



11-1-2013

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November, 2013 Volume 87, No. 9

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Redefining Professionalism? Florida's Code Mandating the Aspirational Raises Challenging Questions

by Keith W. Rizzardi

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Responding to continued criticism of the legal profession, Florida recently adopted a new Code for Resolving Professionalism Complaints (professionalism code).¹ The new requirements transform the aspiration of professionalism into a mandate, but important questions remain as to the meaning of key terms and the methods of implementation.

In its opinion approving the professionalism code, the Florida Supreme Court stated that Florida lawyers had “traditionally followed a more passive, academic approach to enhance and improve professionalism.”² In other words, the combination of continuing legal education programs, speeches, contests, and meetings — methods once called “procedural professionalism” in a 2005 Florida Bar *Journal* article³ — have been insufficient to reverse the perception problems. But on occasion, The Florida Bar does use existing rules to tackle challenging problems of lawyer behavior that also could be characterized as gross violations of professionalism standards.⁴ For example, R. 4-8.4(d) of the Rules Regulating The Florida Bar prohibits lawyer misconduct that is prejudicial to the administration of justice, including conduct “to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis....” Nevertheless, the professionalism code represents another tool to directly regulate individual lawyer conduct, providing new rules for initiating, processing, and resolving professionalism complaints.

Can “Unprofessionalism” be Defined?

Professionalism was once a shared aspiration of the members of The Florida Bar, as described in a “Working Definition of Professionalism” published by The Florida Bar Henry Latimer Center for Professionalism: “Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, civility, and commitment.”⁵

The call to the “highest ideals,” or even civility, is still an amorphous concept. Seeking to rectify that definitional problem, the professionalism code embraced a new term. “Unprofessional conduct” means substantial or repeated violations of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, the Rules Regulating The Florida Bar, or the decisions of the Florida Supreme Court.⁶

Explaining this definition, the court opinion notes that it “provides an integrated standard based on the standards previously adopted and already in existence for many years.” Yet by the court’s own acknowledgement, the Bar continues to experience “significant problems that are unacceptable, requiring further and more concrete action.... Professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today.” In other words, the new definition of professionalism incorporates by reference multiple existing documents that have proven themselves insufficient to solve the fundamental problem.

Moreover, the definition of “unprofessional conduct” obliterates the traditional boundary between ethics and professionalism. In the past, scholars have distinguished ethics from professionalism by emphasizing the consequences; ethics reflected the codified and enforceable standards of the profession,

while professionalism was a higher, aspirational standard.⁷ Now that a violation of an aspirational standard has consequences, lawyers need new ways to delineate the terms.

Will Reasonable Lawyers Disagree on How to Comply?

Definitional confusion is not just a theoretical problem. What, exactly, will it mean to “comply” with the new prohibition of unprofessional conduct? For example, according to the Oath of Admission to The Florida Bar, lawyers must “employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.” Is it dishonorable for a successful trial lawyer to portray himself to a jury as humble and struggling by appearing in court with a hole in the soles of his shoes?⁸ The Oath of Admission also says lawyers “will abstain from all offensive personality” and the Florida Creed of Professionalism says that lawyers “will abstain from all rude, disruptive, disrespectful, and abusive behavior.” Must lawyers cease any use of profanity?⁹ The oath and the creed, now established as law by judicial order and incorporated by reference into the definition of the term “unprofessional conduct,” both contain ambiguous phrases.

Meanwhile, the Ideals and Goals of Professionalism,¹⁰ a document with seven major sections and 60 subsections, offers a series of narrative standards akin to blending the aspirational guidelines of the early legal tradition and the modern Rules Regulating The Florida Bar. Some of the standards for professionalism seem clear and enforceable, like the reasonable expectation that a lawyer “should promptly notify the court or tribunal of any resolution by the parties that renders a scheduled court appearance unnecessary.”¹¹ Others, however, leave vast room for disagreement, like the requirement that a lawyer “should at all times provide the client with objective evaluations and advise without purposefully understating or overstating achievable results or otherwise creating unrealistic expectations.”¹² Disputes over the meaning of unprofessionalism will follow.

Will Reasonable Prosecutors Agree on How to Enforce?

How the definition of “unprofessionalism” will be enforced also remains uncertain because there are different procedural paths that can be taken to pursue a complaint. One path involves The Florida Bar, and more precisely, the Attorney Consumer Assistance and Intake Program (ACAP), “which fields and screens complaints against members of The Florida Bar.” Depending on “the nature and severity” of the complaint, ACAP can resolve a professionalism complaint informally, or refer the matter to a branch office of The Florida Bar for investigation and potentially even discipline. Perhaps, in practice, The Florida Bar will simply exercise its prosecutorial discretion and return to its traditional disciplinary tools because, as noted in multiple paragraphs of the professionalism code, professionalism complaints may also reveal violations of Florida’s Rules of Professional Conduct.¹³

A second, alternative path to enforcement of lawyer professionalism involves a local professionalism panel, defined as “an entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.” Complaints can be brought directly to these local panels, too, and if a panel cannot informally resolve the matter, it can choose to refer the matter to ACAP.¹⁴ This local panel process allows each of Florida’s judicial circuits to adopt its own professionalism process.

A recent administrative order in the 15th Judicial Circuit in Palm Beach County, for example, concluded that the panels had no authority to discipline any attorney, nor to compel any attorney to appear before the panel, but could offer counseling sessions to the attorneys.¹⁵ Although the process is nondisciplinary, if an attorney declines to attend a meeting, the panel can still discuss the matter, summarize its discussions, send a letter to the attorney, and publish its conclusions in the Palm Beach County Bar Association Bulletin with the names deleted.¹⁶ Interestingly, while traditional lawyer regulation proceedings brought by The Florida Bar are sometimes confidential, matters involving minor misconduct or discipline by the circuit courts usually are not. The professionalism code does not expressly provide confidentiality protection for local professionalism panel proceedings.¹⁷ Whether and how Florida’s other circuits will exercise these new responsibilities and maintain confidentiality remains to be seen.

Will Judges Declare the Professionalism Code Void for Vagueness?

The different procedural paths for pursuing professionalism complaints may create problems rather than solve them. Local professionalism panels may interpret the standards differently, and the potential exists for additional interpretive variation among ACAP, The Florida Bar, and the Florida Supreme Court (as the ultimate disciplinary authority). As a result, arguments may emerge over whether the rules provide sufficiently clear and ascertainable standards of guilt — especially when they involve attorney speech that might fall within the protections of the First Amendment.¹⁸

If such inconsistencies emerge, the professionalism code may soon be subjected to challenges as void for vagueness, based on the well-established principles of due process set forth by the U.S. Supreme Court:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.¹⁹

Rules governing attorney discipline, at times, have been found to be unconstitutionally void for vagueness.²⁰ What will happen when a lawyer from Miami-Dade County, who holds a license from The Florida Bar and can practice in any county court, travels to a deposition in Marion County, and violates local professionalism expectations? Depending on the facts, the professionalism code and its definition of unprofessional conduct may be

insufficient to enable the South Florida lawyer to navigate the acceptable and the prohibited. When people of reasonable intelligence disagree over local norms, constitutional claims involving the void for vagueness doctrine seem likely.

Upon considering U.S. Supreme Court precedents on the void for vagueness doctrine, the Florida Supreme Court has focused on the requirement that a law establish minimal guidelines to govern law enforcement. Under this test, too, the professionalism code, with its bifurcated procedural methods, looks like a requirement with “minimal guidelines,” and one that empowers local professionalism panels to “pursue their personal predilections...[with] virtually complete discretion.”²¹

Will the End Result be a Return to the Status Quo?

Of course, the goal of both The Florida Bar and the local professionalism panels is not to randomly discipline attorneys; rather, the common goal is for the Bar to reduce unprofessionalism and to promote the highest ideals of lawyering. In many matters involving minor misconduct, a simple meeting or letter will suffice. But if violations of the professionalism code become an independent basis for formal disciplinary action by Bar officials, then the lawyers who are unwilling to accept a reprimand or other sanction will raise the arguments above. Negotiations between the disciplinary authorities and the offending lawyer will then explore less contentious alternatives. For example, the professionalism code specifically provides that lawyers found to have violated professional standards may be required to attend The Florida Bar’s training programs, including ethics school, professionalism workshops, Law Office Management Assistance Service (LOMAS), anger management classes, Florida Lawyers Assistance, Inc., or the trust accounting workshop. In the end, many professionalism matters are likely to be resolved using the same passive, educational approach that has been used (and critiqued) in the past.²²

Thus, the new professionalism code is not a fully transformative step. A new and enforceable set of professionalism standards, as the Florida Supreme Court suggested, would be premature.²³ Meanwhile, significant professionalism breaches will be subject to traditional disciplinary proceedings.²⁴

Conclusion: Is This Just a Beginning?

The history of the legal profession and its professional standards shows how the standards of lawyer conduct have evolved over time. In the 1700s, inns of court informally supervised the conduct of barristers and solicitors in legal London.²⁵ But in 1836, David Hoffman, a law professor in Maryland, helped transform thinking on legal ethics by positing his *Fifty Resolutions in Regard to Professional Deportment*.²⁶ The Alabama State Bar Association adopted a written code of ethics in 1887.²⁷ The American Bar Association would later adopt the Canons of Professional Ethics in 1908, followed by the Model Code of Professional Responsibility in 1969, and the Model Rules of Professional Conduct in 1983, modified thereafter.²⁸ The model rules later became the cornerstone of the Rules Regulating The Florida Bar.²⁹

Like the ethical rules governing the legal profession, Florida’s professionalism code will need to evolve, too. Florida’s leadership in the professionalism movement cannot rest with a definition of “unprofessional conduct” that cross-references four broadly worded aspirational documents and unidentified opinions of the Florida Supreme Court. Given the potential concerns over important concepts like vagueness, inconsistent enforcement, and confidentiality, revisions to the professionalism code must ensue. But in the future, lawyers and scholars may look back to 2013 as the year when the legal community of Florida concluded that character, competence, civility, commitment, and other core concepts of professionalism became more than just shared aspirations. For better and for worse, Florida’s adoption of a professionalism code represents a determination that lawyer professionalism can and should be mandated and enforced, after all.

¹ *In re Code for Resolving Professionalism Complaints*, No. SC13-688 (June 6, 2013) available at <http://www.floridasupremecourt.org/decisions/2013/sc13-688.pdf> [hereinafter Code for Resolving Professionalism Complaints].

² *Id.* at 2.

³ Keith W. Rizzardi, *Professionalism: I Know It When I See It?*, 79 Fla. B. J. at 38 (July/August 2005), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/95C26C65A87EA83F85257029006FFC30>.

⁴ See also *Florida Bar v. Ratiner*, 46 So. 3d 35, 37 (2010) (during a deposition, Ratiner lambasted opposing counsel in a tirade, tossed wadded up evidence stickers at opposing counsel, and upset the court reporter, leading his own consultant to tell Ratiner to calm down and take a Xanax); *Florida Bar v. Tobkin*, 944 So. 2d 219, 221-222 (Fla. 2006) (Tobkin exhibited objectionable conduct during pretrial discovery and objectionable behavior at a cancer treatment center — snatching medical records from opposing counsel — that resulted in security personnel being called to restrain him.); *Florida Bar v. Morgan*, 938 So. 2d 496, 497-498 (Fla. 2006) (Morgan was involved in a hostile and disrespectful verbal tirade directed at the presiding judge in open court during a felony trial.).

⁵ The Florida Bar Henry Latimer Center for Professionalism, *The Standing Committee’s Working Definition of Professionalism*, (revised Nov. 2, 2011), available at <http://www.floridabar.org/tfb/TFBProfess.nsf/5D2A29F983DC81EF85256709006A486A/AC951AC3ADA1F20085256B2F006CCDA6?OpenDocument>.

⁶ Code for Resolving Professionalism Complaints, app. at 1.

⁷ See generally Rizzardi, *Professionalism: I Know It When I See It?*, 79 Fla. B. J. at 38 (July/August 2005), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/95C26C65A87EA83F85257029006FFC30>.

⁸ See, e.g., Jane Musgrave, *Jury Awards Injured Man Nothing; Did Defense Lawyer's Holey Shoes Play a Role?*, Palm Beach Post, Oct. 15, 2009, available at <http://www.palmbeachpost.com/news/news/local/jury-awards-injured-man-nothing-did-defense-lawy-1/nLkBQ/>.

⁹ Shannon P. Duffy, *After Lawyer Curses Adversary During Deposition, Judge Orders Attorneys to Dinner Summit*, The Legal Intelligencer, September 21, 2009, available at http://www.law.com/jsp/article.jsp?id=1202433929019&After_Lawyer_Curses_Adversary_During_Deposition_Judge_Orders_Attorneys_to_Dinner_Summit&slreturn=20130517112409.

¹⁰ The Florida Bar, *The Florida Bar Ideals and Goals of Professionalism* (May 26, 2011), <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/deafda73c03233e985256b2f006ccd5e?OpenDocument>.

¹¹ *Id.* at §6.8.

¹² *Id.* at §7.2.

¹³ See, e.g., Code for Resolving Professionalism Complaints, §§3.2.3, 3.2.4, and 3.2.5 (all referring to The Rules of Professional Conduct, meaning the existing provisions of Ch. 4 of the Rules Regulating The Florida Bar).

¹⁴ *Id.* at §§1.5, 2.1, and 3.2.2.

¹⁵ Fla. Admin. Order No. 2.105-6113, *In re 15th Circuit Professionalism Panel* (Peter Blanc, Chief Judge) (June 20, 2013), available at http://15thcircuit.co.palm-beach.fl.us:8080/c/document_library/get_file?uuid=9ce94e86-483b-4125-b3b7-5876d091f650&groupId=10136.

¹⁶ *Id.*

¹⁷ Code for Resolving Professionalism Complaints at §3.5 (stating “The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3-7.1 of The Rules Regulating the Florida Bar.” That rule, in turn, states that “[a]ll matters including files, preliminary investigation reports, interoffice memoranda, records of investigations, and the records in trials and other proceedings under these rules, *except those disciplinary matters conducted in circuit courts*, are property of The Florida Bar” and further states that “[a]ny case in which a finding of minor misconduct has been entered by action of the grievance committee or board shall be public information.” Given the explicit terms of the Rules Regulating The Florida Bar, the extent to which the circuit courts can maintain confidentiality of their lawyer regulation process remains unclear.)

¹⁸ Vague laws that involve the First Amendment may be considered void for vagueness. See *Winters v. New York*, 333 U.S. 507, 515 (1948) (“There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.”). See also *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

¹⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), quoted in *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982).

²⁰ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991) (holding that attorney disciplinary rule related to pre-trial publicity and was unconstitutionally vague as applied).

²¹ *Palmieri v. State*, 572 So. 2d 1378 (Fla. 1991) (discussing *Kolender v. Lawson*, 461 U.S. 352 (1983)); see also *Skilling v. U.S.*, 561 U.S. ____ (2010) (declaring honest services fraud statute void for vagueness outside the context of bribes or kickbacks).

²² Code for Resolving Professionalism Complaints at §1.6.

²³ *Id.* at §3.

²⁴ *Id.* at §§3.3 and 3.4

²⁵ John Leubsdorf, *Legal Ethics Falls Apart*, 57 Buff. L. Rev. 959 (2009).

David C. Hoffman, Fifty Resolutions in Regard to Professional Department (1836), available at <http://www.lonang.com/curriculum/9/s91.htm>; see also Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 St. Mary's L. J. 343 (2008).

²⁷ Allison Marston, *Guiding the Profession: the 1887 Code of Ethics of the Alabama State Bar Association*, 49 Ala. L. Rev. 471 (1998).

²⁸ ABA, Canons of Ethics (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf; the ABA Model Code of Professional Responsibility, adopted in 1969 and modified throughout the 1970s, available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>; the ABA Model Rules of Professional Conduct, adopted by the ABA in 1983 and used as a model for most state schemes for lawyer regulation, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

²⁹ Florida adopted the ABA Model Rules of Professional Conduct on July 17, 1986.

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This column is submitted on behalf of the Government Lawyer Section, Barbara C. Wingo, chair.