

Professionalism: Where We Were, Where We Are, Where We Are Going

by Peter R. Bornstein

Beginning in 1986, the CBA conducted a series of surveys to gauge attitudes about the legal profession. Survey responses from both lawyers and non-lawyers showed a high degree of negativity toward what lawyers do and how they do it. This article explores the concept of professionalism and looks at how the organized bar has addressed the issue over the past few decades.

During the 1980s, and in response to a growing malaise from both legal professionals and the general public regarding the legal system, the Colorado Bar Association (CBA) conducted three surveys to document opinions and identify specific issues.¹ The first survey was conducted in 1986 and sought feedback from the general public. A large majority of survey respondents said they thought: (1) the typical lawyer was money hungry; (2) there were too many lawyers; (3) attorney fees were unreasonable; and (4) the courts were too slow and too lenient. When asked to state something positive about the legal system, 40% could name not a single positive attribute.²

The second survey was sent to bar leadership and district court judges in 1989, and a third survey of members of the CBA Litigation Section was conducted that same year.³ Many respondents said they felt that lawyers exhibited a spirit of ruthlessness, abused discovery, asked courts to sanction other lawyers without facts to support a sanction, and charged too much money for their services. Many respondents also stated that recent young admittees to the bar lacked a sense that they were joining a profession with a code of professional conduct. They opined that young lawyers did not have the mindset and training to conduct themselves in a manner befitting a professional lawyer. These surveys documented what lawyers were saying about one another and the system. The grousing was becoming endemic, although some thought it was whining.

The CBA Responds

In 1989, the CBA Professionalism Committee created a Task Force on Professionalism to address the demise of professionalism and to formulate strategies for recovering paradise lost. This task force divided itself into committees and subcommittees, and in March 1990, it issued a report setting forth recommendations to

five groups involved in the legal system: law schools, bar associations, the Colorado Supreme Court, trial judges, and bar examiners.⁴

The task force's report was approved by the CBA Board of Governors in 1990, and a version of the report was published in 1991 as part of *The Colorado Lawyer's* special issue on professionalism.⁵ This special issue—which was titled “Professionalism: Have We Lost It?”—comprised sixteen articles offering numerous viewpoints on the subject. Among the issue's highlights was a foreword by Colorado Supreme Court Justice Joseph R. Quinn titled “Professionalism: We Use It or We Lose It”⁶ and an essay by U.S. District Court Judge Richard P. Matsch titled “Is There an Atticus in the House?”⁷

Reading the observations, thoughts, and opinions presented in the 1991 issue, one might be struck by the lack of uniformity in defining what is meant by the term “professionalism” and defining the problem that all of the authors agreed existed. Each article discussed the problem through its author's own prism of experience. For example, one author decried lawyer advertising, claiming such advertising caused those embarking on a legal career to believe that the practice of law is a commercial endeavor no different from other commercial endeavors. Another defined the problem in terms of the lack of civility among lawyers causing rude, obnoxious, and acrimonious behavior. A third yearned for an ancient golden age of lawyering now debased by a lust for personal gain, hucksterism, a lack of respect for the Rule of Law, clogged courts, low moral standards, and frivolous claims. A fourth and fifth wrote that the adversary system is to blame and that the system must be abolished in favor of a new paradigm for resolving conflicts. Otherwise, these authors asserted, lawyers will continue to exhibit severe stress, disillusionment, burnout, and substance abuse. A sixth ar-



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gued that gender bias toward women is incompatible with professionalism, because the essence of professionalism is a how one treats other people. Another wrote that discovery misuse and abuse—concurrent with Rambo-style lawyering—impairs professionalism and disservices the public. One sees here the proverbial blind men touching the elephant.

Despite the differences in perception and descriptions, some common themes emerged. One theme is that the concept of law as a business crowds out the notion that the law and lawyering exist to seek and achieve a more perfect justice for citizens. The business side also created the billable hour and the need to work young lawyers to the point where they had little personal life and no time for public service or *pro bono* efforts. Another theme is that the need to win at any cost in an urban world with a surfeit of lawyers breeds incivility and discovery abuses, and lowers ethical standards. A third theme is that there is a need to instill in young lawyers—during law school and in their formative practice years—an ethic of “professionalism,” notwithstanding the fact that there is no single, hard-and-fast definition of that term.

Pinpointing Professionalism

In the 1991 special issue, the various authors defined “professionalism” in different ways, each according to his or her own idiosyncratic perspective. Some defined the term on the basis of good manners, civility, and integrity. Those who behave in accordance with those virtues are professional, and those who don’t are unprofessional (and obnoxious). Other defined it according to Dean Roscoe Pound’s formulation 100 years ago:

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.⁸

Some authors emphasized the last piece of Pound’s formulation: making a living. They wrote that an overemphasis on the business side of lawyering—making money—is antithetical to professionalism. The billable hour and the need for associate lawyers to bill a high number of hours to justify their salaries must be reformed to save professionalism. Others stressed the public service language of the formula. More lawyers should be doing *pro bono* work, serving the poor rather than the rich and the environment rather than polluters. If only we moved in this direction, they said, lawyering would recapture the spirit of professionalism. Finally, another group focused on the phrase “learned art.” Not only must the level of competence be held high, we should teach the tenants of professional behavior, ethics, and public service to those in the law schools, add it to the admission standards for a license to practice, and make the inculcation of professionalism part of the requirements for continuing education.

This was how, twenty-two years ago, the term “professionalism” was described by and for individual attorneys and for the greater organized bar. In a series of four lectures delivered at the University of Denver Sturm College of Law in 1990,⁹ Judge John L. Kane, U.S. District Court for District of Colorado, observed that the word “professionalism” was never defined in the seminal report of the American Bar Association’s Commission on Professionalism, which was published in the late 1980s.¹⁰ He stated:

What is today’s crisis? It is frequently expressed by that most inelegant of terms, a loss of “professionalism.” Before I commit

the error I condemn in others, let me say first that the word “professionalism” is particularly noxious to me, not only because of its lack of elegance but also because of its lack of a precise meaning. It is one of those fuzzy words which seem to sound appropriate, but which mean different things to different people. . . . “Professionalism” apparently means something that is positive and favorable, but precisely what it is eludes most of its uses.¹¹

It is important to remember that this introspection occurred at the same time public opinion was negative toward lawyers. It was also a time when young lawyer dissatisfaction became a topic of concern. There was a belief in the organized bar that if the old spirit could be rekindled, lawyers could feel better about the path they had chosen.

Professionalism and the Rule of Law

Twenty-two years later, the Professionalism Coordinating Council, a committee of the CBA and Denver Bar Association (DBA), is still wrestling with the definition. Judge Russell Carparelli of the Colorado Court of Appeals has given the matter considerable thought. He has also developed a curriculum for teaching certain skills to lawyers and would-be lawyers. He has developed the acronym SECRET to define the term. It stands for:

- Service to clients, profession, community
- Excellence in knowledge, skill, judgment
- Commitment to preserving the Rule of Law
- Respect and civility in all interactions
- Ethical in all dealings
- Trustworthy in all words and deeds.

Judge Carparelli has elaborated on his acronym by adding that lawyers as a group profess that everyone is entitled to enjoy the rights and benefits conferred on them under the law and to have the law applied fairly and impartially; and lawyers profess to use their knowledge, skills, and understanding of the law to preserve equality, fairness, and the integrity of our legal system.¹² Lawyers are the keepers of the Rule of Law. He concludes by defining professionalism as the commitment lawyers make to these principles through conduct that demonstrates that commitment.

Similarly, Judge Marcia S. Krieger, Chief Judge of the U.S. District Court in Colorado, wrote about the Rule of Law in a 2009 article for the *University of Denver Law Review*. In her article, “A Twenty-First Century Ethos for the Legal Profession: Why Bother?” Judge Krieger argues that calls for greater professionalism are too vague and are, at best, prescriptions for good conduct.¹³ Lawyers, judges, and law educators need to find a transcendent professional ethos, which, she contends, is the dedication to the Rule of Law. She calls for:

a profession of our dedication to a transcendent value that grounds us all as lawyers, and that both benefits society and counterbalances the subjectivity of any client’s wishes. Our ethos should reflect our core national values and the intrinsic paradox on which our country was founded—namely, that people enjoy maximum freedom only when they create the law and are equally constrained by it. Our profession should articulate the value of, and commit our efforts to, supporting and preserving the Rule of Law.¹⁴

Supporting and preserving the Rule of Law is a goal that has a built-in land mine based on our predilection for confusing due process with doing justice. In one of his president’s messages to

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members, CBA President Ben Aisenberg quoted a cogent observation from Justice Rosalie Abella of the Ontario Canada Court of Appeals that process has become a substitute for doing justice: "We have moved from being a society governed by the *Rule of Law* to being a society governed by the *law of rules*."¹⁵

Abandoning the "Ism"

I tend to agree with those who say it is pointless to try to define the word "professionalism" and then exhort our legal brethren to become more professional. The definitional issue can be resolved by abandoning the use of "ism." According to Cambridge Dictionaries Online, "ism" is "a set of beliefs, especially ones that you disapprove of."¹⁶ Isms refers to doctrines and theories, particularly those that are religious, political, or philosophical. Examples are Catholicism, communism, cubism, Darwinism, Epicureanism, existentialism, fascism, Protestantism, socialism, and stoicism.

The legal profession shouldn't aim to be an ism. First and foremost, the law is a learned profession and not a profession in the sense that football players, policemen, acupuncturists, firemen, and barbers are called professional. To become a lawyer, one must undergo a period of learning a hard-to-master body of knowledge and of acquiring hard-to-master skills to provide services or products for clients. Second, lawyers are the guardians and custodians of the Rule of Law.¹⁷ Third, the would-be lawyer must obtain admission into a society with limited membership, and this society can discipline and banish errant members. Fourth, lawyers embrace the duties imposed on fiduciaries and subsume their own needs, including financial needs, to those of their clients. In my mind, these characteristics define us as a profession and make other uses of the word less applicable.

Measuring Progress With Coffee Spoons

So, if we have come this far along, where are we now? Unfortunately, the organized bar has not created a measurement tool to determine whether the crisis has improved or worsened since 1991. We can only make observations and relate anecdotal stories.

Justice Joseph R. Quinn, after his retirement, spent sixteen years as a senior judge in many parts of the state. He observes today that civility and respectful behavior is improving in the civil trial courts, whereas it has always been very good among criminal lawyers.¹⁸ According to Justice Quinn, the problems in the civil trial law arena derive from the rules of civil procedure, particular discovery, and motion practice. These problems are exacerbated by the sheer number of lawyers practicing in the urban areas of the state.

Having been part of the CBA/DBA Professionalism Coordinating Council and its predecessor, the CBA and DBA Professionalism Committees, I have witnessed small increments of improvement over the past ten years, but nothing dramatic. As T. S. Eliot said in "The Lovesong of J. Alfred Prufrock," "I have measured out my life with coffee spoons." We can catalogue the increments of progress. Below are just a few of the ways professionalism is being addressed in Colorado.

- The Professionalism Coordinating Council has created vignettes to use during professionalism presentations.¹⁹ These vignettes have been seen by hundreds of lawyers and law students during bar meetings, inns of court, and CLE presentations, and have prompted important discussions about unprofessional behavior and what to do about it. If the vignettes

haven't changed behavior, they certainly have created a **buzz** of conversation and a heightened awareness and a common vocabulary.

- A set of thirteen principles of professionalism for both transactional lawyers and those engaged in litigation have been promulgated and disseminated.²⁰
- Teaching law students the rudiments of what it should mean to be a member of the legal profession has been added to the curriculum in some classes, and legal luminaries have spoken to the incoming class of law students in an effort to broach the subject at the beginning of the law school venture.
- The CBA website now contains a list of professionalism resources for Colorado practitioners.²¹
- There are numerous peer professional assistance groups available to mediate disputes between lawyers.²²
- The Colorado Supreme Court is in the process of creating a mentoring program for young lawyers in solo practice and in firms that cannot or will not mentor young lawyers.²³

As I said, there is progress measured in coffee spoons.

Where We Are Going

For sure, there are lawyers who believe that the law simply is a business—an economic enterprise. For them, professionalism means staying on the side of the Rules of Professional Conduct that preserves their law license. Some government lawyers have become bureaucrats owing allegiance only to the agency mission. These lawyers do not and will not subscribe to Judge Krieger's transcendent ethos. We can only let them be.

For other lawyers—and hopefully an overwhelming majority—the desire for something higher, something that resonates with the ideals they had when taking the lawyer's oath, is a compelling enough reason to return the practice of law to that of a learned profession. Being a part of a learned profession, as described in this article, means being part of something noble and important to the society in which we live and whose principles we support. Certainly, being a part of such a profession makes spending long and hard hours at work rewarding. Hopefully, by publicly demonstrating through our deeds, actions, and words what this profession stands for, those of us who choose to be professionals can dispel any negative opinions our jaundiced fellow citizens may hold. That is the goal for the future.

Notes

1. The questionnaires and a summary of the responses are on file at the Colorado Bar Association (CBA).
2. Hagen, "CBA Long-Range Planning Committee Membership Survey Report," 15 *The Colorado Lawyer* 383 (March 1986).
3. The three surveys are described in the CBA Professionalism Committee Task Force Report, "Professionalism: Have We Lost It?" Appendix B (July 24, 1990).
4. "Professionalism—Have We Lost It? A Report from the CBA Task Force on Professionalism, March 1990," 20 *The Colorado Lawyer* 1103 (June 1991).
5. "Professionalism: Have We Lost It? A Special Issue," 20 *The Colorado Lawyer* 1079-1141 (June 1991). CBA members can access the 1991 articles through Casemaker. Contact reban@cobar.org with questions about accessing this free member benefit.
6. Quinn, "Professionalism: We Use It or We Lose It," 20 *The Colorado Lawyer* 1079 (June 1991).

7. Matsch, "Is There an Atticus in the House?" 20 *The Colorado Lawyer* 1083 (June 1991).

8. Pound, *The Lawyer From Antiquity to Modern Times* 5 (West Publishing Co., 1953).

9. Kane, "Ethics and Advocacy" (University of Denver, 1990).

10. American Bar Association Commission on Professionalism (ABA Commission), "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism" 1986, available at www.americanbar.org/groups/professional_responsibility/resources/professionalism/prof_reports.html.

11. In defense of the ABA Commission, it did appear to adopt a definition written by one of its members, which Judge Kane then severely criticized.

12. Judge Carparelli developed the phrase "lawyers as keepers of the Rule of Law" after reading Judge Marsha Krieger's 2009 article, "A Twenty-First Century Ethos for the Legal Profession: Why Bother?" 86 *Univ. of Denver L.Rev.* 865 (2009). He has used this phrase, as well as the SECRET acronym, in various speeches and presentations, including on receiving the Hon. William J. Brennan, Jr. Award in January 2012; in presentations to incoming law students; and during his annual Peer Professionalism Assistance (PPA) Group CLE presentation on professionalism, ethics, and civility.

13. Krieger, *supra* note 12.

14. *Id.* at 894.

15. Aisenberg, "CBA President's Message to Members: Are We Losing Our Way?" 27 *The Colorado Lawyer* 17 (Nov. 1998) (emphasis in original).

16. See dictionary.cambridge.org/us/dictionary/british/ism_1?q=ism.

17. It is this role that requires lawyers to be respectful and civil to one another, to judges, and to citizens (who must accept the Rule of Law over other means to maintain order in society). It is this role that requires lawyers to engage in public service and to provide legal services to the powerless, the indigent, and the criminally accused.

18. Telephone interviews with retired Colorado Supreme Court Chief Justice Joseph R. Quinn (May 2013).

19. The professionalism vignettes and an accompanying teaching manual may be borrowed from the CBA/DBA Professionalism Coordinating Council by contacting the CBA at (303) 860-1115.

20. The Colorado Principles of Professionalism, approved by the CBA Board of Governors in May 2012, are available at www.cobar.org/index.cfm/ID/21435 and are printed in this issue starting on page 77.

21. Select the "Professionalism Resources" link on the CBA home page, www.cobar.org, or go to www.cobar.org/index.cfm/ID/20979/CCRL/Professionalism-Resources.

22. One such group is the PPA. For more information, as well as a current contact list for PPA group members, visit www.cobar.org/index.cfm/ID/20980. The contact list also prints in each issue of *The Colorado Lawyer*.

23. More information about the new Colorado Attorney Mentoring Program (CAMP) is available at www.cobar.org/index.cfm/ID/21965/dpmem/Colorado-Mentoring-Program or by contacting CAMP Program Director John Baker at j.baker@csc.state.co.us. The official CAMP website is currently under construction. ■



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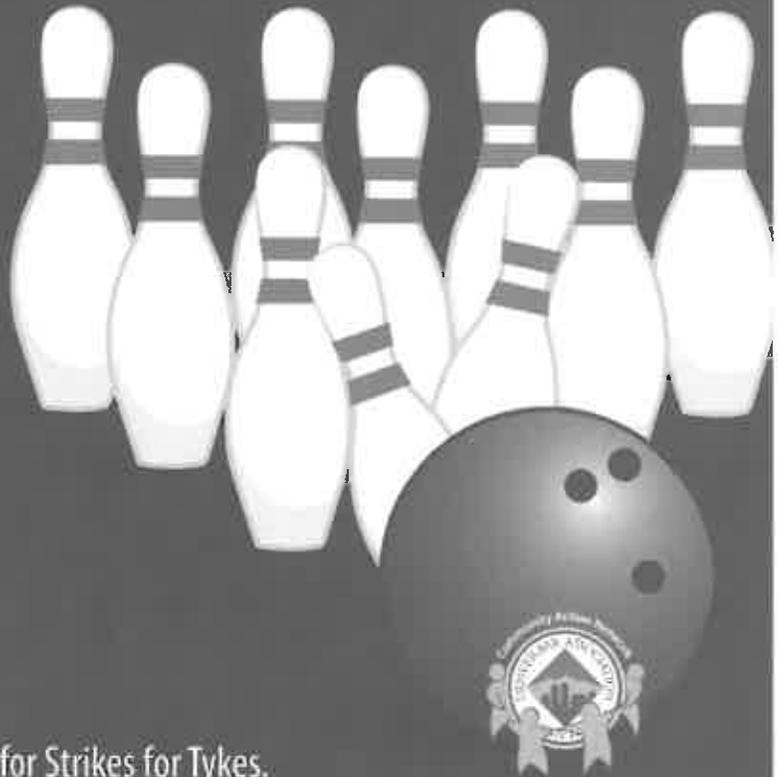
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