

Promoting Professionalism

ABA Programs,
Plans, and Strategies

No element of professionalism is more important than ethics. There is no area in which the American Bar Association has maintained greater continuing leadership than in the ethics of legal practice.

The ethical integrity of the lawyer must be our profession's hallmark and call for public confidence. Ethics is not just a set of rules. It is a value system, a mind-set, a responsibility that must remain constant in the lawyer's consciousness.

The ABA is the preeminent organization in the field of legal ethics. It develops the model rules for lawyers and judges upon which each state's rules are based. It proposes modifications to the rules as the need arises. It issues formal ethics opinions that interpret the Model Rules.

The ABA aims to assist every lawyer in America maintain the highest standards of ethics and integrity and we focus on ensuring that a variety of means are available to lawyers to aid them in this goal. The ABA's programs, products, and publications serving that end are described here.

I. ABA MODEL RULES OF PROFESSIONAL CONDUCT

The American Bar Association takes ethics seriously.

From the *Canons of Professional Ethics* (1908) and the *Model Code of Professional Responsibility* (1969) to the *Model Rules of Professional Conduct* (1983), ethical standards promulgated by the ABA have been adopted by 42 jurisdictions. The ABA is generally acknowledged as the national leader for discussing, drafting, and promulgating rules governing lawyer conduct.

In addition, the *ABA Model Code of Judicial Conduct*, promulgated in 1990, provides standards for the professional conduct of judges.

The ABA Standing Committee on Ethics and Professional Responsibility is responsible for the following:

- Providing interpretations of the model legal and judicial ethics rules by periodically issuing formal ethics opinions. These opinions are distributed widely to subscribers of *Recent Ethics Opinions*; summarized in the *ABA Journal*; reprinted in the *ABA/BNA Lawyers' Manual on Professional Conduct*; placed on-line in West's database on Legal Ethics and Professional Responsibility.
- Conducting ongoing review of the present Rules and proposing revisions from time to time for adoption by the ABA.
- Supervising the collection and analysis of current case law in the area of judicial ethics and works with the ABA Judges Advisory Committee and the Judicial Division on these issues.
- Developing programs on legal and judicial ethics to increase lawyers' and judges' awareness of the ABA standards and their proper interpretation.

II. DIRECT ETHICAL ASSISTANCE TO MEMBERS

A. *ETHICSearch*

The ABA provides direct service to members on issues of professional responsibility through a program called *ETHICSearch*. This service assists lawyers and judges to identify, analyze, and solve professional ethical problems. The ABA Standing Committee on Ethics and Professional Responsibility administers this program.

ETHICSearch not only helps identify the rules applicable to a situation, but locates citations to pertinent ethics opinions and case law, and obtain information on ethics research methodology and resources. This service is ordinarily supplied at no charge.

If a lawyer has a novel problem that has not been previously addressed by *ETHICSearch*, a staff lawyer can research the matter for a nominal hourly rate. Such problems often become the subject of formal opinions of the Ethics Committee.

ETHICSearch lawyers respond to more than 3,000 inquiries annually. In addition, the Committee's Ethics Counsel responds to more than 500 media inquiries a year concerning ABA policies on ethics.

III. LEADERSHIP INVOLVEMENT

The ABA Center for Professional Responsibility coordinates committees comprised of national leaders of the profession. In this way, the nation's most preeminent lawyers have continuing involvement in issues of professional ethics and integrity. The Center also serves as a clearinghouse, research center, and publishing arm.

The constituent entities of the Center's Governing Committee consist of:

- The Standing Committees on Client Protection, Ethics, and Professional Responsibility
- The Standing Committee on Lawyer Competence
- The Standing Committee on Professional Discipline
- The Standing Committee on Professionalism
- The Commission on Evaluation of the Rules of Professional Conduct
- The Commission on Lawyer Assistance Programs
- The Editorial Board of the *ABA/BNA Lawyers' Manual on Professional Conduct*
- The Center Committees on Conference Planning, Membership, and Publications
- The Section/Division Committee on Professionalism and Ethics.

This year, the ABA Board of Governors established a new Governing Committee for the Center for Professional Responsibility to direct the Center's activities, establish priorities, and increase emphasis on the ABA's initiatives in setting and achieving high standards of integrity and ethical conduct for all lawyers. The fourteen-member Governing Committee oversees all ABA policies in the areas of legal ethics, professional regulation, professionalism, competence, and client protection. It ensures that national initiatives in professional responsibility utilize the vast resources of the ABA.

IV. ETHICS 2000

Ethical rules do not remain static. Our current Model Rules are good but cannot be allowed to become frozen in time. Twenty years have passed since the ABA last convened a commission to examine the ethics rules of the profession. Since then, there have been many developments in the profession and challenges to the existing rules. Among these are: the prospective adoption of the American Law Institute's *Restatement of the Law Governing Lawyers*; variances on the Model Rules by some of the 42 jurisdictions that adopted the ABA model; and new issues such as technology, branching of law firms, and globalization arising from the complexity of modern legal practice.

Accordingly, the ABA formed a new thirteen-member Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000).

The Commission members reflect the diversity of the bar and include representatives from the bar, judiciary, law schools, public sector, corporate sector, civil and criminal practice, and the public. Through a broad advisory committee, the Commission will receive input from all ABA entities, from affiliated organizations, and from the public.

In particular, the Commission will:

- examine and evaluate the ABA Model Rules of Professional Conduct and rules governing professional conduct in state and federal jurisdictions;
- conduct original research, surveys, hearings; and
- formulate recommendations for revisions, clarifications, additions, amplifications, and more effective implementation of the rules.

Additionally, it is expected that the Commission will engender a dialogue within the legal profession about ethics issues arising from the variety and complexity of law practice in a new age. There are profound issues to be examined. Some contend that existing rules enable lawyers to maximize wealth and limit competition, but fail to serve consumers of legal services or to advance the administration of justice. Do the rules encompass the duty of lawyers to clients and civil society at large, or are they only a clinical catalogue of those things a lawyer must not do? How do personal morality, the morality of a particular segment of practice or culture, and legal rules interrelate? Are the rules viewed as a ceiling rather than as a floor? Do the rules accomplish moral suasion?

An ongoing goal should be to stimulate conduct that reflects high moral ground.

choices and how lawyers and law firm leadership handle problematic conduct. As part of the examination, prominent social scientists conducted interviews with large firm attorneys, in-house counsel, and judges. The Task Force will issue its report in 1998 and recommend methods for addressing these problems.

The Section of Litigation produced *Litigators Under Fire*, a program cosponsored with ALI-ABA, which deals with recurring issues of professional responsibility for litigators. The Section will cosponsor, with Fordham University, a conference on *The Delivery of Legal Services to Low-Income Clients: Professional and Ethical Issues*, in the winter of 1998 in New York.

O. Tort and Insurance Practice and Young Lawyers Professionalism Project

The Section of Tort and Insurance Practice and the Young Lawyers Division will focus on professionalism at a joint Spring Conference in 1998. The Conference will introduce a new professionalism project consisting of materials and videotaped "real life" hypothetical situations addressing issues lawyers face routinely. Under the guidance of experienced lawyers and judges, the workshop participants will discuss the rules governing such situations and also will explore practical methods of responding professionally to them. The Section plans to videotape these hypothetical situations and offer them as teaching tools to law schools, law firms, and state and local bar associations.

One of the obligations . . . is to monitor our ethical rules and . . . discipline those who fail to comply.

In addition, at the 1998 ABA Annual Meeting in Toronto, the Section of Tort and Insurance Practice, cosponsored by the Young Lawyers Division, is presenting a program building on the professionalism project introduced at the joint Spring Conference. This presentation will include videotaped interviews by nationally known journalists discussing their views on lawyers' behavior and how that behavior should be modified. A panel of state and federal judges and lawyers will then discuss the public's perception of lawyers and how that perception can be affected through education on the proper professional role of lawyers.

VII. PROFESSIONAL DISCIPLINE

One of the obligations of our profession is to monitor our ethical rules and appropriately discipline those who fail to comply with them. This is done on a state-by-state basis. The ABA, through its Standing Committee on Professional Discipline, assists the judiciary and the bar in developing, coordinating, and strengthening disciplinary enforcement throughout the United States. The ABA has played a substantial role in improving disciplinary enforcement since the 1970 report of the Committee chaired by former Supreme Court Justice Tom Clark.

A. Model Rules

The Discipline Committee develops model rules, codes, and texts pertaining to disciplinary enforcement, including the ABA *Model Rules for Lawyer Disciplinary Enforcement (MRLDE)*, adopted by the ABA in 1985. The MRLDE are recommendations formulated by the Discipline Committee for use by states in drafting, updating, and researching lawyer disciplinary rules and procedures.

In 1992, the ABA adopted the Report of the Commission on Evaluation of Disciplinary Enforcement (the McKay Report), published as *Lawyer Regulation for a New Century*, and revised the MRLDE accordingly. Key recommendations of that report endorsed client protection mechanisms, dispute resolution, lawyers' professional liability, professionalism considerations, lawyer competence, lawyer impairment, and alternatives to discipline.

In 1996, the ABA adopted amendments to the MRLDE, adding an alternatives to discipline program. Implementation of ABA policy in this area is encouraged through the Committee's programs and publications. The Committee also provides research and technical assistance to disciplinary counsel and state bars and educates lawyers, judges, and the public about disciplinary practice.

B. State Lawyer and Judicial Discipline System Consultations

Since 1980, the Discipline Committee, through its program of state lawyer discipline system consultations, has assisted in the evaluation and improvement of disciplinary systems in 37 states.

Under this program, state disciplinary systems are examined by a team consisting of one or more Committee members, an experienced disciplinary counsel from another jurisdiction, and other lawyers experienced in the field of lawyer discipline. Upon invitation by a state's highest court, the team visits the state and conducts interviews with disciplinary staff, hearing committee members, bar officials, complainants, respondents' counsel, members of the judiciary, and others who have had contact with or a role in the state's disciplinary system. The team also reviews relevant court rules, reports, and statistics and examines sample disciplinary files. The team then prepares a comprehensive report with recommendations, which is reviewed by the full Discipline Committee. Upon approval by the Committee, the final report is submitted to the court on a confidential basis. The Committee also makes available follow-up assistance in implementing the recommendations in the report.

The Committee also offers a consultation program for state judicial disciplinary systems. These are geared specifically to a state's judicial discipline system, and the visiting team of Committee members includes a judicial disciplinary counsel and others experienced in the field of judicial discipline. The Committee uses the ABA *Model Rules for Judicial Disciplinary Enforcement* (MRJDE) as a guideline. The MRJDE is a balance of competing interests: the rights of judges to fair treatment; judges' interest in confidentiality; the public's concerns that complaints be given serious consideration; the interest in holding judges to high standards; and the interest in prompt and fair resolution of complaints.

The evaluation programs have a symbiotic effect. The consultations with states enable the Committee to offer model disciplinary procedures adopted by the ABA, while learning of other effective procedural mechanisms to be considered for incorporation into current ABA models.

C. Judicial Education

The Discipline Committee's *Judicial Education Project* offers educational programs for the judiciary on the role of judges in reporting lawyer misconduct. Because judges are in a unique position to observe in-court violations of ethical standards, it is important that the judiciary remain cognizant of extrajudicial measures available for addressing misconduct. Since 1980, Committee

members have conducted some 60 programs in 31 jurisdictions to educate judges about their authority and obligation to uphold the standards of the legal profession.

The primary program utilized by the Committee is entitled *The Judicial Response to Misconduct*. *The Judicial Response to Misconduct Program* consists of a comprehensive handbook, a videotape and discussion guide for judicial gatherings, and memoranda and case digests surveying recent developments. The handbook also provides judges with guidance regarding the sanctioning and reporting of misconduct. The videotape uses vignettes to demonstrate when reporting of ethical missteps by lawyers and judges to the appropriate authorities is warranted.

D. National Lawyer Regulatory Data Bank

Established in 1968, the ABA National Lawyer Regulatory Data Bank is the only centralized, computer-based repository of information concerning public disciplinary actions regarding lawyers. Although information concerning sanctions that are matters of public record is theoretically available from each jurisdiction, it is difficult to gather individual court records. By securing the cooperation of disciplinary agencies in forwarding to the Data Bank orders imposing public discipline, the Discipline Committee offers a valuable service to the profession and the public. All states, many federal courts, and some federal agencies now provide disciplinary information to the Data Bank.

**The ABA
Standards
for Imposing
Lawyer
Sanctions . . .
help achieve
. . . consistency
necessary for
fairness . . . in
the imposition
of lawyer
discipline.**

The Data Bank service is particularly helpful to state disciplinary authorities and bar admissions agencies in facilitating reciprocal discipline and preventing the admission of lawyers who have been disciplined elsewhere. West Publishing Company is making the Data Bank available to bar admissions and disciplinary agencies on a private file on Westlaw.

E. Standards for Imposing Lawyer Sanctions

The Discipline Committee also publishes the *ABA Standards for Imposing Lawyer Sanctions*, developed by a committee of lawyers and judges. They were approved by the ABA in 1986 and amended in 1992. These *Standards* categorize types of lawyer misconduct by the professional and social policies the misconduct affects; categorize aggravating and mitigating circumstances; identify goals of lawyer discipline that must be considered in determining an appropriate sanction; and suggest the appropriate level of discipline for the given category of misconduct. They were created to help achieve the degree of consistency necessary for fairness to the public and the bar in the imposition of lawyer discipline.

Courts reacted favorably to the *Standards*. Four states have adopted their own standards for imposing lawyer disciplinary sanctions, based on the *ABA Standards*. Additionally, at least twenty-four other state supreme courts have adopted some form of the *Standards* or cited them for support, and numerous disciplinary agencies utilize the *Standards*.

The Committee is working on an annotated version of the *Standards* to include the case law of the many jurisdictions that regularly utilize them. The Committee also will develop standards for the imposition of judicial disciplinary sanctions.

The administration of justice is part of the ministry of the law. All lawyers, as officers of the court and as part of their commitment to professionalism, have a responsibility to improve the justice system.

The ABA, as the national representative of the legal profession, is committed to a comprehensive set of programs to improve the justice system on many fronts.

I. THE JUDICIARY

A. Protecting the Independence of the Judiciary

The Constitution provides for the independence of judges by giving them terms of unlimited duration, held during good behavior.

In *Federalist No. 78*, Alexander Hamilton explained the reasons for this guarantee of judicial independence:

In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is no less an excellent barrier to the encroachments and the oppression of the legislative body and is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the law.

James Madison, in proposing the Bill of Rights, said:

Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive.

An independent judiciary is a mainstay of a constitutional democracy. It is the measure of effective separation of powers and the grounding for confidence in a judicial system that protects the civil rights and liberties of all citizens. It is the backbone supporting the rule of law. Support of an independent judiciary is a priority for the ABA at all times and particularly when the judiciary comes under attack.

The ABA Commission on Separation of Powers and Judicial Independence, a one-year Commission appointed to study judicial independence and accountability, developed a report and recommendations, released in 1997. The report describes how the organized bar can assist in maintaining and strengthening the independence of judges.

One recommendation from the Commission's report is that the organized bar respond to unfair and inaccurate criticism of judges. It recommends that the bar develop effective mechanisms for evaluating and responding to misleading criticism of judges. As a result of this recommendation, the Judicial Division has updated a protocol on *Unjust Criticism of the Bench*, first published in 1986. The updated protocol will be presented to the ABA House of Delegates for adoption as a model program to respond to criticism of judges. This program is designed to help state and local bar associations correct miscommunications and misunderstandings about the judicial system and to strengthen public support for the judicial system.

The ABA Special Committee on Judicial Independence is a new high-level Committee. Its mission is to promote public awareness and appreciation of judicial independence, to assist judges in protecting their judicial independence, and to further merit selection in state and administrative judiciaries.

In particular, the Committee will assist in preparing educational material about judicial independence for a wide range of audiences. It will help encourage mechanisms to assist judges facing unwarranted criticism that infringes on judicial independence, through distributing educational materials and promoting bench/bar committee support. The Committee also will focus on implementing merit selection initiatives in selected states.

**An
independent
judiciary is a
mainstay of a
constitutional
democracy.**

Other ABA entities also promote the independence of the judiciary. The Coalition for Justice, the Committee on State Justice Initiatives, the Section of Litigation, and the Judicial Division have programs and conferences that highlight the importance of an independent judiciary. For example, the Section of Litigation's Task Force on the Judiciary has developed a program and video on merit selection of judges and works with other ABA entities to make concrete gains in each of these areas.

Additionally, the ABA president and other ABA leaders frequently speak and write about the vital importance of an independent judiciary to a rule of law in a constitutional democracy.

II. THE QUALITY OF JUSTICE

Another very important component of improving the justice system is the ABA's focus on ways and means to enhance judicial quality and to improve the effectiveness of the courts. Many ABA entities focus their efforts on this aspect of justice improvement.

A. The ABA Standing Committee on the Federal Judiciary

The quality of justice depends in a large measure on the quality of judges. The ABA Standing Committee on the Federal Judiciary evaluates the professional qualifications of federal judicial candidates referred to it by the Attorney General. Since 1952, the Committee has been consulted by every U.S. President concerning the professional qualifications of candidates for the Supreme Court, the United States Courts of Appeals, the United States District Courts, and the Court of International Trade.

The Committee conducts an impartial, comprehensive, prenomination evaluation of each candidate's professional qualifications—integrity, professional experience and competence, and judicial temperament, integrity—and assigns the candidate a rating of qualified, well qualified or not qualified. The Committee conducts its investigation and makes its rating without regard to the philosophy or political ideology of the candidate. Observers including United States senators, judges, academics, and public citizens have acknowledged the enormous value of the Committee's nonpartisan objective evaluations.

The Committee's goal is simply to encourage the appointment of the best qualified persons for the federal judiciary. Since its inception, the Committee has played a seminal role in ensuring the high quality of the nation's federal judiciary.

B. Merit Selection of Judges

Experience and reasoning have demonstrated that the best assurance of a quality, nonpolitical judiciary occurs when judges are selected through a merit selection process. The new ABA Special Committee on Judicial Independence is focusing on merit selection and will develop programs and guidelines for advancing merit selection consistent with the ABA's long-standing policy.

Other ABA Committees such as the Coalition for Justice and State Justice Initiatives seek to mobilize public support for merit selection. With the inauguration of the Special Committee on Independence, the ABA will promote merit selection with renewed vigor.

The Committee is identifying jurisdictions where merit selection is under active consideration and will initiate cooperative efforts with local and national organizations to promote quality on the bench through adoption of merit selection.

The Section of Litigation's Task Force on the Judiciary works at the grassroots level, providing technical assistance to local and state bars in states without merit selection of judges and in states seeking greater merit selection.

III. ELIMINATION OF BIAS IN THE ADMINISTRATION OF JUSTICE

A system beset by bias, whether racial, gender, ethnic or in other forms, cannot render equal justice. A key objective of the ABA's Goal I—To Promote Improvements in the American System of Justice—is the elimination of bias from the administration of justice. To further that end, the ABA's Goal IX sets as an objective the full and equal participation of minorities and women in the profession. While our justice system has made improvements in eliminating bias, there is no doubt that bias still exists in many areas of the justice system and requires attention and redress.

The ABA Commission on Opportunities for Minorities in the Profession and its Council on Racial and Ethnic Justice focus on the impact of racial and ethnic bias on the justice system. The Council brings together legal institutions with local communities and advises these diverse groups on how to pool their resources to eliminate racial and ethnic bias.

The Commission's *Bias in the Courtroom* videotape program addresses the problem of biased behavior in the courtroom. Prominent members of the judicial system offer their insights on topics including: how judges' and attorneys' body language and use of names, titles, and characterizations reveals bias; how court personnel—bailiffs, clerks, security officers—exhibit subtle or overt bias and foster discrimination in the courts; and what can be done to counter bias and prevent discrimination in the courtroom.

The Council on Racial and Ethnic Justice issued two reports and will publish a report on *The Summit on Racial and Ethnic Bias*. The focal point of the reports emphasizes the need for state, local, minority, and national bar associations to mobilize their resources and take urgent action to