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ETHICS & PROFESSIONALISM IN GOVERNMENTAL LITIGATION

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The Texas examples in this paper are illustrations and are used only because I practice law in Texas. They are not necessarily indicative of law in other states.

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I. INTRODUCTION

> On at least six different occasions...the president had to make a decision. He could choose truth, or he could choose deception. On all six occasions, the president chose deception.

Kenneth Starr, *quoted in* David Jackson & Richard Whittle, *Clinton Lawyer, Starr Clash*, THE DALLAS MORNING NEWS, Nov. 20, 1998, at A1.

In 1994, the lives of two famed attorneys suddenly became a bit more complicated: President Bill Clinton became the defendant in a sexual harassment suit, Alexis Simendinger, *What's Off-Limits for Clinton?*, THE NAT'L JOURNAL, Oct. 17, 1998, and Kenneth Starr began his independent counsel investigation of President Clinton. *Clinton Lawyers Prepare to Return Starr Fire,* THE STATESMAN (India), Sept. 12, 1998. What these lawyers, and the country, did not yet know was that a scandal of epic proportion, complete with threats of presidential impeachment, was about to sweep the nation and bring lawyers, legal tactics, and large legal costs to the forefront of a political debate.

By March of 1998, Kenneth Starr and his predecessor had spent almost $40 million investigating President Clinton's activities, Stephen Hedges & Vanessa Blum, *GAO Puts Clinton Probe at $39.6 Million,* CHI. TRIB., Oct. 1, 1998, at 6, before anyone had even heard of Monica Lewinsky. *Money Not the Issue in Clinton Mess,* DAYTON DAILY NEWS, Sept. 20, 1998, at 8B. When collateral costs to all branches of government are tallied at the end of Starr's investigation, the cost may exceed $60 million. Jonathan Turley, *The President and the Damage Done: Legal Costs of Clinton's Defense Outweigh Financial Costs*, LEGAL TIMES, April 20, 1998, at 23-24.

Overall, the investigation ultimately cost $10 million in salaries, $16.6 million for FBI and IRS agents and Justice Department lawyers, and $5 million in travel costs. Hedges & Blum, supra, at 6. In addition, Kenneth Starr paid as much as $19,000 per month to house eight members of his staff at a luxury apartment building. Parking assigned to "independent counsel" cost $370 each month. Former Watergate counsel and Georgetown University Law Center professor, Sam Dash joined Starr's team as an ethics consultant in 1994, at the rate of $400 per hour. Lisa Getter & Alan C. Miller, *Records Give Rare Glimpse Into Cost of Starr's Probe,* L.A. TIMES, Oct 29, 1998, at A1.

From January through August of 1998, Kenneth Starr's office spent $4.4 million investigating Clinton's role in the Lewinsky matter, including $434 for "expenses" at the Ritz-Carlton where investigators wired Linda Tripp and secretly taped her lunch meeting with Lewinsky. Id.

Defensive legal fees also gained attention. President and Mrs. Clinton spent an enormous amount of money to defend the investigations. The Clintons' legal fees almost certainly exceeded $8 million before Starr began investigating the Lewinsky affair. Harvey Berkman, *Clintons' Legal Bills Now Exceed $8 million - and Counting,* NAT'L L.J., Feb. 23, 1998, at A10.

What resulted from all this time, money, and effort? Starr delivered a 445-page, sexually graphic report on Clinton's affair with Lewinsky, detailing 11 grounds for impeaching President Clinton. *Game, Set, and Match for Starr?,* INVESTOR'S BUSINESS DAILY, Sept 14, 1998, at A1. Not surprisingly, Democrats and Republicans remain at odds about Starr's investigation. Starr has been widely criticized by Democrats and others for the cost of the investigation. "At the very least, here's a story of a lack of accountability, of extravagance with taxpayer dollars and of arrogance on the part of Ken Starr and his office,' said Jim Jordan, spokesman for the Democrats on the House Judiciary Committee." "Neither this special prosecutor nor any before him has been held accountable. That has to change,' said Sen. Dick Durbin (D-Ill.)." In turn, Republicans blame an uncooperative White House for increasing the cost of the investigation. Getter & Miller, supra, at A1.

Others predict that Starr's "hyperaggressive prosecutorial style and its implications for the criminal justice system may spell trouble for the independent counsel down the line." The National Association of Criminal Defense Lawyers (NACDL) "launched an assault on what it deems unethical conduct by Mr. Starr and his team": allegedly withholding access to legal counsel to Monica Lewinsky, forcing Lewinsky's mother to testify before the federal grand jury, leaking grand jury information, and initiating unauthorized contact with persons already represented by counsel. David E. Rovella, *One Starr Subpoena Awakens the Defense Bar,* NAT'L L.J., March 2, 1998, at A10.

Unquestionably Clinton's misdeeds caused his family, his supporters, and the nation much grief. However, in addition to direct results, the intangible result is that, once again, the legal profession has been portrayed as scheming, manipulative, and overpriced. For those of us who remember Watergate, it was de ja vu all over again!

Lawyers' ethics, or lack thereof, were again brought into the national spotlight in 2001 with the demise of Enron Corporation and the rise of corporate scandals. Although it has been the accountants, namely Arthur Anderson, who have received most of the blame, many allege that "Enron's attorneys not only blessed potentially fraudulent transactions, but also conducted an investigation largely viewed as a whitewash." Jill E. Fisch and Kenneth M. Rosen, *Lessons from Enron, How Did Corporate and Securities Law Fail?*, 48 VILL. L. REV. 1097, 1099 (2003). Neal Batson and firm Alston & Bird, appointed in May 2002 by the U.S. Bankruptcy Court of the Southern District of New York, examined the Enron bankruptcy and outlined possible causes of action against lawyers and law firms for legal malpractice and for aiding and abetting officers' wrongful conduct. The examination resulted in four reports totaling 4,500 pages and a billing by the firm of almost $75 million for the reports and $20 million in expenses. Richard Acello, *Enron Lawyers in the Hot Seat – Bankruptcy Examination Outlines Possible Causes of Action*, 90 JUN-A.B.A. J. 22 (2004). Outside firms named in the reports include two Texas law firms: Vinson & Elkins and Andrews & Kurth, and among the in-house attorneys mentioned were Enron general counsel James V. Derrik and associate general counsel Rex Rogers. Id.

Vinson & Elkins, Houston's largest law firm, represented Enron for the company's entire corporate life and was intimately involved in structuring its transactions, disclosing its finances to the public and conducting internal investigations of its alleged wrong-doing. Dan Ackman,

It's the Lawyers ' Turn to Answer for Enron, FORBES.COM, Mar. 14, 2002, *available at* http://www.forbes.com/2002/03/14/0314topnews.html. Batson's report cites Vinson & Elkins's representation of Enron in transactions with names such as "Rhythms" and "Raptors" that had no rational business purpose except to manipulate Enron's revenue. Acello, supra, at 23. These transactions were at a minimum unethical and perhaps fraudulent. In particular, the firm issued 'true sale' opinions with respect to the establishment of various special purpose entities that formed the basis for Enron's deceptive accounting. Fisch & Rosen, supra, at 1110. The firm may have also crossed an ethical border by undertaking an investigation of Enron's finances, knowing that its own lawyers were possibly involved in structuring and approving the very transactions that were the subject of the investigation. Fisch & Rosen, supra, at 1110. See also Lisa H. Nicholson, *A Hobson's Choice For Securities Lawyers in The Post-Enron Environment: Striking a Balance Between The Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91, 97-98 (2002). Consequently, Vinson & Elkins has been named in a shareholder class action lawsuit that alleges the firm engaged and participated in contrivances and manipulations to help inflate Enron's reported financial results. Acello, supra, at 22.

Andrews & Kurth was Enron's firm of choice for legal work in connection with what is known as the FAS 140 transactions. Enron used these structured finance transactions to transfer illiquid assets to special purpose entities while retaining control of the assets and assuming liability for the debt incurred. Batson's report states that a fact-finder could possibly determine that the law firm knew that Enron in actuality retained control of the assets transferred in many of the transactions, and that Enron was engaging in the transfers to produce misleading financial statements. Acello, supra, at 22, 24.

In the year 2000, Vinson & Elkins billed Enron between $27 million and $30 million, accounting for 7% of the firm's total billings. Dan Ackman, *Enron's Lawyers: Eyes Wide Shut?*, FORBES.COM, Jan. 28, 2002, *available at* http://www.forbes.com/2002/01/28/0128veenron.html. With such a large financial interest at stake, it is not hard for people to jump to the conclusion that the attorneys consciously hid their eyes from Enron's wrongdoings. In response to this outbreak of corporate misconduct, the Sarbanes-Oxley Act was passed by the 107th Congress and signed into law in August 2002. Samantha Ahuja, *What Do I Do Now? A Lawyer's Duty Post-Sarbanes-Oxley*, 38 VAL. U. L. REV. 1263, 1265 (2004). The Act recognized that the role lawyers played in securities fraud was a matter of public concern. In response, section 307 of the SOA mandates that the SEC promulgate rules of professional responsibility for corporate lawyers. Ahuja, *supra*, at 1283. Additionally, the American Bar Association revised its Model Rules of Professional Conduct in August 2003 to help guide attorney's actions in situations such as Enron. The ABA's House of Delegates amended Rule 1.6(b) to permit the lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary. Additionally, Rule 1.13 was amended to require the lawyer for an organizational client to report certain violations of law to higher organizational authority in certain circumstances unless reasonably believed not to be necessary in the best interest of the organization. American Bar Association House of Delegates, Report and Recommendation of the Task Force on Corporate Responsibility (Aug. 11-12, 2003) (Reports 119A and B), *available at* http://www.abanet.org/leadership/2003/2003journal.pdf.

So what is the result for lawyers after these corporate scandals that called into question their ethics? There is a broad consensus that lawyers should play a critical gate keeping role. Lawyers are now expected to report wrongdoing up the corporate chain of command and to establish other minimum standards of professional conduct. It should be made clear that the client of a lawyer representing a corporation is the corporation, and not the members of management, or the company officer doing the deal on which the lawyer is working. If lawyers are going to regain respect from the public, whether they are working for a corporation, the government, or a single-person client, they must meet and exceed what is expected of them ethically and professionally, and look beyond their work assignments on complex projects to see the big picture and understand the ramifications.

II. ETHICS AND PROFESSIONALISM

> Lawyers perform so poorly in the Scriptures that it is small wonder that I frequently hear from young people of faith, 'Can I in good moral conscience become a lawyer?' Inconsistency between professional obligations--the duty of loyalty to the client--and religious and moral mandates loom large in the reflections of thoughtful young men and women contemplating prospects in the legal profession.[1]

Kenneth W. Starr, *Christian Life in the Law*, 27 TEX. TECH L. REV. 1359 (1996). Much of American society views our legal system as a battlefield where cunning lawyers attempt to manipulate facts, find loopholes in the law, and generally take advantage of all parties to a lawsuit, including their own clients. Granted, American society has felt the repercussions of an abused and often over used legal system. Many people blame the star players — lawyers. An example might sound something like this: "Lawyers in the medical malpractice protection racket have increased health care costs and forced doctors to order unnecessary tests to protect themselves on cross-examination should anything go wrong. But the real damage they perpetrate is a loss of trust between doctor and patient...." Id. Legal battles often destroy relationships that previously involved fair dealing, trust, and cooperation. Joseph Califano argues,

> The obsessions of lawyers with making money, turning litigation into 'gotcha' contests and drafting complex documents doesn't simply pit seller against customer, landlord against tenant, pedestrian against driver, patient against doctor, husband against wife, citizen against government and city against state. It leaves little time for the profession to honor an obligation to help society deal with some of its most perplexing problems.

Id.

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[1] Starr was a partner in Kirkland & Ellis, Washington, District of Columbia. He then served as Independent Counsel, Madison Guaranty Savings and Loan Case, popularly called the "Whitewater investigation." Former Solicitor General of the United States, 1989-93; Former Circuit Judge, United States Court of Appeals for the District of Columbia, 1983-89. He is now Chancellor of Pepperdine University.

Changing attitudes have even affected the once trusted lawyer-client relationship itself and seen the rise of malpractice suits coming back to haunt the legal profession itself. "The lawyer/client relationship has undergone fundamental change. Once a personal service built on trust, lawyering has become a bottom-line business. Attorneys are more specialized, their dealings with clients are more transient, and their work is scrutinized more closely." Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All — More Attorneys Are Sued By Clients Disgruntled About Advice They Got — Insurance Bills Are Rising*, WALL S. J., July 11, 1995.

Changing client attitudes may be caused by none other than the legal profession itself. "Lawyers did much to create the litigation frenzy now plaguing them, by convincing people that for every setback, someone is to blame. Now, disgruntled clients are blaming them...." Id. Further, lawyers are more willing than ever to sue their own. "'You wind up with simple cannibalization,' says Joseph W. Acton, publisher of Lawyers' Liability Review . . . 'Lawyers are eating lawyers to maintain their own standard of living.'" Id. The bottom line is that "clients have come to expect guaranteed results." Id.

The images may be a reality to some extent. "It is too often the conceit of our profession that it is harder, that somehow, because our vocation requires us to live in the interstices and divisions of society, we are exempted from the binding force of ordinary human morality." Stephen L. Carter, *Introduction*, 27 TEX. TECH L. REV. 925, 929 (1997).

A. TARNISHED IMAGE

In addition to the issues highlighted in the current Clinton and Enron scandals, several common practices tend to brand the entire legal profession with a reputation. Abusing discovery procedures, using aggressive deposition tactics, coaching witnesses, and charging the bench fuel the fire when it comes to disparaging attorneys.

1. Discovery Abuses

In his article on "Discovery and Its Abuses", John R. Woodward, III lists his "top ten discovery abuses", characterized as "scorched-earth" "Rambo-style" or "take no hostages" and "hardball" discovery. They include:

1. "Speaking" objections;
2. Boiler plate objections to interrogatories;
3. Narrow construction of discovery requests;
4. Non-specific claims of "work product" or "privilege";
5. Instructions not to answer in depositions;
6. Evasive, incomplete answers to discovery requests;

7. Producing "warm bodies" for depositions;

8. Lodging "objections" to Rule 34 Request for Documents which do not exist;

9. Using discovery to punish an adversary;

10. Scheduling harassment. John R. Woodward III, Defense Research Institute, *Discovery and Its Abuses*, FOR THE DEFENSE, December 1995.

Add to that list the following:

1. Sport impeachment - cross-examination designed to slaughter reputation and enhance the lawyer's ego or wallet;

2. Silent theatrics - overt attempts to distract the court, jury or opponent;

3. Stealth pleadings - filing nuisance suits designed to harass and/or intimidate rather than seek redress for a wrong;

4. Pettifoggery by delay - a pettifogger is by definition "a lawyer whose methods are petty, underhanded or disreputable";

5. Universal experts - who serve literally as advocates in the litigation process;

6. Bushwhackery - use of arguments and positions wholly unsupported by evidence;

7. Confirm this, you *&#$% - a developing practice of exchanging letters purporting to confirm and memorialize conversations, albeit inaccurately.

Add to that list, specific, common discovery abuses used to circumvent legitimate discovery which include:

a. **Construe** all inquiries as narrowly as possible to limit the useful information that must be divulged;

b. **Refuse** to respond to written requests that have the slightest ambiguity;

c. **Object** to all written discovery requests;

d. **Conclude** that any useful information is protected by the attorney client privilege;

e. **Bury** any significant material in reams of irrelevant material;

f. **Coach** witnesses to be unresponsive in depositions;

g. **Engage** in useless discovery by asking for voluminous products and by taking needlessly long depositions;

h. **Never** resolve a discovery dispute by agreement;

i. **Demand** a hearing on all matters;

j. **Seek** sanctions at every opportunity;

k. **Never** voluntarily produce or disclose any important material unless ordered to do so; and

l. **Always** surprise the other side with dates and times for depositions, hearing and trials. Whittenburg and Crowley, *The Ethical Trial Lawyer, Oxymoron or Advocate*, TEX. ASS'N OF DEF. COUNSEL, Sept. 1995. (Reprinted by permission.)

Finally, and perhaps most disturbing of all, is the ever-growing use of:

> **Lying** - Number one on everyone's hit parade of "lawyer sins" is plain old-fashioned lying. The proposition has been advanced that "lying" is part of the trial lawyer's job, and that it should be accepted as such. That suggestion has not met with much acceptance and the general consensus seems to be that honesty would better serve trial lawyers in every instance. Id.

This author proposes that the best lawyers practicing today are those that can be successful without bending the rules or abusing discovery procedures.

2. Aggressive Deposition Techniques

The oral deposition is a premier battlefield upon which many lawyers push an ethical envelope in zealously representing their clients. Without the presence of a judge presiding over the process, depositions often become a haven for misconduct.

> Many courts are no longer tolerant of Rambo style deposition tactics. Most abuses begin with failure to abide by the basic rules associated with depositions. Counsel often forget, or are unaware of, FRCP 30 [or its state counterparts], which governs the proper conduct of a deposition. According to the Rule, a deposition should proceed in the same manner as direct and cross-examination at trial.

Earle F. Kyle IV, *Combating Unsavory Deposition Tactics*, TRIAL, Sept. 1997. Courts around the country are beginning to recognize a set of standards addressing the permissibility of deposition tactics. These standards developed in the Eastern District of Pennsylvania in the case

of Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Penn. 1993). The standards, clearly worthy of following, provide that:

- The witness may only seek clarification of words, questions, or documents from deposing counsel

- Only objections that would be waived, or that are necessary to assert privilege, to enforce a court ordered limitation on evidence, or to present a motion to terminate a bad faith deposition may be made

- The witness may only be instructed not to answer a question when necessary to preserve a privilege or comply with a limitation on evidence

- Counsel and his or her witness may only engage in off-the-record conferences to decide whether to assert a privilege

- Counsel-witness conferences during a deposition or break are a proper subject for inquiry by deposing counsel

- The deposing attorney shall contemporaneously provide the witness' attorney with a copy of all documents shown the witness, either prior to the deposition or contemporaneously with each document's showing

- The witness and his or her attorney may not discuss documents privately before answering questions related to the documents

> The *Hall* standards also prohibit the witness' attorney from showing the witness documents or pointing out passages to aid the witness with testimony.

Id. Various courts, when addressing improper deposition tactics, have suggested some of the following mechanisms to minimize the effects of such improper tactics: videotaping the deposition, directing the court reporter to stenographically record obviously suggestive gestures; marking or certifying the transcript; and cross-examining the witness as to whether he or she was coached by his or her attorney during recesses. Id.

3. Witness Preparation

Ethics scholars have recently basked in the hay day debating the highly publicized question of what conduct is or is not proper for witness deposition preparation. This debate was sparked by the production of a witness preparation document used by one of the nation's largest asbestos-plaintiffs' law firms to instruct its plaintiffs prior to their giving deposition testimony. See John Council, *Asbestos Cases Threatened by Stray Document*, TEX. LAWYER, Sept. 29, 1997, at 1, 4. A local district judge commented after reading the twenty-page document, "How much more ink would... it have taken to say, 'Tell the truth'?" Id. at 4. The document, titled

"Preparing for your deposition," included instructions to memorize asbestos product names and other guidelines such as,

> DO NOT say you saw more of one brand than another, or that one brand was more commonly used than another... You NEVER want to give specific quantities or percentages of any product names. The reason for this is that other manufacturers can say you were exposed more to another brand than to theirs, and so they are NOT as responsible for your illness!

Id. The document also instructs, "It is VERY important to say that there were LOTS of other brands. You just cannot recall ALL of the names!" Id. Ethics professor at Hofstra University School of Law, Monroe Freedman, opined that, "Telling a client what they should never' say pushes ethical boundaries.... It's also a directive to the client to withhold information if in fact the client has the information.'" Id. Legal malpractice specialist Broadus Spivey also clarified, "There is absolutely nothing wrong with telling the client the effect of their answers... But what's wrong is to suggest to the client what to say. The statement of fact ought to be the truth, not the result of suggestion." Id.

Despite where the ethical lines are ultimately drawn in this instance, Professor Alex Albright of The University of Texas School of Law pointed out, "When things like this get released, it looks bad from the public's perspective." Id. Irrespective of whether this particular instance constitutes unethical behavior or simply hard-ball representation, it highlights the potential need for more specific behavioral guidelines in an arena virtually free from judicial intervention.

4. Charging the Bench

The most recent trend in the demise of a once integrity-rich profession has been the willingness of many lawyers to affirmatively attack the rulings and work ethic of the judiciary before whom they practice.

Some more blatant examples have landed lawyers before grievance committees or subject to contempt sanctions. The Texas Supreme Court threatened a Corpus Christi, Texas lawyer with both sanctions and the possible referral to a grievance committee after the lawyer filed a motion for rehearing that called the justices "nine nutty professors" as well as described the court as "one of the four horsemen of the apocalypse." Susan Borreson, *Lawyers Who Bad-Mouth Judges May Answer to State Bar*, TEX. LAWYER, Nov. 24, 1997, at 4-5. A state court of appeals sanctioned another Texas attorney $500 and referred him to the Bar based upon his argument in an appellate brief describing the trial judge's ruling as a "pathetic determination to 'take from the rich and give to the poor' [which the attorney further described as a] classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand." Id. Amid the controversy of a state district judge ruling that an exception to the state's forum non conveniens law excluding asbestos cases was unconstitutional, a named partner in one of the nations' foremost plaintiff firms for asbestos litigation called the female district judge a "shill for the

defense bar." John Council, *Asbestos Cases Threatened by Stray Document*, TEX. LAWYER, Sept. 29, 1997, at 4.

The Texas Supreme Court noted in the case of the "nine nutty professor" reference that Texas Disciplinary Rule 8.2 prohibits lawyers from making a statement they know to be false or with reckless disregard for its truth or falsity about the qualifications or integrity of a judge. Id. ABA Model Rule of Professional Conduct 8.2 contains the same prohibition. Further, the Preamble to the ABA Model Rules provides that, "[A] lawyer should demonstrate respect for the legal system and for those who serve it, including judges...." PREAMBLE--MODEL RULES OF PROFESSIONAL CONDUCT [4] (1983). The ABA Guidelines for the Conduct of the Section of Litigation describe the lawyers' duties to the court, including the duty to "speak and write civilly and respectfully in all communications with the court," as well as the duty not to "engage in any conduct that brings disorder or disruption to the courtroom." See Appendix "B", at B(1), (4). One Justice commented, "In a world that seems to have an increasing lack of any sort of dignity or rules...I think it's important that a certain amount of decorum and respect is in the courts." Id. (quoting Chief Justice Phil Hardberger of San Antonio, Texas' 4th Court of Appeals).

Granted, even the judiciary itself consists of lawyers who should attempt, but albeit fail on occasion, to maintain the utmost integrity and professionalism. Justice Thomas Reavley of the Fifth Circuit Court of Appeals once noted,

> Give ego a robe and perch it upon a bench, and it can run rampant. The judge who puts self at the center or atop his universe will fail to observe the limits of his knowledge of the facts and the law, and he will abuse his authority. He will exceed and misuse that authority. He will show-off when he should be listening. He will complicate the rules to display his intellectual superiority when he should be simplifying them for the benefit of those who must obey them.

Justice Thomas Reavley, *My Faith and My Work,* 27 TEX. TECH L. REV. 1295, 1297 (1997). However, despite human weaknesses and/or professional errors made by members of the judiciary, lawyers before the bench should always remain mindful of their duty as officers of the court to maintain a level of respect for the judiciary. Certainly, lawyers have a duty to zealously argue for the reversal of rulings they consider to be incorrect. Nonetheless, the congested courtrooms of the nation contain no room for unneeded insults, sarcasm, and unprofessional attacks on the bench.

B. POLISHING THE IMAGE

Is there an anecdote for polishing the tarnished, and somewhat deserved, image of the legal profession? Ironically, considering some of the accusations made against him, Independent Counsel Kenneth Star described an ideal where lawyers practiced on a higher moral ground:

> So frequently in daily professional life in the law, the questions genuinely are: What is right? What is fair? The moral lawyer is one who takes such questions

> quite seriously, because sound legal advice and legal judgments are rarely far removed from such fundamental moral perspectives.

Kenneth W. Starr, supra, at 1359. Joseph Califano suggests, "If lawyers want to temper the ridicule and stem the hemorrhaging of many of their best and brightest, they must remember that lawyering is a profession as well as a business, retool the profession's sextant and rediscover its moral compass." Id.

1. The Rules of Professional Conduct

In a 1993 *For the Defense* article, Brooke Wunnicke noted that as of June 1993, most states and the District of Columbia had adopted the American Bar Association's Rules of Professional Conduct. All of these states made some amendments to the Model Rules. In fact, some states substantially amended the Rules by adopting a combination of the former Model Code of Professional Responsibility and the Model Rules.

The ABA Model Rules of Professional Conduct begin with a preamble that generally attempts to capture the underlying philosophy and spirit of the Rules, which seems to be a balancing of three factors: (1) zealously representing the client, while (2) dealing honestly and competently with the court and opposing counsel, and (3) seeking generally to further public interest and justice.

In 1988, the judges of the Northern District of Texas, sitting en banc, adopted additional standards of litigation conduct for their district. In doing so, the court opined:

> "We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive."

Dondi Properties Corporation v. Commerce Savings and Loan Association, et al., 121 F.R.D. 284 (D.C.N.D. Texas Dallas Division, 1988). In Dondi, the court went on to adopt "guidelines for professional courtesy" and a "Lawyer's Creed". The Lawyer's Creed was subsequently adopted by the State of Texas as a mandate for professionalism in November, 1989. See Appendix "A". The problems enunciated in Dondi apparently have continued not only in the Northern District of Texas but throughout the country. The Litigation Section of the American Bar Association felt compelled to draft its own "Guidelines" for the conduct of its members. See

Appendix "B". Docket congestion and delay has also continued to escalate, resulting in part because of discovery abuse.[2]

2. Start with the Clients

"[S]o much of what the law does is express moral choices." Stephen L. Carter, supra, at 926. Shouldn't it naturally flow that the men and women defending and promoting those laws do so in a moral and ethical manner?

> Honesty works in practice, and in the practice of law. It is true that some clients aim for ends regardless of means, and want lawyers who will serve the same ends at the cost of ethics and honesty. Sometimes those clients can be shown that their ultimate ends are best served by honesty. I have had clients who would have violated rules or orders, and who would have distorted the truth, but they were willing to accept my explanation of how that conduct would eventually defeat their purposes. Whether the client realizes it to be true for him, the lawyer should know that her reputation for honesty and dependability is essential to her success in obtaining the clients she wants and in winning their causes with judges and jurors.

Justice Thomas Reavley, supra, at 1299. Clients may very well be amid the fray in creating ethical dilemmas for attorneys. It may often time be the client who wishes to push the lawyer to walk the thin line between playing hardball and practicing unethically. Counsel may often find it necessary to inform the client about rules of ethics and professionalism. Counsel is obligated to undertake and perform the representation of a client in strict compliance to standards of legal professionalism. A client's wishes or expectations must not be allowed to detract from the attorney's adherence to ethical and professional standards. Task Force on Selection and Performance of Retained Counsel - ABA Tort and Insurance Practice Section, *Guidelines for Selection and Performance of Retained Counsel, reprinted in*, DEFENSE RESEARCH INSTITUTE, *Insurer's Duties: A Coverage Perspective*, Vol. 3, at 81.

> Few people are needed so much as lawyers are. Angry men and women suffer from what they perceive to be the neglect and violation of their rights. 'Rights' have so obsessed us that mutual obligations and community have been eroded. People need representation, advice, and healing. Controversies cry out for thoughtful and fair compromise. All over this world, as surely as in America, people must learn to appreciate the necessity of social order and community. Until the fullness of time, humans must work for both. Chaos awaits this persistent trumping of positive law by the claims of conscience and natural rights. Likewise, no society can persist on a battlefield; we need common ground, devices to bring us together and notions to bond us. It is world of need to quicken the heart and resolve of every member of this profession.

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[2] Comments on federal rules update by the Hon. James Nowlin, U.S. District Judge for the Western District of Texas, Austin Division – Texas Association of Defense Counsel Fall Meeting – Lake Tahoe, Nevada, September 1995.

Id. at 1298. This author chooses to believe that a large majority of lawyers desire to practice honorably and ethically. The answer may be as simple as personally applying one's fundamental moral perspectives to his or her law practice. Remedying the present lack of respect for our profession comes through taking the responsibility of facing criticism and failures head on and consciously working to be an example to break the mold.

3. Raise the Standards

A prevailing assumption among many lawyers is that the standards set out in the ABA Rules of Professional Conduct and Disciplinary Rules are the standard for "professionalism." I submit that "professionalism" mandates a higher ethical standard than merely complying with those codes and rules.

The question, then, is: "What do we mean by professionalism?" Its characteristics have been defined to include:

1. A commitment to high, ethical standards;

2. A prevailing attitude of altruism - unselfish concern for the welfare of others;

3. Mandatory educational preparation and training;

4. Mandatory continuing education;

5. A formal association or society;

6. Independence; and, with reservations,

7. Public recognition as a profession.

Horn, *On Professions, Professionals and Professional Ethics*, AMERICAN INSTITUTE FOR PROPERTY AND LIABILITY UNDERWRITERS (1978). Professionalism must also include the simplistic ideal of a lawyer maintaining an unyielding respect for the judiciary, other lawyers, and the justice system.

III. COST CONTAINMENT

Some clients operate under the belief that increasing legal costs are "symptomatic of a lawyer mind-set that views clients as the fatted calf, ripe for the milking." *Managing the Risk of Runaway Legal Fees*, THE RISK REPORT, Vol. XVI No. 3, Nov. 1993, at 4. This perception may have been fueled by some extreme cases of unethical billing. For example, one client audited the $5,000 hotel bill of a Cleveland lawyer trying a case in Houston. That audit revealed that the attorney had charged suits, ties, and underwear at a hotel clothing store. The lawyer attempted to justify the charges by explaining that the trial had gone longer than expected, and he had run out of clothes. This example was highlighted in an insurance journal that raised the legitimate

question, "Did Houston lack dry cleaners?" Id. The journal rightly remarked, "Guess who *really* got taken to the cleaners?!" Id. Other flagrant charges noted in the journal included billing for pens, pencils, file folders, and "HVAC" (later explained as charges for heating, ventilation and air-conditioning).

A. GUIDING PRINCIPLES

In the insurance defense debate, and in others regarding litigation costs, counsel, insurer and insured public entity alike should be ever mindful of two fundamentals: (1) the objective of legal counsel, insurance companies, self-insurance pools, public entities and public officials alike must remain the same: to protect and defend the insured in an expedient and reasonable manner; and (2) recognition and acknowledgement that public civil liability claims and lawsuits is **not** an exact science and includes a myriad of intangibles which change from day to day (or even moment to moment) in the course of each claim or suit. Some of those include:

1. What type of judge has the case?

2. What type of attorney represents the plaintiff? Is he competent? Is he reasonable in his assessment of the case?

3. Is the plaintiff pro se?

4. Is it a jury or non-jury case?

5. Is it in Federal court or State court?

6. Which venue?

7. What local rules apply?

8. Can it be mediated?

9. What conflicts exist among the various defendants?

10. How many plaintiffs are there?

11. How many defendants are there?

12. Do the parties include governmental entities or public officials?

13. Does the case have class action potential?

14. Have public officials been sued in their individual capacity?

*15. What does plaintiff want?

16. Does the attorney have control over the client?

17. What limitations, if any, are imposed by the client(s) or insurer(s) involved in the defense of the case?

18. What public policy issues surround the case; i.e., is the defense adverse to settling under any circumstances?

19. Does the insurance coverage require the insured's consent to settle?

20. What intangibles may be an impediment to resolution?

21. What possibilities are there of joining third parties for contribution or indemnity?

22. What is the extent of damages?

23. Does the suit seek injunctive relief and/or attorney fees?

24. What is the status of the law involving the various causes of action; i.e., is it well settled or are there cases presently on appeal which may affect the liability exposure.

25. Are local laws or ordinances applicable?

26. How is the case plead: for example, a failure to provide adequate supervision cause of action arising from a simple assault is far less volatile than one involving sexual assault of a student by a school administrator or other employee.

27. Others?

If the parties on all sides of the litigation cost containment debate will stay focused on the two fundamentals listed in the introductory paragraph on the prior page, perhaps, in a small part, a truly professional assessment of those issues can occur.

B. ALTERNATIVE DISPUTE RESOLUTION

The issue of alternative dispute resolution (A.D.R.), in the form of mediation, arbitration or another form, is at the forefront of all discussions relating to litigation alternatives and cost containment. It is well-known that the costs of litigation are continuing to escalate at an alarming rate and statistics reflect that only two percent (2%) of lawsuits filed ever proceed to trial. In addition, my experience indicates that jurors' perceptions of government and governmental employees are less than sympathetic. Thus, this author strongly contemplates and recommends that some form of alternative dispute resolution must be considered in all cases and at a very early stage. Experience indicates that A.D.R. is an inexpensive and effective discovery tool to both analyze the possibility of early resolution, and to assure that the parties take a realistic look at their risks and real costs, both economic and otherwise, if they litigate. A.D.R.

also provides an opportunity to make direct contact with the adverse party on an informal basis in order to determine how dedicated that party is to pursuing the case, or whether perhaps the case is primarily motivated by another entity, individual or the attorney.

For the A.D.R. process to work, it is essential that the mediator be experienced and knowledgeable in the legal issues involved. Particularly in governmental litigation, it is essential that a person with full authority to mediate and settle on behalf of the governmental entity act as its representative during the mediation process.

Mediation is an effective and economic method with which to obtain an early assessment of what the other party really wants in the case. It can be used to avoid risk, avoid delay, and avoid cost. In short, it provides a forum to listen and be heard and understood in an informal setting before the case becomes mired in the complexities of discovery and pretrial.

1. **The (Ideal) Mediation Process**

   (a) Selecting the Mediator

   (b) Mediation order

   (c) Pre-mediation Submission

   (d) Mediator Introduction

   (e) Lawyers' Opening Statements

   (f) Collective Session/Brainstorming

   (g) Separate Caucuses

   (h) Possible Second Joint Session

   (i) Possible Lawyers' Caucuses Drafting the Settlement Agreement

2. **Selecting the Mediator**

   (a) Extent of litigation experience?

   (b) Practical experience in specialized litigation matters?

   (c) Extent of mediation/arbitration training?

   (d) Actual mediation experience - <u>resume</u>

   (e) Use of case evaluation/separate caucus methodology

(f) Fee structure?

(g) Will he provide a neutral setting for mediation?

(h) Requires pre-mediation submissions?

(i) Encourages lawyer participation?

(j) Adequate time to mediate?

(k) Conflicts?

3. Premediation Submission

(a) Concise statement of issues and positions

(b) Identify strengths and possible weaknesses

(c) Provide a chronology of facts and case development

(d) Outline negotiations and proposals to date

(e) Identify who will be present at the mediation

(f) Provide copies of current pleadings

(g) Provide copies of pertinent appellate decisions

(h) Provide copies of key articles, critical excerpts from depositions, copies of key medical or expert witness reports

(i) Tab and index submission

(j) **MARK CONFIDENTIAL**

4. Client Preparation

(a) Explain mediation process (see 1 above)

(b) Explain mediator's role

(c) Provide copy of premediation submission

(d) Explain your role at: mediation and how it will be different

(e) Explain that client will actively participate

(f) Explain that mediator or anyone else may ask client questions

(g) Anticipate unrealistic: negotiating positions

(h) Anticipate sensitive issues and formulate strategies to deal with such issues

(i) Provide client with background of mediator

(j) Objectively evaluate strengths and weaknesses of case with client

(k) Stress patience, flexibility, open-mindedness, listening

(l) Emphasize polite, constructive approach.

(m) Discuss authority issues

5. Court-Ordered Mediation

(a) Obtain written order prior to session

(b) Include confidentiality reference?

(c) Authority (e.g., mediation statute)

(d) Include identity of mediator

(e) Include date, place, and time for mediation

(f) Include allocation of mediation costs

(g) Include non-binding

6. Who Should Attend/Authority to Settle

(a) Counsel and parties should attend

(b) Entity representative should be designated in advance

(c) Insurance or self-insurance representative with full authority to settle

(d) Should logistical or economic factors make it impractical to have representative with full authority in attendance:

(e) Discuss with opposing counsel

(f) Have local representative with limited authority attend

(g) Agree that representative with full authority shall be available by telephone during the session

(h) Reduce agreement to writing

(i) In exceptional cases, a critical expert witness may attend

(j) In cases in which a structured settlement is anticipated, the structure specialists should attend or be available by phone.

7. Lawyer's Role at Mediation

(a) Different persuasion and negotiating skills than in trial

(b) Rare opportunity to communicate directly with other party

(c) Should not cross-examine other party

(d) Should not permit client to be cross-examined

(e) Should not "showboat" for his client or other side

(f) Emphasizes good faith

(g) Be open-minded and reasonable

(h) Be firm, but diplomatic

(i) **LISTEN!**

8. Lawyer's Opening Statement

(a) Introduce yourself and your clients

(b) Acknowledge belief in the mediation process

(c) Emphasize you and your client are present in good faith

(d) Emphasize you are prepared to listen and work through problems

(e) Emphasis your belief that a resolution will be in everyone's best interest

(f) If strong feelings or emotions are present, acknowledge that you are aware that such feelings exist and that it is not your intention or desire to embarrass, humiliate, or inflame the other party

(g) If the other side is injured or a death has occurred, express your sentiment

(h) Explain your role on behalf of your client

(i) Explain to the other party that you have thoroughly and objectively evaluated the case

(j) Outline to the other party your position, the basis of your position, and the fact that you have a good faith disagreement on such issues

(k) Close by emphasizing your willingness to listen, your willingness to work through problems, and your hope that with effort and patience on both sides an agreement may be reached

(l) Do not discuss money in your opening statement

(m) Do not personalize matters in your opening statement

(n) Avoid absolutes, i.e., "won't", "never", etc.

9. Things Not to Do During Mediation

(a) Never discuss money in the presence of the other party. Communicate offers through the mediator in the separate caucus phase of the mediation

(b) Do not refer to the other party by first name unless you have asked for permission to do so

(c) Do not insult or criticize the mediator ... especially in the other side's presence

(d) Anticipate volatile issues

(e) Do not make comments to the other party calculated to trigger strong emotional responses

(f) Do not undermine the other party's or other lawyer's dignity

(g) Do not engage in theatrics; i.e., getting up to leave, etc.

10. Collective Session (After Opening Statements by Lawyers)

(a) Have your client prepared to respond to mediator's questions

(b) Have your client prepared to discuss his feelings

(c) Have your client prepared to speak in constructive, respectful terms

(d) Have your client prepared to express hope that the session will produce an agreement

(e) Have your client prepared to express his willingness to listen and work through problems

(f) Be prepared to exchange material which is otherwise discoverable

11. Separate Caucuses

(a) Separate rooms and caucuses privately with mediator

(b) All communications are confidential (except what the mediator is authorized to disclose)

(c) Negotiating process typically begins after second round of caucuses

(d) In the initial caucus, the mediator is attempting the following:

(1) Getting to better know the parties (bonding)

(2) Assessing who is the decision-maker (or makers)

(3) Assessing the personality/negotiating styles of the parties

(4) Mining for economic and non-economic issues

(5) Permitting the expression of strong feelings

(6) Identifying sensitive issues

(e) In the second cause, the mediator is attempting the following:

(1) Leading the parties in an objective evaluation of their case

(2) Having the parties identify the strengths of their case on their own

(3) Having the parties identify the weaknesses of their case on their own

(4) Playing devil's advocate with the parties and assisting the parties in understanding or acknowledging possible weaknesses that the parties may not have listed on their own.

(f) In cause round three and thereafter, the mediator is attempting the following:

(1) To get the parties "to dance", i.e., begin the negotiations

(2) To motivate the parties to negotiate reasonably and constructively

(3) To work through impasses

(4) To persistently force the parties to objectively look at their case

(5) To communicate proposals and messages; "shuttle diplomat"

(6) To elect to reconvene the parties if appropriate to work through particular problems

(7) To hold lawyers caucuses if special legal issues arise out of separate caucus

(8) To minimize negative reactions to proposals, to identify interests, and to keep the parties working through impasses

12. Memorandum of Agreement

(a) Not the final settlement documents, but should clearly and specifically outlines all terms of the agreement

(b) Agreement should be jointly drafted by all counsel so that it is not "one side's" agreement and so that the written agreement clearly reflects the agreement reached

(c) Should be signed by all counsel and parties

(d) All counsel and parties should receive copies of the fully executed agreement

13. Impasses

(a) Present, often many times, in every mediation

(b) Often reflects limited or different negotiating styles of parties

(c) Ask "why questions" to overcome impasses; i.e., explain the basis of the proposal and the needs that are reflected in a proposal

(d) Encourage the other party to categorize needs

(e) If at an impasse, forge a new and agreed negotiating pattern

(f) Re-visit the other side's weaknesses with the mediator

(g) Determine if noneconomic interests, if met, will help resolve the impasse

(h) Candidly express frustration and concern regarding impasse to the mediator

Following these guidelines will likely aid an attorney's attempts to successfully mediate his or her case and will in turn aid clients in quickly and perhaps peacefully resolving their legal concerns.

The increasing expense of litigation justifies discussions of cost containment. "The defense lawyer is the perpetual target, forever on the expense side, not the revenue side, of the corporate ledger." Stephen G. Morrison, *On Balloons, Value, and Loyalty*, FOR THE DEFENSE, May 1994, at 2. As a result, defense lawyers must keep costs in mind while defending lawsuits. However, Stephen G. Morrison, former president of the Defense Research Institute, explained, "The talk of reform often forgets about justice. We talk of money and forget about the fair assignment of responsibility. We talk of limiting risks and forget about reason and fault." Id. Morrison argues that, "We are in this adventure together, our clients and us, and we must never lose sight of the true compass point of what we do — the fair, reasonable, and just allegation of responsibility." Id.

C. FACTUAL AND LEGAL CONFLICTS ARISING FROM MULTIPLE REPRESENTATION

Lawyers representing multiple clients must be concerned about only two possible conflicts of interest: (1) actual conflicts, and (2) the appearance of conflicts. The ABA Model Rules of Professional Conduct not only proscribe representation of clients adverse to one another, (See ABA Model Rule 1.7) but also mandate that an attorney should avoid even the "appearance" of impropriety. Where a counsel represents the public entity as well as individual officers or employees, consent by the organization must be given by "an appropriate official" of the organization other than the person who is represented individually. See ABA Model Rule 1.13(e).

In representation of multiple defendants, potential conflicts may arise in a variety of relationships between:

a. the entity and individual members of the governing body;

b. the entity and other policy-makers;

c. the entity and its employees;

d. the employees and supervisory personnel;

e. the entity and its boards, either advisory or decision making;

f. the entity and all of the above persons acting in their individual capacities;

g. the entity and other public or private entities in privity with it;

h. departments of the entity with conflicting policies, procedures or regulations;

i. the entity and former officers or employees;

j. the entity and its attorneys;

k. the entity and its insurance carrier or self-insurance pool;

l. the entity, its insurers and excess carriers;

m. others?

The most difficult aspect of representation of multiple defendants lies in maintaining constant awareness of potential divergent interests of all parties represented and making diligent efforts to identify potential conflicts early in the litigation. Failure to do so compromises all advice, actions, and inactions after the conflict should have been detected.

In today's climate of "litigation cost control", joint representation will most likely continue. If there is to be joint representation of several clients, it is imperative that counsel obtain the "informed consent" of all clients. Rules 1.7 and 1.8 of the ABA Model Rules provide the framework for analysis of these issues. In order to comply with these Rules, counsel must make a full disclosure of all material facts to each of the multiple clients represented. Keep in mind, however, that to maintain confidentiality, such discussions are permissible only after permission of all parties from whom confidential information may be elicited.

Effective waiver and consent of multiple representations requires that conflicting representations will not cause a detriment to any client. Secondly, each client must make an informed consent to the representation after full disclosure of the conflicts.

Analysis of potential conflicts of interest only begins with informed consent of the joint representation by the clients. Particularly serious problems may arise when "common" interests become strained or terminate entirely. If clients have differing interests, the lawyer's ethical duty of undivided loyalty to each client becomes impossible to achieve. In fact, if such a conflict develops, access to confidential information may dictate complete withdrawal from representation of every client.

IV. DEALING WITH THE MEDIA

I was a reporter for 16 years, including 15 with the biggest newspaper in the state. I have interviewed former and future

> presidents, diplomats, members of congress, assorted other politicians, and the proverbial man on the street. Lawyers and ministers are often the hardest to interview and make the biggest mistakes in dealing with the press.

Tom Moran, *Rules and Commandments For Dealing With the Press*, TEX. BAR J. 471 (May, 1995).

Perhaps no other profession, save the entertainment industry, depends so heavily upon language and image for its livelihood than attorneys. The ability to communicate effectively while projecting a positive image for one's client, one's colleagues and one's self in an instant in front of a camera can make or break a career. Unfortunately, the traditional methods used by lawyers to deliver their messages do not translate well into today's popular culture. Where a point-by-point analysis of all relevant issues is necessary to impress a judge or jury, the media is not so forgiving. An image, be it positive or negative, is created in moments; public opinion is decided in five second sound bites. The unwary lawyer, caught in the glare of high-intensity camera lights like a deer on a country road, may freeze up or, perhaps worse, resort to the aforementioned skills acquired in the courtroom or board room, causing the attorney and client to appear arrogant, defensive or combative.

Dealing with the media in litigation need not be like crossing a mine field. With some preparation and forethought, the skillful attorney can use the media as a powerful ally.

This paper is designed to provide a reference guide to which the practitioner can turn for help. It is divided into separate sections outlining separately the various ethical, legal and practical considerations that bear on effective media relations.

A. THE ROLE OF ETHICS

1. Ethical Rules

We lawyers like to envision ourselves as part of an ethical profession. While some situations, such as the representation of parties with directly conflicting interests, are obviously unethical, a lesser known rule governs an attorney's communication with the media when litigation is pending or ongoing. Rule 3.07 (1994) of the Texas Disciplinary Rules of Professional Conduct controls a lawyer's ability to make extrajudicial statements regarding litigation. It provides that:

> 1. In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.
>
> 2. The likelihood of a violation increases if the adjudication is ongoing or imminent and the lawyer makes an extrajudicial statement referring to:

a. the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;

b. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;

c. the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;

d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

e. information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

3. A lawyer ordinarily will not violate Rule 3.07 by making an extrajudicial statement that contains merely:

a. the general nature of the claim or defense;

b. the information contained in a public record;

c. that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

d. except when prohibited by law, the identity of the persons involved in the matter;

e. the scheduling or result of any step in litigation;

f. a request for assistance in obtaining evidence, and information necessary thereto;

g. a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

h. if a criminal case:

(1) the identity, residence, occupation and family status of the accused;

> (2) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;
>
> (3) the fact, time and place of arrest; and
>
> (4) the identity of investigating and arresting officers or agencies and the length of the investigation.

Tex. Disciplinary R. Prof. Conduct 3.07 (1994). The rule seeks to balance the client's right to a fair trial with the "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Tex. Disciplinary R. Prof. Conduct 3.07 cmt. 1 (1994). Clearly the attorney's right to free speech is subordinated to the client's interest in having a fair trial. Id.

Rule 3.07 requires consideration of both the forum in which comments are made and the substance of those comments. The rule prohibits a lawyer from making statements that "a reasonable person would expect to be disseminated by means of public communication." Tex. Disciplinary R. Prof Conduct 3.07(a) (1994). The cautious attorney should always be aware of his audience when discussing matters related to a case. For example, statements that may be appropriate when made to associates, family, or friends may be unethical if made in situations where media representatives could overhear.

The substantive burden prohibits a lawyer from making a statement where he "knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding." Id. The language of the rule attempts to incorporate a certain amount of realism and flexibility. Comment 3 explicitly states that "an otherwise objectionable statement may be excusable if reasonably calculated to counter the unfair prejudicial effect of another public statement." Tex. Disciplinary R. Prof. Conduct 3.07 cmt. 3 (1994).

This provision is especially important in high-profile litigation, which often evokes powerful responses from the community at large. The litigator may quickly find himself in a position where his client faces a rising tide of negative public sentiment that ultimately affects the outcome of pending or ongoing litigation. Likewise, the unpopular plaintiff can easily be painted negatively in the press making any victory at the court house a hollow one. The O.J. Simpson trial is one of many recent examples. In such situations, the attorney may be required to take steps to intervene and reverse the harmful effects. See Tex. Disciplinary R. Prof. Conduct preamble ¶ 3 (1991) ("In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."). Practicality may require a public response; a lawyer's failure to respond to public attack is sure to result in a negative reaction from the client who is the subject of the attack.

As stated in rule 3.07(b), the likelihood of "material prejudice" increases as trial nears. The eve of trial is no time for a last ditch effort to sway public opinion. Although an attorney may be justified in engaging the media at the outset, ethical concerns increase as trial nears. The temporal aspect to rules like 3.07 was recognized by U.S. Supreme Court Justice Kennedy: "[a]

statement which reaches the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process...exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date." Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2729 (1991) (Citations omitted). Without doubt, media interest is bound to increase as a case heads into trial. Counsel should be increasingly circumspect and cautious at this time when the simplest statement, innocently made but broadcast repeatedly on the evening news, could run afoul of rule 3.07.

Not surprising, Rule 3.07 also prescribes indirect "end runs" by the prohibition that an attorney may not direct others to make statements that run afoul of 3.07(a). Although it may be tempting to "leak" a comment to the press during a pitched battle for public approval, the lawyer does so at his peril. "If a particular statement would be inappropriate for a lawyer to make...the lawyer is a readily subject to discipline for counseling or assisting another person to make it as he or she would be for doing so directly." Tex. Disciplinary R. Prof. Conduct 3.07 cmt. 2 (1994). Although an attorney may not be accountable for a client's spontaneous comments to the media, counsel should be mindful of the potential ethical violations involved when advising a client on strategies for press relations.

Disciplinary Rule 4.01 should also be considered when making public statements. It prohibits an attorney from making dishonest statements or from affirming such statements when the lawyer knows that they are false and does so with the intent to mislead others. Tex. Disciplinary R. Prof. Conduct 4.01 and cmt. 2 (1994). The Rule states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a third person; or
>
> (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Id. While the practical effects of lying to the media are discussed below, lawyers should be aware of the disciplinary risks involved with making false statements.

2. Other Considerations

An attorney's ethical obligations when dealing with the media is not limited to the constraints of the disciplinary rules. In recent years, the public's view of the legal profession has suffered greatly. In a recent American Bar Association poll, only 40% of those questioned stated that they have a favorable opinion of attorneys. Gary A. Hengstler & R. William Ide III, *Vox Populi: The public perception of lawyers*, ABA J., Sept. 1993, at 62. Other ranked professions included: teachers (84%), pharmacists (79%), police officers (79%), and doctors (71%). Id. The only two professions with a lower favorable rating were stockbrokers (28%) and politicians (21%). Id. The blame for this disfavor rests squarely upon our shoulders.

Fred Graham, chief anchor and managing editor for Court TV, estimates that up to 75% of all Americans have never been inside a courtroom. Melinda Smith, *Lights! Camera!! Action!!!: Cameras gain cautious popularity in Texas courtrooms*, TEX. BAR J., Nov. 1991, at 1090. A large majority of the information that the public receives about the legal system comes through the mainstream media; in fact, the press may be many peoples' only source. A 1983 survey reported that 54% of respondents receive such information from television newscasts, 51% from newspapers and 28% from radio newscasts. *The Public, the Media, & the Judicial System: A National Survey on Citizen's Awareness*, STATE COURT J., Fall 1983, at 10. Perhaps most troubling, 19% of those polled stated that they get information regarding the legal system from television dramas. Id. Although the Simpson trial and other recent high profile cases may have arguably increased public awareness about the realities of the courtroom, many people still believe that "L.A. Law" and "The Practice" are accurate.

B. Legal Aspects of Media Relations

1. The Rights of the Media to Gather and Publish Information

1) Constitutional Rights

a) Federal

Any discussion of the interaction of the law and the press must begin with the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. While it has been suggested that there may be differences between the freedom of speech and the freedom of the press, it seems that, in reality, the press simply enjoys the rights of free speech granted to all citizens. See Buckley v. Valeo, 96 S. Ct. 612, 650 n. 56 (1976). "Freedom of the press" is not limited solely to print media; the "press" includes motion pictures, television and radio broadcasts and cable programmers and operators. See Turner Broad. Sys., Inc. v. F.C.C., 114 S. Ct. 2445 (1994); Leathers v. Medlock, 111 S. Ct. 1438 (1991); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973); Red Lion Broad. Co. v. FCC, 89 S. Ct. 1794 (1969); Joseph Burstyn, Inc. v. Wilson, 72 S. Ct. 777 (1952).

Laws, statutes and ordinances that regulate the press are subject to the general rules of First Amendment analysis. The level of scrutiny afforded to a regulation of the media depends on whether the regulation is a "content-neutral" or "content-based" restriction. For "content-neutral" regulations to pass constitutional muster, they must be: (1) narrowly tailored to serve a significant government interest; and (2) must leave open ample alternative channels of communication. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 103 S. Ct. 948, 955 (1983). "Content-based" restrictions require the state to show that: (1) the regulation is necessary to serve a compelling state interest; and (2) that the regulation is narrowly drawn to achieve that

end. Id.; see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991). Determining which level of scrutiny applies is a matter of discerning the purpose of the regulation; the "principal inquiry in determining content-neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2745 (1989).

The First Amendment secures "the paramount public interest in a free flow of information to the people...." Pell v. Procunier, 94 S. Ct. 2800, 2809 (1974). To protect this interest, the Supreme Court has established that a right to gather newsworthy information exists for the media, but "[t]he right to speak and publish does not carry with it the unrestricted right to gather information." Zemel v. Rusk, 85 S. Ct. 1271, 1281 (1965); see Pell, 94 S. Ct. at 2809; Branzburg v. Hayes, 92 S. Ct. 2646 (1972). The press has no right of access greater than that available to the general public, nor is the media exempt from laws of general applicability. See Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Houchins v. KQED, Inc., 98 S. Ct. 2588, 2594-95 (1978); Pell, 94 S. Ct. at 2809; Branzburg, 92 S. Ct. at 2657.

b) Texas

The Texas Constitution also contains a free speech/press provision which states:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press...

Tex. Const. art. 1, § 7. The courts have interpreted this provision to provide greater protections than those afforded under the U.S. Constitution. Carpenter v. Wichita Falls I.S.D., 44 F.3d 362, 367 (5th Cir. 1995); See Matthews v. Wozencraft, 15 F.3d 432, 442 (5th Cir. 1994); Davenport v. Garcia, 834 S.W.2d 4, 8 (Tex. 1992). Although the courts will generally analyze laws and statutes that purportedly interfere with freedom of the press according to federal standards, prior restraints, such as gag orders, are subject to more rigorous scrutiny under Texas law. See Davenport, 834 S.W.2d 4 (Tex. 1992); San Antonio Express-News v. Roman, 861 S.W.2d 265 (Tex. App. — San Antonio 1993, no writ).

2. Controlling Trial Publicity

1) Federal Courts

a) Gag Orders

In high-publicity trials, courts will frequently attempt to control media coverage during trial. This is frequently done through orders restricting the ability of the parties, witnesses and attorneys involved in a case to speak with the press. Commonly called "gag orders," these restrictions are subject to First Amendment scrutiny. The federal test requires consideration of the nature and effect of pretrial news coverage, the availability and efficacy of other less-restrictive measures to mitigate the effects of trial publicity, and the efficiency of the gag order in preventing the threatened harm. Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, 2804 (1976).

"The mere potential for confusion if unregulated communication between the trial participants and the press at a heavily covered trial" will be sufficient to provide grounds for an order limiting discussions with the media. KPNX Broad. Co. v. Arizona Superior Court, 103 S. Ct. 584, 586-87 (1982).

2) Texas Courts

a) Gag Orders

Texas courts are much more hostile to gag orders. Since the Texas Constitution has been interpreted to provide greater protections for freedoms of speech and press, gag orders are scrutinized more carefully than in federal court. In Texas, a gag order is valid "only when an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and the judicial action represents the least restrictive means to prevent that harm." Grigsby v. Coker, 904 S.W.2d 619, 620 (Tex. 1995); see also Davenport, 834 S.W.2d 4, 10 (Tex. 1992). Gag orders are presumptively contrary to the Texas Constitution. Davenport, 834 S.W.2d at 10. Even though pretrial publicity may cause harm, Texas law prefers the use of pre-speech remedies to the imposition of prior restraints. Id.

b) Sealing Court Records

Texas Rule of Civil Procedure 76a was adopted in an attempt to control the manner in which court records are sealed and to recognize the public's interest in open courts. Tex. R. Civ. P. 76a; See Boardman v. Elm Block Dev. Ltd., 872 S.W.2d 297, 298-99 (Tex. App. — Eastland 1994, no writ). In furtherance of these goals, Rule 76a provides that court records may not be sealed unless it is shown that sealing the records is the least restrictive means available to protect a "specific, serious and substantial interest" which outweighs the presumption of openness and all probable adverse effects on the public's health and safety. Tex. R. Civ. P. 76a(1); see Burlington N. R.R. v. Southwestern Elec. Power Co., 905 S.W.2d 683, 684 (Tex. App. - Texarkana 1995, n.w.h.).

The rule provides a definition of "court records," which includes all filed documents, except documents filed in camera for the purpose of determining the discoverability of such documents, documents in court files to which access is otherwise restricted by law, and documents filed in an action under the Family Code. Tex. R. Civ. P. 76a(2)(a). Additionally, "court records" includes settlement agreements or discovery materials regarding matters that have a probable adverse effect on the public's health and safety or the administration of government. Tex. R. Civ. P. 76a(2)(b), (c).

Before court records may be sealed, the moving party must post a public notice disclosing the nature of the case and the records that are sought to be sealed. Tex. R. Civ. P. 76a(3); See Marks v. Feldman, 910 S.W.2d 73, 78 (Tex. App. — Dallas, writ granted). The court must hold an open hearing on the motion not less than 14 days after the motion is filed and the notice is posted. Tex. R. Civ. P. 76a(4).

C. Practical Tips for Media Relations

Ideally, all media contact should be handled by a savvy and experienced spokesperson who has received training in dealing with the media and has extensive experience in press relations. However, because this is generally not economically or practically feasible, attorneys are often left to fend for themselves.

> Even experienced trial lawyers often are not prepared for this role. Serious pressures come to bear in high profile governmental lawsuits. Even though a trial lawyer's job involves public performance, the presence of the press will inevitably alter the way an attorney behaves and views his case. Recently Christopher Darden, participating in a national panel discussion on cameras in the courtrooms, made this point clear. The press, according to Darden, transforms everything: the attorneys become more flamboyant, the witnesses become nervous and unsure, and the jury loses focus, concentrating instead on the theatrics going on around them. Videotape of The Defense Research Institute Annual Conference, *Cameras in the Courtroom* (Oct. 9, 1996) (on file with author). This inevitable change must be considered prior to beginning a course of media contacts.

Not only should the attorney consider the impact that the press will have on his performance and strategy, but, most importantly, the lawyer should spend considerable time considering the impact of press coverage on the client's interests. Clients, especially in governmental litigation, may have an interest in avoiding the media's attention. Failure to consider the effect of press coverage on a client is inexcusable. An attorney who decides to engage the media to further his own interests, the lawyer is betraying his client and his profession. Counsel should not engage the media unless he is doing so for the benefit of the client.

1. Defining Your Audience

1) The Medium Itself

When the situation is right, however, effective media relation skills can enhance a lawyer's ability to serve his client. The following is a guideline that, while not exhaustive and not a substitute for experience, should aid the practitioner in most situations.

The process of defining your audience begins by defining the term "media." In its broadest sense, the term encompasses all means of mass communication including television, radio, newspapers, magazines and, increasingly, the Internet. For purposes of an individual case, however, not all of these may be involved. Unless the particular case involves political celebrities or the "hot button" issue of the day, the definition of "media" may be more constrained. This definition is an important one. While pending, a lawsuit is the highest priority to those involved, but they are competing with thousands of other events and stories for a very limited amount of space. Most television news programs are thirty minutes long, and newspapers are equally constrained in the number of stores covered. Editors decide the extent of coverage, if any, to be afforded in terms of ability to garner viewers or sell papers. Accordingly,

while one may devote time, resources and energy to a case, the only reporter who may be interested in covering the case may be from a high school newspaper where the alleged incident happened.

This reality should be considered when deciding how to address media inquiries or requests for news conferences. The message should be tailored to provide the best "fit" with the media involved. Obviously, different tactics need to be used when dealing with the various media. Just as a videotaped deposition relates more information to a jury than a transcript, the difference between television and the print media can impact the message.

2) The Reporters Involved

Having weighed the costs and benefits of the various methods for broadcasting, it then becomes important to consider the individual(s) who will be carrying the message to the public. Reporters are a varied bunch who have their own beliefs and opinions that may influence the "spin" put on your story. To ensure effectiveness, investigate the reporters. Reading past articles and watching his or her broadcasts can provide valuable insight into the reporter's biases and prejudices and can help determine now the reporter will treat the case.

One way to increase the likelihood of positive coverage is to generate and maintain a network of media contacts by establishing and building relationships with the reporters who are likely to cover current and future cases. This process is premised upon the development of trust between the reporter and the attorney. That trust is built by providing solid, reliable information and observing the treatment it receives. A reporter who mischaracterizes facts or who prints "off the record" comments simply should not be trusted. The responsibility for policing the relationship lies with the attorney, but, in most cases, the reporter will act appropriately in hopes of earning trust and "repeat business."

An initial list of contacts can be generated in various ways. One of the simplest ways involves simply reading the paper or watching television. A reporter who appears fair and reports favorably on similar topics can be contacted and offered the story. Peers can also be a valuable resource. A call to other attorneys who frequently deal with the media may turn up valuable information on individual reporters, and may create a sense of familiarity with the reporters. A different approach is simply to call the television station or newspaper and ask which reporters cover your type of story, although this method is unlikely to generate information regarding the trustworthiness and professionalism of the reporters.

Once a contact is made, help the reporters do their job. Provide copies of pleadings and other public papers that explain your positions. Even the simplest habits, like returning phone calls promptly, will produce dividends when it is time for the reporter to sit down and prepare your story.

3) Who's Listening?

While the nature of the medium and the quality of the reporter are important, it is vital to consider whether you will be reaching your target audience. The target will vary depending

upon the nature of the matter and the message to convey. Choice of media will play a large role in whether your message gets out to your desired audience. The viewers of "Hard Copy" are not the same people who subscribe to the *New York Times*. Many television programs, newspapers and magazines have overlapping audiences, but you can be assured of a certain type of audience by carefully contemplating the method of delivery.

2. Preparing for First Contact

Once the decision has been made to give an interview or issue a public statement, the attorney would do well to remember the "six Ps:" **p**roper **p**rior **p**lanning **p**revents **p**oor **p**erformance. Contact with the media can be viewed as an extension of trial. The people who view or read a story about the client are likely to begin forming impressions that may be brought into the jury box. Given the volatility of public opinion, preparation is essential.

1) Knights and Dragons

Almost every case has "good guys" and "bad guys." Establishing which side you are on is essential in deciding what message to send and whether a message should be sent at all. This element will also be a likely predictor of how the media will receive your story. Reporters are likely to save their hardest questions for the party who they perceive as being wrong. If your client is accused of some heinous act, it may be best to avoid the spotlight entirely or to talk only to reporters you trust. On the other hand, if you are the "good" guys, the media can help to maintain your standing while increasing pressure on your opponent.

2) Setting Priorities

Presidential elections are not determined by the candidates' stand on every issue. Any successful campaign requires defining a few issues and sticking to them. Attorneys in high-profile cases should follow this example. Prior to interviews define your issues and what you hope to accomplish by talking to the media. A clear agenda will define your client's role in the matter and will ensure that your message gets through. If you only discuss the positive aspects of your case, you decrease the likelihood that your comments on those aspects will be edited out of the story.

3) The Media Perspective

Stories reporting high-profile litigation generally are built upon conflict. The more a reporter can build a conflict between the parties (or among the parties on the same side of a case), the more the media will pursue the story. Thus, any conflict that can be developed, will generally be pursued. In that regard, reporters sometimes plant leads which are subsequently found to be false. Simply because a comment, quote or question is presented in a particular matter, it should not be assumed that what is presented is accurate.

Also be mindful that reporters have deadlines and many times are looking for only a sound bite. For example, when a new lawsuit has been filed, a simple "no comment" does little to spark the imagination of the reporter. However, comments like "I haven't read the petition

yet, but if what you are telling me is true, there are serious allegations in this case. Please be assured that they will be met by an equally serious defense." By taking that approach, you've said absolutely nothing, given the reporter a significant sound bite, and he or she will go away happy.

4) Study, Study, Study!

It is critical to have complete command of the facts and the law before making any statement to the press. Reporters take notes and make recordings; an error, once made, will not go away. Once your comments are broadcast, your position is set in stone. Any corrections you attempt will be viewed with doubt and suspicion by both the reporter and the public. As a lawyer, the public expects you to be sophisticated and intelligent. A factual or legal error can destroy this image and can cast a shadow on both you and your client.

In governmental litigation, attorneys will often speak without fully understanding the client's interests. It is not unusual to see governmental attorneys standing on the courthouse steps, making statements and taking positions that can have disastrous effects on their clients. Lawyers representing large corporations would never do this. Corporations have diverse interests that may reach far beyond the facts of an individual case; the governmental entity is no different. If you have not discussed your case at length with your client, you may not be aware of the various ways that your actions can affect the client's interests. In such situations, it is better to be thought a fool than to open your mouth and prove it!

5) Singing in the Shower

Practicing your media statement is as important as rehearsing for opening argument. While repeatedly reading your notes will breed familiarity with the topic, talking through your presentation will help clear up problems with word choice and order in advance. Additionally, you will also develop a more relaxed and "natural" tone that will lend credibility.

3. The Interview

1) Defining the Rules

The first rule to be covered in any contact with the press is to define ground rules for the interview. If you have comments you want to make off the record, get agreements from all parties in advance. While most reporters will honor such agreements, it is unlikely that they will allow you to retract statements once made. Making sure what is on the record and what is off the record before commenting will prevent this problem.

Additionally, if you are seeking to restrict the scope of the interview to certain topics, define those topics before you talk with the press. Be mindful that attempting to limit questions may cast doubt on the credibility of your message.

2) The Good, the Bad, and the Ugly

While there are undoubtedly many "Do's" and "Don'ts", the following is a list of some of them.

a) Identify Yourself

At the beginning of any contact with the press, always identify yourself and your client clearly. Be sure to spell any difficult names to insure accuracy.

b) Talk to Your Audience

Interviews can be intimidating. It can be very easy to lapse into "lawyer" mode and begin responding to questions using complex sentences and fifty cent words. Successful use of the media depends on ability to look beyond the cameras and microphones to the audience. Although your answers are given to reporters, the audience which matters is not at the interview. It is vital that answers be framed for maximum effect on the readers or viewers. Do not try to impress reporters with lofty rhetoric and expansive vocabulary. Speak in plain simple terms and direct your message to the real audience.

c) Remember the Golden Rule

Always be civil and courteous to reporters. This can be difficult, especially when faced with a reporter who may try to make your client look foolish and you look like an idiot. However, the consequences of a fight with a reporter can be devastating. The reporter controls the flow of information to the audience. If angered or insulted, the reporter may cast you and your client in an extremely negative light.

This rule should also be extended to cover comments about your opponent. Do not attack opposing counsel in the press. Doing so cheapens your message and the public will perceive you as the "bad guy." If a response to your opponent's attack is needed, do so in a general fashion. Focus on the merits or on societal or economic aspects; never make statements that are directly aimed at your opponent.

d) Be Positive

Always try to frame your comments in a positive manner, even when the question is entirely negative. Putting the right spin on an answer makes you appear enthusiastic and confident in your cause.

Similarly, do not repeat a reporter's question. Once you do so, the reporter has put words into your mouth and you lose control of your statement. If you do not understand a question, ask the reporter to repeat it. Just because a question is asked, doesn't mean there is an answer. Just because a question is asked in a particular way, does not require that it be answered in a particular way. For example, a reporter's comment that "it doesn't sound like this case is going to get resolved before trial", can be diffused with a response of optimism, reminding the reporter that the vast majority of lawsuits get settled and that you have every intention of continuing to pursue settlement if at all possible.

e) Never Lie

Depending on the case, your statement may deal with good facts, bad facts, or both. Regardless, never lie to the media. They may eventually discover your dishonesty, and if so, you will destroy your credibility with the press and the public and make an enemy of the reporter in the process.

f) Never Guess

You should also not guess in response to a question. Remember, your guess is being recorded and may be broadcast. Opposing counsel may see it and use your words against you. If you are not prepared for a question or simply do not know the answer, offer to call the reporter back with a response, and do so as soon as possible after the interview. A simple "I don't know" can be corrected later by supplying the desired information, but a wrong answer is irretrievable. If the question merely catches you by surprise, take time to collect your thoughts prior to answering. A brief pause before answering will be much less harmful than an off-the-cuff answer.

g) Address Bad Facts Head On

If you are forced with bad facts in your case, deal with them in a direct fashion. Generally, be forthcoming and offer an explanation containing as much detail as possible. It is very important to appear open and honest; if you are evasive, the press will think you are trying to cover up or hide your bad news. This, of course, will incite them to continue to inquire and to probe much more deeply into the issue. Remember: news stories need conflict in order to make the news.

Attorneys who become involved in high-profile governmental cases carry a heavy ethical and legal load. This burden can be eased by proper preparation and planning. While the client's wishes significantly impact all decisions involving media coverage or otherwise, the effectiveness of your contact with the media depends on you.

V. CONCLUSION

The Clinton and Enron fiascos brought the unethical practices of the nation's attorneys to the forefront of the public's minds. Unfortunately, society sees the legal profession as one that has been transformed over the past few decades by intensifying competition and an obsessive focus on profits and the bottom line. Lawyers at all levels are under more pressure to bill many hours, leading to more overbilling, and the prospect of riches through corporate deals and litigation has led many lawyers to lower their ethical standards. Let's use these scandals as an impetus for making a real, positive change in our practice of the law. Lawyers have a powerful tool in that they can guide their own conduct simply by following the Model Rules of Professional Conduct or other ethics rules and standards of their state, thereby self-regulating themselves before their behavior comes into question. Hopefully, utilizing this opportunity, along with the subsequent betterment of our profession, will improve our reputation in the public's mind, and in our own.

APPENDIX "A"

The Texas Lawyer's Creed:

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closing are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about the counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility

.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

APPENDIX "B"

I. GUIDELINES FOR CONDUCT OF THE SECTION OF LITIGATION OF THE AMERICAN BAR ASSOCIATION

A. Lawyers' Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to zealously advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications. We will refrain from acting upon or manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or social economic status toward any participant in the legal process.

2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.

4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel.

5. We will not lightly seek court sanctions.

6. We will in good faith adhere to all express promises and to agreements with other counsel, whether oral or in writing, and to all agreements implied by the circumstances or local customs.

7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide other counsel the opportunity to review the writing. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to other counsel's attention. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement to obtain unfair advantage.

9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

11. Whenever circumstances allow, we will make good faith efforts to resolve by agreement objections before presenting them to the court.

12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain unfair advantage.

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel.

16. We will promptly notify other counsel and, if appropriate, the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity, unless the rules provide otherwise.

19. We will take depositions only when actually needed. We will not take depositions for the purpose of harassment or other improper purpose.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law.

22. During depositions we will ask only those questions we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party, or for any other improper purpose.

24. We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents, or to accomplish any other improper purpose.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party, or for any other improper purpose.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information, or for any other improper purpose.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information, or for any other improper purpose.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken.

30. Unless permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

31. Nothing contained in these Guidelines is intended or shall be construed to inhibit vigorous advocacy, including vigorous cross-examination.

B. Lawyers' Duties to the Court

1. We will speak and write civilly and respectfully in all communications with the court.

2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.

5. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.

6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.

7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

C. Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings, and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

D. Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.