

THE MARYLAND JUDICIAL COMMISSION

ON

PROFESSIONALISM

FINAL REPORT

AND

RECOMMENDATIONS

The Honorable Lynne A. Battaglia
Chair

Norman L. Smith, Esq.
Reporter

May 31, 2006

PROFESSIONALISM COMMISSION

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SUBCOMMITTEES

Standards of Professional Conduct, Including Identifying Indicia of Professionalism

Thomas E. Lynch, III, Chair
Karen Federman-Henry
Mike Preston
William P. Young, Jr.

Professionalism Guidelines and Sanctions for Use by Judges

C. Daniel Saunders, Chair
The Hon. Richard D. Bennett
Prof. Abraham Dash
Robert L. Ferguson, Jr.
Robert J. Greenleaf
Master Cornelius Helfrich
The Hon. Benson E. Legg
Steven P. Lemmey
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Dana O. Williams

Discovery Abuse Issues, Including The Use of Discovery Masters

Dana O. Williams, Chair
Steven P. Lemmey
Robert L. Ferguson, Jr.
Linda Sorg Ostovitz
Danny R. Seidman
Daryl T. Walters

Mentoring

The Hon. James P. Salmon, Chair
Rignal W. Baldwin, Jr.
Felecia L. Greer
Linda Sorg Ostovitz
Dwight W. Stone
Prof. Byron Warnken

SUBCOMMITTEES

Update Existing Professionalism Course for New Admittees

Deborah L. Potter, Chair
Mark J. Davis
David W. Densford
William H. Jones
Michael F. O'Connor

Development of a Professionalism Course for Lawyers Who Exhibit Unprofessional Behavior

Norman L. Smith, Chair
Karen Federman-Henry
Robert L. Ferguson, Jr.
The Hon. Jeannie Hong

Defining the Unauthorized Practice of Law

Linda H. Lamone, Chair
Nicholas J. Monteleone
Mike Preston

Judges' Role in the Bar and With Communities

The Hon. Jeannie Hong, Chair
Donald Braden
Master Cornelius D. Helfrich
Kristy D. Hickman
William Hudson
Randy Jackson
Steven P. Lemmey
James Otway
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Note: This Report can also be found on-line at <http://mdcourts.gov/professionalism/index.html> with its Appendices, which includes Interim Reports of the Subcommittees and the Minutes for each of the Commission meetings.

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EXECUTIVE SUMMARY

On April 25, 2002, in response to a recommendation by the Maryland State Bar Association that all licensed Maryland attorneys be required to complete a mandatory continuing legal education course on professionalism, Chief Judge Robert M. Bell of the Maryland Court of Appeals established the Maryland Judicial Task Force on Professionalism. The Task Force was composed of twenty-four Maryland lawyers: one from each Maryland jurisdiction and a lawyer reporter.

After an initial organizational meeting, the Task Force, led by Court of Appeals Judge Lynne A. Battaglia, embarked upon a state-wide “self study” of the concept of professionalism. This was accomplished through a series of town meetings held in each Maryland jurisdiction. The first meeting was held in September 2002 in Howard County, and the last in July 2003 in Cecil County. Chief Judge Bell was present at each meeting, along with Judge Battaglia, Task Force reporter Norman Smith, and Jacqueline Lee, Assistant to Judge Battaglia. Participants included many District, Circuit, and Appellate judges, as well as practicing lawyers.

The Task Force found a near unanimous perception that professionalism in our profession has declined over the years. In order to further professionalism as an important core value, the Task Force recommended that a Professionalism Commission be established and that the Commission, drawing on the findings of the Professionalism Task Force, identify indicia of professionalism, develop standards of professional conduct to be published to the bench and Bar, and study specific ways to improve professionalism throughout the State.

On November 10, 2003, the Maryland Court of Appeals adopted the Professionalism Task Force’s recommendation to establish a Professionalism Commission. Meeting for the first time in March, 2004, the Professionalism Commission, through eight subcommittees, has acted upon the recommendations of the Professionalism Task Force. Judge Battaglia chairs the Commission and Norman Smith is the lawyer-reporter.

The Commission’s charge is to act on the findings of the Task Force: professionalism is more than ethics; there is a higher standard to be achieved by lawyers; specific indicia of professionalism must be identified. The Commission studied all facets of professional conduct and formulated methods to raise professionalism standards in the legal community. In considering courses of action, the Commission examined the work of other states in the area of professionalism and evaluated the effectiveness of their policies.

The Commission divided its members into eight subcommittees to focus on areas of concern that were identified by the Professionalism Task Force:

- Standards and Ideals of Professionalism
- Professionalism Guidelines and Sanctions for Use by Judges
- Discovery Abuse
- Mentoring
- Update Existing Professionalism Course for New Admittees

- Development of a Professionalism Course for Lawyers Who Exhibit Unprofessional Behavior
- Defining the Unauthorized Practice of Law
- The Judge's Role in the Bar and in the Community

The Subcommittee on Standards and Ideals of Professionalism examined the Rules of Professional Conduct in Maryland, the Model Rules, and Rules in other states. The Subcommittee also researched other states' professionalism guidelines and produced recommended Standards of Professionalism.

The Subcommittee on Professionalism Guidelines and Sanctions for Use by Judges determined that judges do not use existing tools effectively and do not have other necessary tools with which to sanction unprofessional behavior. To remedy the situation, the Subcommittee recommended specific changes to the Rules of Professional Conduct, the Maryland Rules of Procedure, and the Judicial Canons.

The Subcommittee on Discovery Abuse evaluated existing methods of resolving discovery disputes and addressing discovery abuse. After studying discovery problems in all jurisdictions, the Subcommittee made certain recommendations, including the use of special masters (lawyers or retired judges) to become involved in the process of promptly resolving discovery disputes.

The Subcommittee on Mentoring recommended exposure to professionalism concerns as early as possible, beginning at the law school level. The Subcommittee evaluated current mentoring programs in the State and noted that, while existing programs are in place, these programs are underutilized by new attorneys. The subcommittee recommended ways to increase awareness that such programs exist as well as to create opportunities for young attorneys to list their questions on professionalism and ethics and have them answered by competent attorneys. The Subcommittee also recommends that mentors be teamed up with new lawyers by means of a questionnaire handed out at the required professionalism course for new admittees.

The Subcommittee to Update the Existing Professionalism Course for New Admittees evaluated the current professionalism course for new admittees who pass the Bar and debated the effectiveness of postponing the course until attorneys have practiced for at least one year. Although there is much to be said for allowing attorneys to gain some experience before taking the course, the Subcommittee determined that the change is not workable at this time.

The Subcommittee on the Development of a Professionalism Course for Lawyers Who Exhibit Unprofessional Behavior examined fourteen other jurisdictions, as well as existing policies in Maryland, to determine a course of action that would work to correct the behavior of errant attorneys within the State. After identifying numerous problem areas with a comprehensive course, the Subcommittee recommended that a counseling program for lawyers offers a more workable solution.

The Subcommittee to Define the Unauthorized Practice of Law examined the scope of known occurrences of unauthorized practice of law (UPL) and the generally expressed concern that some in the real estate field, banking, accountancy, and other non-legal professions may be engaging in the unauthorized practice of law. After a study of treatment of these issues in other states and consultation with Bar Counsel of the Attorney Grievance Commission and attorneys from the Office of the Attorney General, the Subcommittee determined that it is neither necessary nor wise to change the statutory definition of the practice of law. The Subcommittee also cautioned that the profession risks the appearance of “turf protection” if aggressive enforcement is not perceived as protection of the public. The Subcommittee made other specific recommendations for monitoring the unauthorized practice of law and stimulating increased awareness and recourse for the public, the courts and members of the Bar, including public relations efforts, establishment of a clearing house for complaints, mechanisms for review of complaints and, where appropriate, prosecution of the unauthorized practice of law.

The Subcommittee on the Judges’ Role in the Bar and with the Community studied ways to integrate judges into the legal community while maintaining judicial integrity and independence. The Subcommittee determined that the age-old practice in which judges are isolated from practicing lawyers in the legal community is no longer a desired ideal. The Subcommittee examined the canons and rules for judges and evaluated activities currently permitted for judges, such as serving on boards, commissions, participating in Bar activities and teaching.

In submitting its report to the Court, the Commission stresses that its goal is to create a higher awareness of professionalism within the legal community.

RECOMMENDATIONS

I. STANDARDS OF PROFESSIONALISM

The Commission recommends that the Court adopt the Standards of Professionalism as an Appendix to the Rules of Professional Conduct.

Standards of Professionalism

Professionalism is the combination of values that distinguish lawyers as the caretakers of the rule of law in our society.

Preamble

When we, as lawyers, are entrusted with the privilege of practicing law, we take a firm vow or oath to uphold the Constitution and laws of the United States. Lawyers enjoy a distinct position of trust and confidence which, concomitantly, carries the significant responsibility and obligation to be caretakers for the system of justice that is essential to the continuing existence of a civilized society. Each lawyer, therefore, as a custodian of the system of justice, must be conscious of this responsibility and exhibit traits that reflect a personal responsibility to recognize, honor and enhance the rule of law in this society. The standards and characteristics set forth below are representative of a value system that we must demand of ourselves as professionals in order to maintain and enhance the role of legal professionals as the protectors of the rule of law.

Ideals of Professionalism¹

As a lawyer, I will aspire to:

- Put fidelity to clients before self-interest.
- Model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.
- Avoid all forms of wrongful discrimination in all of my activities, including discrimination on the basis of race, religion, sex, age, handicap or national origin. Equality and fairness will be goals for me.
- Preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.
- Make the law, the legal system, and other dispute resolution processes available to all.

¹ Based upon the model from the State of Georgia.

- Practice law with a personal commitment to the rules governing our profession and to encourage others to do the same.
- Preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.
- Achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.
- Practice law not as a business, but as a calling in the spirit of public service.

| | |
|----------|-----------------------|
| R | Responsibility |
| E | Excellence |
| S | Service |
| P | Promotion of fairness |
| E | Education |
| C | Civility/Courtesy |
| T | Trustworthiness |

Responsibility and Trustworthiness (integrity, honesty, trust)

A lawyer should understand that:

1. Punctuality in appearances and filing deadlines promotes the credibility of a lawyer. Tardiness and neglect denigrate the individual as well as the legal profession.
2. Personal integrity is essential to the honorable practice of law. Each lawyer should ensure that clients, opposing counsel, and the court can trust that the lawyer will keep all commitments and perform the tasks promised.
3. Honesty and candid communications promote credibility with the court, with opposing counsel and with clients.
4. External monetary pressures that may cloud professional judgment should be resisted

Education and Excellence

A lawyer should:

1. Make constant efforts to expand his/her legal knowledge and to ensure familiarity with changes in the law that affect a client's interests.

2. Willingly take on the responsibility of promoting the image of the legal profession by educating each client and the public regarding the principles underlying the justice system, and, as a practitioner of a learned art, by conveying to everyone the importance of professionalism.
3. Attend continuing legal education programs to demonstrate a commitment to keeping abreast of changes in the law.
4. As a senior lawyer, accept the role of mentor and teacher, whether through formal education programs or individual mentoring of newer attorneys.
5. Understand that mentoring includes the responsibility for setting a good example for another lawyer as well as an obligation to ensure that each mentee learns the principles enunciated in these standards and adheres to them in practice.

Service

A lawyer should:

1. Serve the public interest by clearly communicating with clients, opposing counsel, judges, and members of the public.
2. Give consideration to the impact on others when scheduling events. Reasonable requests for schedule changes should be accommodated if it does not impact the merits of the case.
3. Maintain an open dialogue with clients and opposing counsel.
4. Respond to all communications promptly, even if more time is needed to locate a complete answer. Delays in returning telephone calls may leave the impression that the call was unimportant or that the message was lost and leads to an elevation in tension and frustration and less effective communication.
5. Keep a client apprised of the status of important matters affecting the client and inform the the client of the frequency with which information will be provided (some matters will require regular contact, while others will require only occasional communication).
6. Always explain a client's options or choices with sufficient detail to help the client make an informed decision.
7. Reflect a spirit of cooperation and compromise in all interactions with opposing counsel, parties, staff, and the court. This requires a reduction in the win/loss approach to issues and an increase in mediation and achieving success for all involved.

8. Accept the responsibility personally to ensure that justice is available to all citizens of this country and not only to those with financial means.

Promotion of fairness

A lawyer should:

1. Act fairly in all dealings as a means of promoting the system of justice established in this country.
2. Understand that an excess of zeal may undermine a client's cause and hamper the administration of justice. A lawyer can zealously advocate the client's cause in a manner that remains fair and civil.
3. Know that zeal requires only that the client's interests are paramount and therefore utilizes negotiation and compromise to achieve a beneficial outcome. Yelling, intimidating, and issuing ultimatums, and using an "all or nothing" approach amounts to nothing more than bullying, not zealous advocacy.
4. Seek to maintain sympathetic objectivity when advising a client so that the client receives a comprehensive view of the legal aspects of the situation presented to the lawyer.
5. Not allow any action or decision to be governed by a client's improper motive and should challenge a client whose wishes are unethical or ill advised. This becomes especially important when deciding whether to consent to an extension of time requested by an opponent. The attorney makes that choice based on the effect, if any, on the outcome of the client's case and not based on the acrimony that may exist between the parties.
6. Negotiate in good faith in an effort to avoid litigation and should suggest alternative dispute resolution when appropriate.
7. Use litigation tools to strengthen the client's case and avoid using litigation tactics in a manner solely to harass, intimidate, or overburden an opposing party.
8. Explicitly note any changes made to documents submitted for review by opposing counsel. Fairness is undermined by attempts to insert or delete language without notifying the other party or his attorney.

Civility and Courtesy

A lawyer should understand that:

1. Professionalism requires civility in all dealings, showing respect for differing points of view, and demonstrating empathy for others.

2. Courtesy does not reflect weakness, but promotes effective advocacy by ensuring that parties have the opportunity to participate in the process without personal attacks or intimidation.
3. Maintaining decorum in the courtroom is neither a relic of the past nor a sign of weakness, but is an essential component of the judicial process.
4. It is essential to prepare scrupulously for meetings and court appearances and show respect for the court, opposing counsel, and the parties through courteous behavior and respectful attire.
5. Courtesy and respect should be demonstrated in all contexts, not just with clients and colleagues, or in the courtroom, but with support staff and court personnel.
6. Hostility between clients should not become grounds for an attorney showing hostility or disrespect to a party, opposing counsel, or the court.
7. Patience enables a lawyer to exercise restraint in volatile situations and to diffuse anger rather than to elevate the tension and animosity between parties or attorneys.

II. PROFESSIONALISM GUIDELINES AND SANCTIONS FOR USE BY JUDGES

In order that judges are provided with uniform professionalism standards and sanctions, the Commission recommends that the Court adopt the following:

A. New Maryland Rule 1-342:

If the court finds that the conduct of any counsel violates the Standards of Professionalism, the Court may impose sanctions as the Court deems appropriate, including the assessment of a monetary civil penalty, a monetary award, or both.

B. Rule 8.4 (h) to the Maryland Rule of Professional Conduct:

Rule 8.4. Misconduct.

It is professional misconduct to:

(h) Repeatedly or egregiously violate the Standards of Professionalism.

C. A Comment to Rule 8.4(h):

Rule 8.4 (h) recognizes professionalism as a core value of the legal profession. It is an essential component in fostering respect for and confidence in the legal process. The fundamental responsibilities of an attorney are set forth in the Standards of Professionalism, which are reprinted as an appendix to these Rules.

D. An addition to Judicial Canon 3:

(3) A judge shall require order and decorum in proceedings and shall report egregious or repeated violations of the Standards of Professionalism to the Attorney Grievance Commission.

III. DISCOVERY ABUSE

To address problems stemming from discovery abuse and unprofessional conduct during discovery, the Commission recommends:

- A. The Maryland State Bar Association revise and expand the *Maryland Discovery Guidelines* to address the concerns reflected in this Report and submit the revised Guidelines to the Rules Committee and to the Court.
- B. The Maryland Judiciary web site be expanded to include discovery opinions from trial courts, in the same manner that the site now publishes opinions from the trial courts in the business and technology case management system.
- C. The Rules Committee expand and annotate the standard discovery forms now found in the Appendix to the Maryland Rules and add a comment that the standard forms are presumptively proper.
- D. The Conference of Circuit Court Judges formulate a uniform discovery protocol designed to ensure that discovery is completed and disputes resolved in a timely fashion, and that the protocol include:
 - 1. At the request of either party in a case, the Court may schedule a discovery conference within 30 days of the filing of an answer. The conference may result in a discovery plan and scheduling order.
 - 2. In Baltimore City, Baltimore County, Anne Arundel County, Montgomery County, and Prince George's County the Administrative Judge appoint a specific judge (consideration to be given to use of retired judges) to handle all discovery disputes and that the discovery judge have authority to assign a discovery master, as necessary, for first-level dispute resolution.
 - 3. In all other counties the Administrative Judge appoint a standing discovery master or assign, as necessary, a special discovery master to the specific case.

- E. Changes in the Maryland Rules to accomplish the following:
1. Facilitate the process for bringing discovery disputes before the Court, including shortening the deadline for filing responses to motions seeking relief in such disputes.
 2. After the deadline for a response to motions for discovery relief has passed, provide for prompt referral to the designated judge or discovery master for resolution.
 3. Provide procedures for the judge's prompt resolution of exceptions to the discovery master's recommendations.
 4. Add to the Rule or Comment that, in resolving discovery disputes, a discovery master or judge may take into consideration any violations of Maryland Discovery Guidelines.

IV. MENTORING

In order to encourage mentoring of new lawyers to promote the ideals of professionalism, the Commission recommends:

- A. The Maryland State Bar Association mentoring program should be revamped so that new admittees who desire mentoring will be assigned a specific mentor.
- B. New admittees may sign up for mentoring at the Professionalism Course held semi-annually.
- C. The Young Lawyers Section of the Maryland State Bar Association should match the mentors and mentees.
- D. A Judicial Experience Program should be established to promote the goals of professionalism.
 1. Students at the two Maryland law schools who enter the Program will attend court with members of the Maryland Judiciary - ALJs, masters, and judges- and learn from the mentor/judge what is expected of a professional.
 2. Students who enter the Judicial Experience Program will do so on a voluntary basis and commit to a 40-hour program.
 3. The Judicial Experience Program will be open to all second and third-year law students at the two Maryland law schools.

V. NEW ADMITTEE COURSE ON PROFESSIONALISM

After reviewing the presentation, timing and substance of the Maryland Professionalism Course for New Bar Admittees, the Commission makes the following recommendations:

- A. The existing timeline for the Professionalism Course should be maintained, although the Commission recognizes that taking the course within one year of admittance to the Bar would allow new attorneys to bring some of their first-hand experience to the course, thus making the course more useful.
- B. The Maryland Professionalism Course should include mentoring initiatives, which could be viewed as the first step in mentoring new attorneys. The Maryland State Bar Association mentoring list should be made available at the course so that the new admittees would have a contact from the start.
- C. The Standards of Professionalism should be incorporated and explained as an integral part of the course.
- D. The course should be made more relevant to attendees by using “breakout” sessions so that material can be directed appropriately to each lawyer’s intended area of practice. Instructors at these sections should represent those specific areas of practice.
- E. To further engage attendees and encourage thought and recognition of the day’s discussions, a writing requirement should be added to round out the course activities. Possible topics include: “What will you do to promote professionalism?” or, “What action will you take in your daily practice to promote professionalism?”
- F. The video vignettes, if used, should be updated.
- G. More emphasis should be placed on the real concerns of legal malpractice and client complaints by including speakers from the Attorney Grievance Commission and representatives from legal liability insurance providers.
- H. The pervasive problem of discovery abuse warrants a discussion in the New Admittee Course. Participants should be encouraged to read *Discovery Problems and Their Solutions*, by the Hon. Paul W. Grimm with Paul Mark Sandler.

VI. COUNSELING FOR LAWYERS DEMONSTRATING REPEATED UNPROFESSIONAL BEHAVIOR

To address the problem posed by lawyers who repeatedly exhibit unprofessional behavior, the Commission recommends:

- A. The Court of Appeals should implement a program to provide a counseling program for experienced attorneys who exhibit unprofessional conduct. The program should include the following elements:
 - 1. Local Bar associations throughout the State should form professionalism committees, comprised of experienced and well-respected local lawyers and judges who will receive complaints from the bench and Bar concerning unprofessional behavior by attorneys that do not rise to the level of a violation of the Rules of Professional Conduct.
 - 2. Each local Bar association should establish its own procedures for the processing of complaints. Complaints deemed serious should become the subject of counseling by a panel of attorneys and at least one judge from the professionalism committee.
- B. No lawyer should be required to participate in counseling, which should be educational and mentoring in nature. No record of counseling should be kept by attorney name, but a statistical record should be kept and submitted annually to the Professionalism Commission concerning the number of attorneys counseled, whether the counseling effected change on the part of the attorney, and other feedback.
- C. Members of the local Bar association professionalism committees should be highly regarded and experienced members of the Bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

VII. UNAUTHORIZED PRACTICE OF LAW

To address professionalism concerns arising from the unauthorized practice of law, the Commission recommends:

- A. No changes (additions or deletions) should be made to the current statutory definition of the practice of law.
- B. Mechanisms and procedures should be established by which the alleged unauthorized practice of law is monitored and, if found, prosecuted.

- C. The Professionalism Commission, if ongoing, should have an Unauthorized Practice of Law Committee to act as a clearinghouse for complaints concerning the unauthorized practice of law and to monitor the unauthorized practice of law.
- D. The Maryland State Bar Association and possibly local and specialty Bar associations should be encouraged to develop means to refer unauthorized practice of law complainants to the appropriate resource and possibly, if necessary, to fund any enforcement proceedings.
- E. The Maryland State Bar Association should maintain the committee on unauthorized practice of law, however named. The committee should be patterned after the Association's Ethics Committee to provide a resource to lawyers and their clients who are seeking advice on whether specific practices constitute the unauthorized practice of law.
- F. The Attorney Grievance Commission and the Office of the Attorney General should coordinate efforts to review and cross-refer any complaints for the purpose of determining which of their offices are best suited to deal with a particular complaint.
- G. The Office of the Attorney General should, in the appropriate case(s), be asked to provide formal opinions on whether specific practices constitute the unauthorized practice of law.
- H. The Professionalism Commission should encourage the Attorney Grievance Commission and/or the Office of the Attorney General to pursue a test case or cases in areas of repeated concern.
- I. The Judiciary, the Bar and the public should be educated about the value of legal representation, the practice of law, and the problems arising from the unauthorized practice of law. Judges and lawyers should be made aware that victims of the unauthorized practice of law can be referred to the Attorney Grievance Commission or the Office of the Attorney General for investigation.
- J. The Attorney Grievance Commission and the Office of the Attorney General should report the nature of all investigated allegations of the unauthorized practice of law and any outcome to the Court of Appeals and the Maryland State Bar Association.

VIII. ROLE OF THE JUDGE WITH THE BAR AND IN THE COMMUNITY

In order to clarify and increase the participation of judges within the Bar and in the community, the Commission recommends:

- A. A Rules change or a comment to Maryland Rule 16-813 and Canon 4 making more explicit the intent of the Court and the Commission that judges be encouraged to engage in greater interaction among the bench, the Bar and the community.
- B. Additional training for judges regarding recusal rules, and updating of sitting judges on any recusal rule changes.
- C. Continued inclusion of professionalism in all judicial training sessions.
- D. A system by which to obtain advisory opinions from the Judicial Ethics Committee and a polling of the Judiciary on the adequacy of the present system.
- E. Judges be encouraged to write and provide for advance review of any proposed public speech by the Court Information Office.
- F. All judges receive a hard copy of each Judicial Ethics report.
- G. Investigative Counsel to the Maryland Judicial Disabilities Commission write a column in "Justice Matters."

IX. CONTINUATION OF THE PROFESSIONALISM COMMISSION

The Commission recommends that the Professionalism Commission be continued with its mission defined in an Administrative Order of the Chief Judge fashioned after the draft Order provided, with funding derived from an annual assessment imposed on each attorney admitted to practice in Maryland

IN THE COURT OF APPEALS OF MARYLAND
ADMINISTRATIVE ORDER CONTINUING PROFESSIONALISM COMMISSION

WHEREAS, Throughout the 1990s, members of the Maryland Bench and Bar had become increasingly aware of issues and repercussions of unprofessional behavior by lawyers, which spurred adoption of civility codes and, since 1992, a mandatory course in professionalism for all new admittees to the Maryland Bar; and

WHEREAS, The Conference of Chief Justices in 1996 adopted a resolution which called for a study of lawyer professionalism and encouraged the appellate court of highest jurisdiction in each state to take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench and Bar by establishing a Commission on Professionalism; and

WHEREAS, By Order dated April 25, 2002, a Professionalism Task Force was established to study the concept of professionalism within the Maryland bench and Bar and to identify the qualities of, and a consensus as to, professionalism; and

WHEREAS, The Task Force completed its work and, among other proposals, recommended the establishment of a Professionalism Commission; and

WHEREAS, On November 10, 2003, the Court of Appeals adopted the recommendation to establish a Professionalism Commission which occurred on February 17, 2004; and

WHEREAS, The Professionalism Commission, over a two-year period, explored the recommendations of the Professionalism Task Force and on May 10, 2006 adopted its first report.

NOW, THEREFORE, I, Robert M. Bell, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Constitution, do hereby order this ___ day of _____, 2006, effective immediately:

1. Creation. The Court Commission on Professionalism shall continue for a period of _____ years.
2. Members.
 - a. Commission. The Commission shall consist of the following members:
 - i. The Chief Judge of the Court of Appeals or a designee of the Chief Judge, as the Chair;
 - ii. The Chief Judge of the Court of Special Appeals or a designee of the Chief Judge;
 - iii. The Chair of the Conference of Circuit Judges or a designee of the Chair;
 - iv. The Chief Judge of the District Court or a designee of the Chief Judge;
 - v. A judge from the United States District Court for Maryland, designated by that Court;

- vi. The Dean of each of the accredited law schools in Maryland or a designee of the Dean;
- vii. A lawyer representative from each Maryland County and Baltimore City, appointed by the Chief Judge of the Court of Appeals;
- viii. The president of the Maryland State Bar Association, Inc. or the president's designee;
- ix. A representative from the Attorney Grievance Commission, appointed by the Chief Judge of the Court of Appeals;
- x. A representative from the Standing Committee on Rules of Practice and Procedure, appointed by the Chief Judge of the Court of Appeals;
- xi. A representative from the Judicial Disabilities Commission, appointed by the Chief Judge of the Court of Appeals; and
- xii. A reporter, appointed by the Chief Judge of the Court of Appeals.

b. Advisors. To the extent provided in the Judiciary's budget or other source of funds, the Commission may invite others to provide advice to, or otherwise participate in, the Commission's work, through invitations to the public for, appointment to subcommittees or assignment of specific tasks such as statistical and academic research.

c. Compensation. The members and advisors are not entitled to compensation but, to the extent provided in the Judiciary's budget, may be reimbursed for expenses in connection with travel related to the work of the Commission.

3. Meetings.

a. Scheduling. The Commission shall meet at the call of the Chair.

b. Quorum. A majority of the authorized membership of the Commission shall constitute a quorum for the transaction of business.

4. Forums.

a. Purposes. The primary tasks of the Commission are to explore, as well as monitor, the implementation of the professionalism policies adopted by the Court of Appeals, examine ways to promote professionalism among Maryland lawyers, and provide sustained attention and assistance to the task of ensuring that the practice of law remains a high calling that is focused on serving clients and promoting the public good.

b. Mission. The mission of the Commission is to support and encourage members of the Judiciary to exhibit the highest levels of professionalism and to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public to fulfill their obligations to improve the law and the legal system and to ensure access to that system.

c. Duties. To carry out its purposes, the Commission shall:

- i. Plan, implement, monitor and coordinate professionalism efforts in the Bar, courts, law schools and law firms;
- ii. Continue to develop mechanisms to advance professionalism as an important core value of the legal profession and the legal process;
- iii. Gather and maintain information to serve as a resource on professionalism for lawyers, judges, court personnel and members of the public;
- iv. Serve as a catalyst for positive change;
- v. Cultivate the professional community of the Bar;
- vi. Consider efforts by lawyers and judges to improve the administration of justice;
- vii. Monitor professionalism efforts in jurisdictions outside Maryland;
- viii. Promote and sponsor state and local activities that emphasize and enhance professionalism to include a yearly Convocation on Professionalism and promote regional and county convocations on professionalism;
- ix. Make recommendations to the Court of Appeals, the Maryland State Bar Association, and local and specialty Bars concerning additional means by which professionalism can be enhanced;
- x. Receive and administer gifts and grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities;
- xi. Monitor the efforts of the Maryland State Bar Association and other associations and committees in carrying out the mandate of this Court with respect to advancement of professionalism and submit periodic reports to this Court on those efforts.

5. Staff. The Commission shall have the staff assistance assigned by the Chief Judge of the Court of Appeals.

6. Source of Funding. The Commission shall be funded by an annual assessment imposed upon every attorney admitted to practice in Maryland.

7. Authority. The Commission on Professionalism has no authority to receive complaints within the province of the Attorney General's Office, the Attorney Grievance Commission or the Commission on Judicial Disabilities and shall refer any such complaints received to the appropriate Commission.

8. Rescission of Prior Order. The Order dated February 27, 2004 is rescinded.

Robert M. Bell
Chief Judge
Court of Appeals of Maryland

Filed:

Clerk
Court of Appeals of Maryland

SUBCOMMITTEE ON STANDARDS OF PROFESSIONAL CONDUCT
INCLUDING IDENTIFYING INDICIA OF PROFESSIONALISM

To carry out the directive of the Court of Appeals as articulated in its Administrative Order of February 17, 2004, the Professionalism Commission was divided into different subcommittees. One of the subcommittees, the Subcommittee on Standards of Professional Conduct, was comprised of lawyers from different parts of the State of Maryland and in different areas of practice. Included in the Subcommittee were lawyers engaged in public and private practice and those involved in litigation and non-litigation disciplines. The Subcommittee was charged with the responsibility for identifying indicia and standards of professionalism. Specifically, the Subcommittee was directed with the following responsibilities set forth in the Court of Appeals' Administrative Order.

Drawing on the findings of the Professionalism Task Force, the Professionalism Commission should, as its first task, identify indicia of professionalism and develop standards of professional conduct to guide its work in the areas that it will explore and shall publish these standards to the Bench and Bar throughout the State.

In furtherance of its effort, the Subcommittee met during the spring of 2004 and presented its First Interim Report to the Professionalism Commission on May 12, 2004. In that report, the Subcommittee articulated the charge detailed above and also sought the full Commission's concurrence as to its methodology for carrying out that charge.

With the concurrence of the full Commission at the May 12th meeting, the Subcommittee articulated the following methodology for completing its assigned responsibilities, which were as follows:

- i. Collation of the results gathered from the town hall meetings conducted throughout the State of Maryland;
- ii. Examination of codes or creeds of professionalism developed in the State of Maryland;
- iii. Examination of the codes or creeds of professionalism and professionalism criteria developed in other states;
- iv. Investigation as to whether any primary data has been developed from juries, etc., as to professionalism of lawyers appearing in our courts;
- v. Review of research data and literature summarizing the results of other efforts to identify and determine the importance of the indicia of professionalism, including the American Bar Association Commission on Professionalism Report entitled "...In The Spirit of Public Service – Blueprint For Rekindling of Lawyer Professionalism" (1986); and

- vi. Developing certain consensus points regarding its investigation and efforts and soliciting the input of the entire Commission on those consensus points.

At the May 12, 2004 meeting, the Subcommittee also advised the full Commission that it had nicknamed itself the “Character Counts” Subcommittee, recognizing that the tasks of developing standards and indicia of professionalism for lawyers is not unlike the Character Counts initiative of the Josephson Institute of Ethics which is being promoted in the public schools in various counties of the State of Maryland. The six pillars of character, which serve as the foundation of the Character Counts initiative, are: Trustworthiness, Respect, Responsibility, Fairness, Caring and Citizenship. The Subcommittee felt that these pillars of character would serve as a good starting point for the Subcommittee’s efforts. At the May 12, 2004 meeting of the entire Commission, consensus was reached that the approach adopted by the Subcommittee was sound.

In furtherance of the charge it had articulated for itself at the May 12th meeting, the Subcommittee, between that date and the Commission meeting on July 21, 2004, engaged in extensive investigation and research. The results of the Subcommittee’s efforts were presented to the entire Commission at its meeting on July 21, 2004, at which time the Subcommittee presented its Second Interim Report. In that report, the Subcommittee summarized its findings and attached as Exhibits to the report, information about the professionalism and civility codes in Maryland and other states in the United States. The Subcommittee also presented in tabular form the elements of professionalism as determined from the town hall meetings of lawyers and judges throughout the State of Maryland.

Recommendations:

Although the Subcommittee recognized in its Second Interim Report that it was not yet in a position to present its final recommendations, it did seek the Commission’s full consensus on the following recommendations:

- The Commission must ensure that its efforts do not simply lead to the development of a published code that, after being drafted and accepted, would be ignored.
- The recognition that, for any indicia or standards of professionalism to be effective, they must be endorsed, supported and promoted by the Courts.
- The recognition that significant efforts must be made by the Maryland State Bar Association, working in conjunction with the Courts, to promote the standards of indicia of professionalism.

- A lawyer or judge's commitment to professionalism must not be a one-time event, but must be something that is repeatedly reaffirmed.
- Local Bar associations must be charged with responsibility to promote and encourage the standards of professionalism on an ongoing basis; and
- Professionalism training must be an integral part of the education of prospective lawyers in our law schools.

A draft of a model code of civility was presented by the Subcommittee at the July 21, 2004 meeting for consideration and discussion by the full Commission.

On November 3, 2004, the Subcommittee submitted a draft of its Final Report to the Professionalism Commission. This report summarized the investigation and research undertaken by the Subcommittee and set forth some of its most important conclusions. Among other things, the Subcommittee had concluded that the task of defining and promoting indicia of professionalism not only was not a trivial exercise, but is critical to the continuing function of the "Rule of Law" in the United States. The Subcommittee summarized its essential conclusion as follows:

"We, as lawyers and judges in this community, have the obligation to be caretakers for our system of justice and for a rule of law which distinguishes this civilization and provides protection against anarchy."

The Subcommittee emphasized for the Commission as a whole that the task is a time-sensitive one. The Subcommittee stated as follows:

"Our efforts, we submit, are time-sensitive. There is significant evidence of erosion of values throughout our culture... one of the elements evident in this erosion is a growing disrespect for many of our institutions of government, including the system of justice. Unprofessional conduct among practicing lawyers and judges certainly is a factor that has contributed to the erosion of the respect for our system of justice. If this erosion continues unabated, it bodes poorly for the future of the rule of law in this country."

The Subcommittee encouraged the lawyers and judges in this State to be leaders in the restoration of a sense of respect for the independence and integrity of the system of justice.

In its draft final report, the Subcommittee concluded that professionalism, no matter how it is described, boils down to a certain value system that is captured in the word "respect:"

R – RESPONSIBILITY
E – EXCELLENCE
S – SERVICE
P – PROMOTES FAIRNESS
E – ETHICAL BEHAVIOR
C – CIVILITY/COURTESY
T – TRUSTWORTHINESS

The Subcommittee attached to its draft final report standards and indicia of professionalism that included general aspirational ideas and specific standards and indicia.

After the Commission reached consensus as to the standards and indicia proposed by the Subcommittee and as to the substance of its other recommendations, the Subcommittee was asked to examine the question of whether the standards and indicia should be made mandatory. This inquiry was presented to the Subcommittee at the same time other subcommittees were examining other issues of concern to the Commission, including implementation of the standards and indicia in various contexts. The Subcommittee's supplemental investigation led to the presentation of a supplemental report on November 16, 2005, in which the Subcommittee provided twelve recommendations for promoting the standards and indicia, ultimately concluding that other subcommittees of the Commission needed to provide direction as to the appropriate manner of application of the standards of indicia in various contexts.

SUBCOMMITTEE ON PROFESSIONAL GUIDELINES AND SANCTIONS FOR USE BY JUDGES

The Subcommittee on Professional Guidelines and Sanctions for use by Judges found that judges often have a difficult time policing discovery matters because the authority to sanction misbehaving lawyers is not clear. The Subcommittee determined that, when lawyers test the bounds of professionalism, judges should be armed with uniform sanctions. The Subcommittee first looked at rules and sanctions that are currently in place and then to possible changes.

The Subcommittee members considered many approaches, such as the adoption of an alter ego program similar to that in place for the Judiciary in many jurisdictions. The Subcommittee also considered such informal measures as encouraging judges to take attorneys into chambers to admonish unprofessional conduct. More specifically the Subcommittee studied amending the Rules of Professional Conduct, the Maryland Rules, and the Judicial Canons to add specific authority and responsibility for judges to issue sanctions.

The Subcommittee's focus was to empower judges to control the conduct of lawyers and to suggest possible sanctions. Sanctions, the Subcommittee felt, are more likely to be warranted if a lawyer has been the subject of a series of such complaints.

The Subcommittee's preliminary report dealt with the inherent problems of enforcing professionalism and civility, particularly in the litigation area. The Subcommittee studied approaches to the enforcement of civility codes in all of the jurisdictions in the United States and observed that virtually none of them promulgate mandatory rules and that all of them appear to wrestle continuously with ongoing incivility within the profession.

The Subcommittee studied the possibility that unprofessional behavior might be referred to a judicial review panel, using the Federal District Court as a model. In this scenario, a judge would make a written disciplinary referral to the Circuit Administrative Judge. Upon receipt of a judicial officer's disciplinary referral, the Administrative Judge would send the respondent attorney a copy of the referral and allow the attorney to respond in writing. After receiving a response, the Administrative Judge would close the referral by issuing a letter of concern to the respondent, forwarding the referral to Bar Counsel, if appropriate, or docketing the referral, and appointing a review panel of three judges.

The Subcommittee also considered specific changes to the Maryland Rules, the Maryland Rules of Professional Conduct, and the Canons for Judicial conduct. Underlying these decisions was the key issue of whether the recommended guidelines should be mandatory, mandatory in part, or not mandatory. The Subcommittee recommends mandatory guidelines, feeling that otherwise, the guidelines will be disregarded. Accordingly, the Subcommittee recommended adding the Standards of Professionalism as a comment or appendix to the Rules of Professional Conduct.

In considering a comment to the Rules of Professional Conduct, making a violation of the Standards of Professionalism a violation of Rule 8.4, the Subcommittee presented three choices: (1) include a comment to Rule 8.4, making violation of the Standards of Professionalism a Rule violation; (2) amend Rule 8.4, adding a subsection specifically addressing violations of the Standards of Professionalism; (3) make the Standards of Professionalism aspirational only. The Subcommittee recommended option 2, and opined that this decision – the aspirational or mandatory nature of the Standards – will shape the future of the Commission and determine whether its focus will be regulatory or educational.

Recommendations:

The Subcommittee proposed and the Commission approved the following changes:

- Modification to Rule 1-342:

If the court finds that the conduct of any counsel violates the Standards of Professionalism the Court may sanction such conduct as the Court deems appropriate, including the assessment of a monetary civil penalty, a monetary award, or both.

- Add to Rules of Professional Conduct, Rule 8.4, a new subsection:

(h) Repeatedly or egregiously violate the standards of professionalism:

- Add a Comment to proposed new Rule 8.4(h):

Rule 8.4 (h) recognizes professionalism as a core value of the legal profession. It is an essential component in fostering respect for and confidence in the legal process. The fundamental responsibilities of an attorney are set forth in the Standards of Professionalism, which are reprinted as an appendix to these Rules.

- Add to Judicial Canon 3:

(3) A judge shall require order and decorum in proceedings and shall report egregious or repeated violations of the Standards of Professionalism to the Attorney Grievance Commission.

SUBCOMMITTEE ON DISCOVERY ABUSE ISSUES INCLUDING THE USE OF DISCOVERY MASTERS

At virtually all of the Town Hall meetings held by the Professionalism Task Force, attendees, when identifying the practice areas giving rise to incivility and unprofessional behavior, pointed to discovery and discovery dispute resolution as an area of serious and repeated concern. This problem was raised so frequently that the Task Force specifically identified this as a major focus area for the Commission in addressing unprofessional behavior by practitioners. Accordingly, the Professionalism Commission formed *The Subcommittee on Discovery Abuse Issues, Including the Use of Discovery Masters*. This Subcommittee studied discovery abuse and discovery dispute resolution and explored practical solutions to improve existing practices without re-writing the Maryland Rules of Procedure. During the two-year course of the Commission, the Subcommittee was in continuous dialogue with the very experienced members of the Commission regarding the Subcommittee's work

One aspect of the Subcommittee's mission was to recognize the different needs and financial resources of the many counties within the State. Significant consideration was given to the different problems and solutions for rural counties as opposed to the State's metropolitan jurisdictions. Before formulating recommendations for review and discussion, the Subcommittee canvassed state-wide, both formally and informally, the different jurisdictions and individuals involved in the discovery dispute resolution process. The Subcommittee looked carefully at what was and what was not working throughout the State in the area of discovery disputes and the conduct leading to disputes.

The Subcommittee reviewed existing protocols and resources, including but not limited to the Maryland Rules regarding Discovery, Scheduling Orders from different Counties, Discovery Forms, the *Maryland Discovery Guidelines*, use of trial court discovery opinions, and informational tools such as the Maryland Judiciary website. Specific consideration was given to the use of masters (special or standing), mediators, facilitators and retired judges to expedite the dispute resolution process. Although it was agreed that the greatest area of concern was the civil arena-including family law, there was also discussion regarding criminal discovery issues.

The Subcommittee found that there are significant differences in the counties as to how discovery disputes are being resolved. Some counties have adopted, either formally or informally, a "flexible" view of the existing discovery rules in order to provide an expeditious resolution procedure. In other jurisdictions, the Judiciary did not seem to be aware of the problem and had no specific dispute resolution protocol in place. In those venues with a local protocol in place discovery disputes are resolved more promptly, diminishing the overall volume of disputes. Simply put, there is a significantly lower incidence of abuse when practitioners are aware that their conduct will be promptly addressed.

Since its inception, the Subcommittee, working in conjunction with the larger Commission, has formulated practical and common sense recommendations that will be helpful to the Judiciary and practitioners in improving discovery dispute resolution practices throughout the State. This, in the Subcommittee's view, will assist in accomplishing the Commission's goal of improving professionalism within the Maryland Bar. The recommendations of the Subcommittee have been approved by the Commission as a whole.

Recommendations:

- That the Maryland State Bar Association revise and expand the *Maryland Discovery Guidelines* to address the concerns voiced throughout the State and reflected in the Report of the Court of Appeals Task Force on Professionalism; and that the Maryland State Bar Association submit the revised Guidelines to the Rules Committee and to the Court;
- That the Maryland Judiciary web site be expanded to include discovery opinions from trial courts, in the same manner that the site now publishes opinions from the trial courts in the business and technology case management system;
- That the Rules Committee expand and annotate the standard discovery forms now found in the Appendix to the Maryland Rules and add a comment that the standard forms are presumptively proper;
- That the Conference of Circuit Court Judges formulate a uniform discovery protocol designed to ensure that discovery is completed and disputes resolved in a timely fashion; and that the protocol include:
 - At the request of either party in a case, the Court may schedule a discovery conference within 30 days of the filing of an answer. The conference may result in a discovery plan and scheduling order.
 - In Baltimore City, Baltimore County, Anne Arundel County, Montgomery County, and Prince George's County, that the Administrative Judge in those jurisdictions should appoint a specific judge (consideration to be given to use of retired judges) to handle all discovery disputes and that the discovery judge be given the authority to assign a discovery master, as necessary, for first-level dispute resolution;
 - In all other counties, that the Administrative Judge appoint a standing discovery master or assign, as necessary, a special discovery master to the specific case.

- Consider changes in the Maryland Rules to accomplish the following:
 - Facilitate the process for bringing discovery disputes before the Court, including shortening the deadline for the filing of responses to motions seeking relief in such disputes;
 - After the deadline for response to motions for discovery relief has passed, provide for prompt referral to the designated judge or discovery Master.

SUBCOMMITTEE ON MENTORING

Recommendation No. 13 of the Professionalism Task Force was as follows:

In each town meeting, attorneys identified a breakdown of the traditional mentoring of new lawyers as another contributor to the decline of professionalism. The Professionalism Task Force feels that there are many mentoring programs available that have been underutilized, perhaps because they are not well known. The Task Force recommends that information about these programs be given wider dissemination and that participants in existing programs for mentoring of inexperienced lawyers be encouraged by the Bench and Bar.

At the first meeting of the Professionalism Commission, it was the consensus of all in attendance that professionalism training must start at law school. Commission members expressed the view that mentoring is an integral part of the success of lawyers. Nevertheless, many newly admitted lawyers have not been exposed to professionalism or to a mentor. Delaware, by contrast, requires new admittees to work under the supervision of an experienced member of the Bar for six months before they may enter practice.

The Mentoring Subcommittee met in the spring of 2004 to establish its objectives and to determine the methodology that should be utilized to achieve them.

The Subcommittee set as its main task the determination of whether the goal of enhancing professionalism among lawyers of this State could be appreciably advanced by establishing a new state-wide mentoring program. Among the questions to be answered by the Subcommittee were the following:

- What are the purposes of mentoring?
- What presently is being done to mentor new lawyers?
- What presently is being done to mentor “problem” lawyers?
- How do existing mentoring programs:
 - Recruit or perhaps force participation of mentees?
 - Select mentors?
 - Train members?
- How can existing programs be improved?

To answer those questions, the Subcommittee undertook the job of contacting Bar association officials in the District of Columbia, Delaware, and Virginia, as well county and city Bar Associations in this State, along with officials of the specialty Bars in Maryland. All told, fourteen organizations were contacted. The purpose of the inquiry was to find out what existing programs for mentoring existed, how those programs operated, and the success, *vel non*, of the extant programs.

At the meeting of the full Commission on July 21, 2004, it was noted that the Maryland State Bar Association currently has a mentors list with the names of lawyers who have agreed to be mentors. Additionally, it was observed that the Montgomery County Bar Association has an existing mentoring program, as do many large firms. It was also noted that it is important that mentoring for young lawyers should not be perceived as a punishment. It should be considered, instead, as an opportunity to obtain guidance. The Subcommittee reached a consensus that being a mentor should be considered an indicia of professionalism and strongly encouraged.

Members of the Subcommittee also agreed that the current Maryland State Bar Association mentoring program is underutilized. Although the Maryland State Bar Association has many persons who have volunteered to serve as mentors, most are never contacted. The perceived reason for this underutilization is because most new lawyers do not know that the Maryland State Bar Association mentoring program is available.

On April 27, 2005, the Subcommittee submitted its first interim report. In that report, it examined the existing mentoring programs in Maryland, Delaware, Virginia, and the District of Columbia. The Subcommittee concluded that the mentoring programs that worked best were ones where an experienced attorney is assigned to an attorney who is just beginning practice. Programs that require the new admittee to take the proactive step of contacting a mentor were far less effective. Therefore, regular mentoring meetings between the mentor and mentee should be encouraged.

The Subcommittee also concluded in its first interim report that the existing formal mentoring programs by the various Bar associations in Maryland are underutilized and, for the most part, only minimally effective. The problem appears to stem from two factors: (1) lack of widespread knowledge that mentoring programs exist; and (2) reluctance of professionals in need of mentoring to reach out and contact a fellow professional (usually a stranger) to ask for help. Mentoring programs in smaller groups, such as law firms, inns of courts, leadership academies, etc., have greater success. That success is attributable to the fact that (1) the organizations pair the mentor/mentee; (2) the organizations make sure that the mentors/mentees meet with one another at regular intervals; and (3) smaller groups that make the match inspire greater confidence and trust between the mentor and mentee.

In the interim report, the Subcommittee expressed the belief that a mentoring program, if properly supervised and administered, could effectively promote the goals of professionalism. A majority of the Subcommittee believes that the best way to improve matters is to make changes in the current mentoring program run by the Maryland State Bar Association. The central problems with the Maryland State Bar Association program as presently administered is that it is

underutilized, is not well advertised, and mentors and mentees are not paired unless the mentee takes the initiative and contacts someone on the Maryland State Bar Association list. As a result, most new lawyers do not take advantage of the program.

The Subcommittee felt that, as presently operated, the Maryland State Bar Association program is basically passive. Attendees at the Professionalism Course are told about the mentoring program's website and encouraged to select a mentor if the need for one arises. Nevertheless, as far as we have been able to determine, no meaningful effort is made to convince the soon-to-be-admitted lawyer to take advantage of the program. The Subcommittee recommended that this be changed. More specifically, the Subcommittee felt that an effort should be made to match the prospective mentor with a prospective mentee.

The Subcommittee also recommended that each attendee at the Professionalism Course should be handed a preprinted form to be completed by the attendee within ten days and returned to the Maryland State Bar Association. The new admittee should be encouraged to name someone within his/her firm (or other place of employment) who will serve as a mentor. Other newly admitted lawyers, including those who intend to be solo practitioners, should be encouraged to select a mentor from a list of Maryland State Bar Association volunteers on the website. It was also tentatively recommended that the Solo Practice Section of the Maryland State Bar Association be encouraged to take on the responsibility of matching the mentors with the mentees. It was the belief of the Subcommittee that a proactive approach, such as the one just described, would significantly increase the utility and participation in the existing Maryland State Bar Association mentoring program.

The Subcommittee, in its first interim report, also expressed the view that there might be a practical way that errant lawyers could be forced to have a mentor. The Subcommittee recommended that judges who witness unprofessional behavior be encouraged to refer errant lawyers to a mentor on the Maryland State Bar Association list in lieu of contempt and that the judge, not the lawyer, should select the mentor. The Subcommittee, in its tentative report, did not believe that a formal training program for every mentor on the Maryland State Bar Association list would be practicable. Nevertheless, it was pointed out that there are several excellent books and articles available that would be useful to anyone who intended to serve as a mentor.

Lastly, the Subcommittee recommended in its interim report that mentoring of new lawyers should last for a minimum of one year and that for "errant" lawyers mentoring should last as long as needed.

At the February 15, 2006 meeting of the Professionalism Committee the Mentoring Subcommittee submitted its second interim report. In that report, the Subcommittee changed its recommendation concerning mentoring for errant lawyers. The Subcommittee decided that it would be almost impossible to implement a workable program to mentor more experienced errant lawyers. It concluded that, if more experienced lawyers failed to abide by the Rules of Professional Conduct, sanctions such as those to be imposed by the proposed Rule 1-342 would suffice.

Additionally, the second interim report recommended that matching of new admittees who wish to have a mentor with those on the Maryland State Bar Association website should be done by the Young Lawyers Section of the Bar Association, not the Solo Practice Section. The change was made because the Solo Practice Section was not willing to undertake the project.

A suggestion was made by Professor Warnken that it would be a good idea to establish a program that would involve judges mentoring law students. That idea was accepted, and in the final report the Subcommittee recommended, for the first time, that masters and Maryland judges, including administrative law judges, be recruited to be used as mentors for law students at the University of Maryland and the University of Baltimore. A program was recommended whereby the student would attend court with the mentor judge or master and afterward be given an opportunity to meet with the mentor to ask questions, exchange ideas, etc. Such a program would allow the student to see the judicial process “up close and personal.” The goal of the relationship would be to help the student learn how the judicial system operates and to promote professionalism. It was noted that both the University of Maryland and the University of Baltimore law schools had shown a keen interest in such a mentoring program.

In the period between the second interim report and the final one, representatives of both law schools were contacted. The Subcommittee agreed with the law school representatives that (1) participation in the program by students should be voluntary and should be open to all third-year students; (2) the program should be called the Maryland State Bar Association Judicial Mentoring and Professionalism Program; (3) there will be a need for administrative support to facilitate the operation of the program; (4) each school will need to designate a faculty representative to serve as a liaison for the program; (5) the goals of the program should be the goals set forth in the Subcommittee’s final report; and (6) while approval of the program by the hierarchy of the two law schools was needed, it was extremely likely that it would be obtained.

Recommendations:

- The Maryland State Bar Association mentoring program should be revamped so that new admittees who want a mentor will be assigned one.
- New admittees who want a mentor will sign up at the Professionalism Course held semi-annually.
- The Young Lawyers Section of the Maryland State Bar Association should match the mentors and mentees.
- A Judicial Experience Program should be established to promote the goals of professionalism.

- Students at the two Maryland law schools who enter the Program will attend court with members of the Maryland Judiciary, i.e., ALJs, masters, and judges, and learn from the mentor-judge what is expected of a professional.
- The students who enter the Judicial Experience Program will do so on a voluntary basis and commit to a 40-hour program.
- The Judicial Experience Program will be open to all second and third-year law students at the two Maryland law schools.

SUBCOMMITTEE ON
UPDATING THE EXISTING PROFESSIONALISM COURSE
FOR NEW ADMITTEES

The New Admittee Course on Professionalism has been evolving since it was established in the 1980s. The Subcommittee examined the current course purpose, content, materials, participant surveys and timing. It contacted both law schools in the State to learn about the professionalism-related course offerings. The most significant issue researched by the Subcommittee was the timing of the course, specifically the idea of deferring participation in the course until one year of practice has been completed. Course materials and information from New Admittee Programs in 23 states and the District of Columbia were collected and studied. The Subcommittee also considered the advantages of having local Bar Associations administer the course to increase course relevance. It also discussed the importance of increasing mentoring efforts for new lawyers. Judge Battaglia compiled additional information from other states with regard to their new admittee courses.

Recommendations:

The Subcommittee makes the following recommendations:

- Timing. New admittees should be allowed to take the course within one year of admittance to the Bar. This would allow new attorneys to bring some of their-first hand experience to the course, thus making the course more useful to attendees. It was the consensus of the Subcommittee that despite the advantages of changing the timing of the course, the lack of a system to track participation and completion currently makes the idea infeasible. The issue should be revisited by the Commission.
- Mentoring. Many of the calls to enhance professionalism include increased mentoring of new attorneys. Any efforts to include mentoring initiatives in the Maryland Professionalism Course should be nurtured. This course could be viewed as the first step in mentoring new attorneys. The process could begin with having the new attorneys gather with other attorneys in their expected area of practice, i.e. transactional, criminal, litigation (large), litigation (small), public interest and government. The Maryland State Bar Association mentoring list could be made available at the course so that the new admittees would have a contact from the start.
- Materials. As a way to enhance the mentoring component of the course, the materials should be made more substantial/practical. The materials could include a library of forms and summary of case law. This gesture could be a way to “set the tone” for new admittees -- offering this assistance as a professional courtesy. It is a way of saying “we are all in this together.”
- Definition of Professionalism. Incorporate the definition of Professionalism into the course as set forth by our fellow Subcommittee members.

- Breakout Sessions. The course can be made more relevant to attendees by utilizing “breakout” sessions so that material can be directed appropriately to each lawyer’s intended area of practice, i.e. criminal, litigation, government, public interest and transactional law. The instructors would also be from the specific areas of practice, which will also build in some natural mentoring opportunities for attendees.
- Writing Requirement. To further engage attendees and encourage thought and recognition of the day’s discussions, a writing requirement could be added to round out the course activities. Possible questions include, “What will you do to promote professionalism?” or, “What action will you take in your daily practice to promote professionalism?”
- General. The video vignettes, if used, should be updated.
- Getting their attention. More emphasis could be placed on the real concerns of legal malpractice and client complaints by including speakers from the Attorney Grievance Commission and representatives from legal liability insurance providers.
- Addressing Discovery Abuse. The pervasive problem of discovery abuse warrants a discussion in the New Admittee Course. This discussion would be more useful if the new admittee has had personal experience practicing law and has witnessed discovery disputes. Further, this discussion would be perceived as waste of time for a non-litigating attorney, and goes to support the concept of breakout sessions. Participants should be encouraged to read *Discovery Problems and Their Solutions*, by the Hon. Paul W. Grimm with Paul Mark Sandler.
- Local Bar Presenting the Course, Instead of a State-wide Course. The idea of having local Bar associations organize and offer the Professionalism Course was discussed at length. It was decided that this change is simply not practical to implement, as some Bar associations are not equipped for this task; many attorneys do not practice where they reside; and tracking course completion could be a challenge.

**SUBCOMMITTEE ON DEVELOPING A COURSE FOR LAWYERS
WHO EXHIBIT UNPROFESSIONAL BEHAVIOR**

COURT OF APPEALS TASK FORCE FINDINGS AND RECOMMENDATION

Noting concern over the deterioration of professionalism throughout the State, the Maryland State Bar Association recommended a professionalism course for experienced attorneys to complement the existing course for new admittees. Shortly thereafter, the Court of Appeals appointed a Professionalism Task Force to study the issue throughout the State. After holding a series of town meetings in every Maryland jurisdiction, the Professionalism Task Force declined to recommend a mandatory course in professionalism beyond that required of new admittees to the Bar. The Task Force did, however, recommend that the Professionalism Commission, in conjunction with the Maryland State Bar Association, develop an appropriate professionalism course to which lawyers acting unprofessionally may be referred.

THE PROFESSIONALISM COMMISSION SUBCOMMITTEE ON DEVELOPING A COURSE FOR
LAWYERS WHO EXHIBIT UNPROFESSIONAL BEHAVIOR

The Subcommittee charged with developing a course for errant lawyers began its preliminary work by researching the format of such courses in other states and reported to the Commission the status of professionalism courses in 14 jurisdictions: Arizona, California, Colorado, District of Columbia, Florida, Georgia, Illinois, Louisiana, Michigan, North Carolina, Tennessee, Utah, Virginia, and Wisconsin.

The Commission felt strongly that a remedial course in professionalism should not be merely a recap of the new admittee professionalism course. The Commission further expressed doubts, however, that the problem of unprofessional behavior, exhibited by a small percentage of lawyers, would be improved by a course. Discussion concerned the role that judges play. Many believe that the bench must actively address the problem, since most abuse is in connection with litigation and discovery.

The Subcommittee paused in its work in order that its recommendations be informed by the work of the Subcommittee on Indicia of Professionalism.

The Standards of Professionalism having been approved, the Subcommittee submitted a revised report, pointing out further problems in the structuring of a course. Any proposed course runs the risk of being either too broad to address specific violations or becoming too narrowly tailored for presentation to a large group of attorneys whose problems may be diverse. Much of what other states include in such courses – escrow account maintenance, client relations, and law office management - does not address the type of professionalism problems concerning the Commission.

The existing professionalism course for new admittees has often been used as a referral course for experienced attorneys who exhibit unprofessional behavior, particularly in the context

of a Conditional Diversionary Agreement with the Attorney Grievance Commission. The content of the new admittee course, however, necessarily covers a wide variety of substantive and practical subjects without targeting the specific problems that are the concern of the Commission.

Civility and interpersonal relationships seem always at the forefront of concerns and unprofessional behavior. Although it is difficult to structure a course intended simply to teach lawyers to act civilly or to avoid abusive tactics, the remediation of these concerns implicates certain underlying problems; for example, the proper balance between a lawyer's duty to zealously represent a client and his or her duty to act professionally toward the opposing counsel, as well as the duty to maintain independence from a client and a client's emotional investment in a case.

The Subcommittee considered several ways to present a course. In addition to the lecture format or Socratic dialogue, several alternative methods of teaching have emerged from other states. Some states have produced videotapes that address professionalism concerns in vignettes. Others have structured a course around the presentation and discussion of hypotheticals dealing with issues such as fees, hidden witnesses, abusive discovery, treatment of confidential information, threats of criminal action to force settlement of a civil case, lack of candor, and others.

One potential problem is in determining how to direct misbehaving lawyers to the course. The Attorney Grievance Commission would certainly utilize the course as a component of Conditional Diversion Agreements. Judges who observe unprofessional behavior in court, in resolving discovery disputes, or in other areas, may recommend that an attorney enroll in some component of the course, but it is not clear that judges can mandate attendance. Court-ordered attendance might possibly be done in some cases through the use of the Court's contempt power or otherwise, although the Rules would probably have to be revised to grant judges the authority to order a person to attend one of the courses.

Ultimately, considering all options, the Commission decided to explore the possibility of an attorney-counseling program instead of a remedial professionalism course. And, at its February 2006 meeting, the Commission authorized the Subcommittee to change its approach to one of developing a counseling program. After studying the procedure in several other states, the Subcommittee reached the following consensus:

Recommendations:

The Court of Appeals should implement a program to provide counseling for experienced attorneys who exhibit unprofessional conduct. The program would mirror those used in other jurisdictions, including the following elements:

- The local Bar associations throughout the State will form professionalism committees, comprised of experienced and well-respected local lawyers and judges who will receive

complaints from the bench and Bar concerning unprofessional behavior by attorneys that do not rise to the level of a violation of the Rules of Professional Conduct.

- Each local Bar association may establish its own procedures for the processing of complaints. Complaints deemed serious should become the subject of counseling by a panel of attorneys and at least one judge from the professionalism committee.
- No lawyer should be required to participate in counseling. Counseling should be educational and mentoring in nature. No records should be kept of attorneys by name; however, a statistical record should be kept and submitted annually to the Professionalism Commission concerning the number of attorneys counseled, whether the counseling effected change on the part of the attorney, and other feedback.
- Local professionalism committees should not accept complaints that may be within the jurisdiction of the Attorney Grievance Commission, nor should it accept complaints from clients. Rather, committees should address matters such as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff.
- Members of committees should be highly regarded and experienced members of the Bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

SUBCOMMITTEE ON DEFINING THE UNAUTHORIZED PRACTICE OF LAW

Attorneys attending Professionalism Task Force meetings in every jurisdiction identified a rise in the unauthorized practice of law as a contributor to the decline in professionalism. The Subcommittee considered working with the Legislature and Attorney Grievance Commission to better define the unauthorized practice of law in order to better enforce sanctions against it.

The Subcommittee complied and reviewed materials from other states, from the American Bar Association, and from Bar Counsel (who, in turn, supplied information from his counterparts throughout the country). In addition, the Subcommittee met with representatives from the Attorney Grievance Commission and the Office of the Attorney General.

The Subcommittee focused not only on disbarred attorneys, but also on lay persons who perform tasks that may encroach upon practicing law without a license. The Subcommittee determined that the definition of the unauthorized practice of law, while vague, is preferable to a more detailed definition, which, by becoming specific, might be construed as excluding some suspect practices. Bar Counsel regularly prosecutes cases involving the unauthorized practice of law and finds no problem with the statute. There is a well-developed body of law on the subject.

In the prosecution of the unauthorized practice of law, the Attorney General has given enforcement authority to the Attorney Grievance Commission. In 2005 the Attorney Grievance Commission brought 22 cases against non-lawyers. Enforcement is complaint-driven. If bankers and accountants are practicing law, as the Task Force heard, the Attorney Grievance Commission must receive the complaints in order to investigate. The Office of the Attorney General also has a role to play. If requested, the Attorney General may issue formal opinions on whether specific practices constitute the unauthorized practice of law. In addition, the Attorney General might consider bringing certain test cases.

Complaints and actions to prevent the unauthorized practice of law must be for the protection of the public. Otherwise, enforcement will appear to be only turf protection of lawyers and potentially violative of antitrust laws. It may be helpful to have an advisory opinion from the Attorney General regarding unauthorized practice of law to identify violations.

Recommendations:

- No changes (additions or deletions) be made to the current statutory definition of the practice of law.
- Any changes to the definition of “the practice of law” should be considered by the Court of Appeals and not the General Assembly.

- There should be established mechanisms and procedures by which the alleged unauthorized practice of law is monitored and prosecuted, if appropriate.
 - The Professionalism Commission, if ongoing, should have an unauthorized practice of law committee to act as a clearinghouse for complaints concerning the unauthorized practice of law and to monitor the unauthorized practice of law.
 - The Maryland State Bar Association and possibly local and specialty Bar associations should be encouraged to develop means to refer unauthorized practice of law complainants to the appropriate resource and, if necessary, to fund any enforcement proceedings.
 - In accordance with the recent recommendation of its long range planning conference, the Maryland State Bar Association should maintain its committee on unauthorized practice of law, however named. The committee should be patterned after the Association's Ethics Committee to provide a resource to lawyers and their clients who are seeking advice on whether specific practices are the unauthorized practice of law.
 - The Attorney Grievance Commission and the Office of the Attorney General should coordinate efforts to review any complaints for the purpose of determining which of their offices are best suited to deal with a particular complaint. To that end, cross-referrals are encouraged.
 - The Office of the Attorney General should, in the appropriate case(s), be asked to provide formal opinions on whether specific practices constitute the unauthorized practice of law.
 - The Attorney Grievance Commission and/or the Office of the Attorney General should, when appropriate, pursue cases charging the unauthorized practice of law.
- A public relations effort should be considered to educate the Judiciary, the Bar and the public about the value of legal representation, the practice of law, and problems arising from the unauthorized practice of law.
- Members of the bench and Bar should be informed about the remedies available to the public concerning alleged acts of the unauthorized practice of law. Specifically, judges and lawyers should be made aware that victims can be referred to the Attorney Grievance Commission or the Office of the Attorney General for investigation. The Court of Appeals and Maryland State Bar Association should be encouraged to communicate this message to the Judiciary and to members of the Bar.
- The Attorney Grievance Commission and the Office of the Attorney General should report the nature of all investigated allegations of the unauthorized practice of law and any outcome to the Court of Appeals and the Maryland State Bar Association.

SUBCOMMITTEE ON THE JUDGES' ROLE IN THE BAR AND WITH COMMUNITIES

In its State-wide survey, the Professionalism Task Force discovered that Maryland attorneys feel a higher degree of professionalism from those judges who participate in Bar and community activities. The Subcommittee was charged with the duty of analyzing judges' active participation with the Bar and as involved members of their respective communities in light of any limitations on judicial behavior imposed by the Maryland Code of Judicial Conduct.

The Subcommittee began its work with an understanding from meetings with the Bar that judges who regularly participate in activities of the legal and general communities demonstrate a higher level of professionalism and serve as role models for attorneys to exhibit a higher level of professionalism and for communities in their respect for the rule of law. The Subcommittee's task was to foster that participation within the confines imposed upon judges by the Canons of the Maryland Code of Judicial Conduct.

The Subcommittee reviewed both state and federal canons as well as other information regarding the role of judges as teachers in law schools and in continuing legal education seminars, as members of Bar associations and other legal organizations, and as participants in non-legal community activity including board memberships, religious, political and social events and public speaking engagements.

The Subcommittee considered recommending that Maryland Rule 16-813 (Canon 4) be amended to explicitly state that judges are encouraged to engage in greater interaction with the bench, Bar and legal and general communities. The Subcommittee also saw, however, a need to better define the lines between permissible and impermissible activity when judges move outside of their normal judicial role.

While recognizing that increased community and Bar participation by judges may increase the likelihood of recusal (which is a more serious issue in jurisdictions with fewer judges), the Subcommittee felt that it might be in those areas that a judge can have the greatest impact in promoting professionalism and a positive image for the profession.

The Subcommittee completed its work and presented its recommendations to the Commission on June 1, 2005. On January 11, 2006 the Commission adopted the report and recommendations.

Recommendations:

- Provide either a Rules change or a comment to Maryland Rule 16-813 Canon 4 (2005), making more explicit the intent of the Court and the Commission that judges be encouraged to engage in greater interaction between the bench, the Bar and the community.
- Train judges on recusal rules, and update sitting judges on any recusal rule changes.
- Continue to include issues of professionalism in all judicial training sessions.
- Provide a system to obtain advisory opinions from the Judicial Ethics Committee and have the Commission take a poll to assess the adequacy of the present system.
- Encourage judges to prepare what they are going to say by writing it down and reviewing it before any speaking engagement and utilize the services of the Court Information Office.
- Increase judges' awareness of the opinions of the Judicial Ethics Report (e.g. Reinstate mailing to each judge, a hard copy of each Judicial Ethics report.)

**FINAL REPORT OF THE SUBCOMMITTEE ON
STANDARDS OF PROFESSIONAL CONDUCT
INCLUDING IDENTIFYING INDICIA OF PROFESSIONALISM**

I. INTRODUCTION

In response to the recommendation of the Maryland State Bar Association that all licensed Maryland attorneys be required to attend a professionalism course, the Maryland Court of Appeals, in 2003, appointed the Professionalism Task Force, chaired by the Honorable Lynne Battaglia. That Task Force, after conducting town hall meetings for lawyers and judges in each county of the State, submitted its report to the Court of Appeals on November 10, 2003. That report recommended the creation of a Professionalism Commission, whose purpose is to promote a higher level of professionalism as an important core value of the bench and the bar.

The Court of Appeals adopted this recommendation and, by Administrative Order entered by Chief Judge Robert Bell on February 17, 2004, created the Professionalism Commission. The Court challenged the Commission with the following tasks:

...4. **Functions.**

a. **Purposes.** The primary tasks of the commission are to develop a consensus about the definition of professionalism, to examine ways to promote professionalism among Maryland lawyers, and to provide sustained attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of client and public good. The commission will pursue the findings and recommendations of the Professionalism Task Force, which should have a significant impact upon the future of litigation in this State.”

Over the months since its creation, the Commission has wrestled with this directive of the Court of Appeals, focusing initially on identifying the indicia of professionalism. As part of that undertaking, the Commission created a number of subcommittees, including this subcommittee.

This subcommittee was charged with the following responsibility contained in the Court of Appeals’ Administrative Order:

“Recommendation 3:

Drawing on the findings of the Professionalism Task Force, the Professionalism Commission should, as its first task, identify indicia of professionalism and develop standards of professional conduct to guide its work in the areas that it will explore and shall publish these standards to the Bench and Bar throughout the State.

In carrying out this charge, this subcommittee undertook to complete and did complete the following tasks:

- i. Collation of the results gathered from the town hall meetings conducted throughout the State of Maryland;
- ii. Examination of codes or creeds of professionalism developed in the State of Maryland;
- iii. Examination of the codes or creeds of professionalism and professionalism criteria developed in other states;
- iv. Investigation as to whether any primary data has been developed from juries, etc., as to professionalism of lawyers appearing in our courts;
- v. Review of research data and literature summarizing the results of other efforts to identify and determine the importance of the indicia of professionalism, including the American Bar Association Commission on Professionalism Report entitled "... In The Spirit of Public Service - Blueprint For Rekindling of Lawyer Professionalism" (1986) (The "ABA Report"); and
- vi. Developing certain consensus points regarding our investigation and efforts and soliciting the input of the entire Commission on those consensus points.

This report will provide a synopsis of our conclusions. So as to avoid duplication, we have not reproduced our First and Second Interim Report presented to the Professionalism Commission on May 12, 2004 and July 21, 2004, respectively.

II. IMPORT OF THIS UNDERTAKING

As our subcommittee has gone about the task of seeking to define the indicia of professionalism, we have consistently asked ourselves the question: What is the importance of this undertaking? We certainly are aware, as a subcommittee, and the Commission certainly is aware that there are those who would trivialize this exercise as having little practical import on the day-to-day existence of lawyers in this State and in the country. As a subcommittee, we have reached exactly the opposite conclusion; namely, that recognizing, understanding and adhering to the elements of professionalism for lawyers and judges not only is an important undertaking, but is critical to the continuing function of "the rule of law" in the United States.

Perhaps the best articulation of the import of this undertaking can be found in the work of two distinguished professionals, Timothy P. Terrell and James H. Wildman, who authored an article in the Emory Law Journal in the Spring of 1992 entitled "Rethinking Professionalism", 41 Emory L.J. 403 (1992). In that article, the authors, who had examined many of the same issues this subcommittee has been examining, asked the question:

"Why does anyone care about the 'professional tradition' of lawyers in the first place; what justifies a careful inquiry into this profession when we are not similarly concerned with the 'heritage' of ... plumbers or prostitutes; why should lawyers be interested in establishing aspirational principles for themselves that reach beyond the present standards of ethics codes?"

41 Emory L.J. at 422.

The answer these two authors provide to this fundamental question is very instructive as to the import of this effort in Maryland. The authors responded to this inquiry with the following insightful comment:

“Lawyers are remarkably important in our culture, therefore, because they are the ‘gatekeepers’ to this vital form of social cohesion. Lawyering exists as a profession to facilitate and control access to rules and courts that channel and temper our relations with each other. Moreover, in order to perform those important functions well, lawyers have long been granted a unique professional independence – an independence from regulation by others in society – so that their work within the legal system will be as unencumbered by extraneous pressures as possible.”

41 Emory L.J. at 423.

As background for their conclusion, the authors explained that a variety of societal factors play a role in how our system of justice is perceived:

“The answer, surprising to some, lies not within the profession itself, but outside it -- in the law as a functioning social institution. Lawyering is a distinctive occupation with unique moral requirements because lawyers have established a special relationship to a fundamental aspect of our culture. Law, for Americans in particular, is not simply a set of rules and regulations that guide our behavior from time to time. It is far more central to our lives: the legal system embodies our last remaining vestige of a sense of ‘community’ – of shared values and expectations. All the other dimensions of our lives – race, religion, education, the arts, regional loyalty, and so on – divide us as much as they join us together because they are based on matters of ‘substance’ on which we so often disagree. No single social theme or set of themes could identify, for example, the ‘community’ of New York City or Los Angeles or even Des Moines. The traditions, heritage, and perspectives of Americans are now so disparate and isolated within ever smaller subcommunities that no common purpose, direction, or moral values connect us fundamentally.

Except our system of law. Not any particular law, of course, but the system as a whole that embodies the ‘rule of law’ in our society (in

contrast to a despotic ‘rule by fiat’). Citizens of the United States, almost uniquely in the world, have come to respect the regularity, consistency, and basic justice over time of the officially promulgated rules and principles that regulate our conduct and redress our grievances. Evidence of this attitude can be found simply in the way we talk: We all now habitually use the characteristic ‘rights’

language of the law in describing our relationships with one another. Ironically, then, we are connected to each other in the nature of the claims we make against each other: we do not ordinarily resort to self-help or depend upon various informal social groups like churches, families, or friends to take up our cause. Instead, we invoke our system of law, both because we have come to have faith in it and because we have largely abandoned other alternatives. American ‘community’, consequently, now means only our ingrained expectation of official non-arbitrariness.”

Ultimately, the professional independence that accompanies a lawyer’s role as a gatekeeper is encumbered by the duty the lawyer has to the rule of law:

But this independence has come with a price. The lawyer’s professional latitude, because it is justified by the importance of the law rather than the importance of lawyers themselves, is granted by society in exchange for the implicit promise by lawyers that their autonomy will be used to enhance the social function of the law. That is, the lawyer’s special pledge is that he or she will help the legal system remain the centerpiece of our fragile sense of community, help it continue to function within our culture as the crucial mechanism for social cohesion and stability.

That promise is the true essence and foundation of the concept of professionalism. Our heritage as lawyers – the ‘living faith’ that links us with our predecessors, and that we must in turn teach to our successors – is the responsibility to recognize, honor, and enhance the rule of law in our society. (emphasis supplied)

41 Emory L.J. at 422-3.

Our subcommittee shares the sentiments expressed in the foregoing. We, as the lawyers and judges in this community, have the obligation to be caretakers for a system of justice and for a rule of law which distinguishes this civilization and provides protection against anarchy.

Our efforts, we submit, are time sensitive. There is significant evidence of erosion of values throughout our culture. Some would describe the current state of “community” in the United States as being promotive of a culture of irresponsibility. We have an obesity epidemic among our children, gang warfare in the schools of many of our urban areas, violence throughout the culture and political polarization in the country not often matched in memory. One of the elements evident in this erosion is a growing disrespect for many of our institutions of government, including the system of justice. Unprofessionalism among practicing lawyers and judges certainly is a factor which has contributed to the erosion of respect for our system of justice. If this erosion continues unabated, it bodes poorly for the future of the rule of law in this country.

Our subcommittee believes that it is incumbent upon the lawyers and judges to be leaders in the restoration of the sense of respect that our citizens have for the independence and integrity of the system of justice.

III. THE MEANING OF PROFESSIONALISM

When asked by this Commission to identify the indicia of professionalism, this subcommittee considered itself to have been assigned a daunting task. Professionalism, in the eyes of many, is an illusive concept incapable of precise definition, but, ironically, (perhaps like pornography), is something you recognize when you see it. We are not the first to have recognized the difficulty of coming to consensus as to the indicia of professionalism. In 1986, the ABA, in its report, stated as follows:

“Professionalism is an elastic concept, the meaning and application of which are hard to pin down. That is perhaps as it should be. The term has a rich, long standing heritage, and any single definition runs the risk of being too confining.”
ABA Report at page 10.

However, as we have gone about the task of examining codes and creeds of professionalism from around the country and throughout this State, reviewing literature and examining other similar undertakings such as the Character Counts program in our public schools, we have become increasingly convinced that professionalism is really a value system comprised of identifiable indicia. One thing that has struck us in our examination of the various codes and creeds of professionalism and reports, studies and articles on professionalism, is the extent to which there is significant overlap in those values or indicia which are seen as earmarks of professionalism. We have set forth in chart form below, the indicia of professionalism identified by the ABA in its 1986 study, by the authors of the Emory Law Journal article and those most frequently mentioned elements by the Maryland lawyers in the Professionalism Task Force’s outreach efforts. One cannot help but be struck by the consistency and overlap in the descriptions:

| <u>ABA 1986</u> | <u>MARYLAND LAWYERS (OUTREACH)</u> | <u>EMORY LAW JOURNAL (1992)</u> |
|---|--|--|
| Integrity Competence Fairness Independence Courage Devotion to Public Interest | Competence Integrity Service to Community (Pro Bono) Civility Respect Honesty/Trustworthiness | Ethic of Excellence Integrity Respect for system and rule of law Respect for other lawyers (civility) Accountability Responsibility to ensure adequate distribution of legal services |

These indicia or values also show remarkable correlation to the six pillars of character which have been developed by the Josephson Institute of Ethics in its Character Counts program used in the public school systems in various counties in the State of Maryland and elsewhere. Those six pillars of character are:

SIX PILLARS

Trustworthiness
Respect
Responsibility
Fairness
Caring
Citizenship

Such overlap and consistency is not accidental in our view. We think it is important to acknowledge this consistency and recognize that professionalism, no matter how you describe it, really boils down to a certain value system which we would synopsise by the word “RESPECT.”

R - RESPONSIBILITY
E - EXCELLENCE
S - SERVICE
P - PROMOTES FAIRNESS
E - ETHICAL BEHAVIOR
C - CIVILITY/COURTESY
T - TRUSTWORTHINESS

IV. CONSENSUS ITEMS

We have previously provided to the Commission certain consensus points agreed upon by our subcommittee. We have refined those consensus points based upon the comments we received from Commission members in August. They are as follows:

1. The courts of the State must endorse, support, and promote the standards and indicia.
2. Professionalism must begin before an individual passes the bar examination and continue throughout one’s legal career. The standards and indicia of professionalism should be an inherent part of law school instruction and woven into continuing legal education programs.
3. This Commission and all lawyers and judges in this State need to convey the message that professionalism promotes success and is expected behavior.
4. The Commission should have an ongoing role in encouraging adherence to professional standards and indicia and in implementing the standards through programs and sanctions.
5. Mentoring and training are core elements that must be incorporated into any plan for promoting and implementing the standards of professionalism. Only through

repeated practice of professional behavior does courtesy and ethical conduct become an integral part of every aspect of lawyering.

6. The standards reflect a respect for the rule of law and those involved in its promotion, but do not purport to unduly restrict personal style and flair.

V. CONCLUSION

This subcommittee remains convinced that an undertaking to define the indicia of professionalism and to develop standards of professionalism for the lawyers and judges in this State is a critical one. We are at an important juncture in the history of this country. There is an erosion of respect for institutions of our government, including our courts. Lawyers and judges need to be part of the effort to reverse this trend. To accomplish this, we need first to examine ourselves and recommit to the value system which distinguishes lawyers as professionals and as the caretakers for our rule of law in this country. We believe that this undertaking starts at home with the lawyers and judges in this State.

The authors of the Emory Law Journal said it well, in our view, when they stated:

“The principal purpose of professionalism is to generate and maintain a core sense of self-respect within lawyers individually and the Bar generally. The respect of the public can be achieved only after that internal effort has been successful.” (Emphasis added)

41 Emory L.J. at 432.

Our subcommittee believes that the buck stops here. We, the lawyers and judges on this Commission, should decide where we go from here. This subcommittee has provided you its best guidance on what it believes to be the indicia of professionalism and has developed a model of the standards and indicia of professionalism and described the workings of this value system in our daily lives. It is now up to the balance of this Commission and its respective subcommittees to determine how such standards and indicia should be fostered in our law schools, the courts, the Bar Association and through enforcement mechanisms for inappropriate conduct. We look forward to being part of the efforts of the balance of the Commission to take this framework and determine how it should be applied in the contexts of our law school education and our daily lives as lawyers and judges.

Michelle Barnes
Karen L. Federman Henry
Thomas E. Lynch, III
Charles M. Preston
William P. Young, Jr.

Subcommittee Members

Attachment: Standards and Indicia of Professionalism

Professionalism is that combination of values that distinguish lawyers as the caretakers of the rule of law in our society.

Preamble

When each lawyer in this country is entrusted with the privilege of practicing law, he or she takes a firm vow or oath to uphold the constitution and laws of the United States. As members of such a profession, lawyers enjoy a distinct position of trust and confidence but, concomitantly, have the significant responsibility and obligation to be caretakers for the system of justice, which is essential to the continuing existence of a civilized society. Each lawyer, therefore, as a custodian of the system of justice, must be conscious of this responsibility and exhibit traits that reflect his or her personal responsibility to recognize, honor and enhance the rule of law in this society. The standards and characteristics set forth below are representative of a value system that we must demand of ourselves as professionals. These standards and indicia are not intended to serve as a basis for discipline or civil action, but are designed to maintain and enhance the role of legal professionals as the protectors of the rule of law in this country.

General Aspirational Ideals²

As a lawyer, I will aspire:

- (a) To put fidelity to clients and, through clients, to the common good, before selfish interests.
- (b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.
- (c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.
- (d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.
- (e) To make the law, the legal system, and other dispute resolution processes available to all.
- (f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.
- (g) To preserve the dignity and the integrity of our profession by my conduct.

² Based upon the model from the State of Georgia.

The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.

- (h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.
- (i) To practice law not as a business, but as a calling in the spirit of public service.”

Specific Standards and Indicia

Indicia of Professionalism:

| | |
|---|-------------------|
| R | Responsibility |
| E | Excellence |
| S | Service |
| P | Promotes fairness |
| E | Education |
| C | Civility/Courtesy |
| T | Trustworthiness |

Responsibility & Trustworthiness (integrity, honesty, trust)

1. Punctuality in appearances and filing deadlines promotes the credibility of a lawyer. Tardiness and neglect denigrate the individual as well as the legal profession.
2. Personal integrity is essential to the honorable practice of law. Each lawyer should ensure that clients, opposing counsel, and the court can trust that the lawyer will keep all commitments and perform the tasks promised.
3. Honesty and candid communications promote credibility with the court, with opposing counsel, and with clients.
4. A lawyer should resist external monetary pressures that may cloud his professional judgment.

Promotes fairness

1. A lawyer should act fairly in all dealings as a means of promoting the system of justice established in this country.
2. An excess of zeal may undermine a client’s cause and hamper the administration of justice. A lawyer can zealously advocate the client’s cause in a manner that remains fair and civil.

3. Zeal requires only that the client's interests are paramount and utilizes negotiation and compromise to achieve a beneficial outcome. Yelling, intimidating, and issuing ultimatums using an "all or nothing" approach amounts to nothing more than bullying, not zealous advocacy.
4. A lawyer should seek to maintain sympathetic objectivity when advising a client, so that the client receives a comprehensive view of the legal aspects of the situation presented to the lawyer.
5. A lawyer should not allow any action or decision to be governed by a client's improper motive and should challenge a client whose wishes are unethical or ill advised. This becomes especially important when deciding whether to consent to an extension of time requested by an opponent - the attorney makes that choice based on the effect, if any, on the outcome of the client's case and not based on the acrimony that may exist between the parties.
6. A lawyer should negotiate in good faith in an effort to avoid litigation and should suggest alternative dispute resolution when appropriate.
7. Litigation tools should be used to strengthen the client's case, and a lawyer should avoid using litigation tactics in a manner solely to harass, intimidate, or overburden an opposing party.
8. A lawyer should explicitly note any changes made to documents submitted for review by opposing counsel. Fairness is undermined by attempts to insert or delete language without notifying the other party or his attorney.

Civility and Courtesy

1. Professionalism requires civility in all dealings, showing respect for differing points of view, and demonstrating empathy for others.
2. Courtesy does not reflect weakness, but promotes effective advocacy, by ensuring that all parties have the opportunity to participate in the process without personal attacks or intimidation.
3. Maintaining decorum in the courtroom is neither a relic of the past nor a sign of weakness, but an essential component of the judicial process.
4. Prepare scrupulously for meetings and court appearances and show respect for the court, opposing counsel, and the parties through courteous behavior and respectful attire.
5. Courtesy and respect should be demonstrated in all contexts, not just with clients and colleagues, or in the courtroom, but with support staff and court personnel.
6. Hostility between clients does not become grounds for an attorney showing hostility or

disrespect to a party, opposing counsel, or the court.

7. Patience enables a lawyer to exercise restraint in volatile situations and to diffuse anger, rather than to elevate the tension and animosity between parties or attorneys.

Service

1. A lawyer serves the public interest by clearly communicating with clients, opposing counsel, judges, and members of the public.
2. Consideration should be given to the impact on others when scheduling events and reasonable requests for schedule changes should be accommodated if it does not impact the merits of the case.
3. Maintain an open dialogue with clients and opposing counsel.
4. Respond to all communications promptly, even if more time is needed to locate a complete answer. Delays in returning telephone calls may leave the impression that the call was unimportant or that the message was lost and leads to an elevation in tension and frustration and less effective communication.
5. A lawyer should keep a client apprised of the status of important matters affecting the client. A lawyer should inform the client of the frequency with which information will be provided (some matters will require regular contact, while others will trigger only occasional communication).
6. Always explain a client's options or choices with sufficient detail to help the client make an informed decision.
7. All interactions with opposing counsel, parties, staff, and the court should reflect a spirit of cooperation and compromise. This requires a reduction in the win/loss approach to issues and an increase in mediation and achieving success for all involved.
8. All lawyers should accept the responsibility personally to ensure that justice is available to all citizens of this country, not only to those of financial means.

Education and Excellence

1. A lawyer should make constant efforts to expand his legal knowledge and to ensure familiarity with changes in the law that affect a client's interests.
2. As a practitioner of a learned art, a lawyer has a responsibility to promote the image of the legal profession by educating each client and the public regarding the principles underlying the justice system and by conveying to everyone the importance of professionalism.

3. A lawyer should attend continuing legal education programs to demonstrate a commitment to keeping abreast with changes in the law.
4. A senior lawyer should accept the role of mentor and teacher, whether through formal education programs or individual mentoring of newer attorneys.
5. Mentoring includes the responsibility of setting a good example for another lawyer as well as an obligation to ensure that each mentee learns the principles enunciated in these standards and indicia and adheres to them in practice.

FINAL REPORT OF THE SUBCOMMITTEE ON
PROFESSIONALISM GUIDELINES AND
SANCTIONS FOR USE BY JUDGES

I. Overview of the Subcommittee’s Work.

The premise of this Subcommittee’s mission is a perception that:

Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process.

In re Hillis, 858 A.2d 317, 324 (Del. 2004) (citing Ty Tasker, *Sticks and Stones: Judicial Handling of Invective in Advocacy*, Judges’ J., Fall 2003, 17 at 19-20), *reargued and aff’d.*, 858 A.2d 325 (Del. 2004).

“[T]o be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil.” *In re Hillis*, 858 A.2d at 324 (quoting *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987)). When does zealous advocacy become unacceptable? Is there an objective standard so abusive litigation tactics and egregious incivility by attorneys can be judicially remedied without violating freedom of speech and the sacred duty to advocate a client’s lawful objectives?

This report touches upon the inherent problems of enforcing civility. The Subcommittee investigated whether civility codes for attorneys have been instituted elsewhere. Our study reviewed statistics of the Attorney Grievance Commission and compared them to reputable opinion polls about public respect for the legal profession. We looked at whether civility could be enforced by the court’s use of its inherent powers in a constitutional manner. We conducted research to see what procedures may pass constitutional muster. We reviewed conventional suspension methods used by schools and discussed whether those generally accepted procedures could be applied to the legal profession. We considered proceedings where attorney incivility has been disciplined as unethical conduct, and reviewed the Maryland Rules of Professional Conduct to see if more rigorous definitions for professionalism could be incorporated.

We also studied the federal system, particularly the U.S. District Court for the District of Maryland, which has incorporated standards of appropriate conduct into its court rules. We examined the Maryland federal district court’s policy for addressing attorney misconduct, and considered it as a possible basis for a state system. On a broader scope, federal case law was analyzed to understand which mechanisms used elsewhere had the most success and were affirmed on appeal.

The Subcommittee’s work remains incomplete until the Commission as a whole decides whether the Maryland Bar needs a mandatory civility code. Until the issue of a mandatory *versus*

an aspirational civility code is decided, it is premature for the Subcommittee to define concrete standards of civility for judges to enforce. Such rules would offer substance and guidance to both judges and attorneys.

It is the consensus view of the Subcommittee that the Maryland Bar can reclaim the high standard of legal professionalism, but only with clear guidelines and enforceable consequences when those limits are violated.

Incivility in the Legal Profession: 1929-present.

Members of the Maryland Bar are held to a higher standard than the laity:

Upon admission to the Bar, an attorney accepts and agrees to be bound by the rules of conduct significantly more demanding than the requirements of law applicable to other members of society. As the Preamble to the Rules of Professional Conduct states: A lawyer is a representative of clients, an officer of the legal system *and a public citizen having special responsibility for the quality of justice.*

Attorney Grievance Comm'n v. Alison, 317 Md. 523, 535, 565 A.2d 660, 665-66 (1989) (Emphasis added).

The vast majority of Maryland's 31,934 attorneys seem able to adhere to that standard. *29th Annual Report*, Attorney Grievance Comm'n of Md. at 33 (2004). The Commission reported 1,610 complaints were filed against Maryland lawyers in fiscal year 2004. *Id.* at 16. Of 1,610 complaints, Bar Counsel docketed 485 of them for further investigation of one or more possible violations of the Maryland Rules of Professional Conduct. *Id.* at 33. Thirteen (2%) of the 485 docketed complaints involved "conduct prejudicial to the administration of justice." *Id.* at 19.

In comparison, ten years ago the Attorney Grievance Commission received 1,594 complaints about attorneys, even though there were then 23,224 (8,710 fewer) Maryland lawyers. *Id.* Interpreting the data, the rate of complaints to Bar population has gone from 6.8% in FY 1994 to 5.0% in FY 2004 - a decrease of 1.8% over the last decade.

A survey for the American Bar Association demonstrates reason for concern. The A.B.A. survey showed only 30% had faith in U.S. justice. *Confidence in Institutions/Professions, Perceptions of the U.S. Justice System*, American Bar Ass'n at 32 (1999) (Online at www.abanet.org/media/perception/perception32). Just 32% placed judges on the high confidence level. *Id.* Equally sobering was how the public perceived attorneys: 42% rated lawyers at the lowest confidence level, and only 14% had a high level of confidence in attorneys. *Id.* The press was the only group to rank lower in the survey. *Id.*

A Gallup Poll measured public opinion about the legal profession in November 2004. (Online at www.pollingreport.com/values). Respondents were asked, "Please tell me how you

would rate the honesty and ethical standards of people in these different fields...?” Judges ranked in the middle at 53%, but lower than police, nurses, schoolteachers, pharmacists, military officers, physicians and clergy. *Id.* Members of Congress had a 20% approval rating. *Id.* Lawyers ranked at 18%; only advertising executives and car salesmen were lower. *Id.*

The number of complaints received by the Attorney Grievance Commission has changed little in ten years, yet the profession’s image has dropped in the polls. Reasons for the trend might include: (a) incidents going unreported to the Attorney Grievance Commission, (b) national polls driven by notorious trials where the jury and the public reach different conclusions, and (c) national polls reflect displeasure with flamboyant tactics of a few celebrity attorneys. A countervailing interpretation is that subjective polling results are negated by objective caseload data of the Attorney Grievance Commission showing a percentage decrease in the complaints against Maryland attorneys during 1994-2004.

Is incivility among the Maryland Bar actually a growing problem, or is it a case of “perception is reality”? In June 1929, “Upholding the Standards of the Legal Profession” was the topic of the Maryland State Bar Association annual meeting in Atlantic City, New Jersey. Three speakers, including one named Edgar Allan Poe, lamented the decline of professional courtesy; the causes of which were blamed on:

- “(1) Size and personnel of the Bar.
- “(2) Treating the law as a business and not as a profession.
- “(3) The mad chase for the dollar.
- “(4) The breaking down and lowering of moral standards generally, that have taken place in recent years.

Report of the Thirty-Fourth Annual Meeting of the Maryland State Bar Association, Maryland State Bar Ass’n, 100, 119 (1929).

The problem confronting the Professionalism Commission in 2005 was not new in 1929. The A.B.A. and Gallup polls show that most people polled do not consider attorneys as very honest, ethical or worthy of a high degree of confidence. But both surveys show that more than half of the public still holds judges in much greater esteem. Judges are therefore better positioned than attorneys to lead the legal profession out of the present professionalism predicament.

The Advent of Civility Codes.

What is the difference between ethics and professionalism? Ethics is a set of rules that lawyers *must* obey. Violations of these rules can result in disciplinary action or disbarment. Professionalism, however, is not what a lawyer *must* do or *must not* do. It is a higher calling of what a lawyer *should* do to serve the client and the public.

Chief Justice E. Norman Veasey, "Making It Right-Veasey Plans Action to Reform Lawyer Conduct," *Bus. L. Today*, Mar.-Apr. 1998, 42, 44. (Emphasis added) (Chief Justice Veasey, now retired from the Supreme Court of Delaware, chaired the A.B.A. Ethics 2000 Commission.).

The Subcommittee believes the decline of professionalism in the practice of law is most noticeable in litigation. Most of the decline is attributable to "hardball" litigators who fail to assert their independent judgment and allow themselves to be mere conduits for "win at all costs" clients. Some of the most egregious behavior is committed in the name of client advocacy. Most seasoned attorneys know not to subordinate ethics and professionalism to a client's contrary needs. Though zealous advocacy for one's client is important to the adversarial process, conduct that is demeaning, harassing or untruthful is *overzealous*, rarely serves an ethical purpose, and is particularly unhelpful to the afterlife of cases where the parties would normally have contact afterward.

In response to the growing deterioration of civility and respect in the legal profession, almost every jurisdiction in the United States is reviewing its judicial codes, professional conduct rules or court rules, and in many instances implementing aspirational civility codes. (See Appendix 1). An October 2004 report of states reviewing professional conduct rules, indicates that eleven have officially amended the rules: Arizona, Delaware, Idaho, Indiana, Louisiana, Montana, New Jersey, North Carolina, Pennsylvania, South Dakota and Virginia. The states that have issued reports are Arkansas, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, South Carolina and Washington. Those states which are currently in the process of reviewing their rules are: Alabama, Alaska, California, District of Columbia, Hawaii, Kentucky, Maine, Massachusetts, New Mexico, North Dakota, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

All jurisdictions in the U.S. that have addressed attorney incivility have done so with aspirational rules. Almost all have a disclaimer negating use for enforcement, *e.g.*, Delaware's "Principles of Professionalism for Delaware Lawyers" states:

They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

Preamble, *Principles of Professionalism for Delaware Lawyers*, Del. State Bar Ass'n and Del. Sup. Ct. (2003) (Online at <http://courts.state.de.us/rules/?prinproflawyers.pdf>). The Principles are reproduced and attached hereto at Appendix 2.

The Subcommittee is unaware of any jurisdiction in the U.S. with a mandatory civility code. But an aspirational civility code is not necessarily toothless. *Aspen Servs., Inc. v. IT Corp.*, 220 Wis. 2d 491, 497, 583 N.W.2d 849, 852 (Wis. Ct. App. 1998) (“Aspen is correct in its assertion that the new rules of civility, SCR 62 ‘Standards of Courtesy and Decorum for the Courts of Wisconsin,’ are not enforceable by the Board of Attorneys Professional Responsibility. [Citation omitted] However, it is mistaken in its belief that the rules in SCR 62 . . . cannot be the basis for imposing a sanction for incivility during litigation. The trial courts and the appellate court of this State do have statutory and inherent authority to enforce civility in the courtroom that is not dependent upon . . . SCR 62.”)

Playing by the Rules – Examples of Cases Involving Incivility.

In *Aspen, supra*, both sides were required to split costs of a referee appointed to control overly contentious discovery in a breach of equipment lease case, and the prevailing party’s request for counsel fees pursuant to the lease agreement was granted but reduced as a sanction for repeated, flagrant incivility. 220 Wis. 2d at 512, 583 N.W.2d at 857. In the case cited earlier of *In re Hillis*, 858 A.2d 317, *reargued and aff’d.*, 858 A.2d 325 (Del. 2004), the Supreme Court of Delaware upheld a fine of \$267 against an attorney whose unjustified tardiness resulted in wasted transport of three prisoners to and from court at the rate of \$89 per defendant.

Dozens of Maryland Court of Appeals cases apply Rule 8.4(d) of the Rules of Professional Conduct to attorneys being held accountable for misbehavior. (See Appendix 3). Examples of cases in other jurisdictions include: *Office of Disciplinary Counsel v. Levin*, 35 Ohio St. 3d 4, 517 N.E.2d 892 (Ohio 1988) (Attorney’s abusive deposition behavior violated DR 1-102(A)(5) and warranted indefinite suspension), *reinstatement granted*, 69 Ohio St. 3d 1222, 635 N.E.2d 380 (1994); *People v. Genchi*, 824 P.2d 815, 816 (Colo. 1992) (Counsel’s “abusive, insulting and unprofessional behavior” during deposition of his own expert violated Rule 8.4(d), DR 1-102(A)(5) and warranted six-month suspension); *In re Illuzzi*, 160 Vt. 474, 480, 632 A.2d 346 (Vt. 1993) (Six-month suspension for attorney who violated DR 1-102(A)(7) by twice suggesting to opposing party that his attorney was “running the meter”); *People v. Holmes*, 921 P.2d 44, 47 (Colo. 1996) (Counsel’s letters to *pro se* opponent containing “undignified, offensive and threatening” material violated Rule 8.4(h) and merited one-year suspension); *In re Black*, 265 Kan. 825, 941 P.2d 1380 (Kan. 1997) (Counsel’s verbal abuse of opposing party during juvenile administrative hearing violated Rule 8.4(d) and warranted indefinite suspension); *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (Kan. 1998) (Counsel’s verbal abuse and physical threats to judge during chambers conference violated Rule 8.4(d) and warranted indefinite suspension).

In *Attorney Grievance Comm’n v. Alison*, 317 Md. 523, 565 A.2d 660 (1989), the Court of Appeals of Maryland sanctioned an attorney for violation of Rule 8.4(d) for verbally abusing court clerks and using profanity in the courtroom. The Court also upheld a Rule 4.4 violation due to the attorney’s service of a subpoena upon a news reporter merely to sequester and thereby prevent the reporter from covering the trial of criminal charges against the attorney for assault of a police officer, resisting arrest, and hindering police. As a sanction, the Court of Appeals suspended Mr. Alison from the practice of law for ninety days.

Citing *Alison, supra*, Bar Counsel sought a 30-day suspension of a different attorney for offensive and disrespectful language. The Court of Appeals found the attorney’s conduct “rude, boorish, insensitive, oppressive and certainly insulting, but it was not even arguably criminal [, n]or was the respondent engaged in a purely personal pursuit.” *Attorney Grievance Comm’n v. Link*, 380 Md. 405, 428, 844 A.2d 1197, 1211 (2004) (Emphasis added). Notwithstanding the implication of the italicized quote that Mr. Link’s incivility was related to a professional matter, the Court of Appeals found no rule violation and dismissed Bar Counsel’s petition. *Id.* Writing for the Court, Chief Judge Robert Bell stated, “Only when such purely private conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent will that conduct be considered as prejudicing, or being prejudicial to, the administration of justice.” *Id.* at 429, 844 A.2d at 1211-12.

Footnote 13 of the *Link* opinion applies to this Commission: “[The Professionalism Commission] is not intended to, and will not, be a vehicle for the micro-management of all aspects of the legal profession, including purely private activities and conduct.” *Id.* at 429, 844 A.2d at 1211 (Emphasis added).

Federal System as a Model for Attorney Discipline.

Federal courts face the same problem of incivility as state courts, and struggle with the enforceability of aspirational civility codes. Federal judges seem less reticent to sanction out-of-bounds behavior of the attorneys appearing before them.

The U.S. District Court for the Eastern District of Washington adopted a “civility code” in its Local Rule 83.1(k) requiring lawyers to “... act with dignity, integrity and courtesy,” and “that civility and courtesy are not to be equated with weakness.” E.D.Wash. LR 83.1(k) pmbl. (1)(c), (2)(a).

In *Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n.*, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988), the U.S. District Court for the Northern District of Texas, sitting *en banc*, in response to abusive litigation tactics, established eleven standards of conduct for civil litigation:

- (A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.
- (B) A lawyer owes, to the Judiciary, candor, diligence and utmost respect.
- (C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.
- (D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.
- (E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

- (F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.
- (G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.
- (H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.
- (I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.
- (J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.
- (K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

121 F.R.D. at 227-28.

The *Dondi* court observed that “[a]ttorneys who abide faithfully by the standard we adopt should have little difficulty conducting themselves as members of a learned profession whose unswerving duty is to the public they serve and to the system of justice in which they practice.” *Id.* at 288. Conversely, “[m]alfeasant counsel can expect . . . **‘a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances.’**” *Id.* (quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)) (Emphasis added).

“Felling Trees in the Ethically Empty Forest”?

It is reasonable to anticipate that the public expects judges to insist attorneys observe high professional standards. As attorney misconduct affects the integrity of the judicial process, it is logical that judges should assert the initiative to address, report or correct such misconduct.

Maryland’s Code of Judicial Conduct, Canon 3(B)(3) already establishes a judge’s duty: “A judge should take or initiate appropriate corrective measures against a judge or lawyer for unprofessional conduct of which the judge may be aware.” Md. Rule 16-813 (2004). The Comment to Canon 3 states, “Corrective measures may include a private admonition or reporting misconduct to the appropriate disciplinary body or a Bar association counseling program.” *Id.*

The implication of Canon 3 is a court has discretion to fashion a reasonable sanction designed to remedy a particular attorney’s misconduct. The Canon also implies authority for informal action, such as a letter of reprimand, or a chambers meeting on or off the record.

Appeals from sanctions and direct contempt proceedings can take many months. Judges know this. During the appeal process, the allegedly errant attorney continues to practice. This can frustrate a judge's ability to be vigilant about reporting misconduct. Informal discussions with Maryland circuit court and district court judges show frustration with the present method for admonishing egregious conduct by litigators. It is too cumbersome, too bureaucratic, and takes too long. The delay between the misbehavior and the exhaustion of the sanction process does little or nothing to restore civility to the pending litigation affected by the misbehavior; the case is usually long over by then. In reversing a jury's defense verdict where corporate counsel argued in closing that the plaintiff's attorney conspired with an expert to defraud the jury, a Florida appellate judge's frustration with that state's grievance process resonates:

While, in light of [the lawyer's] egregious conduct, we feel duty bound . . . to report him to the Florida Bar, we have no illusions that this will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court - reluctantly and usually only after agonizing over what we thought was the seriousness of doing so--have found it appropriate to make such a referral about a lawyer's conduct in litigation [citations omitted], none has resulted in the public imposition of any discipline--not even a reprimand--whatever. [citation omitted] In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years . . . Speaking for himself alone, the present writer has grown tired of felling trees in the ethically empty forest which seems so much a part of the professional landscape in this area. Perhaps the time has come to apply instead the rule of conservation of judicial resources which teaches that a court should not require a useless act, even of itself.

Johnnides v. Amoco Oil Co., 778 So. 2d 443, 444 n. 2 (Fla. Dist. Ct. App. 2001) (“Extensive citation of authority is unnecessary to demonstrate that baseless attacks . . . upon the integrity of counsel, or any other player in the case, are both contemptible and condemnable.”).

The following are examples of misbehavior by Maryland attorneys deserving correction but usually falling below the radar of either contempt proceedings, or formal proceedings by the Attorney Grievance Commission: abusive deposition behavior; overtly disrespectful conduct in court toward a judge or court personnel acting in good faith within the scope of employment; misrepresentations of fact to the court or court personnel; pleadings litigated without good faith; breach of confidentiality terms imposed by the Maryland Rules, by a settlement agreement or by a “gag order;” not promptly entering an appearance after being retained; jury demands and postponement requests motivated by double-booking; and violations of protective orders, scheduling orders, and orders compelling discovery.

The Subcommittee recommends that the Court of Appeals Standing Committee on Rules of Practice and Procedure be duly requested to promulgate a rule creating Behavior Review Panels. The Subcommittee's proposed rule on Behavior Review Panels is at pp. 13-15 of this

report. If a court becomes aware of attorney misconduct in litigation pending before it, then the Behavior Review Panel offers the court a speedy alternative to either contempt proceedings or the Attorney Grievance Commission process. The structure of the Behavior Review Panel resembles a Sentence Review Panel. It also draws from Administrative Federal Local Rule 705, and from the Education Article provisions dealing with student suspensions.

Behavior Review Panels may take remedial action whenever a preponderance of evidence shows that the alleged conduct was prejudicial to the administration of justice. In *Attorney Grievance Comm'n v. Alison*, 317 Md. at 536, 565 A.2d at 666, the Court of Appeals broadly defined conduct prejudicial to the administration of justice:

[C]onduct of this kind [*i.e.*, cursing in court] is prejudicial to the administration of justice. That such conduct does not at the moment of its occurrence delay the proceedings or cause a miscarriage of justice in the matter being tried is not the test. Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice. [citations omitted] Attorneys who cannot maintain that level of professional performance must be disciplined, or if necessary, removed from the profession.

But, Attorney Grievance Comm'n v. Link, 380 Md. at 431-32, 844 A.2d at 121 (Raker and Eldridge, JJ., concurring):

The phrase 'prejudicial to the administration of justice' is not defined in the Rules of Professional Conduct, nor do the rules or our case law give guidance for application to specific circumstances. The standard embraced by the majority is ambiguous and elusive. It smacks of 'I can't define it but I know it when I see it.' Simply because some conduct is so obviously violative of the Rule and 'prejudicial to the administration of justice' does not, in my view, save the Rule. It is unfair to lawyers in the State to be subject simply to the moral barometer of four judges of this Court. Due process requires more – a lawyer is entitled to have fair notice of conduct which would subject him or her to discipline under the Rules of Professional Conduct. The standard adopted by the Court today fails to give fair notice.

Guidelines for sanctioning attorneys have existed since 1979. *Standards for Lawyer Discipline and Disability Proceedings*, American Bar Association (1979). In an effort to develop clearly defined, appropriate sanctions for attorney misconduct, the Standards have been supplemented. *ABA Standards for Imposing Lawyer Sanctions*, American Bar Association (1986, *am.* 1992) (Online at www.abanet.org/cpr/regulation/standards_sanctions).

Under present Maryland case-law, misbehavior by counsel during representation of a client is *not* prejudicial to the administration of justice if it: (a) did not occur in the courthouse, or (b) did not involve court personnel, or (c) did not involve a confrontation with the parties or their attorneys, or (d) was not directed at the parties and their attorneys. *Attorney Grievance Comm'n*

v. Link, 380 Md. at 429, 844 A.2d at 1211-12 (“Only when such purely private conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent will that conduct be considered as prejudicing, or being prejudicial to, the administration of justice.”).

Upon proof by a preponderance of evidence of conduct prejudicial to the administration of justice, the Behavior Review Panel could impose an appropriate remedy up to and including a suspension from practice before any judge of the particular court where the offending conduct occurred. The period of suspension would not exceed 30 days, or whatever other period passes constitutional muster.

Using the State District Court as an example, a duly convened Behavior Review Panel, upon proper proof, could suspend an attorney for up to 30 days from appearing before any judge of the district court in that county, or impose any appropriate lesser sanction.

A Behavior Review Panel remedial order would have the ancillary effect of requiring counsel covered by malpractice insurance to notify the clients and the malpractice carrier of the suspension. It is felt that the impact upon the malpractice insurance renewal premium might also encourage behavior modification by errant attorneys and deter others from similar acts. The Panel proceedings would be modeled after the following:

Behavior Review Panel Proceedings

1. **Review Panel-Jurisdiction.** An appearance, however made, of an attorney-at-law in a proceeding before the Office of Administrative Hearings (“OAH”), orphans’ court, district court or circuit court (hereafter, “court”), subjects the attorney to the jurisdiction of a Review Panel concerning that proceeding. “Attorney-at-law” includes, without limitation, a Maryland-licensed attorney acting *pro se*, and specially admitted counsel.
2. **Review Panel-Referral to.** A judge or judicial appointee (hereafter, “judicial officer”) having probable cause to believe an attorney-at-law has engaged or is engaging in conduct prejudicial to the administration of justice may make a written disciplinary referral of the allegation to the circuit administrative judge of that geographic region.
3. **Review Panel-Appointment of.** Upon receipt of a judicial officer’s disciplinary referral, the circuit administrative judge shall send the respondent attorney a copy of the referral and allow the attorney ten days to comment in writing about the referral. After the ten-day comment period, the circuit administrative judge without a hearing shall:
 - (a) Close the referral by letter of appropriate concern to the respondent attorney; or,
 - (b) Transfer the referral if the underlying proceeding is in another judicial circuit; or,
 - (c) Forward the referral to Bar Counsel for appropriate action; or,
 - (d) Docket the referral, appoint a Review Panel of three judges, and designate which judge will chair the Review Panel.

4. **Review Panel-Procedure Before.** A Review Panel may be appointed for a fixed term or for one or more specific cases. A copy of the disciplinary referral and the response, if any, thereto from or on behalf of the respondent attorney will be attached to the order appointing a Review Panel. The Review Panel will not include a judicial officer who made the disciplinary referral. The Review Panel shall promptly schedule a hearing upon the referral, and cause written notice of the hearing to be sent to the judicial officer making the referral and to the respondent attorney. The respondent attorney shall have an opportunity to be heard by the Review Panel in person or by counsel, and to bring witnesses to the hearing. Unless a public hearing is requested by or on behalf of the respondent attorney, a hearing before the Review Panel shall be held out of the presence of all individuals except those whose presence is considered necessary or desirable by the Panel. At a hearing, the Review Panel may take testimony and receive other information without strict application of Title 5 of the Maryland Rules other than those relating to the competency of witnesses.

5. **Review Panel-Decision.** The Review Panel shall hear and render a written decision upon a disciplinary referral promptly but not later than sixty days after the date of the order of appointment, unless extended by a majority of the Review Panel for a period not to exceed another sixty days. The Review Panel will decide by a majority vote whether a preponderance of evidence shows that the respondent attorney engaged in conduct prejudicial to the administration of justice and, if so, the appropriate sanction under the totality of the circumstances. If the Review Panel finds the allegations are not proven, it will dismiss the referral. If the Review Panel finds one or more allegations proven, the Review Panel may suspend the attorney up to thirty days from appearing in all matters before any judge of the court where the allegations arose, or take such other lesser remedial action as appropriate, and assess costs pursuant to Rule 2-603. The period of suspension, if any, will take effect upon the filing of the decision of the Review Panel. All decisions of a Review Panel will state the outcome, summarize the rationale for the outcome, and be filed with the clerk's office of the court with a copy to the respondent attorney, the referring judicial officer, and Bar Counsel.

6. **Review Panel – Appellate Review.** A referring judicial officer or respondent attorney aggrieved by the decision of the Review Panel may petition the Court of Appeals for a writ of *certiorari*. Pending appellate review, the decision of the Review Panel will remain in effect unless otherwise ordered by the Court of Appeals.

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**FINAL REPORT OF THE SUBCOMMITTEE
ON DISCOVERY ABUSE ISSUES, INCLUDING THE
USE OF DISCOVERY MASTERS**

The Professionalism Commission has reviewed the findings of the Professionalism Task Force and has also confirmed through its own investigation the outstanding problem of discovery abuse in civil cases. As a result, the Commission requests that the Court of Appeals acknowledge the problem by adopting the following recommendations:

1. That the Maryland State Bar Association revise and expand the *Maryland Discovery Guidelines* to address the concerns voiced throughout the State and reflected in the Report of the Court of Appeals Task Force on Professionalism, and that the Maryland State Bar Association submit the revised Guidelines to the Rules Committee and to the Court;

2. That the Maryland Judiciary web site be expanded to include discovery opinions from trial courts in the same manner that the site now publishes opinions from the trial courts in the business and technology case management system;

3. That the Rules Committee expand and annotate the standard discovery forms now found in the Appendix to the Maryland Rules and add comment that the standard forms are presumptively proper;

4. That the Conference of Circuit Court Judges formulate a uniform discovery protocol designed to ensure that discovery is completed and disputes resolved in a timely fashion, and that the protocol include:

A. At the request of either party in a case, the Court may schedule a discovery conference within 30 days of the filing of an answer. The conference may result in a discovery plan and scheduling order.

B.

1. In Baltimore City, Baltimore County, Anne Arundel County, Montgomery County, and Prince George's County, that the Administrative Judge appoint a specific judge (consideration to be given to use of retired judges) to handle all discovery disputes; and that the discovery judge have authority to assign a discovery master, as necessary, for first level dispute resolution;

2. In all other counties, that the Administrative Judge appoint a standing discovery master or assign, as necessary, a special discovery master to the specific case.

- C. Consider changes in the Maryland Rules to accomplish the following:
1. Facilitate the process for bringing discovery disputes before the Court, including the shortening of time for the filing of responses to motion seeking relief in such disputes;
 2. After the time for response to motions for discovery relief has passed, provide for prompt referral to the designated judge or discovery master for resolution;
 3. Provide procedures for the judge's prompt resolution of exceptions to the discovery master's recommendations.
 4. Add to the rule or comment that, in resolving discovery disputes, a discovery master or judge may take into consideration any violations of the Maryland Discovery Guidelines.

FINAL REPORT OF THE SUBCOMMITTEE ON MENTORING

I. Purpose of Mentoring

The purpose of mentoring is to provide guidance and counseling to less-experienced lawyers. One of the goals of this Subcommittee is to evaluate mentoring as a means to promote civility and professional behavior among lawyers through an effective mentorship program.

II. Present Efforts to Mentor New Lawyers and Law Students

A. Maryland

1. Maryland State Bar Association

In the spring of 1999, the Maryland State Bar Association established a select committee on mentoring. Based on the recommendations of the Subcommittee, the Maryland State Bar Association set up a website that lists names of lawyers in Baltimore City and in each county who agree to serve as mentors. Along with the names of the lawyers are the address, phone number, email address and fax number, together with area of specialty, of each mentor. The website also lists the names of mentors from the J. Franklin Bourne and Monumental Bar Associations. There are two hundred ninety-two (292) names listed on the website.

Lawyers who wish to obtain the help of one of the mentors listed on the Maryland State Bar Association website may choose from five areas: (1) practical practice and law office management-related issues; (2) issues involving such matters as personnel, escrow, or other accounts; (3) substantive areas of the law and related procedural issues; (4) appropriate and professional conduct and how to deal with inappropriate conduct; (5) the importance and means of being involved in Bar and community activities and in developing a support network for an attorney's practice.

(Emphasis added.)

The Maryland State Bar Association uses the following criteria to select mentors:

- Five (5) years of practice (for all active practitioners volunteering to become mentors).
- Exhibit those personal qualities necessary to give sound counsel and advice to others.
- Possess the background and experience necessary to advise and counsel a participant new to the practice of law in Maryland.

- Contribute to the Clients' Security Trust Fund (judges, retired attorneys, and state and local governmental attorneys are exempt, as are prosecutors and public defenders, from making such contributions).

No formal training is provided. New admittees are given information about the Maryland State Bar Association mentoring program when they attend the mandatory Professionalism Course. These classes are held twice per year. Once every year, the Maryland State Bar Association's Director of Law Office Management contacts each of the lawyers on the mentoring website to make sure each wishes to continue to serve. There is no formal effort to monitor use of the website.

The Maryland State Bar Association mentoring program focuses exclusively on new lawyers and not upon experienced lawyers who may need mentoring because of unprofessional conduct. The Lawyer's Assistance Program and the Attorney Grievance Commission are the only resources for "problem" lawyers. Neither the Lawyer's Assistance Program nor the Grievance Commission uses the Maryland State Bar Association's mentor list as a part of their remedial education program.

The two central problems with the Maryland State Bar Association program is that it is underutilized and is not well advertised. As a result, many lawyers do not take advantage of the program. This should be remedied.

2. Maryland State Bar Association's Leadership Academy

Presently, there are approximately sixty (60) "fellows" of the Academy. Each year, ten to fifteen new lawyers are selected based on leadership potential and demonstrated ability. Each of the persons selected is assigned a mentor. The mentor meets with the mentee for lunch twice per year, and the mentee is encouraged to contact his/her mentor to discuss professional or personal problems whenever the need arises.

3. Montgomery County Bar Association

The Montgomery County Bar Association has a mentoring subcommittee made up of approximately forty (40) volunteer lawyers. By use of fliers handed out at Bar Association meetings and ads in the Montgomery County Bar Association newsletters, new lawyers are encouraged to request a mentor. When a new lawyer wants help, the Bar Association matches the new admittee with a mentor. The criteria for the match include geographic convenience and area of specialty. The mentor/mentee relationship is for one year. Currently, there are approximately seventy-eight (78) mentor/mentee relationships. One of the problems experienced by Montgomery County is that frequently new admittees sign up and are matched with mentors but fail to contact the mentor.

4. Prince George's County Bar Association

The Prince George's County Bar Association, like the Montgomery County Bar Association, has a mentoring subcommittee. Each September, the Association lists in the Bar Association newsletter numerous specialties (e.g., military law, domestic relations, criminal law, etc.), together with lawyers in those specialties who are willing to serve as mentors. New admittees are advised in the newsletter that if they wish to have a mentor they should contact the chair of the subcommittee. Last year approximately three (3) persons asked for a mentor.

5. Anne Arundel County Bar Association

The Anne Arundel County Bar Association has a mentoring program for new admittees. Experienced lawyers sign up as mentors. New members are asked to enter the mentoring program by filling out a form listing legal specialty, address, etc. The Bar Association matches the new member with a mentor on its list. About fifteen (15) to twenty (20) new lawyers sign up for this program each year. Actual use is unknown.

6. Baltimore County Bar Association

The Baltimore County Bar Association ("BCBA") does not have a mentoring program; it does have a Lawyer Assistance Committee that often touches upon issues of professionalism, including guidance and support for troubled attorneys, which can be considered a form of professionalism mentoring. The Committee is similar in mission to the Maryland State Bar Association's Lawyer Assistance Program, although less formal in its procedures. The BCBA's Lawyer Assistance Committee assists lawyers suffering from mental/emotional, drug, alcohol, family, health, and other personal problems. Often, members of the committee (who are largely self-selected) are contacted by someone who reports that another lawyer is experiencing these types of problems. Reports are sometimes triggered by the lawyer exhibiting unprofessional behavior. One or more committee members, if they deem it appropriate, then contact the lawyer and ask to meet to offer assistance. Referrals to counseling and treatment, or simply informal guidance, may result from the meeting. Whether the lawyer agrees to participate is totally voluntary. The committee is identified on the BCBA website, which also includes the names and email links of the committee's Chair and Vice-Chair. Information is also provided in BCBA newsletters.

7. Baltimore City Bar Association

The Bar Association of Baltimore City ("BABC") has three programs that include mentoring. The Attorney Advisor Program is a special service exclusively for members of the BABC. Experienced attorneys volunteer to participate and serve as advisors/mentors to other attorneys. Volunteer attorneys can enroll via the Bar's website and specify three substantive areas in which they are willing to give advice and mentor others. Attorney-to-attorney consultations are up to one-half hour free of charge. The BABC promotes its program in its newsletter and via its website. This program is not as effective as the Bar would like it to be.

They have found that many attorneys are reluctant to commit to a long-term undertaking. The Bar will be addressing the program's lack of effectiveness in its long-range planning efforts.

The Baltimore City Bar Association also offers a Lawyer Helpline for its members. This program is used more frequently than the Attorney Advisor program. There are approximately forty-five (45) lawyers who give free, confidential advice to lawyers or help lawyers with anything related to the practice of law. Advice includes issues of professionalism. This volunteer project is designed to provide advice and mentoring to any Baltimore lawyer in need, not just to BABC members.

The Baltimore City Bar Association also offers an Ethics Hotline, which the Bar believes is its most effective vehicle for mentoring. Two lawyers volunteer to be "on call" each month. This program is advertised in the Bar's newsletter and in local newspapers.

8. The Maryland Trial Lawyers Association

The Maryland Trial Lawyers Association has a list of approximately fifty (50) lawyers who volunteer as mentors for new members. The program currently is being revamped because of limited participation. The organization hopes to do a better job of matching mentors with mentees interested in the same practice specialties.

9. Women's Bar Association

The Women's Bar Association does not have a mentoring program, although a program has been discussed in the past.

10. University of Maryland School of Law

The University of Maryland's mentoring program is run by the Maryland Alumni Association. Law students are encouraged to sign up to be mentees. If they do so, they are assigned a mentor. The mentor is usually a recent graduate of the law school. Currently, there are eighty-nine (89) students who have signed up for the program, and one hundred six (106) alumni who have agreed to serve as mentors. As the program presently operates, there is no effort to follow up after the assignments have been made, and no formal effort to determine the usefulness of the program.

11. University of Baltimore School of Law

The University of Baltimore School of Law has two mentoring programs for first-year law students – attorney mentor/mentee relationships and faculty mentor/mentee relationships. The only relevant service is the Attorney Mentor Program, which comes under the direction of the Office of External and Alumni Relations ("EAR"). In June or July of each year, the Dean sends letters to all incoming first-year law students, explaining the Attorney Mentor Program and encouraging participation. Included with the letter is an application form that inquires where the student is from, where the student thinks that he/she might practice, and the student's interest

areas within the law. About one hundred students apply annually. Past mentors are used and new ones are recruited through mailings to alumni. Last year, the program had only sixty-five (65) attorney mentors. Currently, the EAR is in the process of partnering with a major law firm to sponsor the Attorney Mentor Program and to create a brochure that might assist the program in recruiting mentors.

In August, during the first-year orientation program, EAR hosts a luncheon for day students and a reception for evening students who have signed up to become mentees. The pairings are made in August and September. In October, there is an orientation breakfast of the mentors and mentees. Both mentors and mentees are encouraged to maintain contact by email and in person (to address, when possible, both academic and non-academic concerns), plus a visit to the mentor's law firm or agency and at least one "job shadowing" experience. In February, there is a midyear reception for mentors and mentees. The Attorney Mentor Program lasts for one academic year.

B. District of Columbia

Through the Lawyer Practice Assistance Committee, the Washington, D.C., Bar Association (<http://www.dcbar.org>) offers mentoring resources, rather than a mentoring program. The D.C. Bar calls its mentoring resources a "natural" program, as opposed to a "planned" program. Although they tried a pilot "planned" mentoring program where they matched lawyers looking for mentors with mentees, it was discontinued due to a lack of participation.

In the D.C. Bar's "natural" mentoring program, lawyers find their own mentors with guidance from the Bar. Using Ida Abbott's book *The Lawyer's Guide to Mentoring*, the Lawyer Practice Assistance Committee created an on-line Mentoring Resource Guide. Lawyers interested in having a mentor are encouraged to go to the website and follow the procedures suggested for obtaining a mentor. In addition to tips on finding a mentor, the website offers suggested protocol, topics of discussion, possible activities to develop the mentoring relationship, and what to expect from the relationship. Lawyers with questions are encouraged to contact the Lawyers' Assistance Program.

C. Virginia

A decade ago, the Virginia Bar Association considered a broad-based mentoring program for the state. After trying the mentoring program on a state level, the Virginia Bar decided to turn the mentoring program over to the local Bar associations. It was believed that the needs of lawyers in the various counties would be better met if coordinated at the local level.

D. Delaware

Under Delaware Rule 52 each applicant for the admission to the Delaware State Bar must complete a five-month clerkship prior to being admitted to practice law. The clerkship consists of having a preceptor or mentor, who is a member of the Bar of Delaware for at least ten (10) years, to vouch for the applicant and his/her completion of the clerkship requirements. The

clerkship can be satisfied by working in a law office, as a law clerk for the courts, or through public office employment. During the clerkship, each applicant must complete a list of activities related to the practice of law. In 2004, there were thirty (30) legal assignments to be completed, such as attending various court proceedings, preparing pleadings, attending depositions, real estate closures, and a sheriff's sale. Prior to admission, both the applicant and the applicant's preceptor must certify to the Board of Bar Examiners that the applicant has completed the required five-month clerkship and the list of legal activities. If the applicant is unable to complete the clerkship prior to the December admission ceremony, the applicant must make arrangements with the Delaware Supreme Court to be sworn in individually.

The Delaware State Bar Association offers to its members a "Lawyers Helping Lawyers" program. This is a volunteer program to provide peer help and support to lawyers on a variety of subjects. The program assists new lawyers faced with problems they are not able to solve, lawyers who move from a large firm setting to a small office or open a solo practice, and lawyers who need advice or guidance.

Additionally, the Delaware Bar Association offers a "Lawyers Assistance Program," which was established to assist lawyers who experience problems in their personal lives or that interfere with their ability to practice law. The program currently has twenty-five (25) volunteers who assist lawyers. This program is designed primarily for errant lawyers. The volunteer lawyers periodically report back to the disciplinary commission on the progress of errant lawyers.

E. American Inns of Court

The American Inns of Court has chapters in all fifty (50) states. Most chapters have about sixty (60) lawyers. Some, but not all, local chapters have mentoring programs for members of the Inn. For example, the Ginsburg Inn in the District of Columbia has a mentoring committee that assigns senior lawyers to mentor newer lawyers who are members of the chapter. The goal is

to provide opportunities for development of attorneys' legal knowledge, skills, and professional relationships. More specific goals include: sharing professional values; addressing ethical concerns; addressing practical concerns and problems; assisting with transitions into practice and while in practice; teaching; promoting Bar involvement and positive relationships among Bar members; improving service to clients; improving the public's perception of the legal profession.

The program works in a fashion similar to the program run by the Maryland State Bar Association's Leadership Academy, described *supra*.

F. Other States

Some state Bar associations have created “mentoring round tables.” For instance, the Massachusetts Bar Association recruits experienced members of the Bar to help newer lawyers by offering them advice in areas of the law that may be unfamiliar to the newer lawyer. Mentees are offered the opportunity to meet with mentors at mentoring round tables several times each year. Participants in these round tables meet in an informal atmosphere, and the group collectively tries to resolve concerns and problems of the mentees.

III. Mentoring “Problem Lawyers” in Maryland

The Attorney Grievance Commission in some cases recommends to the Maryland Court of Appeals that an errant lawyer have a mentor to oversee his/her practice for a set period of time. When this remedy is applied, supervision by a mentor is a condition for the continuation of practice.

As far as the Subcommittee has been able to ascertain, there is no other existing mentoring program designed to help “problem lawyers.”

IV. Selection/Training of Mentors

The Bar associations and other organizations we have contacted have no formal program for training mentors. Instead, the organizations contact established, well-respected members of the Bar and ask that they volunteer their services as mentors. Those who agree to serve are placed on lists.

V. Selection of Mentees

Potential mentees are recruited by the Maryland State Bar Association at the twice annual Professionalism Course. The local Bar associations contact potential mentees by posting ads in the Bar associations’ newsletters and/or by announcements made at Bar meetings.

VI. Effectiveness of Existing Programs

Our investigation has led us to conclude that the existing formal mentoring programs by the various Bar associations are underutilized and minimally effective. We contacted a number of lawyers listed on the Maryland State Bar Association’s list of mentors. Almost unanimously, the attorneys report that, although they have been on the list for several years, no potential mentee has ever contacted them. The problem appears to stem from two factors: (1) lack of widespread knowledge that mentoring programs exist; and (2) reluctance of professionals in need of mentoring to reach out and contact a fellow professional (usually a stranger) to ask for help. Mentoring programs in smaller groups, such as law firms, Inns of Court, Leadership Academies, etc., have greater success. That success is attributable to the facts that (1) the organization takes care in making the pairing of the mentors/mentees; (2) the organization makes sure that the mentors/mentees meet with one another; and (3) smaller groups inspire confidence and trust between the mentor and mentee.

VII. Recommendations for an Improved Program

We believe that a program, if properly supervised and administered, could effectively promote the goals of professionalism. Our Subcommittee considered what type of mentoring program would be most effective. There were three choices considered, *viz.*, (1) establish a completely new mentoring program with an exclusive focus on the goals of professionalism; (2) attempt to improve the current Maryland State Bar Association mentoring program; or (3) establish the framework for a mentoring program to be implemented by local Bar associations.

The Subcommittee unanimously concluded that the second choice is most likely to succeed. The major advantage of the second choice is that we would have a ready source of funding and manpower. All agreed that the present Maryland State Bar Association program could be improved in the ways outlined below.

As now operated, the program is basically passive. Attendees at the Professionalism Course are told about the mentoring program's website and encouraged to select a mentor if the need for one arises. But, as far as we have been able to determine, no meaningful effort is made to persuade new admittees that taking advantage of the mentoring program will be advantageous to him/her and to the profession.

The most formidable obstacle challenge to creating an effective mentoring program in Maryland is the fact that there are so many new admittees each year. Last year, the number of new admittees in Maryland was approximately thirteen hundred (1,300).

We recommend that each attendee at the Professionalism Course receive a pre-printed form ten (10) days before the date of the course. The new admittee should be told in the letter containing the form that if he/she is employed as a law clerk for a judge, or anticipates being employed by a law firm or state or local governmental agency that has an in-house mentoring program, the admittee should identify the judge or the lawyer who will serve as a mentor. Those forms will be kept for informational purposes.

New admittees who do not have a mentor, and who want one, should provide the geographic location and area of specialty, if any. The forms would be collected at the conclusion of the course. This Subcommittee will prepare the forms and cover letter to be sent to the new admittees, stressing the importance of participation in mentoring.

The Young Lawyers Section of the Maryland State Bar Association has agreed to undertake the job of sending out the forms and matching mentors with new admittees. The mentees would be assigned, to the extent possible, with mentors who practice in the same geographic and practice areas. Once the match has been made, a member of the Young Lawyers Section will notify the mentor and mentee of the assignment.

A majority of the Subcommittee members believes that a face-to-face meeting between the mentor and the mentee is essential to establishing the rapport necessary to promote

uninhibited exchanges. In every such assignment, we recommend that the mentor and mentee meet at the both at the beginning and the mid-point of the mentoring relationship for a recommended total of two to four meetings. We recommend the mentor-mentee relationship continue for a one-year period.

We also recommend that the Maryland State Bar Association sponsor a yearly reception for those who have acted as mentors. This would serve as a reward for the volunteer mentors and would provide an opportunity to discuss how the program could be improved. Additionally, we recommend that the Maryland State Bar Association's Director of Law Office Management sample a cross-section of lawyer-mentors in order to evaluate the program and consider improvements.

The Subcommittee recognizes that to have a successful program, more mentors are needed. We recommend that time devoted to mentoring be counted toward the calculation of pro bono service hours.

Additionally, we recommend that each of the twenty-three (23) Maryland State Bar Association special practice sections recruit members to serve as mentors. The requirements would be the same as those set forth in Section II. A. 1, *supra*. We recommend that a letter signed by Chief Judge Bell and Judges Battaglia and Salmon be sent to the practice sections chairs asking them to recruit members. Those members who wish to be mentors would fill out a form indicating specialty areas and locations. The completed forms would be sent to the Young Lawyers Section for matching purposes.

VIII. Mentoring by Judges, Masters, and Administrative Law Judges

The two law schools in this State have a total of about five hundred twenty-five (525) graduates per year – approximately three hundred (300) at the University of Baltimore and two hundred twenty-five (225) at the University of Maryland. The Subcommittee believes that it would promote professionalism if prior to graduation most students had an opportunity to meet with and accompany a member of the judicial branch while court is in session.

There are approximately three hundred (300) state and federal judges in Maryland, not counting administrative law judges. Additionally there are approximately seventy-four (74) masters, although not all are full time.

We believe a program should be developed that permits students at Maryland law schools to be matched with those judges, masters, or administrative law judges willing to participate in a program such as the one outlined below. The student would not be expected to work for his/her judicial mentor but instead would attend court with the mentor and afterward be given an opportunity to ask questions and exchange ideas with the mentor. The judicial mentor would allow the student to observe the judicial process “up close and personal” and discuss the process with the student. The student's fresh perspective could also be of interest to the mentor.

The goals of the program would be to build a professional mentoring opportunity for law student with a member of the Judiciary; exposing future members of the legal profession to the judicial system; and ultimately, encouraging members of the Judiciary and future members of the legal profession to build more of a true professional community and to instill a sense of professionalism with the students as they are about to begin their legal careers. Under a program properly managed, the student should be able to establish a mentoring relationship so that when the student becomes a lawyer, he or she could turn to the source for help regarding issues of civility and professionalism.

We recommend a forty-hour (40) program, which would be open to all students in their last year of law school.

Representatives of both law schools have been contacted, and both endorsed the concept in principle. The law school representatives are convinced that the proposed mentoring program will help us achieve the goal of greater professionalism by an opportunity for a “Judicial Experience” by each law student who enters in August 2006 or later.

At this stage, we recommend that the “Judicial Experience” be voluntary, rather than a compulsory graduation requirement. The representatives of the two law schools have agreed that (1) the program should be open to all second- and third-year students at Maryland law schools; (2) the program be called the Maryland State Bar Association Judicial Mentoring and Professionalism Program; (3) there will be a need for administrative support to facilitate the operation of the program; (4) each school will need to designate a faculty representative to serve as a liaison for the program; (5) the goals of the program should be the goals set forth *supra* at pages 14-15; and (6) to implement the program, approval by law school hierarchy will be necessary.

We believe that a high percentage of judges, masters, and administrative law judges will be willing to participate in the suggested programs. Our optimism is based on the cooperation the University of Baltimore and the University of Maryland have received from judges with their existing internship programs.

FINAL REPORT OF THE SUBCOMMITTEE ON
UPDATING THE EXISTING PROFESSIONALISM COURSE
FOR NEW ADMITTEES

I. Introduction: Maryland’s Rule 11 Professionalism Course

The Subcommittee to Update the Existing Professionalism Course for New Admittees was charged with reviewing the Maryland Rule 11 Professionalism Course and making recommendations. The Scope and activities of the Subcommittee were identified as:

- A. Identify professionalism issues and expectations as related to members of the Bar.
- B. Review the mission statement/goals of the current professionalism course.
- C. Review current curriculum.
- D. Meet with Maryland State Bar Association Chair of Professionalism Course, Bob Ferguson
- E. Review the post-course surveys completed by attendees.
- F. Discuss course timing and length
- G. Review course faculty/staffing and course material presentation
- H. Review professionalism instruction. Curriculum, timing and materials from other states.
- I. Draft recommendations, with appropriate deadlines, for improving course effectiveness
- J. Finalize recommendations to be presented to the Professionalism Commission

II. The Present Course

A. The Course

The current day-long course, its origin dating back to the mid 1980s, is offered twice a year during the period between the announcement of the examination results and the scheduled admission ceremony (*Maryland Rule 11(b), Rules Governing Admission to the Bar of Maryland*). Those who have passed the Maryland Bar Exam are required to take the course before they can be admitted to the Bar. The specific course content can be found in **Appendix B**, “Maryland State Bar Association Professionalism Program for New Admittees”, the course schedule for May 22, 2004 and the course Vignettes/Videos Outline.

B. Course Purpose

The purpose of the course, as stated in the Faculty Guide, is as follows:
“The Professionalism Course seeks to promote the highest standards of professionalism for the newly admitted Maryland lawyer.

Professionalism addresses integrity, competence, civility, and public service with the Four C's: colleagues, clients, courts/tribunals and communities. The mission of the course is to convey, through the faculty a consistent sense of the expectations of a Maryland lawyer: What the lawyer is or does - the very substance and quality of a Maryland lawyer. It is the goal of the Professionalism Committee that the attendees will consider throughout the day what the term "Professional" means and how it translates into being a Maryland lawyer.

The faculty has the opportunity to impart the skills necessary to act professionally. For example, the faculty can convey ideas about those skills available to the attorney to cope with unprofessional behavior. The goal is that an attendee might exit the day of the course and say, "I have come away with skills to be a professional lawyer." There should be an emphasis on the four core values the faculty teaches: competency, integrity, civility and public service."

C. Course Evaluation

In reviewing the participant evaluations of the 2003 course, the Subcommittee found a slim majority of respondents rated the course a "4" in usefulness and success of the course (on a scale of 1 to 5). Another way to interpret that finding is to note that nearly half the respondents found the course neutral in usefulness or not useful at all. See **Appendix C**, "Survey of Course Evaluations."

D. Time to Regroup?

In a nutshell, things have changed since the Maryland Professionalism Course was developed in the 1980s. Professionalism courses are now a part of most law schools' curricula. See **Appendix D**, *The Legal Profession Syllabus*, Professor Longan, Spring 2005; *Professional Responsibility Syllabus*, Associate Professor Michele Gilligan, Fall 2001 and *Professional Responsibility Syllabus*, Professor Robert Rubinson, Fall 2001.

In addition, it seems the Maryland Professionalism Course has evolved into a lesson in philosophy as it relates to the practice of law. The topic generates interesting discussions, but perhaps not practical applications.

E. Subcommittee Observations

Upon admission to the Bar and - to a greater or lesser extent - upon admission to law school, people are confronted - many for the first time in their lives - with what is essentially an honor system. These people have many diverse backgrounds and within those diverse backgrounds, they have been raised with diverse values. Extending across all of those variables nevertheless, it is the opinion of this Subcommittee that perhaps a majority of the candidates approach honor systems with a benign sense of denial.

Intelligent candidates are not ignorant of common virtues and fully understand that honesty, integrity, courage, loyalty and selflessness are good qualities. Still, there is a profound hesitance to believe, for instance, that one is actually expected to report misconduct when observed in others. The Subcommittee believes that the principle purpose of the required professionalism course should be forcefully and unequivocally, to immerse new admittees in the honor system.

New admittees as lawyers starting out in their careers tend to think that they could not or will not become involved in any sort of professional or ethical difficulties. They need to be reminded of the potentially devastating professional and personal consequences of unethical behavior. One lapse alone could mean at best loss of one's credibility, to contact with the Attorney Grievance Commission, to a malpractice suit, to disbarment and to incarceration. That point needs to be driven home.

The exercises, lectures and lessons of the course in which this primary goal is pursued can be the vehicle by which specific rules, principals and traditions can be taught. Always however the message to the candidates ought to be, "You are moving into a world that is not necessarily the world of your friends, brothers, sisters and parents. People may think differently about you when you emerge into this world. Your professional courtesy and manners, and respect for the integrity of other lawyers will give you the strength and conviction that you seek in your profession. The welfare of your families will no longer justify fibbing, cheating or sharp dealing as you may have justified yourself before. You will never again console yourself with the rationale that other people do it and get away with it. You have crossed over."

The Subcommittee believes that this is the right message for the New Admittees Course. The particular subjects of the course need not be discarded as long as they fit within and support the message and process of indoctrination. The goal of the course should be to turn out candidates who not only have good general knowledge of the details of practice (what is an escrow account and why can't I use it in an emergency as long as I put it right back, for instance) but who accept and take pride in their honor. Candidates leaving the program should consider themselves elite, better, more honest, more compassionate, more ethical, than those who live with the misfortune of not being lawyers.

III. Research on the Professionalism Courses Offered in Other States

A. Introduction

Maryland is not alone in its quest to improve professionalism among attorneys. The Subcommittee collected materials from 23 states and the District of Columbia on Professionalism Courses offered to Bar members.

**State Mandatory
New Admittee Programs**

| State | Program Title / Description | Course Length | Timing of Course | Tracking Method | Required for Transfer? | MCLE Rqtd. | Notes |
|----------------------|--|---------------|---|--|------------------------|---|--|
| Alabama | State bar course on professionalism | 8 hours | Within 12 months of admission or being licensed to practice in AL | (MCLE system) Require for Admission | Yes | 12hr/1y | |
| Alaska | 3 hour Ethics lecture by state bar ass'n | 3 hours | Before Admission | (MCLE system) Require for Admission | Yes | None | |
| Arizona | State bar course on professionalism | 8 hours | Within 1 year of admission | (MCLE system) | Yes | 15hr/1y | |
| Colorado | State bar course on professionalism | 8 hours | Before admission / within 6 months for admission on motion | (MCLE system) | Yes | 46hr/3y | |
| | Preadmission conference, Basic Legal Skills course (CLE Rule 4(B), 5 month clerkship requirement | 1 day* | Before admission | Require for Admission | Yes | 24/2y (12/2y courses required in first after 40y) | *2 Basic Skills CLE courses required in first 4 years |
| Delaware | | | | | | | |
| District of Columbia | "Mandatory Course on the D.C. Rules of Professional Conduct and District of Columbia Practice" | 8 hours | Within 1 year of admission | DC Bar Administers and tracks attendance | Yes | None | |
| Florida | "Practicing with Professionalism" and Basic Skills Course Requirement | 8 hours* | Within 8 months prior to or 12 months following admission | (MCLE system) | Yes | 30hr/3y | *2 Basic Skills CLE courses required in first 3 years (not reqd. For transfer) *second day is an elective 8 hour CLE course |
| Georgia | "Bridge-the-Gap Program" | 2 days* | Within 1 year of admission | (MCLE system) Program administered by HI state bar association*** | Yes | 12hr/1y | ***Students register at beginning and must pick up certificate at end of program |
| Hawaii | State bar course on professionalism | 8 hours | Within 1 year of admission | (MCLE system) | Yes | None | |
| Idaho | "Practical Skills Seminar" | 1 day | Within 1 year of admission | (MCLE system) | Yes | 30hr/3y | |
| Indiana | "Applied Professionalism Program for Newly Admitted attorneys" | 8 hours | Within 1 year of admission | (MCLE system) | Yes | 36hr/3y | **Exception for 5 yr experience with similar approved course |
| Kansas | "New Lawyer Practical Skills Program" | 8 hours | Within 6 months of admission | (MCLE system) | Yes** | 12hr/1y | ** Exception for 5 yrs experience or for similar course if approved |
| Kentucky | "New Lawyer Program" | 12.5 credits | Within 1 year of admission | (MCLE system) | Yes** | 12.5/1y | |
| Nevada | "Bridge-the-Gap Program" | 1 day | Within 1 year of admission | (MCLE system) | Yes | 12hr/1y | |

| | | | | | | | |
|----------------|---|-------------------|--|---|-------|--------|---|
| New Jersey | Skills and Methods Course "Professional Responsibility" | 1 day* | Before or within 1 year of admission | Registration with NJ Institute for CLE (NJICLE)** | Yes** | None | * Plus 4 more days of electives; ** Accept PA and NY Credits; ***NJICLE tracks and reports attendance |
| Ohio | "New Lawyers Training Program" | 2 days (12 hours) | Within 1 year of admission | (MCLE system) | No** | 24h/2y | ** If meet certain reqts. (5 years, etc.) |
| Pennsylvania | "Bridge the Gap" | 4 hours | Within 1 year of admission | (MCLE system) | No | 12h/1y | *** Submit Reporting form to Supreme Court's Clerk Office |
| Rhode Island | Bridge the Gap / "Introduction to Practice" | 1 day | Before or within 1 year of admission | (MCLE system)*** | No | 10h/2y | |
| South Carolina | "Bridge-the-Gap Program" | 3 days* | Before admission | Require for Admission | Yes | 14h/1y | * 1 day of electives |
| Texas | "A Guide to the Basics of Law Practice" | 4 hours* | Within 1 year of admission | (MCLE system) | Yes | 15h/1y | * Online Course |
| Utah | "New Lawyers Continuing Legal Education" (NLCLE) | 1 day | Within 2 years of admission | (MCLE system) | No | 24h/2y | |
| Virginia | "Professionalism Course" | 1 day | Within 1 year of admission | (MCLE system) | Yes | 12h/1y | |
| West Virginia | "Bridge-the-Gap Program" | 1 to 1.5 days* | Within 6 months prior to or 1 year after admission | (MCLE system) | Yes | 24h/2y | * awaiting verification |
| Wyoming | 4-hour CLE course | 4 hours | Within 1 year of admission | (MCLE system) | Yes | 15h/1y | |

See **Appendix E**, *State Mandatory New Admittee Programs*

B. Commonalities Among the Courses

Courses range in length from three hours to three days. While a few courses are required before admission to the Bar, most are required to be taken within a year of admission to the Bar. Among the most well thought of courses are found in the following states: Georgia, Kentucky and New Jersey. See **Appendix F**.

- Most of these courses are required to be taken within a year of admission to the Bar.
- Sessions are tailored to address the needs of attorneys in their expected area of practice.
- The course material is practical, often including commentary and specific case law.

C. Enhanced Relevance Through the Utilization of Breakout Sessions

One of the common complaints about the Maryland course found in the course evaluations was that the course is perceived as not very useful. After reviewing the current programs used for new admittee programs in other states, the Subcommittee came across several programs that use breakout sessions for part of their course so that the material can be directed appropriately to lawyers who plan to practice in areas outside of litigation, such as in government, public interests and transactional law. Below are details on the other courses with breakout session features.

1. Arizona

Arizona has a one-day program most similar to our own, and also structures its class discussions around the attorney's relationships. There is a one-hour session on the attorney-client relationship, and a one-and-a-half-hour session on the attorney's relationships with others (other attorneys, judges, and third parties). It is in these two sessions that the entire class of new admittees is broken up into smaller groups relating to their chosen practice area: transactional, criminal, litigation large firm, litigation small firm and "miscellaneous."

Each session covers a series of "professionalism principles" that are relevant to that attorney relationship. Under each professionalism principle are listed a series of "themes" that illustrate the principle. The instructor of each breakout group can choose which of those themes best works with the particular practice area of the group. The instructor then uses hypotheticals provided for those themes for an interactive class discussion.

2. Kentucky

Kentucky has a 12.5 hour, two-day program. On the first day all students attend the same courses on lawyer discipline, stress management, and similar subjects that do not focus on any one area of law such as litigation. During the afternoon of the second day, however, there are two one-hour breakout sessions that separate the new lawyers into three elective courses on practice-specific topics. It is in these sessions that instructors use the most interactive methods among the students.

3. Ohio

Ohio also has a two-day course of at least 12 hours. According to the Ohio Supreme Court's requirements, a CLE provider offering the program must include six hours of general professionalism topics, one hour of skills development, and then at least eight hours of basic substantive topics from different practices areas from which the student must attain the remaining five hours of instruction. The basic substantive topics seem to be less directed toward ethical issues and more to practical instruction in those areas of practice. This course is obviously less integrated than what Maryland provides but still offers a wide array of law practice areas, from "Basic Domestic Relations" to "Law Practice Development."

4. South Carolina

South Carolina requires a three-day program. The first day focuses on professional responsibility issues. The morning of day two includes a review of the South Carolina Court System, and the morning of day three reviews arbitration and mediation. The afternoons of day two and three each offer three hours of breakout sessions that focus mainly either on civil and criminal litigation or transactional and administrative law.

5. Delaware

Delaware's program currently consists of three full-day courses, the first of which must be "Fundamentals of Lawyer-Client Relations," and the second two days must be chosen from five available "Fundamentals" courses: Fundamentals of Will Drafting and Estate Administration, of Real Estate, of Family Law, of Civil Litigation, and of Law Office Management. Again, these elective courses are more focused on basic skills than on professional responsibility or ethics.

6. Texas

Texas is worth mentioning just because of its peculiar approach to new admittee training. Texas requires the completion of four hours of computer-based training either online or with a CD-ROM. Each of the four hours permits a selection from two or more electives from the following four categories: Malpractice Avoidance, Career Killers (stress and depression or substance abuse), Law Office Management, and Professionalism.

III. Recommendations for the Maryland Professionalism Course

The Subcommittee to Update the Existing Professionalism Course for New Admittees makes the following recommendations:

1. Timing. New admittees should be allowed to take the course within one year of admittance to the Bar. This would allow new attorneys to bring some of their first hand experience to the course -- thus making the course more useful to attendees.

2. Mentoring. Many of the calls to enhance professionalism include increased mentoring of new attorneys. We applaud any efforts to include mentoring initiatives in the Maryland Professionalism Course. This course could be viewed as the first step in mentoring new attorneys. The process could begin with allowing the new attorneys to gather with other attorneys in their expected area of practice, i.e. transactional, criminal, litigation large, litigation small, miscellaneous. The instructors for the different segments would be from different areas of practice. The Maryland State Bar Association mentoring list could be made available at the course site so that the new admittees would have help from the start. See **Appendix G, Arizona Professionalism Course Agenda.**

3. Materials. As a way to enhance the mentoring component of the course, the materials should be made more substantial/practical. The materials could include a library of forms, summary of case law. This gesture could be a way to “set the tone” for new admittees -- offering this assistance as a professional courtesy; a way of saying “we are all in this together.”

4. Definition of Professionalism. Incorporate the definition of Professionalism into the course as set forth by our fellow Committee members.

5. Writing Requirement. To further engage attendees and encourage thought and recognition of the day’s discussions, a writing requirement could be added to round out the course activities. Possible questions include: “What will you do to promote professionalism?” or “What action will you take in your daily practice to promote professionalism?”

6. General. The video vignettes, if they are to be used, they should be updated. The dated look of the videos gives the impression that the course is out-of-date and course organizers out-of-touch.

7. Getting Their Attention. More emphasis could be placed on the real concerns of legal malpractice and client complaints by including speakers from the Attorney Grievance Commission and representatives from legal liability insurance providers.

8. Addressing Discovery Abuse. The pervasive problem of discovery abuse warrants a discussion in the New Admittee Course. Again, this discussion makes sense only if the new admittee has had experience with this. Further, this discussion would be perceived as a waste of time for a non-litigating attorney, and goes to support the theory of breakout sessions. Participants should be encouraged to read *Discovery Problems and Their Solutions* by the Hon. Paul W. Grimm with Paul Mark Sandler.

IV. Summary

We are fortunate to have dedicated people committed to providing excellent guidance to the newest members of the Bar through our New Admittee course. The Subcommittee believes that the changes suggested in its recommendations, could further enhance the New Admittee Course.

**FINAL REPORT OF THE SUBCOMMITTEE ON
DEVELOPING A COURSE FOR LAWYERS WHO
EXHIBIT UNPROFESSIONAL BEHAVIOR**

Counseling Option

Given the problems with the construction of a formal course, the Subcommittee decided to explore the possibility of a attorney counseling program instead of a professionalism course. At its February, 2006 meeting, the Commission authorized the Subcommittee to change its approach to one of developing a counseling program and to report out a Final Report based on inquiry in other states. The Subcommittee focused on three jurisdictions as having the broadest representation of the components for a counseling program.

Summaries of Other Jurisdictions

New Jersey

In New Jersey, a professionalism counseling program is a Bar initiative, implemented voluntarily after some encouragement from the State's highest Court. The Commission asked county Bar associations across New Jersey to take the lead through the establishment of Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence. The idea survived a fierce battle, in which many of the local Bar associations feared that the counseling program would become a veiled disciplinary action. Over time, however, almost all counties have created their own professionalism committees to provide a counseling program. The feedback has been favorable.

The New Jersey Professional Counseling Program has been approved by the New Jersey Supreme Court, and judges have been urged to cooperate to help ensure that the program's objectives are met. The New Jersey model involves a State Bar Association appointed committee, sometimes with input from the local chief judge and other senior members of the Bar. Complaints or inquiries start with the committee chair, who may be the one to speak with the complainant and/or the errant attorney before deciding whether to have a committee member counsel the person or to refer the matter to a panel of lawyers to have a discussion with the person. By including a retired or sitting judge, a committee usually has enough clout to gain the errant lawyer's attention.

The New Jersey program addresses conduct that does not rise to the level of a violation of the Rules of Professional Conduct. Specifically, it does not handle any matter that is within the jurisdiction of the New Jersey Ethics Committee (AGC counterpart). The program deals with such things as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff. The program is educational in nature. No discipline or sanctions are imposed, and all matters are confidential. The only records kept are those relating to the type of complaint addressed. There is no formal enforcement mechanism.

The New Jersey Professionalism Commission has set some basic guidelines for Professionalism Committees and lawyer counseling: Lawyer members of committees should be highly regarded and experienced members of the Bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

Generally, complaints are directed to the chair of the local Professionalism Committee. The evaluation of complaints is done pursuant to committee rules and guidelines. Most committees will ask a member to look into a complaint by talking with the lawyers involved. If further action is deemed necessary, committee members will be assigned to counsel the lawyer in question, or the lawyer will be asked to appear before the committee. If a lawyer is reluctant to cooperate, the assignment judge may be asked to intercede and assist in ensuring the lawyer's cooperation. The program offers assistance when a lawyer requests assistance in dealing with another lawyer, or in addressing specific conduct of another lawyer; or when a judge requests assistance in dealing with a lawyer, or in addressing specific conduct of a lawyer. The counseling program does not entertain complaints from clients, or members of the public.

Georgia

Georgia has instituted the Judicial District Professionalism Program, which is an informal, private, and voluntary program developed by the Bench and Bar Committee of the State Bar to improve professionalism by the informal use of local peer influence to open channels of communication on a voluntary basis. No judge or lawyer is required to cooperate or counsel with the Program.

The program is comprised of committees from each of the State's Judicial Districts. Each Judicial District Professionalism Committee consists of the current members of the Board of Governors of the State Bar of Georgia from the particular Judicial District. The committee members for each of the Judicial Districts select one or more Judicial Advisors within each district. The longest serving member on the Board of Governors serves as the Chair for that District.

The Program was authorized by the Georgia Supreme Court, which ordered the program and adopted Rules governing the operation of the Program. The Court also approved internal operating procedures for the administration of the Program and granted the Bench and Bar Committee of the State Bar authority to adopt additional procedures.

The local committees may choose to mentor - provide guidance in "best practices" for lawyers and judges. It may also privately receive and attempt to resolve inquiries and requests for assistance from lawyers and judges on an informal basis, addressing disputes between lawyers and lawyers and disputes between lawyers and judges.

The Program operates independently from attorney disciplinary systems. It is informal, private and voluntary rather than formal and mandatory, and it does not address violations of the

Rules of Professional Conduct. Rather, it handles matters such as incivility, bias or conduct unbecoming a judge or lawyer, lack of appropriate respect or deference, failure to adhere to court rules, excessive delay, consistent lack of preparation, abusive discovery practices, communication problems, and other conduct deemed professionally inappropriate by each committee.

After receiving a complaint, the committee, with input from a judicial advisor, will determine whether the complaint merits study or intervention or whether the complaint needs to be referred to Lawyer Assistance, Law Practice Management, or other State Bar program. If the local committee determines intervention is warranted, it will schedule a meeting between the responding lawyer or judge and the committee members designated to handle the complaint. After resolution of an inquiry by mentoring or counseling, the matter is closed with a confidential file report that does not contain the name of any person about whom an inquiry or concern has been expressed. All inquiries and proceedings are private. No committee will disclose inquiries and proceedings in the absence of an agreement by the participating parties. Records are kept for statistical purposes only and do not contain the names of any inquiring or responding party.

North Carolina

North Carolina has instituted a Professionalism Support Initiative on the local level, an informal, voluntary lawyer and judge assistance program that handles professionalism issues. The program uses local volunteer peers to communicate privately and informally with lawyers and judges. The program offers counsel and assistance to lawyers and judges who receive repeated complaints at the State Bar or through local Bar associations, that may not rise to the level of ethics or professional responsibility violations. The program is comprised of volunteers from the individual judicial district Bar associations who seek to enhance professionalism by confidential peer influence.

No judge or lawyer is required to cooperate or counsel with the committee. If the party against whom the inquiry is addressed refuses to cooperate by meeting with a volunteer, the committee will take no further action regarding the inquiry. Should the lawyer or judge agree to a meeting, the privacy and confidentiality of all inquiries will be maintained.

Specifically, inquiries include any query concerning unprofessional conduct, such as lack of appropriate respect or deference to litigants, attorneys, court personnel, witnesses, clients, etc.; abusive discovery practices; incivility, bias or other conduct unbecoming a lawyer; consistent lack of preparation; communication problems; deficient practice skills; consistent failure to keep appointments and court dates. In addition, inquiries may include any rules or documents adopted by each judicial district's professionalism committee. Inquiries will not include any disciplinary charge, ethics violation, criminal conduct or any other matter falling under the Rules of Professional Conduct. In addition, inquiries do not include fee disputes, employment matters, and lawyer/vendor disputes.

Inquiries are referred to the committee from the State Bar's Client Assistance Program, local Bar associations, voluntary Bar associations, and individual judges and lawyers. The committee does not deal directly with client complainants. Committee volunteers or local professionalism committee members have discretion to decide the appropriate professional to contact the lawyer or judge in question. The professionalism committees may also solicit assistance from any member of the Bar who is in the best position to be of assistance to the lawyer or judge in question. Volunteers may determine that certain inquiries do not merit consideration or counseling, while others may warrant consideration and/or counseling. The volunteer may inform the complainant that the committee has received the inquiry, explain its nature, and provide general information. The complainant is informed of the process and the time it may take. The committee maintains statistical records only.

Recommendations

The Subcommittee recommends that the Professionalism Commission request the Court of Appeals to adopt a counseling program that includes the following elements:

1. Local Bar associations form professionalism committees, comprised of experienced and well-respected local lawyers and judges, who will receive complaints from the bench and Bar concerning unprofessional behavior by attorneys that does not rise to the level of a violation of the Rules of Professional Conduct. Smaller jurisdictions should have an option of joining a nearby committee or the Maryland State Bar Association should establish a committee to provide counseling for those counties.
2. Each local Bar may establish its own procedures for the processing of complaints. Complaints deemed serious should become the subject of counseling by a panel of attorneys and at least one judge from the professionalism committee.
3. No lawyer should be required to participate in counseling. All counseling should be educational and mentoring in nature.
4. Confidentiality should be assured to participants. No records should be kept by name of attorney, but a statistical record should be kept of the number of attorneys counseled, the nature of the counseling (e.g. civility, bias, timeliness), whether the counseling effected change on the part of the attorney, and other feedback.
5. Each committee will submit an annual report to the Professionalism Commission including the information noted in item # 4, along with ideas for developing the program or revising it in the next year.

**FINAL REPORT OF THE SUBCOMMITTEE
ON DEFINING THE UNAUTHORIZED PRACTICE OF LAW**

I. Introduction

Attorneys attending Town Meetings in every jurisdiction identified an increase in the unauthorized practice of law as a factor contributing to the decline in professionalism. These lawyers have observed that certain non-lawyers are engaged in activities which constitute the practice of law, especially in non-litigation matters.³ Examples which have been cited include preparation of estate planning documents, deeds, trusts, powers of attorney, real estate contracts and related documents, as well as residential and commercial leases. Other examples include advice concerning the use of joint bank accounts and advice concerning the manner in which title to real estate should be held. The primary concern is, and must be, that consumers are at risk when non-lawyers engage in the unauthorized practice of law. Also, as the unauthorized practice of law becomes more widespread, more lawyers compete for less work, which, in turn, results in unhealthy competition among lawyers and contributes to the general decline in professionalism. Therefore, the Task Force recommended that the Professionalism Commission investigate the unauthorized practice of law and then consider possible actions to better define the unauthorized practice of law and to enforce sanctions against it.

Many entities, including the Maryland State Bar Association, the American Bar Association, and other state Bar associations, have studied the issue and attempted to formulate a workable definition of the practice of law, and conversely, the unauthorized practice of law. In an effort to avoid reinventing the wheel, the Committee on the Unauthorized Practice of Law (the "UPL Committee") decided to proceed generally as follows:

1. Attempt to gather and review information on some of the prior attempts to define the unauthorized practice of law and to determine the results of those efforts.
2. Determine what, if any, issues have been identified in these previous attempts to define the practice of law or, conversely, the unauthorized practice of law.
3. Examine the enforcement mechanisms available to regulate the unauthorized practice of law and evaluate the results of previous enforcement efforts.
4. Formulate a recommendation as to whether and how the unauthorized practice of law should be defined and/or enforced.

³ The UPL Committee sensed the state-wide concern to be encroachment by other professions, businesses or entities. Bar Counsel, Melvin Hirshman, has indicated that there are a number of on-going prosecutions in Maryland in such cases. Therefore, the UPL Committee elected not to address the unauthorized practice of law by suspended/disbarred lawyers.

II. Materials Reviewed

The UPL Committee has reviewed the following:

- Maryland State Bar Association study on the unauthorized practice of law, including the Washington State Bar Association study.
- 2003, American Bar Association, Center for Professional Responsibility, Task Force on the Model Definition of the Practice of Law (found at the ABA website (<http://www.abanet.org/cpr/model-def-home.html>)).
- Compilation of reported cases from various states in an attempt to identify the enforcement agency and the legal method of enforcement employed by other jurisdictions.
- Material provided by Bar Counsel Melvin Hirshman who, at the request of the UPL Committee, e-mailed his counterparts around the country to request from each jurisdiction: (a) whether that state has a definition of the practice of law (or, conversely, the unauthorized practice of law), and (b) the enforcement mechanism used in that state.⁴
- On March 22, 2005, the UPL Committee met with the following representatives of the Office of the Attorney General to discuss UPL and possible roles to be played by that Office: Robert N. MacDonald, Esquire, Chief Counsel of the Opinions, Advice and Legislative Division; Michael D. Berman, Esquire, Deputy Chief of Litigation; and Ellen S. Cooper, Esquire, Chief of Antitrust Division.

III. Defining the Practice of Law (or the Unauthorized Practice of Law)

Approximately 18 states have defined the practice of law or, conversely, the unauthorized practice of law. (Many of the states that do not have a specific definition rely upon decisions of the appellate courts.) The practice of law, by its very nature, seems difficult to define, and most of the definitions, no matter how broad or inclusive, ultimately are inapplicable when applied to certain non-litigation matters. A definition that is too general may fail to include matters which most lawyers and non-lawyers alike recognize as the practice of law. Likewise, a definition that is too specific and exclusive may fail to include a particular matter which, by implication, is excluded from the definition. *Expressio unius est exclusio alterius*.

⁴ See attached summary

As Justice Elizabeth A. Weaver of the Supreme Court of Michigan stated in her concurring opinion in *Paul Dressel, et al. v. Amerabank* 468 Mich. 557, 664 N.W.2d 151 (2003), “constant new developments in society, technology, business and the law preclude any chance of arriving at a lasting definition.” As she further stated, “Since no definition of the ‘practice of law’ can fully account for the infinite variety of fact situations that will inevitably arise, it is best to decide these cases in light of their specific circumstances. This approach allows the lower courts to explore the concept’s dimensions without confining their analysis to the perimeters of an artificial formula.”

In Maryland, the practice of law is defined in § 10-101(h) of the Business Occupations and Professions Article of the Annotated Code of Maryland (see attached). Section 10-106 identifies certain exceptions (see attached). The Court of Appeals of Maryland in *Public Service Comm’n. v. Hahn Transportation, Inc.*, 223 Md. 571, 253 A.2d 845 (1969), stated that it is for the courts to decide what constitutes the practice of law. The Court of Appeals has construed the statute to preclude a layperson from preparing and filing pleadings in a contested case or appearing and engaging in representation at trial in behalf of another. *Hahn*, 223 Md. at 580-581. The Court of Special Appeals in *Lukas v. Bar Assoc. of Montgomery Co.*, 35 Md.App. 442, 371 A.2d 669 (1977), cert denied, 250 Md. 733 (1977) (citations omitted), cited with approval the following general rule:

“Where trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principals to problems of any complexity is involved, these activities are still the practice of law. On the other hand, where pure engineering, accounting or clerical work is involved, the practice of law is not present, and in these latter areas the layman can adequately perform. VomBaur, *Administrative Agencies and Unauthorized Practice of Law*, 48 A.B.A.J. 715, 716 (1962).”

The Court in *Lukas* also said that the rule is well stated in Annot., 111 A.L.R. 19, 24-25 (1937):

“The practice of drawing for others ... written instruments which require more than the most elementary knowledge of the law, are more than that which the ordinary or average layman may be deemed to possess, may well be deemed to constitute the practice of law, since special legal knowledge and skill are required.”

Consistent with *Lukas*, the Office of the Attorney General, at 65 *Opinions of the Attorney General* 28 at 28 and 33 (1980), made the same distinction, finding that “non-lawyers may fill out forms and perform other purely mechanical functions, [but] may not represent [clients] at hearings ... nor may they give legal advice, interpret legal documents or apply legal principals to any problems of complexity for a client.”

The UPL Committee has concluded that the practice of law is difficult and potentially dangerous to completely define and that no definition will apply at all times to all situations. The

current statutory definition is deemed adequate, especially in view of Business Occupations & Professions Article § 10-101(h)(1)(iii) which includes as part of the definition the performance of “*any other service that the Court of Appeals defines as the practice of law.*” This allows the Courts to address the issue on a case-by-case basis which the UPL Committee believes is the better approach. The real problem seems to be with enforcement, especially as it applies to the activities of non-lawyers.

IV. Enforcement

Originally, prosecutions for the unauthorized practice of law were brought by local and/or state Bar associations. However, §§ 10-401 *et seq.* of the Business Occupations and Professions Article, subject to certain conditions stated therein, authorize the Attorney General and the Attorney Grievance Commission to investigate a complaint for the unauthorized practice of law and enjoin an unauthorized person from practicing, attempting to practice, or offering to practice law (see § 10-406). Pursuant to an agreement between the Attorney General and Bar Counsel, the Attorney Grievance Commission now is authorized to take action against persons engaged in the unauthorized practice of law.⁵ The Office of the Attorney General, however, is not precluded from becoming involved and might, in certain circumstances, be the appropriate vehicle for enforcement, rather than the Attorney Grievance Commission.

On August 25, 2004, the UPL Committee met with the Attorney Grievance Commission Bar Counsel, Melvin Hirshman, to discuss generally the unauthorized practice of law and the Attorney Grievance Commission’s role in initiating enforcement action. Mr. Hirshman indicated that his office has taken and will continue to take action against persons engaged in the unauthorized practice of law. However, the system is complaint driven and prosecutions (or civil actions for injunctive relief) cannot be initiated in the absence of formal complaints. Many lawyers, especially those practicing in smaller communities and rural areas, are reluctant to be involved in the filing of formal complaints because, for practical reasons, they do not wish to be named or associated with a complainant in the enforcement proceedings. The UPL Committee has initiated discussions with the Maryland State Bar Association to determine whether that entity would be willing to become involved (either as the complainant, the referred entity or otherwise) in enforcement proceedings so as to insulate the reporting or referring lawyer.⁶ Mr. Hirshman is satisfied with a system in which the Maryland State Bar Association files the complaint on behalf of a “victim,” provided the Maryland State Bar Association funds the enforcement proceedings, including the cost of expert witnesses.⁷

⁵ For example, in 1999 the Maryland State Bar Association joined with several other states to pursue Allstate Insurance Company, which was encouraging claimants to settle their claims without legal counsel. This matter was handled by the Attorney Grievance Commission.

⁶ It should be noted that prosecutions of UPL by the Attorney Grievance Commission are done in the name of the Bar Counsel. Therefore, if the Maryland State Bar Association made a complaint, it would not be named as the complainant.

⁷ A summary of the unauthorized practice of law cases that have been reported to the Attorney Grievance Commission for the last several years is included as an addendum to this report.

For the Committee's benefit, Mr. Hirshman surveyed UPL matters with the Deputy and Assistant Bar Counsel and has provided the Committee with updates on current and recent cases his office has handled.⁸

As previously noted, the purpose of the meeting at the Office of the Attorney General was to discuss UPL and the possible involvement of the Attorney General with regard to complaints. Aside from immediately bringing our attention to the shortage of funds for enforcement actions, they stressed the importance that, with regard to consumer issues, the Complainant should be the injured "client" and that the Attorney General had to be particularly careful not to engage in anything which might be construed as potential for an antitrust action by the United States Department of Justice, Federal Trade Commission or others. Mr. McDonald made it clear that lawyers could refer their clients to the Consumer Protection Division to make a UPL complaint. Other than as a matter of consumer protection, it appears that the Office of the Attorney General would be looking for one of its regular State clients for funding of any enforcement action. These regular clients would include the Bank Commissioner, the Insurance Commissioner, General Assembly or even the Attorney Grievance Commission. Mr. Berman indicated that his office would have to obtain funding for an enforcement action through one of the State agencies which they represent and he believed that it would most likely come in the form of some type of "test case" which could and would grab the attention of lawmakers and the Executive Branch alike.

Mr. McDonald suggested that one means of addressing any particular issue would be to seek an opinion of the Attorney General through either a State agency, the General Assembly or the Attorney Grievance Commission. Any such request would be directed through his Division for handling. Another important aspect noted was that it may be prudent to apprise the lawyers of Maryland that they can make referrals to the Attorney General and suggest the likely agency which might do the investigating or be supporting financially any prosecution. In that regard, it was also noted that an attorney representing an aggrieved party would not be in violation of the current Code of Professional Conduct by making any such referral (Cf. the old Disciplinary Rules which raised a question about referring clients to the State's Attorney for prosecution in hopes of securing debt payment or restitution).

There was no apparent concern of stepping on toes as regards the oral agreement between Bar Counsel and the Attorney General. Indeed, it was generally agreed that there could be cross referrals between the Office of the Attorney General and the Attorney Grievance Commission when one entity thought that the other was more appropriate for undertaking action.

It should be noted that in regard to "referrals" to either the Office of the Attorney General or the Attorney Grievance Commission, the Maryland State Bar Association and/or a UPL Committee of this Commission (see Recommendation No. 3) could play an important role in

⁸ The late Professor Irving Younger asserted that the evidentiary rule on hearsay was that "Hearsay is admissible ... with a few exceptions."

evaluating any particular situation and referring the ultimate Complainant (and counsel, if any) to the appropriate enforcement arm. The Immediate Past-President of the Maryland State Bar Association, Cornelius D. Helfrich, appointed a special committee chaired by Edwin J. Fee, Jr., Esquire to liaison with the Commission. Furthermore at its recent “planning conference,” a select group of the Bar Association recommended a resurrection of the Bar Association’s UPL Committee.

The Inescapable Conclusion

The UPL Committee has swiftly approached the position that “the unauthorized Practice of Law isn’t ... with a few exceptions.”⁹ The first source of exceptions can be found in Title 10 of the Business Occupations and Professions Article of the Annotated Code of Maryland, supplemented by such services identified by the Court of Appeals as constituting the practice of law [§ 10-101(h)(iii)] and prohibited as to non-lawyers under § 10-601, *et seq.* As previously noted, the UPL Committee is of the opinion that further definition efforts by the Commission should be avoided.

Looking at the enforcement/prosecution of UPL matters, however, leads one to the inescapable conclusion that any enforcement/prosecution of activity which is, or may be, the concern of members of the Bar (see Footnote No. 1, *infra*) must contain and be centered upon the element of protecting the consumer public (be it an individual, a definable group or the public at large) from victimization which results in the absence of a lawyer’s training and experience. Unless any particular enforcement/prosecution can be readily identified as having such a protective objective, such efforts will likely be, at the least, viewed as the self-interested “turf protection” efforts of the Bar and, at the worst, cited for violation of the antitrust laws.

The Washington State Practice of Law Board

The Supreme Court of Washington has established its Practice of Law Board in its effort to address UPL.⁹ Its general purposes are to:

- Promote expanded access to affordable and reliable legal and law-related services;
- Expand public confidence in the administration of justice;
- Make recommendations regarding the circumstances under which non-lawyers may be involved in the delivery of certain types of legal and law-related services;
- Enforce rules prohibiting individuals and organizations from engaging in unauthorized legal and law-related services that pose a threat to the

⁹ See attached information form on filing a UPL complaint with the Board.

general public; and

- Ensure that those engaged in the delivery of legal services in the state of Washington have the requisite skill and competencies to serve the public.

In addition to its investigatory function, the Board will attempt to secure agreements to stop activity deemed it to be UPL, issue interpretive opinions, refer cases for prosecution to the appropriate agency and perform a public educational function relating to the practice of law and UPL. As previously stated, any such agency, board or the like, must have the protection of the public as its *raison d'être*; however, a side benefit is that it involves the State Judiciary (rather than the legislature) in an oversight capacity and reassures those admitted to practice that the courts are, in fact, concerned about UPL. Whether any such body be constituted as a separate “Board,” a “Committee of the Commission” or otherwise is more a matter of form than substance. If, however, the Commission is to be an “ongoing” enterprise, it may be the logical place for such a structure.

Other Jurisdictions

UPL is addressed in varying degrees of formality (or informality) in several states.¹⁰ Though varied, similarities exist and include:

1. Identify the questionable activity.
2. Attempt to secure an agreement to “cease and desist.”
3. Absent an agreement, refer the matter to the proper prosecutorial agency.
4. Seek injunction and in some instances, monetary compensation and/or refund for the victim.
5. Harsh view taken of “repeat offenders” or those in contempt of any injunctive order.

V. Recommendations

The UPL Committee submits the following recommendations for review and approval by the Professionalism Committee:

1. That no changes (additions or deletions) be made to the current statutory definition of the practice of law.

¹⁰ See attached summary of ABA 2004 Survey of UPL Committees and related materials.

2. That any changes to the definition of “the practice of law” should be considered by the Court of Appeals and not by the General Assembly.
3. That there be established mechanisms and procedures by which the alleged unauthorized practice of law shall be monitored and, if founded, prosecuted.
 - a. The Professionalism Commission, if ongoing, should have a continuing oversight role in monitoring the unauthorized practice of law.
 - b. The Maryland State Bar Association, and possibly local and specialty Bar associations, should be encouraged to develop means to refer unauthorized practice of law complainants to the appropriate resource and possibly fund, if necessary, any enforcement proceedings.
 - c. In accordance with the recent recommendation of its long range planning conference, the Maryland State Bar Association should revive its committee on unauthorized practice of law, however named. The committee should be patterned after the Association’s Ethics Committee to provide a resource to lawyers and their clients who are seeking advice on whether specific practices are the unauthorized practice of law.
 - d. The Attorney Grievance Commission and the Office of the Attorney General should coordinate efforts to review any complaints for the purpose of determining which of their offices is best suited to deal with a particular complaint. To that end, cross-referrals are encouraged.
 - e. The Office of the Attorney General should, in the appropriate case(s), be asked to provide opinions of that office on whether specific practices constitute the unauthorized practice of law.
 - f. The Attorney Grievance Commission and/or the Office of the Attorney General should, when appropriate, pursue a test case or cases, provided funding for the litigation expenses is available.
4. That a public relations effort be considered for the education of the Judiciary, the Bar and the public about the value of legal representation, the practice of law and the unauthorized practice of law.
5. That the members of the Judiciary and the Bar be educated on the unauthorized practice of law and the remedies available to the public if there are suspected acts of the unauthorized practice of law (e.g., judges and lawyers should be made aware that victims can be referred to the

Attorney Grievance Commission, a State's Attorney, or the Office of the Attorney General for investigation). The Court of Appeals should be encouraged to communicate this message to the Judiciary. The Maryland State Bar Association should be encouraged to communicate this message to the members of the Bar.

6. That the Attorney Grievance Commission and the Office of the Attorney General should report the nature of all investigated allegations of the unauthorized practice of law and any outcome to the Court of Appeals and the Maryland State Bar Association.

Submitted: May 12, 2005

Revised: November 21, 2005

UPL COMMITTEE FINAL REPORT

ATTACHMENT FOR FOOTNOTE NO. 4

| STATE | HAS DEFINITION (either practice of law or unauthorized practice of law) | WHO ENFORCES |
|----------------------|--|---|
| ALABAMA | Yes-statute | ? |
| ALASKA | Yes-statute & rule | ? |
| ARIZONA | Yes-statute for immigration Yes-rule for other | AG for Immigration & State Bar for other UPL |
| ARKANSAS | Yes-case law | UPL Committee (rule) |
| CALIFORNIA | Yes-case law | Local District Attorneys and local Attorneys General. State Bar may investigate and seek injunction. |
| COLORADO | Yes-case law | Attorney Regulation Counsel |
| CONNECTICUT | Yes-case law | Trial judges and Attorney Grievance Commission |
| DELAWARE | Yes-case law | ? |
| DISTRICT OF COLUMBIA | Yes-rule | Court of Appeals Committee |
| FLORIDA | Yes-case law | ? |
| GEORGIA | Yes-statute | ? |
| HAWAII | Yes-case law | AG & State Bar |
| IDAHO | Yes-case law | Prosecutors, Bar Counsel, UPOL Committee |
| ILLINOIS | Yes-case law | Local Prosecutors |
| INDIANA | Yes-case law (Rule Proposed) | Disciplinary Commission, State Bar, Attorney General |
| IOWA | Yes-case law | UPL Commission |
| KANSAS | Yes-case law | ? |
| KENTUCKY | Yes-statute | ? |

| | | |
|----------------|------------------------|--|
| LOUISIANA | Yes-statute & rule | Criminal Prosecution |
| MAINE | Yes-case law | ? |
| | | |
| MARYLAND | Yes-statute | Bar Counsel, AG & State's Attorney |
| MASSACHUSETTS | Yes-case law | Attorney General |
| MICHIGAN | Yes-case law | State Bar |
| MINNESOTA | Yes-case law | ? |
| MISSISSIPPI | Yes-case law | Bar Committee investigates |
| MISSOURI | Yes-statute & rule | Attorney General and District Attorneys |
| MONTANA | Yes-case law | Bar Counsel & Commission on UPL |
| NEBRASKA | Yes-case law | Bar UPL Committee |
| NEVADA | Yes-case law | State Bar |
| NEW HAMPSHIRE | No | ? |
| NEW JERSEY | Yes-case law | UPL Committee |
| NEW MEXICO | No | ? |
| NEW YORK | No | District Attorneys |
| NORTH CAROLINA | Yes-statute | District Attorney, Member of the Bar, Bar Association or State Bar |
| NORTH DAKOTA | Yes-case law | ? |
| OHIO | Yes-case law | UPL Committee |
| OKLAHOMA | Yes-case law | Bar Association |
| OREGON | Yes-statute & case law | State Bar |
| | | |

| | | |
|----------------|------------------------------------|---|
| PENNSYLVANIA | Yes-case law | Possible Bar Counsel |
| | | |
| RHODE ISLAND | Yes-statute | Supreme Court Committee & AG |
| SOUTH CAROLINA | Yes-case law | Criminal |
| SOUTH DAKOTA | No | ? |
| TENNESSEE | Yes-statute | AG |
| TEXAS | Yes-statute | Supreme Court UPL Committee |
| UTAH | Yes-case law & pending court order | State Bar |
| VERMONT | Yes-case law | AG |
| VIRGINIA | Yes-rule | UPL Committee of the State Bar & Criminal prosecution |
| WASHINGTON | Yes-rule | Practice of Law Board |
| WEST VIRGINIA | Yes-statute & case law | ? |
| WISCONSIN | No | ? |
| WYOMING | Yes-rule | UPL Committee |
| | | |
| | | |
| | | |

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UPL COMMITTEE FINAL REPORT

ATTACHMENT FOR FOOTNOTE NO. 7

MEMORANDUM

DATE: January 26, 2005

TO: Linda Lamone
Commissioner

FROM: Melvin Hirshman
Bar Counsel

RE: Unauthorized Practice of Law

The following is a summary of the unauthorized practice of law cases that we have had reported to us and what we have done in fiscal year 2004 and fiscal year 2005 to date.

1. We received a complaint about an organization for the unauthorized practice of law. The organization is in Florida and the complaint was forwarded to the Florida Discipline Counsel on December 1, 2004.
2. We received a complaint from a Montgomery County attorney that a gentleman representing himself as an attorney was engaged in the unauthorized practice of law. We assigned the matter for investigation. The individual involved is a member of the District of Columbia bar and had no advertisements or indicia at his home that he was engaged in the practice of law in Maryland. The letter about which the Complainant complained emanated from the office of the Respondent from his District of Columbia office. We found no unauthorized practice of law violation.
3. We received a complaint that a person was engaged in the unauthorized practice of law in connection with a bankruptcy matter. Investigation revealed that the Complainant had prepared her own bankruptcy petition and that the individual alleged to be engaged in the unauthorized practice of law in fact was only in the business of lending money to individuals threatened with foreclosure. Even though we found no violation there was a refund made to the Complainant through this office in the sum of \$806.00.
4. We received a complaint from a Baltimore attorney concerning an organization and a person. On January 19th I addressed a letter to the Assistant United States Trustee to determine whether they were conducting any investigation before our office became involved. The Trustee advised us that their office was investigating and I deferred our investigation pending their investigation.

5. We received a complaint from an Anne Arundel County attorney that a person was engaged in the unauthorized practice of law by virtue of naming himself as a plaintiff in an action in the Circuit Court for Anne Arundel County. A letter from Bar Counsel to this person dated December 7, 2004 was responded to by him on December 24, 2004. He indicated that he was proceeding pursuant to Maryland Rule 2-241(a)(3) and that the corporation involved assigned all the causes of action to him as a sole shareholder officer and director. I wrote the Complainant on January 10, 2005 indicating whether she still felt he was involved in the unauthorized practice of law and that is the way that file stands at present.
6. We received a complaint from a Baltimore attorney that alleged that a person was engaged in the unauthorized practice of law. This person is a paralegal who was asked by a gentleman involving a workers' compensation matter about their procedures. She advised the gentleman, Mr. Smith, that she was not an attorney and he needed to contact the complaining lawyer to ask if it was okay. Mr. Smith and his mother asked the Baltimore attorney if this person could help them and he said it was okay. The Complainant was told that this person was not an attorney and only a paralegal. I then passed that information along to the Baltimore attorney who then spoke to me on December 3, 2004 and he said he wasn't sure whether to send the original letter out but his secretary had finally sent it out and he didn't have any problem with what this person did providing she didn't charge any fee. This person advised that she did not charge anything to Mr. Smith and his mother. She said she works full time at a law firm and was only helping two people who did not know what they were doing, with the Baltimore attorney's permission, and that was never hidden from him. The complaint about the unauthorized practice of law was therefore dismissed by this office.
7. We received a fax complaint that a person had filed a pleading in court identifying himself as an attorney and did not appear to be a member of the bar. He responded to me on November 9, 2004 that he was a 2002 graduate of the University of Baltimore Law School and was admitted to the bar in December 2002 having served as a law clerk to two Judges. He indicated that based on Maryland Rule 16-811(e)(4) payments to the Client Protection Fund were due July 1st and his clerkship ended well after that. He thought his contribution would begin the following July 1st. Nevertheless he contacted the Client Protection Fund, changed his status to active and paid the fee. I therefore found that he had in fact been admitted to the practice of law and dismissed the case.
8. We had a complaint that a member of the Georgia bar had answered a Complaint for Divorce in the Circuit Court for Harford County. Since he was a member of the Georgia bar I forwarded that information to Georgia Bar Counsel and spoke to him on December 14, 2004. They agreed to investigate and for them to take appropriate action since it was a one time transaction in Maryland.

9. We had a complaint both in fiscal year 2005 and fiscal year 2004 concerning an organization and a person. The matter was originally investigated and I advised the United States Trustee in June 2004 because we were not able to determine that the person or his agency was giving legal advice since he had contracted with an attorney when an individual contacted his organization and referred them to that attorney. When a new complaint came in this year against the same individual and agency, it was once again investigated and handled by Deputy Bar Counsel Glenn Grossman. He determined that we were unable to show any unauthorized practice of law and the matter has been concluded.
(P.S. A complaint also had been made in fiscal year 2003 against the same organization and we made a determination at that time that we could find no unauthorized practice of law.)
10. We received a complaint from an attorney from a Baltimore City law firm about a person. The law firm represented General Electric's Consumer Finance Division who was contacted by the person alleging that General Electric had violated a settlement agreement with a woman. This person has held himself out as President of an organization called Trial Management Associates, which purported to have offices in Annapolis and Seattle, Washington and Nevada, Texas and Illinois. He has had some legal difficulties having been indicted in the United States District Court for the Eastern District of Virginia for various actions he has had with the Internal Revenue Service and was eventually convicted of intimidating an Internal Revenue Service employee. He has also filed other lawsuits. My last conversation with the Baltimore City law firm in September 2004 was to the effect that I had conversations with Bar Counsel in Virginia and the difficulties they have had in dealing with this person. I indicated that I was going to defer taking any action against this person since I understand that General Electric has been dealing with him for some time. I offered to discuss this matter further but have never heard anything further from the Baltimore City law firm.
11. We received information that a former disbarred attorney may have been involved in the unauthorized practice of law with a collection business. We referred the matter to the State's Attorney office of Prince George's County. As a result of their discussions with the collection business, it re-formatted its website to remove any references to the former disbarred attorney and his former law firm and assured the State's Attorney's office that this person was not an active participant in the collection business. We advised that we would keep our file in this matter but did not contemplate any further action given the representations of the State's Attorney's office of Prince George's County.
12. We received an anonymous complaint about a person who may be engaged in the unauthorized practice of law in Rockville advising the Pakistan community on legal matters involving their immigration cases. That matter was assigned for investigation and this person advised our investigator that

we had previously investigated him and had found no evidence that he had been engaged in the unauthorized practice of law. It appears that the anonymous letter in this file was probably the same individual that filed the earlier complaint. This person is engaged in paralegal immigration services and once again we could not determine that there was any proof that he was engaged in the unauthorized practice of law.

13. We received another complaint that an organization in Laurel may be engaged in the unauthorized practice of law. We wrote the Complainants and advised them that the organization was no longer in the building because they were unable to obtain a business license and our contact with two individuals denied giving legal advice to the Complainants. I did notify the Department of Justice about these individuals since they may be involved in any further immigration matters and closed our file.
14. We then received a complaint about an attorney involved in bankruptcy proceedings in the United States District Court for the District of Maryland. It did involve a member of the District of Columbia bar and I forwarded that complaint to Bar Counsel for the District of Columbia. It did not appear to be one that involved the unauthorized practice of law.
15. We received another complaint about a gentleman engaged in the unauthorized practice of law but his name was misspelled and we ascertained that he was a member of the Maryland bar and therefore transferred this matter to one of our inquiry files. It did not involve the unauthorized practice of law.
16. We had a complaint from a Judge of the Orphan's Court of Baltimore County about an individual. He apparently had drafted a will for someone as a paralegal. A letter was sent to him and he assured me that he would not do that anymore. He indicated that he would not draw a will for anyone else and he had done it for a longtime friend who was dying of inoperable lung cancer and took no money for doing the will.
17. We opened an unauthorized practice law file in July 2004 as a result of a meeting between Deputy Bar Counsel Glenn Grossman and Sterling H. Fletcher, an Investigator, Mark Neal, the Assistant United States Trustee from the Department of Justice. Also in attendance was another United States Trustee and two trial attorneys from the Department of Justice. Bar Counsel was also at that meeting and we were given a Memorandum concerning various bankruptcy preparers allegedly engaged in the unauthorized practice of law. Mr. Neal gave us the names of the individuals they were investigating, some of whom they have been able to enjoin as well as getting the fees reduced which they charged to \$80.00. Mr. Grossman and Mr. Fletcher were invited to attend a 341 Hearing at the Bankruptcy Trustee's office. The Trustee indicated that they had enjoined at least five individuals and were looking into eleven others.

18. Next, we had several complaints against a person who had been filing lawsuits along with another individual in the District Court of Maryland for Frederick County. This person had been signing the complaints as "An Attorney in Fact" for several individuals in which it was alleged that he was operating under a general power of attorney for the individual. As a result of my contact with him, he either withdrew or dismissed several of the cases in which he was acting as an attorney in fact.
19. A former member of the Attorney Grievance Commission questioned the propriety of a layman filing and collecting judgments in District Court. I reviewed the cases in Kent County District Court and determined that the person was collecting debts owed to various creditors under his own name, PRO SE, under the guise of an "Assignment." This is contrary to the provisions of BOP, Section 10-101 and 10-206(b)(4). An Ex Parte Injunction was granted by Judge Price after argument with Defendant present after notice. The TRO was extended for an additional period and the Defendant signed a consent order just prior to trial on the merits. The office is in the process of verifying that he is in compliance with the Order. The TRO was granted on February 10, 2005 and the Extension was granted on February 22, 2005. The Consent Order was filed on March 1, 2005.

The following is a summary of the unauthorized practice of law cases dealt with in fiscal year 2004 (July 1, 2003 through June 30, 2004).

1. We received a complaint from a representative from Allstate Insurance Company that a person was negotiating personal injury claims on behalf of individuals. The matter was assigned for investigation and in September 2003 our investigator visited the office of this person and found the premises to be a low income housing complex and the Respondent's suite is an apartment. No one was home. The Respondent was interviewed on September 18, 2003 at his home. He indicated he was a Maryland State Police Officer for 13 years and had retired for medical reasons. He said his clients are usually family members, friends or people who have been referred to him and he only accepts cases where his "client" was not at fault in the accident. Others he referred to an attorney. He claimed he had handled seven or eight cases without problems with insurance companies and if there could not be a settlement reached the client was referred to an attorney. If there was a settlement he received a portion of the settlement figures. He believes he was a "mediator" denying that he held himself out as an attorney or paralegal. A lawsuit was then filed against him by Assistant Bar Counsel Fletcher P. Thompson in the Circuit Court for Prince George's County seeking an injunction. The defendant was served but did not answer the case and an Order was entered enjoining him on June 3, 2004 by the Honorable Thomas Smith. He was advised in a letter from this office on June 14, 2004 that if he failed to comply with the Order of the Court we would seek a contempt action.

2. On August 23, 2003 we received a letter from a Montgomery County attorney who was a Regional Administrator for the Dispute Settlement Board, which provides arbitration for certain disputes between the Ford Motor Company and its consumers. He had recently encountered a person who presented himself as an attorney. This person, in a letter to this office in September 2003, indicated that he was a procurement and contract specialist and did not feel the people he represented needed an attorney. He indicated he is not licensed to practice law but was scheduled to sit for the multi-state bar exam in February 2004. I notified the Maryland Board of Bar Examiners about this person but they did not have him listed as sitting for the February 2004 multi-state bar exam. On September 29, 2003 this person wrote to Bar Counsel and said "after considerable deliberations, consultation and pray I believe I have no other recourse but to enter into a consent injunction." A consent injunction was prepared in connection with the complaint in the Circuit Court for Prince George's County. On January 2, 2004 an Injunction was entered against this person signed by the Honorable Thomas B. Smith of the Circuit Court for Prince George's County.
3. On September 8, 2003 we received a letter from an attorney in Baltimore City concerning a former employee who apparently left the office and was receiving some money in connection with bankruptcy matters. I wrote to the former employee who wrote me a lengthy letter about her medical problems, deaths in her family, denied ever receiving any money from anyone for bankruptcy or any other matters. She said she downloaded her own matrix for her own bankruptcy case and gave it to someone and denied ever wanting to violate any laws. I advised the Complainant about the letter and believed that no further action was necessary but that our file would be open for three (3) years and I advised the former employee that based on her letter to me I did not think any further action was necessary.
4. We received a complaint from a Baltimore attorney that a paralegal and notary public located in Wheaton, Maryland and Baltimore may be engaged in the unauthorized practice of law. The Baltimore attorney indicated that over the prior several months, before his letter to me in September 2003, six clients had made complaints regarding a paralegal who opened an office down the street from him. I notified the Department of Justice Executive Office from Immigration Review about this individual and assigned the matter for investigation. Investigation indicated that the person is a paralegal who provides translation services, tax services and assistance to Spanish speaking clients. She denied giving legal advice or that she engages in the unauthorized practice of law. She is aware that the unauthorized practice of law is a criminal investigation and refers clients to several attorneys when they request legal advice. The attorney to whom she refers matters was also interviewed and confirmed that the paralegal referred Hispanic clients to him and he did not believe that she was engaged in the unauthorized practice of law. I wrote the Baltimore attorney on October 21, 2003 that based on our investigation we were unable to prove that the paralegal was engaged in the unauthorized practice of law. We have had no further complaints about this

individual.

5. In October 2003 we received a complaint from some Montgomery attorneys alleging that a person was engaged in the unauthorized practice of law. The person is a real estate agent. He, after a prior listing agreement had expired, began to assist a seller of property. The complaint alleged that the property could not be sold because of an improperly written contingency provision drafted by the real estate agent. My review of what the real estate agent did was questionable whether that activity constituted the unauthorized practice of law. Since there was no ongoing activity by the real estate agency, I decided that no injunctive action was necessary.
6. A doctor filed a complaint with this office, received November 2003, concerning the alleged unauthorized practice of law by a licensed certified Social Worker-Clinical. The Complainant was homeless giving us only an e-mail address. I advised the Complainant that this office did not prosecute criminal complaints and referred him to the State's Attorney for Montgomery County. I also advised the Complainant that the information he submitted to us about the licensed certified Social Worker-Clinical was not the unauthorized practice of law.
7. We received a complaint from a retired attorney that he saw two signs on Route 40 about a paralegal service advertising for bankruptcies and uncontested divorces. We also received a letter about the same organization from a Family Law Master for the Circuit Court for Harford County. He said that an individual appeared before him for an uncontested divorce without a corroborating witness and had paid the paralegal services \$300.00 for preparing the Complaint and arranging for service of process. The matter was assigned for investigation. The interview with the client who appeared before the Master said that the person from the paralegal service never claimed to be an attorney and made it quite clear that she was not an attorney. Thereafter the investigator found the paralegal had vacated the address and found only an empty apartment. We received a complaint from another individual who had paid the paralegal service \$225.00 to file a bankruptcy case but we could not locate the paralegal. At one point the investigator spoke with the paralegal who indicated she would only agree to be interviewed with an attorney present but thereafter she could not be located.
8. We received a complaint that someone from a Montgomery County law firm may have been engaged in the unauthorized practice. The law firm responded that a person had forged their letterhead without their knowledge and created a collection letter using their letterhead in an attempt to collect a debt. The matter was assigned for investigation and the person was contacted who admitted writing the letter in question and said it was written "in jest." It turns out this person is a debtor to one of law firm's clients. Absent any evidence of any further ongoing activity we closed our file indicating to the law firm that they could turn the matter over to the United

States Attorney's Office for any possibility of violation of the Federal Mail Fraud Statutes.

9. In January 2004 it came to our attention from Nationwide Insurance Company that the person in Hurlock, Maryland was negotiating personal injury claims. When contacted the person denied that he was so engaged and a lawsuit was filed against him in the Circuit for Dorchester County. After a substantial amount of Discovery, on November 4, 2004 a Consent Order of Injunction Against Charles T. Cephas was entered in the Circuit Court for Dorchester County by the Honorable Alfred Truitt, Jr.
10. In January 2004, we received a letter a person may have been engaged in the unauthorized practice of law. The matter was assigned for investigation. It was determined that the person had a non-profit company, which provides paralegal, immigration services. The company is chartered by the State of Maryland as a non-profit and is registered with the Immigration and Naturalization Services, as a non-profit immigration provider. He indicated he did not give the Complainant any legal advice. The company has been in business since 2001 and has assisted numerous clients in obtaining employment and green cards. We were provided with a letter from the Department of Justice, which provided the organization status as an entity on INS as a non-profit immigration provider organization. We wrote the Complainant and advised him that our investigation did not reveal any unauthorized practice of law.
11. On January 27, 2004, we received a complaint that a person in Pasadena, Maryland was engaged in the unauthorized practice of law. We previously had information about this person and on May 20, 2004 this person was arrested and charged with two counts of the unauthorized practice of law and felony theft.
12. We received a complaint about a person practicing law without a license using a power of attorney. That matter was assigned for investigation in March 2004. This person was in the "credit repair organization business." He did not realize he could not go to court on behalf of his clients and promised not to do so. Mr. Grossman decided no further action was necessary by this office.
13. We received a complaint in March 2004 that an attorney who was suspended may have been engaged in the unauthorized practice of law. The matter was transferred to a docketed file and after investigation was dismissed in July 2004.
14. We received a complaint from an attorney in February 2004 that a person called the attorney's client, represented himself as an attorney and said he was going to file a class action lawsuit against him. The Complainant called the individual who indicated he was a "legal scholar" but not an attorney but could not find an address for the scholar. We advised the Complainant to

ignore him. We received no further complaints concerning this person.

15. We received a complaint in February 2004 from an attorney in Kingsville, Maryland that several tax lien foreclosure cases had been filed on behalf of "Taxillc" a nonlawyer. We asked the Complainant in February 2004 to forward copies of the case files so we could investigate the matter. We never heard anything further from the Complainant.
16. In February 2004, we received a complaint that a person in Annapolis, Maryland represented herself as a paralegal to draft wills and living trusts, etc. We filed a lawsuit against the paralegal and on August 25, 2004, obtained an injunction prohibiting her from preparing wills, trust documents, living trusts, powers of attorney or living wills whether or not she is compensated for performing those services or not.
17. We received a complaint from a Montgomery County attorney that a person was engaged in the unauthorized practice of law filing pleadings in which she had admitted that she was not a member of the Maryland bar. A lawsuit was prepared against her and after a trial on December 1, 2004 an injunction was entered by the Honorable D. Warren Donohue enjoining her from preparing any documents or filing any court case in Maryland, assisting in the preparation of documents for filing in any court and performing any other act which constitutes the practice of law.
18. In March 2004, we received a complaint that a person was engaged in the unauthorized practice of law. I notified the Department of Justice Immigration and Review Department about the complaint and assigned the matter for investigation. The Bar Counsel for the Department of Justice wrote to the Complainant advising that they had reviewed the complaint and their data base did not reveal that the Complainant or her husband had ever had an immigration case before the Immigration Court nor the Board of Immigration Appeals and their jurisdiction was limited to someone who had filed an entry of appearance. The investigator went to the respondent's address which was a residential townhouse with no advertisements or signs holding the Respondent to be in any type of business. It was further ascertained that the individual operated something known as "Migration Services" that rented some offices in Bethesda, Maryland. Apparently Migration Services trashed the office and skipped out on the rent. A letter to Respondent from this office received "Return to Sender" with no forwarding information. Therefore we could not investigate this matter further but we have also received no further complaints against this person.
19. We received a complaint from a Prince George's County attorney that an individual was passing himself off as an attorney. The attorney provided us with a business card. The Complainant's client contacted an automobile acquisition consultant to buy a car and gave the consultant \$13,200.00 to acquire a car from the Respondent. They gave the Respondent \$13,200.00 in exchange for a Bill of Sale, but the Respondent did not have title to the

car. The Respondent then tendered a bad check as a return of the \$13,200.00. The attorney indicated they were pursuing their remedies against the parties. Bar Counsel advised the Complainant that it would appear unnecessary to use the resources of this office to pursue the unauthorized practice of law and that the appropriate office to whom the matter should be reported was the State's Attorney's Office for Prince George's County and I asked the Complainant to follow up with this office. The Complainant advised that they spoke to the State's Attorney's Office. The Respondent is on probation and they would be treating this matter as a violation of the probation and charging the Respondent in connection with this matter.

20. In June 2004 we received a complaint from a Washington County attorney about a licensed private investigator. The investigator is no longer with the investigative agency and the owner did not know that he had written a letter on behalf of a former employee of the agency. The investigator indicated that the letter was mistakenly written and he did not intend to act as an attorney. We determined that it was not necessary to take any further investigative action.

OTHER

Over the past years we have investigated many unauthorized practice of law complaints and obtained several injunctions. In some cases, it was not possible to obtain a witness. I have decided not to use a "sting" operation used in discrimination cases, believing this office would violate the Rules of Professional Conduct in doing so.

UPL COMMITTEE FINAL REPORT

ATTACHMENT FOR FOOTNOTE NO. 9

What You Should Know Before Filing an Unauthorized Practice of Law Complaint with the Practice of Law Board

What is the Practice of Law?

The practice of law is the application of legal principles and judgments to a set of facts to resolve a problem or decide how to proceed under the law. Practicing law requires special skill and knowledge. The Washington State Supreme Court sets the standards and authorizes a person who possesses these special skills and knowledge to practice law. The Supreme Court defines the practice of Law in General Rule 24. It is not the unauthorized practice of law for a person to give general information about the law or legal procedures to another person. A person may represent himself or herself in court or any other legal proceeding.

The Supreme Court authorizes lawyers to provide legal services. It also authorizes certain nonlawyers to provide limited legal services. In addition to court rules there are state and federal laws that authorize nonlawyers to provide certain legal and law-related services. There are also court decisions that have held that certain legal and law-related activities by nonlawyers are not the practice of law.

What is the Unauthorized Practice of Law?

A person who provides legal services, who is not a licensed lawyer, or who is not otherwise authorized by law to provide legal services, may be engaging in the Unauthorized Practice of Law (UPL). In Washington UPL is a crime.

UPL is illegal because of the harm people may suffer if they get bad legal advice. People who are

authorized by law to provide legal services, receive ongoing, formal training and education, and are subject to strict standards that protect that public.

How Do I File an Unauthorized Practice of Law Complaint?

You can get an Unauthorized Practice of Law Complaint Form by calling 1-800-945-9722, by downloading it [here](#) or by writing the Practice of Law Board, 2101 Fourth Avenue, Suite 400, Seattle, WA, 98121-2330. When completing the complaint form, try to explain the problem completely and write legibly. The Board should have as much information as possible so it can determine how to move forward on your complaint. When sending your complaint, include copies of any payment, receipts, court papers, documents, letters, or other relevant materials. **OTHER THAN SIGNED COMPLAINT FORMS, PLEASE DO NOT SEND ORIGINAL DOCUMENTS.** The Board will not be able to return original documents to you.

What Happens After I File a Complaint?

The Practice of Law Board reviews every complaint to see if it has the authority to investigate the problem. If it does, the Board will begin to investigate your complaint. In an investigation, you and the person you are complaining about will be interviewed and asked to provide information or documents related to the complaint. The Board may conduct additional investigations as appropriate to completely understand the problem.

What Will It Cost Me?

Nothing. Practice of Law Board members donate their time as voluntary public service and all other costs are paid by the Washington State Bar Association.

What Kinds of Actions Can Be Taken Against Someone Who Is Not Authorized to Provide the Legal Services I Received?

After the Practice of Law Board receives your complaint and determines it has the authority to investigate the complaint, it will begin a formal investigation. As a result of that investigation, there are several things that could happen. The Board may determine that the person you are complaining about did engage in the Unauthorized Practice of Law (UPL) and that the activity is likely to continue. If that happens, the Board may ask the person to agree in writing to stop his or her activities.

If the person does not stop his or her activities, the Board may refer the matter directly to the appropriate law enforcement agency. The board does not have the power to enforce the law on its own.

The Board may dismiss your case if the Board determines:

- The conduct or activity does not involve the unauthorized practice of law;
- The conduct or activity is an isolated incident that will not be repeated and will not result in a likelihood of future public harm;
- The person you complained about is no longer engaged in UPL in Washington; or
- You do not cooperate with the investigation.

The Board may dismiss your complaint for other reasons.

What Can I Expect?

- The Practice of Law Board's prompt attention.
- Every attempt will be made to handle your complaint in a manner that is fair to both you and the person you are complaining about.
- Any information you provide to the Board will be given to the person you are complaining about and may be made public.
- If the Board determines it will investigate this matter, the investigation and resolution of the matter to take some time.
- If the Board declines to investigate this matter, you will be notified.
- The Board will provide you with written notice when it makes its final decision about your complaint.

What Should I Not Expect?

- Your complaint will not be resolved based only on the information you provide. The final decision will be made based upon information received from many sources during the full investigation.
- The Practice of Law Board cannot represent you individually. If you believe you have been harmed by someone else's actions you should contact the police or a lawyer. Time may be important, so do not wait to protect yourself until the Board has finished its investigation.
- The Board cannot recover any money you may have paid or lost.

What Can I Do if I Do Not Like the Result?

If you are not satisfied with Practice of Law Board's final decision, you may petition the Washington State Supreme Court for review.

A Word About Confidentiality and Immunity

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UPL COMMITTEE FINAL REPORT

ATTACHMENT FOR FOOTNOTE NO. 10

**American Bar Association
Standing Committee on Client Protection**

2004 Survey of Unlicensed Practice of Law Committees

INTRODUCTION

Results of the 2004 Unlicensed Practice of Law Survey

The ABA Standing Committee on Client Protection sponsored a survey on unlicensed practice of law during 2004. Questionnaires were sent to all jurisdictions in the United States. The following 36 jurisdictions responded: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming. Several jurisdictions have more than one entity responsible for UPL enforcement.

Current Enforcement Activity

Twenty-three jurisdictions actively enforce UPL regulations, although some jurisdictions indicate that insufficient funding makes enforcement difficult. Ten jurisdictions stated that enforcement is inactive or non-existent. For example, because of limited resources, California reported that it only investigates a few UPL cases per year.

The majority of responding jurisdictions has definitions for both the “practice of law” and “unauthorized practice of law”. “Practice of Law” definitions are established by court rule in thirteen jurisdictions, by statute in five, through case law in six, and through advisory opinions in two jurisdictions. Some jurisdictions have definitions in more than one resource, such as Idaho, which has practice definitions in a court rule, case law, and in an advisory opinion. “Unauthorized practice of law” definitions usually are found either in statutes (seven jurisdictions) or through a court rule (ten jurisdictions).

Enforcement *authority* against UPL is established by court rule in 11 jurisdictions, by statutes in 14 and by a statute and court rule in ten jurisdictions. In many jurisdictions there are two or more authorities authorized to enforce UPL regulations, including states attorneys general, private individuals (PA), state bar committees/counsel, supreme court committees/commissions, and local and county attorneys. UPL enforcement in the majority of the responding jurisdictions is funded through bar association dues or lawyer assessments. Most jurisdictions either do not have a specific annual expenditure for UPL enforcement or were unaware of the exact amount. The Florida Bar leads the country in funding UPL enforcement, spending approximately \$1.4 million annually.

The penalties/sanctions for UPL violations that are available to enforcement authorities include (by number of responding jurisdictions): civil injunctions (30), criminal fines (25), prison sentence (22), civil contempt (20), restitution (15), civil fines (8), and cease and desist orders (3). Most jurisdictions have several remedies.

Fifteen jurisdictions prosecute UPL cases through state bar committees or bar counsel, while other jurisdictions (17) use attorney generals, county attorneys, or district attorneys. Ten jurisdictions have supreme court committees/commissions established to enforce UPL regulations. Many jurisdictions prosecute UPL cases through multiple entities.

Authorized Nonlawyer Practice

Twenty-one jurisdictions authorize nonlawyers to perform some legal services in limited areas. Sixteen permit legal assistants to perform some legal services under the supervision of a lawyer, seven jurisdictions permit nonlawyers to draft legal documents, eight jurisdictions allow real estate agent/brokers to draft documents for property transactions, one allows law students to perform some legal services and at least twelve jurisdictions permit nonlawyers to attend (and in some states *participate* in) administrative proceedings. However, of the jurisdictions that permit nonlawyer practice, fifteen do not regulate or license the nonlawyers.

Disbarred/Suspended Lawyers

The survey also asked questions regarding the law-related activities of disbarred lawyers. Sixteen responding jurisdictions permit disbarred lawyers to engage in law-related activities while disbarred. Usually the disbarred lawyer's conduct is regulated by court rules or case law that define the supervision necessary for the disbarred lawyer working for a lawyer.

The Future: What's on the Horizon?

Nineteen jurisdictions responded that they expect changes in UPL in the coming year. Those jurisdictions contemplate more active enforcement, an increased budget for enforcement, hiring more staff and changes in the procedures for enforcement. Six jurisdictions responded that they are in the process of adopting a definition of the unlicensed practice of law.

Robert D. Weldon, Chair
Standing Committee on Client Protection
December 2004

FINAL REPORT OF THE SUBCOMMITTEE ON THE JUDGES' ROLE IN THE BAR AND WITH COMMUNITIES

Town hall meetings conducted throughout the state of Maryland revealed that attorneys felt a higher degree of professionalism from those judges that participated in the Bar and the community. The Maryland Code of Judicial Conduct sets forth the guidelines for judges to uphold an appearance of dignity and respect in the community not only for themselves but the entire judicial system. The Subcommittee was charged with the duty of analyzing judges' active participation with the Bar and as involved members of their respective communities in light of any limitations on judicial behavior imposed by the Maryland Code of Judicial Conduct.

The Subcommittee began its work with an understanding from meetings with the Bar that judges, who regularly participate in activities of the legal and general communities, demonstrate a higher level of professionalism. Our task was to foster that participation within the confines imposed upon judges by the Canons of the Maryland Code of Judicial Conduct (Maryland Rules 16-813 and 16-814) and other limitations of available time and resources.

The Subcommittee reviewed both state and federal canons as well as other information regarding judges' roles in institutional settings such as teaching or lecturing in law schools, continuing legal education seminars and Bar Association or Inns of Court membership or participation, as well as, non legal community activity, including board membership, religious, political and social events and public speaking engagements in the community. The Subcommittee completed its work and presented its recommendations to the Commission on June 1, 2005. On January 11, 2006 the Commission adopted the report and recommendations with only minor revisions.

The Subcommittee recommended initially that Maryland Rule 16-813 (Canon 4) be amended to explicitly state that judges are encouraged to engage in greater interaction with the bench, Bar and legal and general communities.

The Subcommittee also perceived a need on the part of the judges for both initial and continuing education on where the lines of demarcation lay between permissible and impermissible activity when they move outside of their normal judicial role. To assist judges in that area the Subcommittee recommended that : (1) trial judges be provided recusal rules and be regularly updated on changes in those rules; (2) issues of professionalism be a continuing and prominent part of all judicial training; (3) the Judiciary be polled on the adequacy of the present system of responding to judicial inquiries involving ethical questions; (4) a system be established for a judge to obtain an advisory opinion from the Judicial Ethics Committee; (5) judges be encouraged to write and review their speeches in advance and to avail themselves of the resources of the Court Information office; and, finally, (6) that the awareness of the judges of judicial ethical issues and rules be increased by reinstating the former practice of forwarding a hard copy of each Judicial Ethics Report rather than the current electronic copy, which can easily be overlooked in the sea of emails received by each judge.

Recommendations:

- Provide either a Rules change or a comment to Maryland Rule 16-813 Canon 4 (2005), making more explicit the intent of the Court and the Commission that judges be encouraged to engage in greater interaction between the bench, the Bar and the community.
- Train judges on recusal rules, and update sitting judges on any recusal rule changes.
- Continue to include issues of professionalism in all judicial training sessions.
- Provide a system to obtain advisory opinions from the Judicial Ethics Committee and have the Commission take a poll to assess the adequacy of the present system.
- Encourage judges to prepare what they are going to say by writing it down and reviewing it before any speaking engagement and utilize the services of the Court Information Office.
- Increase judges' awareness of the opinions of the Judicial Ethics Report (e.g. Reinstate mailing to each judge, a hard copy of each Judicial Ethics report.).

Conclusion

The Maryland Code of Judicial Conduct recognizes the importance of the Judiciary not only in the administration of justice but also in the community. It is important for the Judiciary to assume an active role in community functions to promote justice, civility and professionalism, in addition to promoting and upholding rule of law in the community. The Code provides the guidelines for judges to follow to assume an active role in the community without compromising the integrity of the bench. Community involvement in promoting professionalism is strongly encouraged and judges should seize any opportunity to become involved.