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# STANDARD LAWYER BEHAVIOR? PROFESSIONALISM AS AN ESSENTIAL STANDARD FOR ABA ACCREDITATION

Nicola A. Boothe-Perry\*

*“You see, in life, lots of people know what to do, but few people actually do what they know. Knowing is not enough! You must take action.”—Anthony Robbins<sup>1</sup>*

## I. INTRODUCTION

High-visibility examples of lawyer behavior (such as attorneys falling asleep in court);<sup>2</sup> outrageous deposition behavior;<sup>3</sup> disrespectful be-

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1. *Anthony Robbins Quotes*, THINKEXIST.COM, [http://thinkexist.com/quotation/you\\_see-in\\_life-lots\\_of\\_people\\_know\\_what\\_to\\_do/12795.html](http://thinkexist.com/quotation/you_see-in_life-lots_of_people_know_what_to_do/12795.html) (last visited Nov. 22, 2011).

2. *Burdine v. Johnson*, 262 F.3d 336, 338–39 (5th Cir. 2001) (holding that accused suspect’s attorney, Joe F. Cannon, prejudiced defendant’s capital murder case by falling asleep during the trial).

3. *See, e.g., In re Golden*, 496 S.E.2d 619, 621 (S.C. 1998) (documenting attorney’s behavior after a deposition of his client’s wife, the adverse party in a domestic proceeding). Specifically:

The grievance complaint alleged that after the deposition, the attorney stated to [the estranged wife]: “You are a mean-spirited, vicious witch and I don’t like your face and I don’t like your voice. What I’d like, is to be locked in a room with you naked with a very sharp knife.” Thereafter, it is alleged that Attorney said: “What we need for her [pointing to [the estranged wife]] is a big bag to put her in without the mouth cut out.”

*Id. See also* *Huggins v. Coatsville Area Sch. Dist.*, No. 07-4917, 2009 WL 2973044 (E.D. Pa. 2009) (noting that counsel engaged in “incessant insult exchanges and aggressive questioning” during deposition. The court characterized counsels’ exchanges as “heated, personal, rude, and pointless” statements that included a “few choice epithets” and “foul language.” The court found that one lawyer in particular acted highly improperly, stating that: “[his] behavior falls far short of that which lawyers are to exhibit in the performance of their professional services. Treating an advertent with discourtesy, let alone with calumny or derision, rends the fabric of the law.”); *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53–54 (Del. 1994). The following deposition testimony was recorded:

MR. JAMAIL: Don’t answer that.

havior in court<sup>4</sup> and out of court<sup>5</sup> (even in their capacity as elected officials)<sup>6</sup> have garnered considerable attention.<sup>7</sup> This publicity cultivates and fosters a perception by the general public that lawyers lack profes-

How would he know what was going on in Mr. Oresman's mind?

Don't answer it. Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

MR. JOHNSTON: No, Joe, Joe—

MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

*Id.*; Miriam Rozen, *Hairpiece v. Fat Boy*, Am. Law. Oct. 1992 at 82:

JAMAIL: You don't run this deposition, you understand?

CARSTARPHEN: Neither do you, Joe.

JAMAIL: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.

CARSTARPHEN: Well, that's not your job, Mr. Hairpiece.

WITNESS: As I said before, you have an incipient—

JAMAIL: What do you want to do about it, asshole?

CARSTARPHEN: You're not going to bully this guy.

JAMAIL: Oh, you big tub of sh\*t, sit down.

CARSTARPHEN: I don't care how many of you come up against me.

JAMAIL: Oh, you big fat tub of sh\*t, sit down. Sit down, you fat tub of sh\*t.

*Id.* In another reported account, Florida attorney Ratiner lost control when the opposing counsel attempted to put an exhibit sticker on Mr. Ratiner's laptop. The opposing counsel was apparently trying to turn Mr. Ratiner's laptop into a deposition exhibit. Mr. Ratiner briefly touched the opposing counsel's hand and then attempted to run around the table toward the opposing counsel. According to a referee who investigated the incident, Mr. Ratiner then tore up the exhibit sticker (typically about two inches by two inches) and tossed the little pieces toward the opposing counsel. Mr. Ratiner leaned in toward the opposing counsel and berated him. For a full account of the story, see [http://www.abajournal.com/weekly/article/lawyer\\_suspended\\_for\\_deposition\\_tirade\\_taped\\_incident\\_is\\_instructive\\_court/](http://www.abajournal.com/weekly/article/lawyer_suspended_for_deposition_tirade_taped_incident_is_instructive_court/) (Posting of Debra Casens Weiss (Aug. 2, 2010, 7:39 AM CST)).

4. In one example, in response to a prosecutor's objection during trial, defense counsel made "a simulated masturbatory gesture with his hand while making eye contact with the Court." Posting of John G. Browning to THE SOUTHEAST TEXAS RECORD, <http://www.setexasrecord.com/arguments/210542-legally-speaking-lawyers-behaving-badly-part-three> (Mar. 9, 2008, 9:32 AM).

5. In a recent alleged scuffle between attorneys David Lawrence and Aaron Matusick of Portland, Oregon, "one of the lawyers slapped the other, and the attorney retaliated with a punch to the head." *Id.*

6. See, e.g., *In re Cammarano*, 902 N.Y.S. 2d 446 (N.Y. App. Div. 2010) (ordering the disbarment of respondent, former mayor of the City of Hoboken, N.J., after his conviction of conspiracy to obstruct commerce by extortion under color of official right and for taking bribes from an FBI informant); *Clark v. Conahan*, 737 F. Supp. 2d 239 (M.D. Pa. 2010) (holding that defendants, then-judges Mark A. Ciavarella, Jr., and Michael T. Conahan, did not have immunity from their actions in connection with

sionalism.<sup>8</sup> Equally, the lack of civility among lawyers, and other forms of dubious professional conduct, have led to lawyers themselves criticizing the lack of professionalism in their ranks.<sup>9</sup> On occasion, the questionable

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scheme to divert juvenile offenders to a newly constructed privately-owned juvenile detention facilities in return for kickbacks).

7. With the common use of the Internet, a quick search for badly behaving lawyers will produce pages of examples, including visual examples often found on YouTube. Lawyer Fight!!!!, YouTube, <http://www.youtube.com/watch?v=Nk60qiB9FWI> (last visited Nov. 22, 2011); Drunk Vegas Lawyer Causes Mistrial In Court Part 1/4, YouTube, <http://www.youtube.com/watch?v=yV2qtvbIPFE> (last visited Nov. 22, 2011); Old Lawyer Fight, YouTube, <http://www.youtube.com/watch?v=td-KKmcYtrM> (last visited Nov. 22, 2011); This lawyer is the best! Flip the bird, YouTube, <http://www.youtube.com/watch?v=fw7J53YhRvs> (last visited Nov. 22, 2011); TV Judge Completely Ends Smartass Lawyer, YouTube, <http://www.youtube.com/watch?v=dSirLliYBXk> (last visited Nov. 22, 2011); see also Richard Abel, Book Review, 57 J. LEGAL EDUC. 130 (reviewing MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005)); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147–48 (2001) (citing incidents of attorneys falling asleep during trials); CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 17 (1999), available at <http://ccj.ncsc.dni.us/natlplan/natlactionplan.html> [hereinafter CHIEF JUSTICES' ACTION PLAN]. See, e.g., *Javor v. United States*, 724 F.2d 831, 832 (9th Cir. 1984).

8. See Honorable Paul W. Grimm & Michael Schwarz, *Current Developments in Employment Law: The Obama Years, Professionalism—Supplemental Material*, CS006 ALI-ABA 1425 (2010) (noting that “[L]awyers are not well perceived by the public. We are called ‘shysters,’ money grabbers, and a whole range of expletives”); Nicola A. Boothe-Perry, *Enforcement of Law Schools’ Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 849 NEB. L. REV. 634, 635 (2011).

9. See CHIEF JUSTICES’ ACTION PLAN, *supra* note 7, at 17 (noting how the unethical and unprofessional conduct of a small portion of lawyers has tainted the image of the legal community and diminished public confidence in legal and judicial institutions); AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]. The lack of professionalism has even been noted by law students. For example, law students in the clinical program at Florida A&M University College of Law are often shocked and surprised by the comments, behavior and attire of some of the attorneys in court. Specifically, students in the Guardian Ad Litem Clinic taught by the author, often note the casual attire worn by some lawyers in dependency court. While clerking for United States District Court Chief Magistrate Charles W. Grimm, Law Clerk W. James Denvil (then law student at University of Baltimore) aptly noted that “[t]he skyrocketing costs of discovery and simple integrity demand that lawyers act like professionals, not spoiled children.” Email from W. James Denvil, Editor-in-Chief, University of Baltimore Law Review, to Nicola A. Boothe-Perry, Assistant Professor of Law, Florida A&M University College of Law (Apr. 4, 2011, 10:04 PM) (on file with author).

behavior coexists with a violation of ethical rules.<sup>10</sup> The “crisis of professionalism” is noticeable in a decline of civility and an increase in adversarialism.<sup>11</sup> These trends are a source of discomfort to all segments of the legal profession as they threaten not only the preeminent and prominent position held by lawyers;<sup>12</sup> but also threaten to sever the “significant grant” of public trust given to lawyers.<sup>13</sup> Increasingly, across the country, local and national bar associations, the judiciary, and a few law schools are heeding the calls for lawyer behavior reform; thus instituting programs and initiatives to address professionalism.<sup>14</sup> Yet, despite efforts to

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10. See, e.g., *In re Dennis Montoya*, 2011-NMSC-042, 266 P.3d 11. There, the New Mexico Supreme Court suspended Rio Rancho attorney Dennis Montoya from practicing law for a year after resolving three pending disciplinary actions against him. The charges included misrepresentations, knowingly making false statements to the court, failure to account for funds received from settlements in a wrongful death lawsuit in state court, and complaints by federal judges about his handling of cases there. Montoya reported that his (mis)behavior in federal court was due to overwork. Justice Richard Bosson of the New Mexico Supreme Court noted Mr. Montoya’s habits: “One impression I have is Mr. Montoya has a tendency to blame others for his own problems, I guess a human enough trait, and ascribe to others ill motives—racial motives, ethnic motives, discriminatory motives, they’re-coming-to-get-me motives, personal animus—when really it’s his own shortcomings that’s the cause of the problem.” Scott Sandlin, *Justices Suspend Lawyer For Year*, ALBUQUERQUE J., May 12, 2011, at C2, available at <http://www.abqjournal.com/main/2011/05/11/abqnewsseeker/rio-rancho-lawyer-suspended-for-a-year.html>.

11. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 136–37 (Jossey-Bass 2007) (noting that this “crisis” also includes a decline in the role of the counselor and in lawyers’ competence, including ethical competence, and a new “sense of the law as a business, subject to greater competitive economic pressures and answerable only to the bottom line”).

12. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 3–4 (Oxford University Press 2000) (reviewing survey data showing that the public perceives lawyers as greedy, unethical, and arrogant); SULLIVAN ET AL., *supra* note 11, at 1 (noting that lawyers hold “prominent positions” in American society and that “[i]n addition to their more conspicuous roles as champions in courtroom conflicts, lawyers have become indispensable suppliers of . . . ‘artificial trust’—the enforceable agreements and contracts that formalize social relationships and seem increasingly necessary to hold together a turbulent and litigious society.”) (internal citation omitted).

13. SULLIVAN ET AL., *supra* note 11, at 21.

14. See, e.g., Washington and Lee University School of Law’s Third Year Reform program in which the school blends simulated and actual practice experiences and instruction in professionalism to help students learn the craft of law. The program includes a semester-long professionalism course. *Washington and Lee’s New Third Year Reform: Leading the Way in Legal Education Reform*, <http://law.wlu.edu/thirdyear/> (last visited Nov. 22, 2011); Thomas M. Cooley Law School (Winner of the ABA’s Smith Gambrell Professionalism Award) which created the Center for Ethics,

correct the problem, there are still far too many lawyers, particularly those first entering the practice of law, who appear ill-equipped to handle their professional careers. The question regarding law schools' ultimate responsibility to educate young lawyers on the tenets of professionalism is attracting attention.<sup>15</sup>

In recent years, several law schools have begun to recognize the importance of professionalism training by taking steps to incorporate a professionalism component into their core curriculum and by requiring participation in professionalism programs.<sup>16</sup> A significant majority of law schools, however, have made no tangible changes to increase professionalism in the legal profession.<sup>17</sup> In most law schools, professionalism remains subordinated to academic requirements, and is often viewed as subjective and indeterminate.<sup>18</sup> Yet, repeatedly, research evidences that law schools can promote the development of more mature moral thinking, which can result in ethical conduct and professional behavior among future attorneys.<sup>19</sup> In order to promote such professionalism, however, law schools must make an explicit effort to do so.<sup>20</sup>

The question therefore arises as to what more can be done to encourage law schools to take action to increase professionalism training among their students? Should the American Bar Association (ABA) encourage law schools to implement professionalism training for their students, or in some other manner demonstrate that their students understand and exhibit professionalism in their conduct?

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Service and Professionalism, initiated the Professionalism Portfolio Project, and has many school-supported professionalism initiatives. Cooley.edu, Ethics, Service, and Professionalism, <http://www.cooley.edu/ethics/> (last visited Nov. 22, 2011).

15. See generally, Boothe-Perry, *supra* note 8; Nicola A. Boothe-Perry, *Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOYOLA L. REV. 517 (2009).

16. See, e.g., Washington and Lee University School of Law's New Third Year Program, <http://law.wlu.edu/thirdyear/> (last visited Nov. 22, 2011).

17. NATIONAL ORGANIZATION OF BAR COUNSEL, LAW SCHOOL PROFESSIONAL INITIATIVE REPORT ¶ 2 (2009).

18. See WILLIAM M. SULLIVAN, *supra* note 11, at 133 (noting that in the minds of many faculty, "ethical and social values are subjective and indeterminate and, for that reason, can potentially even conflict with the all-important values of the academy—values that underlie the cognitive apprenticeship: rigor, skepticism, intellectual distance, and objectivity").

19. *Id.* at 135 ("Law school experiences, if they are powerfully engaging, have the potential to influence the place of moral values such as integrity and social contribution in students' sense of self").

20. *Id.* at 134 (recounting research on legal education results which show that specially designed courses in professional responsibility and legal ethics do support the development of more mature moral thinking and moral judgment).

This article addresses the ABA as a source of pressure to encourage and foster professionalism education in law schools. The ABA holds a uniquely powerful position in the American legal community, and with it the ABA enjoys the attendant ability to influence professionalism training and awareness. The principal tool at the ABA's disposal considered in this article is the ABA's ability to promulgate standards for professionalism as a requirement for law school accreditation.<sup>21</sup> This article argues that this is the proper time for the ABA to institute a specific standard in an effort to increase professionalism in the legal profession.

Part II of the article provides a definition of professionalism. Part III briefly discusses why professionalism should be considered as part of the accreditation process. The remaining subparts of Part III will provide an overview of the history and purpose of the accreditation process, and identify the current procedural and substantive requirements for accreditation that might be brought to bear on professionalism issues.<sup>22</sup> Part IV addresses potential legal challenges to new requirements that would make professionalism training a mandatory element in accreditation. Part V reviews prominent reports such as the *MacCrate Report*,<sup>23</sup> *Carnegie Report*,<sup>24</sup> and the *National Organization of Bar Counsel Report*,<sup>25</sup> which all support the need for a professionalism standard. The Model Rules of Professional Conduct are also analyzed in Part V as they relate to professionalism.

Part VI.A focuses on existing and anticipated institutional resistance to further accreditation requirements such as professionalism-related requirements. This part highlights legal academia's generally tepid response to the recent calls for more practice-oriented training and other barriers to implementation of a professionalism training requirement. Part VI.B provides tangible methods by which the ABA could measure accountabil-

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21. The ABA has other roles it could play in spurring more comprehensive awareness and familiarity with the elements of professionalism. For example, the ABA can influence state bars to adjust admission criteria and CLE requirements in ways that make professionalism training a mandatory part of licensure. This article will limit its focus to the ABA's role in the accreditation process of law school education.

22. See Henry Ramsey, Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, 30 WAKE FOREST L. REV. 267 (1995) (discussing in depth the ABA's accreditation process); see also James P. White, *The American Bar Association Law School Approval Process: A Century Plus of Public Service*, 30 WAKE FOREST L. REV. 283 (1995).

23. For discussion of the MACCRATE REPORT, see *infra* Part V.B.

24. For discussion of the CARNEGIE REPORT, see *infra* Part V.C.

25. For discussion of NATIONAL ORGANIZATION OF BAR COUNSEL REPORT, see *infra* Part V.D.

ity with a professionalism accreditation standard. Part VII explores the use of an “outcome measures” approach in determining whether a law school has met a proposed professionalism standard for accreditation.

## II. PROFESSIONALISM DEFINED

In 1953, Dean Roscoe Pound defined “profession” as a “traditionally dignified calling” and described professionals as “a group . . . pursuing a learned art . . . in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood.”<sup>26</sup> Pound suggested that this esteemed group should “aspire to exhibit behaviors consistent with the professional status”; behavior he described as “professionalism.”<sup>27</sup> However, the exact nature of such “behaviors consistent with the professional status” has not been succinctly defined.

It is unrefuted that professionalism is foundational for a profession’s fulfillment of its social and ethical responsibility to the public.<sup>28</sup> However, professionalism in law, as a concept, though widely discussed, remains inadequately defined.<sup>29</sup> Without a clear definition of the principles of pro-

26. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953). Pound was Dean of Harvard Law School at the time of publication of his book. See *Who Is Roscoe Pound?* THE POUND CIVIL JUSTICE INSTITUTE, <http://www.roscoepond.org/whoisroscoe.aspx>.

27. POUND, *supra* note 26, at 29.

28. See, e.g., SULLIVAN, *supra* note 11, at 21–22 (using the term “social contract” in discussing an optimal outcome maximizing the public good); Neil Hamilton, *Assessing Professionalism: Measuring Progress In the Formation of An Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 473–74 (2008) (noting that these social contracts are premised on the public’s trust that a profession and its individual members are serious about professionalism. “High degrees of professionalism build confidence . . . [f]ailures of professionalism undermine the social contract.”).

29. See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 35 WM. & MARY L. REV. 1303, 1307 (1995) (noting professionalism is an abused term and is often defined as “to act the way we want lawyers to act”); Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEX. L. REV. 275, 277–78 (1994) (explaining that the concept of professionalism remains inadequately defined despite passionate support and extensive efforts); Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4, 5 (2008) (noting that scholars so far have been unable to construct and agree upon a widely-accepted clear and succinct definition of “professionalism”); Timothy Terrell & James Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 406 (1992) (concluding that professionalism is an elusive concept and a lofty goal); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 657 n.2 (1994) (stating that there is a tendency to rely on metaphor in the use of the term professionalism, which may contribute to the absence of consensus as to the term’s meaning).



fessionalism, lawyers who “toe-the-line” of violating the rules of ethics (i.e., the “line-toers”)<sup>30</sup> will increase as the minimum floor of competence and compliance with professional rules becomes the norm. This behavior will, in turn, lead to a faulty understanding in the legal profession that professionalism is simply equated with mere rule compliance and malpractice avoidance.<sup>31</sup> To allow such an erosion of the reputation of the profession is unacceptable and detrimental. A clear and accepted definition of professionalism is therefore necessary to increase the public trust, and support the ability to influence the behavior of law students and practicing lawyers.<sup>32</sup>

In its common meaning, professionalism describes the aspirations, conduct, and qualities that mark a professional person.<sup>33</sup> “Civility” is often used interchangeably in describing professionalism.<sup>34</sup> Candor and competency are also frequently used as synonyms.<sup>35</sup> Most professionalism

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30. See generally Boothe-Perry, *supra* note 15, at 518 (2009) (discussing the “existing and growing population of attorneys that have yet to cross the line into ‘unethical hell’ [who are simply toeing the line that would] cross into a realm where their unprofessional pattern of behavior threatens the perceived sanctity of the profession”).

31. See Hamilton, *supra* note 28, at 476. Professor Hamilton notes that a “practicing lawyer not socialized into the core values and ideals of the profession may have very limited tools to deal with the vast spectrum of lawyer decisions involving ethical dimensions beyond simple rule compliance or malpractice avoidance.” *Id.*

32. *Id.* at 477. “Confusion about the meaning of professionalism undermines the public’s trust that the profession and each individual lawyer are serious about meeting their obligations under the social contract.” Hamilton, *supra* note 29, at 6. Furthermore, it “reduces the possibility that the concept will actually influence law student or lawyer conduct.” *Id.* Professor Hamilton notes that students and practicing professionals “will give more attention and energy to clear expectations that are clearly stated and rigorously evaluated.” *Id.*

33. Hamilton, *supra* note 28, at 472.

34. It has been suggested that the use of the word “civility” is misguided, since incivility is a symptom of some underlying cause (e.g., out-of-control discovery), and the use of civility would therefore prove harmful to equate norms of behavior as precluding challenges to injustices within the legal system. W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S.C. L. REV. 1027, 1031 (2003); see also Monroe Freedman & Abbe Smith, UNDERSTANDING LAWYERS’ ETHICS 23–25 (3d ed. 2004) (noting that professionalism’s emphasis on civility and courtesy will undermine zealous advocacy).

35. See Wm. Reece Smith, Jr., *Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613, 615 (1997) (defining professionalism as “competence, character, and commitment”). See also Melissa H. Weresh, *I’ll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives On Professional Identity Development and Influence of Generational Differences*, 61 S.C. LAW REVIEW 337, 345 (2009) (stating that “[p]rofessionalism is also a manifestation of unique values, practices, and

creeds contain a statement regarding candor to the court.<sup>36</sup> In more pragmatic terms, in the economic climate of the early twenty-first century, scholars have viewed failed professionalism as “the actions of attorneys who turn a blind eye toward clients’ excessive short-term self-interest and risk.”<sup>37</sup>

Professor Neil Hamilton, a renowned professionalism scholar, defined a tri-partite model of professionalism consisting of: (1) “Personal Conscience” (an awareness of the moral goodness or blameworthiness of one’s own intentions and conduct together with a feeling of obligation to be and do what is morally good); (2) the “Ethics of Duty” (the obligatory and disciplinary elements of the Model Rules of Professional Conduct”); and (3) “the Ethics of Aspiration” (the core values and ideals of the profession).<sup>38</sup> Hamilton comes closest to a concise definition of professionalism by listing elements such as personal conscience growth, compliance with the ethics of duty, internalization of the highest standards for a lawyer’s professional skills and ethical conduct, holding other lawyers accountable for the standards set forth in governing rules of professional conduct, and acting as a fiduciary to serving the client and the public good.<sup>39</sup> The elements, as enum-

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expectations, particularly those values, practices, and expectations relating to civility, competence, diligence, candor, and advocacy”).

36. Grimm & Schwarz, *supra* note 8, at 1.

37. Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 139 (2011).

38. Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4 (2008). Professor Hamilton derived his model through an analysis and synthesis of various ABA reports, Chief Justice Reports, and the Preamble to the Model Rules of Professional Conduct. *See id.*

39. Hamilton, *supra* note 28, at 482–83 (2008). Professor Hamilton posits that professionalism means that each lawyer:

1. Continues to grow in personal conscience over his or her career;
2. Agrees to comply with the ethics of duty—the minimum standards for the lawyer’s professional skills and ethical conduct set by the Rules;
3. Strives to realize, over a career, the ethics of aspiration—the core values and ideals of the profession, including internalization of the highest standards for the lawyer’s professional skills and ethical conduct;
4. Agrees to both hold other lawyers accountable for meeting the minimum standards set forth in the Rules and encourage them to realize core values and ideals of the profession; and,
5. Agrees to act as a fiduciary, where his or her self-interest is overbalanced by devotion to serving the client and the public good in the profession’s area of responsibility: justice. This includes:
  - a. Devoting professional time to serving the public good, particularly by representing pro bono clients; and,

erated by Hamilton, combine to provide a definition of professionalism.<sup>40</sup>

Using the foundational basis provided, a current definition of professionalism would entail: those attitudes and behaviors that supersede self-interest, serve to enhance public opinion and trust, adhere to high ethical and moral standards, and aspire daily to a commitment of excellence in one's personal and professional life. A non-exclusive guideline of such attitudes and behaviors include:

1. Respect for the practice of law;
2. Respect for the legal system (including, but not limited to, professional behavior toward the court);
3. Integrity;
4. Respect for persons involved in the legal system (e.g., civility/courtesy; and the promotion of civility among colleagues, and mutual respect throughout the profession);
5. Cultivation of habits of personal living that enhance a moral core of responsibility to the profession;
6. Avoidance of personal attacks, rudeness, disrespectful or profane comments and aggressive behaviors that lead to unproductive or disruptive stress and conflict, and;
7. Maintenance of a professional appearance to include appropriate attire.

The behavioral guidelines set forth above all include an underlying thread of respect; yet, applicability may vary depending on the lawyer's specific circumstances. For instance, a lawyer's "respect for the practice of law" would include adherence to the Model Rules of Professional Conduct as well as adherence to federal and state rules of procedure where applicable. Whereas a lawyer's "respect for the legal system" would encompass actions not specifically included in the Model Rules of Professional Conduct or any federal or state statute or rule but would instead regulate behavior with both colleagues and other administrative personnel who are active participants in the holistic legal system.

One enumerated factor that underscores the general premise of respect, yet is critically important to the definition of professionalism is number five: cultivation of habits of personal living that enhance a moral core of responsibility to the profession. In recent years, the Carnegie Foundation published *Educating Physicians: A Call for Reform of Medi-*

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b. Undertaking a continuing reflective engagement, over the course of a career, on the relative importance of income and wealth in light of the other principles of professionalism.

*Id.*

40. *Id.* at 482.

*cal School and Residency*.<sup>41</sup> In the foreword, Lee Shulman notes: “[I]n every field we studied, we concluded that the most overlooked aspect of professional preparation was the formation of a professional identity with a moral core of service and responsibility around which the habits of mind and practice could be organized.”<sup>42</sup> The importance of the formation of such a professional identity in the practice of law is paramount. A law student or lawyer who has this “moral core” of service and responsibility to others, including clients and others in the legal system, will inevitably exhibit the respect that underlies all the other elements of true professionalism.

Lawyers must be able to represent and competently advocate for their clients without succumbing to behavior that is not commensurate with the esteemed position of the legal profession. In other words, a professional lawyer must learn how to disagree without being disagreeable, address differences of opinion through competent and civil discussion, and utilize polite discourse.

Over the years, competence and effectiveness have been important benchmarks of a “good” lawyer.<sup>43</sup> Empirical data suggests however that a lawyer’s success and effectiveness is inextricably linked to the lawyer’s professionalism.<sup>44</sup> Research conducted by Professors Neil Hamilton and Verna Monson on the topic has drawn the conclusion that professionalism should be defined to include “all the elements of an ethical professional identity . . . associated with a lawyer’s effectiveness.”<sup>45</sup> Hamilton and Monson found both that “[a] highly professional lawyer is substantially more likely to be an effective lawyer” and that “ethical professional formation occurs throughout a career.”<sup>46</sup> As such, they suggest that “legal educators, law firm [sic] and bar leadership, and malpractice insurers should challenge law students and lawyers to progress to the next stage of professionalism from wherever they are starting.”<sup>47</sup> The ABA should like-

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41. MOLLY COOKE ET AL., *EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY* (2010).

42. *Id.* at ix.

43. The Preamble to the Model Rules of Professional Conduct states directly that “[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession’s ideals of public service.” MODEL RULES OF PROF’L CONDUCT 2 (2009). In addition, the Model Rules’ Preamble specifically requires a lawyer to observe the Model Rules. *Id.* §§ 7, 12, 14. Rule 8.3 states that it is professional misconduct to violate the Rules, which include Rule 1.1 on competence and Rule 1.3 on diligence. *See id.* R 8.3.

44. Hamilton & Monson, *supra* note 37, at 163.

45. *Id.* at 139.

46. *Id.* at 143.

47. *Id.*

wise do more than simply challenge, and instead mandate similar progress.

### III. THE ABA ACCREDITATION PROCESS

The effort to wield professionalism progress is the responsibility of the entire legal profession. The ABA's influence on the viability of law schools is a critical component in that regard.

#### A. *Why the ABA's Accreditation Process?*

Detailed requirements for accreditation have been promulgated by the ABA. These requirements cover every aspect of law school accreditation, including the precise standards for the collections held by the law library and the minimum number of minutes of instruction required to receive a law degree.<sup>48</sup> The accreditation process has endured the critics and continues to progress. Therefore, abolition of the process seems highly unlikely.

As it stands, the power wielded by the ABA over law schools through the accreditation process has far-reaching consequences. For example, the majority of students who enroll in law school do so with the intent to become licensed attorneys. Students from unaccredited law schools are unable to take the necessary bar examination for licensure except in states with a separate state-specific accreditation process.<sup>49</sup> Currently almost all states require graduation from an accredited law school<sup>50</sup> and exclude graduates of unaccredited schools from practice in both state and federal courts.

Since 1952, the U.S. Department of Education (ED) has recognized the ABA as a "reliable authority" concerning the quality of legal education and has designated it as the relevant accrediting body.<sup>51</sup> Under Title

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48. See *Standards and Rules of Procedure for Approval of Law Schools*, 2009–2010 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR.

49. For example, the State Bar of California's Committee of Bar Examiners has approved a separate accreditation process for schools that do not have ABA approval. Graduates of those non-ABA accredited schools in California can sit for the bar exam—but only in the state of California. THE STATE BAR OF CALIFORNIA, Title 4. ADMISSIONS AND EDUCATIONAL STANDARDS, DIVISION 1, RULE 4.26 LEGAL EDUCATION (2008), available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=-2KV5j0w6Cw%3d&tabid=1227>.

50. *Comprehensive Guide to Bar Admission Requirements*, 2002 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR 16–17.

51. 20 U.S.C. § 1099b(a) (2006); American Bar Association Section of Legal Education and Admissions to the Bar, *Frequently Asked Questions*, AMERICAN BAR ASSOCIATION (answering the question) "What Is ABA Approval of Law Schools?" by

34, Chapter VI, Section 602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the ED as the accrediting agencies for programs that lead to the J.D. degree.<sup>52</sup> As a result of this recognition, ABA-accredited schools are eligible to participate in federal student loan programs.<sup>53</sup> In fact, the ED recognizes *only* ABA-accredited law schools in providing federal financial assistance for the law school education of enrolled students.<sup>54</sup> As such, law schools seeking to ensure enrollment—enrollment that will in turn ensure the longevity of the law school—must comply with the ABA’s standards to both obtain *and* retain accreditation status.<sup>55</sup>

ABA accreditation standards direct law schools to provide each student with instruction on “the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”<sup>56</sup> This includes “instruction in matters such as the law of lawyering.”<sup>57</sup> The stated mission of the ABA, in part, is to “serve equally our members, our profession and the public.” The effort to “serve . . . the public,” however, has been undermined by the growing trend of lawyer behavior not commensurate with the standards expected of the legal profession.<sup>58</sup> With its inherent

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stating that, “[s]ince 1952, the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association has been recognized by the United States Department of Education as the national agency for the accreditation of programs leading to the J.D. degree in the United States”), *available at* [http://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions.html](http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html).

52. *Id.* See generally American Bar Association Section of Legal Education and Admissions to the Bar, *Accreditation Overview*, AMERICAN BAR ASSOCIATION, *available at* <http://www.abanet.org/legaled/accreditation/acinfo.html>.

53. See 20 U.S.C. § 1141(a)(5) (1997).

54. See *Thomas M. Cooley Law School v. Am. Bar Ass’n.*, 459 F.3d 705, 707 (6th Cir. 2006) (noting that “[a]ccreditation is important to a school for a number of reasons, not the least of which is that it allows the students of the school to receive federally-backed financial aid”).

55. The U.S. Code provides criteria by which an ED-approved accreditor must review an applicant institution. 20 U.S.C. § 1099b(a)(5) (2006). Accreditors are required to assess the institution’s curricula, faculty, physical facilities, fiscal stability, student services, program length, degrees offered, and history of student complaints. *Id.* The ABA Accreditation Standards, not surprisingly, faithfully track section 1099b’s framework: assessing curricula, faculty, facilities, etc., during the accreditation process. See *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 48, Chapters 1–8.

56. *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 48, at 21.

57. *Id.* at 23.

58. See Abel, *supra* note 7; Boothe-Perry, *supra* note 15; Levinson, *supra* note 7, at 147–48.

power regarding the status of law schools, the ABA has the ability to promulgate any and all standards commensurate with the profession, including standards for professionalism.

### *B. History and Purpose of the Accreditation Process*

In the late 1920s into the 1930s, elite lawyers represented by the ABA sought to eliminate competition from persons obtaining licenses to practice law through apprenticeship alone.<sup>59</sup> During the Great Depression, the ABA convinced federal and state governments to only grant law licenses to graduates of ABA-accredited law schools.<sup>60</sup> In 1922, elite law schools and faculties, represented by the American Association of Law Schools (AALS), began to refuse membership to proprietary schools on similar grounds of prevention of competition.<sup>61</sup>

In 1921, the ABA promulgated its first Standards for Legal Education, and published lists of law schools that satisfied their criteria.<sup>62</sup> State bar associations in states such as California, Ohio, Texas, and Tennessee, joined the ABA and AALS in arguing that protection from competition was an urgent matter,<sup>63</sup> and called for state legislatures to make unapproved schools illegal.<sup>64</sup> These campaigns were ultimately successful, in great part due to the fact that there were no substantial rival lawyers' groups.<sup>65</sup> As a result, the rapidly growing power wielded by the ABA be-

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59. Aspiring lawyers would clerk for a specified period in a law firm, and then pass the bar exam to gain entry into the profession. See Harry First, *Competition in the Legal Education Industry: An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979) (describing history of ABA accreditation and analyzing accreditation as a boycott by law schools of unaccredited law schools); see also Andy Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 MICH. J. LAW REFORM 635 (1995 and 1996).

60. See George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637 (2003).

61. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2116 (1998) (noting that the elite law schools recognized the economic threat that the new proprietary schools posed to existing practicing lawyers and existing law schools) (citing Harry First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311 (1978)). Furthermore, the AALS, formed in 1900 with thirty-two law schools, is currently a "non-profit educational association of 172 law schools representing over 10,000 law faculty in the United States." The purpose of the AALS is "the improvement of the legal profession through legal education." AALS, <http://www.aals.org/about.php>.

62. Shepherd & Shepherd, *supra* note 61, at 2120; see also *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 48, at iv.

63. See RICHARD L. ABEL, *AMERICAN LAWYERS* 54–55 (1989).

64. *Id.*

65. Shepherd & Shepherd, *supra* note 61, at 2122.

came apparent. In 1927, no state required graduation from law school at all for admission to the bar, much less from an ABA-accredited school.<sup>66</sup> By 1935, nine states required graduation from an ABA-accredited school; by 1937, twenty states required this; by 1938, twenty-three states required an ABA-approved degree; by 1941, forty-one states required one.<sup>67</sup> As of 2010, forty-nine states require graduation from an ABA-accredited school.<sup>68</sup> As of September 2010, there were a total of 200 ABA-approved institutions.<sup>69</sup> In 2009, Florida A & M University College of Law became the most recent law school to obtain full accreditation from the ABA.<sup>70</sup>

The importance of an institution's satisfaction with the ABA accreditation standards is evident. A law student's ability to obtain a license to practice law is inextricably linked to his or her matriculation from an ABA-accredited school. Only in California can an individual sit for the bar examination notwithstanding graduation from an ABA-accredited law school.<sup>71</sup>

The ABA states that it has promulgated the *Standards for Approval of Law Schools* (Standards) to serve the objective of "improving the competence of those entering the legal profession"—a main concern that led to the formation of the ABA in 1878.<sup>72</sup> The Standards are founded "primarily on the fact that law schools are the gateway to the legal profession," and therefore provide "minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal

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66. See ABEL, *supra* note 63, at 55.

67. *Id.* at 55–56.

68. Dan Morris & Andrew Mazoff, *Law School's Role in Building the Future Practitioner: A Perspective*, 3 PHOENIX L. REV. 407 (2010); see also George Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 112 (2003).

69. ABA-Approved Law Schools, <http://www.abanet.org/legaled/approvedlaw/schools/approved.html> (last visited Nov. 27, 2011). One hundred ninety-nine of the ABA-approved institutions "confer the first degree in law (the J.D. degree); the other ABA-approved school is the U.S. Army Judge Advocate General's School, which offers an officer's resident graduate course, a specialized program beyond the first degree in law." *Id.* As of September 2010, five of the 200 law schools were provisionally approved. *Id.*

70. *Id.*

71. The State of California maintains a separate accreditation system that allows graduates of non-ABA-accredited law schools to sit for the state-specific California bar examination. THE STATE BAR OF CALIFORNIA, Title 4. ADMISSIONS AND EDUCATIONAL STANDARDS, DIVISION 1. ADMISSION TO PRACTICE LAW IN CALIFORNIA, available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=-2KV5j0w6Cw%3d&tabid=1227>.

72. *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 48, at iv.



of providing a sound program of legal education.”<sup>73</sup> Some scholars have surmised that this justification for the accreditation process is “presumably in the service of consumer protection.”<sup>74</sup> In keeping with the protection of the public, as well as the advancement of basic requirements in preparation for a legal career, the ABA ensures an internal system of checks and balances on the accreditation process.<sup>75</sup> The responsibility for making accreditation decisions is, in theory, dispersed among four groups in the ABA.<sup>76</sup> However, primary authority for accreditation belongs to the ABA House of Delegates.<sup>77</sup>

### C. Procedural and Substantive Requirements

The House of Delegates follows specific procedural guidelines in evaluating a law school’s adherence to the substantive requirements for ABA accreditation.

#### 1. Procedural Requirements

The lengthy and oftentimes costly<sup>78</sup> accreditation process begins once a law school has completed at least one full academic year of operation.<sup>79</sup> The one-year old law school will generally hire an outside advisor to assist with the extensive reporting mandates for accreditation.<sup>80</sup> This outside advisor is oftentimes a legal academic who previously worked

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73. *Id.* at viii.

74. Robert W. Bennett, *Reflections on the Law School Accreditation Process*, 30 WAKE FOREST L. REV. 379, 379 (1995).

75. *See id.*

76. Shepherd & Shepherd, *supra* note 61, at 2128.

77. *See* REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION’S ACCREDITATION OF AMERICAN LAW SCHOOLS, at 12 (1995), available at <http://apps.americanbar.org/legaled/accreditation/Wahl%20Report.pdf>.

78. Costs associated with the approval process (minimum of three initial inspections, costs and fees) can exceed \$50,000. *See* ABA fee schedule, <http://apps.americanbar.org/legaled/accreditation/sitevisit/fees.html> (last visited Nov. 27, 2011). *See also* Shepherd & Shepherd, *supra* note 61, at 2131 (noting that “indirect costs . . . can easily exceed \$300,000 for each of the three years,” bringing the total potential cost of accreditation to in excess of one million dollars).

79. Shepherd & Shepherd, *supra* note 61, at 2129. The requirement for a completed academic year of operation may place many new law schools in a quandary as most qualified law students may be unwilling to attend a school that lacks accreditation.

80. *Id.*

with or for the ABA in the accreditation process.<sup>81</sup> A “comprehensive feasibility study,” as well as a comprehensive self-study discussing the new law school’s educational program and its goals are required.<sup>82</sup> In addition, the new law school must complete both an extensive “site evaluation questionnaire” and an “annual questionnaire.”<sup>83</sup> The school must also provide financial operating statements for the last three years<sup>84</sup> and pay a substantial application fee.<sup>85</sup>

A three-day site evaluation is conducted by a team of five to seven evaluators (Site Evaluation Team)<sup>86</sup> at the law school’s expense.<sup>87</sup> The Site Evaluation Team typically consists of the chairperson,<sup>88</sup> one or two academic law school faculty members, a law librarian, one faculty member with an expertise in professional skills,<sup>89</sup> one judge or practitioner,<sup>90</sup> and one university administrator who is not a member of a law faculty.<sup>91</sup>

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81. *Id.* A person must wait two years after ending service for the ABA accreditation process before accepting the position as a consultant to a law school seeking accreditation. *Id.* at n.121.

82. *Id.* at 2130.

83. *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 48, R. 4(b)(2)–(3) at 75.

84. *Id.* R. 4(b)(6) at 75. If the school has been existence for less than three years, financial statements must be produced for the entire period of the school’s existence.

85. *Id.* R. 4(b)(9) at 75.

86. The Site Evaluation Team members are appointed by the Office of the Consultant. The consultant is responsible for overseeing the training of site evaluation teams that conduct law school inspections, and for assuring the production of inspection reports in accordance with established standards. *See ABA Consultant on Legal Education*, AMERICAN BAR ASSOCIATION, <http://apps.americanbar.org/legaled/section/consultant/consultant.html>.

87. *See generally* Shepherd & Shepherd, *supra* note 61, at 2130 (indicating that the site evaluation imposes a “substantial expense on the law school,” and “some members of the site teams view the site visit as an opportunity to splurge at the school’s expense”).

88. OFFICE OF THE CONSULTANT ON LEGAL EDUCATION, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, CONDUCT MEMO: OVERVIEW OF THE ABA ACCREDITATION AND SITE VISIT PROCESS, 2 (2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2011\\_site\\_visit\\_conduct\\_memo.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2011_site_visit_conduct_memo.authcheckdam.pdf).

89. *The Law School Accreditation Process*, 2010 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR 10, *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2010\\_aba\\_accaccredit\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accaccredit_brochure.authcheckdam.pdf) (noting that the professional skills include clinic, simulation skills, or legal writing).

90. *Id.* Law schools not affiliated with a university or college do not have a university administrator on their site visit teams. *Id.*

91. *Id.*

On completion of the visit, the Site Evaluation Team submits a “written report based on the site evaluation.”<sup>92</sup> The site evaluation report “addresses the factual information relevant to each of the Standards so that the ABA’s Accreditation Committee (Accreditation Committee) can determine whether a school is in compliance with the Standards.”<sup>93</sup> The Site Evaluation Team makes no conclusions or recommendations, and simply provides the report to the consultant’s office.<sup>94</sup> The Site Evaluation Team’s report is then provided to the law school; together with the school’s comments,<sup>95</sup> the report is submitted to the Accreditation Committee.<sup>96</sup>

Based on the findings in the report, the Consultant issues an “action letter” informing the school of the Committee’s conclusions of compliance or noncompliance.<sup>97</sup> Where noncompliance with ABA standards is found, a “show cause” hearing is held allowing both the law school and a representative of the site team an opportunity to be heard.<sup>98</sup> “If the Accreditation Committee finds that the school is, in fact, out of compliance, then it gives the school no more than two years to come into compliance, absent a finding of good cause for extending the time period.”<sup>99</sup> The Accreditation Committee can also initially deny the request for accreditation.<sup>100</sup> On denial of the request, the law school can either appeal, or reapply.<sup>101</sup>

A recommendation for provisional approval must be reviewed by both the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association (Council) and the Accreditation Committee.<sup>102</sup> If a provisionally approved law school “fails to come into compliance during that two-year period, the Accreditation Commit-

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92. *Rules of Procedure for Approval of Law Schools*, 2012 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, R. 2(d), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_aba\\_rules\\_of\\_procedure\\_for\\_accreditation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_aba_rules_of_procedure_for_accreditation.authcheckdam.pdf).

93. *The Law School Accreditation Process*, *supra* note 89.

94. Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 CLINICAL L. REV. 681, 702 n.90 (2004).

95. *Rules of Procedure for Approval of Law Schools*, *supra* note 92, R. 3(d). Both the law school and the university’s president, where applicable, have an opportunity to offer corrections to the report. *Id.* R. 2(e).

96. *Id.* R. 5(a).

97. *Id.* R. 13 (a).

98. *Id.* R. 13(c).

99. *The Law School Accreditation Process*, *supra* note 89, at 9.

100. *Rules of Procedure for Approval of Law Schools*, *supra* note 92, at R. 5(b).

101. *Id.* R. 10 (a).

102. *Id.* R. 5(a)(1), 8(a).

tee initiates action to remove the school from the list of approved law schools.”<sup>103</sup>

Moving from provisional to full ABA approval is an ongoing and intrusive process. Each year for at least two more years following provisional approval, the law school is required to endure annual site evaluations before being considered for full approval.<sup>104</sup> Even after a school is granted full approval, it must still undergo additional evaluations.<sup>105</sup> During the third and seventh years after full accreditation is first obtained, the law school continues to be subject to the accreditation process, including additional site visits, long reports, and inspections.<sup>106</sup> Thereafter, “sabbatical site evaluations” generally occur every seven years.<sup>107</sup> If ABA inspectors find any deficiencies in a law school’s performance during the post-accreditation site visits, the Consultant will send the law school a letter listing the defects, which per the ABA rules must be fixed or result in revocation of accreditation.<sup>108</sup>

During pre- and post-accreditation site visits, the Site Evaluation Team reviews a number of substantive enumerated requirements to determine compliance.<sup>109</sup> The Site Evaluation Team prepares another detailed report for the Accreditation Committee which in turn makes recommendations to: (1) continue provisional accreditation of the approved law school; (2) require additional information related to potential noncompliance with ABA standards; or (3) require a hearing if the school appears to be in noncompliance with the Standards or their interpretations.<sup>110</sup> The Committee may recommend that the school be placed on “probation, or removed from the list of law schools approved by the Association.”<sup>111</sup> Any recommendation for probation or removal is submitted for review by the Council.<sup>112</sup> Although the Committee has only recommendatory power, its accompanying report to the Council is of great moment for the school under review. Where there is “substantial evidence to

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103. *The Law School Accreditation Process*, *supra* note 89, at 9.

104. *Rules of Procedure for Approval of Law Schools*, *supra* note 92, at R. 13(b).

105. *The Law School Accreditation Process*, *supra* note 89, at 10 (a full site evaluation is conducted in the third year after full approval, and then a full sabbatical evaluation every seven years).

106. *Rules of Procedure for Approval of Law Schools*, *supra* note 92, at R. 12(a), (b).

107. ABA Policies, Pol’y 10, at 11.

108. *Rules of Procedure for Approval of Law Schools*, *supra* note 92, at R. 13.

109. See more detailed information regarding the substantive requirement in Part III.C.2, *infra*.

110. *Rules of Procedure for Approval of Law Schools*, *supra* note 92, at R. 2.

111. *Id.* R. 5.

112. *Id.*

support” the recommendations and conclusions of the Committee, the Council is to affirm the recommendation for probation or removal of accreditation.<sup>113</sup>

During all pre- and post-accreditation site visits, the Site Evaluation Team reviews the law school’s adherence to specified substantive requirements. These include faculty and administration, the academic program, the student body and its success on the bar examination and in job placement, student services, library and information resources, financial resources, and physical facilities and technological capacities.<sup>114</sup>

## 2. Substantive Requirements

In order for a law school to obtain and retain accreditation from the ABA, there are seven substantive chapters outlining minimum standards.<sup>115</sup> Chapter 1, Standards 101–106, provides the general purposes, practices, and definitions.<sup>116</sup> Standards 201–213 in Chapter 2 address the law school’s organization and administration, which includes standards relating to the allocation of authority between the dean and the faculty, involvement of alumni, students, and others; and the law school’s practice of equal opportunity and diversity.<sup>117</sup> Standards 301–308 specifically address the “program of Legal Education” focusing on the objective of “maintain[ing] an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”<sup>118</sup> These Standards also address curriculum, academic standards and achievements, course of study, academic calendar, study

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113. REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION’S ACCREDITATION OF AMERICAN LAW SCHOOLS 50–51 (1995), available at <http://apps.americanbar.org/legaled/accreditation/WahlReport.pdf> [hereinafter WAHL REPORT].

114. *The Law School Accreditation Process*, *supra* note 89, at 8.

115. *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 48, at viii, 1–3. (The Preamble to the Standards indicate that “[c]onsistent with their aspirations, mission and resources, law schools should continuously seek to exceed *these minimum requirements* in order to improve the quality of legal education and to promote high standards of professional competence, responsibility and conduct.”) (emphasis added).

116. *Id.* at 4–11.

117. *Id.* at 12–18 (The enumerated standards address resources for programs, self study, strategic planning and assessment, governing board of an independent law school, governing board and law school authority, dean, allocation of authority between dean and faculty, involvement of alumni, students, and others, non-university affiliated law school, law school-university relationship, nondiscrimination and equality of opportunity, equal opportunity and diversity, and reasonable accommodation for qualified individuals with disabilities).

118. *Id.* at 19–31.

outside the classroom, distance education, participation in studies or activities in a foreign country, and degree programs in addition to the J.D.<sup>119</sup> Standards 401–405 provide specifications for faculty size, qualifications, instructional role, responsibilities, and the professional environment.<sup>120</sup> Chapter 5, Standards 501–511, address admissions and student services.<sup>121</sup> Chapter 6 and 7, Standards 601–704, provide standards for law school libraries, information resources and facilities.<sup>122</sup>

Compliance with all standards is required, and the majority of schools do everything within their power to ensure observance of the Standards. However, not all law schools have acquiesced in the ABA's imposition of requirements or in the ABA's assessment of whether a school is in compliance. Those disagreements have given rise to challenges to the ABA's enforcement ability. As described below, the outcomes of those controversies are instructive as to the authority of the ABA to require programmatic elements that relate to professionalism as a standard in the accreditation process, and leave little doubt that the ABA can do so if it wishes.

#### IV. LEGAL CHALLENGES TO, AND CRITICISM OF, ABA ACCREDITATION

Reaching a zenith in the 1990s and continuing sporadically after that, the ABA accreditation process has been attacked on legal, pragmatic, and moral grounds by scholars and in the courts.<sup>123</sup> In 1992, the accreditation process was critiqued by the ABA's own Section on Legal Education and Admission to the Bar, chaired by Robert MacCrate.<sup>124</sup> In that same era, both the Massachusetts School of Law (MSL)<sup>125</sup> and the Department of Justice<sup>126</sup> individually challenged the ABA's accreditation process and regulation of legal education as a violation of antitrust laws.

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119. *Id.*

120. *Id.* at 32–37.

121. *Id.* at 38–43.

122. *Id.* at 44–51.

123. See, e.g., Matthew D. Staver & Anita L. Staver, *Lifting the Veil: An Expose on the American Bar Associations' Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 3 (2003) (calling the accreditation process an antitrust violation causing injury to the legal market as being an unreasonable restraint on trade amounting to “abdication of political responsibility”).

124. See MACCRATE REPORT, *supra* note 9.

125. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 872 F. Supp. 1346, 1368 (E.D. Pa. 1994); see also Portinga, *supra* note 59 (advancing the proposition that the accreditation of law schools is within the scope of the Sherman Act).

126. See *United States v. Am. Bar Ass'n*, 934 F.Supp. 435 (D. D.C. 1996).

As discussed below, these challenges forced a change in both the content and procedures surrounding ABA regulation of law schools.

In November 1993, the Massachusetts School of Law (MSL) filed suit in federal district court against the ABA alleging that the ABA's accreditation standards violated the Sherman Act.<sup>127</sup> Having been denied accreditation by the ABA, MSL filed an antitrust claim against the ABA charging that the ABA, through its accreditation standards and procedures, among other things, combined and conspired to organize and enforce a group boycott in restraint of trade.<sup>128</sup> MSL further alleged that the ABA conspired to monopolize the provision of law school training, the accreditation of law schools, and the licensing of lawyers.<sup>129</sup> Specifically, MSL alleged that the ABA fixed salaries, required reduced teaching loads, increased the cost of legal education, and prevented disadvantaged persons from obtaining a legal education.<sup>130</sup> In short, MSL claimed that the ABA operated like a "typical cartel, increasing price and reducing output."<sup>131</sup> Between 1994 and 1996, the district court published no fewer than nine opinions in the case.<sup>132</sup> After years of litigation, the district court granted summary judgment to the ABA.<sup>133</sup> On appeal, the Third Circuit Court of Appeals affirmed, ruling in part that MSL did not suffer antitrust injury from the ABA's alleged fixing of salaries at accredited schools.<sup>134</sup> MSL also filed suit in Massachusetts state courts asserting

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127. *Mass. Sch. of Law at Andover, Inc.*, 872 F. Supp. at 1368.

128. 15 U.S.C. §§ 1, 2 (2006); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 853 F. Supp. 837, 839 (E.D.Pa. 1994).

129. *Id.*

130. *Mass. Sch. of Law v. Am. Bar Ass'n*, 107 F.3d 1026, 1031–32 (3d Cir. 1997), *cert. denied*, 118 U.S. 264 (1997).

131. See Portinga, *supra* note 59, at 636 (citing Paul A. Samuelson, *ECONOMICS* 107, 484 (11th ed. 1980)).

132. See *Mass. Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 846 F.Supp. 374 (E.D. Pa. 1994) (dismissing claims against certain individual defendants for lack of personal jurisdiction); 853 F.Supp. 837 (E.D. Pa. 1994) (resolving controversies anent discovery); 853 F.Supp. 843 (E.D. Pa. 1994) (denying plaintiff's motion for reconsideration); 855 F.Supp. 108 (E.D. Pa. 1994) (granting in part defendants' motions for summary judgment); 857 F.Supp. 455 (E.D. Pa. 1994) (reconsidering discovery orders); 872 F.Supp. 1346 (E.D. Pa. 1994) (denying plaintiff's recusal motion); 895 F.Supp. 88 (E.D. Pa. 1995) (reaffirming earlier decision); 914 F.Supp. 1172 (E.D. Pa. 1996) (imposing sanctions); 937 F.Supp. 435 (E.D. Pa. 1996) (granting remaining defendants' dispositive motions).

133. *Mass. Sch. of Law at Andover, Inc.*, 846 F.Supp. 374; *Mass. Sch. of Law at Andover, Inc.*, 853 F.Supp. 837; *Mass. Sch. of Law at Andover, Inc.*, 857 F.Supp. 455; *Mass. Sch. of Law at Andover, Inc.*, 872 F.Supp. 1346; *Mass. Sch. of Law at Andover, Inc.*, 937 F.Supp. 435.

134. *Mass. Sch. of Law at Andover, Inc.*, 107 F.3d at 1041.

claims for violation of Massachusetts General Laws, Chapter 93A,<sup>135</sup> and for tortious misrepresentation against all the defendants, as well as claims for fraud, deceit, civil conspiracy, and breach of contract against the AALS, the ABA, and the fourteen named individuals.<sup>136</sup> Motions to dismiss and summary judgments were granted in favor of the defendants and upheld on appeal.<sup>137</sup>

During the pendency of the MSL litigation, additional challenges and criticism of the accreditation process arose. MSL's objections to the ABA's intrusive control of legal education were echoed by various segments of legal academia. With the MSL litigation still extant, and in part due to the *MacCrate Report* issued, the deans of fourteen law schools, including Harvard, Stanford, and the University of Chicago, sent an open letter to the deans of every ABA-accredited law school urging that the accreditation process be reformed.<sup>138</sup> The letter stated in part:

We find the current process overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly in administrative time as well as actual dollar costs to schools . . . . It is this sense of responsibility that gives rise to our concern that the accreditation process for law schools is heading in the wrong direction.<sup>139</sup>

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135. Chapter 93A addresses Administration of the Government, Regulation of Trade/Regulation of Business Practices for Consumer Protection. MASS. GEN. LAWS ch. 93A, Refs & Annos (2011).

136. The state case was removed to the U.S. District Court for the District of Massachusetts. The district court denied MSL's motion to remand and "methodically dismembered MSL's complaint," defendant by defendant, during a four-month period in 1997; on January 10, it granted New England School of Law's motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6); on February 13, it granted the eight individual defendants' motion to dismiss for lack of personal jurisdiction; on March 3, it granted the AALS's motion for summary judgment; and on May 8, it granted summary judgment in favor of the ABA and the six individual defendants. On appeal, the First Circuit Court of Appeals affirmed the findings of the District Court. *See* Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 914 F.Supp. 688 (D. Mass. 1996), *aff'd*, 142 F.3d 26 (1st Cir. 1998); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 952 F.Supp. 884 (D.Mass. 1997), *aff'd*, 142 F.3d 26 (1st Cir. 1998); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 959 F. Supp. 36 (D. Mass. 1997), *aff'd*, 142 F.3d 26 (1st Cir. 1998); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, No. 95-CV-12320-MEL, 1997 WL 263732 (D. Mass. May 9, 1997), *aff'd*, 142 F.3d 26 (1st Cir. 1998).

137. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26 (1st Cir. 1998).

138. *See* Portinga, *supra* note 59, at 637.

139. *Id.*



On February 8, 1995, at the ABA's mid-winter meeting of the Section of Legal Education and Admissions to the Bar, Henry Ramsey, then Dean and Professor of Law at Howard University School of Law, delivered the keynote speech to the Dean's Workshop.<sup>140</sup> Dean Ramsey touted the achievements of the ABA's accreditation process, refuted the criticisms of the process, and noted that the criticisms of the process voiced by the deans and others were a "serious challenge to [legal education]."<sup>141</sup>

With the debate rising in legal academia, the DOJ began investigating the ABA in 1994, subsequently filing its own federal antitrust action on June 27, 1995, claiming that the ABA process violated the Sherman Act.<sup>142</sup> In its complaint, the DOJ alleged that "the ABA restrained competition among personnel at ABA-approved schools."<sup>143</sup> The complaint also alleged that the ABA allowed its law school accreditation process to be "captured by those with a direct interest in its outcome . . . [and that] rather than setting minimum standards for law school quality . . . the legitimate purpose of accreditation, the ABA at times acted as a guild that protected the interest of professional law school personnel."<sup>144</sup> In response, the ABA formed the "Commission to Review the Substance and Process of the American Bar Association's Accreditation of American Law Schools."<sup>145</sup> On June 25, 1996, the ABA agreed to the entry of a consent decree requiring modifications to the accreditation process specifically eliminating three prior practices: (1) setting faculty salaries; (2) prohibiting for-profit schools; and (3) precluding accredited schools from accepting course credits from students who transfer from unaccredited schools.<sup>146</sup> Per the requirements of the Antitrust Procedures and Penalties

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140. Henry Ramsey, Jr., *Legal Education: Past Developments, Present Status, and Future Possibilities Speech: The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, 30 WAKE FOREST L. REV. 267 (1995).

141. *Id.* at 281.

142. Complaint, *United States v. Am. Bar Ass'n*, 934 F.Supp. 435 (D.D.C. 2006) (No. 95-1211), available at <http://www.justice.gov/atr/cases/f1000/1037.pdf>. See also Department of Justice, Notices, 60 Fed. Reg. 63,766 (1995) (discussing claims against the ABA, setting out details of proposed consent decree between the ABA and government and providing summary of public comments regarding settlement).

143. Complaint at 12, *ABA*, 934 F. Supp. 435 (No. 95-1211).

144. Competitive Impact Statement at 1-2, *U.S. v. ABA*, 934 F. Supp. 435 (D.D.C. 2006) (No. 95-1211).

145. See WAHL REPORT, *supra* note 113. The report was designated the "Wahl Commission" after the commission's chair, former Minnesota Supreme Court Justice Rosalie Wahl. *Id.*

146. *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 436 (D. D.C. 1996).

Act, the consent decree became a final order, after a designated period for comments.<sup>147</sup>

As a result of the litigation and investigations of the 1990s, the ABA realized that in order to avoid antitrust problems, each accreditation requirement/standard must be linked to a legitimate educational goal.<sup>148</sup> Such legitimate goals should directly relate to the quality of legal education provided.<sup>149</sup> Professionalism training, an integral component of legal education could certainly be considered a legitimate educational goal recognized by the ABA. The Model Rules of Professional Conduct, and the issuance of some noteworthy reports in the past few decades reinforce this notion.

## V. SUPPORT FOR A PROFESSIONALISM STANDARD

A professionalism accreditation standard would be compatible with the tenets of the Model Rules of Professional Conduct, as well as a few prominent reports that bear mention. The *MacCrate Report*, the *Carnegie Report*, and the recent report of the NOBC provide support for the need for a professionalism standard in the accreditation process in order to increase professionalism in law schools and beyond.

### A. Model Rules of Professional Conduct

For decades, the ABA has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession.<sup>150</sup> The Model Rules of Professional Conduct (the Rules) were origi-

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147. 15 U.S.C. § 16(b)-(h) (1994). See also U.S. v. ABA, 60 Fed. Reg. 63,766, 63,768–836 (Dep't of Justice Dec. 12, 1995), available at <http://www.gpo.gov/fdsys/pkg/FR-1995-12-12/pdf/FR-1995-12-12.pdf>; Joel I. Klein, *Competitive Impact Statements: United States v. ABA*, Civ. Action No. 9501211 (CR), in CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 689, 692 (1996).

148. See Peter James Kolovos, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689, 692–93 (1996) (citing Press Release, Department of Justice, Antitrust Division, News Release: Justice Department and American Bar Association Resolve Charges that the ABA's Process for Accrediting Law Schools Was Misused, DOJ 95-363 (June 27, 1995), available at [http://www.justice.gov/opa/pr/Pre\\_96/June95/363.txt.html](http://www.justice.gov/opa/pr/Pre_96/June95/363.txt.html) (Anne Bingaman, Assistant Attorney General in charge of the Antitrust Division, noted that the consent decree is intended to eliminate any accreditation requirements that are unrelated to the quality of legal education provided)).

149. Kolovos, *supra* note 148.

150. A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (6th ed. 2007) [hereinafter ANNOTATED MODEL

nally adopted by the ABA in 1983, and subsequently amended thirty times between 1983 and 2007.<sup>151</sup> The current edition of the Rules takes into account all amendments through February 2007, as well as the American Law Institute's *Restatement (Third) of the Law Governing Lawyers* (2000).<sup>152</sup> The Rules serve as the standards of ethical and professional behavior governing those in the legal profession in keeping with the ABA's pursuit of "its goal of assuring the highest standards of professional competence and ethical conduct."<sup>153</sup>

The goal and the practice of the Rules illustrate the importance of professionalism in order to maintain the reputation and integrity of the legal profession. The Preamble to the Rules dictate that a lawyer "as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>154</sup> In defining the lawyer's responsibilities, the Preamble further dictates that:

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.

[6] In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.<sup>155</sup>

Although the Rules employ both substantive and procedural law in defining the lawyer's professional responsibilities, lawyers are still expected to be guided by personal conscience and the approbation of pro-

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RULES OF PROFESSIONAL CONDUCT] (giving a brief history of the adoption of the ABA Model Rules of Professional Responsibility).

151. The MODEL RULES OF PROFESSIONAL CONDUCT, including Preamble, Scope, Terminology and Comment, were adopted by the ABA House of Delegates initially on August 2, 1983. Since that time, the Rules have been amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 2000, 2002, 2003 and 2007. See A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY, RULES AND STANDARDS (2008); Preface to the MODEL RULES OF PROF'L CONDUCT (2009).

152. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 150, at iii.

153. *Id.* at viii. "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." *Id.* at 3. "The Rules simply provide a framework for the ethical practice of law." *Id.*

154. *Id.* at 1.

155. *Id.*

fessional peers.<sup>156</sup> A lawyer is therefore required to strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.<sup>157</sup> This includes a lawyer's responsibility to resolve "difficult issues of professional discretion through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."<sup>158</sup> These principles include the lawyer's obligation to "zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."<sup>159</sup> In other words, the lawyer is bound by the Rules to act in a manner displaying a high degree of professionalism.

Beyond the dictates of the Preamble, a number of the enumerated Rules specifically speak to a lawyer's appropriate professional behavior. For instance, in the role of advocate, candor toward the tribunal is an important precept. Rule 3.3(a) sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.<sup>160</sup> The Rule states in part that a lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.<sup>161</sup>

Similarly, the comment to Rule 3.5 advises that although the lawyer must advocate for his client, "refraining from abusive or obstreperous

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156. *Id.* at 2.

157. *Id.*

158. *Id.*

159. *Id.*

160. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2009).

161. *Id.*

conduct is a corollary of the advocate's right to speak on behalf of litigants."<sup>162</sup> This includes the duty to refrain from disruptive conduct.<sup>163</sup>

The lawyer's conduct as it pertains to transactions with persons other than clients is addressed in Rule 4.1. Rule 4.1 highlights the requirement that a lawyer be truthful, stating in part that a lawyer is prohibited from knowingly:

(a) mak[ing] a false statement of material fact or law to a third person; or (b) fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [confidentiality inherent in the Client-Lawyer relationship].<sup>164</sup>

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162. *Id.* R. 3.5 (explaining the requirement of impartiality and decorum of the tribunal). *See, e.g.*, Fla. Bar v. Martocci, 791 So.2d 1074, 1075 (Fla. 2001) (where lawyer crossed line from zealous advocacy to misconduct by making profane, belittling insults to opposing litigant, her family, and her counsel, including making demeaning facial gestures, sticking out his tongue, and calling litigant "nut case" and "stupid idiot" who should "go back to Puerto Rico"); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239 (W. Va. 2000) (lawyer for murder defendant was held to violate Rule 3.5 by referring to prosecutor as "coke dealer" in front of jury and falsely telling jury that both defendant and his wife had taken polygraph tests). *See generally* Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1325 n. 29 (11th Cir. 2002) (listing cases of lawyers being sanctioned for unsubstantiated accusations and demeaning comments directed at opposing counsel).

163. MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. 5 (2009). *See also* Fla. Bar v. Wasserman, 675 So. 2d 103, 104 (Fla. 1996) (lawyer who made profane out-of-court statements to judicial assistant and displayed contemptuous behavior toward judge during hearing was suspended for six months); *In re Moore*, 665 N.E.2d 40 (Ind. 1996) (lawyer who struck opposing counsel in judge's chambers was suspended); *In re McClure*, 652 N.E.2d 863, 864 (Ind. 1995) (suspending lawyer for sixty days after he threw soft drink at opposing counsel and restrained him in his chair in response to deposition questioning of lawyer's wife); *In re Larvadain*, 664 So. 2d 395, 395 (La. 1995) (where attorney attacked integrity of the district court judge by accusing him of being racist while cursing him and attempting to intimidate him. The attorney was subject to a three-month suspension); *In re Coe*, 903 S.W.2d 916, 916-17 (Mo. 1995) (en banc) (lawyer accused trial court of unfair practices, openly argued with the court's rulings, gestured, and expressed obvious unhappiness); *In re Vincenti*, 704 A.2d 927 (N.J. 1998) (lawyer who engaged in pattern of harassment, intimidation, and insulting behavior toward judges, witnesses, and opposing counsel was disbarred); *Corsini v. U-Haul Int'l*, 630 N.Y.S.2d 45 (N.Y. App. Div. 1995) (court found that lawyer's behavior of making personal attacks against defense counsel, refusing to answer numerous relevant and appropriate questions, and giving argumentative responses was so "lacking in professionalism and civility" that dismissal was the only appropriate remedy).

164. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009).

A lawyer is similarly charged to maintain the integrity of the profession. Rule 8.4 identifies “professional misconduct” as lawyer behavior that:

- (a) violate[s] or attempt[s] to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.<sup>165</sup>

Importantly, Rule 8.4 is not limited to the confines of the lawyer-client relationship—it instead reaches conduct outside the practice of law.<sup>166</sup> The conduct regulated includes both commission of violent crimes or other crimes that give rise to convictions, and other less-actionable offenses.<sup>167</sup> The annotation to Rule 8.4(c) notes that this Rule also extends to dishonesty in “dealings with the world at large,” such as a law-

165. *Id.* R. 8.4

166. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 150, at 576.

167. *See also* *People v. Bauder*, 941 P.2d 282, 283 (Colo. 1997) (en banc) (where lawyer solicited prostitution during telephone call to wife of client in divorce case by offering to pay wife and client’s girlfriend for sexual rendezvous); *People v. Parsley*, 109 P.3d 1060, 1061 (Colo. O.P.D.J. 2005) (involving a lawyer who fraudulently obtained a loan from a mortgage company); *In re Moore*, 691 A.2d 1151, 1151 (D.C. 1997) (lawyer’s willful failure to file federal income tax returns); *In re Holloway*, 469 S.E.2d 167, 168 (Ga. 1996) (lawyer charged with invasion of privacy after surreptitiously videotaping secretary in bathroom); *In re Quinn*, 696 N.E.2d 863, 864 (Ind. 1998) (explaining that “[c]riminal offenses such as driving while intoxicated, public intoxication, and gambling, while not directly linked to the practice of law, may nonetheless reflect adversely on one’s fitness as an attorney because such conduct tends to indicate a general indifference to legal standards of conduct. That perception is magnified where there is a pattern of such offenses.”) (citation omitted); *In re Wittenbrink*, 849 So.2d 18, 19 (La. 2003) (lawyer who violated tax law); *In re Grella*, 777 N.E.2d 167, 168 (Mass. 2002) (lawyer who assaulted his estranged wife); *In re Disciplinary Action Against Peterson*, 718 N.W.2d 849, 853 (Minn. 2006) (lawyer’s tax evasion in connection with purchase of motor vehicle); *In re Disciplinary Action Against Pugh*, 710 N.W.2d 285, 286 (Minn. 2006) (disbarring lawyer who misappropriated over one million dollars from a real estate closing company he owned); *In re Conduct of Carpenter*, 95 P.3d 203, 205 (Or. 2004) (en banc) (discussing behavior of lawyer who posted a message on an Internet site purporting to be a local high school teacher, which message implied that the teacher had engaged in sexual relations with students); *In re Parrott*, 480 S.E.2d 722, 723 (S.C.1997) (lawyer who pulled down woman’s bathing suit at beach pled guilty to assault and battery); *In re Taylor*, 768 A.2d 1273, 1274 (Vt. 2000) (lawyer who was on inactive status was suspended for six months for failing to pay child support and spousal maintenance); *In re Disciplinary*

yer's behavior when dealing with creditors, post-dating and subsequent stop-payment of a check, or illicit Internet communications.<sup>168</sup>

Conduct that is "rude or defiant, or that otherwise disrupts legal proceedings" can violate Rule 8.4(d).<sup>169</sup> Such behavior has been viewed as "demean[ing] [to] the judiciary and the legal profession."<sup>170</sup> As such, instances of lawyer drunkenness,<sup>171</sup> making a disparaging statement about the judge,<sup>172</sup> sidebars loud enough for jurors to hear,<sup>173</sup> and abusive and

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Proceeding Against Whitney, 120 P.3d 550, 552 (Wash. 2005) (en banc) (lawyer who gave false testimony while serving in capacity as *guardian ad litem*).

168. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 150, at 586 (citing *In re Mitchell*, 822 A.2d 1106 (D.C. 2003) (where lawyer made false statements to client's creditor about status of personal injury suit and handling of debt to be paid out of proceeds)); Fla. Bar v. Schultz, 712 So.2d 386 (Fla. 1998) (lawyer tendered postdated check to travel agent but stopped payment on it that same day); *see also* Attorney Grievance Comm'n of Md. v. Childress, 770 A.2d 685 (Md. 2001) (lawyer used internet to solicit sex with underage girls). There are other examples of cases addressing lawyer's dishonesty beyond the perimeter of client representation. *See generally* People v. Rishel, 50 P.3d 938 (Colo. 2002) (lawyer misappropriated funds tendered to him by third parties for purchase of baseball season tickets); *In re Royer*, 78 P.3d 449 (Kan. 2003) (lawyer for a client who was facing condemnation proceedings sold the client's dilapidated building to a homeless man for one dollar to avoid incurring the costs of demolition).

169. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 150, at 592.

170. *In re McClellan*, 754 N.E.2d 500, 502 (Ind. 2001). There, lawyer was held to be in violation of Rule 8.4(d) when he filed a petition for rehearing, stating that "the court's decision reads like a bad lawyer joke . . . 'When is it okay for a lawyer to lie? When his lips are moving to an insurance adjuster.'" *Id.* at 501 (emphasis omitted).

171. *See, e.g., In re Gilman*, 126 P.3d 1115 (Kan. 2006) (lawyer's appearance at court after consuming several drinks of whiskey necessitated judge to call recess to address lawyer's condition); Colorado v. Coulter, 950 P.2d 176 (Colo. 1998) (lawyer acting as *guardian ad litem* appeared in court while intoxicated on two consecutive days).

172. Miss. Bar v. Lumumba, 912 So. 2d 871, 875-76, 880 (Miss. 2005) (lawyer made statement to judge that he would "pay for justice" if necessary and that judge's "henchmen" were going to throw him out of courtroom, and his statement to newspaper reporter that the judge "had the judicial temperament of a barbarian."); Bd. of Prof'l Responsibility v. Slavin, 145 S.W.3d 538, 543 (Tenn. 2004) (lawyer made numerous disparaging remarks in court documents about administrative law judges, referring to one as "[p]etty, barbarous and cruel").

173. Disciplinary Counsel v. LoDico, 833 N.E.2d 1235, 1237 (Ohio 2005) (lawyer engaged in a pattern of disruptive behavior by speaking loudly at sidebars so jurors could hear his statements suggesting witnesses were lying, by throwing money and credit cards on the bench in anticipation of sanction, by telling the judge "[go] ahead and fine me," and by making inappropriate "dramatic" facial expressions in front of jury as witnesses testified).

uncivil behavior toward opposing counsel or witnesses,<sup>174</sup> have all been held to violate Rule 8.4(d).

The obligation to adhere to the ethical and professional standards dictated by the rules extends to duties imposed as a result of membership in a self-regulating profession. Therefore, if a lawyer knows that another lawyer or a judge has committed a violation of the Rules, such lawyer has a duty to report any violations that raise a “substantial question as to [the] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>175</sup> Thus, the importance of professionalism, as shown by the emphasis on acceptable and appropriate lawyer behavior, is inextricably woven throughout the Rules.

### B. MacCrate Report Input

In July 1992, the ABA’s Section on Legal Education and Admissions to the Bar, chaired by Robert MacCrate, issued *An Educational Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (MacCrate Report).<sup>176</sup> The MacCrate Report lends strong support to the incorporation of professionalism in determining accreditation.

The central mission of the MacCrate Report task force was two-fold.<sup>177</sup> First, the task force sought to identify the necessary skills and values for lawyers to describe what law schools and the practicing bar were doing to advance the professional development of lawyers.<sup>178</sup> Second, the

174. See *In re Fletcher*, 424 F.3d 783, 790–91 (8th Cir. 2005) (finding that lawyer engaged in a pattern of unprofessional conduct “in an attempt to harass, humiliate and intimidate deponents and their counsel”); *People v. Nelson*, 941 P.2d 922 (Colo. 1997) (lawyer shoved another lawyer in courtroom); *Fla. Bar v. Martocci*, 791 So.2d 1074 (Fla. 2001) (lawyer made disparaging and profane remarks to humiliate opposing party and counsel in divorce proceedings); *Fla. Bar v. Sayler*, 721 So.2d 1152 (Fla. 1998) (lawyer sent threatening letter to opposing counsel); *In re Moore*, 665 N.E.2d 40 (Ind. 1996) (lawyer grabbed opposing counsel’s tie and hit him with sufficient force to drive him across the table); *In re Jaques*, 972 F. Supp. 1070 (E.D. Tex. 1997) (lawyer assaulted opposing counsel in courtroom during recess, engaged in abusive and disruptive behavior during his own deposition, and defrauded one of his clients).

175. MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2009). See generally Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003); Nikki A. Ott & Heather F. Newton, Note, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747 (2003); Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999).

176. MACCRATE REPORT, *supra* note 9.

177. *Id.*

178. *Id.*



group was tasked to formulate recommendations on how the legal education community and the practicing bar can join together to fulfill their respective responsibilities to the profession and the consuming public.<sup>179</sup>

The report delineated a "Statement of Skills and Values" (SSV) for competent law practice,<sup>180</sup> with an emphasis on practice-related skills and values.<sup>181</sup> A series of hearings conducted by the task force generated considerable information and a wide range of views pertinent to the subject of the SSV.<sup>182</sup> Input was also received from representatives of the ABA's sections and committees, the AALS, the Appellate Judges Conference, the Conference of Chief Justices, and state and local bar associations, as well as judges, law school deans and faculty members, practitioners, and professionals in other fields who regularly work with lawyers.<sup>183</sup> The task force concluded in part that it is the "responsibility of law schools and the practicing bar [collectively] to assist students and lawyers in developing the skills and values required to complete the journey."<sup>184</sup> The resulting SSV for the competent practice of law was widely disseminated throughout the profession. Although the *MacCrate Report* specifically provided that the SSV is not "meant to serve as a blue print" or "designed to be a measure of performance" in the accrediting process,<sup>185</sup> the report does suggest a role for skills training in the accreditation process that would encompass professionalism training as well.

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179. *Id.*

180. *Id.* at 135–221.

181. Skill 9.4 reads: "In order to organize and manage legal work effectively, a lawyer should be familiar with the skills [and] concepts . . . including . . . Developing Systems and Procedures for Effectively Working with Other People." *Id.* at 199, 201 (emphasis omitted). Skill 10.3 suggests that a lawyer be familiar with "the Processes for Recognizing and Resolving Ethical Dilemmas." *Id.* at 206 (emphasis omitted). Values 2.1 and 2.3 note that "a member of a profession that bears 'special responsibilities for the quality of justice'" should be committed to values of "Promoting Justice, Fairness, and Morality in One's Own Daily Practice" and "Contributing to the Profession's Fulfillment of Its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice." *Id.* at 213.

182. MACCRATE REPORT, *supra* note 9, at Appendix C.

183. *Id.*

184. *Id.*

185. In suggesting uses for the SSV, the MACCRATE REPORT noted that same could be useful to law schools when "conducting the Self-Study required by Standard 201(a) of the American Bar Association Accreditation Standards . . . [by serving] as a useful tool when a law school assesses the extent to which its curriculum "provide[s] a sound legal education and accomplish[es] the objectives of [the school's] . . . educational program" (Standard 201(b)), "offer[s] instruction in professional skills . . . [and] the duties and responsibilities of the legal profession" (Standard 302(a)(iii)-(iv)), and provides "an educational program that is designed to qualify its graduates for admission to the bar" (Standard 301(a)). *Id.* at 128.

The “Values” portion of the report recognized, among other things, the “ideals to which a lawyer should be committed as a member of [the legal] profession.”<sup>186</sup> The *MacCrate Report*’s recommendations for “enhancing professional development during the law school years” suggested that Standard 301(a) regarding a law school’s educational program be amended.<sup>187</sup> The suggested amendment would qualify graduates for bar admission by adding: “and to prepare them to participate effectively in the legal profession.”<sup>188</sup> Effective participation would require developing habits of respect for the law, all persons involved in the legal system, and the legal system itself—all enumerated elements of professionalism.<sup>189</sup> This addition would underscore the premise that education in lawyering skills and professional values is “central to the mission of law schools.”<sup>190</sup> The establishment of professionalism as a standard for accreditation, therefore, could easily be linked with the mandate to ensure that law school graduates possess the necessary skills and values for the competent practice of law.

The *MacCrate Report* generated numerous comments in blogs and scholarly analysis,<sup>191</sup> and remains a critical source for matters concerning

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186. In analyzing “professional values” the report recognizes that “training in professional responsibility” should involve more than “just the specifics of the Code of Professional Responsibility and the Model Rules of Professional Conduct”; it should encompass “the values of the profession,” including “the obligations and accountability of a professional dealing with the lives and affairs of clients.” *Id.* at 135 (citing AM. BAR ASS’N, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992) at 509–10) [hereinafter MCKAY REPORT], available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html). As enumerated, the values set forth in the report (1) examine the value of competent representation and the ideals to which a lawyer should be committed as a member of a profession dedicated to the service of clients; (2) consider the importance of striving to promote justice, fairness, morality, and the ideals to which a lawyer should be committed as a member of a profession that bears “special responsibility[ies] for the quality of justice” (Model Rules, Preamble); (3) address the value of striving to improve the profession and explore the ideals to which a lawyer should be committed as a member of a “self-governing” profession; and (4) examine the value of professional self-development, analyzing the ideals to which a lawyer should be committed as a member of a “learned profession.” *Id.* at 136.

187. *Id.* at 330.

188. *Id.*

189. *See supra* Part II.

190. *Id.*

191. John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993) (criticizing the MACCRATE REPORT); Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 110 (2001) (supporting the MACCRATE REPORT); Richard A. Matasar, *The MacCrate Report*

enhancement of legal education.<sup>192</sup> Not coincidentally, shortly after the *MacCrate Report* was issued, the “Open Letter” authored by the fourteen law school deans was published. The letter expressed, in part, the concern that the accreditation process would be used to impose obligations on law schools which would reduce their diversity and their ability to pursue other important legal research goals.<sup>193</sup>

The reception given the SSV by law schools foretells the degree of resistance that a professionalism training requirement is likely to face if adopted. There is however, evidence that a professionalism standard would not only be welcome, but could also be a necessity to preserve the essence of the legal profession.

### C. Carnegie Report Input

In 2007, the authors of *Educating Lawyers: Preparation for the Profession of Law* (*Carnegie Report*) recognized the “dramatic way” that law schools are able to develop legal understanding and form professional identities in their students.<sup>194</sup> The authors noted that, like other professional schools, law schools are not only “where expert knowledge and judgment are communicated. . . they are also the place where the profession puts its defining values and exemplars on display.”<sup>195</sup> Their research supported the premise that professionalism needs to become more explicit and better diffused throughout legal preparation, particularly in light of the current climate where questions about the legitimacy of the legal profession are voiced.<sup>196</sup> The authors believe that if the focus of legal education is to develop legal professionals who are both competent and responsible to clients and the public, learning legal analysis and practical

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*from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 457 (1994) (critical of the effect of the MACCRATE REPORT).

192. Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 338 (2010) (discussing the findings in the MACCRATE REPORT); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 180 (2010) (discussing the values and skills that all lawyers should possess as outlined in the MACCRATE REPORT); Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism Into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 432 (2005) (discussing the purpose of the MACCRATE REPORT).

193. John Costonis, *supra* note 191, at 191; Portinga, *supra* note 59, at n.11 (citing an Open Letter to the Deans of the ABA Accredited Law Schools).

194. William Sullivan et al., *supra* note 11, at 3.

195. *Id.* at 4.

196. *Id.* at 14.

skills should be more fully integrated in law schools.<sup>197</sup> As such, they call attention to concerns regarding a lack of professionalism, and urge ways in which movement toward more professionalism can be strengthened.<sup>198</sup> “Skill, honesty, trustworthiness, reliability, respect for legal obligations, responsibility, civility in dealings with others, personal integrity and empathy” are traits that require increased emphasis in formal legal education.<sup>199</sup> These traits underscore the enumerated elements of the professionalism definition,<sup>200</sup> and reflect the basis for enhancing professionalism of those in law school and throughout their legal careers.

#### *D. National Organization of Bar Counsel’s Input*

In May 2007, the ABA’s Accreditation Policy Task Force recommended that a task force be formed to examine ways to revise the accreditation process to rely on output measures.<sup>201</sup> In response, a Special Committee on Outcome Measures (Outcome Measures Committee) was formed in October 2007.<sup>202</sup> In accordance with the terms of the charge, the Outcome Measures Committee examined the “current state of thought on law school pedagogy and approaches to accreditation.”<sup>203</sup> In 2008, the Outcome Measures Committee issued its report recommending in part that an accreditation model reducing reliance on input measurements in favor of increasing emphasis on outcome measurements be utilized.<sup>204</sup>

The National Organization of Bar Counsel (NOBC), a nonprofit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States, Canada, and Australia, provided support for this recommendation.<sup>205</sup> The NOBC was formed in 1965 to enhance the professionalism and effectiveness of lawyer disciplinary counsel throughout the

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197. *Id.*

198. *Id.*

199. See generally Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041 (2006).

200. See *supra* Part II.

201. REPORT OF THE OUTCOME MEASURES COMMITTEE, 2008 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR 1, available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf> [hereinafter REPORT OF THE OUTCOME MEASURES COMMITTEE].

202. *Id.*

203. *Id.*

204. *Id.* at 2.

205. NAT’L ORG. OF BAR COUNSEL, <http://nobc.org/> (last visited Nov. 16, 2011).

United States.<sup>206</sup> The NOBC is represented in the ABA House of Delegates, and NOBC liaisons have been active in the major commissions and workgroups that produce national reports, standards, and models in the field of legal ethics and attorney regulation.<sup>207</sup>

In 2009, the NOBC issued the *Law School Professionalism Initiative Report (NOBC Report)*.<sup>208</sup> The *NOBC Report* advocates changes in legal education that emphasize the development of practical skills and professional identity.<sup>209</sup> The *NOBC Report* posits that as part of the accreditation process, law schools be required to submit plans for the development of professionalism and professional identity in their students, including detailed and concrete goals and measurements.<sup>210</sup> The *NOBC Report* states that: “[A] school’s plan for achieving the goal of instilling professional values and identity in its students should go beyond curriculum and extend to tracking student behavior, remediation of students with observed and demonstrated problems and holding students accountable for their behavior in the law school environment.”<sup>211</sup> The *NOBC Report* has been submitted to both the ABA and AALS for further consideration.

Pending the response to the *NOBC Report*, it is clear from the thus-far lukewarm effect of all these prominent reports that there is potential for a new wave of opposition against the ABA’s accreditation process as a tool to promote professionalism in law schools.

## VI. OBSTACLES TO IMPLEMENTATION

Concerns regarding costs, faculty governance, and assessment may also be used to bolster arguments against implementing a professionalism standard.

### A. Faculty Governance

Professionalism as a concept is mostly absent from traditional law school curricula. Generally, professionalism is identified with the standard version of legal ethics as articulated in professional responsibility or

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206. *History of the National Organization of Bar Counsel*, NAT’L ORG. OF BAR COUNSEL, <http://nobc.org/history.aspx> (last visited Nov. 16, 2011).

207. *Id.*

208. NAT’L ORG. OF BAR COUNSEL LAW SCHOOL PROFESSIONALISM INITIATIVE COMM., *LAW SCHOOL PROFESSIONALISM INITIATIVE REPORT* (2009), available at [http://nobc.org/template\\_main.aspx?id=3072&terms=Law+School+Professionalism+Initiative+Report](http://nobc.org/template_main.aspx?id=3072&terms=Law+School+Professionalism+Initiative+Report) (last visited Nov. 17, 2011).

209. *Id.*

210. *Id.*

211. *Id.* at 3.

ethics courses.<sup>212</sup> Outside of those narrow confines, on the priority list of most academicians, professionalism appears tangential. Law professor focus rests on teaching, scholarly agendas, and service entrenched in theory, doctrine, and analysis.<sup>213</sup> The requirements to manage students and meet both institutional and professional demands leaves little opportunity for legal academicians to reflect and act on issues of professionalism. However, with an eye toward improving and advancing the reputation of the profession, the necessary time could be invested to fulfill the obligation to not just prepare “students for ‘the world’ in a general sense, but to prepare them for the world in a very immediate and particular sense; that is, for participation in a profession that aims to make a difference in the world.”<sup>214</sup> Yet, despite any time-management demands that may be overcome, the practice and teaching of professionalism still appears to be “second-seated” to teaching theory, doctrinal principles, and analytical skills.<sup>215</sup>

Professor Mark Heyrman observed that “most law school faculties are comprised primarily of traditional academics who are not particularly concerned with or engaged in professional skills instruction.”<sup>216</sup> Many may even believe that a focus on professionalism and professional skills, in addition to being unnecessary, may also cause “retardation of ongoing efforts to integrate the law school with the [larger] university.”<sup>217</sup> As such, in most law schools, law faculty focus on teaching scholarly agendas and service,<sup>218</sup> with their primary focus on scholarly pursuits.<sup>219</sup> This focus leaves little room for reflection and action regarding the importance of professionalism values that may seem tangential.<sup>220</sup> The focus of law school faculties therefore tends to rest more on scholarly pursuits, and less on issues of professionalism.<sup>221</sup> As a result of such preoccupation with

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212. Boothe-Perry, *supra* note 15, at 541.

213. See Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 144–45 (2001) (noting that law professors’ professional reputations depend heavily on scholarly publication, making strong incentives to maximize the amount of time spent in scholarship).

214. *Id.* at 134.

215. *Id.* at 118.

216. Mark Heyrman, *Regulating Law Schools: Should the ABA Accreditation Process Be Used to Speed the Implementation of the MacCrate Report Recommendations?*, 1 CLINICAL L. REV. 389, 393 (1994).

217. Costonis, *supra* note 191, at 191.

218. Sullivan & Podgor, *supra* note 213, at 144–45.

219. Boothe-Perry, *supra* note 15, at 543 (teaching/instruction is a close secondary and often concordant goal).

220. Sullivan & Podgor, *supra* note 213, at 144.

221. Boothe-Perry, *supra* note 15, at 543.

nonprofessional matters, “[i]t is doubtful that [the academics] will readily reduce the amount of resources devoted to traditional scholarly work or traditional academic teaching in the absence of outside pressure.”<sup>222</sup>

In the absence of such pressure, professionalism will be kept subordinate to academic training, thereby continuing to lose its value and importance both to law students and newly licensed lawyers. Being that the accreditation process has proven to be very effective in influencing the landscape of legal academia, it stands to reason that any appropriate force or pressure needed to encourage an increase in professionalism training in law schools can be similarly wielded by the ABA through its accreditation process.

### B. Cost

Indubitably, implementation will involve costs—both physical and economic. Effective professionalism programs generally require strong institutional commitments to the subject. Law school administrators play a role in fostering an environment of professionalism. However, it is the collective faculty with common commitments that will be the true catalyst to foster such an environment.<sup>223</sup> As with questions of faculty governance, law school faculty may not be overly willing to invest the time and energy needed to execute an increase in professionalism values in law schools. In addition, well-structured course materials and methods of evaluating student performance are essential components that will necessarily require investments of time, energy, and money.

The benefits to increased professionalism, however, far outweigh the costs. Moreover, law schools can invoke numerous cost-effective strategies such as interactive learning formats,<sup>224</sup> curriculum changes, and non-traditional learning tools<sup>225</sup> that would require minimum expenditures. In addition, external resources would be available to assist and offset any costs involved with instituting professionalism. Local and state bar associations across the country have expressed their willingness and ability to assist law schools, both financially and physically through the provision of time and expertise.<sup>226</sup>

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222. Heyrman, *supra* note 216, at 393.

223. See Sullivan & Podgor, *supra* note 213, at 150.

224. Some examples of interactive formats include problem solving and role-playing.

225. Examples of nontraditional learning tools are review of current cases and review of pop culture and its relationship to the practice of law.

226. Notable examples are state and law school mentor programs. For instance, Florida A&M University, College of Law, instituted a mentorship program for first-year law students in affiliation with the local Bar Association. Similarly, the Univer-

## VII. ASSESSMENT/MEASURABILITY

In recent years there has been a consistent push for the use of outcome measures as opposed to input measurements.<sup>227</sup> The ABA is in fact considering accreditation standards that require outcome measurement.<sup>228</sup> In 2007, the ABA's Section of Legal Education and Admissions to the Bar issued its *Report of the Accreditation Policy Task Force 7*.<sup>229</sup> The Task Force's final report "noted with approval the growing trend among accrediting bodies to evaluate programs on the basis of fulfillment of stated goals, as assessed by outcome measures, [and] recommend[ed] that the ABA move . . . as rapidly as possible to a more outcome-based evaluation system."<sup>230</sup> Recognizing the difficulty in moving the "theoretical benefits of outcome assessment to the practical plane of reality," the Task Force recommended that "[t]he Council form a task force to examine ways to revise the accreditation process to rely, to a greater extent than it currently does, on output measures."<sup>231</sup> In October 2007, the Honorable Ruth V. McGregor, Chief Justice of the Arizona Supreme Court, appointed a "Special Committee on Output Measures" which was charged

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sity of St. Thomas School of Law's for-credit mentorship program matches a student with a mentor in all three years of law school with a seminar portion focused on professionalism. See Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102 (2007).

227. REPORT OF THE OUTCOME MEASURES COMMITTEE, *supra* note 201, at 3 (defining "outcome measures" as "accreditation criteria that concentrate on whether the law school has fulfilled its goals of imparting certain types of knowledge and enabling students to attain certain types of capacities, as well as achieving whatever other specific mission(s) the law school has adopted"; and "input measures" as "criteria that concentrate whether law schools are investing the right types and amounts of resources (such as physical plant, number of faculty, and budget) to achieve the goals identified in the accreditation standards and the school's missions"). Outcome Measures would assess outcomes that are generally accepted by the legal community. *Id.* at 8.

228. Steve Bahls, *The ABA's Shift to an Outcome Measures Approach for Accreditation Standards*, STRUM C. LAW (Sept. 13, 2009), <http://law.du.edu/index.php/assessment-conference/program> (click on video link for lecture). Scholars have supported an output measurement accreditation standard, noting that "assessment of student learning outcomes is justified as an ABA accreditation standard given the history of questionable quality and unaccountability in post-secondary education and the increasing reliance on accreditation as a form of consumer protection, particularly given the recent proliferation of online diploma mills." Lori A. Roberts, *Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes*, 3 DREXEL L. REV. 457, 458 (2011).

229. REPORT OF THE OUTCOME MEASURES COMMITTEE, *supra* note 201, at 1.

230. *Id.* at 3.

231. *Id.* at 4.



with determining “whether and how . . . output measures, other than bar passage and job placement, [can be used] in the accreditation process.”<sup>232</sup>

The resulting report of the Output Measures Committee provides instruction on how to use outcome measures to determine if a law school has fulfilled a proposed professionalism standard for accreditation. Of interest, the Output Measures Committee suggested that “[a]n outcome-oriented approach to accreditation would call for reframing Standard 302 so that, instead of focusing on the areas and types of instruction that the law school should provide, the Standard would instead focus on the types of lessons the students should have learned by the time of graduation from law school.”<sup>233</sup> These lessons would include both the skills *and* values that cultivate habits that enhance a moral core of responsibility to the profession—elements necessary for good lawyering.

These ideals could be measured in a tripartite fashion by assessing faculty, administration, and student satisfaction with stated criteria. While full responsibility for satisfying a professionalism standard cannot lie solely on any one faction of the law school in order to establish and preserve both a spirit and practice of professionalism, there must be a conducive law school environment created equally by faculty, administration, and students.

#### A. *Measurability of Faculty*

The process of professionalism training should not consist merely of one or two courses such as the standard professional responsibility or ethics course. Professionalism should be a consistent and comprehensive educational focus throughout the law school curriculum. This would require participation by all faculty members. Measurement of the faculty’s participation in increasing professionalism awareness in the law school could be accomplished through various measures. The faculty’s input could be summarily determined from a review of professionalism endeavors both in and outside the law school.

Internally, the general law school curriculum should be reviewed to determine how many classes are offered for-credit that specifically address issues of professionalism and ethics. In other words, does the law school offer any courses relating to the exercise of the mandates of the Model Rules other than professional responsibility?<sup>234</sup> A review of the

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232. *Id.*

233. *Id.* at 19.

234. A number of law schools currently offer a variety of courses beyond the typical required professional responsibility course that address professionalism and ethics. A few of the courses, as titled by the different law schools, are: “Ethics of Lawyering in Government”; “Professional Responsibility: Regulatory Tax and Inter-

law school curriculum should determine other important professionalism-related factors such as whether: (1) the course content supports the development of professional and personal virtues; (2) course pedagogies provide opportunity for practicing ethically and socially responsible law; (3) there are course offerings in law office management; (4) enough skill and practice based courses such as clinical programs<sup>235</sup> are offered; and (5) the curriculum includes mandatory participation in either pro bono or public service endeavors.<sup>236</sup> Review of these factors will provide tangible evidence of a law school's commitment and adherence to a professionalism standard.

Next, a review of teaching evaluations and syllabi would demonstrate if and how professionalism is being incorporated into the law school classroom. Questions that need to be asked include: Is professionalism stated as an objective of the class? Are requirements for professionalism, such as accepted and appropriate classroom behavior, duly noted in the syllabi? Do professors address issues of professionalism even in pedagogical lectures? Are interactive presentation methods utilized in classes? As part of the pedagogical practice, are professors inviting practicing lawyers to speak and place real-life application of doctrinal issues in context?<sup>237</sup> Are professors using a pervasive method in traditional substantive courses to incorporate ethical issues specific to particular fields

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national Practice"; Professional Responsibility: Corporate Counsel"; "Heroes and Villains"; "The Legal Profession"; "Legal Malpractice"; "Lawyering Practice"; "Advanced Legal Ethics"; "Lawyers and Ethics in Film and Law"; "Comparative Professional Ethics: Law & Medicine"; and "Ethics of Lawyering in Government." See REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS, 2006 A.B.A. STANDING COMM. ON PROFESSIONALISM 54–70, available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool\\_ProfSurvey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool_ProfSurvey.authcheckdam.pdf) [hereinafter REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS] (listing professionalism and ethics courses offered at law schools with course descriptions).

235. Both internships and externship clinical programs should be considered.

236. Model Rule 6.1 mandates that:

[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year . . . . In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009).

237. Empirical evidence exists concerning the most effective pedagogies to foster student professional formation. For a general discussion of the impact of such evidence, see Neil W. Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)*, THE PROFESSIONAL LAWYER, Vol. 20, No. 4, 2011, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1791216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791216).

of law? Answers to these questions will offer measurable data regarding individual faculty members' participation in professionalism training. Incorporating issues of professionalism both in pedagogy and in practice in the law school classrooms will encourage students to operate under the general tenet of respect for the practice of law and the legal system in general—thus forming habits central to a moral core of responsibility to the profession.

Further, faculty members can rely on existing simulation exercises to expose students to professionalism issues in the classroom. A number of exercises are readily available for use in facilitating independent professionalism programs and integrating professionalism into the general law school curriculum.<sup>238</sup> These programs can be utilized as early as orientation for first-year law students, but also have been used for second- and third-year students.<sup>239</sup>

In addition to internal review of faculty involvement with professionalism issues, external participation can be determined by reviewing factors such as: (1) participation in continuing legal education programs that specifically deal with professionalism; (2) presentations given on the subject or related issues; and (3) involvement and collaboration with community organizations that allow opportunities to both enlighten the community and exhibit professionalism.

### *B. Measurability of Administration*

Professionalism training needs to begin on the first day of the law school student's tenure. The law school administration plays a crucial role in establishing the school's expectations for student behavior and conduct. In determining the administration's acquiescence with a mandate to institute professionalism, documentation of any mandatory professionalism orientation program will be important. As an indicator of effective-

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238. See, e.g., the Travis Divorce Simulation and the Devon Simulation. Both programs were developed by faculty at Columbia University School of Law in New York and have been used by other law schools. The Travis Divorce Simulation and the Devon Simulation were written by Professor Harriet Rabb, a George M. Jaffin Professor of Law and Social Responsibility. See Carol Bensinger Leibman, *The Profession of Law: Columbia Law School's Use of Experiential Learning Techniques to Teach Professional Responsibility*, LAW & CONTEMP. PROBS., Summer–Autumn 1995, at 74.

239. Campbell University School of Law and Elon University School of Law use simulations in their winter intersession programs for first-year students. Duke University School of Law uses the simulations during its "Spring Ethics Exercise" for second-year students. See THE NORTH CAROLINA COURT SYSTEM, [www.nccourts.org/courts/CRS/Councils/Professionalism/LawSchool.asp](http://www.nccourts.org/courts/CRS/Councils/Professionalism/LawSchool.asp) (last visited Nov. 26, 2011).

ness, the administration should use not only faculty, but practicing members of the bench and bar.

The administration's participation could also be evidenced by its creation of programs that support law students' overall mental health, and by encouraging and expecting professional behavior at all times. A majority of law schools already have some programs of assistance available to law students who may be dealing with substance abuse or mental health issues.<sup>240</sup> Many schools rely on established resources such as the parent-university's counseling professionals and local and state bar associations.<sup>241</sup> Most states have either a professionalism branch of the state bar or a professionalism organization sponsored by the highest court of the state.<sup>242</sup> These organizations are eager and available to sponsor professionalism and ethics programs at law schools in their state, and to assist with implementation of professionalism programs.<sup>243</sup> A majority of the

240. See REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS, *supra* note 234, at 1; The Supreme Court of Ohio, *Supreme Court Rules for the Government of the Bar of Ohio*, SUPREME COURT RULES 3(E)(2), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf> (noting that the State of Ohio requires one hour of instruction related to substance abuse before an applicant may sit for the bar).

241. See REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS, *supra* note 234, at 9.

242. See, e.g., [Florida] HENRY LATIMER CENTER FOR PROFESSIONALISM, available at <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/70a2904f12d21f4785256b2f006cd781?OpenDocument>.

243. *Id.* See, e.g., [Georgia] CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM, [http://www.gabar.org/related\\_organizations/chief\\_justices\\_commission\\_on\\_professionalism/](http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/) (last visited Nov. 26, 2011); HAWAII SUPREME COURT COMMISSION ON PROFESSIONALISM PROJECTS, [http://www.courts.state.hi.us/courts/supreme/professionalism\\_projects.html](http://www.courts.state.hi.us/courts/supreme/professionalism_projects.html) (last visited Nov. 26, 2011); ILLINOIS' SUPREME COURT COMMISSION ON PROFESSIONALISM, <http://ilscpc.org/> (last visited Nov. 26, 2011); [Maryland] COMMISSION ON PROFESSIONALISM, <http://www.courts.state.md.us/professionalism/> (last visited Nov. 26, 2011); [Mississippi] PROFESSIONALISM, <http://www.msbar.org/professionalism.php> (last visited Nov. 26, 2011); [New Jersey] NJ COMMISSION ON PROFESSIONALISM, <http://www.njsba.com/resources/njcop/index.html> (last visited Nov. 26, 2011); [New Mexico] COMMISSION ON PROFESSIONALISM, <http://www.nmbar.org/Attorneys/commissiononprofessionalism.html> (last visited Nov. 26, 2011); NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW, <http://www.nycourts.gov/ip/jipl/index.shtml> (last visited Nov. 26, 2011); NORTH CAROLINA COURT SYSTEM, <http://www.nccourts.org/Courts/CRS/Councils/Professionalism/LawSchool.asp> (last visited Nov. 26, 2011); OHIO COMMISSION ON PROFESSIONALISM, <http://www.supremecourt.ohio.gov/Boards/CP/default.asp> (last visited Nov. 26, 2011); [South Carolina] CHIEF JUSTICE'S COMMISSION ON THE PROFESSION, <http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=420.0&subRuleID=&ruleType=APP> (last visited Nov. 26, 2011); TEXAS CENTER FOR LEGAL ETHICS, <http://www.legalethicstexas.com/Home.aspx> (last visited Nov. 26, 2011). See also, ABA Standing

state bars have established mentoring programs available for law students.<sup>244</sup> These mentoring opportunities should be recommended and potentially mandated for all students.

A review of the school's career placement office will also be important. Students should be counseled early on in their law school careers about the requirements for bar admission as they relate to ethics and professionalism. To further determine an administration's commitment to professionalism a review should determine whether: (1) the administration facilitates use of meeting space and provides necessary equipment and materials for professionalism programs; (2) the school conducts regular workshops on professionalism or other programs that address professionalism; (3) the school has an internal committee or panel that specifically addresses issues of professionalism; and (4) there is ongoing support of the use of guest speakers in the classroom and other similar opportunities for professionalism exposure.

A review of the law school's rules and policies regarding conduct and integrity will also be critical in determining compliance with professionalism enforcement. Throughout the tenure of a lawyer's professional life, law schools are the singular institutions with the opportunity, the resources, the institutional capacity, and the leverage to effectuate meaningful training in professionalism. It is therefore critical that they should have the right to promulgate and administer reasonable rules and regulations toward fulfilling that responsibility.

One critical method in fulfilling this responsibility is through the enactment and enforcement of student honor codes. Awareness and conformance to rules and regulations governing the appropriate and acceptable scope of behavior for students pursuing law degrees will provide training and reinforcement for professional behavior in subsequent practice. As with any effective judicial or quasi-judicial process, Honor Codes<sup>245</sup> should have an appeals process. The Codes should also include diversion and rehabilitation programs as appropriate. Administrators should enact a system to ensure regular evaluation of the rules and their

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Committee on Professionalism, *A Guide to Professionalism Commissions*, STANDING COMMITTEE ON PROFESSIONALISM 5 (August 2008), <http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/full.authcheckdam.pdf>.

244. See *Mentoring Programs Listed by State*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, [www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/mentoring.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html) (last visited Nov. 27, 2011) (listing state bar mentoring programs).

245. Honor Codes are oftentimes titled "Conduct Codes" or "Codes of Conduct."

effectiveness.<sup>246</sup> Most law schools have some form of honor code or student code of conduct.<sup>247</sup> Codes of conduct always address academic mis-

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246. In its summary of Professional Surveys received from a number of law schools, the ABA Standing Committee on Professionalism reported that less than half of the reporting law schools regularly evaluated the performance of their student conduct system. See REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS, *supra* note 234, at 18 (reporting that only forty-nine percent of law schools regularly evaluate the performance of their student conduct code systems).

247. See, e.g. Appalachian Sch. of Law, *Student Academic Conduct* (Apr. 2011), <http://www.asl.edu/The-Program/Academic-Standards.html#student%20academic%20conduct>; BRIGHAM YOUNG UNIV., *Honor Code*, in UNDERGRADUATE CATALOG 2010–2011 (2010), available at <http://saas.byu.edu/catalog/2011-2012ucat/GeneralInfo/HonorCode.php>; CAMPBELL UNIV. SCH. OF LAW, *Code of Honor*, in STUDENT HANDBOOK 2011–2012 (2011), available at <http://www.campbell.edu/pdf/current-students/student-handbook/2011-2012/general-information.pdf>; DUKE UNIV. SCH. OF LAW, *Rules & Policies*, <http://www.law.duke.edu/about/community/rules/sec5.html#rule5-1>; FLA. A&M UNIV. COLL. OF LAW, *Student Code of Conduct*, in STUDENT HANDBOOK 2010–2011, at 46 (2010), available at [http://law.famu.edu/download/file/2010%20-%202011%20Student%20Handbook\\_FinalV.pdf](http://law.famu.edu/download/file/2010%20-%202011%20Student%20Handbook_FinalV.pdf); Ga. State Univ. Coll. of Law, *Honor Code* (Apr. 15, 2004), <http://law.gsu.edu/students/4769.html>; HOFSTRA LAW, *Code of Academic Conduct*, in 2011–2012 STUDENT HANDBOOK 41 (2011), available at [http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb\\_handbook.pdf](http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb_handbook.pdf); Lewis & Clark Law Sch., *Honor Code*, WHAT'S WHAT STUDENT HANDBOOK, [http://law.lclark.edu/academics/whats\\_what/honor\\_code\\_and\\_procedure/](http://law.lclark.edu/academics/whats_what/honor_code_and_procedure/) (last visited Nov. 22, 2011); Mo. Univ. Sch. of Law, *Honor Code* (2005), <http://law.missouri.edu/students/policies/conduct.html#code>; N.Y. LAW SCH. HONOR CODE, available at <http://www.nyls.edu/pdfs/studhandbk0405.pdf>; Okla. City Univ. Sch. of Law *Student Conduct Code*, STUDENT HANDBOOK (July 4, 2011), <https://docs.google.com/leaf?id=0B2fXsdh6lT31ZTI5ZDQ0ZTktODNkMS00MzRjLWJlYmEtODA4ODcxYjhiZGNj&hl=en>; QUINNIPIAC UNIV. SCH. OF LAW, *Student Conduct Code*, in STUDENT SERVICES HANDBOOK 28 (2001), available at [http://law.quinnipiac.edu/prebuilt/pdf/law\\_studentaffairshandbook\\_2011-12.pdf](http://law.quinnipiac.edu/prebuilt/pdf/law_studentaffairshandbook_2011-12.pdf); SAINT LOUIS UNIV. SCH. OF LAW, *Student Honor Code*, in STUDENT HANDBOOK 26 (2011), available at [http://www.slu.edu/Documents/law/Academics/StudentHandbook/student\\_handbook\\_11-12.pdf](http://www.slu.edu/Documents/law/Academics/StudentHandbook/student_handbook_11-12.pdf); SANTA CLARA LAW, *Student Conduct Code*, in STUDENT HANDBOOK 2010–2011, at 14 (2010), available at [http://www.scu.edu/studentlife/osl/upload/7277H\\_2010\\_StudentHandbook\\_Update-9-30-10.PDF](http://www.scu.edu/studentlife/osl/upload/7277H_2010_StudentHandbook_Update-9-30-10.PDF); ST. JOHN'S UNIV. SCH. OF LAW, *Code of Student Professional Responsibility*, in STUDENT HANDBOOK 2011–2012, at 47 (2011), available at <http://new.stjohns.edu/academics/graduate/law/current/handbook/appendices/b.sju>; STETSON UNIV. COLL. OF LAW, *HONOR CODE*, available at <http://www.law.stetson.edu/policies/home/media/academic-honor-code-pdf.pdf>; THOMAS M. COOLEY LAW SCH., *Honor Code*, [http://www.cooley.edu/ethics/honor\\_code.html](http://www.cooley.edu/ethics/honor_code.html) (last visited Nov. 21, 2011); Tulane Univ. Sch. of Law, *Code of Professionalism*, [http://www.law.tulane.edu/uploadedFiles/Summer\\_Abroad/Code%20of%20Professionalism\(2\).pdf](http://www.law.tulane.edu/uploadedFiles/Summer_Abroad/Code%20of%20Professionalism(2).pdf) (last visited Nov. 22, 2011); UNIV. OF CHI. LAW SCH., STUDENT HANDBOOK (2011), available at [http://www.law.uchicago.edu/files/file/Final%202011-2012%20Student%20Handbook%20with%209.15.2011%20Revision\\_0.pdf](http://www.law.uchicago.edu/files/file/Final%202011-2012%20Student%20Handbook%20with%209.15.2011%20Revision_0.pdf); UNIV. OF FLA. LEVIN COLL. OF LAW, *Honor Code*, in 2006–07 STUDENT HANDBOOK & STUDENT HONOR SYSTEM 40

conduct.<sup>248</sup> Other unprofessional conduct, however, is not consistently regulated.<sup>249</sup> A professionalism accreditation standard would necessitate regulation of non-academic behavior in order to serve a legitimate education goal.

### C. Measurability of Students

The law students' education of and adherence to professionalism standards will in part be evidenced by the review of the faculty and administration. The most effective method for assessing student professionalism, however, would be the use of outcome measures. Indications of what students have learned is more probative evidence of true "student learning," as opposed to what or how students were taught. In fulfilling an accreditation standard, the students should demonstrate proficiency in all areas of the *MacCrate Report* dictate: knowledge, skills, and values. Included within these values are ethics, trust, and integrity.<sup>250</sup> Students should also evidence specific professionalism traits as set forth above,

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(2006), available at <http://www.law.ufl.edu/students/pdf/hdbook2006.pdf>; UNIV. OF IDAHO COLL. OF LAW, HONOR CODE (2001), available at <http://www.uidaho.edu/law/academics/academicadministration/honorcode>; UNIV. OF MAINE SCH. OF LAW, *Honor Code*, in STUDENT HANDBOOK 2011–2012, at 41 app. 1 (2011), available at <http://mainelaw.maine.edu/student-services/pdf/student-handbook.pdf>; UNIV. OF NEW MEXICO SCH. OF LAW, *Code of Conduct*, in BULLETIN AND HANDBOOK OF POLICIES (2011–2012), available at <http://lawschool.unm.edu/academics/policies/bulletin-handbook-policies.pdf#page=56>; UNIV. OF NOTRE DAME LAW SCH., *Honor Code*, in HOYNES CODE 33 (2011), available at <http://www.nd.edu/~ndlaw/currentstudents/hoyne/honorcode.pdf>; UNIV. OF THE D.C. DAVID A. CLARKE SCH. OF LAW, STUDENT HANDBOOK: HONOR SYSTEM (2011), available at [http://www.law.udc.edu/resource/collection/C2624566-F29D-4527-9248-F5876CD7ECB2/honor\\_system\\_handbook\\_2011-2012.pdf](http://www.law.udc.edu/resource/collection/C2624566-F29D-4527-9248-F5876CD7ECB2/honor_system_handbook_2011-2012.pdf); UNIV. OF TULSA COLL. OF LAW, HONOR CODE (1999), available at <http://www.utulsa.edu/academics/colleges/college-of-law/Student%20Services/Academic%20Policies.aspx>; Washburn Univ. Sch. of Law, *Honor Code* (Aug. 15, 2008), <http://washburnlaw.edu/policies/honorcode.php>; Washington Univ. Law, *Honor Code* (Aug. 2, 2005), <http://law.wustl.edu/students/pages.aspx?id=1002>; William and Mary Law Sch., *Honor System* (2010), [http://www.wm.edu/offices/deanofstudents/services/studentconduct/studenthandbook/honor\\_system/index.php](http://www.wm.edu/offices/deanofstudents/services/studentconduct/studenthandbook/honor_system/index.php).

248. See *Report on a Survey of Law School Professionalism Programs*, *supra* note 234, at 13 (One-hundred percent of reporting schools indicated that they maintain jurisdiction over matters of academic misconduct).

249. *Id.* (Only sixty-nine percent of reporting schools indicated that they regulate "conduct unbecoming a lawyer occurring in law school activities." Seventy-six percent reported regulation of "other misconduct at the law school", and only forty-seven percent regulated conduct "unbecoming a lawyer outside of the law school community").

250. "Integrity" would necessarily include personal integrity, integrity in the workplace, integrity in the courtroom, integrity in society and the community at large.

such as civility, courtesy, and respect for the law. More importantly, students should exhibit “habits of personal living that enhance a moral core of responsibility to the profession.”<sup>251</sup>

Law school clinical education is an ideal setting to embrace student assessment because these programs already focus, by necessity, on training student-attorneys to perform common legal tasks in a practical environment.<sup>252</sup> Clinical legal education joins together all aspects of competence, skills, and values in a supervised setting. Law school clinics promote responsibility, accountability, and professionalism, as students learn to promote justice using a high level of ethics.<sup>253</sup> The Carnegie Foundation observed that the clinical case conference reveals features of a legal environment in “simplified forms so they can be understood by novice practitioners, who can begin to develop their own perception and judgment.”<sup>254</sup> Clinical programs across the country currently utilize a number of varied systems to measure the outcome of the pedagogy and methodology being taught in the clinics. Law schools that are devoid of any current outcome measurement system in their clinical program can look to publications of eminent scholars who have provided the necessary framework.<sup>255</sup>

Another avenue to determine student learning of professionalism concepts is through the offering of other courses in lawyering. Lawyering courses cover a wide range, including: the previously noted clinical pro-

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251. See *supra* Part II.

252. Ann Marie Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing The Effectiveness of Student Learning Outcomes*, 40 SW. L. REV. 1, 2 (2010).

253. *Id.* at 7 (Professor Cavazos notes that “[t]he objective of most law school clinical programs is to provide outstanding student-attorneys to the community’s indigent residents, as well as local legal organizations and agencies that serve the public interest. In furtherance of this goal, clinics promote responsibility, accountability, and professionalism at all times by all parties, while striving for excellence in promoting justice, fairness, and a high level of ethics”).

254. Sullivan, *supra* note 11, at 10.

255. See, e.g., Cavazos, *supra* note 252, at 22 (articulating the necessary “Tools of the Trade” for effective measurement of the success of a model clinical program. In addition, she has noted a number of highly useful evaluation forms that can be used to codify the results of the program); see also Cynthia Batt & Harriet N. Katz, *Confronting Students: Evaluation in the Process of Mentoring Student Professional Development*, 10 CLINICAL L. REV. 581, 593–99 (2003–2004); J.P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZ. L. REV. 155, 175 (2002–2003); Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 967–69 (1989–1990); Amy L. Ziegler, *Developing a System of Evaluation in Clinical Legal Teaching*, 42 J. LEGAL EDUC. 575, 588 (1992).



grams; research and legal writing courses; and classes in trial advocacy, mediation, and interviewing, counseling, and negotiation. Many law schools offer and oftentimes require other classes that address professionalism issues, and in which student outcome is definable.<sup>256</sup> The City University of New York has implemented a workable example wherein they require all first-year students to take a two-semester series of courses called “lawyering seminars,” each of which is linked to a doctrinal or substantive course.<sup>257</sup> The goal of these seminars is to integrate the students’ learning of the skills of practice and the ethical demands of professional identity with a more typical course such as civil and criminal procedure, contracts, and torts.<sup>258</sup> As with any class, the teaching faculty have devised methods to determine the student’s learning from participation in the seminars.

As the *Carnegie Report* aptly noted: “Practical courses in lawyering and work in legal clinics are . . . the logical complement to the forced decontextualization that students experience in the standard first year curriculum.”<sup>259</sup> Clinical programs are a valuable site for the development of dispositions crucial for legal professionalism.<sup>260</sup> The tools for documenting student learning outcomes on the issue of professionalism are already available in these classes and clinics.

### VIII. CONCLUSION

The Carnegie Foundation for the Advancement of Teaching emphasized that “[a]cross the otherwise disparate-seeming educational experiences of seminary, medical school, nursing school, engineering school, and law school, [the Carnegie Foundation] identified a common goal:

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256. See, e.g., *Curriculum*, FLORIDA A&M UNIVERSITY COLLEGE OF LAW (1887–2011), <http://law.famu.edu/go.cfm/do/Page.View/pid/50/t/Required-Course-Sequence>. The Business Organization course description states “[a] study of the fundamentals of basic business associations with an emphasis on closely held businesses . . . Corporate issues pertaining to corporations that are not publicly held will also be the focus. These include . . . duty of care and loyalty.” *Id.*

257. Sullivan, *supra* note 11, at 34–35.

258. The Lawyering Curriculum, CUNY SCHOOL OF LAW (2011), <http://www.law.cuny.edu/academics/curriculum/Lawyering.html>; see also Sullivan, *supra* note 11, at 35.

259. Sullivan, *supra* note 11, at 59.

260. *Id.* at 120 (noting that “[d]ecades of pedagogical experimentation in clinical-legal teaching, the example of other professional schools, and contemporary learning theory all point toward the value of clinical education as a site for developing not only intellectual understanding and complex skills of practice but also the dispositions crucial for legal professionalism”).

professional education aims to initiate novice practitioners to think, to perform, and to conduct themselves like . . . professionals.”<sup>261</sup> In essence, the Carnegie Foundation noted the need for professional education to instruct its students to act morally, ethically, and in a professional manner. The need for such professionalism training is critical.

In February 2011, the 560-member policymaking House of Delegates met as part of the ABA’s Midyear Meeting and adopted Resolution 100A as amended, thereby reaffirming support for ethical independence of law school clinical programs and courses consistent with the ABA Model Rules of Professional Conduct.<sup>262</sup> The adoption of 100A underscores not only the principles of clinical independence and law school self-governance, but also highlights the ABA’s support of the preservation and enhancement of professional conduct. The insightful and persuasive reports that have been generated in the past decade exploring the need for improved professionalism, illustrate that schools need to promote healthy interpersonal communication skills and intrinsic values by providing an organizational culture that promotes and encourages compliance with tenets of professionalism and adherence to professional conduct. Unfortunately, the majority of law schools will not voluntarily infuse professionalism into the law school curricula.<sup>263</sup> The ABA can, however, provide the necessary pressure to ensure stronger accountability by law schools.

The ABA’s current accreditation standards already require instruction on not just the law of lawyering and ethical rules, but also on the values and responsibilities of the profession and its members.<sup>264</sup> It is time for pressure to be placed on law schools to hold true to instruction on such professionalism values and responsibilities. Professionalism should no longer be subordinate to strict academic instruction. To do so risks

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261. *Id.* at 22.

262. MODEL RULES OF PROF’L CONDUCT R. 100A (2011). As amended, the adopted policy states:

RESOLVED, That the ABA also reaffirms its support for the ethical independence of law school clinical programs and courses consistent with the ABA Model Rules of Professional Conduct;

FURTHER RESOLVED, That the ABA opposes attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses;

FURTHER RESOLVED, That the ABA will assist law schools, as appropriate, in preserving the independence of clinical programs and courses.

263. See Heyrman, *supra* note 216 (discussing generally the barriers faced in implementing the MACCRATE REPORT’s Statement of Skills and Values).

264. *Standards and Rules of Procedure for Approval of Law Schools*, 2009–2010 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR 21 (regarding Standard 302).

educating “mere legal technicians for hire”<sup>265</sup> in place of true professionals who are committed to the profession’s highest levels of both competence and professional behavior.

The accreditation process is an optimum mechanism for increasing the focus on professionalism in law schools. Therefore, the ABA should give serious consideration to using its regulatory responsibility to correct the deficiency in professionalism evidenced in the legal profession.

*“Responsibility is the price of greatness.”—Winston Churchill.*<sup>266</sup>

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265. Sullivan, *supra* note 11, at 160 (noting that a neglect of holistic preparation of lawyers would result in educating “mere legal technicians for hire in the place of genuine professionals . . .”).

266. *Winston Churchill Quotes*, THINKEXIST.COM, [http://thinkexist.com/quotation/the\\_price\\_of\\_greatness\\_is\\_responsibility/15841.html](http://thinkexist.com/quotation/the_price_of_greatness_is_responsibility/15841.html) (1999–2011).