ESSAY

PROFESSIONALISM LITE: ASPIRING TO CIVILITY, IDEALIZING THE PAST

BY BILL WERNZ

The Minnesota Supreme Court recently adopted its "Professionalism Aspirations," in the form of standards, commitments, obligations, and resolutions.[1] The Court's promulgation, the bar's more general discussions of professionalism, and the efforts of the Court and bar to implement professionalism are welcome and important. However, the Professionalism Aspirations are framed too narrowly to fit the large dimensions of our true professional mission. More unfortunately, those of the broader professionalism discussions that idealize the past are not faithful to the critical search for truth, which is central to our profession.

The Aspirations and professionalism discourse are inadequate insofar as they: make minor virtues like civility central; do not adequately address fundamental issues like how to live a good life in the law and how truly to serve clients; and do not recognize that lawyering necessarily involves paradox, the appearance of impropriety, and misunderstanding by the public. In addition, the professionalism literature often depicts the profession in a state of decline without specifically and convincingly telling us when and how the profession was once, *on the whole*, better.

APIRING TO CIVILITY

Official professionalism aspirations should address that to which we, as professionals, aspire. An aspiration is "a strong desire to achieve something high or great." Indeed, the Professionalism Aspirations aim high: "The following standards reflect our commitment to professionalism. These standards memorialize our obligations to each other, our clients and to the people of the State of Minnesota." A leading commentator goes even further: "The Professionalism Aspirations are an enormous positive step affirming our commitment to *the highest professional ideals*."[2] Instead of raising our vision to the stars, however, the Aspirations repeatedly tell us to refrain from being impolite: "We will disagree without being disagreeable. We recognize that effective representation does not require antagonistic or obnoxious behavior." A lawyer should cultivate habits of civility, but surely a lawyer's aspiration should be for something greater than refraining from being obnoxious. A manifesto of professionalism that makes civility its cardinal aspiration risks banality and, worse, confusion over what it means to be a true professional.

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The Aspirations repeatedly stress civility, especially among litigators. There are 36 "Lawyer to Lawyer" Aspirations, 23 "Lawyer and Judge" Aspirations, but only 8 "Lawyer to Client" Aspirations, most of which repeat civility pledges, *e.g.*, "We will advise our clients, if necessary, that they do not have a right to demand that we engage in abusive or offensive conduct and we will not engage in such conduct." The Aspirations embrace other values, particularly fidelity to the administration of justice, but their overarching value is civility. Other jurisdictions have more modestly, and accurately, labeled similar documents, *e.g.*, the "D.C. Bar Voluntary Standards for Civility in Professional Conduct."

The Aspirations are useful, because too many lawyers need remedial education by Miss Manners. However, even if, as Burke said, "manners are morals," manners cannot comprise the lofty aspirations of an ancient and honorable profession. As classical philosophy recognized, temperance (of which civility is but one species) is least among the cardinal virtues, after prudence, justice and fortitude.[3] For good lawyers, manners are largely a byproduct, rather than a goal, of their aspirations. Most lawyers aspire to live good lives in the law, but neither goodness nor the challenge of integrating personal integrity with a profession rife with ambiguities appears in the Aspirations. There is no Aspiration to engage clients about the deep things in life, which a wise counselor will discuss on the right occasion. The estate planner, bond or real estate lawyer will wonder what all the resolutions about litigation proprieties have to do with her aspirations.

ASPIRING TO INOFFENSIVENESS

Should we pledge always to avoid "offensive conduct" or "to always endeavor to conduct ourselves in such a manner as to avoid even the appearance of impropriety?" The Aspirations do not wrestle with the ambiguity and tension inherent in zealous advocacy. Aristotle's view of the virtuous man better suits the litigator: "The man who is angry at the right things and with the right people, and further, as he ought, when he ought, and as long as he ought, is praised." Jack Nordby has gone farther, arguing that a criminal defense attorney has "an ethical duty to be a pariah."[4] It will appear improper when a lawyer defends a corporation whose products may cause harm or when a lawyer argues a client's innocence, even though the lawyer does not believe the client to be innocent. Offense will be taken when a lawyer vigorously cross-examines a vulnerable witness. True, *gratuitous* offensiveness has no place in lawyering. However, the absence in the Aspirations of anything like the "warm zeal" extolled by the 1908 ABA Canons of Professional Ethics creates doubt whether the Aspirations' heart is in the right place.

IDEALIZING THE PAST

A major theme of professionalism literature is that lawyering has declined from a time when lawyers were mannerly gen-

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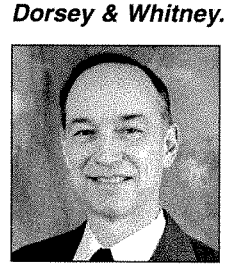

tlemen, favorably distinguished from mere businessmen. Dean Haynsworth reports, and concurs in, a "general agreement" in the literature that "the decline in the level of professionalism in recent years has been pervasive. It has occurred in every form of practice and in all parts of the country."[5] Materialism and abrasiveness may well be on the rise, but before they are equated with a general professional "decline," a few questions are in order, regarding whether in past decades core professional values — the balance of professionalism and money, avoiding conflicts of interest, self-regulation, care for clients and adverse parties, service to society's outsiders, and diversity — were truly on a plane higher than today's.

Were lawyers once less disposed to pad their pocketbooks? Let us not forget that through most of the 20th century the profession used its ethics system and professional status to enforce and justify price-fixing. From 1908 to 1970 ABA Canon of Professional Ethics 12 stated, "In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them." *In re Greathouse*, 248 N.W. 735, 740 (Minn. 1933) condemned solicitation of clients because "Such conduct [is unseemly and] also leads to underbidding." In 1961 an MSBA Practice of Law Committee opined, "It is unethical for a lawyer deliberately, habitually and systematically to perform or offer to perform legal services for less than the amount set forth in a recommended [sic] minimum fee schedule . . . ." The profession stopped using ethics opinions to enforce minimum fee schedules only after *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 (1975) determined that such practices were illegal and "unusually damaging" to the public. The bar's argument in *Goldfarb* that a "learned profession" ought to be able to fix prices was nothing but self-interest hiding in Sunday clothes.[6]

Were lawyers once more concerned to avoid conflicts of interest? Consider *In Re Estate of Wunsch*, 225 N.W. 109 (Minn. 1929). A will contestant appealed because at a bench trial the presiding judge's son represented the successful litigant. The Court dismissed the alleged conflict out of hand: "The fact that a son of the judge appeared for the respondents furnished no legal ground for . . . the requested change of venue, or for the calling for another judge to try the case . . .." Such conduct was not forbidden until the Code of Judicial Conduct was adopted in Minnesota in 1974. As for concern with conflicts of interest generally, until about

20 years ago there was no reported case of disqualification or of public discipline for conflicts between client representations. Until 1985 there was no ethics rule addressed to former client conflicts or to a lawyer suing a client. Today's conflicts rules and practices are far stricter, and more strictly enforced, than those of any previous time.

One hallmark of a healthy profession is self-regulation — would anyone maintain that professionalism has declined in this regard? Until 1955, when Minnesota adopted the 1908 ABA Canons, Minnesota lawyers practiced without formal ethics rules. Minnesota established the Office of Lawyers Professional Responsibility only after the ABA *Clark Report* in 1970 found "a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions." Similarly, after the Watergate convictions and disbarments of numerous prominent lawyers in the mid-1970s, law schools began to take ethics education seriously. More recently, we have recognized that professionalism requires lawyer funding of client security (1987) and legal aid services (1997).

Did the profession formerly care more about clients and about adverse parties? Consider *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). In this famous legal ethics case, defense counsel for two drivers knew — but the plaintiff/passenger, his doctor and his attorney did not — that plaintiff suffered a life-threatening (but remediable) aneurysm in an accident, which was the subject of the suit. Not only did defense counsel not tell plaintiff about his injury, they apparently did not consult their own clients, thereby unilaterally choosing that defendants' alleged negligence might result in a needless death. Defense counsel's failure to consult with clients is most plausibly ascribed to the professional paternalism of the era.[7] Today's lawyers might well divide on whether to tell the plaintiff about his endangerment if defendants would not authorize disclosure, but few would decide without consulting their clients.

Speaking of clients, would anyone contend that indigent criminal defendants and legal aid clients were apt to receive better representation in earlier decades? Despite considerable efforts of the private bar, until the 1970s there was limited systematic legal aid available for the poor. What about the client who wanted a file returned but, until statutory repeal in 1976, was faced with a lawyer's retaining lien?

Turning to lawyers, yesterday's gentlemen's club was no doubt more polite, but was it also not more exclusive? Would most lawyers who are female, minority or Jewish rather practice in some earlier era? Presumably any golden age began after 1877, when the Minnesota Legislature removed the "any *male* person" requirement from the bar admission statute. There were no disciplines for sexual harassment or religious or racial slurs until the late 1980's.[8] More recently, however, Minnesota has become a national leader in professional protection of women and minorities.

Does the "general agreement" about our profession's purported "decline" take account of our manifold progress? Our public defender, legal aid, private *pro bono*, client security and attorney professional responsibility systems are truly outstanding. We export our professional dedication in death penalty cases in Texas and Louisiana and, through Minnesota Advocates, to other countries. Our law schools compete for better models for training lawyers in careers of service. Our membership is far more diverse than ever. We robustly debate how to improve the profession. There are many lawyers practicing today, whose deeds and biographies would tell us all we need to know about being true professionals. Watching them closely and telling other lawyers about them will be our best teacher. The MSBA's excellent history, *For the Record: 150 Years of Law & Lawyers in Minnesota*, (1999), tells us far more about the profession, warts, achievements and all, than literature that mythologizes the past.[9]

Taking a Broader View

Supporters of professionalism and of the Professionalism Aspirations should be applauded for trying to counteract the harshness that makes service of clients and life in the law more difficult. However, the Professionalism Aspirations and professionalism discussions generally could be enriched by taking a broader view — of our true aspirations as professionals and as human beings called to service in the law; and of the accomplishments and shortcomings of our professional history, past and present. To paraphrase the Oxford English Dictionary, "If our sense of mystery is feeble, our aspirational power will be almost nil." Discussion that makes too much of manners, and that idealizes the past, cannot substitute for discourse about our real calling and our true history. □

NOTES

1. *The Aspirations, adopted January 22, 2001, by the Court on the* MSBA's *petition, are found in the October 2000* Bench & Bar *and at www.mn.bar.org. Most of the Aspirations are oddly labeled "Commentary," but are in a form that suggests pledging, e.g., "We will not quarrel over matters of form or style, but concentrate on matters of substance."*
2. *Neil Hamilton, "Attorneys Should Read Professionalism Aspirations,"* Minnesota Lawyer *(March 12, 2001) at 4, emphasis added.*
3. *Thomas Aquinas,* The Summa Theologica, *Q. 66, Art. 1.*
4. *Aristotle,* Nicomachean Ethics, *Bk. IV, Ch. 5. Jack Nordby, "The Lawyer's Ethical Duty to Be a Pariah,"* The Hennepin Lawyer *(March-April 1989).*
5. *Harry J. Haynsworth, "Addressing Professionalism,"* Bench & Bar (August 1997). *The reference to vague time periods, such as "recent years" is common in the professionalism literature. If professionalism writers imposed on themselves the discipline of identifying a specific decade that preceded the alleged "decline," we could survey that era to determine whether the profession really was then in better shape.*
6. *The bar distinguished itself from mere businesspeople by using its professional status to take the lower road. The Virginia bar's minimum fee was 1 percent of home sales price for a title examination. It may be noted that the average Minnesota lawyer in 1970 earned $23,439, the equivalent of $105,775 today.* For the Record: 150 Years of Law & Lawyers in Minnesota, (MSBA 1999), at 72.
7. *Cramton and Knowles, "Professional Secrecy and its Exceptions:* Spaulding v. Zimmerman *Revisited," 83* Minn. L. Rev. *63 (Nov. 1998). The possibility that defense counsel's silence might result in their client becoming the negligent killer of a friend or coworker — a perversion of the duty to seek the client's best interests — was not discussed by the court.*
8. *In re Peters, 428 N.W.2d 375 (1988);* In re Williams, *414 N.W.2d 394 (Minn. 1987);* In re Plunkett, *432 N.W.2d 454 (Minn. 1988).*
9. *The regular columns of Professor Hamilton and of the Lawyers Board staff in* Minnesota Lawyer, *and of Board Director Edward Cleary and* MSBA president Kent Gernander in Bench & Bar *offer considerations of professional responsibility issues which are excellent in quality and unprecedented in breadth.*