Chapter 19

PROFESSIONALISM AS SURVIVAL STRATEGY

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1. Introduction

In the twenty-first century, lawyer professionalism emerges as more than some venerable notion of how lawyers behave at their best. It becomes the very path to preservation of our profession, informing what must be done to build and maintain a lawyer’s professional identity, reinforce the bar’s bedrock service ethic, and equip young lawyers with the resilience they surely need to survive and succeed in an altered law practice environment.

Preserving professional identity means imparting the tools and traits all lawyers will need to exercise independent judgment and maintain needed professional distance; to remain devoted to the common good and the justice system; and to continue to set the legal profession apart as the
force that advances the rule of law, brings order to society and commerce, and points the way to social progress and a better world.

Reinforcing the bar’s service ethic means facilitating pro bono and public service at a time when demand for lawyers’ contributions of their time and talent can only expand. The access to justice gap, already vast, will widen in the decades ahead as government legal help for those in need continues to diminish, with a steady decline in funding for Legal Aid, public defenders, and state and federal court resources. The service element of professionalism must also find greater expression in the established lawyer’s role as mentor, if those new lawyers compelled by market forces to become solo practitioners upon graduation from law school are to find models of how to act and practice like professionals.

To be sure, obstacles to lawyer professionalism loom as law firms increasingly mimic business organizations, “commoditization” of legal services becomes more commonplace, and incivility concerns mount in the courts and the bar. In the end, however, the core values of professionalism will and must prevail if lawyers are to be more than just another group of specialist workers out there earning a living. The profession’s future depends on the quality of its professionalism.

This chapter will define lawyer professionalism, distinguishing it from mere adherence to lawyer ethics mandates, and explore why professionalism means taking an approach to a career that allows lawyers to fulfill their professional obligations while embracing change. It will examine how and why legal professionals must master the Internet and other technology to remain competent and to communicate effectively. The chapter will explore how the coming focus of law practice on conflict resolution, rather than on conflict itself, should present an opportunity to curb lawyer incivility. And it will reflect on ways that the central element of lawyer professionalism—the service ethic—must manifest itself to address the access-to-justice gap and the lawyer training gap in coming years. The discussion below also will also note that as multidisciplinary practice becomes prevalent in the years ahead, as many predict, professionalism values will mark and preserve the professional identity of lawyers working alongside accountants, consultants, and others in the same firm.
II. Professionalism Defined
As members of a profession, lawyers have ethical obligations governing how they serve clients, the legal system, and the public good. The ethical rules represent the floor of acceptable conduct, violation of which will subject lawyers to discipline. Not every lawyer who escapes discipline and complies with the ethical rules, however, exemplifies professionalism.

Ethical rules delineate the way lawyers must behave; professionalism concepts animate the way lawyers should behave and practice. As made clear in the aspirational Preamble to the Model Rules of Professional Conduct, lawyers have obligations not only to their clients, but also to the legal system and to the public. Preamble [1], [6]. First, lawyers have a “special responsibility for the quality of justice” (id. [1]) and are charged to strive for improvement in the quality of services rendered by the legal profession (id. [6]). This responsibility naturally requires lawyers to assess whether using technology for research, investigation, and litigation processes would improve the quality of services. Second, professionalism requires that lawyers cultivate the public’s knowledge of the law to further the public’s understanding of and confidence in the rule of law. Finally, as the Preamble underscores in its opening paragraph, professionalism speaks to the lawyer’s duty as “public citizen” exemplifying the ideals of public service, including access to justice.

Professionalism distinguishes law as a profession from a business motivated only to maximize profits from the sale of legal services. Professionalism is also a prescription for surviving and thriving in the new normal of legal practice by utilizing cutting-edge tools to both be and do better, with an open attitude toward lifelong learning in a practice approach characterized by civility and respect and an enduring commitment to service. As lawyers adopt new ways to work, think, and act, the commitment to professionalism preserves and reinforces their professional identity as lawyers and provides a prescription for competitive advantage.

III. Professionalism Applied to a Profession in Transition
A. Improving the Quality of Legal Services
Many decry the ongoing transformation of the practice of law as a damaging shift toward a “business model” and away from a professional
model of practice. The idea is that business pressures and profit-minded priorities detract from a lawyer's ability to reflect, exercise independent judgment, spend time on collegial activity and service, and impart practical wisdom. Those critics paint with too broad a brush. If being more businesslike means that the legal profession is becoming more responsive to clients, willing to render services with greater efficiency and demonstrated understanding of the newest developments so that lawyers perform with greater competency, professionalism is also enhanced.

If, however, being businesslike means that lawyers no longer acknowledge or fulfill their unique ethical obligations and the inextricable component parts of service to the administration of justice and to the public (as memorialized in the Preamble to the Rules of Professional Conduct), professionalism suffers. These elements distinguish the law as a profession, notwithstanding the changes in manner of delivery of service in pursuit of efficiency and commoditization. Without these elements, the core of professionalism and the meaning of law as a profession would be eviscerated.

i. Keeping mere provision of legal information separate from the giving of legal advice

One of the "business" characteristics of the current professional climate is the emphasis on packaging and widely distributing legal information. With the proliferation of the Internet, information of all types, and commoditized products built on information, are readily available to the consuming public.

The term "commoditization of legal services" refers to the notion that in the digital age, some legal problems may be broken down and addressed in a more efficient way, especially through the use of technology. Lawyers may no longer charge for services that are more efficiently accomplished by the use of technology. They would be well served to recognize that the value they bring to clients transcends mere provision of legal information. Going forward, successful lawyers will be those equipped to avail themselves of the best information and identify the significance of legal information in light of the unique aspects of their clients' circumstances. The lawyer's role as counselor becomes paramount. A lawyer's judgment
and wisdom will have enhanced value because the confounding mass of freely available legal information will need honing, synthesizing, and directing. In the end, lawyers will remain visible and viable as professional counselors whose judgment and knowledge deliver real value, rather than as purveyors of a sea of commoditized services.

To chart a successful course, lawyers will acknowledge the emerging reality that nonlawyer legal providers, such as LegalZoom and Rocket Lawyer, which provide legal documents and answer legal questions via the Internet, are here to stay. Some lawyers worry about the loss of legal work to these organizations. Some lawyers, and lawyer regulators, worry about whether the public is being adequately served by these organizations, run by individuals who presumably do not have a juris doctor degree and are unrestrained by the licensing and ethical requirements applicable to lawyers.

A better reaction—both more enlightened and more realistic—is not to renounce the advent of Internet legal service providers, but to remain mindful of the lawyer’s duty to add value to available legal information when applying professional experience and wisdom to the nuanced circumstances of the client’s needs. Lawyers should focus on expanding the “pie” of services they provide to clients, rather than on trying to get the slice back that Internet service providers have already consumed.

ii. Communicating the way clients want to communicate
In the age of instant communication, it is more important than ever that lawyers guard the core values of the profession even as they embrace new media to better serve clients.

Face-to-face consultation, telephone calls, and paper correspondence have yielded to the ease and convenience of email and texting as the primary channels of private communications between lawyers and their clients. Email is designed as a private forum, but as a web-based medium is still vulnerable to outside eyes. Strong passwords, robust Internet security, and encryption are crucial to protecting a client’s privacy and privileged information. It is anticipated that encryption will become more commonplace as more people rely on the Internet to convey private communications. Lawyers will do well to learn about incorporating
these safeguards into their law office communications. In that respect, it is noteworthy that the official comments to Model Rule of Professional Conduct 1.1, Competence, now instruct lawyers that competence today entails keeping abreast of technology.

In addition, the content of what is communicated must be conformed to the client’s wishes. Consistent survey data indicates that corporate clients want less legalese and more pointed practical advice that demonstrates the lawyer understands the applicable law and also understands the internal budgetary and communication constraints of the client’s organization and sector. Clients are looking for lawyers who can proactively advise them about strategies to minimize risk and maximize effectiveness and profitability. It may be assumed that individual clients share the desire for clear and not legally complicated communication from their lawyers.

iii. Using better case development tools
The Internet provides much more efficient research and better service for clients. Lawyers (as well as their clients) may access information and resources beyond what is readily available in their local or law library or geographic region.

The Internet can be a valuable aid to case investigation. Social media, especially the public pages of Facebook, yield a treasure trove of information that can be scanned for information that may be helpful to a client’s cause. Although the trend of ethics opinions across the country is to allow lawyers to access the public pages of social media sites, lawyers must be careful to consult the ethics opinions in their jurisdictions with respect to which of those online contacts or communications of witnesses, potential jurors, or judges may be fair game.

Finally, the technology-aided management of litigation, especially in the document review and production phase of litigation, has transformed the practice of law. No longer are hordes of young lawyers dispatched to dusty warehouses to identify documents by hand that may be relevant or privileged in a litigation matter. Instead, documents are reviewed through cloud-based servers housed in remote locations, using devices and methodology not even contemplated twenty years ago.
A side benefit to these changes is that removing from lawyers’ workday the mechanical or routinized aspects of practice, such as document review, will reserve for them the tasks requiring higher levels of critical thinking. In turn, this should lead to more intellectual and professional satisfaction among lawyers, promoting greater career reward and fulfillment for attorneys. When lawyers are freed up to engage in more of the work requiring analysis, judgment, and strategy, they feel more connected to the higher purpose that animated their decision to pursue a career in the law. Additionally, technology has leveled the playing field among legal professionals. Now solo practitioners or attorneys in small firms may have the same opportunity to serve clients that previously was available only to the more well-resourced large firms.

iv. Collaborating to deliver a higher quality of services
In order to meet client expectations of more useful legal advice, lawyers increasingly will collaborate with their clients and with nonlawyer professionals to anticipate and solve legal and combined legal/business problems. Lawyers must be prepared to practice in an environment where they are part of an integrated office of various service professionals, as opposed to an environment where they are segregated in a firm of lawyers as the sole service professionals.

In today’s integrated economy, it appears highly likely (if not inevitable) that before long lawyers will be practicing in a multidisciplinary firm environment. Yet nonlawyers are not subject to the same ethical and professional obligations as lawyers. The challenge for lawyers will be to not lose sight of professionalism values as they honor their distinct ethical duties as lawyers. In any professional setting or capacity, lawyers must abide by the Rules of Professional Conduct and ensure that subordinates in their organization conduct themselves in a way that is compatible with the lawyer’s professional obligations. From an ethical standpoint, lawyers will need to be proactive about educating others with whom they collaborate.
B. The Service Ethic Will Grow in Importance

A hallmark of professionalism is that lawyers work to expand access to justice. Research shows that only 15–25 percent of the civil legal needs of low- or modest-income people are being met. Just as more people are in need of legal services, particularly in the areas of consumer credit, family law, and housing, federal and state funding for legal services have seen significant cuts. As a result, litigants increasingly are representing themselves in court, leaving them overwhelmed and bewildered by the system and slowing down court operations.

In recent years, nonlawyer firms have stepped in to fill the unmet needs of individuals, most often over the Internet. The web has broken the monopoly on legal information enjoyed by attorneys for many generations, opening up access to those without legal training. Nonlawyer enterprises are delivering this information for less than lawyer rates.

Our profession should celebrate (rather than view with suspicion) the broader availability, through the Internet, of legal information that helps the public. In that respect, Internet enterprises are serving the goal of expanding access to justice.

The justice gap in this nation, however, remains vast, and the need for pro bono and public service work by lawyers—the core tenet of professionalism—is sure to intensify in coming decades. In the past several years, courts of most states have been forced to operate with at least 10 percent less funding than they had in 2007, resulting in frozen or reduced salaries for judges and staff. In addition, courts in many states have experienced delayed filling of judicial vacancies, furloughs of clerical staff and judges, or a curtailing of hours or days they are open to conduct judicial business. Although some of the severe cuts of the threatened sequester of 2013 were averted, federal public defender offices across the country have experienced serious staff reductions despite a workload that represents approximately 60 percent of the criminal defendants in the federal court system.

Public service thus grows in importance. It is the lawyer’s professional duty to others in society. It is also self-serving in the sense that a thoroughly compromised justice system (that simply does not work for most
citizens) is not an environment conducive to a fulfilling legal career, much less a just society.

C. Cultivating Public Knowledge of the Law and Respect for the Rule of Law

Many lawyers find it interesting and rewarding to write blogs or otherwise post information on social media platforms. Social media channels offer an opportunity for lawyers to maximize their reach beyond the people they interact with either one-on-one or by telephone.

Social media provide a powerful platform for lawyers to offer insights and observations that demonstrate skill and judgment and educate the public about an aspect of the law. A lawyer's Internet presence is also a wonderful opportunity to help nonlawyers become more connected to the system and to understand the nuances of the administration of justice. The foundational importance of that objective is again set forth in the Preamble to the Model Rules of Professional Conduct. "[L]egal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Preamble [6].

If members of the public do not understand or have confidence in our legal system, they will neither participate in it nor support it. To the extent that it may be the public's view that legal-related services may be provided interchangeably by lawyers and nonlawyers, it is up to lawyers to correct that misimpression.

Blogging or other social media postings may, in turn, yield new client prospects. It is important, however, for lawyers to abide by the applicable ethical rules regarding solicitation and advertising and to remember that social media are public and should never be used to communicate with clients about their matters. Even indirect references can identify the subject of a lawyer's postings. Utmost care should be taken to ensure that all postings protect client confidentiality. There have been a number of recent disciplinary cases where lawyers have written blog posts about former, and even current, clients, disclosing confidential, privileged, and often embarrassing information about them. Professionalism mandates that lawyers never even approach that line. Ethics instructs that a lawyer crossing the line may face discipline.
It should be self-evident that, despite the casual nature of many postings, professional lawyers should avoid cursing, using personally derogatory language, and bringing disrepute to others in the profession. Ethics decisions on point are coming out regularly and are not necessarily consistent across jurisdictions. Lawyers must seek the authorities in the jurisdictions where they practice to make sure they do not run afoul of ethical considerations as they use social media.

IV. A New Mindset
An exhortation every law student hears and most lawyers remember having heard in law school is to “think like a lawyer.” That way of thinking conforms the world to the construct of lawyers by, for example, turning ordinary interactions into elements of a cause of action or requirements for forming a contract. However, the world has become too complex for lawyers to use only the skills they learned in law school if they expect to fulfill their professional obligations. Professionalism in the future will require lawyers to expand their thinking, be open to continuous learning, and learn to “think like a client”—not just like a lawyer.

Moreover, as information becomes more ubiquitous, it is important for lawyers to see and understand how law relates to the broader society. Formal education, from law school to substantive continuing legal education, is only the beginning of the learning lawyers must pursue to remain competent and relevant in the future. The Internet makes it not only possible but necessary for lawyers to be in a continuous learning mode in order to provide value to their clients. Because law schools have not historically equipped their students for the advent and eventual incorporation of new technology into the practice of law, lawyers are admitted to the bar without these skills. As a result, lawyers are called upon to educate themselves about project management, e-discovery, and other technology-based aspects of practicing law that have now become staples of the profession.

Despite the pressures to do more, and faster, professionalism requires lawyers to slow down and, quite literally, make time for thinking. Today, forms and templates are a click away. Although lawyers should take advantage of these opportunities to serve clients more efficiently, caveat
advocator: professionalism requires lawyers to analyze, evaluate, and double-check their work. Moreover, lawyers must always be careful that their work is their own, and not inadvertently plagiarized from another source. Because information is widely available, original and creative thought is more valuable. Lawyers should discern how information may be relevant to their clients and make connections to the broader sector or to unrelated fields that others have not thought of. This is the concept of delivering value as legal professionals that is required in a world in which information is readily available.

Part of being open to learning is to recognize the value of understanding and incorporating diverse perspectives. Diversity and inclusion are treated in another chapter of this book, but they are briefly mentioned here because a commitment to diversity and inclusion is an important and essential element of professionalism. See Chapter 6, Arin N. Reeves, "Diversity and Inclusion as Filters for Envisioning the Future," p. 67. Lawyers are sworn to uphold the rule of law and the concept of equal justice for all. It becomes difficult to convey the authenticity of that precept when the members of the profession do not reflect the diversity of the population by gender, race, or sexual orientation. For over two decades, women have graduated from United States law schools at a higher rate than men, yet they fail to stay in the profession or advance to the higher levels of their legal organizations. The statistics for lawyers of color are more disappointing.

At the same time that the legal profession seems to be excluding full participation by women and minorities, globalization is putting lawyers in contact with clients from other cultures and in countries beyond our own. To be a successful professional, a lawyer must strive to understand different cultures and perspectives. Research confirms that diversity and inclusion lead to better decisions. In a world where collaboration, rather than hierarchical decision-making, will increasingly be the norm, there are opportunities for women and others who may naturally be more comfortable with collaboration as opposed to top-down decision-making. In the end, by embracing diversity in all its forms, lawyers have the opportunity to change the face of our profession and provide more holistic advice for clients.
In this world of both complexity and rising isolation, lawyers should think about their professional identity and connections to other lawyers as part of their education and legacy. Professionalism, as a way of working, thinking, and interacting as a lawyer, must be reinforced through mentorship. Another chapter is devoted entirely to the importance of mentorship, an essential activity for lawyers, both new and seasoned. See Chapter 17, Lori L. Keating and Amy Timmer, “Mentoring: No App for That,” p. 231. The successful practice of law entails nuanced consideration of unique circumstances. Seasoned mentors can provide wisdom and judgment derived from personal experience and interactions. New lawyers, most of whom have been “wired” their whole lives, can provide “reverse mentoring,” especially in the area of technology. These dynamics are becoming increasingly important as firms are investing less in formal training programs, clients are balking at paying for younger attorneys to shadow or second-chair older counsel, and attorneys are opting for CLE programs that are delivered via the Internet. The interpersonal interactions of mentoring create not only a milieu for the transfer of knowledge, but perhaps more important, they also allow for the creation of personal relationships that can provide a touchstone and an anchor for the mentoring pair and strengthen the professional identity of the lawyers.

Finally, professional lawyers use their skills and talents in pro bono publico service. Lawyers are called upon, but in most jurisdictions not explicitly required, to volunteer their training, skills, and experience to provide service in the public interest. Service in the public interest may include pro bono representation of people who cannot afford to pay for legal services and work in the area of legal reform. This obligation is not shared by nonlawyers and is another characteristic distinguishing the profession from a mere business. Research shows that individuals who volunteer service reap physiological and emotional rewards. Lawyers are fortunate that the professionalism required by their chosen career carries with it such a strong intrinsic personal benefit.

V. Civil Comportment
The ultimate element of professionalism that should be on lawyers’ radar screens as the future unfolds is civility. Civility here refers to lawyers’
interpersonal behavior—demonstrating respect toward others in the system, including opposing counsel, court personnel and, of course, clients.

Civility becomes more important and essential in the future as the lawyer’s job becomes less about confrontation and more about collaboration, at every level.

There is a growing consensus that the civility of lawyers has been declining over the past few decades, despite the fact that lawyers affirm in the bar admission process their respect for the system of justice. Further, lawyers are instructed to abide by principles of professionalism, and as stated several times in the Comments and Preamble to the Model Rules of Professional Conduct, to temper their zealous advocacy with civility.

Some postulate that the advent of technology has prompted a rise in incivility. Lawyers using text and email tend to be more abrupt and abrasive, theory goes, without the reflection, inflection, and nuance possible with oral communications. A knee-jerk response by the attorney can compound a problematic situation. Isolated behind their computers, lawyers may treat opposing counsel, or even their own clients, dismissively or with disrespect. A common venue for uncivil outbursts is discovery disputes, including depositions.

On the other hand, technology also may facilitate greater civility between and among lawyers. Now anyone who has contact with a lawyer may rate and comment on the lawyer’s performance and demeanor on websites devoted to ranking lawyers or social media. Incivility or other negative behavior published through rating sites can haunt a lawyer’s reputation far beyond the few individuals who may have heard about negative behavior through word of mouth.

Finally, as discussed previously, the ubiquitous availability of information means that lawyers will deliver value for their clients by being creative and open to new perspectives rather than retreating to and defending a corner of the boxing ring at all costs. Increasingly, civil disputes are settled or otherwise resolved by methods other than trial. Trials are increasingly seen as slow, cumbersome, costly, and uncertain—all qualities eschewed by corporate clients. The move toward developing collaborative services as demanded at least by corporate clients will require attorneys to put aside the gladiator mentality of advocacy and work more civilly toward
cost-effective solutions. Moreover, resolving business problems and civil
disputes by mediation or negotiation involves the lawyers and parties
in a collaborative process in which a premium is placed on civility over
dogged advocacy.

VI. Conclusion
Professionalism in all its aspects is the lodestar for lawyers in the twenty-
first century. The foundational principles of professionalism are furthered
by the current transformation of the practice of law and the expansion of
the law's protection to people who historically have been shut out of, or
ignored by, the system. Making the law more understandable and access-
sible to clients, potential clients, and members of the public furthers the
goals of professionalism. Moreover, by focusing on practice that comprises
the highest and best use of their time and talents, rather than more routine
tasks, lawyers also will derive greater reward and satisfaction from their
work. By embracing the ideals of professionalism in their work, lawyers
will ensure greater success for themselves and improved service for cli-
ents, and contribute to the betterment of society.

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