PROFESSIONALISM: REPAYING THE DEBT

by Presiding Justice Harold G. Clarke, Georgia Supreme Court

After the Supreme Court of Georgia and the State Bar of Georgia announced their emphasis on professionalism, skeptics posed two questions: what is it and why does it matter? This article attempts to examine, but perhaps not answer, those questions looking at them in reverse order.

Public attitudes and expressions offer evidence of diminished professionalism in the law practice. Nobody allows us to forget the poll which indicated that lawyers enjoy public esteem equivalent to that of used car salesmen. Lawyer jokes are popular at every cocktail party and prove to us that cleverness is not so funny when we are the subject.

The natural question is what led to this attitude? Some point to Watergate as the watershed and say until that time lawyers enjoyed far greater respect. While it is true that John Dean uttered that immortal sentence, "How in God's name could so many lawyers get involved in something like this?," I do not believe that this one unfortunate episode created lawyer unpopularity. The popular pastime of lawyer baiting began long before anybody ever heard of Watergate. Even the English poet John Keats said, "I think we may class the lawyers in the natural history of monsters." And Woodrow Wilson, who once practiced law in Atlanta, commented, "I used to be a lawyer but now I am a reformed character." The problem is not a new one but it has become more acute in recent years.

I believe the main causes of deterioration of lawyer reputation are the over-commercialism of the profession, over-aggressiveness on the part of some lawyers, and the view that lawyers and the law stand as obstacles in the path of things which should be accomplished.

I further believe that the existence of these problems makes necessary an identification of the nature of professionalism and an examination of how it can be instituted.

Professionalism Defined

Most observers express a belief that a definition of professionalism lies outside an area in which a concensus can be reached. Some even say that professionalism is simply in the eye of the beholder. With this in mind, I proceed not as a member of the Supreme Court of Georgia, but as a beholder who believes the term is capable of definition. I also believe that lawyers and judges benefit from the exercise of attempting to define professionalism. So, here goes my effort.

I wrote this definition down several years ago, and while I believe it is one I personally drafted after reviewing numbers of others, there is at least a possibility of forgotten plagiarism.

> **Professional** – A member of a group which provides an essential service in which the public has a vital interest and requires of the performer extensive training and the exercise of qualitative judgment.

"Essential service," "vital public interest," "extensive training," and "qualitative judgment" constitute the key phrases in this definition. Every lawyer would do well to use these phrases as a checklist for his or her everyday activities. This checklist stands as a reminder that the distinction between a profession and a commercial enterprise is that a profession demands adherence to the public interest.

Upon becoming a professional, an individual is endowed with certain privileges, including better earnings than most and higher status than most. These privileges likely lead to a higher standard of living and perhaps a high standard of self satisfaction. Deserved privileges need no criticism, but lawyers need to examine whether they deserve their privileges. Another way to put it is whether lawyers are repaying their "debt," that of being a professional.

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The debt of professionalism has an enormous principal, carries an astronomical rate of interest and its term extends for a lifetime. The debtor is each lawyer, but the creditors are at least five in number. Each lawyer owes a debt to the client, the law, the system of justice, fellow lawyers, and the public.

Debt to the Client: Hard Work, Not Hardball

To the client, the lawyer owes honesty, knowledge, hard work, concern, courtesy, communication and zeal within appropriate limits.

The requirement of honesty as a professional goes deeper than the prohibition against lying and stealing. A professional's honesty is the type of openness and candor with the client which even extends to expression of independent judgment that a client's cause may not be a winner. The requirements of courtesy and concern also overlap and go along with the realization that to the client a matter of legal business is gravely important and sometimes even frightening. Appropriate response to the anxieties of a person tangled in the web of legal problems is a serious debt of professionalism. The lawyer who fails to answer letters, return phone calls, and keep the client abreast of developments falls short of professionalism by failing to appreciate the need for communication. Professionalism mandates zeal in the representation of clients. It also mandates reasonable limits upon that zeal. In a speech to a group of lawyers assembled for the administration of the oath of admission, Justice Hardy Gregory of the Georgia Supreme Court said the following:

> Barbara Tuchman, the Pulitzer Prize winning historian, has recently published a best seller, *The March of Folly*. Her thesis is that governments often pursue policies contrary to their own best interest despite the availability of feasible alternatives. She traces this folly through history, from Troy to Vietnam. One prize example is the government of Great Britain at the time of the American Revolution. England could have yielded so little and gained so much yet the British government blindly insisted on its sovereign right to tax tea and other things prompting Benjamin Franklin to comment: 'Everything one has a right to do is not best to be done.' The message is this: I detect in law practice today a new meanness and blind insistence on the rights of clients with a serious lack of a spirit of compromise and sometimes even common sense. There's a time to take a stand and there's a time to find a way. Good lawyering is knowing the difference.

Hard work as a debt owed to the client surprises no one but lawyers too often fail to pay this debt.

Debt to the Law: Lawyers as Problem Solvers

To the law itself, the lawyer owes a debt of study, understanding of the purpose of the law and the application of the law to good use. The lawyer who limits study to the technicalities of statutes and regulations and the meanderings of judicial opinions falls short of that which professionalism demands. Certainly, a lawyer needs knowledge of the law and its interpretations, but a lawyer also needs an understanding of human beings. That kind of understanding flows not so much from law books as it does from the humanities. Writing in *Law and The American Future*, Lyman M. Tondel, Jr., said, ". . . training and other qualities to perform the function beyond those of the technician are needed – those of the expositor and protector of individual liberty. The lawyer should also acquire a broad understanding of the role of the law, the power, purposes of regulation in our society, and the uniqueness of the lawyer's role; and he should know enough of history and culture to have a broader perspective than most." Mr. Tondel also quotes Learned Hand: "I am arguing that an education which includes the 'humanities' is essential to political wisdom. By humanities, I especially mean history; but close beside history and of almost, if not quite, equal importance are letters, poetry, philosophy, the plastic arts, and music. . . ."

In looking for an understanding of the purpose of the law and the application of its use for good, one statement comes quickly to mind. A lawyer justifies his or her existence only when the lawyer serves as a problem solver. A substantial portion of the public views the legal profession as an institution dedicated to erecting barriers which impede progress. They see us as spending our time telling clients why they can't do things that ought to be done. J. P. Morgan once said, "I don't want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do." Mr. Morgan's statement is capable of two interpretations. First, he sought a lawyer to discover loopholes for the accomplishment of questionable goals. Another interpretation leads to the belief that he sought a lawyer who had the clarity of thought to recognize a problem and the creativity to find a solution. This is a worthy quest. Negativism should not be the hallmark of the law practice. We should rather strive as professionals to devise a system of conduct within which worthy things can be accomplished, so long as they do not infringe upon the rights of others.

In a speech to the Southern Conference of Bar Presidents, E. Osborne Ayscue, Jr., Past President of the North Carolina Bar Association, commented:

> "The lawyer who uses his relationship with his client to influence him to act within the spirit of the law, and not just within its technical letter, is a professional. The lawyer who assists a client in finding a way to achieve a socially undesirable result, while staying within the letter of the law, is nothing more than a hired gun."

Debt to Justice: To Act in the Public Interest

To the system of justice, lawyers owe a debt of respect, candor, cooperation and willingness to represent

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> "I (attorney's name) swear that I will truly and honestly, justly and uprightly demean myself, according to the laws, as an attorney, counselor, and solicitor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So Help me God."
>
> *The new professionalism oath for Georgia attorneys which was adopted by the Georgia Supreme Court and took effect on October 14, 1988.*

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unpopular causes. As an officer of the court, a professional's respect for the system stems from an understanding that failure to work for efficient, inexpensive and speedy administration of justice amounts to failure in the practice of law. Lack of candor with the court serves to impede the wheels of justice and degrade the profession. The legal profession has risen to no greater heights than when it stepped forward in defense of the despised. A lawyer proves his or her professionalism with the willingness to represent an unpopular cause. Just as John Adams defended British soldiers who participated in the Boston Massacre, lawyers of this age have a duty to serve those in need without respect to their popularity.

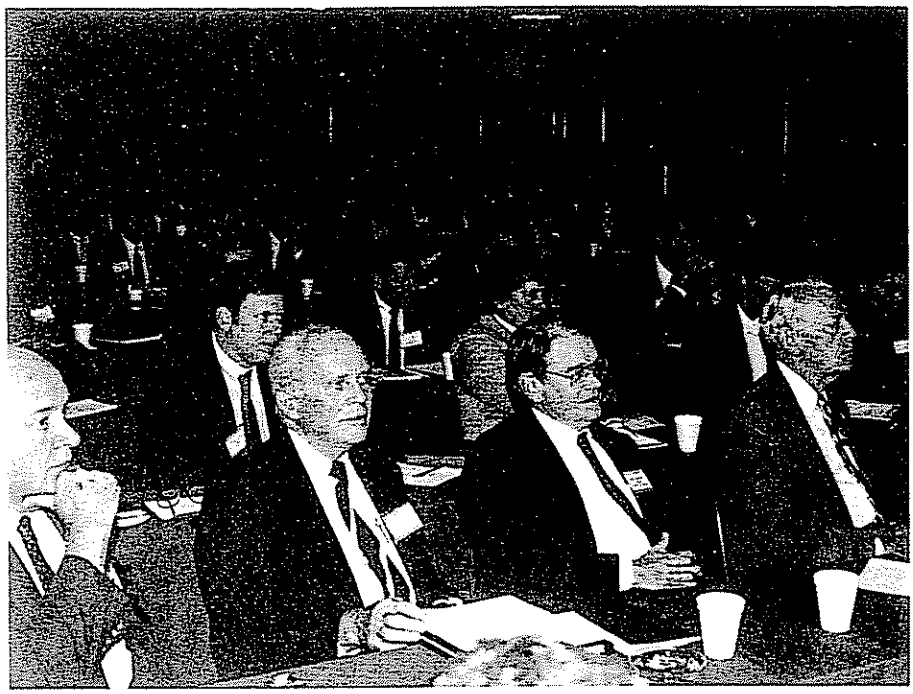
Activities within the organized bar constitute a portion of the debt owed by lawyers to the system of justice. The Bar is an organization dedicated to the public interest. At its very inception the Supreme Court stated the purpose of the State Bar in Rule 1-103:

> "The purposes of the State Bar of Georgia shall be: (a) to foster among the members of the bar of this State the principles of duty and service to the public; (b) to improve the administration of justice; and (c) to advance the science of law."

The State Bar through its activities has been faithful to this purpose. These activities run the gamut from pro bono service to improved lawyer competence and enforced discipline. Its success or failure depends upon the work, interest and time of its members. A professional recognizes this need.

Debt to Fellow Lawyers: Cooperation and Civility

Lawyers owe a debt to fellow lawyers. This debt involves civility and cooperation. Some would say this proposition reeks of collusionary cliquism. The ABA Journal, July 1987, contained an article entitled "Playing Hardball." This article quoted a prominent law professor as viewing civility in litigation as a "euphemism for the old boy network, or covering up for one another." Almost a year later, the ABA Journal, March 1988, expressed a different view in the article, "Rambo Litigation – Why Hardball Tactics Do Not Work." This article viewed hardball as ineffective and often causing harm to the clients. The New York City Bar Association's Committee on Federal Courts in its 1988 report expressed opposition to hardball litigation tactics[1] and Chief Justice Warren E. Burger, retired, expressed similar views as far back as 1971. In his remarks to the American Law Institute, he said, "Someone must teach that good manners, disciplined behavior and civility – by whatever name – are the lubricants that prevent law suits from turning into combat. More than that, it is really the very glue that keeps an organized society from flying apart." On another occasion, Chief Justice Burger said, "In their highest role, lawyers are – or should be – healers of conflicts. . . . In their highest role, lawyers should try to conciliate, mediate and arbitrate."



Some of the 120 lawyers and judges who attended an October convocation on professionalism in Macon.

Most of us recall Leo Durocher's alleged quote "nice guys finish last." The truthfulness of that statement is doubtful on the baseball field and far more doubtful in the courtroom and law offices. Polarization of lawyers and parties resulting from uncivil conduct frequently creates an unfortunate outcome for all concerned. Civility with the fellow lawyer lies in the public interest because of the likelihood of quicker resolution of disputes with better results. Long experience teaches that undue aggressiveness leads to the kind of polarization which often prevents settlement or at least deters more efficient resolution of contested disputes. This even impacts on the public interest because of the increased financial burden on the judicial system.

Duty to Serve and to Lead

The last and perhaps most important debt to be discussed is the one owed to the public. Professionalism burdens lawyers with a duty to serve and to lead.

The lawyer's debt to the public begins with the duty to weigh the public interest against the purely private interest of the lawyer and the client. An aspect of professionalism is the development of the sixth sense which imposes a self-prohibition against crossing the undefinable line into action which a professional is expected to avoid. In a positive sense, lawyers owe the public the debt of service and leadership. Service generally takes a form of pro bono legal work, because the needs of the deprived lie waiting for the

service of the more fortunate. The grand tradition of the legal profession insists that lawyers not shrink from leadership roles. By nature and training, lawyers possess qualities which uniquely fit them for positions of leadership in both the public and private sector. From the very beginnings of our republic, Americans have looked to lawyers for leadership. Some evidence indicates the setting of the sun on this tradition. Fewer and fewer lawyers offer to serve as public officials and it even seems that lawyers are volunteering less frequently to lead in civic and charitable activity. At least one reason for this unfortunate development is the explosion of cost in the operation of a law practice which makes time an enormously valuable commodity. With respect to public office, another reason is the tendency on the part of some persons to distrust lawyers and therefore diminish their electability. Perhaps the best way to regain lost trust is to reassert our willingness to serve and lead.

A Higher Standard Than Ethical Canons

Leaving the issue of the debts of professionalism, it is well to call attention to the use to which lawyers may put the privileges of professionalism. Chief Justice Warren said: ". . . because the Constitution permits a given activity does not mean it is ethically appropriate for members of a profession to pursue it." I would take this a step further and paraphrase that statement in this manner: because the canons of ethics permit a given activity does not mean that it is professionally appropriate for lawyers to pursue it. The predicate for this proposition is the idea that ethics is a minimum standard which is *required* of all lawyers while professionalism is a higher standard *expected* of all lawyers. This is the kind of standard which leads to a satisfaction for a job well done or a life well spent. John Ruskin said: "The highest reward for a person's toil is not what they get for it, but what they become by it." We may well ask what we have become by our experience as members of the legal profession.

Another question is what our experience may do to the profession itself. Writing in the Torts and Insurance Practice and Section's Monograph on Professional Independence, Professor Bob McKay reasoned that in return for the right to regulate itself, the legal profession has accepted the implicit compact to act in the public interest.

What Is At Stake?

This reasoning leads to even more serious considerations. Acting in the public interest is an element of professionalism. It can be said that when lawyers fail to act professionally, they forfeit their right to independence. The loss of lawyer independence obviously would result in a diminution of the stature of the bar. But more important is the effect it would have on the public good. For more than two hundred years, an independent bench and bar have stood as primary protectors of individual rights and the stability of our government. In exercise of their independence, lawyers have undertaken the representation of unpopular causes throughout the history of this republic beginning with the defense of the British soldiers in the Boston Massacre cases and continuing through a long line of cases in which lawyers and the judicial system stood fast in defense of individual liberties. Whether the right protected was that of little Miss Brown in the claim against the Board of Education or an unlovable, industrial giant in its battle against a government agency, the independence of the lawyers was essential in securing those rights.

Institutionally, lawyers in the exercise of their independence wrote the Declaration of Independence, devised the basic tenets of the United States Constitution and mapped out the framework of a judicial system which affords more protection to more people than any the world has ever known. To say that the independence of lawyers and the courts is important only to the legal profession and the judiciary overlooks many of the great truths of history. The United States in its two hundred year history has faced numerous crises in which factions of one sort or another have pulled in opposite directions. Yet only in 1861 has the legal system failed to resolve the conflicting positions of those factions. In the absence of independence, the system could not have acted so successfully in defense of the republic.

This leads then to the conclusion that the stakes in the question of whether lawyers act professionally extend far beyond the impact on the lawyers themselves or their clients or the courts. The absence of professional conduct leads to the loss of the right of self-regulation. The loss of the right of self-regulation leads to the loss of lawyer independence. The loss of lawyer independence puts at risk individual rights and the institutional protection of the republic. We cannot carry so heavy a burden as an amalgam of self-seeking individuals. We can do it only as members of a profession.

Footnote

1. The Committee on Federal Courts, *A Proposed Code of Litigation Conduct*, 43 THE RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 738 (Oct. 1988).