

## THE CONTINUUM OF PROFESSIONALISM

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The legal profession has recently engaged in extensive self-examination. The focus has been on professionalism. There have been seminars, committees, studies, commissions, and various writings dealing with the perceived lack of professionalism. The judiciary has jumped into the debate. Some judges have expressed concern, frustration, and anger over a perceived lack of professionalism. This essay suggests what may be the biggest problem in this area.

Identification of that problem depends to a large degree on one's definition of professionalism. There is no consensus on the meaning of that term. As with any subject, definitions can be found in dictionaries, on the Internet, or from other sources, but the best definition may be derived from the nature of the practice. Every practicing lawyer must constantly balance two primary duties: (1) zealous representation of his or her client and (2) service as an officer of the court.

Professionalism is about effectively balancing these responsibilities. It should be defined in terms of what we ought to expect of lawyers and what they ought to demand of themselves. Based on these parameters, this definition is most fitting: Professionalism is an approach to the practice of law that minimizes conflict which is unnecessary for the effective representation of clients and maximizes the quality of service that the judicial system is able to provide.

This definition suggests that conduct is not simply professional or unprofessional, but rather, it is more accurately evaluated along a

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continuum. On the extreme left of the continuum is conduct that causes unnecessary conflict and reduces the quality of service. Such conduct is unprofessional. On the extreme right of the continuum is conduct that minimizes unnecessary conflict and maximizes the quality of service. Such conduct is the most professional. All behavior that is between these extremes is professional to some degree. Everyone should strive to move toward the right side of the continuum. The further to the right that one is able to move, the more his or her conduct reduces unnecessary conflict and maximizes the quality of service.

These concepts point to the biggest problem with professionalism — the failure to strive to move toward the right of the continuum. Every lawyer should evaluate each step in litigation based on two questions. First, does this minimize conflict that is unnecessary to the effective representation of my client? Second, does this maximize the quality of judicial service? The failure to consider these questions in decisionmaking is the problem.

Why is commitment to these concepts so important? The answer is that they go to the core of the legal profession and the judicial process. People file or defend lawsuits because they have objectives — they do not file or defend lawsuits because they seek procedural victories. Such victories have absolutely no significance to clients unless these victories serve their ultimate goals with the least expense and stress. Furthermore, reducing procedural battles that do not, in the end, serve clients' goals enhances the quality of service provided to all litigants, because more time becomes available and the demands on the court are reduced.

There are many examples of where consideration of minimizing conflict and maximizing the quality of judicial service would be appropriate and beneficial, including: (1) motions to compel answers to interrogatories or requests for production that are relatively insignificant, or refusal to provide any information in response when it is clear that some information will have to be provided; (2) motions to dismiss on grounds that are technically correct, but of no real significance, or refusal to agree to reasonable amendments to pleadings; (3) refusal to engage in serious discussions and efforts to compromise on many matters; (4) failure to use stipulations to resolve many procedural disputes; and (5) failure to resolve mid-trial disputes through pretrial discussion and compromise. There is no doubt that commitment to minimizing conflict and maximizing the

quality of judicial service in each of these areas would save time, money, and stress for everyone and produce better outcomes. In other words, an effort to move to the right side of the continuum reduces cost to clients, frees up court time for others to use, and moves clients' cases to a faster conclusion.

So, the biggest problem with professionalism is the inability or refusal of counsel to recognize the importance of the definitions and concepts described in this essay. It is the unwillingness of attorneys to prioritize their tasks and their actions based on these considerations. What, then, is the solution? Several things come to mind.

Sanctions are generally not the solution. Most of what needs to be done involves many lawyers who are already professionals, but who can become more professional. Certainly, sanctions are not appropriate to accomplish this task. Sanctions should be applied only to the lawyers who are on the extreme left end of the continuum, whose conduct does nothing to minimize unnecessary conflict or to maximize the quality of judicial service. However, even in those cases, sanctions should be applied with caution. The danger is that the liberal application of sanctions will breed a profession of hostile individuals, nervously watching their backs and one another. The rules should clearly define when sanctions may be used and what they should be. But, more positive steps are required in three areas.

First, much of the solution lies with individual lawyers. They must be willing to accept the proposition that not every procedural battle is worth fighting. For instance, attorneys need to consider the possibility that pursuit of a minor discovery dispute, requiring the client to pay a fee, taking court time, and delaying completion of discovery, serves neither the client nor the judicial system. Attorneys must recognize the importance of their clients' objectives over the importance of procedural victories that do not necessarily serve those objectives.

Second, there needs to be a system-wide commitment to the principles identified in this essay or, at least, something like them. The courts, the bar, and law schools must accept the importance of minimizing unnecessary conflict and maximizing judicial service, and make a public commitment to those principles at every opportunity. They must encourage movement to the right side of the continuum. They should develop a model of legal representation that stresses diplomatic dispute resolution and the use of confrontation only as a last resort. Although various forms of alternative dispute

resolution have become readily accepted and employed, litigation remains primarily an adversarial process.

Third, as suggested above, law schools must play a pivotal role in addressing this problem. Law schools can fulfill their role by offering courses and programs for both students and lawyers. Law schools should require a survey course in alternative dispute resolution as part of their core curricula. They should offer more advanced courses on this subject as electives. The advanced courses should include a practice course like trial advocacy, which focuses on the use of negotiation techniques and other forms of alternative dispute resolution. Law schools should also encourage student participation in producing regular law review research and publications addressing the diplomatic resolution of legal disputes — such publications would aid both students and practitioners.

Law schools are also uniquely qualified to present this subject in other ways. They can provide regular high quality seminars for the practitioner. This subject lends itself to such treatment. Those programs could consist of discussions of and practical exercises in the use and value of diplomatic dispute resolution.

The biggest problem with professionalism is not the unprofessional conduct at the extreme left of the continuum — it is the absence of consistent conduct committed to moving toward the right side of the continuum. While most lawyers, most of the time, are doing something to minimize unnecessary conflict and to maximize the quality of judicial service, many lawyers are not doing as much as they could. Nevertheless, despite negative public perception, the system is okay; it generally does a good job and it will continue to do so. However, it can do a much better job and public perceptions can be improved with a consistent commitment by lawyers to minimizing unnecessary conflict and maximizing the quality of judicial service.