

ETHICS AND PROFESSIONALISM

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A. THE ATTORNEY'S ROLE.

“Always do right; this will gratify some people and astonish the rest.” - *Mark Twain*.

Attorneys play a multi-faceted role in the practice of law generally, and in real estate matters specifically. The Preamble to the Virginia Rules of Professional Conduct (effective January 1, 2000) provides:

“A lawyer is a representative of clients... an officer of the legal system and a public citizen having special responsibility for the quality of justice... Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skills to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service...”

For many consumers, the purchase of a home represents the largest and most important investment of their lifetimes. Attorneys often play a pivotal role in guiding purchasers and sellers through this emotionally charged process – a process replete with layers of regulatory disclosures and disclaimers and fraught with conflicting interests. Attorneys for the parties often must apply both their legal knowledge and their counseling skills to properly represent their clients' interests in these transactions. Attorneys who also serve as settlement or title agents have a more complicated role, both as a practical matter and as a matter of ethics and professionalism.

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B. ETHICS AND PROFESSIONALISM.

“All my life... I have striven to make the necessary working compromise between the ideal and the practical. If a man does not have an ideal and try to live up to it, then he becomes a mean, base and sordid creature, no matter how successful. If, on the other hand, he does not work practically, with the knowledge that he is in the world of actual men and must get results, he becomes a worthless head-in-the-air creature, a nuisance to himself and everybody else.”

Theodore Roosevelt
January 17, 1915

Ethics rules represent the mandatory minimum standard of conduct below which no attorney may fall, without being subject to disciplinary action.¹ By contrast, concepts of professionalism represent aspirational standards of conduct, above and beyond those ethics standards. The introduction to the Virginia Rules of Professional Conduct is instructive:

“The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”

¹ Practitioners are often counseled with regard to the seven cardinal rules for ethical behavior:

1. Keep the client informed.
2. Don't procrastinate.
3. Have a clear, written agreement with the client regarding fees and costs.
4. Accept matters only in those areas of law in which you are competent. (Enlist the assistance of co-counsel, or refer a matter out if you are not competent to do the work.)
5. Avoid conflicts of interest; do not compromise your independent professional judgment.
6. Maintain appropriate controls over client funds.
7. Be honest with your client, opposing counsel and the court.

Many articles have been written, bemoaning the decline of professionalism among lawyers, and calling upon attorneys to acknowledge and fulfill the responsibilities associated with their professional status. How do we define “professional”? In a broad sense, a professional is one who puts the interests of others above his or her self-interest. It’s more than simply doing what’s right or treating others with dignity. Jerome Shestock, past-president of the American Bar Association, defined a “professional” lawyer as an “expert in the law, pursuing a learned act, 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 the public good.”²

The message of professionalism is a combination of competency and diligence, conformance to ethics, civility to others in the system, providing service to the needy and improving the system. Former Virginia State Bar President Edward Lowry focused on attorneys’ obligations as counselors, “to provide greater context and meaning for their clients.” Clients sometimes can’t see the forest for the trees. “When their clients come to them angry, hurt, bewildered or confused, lawyers offer choices and provide perspective. It is as simple as asking clients how they want to feel about themselves when the case is settled, when the dust clears and they look back in hindsight . . . When attorneys go through this process with their clients . . . they elevate legal representation to an act of human service encompassing the broader needs of the client.”³

“The American Lawyer generally regards it as his obligation to solve his clients’ problems, not merely to answer his questions. He is conscious of a duty to his profession and of an obligation to the law and the society which has licensed him.”
(*Simon H. Rifkind, February 15, 1985 remarks to the American Bar Association.*)⁴

² Jerome J. Shestack, “A National Message on Professionalism”, Maryland State Bar Association *Bar Bulletin*, January 15, 1998.

³ Edward B. Lowry, “The Virtue of the Practice of Law”, *Virginia Lawyer*, April 1998.

⁴ Mr. Rifkind, in his remarks also quoted an opinion of the highest court in New York:

“A profession is not a business. It is distinguished by the requirements of extensive

The Virginia Code of Professional Responsibility, Ethical Consideration EC 1-5 provides:

“A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and ethically reprehensible conduct which reflects adversely on his fitness to practice law. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.”

The Virginia Code of Professional Responsibility, Ethical Consideration EC-7-34 provides:

“In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.”

C. CODES OF CIVILITY.

“The lawyer’s contribution to the civilizing of humanity is evidenced in the capacity of lawyers to argue furiously in the courtroom, then sit down as friends over a drink or dinner. This habit is often interpreted by the layman as a mark of their ultimate corruption... In my opinion it is their greatest moral achievement: It is a

formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation. These qualities distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal. Interwoven with the professional standards, of course, is pursuit of the ideal and that the profession not be debased by lesser commercial standards.”

(Matter of Freeman, 34 N.Y. 2d (1974))

characteristic of humane tolerance that is most desperately needed at the present time.”

- *John R. Silber, quoted in the Wall Street Journal, March 16, 1972*

The concept of promoting civility among participants in the legal system is based upon achieving a number of different goals. Justice Anthony Kennedy stated that “civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself.” Most of us would enjoy a more genteel approach to the inevitable differences in negotiating positions, tempered by the duty to zealously represent the client. But Kennedy’s point is that civility also has deep roots in the democratic ideal of respect for individual rights.

Stated another way, we are civil to each other because we respect each other’s human aspirations and equal standing in a democratic society. Taken to an extreme, lawyers who trample on civility undercut the law’s role in society. All members of the bar are engaged in a common enterprise, obligated to see to the better working of the legal system. Of course, it is easier to discuss the niceties of the practice of law in an article, than it is to be subjected to opposing counsel’s slights (real or perceived), to withstand the temptation to bring an abrupt end to unproductive meetings or telephone calls, or even to avoid adopting a “pit-bull” approach if that is what clients believe they want or need. Virginia has not yet adopted a Code of Civility for all practitioners governed by Virginia professional guidelines, although as cited above, the Code does make references to the concept of civility, and the Virginia State Bar Association’s Litigation Section adopted certain principles of professional courtesy published in the June 1988 edition of the Virginia Lawyer.

D. PUBLIC RELATIONS AND OTHER POTENTIAL REMEDIES.

“Why is there always a secret singing
When a lawyer cashes in?”

Why does a hearse horse snicker
Hauling a lawyer away?"

Carl Sandburg, "The Lawyers Know Too Much," 1920, in "Complete Poems of Carl Sandburg" 189 (1969)

The public's general disdain for lawyers is well-known. But it seems that lawyers are alternatively reviled and revered. Lawyer jokes are commonplace. Many surveys exploring the level of respect (or disrespect) for lawyers place lawyers in the same category as used car salesmen. One typical response to this is that people often mock what they don't understand. Some observers dispute this analysis. The public's perception may differ dramatically if the survey was limited to those who have actually hired an attorney. Perhaps even more telling, people generally have a great deal of respect for their own attorney. The situation may be analogous to the public's view towards politicians; Congress is routinely lambasted, and yet incumbents are re-elected in overwhelming numbers. So the real issue may be a failure on the part of the profession to educate the public on the importance of the role of attorneys in American society.⁵ People don't appear to appreciate the fact that surveys show most attorneys are solo practitioners or practicing in small firms. People also don't realize the important role lawyers play in fighting to promote justice and to preserve individuals' liberty. Instead people simply assume that America has far too many lawyers and that lawyers are a nuisance or even a menace, simply because we have more lawyers per capita than other industrialized nations. Consider the following perspective:

"The American lawyer is an independent professional. What I have seen around the globe persuades me that an independent bar is indispensable to liberty. Indeed, I have noticed that the greater the degree of the lawyer's independence, the more expansive are the perception and expression of liberty.

The American lawyer is inventive. We all know that the law as practiced in the United States does not consist of a canon of immutable commandments. What many

⁵ See the *Virginia Lawyers Weekly* article, [Improving the Image of Lawyers](#), May 3, 1999 regarding the recent public relations campaign initiated by the Virginia State Bar.

laymen do not know, when they attribute some great advance in the law to one court or another, is that in almost every instance it was a lawyer, bent on his assignment to advance the cause of his client's interest, who has articulated the new principle, searched for and accumulated the historical learning in support of it and mustered the logical advocacy in order to evoke a judicial imprimatur upon the change.

Periodically great new policies are established by the lawmakers requiring citizen participation. When that happens, the lawyer becomes the indispensable tutor and enforcer without whose help the goals of the new regulations could not possibly be achieved. It takes a very learned and sophisticated profession to assist the United States in achieving the ends designed by the antitrust laws, the securities laws, the internal revenue laws, and other measures of social amelioration...

Without this contribution American business could not function. That other societies of a more homogeneous demographic make-up, less mobile, more tradition-bound by folkways and habits, manage with fewer lawyers tells us nothing about the American scene.

True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures – unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see.

But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state."

John W. Davis, (address), New York, Mar. 16, 1946, in 1 Record of the Association of the Bar of the City of New York 101, 102 (1946)

One way for lawyers to return to, or to attain positions of respect in society might be to educate and inform the public about what it is attorneys do and why it is that attorneys sometimes take controversial stances or champion unpopular causes. "Anyone who believes a better day dawns when lawyers are eliminated bears the burden of explaining who will take their place. Who will protect the poor, the injured, the victims of negligence, the victims of racial discrimination and the victims of racial violence?" *John J. Curtin Jr., (remarks to the American Bar Association), Atlanta, Aug. 13, 1991, quoted in Time, Aug. 26, 1991.*

Maybe the public's distaste for lawyers should be tempered by the hard-earned battles won in matters against Ford Motor Company in the Pinto case, or in the more recent victory against the tobacco industry.⁶ What other remedies are available to address the poor public perception of attorneys?

One way to start might be to respect our colleagues. Clearly, if we show little respect for ourselves, then we invite others to treat us similarly. Many jurisdictions such as Maryland and the District of Columbia, have adopted Codes of Civility to articulate the standards of conduct of members of the profession to each other, for which all practitioners in those jurisdictions might voluntarily aspire.

⁶ The Ford Pinto case is one of the most famous products liability cases in legal history. According to commentary related to the case, in 1969, Ford Motor Company made a deliberate decision to produce a new subcompact, the Pinto, with a gas tank that its executives knew was prone to explode in minor collisions. Crash tests on prototypes revealed that when the Pinto was rear-ended at speeds as low as 21 miles per hour, the fuel tank mounted only six inches from the rear bumper, was ruptured by nine separate projections in the rear that were cutting holes in the tank upon impact, sometimes flooding the passenger's compartment with gasoline. To compound the problem the doors also jammed as a result of that collision. Lee Iacocca, who was then the executive vice president of Ford, had mandated that the car be engineered to weigh no more than 2,000 pounds and to sell for no more than \$2,000. Evidence showed that Ford's engineers proposed a variety of ways to address the gas tank problem, all of which were vetoed because they impacted the weight and cost parameters.

The jury found that Ford had knowingly fitted Pintos with poorly designed gas tanks and apparently focused on the relatively minor cost of \$8 per vehicle needed to modify the gas tanks, in rendering punitive damages of \$128.5 million (later reduced to \$3.5 million), and an internal Ford memo which showed that Ford did not modify the gas tanks because it determined that would be cheaper to face the lawsuits when people were killed in the fires.

Ford's problems included allegations of obstructing discovery, including a memo where Ford's statisticians performed a cost-benefit analysis, comparing the cost of improving fuel tank safety, with the savings estimated at \$200,000 per life based upon litigation losses or settlement payments. Compounding this so-called "smoking-gun" memo was Iacocca's presence on the Watergate tapes asking then President Nixon to delay the imposition of new National Highway Transportation Administration regulations, including enhanced bumper requirements that would have ameliorated the gas tank problems.

The Plaintiff's lawyers set an important precedent for punitive damages as a tool of punishment of outrageous acts for victims, of recovery for those harmed and of deterrence for the benefit of the general public. The Ford Pinto case also led to the NHTSA's action to compel Ford to recall the 1.5 million Pintos then on the road.

One way to look at civility is captured by this quote, attributed to Cookie Stinnett, “A diplomat is a person who can tell you to go to hell in such a way that you actually look forward to the trip.”

Another potential remedy lies in lawyers giving something back to the community. One overused phrase states that from those to whom much is given, much is expected. We have a tremendously wide range of opportunities to volunteer for the benefit of others. (See the Virginia Bar website for a partial listing; www.vsb.org/probono/probonoop.)

And for those who place the blame of the current status of the practice of law at the feet of younger lawyers, many respond by calling upon the more senior members of the bar to serve as mentors, so that the younger attorneys may benefit from the experience and perspective of those who came before them. Many larger firms have formal mentor programs to introduce nuances of practice to newer members of the bar. But perhaps the mentor-mentee relationship succeeds best when it is employed on an informal basis and extends beyond law firm boundaries.

Of course, none of these remedies alone will operate to promptly restore public confidence in the profession and return us to positions of esteem. But each of us can try to make a difference.