

**CHIEF JUSTICE OF ONTARIO
ADVISORY COMMITTEE ON PROFESSIONALISM**

WORKING GROUP ON THE DEFINITION OF PROFESSIONALISM

“DEFINING PROFESSIONALISM”

**DRAFT
OCTOBER 2001
(Revised December 2001)**

Introduction

As a personal characteristic, professionalism is revealed in an individual’s attitude and approach to his or her occupation, and is commonly characterized by intelligence, integrity, maturity, and thoughtfulness. There is an expectation among lawyers, whose occupation is defined as a profession, and in the public who receive legal services, that professionalism will inform a lawyer’s work and conduct. Recently, however, concerns have emerged about a decline in professionalism, and there has been a renewed call for professionalism among lawyers. The call is, in part, a response to a growing lack of civility by lawyers towards each other, to the opposition in a dispute, and, on occasion, to clients. There is a perception that lawyers have forsaken their professional roots and see law more as a business than a calling. These developments create the need to inform lawyers and the public about the nature of professionalism and to describe the standards and values of professional service and conduct.

The Building Blocks of Professionalism

Creating a definition of professionalism that all lawyers can embrace begins with identification and discussion of its various components - the “building blocks” of professionalism. They are: scholarship; integrity; honour; leadership; independence; pride; spirit; collegiality; service; and balanced commercialism.

Scholarship

Lawyers must satisfy advanced educational requirements to be admitted to the profession, and they are

expected to provide competent legal services throughout their career. They must be learned in the discipline and skills of the law. Legal education has been characterized as instructing individuals how to think like lawyers. Anthony T. Kronman, the Dean of Yale Law School, explained:

[thinking like lawyers] means, broadly speaking, to be attentive to the facts and to know which ones in any given situation are important to be able to tell a story with the facts, to master the power of narration; to recognize what others hope to achieve, even or especially when they have a hard time defining their own ambitions, and to appreciate empathically a range of human purposes and values and ideals wider than one's own, to know the law and the legal system in which they serve.

[from Anthony T. Kronman, "Professionalism", *Journal of the Institute for the Study of Legal Ethics*, Vol. 2, 1999, page 89]

Professional expertise, gained through experience, reinforced by mentors, augmented by the example of peers, and developed by continuing legal education, gives the lawyer the ability to apply the relevant law to the client's factual circumstances. It also gives the lawyer the ability to provide independent legal advice and sage judgment, which abilities are among the good lawyer's most important and valuable attributes.

Integrity

A lawyer should recognize ethical practice and conduct as a key component of professionalism, but in addition to their obligations to observe ethical standards established by their governing body, lawyers are expected to exhibit professional self-discipline and high standards of character. Professionalism transcends ethics as a higher standard that is expected of all lawyers. A lawyer accepts individual responsibility for personal ethics but also a collective responsibility for ensuring, so far as practicable, that the profession as a whole discharge its role appropriately and ethically.

Lawyers are subject to self-regulation as members of their governing body which grants a license as a matter of privilege for the practice of law. This aspect of professionalism has been identified by some legal scholars as a social contract under which society has delegated self-regulatory powers to the legal profession on the understanding that the profession will exercise those powers in the public interest. In this sense, lawyers assume the moral and ethical obligation individually and collectively to perform their side of

the implied bargain. The American Bar Association captured the thought well in the paragraph 11 of the Preamble to the *Model Rules of Professional Conduct*, where integrity is closely linked to protection of lawyers' self-regulation and independence.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it services.

Thus, the lawyer's dedication to personal and collective professional responsibility supports and protects other core values of the profession and autonomous self-regulation.

Honour

Closely related to integrity is the concept of law as a noble profession, not in the sense of status but as having the attributes of honour, dignity, courage, and dedication. Commentary to the Law Society's Role Statement describes honour as "the respect or esteem in which one is held by others" and states that "the integrity and honour of the profession as a whole depends on the integrity of its individual members". A similar sentiment can be expressed about the dignity of the profession, of which lawyers are the guardians. The honour and dignity of the profession must be seen in lawyers' everyday actions and attitudes towards peers, new members of the profession, clients, judges and those who assist in the administration of justice.

Character and courage are often best illustrated in the lawyer's dedicated service to a client's unpopular or provocative cause. Resolute representation will survive public censure or criticism because our justice system relies for its integrity on, among other things, loyal and independent counsel to assist clients. While the lawyer's personal and professional character may be tested in such circumstances, professionalism demands the lawyer's unwavering support as legal advisor in the face of attacks that may surround the client's case.

Leadership

From simple matters to those involving the most profound human experiences, lawyers are called upon to provide leadership. It may mean providing a path through complex laws and regulations and guiding and advising the client on his or her intersection with the law and its intricacies. It may mean speaking out to address a systemic injustice. It may mean providing free legal services or education, serving on the boards of institutions and organizations where legal expertise and the “thinking” of a lawyer is invaluable, or writing about the law in journals and newspapers. All of these activities translate into a valuable public service that can create order out of chaos, instill an accountability in society, and educate the public about what it is that lawyers do in legal systems and why they do it. These are the benefits of leadership inspired by professionalism.

Historically, lawyers have occupied positions of privilege and power in society - in business, politics and academia. In that sense, they are also leaders. Lawyers in whom the trust of private or public enterprises is placed will fulfil their leadership role with dedication and intensity. They bring to those roles an individual responsibility that reflects the worthiness of the profession and that does it honour. This too is a hallmark of legal professionalism.

Independence

The independence associated with the lawyer’s calling operates at two levels. The first is the independence of the lawyer’s professional judgment with respect to a particular client and the obligation to avoid conflicting interests that may affect the lawyer’s loyalty to the client. This duty, found in rules of conduct, is observed by lawyers as a matter of ethical conduct. The second feature of independence is related but broader. Professor Robert W. Gordon of Yale Law School defined it when he described the professional ideal as including a high degree of autonomy from external controls other than those imposed by self-regulation. He said:

Professional work, ideally, is self-directed and self-regulated to an unusual degree in the

division of labour. The requirement of autonomy is said to follow from the professional's distinctive relations of trust and authority with clients...and his or her need to exercise independent discretionary judgment.

...

Professionals' resistance to regulation from outside the profession has usually been based...on the claim that external controls are likely to disrupt professional/client relations by undermining their basis of trust and authority, and unduly interfere with the professional's capacity for independent decision making.

[from "Can Lawyers' Professional Values Be Saved? Are They Worth Saving?" by Professor Robert W. Gordon, Fred A. Johnston Professor of Law and Professor of History, Yale Law School, October 1999]

Ottawa lawyer David W. Scott Q.C. related this aspect of independence to the lawyer's role in the administration of justice in the following way:

The Bar is independent of the State and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of government. The right to counsel, which as mentioned, is inter-related with the law of privilege, depends for its efficacy on independence.

...

In order to fulfil the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential. It is always within the framework of this relationship that the commercial interests of the client and the lawyer's interests must give way to the overriding duty to the court. This is not an obligation shared by other professionals.... Our duties as officers of the court could not possibly be discharged other than in an environment of total independence.

[from Law Society of Upper Canada Report to Convocation of the Futures Task Force Working Group on Multi-Discipline Partnerships, September 1998]

Pride

To enter the legal profession is to engage in an activity that draws heavily on historical tradition but that is modern and dynamic. Lawyers take pride in both their past and current contribution to society. Professor Gordon, in the same paper quoted above, describes his argument for the place of law in modern society and why the ideals of professionalism must be maintained:

...capitalist markets and stable democracies depend for their reproduction and survival upon an infrastructure of law and cultural conventions... [P]rofessionals have a key role in maintaining that infrastructure of "cultural capital"...

Systems of laws and the judicial process are accessed by the members of the public with problems or issues in the expectation that they will be resolved in a rational and efficient manner and in a way that produces fair and just results. Part of a lawyer's responsibilities is to educate the public about the capabilities and limits of the law, and ensure the soundness of legal institutions for the sake of justice. The Massachusetts Bar Association described how this is accomplished in the lawyer client relationship:

To advocate the cause of a client is actually to teach the law in a uniquely practical, effective and individual manner. It requires an uncompromising integrity, a passionate desire for the truth, a practical respect for the law and the legal system, a broad and genuine understanding of the times in which we live, and, most of all a love of life and humankind.

[from [Massachusetts Bar Association Statement on Lawyer Professionalism, October 1989](#)]

In embracing these elements of professionalism, lawyers will acquire a reputation for skill and respect in the eyes of the public and colleagues and can take pride in their contribution to the public good.

Spirit and Enthusiasm

David Maister, a former professor at the Harvard Business School and a consultant to professionals, discussed 'real' professionalism as involving a pride in work, a commitment to quality, a dedication to the interests of the client and a sincere desire to help. He said professionalism is about attitudes and about character, and requires energy, drive, initiative, commitment, involvement, and - above all - enthusiasm.

Civility and Collegiality

As professionals, lawyers are expected to act in a courteous, dignified and civil manner toward the public they serve, other members of the profession, and members of the judiciary. Civility is the natural result of collegiality among members of the profession, and that attitude should be nurtured and encouraged by every lawyer. Collegiality undergirds the supervision of the profession through self-regulation, where rules and standards are developed and applied collectively by members of the profession itself, rather than by external bodies.

Civility is not differentiated among barristers or solicitors, and spans the range of activities lawyers perform in practice or employment. The broad responsibility is to the administration of justice, and as officers of the court, lawyers have a duty to the justice system to act with integrity, an overarching responsibility that requires civil conduct. London lawyer Michael Eizenga, in commenting on civility, said:

...thoughtful, open-minded and mutually respectful interactions between legal professionals represent quintessentially civil conduct, and result in an amelioration of the fragmenting forces within our community. In this way, civility must be recognized as an instrumental value informing the conduct of citizenship in the legal profession.

[from “Citizenship in the Legal Profession: Civility as an Instrumental Value in Self-Governance” by Michael Eizenga of Siskind, Cromary, Ivey and Dowler LLP, London, October 2000]

Collegiality finds expression in the willingness of experienced lawyers to mentor those less experienced in the law. Successful mentoring involves the development of professional and personal relationships of trust between junior and senior lawyers, and sharing of not only practical legal knowledge and expertise but standards for ethical conduct and professional values. The benefits of mentoring confirm its value as a tool of professionalism: more competent lawyers, a more rewarding professional experience and an improved work environment for new members of the profession, and better professional service to clients.

Service to the public good

Professionalism, or the essence of a professional, is distinguished by an element of trust that clients, who generally are unable to assess the adequacy of the services provided, place in lawyers. That in turn imposes a moral obligation on lawyers to look after the interests of clients, an obligation not found in ordinary commercial relationships.

Lawyers also recognize a duty to serve in a way that protects public interests and promotes the public good. The lawyer’s public interest mentality finds expression, for example, in advancing access to the law and the legal system for all persons, regardless of their means or popularity of their causes. Monroe H. Freedman, professor of law at Hofstra University School of Law, expanded on this concept as follows:

...professionalism means that a lawyer should:

help members of the public to be aware of their legal rights and of the availability of legal services to achieve those rights;

advise each client fully and candidly regarding the client's legal rights and legal and moral obligations; and

zealously and competently use all lawful means to protect and advance the client's lawful interests as the client determines those interests to be.

[from Monroe H. Freedman, "The Golden Age of Law That Never Was", *Texas Lawyer*, January 7, 1991]

Lawyers, who are uniquely placed in the justice system, may experience tension between the private interests of clients and the public good. Lawyers may be in the unenviable position of having to insist that a client refrain from actions that may be in the client's self-interest but which subvert the administration of justice. It is a struggle between the duty to serve the client and the equally important obligation to serve the law for society's sake - a struggle that uniquely defines the lawyer as professional.

Balanced Commercialism

In 1953, Roscoe Pound, the American legal educator and jurist, defined professionalism and recognized that lawyers are engaged in making a living and a career:

The term [professionalism] refers to a group 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 a public service is the primary purpose.

[from Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul, Minn.: West Publishing Co., 1953) p. 5.]

Applied to the legal profession, this traditional definition focusses on the lawyer as an individual dedicated to public service, with income and status as worthy but not the prime goals. This contrasts with what some lawyers and members of the public see as today's reality in the profession, namely, a desire to maximize the income and status of the lawyer with little or no attention to public service. While the law-as-profession vs. law-as-business dichotomy is not new, the intersection of these notions leads to another important

component of professionalism, which might be called “balanced commercialism”.

William H. Hurlburt, in a 2000 paper prepared for the Law Society of Alberta and the Alberta Law Reform Institute, posited that lawyers are influenced by the prevailing business ethic, which does not include a significant moral or public service element unless a significant moral or public service element helps to maximize profits. But he also argued that in addition to these strictly economic and selfish factors, lawyers recognize an individual duty to advance their clients’ interests by the provision of conscientious, competent legal services, and an individual duty to conduct their clients’ affairs according to accepted norms based on duty to clients and duty to society. He determined that this intersection of the traditional model and the economic or business realities of practice does not ignore the fact that professionals commonly provide services in order to be paid for them. But he adds and emphasizes a dimension to lawyer-professionals’ approach to providing professional services that is not morally or ethically required of persons engaged in non-professional occupations - an approach as a matter of obligation.

It may sometimes be difficult to achieve the middle ground between public service orientation and economic demands. But while a lawyer’s self-interests are not ignored, professionalism demands that clients must be served and justice manifested. As the Creed of Professionalism of the North Carolina Wake County/Tenth Judicial District Bar (February, 1997) states, “A lawyer need not sacrifice the opportunity to prosper, but the practice of law must be motivated by service rather than inspired by profit.”

Conclusion

In summary, the elements of professionalism are

- Scholarship, through substantial intellectual training and development of legal skills, competence and expertise
- Integrity, illustrated through ethical and professionally responsible conduct and practice
- Honour including integrity, dignity, courage, and upstanding character
- Leadership

- Independence, from the state and as the client's loyal legal advisor
- Pride, with an appreciation for the history and tradition of the profession and its modern contribution
- Spirit and enthusiasm
- Collegiality and civility
- Service to the public good, through client relationships and responsibilities to the administration of justice
- Balanced commercialism, a livelihood motivated by service

Roger Cramton, professor of law at Cornell Law School, posed the following challenge:

Although the sense of lawyers' professionalism is threatened ... a more important issue is whether there is a threat to what the public is entitled to expect: competent legal services at a reasonable price from professionals who do not abuse their trust and who act in the public interest.

[from Roger C. Cramton, "The Changing Legal Profession", *ILR Report* (Spring 1990)]

The answer to the challenge is professionalism as described above. As an essential element of the vocation of law, professionalism must be a part of the lawyer's everyday work. Professionalism gains substance and utility when linked to a lawyer's understanding of the legal profession's role in society and when exercised in service to the public.