

**NAELA’S ASPIRATIONAL STANDARDS - READY, SET GO!
WHEN AND HOW TO BEGIN HONORING COMPLIANCE IN PRACTICE.**

By

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I. INTRODUCTION

This article focuses on the beginning of a new era for the National Academy of Elder Law Attorneys (“NAELA”); an era when NAELA’s members will commit to practice elder law at a higher ethical level. It summarizes the history behind the new era as the source of its beginning. It identifies the time when commitment begins and describes what NAELA members must do, and when, to be in compliance. The article provides practical steps to begin, identifying the top ten Aspirational Standards that should be recognized in an elder law practice. The article discusses what NAELA’s response should be if members do not make the commitment - turning enforcement and audit into positive approaches. The approaches include individual education, training and development in the Aspirational Standards and ethical practice, delivering recognition and credit for those elder law attorneys completing the academic process; raising the potential for voluntary peer and self-directed audits; and providing voluntary audits of elder law practices for compliance.

Finally, the authors suggest to NAELA leadership and other appropriate ancillary organizations that there be created the Joint Commission on Elder Law Accreditation based on the Aspirational Standards. Support of the National Elder Law Foundation (“NELF”) and other nationally recognized gerontology or elder law centers would solidify the success of such an entity to organize, develop and administer an accreditation process.

**II. NAELA’S HISTORY FROM WHICH THE ASPIRATIONAL
STANDARDS EMERGED**

A. Historical Context

What NAELA did is founded on historical precedence within the life of NAELA. It can be traced to NAELA’s beginning, born of the seeds of America’s aging demographics. NAELA moved through the last decades of the Twentieth Century in the midst of the American warning that as the World War II Greatest Generation aged, the Baby Boomer Generation coming behind it would mark the graying of our society in a

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significant way.² This created a stage on which two forces moved concurrently from the creation and through the organization of NAELA; they continue to exist at the core of NAELA today.

The first force was one of relationship building with those attorneys facing the aging of their clients without the education and experience to serve them. Passionate debate by the founders over an “invitation only” exclusive network versus an “only lawyers” trade association crackled into the predawn hours of many a morning, kindling spirits that sparked creative ideas and forged collegial fellowship of kindred spirits evidencing a bond that embraces many NAELA memberships and their leadership to this day. The second force was one of ethics and the greater complexity of applying those ethics to issues in representing older clients.

1. The First Force

At its creation, the NAELA founders struggled with the vision and mission for this new specialized legal practice.³ There were two views of NAELA’s organization: (1) invitation only, similar to the American College of Trust and Estate Counsel, requiring levels of expertise in primary areas of practice and an invitation extended solely by the organization; and (2) open to all licensed, practicing attorneys, with the focus of “identifying the special problems of the elderly and the specialized knowledge required to provide assistance to the members of the Bar, many of whom were unaware of the problems, let alone some of the solutions.”⁴ The NAELA founders opted for the latter on the premise that the more attorneys the organization exposed to the complexities of elder law and good practice, the more elderly clients would benefit.⁵

2. The Second Force

With its 20th anniversary nearing, NAELA has produced literally hundreds of development, training and educational opportunities for its members and lawyers across

² See Katherine K. Wallman, *Older Americans 2000: Key Indicators of Well-Being, Indicator 15 – Memory Impairment*, at 25 (Federal Interagency Forum on Aging – Office of Management and Budget 2000); *Beyond 50.02: A Report to the Nation on Trends in Health Security*, Section II Overview of Trends affecting population age groupings from 50 to 85 (AARP 2002).

³ See NAELA Mission Statement of 1989-90. (The mission of the Academy is to provide information, education, networking and assistance to attorneys, bar organizations, and other individuals or groups advising elderly clients and their families; to promote high standards of technical expertise and ethical awareness among attorneys, bar organizations and other individuals or groups engaged in the practice of advising elderly clients and their families; and to develop awareness of the issues surrounding legal services to the elderly.) *Id.*

⁴ See Alan D. Bogutz, *President’s Message*, 1 NAELA News 2 (Fall 1989); see also, Vincent J. Russo, *President’s Message*, 4 NAELA News 3 (July 1992) (“We have an ‘extended’ family – our elderly clients, our community and now our family of 35 founding members is more than 1,600 strong. We are ‘family.’”).

⁵ See Scott R. Severns, *President’s Message*, 3 NAELA Quarterly 2 (Summer 1991).

the country. Throughout those two decades, NAELA and its leadership have emphasized the importance of incorporating legal ethics into the practice of elder law.⁶

As for the second force that has moved through the history of NAELA, it is fitting and appropriate to identify several of the past and present leaders who passionately gave (many continuing to give) their time and commitment to drive NAELA to the forefront of ethics and representation of our elders:

- a. Cynthia L. Barrett, Esq. NAELA Past President (1993-1994); Barrett was one of the first visionaries prompting NAELA to take the initiative and convene an ethics and the elderly forum. What occurred was an event of the decade.⁷
- b. Clifton B. Kruse, Jr., Esq. NAELA Past President (1995-1996). Kruse is the professionalism mentor of many of us, for whom the Kruse lecture in Professionalism and Ethics was named and had as its first lecturer, Professor Geoffrey C. Hazard, Jr., at the 2004 NAELA Advanced Institute in Colorado Springs.⁸
- c. Professor Rebecca C. Morgan, NAELA Past President (1998-1999). Professor Morgan has continually place the ethics of elder law attorneys in the practice of law at the forefront of NAELA practice and development. With her learned colleague, Professor Roberta Flowers, they have developed interactive videos and power point presentations that have forced participants to apply their understanding of ethical boundaries and moral application to the cases that confront them on a daily basis in the practice of elder law.
- d. Stuart D. Zimring, Esq. NAELA Immediate Past President (2004-2005). Zimring had the wisdom to extend the mandate for developing higher ethical standards as applied to NAELA members, giving the Professionalism and Ethics Committee additional time and dollars to finish the project.
- e. Gregory S. French, Esq., current chair of the Professionalism & Ethics Committee of NAELA. French diligently guided the development of the Aspirational Standards through a rigorous, oftentimes grueling process.

⁶ See *Ethics Discussion*, 2 NAELA Quarterly 12 (November 1990); see also Jonathan M. Forster, *Ethical Obligations of the Elder Law Planner: Who Is the Client?* 3 NAELA Quarterly 14 (Summer 1991).

⁷ See *infra* Note 10, and accompanying text.

⁸ See Geoffrey C. Hazard, Jr., *Family: A Social Unit Not a Legal Unit*, NAELA, NGA and NCPJ Joint Conference and Advanced Institute, Tab 5 (NAELA Institute 2004).

- f. The authors also give recognition to the current writers and reviewers of the Aspirational Standards, who committed countless hours in the furtherance of NAELA's vision for an ethical step-up in what NAELA members should do compared to what the ethics rules command them to do.⁹

In the last decade, NAELA took its place as one of the seminal organizations in the aging network that provides access, connection and voice to elderly clients through its members, especially when the members are serving clients with diminished capacity. NAELA's involvement first focused on ethical issues that conflicted with the usual rules, needing analysis that was more detailed. Concern for ethics prompted the development of the Fordham Conference on Ethics and the Elderly.

a. The Fordham Conference on Ethics and Elder Law.

In December of 1993, a major conference on ethical issues in representing older clients convened at the Fordham University School of Law.¹⁰ Conference participants were organized into working groups that developed ways by which professional responsibility problems may be resolved. After presentations by each working group to the body of delegates, conference participants specifically developed and voted the approval of professional practice recommendations intended to enable attorneys to better serve older clients in various contexts.¹¹ In addition to the published recommendations, a wide range of elder complexities, including confidentiality,¹² were published that embraced examinations of intergenerational representation,¹³ ethical management of assets,¹⁴ ethical considerations of Medicaid estate planning,¹⁵ and family values that create competing approaches.¹⁶ A few

⁹ See the NAELA Aspirational Standards published in this issue of the NAELA Journal for the names of current committee members and writers in attachment. In addition to current committee members, others to be acknowledged for their support and involvement over the years include all committee members serving in the past and Professor Roberta K. Flowers, Ex-officio member, Hugh K. Webster, Esq. NAELA counsel, Laury Gelardi, past NAELA Executive Director and Bridget Jurich, NAELA staff.

¹⁰ The conference was a collaboration of The National Academy of Elder Law Attorneys (NAELA) and five other organizations: (1) the American Association of Retired Persons (AARP), (2) the ABA Commission on Legal Problems of the Elderly, (3) the ABA Section on Real Property, Probate and Trust Law, (4) the American College of Trust and Estate Counsel (ACTEC), and (5) Fordham Law School's Stein Center for Ethics and Public Interest Law. See publication of the proceedings, 62 Fordham L. Rev. 961 (1994) (Hereafter "Fordham Ethics and the Elderly").

¹¹ *Id.*, Bruce Green, *Forward*, at 961

¹² *Id.* Burnele V. Powell and Ronald C. Link, *The Sense of a Client: Confidentiality Issues in Representing the Elderly*, at 1197-1251. Professors Powell and Link cite Charles Wolfram as the source for characterizing the evolution of the Confidentiality Principle in the lawyer ethics codes ("Progress[ing] from [a] passing reference to a lawyer's obligation of confidentiality to [an] extensive and controversial involvement with it.) *id* at 1202, *citing Wolfram*, at 297; *see also* Lawrence J. Fox, *It's All in the Atmosphere*, at 1447.

¹³ *Id.* Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, at 1453, 1484-85.

¹⁴ *Id.* Steven H. Hobbs and Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role and Law Approach*, at 1411.

years later, additional articles were published in the symposium “Should the Family Be Represented as an Entity?”: Re-examining the Family Values of Legal Ethics.¹⁷

(b) The ABA and Its Creeds, Codes, Ethics and Rules of Professional Conduct

In the latter part of the last decade, the ABA responded to the cyclical uproar over the need for policing the profession. As one writer observed, “Any hardened observer of modern lawyer regulation cannot avoid the overwhelming sensation of churning.”¹⁸ Organizations and associations serving the legal profession decried a “crisis” in the profession, proposing various solutions, ranging from hortatory to regulatory.¹⁹ These reform efforts have historically proceeded along two tracks: increasing “professionalism”²⁰ and revising and recalibrating the regulations governing the minimum standards of attorney conduct.²¹

¹⁵ *Id.* Eleanor M. Crosby and Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct* at 1503.

¹⁶ *Id.* Russell G. Pearce, *Family Values and Legal Approaches to Conflicts in Representing Spouses*, at 1253.

¹⁷ See Russell G. Pearce, *Forward, Symposium: Should the Family Be Represented as an Entity?: Reexamining the Family Values of Legal Ethics*, 22 *Seattle U. L. Rev.* 1 (1998).

¹⁸ See Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral and Practical Approach of the Canons*, 83 *N. C. L. Rev.* 411 (January 2005)(footnotes omitted).

¹⁹ *Id.*

²⁰ *Id.*, at 412.

²¹ Barton went on to expound on the vagary of the “crisis” and the lack of a definition of “professionalism”:

Despite the prevalence of the terms "crisis" and "professionalism" in these reform efforts, neither term is particularly well defined. There are actually at least four related but distinct crises listed in these various accounts of the Job-like woes of the legal profession. First, many lament the public's low opinion of the legal profession; second, others concern themselves with the unhappy and unhealthy nature of the legal profession itself; third, many bemoan the loss of "professionalism" amongst lawyers; and last, some fret over the legal profession's alleged transformation from profession to business.

Moreover, the term "professionalism" itself has proven abstruse. Most agree that professionalism implies something above and beyond the minimum behavior required under state rules of professional conduct (often referred to as rules of "ethics"). It has proven notoriously difficult to define what professionalism offers beyond the minimums of legal ethics, and most scholars and bar officials have abandoned efforts at a specific definition.

Thus, reformers of the legal profession have attempted to address a shifting set of problems, crises, with a series of reforms based upon an indeterminate concept, professionalism. Not surprisingly, there is a sense within the profession and academia that much of the professionalism crusade has fallen short of the mark. Public opinion of lawyers remains low, lawyer satisfaction has not risen, the law continues its drift from profession to business, and most damningly, there is little evidence of any increase in lawyer professionalism, however defined. *Id.*, at 412-416.

Whether at the turn of the Nineteenth Century, or at the turn of the Twentieth Century, the legal profession and its lawyers have pondered the public's view of it and them.²² Moliterno's 1997 article highlighted this point by merging quotes from 1902, 1906 and 1931 with quotes from 1986 and 1993.

Unquestionably, "popular respect for the legal profession is steadily falling"; there is "much cause for discouragement and some cause for alarm." "[L]awyers ... are blamed for some serious public problems," including the enormous costs of increased litigation. "Year by year the various law schools send increasing armies of new recruits, far beyond the requirements of even this litigious community." Lawyers act with "exaggerated contentious[ness]," as if they were "gladiator[s]" in a war, making every effort to "wipe out the other side." Among the causes of this crisis is the attitude that the law is no longer a profession, but a mere competitive business in which its members face increased "economic pressure[s]." Better legal education may not even help because "[t]he evil ... is not so much a professional as an American fault. It has its source in our inordinate love for the almighty dollar."²³

(1) The Stories and Narratives about Lawyers.

In the past, the bar's narratives framed the reality of lawyers and lawyering, creating a myth of elitism that possessed power.²⁴

These narratives, and others, have shaped the self-conception of the legal profession for generations. And the state's law has for the most part embraced these narratives in the construction of the law of lawyering.²⁵

²² See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 Wake L. Rev. 781 (Summer 1997); see also, James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 Buffalo L. Rev. 349 (Spring 2000); (Analysis of the phrase "Officer of the Court" has surprisingly little content; it is mostly rhetoric, **caused by self-love, and self promotion**. What little content it does have points to a role of the attorney as agent whose obligations to the court are almost identical to those owed by non-lawyers and almost entirely consistent with duties to client") *id* (emphasis added). This portion of the manuscript was first presented at the 2001 symposium of the ABA Center of Professional Responsibility.

²³ *Id.*, citing n.1, Morris Gisnet, *A Lawyer Tells the Truth* 11-12 (1931); n.2, ABA Commn on Professionalism, ' . . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 253 (1986); n.3, 10 The Law Student's Helper 35 (Sprague 1902) (on file with the author); n.4, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 29 A.B.A. REP. 395, 406 (1906); n.5, Robert L. Haig & Robert S. Getman, *Does "Hardball" Litigation Produce the Best Result for Your Client?*, N.Y. ST. B.J., Jan. 1993, at 24, 26 (quoting a local bar president).

²⁴ See Thomas Ross, *Knowing No Other Duty: Privity, the Myth of Elitism, and the Transformation of the Legal Profession*, 32 Wake L. Rev. 819 (Fall 1997)..

Simply stated, Ross believes state law has in the past granted the legal profession extensive privileges and immunities, based on the myth of elitism as the foundation, excluding other agents, actors or, for that matter, professions.²⁶ However, the myth has held little currency outside the profession.²⁷ As the myth crumbles even further, it is not only changing the public's perception of lawyers, but the legal profession's internal understanding of itself as well.²⁸

Laypersons have always viewed our profession with distrust and antipathy. Yet, the contemporary expressions of public disregard for the profession may represent a new high, or low, depending on your perspective. Also, even within the profession, the myth's standing has changed. When the lawyers of previous generations gathered for Law Day speeches and heard the bar's narratives, they received those stories presumably with some real sense that the speechmaker was describing their profession, albeit tempered with some self-conscious recognition of the gap between their ideals and the reality of day-to-day lawyering.²⁹

Ross finds this evolution significant because it suggests a dramatic change in the bar's conception of itself and in the content of the state's law governing lawyering, demonstrated in the civil liability law that determines a lawyer's liability to non-clients for negligence.³⁰

During the decade of the Nineties, response from the legal profession had little real impact on society's lack of trust in lawyering as a profession.³¹ The profession seemed content in placing band-aids on the broken bonds of faith with the public. The band-aids came in the form of internal ABA conferences such as the 1997 Leadership Conference

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, at 820. "Our society believes that lawyers do not cling to the myth of elitism, especially the idea that they are the best and the brightest, or that the practice of law is a truly 'public service', but merely just another way to make a buck." *Id.* at 821. (A short trip on the World Wide Web quickly presents current lawyer narratives that graphically represent one way that society now views lawyers and the legal profession. One harrowing web site is www.deadlawyers.com, describing how lawyers have been killed, or unwittingly met their demise. Interestingly, when the author went to this web site to confirm that it was still in operation, it declared that it was "closed for remodeling.")

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See *supra* Note 19 and accompanying text.

of the ABA's Coalition for Justice.³² However, such band-aids may not be enough to regain the public's trust, allowing non-lawyer organizations and professions to gain inroads and steal clients of the legal profession,³³ defying the profession with what has typically been considered the unauthorized practice of law.³⁴

(2) Countering the Negative Offensive.

The attempt to counter the bashing of the legal profession has had little impact on the cynical, even negative swell against lawyers that has in recent years risen to the level of a national past time. As the butt of jokes on Jay Leno's Tonight Show, or the target of ridicule on Late Night with David Letterman, lawyers and lawyering often are center stage. There are ample sources for pithy sound bites and crude depictions, from Judge Judy to Judge Starr, from O. J. Simpson to Oprah Winfree. If the ethics of any culture are found in its stories and narratives,³⁵ then woe be unto the legal profession, for the stories and narratives depict too many lawyers violating that which society perceives as right.³⁶ The moral of countless stories or narratives is that society does not perceive lawyers and their profession as elite.³⁷

(3) What the Negative Stories and Narratives are Telling America.

Contemporary narratives and stories show the vilification of lawyers literally spanning thousands of years. Law Librarian and author, Edward J. Bander notes in his epistle that lawyer-bashing has been with us throughout the ages.³⁸

³² See Philip J. Anderson, *President's Message – Incremental Steps Towards Justice*, 85 ABA Journal 8 (January 1999)(Commenting on the work of the Coalition for Justice, whose mission is to restore public confidence in the justice system). *Id.*

³³ See Charles F. Robinson, *Written Remarks to the ABA Commission on Multidisciplinary Practice*, February 5, 1999, <http://www.abanet.org/cpr/multicom.html>; see also Laurel S. Terry, *Written Remarks to the ABA Commission on Multidisciplinary Practice*, March 12, 1999, <http://www.abanet.org/cpr/multicom.html>.

³⁴ Examples of the marketing efforts of the AICPA and individual professional service providers are all around us. See for example <http://www.aicpa.org>; and www.financialpor.org (web site of the Society of Financial Service Professionals (SFSP, membership arm of the American College.)

³⁵ See Nina Rosenstand, *The Moral of the Story: An Introduction to Ethics*, Chp. 1, *Ethics in Narratives*, 23 (3d ed., Mayfield Publishing 2000).

³⁶ *Id.* at 10. (Every functional society on earth has had a “philosophy” of what one should do or be in order to be considered a good person doing the right thing. Sometimes this moral code is expressed orally in stories or songs...). *Id.*

³⁷ See *supra* Note 25, Thomas Ross, *Knowing No Other Duty: Privity, the Myth of Elitism, and the Transformation of the Legal Profession*, 32 Wake L. Rev. at 820.

³⁸ See Edward J. Bander, *The Lawyer as Devil's Advocate*, Proceeding of the Lawyer and Popular Culture (Tarlton Law Library 1993).

A book by Andrew and Jonathan Roth entitled *Devil's Advocates: The Unnatural History of Lawyers*,³⁹ records the scorn heaped on lawyers throughout the centuries. The editors have culled passages from the Bible, from literature, and from the mouths of lawyers from early times to the present, that make a just person wonder why civilization puts up with attorneys. Strangely enough, the ABA, leading law reviews, and legal publications generally have not made mention of this book. The *Index to Legal Periodicals* does not list one review of this book, despite the fact that it represents a substantial amount of research and, at the least, deserves a rebuttal from those who object to page after page of attacks from Confucius, Dickens, Cicero, Jesus, Martin Luther, and many, many others. What is wrong with the Roth book is that it is mean spirited. It has no purpose except to embarrass a profession that is necessary to our American culture; and, if that profession has lost its way, it must be led back to the noble purposes that our Founding Fathers, many of them lawyers, espoused. It is the purpose of this essay to show the depth of feeling against the legal profession and to show that many of the critics of lawyers have only their own best interests at heart.

The columnist H. L. Mencken probably epitomized the feelings against the legal profession when he wrote:

But is there any reason to believe that, among lawyers, the best are much better than the worst? I can find none. All the extravagance and incompetence of our present Government is due, in the main, to lawyers and, in part at least, to good ones. They are responsible for nine tenths of the useless and vicious laws that now clutter the statute-books, and for all the evils that go with the vain attempt to enforce them. Every Federal judge is a lawyer. So are most Congressmen. Every invasion of the plain rights of the citizen has a lawyer behind it. If all lawyers were hanged tomorrow, and their bones sold to a mahjong factory, we'd all be freer and safer, and our taxes would be reduced by almost a half.⁴⁰

(4) The ABA's Proactive Effort to Respond.

³⁹ *Id.*, citing, Lawyer Bashing is Back -- With A Vengeance," *American Bar Association Journal* 77 (Oct. 1991): 66 (Items by Matthew A. Hodel, Walter K. Olsen and Alan Dershowitz). Mr. Dershowitz suggests that the "current attack on lawyers is not neutral or value-free. It is a well-orchestrated campaign being conducted by business interests that have the most to lose from increased litigation." *Id.*, 73. On the other hand, Richard Kahlenberg quotes Professor Dershowitz as saying: "It's as if all the medical doctors in America were performing elective cosmetic surgery while the emergency wards of our hospitals had no doctors." Richard D. Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* (New York: Hill and Wang, 1992).

⁴⁰ *Id.*, citing Marion E. Rodgers, ed., *The Impossible H. L. Mencken* (1991), at 286.

In response to the negative image and exposure, the ABA organized two commissions in the late 1990s, examining how lawyers practice and recommending changes in professional conduct and standards.⁴¹

Between 1997 and 2003, the ABA, state bars and related legal organizations confronted the changing status of the legal profession by generally responding to ethical and practice changes, many of which specifically impact on elder law and estate planning attorneys. Through the Center for Professional Responsibility, the ABA developed and interpreted standards and scholarly resources in legal ethics, professional regulation, professionalism and client protection mechanisms.⁴² One commission looked internally at the legal profession's ethics beyond the year 2000, while the other commission looked externally at how law practices will be organized into the next century.

Beginning in August 1997, the ABA E2K Commission worked at a feverish pace to finish its task in time for the annual meeting in August of 2000.⁴³ The 13-member Commission, reflecting the ABA's diversity with judges, law professors, government lawyers, corporate counsel, civil and criminal practitioners and one non-lawyer, was charged with: 1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; 3) conducting original research, surveys and hearings; and 4) formulating recommendations for action.⁴⁴

⁴¹ See Rhonda McMillion, *Ethics in 2000 and Beyond: Profession Hustles to Keep Apace of Changing Standards*, 85 ABA Journal 96 (August 1999).

⁴² With substantial overlap and interaction, the Center described its departments: The Ethics Department is the place for study, development and implementation of model legal and judicial ethics standards; The Professionalism Department provides counsel to various ABA committees as well as support in efforts to improve the professionalism and competence of lawyers and judges; The Professional Regulation Department provides legal support and policy guidance for various ABA Committees as well as responds to requests for information on case law, statistics and procedural standards; and The Client Protection Department serves the concerns and best interests of the client population through programs that prevent or redress harm done in the practice of law or the rendering of legal services. See <http://www.abanet.org/cpr/home.html>.

⁴³ In support of its assertion that it has maintained a great leadership role in ethics and professionalism of the legal profession, the ABA cited the adoption of its ethical standards by virtually every jurisdiction, implicitly acknowledging that the it is a recognized leader and the appropriate forum for discussing, drafting and adopting rules governing lawyer conduct. See *Ethics 2000 Home Page*, <http://www.abanet.org/cpr/ethics2k.html>.

⁴⁴ On March 23, 1999, the Commission published for comment and consideration, revisions of Model Rules 1.4, 1.6, 1.7, 1.8, 1.9, 1.10 and 2.2, with accompanying comment.⁴⁴ On November 15, 1999, the Commission published for comment and consideration, revisions of Model Rules 1.5, 1.15, 1.18 (a proposed new rule), 4.4, 5.1, 5.2, and 5.3 with accompanying comment. On February 21, 2000, the Commission published for comment and consideration the most recent revisions of Model Rules 1.16, 1.17, 2.1, 3.6, 4.1, 4.2, 4.3, 5.6, 6.2, and 6.4 with accompanying comment. Of significant interest are the proposed new rule, 1.18 – prospective client, and the draft revision of rule 1.14 – Client with Diminished Capacity. On June 1, 2000, the Commission posted proposed new rule 1.0, Terminology, including a definition of informed consent. In 2001, The Commission published its report and recommendations.

The ABA Commission on Multidisciplinary Practice (Hereinafter “ABA MDP Commission”) was created in August, 1998, to face the unprecedented challenges of revolutionary advances in technology and information sharing, of the globalization of the capital and financial services markets, and of more expansive government regulation of commercial and private activities. The ABA MDP Commission’s members included a cross-section of the legal profession including distinguished practitioners, judges, and academicians. It worked believing that there was a degree of urgency with the emergence of consulting firms that had been aggressively soliciting clients, offering services remarkably similar to those traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, human resources, and litigation support systems.⁴⁵

The work of the ABA MDP Commission may be examined in its Background Paper on Multidisciplinary Practice: Issues and Developments;⁴⁶ its development of Hypotheticals and Models, based on some of the testimony and comments received by the Commission through the summer of 1999;⁴⁷ and the written remarks of the more than eighty witnesses appearing at public hearings.⁴⁸ While the Commission recommended MDP, the ABA House of Delegates voted it down.⁴⁹ This turned out to be a critical maneuver in light of the subsequent Enron scandals, and especially when compared to the thrust of ABA MRPC Rule 5.7 – Ancillary and Related Services and the private business of law argument.⁵⁰

(5) Alternatives that are a Paradigm Shift in the Law of Lawyering.

⁴⁵ The Commission met in executive session in September, November, and December, 1999, and held two-day public hearings in November, 1999, February, March, June and July 2000. The Commission submitted progress reports, considered the most important issue to face the legal profession this century, in August, at the 1999 Annual Meeting of the ABA House of Delegates, and again in July, at the 2000 Annual Meeting (New York) of the ABA House of Delegates.

⁴⁶ The Commission anticipated submitting a final report with recommendations in the fall of 2000. The ABA E2K Commission invited the public, members of the House of Delegates, ABA entities, and all other interested persons and organizations to respond to its posting of the proposed new rules, revised and edited rules, repealed rules and the minutes of the July 7, 2000 meeting of the Commission. See *ABA E2K Commission*, <http://www.abanet.org/cpr/070700mtg.html>.

⁴⁷ The Commission noted that in some designated instances, the hypotheticals were based on the Restatement of the Law Governing Lawyers (Proposed Final Draft No. 1, 1996).

⁴⁸ The papers of the Commission, and the written comments of the witnesses were published on the home page of the Commission. See *Multidisciplinary Commission*, <http://www.abanet.org/cpr/multicom.html>.

⁴⁹ See ABA Journal 2001 announcing the vote of the House of Delegates.

⁵⁰ See ABA MRCP Rule 5.7 (2005).

When viewed as a private enterprise, one author suggests that any remedies, hard as they may be to swallow, that might repair the damaged image of lawyers, may only end up being implemented by outside sources stuffing the harsh medicine down the throats of lawyers, while the legal profession sits on the sideline.⁵¹ The legal insiders will watch the free enterprise market rally the citizenry to demand that accountability be taken out of the hands of the ABA and the judiciary. One competition based remedy

“...includes opening up the right to practice law in certain areas of practice to interests of a kind other than those who graduated from the traditional American law school. This measure, coupled with changes in the nature of who can offer legal education considered sufficient to qualify someone for the right to practice law, will expand the availability of legal services and most likely create some real efficiencies in its delivery. It will obviously also drive some lawyers out of the market because they will be unable or unwilling to compete under the new terms. I do not expect the proposals listed here to be palatable for many lawyers. But if we have the desire to protect clients and improve the quality of legal services then I see no effective alternatives.”⁵²

B. NAELA’s Involvement in the Development of Creeds, Codes, Ethics and Rules of Professional Conduct

In the last ten years, NAELA has increased and enhanced its involvement in the legal profession’s revision of its ethical rules. When hearings were scheduled before the ABA Ethics 2000 Commission in August of 1999, NAELA’s leadership concluded that NAELA needed to be visible, sharing its position with those charged with the responsibility of rewriting and editing the rules. To that end, NAELA prepared position statements on recommended revisions of the rules being considered. At the time, the Commission was looking, in part, at Rules 1.6, 1.7, and 2.2, rules of primary interest to NAELA. It was also beginning an examination of Rule 1.14, Clients with Disability, in which NAELA had a significant interest as far as its members’ clients were concerned.⁵³

⁵¹ See David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 Geo J. Legal Ethics, 203, 266 (Winter 2004).

⁵² *Id.*, at 257-265. Branhizer offers several (hard to believe) specific strategies, the titles of which include: 1. REMOVING CONTROL FROM JUDGES AND THE BAR; 2. MANDATORY DISCLOSURE REQUIREMENTS IN SUPPORT OF MALPRACTICE CASES; 3. BURDEN-SHIFTING AND QUALIFIED IMMUNITY RULES; 4. CREATING MALPRACTICE ARBITRATION AND MEDIATION SYSTEMS OUTSIDE LAWYERS' CONTROL; 5. MENTORING PROGRAMS; 6. LAW SCHOOL SHOULD BE RESTRUCTURED AND ABBREVIATED; 7. EXPANDING THE RIGHT TO PRACTICE IN THE BUSINESS OF LAW; 8. LAW FIRM AND LAWYER DISCLOSURE AND ACCOUNTABILITY DATABASES FOR POTENTIAL CLIENTS; 9. ACCOUNTABILITY AND LIABILITY MECHANISMS; 10. REQUIRING THE "PROFESSIONAL" DESIGNATION TO BE EARNED BY ACTUAL SERVICE.

⁵³ See the written testimony from three appearances before the ABA Ethics 2000 Commission between 1999 and 2001, published in part in *Model Rule 1.7 Applied to Elder Law: Conflicts in Multiple Client and Family Entity Engagements*, 14 NAELA Quarterly 19 (Winter 2001). Other NAELA leaders attending

NAELA achieved visibility when the ABA Journal published a report on the Commission hearing. The report specifically chronicled the debate that went back and forth on client representation and the communitarian approach.⁵⁴ The article spurred additional comment and dialogue from scholars, judges and lawyers with some asking just how family representation would work, and others voicing strident opposition.⁵⁵

NAELA was again before the Commission in February, 2000, to comment about the revisions to Model Rule 1.14, Client with Diminished Capacity, and addressing multiple and joint representation and how additional proactive comments might be written to guide lawyers offering such engagements to clients.⁵⁶ The NAELA Board crafted NAELA's final comment, which was subsequently reviewed by the NAELA Professionalism and Ethics Task Force and presented to the Commission at the annual meeting of the ABA's Center for Professional Responsibility in June.⁵⁷ NAELA participation in revising the ABA Model Rules of Professional Responsibility gave NAELA leaders the opportunity to present lectures and moderate work sessions on the application of the rules revisions when representing elderly clients.

During this period, the NAELA Committee on Professionalism and Ethics began to examine ways by which NAELA might strengthen its members' standards of practice. The examination evolved into a lengthy, often times arduous exercises in writing, analysis and commentary. In the last two years, the Professionalism and Ethics committee directed its primary focus and attention on the development of the Aspirational Standards by which NAELA's members might strive to practice elder law at a higher ethical level.⁵⁸

III. WHAT DID NAELA DO? AND WHAT MUST NAELIANS DO, AND WHEN, FOR COMPLIANCE?

work sessions of the ABA Ethics 2000 Commission included past president Professor Rebecca Morgan, past president Clifton Kruse, Russell Carlisle, past president Bill Overman, past president Charlie Sabatino and NAELA executive director Laury Gilardi.

⁵⁴ See John Gibeaut, *Ethics 2000 Work Continues: Commission Cautious About Proposal to Allow Lawyers to Represent Families*, 85 ABA Journal 91 (October, 1999).

⁵⁵ Author Johns received one letter in opposition from a probate judge. The judge's primary concern addressed the potential of lawyers appearing in court representing both parties in the adversarial process. The letter is on file at NAELA.

⁵⁶ See *Position Statement to the ABA E2K Commission* (February, 2000). This statement was not that of NAELA. It was subsequently proposed to the NAELA Board for acceptance. The position statement is on file in the records of the NAELA Board at its national office in Tucson, Arizona.

⁵⁷ See *NAELA Position Statement to the ABA E2K Commission*, <http://www.abanet.org/cpr/naela600.html>. This statement is the official position of NAELA. The position statement is on file in the records of the NAELA Board at its national office in Tucson, Arizona.

⁵⁸ See Stuart Zimring, *Keynote Address, NAELA Symposium (2004)*.

A. What NAELA Did.

In 2005, NAELA's Board of Directors approved the Aspirational Standards recommended by the Professionalism and Ethics Committee. In a bold move, NAELA's Board also voted to submit to the membership a change in the NAELA bylaws that required a commitment from every NAELA member to support the Aspirational Standards to the extent that they are consistent with and not in violation of any state rules of professional conduct. Over eighty-seven percent of those members voting on the bylaw amendment voted its approval. This issue of the NAELA Journal has dedicated the majority of its articles to the subject of the Aspirational Standards, and their supporting comments.

In November 2005, NAELA's leadership authorized the following:

1. For the NAELA billing, the following verbiage should go on the invoices above the signature line:

"The NAELA Aspirational Standards are intended to elevate the level of professionalism in the practice of Elder Law and enhance the quality of service to clients. In an historic step, the NAELA membership voted to include a requirement, in the NAELA Bylaws, that an affirmation of support for the Aspirational Standards be a condition of membership. However, the Aspirational Standards are not a code of ethics, and NAELA does not require adherence to the Aspirational Standards. The Bylaws only require an expression of support, not fealty. Consistent with this approach, of course, State Bar rules must guide members' conduct regardless of any provision in the Aspirational Standards. Finally, the Aspirational Standards are explicit that they do not define or establish a standard of care or create a cause of action for civil liability or related purposes."

NAELA Bylaws require that all members sign a pledge of support for the Academy's Standards for the Practice of Elder Law as a condition of membership. For the convenience of renewing members, NAELA will accept payment of this dues invoice as affirmation of such support.

"(Note: Attempts to withhold support for the Academy's Standards, or any part(s) thereof, shall not be effective. Any member who does not wish to support the Academy's Standards in their entirety may do so only by resigning or not renewing their membership)."

2. For the web and new applications, again, above the signature line:

"The NAELA Aspirational Standards are intended to elevate the level of professionalism in the practice of Elder Law and enhance the quality of service to clients. In an historic step, the NAELA membership voted to include a requirement, in the NAELA Bylaws, that an affirmation of support

for the Aspirational Standards be a condition of membership. However, the Aspirational Standards are not a code of ethics, and NAELA does not require adherence to the Aspirational Standards. The Bylaws only require an expression of support, not fealty. Consistent with this approach, of course, State Bar rules must guide members' conduct regardless of any provision in the Aspirational Standards. Finally, the Aspirational Standards are explicit that they do not define or establish a standard of care or create a cause of action for civil liability or related purposes."

NAELA Bylaws require that all members sign a pledge of support for the Academy's Standards for the Practice of Elder Law as a condition of membership. NAELA will accept payment of this membership application or renewal as affirmation of such support.

"(Note: Attempts to withhold support for the Academy's Standards, or any part(s) thereof, shall not be effective. Any individual who does not wish to support the Academy's Standards in their entirety should not submit an application for membership)."

The posting on the NAELA web site as of December 6, 2005, reads as follows:

The Aspirational Standards with Commentaries define the meaning of professionalism in elder law. They describe best practices which, when followed in conjunction with independent professional judgment and state disciplinary rules, raise the level of professionalism and enhance the quality of service to clients. They do not define or establish an ethical or disciplinary breach or a standard of care or create a cause of action for civil liability or related purposes.

As the year was ending, several members of the NAELA listserv were debating the rightness or wrongness of NAELA's leadership to impose this higher ethical commitment on members. One posting reminded them that the Aspirational Standards had been approved by more than 87 percent of the members exercising their right to vote on the bylaw amendment. The Aspirational Standards with commentaries and the bylaw amendment were also the subject of plenary and breakout sessions of NAELA's symposiums and institutes over the last two years, and they were featured in NAELA publication articles. At the same time, the Professionalism and Ethics Committee detailed the final language of the statement to be submitted to members relating to their commitment. The back of the 2006 dues invoices sent out to NAELA members currently reads as follows:

In an historic step intended to elevate the level of professionalism in the practice of Elder Law and enhance the quality of service to clients, NAELA membership voted to require an affirmation of support for the Aspirational Standards as a condition of membership.

Being a NAELA member means that you support the Aspirational Standards as best practices, to the extent that they are consistent with state disciplinary rules and the exercise of your independent professional judgment.

The Aspirational Standards are explicit that they do not define or establish a standard of care or create a cause of action for civil liability or related purposes

NAELA bylaws require that all members sign a pledge of support for the Academy's Standards for the Practice of elder Law as a condition of membership. For the convenience of renewing members, NAELA will accept payment of this dues invoice as affirmation of support.

"(Note: Attempts to withhold support for the Academy's Standards, or any part(s) thereof, shall not be effective. Any member who does not wish to support the Academy's Standards in their entirety may do so only by resigning or not renewing their membership)."

B. What NAELiens Must Do and When.

Amid the hoopla and celebration of NAELA's leadership, especially the Professionalism and Ethics Committee, over achieving the milestone of passage of the Aspirational Standards and commentaries, it has been difficult for many NAELiens (the nickname affectionately coined by past president Vincent Russo) to understand what members must do and when they must do it.

When joining or rejoining NAELA, members are being asked to sign at the bottom of the application their affirmation in support of the Aspirational Standards as a condition of membership. This is to be done only to the extent consistent with the member's state ethics rules. Members are to accept this additional condition in conjunction with the current mission and conditions of NAELA membership:

NAELA's Mission:

The mission of the National Academy of Elder Law Attorneys is to establish NAELA members as the premier providers of legal advocacy, guidance and services to enhance the lives of people with special needs and people as they age.

Criteria for NAELA Membership:

1. Membership is open to attorneys and all those who possess a juris doctorate or equivalent degree and are licensed or authorized to practice law under the jurisdiction of any country.

Full-time law school students at an accredited college or university are eligible for membership during the duration of their studies.

2. The attorney renders legal services for the benefit of the elderly or is in an endeavor which encompasses the legal needs of the elderly.
3. The attorney has an understanding of the aging process and a sensitivity to the needs of the elderly.
4. The attorney is committed to the highest standards of ethics in representing the needs or promoting the welfare of the elderly.
5. The attorney has a knowledge of the aging network and those services available through other agencies which benefit the elderly, or wishes to gain such knowledge.
6. The attorney has a commitment to positive involvement in the work of the Academy and its purposes.

These are the conditions of membership. However, the only condition enforced is the one requiring a law degree and licensure in any country, or proof of being a full time law student in good standing.⁵⁹ While NAELA has in its history terminated membership of those convicted of crimes, disbarred or sanctioned for state ethics violations,⁶⁰ it has never checked to see if a member “[2]...renders legal services for the benefit of the elderly or is in an endeavor which encompasses the legal needs of the elderly.”; “[3]...has an understanding of the aging process and a sensitivity to the needs of the elderly.”; or “[6]...has a commitment to positive involvement in the work of the Academy and its purposes.”

In this context, compare condition number 4 above with the affirmation of support. There is little if any difference between “...committed to the highest standards of ethics...” and “...elevate the level of professionalism in the practice of Elder Law...[and] ...support the Aspirational Standards as best practices, to the extent that they are consistent with state disciplinary rules and the exercise of your independent professional judgment.” The true impact of the affirmation is not to be found through enforcement. However, the act of affirmation helps all members begin to focus on how to elevate service delivery within the elder law specialization. It is a modest beginning, but an important beginning just the same.

⁵⁹ Maybe the most important enforced condition is the payment of dues.

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IV. WHAT PRACTICAL STEPS SHOULD BE TAKEN TO BEGIN? THE TOP TEN ASPIRATIONAL STANDARDS THAT SHOULD BE RECOGNIZED IN AN ELDER LAW PRACTICE

With NAELA's new era beginning, many members have read, even studied, the Aspirational Standards and commentaries, only to realize how many of those general declarations of higher ethical standards are not being implemented in their own practices. Beyond the rigors of state codes and rules, there are specific steps NAELA members can target as a beginning.

A. The Top Ten Practical Aspirational Standards⁶¹:

1. Identify who the client is. (A-1)
2. Meet with the identified prospective or actual elder client in private. (A-2)
3. Provide the client with a written engagement contract. (A-3)
4. Carefully explain the obligation of confidentiality to the client and involved parties as early as possible in the representation (C-1)
5. Approach client matters in a holistic manner, recognizing that legal representation of clients often is enhanced by the involvement of other professionals. (D-2)
6. Ensure adequate training and supervision of legal and non-legal staff (D-4)
7. Develop and utilize appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand. (E-3)
8. Advocate within the law courses of action chosen by the client. (F-5)
9. Ensure that no materially false or misleading information is communicated in connection with a seminar, presentation, or similar activity. (G-4)
10. Ensure that any ancillary services recommended meet the requirements of licensure and the needs of the client. (H-)

These 10 Aspirational Standards are singled out primarily because many are not found in the ABA Model Rules of Professional Conduct or within the disciplinary codes and rules of the states. They are representative of what an elder law attorney would do given the opportunity to elevate to a higher standard of practice.

⁶¹ The authors chose the top ten somewhat subjectively from the 9 standards and more than 50 action statements. NAELA welcomes the readers' offering of a top ten list of their own.

These 10 standards are singled out secondarily because they would not be difficult to incorporate into an elder law practice. NAELA members should identify the list, declaring to all attorneys and staff in the firm that there will be meetings in which planning for implementation will take place. This will assure that everyone understands what the changes in practice will be and how they will be part of the practice and process of the firm going forward.

During the course of developing this manuscript, NAELA member, Robert C. Anderson, CELA, sent a letter to one of the authors describing his limited success in training his staff on how to apply the Aspirational Standards.⁶²

After a follow-up phone conversation, Anderson wrote further, explaining that it was one thing to hear about the new Aspirational Standards for almost two years, and another thing to actually implement them on a consistent basis in each and every matter. That is why Anderson developed an Internal (three-page) Ethical Screen that provides an easy-to-use checklist covering NAELA's Aspirational Standards. He requires that the attorneys of his firm in each and every case fill it out. The Internal Ethical Screen helps assure that an attorney does not forget something. A copy of the Internal Ethical Screen is attached as an exhibit to this article.⁶³

Anecdotally, Anderson described how recently, staff members of his firm were called as witnesses in a trust contest matter to confirm a deceased client's capacity. He opined how dramatic and impressive it would have been had they had in place the Internal Ethical Screen, using it to back-up their testimony.⁶⁴

Anderson did not stop there. He also created an Elder Law Check-Up Form containing a 71-item checklist his firm has identified as essential items that every senior citizen's plan should contain.⁶⁵ Anderson explained, "senior citizens who have prepared estate plans with a traditional Will and Trust attorney will be able to discover for themselves how Elder Law improves upon traditional death-time planning documents."⁶⁶

⁶² See Letter dated January 2, 2006, from Bob Anderson of Marquette, Michigan to Frank Johns on file with the author and available on request.

⁶³ [See Email letter dated January 9, 2005, from Anderson to Johns on file with the author. Anderson had initially copyrighted the Internal Ethical Screen, but in a collegial gesture has allowed it to be published as an exhibit to this article. Please take time to thank Bob for his good work and generosity.](#)

⁶⁴ *Id.*

⁶⁵ [See attached exhibit authorized by Anderson for publication and use my readers. If these exhibits are used, please provide appropriate attribution to Bob Anderson, CELA of Marquette, Michigan. Again, thank you Bob.](#)

⁶⁶ [See supra Note 53.](#)

Anderson specifically references item number 2 on the checklist, “Does your attorney regularly use the 2005 ethical standards adopted by NAELA?”⁶⁷

Anderson asked one last question, “Has the Professionalism and Ethics Committee discussed any implementation guidelines for the Aspirational Standards? The answer is simply no. NAELA was in a quandary, struggling to finish a significant new document that has credibility and doing so in a timeframe that would be relevant to NAELA members. The volunteer time mounted in the hundreds of hours. Those dedicated NAELA members giving that time were doing so at the expense of their practices and their families. There are not that many NAELA members available to jump in, preparing guidelines and initiating educational and training programs right away.

However, the NAELA leadership and the Professionalism and Ethics Committee believed that to delay the publishing of the Aspirational Standards could be its demise. Certainly, guidelines, programs, work sessions, seminars and invitational certifications are an important goal for the NAELA Program and Publication Committees in the coming months and years, but they could not be created at the same time as the Aspirational Standards. This dialogue creates an easy segue to the next section on positive approaches to implementation.

IV. WHAT WILL BE NAELA’S RESPONSE IF MEMBERS DO NOT BEGIN? TURNING ENFORCEMENT AND AUDIT INTO POSITIVE APPROACHES

The NAELA leadership has never viewed implementation of the Aspirational Standards from an enforcement perspective. Throughout the development process, the intent was to be inviting and non-confrontational. The true imposition is diverting member attention from the legal substantive rigors of the elder law practice⁶⁸ to important, albeit not critical, ethical practices in the Elder Law Bar. The NAELA leadership has always viewed the development and implementation of the Aspirational Standards as an on-going process, inviting members to apply these standards to the practice of elder law.

Enforcement does occur, but only in veiled reaction to “Attempts to withhold support for the Academy's Standards, or any part(s) thereof...” by declaring such attempts as ineffective. Even when a member declares opposition to the NAELA Aspirational Standards, NAELA does not expressly assert that any enforcement will be taken. The only action taken is the action by the member to resign or not renew membership.

⁶⁷ *Id.*

⁶⁸ As the manuscript is being written, US Senate Bill 1932 has been amended and sent back for reconsideration and vote by the House of Representatives. This has had the constant attention of most if not all NAELA members.

Two beliefs frame the basis for NAELA’s proactive approach: (1) that NAELA members welcome the guidance to implement better ethical elder law practice methods; and (2) that if members actually implement the top ten Aspirational Standards and give more than “lip-service” support to all of them, members should be able to market themselves as having a distinctive difference from non-NAELA members.⁶⁹

A. Individual Education, Training and Development in Aspirational Standards and Ethical Practice, Gaining Recognition for Those Lawyers Who Go Through the Process

1. Continuing Education in Ethics and Aspirational Standards for all NAELA Members in Symposia or Institutes

The focus of programs and publications on the Aspirational Standards began in earnest as early as 2004 at the NAELA Symposium in Charleston, South Carolina.⁷⁰ It continued at the NAELA, NGA and NCPJ Joint Conference in Colorado Springs, Colorado,⁷¹ followed by the NAELA Symposium in San Francisco, California⁷² and the NAELA Institute in Tucson, Arizona.⁷³

NAELA’s Publication Committee, in conjunction with the NAELA Journal Board of Editors, authorized the publishing of an article in the last issue of the NAELA Journal that referenced the Aspirational Standards, including the standards, without commentary, as an addendum to the article.⁷⁴ Also (as referenced earlier), this article is being published with many other articles focused solely on the Aspirational Standards.⁷⁵ In the future, as the dialogue moves back and forth about the standards, there will be an abundance of critiques, points, counterpoints, and debates. This will make the Aspirational Standards a living document, growing through many revisionism and editions, each time enhancing its importance and relevance as part of the practice of Elder Law. NAELA intends to follow the growth and development of the Aspirational Standards in its programs and publications for years to come.

2. Voluntary Individual Internal Self-Auditing of Your Own Elder Law Practice for Compliance

⁶⁹ This opportunity is guided by compliance with state disciplinary rules on marketing, advertising and solicitation, and Aspirational Standard G – Marketing.

⁷⁰ See Gregory French, chair of plenary session -NAELA Symposium (2004).

⁷¹ See Gregory French, chair of plenary session -NAELA Institute (2004).

⁷² See Gregory French, chair of plenary session -NAELA Symposium (2005).

⁷³ See Gregory French, chair of plenary session -NAELA Institute (2005).

⁷⁴ See A. Frank Johns and Bernard C. Krooks, a(2005).

⁷⁵ See various articles in this issue of the NAELA Journal.

Many ideas are being considered to implement the Aspirational Standards into the elder law practice of members. One idea is voluntary self-individualized internal auditing. One way it could work would be for members to attend, either in person or through teleconferences, a basic Aspirational Standards skills course. After successfully finishing the course, the member would process through a self-administered voluntary audit of her or his elder law practice. Successful completion of the audit would garner a certificate of completion and the member would receive supporting press announcements.⁷⁶

3. Voluntary Peer Auditing of Your Own Elder Law Practice for Compliance

Another idea similar to the one above is for NAELA to organize members of NAELA Chapters to conduct voluntary peer audits. This came as a suggestion of Robert Anderson when he was discussing his earlier efforts in developing the internal ethics check list and the complete Aspirational Standards Checklist. Anderson, previously on his state's Board of Accountancy, participated in mandatory peer review audits for the continuing certification of CPAs in his state. He suggested this as another way to assist members in implementing the Aspirational Standards into their practices.⁷⁷

4. Recognition for Those NAELA members going through Successful Audits

Individual and voluntary peer auditing of compliance through which members are successful should bring with it public accolades and recognition. The recognition should be of some significance for those members who would generate time, money and commitment to achieving higher standards of practice.

V. Joint Commission on Aspirational Standards Accreditation

A. Support of NELF and Other Nationally Recognized Gerontology or Elder Law Centers That Would Organize, Develop and Conduct the National Elder Law Accreditation Commission – Delivering Formal External Education and Accreditation Programs

Another creative option would be the creation of a national joint commission on the accreditation of NAELA members and elder law practices adhering to the NAELA Aspirational Standards. A marketing survey and feasibility study could determine sufficient interest in accreditation as another way to set certain NAELA members apart

⁷⁶ This is just one of many ideas – what do you think? Share your own ideas with NAELA leadership and staff.

⁷⁷ See [supra](#) Note 53 and accompanying text. (Anderson wrote, “Ultimately, I would like to see NAELA attorneys perform ethical audits on each other as the AICPA requires for CPA membership. This would distinguish participating NAELA members from those who don’t and elevate NAELA’s reputation above other attorney specialty areas.”) *id.*

from all other elder law and estate planning practitioners. Lodging the process in a joint commission of several external professional entities in the aging network would heighten its credibility.

The foremost elder law certification organization in the legal profession and the aging network is the National Elder Law Foundation (“NELF”). NELF is a non-profit organization founded in 1993, and dedicated to the development and improvement of the professional competence of lawyers in the area of elder law. NELF was one of the first organizations to gain licensure through the American Bar Association (“ABA”), adopting its voluntary national standards, along with a set of procedures to accredit elder law as one of the ABA’s specialty certification programs. After NELF obtained licensure, it began the elder law certification program to identify those lawyers who have the enhanced knowledge, skills, experience and proficiency to be properly identified to the public as certified elder law attorneys. NELF has the experience and skill to join with several other academic and educational entities to develop and implement an accreditation program based on NAELA’s Aspirational Standards.

NELF has a close organizational relationship with NAELA. Aligning it with nationally recognized gerontology and law and aging centers in the joint commission would enhance the accreditation entity by wrapping it with objectivity and organizational distance. The aligned entities, structured as a separate joint commission, could provide the necessary experience and academic credentials necessary to develop and operate the external auditing teams.

B. Structuring the National Elder Law Accreditation Joint Commission -A Multi-faceted Accreditation Curriculum and Re-accreditation Timeframe for Offered Exclusively to NAELA Member

NAELA members with the necessary credentials would be allowed to apply for admission to the accrediting program of the National Elder Law Accreditation Joint Commission. The accreditation program could last for up to 24 months, requiring tuition fees and auditing costs throughout, and including classes, on-site audit protocols and peer recommendations specifically related to ethics. After successful accreditation, the NAELA member would receive appropriate commendation and singular recognition. The accreditation would last a number of years with re-accreditation required for continued recognition.

VI. EPILOGUE

The primary goal of this article was to provide NAELA members with a bright-line notice of when compliance with the Aspirational Standards go onto effect. It provided an historical backdrop for the development of the Aspirational Standards and identified the top ten practical Aspirational standards that members could implement. The article then acknowledged NAELA’s invitational rather than enforcement approach to implementation. The article ended with several ideas that might be developed by NAELA

and other aligned organizations, especially targeting the potential for a joint commission on accreditation.