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## CIVILITY AND PROFESSIONALISM IN THE PRACTICE OF LAW

### I. INTRODUCTION

Professionalism has been defined in a recent edition of *Black's Law Dictionary* as “[t]he practice of a learned art in a characteristically methodical, courteous, and ethical manner.” Some consider Dean Roscoe Pound’s definition that professionalism is “pursuing a learned art as a common calling in the spirit of public service” as the best one. Most people who study the subject consider professionalism to be related to ethics but somehow broader in the way lawyers should act in their conduct toward fellow lawyers, clients, and the courts. It’s been noted that the basic distinction between ethics and professionalism is that rules of ethics tell us what we must do and professionalism teaches us what we should do. The ABA has stated in a report on professionalism that “professionalism is an elastic concept the meaning and application of which are hard to pin down.” Some commentators have written that as a profession lawyers have sought a cure for the disease of incivility or lack of professionalism before agreeing on its nature, symptoms, and causes.

As shown below, for many years federal and state bar associations have addressed professionalism or civility problems with numerous codes of conduct. About one half of our states require more than an hour of CLE each year in ethics and/or professionalism. The professionalism requirement of one hour per year in many states is distinct from, and in addition to, the ethics requirement of one hour per year. As is typical in such states, the Louisiana Supreme Court continuing legal education rules consider that “[p]rofessionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations.” In 1998, the Supreme Court began requiring Louisiana attorneys to devote at least one hour of study each year to the topic of professionalism.

A review of the codes of professionalism shows that they are by design performance and goal based. The codes tell attorneys what to do and urge them to elevate their behavior above the floor set by ethical rules. But the professionalism codes don’t provide directions to help lawyers reach that higher ground. For the most part,

instruction received in continuing legal education courses about professionalism encourages lawyers to aspire to lofty goals, follow the rules, play fair, and be civil to others. Most of us agree these are worthwhile aspirations.

A problem rarely touched upon in professionalism is the fact that a significant portion of the audience receiving the message is afflicted with more mental and physical health problems than that of the general population. As a group, lawyers are in poor health. Abundant studies document that many lawyers are unhappy in their work, so much so that lawyers experience levels of depression, anxiety, and other mental illnesses at a higher rate than any other profession. Commentators have identified several reasons for lawyers' despair--heightened competitiveness, a quest for money, a general decline in values, dissatisfaction with work, and the diminished view in which the public holds the profession.

A recent survey finds that over one half of attorneys want less stress and fewer hours on the job as opposed to just two percent who want more compensation. The legal consulting firm who conducted the study reports that "[j]ob-related stress and work/life balance issues can lead to employee dissatisfaction and staff turnover which may decrease a firm's productivity and directly impact its ability to remain competitive." To counter these trends, the consulting firm recommends that employers offer flexible and part-time scheduling, job sharing, telecommuting, and compressed work weeks to keep its work force. Legal employment should also include mentoring, continuing legal education, and cross-training in a variety of practice areas.

Further complicating matters, renowned psychologist Martin Seligman studied over 100 professions and pursuits and found that law is the only one where pessimists outperform optimists. Seligman is the founder of Positive Psychology which basically looks at psychology from the perspective of wellness as opposed to dysfunction. Seligman writes that a "pessimist views bad events as pervasive, permanent and uncontrollable, while the optimist sees them as local, temporary and changeable." In all other endeavors pessimism is a bad trait and pessimists tend to perform more poorly than their optimistic cohorts. Except for one profession. Writes Seligman:

Pessimism is seen as a plus among lawyers, because seeing troubles as pervasive and permanent is a component of what the law profession deems prudent. A prudent perspective enables a good lawyer to see every conceivable snare and catastrophe that might occur in any transaction. The ability to anticipate the whole range of problems and betrayals that non-lawyers are blind to is highly adaptive for the practicing lawyer who can, by so doing, help his clients defend against these far-fetched eventualities. If you don't have this prudence to begin with, law school will seek to teach it to you. Unfortunately, though, a trait that makes you good at your profession does not always make you a happy human being.

Research shows that lawyers' health problems start in law school. Investigations conducted by Professors Kennon Sheldon and Lawrence Krieger consistently reveal that the optimism law students possess when they enter law school is substantially eroded by the time the students finish their first year of study. The authors explain their findings.

The popular notion that law school is an exceptionally stressful experience for many students has been substantiated by longitudinal studies. Indeed, the emotional distress of law students appears to significantly exceed that of medical students and at times to approach that of psychiatric populations. These findings have substantial human and social significance, given that the level of adjustment of graduating law students is likely to carry over into professional practice and may set the stage for the unparalleled frequency of psychological distress and other problems seen broadly among lawyers today.

Causes that contribute to our profession's unhappiness include the selection of lawyers for their pessimism which they too often generalize to their personal lives; jobs characterized by high pressure and low decision latitude; and the adversary nature of our legal system (a zero-sum game) from which negative emotions flow. This presentation will explore some of the social science studies which explain these conditions and examine possible solutions to eliminate or lessen these causal factors. For those interested, further reading in this area is found below.

## **II. National Professionalism Codes**

### **A. AAJ Code of Conduct and Professionalism**

In November, 2007 the Board of Governors of The American Association for Justice rewrote a code of conduct originally adopted in 1988 regarding professionalism. In the representation of clients and otherwise in the practice of the profession as trial attorneys, AAJ members shall abide by the following principles:

- Zealously represent the best interests of their clients within the framework of all applicable Rules of Professional Responsibility and with the highest ethical standards of the profession.
- Not prosecute or counsel any action, or assert any claim or defense, which is false, frivolous, or wholly insubstantial.
- Engage only in advertising that fully complies with the rules of the jurisdictions in which the member is admitted or where the advertising is placed, and not engage in any form of false, misleading, or deceptive

advertising.

- Not initiate personal contact with any injured party or aggrieved survivor, either personally or through a representative, without a specific request or for the sole purpose of attracting cases.
- Not initiate press contact following a disaster or incident that resulted in or death for the sole purpose of attracting cases.
- Not knowingly accept referral of a case that has been the subject of conduct that violates the provisions of this Code or other applicable rule.
- Disclose and explain the fee to be charged to the client and how it is calculated; the handling of costs while the case is pending and on resolution; and, if contingent upon recovery, memorialize the fee clearly in a written fee agreement.
- To the extent consistent with state law or Rules of Professional Conduct, ensure that all decisions to arbitrate disputes arising from contracts with clients are voluntary and that a client's judicial rights and remedies are not waived under coercion; include no predispute mandatory binding arbitration clauses in agreements with clients.
- Accept only cases and legal matters for which the attorney or co-counsel possesses the requisite knowledge, skill, time, and resources to prosecute diligently and competently.
- Disclose to clients the intention to refer their case to another attorney or to engage the services of another attorney to represent their interests.
- Communicate promptly, frankly, and fully with clients when they inquire about their cases and at other times as appropriate to keep them informed about the progress and status of their case

## **B. Maritime Law Association Code of Professional Conduct**

The Code of Professional Conduct for the Maritime Law Association was prepared by its committee on Professional Relations and approved by its Board of Directors and membership in 1997.

1. I will provide the highest level of competency and efficiency in the performance of all legal services.

2. I will comply with all rules and codes of professional conduct, and respect the law and preserve the decorum and integrity of the judicial process.
3. I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior.
4. I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity.
5. I will maintain the trust of my clients by keeping them well-informed and actively involved in making decisions affecting them.
6. I will resolve all disputes expeditiously and not engage in any course of conduct which unnecessarily increases cost or delays litigation.
7. I will engage in the discovery process, seeking an expeditious result for my client's legitimate interest, while avoiding abuse and harassment of witnesses and parties.
8. I will contribute time and resources to pro bono activities.
9. I will not mislead or make any misrepresentation to the court.
10. I will exemplify and instill in others the tenets of this Code of Professional Conduct.

### **III. Louisiana Professionalism Codes**

#### **A. Louisiana Association for Justice**

The Louisiana Association for Justice also has aspirational rules for its members:

1. I revere the law, the civil justice system, and the profession, and I pledge that in my private and professional life, and in my dealings with fellow members of the Bar, I will uphold the dignity and respect of each in my behavior toward others.
2. In all dealings with fellow members of the bar, I will be guided by a fundamental sense of integrity and fair play; I know that effective advocacy does not mean hitting below the belt.
3. I will not abuse the civil justice system or the profession by pursuing or

opposing discovery through arbitrariness or for the purpose of harassment or undue delay.

4. I will not seek accommodation from a fellow member of the bar for the rescheduling of any court setting or discovery unless a legitimate need exists. I will not misrepresent conflicts, nor will I ask for accommodation for the purpose of tactical advantage or undue delay.
5. In my dealings with the court and my fellow counsel, as well as others, my word is my bond.
6. I will readily stipulate the undisputed facts to avoid needless cost and inconvenience to any party and will work with opposing counsel to reduce the expense of litigation.
7. I recognize that my conduct is not governed solely by the Rules of Professional Conduct, but also by standards of fundamental decency and courtesy.
8. I will strive to be punctual in communications with others and in honoring scheduled appearances, and I will recognize that neglect and tardiness are demeaning to me and to the profession.
9. If a fellow member of the bar makes a just request for cooperation, or seeks scheduling accommodation, I will not arbitrarily or unreasonably withhold consent.
10. I recognize that effective advocacy does not require antagonistic or obnoxious behavior, and as a member of the bar, I pledge to adhere to the higher standard of conduct which we, our clients, and the public may rightfully expect.

## **B. Louisiana Code of Professionalism**

Following approval by the Louisiana State Bar Association House of Delegates and Board of Governors at the Mid-Year Meeting, and approval by the Supreme Court of Louisiana on January 10, 1992, the Code of Professionalism was adopted for the membership. The Code originated out of the Professionalism and Quality of Life Committee.

The Louisiana Code of Professionalism, approved by the LSBA House of Delegates and the Louisiana Supreme Court, reads as follows:

1. My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

2. I will clearly identify for other counsel changes I have made in documents submitted to me.
3. I will conduct myself with dignity, civility, courtesy and a sense of fair play.
4. I will not abuse or misuse the law, its procedures or the participants in the judicial process.
5. I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.
6. I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.
7. I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.
8. I will not use the threat of sanctions as a litigation tactic.
9. I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.
10. I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

#### **IV. Further Reading**

##### **A. Alcoholism/Chemical Dependency/Mental Health**

Martin E. P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers are Unhappy*, 23 *Cardozo Law Review* 33 (2001).

William Eaton, et al. *Occupations and the Prevalence of Major Depressive Disorder*, 32 *J. Occupational Med.* 1079 (1990).

John Harkness, Jr., *Lawyers Helping Lawyers: A Message of Hope*, 73 *Fla. B.J.* 10 (1999).

## **B. The Role of Law School in Causing Lawyer Unhappiness**

G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 Am. B. Found. Res. J, 225.

Phyllis W. Beck & David Burns, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 J. Legal Educ. 270 (1979).

Kennon M. Sheldon and Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, Personality and Social Psychology Bulletin, Vol. 33: 883 (2007).

Todd David Peterson and Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, Yale J Health Policy Law Ethics 2009 Summer; 9(2):357-434.

## **C. Lawyer Dissatisfaction with the Profession**

Deborah L. Rhode, *The Profession and Its Discontents*, 61 Ohio St. L.J. 1335 (2000).

Amiram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, 23 J. Psychiatry & L., 205 (1995).

Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871 (1999).

## **D. Books on Coping with Stress, Increasing Professional Satisfaction, and Inoculating against Pessimism**

Martin E. P. Seligman, *Learned Optimism, How to Change Your Mind and Your Life*, New York: Vintage Books (2006).

George W. Kaufman, *The Lawyer's Guide to Balancing Life and Work: Taking the Stress Out of Success*, ABA Publishing (1999).

Amiram Elwork, *Stress Management for Lawyers: How to Increase Personal & Professional Satisfaction in the Law*, The Vorkell Group (1995).

Steven Keeva, *Transforming Practices: Finding Joy and Satisfaction in the*

*Legal Life*, Contemporary Books (1999).

Michael F. Melcher, *The Creative Lawyer: A Practical Guide to Authentic Professional Satisfaction*, ABA Publishing (2007).

Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness, Meditation to Law Students, Lawyers, and Their Clients*, 7 Harv. Negot. L. Rev. I (2002).

Susan Swaim Daicoff, *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses (Law and Public Policy: Psychology and the Social Sciences)*, American Psychological Association (2004).