

In Pursuit of Professionalism Among Business Lawyers

by Gianfranco A. Pietrafesa

As lawyers, we strive to act professionally. Many of us believe we act professionally in our practices. But what is professionalism? How do you describe it? If you act ethically by following the Rules of Professional Conduct, are you acting with professionalism?

There is an important difference between ethics and professionalism. “[E]thics prescribe what a lawyer *must* do while professionalism prescribes what a lawyer *should* do.”¹ Stated differently, “ethics is a minimum standard which is *required* of all lawyers while professionalism is a higher standard *expected* of all lawyers.”² Therefore, an attorney can act ethically by following the Rules of Professional Conduct, yet fail to act with professionalism.

How does an attorney know if he or she is acting with professionalism?

“Professionalism starts from the proposition that there are often alternative ways of addressing various situations, none of which, strictly speaking, would violate one of the Rules of Professional Conduct. The question then becomes what course of action is the most professional way to address these situations.”³

The difference between ethics and professionalism can be illustrated by an example. You represent the seller of business assets. In negotiations with the buyer’s lawyer, it becomes clear to you that he does not understand that he should submit a notice of sale, transfer or assignment in bulk to the New Jersey Division of Taxation. By failing to do so, the division will not issue a tax escrow letter requiring the buyer’s lawyer to hold a portion of the purchase price in escrow, nor will it issue a tax clearance letter. As a result, the buyer will be responsible for any state tax liabilities of the seller. What must, or should, you do?

Nothing in the Rules of Professional Conduct obligates you to notify opposing counsel that the notice should be submitted to the division. The Rules of Professional Conduct do not require a lawyer to do the work of his or her adversary. You act ethically by remaining silent, but your reputation and integrity—two characteristics of professionalism—will suffer. As a professional, you should strive toward a higher standard, and notify your adversary about filing the notice with the division.

Lawyers’ opinions can differ on the subject of professionalism. Indeed, many lawyers are probably unaware that they

may, or should, do more than simply observe the Rules of Professional Conduct in the practice of law. In this regard, more than 25 years ago, the American Bar Association noted:

Lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. However, lawyers have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.⁴

Since then, the rigors of practicing law have only intensified, with lawyering becoming more of a business and less of a profession. As a result, there has been a continuing erosion of professionalism among lawyers. Among the factors contributing to this erosion are:

- The requirement of more billable hours
- An increasing number of lawyers
- Lawyers being less loyal, and moving from firm to firm
- Lawyers having less time to mentor younger lawyers
- Clients retaining attorneys for selected matters, rather than on a continuing basis
- Use of technology (*e.g.*, email and smart phones) creating client expectations of instantaneous service from lawyers
- Unrealistic client expectations about results (*i.e.*, winner takes all) and the amount of legal fees
- Use of technology allowing lawyers to remain in their offices instead of going out and interacting with other lawyers
- Negotiating and closing transactions remotely (*i.e.*, by email) instead of in person⁵

The decline in professionalism was and is most evident in the lack of civility and personal integrity among lawyers. It has spawned the birth of the ‘Rambo lawyer,’ who is alive and well. A lawyer’s word is no longer his or her bond. Now, even trivial matters must be confirmed in writing.

What can be done to turn the tide and restore professionalism? To begin with, lawyers can strive to follow the principles of professionalism issued by the New Jersey Commission on Professionalism in the Law. These principles are aspirational in nature, and designed to assist and encourage lawyers (and judges) to set

their standards at a higher level.⁶

In addition, business lawyers can observe certain guidelines or principles of professionalism that have been customarily followed by many experienced practitioners. The Professionalism Committee of the New Jersey State Bar Association's Business Law Section is developing such guidelines, and will be publishing them as supplemental principles of professionalism for business lawyers.

The author has drafted proposed supplemental principles of professionalism. They are the author's personal views and not the official position of the Business Law Section or its Professionalism Committee. These principles are not original or unique to New Jersey. In fact, many of them are derived from the excellent work done by other bar associations and professional organizations, including the American College of Real Estate Lawyers (ACREL); the North Carolina Bar Association Business Law Section; and the Tort, Trial and Insurance Practice Section of the American Bar Association. An effort was made not to repeat the principles that already appear in the New Jersey commission's principles of professionalism.

The author's proposed supplemental principles of professionalism for business lawyers are:

With respect to clients:

1. I will endeavor to understand and be guided by my client's lawful objectives in business transactions.
2. I will endeavor to achieve my client's objectives as expeditiously and economically as possible.
3. I will explain all relevant legal issues to my client and advise my client of important legal risks.

With respect to working with other lawyers:

4. I will not make misleading statements of fact or law, including by omission or inference.
5. I will endeavor to negotiate, document and consummate transactions

in an atmosphere of cooperation and informed mutual agreement.

6. I will strive to draft understandable documents that reflect the agreement of the parties and that are appropriate for the transaction.
7. In negotiations and in the preparation of documents, I will concentrate on substance and content, and not on form or style.
8. When requested, I will clearly mark or identify for other counsel all revisions that I have made in all documents.
9. I will disclose to other counsel obvious drafting errors inconsistent with the agreement of the parties.
10. In making due diligence requests, I will endeavor to request only relevant and necessary documents and information appropriate to the type and size of the transaction.
11. When requesting a legal opinion, I will follow the Golden Rule, and not ask for an opinion that I would not give myself.

With respect to the legal profession and the community:

12. I will keep current in the areas of law in which I practice and, when necessary, I will associate with, or refer my client to, counsel knowledgeable in another field of practice.
13. I will participate as a speaker in continuing legal education programs in the areas of law in which I practice, and will endeavor to train and mentor younger business lawyers.
14. I will strive to participate in organized bar activities to improve business laws.
15. I will strive to improve business development by providing *pro bono* legal services to deserving individuals, businesses and nonprofit organizations.

As noted by the Appellate Division of the New Jersey Superior Court: "The practice of law is a profession, not a

business....[and,] the practice of law is not easy. Attorneys are frequently faced with difficult decisions. They must make the right decision."⁷

For business lawyers, making the right decision should mean striving to conduct ourselves with professionalism. Professionalism begins where the Rules of Professional Conduct end. The New Jersey commission's principles of professionalism, and the proposed supplemental principles of professionalism for business lawyers, can serve as guidelines of conduct for all attorneys. ♪

Endnotes

1. Report of the American College of Real Estate Lawyers (ACREL) Working Group on Ethics and Professionalism (Sept. 27, 2004), at n.9 (citations omitted; emphasis in original).
2. Chief Justice's Commission on Professionalism to the Supreme Court of Georgia, §10, at 4 (1996) (emphasis in original).
3. State Bar of Arizona Instructor's Manual for the Professionalism Course (May 9, 2005), at 3.
4. ABA Commission on Professionalism, In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 259 (1986).
5. See, e.g., Maryland Judicial Task Force on Professionalism Report and Recommendations (Nov. 23, 2003).
6. The principles of professionalism can be found on the website of the New Jersey State Bar Association. See www.njsba.com/resources/njcop/njcop-principle-prof.html.
7. *Davin v. Daham*, 329 N.J. Super. 54, 76 & 78 (App. Div. 2000).

Gianfranco A. Pietrafesa is a member of Archer & Greiner, P.C., in Hackensack, where he handles business transactions and related litigation. He is the immediate past chair of the Business Law Section of the New Jersey State Bar Association.