

February 2004

Thoughts on Professionalism
By Clemens W. Pauly

In the past two decades we have seen an increasing number of articles about professionalism and bar associations and courts have published codes of civility or conduct¹ in response to the observed apparent decline in professionalism.² These articles and codes are concerned with the unfavorable public image of the legal profession fostered by unprofessional behavior of lawyers towards clients, colleagues and judges. Recurring issues include the lawyer's dilemma of dealing with the overly aggressive client with respect to matters that do not affect the objective of the litigation,³ aggressive and abusive discovery practices,⁴ the value of cooperation among counsel in granting extensions except when the client's case would be prejudiced,⁵ and in coordinating depositions, hearings, meetings, and conferences with opposing counsel.⁶ In sum, the focus is on the self-image of the legal profession as expressed through the moral values of its members.

The existing ethics rules and regulations are insufficient to fully address the issue of professionalism because they only set the minimum standards required of all lawyers

¹ Most notably under the codes are the (Proposed) Standards for Prof'l Conduct Within the Seventh Fed. Jud. Cir. (hereafter "Standards"), Final Rep. of the Comm. on Civility of the Seventh Fed. Jud. Cir., 143 F.R.D. 441, 448 (1992); and under the policy guidelines the Lawyer's Creed Of Professionalism (hereafter "Lawyer's Creed") as promulgated by the ABA Torts and Insurance Practice Section in 1989 and adopted by a number of state and local bar associations, such as the State Bar of Maryland: MSBA Code of Civility, at <http://www.msba.org/departments/commpubl/publications/code.htm>.

² The Md. Jud. Task Force on Professionalism, Rep. and Recommendations, November 10, 2003, at 3, 13, at <http://www.courts.state.md.us/publications/professionalism2003.pdf>; ABA Comm'n on Professionalism, In the Spirit of Pub. Serv.: A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 259 (1986).

³ See Lawyer's Creed ¶¶ A.4., A.6.

⁴ Lawyer's Creed ¶ B.6; Standards: Lawyer's Duties to Other Counsel ¶¶ 2, 10, 22, 23, 25.

⁵ Lawyer's Creed ¶ B.3; Standards, supra note 4, ¶¶ 13, 17.

⁶ Lawyer's Creed ¶ B.4; Standards, supra note 4, ¶¶ 10, 14, 15.

while professionalism is a higher standard expected of all lawyers.⁷ Chief Justice Clarke of the Georgia Supreme Court explained that professionalism focuses on helping, caring, protecting, counseling, and setting a good example,⁸ in short it defines the character each lawyer should aspire to have and exhibit in his or her daily practice of law. This essay will try to determine if there is a common understanding of what the character of a lawyer should be and will propose ways to implement changes in the approach towards achieving a harmonized understanding of this character.

If professionalism is concerned with the lawyer's aspiration to be a good role model, then should we not just follow the *Kant'sche Imperative*⁹ and treat others like we expect them to treat us? Maybe this would be a beginning in the right direction, but Kant would probably just lead us to a basic law of lawyers as we find it in the ethical rules. It would not necessarily lead us to a common understanding of what civility and common courtesy means since each person has his or her own values. Henry G. Miller suggests that we should treat all people fairly because they deserve it and that respect for each other is the basis for all morality.¹⁰ But what is fairness, and if we can agree to treat the participants of the legal system with respect and civility, where is the line between reaching this aspirational goal and conflicting with our ethical obligations?

Nothing in our ethical obligations prohibits us from being nice to our opponents. While the client is entitled to expect that her lawyer zealously asserts the client's

⁷ Chief Justices' Comm'n on Professionalism to the Sup. Ct. of Ga., § 10, at 4 (1996).

⁸ Id.

⁹ This is of course a very simplified interpretation of Immanuel Kant's "kategorische Imperativ" quoted in Artur Kaufmann and Winfried Hassemer, Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart [Introduction to Contemporaneous Legal Philosophy and Theory], at 64 n. 105 (5th ed. 1989).

¹⁰ Henry G. Miller, ATLA's Litigation Tort Cases, The 50 Ethical Commandments For Tort Lawyers, §49:54 (2003).

position,¹¹ exhibiting common courtesy is not to be misunderstood as showing weakness.¹² Thus the civility codes seem to track the basic tenor of the Lawyer's Creed in asking for courteous and civil oral and written communications,¹³ the cooperation of lawyers in coordinating depositions and conferences,¹⁴ and avoiding the use the judicial system for improper purposes.¹⁵

However, granting reasonable extensions or not making a motion for default out of courtesy towards the other colleague will bring us close to the line where a lawyer should stop and follow the client's instructions.¹⁶ While the granting of reasonable extensions is an example of civility found in most codes,¹⁷ another example of not enforcing a procedural right is highly contentious. Let us test the lawyer's dilemma in this field with the following example:

Lawyer Able represents a client in small claims court. Shortly after filing the complaint and serving the complaint on opposing counsel, Lawyer Late, Able appears for the first hearing in this matter and while an answer has not been filed in the case, he knows that the Defendant is represented by Late, who Able has dealt with on prior occasions. After the call of the case Able waits for another 30 minutes but Late does not show up. Able makes a motion for default, which is granted and submits a default judgment. Subsequently, Able meets Late in the isle outside the courtroom and informs him of the default. Late explains that he had incorrectly calendared the hearing an hour late but Able does not want to stipulate to set aside the default. Did Able behave professionally?¹⁸

¹¹ Model Rules of Prof'l Conduct, Preamble: A Lawyer's Responsibilities, ¶ 3 (August 2003).

¹² Lawyer's Creed ¶ A.5.

¹³ Lawyer's Creed ¶ B.1.; Standards, Preamble para. 1, and Lawyers' Duties to Other Counsel ¶ 1; MSBA Code of Civility, Lawyers' Duties ¶¶ 1,2; Standards of Prof'l Courtesy for the Sixth Jud. Cir. (hereafter "Sixth Cir. Standards"), ¶ A.1, at <http://www.jud6.org/LegalPractice/AOSAndRules/aos/aos99/ao-99-46.html>.

¹⁴ Lawyer's Creed ¶ B.4; Standards, Lawyers' Duties to Other Counsel ¶¶ 14, 15; Sixth Cir. Standards, ¶ B.

¹⁵ See Lawyer's Creed ¶¶ A.4, B.5; Sixth Cir. Standards, ¶¶ B.5, F.1, 7, 16.

¹⁶ See Model Rules of Prof'l Conduct R. 1.2(a)(proscribing the client's authority in deciding on the objective of representation and the lawyer's duty to consult with the client on matters of trial strategy).

¹⁷ See Standards, *supra* note 14, at ¶ 17; Lawyer's Creed ¶ B.3; Sixth Cir. Standards, ¶¶ B. 7, 8.

¹⁸ Example adapted from the facts of Oberlandesgericht [OLG] Köln [Higher Regional Court of Cologne], 18 U 33/93, May 6, 1993 (F.R.G.), at <http://www.ra-kotz.de/versaemnisurteil.htm>.

The ethical rules expect Able to represent the interests of his client, and he did so by making the appropriate motion and achieving a favorable result for his client. The Standards, however, would have expected Able to first notify Late before making the motion.¹⁹ While the Standards are not binding, it certainly would have been fair to opposing counsel to warn him of the motion, since Able knew that Late was representing the Defendant. But is this requirement under the Standards a common understanding of the character a lawyer should exhibit? None of the other civility codes that I have seen has a requirement similar to the one found in the Standards.²⁰

In fact, two groups are directly at odds over this issue. On the one side are the proponents of civility, which argue that the duty of zealous advocacy cannot trump the duty of professionalism.²¹ On the other side are the proponents of zealous advocacy, who argue that this duty is paramount and who fear that the Standards can be abused by judges and have the potential to undermine the proper functioning of the adversary system.²²

Exposed to this uncertainty and with the willingness to be more civil is now the young lawyer, who enters the scene, learned in the intricacies of the adversarial system with all its tactics and skills, and eager to be his client's zealous advocate. Should he be the "Rambo litigator"²³ or follow the aspirational codes of civility?

The example falls into the gray area of Rule 1.2(a) of the Model Rules of Professional Conduct, which seeks to determine the division of authority between the

¹⁹ Standards, Lawyers' Duties to Other Counsel ¶ 18.

²⁰ Cf. Lawyer's Creed; Dade County Bar Ass'n Code of Professionalism and Civility, at <http://www.dadecountybar.org/codeofcivility/>; MSBA Code of Civility, *supra*; Sixth Cir. Standards, *supra*.

²¹ See Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 Stetson L. Rev. 253 (1998); Marvin E. Aspen, *Let Us Be "Officers of the Court"*, A.B.A. J., July 1997, at 94, 95-96.

²² See Monroe H. Freeman, *The Ethical Danger of "Civility" and "Professionalism"*, *Crim. Just. J.*, Spring 1998, at 17-19; Monroe Freedman, *Civility Runs Amok*, *Legal Times*, Aug. 14, 1995, at 54.

²³ Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 *Pepp. L. Rev.* 637 (1990).

client and the lawyer. The filing and obtaining of a motion certainly falls within the “means” by which the lawyer pursues the client’s objectives,²⁴ and therefore, Able was well-advised to make the motion for his client as his client would most certainly have asked him to do the same and it was in the client’s best interest. However, there are good reasons why it may have been reasonable to forego the quick chance for an early victory in form of a default judgment, specifically in light of the standards applicable to set aside the default²⁵ or vacate the default judgment.²⁶ In the above example, if Late can present a meritorious defense and seeks relief without delay, a judge will likely excuse Late’s nonappearance and set aside the default as courts have found a secretarial error to be excusable neglect.²⁷

So why should Able not first notify Late of his intention to take a default judgment? This act of civility would earn him the respect of his fellow lawyer and not waste judicial resources.²⁸ Of course, Able should not jeopardize his client’s position, which I suggest he would not. In today’s times he could have called him on the cell phone right from the courtroom to see if Late was on his way. He did not do it, and while only one US civility code would have expected him to,²⁹ it would have been fair.

Nevertheless, as seen by the different positions taken on this issue, this example of civility is not a common value, which is probably a sign of moderns times and the urbanization of the legal practice, in which the legal profession becomes more and more

²⁴ Model Rules of Prof’l Conduct R. 1.2(a) cmt.2.

²⁵ See Fla.R.Civ.P. 1.500(d); Fed.R.Civ.P. 55(c).

²⁶ See Fla.R.Civ.P. 1.540(b); Fed.R.Civ.P. 60(b).

²⁷ See Winn Dixie Stores, Inc. v. Danielsen, 544 So.2d 320 (4 DCA 1989)(reversing order denying motion to vacate default where default due to secretarial error constituted excusable neglect and a meritorious defense existed, and where Defendant showed due diligence in seeking relief on the day of the default).

²⁸ Judge Aspen cites the departure from the standards of civility in Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993) as an obvious example of ineffective and counterproductive advocacy, Marvin E. Aspen, A Response to Civility Naysayers, *supra* note 21, at 261.

²⁹ Standards, Lawyers’ Duties to Other Counsel ¶ 18.

impersonal due to the mass of lawyers and the need to be so competitive that attorney interaction no longer happens on a social level and in Bar association events but is mostly reduced to confrontation during litigation.³⁰

This trend is not an inherent American trend, but can also be found in the European countries, where an equally growing body of lawyers faces the same challenges. Gone are the “good old days” in German legal professionalism where ethical rules of local and regional bar associations as well as national ethical rules required the lawyer to warn in writing his or her colleague before filing a motion for default.³¹ Over ten years ago, the German courts have declared these rules non-binding when conflicting with rules of procedure.³² And while it may well be good practice in some smaller localities to this day, attorneys cannot rely on this usage anymore as their protection against their client’s malpractice action.

Needless to say, on the European level, there is no such rule or recognized usage. The only published code is the Code of Conduct for Lawyers in the European Union (CCBE)³³ which is the model code for all lawyers in the European Union and the European Economic Area.³⁴ Similar to the ABA Model Rules of Professional Conduct, the CCBE represents only the minimum standard of ethics and is not an expression of aspirational goals of professionalism. Therefore, there cannot be any such wide-ranging

³⁰ The Md. Jud. Task Force Rep., *supra* note 2, at 32 suggests that when the Bar was smaller, the atmosphere was much more collegial, so that lawyers and judges who knew each other personally could rely upon their words. It further identifies the economic pressures and unreasonable client expectations as contributing factors to the alienation of lawyers’ and decline in camaraderie.

³¹ § 23 RichtlIRA [Attorney Guidelines], §13 BORA [Rules Regulating Attorneys](F.R.G.), and most recently in the protocol of the Aachener Anwaltsverein e.V. [Bar association of the city of Aachen, Germany], April 1, 1993, and *referred to* in OLG Köln, *supra* note 18.

³² Bundesverfassungsgericht [BVerfG][Fed. Const. Ct.] 1991 Neue Juristische Wochenschrift [NJW] [New Jud. Weekly] 121 (F.R.G.); BVerfG 1993 NJW 121; BVerfG 2000 NJW 347; Bundesgerichtshof [BGH][Fed. Sup. Ct.] 1991 NJW 42 (F.R.G.).

³³ CCBE (2002), at http://www.ccbe.org/doc/En/code2002_en.pdf.

³⁴ CCBE Rule 1.4.

civility rule. The CCBE demands, however, that the traditional virtues of this profession, namely the lawyer's personal honor, honesty and integrity are beyond doubt.³⁵

It seems to me that if there is a global trend which makes the practice of law more and more confrontational and due to the increasing internalization more and more impersonal, then we are well-served in recognizing the various civility codes and standards. The rules are not senseless nostalgia³⁶ but help us focus on the core values of our profession and improve the public image. And yet more than just publishing those codes as aspirational goals, courts should enforce them more vigorously as part of their inherent powers to impose silence, respect and decorum in their presence.³⁷ I would recommend that the American Bar Association adopt the Standards or incorporate them into the Model Rules of Professional Conduct in order to proclaim them as standards of model behavior for lawyers. The states would then still have the option to choose and pick the rules they wish to adopt and could thus eliminate the more contentious rules whether advance warning is required before certain motions are made. Most importantly, by incorporating the Standards into the Model Rules of Professional Conduct, universities would also include them in their professional responsibility courses and could thus mold the young lawyer accordingly before he becomes a Rambo litigator.

³⁵ CCBE Rule 2.2.

³⁶ See Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 Dick. L. Rev. 549 (1996)

³⁷ Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991).