ETHICS and PROFESSIONALISM:
A Distinction With A Difference?

American Bar Association
Section of Labor & Employment Law
Ethics and Professional Responsibilities Committee
Midwinter Meeting
San Francisco, California
March 22-24, 2012

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Ethics and Professionalism: A Distinction With a Difference?

Several decades ago the organized bar, the judiciary, and many individual attorneys began to express alarm regarding a growing lack of professionalism among attorneys. Often this was described as a marked departure from a level of civility expected within the profession of law. Writing on the topic exploded, as did legal conferences and seminars featuring presentations that dealt with civility. Across the nation, bar leaders made commitments toward efforts aimed at encouraging civility, or stated another way, efforts designed to stamp out behavior considered to be unacceptable for the practice of law.

Much of the attention focused on tactics used in litigation. The expression “Rambo litigation” became a catchphrase of the legal profession and today rarely requires definition. A Google search for the phrase turns up thousands of references; clearly, interest in the topic has not waned. Rambo litigation appears to cover a wide variety of misconduct ranging from relentless filing of motions and use of discovery as a weapon of intimidation and vexation to a complete disdain for courtesy, often aimed at making litigation a miserable experience for one’s opponent.

According to one widely circulated article, the behavioral characteristics of an uncivil legal approach include:

• a mindset that litigation is war, describing trial practice in military terms;
• a conviction that it is invariably in your interest to make life miserable for your opponent;
• a disdain for common courtesy and civility, assuming that such are ill-suited for the true warrior;
• a facility for manipulating facts and engaging in revisionist history;
• a hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact finding; and
• an urge to put the trial lawyer on center stage rather than the client or his or her cause.  

Litigation misconduct seems to fall into the following categories:  (A) Threats: expressing the risk of damage to reputation and adverse publicity if the matter is not settled; (B) Discovery abuse: obstructive tactics, vulgar speech, abusive conduct and general incivility; and (C) Conducting litigation in bad faith: baseless claims, accusation, and name-calling.  

The problems generated by increasing incivility falls into categories that produce harm both within and without the profession. Commonly cited negative results include: (1) the job dissatisfaction within the profession, including both judges and lawyers, (2) the overloaded trial dockets resulting from tactics that burden and prolong the litigation process, (3) a decline in public respect, and (4) the increased cost to clients as a result of unnecessary and bad faith pleadings, hearings, and conflict between counsel and parties. 

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In an effort to stem the tide of incivility, courts and state or local bar organizations by the hundreds enacted codes of conduct urging civility and professionalism among attorneys. The focus on professionalism often amounted to an add-on to basic ethics requirements mandated for attorneys. Today ethics and professionalism often are a joint topic or pursuit. This article does not intend to review the trend that is designed to create a culture of professionalism among attorneys. Instead, the writer will seek to explore the distinction, if any, between ethics and professionalism.

Upon its founding, this committee operated under the title “Ethics and Professionalism.” A few years ago the name was changed to “Ethics and Professional Responsibilities.” For purposes of distinguishing between the two topics, the split as spelled out by the earlier committee name, Ethics and Professionalism, will be used in this article. The current committee title using “Professional Responsibilities” appears to encompass a more comprehensive and significant range of topics including diversity, addiction, delivery of legal services to those who cannot afford to hire an attorney, and other areas deemed to be the professional responsibility of attorneys.

**Continuing Legal Education Requirements for Ethics and Professionalism**

Virtually all states now require some continuing legal education regarding topics of ethics, professional responsibilities, malpractice prevention, and various issues such as

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4A collection of links to dozens of codes adopted by state and local bars can be found at http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html
alcohol abuse, diversity, and child abuse obligations. The Supreme Courts in several states distinguish between ethics and professionalism, to the extent of creating separate requirements for each topic. These states include Georgia, Louisiana, and Ohio.

Even in states where separate requirements are not set out for CLE, there have been efforts to categorize certain topics as falling within either ethics or professionalism. Ethics topics generally include malpractice prevention and specific legal ethics issues. A wider variety of topics are clustered under professionalism including, e.g. substance abuse or addiction, mental illness awareness, emotional distress, civility, bias elimination, diversity, client/attorney disputes, pro bono obligations, and various quality of life and practice topics.

While the distinction between ethics and professionalism may not be critical for an individual lawyer in carrying out professional responsibilities, some understanding of any distinction may be useful in planning for bar conferences, efforts at improving the quality of law practice, and for a committee operating under the title of Ethics and Professional Responsibilities as it seeks to balance its focus on both areas.

**Is There a Difference Between Ethics and Professionalism?**

At least three states discern some distinction between the two topics because governing bodies in Georgia, Louisiana and Ohio have adopted separate CLE requirements labeled as ethics and professionalism. Leaders in those states with a
separate requirement have attempted to spell out a difference. Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as:

\[\ldots\text{ the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers.}\]

The Georgia Chief Justice’s Commission on Professionalism states that the “term Ethics commonly is understood in the CLE context to mean ‘the law of lawyering’ and the rules by which lawyers must abide in order to remain in good standing before the bar.” Professionalism, on the other hand, appears to harken back to the traditional meaning of ethics, i.e., one who would rise above the minimal standard would be described as ethical. But the passage of precise rules setting out a minimal threshold of legally permissible conduct in specific situations may have altered our understanding of professionalism. Most attorneys would not describe mere adherence to such rules of minimal behavior as professional conduct in the praiseworthy sense. It would seem clear that authentic professionalism must rise to a higher level than the mere minimum standard for preserving the right to practice law.

Both ethics and professional discussions tend to focus on misconduct -- the undesirable elements of lawyering. Moving beyond mere adherence to minimum expected conduct, the Georgia Commission declared that “professionalism is meant to address the aspirations of the profession and how we as lawyers should behave.”

According to the Commission:
Professionalism is a wide umbrella of values encompassing competence, civility, legal ethics, integrity, commitment to the rule of law, to justice and to the public good. Professionalism calls us to be mindful of the lawyer's roles as officer of the court, advocate, counselor, negotiator, and problem solver. Professionalism asks us to commit to improvement of the law, the legal system, and access to that system. These are the values that make us a profession enlisted in the service not only of the client but of the public good as well. While none of us achieves perfection in serving these values, it is the consistent aspiration toward them that defines a professional. The Commission encourages thought not only about the lawyer-client relationship central to the practice of law but also about how the legal profession can shape us as people and a society.

Laws and the Rules of Professional Conduct establish minimal standards adopted to govern the conduct of attorneys; for example, the standard to which an attorney must adhere in order to maintain a license to practice. One would hardly describe an attorney as ethical merely because the minimal standards of the occupation are satisfied. One is not ethical, in the traditional sense, because he or she acts lawfully or even within the bounds of an official code of ethics.

The term professional generally is applied to the three earliest professions of the law, medicine, and ministry. The term profession evolved to describe occupations that required new entrants to take an oath acknowledging their commitment to the ideals and practices associated with a calling that required education. Dean Roscoe Pound of Harvard Law School described a professional as follows:

The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service, no less a public service because it may
incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.\textsuperscript{5}

The 1996 Report of the Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar, \textit{Teaching and Learning Professionalism}, extends and particularizes the definition to the practice of law:

A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.

Justice Sandra Day O’Connor, a steadfast speaker on the topic, set forth a description of professionalism:

To me, the essence of professionalism is a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all.\textsuperscript{6}

Discussion regarding professionalism often evokes a seemingly idyllic age when lawyers scheduled a deposition on a verbal agreement and generally practiced as if one’s word was a bond. There are tales of opposing lawyers accompanying one another on a train ride for a hearing or deposition held in another city; and, following a hearing,

\textsuperscript{5} Roscoe Pound, \textit{The Lawyer from Antiquity to Modern Times}, p. 5 (1953).
\textsuperscript{6} Court of Appeals of Maryland Professionalism Course,” Professionalism Above and Beyond Ethics” p. 15 (1992)
opposing counsel gathering for fellowship at a tavern frequented by the legal community. If such blissful days of law practice ever existed, they now are gone, likely forever.

The sheer number of lawyers today dictates that much anonymity pervades the practice; a bad deed done to opposing counsel is not directed at a friend or colleague. Moreover, large sums of money often are at stake, making litigation more than a friendly encounter to work out disputes between clients. And almost all of us would acknowledge that the practice of law has become more of a business than anticipated when we entered the profession.

**Civility and Professionalism Codes Adopted**

Bar groups and the judiciary have sought to encourage civility among attorneys by adopting or revising codes that govern conduct and ethics. These civility codes set out in language to which any attorney should aspire a lofty goal of treating opposing counsel, opposing party, the judiciary, and all connected to the legal system in terms of what one would hope to receive from others. (Attached as an appendix are several civility codes adopted by bar organization and state authorities)

One interesting topic in most codes is the place of *zealous* representation by attorneys. Many senior attorneys were introduced to the profession by learning of the legendary plea by Lord Henry Brougham in his defense of England’s Queen Caroline almost two centuries ago:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and
expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty: and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

The Model Code of Professional Responsibility formerly stated that it was a lawyer’s duty “to represent his clients zealously within the bounds of the law.” That provision today reads that “(a) lawyers shall act with reasonable diligence . . . in representing a client.” (Rule 1.3)

Almost all states (apparently only Massachusetts and the District of Columbia still expect zeal) have eliminated a duty of zealous advocacy in favor of a mandate for diligent representation.

One writer summarized the role of zealous advocacy as follow:

The “z” words – zeal, zealous, and zealotry – have been repeatedly blamed for promoting incivility in the profession. Lawyers sometimes defend their incivility by invoking a need to represent their clients zealous, apparently unaware that most states have eliminated the zealous advocacy requirement from their ethics rules.7

But there is not uniform agreement within bar circles that the mandate for zealous representation should be removed from lawyering. A recent article on the topic declared: “the traditional aspiration of zealous advocacy remains ‘the fundamental principle of the

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law of lawyering’ and ‘the dominant standard of lawyerly excellence among lawyers
today.”8 The writer argues:

“Zealous advocacy” is the time-honored response to the question lawyers
often receive: “How can you represent someone who is guilty?” . . . It
(also) permits . . . the lawyer . . . to say to his client: “I am on your side.”
“Zealous advocacy” is what clients expect, and it is what they deserve.9

The obvious middle ground to the debate is that an attorney can be devoted, if not
zealous, without adopting the tactics of a zealot. Clearly, the apparent conflict regarding
the place of zeal in lawyering is an appropriate topic for study by those who deal with the
issue of professionalism.

Conclusion

Is there a difference between ethics and professionalism? Is it a distinction that
makes a difference? This writer believes that the distinction is significant because
professionalism concerns often are subverted to issues of ethics that are more clear-cut
and susceptible to precise discussion. The tendency also may be to deal with the most
pressing concern -- to ensure that members of the bar meet minimal requirements – with
the thought that aspirational models may temporarily take a back seat. Unfortunately, this
may mean that our efforts are designed merely to encourage that lawyers adhere to
minimum standards, rather than aspire to changes that will lift the profession.

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9 Id.
Lawyers today often are introduced as speakers with a so-called lawyer joke to warm the audience. Unfortunately the jokes may sometimes contain a core of legitimacy in directing a barb at conduct within our profession. Rather than bemoan the seemingly viral transmission of lawyer jokes among the general public, we would do well to minimize conduct that gives traction and renders believable the factual background of jokes depicting our profession as greedy, obstreperous, disruptive of problem solving, too often given to a militaristic approach to disputes, attention-seeking, and other behavior that is depicted in such humor. When it is more certain to those of us who are privileged to practice within this profession, that we are striving through our individual and concerted conduct to uplift professionalism among lawyers, then the seeds of humor in lawyer jokes likely will be cast on unfruitful ground.

I believe there is a place for various approaches to lifting the profession. Obviously, we need to continue discussion of ethics so as to ensure the minimum standards of representation are maintained and that clients and the legal system is protected. And we should continue to discuss responsibilities of our profession to the public by discussing those topics that help shape society through delivery of legal services. This well-intended and beneficial activity should not, however, be carried out at the expense of discussing topics that can be labeled as pure professionalism so as to deal with issues of civility in the relationship of lawyers with other attorneys, clients, citizens within the justice system, the judiciary, and anyone else who is impacted by our conduct.