2003

What Do Clients Want? A Client's Theory of Professionalism

Leslie C. Griffin
University of Nevada, Las Vegas -- William S. Boyd School of Law

A CLIENTS' THEORY OF PROFESSIONALISM

*Leslie Griffin**

In this Article I identify some elements of a clients' theory of professionalism. My starting point is the most common complaint of clients about lawyers: they *neglect* the matters entrusted to them. In Part I, I identify the standard, *lawyers'* account of professionalism, with its two principles of partisanship and nonaccountability. In Part II, I select the two principles that many *clients* would prefer, namely competence and diligence. Lawyers have made at least three attempts to codify these *clients'* principles. Part II.A examines their treatment in Canons 6 and 7 of the Model Code of Professional Responsibility. Part II.B reviews Model Rules of Professional Conduct 1.1 and 1.3. Part II.C analyzes the distinctive Texas Rule of Professional Conduct 1.01, which combines competence and diligence into one standard. Because the Texas disciplinary rule adopts a standard that is more than negligent but less than intentional conduct, in Part III, I analyze the difference between negligence and neglect. In Part IV, I suggest that clients would prefer a disciplinary system based on strict liability for neglect.

I. PARTISANSHIP AND NONACCOUNTABILITY

The standard account of legal ethics, developed primarily from the experience of lawyers and debated principally by law professors, emphasizes two principles: partisanship and moral nonaccountability, which comprise the "standard" or "dominant" conception of the lawyer's role.[1] Partisanship "holds that lawyers should undertake all lawful actions that best serve their clients' interests, even if those actions are antithetical to the interests of justice or morality in particular cases."[2] Hence, partisan lawyers are zealous advocates who do all they can to serve their clients' interests; they "follow their clients' wishes."[3] Nonaccountability means that "lawyers are not morally responsible

* Larry & Joanne Doherty Chair in Legal Ethics, University of Houston Law Center. Ph.D., Yale; J.D., Stanford Law School. Thanks to Anita Bernstein for organizing this Symposium and to Carla Bey, Lorely Ramirez, Harriet Richman, and Michelle Wu for excellent research assistance.

[1] *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50-55, 154-57 (1988); Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829, 845 (2001).

[2] Perlman, *supra* note 1, at 846.

[3] *Id.* at 848.

for the clients they represent or for the lawful means they employ to accomplish their clients' objectives."[4] Hence, lawyers deserve no moral opprobrium when they represent the guiltiest criminal defendants accused of the grimmest crimes. The client's immorality or guilt is not imputed to the morally nonaccountable lawyer. Recently "neutral partisanship" has become the favored expression that summarizes these two principles and the standard account.[5]

Neutral partisanship is ostensibly based on the profession's concern about clients and thus provides a suitable starting point for this Symposium on clients' wants. Indeed, classic essays in legal ethics state that these two principles "described the essence of client-centered lawyering."[6] Contemporary commentators agree that the two principles are foundational because they protect clients' autonomy.[7] Another well-known article, moreover, argued that the lawyer's amoral role can be justified because that role assists clients to exercise their autonomy. Indeed, by now the standard criticism of this standard conception is that it is *too* client-centered because it neglects other concerns about, for example, common morality, social values, or the public interest.[8] Some critics insist that morality-centered legal ethics should replace client-centered ones.[9]

A different criticism comes from those who argue, relying on empirical data, that real lawyers do not act according to the ideal of neutral partisanship. Instead, "the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests."[10] Perhaps lawyers are not so client-centered after all. Disciplinary data about lawyers' neglect support this observation that lawyers are not always zealous. Across states, jurisdictions, and decades, the

---

[4] *Id.* at 850.

[5] *See* Nathan Crystal, *Developing A Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 86 (2000) (citing Murray Schwartz) ("Following Simon, many writers now use the term 'Neutral Partisanship' to refer to the standard conception of the lawyer's role.").

[6] *Id.* at 86 (citing Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543).

[7] Perlman, *supra* note 1, at 851.

[8] *See* Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995).

[9] *See* David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999) (identifying morality-centered and law-centered approaches to legal ethics).

[10] Crystal, *supra* note 5, at 88.

leading complaint against lawyers remains that they neglect their clients' matters.[11] Hence, clients too may be skeptical of the standard account and prefer a legal ethic that addresses their primary complaint: neglect.

In a simple and elegant book entitled *Lying*, Sissela Bok argued that too frequently the lie is examined from the perspective of the liar rather than that of the deceived.[12] In the same way, lawyers may view neglect from their own perspective and ignore the viewpoint of the client. In this Symposium we examined what legal professionalism looks like from the perspective of the neglected. From their viewpoint, the most important professional principles are competence and diligence. Being prepared and punctual is so commonsensical and unobjectionable that these rules are not as interesting theoretically as partisanship and nonaccountability. Nor do they pose as many difficult ethical dilemmas. This suggests that a *clients'* theory of professionalism would begin with discipline rather than theory.

II. COMPETENCE AND DILIGENCE

Lawyers have developed at least three ethical and disciplinary versions of competence and diligence: the Model Code of Professional Responsibility, the Model Rules of Professional Conduct, and the Texas Disciplinary Rules of Professional Conduct.

A. *Model Code of Professional Responsibility*

The American Bar Association (ABA) Model Code of Professional Responsibility (the Code) was drafted in 1969 and, at that time, was adopted in many states, including Texas. The Code's structure includes *canons* (which state the broad principles governing lawyers' conduct), *ethical considerations*

---

[11] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(3) n.5 (1980) (citing Annual Report of City of New York for 1967-1968 where "more than half of all such offenses . . . involved neglect"); State Bar of Texas Attorney Grievance System (chart on file with author) (showing that out of 32,958 rules violations alleged from 1994-2002, 17,971, or 53%, involved neglect); Justice Edward Kinkeade, *The Top Ten Reasons Clients File Grievances Against Their Lawyers*, 5 TEX. WESLEYAN L. REV. 35, 36 (1998) ("[Neglect] is the most common cause for grievances filed on lawyers."); *see also* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 6-13 to 6-14 (2003), which notes:

> Interestingly, a footnote to DR 6-101(A)(3) stated that in 1968 in New York City, over half of the complaints against lawyers that involved offenses against clients were for neglect. More recent but remarkably similar statistics may be obtained from virtually every state disciplinary authority, as well as the American Bar Association Center for Professional Responsibility.

[12] *See generally* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 20-23 (1999).

(which affirm the highest standards toward which lawyers aspire), and *disciplinary rules* (which identify norms whose violation subjects lawyers to censure, reprimand, suspension, or disbarment). On the subject of neglect, the most important Canons are 6 and 7.[13] Canon 6 states that a "lawyer should represent a client competently"; Canon 7 states that "a lawyer should represent a client zealously within the bounds of the law."[14] Because Canon 7 focuses primarily on issues of zealousness, nonaccountability, and partisanship, I concentrate on Canon 6.

Under Canon 6, a lawyer must possess or acquire sufficient learning to master her cases and keep up with new developments in the law. Ethical Consideration 6-4 states that a lawyer should "prepare adequately for and give appropriate attention to his legal work."[15] Ethical Consideration 6-5 identifies positive reasons for lawyers to avoid neglect: "A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty." The disciplinary rule connected with Canon 6 and these aspirational Canons and ethical ideals is more pragmatic. It states, quite simply: "A lawyer shall not: Neglect a legal matter entrusted to him."[16]

Such a straightforward disciplinary rule would seem appealing to clients and easy to administer. An early ABA informal opinion, however, anticipated that the application of the rule could become complex. The questions presented to the ethics panel represent typical instances of client neglect, including delay, missing the statute of limitations, and adequate preparation for trial:

> 1. A lawyer is retained to seek redress for losses sustained by his client. A year elapses and his file reveals that he has taken little, if any, affirmative action in the matter. Has the lawyer violated DR 6-101?

---

[13] MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1980); *id.* Canon 7.

[14] *See* RONALD D. ROTUNDA, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 2002-2003, at 69 ("DR 7-101(A)(1) provided that a lawyer 'shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . .'"). DR 7-101(A)(3) provided that a lawyer "shall not intentionally . . . [p]rejudice or damage his client during the course of the relationship . . . ." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(3).

[15] MODEL CODE OF PROF'L RESPONSIBILITY EC 6-4.

[16] *Id.* DR 6-101(A)(3).

2. Assume the lawyer engaged in necessary investigation and adequately prepares the claim, but he fails to file a suit within the applicable statute of limitations. Has the lawyer violated DR 6-101? Is it relevant whether the omission by the lawyer was inadvertent?

3. Assume a lawyer has not neglected the matter entrusted to him, is his ordinary negligence involving an affirmative act or omission grounds for disciplinary action?

4. Assume the lawyer for the plaintiff does in fact file the suit but not within the applicable statute of limitations. Defense counsel, however, fails to plead the affirmative defense of the statute of limitations, and the suit goes to trial. Has defense counsel violated DR 6-101?

5. A lawyer, a member of the bar for two years, is retained to defend a client charged with a criminal offense for which the maximum sentence that could be imposed is twenty years. The lawyer has some limited experience in minor criminal matters but has not previously handled a case of equivalent seriousness. The lawyer does not associate himself with experienced counsel and represents the defendant at trial. Has the lawyer violated DR 6-101?[17]

Despite the simple scenarios of the questions, the ABA refused to address questions 1, 2, 4, and 5 "because each of the four fact situations could be supplemented by additional facts, not inconsistent with the facts given . . . from which neglect might or might not be shown depending on all other relevant factors."[18] The opinion avoided analysis of the specific facts (of most concern to clients) and focused on the harder analytical question 3 of the relationship between neglect and negligence. From the bar's standpoint, the difficult disciplinary issue ("an important question of broad import"[19]) was whether ordinary negligence would constitute neglect.

This early ABA informal opinion rejected the idea that one act of ordinary negligence (for which a lawyer could be liable in civil court) warrants disciplinary sanction for neglect before state bar associations. It distinguished neglect from negligence in the following definition:

---

[17] ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973).
[18] *Id.*
[19] *Id.*

> Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.[20]

Hence the straightforward: "A lawyer shall not: Neglect a legal matter entrusted to him" was "soon . . . limited to instances of 'indifference and . . . consistent failure' to attend to, or a 'conscious disregard' of, a client's matter."[21] Moreover, the wording "gave the impression that the rule was concerned with . . . a *pattern* of neglect. For this reason, most cases imposing discipline under Canon 6 involved conduct that was either outlandish or prolonged, frequently coupled with other violations."[22]

Texas chose more limited language for its disciplinary rule when it adopted Canon 6; it included a willful or intentional element. "A lawyer shall not: *Willfully* or *intentionally* neglect a legal matter entrusted to him."[23] "Thus, only those lawyers shown to have deliberately chosen not to attend to a matter could be disciplined for neglect."[24] As Professors Schuwerk and Sutton

---

[20] *Id.* *See also* Leonard E. Gross, *Contractual Limitations on Attorney Malpractice Liability: An Economic Approach*, 75 KY. L.J. 793, 813 n.51 (1986) (quoting ABA Comm. on Prof'l Ethics and Grievances, Informal Op. 1273 (1973)); Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 25 (1990) ("The ABA, however, soon interpreted the proscription as limited to instances of 'indifference and . . . consistent failure' to attend to, or a 'conscious disregard' of, a client's matter." (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 n.1 (1974) (quoting ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973)))).

> "Neglect" is an important concept in the law of ethics: it means a pattern of action or inaction, more than one instance of delay. Under the Model Code, a showing of neglect usually required proof of a pattern of behavior. If a lawyer on one occasion forgot to file an answer to a complaint in time because of inadvertence, he would be guilty of civil malpractice if the client were damaged, but he would not be guilty of the ethical violation of neglect. "Neglect involves indifference and a *consistent failure* to carry out the obligations which the lawyer has assumed to the client or a conscious disregard for the responsibility owed to the client." Neglect requires a pattern of omission.

ROTUNDA, *supra* note 14, § 4-2, at 88-89.

[21] Schuwerk & Sutton, *supra* note 20, at 25 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 n.1 (1974) and quoting ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973)).

[22] HAZARD & HODES, *supra* note 11, § 3-4.

[23] TEXAS CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(3) (1988) (emphasis added); Schuwerk & Sutton, Jr., *supra* note 20, at 18 ("DR 6-101(a)(3) did require that a lawyer's neglect of a matter be willful or intentional before the lawyer could be subjected to discipline.").

[24] Schuwerk & Sutton, *supra* note 20, at 25.

observed (after drafting their own Texas Rule 1.01 in 1990), the high standard "allowed many instances of highly unprofessional conduct to go unpunished altogether."[25]

B. Model Rules of Professional Conduct

The ABA adopted the Model Rules of Professional Conduct in 1983. The provisions relevant to neglect were located in two new rules, 1.1 (Competence) and 1.3 (Diligence). According to Model Rule 1.1, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[26] The simple, straightforward rule of neglect was abandoned. "Whereas DR 6-101(A)(3) prohibited the '[n]eglect of a legal matter,' Rule 1.1 does not contain such a prohibition. Instead, Rule 1.1 affirmatively requires the lawyer to be competent."[27]

The neglect provisions fit more naturally into the rule on diligence. According to Model Rule 1.3, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[28] As Professors Hazard and Hodes explain in their commentary on Model Rule 1.3:

> The (disciplinary) duty of reasonable diligence set forth in Model Rule 1.3 is derived from aspects of Canons 6 and 7 of the Model Code of Professional Responsibility. Canon 6 generally prohibited failure to act "competently," and one of its disciplinary rules, DR 6-101(A)(3), mandated that a lawyer not "*neglect* a legal matter entrusted to him." Canon 7 of the Code stated an obligation of "zeal." Model Rule 1.3 clarifies and expands both these concepts.[29]

The sections of 1.3 that best address neglect appear in Comment [2], on the evils of procrastination:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay

---

25 *Id.*

26 MODEL RULES OF PROF'L CONDUCT, R. 1.1 (1983).

27 *Id.* R. 1.1 (Model Code Comparison).

28 *Id.* R. 1.3.

29 HAZARD & HODES, *supra* note 11, at 6-3.

> can cause a client needless anxiety and undermine confidence in a lawyer's trustworthiness.[30]

That last sentence has been important in the disciplinary setting. Lawyers can be disciplined for neglect even though the client's case was not harmed by the delay. As the Oregon Supreme Court stated in *In re Gastineau*, "If a lawyer does a poor job, but the client fortuitously or through the efforts of others obtains a good result, that does not excuse the lawyer from providing competent representation or justify neglecting the case."[31] Thus, in such circumstances, it is possible to reprimand an attorney for delay even though her client could not pursue a civil case. Moreover, in contrast to the interpretations of the Code, the rule lacks any requirement that "a lawyer engage in a *pattern* of misconduct before discipline may be imposed."[32] A single breach of duty to one's client deserves discipline.[33]

Despite these features that make the new Model Rules more client-friendly than the Code, the diligence rule remains difficult to enforce because it provides "no absolute standard";[34] it is fact-specific. The leading commentary on the Rules remains lawyer-friendly when it concludes that "[a] lawyer is not required to over-pursue or overstaff every case in order to demonstrate diligence."[35]

---

30 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2. *See also* HAZARD & HODES, *supra* note 11, at 6-8 to 6-9 which states:

> Improper procrastination is all too common a failing in the legal profession, often resulting from a lawyer or law firm's taking on too much legal work. It is a special cause of resentment against lawyers generally, and it is entirely inexcusable. Published statistics consistently indicate that procrastination is one of the most common bases of complaints against lawyers. *Even when the consequences of delay are not as serious as missing a filing date that destroys a client's case, delay causes resentment, anxiety, and loss of client confidence.*

(emphasis added).

31 *In re* Gastineau, 857 P.2d 136, 142 (Or. 1993). *See also* Mendocino v. Magagna, 572 P.2d 21 (Wyo. 1977) (lawyer who neglected forty estates over twenty-four years could be disciplined for neglect even without allegations that clients suffered a pecuniary loss).

32 HAZARD & HODES, *supra* note 11, at 6-10 (emphasis added).

33 *Id.*

34 *Id.* at 6-8.

35 *Id.* at 6-9.

C. Texas

As noted above, Texas initially adopted a version of DR 6-101(A)(3) that required willful or intentional conduct for a violation of the rule. In *Brown v. State Bar of Texas*, the Texas Court of Appeals defined these terms as follows.

> The violations of these two sections [6-101(A)(3) and 7-101(A)(2)] can only occur if there is something more than mere neglect or bad judgment and the neglect must be willful or intentional. Willful means something said or done *deliberately or intentionally or following one's own will unreasoningly; obstinate; stubborn.* . . . Intentional is defined as having to do with intention or purpose or it is *intended; designed; done with design or purpose*; as, the act was intentional, not accidental.[36]

The willful or intentional standard was difficult for complainants to prove. Unlike other states, Texas did not favor circumstantial proof of intent.[37] Moreover, its well-pled complaint requirement "may well have permitted many cases of actually willful or intentional neglect to go uninvestigated. This problem emerge[d] because although many clients could allege that their lawyers *had in fact neglected* their case, far fewer would be able to say precisely *why* their lawyer had done so."[38] As Professors Schuwerk and Sutton concluded, this "willful" and "intentional" standard of the Texas Code meant that some unprofessional conduct could go "unpunished."[39]

Accordingly, when the professors and the Texas State Bar drafted the Texas Disciplinary Rules of Professional Conduct (effective 1990), they modified both the old Code standard and the new ABA Model Rules 1.1 and 1.3. Texas Rule 1.01 combines the elements of Model Rules 1.1 and 1.3 into one rule about "competent and diligent representation." In contrast to the ABA Model Rules, neglect not only remains in the text of the disciplinary rule but is identified therein. Rule 1.01 provides, in relevant part, that:

> (b) In representing a client, a lawyer shall not:
>
> (1) *neglect* a legal matter entrusted to the lawyer; or

---

[36] Brown v. State Bar of Tex., 960 S.W.2d 671, 678 (Tex. Ct. App. 1997) (emphasis added).

[37] ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS 320 (2002).

[38] *Id.*

[39] Schuwerk & Sutton, *supra* note 20, at 25.

> (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.
>
> (c) As used in this Rule, *"neglect"* signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.[40]

With this new language and definition, the "Rule adopts a standard of discipline between the simple neglect that might suffice in an action for malpractice and the 'willful or intentional' standard of the former Texas Code . . . illustrating that *more than simple negligence* is required."[41] Such neglect could be proved by circumstantial evidence.[42]

By abandoning the tough Texas Code requirements, the new rule encouraged more investigation of complaints and more discipline for lawyers. Nonetheless, it retained some protection for lawyers by setting the disciplinary standard higher than simple negligence, as the ABA had done in its early ethics opinion on the Code.[43] Why set a standard higher than simple neglect?

> [S]ome degree of neglect unfortunately emerges as a simple fact of professional life. Any practicing lawyer can recall some instances in which he or she paid less attention to a legal matter than it deserved, at least for some period of time. If all such lapses could give rise to disciplinary action, virtually all lawyers would have black marks against their names.[44]

---

[40] TEXAS DISCIPLINARY R. OF PROF'L CONDUCT 1.01 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. (Vernon Supp. 1995) (emphasis added); *see also* Schuwerk & Sutton, *supra* note 20, at 18 ("Paragraph (c) has no direct counterpart in the former Texas Code, although DR 6-101(A)(3) did require that a lawyer's neglect of a matter be willful or intentional before the lawyer could be subjected to discipline.").

> As used in the rule, "neglect" means inattentiveness involving a conscious disregard for the responsibilities owed to a client . . . . Comment 6 to Rule 1.01 explains that having accepted employment, a lawyer should act with competence, commitment, and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.

Eureste v. Comm'n for Lawyer Discipline, 76 S.W.3d 184 (Tex. Ct. App. 2002).

[41] TEX. YOUNG LAWYERS ASS'N, TEXAS LAWYERS' PROFESSIONAL ETHICS: A PROJECT OF THE TEXAS YOUNG LAWYERS ASS'N 1-8 to 1-9 (3rd ed. 1997) (emphasis added). *See also* SCHUWERK & HARDWICK, *supra* note 37, at 321 ("[I]n formulating Rule 1.01, the drafting committee consciously established a standard of discipline between the simple neglect that might suffice in an action for malpractice and the 'willful or intentional' standard of the former Texas Code . . . illustrating that more than simple negligence is involved.").

[42] SCHUWERK & HARDWICK, *supra* note 37, at 322.

[43] *See supra* note 20 and accompanying text.

[44] Schuwerk & Sutton, *supra* note 20, at 25. *See also* SCHUWERK & HARDWICK, *supra* note 37, at 320; TEX. YOUNG LAWYERS ASS'N, *supra* note 41, at 1-8, which states:

Texas Disciplinary Rule 1.01 contains a comment about procrastination with the same opening sentences to Model Rule 1.3's comment 2.[45] It adds more details, however, about what constitutes neglect. For example, it clarifies that because of the wording of paragraph (b) lawyers may be disciplined for either a pattern or single instance of neglect.

> Under paragraph (b), a lawyer is subject to professional discipline for neglecting a particular legal matter as well as for frequent failures to carry out fully the obligations owed to one or more clients. A lawyer who acts in good faith is not subject to discipline, under those provisions for an isolated, inadvertent, or unskilled act or omission, tactical error, or error of judgment.[46]

A pattern of inattentiveness toward many clients constitutes neglect, even though the lawyer did not act in conscious disregard of a client's well-being.[47]

One of the reasons that Texas opted for its combination diligence/competence rule, with its specific standards, instead of the ABA Rules, was to avoid "blur[ring], if not eradicat[ing], the traditional distinction between lawyer behavior meriting disciplinary sanctions and lawyer behavior exposing the lawyer to civil liability for malpractice."[48] Part III examines this relationship between neglect and negligence.

III. NEGLIGENCE V. NEGLECT

Throughout the development of the neglect standards explained in Part II, the commentators and rulemakers have emphasized the distinction between neglect and negligence. Nonetheless, "[n]eglect and negligence are frequently confused and important distinctions between them overlooked. . . . Negligence is a tort arising from a breach of duty owed to a client. Malpractice is a species of negligence. . . . Neglect, on the other hand, is a breach of an ethical

---

> The neglect of legal matters by the lawyers to whom they have been entrusted is one of the most widely condemned failures of our profession. Although serious neglect of legal matters is justifiably condemned, some degree of neglect unfortunately emerges on occasion as a fact of professional life for virtually every lawyer. Consequently, it is necessary to decide what degree of neglect should suffice to subject a lawyer to discipline.

45 *See supra* note 30 and accompanying text.

46 TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.01 cmt. 7 (1989), *reprinted in* TEXAS GOV'T CODE ANN., tit. 2, subtit. G, app. (Vernon Supp. 1995).

47 SCHUWERK & HARDWICK, *supra* note 37, at 323.

48 Schuwerk & Sutton, *supra* note 20, at 19.

standard imposed upon the entire profession."[49] The confusion between the two concepts makes it difficult for disciplinary committees to identify and punish neglect.[50] Moreover, the disciplinary rules, with their "duties of diligence, promptness, and competence are all encompassed within the bundle of duties to clients that are most commonly enforced through legal malpractice actions rather than through lawyer discipline."[51]

In states like Texas, it can be harder to prove incompetence than negligence; Texas Disciplinary Rule 1.01 requires something more than "simple negligence."[52] Sometimes neglect requires a pattern of behavior and negligence only a single instance of misconduct. At other times it may be easier to prove neglect than negligence. For example, discipline for neglect does not require harm to clients.[53]

Judgments about neglect are similar to negligence because they are fact-specific. The fact situations of neglect cases are repetitive. They include "failure to commence an action, appear at a hearing, respond to discovery, or respond to correspondence from opposing counsel and the court."[54] Neglect "may mean abandoning a contract for services, missing a deadline, or negligently failing to assert a claim. Neglect also encompasses the failure to

---

[49] Dana D. Peck & James J. Coffey, *Unhappy Clients May Lodge Complaints of Neglect Even when Malpractice Is not an Issue*, 71 N.Y. ST. B.J. 47, 47 (1999).

[50] *See, e.g.*, RICHARD ZITRIN & CAROLE LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 49 (2002) ("Even cases which discipline lawyers purely on competence grounds recognize the difficulty in applying what many see more as a negligence standard.").

[51] HAZARD & HODES, *supra* note 11, at 6-3.

[52] *See supra* note 41 and accompanying text.

> Past cases that have resulted in the imposition of public sanctions by the South Carolina Supreme Court have not involved mere negligence. All lawyers make mistakes, but these mistakes are seldom the sole basis for grievance proceedings. The court sanctions patterns of continued neglect and incompetence or neglect plus additional misconduct.
>
> These cases demonstrate that the court is very aware of the distinctive purpose of the grievance process. Normal acts of negligence and normal mistakes do not result in disciplinary sanctions. Only when they are combined with fraudulent or unethical conduct or a continued and repeated pattern will the court invoke its sanctioning authority. Representative cases exemplify the notion that more grievous instances of neglect, especially when coupled with other misconduct, warrant at least a public reprimand.

Charles E. Carpenter, Jr., *Negligence or Neglect—Mistake or Grievance: Lawyer Conduct and the Limits of the Grievance Process*, 42 S.C. L. REV. 943, 953 (1991).

[53] *See* Peck & Coffey, *supra* note 49, at 47 ("Neglect, therefore, usually involves more than a single act or omission, while negligence may arise from a solitary significant error in judgment. In addition, a charge of neglect, unlike negligence, does not require a showing of actual harm to the client.").

[54] Schuwerk & Sutton, *supra* note 20, at 24.

appear at a proceeding, failure to prepare a necessary document, or failure to carry out administrative duties in probate or bankruptcy proceedings."[55] Or, there is the "recurring scenario" (as in the Louisiana Bar) of attorneys accepting money for work and then pretending they have earned their fee:

> Collectively, these [neglect] cases and others suggest a recurring scenario that is growing disturbingly familiar: An attorney accepts, for a small advance, a case which will require a substantial amount of work; the attorney does not make clear exactly how much work will be done for the advanced amount; the client, however, expects that a substantial amount will be done toward solving the problem before more money is due, or expects that the remainder of the attorney's fee will be paid out of his recovery; the attorney does nothing more, keeps the advance, and, if questioned, takes the position that he or she earned the fee in the first interview or with the initial research.[56]

When disciplinary agencies assess these recurring situations of neglect, they usually weigh the following factors: length of the delay, urgency of the legal matter, complexity of the legal matter, harm to the client, and harm to the profession.[57] The grievance committees also apply mitigating factors, including personal characteristics (good reputation and candor) and explanations of the lawyer's conduct (personal or family crises, illness).[58]

The disciplinary system of the State Bar of Texas includes seventeen disciplinary districts, each of which has at least one Grievance Committee comprised of practicing attorneys and members of the public. These committees investigate complaints, hear cases, and punish practicing attorneys for any violation of the Texas Disciplinary Rules. These committees change membership every several years. Punishments administered by the grievance committees include private reprimands, required participation in rehabilitation programs, public reprimands, probation, suspension, and disbarment. Texas

---

[55] Carpenter, *supra* note 52, at 952.

[56] La. State Bar Ass'n v. Williams, 549 So. 2d 275, 277-78 (La. 1989). See also *Hunt v. Disciplinary Bd. of the Ala. State Bar* in which the court found:

> The law governing the lawyer-client relationship may be stated, in the context of the instant case and Disciplinary Rule 6-101(A), Code of Professional Responsibility, as follows: Whenever a person consults a lawyer, advising him of the facts concerning a legal claim, and the lawyer agrees to "take the case," and thereafter assures such person that he is handling the case and that it will be heard at a future date, a lawyer-client relationship is established; and the lawyer is guilty of wilfully [sic] neglecting a legal matter entrusted to him if he takes no action on client's behalf.

381 So. 2d 52, 53-54 (Ala. 1980).

[57] Peck & Coffey, *supra* note 49, at 47-49.

[58] *Id.* at 49.

law requires that the bar maintain a "complaint tracking system" of grievances against Texas lawyers.[59]

As in other jurisdictions, in Texas neglect is the most frequent complaint against lawyers.[60] Although some complaints involve neglect alone, often neglect accompanies other violations of the disciplinary rules.[61] Hence it is difficult to quantify what discipline is assessed for neglect alone.[62] Moreover, the cases are fact-specific, and punishment is determined on a case-by-case basis. Thus it is difficult to discern a pattern to the penalties that are imposed.[63] Finally, there is (and can be) no comparative study of how discipline for

---

[59] Under VTCA Government Code § 81.072(b)(5), the State Bar of Texas is required to maintain a complaint tracking system for lawyers. According to Constance Miller, Program Director for the Client Attorney Assistance Program of the State Bar of Texas, the grievance process and tracking system work in the following manner:

> Any grievance reported through the "hotline" is gathered and recorded. However, the process does not become formal until a written complaint is filed. When the written complaint is filed, it is forwarded to the Office of Disciplinary Counsel (OCD) [sic]. See Rule of Procedure 2.09. The OCD has a database tracking system, which can identify all complaints against any attorney. The database also notes when the investigation was conducted, whether the complaint was dismissed (i.e. did not fall within the Texas Rules of Disciplinary Procedure), or whether a legitimate complaint was found. If a legitimate complaint was found, a Just Cause Hearing is set up, & the attorney is served with a copy of the complaint. The database also tracks all of this information.
>
> Note that the grievance process is confidential until a finding of just cause is found and the disciplinary action taken is a public reprimand or greater (Rule 2.15 of the Texas Rules of Disciplinary Procedure). It is only after these requirements that information on the entire grievance process (including what was "tracked" in the database) for a particular case may be obtained.

E-Mail Memorandum from Loreley Ramirez, University of Houston Research Assistant to author, *Complaint Tracking System* (April 4, 2003) (on file with author).

[60] See chart, "State Bar of Texas Attorney Grievance System," provided to author by Constance J. Miller, Program Director, Client-Attorney Assistance Program, State Bar of Texas, in letter of 4/4/03 to UH Faculty Service Librarian Harriet Richman (identifying the following numbers of neglect violations from 1994-2002: 01-02, 1,788; 00-01, 1,749; 99-00, 1,911; 98-99, 2,429; 97-98, 2,310; 96-97, 2,408; 95-96, 2,614; 94-95, 2,590). The next-highest violations—safeguarding property and declining or terminating representation—occur much less frequently—only up to a high of 766 complaints about declining representation in 1994-1995.

[61] See E-Mail Memorandum from Lorely Ramirez, University of Houston research assistant to author (April 9, 2003) (on file with author) (Mark Pinckard, from the Texas Office of Disciplinary Counsel, said that "the State Bar did not have a tracking system identifying which complaints about neglect led to disciplinary actions or how many were dismissed. He said that often the grievance will start off as neglect & later evidence will come up that there was another violation, and there was no tracking system to record when this happened.").

[62] *Id.*

[63] This conclusion is based on information and materials provided by Texas bar counsel Mark Pinckard to University of Houston law student, Carla Bey.

neglect fared under the old Code and the new Rules; the "old statistics were done by hand" and are inaccessible.[64] Although neglect is clients' primary complaint about lawyers, the effects and effectiveness of their grievances remain uncertain, an undesirable result under a clients' theory of professionalism.

IV. CLIENTS' CONCLUSION FOR STRICT LIABILITY?

Although the lawyers' standards have changed and developed, the clients' complaints remain constant; lawyers neglect their clients' affairs. From the perspective of the lawyer, neglect requires more than simple negligence. Otherwise, lawyers would be penalized for every mistake.

In contrast, clients could tolerate a disciplinary standard that permits some sanction of lawyers for neglect-style mistakes. For example, in Texas, the "many types of negligence claims against lawyers" include the following mistakes:

> Statute of limitations/timely filing error, error in drafting transaction documents, failure to present required notification on a note acceleration, failure to present timely administrative claims, failure to present timely claims to estate administrators, failure to prosecute or delay in prosecuting claims, delay in preparing closing documents, failure to file an appearance or answer, failure to raise defenses, and failure to investigate.[65]

Without an intent or conscious disregard or more-than-negligence requirement, disciplinary agencies could easily penalize lawyers for such occurrences. Late is late; unfiled is unfiled; absent is absent.

As in current case law, there would be no sanction if "there is no evidence in the record to suggest that Rule 1.01 was violated."[66] The punishment need not be harsh; it could be an admonitory letter or a system of points listed on one's record. Serious penalties like disbarment would arise only (as they do

---

[64] In response to author's query, "Do they have pre-1990 numbers on neglect allegations that we could see?" Mark Pinckard "said that before 1993 all statistics were done by hand, & he is not sure what happened to them & didn't have a way of accessing them." *Id.*

[65] CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 30-39 (3d ed. 2002).

[66] Brown v. State Bar of Texas, 960 S.W.2d 671, 676 (Tx. Ct. App. 1997).

now) when "a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client."[67]

In the area of neglect, the real question is not to identify what clients want, but whether the bar will give them what they want, *i.e.*, a disciplinary system that effectively sanctions lawyers for their neglect of clients' matters.

[67] Colorado v. Wyman, 782 P.2d 339 (Colo. 1989) (quoting Section 4.41 of the ABA Standards for Imposing Lawyer Sanctions (1986)).