



**RAISING THE BAR
FOR PROFESSIONALISM:
Ethics for the City Attorney**

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Raising the Bar for Professionalism

I. Changing Perception of the Legal Profession

A. Rise in Number of Lawyers

When asked to describe lawyers, many people's first response would be that there are too many of them. Despite this common reaction by non-lawyers, the legal market continues to demand new lawyers. Each year the number of students entering law school increases, thereby producing more lawyers once they graduate. In 2005, 42,672 students graduated from ABA accredited law schools. National Association for Legal Career Professionals, *Jobs and JD's: Employment and Salaries of New Law Graduates – Class of 2005*, available at http://www.nalp.org/assets/316_erssselectedfindings05.pdf. This number is only increasing as 48,132 students entered law school in 2005, with over 140,000 in total J.D. enrollment for the year. American Bar Association, *Enrollment and Degrees Awarded 1963-2005*, available at <http://www.abanet.org/legaied/statistics/charts/enrollmentdegreesawarded.pdf>. During the period of 1962-2002, the number of lawyers roughly tripled. The number of lawyers per hundred thousand persons grew from 160.4 in 1970 to 366.0 in 2002. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUDIES 3, (Nov. 2004), available at www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf. With over 1.1 million lawyers in the United States today, there are more lawyers per capita in the United States than any other country. See American Bar Association Market Research Department, *National Lawyer Population by State*, available at www.abanet.org/marketresearch/2005nbrolawyersbystate.pdf.

Despite these vast number of lawyers and lawyer hopefuls, the National Association for Legal Career Professionals found that in the last eight years, the employment market for new law school graduates has remained relatively strong, lingering around an 89% employment rate. National Association for Legal Career Professionals, *Trends in Graduate Employment 1985-2005*, available at <http://www.nalp.org/content/index.php?pid=386>. Between the years 1995 through 2005 the number of law firm job opportunities actually increased by 24.4%, while the population increase nationwide was only 11.3%. National Association for Legal Career Professionals, *Law Firm Job Opportunities and Population Changes, 1995-2005*, available at <http://www.nalp.org/content/index.php?pid=451>.

Ease of obtaining a legal job also seems to be relatively stable. About 67% of jobs for the class of 2004 were obtained before graduation. The two most common means of obtaining a job were on-campus interviewing programs which accounted for 32% of law firm jobs, and student-initiated contact with the employer, which accounted for about 22% of jobs. National Association for Legal Career Professionals, *Market for New Law Graduates Is Steady*, July 15, 2005, available at www.nalp.org/press/details.php?id=55. Of these 2004 graduates, 73% obtained a job which required passing the bar exam, and around 56% of the graduates entered private practice. 27.7% of the graduates took some form of public service employment, with around 13% of that number entering governmental employment, a statistic that has remained relatively constant for the last 20 years. National Association for Legal Career Professionals, *Employment Patterns – 20-Year Trends – 1982 - 2002*, available at www.nalp.org/content/index.php?pid=169.

Another study also seemed to contradict the myth that there are too many lawyers and not enough jobs. The National Association for Legal Career Professionals found that the market for entry-level associates at law firms has had slight decreases but has remained stabilized when looking over a period of years. National Association for Legal Career Professionals, *Entry-Level Hiring at Law Firm Stabilizes – Lateral Hiring Increases*, March 25, 2005, available at www.nalp.org/press/details.php?id=50. At the same time, the demand for more experienced lawyers has actually increased. Lateral hiring increased by almost 8% between 2002 and 2003, resulting in firms hiring in aggregate about as many laterals as entry-level attorneys in 2003. *Id.* Additionally, the U.S. Department of Labor expects employment of lawyers to grow about as fast as the average through the year 2012. U.S. Department of Labor, Bureau of Labor

Statistics, *Occupational Outlook Handbook, 2004-05 Edition, Lawyers*, available at www.bls.gov/oco/ocos053.htm.

Despite these optimistic numbers for attorney employment, the growth in demand for lawyers is somewhat mitigated by competition from other professions. Lawyers are facing increased competition from other professionals, primarily accountants and consultants, and the Internet is making this easier for them to do. Non-lawyers are providing legal and close-to-legal services electronically over the Internet and this will increase. American Bar Association Committee on Research About the Future of the Legal Profession, *Trends Affecting the Legal Profession*, available at http://www.abanet.org/lawfutures/report2001/report_trends.pdf. Many businesses increasingly are using large accounting firms and paralegals to perform some of the same functions that lawyers do. For example, accounting firms may provide employee-benefit counseling, process documents, or handle various other services previously performed by lawyers exclusively. U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2004-05 Edition, Lawyers*, available at www.bls.gov/oco/ocos053.htm.

B. Lawyers' Tarnished Image

These statistics may look good to attorneys, but not necessarily to the public. To the average citizen our society has too many lawyers, but not too many good lawyers. There is a public perception that it is actually the lawyers who are unnecessarily creating the need for more lawyers. A *Chicago Tribune* editorial cartoon showed a bar association speaker announcing, "The Chief justice has predicted that our legal system will crumble under the weight of too much litigation," then asking how the legal profession should respond to this challenge, to which the assembled lawyers roared, "Sue the old buzzard!" See David K. Watkiss, *The Litigation Explosion and the Trial Lawyer's Changing Role*, available at www.iatl.net/deans/83_litigation_1.asp. Americans believe that lawyers' connections with politics, the judiciary, government, big business, and law enforcement enables them not only to manipulate the legal system, but also to shape that very system. American Bar Association, Section of Litigation and Leo J. Shapiro & Assoc., *Public Perceptions of Lawyers Consumer Research Findings*, April 2002, available at www.abanet.org/litigation/lawyers/.

Changing attitudes may be caused by none other than the legal profession itself. "Lawyers did much to create the litigation frenzy now plaguing them, by convincing people that for every setback, someone is to blame. Now, disgruntled clients are blaming them..." Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All — More Attorneys Are Sued By Clients Disgruntled About Advice They Got — Insurance Bills Are Rising*, WALL ST. J., July 11, 1995. These changing attitudes have even affected the once trusted lawyer-client relationship and seen the rise of malpractice suits coming back to haunt the legal profession itself. "The lawyer/client relationship has undergone fundamental change. Once a personal service built on trust, lawyering has become a bottom-line business. Attorneys are more specialized, their dealings with clients are more transient, and their work is scrutinized more closely." *Id.* Further, lawyers are more willing than ever to sue their own. "'You wind up with simple cannibalization,' says Joseph W. Acton, publisher of Lawyers' Liability Review . . . 'Lawyers are eating lawyers to maintain their own standard of living.'" *Id.*

A study by the American Bar Association, Section of Litigation found that most Americans say that lawyers are knowledgeable about the law and can help clients navigate through difficult legal situations, but that they are uncertain how to tell a good lawyer from a bad one, dissatisfied with the way lawyers communicate with them, and confused about how lawyers bill for their services. American Bar Association, Section of Litigation and Leo J. Shapiro & Assoc., *Public Perceptions of Lawyers Consumer Research Findings*, April 2002, available at www.abanet.org/litigation/lawyers/. Based on their personal experiences with lawyers, study participants said that lawyers are greedy, manipulative, and corrupt. Some specific complaints included lawyers misrepresenting their qualifications, over promising a result, charging too much for their services, taking too long to resolve matters, and failing to return client phone calls. *Id.*

Unfortunately our profession has a reputation for being unethical – that our only goal is to make money and look out for ourselves and that we cheat our clients and other attorneys. Much of American society views our legal system as a battlefield where cunning lawyers attempt to manipulate facts, find loopholes in the law, and generally take advantage of all parties to a lawsuit, including their own clients. Lawyers are seen as creating legal battles that often destroy relationships that previously involved fair dealing, trust, and cooperation. Joseph Califano argues,

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

J. Phillip Wogaman, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 827, 837 (April 1999), quoting Joseph A. Califano, Jr., *The Law: Once a Noble Profession*, WASH. POST, Jan. 28, 1996, at C1.

It is not hard to see why the public views attorneys as unethical if one simply looks to what the discovery process has turned into. What was meant as a process to gain valuable information for your client’s case has turned into an avenue to harass your opposing counsel. Texas, for example, has clear rules concerning discovery limits, including: (1) Requests for production must specify the items to be produced or inspected with reasonable particularity. Tex. R. Civ. P. 196.1(b); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989); (2) Discovery may not be used as a fishing expedition. *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996); (3) Requests must be tailored to include only matters relevant to the case. *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998); and (4) Discovery orders "requiring document production from an unreasonably long period or from distant and unrelated locales" are impermissibly overbroad and are subject to correction by mandamus. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003).

Despite these unambiguous rules, lawyers continue to violate them on a daily basis, thereby generating more litigation and distrust from the public. For example, in a recent Texas Court of Appeals case, an insurance company, TIG, argued that discovery requests by a former insured, Beck Co., who was liable in several personal injury suits for asbestos exposure, were overly broad. TIG maintained that Beck’s requests required it to produce every manual, every written guideline, and every written procedure ever generated by TIG between 1911, the date TIG asserts is the date it was founded, and the filing of Beck’s suit in March 2004. TIG also argued that the requests would require it to produce every policy of insurance issued by TIG to Beck between 1960 and 1986, whether the policy was relevant to an asbestos claim or not, and whether or not the policies were related to the underlying asbestos claimants’ suits. *In re TIG Insurance Co.*, 172 S.W.3d 160 (Tex. App.--Beaumont 2005, no pet.). The Beaumont Court of Appeals agreed with TIG that Beck’s discovery requests were overly broad and beyond the scope of discovery under the rules. The court pointed out that it should not be the responsibility of the courts to draft proper discovery, but on the party that drafted it in the first place. *Id.* This case illustrates a central problem within our profession. There are clear sets of rules for lawyers to follow, yet they are not being complied with, resulting in the courts resolving our own disputes, all the while the public further distrusting our ethics.

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

1. “Speaking” objections;
2. Boiler plate objections to interrogatories;
3. Narrow construction of discovery requests;
4. Non-specific claims of “work product” or “privilege”;

5. Instructions not to answer in depositions;
6. Evasive, incomplete answers to discovery requests;
7. Producing “warm bodies” for depositions;
8. Lodging “objections” to Rule 34 Request for Documents which do not exist;
9. Using discovery to punish an adversary;
10. Scheduling harassment. John R. Woodward III, Defense Research Institute, *Discovery and Its Abuses*, FOR THE DEFENSE, December 1995.

Add to that list the following:

1. Sport impeachment - cross-examination designed to slaughter reputation and enhance the lawyer’s ego or wallet;
2. Silent theatrics - overt attempts to distract the court, jury or opponent;
3. Stealth pleadings - filing nuisance suits designed to harass and/or intimidate rather than seek redress for a wrong;
4. Pettifoggery by delay - a pettifogger is by definition “a lawyer whose methods are petty, underhanded or disreputable”;
5. Universal experts - who serve literally as advocates in the litigation process;
6. Bushwhackery - use of arguments and positions wholly unsupported by evidence;
7. Confirm this, you *&#;% - a developing practice of exchanging letters purporting to confirm and memorialize conversations, albeit inaccurately.

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

1. Construe all inquiries as narrowly as possible to limit the useful information that must be divulged;
2. Refuse to respond to written requests that have the slightest ambiguity;
3. Object to all written discovery requests;
4. Conclude that any useful information is protected by the attorney client privilege;
5. Bury any significant material in reams of irrelevant material;
6. Coach witnesses to be unresponsive in depositions;
7. Engage in useless discovery by asking for voluminous products and by taking needlessly long depositions;
8. Never resolve a discovery dispute by agreement;
9. Demand a hearing on all matters;
10. Seek sanctions at every opportunity;
11. Never voluntarily produce or disclose any important material unless ordered to do so; and
12. Always surprise the other side with dates and times for depositions, hearing and trials. Whittenburg and Crowley, *The Ethical Trial Lawyer, Oxymoron or Advocate*, TEX. ASS’N OF DEF. COUNSEL, Sept. 1995. (Reprinted by permission.)

Finally, and perhaps most disturbing of all, is the ever-growing use of lying. Number one on everyone’s hit parade of “lawyer sins” is plain old-fashioned lying. The proposition has been advanced that “lying” is part of the trial lawyer’s job, and that it should be accepted as such. That suggestion has not met with much acceptance and the general consensus seems to be that honesty would better serve trial lawyers in every instance. *Id.*

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

II. Polishing the Image

What are we as a profession to do to change these negative perceptions of attorneys? It is going to take a change from within the profession in order for the public to view us differently. In today's climate of an overabundance of attorneys, only the strong should survive – that is, the best and most ethical lawyers.

A. Follow the Rules

In a 1993 *For the Defense* article, Brooke Wunnicke noted that as of June 1993, most states and the District of Columbia had adopted the American Bar Association's Rules of Professional Conduct. All of these states made some amendments to the Model Rules. In fact, some states substantially amended the Rules by adopting a combination of the former Model Code of Professional Responsibility and the Model Rules. The ABA Model Rules of Professional Conduct begin with a preamble that generally attempts to capture the underlying philosophy and spirit of the Rules, which seems to be a balancing of three factors: (1) zealously representing the client, while (2) dealing honestly and competently with the court and opposing counsel, and (3) seeking generally to further public interest and justice.

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

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

Dondi Props. Corp. v. Commerce Sav. & Loan Ass., 121 F.R.D. 284 (D.C.N.D. Texas Dallas Division, 1988). In *Dondi*, the court went on to adopt “guidelines for professional courtesy” and a “Lawyer's Creed”. The Lawyer's Creed was subsequently adopted by the State of Texas as a mandate for professionalism in November, 1989. The problems enunciated in *Dondi* have continued not only in the Northern District of Texas but throughout the country. The Litigation Section of the American Bar Association felt compelled to draft its own “Guidelines” for the conduct of its members. The first step attorneys can take in polishing their image is to actually follow the rules of professional conduct and encourage other attorneys to do the same. The stereotypical assumption that all lawyers are unethical will remain so long as attorneys continue to violate the rules governing their conduct.

B. Raise the Standards

A prevailing assumption among many lawyers is that the standards set out in the ABA Rules of Professional Conduct and Disciplinary Rules are the standard for “professionalism.” I submit that “professionalism” mandates a higher ethical standard than merely complying with those codes and rules. We need to raise the bar for professionalism and ensure that high standards are being met by all attorneys. With the number of attorneys up and the standards raised for law school admissions, our profession has the opportunity to raise the bar for what is required of an attorney both ethically and performance-wise. The question, then, is: “What do we mean by professionalism?” Its characteristics have been defined to include:

1. A commitment to high, ethical standards;
2. A prevailing attitude of altruism - unselfish concern for the welfare of others;
3. Mandatory educational preparation and training;
4. Mandatory continuing education;
5. A formal association or society;
6. Independence; and, with reservations,
7. Public recognition as a profession.

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

C. Role Models

Lawyers can change their negative image by becoming role models for other lawyers through their actions and commitment to professionalism. As government attorneys, we have an even greater opportunity to be role models because we have the unique position of representing governmental institutions. Citizens believe in their government and hold it to a higher standard. The image of lawyers is not just a matter of professional or personal pride. It affects the public's belief in our justice system, and ultimately, their faith in our democracy. American Bar Association, Section of Litigation and Leo J. Shapiro & Assoc., *Public Perceptions of Lawyers Consumer Research Findings*, April 2002, available at www.abanet.org/litigation/lawyers/.

Lawyers should aspire to be public citizens, that is to strive to make a difference in the world by promoting the public interest alongside the interests of their clients. Good lawyers should take the time to educate their clients on how their cases fit into the larger picture of our society by explaining the nature of the legal process and the reasons behind the complexity and uncertainty of our practice. Clients should also understand the competing social interests that are involved and how they relate to their particular situations and needs. Such lawyers will be successful because the community will recognize that they have the public interest in mind. Such lawyers speak the truth to clients and should be taken seriously when advocating a position in the affairs of the community. We should avoid being the lawyer who takes a highly partisan view of the client's case, who explains all adversity as due to corruption or stupidity, who degrades the legal system, and who generally takes the side of the client in all matters versus "them," whoever they are. Robert E. Scott, *The Lawyer as Public Citizen*, 31 TOLEDO LAW REV. 4 (Summer 2000), available at www.law.virginia.edu/home2002/html/prospectives/lawyer.htm.

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

Justice Thomas Reavley, *My Faith and My Work*, 27 TEX. TECH L. REV. 1295, 1299 (1997). Clients may very well be amid the conflict in creating ethical dilemmas for attorneys. It may often be the client who wishes to push the lawyer to walk a thin line between playing hardball and practicing unethically. Counsel may often find it necessary to inform the client about rules of ethics and professionalism. An attorney is obligated to undertake and perform the representation of a client in strict compliance with standards of legal professionalism. A client's wishes or expectations must not be allowed to detract from the attorney's adherence to ethical and professional standards. Task Force on Selection and Performance

of Retained Counsel - ABA Tort and Insurance Practice Section, *Guidelines for Selection and Performance of Retained Counsel*, reprinted in, DEFENSE RESEARCH INSTITUTE, *Insurer's Duties: A Coverage Perspective*, Vol. 3, at 81. At the end of the day, good attorneys should see how their work fits into the big picture, and whether their actions are those of a role model or those of a greedy, unethical manipulator.

D. Alternatives to Lawsuits

Mediation, arbitration, settlements, and preventative legal work are alternatives that lawyers should seriously consider. The growing number of proponents of non-judicial dispute resolution believe that society must develop ways of reducing adversary trials, the archaic confrontation of lawyers as gladiators, and the dollars, talent, and energy wasted in preparing and conducting trials. They want to redirect and moderate adversarial skills into a less rule-ridden and more cost-effective system. There is an argument that trial practice is inherently inefficient and that selective use of alternatives will increase the productivity and social utility of lawyers. David K. Watkiss, *The Litigation Explosion and the Trial Lawyer's Changing Role*, available at www.iatl.net/deans/83_litigation_1.asp.

The issue of alternative dispute resolution (A.D.R.), in the form of mediation, arbitration or another form, is at the forefront of all discussions relating to litigation alternatives and cost containment. It is well-known that the costs of litigation are continuing to escalate at an alarming rate, and statistics reflect that only two percent of lawsuits filed ever proceed to trial. In addition, my experience indicates that jurors' perceptions of government and governmental employees are less than sympathetic. Thus, this author strongly contemplates and recommends that some form of A.D.R. must be considered in all cases and at a very early stage. Experience indicates that A.D.R. is an inexpensive and effective discovery tool to both analyze the possibility of early resolution, and to assure that the parties take a realistic look at the risks and real costs, both economic and otherwise, of litigation. A.D.R. also provides an opportunity to make direct contact with the adverse party on an informal basis in order to determine how dedicated that party is to pursuing the case, or whether perhaps the case is primarily motivated by another entity, individual, or the attorney.

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

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

1. The (Ideal) Mediation Process

- (a) Selecting the Mediator
- (b) Mediation order
- (c) Pre-mediation Submission
- (d) Mediator Introduction
- (e) Lawyers' Opening Statements
- (f) Collective Session/Brainstorming
- (g) Separate Caucuses
- (h) Possible Second Joint Session
- (i) Possible Lawyers' Caucuses Drafting the Settlement Agreement

2. Selecting the Mediator

- (a) Extent of litigation experience?
- (b) Practical experience in specialized litigation matters?

- (c) Extent of mediation/arbitration training?
- (d) Actual mediation experience – resume
- (e) Use of case evaluation/separate caucus methodology
- (f) Fee structure?
- (g) Will he provide a neutral setting for mediation?
- (h) Requires pre-mediation submissions?
- (i) Encourages lawyer participation?
- (j) Adequate time to mediate?
- (k) Conflicts?

3. Premediation Submission

- (a) Concise statement of issues and positions
- (b) Identify strengths and possible weaknesses
- (c) Provide a chronology of facts and case development
- (d) Outline negotiations and proposals to date
- (e) Identify who will be present at the mediation
- (f) Provide copies of current pleadings
- (g) Provide copies of pertinent appellate decisions
- (h) Provide copies of key articles, critical excerpts from depositions, copies of key medical or expert witness reports
- (i) Tab and index submission
- (j) **MARK CONFIDENTIAL**

4. Client Preparation

- (a) Explain mediation process (see 1 above)
- (b) Explain mediator's role
- (c) Provide copy of premediation submission
- (d) Explain your role at mediation and how it will be different
- (e) Explain that client will actively participate
- (f) Explain that mediator or anyone else may ask client questions
- (g) Anticipate unrealistic negotiating positions
- (h) Anticipate sensitive issues and formulate strategies to deal with such issues
- (i) Provide client with background of mediator
- (j) Objectively evaluate strengths and weaknesses of case with client
- (k) Stress patience, flexibility, open-mindedness, listening
- (l) Emphasize polite, constructive approach.
- (m) Discuss authority issues

5. Court-Ordered Mediation

- (a) Obtain written order prior to session
- (b) Include confidentiality reference?
- (c) Authority (e.g., mediation statute)
- (d) Include identity of mediator
- (e) Include date, place, and time for mediation
- (f) Include allocation of mediation costs
- (g) Include non-binding

6. Who Should Attend/Authority to Settle

- (a) Counsel and parties should attend
- (b) Entity representative should be designated in advance
- (c) Insurance or self-insurance representative with full authority to settle
- (d) Should logistical or economic factors make it impractical to have representative with full authority in attendance:

- (e) Discuss with opposing counsel
- (f) Have local representative with limited authority attend
- (g) Agree that representative with full authority shall be available by telephone during the session
- (h) Reduce agreement to writing
- (i) In exceptional cases, a critical expert witness may attend
- (j) In cases in which a structured settlement is anticipated, the structure specialists should attend or be available by phone.

7. Lawyer's Role at Mediation

- (a) Different persuasion and negotiating skills than in trial
- (b) Rare opportunity to communicate directly with other party
- (c) Should not cross-examine other party
- (d) Should not permit client to be cross-examined
- (e) Should not "showboat" for his client or other side
- (f) Emphasize good faith
- (g) Be open-minded and reasonable
- (h) Be firm, but diplomatic
- (i) **LISTEN!**

8. Lawyer's Opening Statement

- (a) Introduce yourself and your clients
- (b) Acknowledge belief in the mediation process
- (c) Emphasize you and your client are present in good faith
- (d) Emphasize you are prepared to listen and work through problems
- (e) Emphasize your belief that a resolution will be in everyone's best interest
- (f) If strong feelings or emotions are present, acknowledge that you are aware that such feelings exist and that it is not your intention or desire to embarrass, humiliate, or inflame the other party
- (g) If the other side is injured or a death has occurred, express your sentiment
- (h) Explain your role on behalf of your client
- (i) Explain to the other party that you have thoroughly and objectively evaluated the case
- (j) Outline to the other party your position, the basis of your position, and the fact that you have a good faith disagreement on such issues
- (k) Close by emphasizing your willingness to listen, your willingness to work through problems, and your hope that with effort and patience on both sides an agreement may be reached
- (l) Do not discuss money in your opening statement
- (m) Do not personalize matters in your opening statement
- (n) Avoid absolutes, i.e., "won't", "never", etc.

9. Things Not to Do During Mediation

- (a) Never discuss money in the presence of the other party. Communicate offers through the mediator in the separate caucus phase of the mediation
- (b) Do not refer to the other party by first name unless you have asked for permission to do so
- (c) Do not insult or criticize the mediator ... especially in the other side's presence
- (d) Anticipate volatile issues
- (e) Do not make comments to the other party calculated to trigger strong emotional responses
- (f) Do not undermine the other party's or other lawyer's dignity
- (g) Do not engage in theatrics; i.e., getting up to leave, etc.

- 10. Collective Session (After Opening Statements by Lawyers)**
- (a) Have your client prepared to respond to mediator's questions
 - (b) Have your client prepared to discuss his feelings
 - (c) Have your client prepared to speak in constructive, respectful terms
 - (d) Have your client prepared to express hope that the session will produce an agreement
 - (e) Have your client prepared to express his willingness to listen and work through problems
 - (f) Be prepared to exchange material which is otherwise discoverable
- 11. Separate Caucuses**
- (a) Separate rooms and caucuses privately with mediator
 - (b) All communications are confidential (except what the mediator is authorized to disclose)
 - (c) Negotiating process typically begins after second round of caucuses
 - (d) In the initial caucus, the mediator is attempting the following:
 - (1) Getting to better know the parties (bonding)
 - (2) Assessing who is the decision-maker (or makers)
 - (3) Assessing the personality/negotiating styles of the parties
 - (4) Mining for economic and non-economic issues
 - (5) Permitting the expression of strong feelings
 - (6) Identifying sensitive issues
 - (e) In the second caucus, the mediator is attempting the following:
 - (1) Leading the parties in an objective evaluation of their case
 - (2) Having the parties identify the strengths of their case on their own
 - (3) Having the parties identify the weaknesses of their case on their own
 - (4) Playing devil's advocate with the parties and assisting the parties in understanding or acknowledging possible weaknesses that the parties may not have listed on their own.
 - (f) In the third caucus and thereafter, the mediator is attempting the following:
 - (1) To get the parties "to dance", i.e., begin the negotiations
 - (2) To motivate the parties to negotiate reasonably and constructively
 - (3) To work through impasses
 - (4) To persistently force the parties to look objectively at their case
 - (5) To communicate proposals and messages; "shuttle diplomat"
 - (6) To elect to reconvene the parties if appropriate to work through particular problems
 - (7) To hold lawyers caucuses if special legal issues arise out of separate caucus
 - (8) To minimize negative reactions to proposals, to identify interests, and to keep the parties working through impasses
- 12. Memorandum of Agreement**
- (a) Not the final settlement documents, but should clearly and specifically outline all terms of the agreement
 - (b) Agreement should be jointly drafted by all counsel so that it is not "one side's" agreement and so that the written agreement clearly reflects the agreement reached
 - (c) Should be signed by all counsel and parties
 - (d) All counsel and parties should receive copies of the fully executed agreement

13. Impasses

- (a) Present, often many times, in every mediation
- (b) Often reflects limited or different negotiating styles of parties
- (c) Ask “why questions” to overcome impasses; i.e., explain the basis of the proposal and the needs that are reflected in the proposal
- (d) Encourage the other party to categorize needs
- (e) If at an impasse, forge a new and agreed negotiating pattern
- (f) Re-visit the other side’s weaknesses with the mediator
- (g) Determine if noneconomic interests, if met, will help resolve the impasse
- (h) Candidly express frustration and concern regarding impasse to the mediator

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

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

E. Promote Public Service and Pro Bono Work

A great way to improve the image of attorneys and to make us a better profession as a whole is to get involved in public service and pro bono work. This is not limited to providing legal services for the indigent, but can also include work to make the legal system itself a better profession. Lawyers can contribute by giving their time and expertise to improve the practice of law. A great way to implement this is through seminars where the attorney is not remunerated. For example, the Center for International Legal Studies, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, offers roughly 70 short term visiting professorships to senior lawyers who have significant practice experience in the area they propose to lecture. The purpose of the seminars is to introduce particular areas of American law to law students in Eastern Europe. *See* Center for International Legal Studies, *Faculty Appointments for Senior Lawyers*, available at www.cils2.org/. Participating in a program of this nature is just one example of service by lawyers that reflect positively on our profession.

Lawyers also have a unique opportunity to serve in the aftermath of tragedy. Public confidence in the courts and the legal system increased after September 11. During the months after the terrorist attacks, lawyers were out in front, providing free legal help to thousands of victims and their families and military personnel, advising our government leaders on the myriad legal issues arising from the disaster, and speaking out in their communities for tolerance and understanding.

We had a similar occasion to step up and be leaders in the wake of Hurricanes Katrina and Rita. Lawyers helped by donating their time, money, and expertise. People affected by these hurricanes needed legal help on matters including housing, insurance, lost documents, public benefits, unemployment assistance, tax issues, and probate matters. The American Bar Association (ABA) committed itself to helping individual hurricane victims, small businesses, lawyers, law schools, students, military personnel and others as they coped with the natural disaster. The ABA website made it easy for lawyers to volunteer to provide legal assistance, make donations for disaster relief, and otherwise assist the victims of the hurricanes. *See* American Bar Association, *Hurricane Katrina Disaster Resources*, available at www.abanet.org/katrina/. The ABA also provided resources on rebuilding a law practice and disaster recovery plans for members directly impacted by the disasters.

Lawyers and lawyer organizations can follow the example of the ABA's post-Katrina efforts to help those in need by providing similar assistance whenever disaster or tragedy strikes in their communities. Lawyers possess skills that are particularly valuable in the aftermath of such events and they can make a tremendous difference in the lives of many. Recognizing this opportunity, lawyers should act as leaders to their communities and seek ways to help. Similarly, lawyers should not perceive disasters as an occasion to bring frivolous lawsuits that only serve to waste time and resources. As lawyers, we need to remember that we should not look for someone to sue just because something went wrong. Americans already believe that lawyers bring too many frivolous lawsuits, so here is an opportunity to refuse to bring groundless lawsuits, and focus instead on what we can do to help.

F. Strong Bar Associations

Americans believe that lawyers do a poor job of policing themselves. Bar associations are not viewed as protectors of the public or the public interest, but as clubs to protect lawyers. American Bar Association, Section of Litigation and Leo J. Shapiro & Assoc., *Public Perceptions of Lawyers Consumer Research Findings*, April 2002, available at www.abanet.org/litigation/lawyers/. Many people feel that they have no recourse if their attorney fails to properly represent them, that the ABA is almost like a rubber stamp and an attorney has to do something drastically bad to be disbarred. *Id.*

Having strong bar associations will improve our profession and in turn our reputation. Bar associations can promote the profession through public education, continuing education of lawyers, policing the profession more aggressively and promoting the good things that lawyers already do and are known for. Some examples of things bar associations can do include educating consumers about handling common legal problems, educating lawyers about maintaining good client relationships, supporting and promoting safeguards for consumers and enforcing disciplinary rules, encouraging public service activities of lawyers, and improving public relations and public outreach. *Id.*

Confidence in and approval of attorneys can greatly increase by having a more open and active lawyer disciplinary system through bar associations. If people know that a lawyer will be sanctioned when he or she has violated a rule, then the bad attorneys are less likely to give the profession as a whole a bad name.

Not only is it important for bar associations to discipline lawyers, but it is vital that they defend the profession when it is unjustifiably attacked and correct misstatements and inaccuracies regarding lawyers, the legal system, and judges. During these times of attacks against lawyers, judges, and the legal system in the media, political campaigns, and in public and political discourse, it is important that bar associations, in particular, the American Bar Association, affirm its support for the independence of the judiciary and the role of lawyers in the justice system. As the leader of lawyers in this country, the ABA must continue its vital role as the voice of the legal profession that denounces unwarranted attacks on the judiciary system. The ABA can do this by increasing its work with organized bars in educating the public regarding the proper role of lawyers and the judiciary in our system of government. *See generally* Statement of Robert J. Grey, Jr. President, American Bar Association, *Attacks On the Judiciary in the Terri Schiavo Case*, March 25, 2005.

G. Conclusion

Despite the vast number of attorneys in the United States, our numbers are still rising as are the number of legal issues. This makes it all the more critical to ensure that the reputation of attorneys is one of intelligence, high ethical standards, and service-oriented, rather than unethical, manipulating, and greedy. If lawyers are going to regain respect from the public, whether they are working for a corporation, the government, or a single-person client, they must meet and exceed what is expected of them ethically and professionally, and look beyond their individual client to see the big picture and understand the ramifications of their actions in society.

III. Other Issues Facing the City Attorney

A. Records Retention Schedules

Records retention is an important issue for local governments and city attorneys. Efficient management of government records helps to ensure “effective and economic” governmental operation and provides citizens with “resources concerning their history and to document their rights of citizenship and property.” TEX. LOC. GOV’T CODE ANN. § 201.002 (1)-(2) (Vernon 2005). The Local Government Records Act sets guidelines for retention and destruction of local government records and mandates that local governments establish a retention schedule approved by the Texas State Library and Archives Commission (TSLAC). TEX. LOC. GOV’T CODE ANN. § 201-205 (Vernon 2005); *see also* TSLAC Records Management Publications, *available at* <http://www.tsl.state.tx.us/slr/recordspubs/index.html>. The Act defines “local government record” as “any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business.” TEX. LOC. GOV’T CODE ANN. § 201.003 (8) (Vernon 2005).

This broad definition encompasses documents used and collected in the process of legal representation. Thus, it is imperative for city attorneys to be familiar with their individual municipality’s record retention schedule and to understand how to follow it. This is particularly essential in the aftermath of litigation. Boxes and boxes of documents accumulate during the course of a lawsuit. City attorneys should work to keep those documents organized so as to make compliance with the retention schedule as efficient and cost-effective as possible. If possible, city attorneys should consult with the city’s records manager or other such responsible party at the outset of any significant legal matter. Doing so could save a great deal of time and frustration later.

B. Private Attorney Access to City Officials

As a city attorney, you represent the governmental entity itself, not the mayor or other city officials or employees. However, when city officials and employees are closely involved in a legal matter concerning the city, the city attorney may represent them as well. *See* Rosemary M. Marin and Sheri Crosby, *And Lead Us Not Into Temptation...: Communicating with a Corporation or Governmental Entity That Is Represented By Counsel*, IN BRIEF: A FORUM FOR TEXAS WOMEN LAWYERS (Sept. 2003), *available at* <http://www.texaswomenlawyers.org/NL-Sep03.pdf>. This situation is similar to that of a corporation or other organization in which managers or employees are intimately engaged in the matter and thus are closely identified with the interests of the entity. *See id.*

When city officials are closely involved in a legal matter such that the city attorney’s representation extends to them, the city attorney should remind city officials as well as opposing counsel of Texas Rule of Professional Conduct 4.02. “Under Rule 4.02 ..., during the course of the representation of a client, a lawyer cannot communicate or cause another to communicate on the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer without consent of opposing counsel if (1) the employee is an officer or managing employee or (2) the conduct (act or omission) of the employee in connection with the subject of the representation may make the organization or entity vicariously liable for such act or omission.” *Id.*; *see also* TEX. R. PROF’L CONDUCT 4.02(a), (c), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005); Tex. Comm. on Prof’l Ethics, Op. 474, 55 TEX. B.J. 882 (1992). In other words, opposing counsel must go through the city attorney before attempting communication with a city official or employee about the subject of the legal matter. Because city officials are elected representatives, there exists a common misunderstanding among lawyers that they may bypass the city attorney and speak directly to city officials about legal matters. Attorneys who do this, however, violate Rule 4.02 and are subject to discipline.

Rule 4.02 is only implicated when the communication is related to the subject of the litigation or legal matter at issue. *Id.* Attorneys may speak with city officials or employees about matters other than their client's case without getting the city attorney's approval. *Id.* Rule 4.02 also does not apply to communications with former city officials or employees, or to current non-managerial employees not involved in the case. *Id.*

Additionally, if a city official or employee has retained personal legal counsel for the case, opposing counsel may contact that representative directly without getting consent from the city attorney. *Id.* Further, if city officials or employees seek advice about the matter from an outside lawyer, that lawyer may give such advice without getting consent of the city attorney. *Id.*; TEX. R. PROF'L CONDUCT 4.02(d).