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BETWEEN LAW AND VIRTUE

Joseph P. Tomain*
Barbara G. Watts**

INTRODUCTION

Legal ethics and professionalism have not enjoyed a comfortable alliance throughout the history of the legal profession in this country. Even before the concept of professionalism attained its current notoriety, ethics scholars, code drafters, and committee reporters addressing legal ethics have found it difficult to satisfy two needs of professional behavior. The first need is for a disciplinary code to guide lawyer conduct so that the profession can police itself and maintain public confidence. The second need is for an aspirational code of directions for leading a good life as a lawyer. It may well be the case that the profession cannot capture these two perhaps incompatible needs in one document; understanding the relationship between legal ethics and professionalism remains important, nevertheless. Such an understanding can lead not only to greater awareness of professionalism, but can also lead to educational opportunities for law students and lawyers alike.

Legal ethics, professional responsibility, and professionalism are timely topics as lawyers continually reevaluate the standards of their profession, particularly in light of the challenges of multidisciplinary and multijurisdictional practice, as well as the embarrassment facing lawyers involved in and surrounding the Enron collapse.

In this article, our goal is to discuss how to think and talk about ethics and professionalism. By way of preview, we need to understand that ethics and professionalism use different vocabularies and, consequently, talk past each other to some extent. Our hope is that understanding the existence of these two vocabularies helps reduce the misunderstanding. Both the areas of legal ethics and of professionalism are dynamic and both are a part of legal education and continuing professional education. Legal ethics and professional responsibility have been a required part of legal education since Watergate. Today, professionalism and professional training are becoming an increasing part of law school and post law school instruction.1

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1. Such training is an accreditation requirement. ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL FOR LAW SCHOOLS § 302(b) (1998). Section 302(b) provides:
In Part I we trace briefly the history of legal ethics in the United States and discuss the fundamental conflict that prevents aspiration and discipline from residing in the same space. Part II elaborates on the concept of professionalism and discusses current efforts to give content to professionalism for purposes of teaching it to law students and promoting it with lawyers.

I. LEGAL ETHICS

A. The Virtue of Princes

According to legend, just before his death on 21 June 1527, Niccolo Machiavelli told the faithful friends who had stayed with him to the very end about a dream he had had, a dream that over the centuries became renowned as "Machiavelli's dream."

In his dream, Machiavelli had seen a band of poorly dressed men, ragged and miserable in appearance. He asked them who they were. They replied, "We are the saintly and the blessed; we are on our way to Heaven." Then he saw a crowd of solemnly attired men, noble and grave in appearance, speaking seriously of important political matters. In their midst he recognized the great philosophers and historians of antiquity who had written fundamental works on politics and the state, such as Plato, Plutarch, and Tacitus. Again, he asked them who they were and where they were going. "We are the damned of Hell" was their answer. After telling his friends of his dream, Machiavelli remarked that he would be far happier in Hell, where he could discuss politics with the great men of the ancient world, than in Heaven, where he would languish in boredom among the blessed and the saintly.2

What does Machiavelli's dream have to tell us about legal ethics? Simply, Machiavelli, more particularly his notion of virtù, defines our modern understanding of legal ethics. Machiavelli's virtù separated morality from politics. A good politician was someone who could acquire and maintain power. According to Machiavelli, it is not at all necessary for a good politician to be a good man, desirable though that

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A law school shall require all students in the J.D. program to receive instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, included in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction. Professionalism continuing legal education is also required in Ohio. SUP. CT. RULES FOR THE GOV'T OF OHIO X.

may be. Similarly today, a good lawyer plays just within the disciplinary rules and need not be a good man, desirable though that may be.

Before returning to Machiavelli, however, we need to review another, somewhat more modern, quotation only about 165 years old from Alexis de Tocqueville's *Democracy in America*: “Hidden at the bottom of the souls of lawyers one therefore finds a part of the tastes and habits of the aristocracy.” When de Tocqueville linked lawyers with the aristocracy he did not do so pejoratively. Quite the opposite. He saw American lawyers as protectors against abuses by the democratic majority. For de Tocqueville, “Lawyers therefore form the superior political class and the most intellectual position of society.”

Machiavelli and de Tocqueville may seem, may even be, an odd pairing, odder still for a look at contemporary legal ethics. However, the connection is simply this: In early 19th century America, at the dawn of American legal ethics, de Tocqueville perceived lawyers as aristocrats, as princes. Then who better than Machiavelli to describe the “virtue” of princes. Coincidentally, or even ironically, Machiavelli’s conception of princely virtue is exactly that adopted by and embedded in 21st century legal ethics codes. This sleight-of-hand traveling through the centuries is a remarkable story, and the conclusion is best understood by what legal ethics is not. Legal ethics is not professionalism. Also, today’s legal ethics is not morality—it is regulatory politics. Machiavelli’s dream of politics is as true for lawyers today as it was for ambitious would-be Renaissance diplomats.

B. United States History

The standard story of legal ethics in the United States finds its roots in the not so dim mists of the early 19th century and remains the current story we tell. This history reveals the tension between the formal disciplinary rules of professional behavior and the desire for a broader moral ethos.

David Hoffman, a Baltimore lawyer, has been called the father of American legal ethics. As an educator, Hoffman offered a course of legal study first published in 1817 and later published in two volumes in

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3. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Harvey C. Mansfield & Delba Winthrop trans., 2000).
4. Id. at 256.
1836. It was the later edition in which he listed “Some Rules for a Lawyer’s Conduct Throughout Life.” The rules contain fifty “Resolutions in Regard to Professional Deportment” such as: respond to letters (Rule 36); avoid envy (Rule 37); do not disregard the feelings of witnesses under examination (Rule 42); and avoid avarice (Rule 49).7

Hoffman’s work clearly imports then-contemporary morality into his understanding of legal ethics. Indeed, he proclaims that it is the office of the legal vocation “to vindicate the laws of God and man.” He counsels that if a lawyer is “persuaded that [a] client’s claim or defense cannot, or rather ought not to be sustained, [the lawyer] will promptly advise him to abandon it.”8 Hoffman’s sense of legal ethics is clearly one of personal morality in which he admonishes lawyers to adopt good morals as habit or virtue.9

A bit of local pride requires us to mention that the first dean of the University of Cincinnati College of Law, Timothy Walker, was also instrumental in the development of legal ethics. His book, Introduction to American Law, first published in 1837, was the key legal text for American students of law for most of the 19th century, including no lesser a personage than Justice Oliver Wendell Holmes. Most of Walker’s book involves substantive law, but at the end he addresses legal ethics as he describes for his readers the “ways and means of professional success.”

There is something modern, maybe timeless, about Walker’s critical attitude toward lawyers. He writes: “The vulgar notion is, that lawyers are seldom honest men.” And lawyers are considered “errant naves.” Walker concludes his set of lectures with an admonishment of the need for professional integrity. A career in law is not the path to riches, rather it is the path to independence, “which is all a wise man need desire.”10 For Walker, the keys to successful practice are knowledge of the law; dedication; professional integrity; and the avoidance of “pettifogging.”11 Walker’s opinion of lawyers clearly is more realistic and closer to our own while Hoffman’s is more hopeful. Walker’s approach is more “Thou Shall Not” rather than “Blessed be the Peacemaker.” And to put the matter another way, for Walker, legal ethics is about conduct that is prohibited rather than about behavior that will make a lawyer a better person, as Hoffman hoped.

7. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 767-73 (2d ed. 1846).
8. Id. at 754 (emphasis added).
9. Ethics as virtue, or “virtue ethics” has a distinguished lineage. See, e.g., ARISTOTLE, NICOMACHAEAN ETHICS; ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984); JUSTIN OAKLEY & DEAN COCKING, VIRTUE ETHICS AND PROFESSIONAL ROLES (2001).
10. TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 670 (11th ed. 1905).
11. Id. at 670-71.
Judge George Sharswood of Philadelphia followed Hoffman and Walker, and his 1854 Essay on Professional Ethics\(^\text{12}\) became the standard and most influential work on the subject. With Sharswood, professional ethics takes a formal turn as Sharswood adopts a position familiar to us. The guilty client, for example, can be represented because it is a lawyer’s duty to do so, and it is the system, not the individual lawyer, that judges guilt or innocence based upon fair arguments arising from the evidence. Thus, early on, between Hoffman and Sharswood, the development of legal ethics revealed the tension between moral prescription and formal disciplinary rule.

The first code of professional ethics was adopted by the Alabama State Bar Association in 1887\(^\text{13}\) and was based upon Sharswood’s lectures. Thirty years later, the American Bar Association adopted its first canons of ethics based on the Alabama code. Both the Alabama Code of Ethics and the 1908 ABA Canons set out a series of duties to be observed by lawyers, such as upholding the institution and laws of the state and of the United States and the need for respect of courts, judges, each other, clients, and the public. Largely hortatory, the 1908 Canons were addressed to trial lawyers. It must be noted that these rules had no legal effect until they were adopted by individual states and enforced by that jurisdiction’s courts in lawyer disciplinary actions.\(^\text{14}\)

The 1908 Canons served as a forerunner to the 1969 ABA Model Code of Professional Responsibility (CPR), which was the outcome of a committee appointed in 1964 by then ABA President Louis F. Powell, Jr. Like the 1908 Canons, the CPR did not have the force of law until adopted by a state, usually a state’s supreme court. Unlike the 1908 Canons, the CPR had more disciplinary bite.

The CPR was widely adopted and consists of four parts: Canons, Disciplinary Rules, Ethical Considerations, and Definitions. Notably, versions of the CPR remain in effect in Ohio, New York, and other states.\(^\text{15}\) The Canons set norms, such as “[a] lawyer should represent a client zealously within the bounds of the law.”\(^\text{16}\) A Canon is followed by Ethical Considerations which elaborate on this duty, such as “[w]hile serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.”\(^\text{17}\) Ethical Considerations are
interpretive guides and, thus, are aspirational as opposed to prescriptive and contain no disciplinary force.

The Disciplinary Rules are mandatory and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." In Disciplinary Rule 7-101, for example, a lawyer may be disciplined if his representation extends to "conduct that [a lawyer] believes to be unlawful." The 1969 Code of Professional Responsibility was subject to its own criticisms. Discipline is narrowly imposed; the CPR is also written mainly for trial lawyers rather than transactional or in-house lawyers; aspirational goals go unrealized; and the CPR does not keep pace with a profession remarkably changed by technological advances, increasing competition, and decreasing loyalty.

Simply, a one size fits all code of ethical behavior and professional responsibility is inadequate to contemporary professional needs. As the size of the profession significantly increased, private law firms got larger, the practice of law diversified in terms of demographics, practice areas, and career tracks, and law became more technology driven and more complex as well as more "professionalized" as firms turned to marketing and public relations. Changes in government regulation, multijurisdictional practice, class action lawsuits, and institutional litigation all contributed to a demand for a reappraisal of the CPR.

ABA leadership appointed a committee in 1977 that redrafted the Code of Professional Responsibility through the leadership of Omaha, Nebraska lawyer Robert J. Kutak. The Kutak Commission served from 1977 to 1983, at which time the 1983 ABA Model Rules of Professional Conduct (Model Rules) were issued. The Model Rules were controversial because of their more ambitious proposals, such as limiting client confidentiality; mandating pro bono work by every lawyer; limiting the kinds of cases that the lawyer could accept; regulating of conflicts aggressively; requiring a full disclosure and fairness in trials and

18. Id. at PREFACE.
19. Id. at DR 7-101(B)(2).
20. Changes in the legal profession have been dramatic over the last two decades and critics have been unsparing in their criticism. The most recent criticism has been sounded on a particularly trenchant note—most of it comes from legal professionals—lawyers, judges, and law teachers—rather than from the public. See Anthony Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993); Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society (1994); Sol Linowitz, The Betrayed Profession: Lawyering at the End of the 20th Century (1994); Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession (2000); Walter Bennett, The Lawyer's Myth: Reviving Ideals in the Legal Profession (2001); William H. Simon, The Practice of Justice: A Theory of Lawyer's Ethics (1998).
negotiations; and expanding permissible limits on advertising and solicitation.

The Model Rules begin with a Preamble setting underlying philosophy. The Scope section attempts to place the Model Rules in a larger context. The bulk of the Model Rules is taken up with fifty-two Rules with explanatory commentary. Some of the rules are pointedly disciplinary in nature. Others provide for more discretion and may involve discipline. Others are prescriptive only. Again, the Model Rules succeed more as a minimal disciplinary code than as a behavioral guide.

C. Ethics 2000 and The Law Governing Lawyers

The controversy surrounding the Model Rules and the growing popular dissatisfaction with the legal profession led to the appointment of yet another ABA commission to undertake a comprehensive review of the 1983 Model Rules.

In 1997, the ABA appointed a Commission on the Evaluation of the Rules of Professional Conduct, chaired by Chief Justice E. Norman Veasey of the Delaware Supreme Court, and that body, known as the Ethics 2000 Commission, issued its report in November of 2000. According to the Report, one of the reasons to evaluate the Model Rules was the growing disparity in state ethics codes. The Report states that forty-two states and the District of Columbia have adopted some version of the Model Rules and that significant differences in the state versions resulted in significant lack of uniformity.

In addition to the disparities in the ethics codes among the states, the Ethics 2000 Commission felt that technological developments so greatly affected the delivery of legal services that the explosive dynamics of modern law practice sent "a sense of urgency" to the project.

Ethics 2000 retains the "basic architecture" of the Model Rules and the sense that the primary function of the rules is disciplinary, rather than a set of "best practices" or professionalism concepts. Ethics 2000 reintroduces the basic tension between ethics and professionalism. The Commission clearly opted to maintain a set of rules that established minimum standards that must be achieved before subjecting a lawyer to disciplinary practices, as opposed to the aspirational values of professionalism concepts. The Commission "tinker[ed] with the . . . Model

22. Id. at xi.
23. Id. at xii.
Rules and made a large number of small changes, the most significant of which involved communications with clients, informed consent, allocation of authority, confidentiality, and conflicts. What is more noteworthy is what the Commission did not do. It did not amend prohibitions on multidisciplinary practice, nor did it vote to make pro bono service mandatory, rather keeping it voluntary.

In summer 2001 the ABA House of Delegates began to review Ethics 2000, and the provisions that captured most of the publicity indicate the endurance of Machiavelli's dream. Rule 1.6(b) of Ethics 2000 proposed that a

lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

After a scholastic debate worthy of St. Thomas Aquinas, the House adopted (1) and struck (2). At first glance, certainly we can all agree that life is more important than property. Yet, as lawyers, how do we really feel about furthering crime? Would the House of Delegates vote the same way post-Enron/Arthur Andersen? What would David Hoffman have said? Or de Tocqueville for that matter? Most likely, Machiavelli would have approved.

While the ABA's Ethics 2000 was under consideration, the American Law Institute was concluding its fifteen-year restatement project entitled The Law Governing Lawyers. Although intended as complementary to the CPR and the Model Rules, the Restatement goes "well beyond the scope of the ethics codes in all jurisdictions." More particularly, while the bite of ethics codes lies in disciplinary proceedings that can result in suspension or disbarment, the Restatement addresses civil liability through malpractice and recognizes civil liability to non-clients. While the Restatement undertakes to restate much of the law governing lawyers, it does not cover all of it and is not co-extensive with the ethics codes. The Restatement, for example, omits extensive consideration of advertising and solicitation, the right to counsel, group legal services, and court-awarded attorney fees.

The distinguishing feature between *Ethics 2000* and the Restatement is the function each assumes regarding the regulation of lawyer conduct. *Ethics 2000* clearly rejects assuming a regulatory function, while the Restatement embraces it, albeit to a limited extent. The Restatement recognizes that lawyer behavior is regulated by moral, professional, and legal constraints while focusing on the legal constraints affecting discipline and liability. Like all of the ALI restatements, *The Law Governing Lawyers* is both comprehensive and scholarly, so scholarly in fact that it may well be of more use to law professors than to daily practitioners. Nevertheless, it provides an important compendium of decisional law should one ever need it.

**D. The Virtue of Princes Redux**

Having traced the history of ethics codes from 1817 Baltimore to Chicago 2001, it is time to return to Machiavelli.

By all accounts, Niccolo Machiavelli was a true Renaissance humanist whose thought was best realized in his enduring job application to Lorenzo de Medici—*The Prince*. But what does a book written over 450 years ago by a sometime Florentine bureaucrat have to say to us down through the centuries? Particularly a book so often referred to dismissively as a how-to manual? Today we can expect to find a shelf or two devoted to Machiavelli in the self-help section of the local bookstore stocked with such titles as: *Machiavelli and Management; The Princessa: Machiavelli for Women;* or *Machiavelli on Modern Leadership*. It would not be surprising to find a volume entitled *Machiavelli for Lawyers.*

*The Prince* is generally considered the first great work of modern political theory, mostly for the way it decoupled morality from action. Indeed, it can be said that Machiavelli stood Aristotelian virtue ethics on
its head and redefined the term.\textsuperscript{31} Again, the simple and stark theme of \textit{The Prince} is that a successful prince was defined by how effectively he could acquire and maintain power. Not so different from a lawyer building a practice in a competitive world. Machiavelli’s redefinition of virtue makes the Socratic question: “How should I live the good life?” subordinate or irrelevant to power politics just as the question “Can a good lawyer be a good person?” has become irrelevant for ethics codes.\textsuperscript{32} Indeed, according to \textit{The Prince}, goodness can only be used in service of power, it has no value on its own. Similarly, ethics codes are about keeping your license rather than improving your soul.

Machiavelli’s central claim about the behavior of princes echoes the basic tension that divides ethics and professionalism into a set of formal rules for behavior and discipline and into a separate set of aspirational standards. Former Harvard law professor and jurisprude, Lon Fuller, called this divide between ethics and professionalism a divide between the “morality of duty” and the “morality of aspiration.”\textsuperscript{33}

Similarly to \textit{The Prince}, the discussion of the moral or amoral nature of lawyer behavior is analogous to Holmes’s bad man. Holmes is often wrongly quoted on this point. In \textit{The Path of the Law}\textsuperscript{34} Holmes wrote that to study law, and here we would say its ethics codes, one is best served by doing so as a bad man to understand its limits before suffering its penalties, even while acknowledging that the “law is the witness and external deposit of our moral life.”\textsuperscript{35}

\textit{The Prince} provides a departure point to discuss the ethical and moral obligations of being a lawyer. For those lawyers who find solace in minima, again like Holmes’s bad man, legal ethics rules are to be read narrowly and taken right up to the limit. For lawyers who believe that the profession embodies a broader sense of responsibility and justice, a discussion of professionalism provides some guidance.

\section*{II. PROFESSIONALISM}

Many legal professionals believe that disciplinary codes do not go far enough, particularly if we are to improve public trust in the profession and reverse growing dissatisfaction among lawyers. While the history

\begin{itemize}
\item \textsuperscript{31} See, e.g., QUENTIN SKINNER, MACHIAVELLI vi (1981) (“And I have held to my belief that Machiavelli’s pivotal concept of virtù (\textit{virtus} in Latin) cannot be translated into modern English by any single word or manageable series of periphrases.”).
\item \textsuperscript{32} See THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS (David Luban ed., 1984); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).
\item \textsuperscript{33} LON L. FULLER, THE MORALITY OF LAW 4 (2d ed. 1969).
\item \textsuperscript{34} Oliver Wendell Holmes, \textit{The Path of the Law}, 10 HARV. L. REV. 457 (1897).
\item \textsuperscript{35} Id. at 459.
\end{itemize}
of legal ethics codes is instructive, presenting as it does the tension between discipline and aspiration, it is less instructive on how to navigate that tension. Instead, the path from minimum rules to aspirational goals requires other guides, and the current guide of choice is the concept of professionalism.

A. Introduction

Although professionalism has captured the attention of the legal profession from law schools to state supreme courts, it is a mistake to equate it with legal ethics. Here we take the view that professionalism is a broad concept, encompassing the lawyer's obligation not only to adhere to disciplinary rules, but also to undertake the lifelong challenges of maintaining competence, acting with integrity, serving the public, and seeking justice. Because these four challenges should become a significant part of a lawyer's life, that part should begin to be developed in law school.

Thinking about professionalism in the context of legal education, and particularly new student orientation, offers several advantages. First, new law students bring few preconceptions to what experienced attorneys may regard as the overworked notion of "professionalism." Unjaded, they can think freshly and even idealistically about the concept of professionalism. Presenters, whether legal educators or practitioners, offered this tabula rasa, have a rare opportunity to think creatively about first principles of professionalism and what might be said on the first day of law school to instill the commitments undertaken by beginning the study of law. Second, such beginning instruction forms the essential foundation for more complex notions of professional responsibility that will carry over into the students' careers. To borrow a concept from a

36. Several states have initiated programs on professionalism for law students. For example, the Chief Justice's Commission on Professionalism in Georgia has adopted an extensive program, mounted at all Georgia law schools by attorney volunteers, who are specially trained to work in two hour program segments with material developed to guide new law students in professionalism considerations. Each program begins with an address by a Justice of the Georgia Supreme Court and is followed by attorney-led breakout sections where students discuss hypothetical problems about ethics and professionalism which might arise in law school or in practice. CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM, TEACHING PROFESSIONALISM IN GEORGIA 7.

37. The inclusion of the professionalism CLE requirements for lawyers has been met with skepticism in some quarters. Repetitive programs emphasizing the same "Lawyers Creed" have harmed the professionalism movement more than helped it. CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM, THE WORKING GROUP OF LAWYER CONDUCT AND PROFESSIONALISM, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 13 (1999). Recent efforts to address professionalism issues in the context of particular substantive practice areas have been more successful. Guidelines for Professionalism CLE programs have been issued in Georgia, Ohio, and several other states.
1992 ABA task force report, legal education, and by extension professionalism education, occurs along a continuum. Finally, introducing students to professionalism from their first day of law school lends symbolic import to that moment in their professional character development.

Even with these advantages, professionalism as a dimension of a lawyer's ethos presents real educational problems, largely because our considerations of what professionalism means have too often been considerations of superficial symptoms combined with quick fix cures.

B. Superficial Symptoms and Quick Fix Cures

Civility

Arriving at the four broad challenges for professionalism education started with the conviction that concern about the unbecoming conduct of lawyers had limited rather than informed our understanding of professionalism. The conflation of professionalism with civility is the primary example of this limitation. While civility may be the result of true professionalism, it is not co-extensive with it. The following are a few examples of how we have tended to equate civility and professionalism.

The Supreme Court of Ohio's concern for professionalism grew out of an observation that instances of unprofessional conduct were increasing in frequency and severity. The Court's response was to designate a committee to study existing creeds of professionalism. The work of this committee ultimately led to the formation of the Supreme Court Commission on Professionalism in 1992, and the adoption in 1997 of the Statement on Professionalism, A Lawyer's Creed, and A Lawyer's Aspirational Ideals. In particular, A Lawyer's Creed addresses professionalism as a matter of conducting ourselves civilly vis-à-vis others involved in the legal system.

In 1998, the Columbus Bar Association developed one of the first programs of the organized bar to address problems of civility. The

38. ABA SEC. ON LEGAL EDUC. & ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 140 (1992) [hereinafter MACCRATE REPORT]. See infra notes 79-80.


Civility Enhancement Program enables lawyers to lodge complaints with the bar association, which may lead to efforts at conciliation. An express goal of the program is to "promote and influence the attainment of an enhanced standard of professionalism."\(^{41}\)

In August 2001, the Cincinnati Bar Association adopted the report of the Civility Task Force, a part of which is a recommended Attorney Code of Conduct.\(^{42}\) A feature of the code is that members of the legal community can pledge to promote professionalism and civility by calling to have their names added to the list of endorsing attorneys. In all three of these laudable efforts, professionalism and civility are presented as virtually co-extensive. Or if not co-extensive, then civility is at least presented as topic one under the heading "professionalism."

That civility leads the list of professionalism concerns is no surprise. It is an obvious problem; it can make the practice of law unpleasant for many lawyers; and it can be defined in behavioral, and therefore more concrete, terms. We know civility (or incivility) when we see it.

Civility creeds and codes are not without their critics.\(^{43}\) Critics argue that the civility movement, including CLE programs, focuses too much on "making lawyers feel better about themselves," and on making the public think more favorably of the profession rather than addressing underlying problems of lawyer behavior.\(^{44}\) Civility, it has been suggested, is understood by some to be a "bumper sticker slogan, as in, 'have you hugged your adversary today.'"\(^{45}\) It has also been suggested that civility is a problem only in large law firm practices or in litigation settings. Civility codes are criticized because "[t]hose lawyers who don't need codes observe them, and those who do, don't."\(^{46}\)

Yet, we are less willing to dismiss such efforts.\(^{47}\) Rather, we believe that civility initiatives are important, but recognize with Roger Cramton of Cornell that "[c]ivility is not the core of the enterprise. It is like an


\(^{42}\) CINCINNATI BAR ASS'N CIVILITY TASK FORCE, CHARACTER COUNTS: FOCUS ON PROFESSIONALISM AND CIVILITY IN THE LAW (2001) [hereinafter CHARACTER COUNTS].

\(^{43}\) Thomas A. Gotschalk, Civility Codes: Treating the Symptom, Not the Disease, 1996 THE PROF. LAW. 37.

\(^{44}\) Id.

\(^{45}\) Louis H. Pollak, Professional Attitude, 84-ALG. A.B.A.J. 66 (1998) (quoting United States Supreme Court Justice Anthony Kennedy). Justice Kennedy is critical of this superficial view of civility. He states, "Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself." Id.

\(^{46}\) PROMOTING PROFESSIONALISM, supra note 40, at 35.

\(^{47}\) See CHARACTER COUNTS, supra note 42, for an excellent statement and practical list of aspirational goals.
elegant dessert, which dresses up and completes a good meal. The nourishment,” Cramton suggests, “lies elsewhere.”

Taking professionalism to mean civil behavior has focused our attention too much on superficial conduct and too little on broader themes. To make civil behavior understood as an important aspect of professionalism, it must be presented as the logical manifestation of embracing a professional’s value system.

**Competition and Commercialization**

A second limitation on our understanding of the broad concept of professionalism is our nostalgia for earlier times when practicing law was “more a profession than a business.” These memories are usually accompanied by stories of clients who paid, without question, sizable unitemized bills “for professional services rendered.”

The character of this older form of law practice was collegial: a fellowship, with some masters and some beginners, practicing a historically rooted public craft founded upon an established body of knowledge believed to be ennobling. Today’s commercialized model of law practice is not collegial in spirit. Nor is it even political, except in the narrow sense implying contentiousness of conflicting desires. It is corporate in form, competitive in character, and all too often avaricious in aims.

Numerous factors are to blame for the perceived increasing commercialism of law practice. Firms have gotten larger; lawyers have multiple employment tracks; cases have gotten more complicated; salaries have gone through roofs; mentoring is a memory; loyalty is a thing of the past; and marketing and public relations (not to mention advertising) are matters of day-to-day lawyering. This description, however, tells only half the picture. There are more women and

48. ROGER C. CRAMTON, ABA SEC. ON LEGAL EDUC. & ADMISSION TO THE BAR ON GIVING MEANING TO “PROFESSIONALISM” 7, 14 (1996).
52. Lawyer advertising has occasionally been a worry. Take the infamous Rosalie Osias, of Great Neck, New York, whose ads have been described as follows: “A woman in a black leather miniskirt crouches seductively over a motorcycle, vowing her company will ‘ride anything’ to accommodate a client’s deadlines. In another pose, the woman is draped across a desk, her heels kicked up behind her as she seductively bites a pencil and intimates that her firm ‘has a reputation.’” According to Ms. Osias, “Sex sells. It sells everything in our society, why not legal services?” Di Mari Ricker, *Ad Aware: Has Lawyer Advertising Run Amok?,* 26 STUDENT L. 19 (1998). Seriously, don’t these cases take care of themselves?
53. See supra note 20.
minorities in the profession; employment tracks are more flexible; new areas of practice are opening, particularly related to technology; new skills, largely entrepreneurial, are required; and the practice of law has become less clubby and more democratic.

In short, it would be mistaken to blame economic forces leading to the infusion of business and commercial concepts and attitudes into the practice of law as the bane of professionalism. It is more likely the case that lawyers and firms need to become more business-like to become more professional. They must concentrate on adding value to client matters and investing and developing human capital as examples of positive lessons learned from business.34

The Supreme Court of Ohio targeted competition as a cause of the profession’s troubles, suggesting this genesis in its 1997 Statement on Professionalism. The Court said, “[T]rends . . . developing among lawyers in Ohio and elsewhere which emphasize commercialism in the practice of law”35 were, along with incivility, reasons for the creation of the Commission on Professionalism. Yet, good business practices are client or customer-centered and have much to teach lawyers about what is valuable in law practice.36

Eliminating, or even diminishing, the commercial aspect of practicing law does not pave the path to professionalism. The concept of professionalism that takes the “American virtues of risk-taking, private initiative, and competitive markets as vices in the practice of law . . . is inconsistent with both history and reality.”37 The entrepreneurial character of the practice of law has more often been a source of strength than of weakness. Moreover, in the face of competitive issues like multidisciplinary practice and multijurisdictional practice, lawyers must be both entrepreneurial and professional to survive. What lawyers must learn is that respect and care for clients, colleagues, staff, and even adversaries are best practices in both business and the profession.

Eliminating the entrepreneurial character of practicing law is not only impossible but also undesirable, and avoiding the commercialism typified by lawyer advertising is neither practical nor helpful in understanding the essence of professionalism. Like civility, dignified advertising, while perhaps desirable, should not be an end in itself but

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34. See, e.g., DAVID H. MAISTER, TRUE PROFESSIONALISM: THE COURAGE TO CARE ABOUT YOUR PEOPLE, YOUR CLIENTS, AND YOUR CAREER (1997); STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (1999); MIHALY CSIKSZENTMIHALY & WILLIAM DAMON, GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET (2001).
35. Statement on Professionalism Issued by the Supreme Court of Ohio (February 3, 1997).
36. See, e.g., MAISTER, supra note 54; KEEVA, supra note 54.
37. CRAMTON, supra note 48, at 15.
should result from a commitment to some more fundamental set of values.

Bridge-the-Gap Programs

A customary fix for professionalism concerns has been correcting behaviors and attitudes of new lawyers, leading to initiatives that address professionalism more comprehensively in law school. This approach assumes a consensus exists about what to teach, but that law schools are not teaching it soon enough. As educators, we take this criticism with no small amount of skepticism. Law schools play a very important role in the professional education and training of lawyers, but student readiness for professionalism instruction may be limited by the demands of substantive course work and the absence of the client context. Readiness quickly occurs once a law school graduate takes the oath and begins representing real clients. This experience can be duplicated to some degree in law school through clinical and internship experiences, or even in some summer clerkships. But when the personal consequences are, at worst, a bad grade, the motivation is not the same as when the admitted lawyer takes responsibility for the legal affairs of another.

Bridge-the-Gap programs for new admittees are preferred by the Supreme Court of Ohio. The Court has recently adopted a New Lawyers Training obligation, required for the first time of those who passed the July 2001 bar. It consists of twelve hours covering specific subjects, and must be completed before the end of the year following admission. The rule requires six hours of instruction on topics related to the professional relationships and obligations of lawyers. Skepticism is warranted here, even though both authors were involved in the study and adoption of Ohio's Bridge-the-Gap rules. Students must learn the nuts-and-bolts, and such programs can start that process. To a lesser extent, Bridge-the-Gap programs can continue the development of professionalism started in law school, but it cannot substitute for continued education in the profession.

Mentoring

Better mentoring of new lawyers has also been suggested as a quick fix to professionalism problems. Structured mentoring programs, in which mentors are assigned to junior lawyers, appeal to many because

senior lawyers, under numerous pressures, no longer devote time to coaching and teaching new lawyers as they once used to do, informally, as a matter of course. At first impression, assigning experienced attorneys to nurture and train new attorneys makes common sense. Though an excellent idea in theory, with respected antecedents, today, assigned mentoring rarely works. The competitive pressures on practice catalogued above do take their toll here. Simply, senior lawyers find themselves too busy to mentor junior lawyers on a sustained basis. Evidence also suggests that women receive less mentoring than men, although both suffer.

Even though mentoring programs are difficult to implement and sustain, they may nevertheless be worth trying, as mentoring can work if certain conditions are present. First, mentoring works best when the program is small and local, giving the mentor and the new lawyer an opportunity to be in regular proximity. Second, mentoring requires some affinity between the mentor and the new lawyer, or at least a belief that each will be a credit to the other. In too many mentoring programs, mentors and mentees are assigned, giving too little attention to either of these factors, or to a third important one, that the senior lawyer and the new lawyer have enough in common so that they can talk easily about subjects other than the practice of law. Third, the contacts must be sustained over a long enough period of time for coaching lessons to be effective. Finally, difficulties inherent in administering a program must be addressed and overcome. Questions likely to arise for the program administrator include who qualifies as a mentor, who decides which mentor is assigned to which new lawyer, what are the expectations on each side of the relationship, and what happens if those expectations are not met.

Because of difficulties in creating and maintaining necessary structures, mentoring programs are not the panacea they might at first appear to be. Attorneys who enjoy mentoring should be encouraged to continue to assist new lawyers in making the transition into the practice of law, but reliance on assigned mentors will not solve our professionalism problems.

Attention to civility, undignified commercialization, new lawyer training, and mentoring has enabled us to make progress toward professionalism, and in fact these represent important initiatives and


60. For an excellent description of problems and practical solutions for mentoring programs, see Linda Phillips-Jones, ABA Section of Litigation Annual Fall Meeting Common Problems in Planned Mentoring Programs (1992) (on file with author).
discussions. Other undertakings might be mentioned here as well, such as fulfilling pro bono obligations, which is a strong theme of the ABA. Still, if professionalism is going to guide us to the aspirational goals missing from black letter disciplinary codes, we must delve deeper to find a statement of the first values of the profession.

C. The First Values of Professionalism

Standard definitions of professionalism offer a place to start. One favored definition was coined mid-century by Harvard Dean Roscoe Pound, who said:

the term refers to a group of men 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 public service is the primary purpose.

The Pound definition was recently updated and re-published in an ABA publication, *Teaching and Learning Professionalism*, the 1996 report of the Professionalism Committee of the American Bar Association Section on Legal Education and Admissions to the Bar. Its authors adopted Pound's approach, suggesting that the core of professionalism is public service. The Report updated and expanded the definition, as follows:

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.

The Report goes on to list the "essential characteristics of the professional lawyer," which are: (1) learned knowledge, (2) skill in applying the applicable law to the factual context, (3) thoroughness of preparation, (4) practical and prudential wisdom, (5) ethical conduct and integrity, and (6) dedication to justice and the public good. The definition section of the report ends by noting that the "values underlying lawyer professionalism are aspirational in nature, unlike the minimum standard" of the "ethical disciplinary rules."

61. **Promoting Professionalism**, supra note 40, at 75.
63. **ABA SEC. ON LEGAL EDUC. & ADMISSIONS TO THE BAR, REP. OF THE PROFESSIONALISM COMMITTEE, TEACHING AND LEARNING PROFESSIONALISM** (1995) [hereinafter **TEACHING & LEARNING PROFESSIONALISM**].
64. *id.* at 6.
65. *id.* at 6-7.
66. *id.* at 10.
Professor Roger Cramton, in an exceptionally thoughtful essay,67 called for a reaffirmation of the central moral tradition of lawyering, which he says is fully described in a 1958 ABA joint report on the professional responsibilities of lawyers, authored primarily by Lon Fuller.68 In Fuller's words, the lawyer's primary obligation is to the "procedures and institutions of the law."69 Moreover, he continues, the role of the lawyer within the legal system "imposes a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."70

Cramton suggests that the problem today is the professional ideology that requires total commitment to clients. He says, "If 'client comes first' meant only that the client's interest is superior to that of the lawyer, it would be sound and praiseworthy. But the dominant view often means that only client interests are respected, not those of courts, third persons, and the public."71

He cites a number of reports that suggest that legal services today are "market driven, with lawyers serving as expert technicians and hired guns who view their work as a task-oriented commodity."72 Cramton speaks critically and notes the great symbolic importance of the ABA's resistance to imposing upon lawyers a duty to disclose client confidences when necessary to prevent or rectify client fraud where the lawyer's services were used.73

The Fuller report discussed the difficulty of bringing home to the law student, the lawyer, and the public an understanding of the nature of the lawyer's professional responsibilities.74 In the report, Fuller describes how private practice can be a form of public service, saying "private practice is a form of public service when it is conducted with an appreciation of, and a respect for, the larger framework of government of which it forms a part, including the voluntary forms of self-regulation."75

67. CRAMTON, supra note 48, at 20.
69. Id. at 162.
70. Id.
71. CRAMTON, supra note 48, at 19.
72. Id.
73. ABA discussions of revisions to Rule 1.6(b) of the Model Rules of Professional Conduct are the most recent example of Cramton's point. See Mark Hansen, Model Rules Rehaul: House Tackles Tough Issues as Ethics Debate Begins, 87-88 A.B.A. J. 80 (2001).
74. Fuller & Randall, supra note 68, at 1162.
75. Id. By voluntary forms of self-regulation, Fuller refers to those instances where parties set terms under which they will come together to collaborate and to arrange their relationships: by forming
Justice O'Connor's oft-quoted assessment of professionalism is similar, more recent, and noteworthy:

To me, the essence of professionalism is a commitment to develop one's skills and to apply [them] 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.

She continues:

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.76

Justice O'Connor's articulation, to a great degree, synthesizes and simplifies the other definitions and aptly strikes four broad aspirational themes: developing skills, adhering to ethical standards, serving clients and the public, and taking responsibility to provide justice for all. These challenges, basic and easily remembered, can serve as the right foundational guides for law students, and form a broad foundation for professionalism activities considered by bar associations and state supreme courts.77

D. Four Challenges of Professionalism

Skills Competence

Achieving and maintaining competence in a wide range of analytical and operational skills lies at the core of professionalism. The challenge is to understand that achieving and maintaining competence is not separate from professionalism, but one of its first principles. To embrace the notion that competence is more than technical skills is
likewise critical. Meeting this challenge means not only mastering a certain body of substantive knowledge and a set of lawyering skills, but also applying them both with independent judgment and practical wisdom.78

The 1992 Report on Law Schools and the Profession,79 known as the MacCrate Report after its primary author, Robert MacCrate,80 identifies as the first fundamental value of the profession, "the Provision of Competent Representation."81 The ABA's Standing Committee on Lawyer Competence captured this challenge well when it emphasized that, "Law is a craft that endeavors to shape its work with balance and precision, that rejects imperfection and flaw, that values dispassionate analysis, that is conscious and sensitive, and that understands that one apt word or phrase can clarify an issue, or convert contention into consensus."82 Understanding law is a craft that elicits pride and responsibility. This tradition gives competence a special meaning and emphasizes it as a crucial element of professionalism.

**Integrity**

The second challenge calls for lawyers to act with integrity, or what Justice O'Connor refers to as the highest ethical standards. Many people think of professionalism exclusively as a higher form of ethics, calling for us to do what the Code of Professional Responsibility requires, and then to do it with respect for the relationships lawyers must maintain with the others who inhabit the legal system. The Ohio Lawyer’s Creed, written in terms of the character of the relationships we have with judges, lawyers, our colleagues in our firms, our clients, and finally with the public at large, seems to take this view.83

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79. MacCrate Report, supra note 38. The MACCRATE REPORT is a thorough and comprehensive study listing ten fundamental skills and four values of the legal professional. The Report explains each of these in great detail and is recommended to you for your reading. For our purposes, we have reduced the several skills and values of the MACCRATE REPORT into four challenges of professionalism. The fundamental skills are: Problem Solving; Legal Analysis and Reasoning; Legal Research; Factual Investigation; Communication; Counseling; Negotiation; Litigation and Alternate Dispute Resolution; Organization and Management of Legal Work; and, Recognizing and Resolving Ethical Dilemmas. The fundamental values are: Provision of Competent Representation; Striving to Promote Justice, Fairness and Morality; Striving to Improve the Profession; and, Professional Self-Development.
80. Robert MacCrate is senior counsel with Sullivan & Cromwell; he is a past president of the ABA, and the State Bar of New York.
81. MacCrate Report, supra note 38, at 207.
82. Promoting Professionalism, supra note 40, at 43.
Although the ethical integrity of the lawyer must be the profession's first commitment, the ethics rules of today are primarily a set of behavioral rules. "Acting with integrity" is the phrase which seems to capture better the idea of a value system, a mind-set, a responsibility that should remain constantly in the lawyer's consciousness as well as the idea of acting accordingly. Just as competence is more than a set of technical skills, acting with integrity is more fundamental than simply staying out of trouble with the grievance committee.

Service

Meeting the challenge of integrity in the profession lies largely in reaffirming the central moral tradition of lawyering. That tradition asserts that the lawyer's primary obligation is, in Fuller's words quoted earlier, to the "procedures and institutions of the law," which leads to the third challenge, making a commitment to a life of service.

If service to others is the central commitment of a lawyer's professional life, then the challenge of this aspect of professionalism is to understand service in a more complex way than volunteering in community organizations or doing pro bono work. These are important undertakings, but the more complicated challenge is to reconsider and re-embrace the understanding of client service as taking place within the tradition of service to the public. In the words of Professor Cramton,

Representation of private clients serves public goals . . . when lawyer professionalism [1] encourages lawyers to assist clients in refining their objectives in the light of moral concerns, [2] channels client conduct in law-abiding paths, and [3] subordinates the interests of clients in those less common situations in which a client's wrongful conduct threatens serious injury to third persons or to the integrity of judicial process.

Justice O'Connor likewise calls for the subordination of narrow self interest to the more fundamental goal of public service.

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84. PROMOTING PROFESSIONALISM, supra note 40, at 9.
85. See supra Part I. Several commentators have noted the transition in this century from the 1908 Canons of Ethics, which were aspirational in nature, to the Model Rules, adopted in 1983 by the ABA, which set forth black letter rules for ethical behavior. The Model Rules have come to be regarded, not as minimum standards beyond which all lawyers should strive, but as the maximum standards of ethical behavior, in other words, not a floor, but a ceiling.
86. CRAMTON, supra note 48, at 18-19.
87. Fuller & Randall, supra note 68, at 1162.
88. POUND, supra note 62, at 9-10.
89. CRAMTON, supra note 48, at 16-17.
Recent writings on professionalism have begun to address with greater emphasis the problem of "hired gun" advocacy.90 According to Russell Pearce, Director of Fordham's Center for Law and Ethics, "Persuading today's elite lawyers of an obligation to the public good requires a new understanding, with two objectives. First, commitment to the public good must be reconciled with the acknowledgment that law is a business. Second, the hired gun's principle of moral non-accountability must end."91

To achieve the goal of service to private clients as a form of public service, attorneys must more strongly reclaim the independence of judgment for which our services are sought. Jerome Shestack, President of the ABA in 1997-1998, for whom Professionalism was the theme of his presidential year, notes that today, too many lawyers, acting out of enthusiasm to gain and keep their clients, "are willing to forego their independent judgment and adherence to professional values to do whatever the client asks." For these lawyers, the desire for economic gain and the culture of the marketplace have been allowed to override independent judgment.92

The challenge, then, in making a commitment to practice law in service to one's clients and the public good is in finding the proper balance between zealous advocacy on the one hand, and independent judgment and moral accountability on the other.

Seeking Justice

The fourth and final challenge of professionalism is seeking justice for all as a priority of our legal institutions. This challenge may be divided into two parts: Part one is assuring the quality of legal representation for those unable to afford it. The challenge associated with the distribution of legal services remains unsolved partly because there is no agreement, except at the rhetorical level, about what the problems are.93

In her recent book, In the Interests of Justice: Reforming the Legal Profession, Deborah Rhode of Stanford University asserts that the public is

91. Pearce, supra note 90. The first step will be distinguishing loyalty to the client from hired gun advocacy. One quality the public highly values is that lawyers are faithful in protecting the interests of their clients. At the same time, the quality the public identifies as the least desirable is the lawyer's perceived willingness to bend the rules to the point of breaking (or further) to serve a client's interests. "People hate a hired gun until they need one of their own." DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 7 (2000).
92. Shestack, supra note 78, at 73.
93. RHODE, supra note 91, at 17.
ambivalent about the connection between money and justice. Americans dislike the idea that law is accessible only to the wealthy, but our social policies in recent years have not provided a remedy to the problem of legal services for the poor, much less those of moderate income. The MacCrate Report, referred to earlier, identifies an obligation to provide pro bono service as one of four fundamental values of the profession, but surveys indicate that the average annual pro bono contribution for lawyers is less than eighty-five dollars.

One development which may seem counter-intuitive on the issue of legal services for the public is the growth of public interest law. When the Office of Equal Opportunity Legal Services Program was created in 1965, meeting the legal needs of the poor was determined to be the responsibility, not of the bar at large, but of a smaller group of dedicated public interest lawyers who, out of that dedication, were willing to take lower salaries to ensure that the law might be available to those without funds to pay. The emergence of public interest law as a specialty of practice has enabled the legal profession to place the burden of meeting the professionalism challenge of seeking justice for all on the shoulders of a few lawyers. As economic pressures on private firm lawyers have increased, this has been a convenient shift.

The development of public interest practice has greatly benefited society, and the attorneys who contribute their pro bono hours are to be commended and recognized. However, the limitations on the type of work public interest lawyers can do and the threatened de-funding of LSC in 1981, suggest that the professionalism challenge of "justice for all" is one we ought not in good conscience leave to one segment of the bar or assume is resolved.

The second part of the challenge of seeking justice is the openness of the profession to diversity. In the words of a recent ABA publication, "A system beset by bias, whether racial, gender, ethnic or in other forms, cannot render equal justice." To further the end of equal justice, one of the most serious challenges of professionalism must be to seek the full and equal participation of minorities and women in the profession.

94. Id. at 7; PROMOTING PROFESSIONALISM, supra note 40, at 63-64.
95. MACCRAKE REPORT, supra note 38, at 214.
96. RHODE, supra note 91, at 5.
98. PROMOTING PROFESSIONALISM, supra note 40, at 62.
99. Id. Ironically, diversity in the profession is sometimes named as part of the reason for a decline of professionalism. Under this theory, when women and minorities came into the profession in significant numbers, they undermined the profession's ability to identify and perpetuate a commitment to the common
The legal profession cannot claim the high moral ground of seeking justice for all and at the same time neglect barriers to the successful participation of women and minorities in the legal profession. Numerous reports show us how, but response has been sluggish. For example, the recent publication, "The Unfinished Agenda," by the ABA Commission on Women in the Profession, concludes that equality for women in the profession continues to be elusive. Few of the problems reflect intentional discrimination; women’s opportunities are limited by traditional gender schema and inflexible workplace structures, to name just two remaining issues.100

Meeting these four challenges requires first that we think about the concept of professionalism as both simpler and more profound than adhering to particular kinds of conduct, eliminating commercialism and entrepreneurial efforts, or teaching new law students or new lawyers the correct values before they go wrong. Professionalism education means going beyond these worthy efforts to consider the first principles of achieving and maintaining competence, acting with integrity, committing to service, and seeking justice for all.101

We can draw upon numerous examples from our lives as lawyers to develop the ideal of professionalism. At the most fundamental level, representing a client to help that client realize ambitions or goals, or to avoid the imposition of power resides at the heart of justice. If that representation is undertaken competently, independently, and without conflict, then justice will be served. Legal representation is an awesome responsibility, and individual reflection on its application goes to the core of professionalism.


101. The practical challenge presented to legal educators and to judges and lawyers involved in professionalism continuing legal education is to convert these concepts into a list of concrete steps that law students and lawyers will find more immediately applicable. In making that conversion, a long list of suggested issues and topics have been identified by Professionalism Commissions as appropriate for professionalism CLE.

Ohio Professionalism CLE Guidelines state expressly that the ideals and values in the Lawyers Creed and the Aspirational Ideals which were adopted in 1997, as well as those in the more recently adopted Judicial Creed (2001), should be used to suggest issues and subjects that lawyers and judges need to examine as they strive to meet the lofty goals and ideals, and to achieve the highest standards of a learned profession. SUPREME COURT OF OHIO COMMISSION ON PROFESSIONALISM, PROFESSIONALISM CLE GUIDELINES (Jun. 14, 2002), at http://www.sconet.state.oh.us/CP/guidelines.pdf.
CONCLUSION

Clearly, professionalism is a concept broader than legal ethics. Yet, in our minds and in our discussions, legal ethics precedes professionalism for several reasons. First and most obviously, it is a fact that legal ethics precedes professionalism as a historical matter. A discussion of ethics pervades the 19th and 20th centuries, and professionalism is late to arrive at the tail end of the 20th century. It is also the case that legal ethics rules as we have come to know them are more congenial to the formal legalistic mind. As lawyers we understand better how to read, interpret, dissect, and apply rules, than how to define, understand, and achieve aspirational standards. We have, after all, been educated as Holmes’s bad man.

Next, the fact that ethics precedes professionalism is reinforced as the legal profession undergoes dramatic changes. More specifically, the profession, with increased competition and decreased loyalty, finds disciplinary rules easier both to administer and to understand, while finding aspirational standards not only difficult to define, but also not economically worth the effort. Finally, the lack of a clear or accepted definition of professionalism makes an attempt to codify it difficult, if not impossible.102

Legal ethics and professionalism are distinct but related ways of thinking about lawyer’s obligations. Professionalism can be a much less maligned idea if we articulate the proper relationship between legal ethics and professionalism. Further, we must understand that although professionalism is a broader idea, it nevertheless has distinctive characteristics. Where legal ethics is rule-based, event-specific, retrospective, and disciplinary, calling for the exercise of good judgment, professionalism is standard-based, career-long, prospective, and aspirational, calling for the exercise of wisdom.

Ethics 2000 and The Law Governing Lawyers present an opportunity for lawyers to reassess their professional codes in light of modern developments and maybe even with an eye on professionalism. This is a challenge for neither the weak-willed nor the short-winded; but it is a challenge worth undertaking for the improvement of the legal profession which comes with being a member of the bar.

These interactions are the stuff of better education.103

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102. Despite scholarship of Pound, Cramton, Stanley, Redlick, MacCrate, etc., the only good definition of professionalism is the one you develop for yourself.
103. TEACHING & LEARNING PROFESSIONALISM, supra note 63; ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, PROFESSIONALISM COMMITTEE & STANDING COMMITTEES ON PROFESSIONALISM AND LAWYER COMPETENCE OF THE ABA CTR. FOR PROF. RESPONSIBILITY, TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS (October 2-4, 1996).