. Surely something tells us that such people cannot be "good" lawyers no matter how prodigious their technical talents. So being a good lawyer means something more than simply possessing the requisite skills and knowledge to practice in a particular area of the law.

What is this "something more" that distinguishes the "good" practitioner from the "competent" practitioner? The simple answer, of course, is "ethics." But this apparent simplicity covers enormous complexity. It is not at all clear what one has added to the mix by describing someone as "ethical." For many, an ethical lawyer is simply one who practices within the bounds established by the Rules of Professional Conduct or any similar code. Like many other professions, the practice of law is hedged round by rules of conduct, laid out in officially adopted codes and enforced by professional conduct boards and the courts. But is a lawyer who adheres strictly to a code really anything more than technically competent? Such a lawyer has simply mastered the skills and knowledge required to practice (and continue practicing) in a chosen field of law. Is such a person a "good lawyer"? Not necessarily, for one can stay within the broadly defined and often indistinct boundaries of the Rules without being "good" in the larger sense we are seeking to identify. Narrow-minded, mean-spirited, nasty reprobates can avoid violating disciplinary rules. But we would hesitate to call such persons "good," despite their assiduous rule-following. In other words, following rules bears no necessary relation to being good.

Yet we find it enormously difficult to think of ethics other than in the context of rules specifying right and wrong - and in this we are the products of our age. The great modern ethical thinkers, faced with the observed diversity of views on moral questions, sought to find a solid ground upon which to determine the correct system of morals, or to figure out how to decide what to do in particular circumstances. Theories as diverse (and opposed) as Bentham's utilitarianism and Kant's duty-based ethics sought to establish a methodology for the determination of how to act in particular situations. Centuries of preoccupation with finding the appropriate standards for ethical decision-making have resulted in the common conception that ethics consists of nothing more than finding general principles and applying them to ethical dilemmas.

To frame the subject matter of ethics in this manner is to make it sound very familiar to lawyers. Lawyers are trained - perhaps they are predisposed - to look for general standards to apply to the facts of a particular situation. The study of law involves the mastery of general principles, rules, and the official interpretation of them. It also entails the development of proficiency in the application of those rules to particular situations. Law (including principles and rules, both written and unwritten) establishes the boundaries of behavior. Law tells a person what can and cannot be done, as well as what must be done in order to alter the existing order of things (e.g., contract law, the law of sales, property law). The competent lawyer is the master of these rules (or a specialized subset of them), of their interpretation by the courts, and of their application to the diverse circumstances of modern life.

Given the lawyer's deeply engrained orientation toward the determination of right and wrong by focusing on specific situations and evaluating them using general standards, it is no wonder that when lawyers think of ethics they think of a code of law-like disciplinary rules. The Rules of Professional Conduct (and similar codes in other jurisdictions) share with much of modern ethical thought the assumption that ethical behavior stems from the proper application of general standards to particular circumstances. To a large and discomforting extent, ethics for lawyers has become what it is for modern ethicists: a matter of general rules and their use to cope with quandaries.

But something has gone wrong here. For one, conduct codes merely set out a "moral baseline," specifying the bare minimum of ethical conduct. To be sure, an attorney who steals a client's funds - or misappropriates those funds to pay for something other than service to the client - is unethical and should lose the privilege of practicing law. But that does not mean that an attorney who avoids stealing or misappropriating client funds is ethical (let alone "good"): such an attorney may be merely wary of the consequences of violating the ethical rules of the profession. Surely ethics cannot be reduced to a "bad man theory" (to adapt a pithy phrase from Justice Holmes). The bad person wants to know what can be gotten away with, and follows the rules only to the extent that their violation will lead to distasteful consequences. The attorney who handles client funds properly because doing otherwise would jeopardize a license seems more bad than good. Adhering to the moral baseline in this manner puts one into a gray area between being unethical (breaking the rules) and being good. Conforming to the bare minimum earns us a passing grade, but hardly makes us excellent.

Further, modern ethical thought, as reflected in professional conduct codes, reduces the realm of ethics to unusual situations in which principles and rules conflict or speak ambiguously. But true predicaments of this sort are rare. A human life involves much more than a series of dilemmas. It involves creating oneself over time; it is a matter of daily living, of how one thinks, speaks, and acts every day. For Socrates the heart of the matter lay in the question "How best is it to live?" The Socratic question suggests a much broader conception of ethics than that found in modern thought. Socrates' question focuses our attention on a whole life rather than a particular moment in life. It asks us to consider how to be, rather than what to do. It prompts us to ponder the conditions of the good life for the human person. Possessing an adequate method for deciding what to do, or even making the right choice, in the occasional quandary does not make a person good. Being good is different from doing right, however the latter is determined.

The Socratic conception of ethics, which is experiencing a renaissance in the academic literature and among thoughtful commentators, pushes us to examine questions of character and the virtues and vices that reveal character.¹ Virtues are character traits that lead us to seek out or admire persons; vices lead us to avoid or disdain persons. Virtues do not occur naturally, but are dispositions to act in certain ways bred by proper training and by exercise. Virtues are habits (as are vices); a person who performs one honest act cannot be said to be honest. The honest person always inclines toward the honest action; one possesses the virtue of honesty if one's whole life reflects an honesty others only manage on rare occasions. But habits are only haphazardly bred by rules, which, as we have seen, establish the minimal requirements of acceptability in exceptional circumstances. Virtues (and vices) inform a whole life in a way that rules never can.

What are the virtues of the good person? Aristotle discussed such traits as bravery, temperance, generosity, magnificence, magnanimity, mildness, friendliness, truthfulness, wit, and justice. Other writers have offered different, often longer lists. But no matter what the contents of the list, the underlying idea is the same: virtues are those characteristics that we esteem; vices are characteristics we scorn.

One of the implications of looking at ethics in this way is that the virtues of the good person and the virtues of the good practitioner are unlikely to conflict. The virtues of the good lawyer may be more detailed, more directed to the specifics of the practice of law, but they are always consistent with the virtues of a good person in general. The good lawyer possesses those virtues of character that we admire in anyone - justice, moderation, honor, and so forth - and lacks those vices that we disdain in others - niggardliness, surliness, selfishness, and so forth. There is no separate morality for lawyers. The ethics of the good practitioner and of the good person are the same. Good lawyers are good persons who practice law.

Do you agree? Are you more comfortable with this formulation? Is it really that simple? Does being a lawyer and having a license to practice give you the right, or perhaps ever require you, to do things "out of character"? Think about circumstances where this might be the case. How do you deal with them? Can you avoid such challenges? If not, how can you (should you) justify them?

Is there intrinsic good in lawyering that justifies actions inconsistent with our normal behavior and character? If so, what is it?

3. Why is there an assault on lawyers? What characteristics, traits, etc. does the public believe about lawyers that causes this? Are they traits that lawyers have as people, or as lawyers? Is there truly no difference? Are these concerns of the public warranted? Can we change them? How?

¹ Popular discussion today often uses the word "character" as a positive trait that some people lack. This seems wrong. We all have a character: some of us a character that, on balance, is good; others, on balance, have a bad character. Perhaps we can even have a weak character. But none of us, at least no adult, is devoid of character. Character develops over time, for it is the product of how we think, speak, and act. It can change, but it is never absent.

4. What are the demands and expectations placed on us as lawyers? Where do they come from? Are they valid? *Make a list of things others want or expect from you as a lawyer (we will further develop this list in class).* How can you respond to these often competing demands in ways that preserve the kind of lawyer and person you want to be? What influences negatively impact on your ability to be the kind of lawyer and person you want to be? How can you respond to these?

5. Has the growth of law as a business undercut the view of lawyers as professionals? Is this desirable? What problems arise from viewing lawyers as business people rather than professionals? What benefits? Is this really an issue of professionalism, and can that be separated fully from the bigger issue of professional identity?

The ABA has been increasingly concerned with these issues, which lie at the core of the future of the Legal Profession. See ABA Commission on Professionalism, *In The Spirit of a Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986). Almost all state bars have created committees or commissions on professionalism, and many groups have adopted "Creeds of Professionalism." One such creed contains thirty-three "credos" aimed at doing away with a "win at any cost" mentality and encouraging fairness in litigation. Another is a twelve statement "pledge of professionalism." Similar tenets of professional courtesy have been adopted by both the Young Lawyers Section of the Missouri Bar and the KCMBA. All of these efforts, however, are only aspirational in nature.

Does the apparent increase in hard-ball tactics and decrease in courtesy and cooperation reflect an increase or a decrease in professionalism? Does it depend on how one defines professionalism? Is courtesy a professional value if it doesn't advance the client's interests? Or is collegiality and trust among lawyers a necessary part of professionalism regardless of the client's interests? Do these apparent changes in behavior on the part of many lawyers reflect changes in the times that are beyond our control as attorneys (and that in fact merely mirror changes in business and personal relationships) or are these matters that the Bar can and should address?

Let's return for a moment to Monroe Freedman, this time in 1991. See Monroe Freedman, *The Lawyer as Professional: The Golden Age of Law That Never Was*, http://www.txethics.org/resources_lawyerprofessional.asp?view=2Freedman. Do you agree with his formulation?

There are obviously no right answers to these difficult questions, but issues of role, identity, professionalism, and acceptance of "the system" will continue to require consideration as we proceed through these materials.

II. PROFESSIONALISM

As we saw in the preceding section, issues of professionalism bear on our sense of who we are as professionals – our personal sense of professional identity. But professionalism is also addressed in the larger context of who we are as a profession.

Although these issues are integrally related, the following article addresses the larger issue.

Rethinking "Professionalism"

Timothy P. Terrell and James H. Wildman, 41 Emory L.J. 403 (1992)

Over the past few years, "professionalism" has been much on the minds of lawyers across the country. It is more than just a topic of conversation, however. "Professionalism" is now the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held -- not only by the public but also, ironically, by lawyers themselves. Being a lawyer, particularly one engaged in private practice, seems suddenly an embarrassment rather than a source of pride. The Bar's response, unaccustomed as it is to apologizing for its social role, has been predictably defensive and schizophrenic: members are usually reminded by their leaders that, as a group, lawyers really aren't as bad as people seem to think, but they are admonished nevertheless that the profession is threatened by a decline in common decency, attitudes, and standards. Not surprisingly, then, this confused message has led to little progress in reversing whatever negative trends lawyers perceive within the practice.

The legal profession's quandary can be summarized relatively easily: lawyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes. We want to be happy in our professional lives without investigating seriously why many of us are unhappy. We want, in short, to moralize without examining our morals. Explaining this superficiality, however, is more difficult. Perhaps we are afraid of what we will find if we turn over the rock of lawyering and examine what lurks beneath. Or perhaps the problem is not with what we do as lawyers, but with our understanding of "professionalism."

The perspective of this Essay is that the concept of professionalism has become confused and disjointed because it has been diagnosed too hastily. A proper evaluation requires patience. It demands, for example, that we begin with fundamental points like, among others, the contrast between the profession's past and its present, and the changing demands society has placed on the legal system over the last half century. Once we have established a better foundation, the true substance of legal professionalism -- the values that make this nebulous concept worthy of our attention -- becomes much easier to identify. . . .

Part of the problem with the debate about legal professionalism is that the subject is a moving target. Both the legal profession and the law itself have changed dramatically over the past century, suggesting that any attempt to identify a single professional tradition or heritage may be fanciful. But this conclusion is too quick and reflects the kind of cynicism we must avoid. Instead, analyzing the changes in the profession gives us an appropriate and very important historical perspective on the present struggle to define professionalism.

A. The Bar as a "Club"

One lesson that history reveals, not surprisingly, is that some of the cynicism about professionalism is justified. The heritage of Bar associations, like that of all trade organizations, rests initially in self-interest and protectionism rather than any noble spirit of public service. Our medieval predecessors established guilds to control

competition, not to encourage it, and until relatively recently we happily continued that tradition. But before we leap to the conclusion that we should therefore condemn our past, we should realize two things: self-interest can in fact produce public benefits, and our history predicts much of the ambivalence with which we today approach professional ethics and professionalism.

A useful perspective from which to view the growth and popularity of professional associations is that of the economic theory of "clubs." This theory holds that social organizations even this informal do not arise by accident, but because they serve some purpose for their members. It would be a mistake to assume, however, as many do, that those purposes are essentially "negative" -- that is, to control behavior in ways that benefit that group but not the larger community (for example, to stifle competition). To the contrary, social groupings of this kind can in fact originate out of an interest to enhance economic efficiency, not avoid it.

The basic efficiency-enhancing feature that clubs can provide is predictability. In situations of great uncertainty -- where social circumstances are in flux or the nature and quality of a product are not readily apparent -- individuals with similar interests may organize to provide each other with consistent, comprehensible feedback, and to provide outsiders with a standard against which the members of the club might be assessed. The essential function of the group, consequently, is information . . . [T]o serve this information function, club membership must mean something; but to mean something, clubs must in turn be able to exercise serious control over entry into the group and the behavior of their members. The danger here, of course, is that rigor and consistency can devolve into rigidity and stagnation, and the organization can destroy its social usefulness.

Bar associations are excellent examples of all the features economic theory predicts, not only concerning the early structure they exhibited, but also the current challenges they face. Regarding their past, Bar associations exhibited all the classic "negative" features of a closed club:

* Barriers to entry into the profession were serious. Before the advent of law schools, the only route available was apprenticeship to a current member of the Bar, and there were very few of them. They could in turn exercise idiosyncratic control over those they permitted to work for them . . . [C]riteria could be much more socially and personally detailed, like one's race, class, religion, and so on. Later, once law schools became the principal place of initial legal education, entry was still difficult because of the expense involved . . .

* Control over the decision to admit new members was tightly held by existing members, so that growth of the organization could be kept small and slow.

* Competition among members was kept within a very narrow range. Price-fixing, for example, was not only characteristic, it was rigidly enforced. Advertising anything other than club membership was similarly prohibited.

* Written codes of conduct, on the other hand, were consequently all but unnecessary. Because the members of this club were so similar to each other (virtually all drawn from the same social stratum, often closely interconnected with each other in the community, and so on), they shared very similar personal values concerning ethics and decorum.

The Bar associations of today provide a stark contrast. Indeed, the present struggle over the concept of professionalism is largely a function of the fact that each of these characteristics has not simply changed, it has been reversed:

* The only barriers to entry into the profession are the educational requirements imposed by law schools. An applicant's racial or other social background plays no serious role, and economic background is not nearly as relevant as it once was because of financial aid and low tuitions at state- funded institutions. Competition among law schools has even lowered the educational prerequisites to remarkably low levels.

* Control over admission to the Bar is still held by the Bar itself, but those making the decisions are a relatively small group faced with assessing a very large pool of applicants. Criteria are therefore non- personal and relatively objective: graduating from an accredited law school and passing a local Bar examination. Neither of these criteria, as it turns out, are particularly difficult to meet, and few applicants are therefore excluded because of them. The profession has consequently grown very rapidly.

* Anti-competitive controls, such as those on fees and advertising, are out, and competition is fully in. Legal services are therefore no longer a luxury available only to a small segment of society; such services are now widely available, and at competitively varying cost.

* Lack of limitation on entry has meant that the Bar has grown not only in number but in the diversity of its membership on every dimension: race, religion, gender, and (of specific interest here) sets of moral values. What was once understood or assumed concerning appropriate behavior no longer pertains generally. Instead, the standards that supposedly characterize the practice of law are vague, lack serious moral force, and are constantly being challenged or rethought.

Over the last half century, then, we have witnessed the fundamental transformation not only of the Bar, but concomitantly of the information conveyed by the simple fact of Bar membership. Where membership once signaled a host of impressions or expectations about the lawyer's personality, social background, fees, tasks that would be accepted, and so on, it now indicates much less. In other words, what was once akin to a priesthood may now be little more than a fan club. The question before us now, therefore, is whether this change is significant in any way. Specifically, has it had an impact on the practice of law or the concept of legal professionalism? It has, on both.

B. Five Consequences of the Breakdown of the "Club"

The transformation of the Bar from a close-knit community of colleagues to a large, diverse, competitive service industry has generated five important consequences for the practice of law.

1. Moral Diversity, Codes of Ethics, and Professionalism

In moving from moral clubishness to moral diversity, Bar membership could have become virtually meaningless. If no particular set of values could be ascribed to lawyers -- indeed, if the public could no longer ascribe any values at all to a lawyer that might limit or channel her conduct -- then being a member of the Bar would say

very little of any significance to anyone. Neither lawyers nor non-lawyers would be able to predict the kind of interaction they would have with each other in professional contexts. This sad state of affairs would then be economically inefficient: without information, everyone would waste much of their time and energy protecting themselves from the unscrupulous, and trying to determine whom they could trust.

This extreme result has been avoided, however, by introduction of the Bar's self-generated and self-imposed codes of "professional ethics." The unique function of these sets of standards is to restore to Bar membership some basic but quite useful "moral information." In other words, despite the Bar's moral diversity and economic competitiveness, the codes announce a purported set of common values held by all Bar members. This in turn produces some level of predictability in one's interactions with lawyers: the public and other lawyers can now expect lawyers to do or not do some things in certain circumstances.

But those things and circumstances remain vague and limited. The rhetoric of these codes is often lofty, but they in fact enforce only minimum standards of behavior: sanctions are imposed only for the most egregious forms of misconduct. Thus, the "moral information" provided by the fact of Bar membership is really very small; indeed, so small as to form the irony underlying all the lawyer jokes currently so popular.

This, then, is where "professionalism" is supposed to enter the picture. Its function is to reach beyond the basic and uninspiring values enforced by the codes, and demonstrate that lawyers share, or ought to share, higher, more ambitious moral aspirations. Professionalism seeks to infuse into Bar membership the important moral information it currently lacks. But herein lies the basic problem that makes all discussions of professionalism so controversial and unsatisfying: in an era characterized by moral diversity and economic competitiveness, it is very difficult to discuss any "shared professional aspirations." The differences that separate us may simply be too vast.

But there is no reason to assume that moral diversity means we are left with moral nihilism. Quite the contrary, it means that the need to identify the essential elements of our shared professional heritage is greater than ever, for that perspective will give us an anchor for the inevitable debate about the profession's appropriate aspirations.

2. Increased Client Control

The effort to identify those aspirations faces another subtle challenge that is an outgrowth of the Bar's new moral diversity and sense of competitiveness. The popular image of the lawyer as an independent and objective counselor to whom a client could turn for dispassionate and, if necessary, unwelcome advice has eroded badly in recent years. . . . The pressure on lawyers today is to portray themselves as "can do" people, dedicated to making every possible effort to achieve the goals set by the client. This pressure has in turn redefined how lawyers relate to each other (and often how they portray each other to clients), and it has significantly altered the way lawyers relate to the legal system. Although legal codes of ethics insist that lawyers owe a loyalty to that system itself, the legal system often seems to be viewed today as simply one more tool to be manipulated as necessary in service to a client.

3. Expansion of "Rights-Consciousness"

The lawyer's changing relationship to the legal system has coincided with the public's changing perception of that system. The law is no longer viewed as a conservative social institution that reveres the past and is suspicious of change. Quite the contrary, the popular image of the law today is that of a dynamic social force that can, and should, vindicate the "rights" of citizens. Lawyers, as "can do" people, have done their part to foster this modern perspective, shifting much of the debate about the proper social role of law into "rights-talk." As a consequence, the client's expectation is that his lawyer will be as creative and dynamic as the new sense of the legal system suggests he should be. And given the transformations occurring within the Bar itself -- its moral diversity and the demands of competition -- there are no traditional conservative forces within the profession to hinder the continuation of this trend.

4. Challenges for the Judiciary

As both the Bar and the public have changed their approach to the legal system, a particularly daunting set of new challenges has arisen for the judiciary. Judges are lawyers with only the legal system itself as a client, and their unique responsibility is therefore to its proper functioning. But that duty can no longer be fulfilled simply by deciding legal issues in the way the public imagines judges do; instead, judges must now act as babysitters of the system's processes as well. Those processes have been strained by the use given the system by eager clients and their equally eager lawyers, and as diversity and competitiveness increase within the Bar, there is little consensus among litigators about limits they should impose on themselves. Judges, therefore, find themselves as the only serious source of guidance on the appropriate use of the courts in the service of clients. . . .

5. Changing Role of Law Schools

Law schools face a related challenge. They too have changed dramatically in both size and composition over the last half century, keeping pace with the increased demand for and interest in legal services. They have therefore been a major force in the move within the Bar toward moral diversity and economic competition, and furthermore, then, in the undermining of traditional impressions of the professional heritage of lawyers. The question, however, is whether law schools consequently have some special responsibility for reinvigorating the discussion of professionalism, and if so, what their effort should look like. It would be very easy for members of the Bar to cast special blame on law schools for the current moral predicament of lawyers -- and they often do -- claiming that the decline of professionalism is a function of a lack of academic interest in it: since it isn't taught early, it is never appreciated properly.

But this view assumes far too much. It assumes either that law professors know what professionalism is, and fail to teach it, or that they too are confused, and therefore avoid the matter. The truth, however, is probably more subtle: law schools do not focus much attention on the ideas that seem to be most popular in the current discussions of professionalism, not because they have failed to see their responsibility in this regard, but generally because they are not much impressed with the nature and substance of those ideas. Instead, by continuing to do what they do best -- focusing on the rigorous examination of legal rules and principles -- law schools are probably doing a good job of teaching (albeit implicitly and accidentally) the basic values that

should be related to professionalism, an argument we will complete in later sections of this Essay. They would do better, however, to acknowledge those values more forthrightly.

C. Minimum Points of "Procedural" Agreement Concerning Professionalism

But for law schools or Bar associations or anyone else to acknowledge and preach the values of professionalism, lawyers must first agree on the nature and substance of the sermon. This is particularly difficult, as we have seen, in the context of a profession whose heritage has apparently changed significantly over the last half century, and is still evolving. We tackle in the next section of this Essay the task of identifying what we believe are the essential substantive values of legal professionalism; here, however, we seek to identify a few less controversial "procedural" aspects of professionalism with which we believe all lawyers, despite much disagreement on substance, would nevertheless agree.

By "procedural" we mean the scope and purposes within the legal profession of the values of professionalism whatever the substance of those values turns out to be. We believe there are three such propositions that lie behind all discussions of professionalism: the universality of its values, its relevance to the practice of law, and certain general functions it performs within the Bar.

1. Universality

We would argue that all lawyers believe that, if "professionalism" exists, then it applies to all lawyers and all areas of the practice of law, not to some smaller group within the Bar. . . .

2. Relevance

As a second point of "procedural" agreement, we believe all lawyers accept the idea that some set of special demands is made on them -- which we now characterize as "ethics" and "professionalism" -- even if their substance remains controversial. . . .

3. Functions

Despite an inevitable focus on actions rather than attitudes, the demands of professionalism, whatever they may be in detail, serve two functions that can have an impact on attitudes. First, if it were well-defined, professionalism would help the Bar attract people to the profession who already have the values we hope will continue within it. This could in turn have both positive and negative effects: on the one hand, it would allow experienced lawyers to save the time involved in preaching those values to new entrants; on the other, that "saved" time would be a loss to the profession's sense of its heritage, and therefore to professionalism. Second, again if it were well-defined, professionalism would announce to all new entrants into the profession that the Bar's contemporary moral diversity and competitiveness, while consistent with the minimal standards of the Model Code and Model Rules, nevertheless have their limits. In other words, some aspirational, professional values would be expected to be held by each lawyer regardless of his or her personal proclivities or desires.

The central issue in the professionalism debate, then, becomes: What are those values or aspirations that we must all share?

* * * * *

The authors of this article suggest some answers to their questions of shared values of professionalism. *Try your hand at answering this question for yourself. What are some of the basic values that all attorneys must or should share? Make a list to discuss in class.*

CHAPTER II

PROFESSIONAL REGULATION

As we have seen in Chapter I, lawyers, by virtue of their position, may be entitled (and perhaps required) to act for clients in ways which might not be acceptable if not acting in such capacity. How far, however, can lawyers go? How far should they go? The possible answers deriving from perceptions of role were addressed in Chapter I. This Chapter will address the more formal constraints on attorney conduct.

There are many sources of "law" governing conduct by attorneys. As citizens, attorneys are subject to the "positive" law of the jurisdictions in which they practice. Thus, in some instances, criminal statutes relating to perjury, conflict of interest and related matters must be consulted. Court and agency rules of practice, procedure and evidence may provide guidance as well. In addition, some guidance may be found in court decisions in malpractice, disqualification, and ineffective-assistance-of-counsel cases.

The primary source of guidance for attorneys, however, is found in the rules developed by the Bar. Those rules are currently embodied in the Model Rules of Professional Conduct. The Model Rules were initially adopted by the ABA in 1983 to supersede the Code of Professional Responsibility, which had been adopted in some form in 49 states. The Model Rules have been adopted in the large majority of states (although a few states have explicitly rejected them). The Rules were adopted in Missouri (effective January 1, 1986) and Kansas (effective March 1, 1988). The Missouri and Kansas rules are available on the disk that accompanies the Standards Supplement.

The Code was written by the American Bar Association in 1969 to replace the then-existing Canons of Professional Ethics. The Code, in effect from 1969 through 1983, was divided into three parts: Canons, Disciplinary Rules and Ethical Considerations. The Rules rejected this 3-part approach and contain instead "black letter" rules and commentary. Neither the Rules nor the Code provide sanctions for violation of its proscriptions. These are left to the courts which supervise enforcement.

In the late 1990's, a Commission (commonly called Ethics 2000) completed study of possible revisions to the Model Rules and recommended numerous changes to those Rules. The ABA House of Delegates adopted some of the changes at its midyear meeting in February 2002. Additional changes were adopted in 2003. We will be studying the current ABA Rules (which can be found in the Standards Supplement), but we will also be referring to the Missouri and Kansas versions of the rules. Both the Missouri and Kansas Supreme Courts adopted versions of the amended rules effective July 1, 2007. Both jurisdictions adopted most of the changes, but there are still some significant differences between the ABA rules and the Missouri and Kansas versions of the rules.

At this point, *read through the Model Rules to get a sense of their structure and approach.* It may also be desirable to compare the structure of the Rules to that of the

Code.

The Code was heavily criticized on many grounds, among them its failure to set out guiding principles, its inability to provide any real guidance to lawyers in making difficult decisions, its failure to take into account the realities of present day law practice, and its over-protectiveness of lawyers. The Model Rules were drafted in an attempt to meet these criticisms, but, partly as a function of compromises during the adoption process, there is some question as to whether this effort was successful. The most recent changes reflect changes in practice as well as a response to corporate crises such as Enron. Although major overhaul of the Rules was considered, in most areas, amendments were more in the nature of tinkering rather than major structural change.

1. Why should we have a code of professional conduct? What purposes should it serve? Whose interests should it protect? What principles should be reflected, and how should these be prioritized? What are the priorities reflected in the current Rules? Have they changed in the last few years? Can you identify the prioritization of principles? Is it consistent? If not, why not? How should it be changed?

2. Who should regulate lawyers? The profession? The state? The judiciary? Consumers of legal services? Some combination of the above? Who regulates other trades and professions? Is there anything unique about law which requires a particular form of regulation?

3. Whose values should a professional code reflect? Can a code of conduct be ethically neutral? Should it? If not, whose ethics and values should be embodied therein? Can one code of conduct govern the practice of law in diverse settings by diverse groups of professionals? If it must, must we insure representation by the many factions within the Bar in the drafting of such a code? Is a code drafted by the organized Bar necessarily a "political" document?

4. How specific should a code be? Should it be a collection of "do's" and "don't's" or a document to "sensitize lawyers to the scope, depth and complexity of the commitments that they have undertaken in entering the profession" and to act as "a catalyst for a continuing discourse on the profession's *raison d'être*?" See Frankel, *Book Review, Code of Professional Responsibility*, 43 U. Chi. L. Rev. 874 (1976). Should it be a document reflecting and rationalizing the underlying principles of the profession? Should it be aspirational, or merely set lower limits of conduct? What are the costs and benefits of either approach?

5. Where can attorneys go for guidance if the Code or Rules are not crystal clear in their resolution of a professional responsibility problem? There are several sources of help for attorneys with professional responsibility problems, although a necessary first step is consulting the Code or Rules.

As noted, the Code or Rules are not applicable in a jurisdiction until adopted by the appropriate governmental body. They are generally adopted by the highest court in

a state as a court rule (in Missouri, as Rule 4 of the Rules Governing The Missouri Bar and the Judiciary, and in Kansas, as Rule 226, Rules for Discipline of Attorneys), and decided cases can be found through the annotated rules. These cases may provide more definitive interpretations of the relevant rules and generally have precedential value.

The American Bar Association and local bar committees issue opinions which are advisory only and are not binding on the courts. They are often referred to and relied on in court opinions, however. The ABA Standing Committee on Ethics and Professional Responsibility will respond to requests for interpretations of the Rules in formal or informal ethical opinions. Formal opinions are issued on questions of wide significance, whereas informal opinions tend to respond to more specific problems. Both formal and informal opinions of the ABA committee are published. The ABA opinions and those of many states and local bars are available in the ABA/BNA Manual, and many are available on-line. In addition, summaries of recent formal ethics opinions can be found at <http://www.abanet.org/cpr/ethicopinions.html>. Missouri formal and informal opinions are available on-line in searchable format at the "Professionalism" tab of the Missouri Bar website, www.mobar.org..

In Missouri, Supreme Court Rule 5.30 provides as follows:

OPINIONS AND REGULATIONS BY ADVISORY COMMITTEE

(a) The advisory committee may give formal opinions as to the interpretations of Rules 4, 5, and 6, and the amendments or additions thereto and may make regulations consistent therewith for the administration of Rules 4, 5, and 6. Formal opinions and regulations of the advisory committee shall be published in the Journal of The Missouri Bar after adoption thereof.

(b) The chief disciplinary counsel or any member of the bar who is substantially and individually aggrieved by any formal opinion of the advisory committee may petition this Court for review of the opinion. The Court in its discretion may direct that the petition be briefed and argued as though a petition for an original remedial writ has been sustained, may sustain, modify or vacate the opinion, or may dismiss the petition.

(c) The ethics counsel on behalf of the advisory committee on request may give a member of the bar an informal opinion on matters of special concern to the lawyer. Informal opinions are not binding. Written summaries of informal opinions may be published for informational purposes as determined by the advisory committee.

(Adopted June 1995; amended September 2002, effective Jan. 1, 2003)

In addition to Ethical opinions and decided cases, attorneys with professional responsibility problems should determine whether rules (either mandatory or advisory) exist for the particular type or area of practice in which they are involved. These can often be helpful when trying to determine a course of conduct. See, e.g., ABA Standards Relating to the Administration of Criminal Justice: Prosecution and Defense

Functions (guidelines); American Academy of Matrimonial Lawyers, *Bounds of Advocacy*(2000)(<http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm>)(guidelines); S.E.C. Rule of Practice 2(e), 17 C.F.R. §201.102(e) (mandatory rule) and Standards for Professional Conduct of Attorneys, 17 C.F.R. §205 (adopted in response to the Sarbanes-Oxley Act).

An important resource for researching and resolving professional responsibility issues is the Restatement of the Law Governing Lawyers, which was adopted by the American Law Institute. The Restatement is becoming an important source of guidance for lawyers. It can be found in the Standards Supplement and should be consulted regularly as part of your reading for the course. In addition, relevant cases and articles can be found using the ABA/BNA Manual on Lawyer's Professional Conduct and the ABA's Annotated Model Rules of Professional Conduct. Much helpful information can also be found on the ABA's Center for Professional Responsibility website, which can be accessed at <http://www.abanet.org/cpr>. Finally, assistance in researching professional responsibility issues can be obtained from Professor Glesner Fines' website at <http://www.law.umkc.edu/faculty/profiles/glesnerfines/bgf-13.htm>.

If research efforts fail and an advisory opinion is impracticable, an attorney should discuss the problem with other reputable lawyers (taking care, of course, to preserve confidentiality [see Model Rules (2003), Rule 1.6(b)(2)]). In addition to hopefully getting sound advice, this will help to establish a good faith attempt at proper resolution of the problem should disciplinary action ultimately ensue.

CHAPTER III

ADMISSION AND DISCIPLINE

I. ADMISSION

A. *Introduction*

The power to grant admission to the practice of law is an inherent judicial power. "Only the judicial department of government has power to license persons to practice law." *Hulse v. Criger*, 363 Mo. 26, 147 S.W.2d 855, 857 (en banc. 1952).

Admission to practice is governed by the highest court in each state and by the various federal courts. The courts generally establish standards for admission by court rule, and delegate to a Board of Law Examiners the power to administer the rules and promulgate regulations consistent therewith. In Missouri, the rules are found in Supreme Court Rule 8. A comprehensive guide to bar admissions in all states is available at the National Conference of Bar Examiners website and can be accessed and downloaded at <http://www.ncbex.org/comprehensive-guide-to-bar-admissions/>.

The states have broad powers to establish rules for admission, subject to Fourteenth Amendment constraints.

Schware v. Board of Bar Examiners, 353 U.S. 232 (1951):

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

In *In re Alexander*, 807 S.W.2d 70, cert. denied, 502 U.S. 885 (1991), the only reported case in Missouri addressing law student registration, the Court stated:

The purpose of Rule 8 is to exclude from the practice of law those persons possessing traits that are likely to result in injury to future clients, obstruction of the administration of justice, or a violation of the ethical standards established for members of the bar. [One] must possess good moral character to be admitted to the Bar and must qualify himself by the long preparation and study prescribed. He must demonstrate his qualifications by passing strict tests. To properly do his part as an officer of the court in the administration of justice, his conduct must conform to a high standard of ethics. Anything less than these standards may bring disrepute upon the legal profession, impair the standing of the courts and impede the administration of justice.

B. Requirements for Admission

Typically, states require a showing of proficiency in the law, normally through the passage of a bar examination. See, e.g., Missouri Supreme Court Rule 8.08. In addition, they require that the applicant for admission be "of good moral character." See Missouri Rule 8.05. Missouri Supreme Court Rule 8.14 states:

The practice of law in this state is a privilege. The burden of demonstrating that the requirements of this Rule 8 have been met shall be upon the applicants.

While the United States Supreme Court has been unwilling to "enter into a discussion whether the practice of law is a "right" or "privilege", *Schware v. Board of Bar Examiners*, 353 U.S. at 239, n.5, it has upheld placing the burden of proving compliance with necessary requirements on the applicant. *Konigsberg v. State Bar of California*, 353 U.S. 252 (1961).

1. Proficiency

There have been many challenges to the denial of admission based on failure of the bar examination, but these have not fared well in the courts. Illustrative is *Harper v. District of Columbia Committee on Admissions*, 375 A.2d 25 (D.C. 1977):

Next, we consider the contention that there is no valid relationship between the examination and the practice of law within the District of Columbia. Such a challenge has been raised in various states and uniformly rejected by the reviewing courts. The Fifth Circuit quoted *Banks v. Miller* as follows: The relevant question must then be whether the passing of an examination made up of subjective essay-type questions has a rational connection with the applicant's ability to practice law in the State of Georgia. It is beyond question that it does. While plaintiff would apparently favor a more objective type of examination, much of an attorney's actual work once admitted into practice involves the analysis of complicated fact situations and the application thereto of abstract legal principles. Both in legal practice and with these essay-type questions, recognition of the legal problem presented and well-reasoned explication of the relevant considerations is of utmost importance. We have no hesitation in concluding that the Committee's essay examination has a rational relationship to the practice of law in the District of Columbia and hence is a valid prerequisite to admission to the Bar.

Challenges based on objective questions have fared no better. See, e.g., *In re Revision of the Montana Bar Exam*, 720 P.2d 285 (1986) (rejecting challenge to use of the Multistate Bar Exam).

What is proficiency? What level of performance on the bar exam is sufficient to demonstrate proficiency? While the Missouri Supreme Court recently reduced the passing score for Missouri, that decision bucks the national trend. Many jurisdictions have increased their minimum passing scores. How should a jurisdiction determine its passing score? See *Amendments to Rules of the Supreme Court Relating to*

Admissions to the Bar, 843 So.2d 245 (Fla. 2003), where the Court relied on an expert to determine the appropriate score to assess proficiency. What considerations should go into setting the pass rate?

Of equal or greater importance, does the bar exam adequately test the characteristics necessary for good lawyering? If not, how else could bar authorities determine proficiency? The bar exam has come under fire in recent years. Consider the following:

Society of American Law Teachers Statement on the Bar Exam
52 J. Leg. Ed. 446 (2002) (<http://www.saltlaw.org/positionbarexam.htm>)
(footnotes omitted)

Summary:

Bar examinations, as currently administered,

- fail to adequately measure professional competence to practice law,
- negatively impact law school curricular development and the law school admission process, and
- are a significant barrier to achieving a more diverse bench and bar.

Recent efforts in some states to raise the requisite passing scores only serve to aggravate these problems. In response to these and other concerns outlined below, the Society of American Law Teachers (SALT), the largest membership organization of law professors in the nation, strongly urges states to consider alternative ways to measure professional competence and license new attorneys.

The Current Bar Exam Inaccurately Measures
Professional Competence to Practice Law

Although the history of the bar examination extends back to the mid-1800s, when law school attendance was not a prerequisite for a law license, the present bar examination format – a 200 question, multiple choice, multi-state exam (the MBE), combined with a set of essay questions on state law – dates only from the early 1970s. In creating the MBE, the National Conference of Bar Examiners was responding to states' desires to find a time- and cost-efficient alternative to administering their own comprehensive essay exams. More recently, some states have adopted a "written performance" test in addition to the MBE, state essay exam questions, and the multiple choice ethics exam (MPRE).

The stated purpose of the bar examination is to ensure that new lawyers are minimally competent to practice law. There are many reasons why the current bar examination fails to achieve its purpose. First, despite the inclusion of multiple sections, the exam only attempts to measure a few of the many skills new lawyers must possess in order to competently practice law. A blue ribbon commission of lawyers, judges and academics issued a report (The MacCrate Report) detailing the skills and values that competent lawyers should

possess. The bar examination does not even attempt to screen for many of the skills identified in the MacCrate Report, including key skills such as the ability to perform legal research, conduct factual investigations, communicate orally, counsel clients and negotiate. Nor does it attempt to measure other qualities important to the profession, such as empathy for the client, problem-solving skills, the bar applicant's commitment to public service work or the likelihood that the applicant will work with underserved communities.

Second, the examination overemphasizes the importance of memorizing legal doctrine. Memorizing legal rules in order to pass the bar examination does not guarantee that what is memorized will actually be retained for any length of time after the exam. Memorization of legal principles so that one can answer multiple-choice questions or spot issues on an essay exam does not mean that one actually understands the law, its intricacies and nuances. In fact, practicing lawyers who rely upon their memory of the law, rather than upon legal research, may be subjected to judicial sanctions and malpractice claims. Yet, a large part of successfully taking the bar examination depends upon the bar applicant's ability to memorize hundreds of legal rules. The ability to memorize the law in order to pass the bar examination is simply not a measure of one's ability to practice law.

Third, the exam assesses bar applicants' ability to apply the law in artificial ways that are unrelated to the practice of law. In most states, up to one half of the total bar examination score is based upon the Multi-State Bar Exam (MBE). This six-hour, 200-question, multiple-choice test covers the majority/minority rules in six complex, substantive legal areas. In answering the questions, the examinee must choose the "most correct", or in some cases, the "least wrong" of four answers. No practicing lawyer is faced with the need to apply a memorized legal principle to a set of facts she has never seen before and then choose, in 1.8 minutes, the "most correct" of four given answers. No lawyer can competently make decisions without more context for the case and without the opportunity to ask more questions or to clarify issues. Yet, if a bar applicant cannot successfully take multiple-choice tests, the applicant may never have the opportunity to practice law.

Fourth, a substantial portion of the examination does not test the law of the administering state. The MBE questions are based upon the majority/minority rules of law that may, or may not, be the same as the law in the administering state. In addition, many states have now adopted the Multi-State Essay Exam (MEE), which is also based upon majority rules rather than the administering state's law. In all states, up to one-half of the examination is not based upon the administering state's own laws; in some states, the entire examination requires no knowledge of the particular administering state's governing law. Thus, even if one believes that memorizing the law equates to "knowing" the law, the existing examination does not test how well the applicant knows the law which he or she will actually use in practice.

Fifth, the examination covers a very wide range of substantive areas, thus failing to recognize that today's practitioners are, by and large, specialists not generalists. Although some basic knowledge of a broad range of fields is important, the current examination does not test for basic knowledge, but instead often tests relatively obscure rules of law. In the modern legal world, it is virtually impossible, even for the most diligent, skilled and experienced

lawyer, to truly remain current in more than one or two related fields. The examination thus fails to test for competence as it is really reflected in today's market - a market in which lawyers need expertise in their specific area of practice, rather than a broad but shallow knowledge of a wide range of legal rules.

Sixth, most law students take a ten-week bar review course, and some take an additional course on essay writing or on how to take multiple-choice questions, in order to pass the bar examination. These review courses, which may cost as much as \$3,000, drill bar applicants on the black letter law and "tricks" to answering bar examination questions. They are not geared toward fostering an in-depth understanding of important legal concepts, nor do they focus on synthesizing rules from various substantive areas. The content of the review courses, and the necessity of taking the courses in order to pass, belie the argument that the bar examination is geared toward testing professional competence or aptitude in any meaningful way.

The Current Bar Exam has a Negative Impact on Law School Curricular Development and the Law School Admission Process

In addition to failing to measure professional competence in any meaningful way, the bar examination has a pernicious effect on both law school curricular development and on the law school admission process. From the moment they enter law school through graduation, law students realize that unless they pass the bar examination, their substantial financial commitment and their years of hard work will be wasted. As a result, many students concentrate on learning primarily what they need to know in order to pass the bar examination, which often translates into high student attendance in courses that address the substantive law tested on the bar examination and reduced participation in clinical courses – the courses designed to introduce students to the skills required for the actual practice of law – and in courses such as environmental law, poverty law, civil rights litigation, law and economics, and race and the law. As a result, the students fail to fully engage in a law school experience that will give them both the practical skills and the jurisprudential perspective that will make them better lawyers.

In addition to being a driving force in the law school curriculum, the bar examination inevitably influences law school admission decisions. Schools want to admit students who will pass the bar examination. A high bar pass rate bodes well for alumni contributions, is perceived to play an important role in U.S. News and World Report rankings, brings a sense of satisfaction to the faculty, eases students' fears about their own ability to pass the examination, and makes it easier to attract new students. Since there is some correlation between LSAT scores and bar examination passing scores, law school admission officers may be overly reliant on LSAT scores in admitting students. As Dean Kristin Glen notes, "If you take students who know how to take a test almost exactly like the bar examination and know how to take it successfully, as the LSAC study tells us is the case with the LSAT, you don't actually have to do much with those students in law school to assure their success on the bar examination." Thus, many schools may over-emphasize the value of the LSAT, at the expense of admitting students who will bring a broader perspective into the student body, into law school classes, and ultimately, into practice.

Finally, the bar examination has a negative impact on how law schools assess students. Like the bar examination, most law school grades are based upon a one-time “make it or break it” examination that focuses on only a very few of the many skills that competent lawyers need. If the bar examination assessed a broader range of skills, or assessed skills in various ways, law schools might also adjust their assessment modalities so that they were not all geared toward rewarding just one type of skill or intelligence. In sum, from the admission process, through curriculum choices and law school assessment modalities, the bar examination has a far-reaching negative pedagogical effect.

The Current Bar Exam Negatively Affects States' Ability to Create a More Diverse Bench and Bar

In the 1980s and 1990s, many states and federal circuits established commissions on racial and gender equality. After extensive study, many of these commissions concluded that people of color were under-represented in the legal profession on both a state and national level, that there is a perception of racial and ethnic bias in the court system, and that there is evidence that the perception is based upon reality. To begin to achieve a more racially and ethnically balanced justice system, many commissions recommended that states take affirmative steps to increase minority representation in the bench and bar.

There are many reasons for states to want a more diverse bench and bar. A diverse bench and bar improves public perceptions about the justice system. It also positively impacts the availability of legal services for underserved segments of our population. Additionally, a more diverse bar is likely to be a more publicly-minded bar. A University of Michigan study found that among graduates who enter private practice, “minority alumni tend to do more pro bono work, sit on the boards of more community organizations, and do more mentoring of younger attorneys than white alumni do.”

The failure of the current bench and bar to be as diverse as it could be is partly attributable to the existing bar examination. The current examination disproportionately delays entry of people of color into, or excludes them from, the practice of law. A six-year study commissioned by the Law School Admission Council (LSAC) indicates that first-time bar examination pass rates are 92% for whites, 61% for African Americans, 66% for Native Americans, 75% for Latino/Latina and 81% for Asian Americans. Although the disparity between pass rates narrowed when applicants re-took the bar examination, a substantial number of applicants who failed on the first attempt did not re-take the exam. And for those who did re-take the examination, the psychological and financial cost of doing so was extremely high.

Despite the disparate impact that the bar examination has on people of color, numerous states have raised, or are considering raising, the passing scores on their bar examinations. Many states have hired Stephen Klein, Ph.D., the National Conference of Bar Examiners’ chief psychometric consultant, to help them set a new passing score and to help them determine the effect of the higher score on minority passing rates. Klein has concluded that raising the passing score on the bar examination will not disproportionately affect minority bar applicants. Serious flaws appear to exist both in the

methodology Klein uses to set new passing scores and in his contention that higher passing scores will not disproportionately impact people of color. In fact, one commentator has found that not only will raising the passing score have a disparate impact on the bar passage rate for people of color, the decision to raise bar passing scores also correlates with admission officers putting more weight on the LSAT, rather than on undergraduate GPAs, thereby widening the law school admission gap between white students and students of color.

Even if the bar examination were a valid screening device, one would have to ask whether its disproportionate impact on people of color could be justified. Given that the bar examination is not a good measure for determining professional competency, it is simply wrong to retain it without trying to find a better assessment tool.

Alternatives

We cannot hope to exhaust all the possible alternatives to the bar exam in this brief document. But preliminarily, SALT recommends that states begin to explore one or more of the following alternatives:

1. The Diploma Privilege. This method of licensure, currently used in Wisconsin, grants a law license to all graduates of the state's ABA accredited law schools.
2. A Practical Skills Teaching Term. Using this method of licensure, states could require satisfactory completion of a ten-week teaching term, similar to one phase of the licensing requirements in some Canadian provinces. During the Canadian teaching term, bar applicants must pass two, three-hour tests which assess their knowledge of basic principles in ten substantive areas. They also receive training and must receive a passing grade on assessments in interviewing, advocacy, legal writing and legal drafting skills.
3. The Public Service Alternative to the Bar Exam (PSABE). States could adopt the pilot project proposed by Dean Kristin Glen, in which bar applicants are given the option of either taking the existing bar exam or working for 350 hours over ten weeks within the court system and satisfactorily completing a variety of assignments in which competence on all of the MacCrate Report skills are evaluated by trained court personnel and law school clinical teachers.
4. Computer-Based Testing. States also should begin exploring the use of computer based testing as another potential way to assess a broader range of skills and to measure the skills in ways that better reflect the practice of law.

These alternatives, and others that might be developed, can provide states with options other than the current examination to measure the competence of nascent lawyers. SALT recommends that states begin to study and experiment with these and other alternatives to the existing bar exam so as to ameliorate the pernicious effects of the existing examination structure.

Conclusion

The bar examination, by testing a narrow range of skills, and testing

them in a way unrelated to the practice of law, fails to measure in any meaningful way whether those who pass the examination will be competent lawyers. In addition to not measuring what it purports to measure, the examination negatively impacts the law school admission process, as well as course curriculum and content, and impedes the attainment of a more diverse bench and bar. Raising the passing score on the bar examination exacerbates these negative effects. Thus, SALT strongly opposes the move to increase the passing score on the bar examination. Maintaining the status quo is not enough. SALT recommends that states make a concerted, systematic effort to explore better ways of measuring lawyer competency without perpetuating the negative effects elaborated above.

Do you agree with the criticisms expressed? What about the proposed alternatives? Do you think such alternatives are feasible? Desirable? Why or why not?

Can you structure a better bar admissions process? What would it look like? What are the impediments to adopting such a system?

2. *Good Moral Character*

The more common legal challenges arise where the Board finds that an applicant has failed to meet his or her burden of proof on the issue of good moral character and denies admission accordingly. Good moral character is a difficult term to define. It had, in the past, been used to keep out, or at least subject to close scrutiny, those who were not viewed to be in the mainstream. There are those who think it still does. As you read the following, think about what ought to constitute “good moral character” and what characteristics reflect absence of that character. Think also about the costs and benefits of character screening. Does such screening go too far, or not far enough?

In re Eimers, 358 So. 2d 7 (Fla. 1978):

The Florida Board of Bar Examiners (the Board) has requested certain information for its guidance in determining the admissibility of an applicant to The Florida Bar.

The question which has been submitted by the Board with request for this Court's answer is:

Whether an applicant with an admitted homosexual orientation who is fully qualified for admission to The Florida Bar in all other respects can qualify for admission under the provisions of Article IV, Section 19, of the Rules of the Supreme Court of Florida Relating to Admission to the Bar, which section places a strict prohibition against any recommendation by the Board to the Supreme Court for admission to The Florida Bar for a person not determined to be of good moral character.

We answer this question in the affirmative, noting that our response is limited to situations in which the applicant's sexual orientation or preference is at issue. This opinion, then, does not address itself to the circumstance where evidence establishes that an individual has actually engaged in homosexual acts.

The applicant in the instant case is a graduate of an accredited law school, is certified for admission to the Pennsylvania Bar, and has passed all parts of The Florida Bar examination. The Florida Board of Bar Examiners has found him qualified for admission to The Florida Bar in all respects with the possible exception that he may fail to meet the "good moral character" standard for admission due to his homosexual preference.

The applicant admitted his homosexual preference in response to inquiry made at a hearing before the Board. He was not questioned about what sexual acts he may have engaged in. Further, no evidence was presented indicating that the applicant has acted or plans to act on his sexual preferences.

The United States Supreme Court described the term "good moral character" as "unusually ambiguous":

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law. (Footnotes omitted)

Konigsberg v. State Bar of California, 353 U.S. 252, 262-263 (1957).

Wary of the state's capacity to arbitrarily deny an applicant admission to a state bar, the Supreme Court recognized as early as 1866 that the reasons for denying admission should be related to the purposes for exclusion. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (test oath required of all candidates for admission to the bar bore no relation to the qualifications necessary for the profession); cf. *In re Rouss*, 221 N.Y. 81, 85, 116 N.E. 782, 783 (1917). However, as long as there was a rational connection between the qualification and the applicant's ability to practice law, courts could exclude incompetent and iniquitous persons from the legal profession to protect clients and to assure a credible bar.

Elucidating upon these principles in the landmark case of *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), the Supreme Court held that:

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. (Emphasis added)

Id. at 238-239.

Thus, in determining fitness for admission to the bar, state courts must now meet the standard imposed by the due process clause found in the Fourteenth Amendment. In the instant case, the issue which must be resolved is whether there is a rational connection between homosexual orientation and fitness to practice law.

In assessing the reasonableness of the relation between homosexual orientation and moral unfitness to be an attorney, we must make reference to the purposes promoted by ostracizing the morally unfit. The layman must have confidence that he has employed an attorney who will protect his interests. See Drinker, Legal Ethics, p. 89-188 (1953). Further, society must be guaranteed that the applicant will not thwart the administration of justice. These exigencies arise because the technical nature of law provides the unscrupulous attorney with a frequent vehicle to defraud a client. Further, the lawyer can obstruct the judicial process in numerous ways, e. g., by recommending perjury, misrepresenting case holdings, or attempting to bribe judges or jurors. Consequently, if an applicant has committed certain illegal acts in the past, he may represent a future peril to society which would justify denying the applicant admission.

In the instant case, however, we cannot believe that the candidate's mere preference for homosexuality threatens these societal exigencies. In a related context, we note that former Justice Ervin in *The Florida Bar v. Kay*, 232 So.2d 378 (Fla.1970) (Ervin, C. J., specially concurring)* observed:

While Respondent's act definitely affronts public conventions, I am concerned as to the extent of the authority of the Board of Governors of The Florida Bar under controlling concepts of due process to continue the discipline of Respondent since there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent's part to live up to the professional responsibility and conduct required of an attorney. . . .

The present record contains no evidence scientific, medical, pathological or otherwise suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar. . . .

Since it is held in Florida that The Bar has jurisdiction to discipline Florida Bar members concerning their personal or private morals, it would appear appropriate to require that such discipline be subject to a

* In *The Florida Bar v. Kay*, supra, this Court considered the propriety of permanently disbarring an attorney who was convicted of indecent exposure after being observed engaging in a he Bar indicated that no permanent disbarment was intended and he was subsequently readmitted to practice. While we find the following language persuasive, we do not mean to imply that we are not unmindful of the differing standards to be met for admissions to The Bar as compared to disciplinary or disbarment proceedings.

showing originally or when reinstatement is sought that there is a substantial connection between a member's antisocial behavior and his ability to otherwise carry out his professional responsibilities as an attorney. Otherwise, The Bar will be virtually unfettered in its power to censor the private morals of Florida Bar members, regardless of any nexus between the behavior and the ability to responsibly perform as an attorney. Governmental regulation in the area of private morality is generally considered anachronistic in the absence of a clear and convincing showing there is a substantial connection between the private acts regulated and public interests and welfare. (Emphasis added) Id. at 379-381.

Accordingly, we find that the applicant in the instant case is qualified for admission to The Florida Bar under the provisions of Article IV, Section 19, of the Rules of the Supreme Court of Florida Relating to Admission to The Florida Bar.

It is so ordered.

BOYD, Justice, dissenting.

Applicant admits he is a homosexual. Before a finding on the issue of his fitness to practice law I would remand this cause to the Board of Bar Examiners for an inquiry into whether he has committed homosexual acts of the kind criminally outlawed by Section 800.02, Florida Statutes. There should not be admitted to The Florida Bar anyone whose sexual life style contemplates routine violation of a criminal statute.

What, if any, types of sexual conduct are appropriate factors in determining admission to the Bar? See generally *Sexual Conduct or Orientation as Grounds for Denial of Admission to the Bar*, 105 A.L.R.5th 217.

Is the good moral character standard clear enough to avoid improper discretion by bar examiners and courts? Does it provide meaningful standards or reflect a professional consensus, and if not, is its use likely to be "inconsistent, idiosyncratic, and needlessly intrusive." See Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). What actions of an applicant will be sufficient to prevent a finding of good moral character?

a. As late as 1979, a trial judge in Virginia refused to issue a certificate of good moral character to a woman who was living with a man to whom she was not married. The Virginia Supreme Court disagreed, stating:

While [applicant's] living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational connection to her fitness to practice law. It cannot, therefore, serve to deny her the certificate required by [Virginia Code].

Cord v. Gibb. 254 S.E.2d 71, 73 (Va. 1979). To what extent, if at all, should life-style issues affect admission to the Bar? If they are to have an effect, who is to determine

what is “unorthodox” or appropriate? What consequences are there to such an approach?

b. Does failure to meet one’s obligations constitute lack of good moral character? Several courts have said yes. See *Board of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994) (unsatisfied judgments); *In re Beasley*, 243 Ga. 1344, 253 S.E.2d 615, 617 (1979) (failure to honor child support obligations and URESA orders); *In re Heller*, 333 A.2d 401 (D.C.), cert. denied, 423 U.S. 840 (1975).

Even where there may be no legal obligation (as where a debt has been discharged in bankruptcy), the facts surrounding the discharge of the debt may evidence a lack of good moral character.

Application of Gahan, 279 N.W.2d 826, 831 (Minn. 1979):

The issue on appeal is whether, in view of the facts of this case and the applicable Federal rights protecting those who elect to file voluntary bankruptcy, the applicant to the Minnesota bar was properly denied admission on the grounds of insufficient moral character. . . .

Initially, we observe that persons discharging their debts in bankruptcy are afforded certain rights under Federal law. The fact of filing bankruptcy or the refusal to reinstate obligations discharged in bankruptcy cannot be a basis for denial of admission to the bar of the State of Minnesota. Any refusal so grounded would violate the Supremacy Clause of the United States Constitution since applicable Federal law clearly prohibits such a result.

However, these constitutional limitations do not preclude a court from inquiring into the bar applicant's responsibility or moral character in financial matters. The inquiry is impermissible only when the fact of bankruptcy is labeled "immoral" or "irresponsible," and admission is denied for that reason. In other words, we cannot declare bankruptcy a wrong when Federal law has declared it a right.

Thus, in the present case, Gahan's conduct prior to bankruptcy surrounding his financial responsibility and his default on the student loans may be considered to judge his moral character. However, the fact of his bankruptcy may not be considered, nor may his present willingness or ability to pay the loans be considered because under Federal bankruptcy law, he now has a right to not pay the loans.

2. Applicant's Moral Character.

. . . We hold that applicants who flagrantly disregard the rights of others and default on serious financial obligations, such as student loans, are lacking in good moral character if the default is neglectful, irresponsible, and cannot be excused by a compelling hardship that is reasonably beyond the control of the applicant. Such hardships might include an unusual misfortune, a catastrophe, an overriding financial obligation, or unavoidable unemployment.

We are, under the Minnesota Constitution, entrusted with the exclusive duty to assure the high moral standards of the Minnesota bar. We have no

difficulty in concluding that Federal law does not preclude us from evaluating the responsibility of a bar applicant in satisfying his or her financial obligations. This is particularly true where, as here, the obligation has the significance of \$14,000 in Federally insured student loans. A student loan is entrusted to a person, and is to be repaid to creditors upon graduation when and if financially able. Moreover, repayment provides stability to the student loan program and guarantees the continuance of the program for future student needs. A flagrant disregard of this repayment responsibility by the loan recipient indicates to us a lack of moral commitment to the rights of other students and particularly the rights of creditors. Such flagrant financial irresponsibility reflects adversely on an applicant's ability to manage financial matters and reflects adversely on his commitment to the rights of others, thereby reflecting adversely on his fitness for the practice of law. It is appropriate to prevent problems from such irresponsibility by denying admission, rather than seek to remedy the problem after it occurs and victimizes a client.

Applying the above principles to this case, we conclude that Gahan's failure to satisfy his obligations on the student loans cannot be excused for some compelling hardship reasonably beyond his control. During the period prior to bankruptcy, he was employed for most of the time at an annual salary of \$15,000 and then \$18,000. Monthly, he grossed from \$1,250 to \$1,500, and he accounted for monthly expenses of approximately \$500. The record indicates that his monthly payments on the loans would be approximately \$175. He was healthy, single, and not subject to any unusual hardship. He was reasonably able to satisfy his legal and moral obligation to prepare for repayment and continue repayment of his student loans. His failure to do so demonstrates lack of good moral character and reflects adversely on his ability to perform the duties of a lawyer.

Compare *Florida Board of Bar Examiners re: G.W.L.*, 364 So.2d 454 (Fla. 1978) (facts surrounding applicant's declaration and discharge in bankruptcy raised substantial doubts about his honesty, fairness and respect for rights of others and for law of state and nation; application denied) with *Florida Board of Bar Examiners re: Groot*, 365 So.2d 164 (Fla. 1978) (facts surrounding discharge indicate conduct not morally reprehensible in circumstances; application granted). See also *In re W.D.P.*, 91 P.3d 1078, 1088-91 (Haw. 2004) (pattern of financial irresponsibility and credit history inconsistent with good moral character); *In re Perry*, 827 So.2d 1144 (La. 2002) (where applicant is making a good faith effort to comply with Chapter 13 Bankruptcy Plan, conditional admission appropriate); *Application of Scallan*, 956 P.2d 982 (Or. 1998) (allowing conditional admission after bankruptcy and fiscal irresponsibility a "close call").

c. Will prior criminal convictions prevent a finding of good moral character? Not necessarily, although in Missouri, a person who has been convicted of or pleaded guilty to a felony "shall not be eligible to apply for admission to the Bar until five years after" the conviction or completion of sentence, whichever is later. Mo. Sup. Ct. Rule 8.05(b).

Since present good moral character is the test, past criminal conduct may be instructive, but is not necessarily controlling. Courts consider a variety of factors relating to the conviction itself and the applicant's conduct since conviction. See. e.g.,

In re McMillian, 557 S.E.2d 319, 322 (WV 2001) (considering eleven factors). Illustrative is *Application of A.T.*, 286 Md. 507, 408 A.2d 1023 (1979), where the applicant had several prior convictions for drug charges and drug related thefts and had served forty-four months in prison:

Rule 2d of the Rules Governing Admission to the Bar of Maryland provides that the applicant "shall at all times have the burden of proving his good moral character before the Character Committee, the Board and the Court . . ." We have said that no litmus test exists for determining whether an applicant for admission to the Bar possesses good moral character. In *Allan S.*, the Court set forth the controlling principles for determining whether an applicant with a criminal record has the requisite present moral character fitness to be admitted to the Bar. We said that where, as here, an applicant for admission to the Bar is shown to have committed a crime, the nature of the offense must be taken into consideration in determining whether his present moral character is good. We said that although a prior conviction is not conclusive of a lack of present good moral character, particularly where the offense occurred a number of years previous to the applicant's request for admission, it adds to his burden of establishing present good character by requiring convincing proof of his full and complete rehabilitation. Thus, we observed that a prior conviction must be taken into account in the overall measurement of character and considered in connection with other evidence of subsequent rehabilitation and present moral character. We said that the ultimate test of present moral character, applicable to original admissions to the Bar, is whether, viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion. Finally, we noted the cardinal principle governing applications for original admission to the Bar is that the absence of good moral character in the past is secondary to the existence of good moral character in the present.

* * *

Applying the principles articulated in *Allan S.* to the present case, we note, in considering the nature of the applicant's offenses, that all were directly related to his drug addiction. Furthermore, as pointed out by the Character Committee, the applicant was a user and not a dealer in drugs. In addition to the nature of the criminal offenses, we must consider the length of time that has elapsed since the criminal conduct occurred. In this case, the passage of time has been significant and substantial. The applicant's last offense occurred more than thirteen years before the Board hearing in October of 1979. Furthermore, the applicant has not used illicit drugs since August of 1967, a period of time spanning approximately twelve years. Finally, the applicant has been completely detoxified from methadone for more than six years.

As pointed out in *Allan S.*, the crucial matter upon which we must focus is the applicant's present moral character fitness, as evidenced by the convincing record of his rehabilitation. The record wholly supports the conclusions of the Character Committee and the Board that the applicant is fully rehabilitated from his prior illegal activity. In undertaking to prove his present good moral character the applicant not only presented convincing medical evidence of his rehabilitation from drug use, but also produced character witnesses who gave particularly strong endorsements of his present good moral character. He also introduced into the record letters of

recommendation from members of the legal and lay community. These letters attested to the applicant's present good character and are entitled to respectful consideration by the Court.

Giving due consideration to the nature of the applicant's offenses, the time of their commission, the circumstances involved, the fact that the burden rests upon the applicant to prove his good moral character, and most importantly, the convincing evidence of the applicant's rehabilitation, we think that he has established the requisite present moral character fitness that justifies his admission to the Bar of Maryland.

IT IS SO ORDERED.

SMITH, Judge, dissenting.

It is with regret that I once again dissent from the admission of an individual to practice before this Court.

Part of the problem apparently is a difference between my colleagues and me as to what constitutes good moral character. They seem to be of the belief that one can be said to possess good moral character if he has not violated the law lately. I do not see it that way. Thomas Paine, the political pamphleteer of the American Revolution, observed in *The American Crisis* No. XXIII (1783), "Character is much easier kept than recovered." I agree.

The Random House Dictionary of the English Language (unabridged ed. 1967) defines "character" in pertinent part:

1. the aggregate of features and traits that form the apparent individual nature of some person or thing.
 2. one such feature or trait; characteristic.
 3. moral or ethical quality
 4. qualities of honesty, courage, or the like; integrity
 5. reputation
 6. good repute. . . .
- (Id. at 247.)

Webster's Third New International Dictionary (unabridged ed. 1961) states in pertinent part on this subject:

- 1 : 9 : reputation esp. when good
 - 10 : a composite of good moral qualities typically of moral excellence and firmness blended with resolution, self-discipline, high ethics, force, and judgment
- (Id. at 376.)

The American Heritage Dictionary of the English Language (New College ed. 1976) defines the term in pertinent part:

1. . . . 3. The combined moral or ethical structure of a person
 4. Moral or ethical strength; integrity; fortitude.
 5. Reputation:
 10. A description of a person's attributes, traits, or abilities. . . .
- (Id. at 226.)

In *World v. State*, 50 Md. 49 (1878), Judge Grason said for the Court:

It was further contended that the evidence of the police officer was inadmissible, because it related to the Character of the accused, instead

of being confined to his Reputation. Character and reputation are synonymous terms, and we can see no objection to the evidence introduced, that the character and reputation of the accused was that of a "common thief" during the time the witness knew him. (*Id.* at 56 (emphasis in original).)

Black's Law Dictionary (5th ed. 1979) states relative to character:

The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguishing attributes. That moral predisposition or habit, or aggregate of ethical qualities, which is believed to attach to a person, on the strength of the common opinion and report concerning him. A person's fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good or otherwise, is obtained. The estimate attached to an individual or thing in the community. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him. Although "character" and "reputation" are often used synonymously, the terms are distinguishable. "Character" is what a man is, and "reputation" is what he is supposed to be in what people say he is. "Character" depends on attributes possessed, and "reputation" on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present. (*Id.* at 211.) As to good character it says: Sum or totality of virtues of a person which generally forms the basis for one's reputation in the community, though his reputation is distinct from his character. (*Id.* at 623.)

If this young man has in fact reformed from his earlier drug habit and stealing, I am delighted. The fact that it is believed by some that he will not revert to his former habits, however, does not in my view automatically establish good moral character. Where would the majority draw the line? As judges and prior experienced practitioners of the law they know that many homicides are a once in a lifetime proposition in which there will be no recurrence of the circumstances giving rise to the homicide. Thus, in the absence of evidence of other violations of law, one could say that the person has reformed. Do my colleagues propose permitting convicted murderers to become Maryland lawyers since they have not killed anyone lately?

* * *

Our requirement that a candidate show himself to be possessed of good moral character is for the purpose of protecting the public. In the same manner we have said that the imposition of a sanction on an erring attorney is not for purposes of punishment of the individual lawyer but for the protection of the public. The practice of law often involves handling the funds of clients running into tens of thousands and even hundreds of thousands of dollars. This can and does present a temptation to some individuals, as experience has amply demonstrated. Therefore, I regard honesty as one of the most important traits of character which should be required of a prospective lawyer. He should be forthright and honest in all of his dealings, but particularly where the funds and property of others are concerned. When a person is admitted to the Bar he becomes an officer of this Court. When we admit him we are in effect certifying

to the general public that he is a person to whom the affairs of others may safely be entrusted. I am not prepared at this time to say that this young man is possessed of good moral character and thus is a proper person to be an officer of this Court.

See also *In re Sabin*, 649 A.2d 589 (D.C. 1994) (felony conviction for conspiracy to manufacture controlled substances and aiding and abetting prostitution and racketeering not sufficient to deny admission where offenses occurred a substantial time in the past and the applicant had a strong record since that time). See generally, Annot., 88 A.L.R.3d 192 (1978). It is frequently the facts surrounding the offense, and not the offense itself, which warrants denial of admission. Even where a conviction is reversed, the facts underlying the offense may be the basis for denial of admission. See *In re W.D.P.*, 91 P.3d 1078, 1083 (Haw. 2004).

Should certain offenses bar admission forever? If so, which ones? Should a murderer ever be allowed admission to the Bar? That issue has arisen recently in Arizona. See <http://www.cbsnews.com/stories/2004/10/13/60II/main649084.shtml> and <http://www.eastvalleytribune.com/index.php?sty=23496>. The Arizona Supreme Court denied admission in this case. See *In re Hamm*, 136 P.3d 652 (Ariz. 2005), where the court held that, although persons convicted of extremely serious crimes such as first-degree murder are not automatically excluded from becoming members of the bar, they must make an "extraordinary showing of rehabilitation and present good moral character to be admitted to the practice of law." The court found that Hamm had not made the requisite showing. See also *In re King*, 136 P.3d 878 (Ariz. 2006) (same with regard to an applicant who was convicted of attempted murder). Compare *In re Dortch*, 860 A.2d 346 (D.C. 2004) (refusing to find that applicant had made a clear and convincing showing of good moral character where he had been convicted of second-degree murder and was still on parole) with *In re Manville*, 538 A.2d 1128 (DC 1988) (en banc) (allowing admission to one previously convicted of murder under a preponderance standard). See also *In re Hinson-Lyles*, 864 So.2d 108 (La. 2003), where a sharply divided court refused to allow admission to a former schoolteacher who had been convicted of sexual relations with a fourteen-year old student.

What about relatively minor offenses? Should they be relevant to a finding of good moral character? What if such offenses, although minor, are repeated? What about traffic violations? While generally offenses that are minor will not prevent a finding of good moral character unless they bear directly on honesty or fitness to practice, at least one court has found that repeated violation of traffic laws, including speeding and reckless driving, that led to license revocation were sufficient to warrant denial of admission to practice. See *In re Kapel*, 72 Ohio St. 3d 532, 651 N.E.2d 955 (1995).

d. Other than that already discussed, what kind of activity or behavior is likely to prevent a finding of good moral character? What about applicants who are obnoxious, rude, bizarre or offensive? See, e.g., *Lane v. Nebraska State Bar Ass'n*, 249 Neb. 499, 544 N.W.2d 367 (1996). Should law schools screen applicants on the basis of moral character? Why or why not? For a discussion of this and related issues, see Elizabeth Gepford McCulley, *School of Sharks? Bar Fitness Requirements*

of Good Moral Character and the Role of Law Schools, 14 Geo. J. L. Ethics 839 (2001).

Surprisingly, one relatively common basis for denial of admission is engaging in the unauthorized practice of law. This is particularly true where one holds him or herself out as an attorney. See, e.g., *In re Lee*, 571 S.E.2d 720 (Ga. 2002); *In re Craig*, 190 Wis. 2d 494, 526 N.W.2d 261 (1995).

Lack of candor or misstatements on bar applications are frequently grounds for failure to find good moral character. See, e.g., *In re Heckman*, 556 N.W.2d 746 (Wis. 1996); *In re Beasley*, 243 Ga. 134, 252 S.E.2d 615, 617 (1979) (false, misleading or evasive answers may be grounds for finding lack of requisite good moral character). Lack of candor can lead to denial of admission or to discipline once admitted. M.R. 8.1(a)(b). See *In re Moore*, 812 N.E.2d 1197 (Mass. 2004), where the Court ordered a two-year suspension for lack of candor on Respondent's bar application. The Court rejected Respondent's claim of literal accuracy and his contention that the questions were ambiguous, finding he had the requisite intent to deceive and mislead. The Court stated:

Whether an individual is of good moral character and fit to practice law in the Commonwealth is a most serious issue. Questions exploring this issue are not to be answered by gamesmanship. Bar applicants should always err on the side of full disclosure. If the meaning or scope of a particular bar application question is unclear to them, they should contact the Board of Bar Examiners to ascertain exactly what information is being sought in response to that question.

The Court went on to add:

"in the future, we intend to impose much harsher sanctions, including disbarment, "to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity." *Matter of Foley*, 439 Mass. 324, 339, 787 N.E.2d 561 (2003).

812 N.E.2d at 1205. See also *In re Stamps*, 874 So.2d 113 (La. 2004), where a couple was disbarred for failure to disclose unauthorized practice of law in North Carolina on their bar application in Louisiana.

Lack of candor can also lead to revocation of a conditional admission. See *Character and Fitness Committee Office of Bar Admissions v. Jones*, 62 S.W.3d 28 (Ky. 2001), where the court found Respondent's dishonest statements reflected a lack of candor and found his "cunning word games" and "bald-faced attempts to exploit . . . semantic flaws" in his conditional admission agreement cast the profession in a bad light and served as a basis to deny admission.

What about a failure or refusal to answer questions? Although an applicant may not be penalized for refusing to answer questions that request constitutionally protected information, see, e.g., *Carfagno v. Harris*, 470 F. Supp. 219 (E.D. Ark. 1979) (protected associational activity), failure to provide requested information without such basis may well lead to denial. The right of bar examiners to ask a broad range of questions has been recognized, see e.g., *In re Roots*, 762 A.2d 1161, 1166 (RI 2000)(holding the requirement to list all traffic violations not "superfluous nor a mere incursion into the applicant's privacy"), although there are limits. An issue of concern is the extent to which the Americans with Disabilities Act (ADA) imposes limits on the bar's ability to ask questions regarding previous drug abuse or mental health problems and treatment. See, e.g., *In re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996).

3. Ties to the Jurisdiction

Historically, many state and federal courts required residency in the local jurisdiction as a pre-condition to bar admission. In three cases, however, the Supreme Court held that such residency requirements violate the Privileges and Immunities Clause of the United States Constitution and are therefore unconstitutional. In *Piper v. New Hampshire Supreme Court*, 470 U.S. 274 (1985), the court invalidated a simple residency requirement that mandated residency at the date of admission. In *Virginia Supreme Court v. Friedman*, 487 U.S. 59 (1988), the Court applied Piper to invalidate a provision requiring nonresident attorneys to take a bar exam for admission but allowing resident attorneys to "waive into" the bar without examination. Finally, in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), the Court invalidated a Virgin Island requirement that applicants have previously resided for a year and intend to reside in the future.

In each of these cases, the Court rejected various justifications asserted for the residency requirement at issue, finding them to be insubstantial. Thus, the Court found that fears that non-resident lawyers would not be abreast of local rules and procedures, would behave unethically, would be unavailable for court appearances, and would decline pro bono work were unwarranted. Moreover, the Court found that a state's desire to protect its own lawyers from competition was not a substantial justification, but rather was precisely the type of "economic protectionism" that the Clause was designed to prevent.

Many states, in an effort to foster protectionism without running afoul of the Privileges and Immunities clause, established requirements that attorneys maintain an office for full-time practice of law in the jurisdiction in order to obtain admission. Others did away with admission without examination, although a counter-trend toward reestablishing such admission has emerged. Kansas recently adopted a rule that allows reciprocal admission to the Kansas Bar without examination under certain circumstances.

With the increase in national and international practice and use of the multistate bar exam, are we likely to move toward national standards for admission, or in fact toward national bar admission? What resistance is there likely to be? What consequences might such a development have on the structure of law practice? Is this

desirable? The ABA has been studying these issues and the Report of its Commission on Multijurisdictional Practice has recently been adopted by the ABA House of Delegates. While reaffirming the principle of state regulation of the practice of law, the recommendations include clarifying when attorneys may engage in temporary practice in jurisdictions in which they are not admitted and make admission on motion more available. Look at the Introduction and Overview available online at <http://www.abanet.org/cpr/mjp/home.html>. Do you think these recommendations go too far? Not far enough? With the growth of the Internet and globalization, these issues, including transnational practice, will continue to be important.

II. DISCIPLINE

A. Introduction

The discipline of lawyers has been a subject of concern and discussion for many years among lawyers and non-lawyers alike. More than twenty years ago, in an article entitled *Why Crooked Lawyers Go Free*, Readers Digest brought this problem to the public, documenting problems with the attorney discipline system including the large number of complaints compared to the small incidence of actual discipline, secrecy in the disciplinary process, the ability of disciplined lawyers to practice law in other jurisdictions, cronyism and failure of lawyers and judges to report other lawyers for known violations. The article quoted a Wall Street attorney who chaired a New York Commission studying lawyer discipline as follows:

“It is little wonder that some attorneys do not feel impelled to be responsible to the disciplinary system. A system that moves in secret, then winds up disciplining a minuscule percent of those whose conduct is complained about, can neither be effective nor credible.”

Although things have changed for the better in the more than twenty years since this article was written, some of the same concerns exist. The ABA Standards for Lawyer Disciplinary Enforcement address many of these issues, and jurisdictions around the country have revised their disciplinary procedures with assistance from the ABA. Most jurisdictions now have professional staffs to administer their discipline systems, although most still use volunteer attorneys as well. Most states have added lay members to their disciplinary panels, and a national clearinghouse to share information among states about disciplined lawyers is in operation. Concern still exists regarding the degree of secrecy in the system, although some states have made changes in this area as well. The problem of attorneys and judges not making complaints about other attorneys still exists, and, although the incidence of discipline has increased, there are still concerns regarding the effectiveness of the disciplinary system as a source of control over lawyer conduct. It is likely that these issues will continue to exist and be debated well into the future.

Finally, the overall issue of lawyer self-regulation continues to be the subject of debate. As many begin to view law as more of a business than a profession, the question whether the degree of self-regulation now afforded the legal profession is

appropriate takes on increasing focus. These issues are not likely to go away in the foreseeable future.

B. Purpose of Discipline

The original commentary to 1.1 of *The A.B.A. Standards for Lawyer Discipline and Disability Proceedings* reads as follows (citations omitted):

. . . Disciplinary proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and the attorney's right to continue to practice a profession imbued with public trust.'

The lawyer's license proclaims to the public that the holder has been found qualified to practice law in accordance with standards imposed by the court, and that potential clients may therefore entrust their legal problems to him. The public has no adequate independent means by which to determine the lawyer's trustworthiness, and must rely upon the certification inherent in the license.

If there is evidence indicating that the lawyer is no longer meeting minimum standards, the court, on behalf of the public, is obligated to ensure an inquiry, or to provide a means of instituting an inquiry, to determine whether the license and the certification inherent therein should be revoked. The discipline and disability system is the structure established for that purpose.

'A court has the duty, since attorneys are its officers, to insist upon the maintenance of the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing its image into disrepute. Disciplinary procedures have been established for this purpose, not for punishment, but rather as a catharsis for the profession and a prophylactic for the public."

Missouri is in accord with the *Standards* in this regard.

In the Matter of Bear, 578 S.W.2d 928 (Mo. banc 1979):

The main purpose of a disciplinary proceeding is to inquire into the fitness of an attorney to continue in the practice of law. The objective is not to punish the attorney but to protect the public and to protect the integrity of the profession and the courts.

See also *In re Snyder*, 35 S.W.3d 380, 384 (Mo. banc. 2000); *Matter of Dorsey*, 731 S.W.2d 252, 253 (Mo. banc 1987).

But see *In re Ruffalo*, 390 U.S. 544, 550 (1968):

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer [and therefore due process principles apply].

Eric Steele and Raymond Nimmer, in a comprehensive article entitled *Lawyers, Clients and Professional Regulation*, 1976 A.B.F. Res. J. 919, 999 state:

The current policy goals of professional self-regulation may be expressed analytically in terms of three functions: (1) to identify and remove from the profession all seriously deviant members (the “cleansing” function), (2) to deter normative deviance and maximize compliance with norms among attorneys (the deterrence function), and (3) to maintain a level of response to deviance sufficient to forestall public dissatisfaction (the public image function).

This formulation is similar to that expressed by the Missouri Supreme Court in *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990):

The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession. The discipline must be designed to correct any antisocial tendency on the part of the attorney as well as to deter others who might tend to engage in similar violations

See also ABA Standards for Imposing Lawyer Sanctions, Commentary to Standard 1.1. To what extent are these functions appropriate goals of a lawyer disciplinary system, and if appropriate, to what extent are they served by disciplinary rules and procedures currently in use? As we examine instances of discipline, consider which functions are being served and whether they are being served effectively.

Note that the disciplinary process deals only with lawyers who fall below the minimally acceptable standards. It does nothing to encourage best practices or professionalism. Additionally, discipline may remove the offending attorney from practice and, at least theoretically, may give notice of the attorney's infraction to the public, but it has no direct remedial effect. Clients and others harmed by attorney conduct are, for the most part, left to civil remedies (i.e., malpractice). Some states have, however, created client security funds to provide reimbursement to clients, but they are usually limited to intentional misappropriation of funds. See Steele and Nimmer, at 1007-1014.

A recent development in attorney discipline is the arrival of alternative dispute resolution. For example, in Missouri, pursuant to Rule 5.10, appropriate complaints may be referred for mediation rather than formal disciplinary proceedings. This may allow for greater involvement by the complainant and a more satisfactory resolution of the matter.

C. Grounds for Discipline

Pursuant to the Model Rules, “[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” Scope Note, § 5. In Missouri, disciplinary counsel is authorized to investigate “any matter of professional misconduct.” Mo. Sup. Ct. R. 5.08. Rule 8.4 (found in Missouri in

Supreme Court Rule 4) defines professional misconduct. “It is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.” 8.4(a). Rule 8.4(a) essentially incorporates violations or attempts to violate other model rules, and thus a violation of a substantive rule “conclusively establishes that respondent violated Rule 8.4(a).” *In re Oberhellmann*, 873 S.W.2d 851 (Mo. banc 1994). The remainder of Rule 8.4 sets out other forms of professional misconduct that are independent of the substantive rules.

Rule 8.4(b) makes it misconduct for an attorney to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The prior version (under the Code) focused on crimes of moral turpitude, but the Rules chose to avoid use of that potentially vague term. It is not necessary that the attorney be convicted of a crime for this provision to apply as long as the conduct violates the criminal law. See Wolfram, MODERN LEGAL ETHICS ¶ 3.3.2 at 91 (1986). Moreover, “a criminal acquittal does not bar subsequent disciplinary action.” *In re Storment*, 873 S.W.2d 227, 229 (Mo. banc 1994).

Where an attorney has been convicted of a serious crime, discipline will frequently follow. See, e.g., *In re Kazanas*, 96 S.W.3d 803 (Mo. banc. 2003). In Missouri, proceedings under Missouri Supreme Court Rule 5.21 permit suspension of an attorney upon conviction of or plea to a felony or a misdemeanor involving moral turpitude. *Id.* at 808. Once such conviction is final, discipline may be imposed by the Court based on motion of disciplinary counsel and a certified copy of the judgment without further proceedings. Rule 5.21(c). This section has been used to impose discipline on attorneys convicted of felonies as well as various misdemeanor offenses. The Court has found failure to pay income taxes, *In re Duncan*, 844 S.W.2d 443 (Mo. banc 1993); failure to pay child support, *In re Warren*, 888 S.W.2d 334 (Mo. banc 1994); and possession of cocaine, *In re Shunk*, 847 S.W.2d 789 (Mo. banc 1993), all to be offenses involving moral turpitude.

Rule 8.4(c) makes it misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” This provision is related to and overlaps with other provisions of the rules, including 8.4(b). See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th. ed. 2003) at 608. This Rule covers a broad variety of conduct, including forging a name on a client’s check, *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); lying to opposing counsel as to availability for trial, *In re Stricker*, 808 S.W.2d 356 (Mo. banc 1991); and converting client funds. *In re Phillips*, 767 S.W.2d 16 (Mo. banc 1989). “[I]t is not necessary to the exercise of the disciplinary powers of the Court that the fraud committed by a lawyer be committed in his capacity as a lawyer” *In re Kirtz*, 494 S.W.2d 324,328 (Mo. banc 1973). See also *In re Paneck*, 585 S.W.2d 477 (Mo. banc 1979). *In re Smith*, 749 S.W.2d 408, 413 (Mo. banc 1988). As the Court noted in *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996):

Discipline for violation of this rule does not depend on the existence of an attorney-client relationship. . . . Questions of honesty go to the heart of fitness to practice law. . . . Misconduct involving subterfuge, failing to keep promises, and untrustworthiness undermine public confidence in not only the individual but in the bar.

Rule 8.4(d) makes it misconduct to “engage in conduct that is prejudicial to the administration of justice.” This provision is used in a wide variety of contexts and overlaps with other provisions. See, e.g., *In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991) (reckless accusations against judge); *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989) (failure to cooperate with disciplinary investigation); *In re Bear*, 578 S.W.2d 928 (Mo. banc 1979) (tampering with evidence by erasing a tape that, although inadmissible, was part of an ongoing investigation). Since this provision is generally used in conjunction with other Rules, the potential vagueness of this term has not been as problematic as it might be. It has, however, been challenged on occasion, although to date without success. See ANNOTATED RULES, at 614-16.

Although subsections (b) through (d) of Rule 8.4 provide for discipline in a broad range of circumstances, their use is not unlimited. In *In re Mills*, 462 S.W.2d 700, 701 (Mo. banc 1971), the Court stated (under similar provisions of the Code) that in Missouri, discipline is not appropriate for conduct “in the nature of bad taste and bad manners” if the attorney’s “honesty, integrity and moral character remain uncompromised.” See *Maryland Grievance Com'n. v. Link*, 844 A.2d 1197 (Md. 2004) (Rude, boorish, insensitive and insulting conduct, while inappropriate and unfortunate, is not subject to discipline unless criminal or arising within the legal process itself. While civility and professionalism are very important, “it is neither feasible nor desirable that every social interaction between a lawyer and a non-lawyer be regulated . . . ”).

Rule 8.4(e) prohibits an attorney from stating or implying an ability to influence a government agency or official (and, in the current version, to achieve results by means that violate the Rules or other law) and (f) prohibits knowingly assisting a judge in violating the judicial code. For situations involving these rules, see ANNOTATED RULES, at 619-20.

The ABA proposed an addition to Rule 8.4 of a section addressing bias and prejudice. The proposal was withdrawn and language was added to paragraph 3 of the Comment indicating that manifestation of bias or prejudice violates Rule 8.4 where “such actions are prejudicial to the administration of justice.” A rule was adopted in Missouri in 1995 that makes it professional misconduct to:

manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, or age. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, or age, or other similar factors, are issues.

Mo. Sup. Ct. Rule 4-8.4(g). The Rule only applies to attorneys in the course of representing a client, and difficult questions remain regarding the scope of the “legitimate advocacy” exception. There is strong reason to believe the Rule is designed more to make a statement than as a likely basis for discipline except in egregious cases.

D. Procedure

Missouri's disciplinary procedures have gone through major revision several times in recent years. They are now fairly consistent with the ABA Standards for disciplinary proceedings and with practice around the country. The relevant rules are found in Missouri Supreme Court Rule 5. See <http://www.mochiefcounsel.org/> (explanation of disciplinary system for the public by the Office of Disciplinary Counsel); <http://www.mobar.org/pamphlet/discip.htm> (explanation of disciplinary system for the public by the Missouri Bar).

The disciplinary system is administered by the Office of Disciplinary Counsel. Complaints are filed with that Office. The Office of Disciplinary Counsel can either investigate the complaint itself or refer it to a circuit bar committee for investigation. Investigations can be initiated by disciplinary counsel even without a formal complaint. 5.08. In cases where it is believed a complaint can appropriately be resolved through mediation, counsel may refer the complaint to the Bar Complaint Resolution Program for resolution. 5.10. If a complaint is not so referred or if it cannot be satisfactorily resolved through mediation, an investigation ensues. If, after investigation, probable cause is found, counsel or the appropriate committee may offer an admonition, if appropriate. The respondent attorney then has 15 days to accept or reject the admonition. 5.11(a)(b). If an admonition is not appropriate, or if one that is offered is rejected, an information shall be drafted and served on the respondent. 5.11(c). If no probable cause is found, the complainant shall be notified within 10 days. The complainant can then seek Advisory Committee review of the determination of no probable cause. 5.12.

Once an information has been filed, respondent is to file an answer or risk default. 5.13. A hearing is then held before a disciplinary hearing panel or, in some cases, a special master. 5.14. The hearing is prosecuted by disciplinary counsel or a designee. The hearing must determine whether the respondent is guilty of professional misconduct, and the burden of proof on disciplinary counsel is to establish a violation of Rule 4 by a preponderance of the evidence. Hearings are conducted in accordance with normal rules of court, except that discovery is more limited. 5.15. Within thirty days of completion of the hearing, the panel shall render a written decision including findings regarding each alleged act of misconduct and recommendations for discipline if violations are found. 5.16.

After hearing, the panel may find that the information should be dismissed, that a written admonition is appropriate, or that further proceedings are warranted. If an admonition is offered, the respondent has fifteen days to accept or reject it. If the panel recommends discipline, it shall file its report with the Supreme Court. If the parties concur in the written decision, they may stipulate to the report. If the Court concurs with the stipulation, discipline is imposed without further proceedings. If the parties do not concur, or if the Court does not accept the stipulation, disciplinary counsel must file the complete record before the panel with the Court. The matter is then briefed and argued by the parties. If the Court finds for the respondent, it shall dismiss the information. If the Court finds the misconduct charged, it shall impose appropriate discipline. 5.19.

The Rules also provide for proceedings where an attorney is incapacitated or disabled. 5.23, and for interim suspension for threat of harm. 5.24. In addition, an attorney may voluntarily surrender his or her license upon application to the Court, although the Court is not required to accept surrender and may require disciplinary counsel to proceed under the Rules. 5.25. See *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003) (court refused surrender, disbarment ordered after proceedings completed).

E. Sanctions

The original ABA Standards for Lawyers Discipline addressed the issue of sanctions as follows:

DISCIPLINE TO BE IMPOSED IN A PARTICULAR CASE

7.1 Factors to be Considered. The discipline to be imposed should depend upon the specific facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances.

COMMENTARY

The nature and degree of discipline to be imposed should be determined on a case by case basis, after consideration of all relevant factors. . . .The court should avoid adoption of rules that mandate dispositions for certain forms of misconduct. Fixed penalties limit the court's ability to deal with the complexity and variety of circumstances involved in each matter.

In determining the nature and extent of the discipline the court should consider (a) the seriousness and circumstances of the offense, (b) avoidance of repetition (c) deterrent effect upon others, (d) maintenance of respect for the honor and dignity of the legal profession, and (e) assurance that those who seek legal service will be insulated from unprofessional conduct.

The respondent's lack of remorse, his failure to cooperate with the agency in its investigation, his failure to voluntarily make restitution to those injured by his misconduct, his failure to acknowledge and recognize the seriousness of his violation, the extent of his breach of trust, and his record of prior discipline, are factors which have been viewed as 'aggravating.' The courts have imposed more severe discipline when such factors have been present than when they are absent.

Sometimes circumstances present in a case will cause the court to be lenient. A willingness to rectify the damage caused by the misconduct, contrition, inexperience, temporary mental aberrations for which the respondent has sought treatment, and restitution prior to the filing of a grievance, have been relied upon by courts as mitigating factors warranting lesser discipline.

The current standards are found at §3.0. See ABA Standards for Imposing Lawyer Sanctions at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf, Do either of these formulations adequately address the issues at stake?

Following adoption of the ABA Standards for Lawyer Discipline, which did not attempt to recommend particular types of discipline for particular cases, the ABA became concerned that there was widespread inconsistency in sanctions and that this was undesirable. As a result, it formed a Joint Committee on Professional Sanctions, whose mandate was to formulate standards for the imposition of appropriate sanctions. The House of Delegates approved their proposed Standards in February 1986. These are not binding, but provide guidance in the imposition of sanction and are considered by some courts. Missouri relies heavily on the Standards in imposing discipline. See, e.g., *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005).

Standards 2.2-2.8 contain the available sanctions, including disbarment, suspension, reprimand, admonition, probation, and restitution. Standard 3.0 describes the factors to be considered in imposing sanctions, and Standards 4.0 - 8.0 detail what sanctions are appropriate for particular types and degrees of misconduct.

In Missouri, Rule 5.33 provides “[n]othing in this Rule 5 shall be construed as a limitation upon the powers of this Court to govern the conduct of its officers This Rule 5 shall not constitute an exclusive method for regulating the practice of law” A predecessor provision in Rule 5.27 was interpreted by the Missouri Supreme Court as giving it the “inherent power. . . to tailor and shape its judgment to fit the nature, character, gravity and effect of professional misconduct” Thus, the Court has broad authority with regard to sanctions.

Rule 5.16 provides:

(d) The recommended discipline may be a public reprimand, suspension or disbarment. A recommendation for suspension shall include the length of time that must elapse before the respondent is eligible to apply for reinstatement. A recommendation for suspension may provide that the suspension be stayed in whole or in part and that the respondent be placed on probation.

In addition, Rule 5.225 specifically provides for probation. In *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003), the rule was used to place the attorney on probation for one year under the supervision of Chief Disciplinary Counsel. Even prior to adoption of Rule 5.225, the Court imposed that sanction pursuant to its broad powers. See, e.g., *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978) (prohibiting respondent from acting as a fiduciary for two years); *In re Schiff*, 542 S.W.2d 771 (Mo. banc 1976) (requiring that respondent read Code and periodically report compliance to Court during two year period). Additionally, the Court has required completion of CLE courses (in bankruptcy and ethics) as a condition of reinstatement after suspension. *In re Snyder*, 35 S.W.3d 380, 385 (2000).

Other jurisdictions utilize the sanction of probation with conditions where a reprimand is insufficient but suspension is unwarranted. A particularly interesting case is *In re Greene*, 276 Or. 1117, 557 P.2d 644 (1977) where the Court found that the accused attorney “was deficient in some elementary probate procedures” and failed to recognize a conflict of interest. Accordingly, it placed the attorney on probation “until he furnishes evidence that he successfully passed, with a grade of no less than B or its

equivalent, courses at a law school of this state in Professional Responsibility and the Administration of Estates. The attorney was given twenty months to do so.

In Missouri, as in other jurisdictions, disbarment is reserved for the most serious misconduct. The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession. *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986). This Court has reserved disbarment for persons clearly unfit to practice law and used reprimands for isolated acts not involving dishonest, fraudulent, or deceitful conduct. *Id.*

The intermediate sanction of suspension is appropriate considering the circumstances of this case, where respondent violated his duty to the public to maintain personal integrity, but the conduct does not rise to a level indicating respondent is clearly unfit to practice law. See ABA Standards for Imposing Lawyer Sanctions Rule 5.0 (1986). Brief suspension should be sufficient to protect the public.

In re Disney, 922 S.W.2d at 15-16.

In many jurisdictions, disbarment is permanent and no reinstatement is possible. In others, reinstatement is permitted but generally requires a showing of rehabilitation and current fitness to practice. In most jurisdictions where a respondent is disbarred for conviction of crime, he or she must also show "repentance", which requires an admission of guilt. *But see In re Hiss*, 368 Mass. 447, 333 N.E.2d 428 (1975). In Missouri, reinstatement is permitted and is governed by Rule 5.28. Pursuant to that rule, an attorney who has been disbarred or suspended may be reinstated if the conditions set out in the Rule have been met and the Court, after reviewing a report by disciplinary counsel, finds that the applicant's license should be restored. Among the requirements for reinstatement are that the cause for disbarment or suspension has abated, all persons injured by the lawyer's conduct have received restitution or have been notified of the application, all special conditions imposed at the time the right to practice was lost have been met, a specified amount of CLE has been completed, the person has passed the MPRE within two years preceding reinstatement, and the person is of good moral character and the best interests of the public will be served by reinstatement.

Sanctions less than disbarment and suspension are also available and are used where interruption of a lawyer's practice is not warranted. Reprimands are often imposed where the conduct is negligent or where there is an isolated act of misconduct that is not serious enough to warrant suspension. Absent aggravating or mitigating circumstances, a reprimand is generally the appropriate sanction where a lawyer has previously received an admonition. See *In re Frank*, 885 S.W.2d 328, 333 (Mo. banc 1994).

An attorney who has been disciplined in one jurisdiction is normally required to show cause why he or she should not be disciplined in other states in which he or she is licensed to practice law. See Rule 5.20. Since discipline in another jurisdiction is to be afforded full faith and credit, the other state's proceedings may be attacked only for

lack of jurisdiction, improper notice or fraud. *In re Storment*, 873 S.W.2d 227, 230 (Mo. banc 1994).

However, according the [other state's] order full faith and credit does not require discipline in Missouri. *In re Weiner*, 530 S.W.2d 222, 224 (Mo. banc 1975). [The] Rule contemplates that this Court may choose not to discipline a lawyer disciplined by another state. *Id.* For example, the attorney's conduct may not be a ground for discipline in Missouri. *In re Veach*, 287 S.W.2d at 759. This Court makes its own independent judgment as to the fitness of the members of its bar. *Id.* at 755; *Weiner*, 530 S.W.2d at 224.

Storment, 873 S.W.2d at 230. In doing so, the burden of proof is on the attorney to show why the other state's disciplinary order "should not be conclusive of misconduct for the purpose of discipline" by the Court. *Id.* at 230-31. If the Court accepts the finding of misconduct, it makes its own independent determination of sanction. *Id.* Where two jurisdictions both conduct an investigation of an attorney, each can reach its own independent conclusion and impose appropriate discipline even though inconsistent. See *In re Rokahr*, 681 N.W.2d 100 (SD 2004) (Finding of intentional misconduct led to suspension in Nebraska; finding of inadvertent misconduct led to reprimand in South Dakota).

Recent amendments to Model Rule 8.5 (recently adopted in Missouri) permit discipline of lawyers in jurisdictions in which they are not admitted if they offer or provide services in that jurisdiction. In addition, the Rule clarifies choice of law principles relating to discipline of attorneys who are admitted in multiple jurisdictions. Read Rule 8.5.

F. Reporting Misconduct

M.R. 8.3 requires an attorney who has knowledge that another lawyer has committed a violation of the rules to report such knowledge to the relevant professional authority where the violation is one that raises a substantial question regarding the lawyer's honesty, trustworthiness or fitness to practice. Reporting is required regardless of whether the misconduct occurred in the practice of law. ABA Formal Op. 04-433 (2004). There is no obligation if the information providing such knowledge is governed by the confidentiality requirements of Rule 1.6 or if the lawyer with knowledge gained the information while serving in an approved lawyer assistance program. Knowledge in this context means actual knowledge or a substantial basis for believing a serious violation exists. See N.M. Bar Adv. Opin. 1988-8.

Very few lawyers have been disciplined for violation of these "whistle-blowing" provisions, and generally such discipline has been minor. As a result, the reporting requirements have been largely ignored. There was some indication that courts were beginning to take these provisions more seriously when a lawyer was suspended for one year for failing to report misconduct and using such failure to report as leverage in obtaining a settlement. *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988). The incidence of lawyer reporting increased in the months following *Himmel*, but subsequently declined as it appeared that that case was an isolated instance of discipline rather than the beginning of a trend.

The reporting requirements are controversial and are almost universally disliked by lawyers. As noted in the Readers Digest article, however, this failure of lawyers to report each other is a source of serious concern with the general public.

CHAPTER IV

THE ATTORNEY-CLIENT RELATIONSHIP

I. NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship is composed of many elements and has a complex of values and theoretical bases underpinning it. The relationship is based on contract, agency and fiduciary principles, but cannot solely be characterized as a contractual, agency or fiduciary relationship. In fact, the most appropriate response to the question “what is the nature of the attorney-client relationship” (as well as the question whether such a relationship exists in any given situation) is likely to be “why do you ask?”

Courts frequently refer to this complex of values in discussing the attorney-client relationship, and Missouri is no exception:

In general principle, the relationship of lawyer and client is contractual. . . . It is also a relation of agency, and its general contours are governed by the same rules. . . . It is, nevertheless, distinguished from other types of agency by its highly fiduciary quality and by the limit of its scope

Jarnagin v. Terry, 807 S.W.2d 190, 193-94 (Mo. App. 1991). In other cases, however, the courts will focus on a particular characterization of the relationship that is most relevant or appropriate to the issue at hand. See, e.g., *Baker v. Whitaker*, 887 S.W.2d 664, 669 (Mo. App. 1994) (“An agreement between an attorney and client should be construed under the same rules that apply to other contracts”); *Resolution Trust Company v. Gibson*, 829 F. Supp. 1121 (W.D. Mo. 1993) (“Under Missouri law, the attorney-client relationship is an agency relationship governed by the same law as that which applies to agency relationships generally”); *Kline v. Board of Parks and Recreation Com’rs*, 73 S.W.3d 63, 67 (Mo. App. 2002)(same); *Macke Laundry Service Limited Partnership v. Jetz Service Co.*, 931 S.W.2d 166 (Mo. App. 1996) (The attorney-client relationship is one of agency.); *Corrigan v. Armstrong, Teasdale, Schlaflly, Davis & Dicus*, 824 S.W.2d 92, 98 (Mo. App. 1992) (“Admittedly, an attorney hired by a client is . . . an agent with the normal fiduciary duties imposed by law and with specific ethical duties imposed as a condition of the privilege to practice law.”); *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. App. 1995) (“The relation between attorney and client is fiduciary and binds the attorney to a scrupulous fidelity to the cause of the client which precludes the attorney from any personal advantage from the abuse of that reposed confidence. . . . As a fiduciary, an attorney owes his client the greatest degree of loyalty, good faith and faithfulness.”); *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995) (“The relation between attorney and client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on attorney’s part”).

Each characterization brings with it certain rights, duties and responsibilities. In any case where the existence or nature of the relationship is seriously in issue, it is necessary to look to these background principles for guidance.

II. WHEN DOES THE ATTORNEY-CLIENT RELATIONSHIP BEGIN?

“A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not.” RESTATEMENT OF THE LAW GOVERNING LAWYERS, Topic 1 Introductory Note (before § 14). Generally, there is no question regarding whether an attorney-client relationship has been created. Where a client seeks out an attorney in his or her office, requests representation and agrees to pay a fee, and the attorney agrees to undertake that representation, the relationship has clearly been established. But frequently, one or more of these factors are missing, and the question to be addressed is whether, despite this, an attorney-client relationship exists.

The Model Rules do not directly address when an attorney-client relationship is created. In fact, the Scope Note to the Rules explicitly negates any role for the Rules in this regard. Paragraph 3 states, “for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.” The same paragraph does acknowledge that whether such a “relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”

The Restatement addresses the issue in § 14 as follows:

Formation of the Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

The Restatement recognizes that, while this is the general rule for establishment of the attorney-client relationship, aspects of that relationship can be created at different times in different manners. Comment to § 14. The greater the duty to the client that is being asserted, and the more likely recognition of the relationship will “compel a lawyer to provide onerous services,” the less likely a full attorney-client relationship will be found. RESTATEMENT, Comment to § 14. Courts are loathe to impose fiduciary duties on attorneys where the lawyer has not agreed to enter into a relationship of that nature.

Missouri law on the subject was set out in *Resolution Trust Company v. Gibson*,

829 F. Supp. 1121, 1127 (W.D. Mo. 1993):

Under Missouri law, the attorney-client relationship is an agency relationship governed by the same law as that which applies to agency relationships generally. . . . An agency relationship results from “the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Leidy v. Taliaferro*, 260 S.W.2d 504, 505 (Mo.1953); *Groh v. Shelton*, 428 S.W.2d 911, 916 (Mo. App.1968); *Dillard v. Rowland*, 520 S.W.2d 81, 90 (Mo.App.1974). An agency relationship may be established by consent manifested in words and conduct. *Groh*, 428 S.W.2d at 916. Neither a contract nor an express appointment and acceptance is essential to the formation of an agency relationship. *Id.* Furthermore, in Missouri, “[t]he creation of the attorney- client relationship 'is sufficiently established when the advice and assistance of the attorney are sought and received in matters pertinent to his profession.' ” *Erickson v. Civic Plaza Nat. Bank of Kansas City*, 422 S.W.2d 373, 378 (Mo.App.1967). See also *State v. Longo*, 789 S.W.2d 812, 815 (Mo.App.1990) (citing *Erickson* for the same proposition).

Where parties can prove that they “sought and received legal advice and assistance and that [the lawyer] intended to undertake to give such advice and assistance on their behalf . . . , the attorney-client relationship may be found to exist.” *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. banc 1995). However, “reliance alone upon the advice or conduct of a lawyer does not create an attorney-client relationship.” *Id.*, citing Ronald E. Mallin and Jeffrey M. Smith, *LEGAL MALPRACTICE* ¶ 8.2, at 96 (3rd. ed. Supp. 1993). “It is the client's reasonable belief that an attorney is representing him” that provides the basis for recognizing the existence of the relationship. *Longo*, 789 S.W.2d at 816 (in the context of the attorney-client privilege).

In any case where the existence of an attorney-client relationship is in issue, it will be necessary to identify the nature of the duties and responsibilities that are at issue and to determine the existence of the relationship in that context. There is a tension between protecting legitimate interests of prospective clients, who are not in the best position to judge whether the relationship has been created, and the right of an attorney to freely choose whether to enter into such a relationship. Many courts now err on the side of the client where the lawyer could have clarified the matter and did not. It is therefore a good idea for an attorney who does not undertake to represent a potential client after an initial consultation (or what could be reasonably construed as one) to send a non-engagement letter to that individual. For further discussion of these issues, see RESTATEMENT, Comment and Reporter's Note to § 14; ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, 31:101-106.

III. ESSENTIAL REQUISITES OF THE ATTORNEY-CLIENT RELATIONSHIP

A. The Lawyer's Duties to the Client

The Restatement addresses the basic requisites of the attorney-client relationship in § 16 as follows:

To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;

(2) act with reasonable competence and diligence;

(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

(4) fulfill valid contractual obligations to the client.

Where in the Model Rules is each of these duties addressed? What is the source of each of these obligations (contract, agency or fiduciary duty), and how does that source impact on the definition and scope of the duty? As we address each of these obligations individually throughout the semester, we will address these and other questions regarding each of these duties.

Some duties may arise even before representation is undertaken or even if no relationship ever materializes. Section 15 of the Restatement sets out the duties a lawyer owes to a prospective client. These duties are significantly less than the duties owed once a relationship ensues.

Note that a lawyer's duties to his or her client may be limited by an agreement between the lawyer and the client, RESTATEMENT §18,19. Pursuant to the Model Rules, a lawyer may limit the objectives of a representation if the client consents after consultation. M.R. 1.2(c).

B. Decision-Making Within the Attorney-Client Relationship

Within the attorney-client relationship, the attorney and client may allocate decision-making authority by agreement. RESTATEMENT § 21. Absent such agreement, a lawyer shall abide by a client's decisions regarding objectives and shall consult with the client regarding means. M.R. 1.2(a); see also RESTATEMENT §§ 22,23. The attorney has a duty to communicate with the client to the extent necessary to effectuate this decision-making authority. M.R. 1.4; RESTATEMENT § 20.

To a large extent, concepts of agency govern issues of decision-making and authority within the attorney-client relationship. Thus, courts generally look to agency concepts in resolving questions regarding the authority of the attorney to bind the client. See *Rosenblum v. Jacks or Better of America*, 745 S.W.2d 754, 760-61 (Mo. App. 1988). Because of the fiduciary nature of the relationship and the professional role of the attorney, however, these concepts are instructive, but are not conclusive, in determining these issues. See generally LAWYER'S MANUAL at 31:301-304. This is especially true where settlement of litigation is involved.

Who should “control” aspects of the attorney-client relationship? Does it (should it) matter, as the Rules appear to instruct, whether objectives or means are involved? Why or why not? Is the line between objectives and means always that clear? Can you imagine a situation in which a client might be more concerned with means than with ultimate ends?

There are several theories that address authority and control within the attorney-client relationship. The standard conception, based on client autonomy, is a client-centered approach. Under this theory, it is not for the lawyer to judge the client's objectives or means, nor is the lawyer accountable for them, at least once representation has been undertaken. The lawyer's job is to advance the client's interests, as defined by the client. Doing so advances the autonomy of the client, and is supported by principles of partisanship and neutrality. Those who favor this view characterize it as non-judgmental; those who disparage this concept of lawyering characterize the lawyer who plays this role as a “hired gun.”

A second view is sometimes termed the moral activist or directive approach. Proponents of this theory reject the extreme role-differentiation they perceive under the standard conception, and believe that lawyers must take a broader view of their obligation to influence clients to make what the lawyer believes to be the morally appropriate choices. Where the lawyer has discretion, he or she is to act in ways that are likely to promote justice. Critics of this approach question why the lawyer's view of morality or justice should control over the client's interests.

A third approach, based on practical rather than theoretical considerations, is more in the nature of the business model. The lawyer asks what actions and approaches will best advance good client relations and make the client happy and acts in accordance with the answers to those questions. Moral issues are relevant only to the extent the client makes them so.

A final approach that has been suggested is a collaborative model, in which the lawyer and client resolve issues together through moral discourse. It is urged that this is the best approach. In this model, the client makes the ultimate decision, but the lawyer is actively involved in the process of determining what course should be chosen. The lawyer does not impose his or her moral views on the client, but works with the client to help the client articulate his or her own moral position. While this model works well in theory, it is harder to make work in practice.

What are the pros and cons of each approach? Which is more consistent with your own views of lawyering and legal practice?

Finally, an important emerging dimension of the lawyer-client relationship relates to cultural competence. As our society becomes more diverse, an attorney needs to be sensitive not only to the stated objectives of the client, but to the cultural context in which the attorney-client relationship exists. It is important for lawyers to be cognizant of the extent to which their own cultural context influences their understanding and expectations of their clients and to be aware of the extent to which

cultural differences can impact the attorney-client relationship. Among the issues attorneys must pay attention to are perception and use of interpersonal space, body language, time and priority considerations, narrative preferences, individual vs. collective orientation and scientific orientation. To be sensitive and effective in this regard, lawyers should cultivate their own cultural identities, acknowledging biases and oppression that their culture contains. See generally, Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 Clinical L. Rev. 373, 385-414 (2002); Michelle Jacobs, *People from the Footnotes: The Missing Element of Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 400-401 (1997); Susan Bryant, *The Five Habits: Building Cross Cultural Competence in Lawyering*, 8 Clinical L. Rev. 33 (2001).

IV. THE FINANCIAL ASPECTS OF THE ATTORNEY-CLIENT RELATIONSHIP

Except in cases of pro bono representation, the client will generally have a financial relationship with the attorney as part of the attorney-client relationship. What is appropriate with regard to fees?

Model Rule 1.5 governs attorneys' fees. M.R. 1.5 (a) prohibits the charging of unreasonable fees or expenses. See also RESTATEMENT §34. The Rule sets out factors that are to be considered in determining reasonableness, but does not prioritize among those factors. In general, where a fee is negotiated at arms' length between a lawyer and client with generally equal bargaining power, it will rarely be second-guessed. Lawyers must communicate the scope of the representation and the basis or rate of the fee to be charged early in the representation, preferably in writing. M.R. 1.5(b).

There are many types of fees, including hourly fees, flat fees, contingent fees and hybrids. Special rules govern the use of contingency fees. See RESTATEMENT §35. They are prohibited in criminal and domestic cases, M.R. 1.5 (d), and, where an alternative fee would better serve the client's interests, that alternative should be offered to the client. See Comment, ¶3. Additionally, special rules require that contingent fees be in writing. See M.R. 1.5(c) for these requirements.

Lawyer-client fee contracts are not directly addressed by the rules, but guidance is provided in the Restatement. See RESTATEMENT § 38. Splitting of fees is addressed in the Rules, however. Lawyers not in the same firm can only split fees under limited circumstances, see M.R. 1.5(e) and RESTATEMENT § 47, and lawyers may not split fees with non-lawyers. See M.R. 5.4.

V. TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP

Generally, an attorney is expected to continue representation of a client until the matter for which the attorney has been retained has been completed. In some situations, either the attorney or the client will want to end the relationship prematurely. Model Rule 1.16 governs the termination of the attorney-client relationship. That Rule makes withdrawal mandatory in certain circumstances (see 1.16(a)) and permits withdrawal in others. (See 1.16(b)). Read Rule 1.16. Generally, the Restatement is in

accord with the Rules. See RESTATEMENT § 32. Termination of the relationship ordinarily ends the attorney's authority to act on behalf of the client. See RESTATEMENT § 31. With regard to withdrawal, see generally LAWYER'S MANUAL at 31:1001-1212.

Whenever an attorney withdraws from representation, the attorney has an obligation to take reasonable steps to protect the client's interests. This may include giving reasonable notice of the intent to withdraw, surrendering property and papers of the client and refunding any unearned fees. See M.R. 1.16(d); RESTATEMENT § 33. Where litigation is involved, the attorney may need permission of the court to withdraw. See M.R. 1.16(c)(2002).