

Virginia's New Principles of Professionalism

by Thomas E. Spahn

FOR THE FIRST TIME in Virginia's legal history, the Supreme Court of Virginia has endorsed aspirational statements of lawyer civility. All of us should use this historic event to redouble our commitment to treat each other and everyone with whom we deal the way we would like to be treated. This article describes the difference between ethics and professionalism, and the process that resulted in the Supreme Court's action.

The Difference Between Ethics and Professionalism

Lawyers have always struggled with the tension between our role as advocates for our clients and the golden-rule behavior that marks conduct in most professions.

For example, absent your client's consent, you generally cannot advise adversaries about some important argument they have overlooked or an appellate deadline they are about to miss. This is because our ethics rules require that we act as our clients' advocates. On one level, this might seem unfair and unprofessional. But our role as advocates makes us indispensable players in the most efficient and fair justice system ever devised. Unfortunately, many non-lawyers do not understand our role, which accounts for at least part of our profession's unpopularity. There really is nothing that lawyers can do to change our role in the adversarial system. To the extent that our ethics obligations fuel public criticism, we can only try to explain what we do and why everyone benefits when we do it well.

On the other hand, we have total control over another source of public condemnation: how we act toward those with whom we deal. This involves professionalism.

Thus, ethics and professionalism are entirely different concepts. Ethics guides our role as advocates and the substance of our daily decisions. Sometimes, ethics requires us to take actions that seem unprofessional and discourteous. It guides our interactions with others.

Professionalism cannot trump our duty of advocacy, but it can direct the way we undertake that duty. Professionalism focuses on civility and the golden rule.

Unfortunately, the news on the professionalism front is bad and getting worse. Our profession seems to attract driven people short on time and patience. Demographics and economics conspire against us. Lawyers who practice in small bars are restrained by the fear of social ostracism, or the certainty that karma eventually returns incivility exhibited toward another lawyer. But these deterrents disappear in large bars or among transitory lawyers. Traditionally, young lawyers relied upon mentors to guide their conduct. As law firms and bars have grown, these types of helpful relationships have largely disappeared or have been eroded by financial concerns.

Professionalism Efforts in Virginia

As in every other state, Virginia's ethics rules have never required lawyers to act with courtesy in their day-to-day dealings with others.

To be sure, Virginia Rule 3.4(j) contains the standard prohibition on lawyers taking any actions on behalf of their client "when the lawyer knows or when it is obvious that such action would serve *merely* to harass or maliciously injure another." (emphasis added). This obviously prohibits grossly discourteous behavior. In essence, the rule represents a minimum level of civility. Lawyers who fall below this minimum can face bar discipline. The American Bar Association Model Rules and every other state's rules contain the same provision.

However, the Virginia Rules of Professional Conduct also contain several unique provisions that do more than set a minimum standard. These provisions remind lawyers of the way we should act.

Virginia Rule 3.4 comment [7] explains that "[t]he duty of lawyers to represent a client with zeal does not militate against his concurrent obligation to

treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm." Virginia Rule 3.4 cmt. [8] provides additional guidance to lawyers involved in "adversary proceedings." That comment advises litigators to act with courtesy and respect, but begins each statement with a "should" rather than a "must."

These provisions do not appear in the ABA Model Rules, and their inclusion in the Virginia Rules speaks volumes about Virginia's desire to encourage everyday courtesy, not just describe the type of extreme discourtesy that justifies discipline.

Given Virginia's heritage, it should come as no surprise that many lawyers have tried to encourage civility here. Over the years, Virginia voluntary bar groups have adopted their own civility creeds.

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Starting in early 2007, Virginia Bar Association President William R. Van Buren III proposed establishing a statewide group that could finally articulate widely accepted standards of civility that our Supreme Court might officially acknowledge.

Working with VBA Executive Director Guy K. Tower, Van Buren selected judges, professors, and lawyers to serve on the Virginia Bar Association Commission on Professionalism. The panel reflects the full diversity of Virginia's legal profession and includes representatives of every statewide voluntary bar group.

Starting in June 2007, the commission met four times to discuss how best to encourage professionalism among Virginia's lawyers. The commission unanimously agreed on an approach to articulating and implementing standards of civility.

In adopting the Principles of Professionalism for Virginia Lawyers, the commission unanimously agreed to:

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- Emphasize that we are not recommending mandatory rules — the violation of which could result in discipline. Instead, we are articulating aspirational statements of how Virginia lawyers should act.
 - Include this important distinction in our report to the Supreme Court rather than in the principles, so that the principles themselves emphasize the positive rather than the negative.
 - Avoid other states' inappropriate mixture of ethics and professionalism. The Virginia principles have no references to competence, ex parte communications, continuing legal education, excessive discovery, and other ethics issues that appear in many states' creeds.
 - Address only how lawyers should act, and not how we think judges should act.
 - Organize the civility standard in a common-sense way, starting with everyone with whom Virginia lawyers interact, then moving to our clients, courts, other institutions, and opposing counsel.
 - Take a modest approach. Ohio's creed has eighty-nine statements. The Virginia principles have only twenty-four statements, stated in fewer than five hundred words.
 - Keep our approach simple. Some states have elaborate combinations of canons, rules, and commentary. The principles have one list.
 - Avoid legalese. Not surprisingly, most states' creeds sound like they were written by lawyers — a cause of public ridicule over which we have some control, and which the principles try to avoid.
 - Emphasize lawyers' personal involvement in professionalism. Unlike many states' creeds, the principles use the first-person singular.
 - Add a few principles that we think other states have overlooked, such as a blanket antidiscrimination goal and a pledge to treat other lawyers' employees with respect.
- In discussing how best to implement the Virginia Principles of Professionalism, the commission unanimously determined to:
- Seek endorsement of the principles from every voluntary statewide bar group. We succeeded in this goal with the help of those groups' representatives serving on the commission.
 - Seek judicial acknowledgement of the principles from as many courts as possible, starting with the Supreme Court of Virginia.
 - Seek a big statewide publicity splash by selecting a rollout date with historic significance. We settled on April 13, 2009 — the 266th anniversary of Thomas Jefferson's birth.
 - Seek widespread publicity of our new principles.
 - Involve as many bar groups, law firms, law schools, and other institutions as possible in endorsing the principles and circulating them within their own communities.
 - Work with the Virginia State Bar's Harry L. Carrico Professionalism Course to incorporate the principles into that mandatory program, with the understanding that the principles represent statements of civility to which we should aspire, rather than standards of required conduct.
 - Prepare a CLE program that focuses on professionalism and entitles attendees to ethics MCLE credit.
- After meeting with commission representatives, Chief Justice Leroy R. Hassell Sr. sent a letter in June 2008 to VBA President B. Michael Pace Jr., expressing the Supreme Court's endorsement of the principles, and encouraging "the widest possible dissemination of these Principles."
- Virginia's federal courts have also welcomed the principles. The Western District commended the Principles of

Professionalism, and the Eastern District announced that it "fully supports" the aspirational principles. Chief Judge James R. Spencer stated that "the impact of the principles on the practice of law here in Virginia is potentially profound," and that he stands ready to assist "in publicizing these principles and encouraging the consideration of them by all Virginia lawyers."

Future Steps

The Supreme Court's endorsement of the Principles of Professionalism represents a historic event that should energize all of us.

As the principles' preamble boasts, Virginia has been blessed with lawyers who have played a pivotal role in American history — from Thomas Jefferson to Oliver W. Hill Sr. — who have played a pivotal role in American history. Virginia lawyers who served before us wrote the principles that define the United States, and then struggled to assure that the country live by those principles.

Our commission's goal has been deliberately far more modest. We hope to remind lawyers that acting as our clients' advocates does not require us to act discourteously. In our small way, we hope to make it more enjoyable to be a Virginia lawyer, and to revive the sort of respect in which our predecessors were held.

Of course, the principles signal only the start of everyone's efforts. We all should disseminate them as widely as possible, try to follow them in our own lives, and encourage others to follow them as well.

Editor's note: The Virginia Principles of Professionalism were published in the 2008-2009 Professionalism Guidelines, (http://www.vsb.org/docs/2008-09_principles.pdf) and are distributed in the materials for the Carrico Professionalism Course. The Virginia State Bar joined voluntary bar groups in endorsing the principles in 2008.

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June 2, 2008

G. Michael Pace, Jr., Esq.
President, Virginia Bar Association
Gentry, Locke, Rakes & Moore, LLP
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Roanoke, VA 24022-0013

Dear Mr. Pace:

The Supreme Court of Virginia has endorsed the following Principles of Professionalism for Virginia Lawyers:

"The Supreme Court of Virginia endorses the attached Principles of Professionalism for Virginia Lawyers prepared by the Virginia Bar Association Commission on Professionalism. Having been unanimously endorsed by Virginia's statewide bar organizations, the Principles articulate standards of civility to which all Virginia lawyers should aspire. The Principles of Professionalism shall not serve as a basis for disciplinary action or for civil liability. We encourage the widest possible dissemination of these Principles."

I commend the Virginia Bar Association for its outstanding leadership.

Sincerely,

A handwritten signature in cursive script that reads "Leroy Rountree Hassell, Sr.".

Leroy Rountree Hassell, Sr.

Virginia's New Principles of Professionalism

PRINCIPLES OF PROFESSIONALISM FOR VIRGINIA LAWYERS

Preamble

Virginia can take special pride in the important role its lawyers have played in American history. From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession's highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously." Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy. These Principles of Professionalism serve as a reminder of how Virginia lawyers have acted in the past and should act in the future.

Principles

In my conduct toward everyone with whom I deal, I should:

- Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
- Act at all times with professional integrity, so that others will know that my word is my bond.
- Avoid all bigotry, discrimination, or prejudice.
- Treat everyone as I want to be treated — with respect and courtesy.
- Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.
- Contribute my skills, knowledge and influence in the service of my community.
- Encourage those I supervise to act with the same professionalism to which I aspire.

In my conduct toward my clients, I should:

- Act with diligence and dedication — tempered with, but never compromised by, my professional conduct toward others.
- Act with respect and courtesy.
- Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward courts and other institutions with which I deal, I should:

- Treat all judges and court personnel with respect and courtesy.
- Be punctual in attending all court appearances and other scheduled events.
- Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.
- Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.

In my conduct toward opposing counsel, I should:

- Treat both opposing counsel and their staff with respect and courtesy.
- Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.
- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.

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- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.
- Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsel's schedules whenever possible.
- Agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests.
- Notify opposing counsel of any schedule changes as soon as possible.
- Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.
- Be punctual in attending all scheduled events.
- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Commission Members

Virginia Bar Association Commission on Professionalism members and the organizations they represented were:

Thomas E. Spahn, chair
Gov. Gerald L. Baliles
Reginald M. Barley (Old Dominion Bar Association)
Judge B. Waugh Crigler
Judge Joel C. Cunningham
Patricia K. Epps
Cheshire I'Anson Eveleigh
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Robert J. Grey Jr.
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Justice Donald W. Lemons
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Howard C. McElroy
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William R. Van Buren III (Virginia Bar Association)
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