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The Common Quest for Professionalism

by Donald J. Weidner

The legal professionalism movement in the United States is now almost 20 years old. It is generally traceable to the American Bar Association Commission on Professionalism, which was authorized by the ABA Board of Governors in December 1984, at the urging of then Chief Justice Warren E. Burger. The commission’s 1986 report noted that “professionalism” is an elastic concept, and for its essence quoted Roscoe Pound’s definition of a profession:

The term 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.

The commission’s report made specific recommendations for each of the three basic segments of the profession: the practicing bar, the judiciary, and the law schools.

The report also made seven general recommendations that apply to all segments of the profession. It said that all segments of the profession should:

1. Preserve and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest.
2. Resolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.
3. Increase the participation of lawyers in pro bono activities and help lawyers recognize their obligation to participate.
4. Resist the temptation to make the acquisition of wealth a primary goal of law practice.
5. Encourage innovative methods which simplify and make less expensive the rendering of legal services.
6. Educate the public about legal processes and the legal system.
7. Resolve to employ all the organizational resources necessary in order to assure that the legal profession is effectively self-regulating.

The Florida Bar Board of Governors adopted its ideals and goals of professionalism in 1990, and The Florida Bar’s Standing Committee on Professionalism has been quite active since that time. In 1996, The Florida Supreme Court Commission on Professionalism was founded, and it has been my pleasure to have served on the commission since its formation.

The first chair of the Florida Supreme Court commission, Justice Harry Lee Anstead, emphasized that the uniqueness of the commission was that it brought together, in one place, leadership of the bench, the Bar, and the academy. Over the past seven years, the membership of the commission has changed as the leadership of Florida’s profession has changed. There have been new justices and other judges, new Bar presidents and other Bar leaders, and new law school deans. Justice Anstead was succeeded as chair by Justice Major Harding, and the current chair of the commission is Justice Raoul Cantero. Despite these changes, the underlying values of the commission remain the same. This essay presents some reflections on the professionalism movement in general, on the work of the commission in particular, and on some steps that have been have taken at the Florida State University law school to advance the cause of professionalism.

A Higher Aspiration

Particularly significant is the ABA commission’s second general recommendation: Each lawyer should
Professionalism begins only when there is no civil liability, criminal liability, or professional sanction. Professionalism asks us to do more than the bare minimum.

"[r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct." The Florida Bar standing committee and the Florida Supreme Court commission have embraced this basic goal of professionalism. Professionalism takes up where other legal norms leave off. Professionalism begins only when there is no civil liability, criminal liability, or professional sanction. Professionalism asks us to do more than the bare minimum, and to try to get others to join us.

One might ask whether this is silly—or worse, pompous. Is this talk of professionalism anything more than lawyer posturing? Is it simply another attempt by the bar, especially the organized bar, at a public relations campaign to deflect criticism and defend the professional autonomy of lawyers?

My clear answer to these questions is that it is not silly, not pompous, and not merely lawyer posturing or public relations. I think something much more important is going on. First, I think the discussion of professionalism, certainly to the extent it focuses on civility, reflects a broader movement in our society that is not limited to the legal profession. I see the lawyer professionalism movement in part as a reflection of the larger national concern about the quality of our public discourse. There is a coarsening of the language and of the quality of our discussions of public policy and other issues. Too many of our public discussions are like political food fights—more like verbal professional wrestling matches than thoughtful exchanges of ideas. Second, even focusing solely within the legal profession, I think the professionalism movement is a sincere attempt to make a better world. The professionalism movement is an attempt to influence the culture of the legal profession for the greater good both of lawyers and of the rest of society. The effort now is to make sure that what started as a top-down movement has become a self-sustaining grassroots movement.

Four Recollections and a Burning Bush

I did not become a convert to the professionalism movement until I became part of the Supreme Court commission. I share with you a few of my recollections on the path to conversion, one of which rises to the level of a "burning bush" experience.

First, I recall a conversation with John Frost while he was president-elect of The Florida Bar. John, who made professionalism a major part of his presidency, said that the first place to start thinking about professionalism is the way lawyers treat one another. We need to get our own house in order. We lawyers need to make the practice of law less punishing on one another. That in turn will help us think about improving things for our clients, the courts, and the public. In the years since that conversation with John, I have continued to hear other lawyers say the same basic thing. The way many lawyers treat one another is disgraceful. It is making law practice unattractive, especially judging from the experience of litigators. The only action plan makes things better is the professionalism movement.

Second, I recall reading an article by Indiana’s then Chief Justice Randall T. Shepard, in which he addressed, among other things, the way judges treat one another. Gratuitous sniping in the courthouses, and publicly in judicial opinions, has gotten out of hand, he said, making it more difficult to be a judge and making judges as a group less effective. Justice Shepard also focused on the need for cross-fertilization among the three branches of the legal profession, and on contributions judges can make outside the courtroom, including those to the processes of law reform.

The scales fell from my eyes. John Frost and Justice Shepard were each saying things about their branches of the legal profession that applied with equal force to my own branch of the profession: the law schools. Their comments reminded me of the negotiation session that took place when I first became dean at Florida State. I returned to Tallahassee one Saturday from a stint as a visiting professor at the UNC Chapel Hill Law School. I sat down at a table in my kitchen with the then-provost of the university, Gus Turnbull. He agreed to most of my requests for additional funding for the law school and then he, as my new boss, told me what my job was. “Stop the fighting at the law school,” he said.

From the well-known strife at Harvard Law School to similar bad behaviors at less prominent law schools, law professors had been engaging in bad behaviors that made it much less pleasant to be a law professor and that also undermined the credibility and effectiveness of law schools and their faculties. Like the lawyers John Frost was addressing and the judges Justice Shepard has spoken and written about, too many faculty members have been making life unnecessarily unpleasant for one another, both orally and in print.

The same bad behaviors have taken place on the bench, at the bar, and in the law schools. We have had a common problem. More importantly, each branch of the profession can fortify itself and the others by supporting our common response: the professionalism movement. Knowing that the bench and the bar are taking steps to improve, it is easier for the law schools to take steps to improve.
Each of us must first admit there is a problem, then we can learn from one another's efforts.

I think this is an important aspect of the professionalism movement: The three branches of the profession need to understand one another and appreciate their common interests. As we do, we can be fortified by one another's efforts. Cooperation among the three branches of the profession is essential to maximize the goals of the professionalism movement. At our law school the situation has been transformed, and the professionalism movement has been an important part of that transformation. Faculty members are more collegial than they have ever been, and as a result are more effective.

My third recollection along the path to conversion is of a presentation made at our law school by U.S. District Judge William Stafford. Judge Stafford underscored the fact that the legal profession is the only profession that has its own captive branch of government, the judiciary. You cannot be a judge without being a lawyer. And the judges are the ultimate arbiters of legality. That presents us with special opportunities and with special obligations. We should all approach our tasks with a certain humility. Unfortunately, there are very few institutions in our culture that present humility as a desirable and attainable personal goal. I think the professionalism movement is a suitable vehicle for advancing the cause of humility. In part through its emphasis on public service, it asks us to be grateful for what we have by sharing some of our good fortune with others. In part through its emphasis on peacemaking, it asks us to consider that it is better to understand than to be understood. If we can advance the cause of humility throughout the legal profession, the world will be a better place. Never underestimate the power of a kind word. Never underestimate our ability to do good.

My fourth recollection is of impromptu remarks made at a Florida Bar Annual Meeting by then Chief Justice Gerald Kogan. He spoke at a joint meeting of the standing committee and the Supreme Court commission of the need to fortify trial court judges in their attempts to require good behavior on the part of the lawyers practicing before them. He noted that some judges fear disapproval of the attorneys who practice before them. No judge wants to incur the wrath of the bar for having expectations that are too strict or otherwise unreasonable. All other things being equal, some judges are averse to creating professional or political opposition by requiring lawyers to improve their behaviors. They don't want bad evaluations by the practicing bar. Justice Kogan asked: how do we support them in their efforts to require, as a matter of culture or practice, what is not required by law or ethics?

Here, again, the parallel to life within the law schools was dramatic. The same thing had been happening to some professors that had been happening to some judges. Professors do not want to be overly strict with their students because they do not want to receive student evaluations indicating poor teaching performance. Student evaluations are used in promotion, tenure, and salary determinations. Professors don't want bad evaluations any more than do judges. How do we fortify them in their efforts to require better behaviors of their students? I can tell you part of the answer right off the bat: Let the professors and their students know that judges and practicing lawyers are struggling with the same problem. And the important point is they continue struggling with the problem. They have not given up. They are trying to make things better, and they are succeeding, in part because of the common front of the professionalism movement. Each of us can make more of a difference knowing that there are others who are trying to do the same.

A fifth, and my most memorable
Students are more civil to one another after they understand that all three branches of the profession are united in the attempt to be more courteous—more civil—than the rules require.

and most painful recollection, I put in the “burning bush” category. The blaze ignited, without warning, during a conversation I had at the gym one evening with a recent graduate who had become a litigator. Over the handlebars of our aerobic exercise machines, he recounted the story of his exchanges with opposing counsel in a piece of civil litigation. He and opposing counsel were involved in a disagreement over discovery. He was victorious, but what disturbed me was the way he characterized his behavior leading to the victory. “Dean,” he said, “you would have been proud of me—I hammered him.” I was appalled. I was embarrassed. And I was mystified. What had I personally done that would have led him to think that needlessly—and as he told the story to me it was indeed needlessly—“hammering” another human being was admirable? Had we as an institution encouraged that kind of thinking? Or had we simply failed to set a higher level of expectation? Either way, it was clear that we needed to do something different.

One Law School’s Efforts

Chief Judge Robert Bennett recently asked me: “You in the law schools will train the students to think like lawyers, but will you also train them to act like lawyers?” I am pleased to say that my answer is a resounding “yes.” Florida State University College of Law has taken a wide variety of steps to advance professionalism. Not necessarily in order of importance, I offer a few.

- Orientation of New Law Students

Florida State has changed the way we orient students to law school. Prior to the burning bush, we only welcomed and introduced new students to the study of law and to our law school. After the bush burning, we also welcome our students to the legal profession. Before they take their first law class, we give the entering students their first orientation to the legal profession, and we do it with great pride in and care for the profession. No student will ever again graduate with the perception that the dean or faculty think it is good to “hammer” opposing counsel or anyone else.

A significant portion of our orientation of new students is an introduction to the professionalism movement by at least one representative from each branch of the profession (a judge, a practicing lawyer, and a law professor) plus someone who represents the future of the profession: a student. The judges and practicing lawyers who have been part of our program have been inspirational, but it is particularly impressive to listen to a student panel discuss why professionalism is personally important. They want the better quality of life—in law school and later—that they think is available to them because of the professionalism movement.

Apart from enlisting law students to the long-term cause of the professionalism movement, there are two immediate consequences of including professionalism in our new student orientation. First, student-on-student behaviors are improved. Students are more civil to one another after they understand that all three branches of the profession are united in the attempt to be more courteous—more civil—than the rules require. They understand that both the leadership and the grass roots of all three branches of the profession believe that we all must make a sustained effort to be ethical and courteous. Pit bulls hurt us all. The issues we address are difficult enough without making matters worse by failing to respect the dignity of all the players.

The second basic consequence of including professionalism in our new student orientation is that the members of the faculty have an enhanced sense of common purpose with the other two branches of the profession. Academic lawyers realize that they are in the same professional boat as practicing lawyers and judges. Faculty members feel supported, not undermined, by deploying judges and practicing lawyers in our new student orientation. They realize that it is good for the students to learn, for example, that all branches of the profession are committed to providing full access to those who have been historically underrepresented.

- Directly Addressing Bad Behaviors

Leadership by example is critical. People will judge us by what we do, not merely by what we say. But leading by example is not sufficient. I am reminded of the office staff situation when I first became dean. Upon arriving at my office in the morning, I noted that at least one of the support staff was always late. Then there were times when I noted that all the support staff were late. My first response was to lead by example. I came in early every day, and set a good example for everyone to follow. They did not follow. The straw that broke this camel’s back was the day, shortly after 8 a.m., when I found myself the only one in the office. The provost, my boss, called in on one line. Seconds later, the chancellor of the state university system, the provost’s boss’s boss, called on another line. I was answering the phones. I had not been training the people out of their bad behaviors—they had been training me. They had been training me to cover for their bad behaviors. I realized that day that I needed to do something more. I needed to directly address their bad behaviors.

So, too, with lawyers, judges, and professors. Lawyers or judges or aca-
demics who are behaving badly must be told that they are behaving badly. How do you do that? There may be an institutional mechanism, like the local professionalism peer review committees that have been formed in some areas to confront bad actors with bad behaviors. But more often there is no readily available institutional mechanism. We are, after all, talking about seeking a level of behavior that is more than the rules require. So we are left to individual action. Initially, I personally follow the rule of “praise in public, criticize in private.” However, the criticizing that must take place may need to come from more people than the person at the top of the bad actor’s immediate hierarchy. It is not enough for the dean or the chief judge or the managing partner to confront bad actors about their bad behaviors. Others in or around the organization must do the same. Other faculty, other judges, other lawyers must confront the individual, at least initially privately and gently, about their lack of professionalism. If that doesn’t work, then more public conversations may be needed to explicitly or implicitly identify the person whose behavior is found lacking. In effect, what is needed is a generally supported system of progressive discipline on professionalism issues.

I add a special word about substance abuse. Many bad behaviors are caused or aggravated by substance abuse. Problems of substance abuse permeate our society and our profession. Problems within the workplaces of our profession may actually be worse than in the case of the broader population. The reason is that bad actors in law often rationalize their bad behavior by pointing to the adversary nature of their practice. All too often, an adversarial proceeding turns into an abusive proceeding and some of the lawyers involved don’t seem to notice the difference. Instead, a lawyer actually takes pride in “hammering” another lawyer.

Who wants to run up against a pit bull and present him with our concerns? How do you go about doing that? I don’t have a complete answer, but I do have a tool. For me, it is as tangible and as invaluable as a Phillips head screwdriver when a flathead screwdriver simply will not do. The tool is this: Ask yourself the question, “How can I help this person?” If you purge yourself of any ego, of any sense of retaliatory motive, and are prepared to approach someone with a pure heart, then you are ready to have the conversation. In my experience, even the most cutting of bad actors will sense if you are trying to help them rather than to dominate or punish them. This is true whether you are confronting them about bad behaviors in general or with your particular concerns about their substance abuse.

Faculty Involvement in “The Real World”

There are two basic kinds of strong law faculties. The first kind of strong law faculty focuses virtually all its attention within the academy. This kind of strong law faculty orients itself almost exclusively toward the students and to other professors. The second kind of strong law faculty is heavily interactive with the bench and the bar. We are the second kind of law faculty. Our faculty are great teachers of law students and they are great scholars. But it is also critical to us that we are interactive with the rest of the legal profession. We believe that interacting with practicing lawyers and judges will make our faculty even stronger, and in ways that will help our students. Classroom experiences will be enriched; scholarship will be better grounded; the institutional impact will be greater, including the impact on law reform; and there will be greater networking on behalf of the students.

We in law schools with this philosophy need the help of the bench and the bar with this initiative. It is often difficult for some of us in the academy—particularly younger faculty—to get invitations to speak at continuing legal education programs or at community programs, such as Rotary meetings. Both continuing judicial and continuing legal education groups tend to stay with proven commodities and, at least in continuing legal education programs produced by the organized bar, speaking invitations are often “plum” assign-
ments for loyal section citizens. Academics interested in interacting with the bench and the bar need external help to get before these groups as speakers or panelists. At Florida State, we have an alumni committee charged with the task of helping our faculty engage in these important professional interactions. We ask the bench and bar to help us, both for our own sake and for the sake of a stronger profession. The enrichment from the cross-fertilization will benefit all segments of the profession. Florida State thinks that interacting with the rest of the profession is so central to our core mission that, if necessary, we will pay the cost to send our faculty to address external professional groups or to participate in law reform.

• Preserving the Centrality of the "Learned Art"

Recall that Roscoe Pound repeatedly describes the profession as a "learned art." We at Florida State have tried to excel in training our students in law as a learned profession. We express to prospective students the high priority on producing well-educated lawyers by referring to our "liberal arts" orientation. We try to educate our students to be thoughtful and well-rounded members of a literary profession with a great history. We bring some of the broader perspectives—such as those of the historian and the philosopher and the economist—to bear upon the study of law. We can do the same for continuing or judicial education programs.

• Enhanced Professional Skills Offerings

Most law schools have dramatically improved their professional skills programs over the last 20 years. One of the things that simply did not exist when I was in law school is the "live client" clinic within the law schools. In these clinics, students earn academic credit by representing real clients, under the supervision of clinical professors. An important aspect of the clinics is to train students to handle real-life ethical and professionalism issues. Another important aspect of the clinics is to train students for pro bono work and to prepare for careers in the public interest. At our school, our clinic represents three kinds of live clients: victims of domestic violence, persons with disabilities, and children. We also have a wide variety of well-supervised externships. Finally, our mandatory pro bono program operates as a mini externship. In order to graduate, each student must perform 20 hours of pro bono legal work under the supervision of a practicing lawyer. Many of our students serve far more than the required 20 hours, and many of them forge lasting relationships in the process.

• Pervasive Use of Judges and Practicing Lawyers

Judges are involved in our academic programs in many important ways throughout the academic year. We in Tallahassee are extremely fortunate to have judges at various state and federal levels as part of our program. For example, we recently had our student moot court arguments before the Florida Supreme Court. Two of the current justices, Raoul Cantero and Kenneth Bell, attend monthly, informal lunches with small groups of our students. Other judges preside over moot court or mock trial competitions. Many judges teach courses as adjunct professors. Judge William Van Nortwick of the First District Court of Appeal, a member of the Florida Supreme Court Commission on Professionalism, regularly teaches a professional responsibility course at the law school. Practicing lawyers also enrich our program by serving as adjunct professors and by judging moot court, mock trial, and other student competitions. They participate in many other important ways. For example, we have a good relationship with several sections of The Florida Bar. Very recently, the Real Property Section had a reception and workshop for our students interested in real property practice. The Business Law Section has had similar programs, which have been well received by the students. We also have a wide range of panels made up of practicing lawyers who educate our students about different types of law practice. Often they coordinate with an interested student group. Last year we had a very successful practitioner program that was presented in conjunction with our student Entertainment and Sports Law Society. Most law schools welcome this kind of involvement with the practicing bar.

• Mentoring Programs

Judge and practitioner involvement raises the more specific topic of mentoring, which is currently getting a lot of attention from the organized bar. At Florida State, we have a wide range of mentoring programs. Our faculty and our students not only welcome but also encourage mentoring programs. For example, we have a mentoring program with the Tallahassee Bar Association. Each fall, the TBA hosts a reception and dinner party for our students, and encourages their membership. I am especially grateful to all the alums of other law schools who attend this event to welcome our students as young lawyers. Similarly, we have mentoring programs with the Tallahassee Women Lawyers, with the Barristers (our leading local African-American professional group), with the Tallahassee chapter of the Inns of Court, and with our alumni mentors. We are also participating in the new e-Mentor program of

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The Florida Bar; state-wide, so far about 1,500 law students have signed up for e-Mentors.

Conclusion
Many good things are taking place because of the professionalism movement. The professionalism movement is currently the only game in town for addressing bad behaviors that fall short of rule violations. It is also the only game in town for bringing the three branches of the profession into closer and more fruitful working relationships. Working together is an honor, and is fun and productive. It is also good for the public we serve.

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3 Report at 15.
4 FLA. IDEALS AND GOALS OF PROFESSIONALISM (1990). This and other professionalism-related materials can be found on the Web site of Florida’s Professionalism Center, at www.flabar.org, Professionalism.
6 GUIDELINES FOR PROFESSIONAL CONDUCT (1995) now fortify judges and instruct the bar more specifically than general professionalism principles. These guidelines are published, along with the IDEALS AND GOALS OF PROFESSIONALISM (1990), with the approval of both the Supreme Court Commission on Professionalism and The Florida Bar’s Standing Committee on Professionalism and are on the Professionalism Center’s home page, see supra note 4. The GUIDELINES began with the Hillsborough County Bar Association, were endorsed by the Executive Council of the Trial Lawyers Section of The Florida Bar and were approved by the Florida Conference of Circuit Judges in 1995.