

WHY WORRY ABOUT PROFESSIONALISM?

8th Annual Gas and Power Institute

Ritz Carlton, Houston, Texas

September 10, 2009

By

Michael H. Rubin¹

McGLINCHEY STAFFORD, PLLC

14th Floor, One American Place

Baton Rouge, Louisiana, 70808

225.383.9000

mrubin@mcglinchey.com

¹ Mr. Rubin has an active commercial transaction and litigation practice and has lectured nationally on issues of ethics and professionalism. His writings on ethics have been used at law schools around the country. He received the national Burton Award at the Library of Congress for excellence in legal writing for his publication on ethics. He is a member of the American Law Institute and participated in the debates on the ALI Restatement of the Law Governing Lawyers, and he was a member of the ABA House of Delegates during its deliberations on the Ethics 2000 Revision to the Model Rules. He has served as an Adjunct Professor since 1976, teaching Louisiana real property finance law at LSU Law School and ethics at Tulane Law School. He has served as President of the American College of Real Estate Lawyers, the Louisiana State Bar Association, the Southern Conference of Bar Presidents (covering 17 State Bar Associations), and the Bar Association of the U.S. Fifth Circuit Court of Appeals, and has served on the Board of the National Conference of Bar Presidents. He is a member of the American Academy of Appellate Lawyers, the American College of Commercial Finance Lawyers, and is one of only 50 U.S. attorneys in the Anglo-American Real Property Institute. His numerous legal publications have been cited as authoritative by courts at all levels in Louisiana and by the U.S. Fifth Circuit Court of Appeals. A portion of this paper consists of adaptations of the author's prior publications, including: "The Ethical Utah Lawyer: What Are The Limits In Negotiation?," 21 Utah Bar Journal 15 (March/April, 2008); "The Intersection of Conflicts of Interest and Imputation of Knowledge," 22 ABA Probate and Property 53 (Nov. 08); "Ethics," The Construction Lawyer, Fall 2006; and "Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003, "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 The Construction Lawyer 12 (2006); "Breaching the Protective Privy Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA); "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and "A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); and "The Ethics of Negotiations: Are There Any?" 56 Louisiana Law Review 447 (1995).

TABLE OF CONTENTS

WHY WORRY ABOUT PROFESSIONALISM?	1
1. ETHICS vs. PROFESSIONALISM – AN OVERVIEW	1
2. PROFESSIONALISM LAUDED BY COURTS	3
3. A LACK OF PROFESSIONALISM CRITICIZED BY COURTS.....	4
4. WHAT DOES “PROFESSIONALISM” HAVE TO DO WITH NEGOTIATIONS?	7
5. A BRIEF HISTORY OF THE ABA MODEL RULES.....	10
6. THE CURRENT MODEL RULES AND “TRUTHFULNESS”	12
8. MOST BASIC NEGOTIATION: YOUR OWN JOB	17
9. RESTATING LIABILITY: TWO ALI PROJECTS	19
10. A CURIOUS PARADOX	24
11. ETHICS, PROFESSIONALISM, AND TACTICS DURING NEGOTIATION	24
12. THE NOT SO SUBTLE ART OF MISDIRECTION	26
13. NON-LITIGATION NEGOTIATIONS AND LIABILITY TO THIRD PARTIES	31
14. A LOOK AT APPELLATE DECISIONS.....	36
15. WHAT ABOUT FEDERAL DISTRICT COURTS?	42
16. FAMILY LAW NEGOTIATIONS	42
17. NON-TEXAS BAR DISCIPLINARY PROCEEDINGS INVOLVING NEGOTIATIONS	43
18. TAX ISSUES	45
19. CONFLICT OF LAW ISSUES: MULTIJURISDICTIONAL PRACTICE.....	48
20. CAN YOU WITHDRAW IF YOUR CLIENT REFUSES TO DO WHAT YOU SUGGEST, AND HOW SHOULD YOU WITHDRAW – THE “SILENT” v. “NOISY” WITHDRAWAL.....	51
21. CONCLUSION	54

TABLE OF AUTHORITIES

Cases

<i>Alizadeh v. Safeway Stores, Inc.</i> , 910 F.2d 234, 236 (5th Cir.1990)	40
<i>Atwood v. Union Carbide Corp.</i> , 847 F.2d 278, (5th Cir.1988)	40
<i>Avers v. C.I.R.</i> , T.C. Memo 1988-176, 55 T.C.M. 678.....	47
<i>Baldassarre v. Butler</i>	34
<i>Baulch v. Johns</i> , 70 F.3d 813, 818 (5 th Cir. 1995)	40
<i>Baxt v. Liloia</i> , 155 N.J. 190, 197; 714 A.2d 271, 274 (1998).....	34
<i>Beardslee v. Brown</i> , 393 F.3d 1032, 2035 (9th Cir. 2004), <i>cert den</i> 543 U.S. 1096, 125 S.Ct. 982, 160 L.Ed.2d 910 (2005)	4
<i>Birbrower, Montalbano, Condon & Frank, P.C., et al. v. The Superior Court of Santa Clara</i> , 949 P.2d 1 (Calif. S.Ct. 1998).....	48
<i>Capps v. Eggers</i> , 782 F.2d 1341, 1343 (5th Cir.1986).	40
<i>Carmon v. Lubrizol Corp.</i> , 17 F.3d 791, 795 (5th Cir.1994).....	39
<i>Chambers v. Nasco</i> , 115 L.Ed.2d 27, 501 U.S. 1269, 1112 S.Ct. 12 (1991).	36
<i>Coghlan v. Starkey</i> , 852 F.2d 806 (5 th Cir. 1988)	39
<i>Coghlan v. Starkey</i> , 852 F.2d 806 (5th Cir.1988).....	40
<i>Commission on Legal Ethics v. Printz</i> , 416 S.E.2d 720 (W. Va. 1992).....	43
<i>Commission on Legal Ethics v. Printz</i> , 416 S.E.2d at 722.....	43
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384, 406, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).....	39
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384, 413, 110 S.Ct. 2447, 2464-65 (1990)	8
<i>Cummings v. United States</i> , 648 F.2d 289 (5th Cir. Unit A Jun. 1981).....	40
<i>Dirks v. Securities and Exchange Commission</i> , 681 F.2d 824 (D.C.Cir. 1982), <i>reversed sub nom. Dirks v. S.E.C.</i> , 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983)	32
<i>Doe v. A. Corporation</i> , 709 F.2d 1043, (5th Cir. 1983).....	18
<i>Douglas v. DynMcDermott</i>	17
<i>Douglas v. DynMcDermott</i> , 144 F.3d 364 (5 th Cir. 1998)	17
<i>Dungaree Realty, Inc. v. U.S.</i> , 30 F.3d 122 (Fed. Cir. 1994).....	36
<i>DynMcDermott</i>	17, 18
<i>Ferguson v. MBank Houston, N.A.</i> , 808 F.2d 358 (5th Cir.1986)	40
<i>Federal Insurance Co. v. CompUSA, Inc. and James F. Halpern</i> , 319 F.3d 746 (5 th Cir. 2003)	41
<i>First National Bank of Durant v. Trans Terra Corporation International</i> , 142 F.3d 802 (5 th Cir. 1999)	23
<i>Flexible Mfg. Systems Pty. v. Super Products</i> , 86 F.3d 96, 101 (7 th Cir. 1996).	37
<i>Fought & Company, Inc. v. Steel Engineering and Erection, Inc.</i> , 91 P.2d 487 (Hawaii S.Ct. 1998)	48
<i>Fox v. Lam</i> , 25,616 (La.App. 2 Cir. 2/23/94), 632 So.2d 877	6
<i>Garcia v. Teitler</i> , 2004 WL 1636982 (E.D. N.Y. 2004), [<i>aff'd</i> 443 F.3d 202 (2nd Cir. 2006)	4
<i>Harrah's Club v. United States</i> , 661 F.2d 203, 205 (Ct. Cl. 1981).....	48
<i>Hartz v. Administrators of the Tulane Educational fund</i> , ___ F.3d ___, No. 07-30506 (5 th Cir. 4/16/08)	41
<i>Hofer v. Unum Life Ins. Co. Of America</i> , 441 F.3d 872 (10th Cir. 2006).....	3
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 486 (1978).....	17
<i>In Matter of Raspanti</i> , ___ F.3d ___, No. 06-31252 (5 th Cir. 4/14/08).....	38
<i>In Re O'Keefe</i> , 2003-3195 (La. 7/2/04), 877 So.2d 79	5
<i>In Re Solerwitz</i> , 848 F.2d 1573 (Fed. Cir. 1988), <i>cert. den.</i> 488 U.S. 1004 (1989).....	37
<i>In the Matter of First City Bancorporation of Texas, Inc.</i> , 282 F.3d 864 (5 th Cir. 2002)	41
<i>In the Matter of McCabe</i> , 411 Mass. 436, 583 N.E. 2d 233 (Mass. 1991)	48
<i>Jacobellis v. Ohio</i> , 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964)	2
<i>J-Rich Clinic, Inc. v. Cosmedic Concepts, Inc.</i> , 98 Fed.Appx. 444, 448 (6th Cir. 2004).	7
<i>Kaible v. U.S. Computer Group, Inc.</i> , 27 F. Supp. 2d 373 (E.D. N.Y. 1998).....	17
<i>Kaplan & Begy</i>	19
<i>Krieger v. Adler</i>	19
<i>Laidlaw v. Organ</i> , 15 U.S. (2 Wheaton) 178, 179 (1817).	30

<i>Largen v. U.S.</i> , 1995 WL 556621 (M.D. Fla. 1995),	45
<i>Louisiana State Bar Association v. Klein</i> , 538 So.2d 559 (La. 1989).....	33
<i>Matter of Silverman</i> , 113 N.J. 193, 549 A.2d 1225 (1988)	44
<i>McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests</i> , 991 S.W.2d 787 (S.Ct. Tex. 1999)	23
<i>McDougal v. Comm'r</i> , 818 F.2d 453, 455 (5th Cir.1987).....	40
<i>Mickens v. Taylor</i> , 535 U.S. 162, 207 (2001)	3
<i>NASCO, Inc. v. Calcasieu Television & Radio, Inc.</i> , 124 F.R.D. 120 (W.D. La. 1989), affirmed and remanded, 894 F.2d 696 (5th Cir. 1990)	48
<i>Newman v. Fjelstad</i> , 271 Minn. 514, 137 N.W.2d 181 (1965).....	55
<i>Oyler v. Boles</i> , 368 U.S. 448 (1962).....	48
<i>Parker v. Commissioner of Internal Revenue</i> , 117 F.3d 785, 787 (5 th Cir. 1997)	38
<i>Penn-Field Industries, Inc. v. Commissioner</i> , 74 T.C. 720, 723 (1980)	48
<i>Perry v. Pogemiller</i> , 16 F.3d 138, 140 (7 th Cir. 1993).....	37
<i>Petrillo v. Bachenberg</i>	34
<i>Plattenburg v. Allstate Ins. Co.</i> , 918 F.2d 562, 562 (5th Cir.1990).....	39
<i>Pryor v. Gainer</i> , 177 W.Va. 218, 225, 351 S.E.2d 404, 411 (1986).....	43
<i>Public Utilities Com'n of State of Cal. v. F.E.R.C.</i> , 462 F.3d 1027, 1034, (9th Cir. 2006)	3
<i>R.H. Stearns Co. v. United States</i> , 291 U.S. 54, 61-62 (1934)	46
<i>Roadway Express, Inc. v. Piper</i> , 447 U.S. 752, 762-63, 100 S.Ct. 2455, 2462, 65 L.Ed.2d 488 (1980).....	40
<i>RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Company</i> , 58 F.Supp.2d 503, 524 (D. N.J. 1999)	36
<i>Sample v. Morgan</i> , 935 A.2d 1046 (Del. Ch., Nov. 27, 2007)	49
<i>Schiavo ex rel. Schindler v. Schiavo</i> , 403 F.3d 1289, 1302 (11th Cir. 2005), <i>rehearing en banc denied</i> , 404 F.3d 1270 (11th Cir. 2005), <i>rehearing denied</i> , 404 F.3d 1282 (11th Cir. 2005), <i>stay denied</i> 544 U.S. 957, 125 S.Ct. 1722, 161 L.Ed.2d 541 (2005).....	4
<i>Siliezar v. East Jefferson General Hospital</i> , 04-939 (La.App. 5 Cir. 1/11/05), 894 So.2d 373.....	5
<i>Simons v. Shiek's, Inc.</i> , 275 Minn. 132, 145 N.W.2d 548 (1966)	55
<i>Soliman v. Ebasco Services, Inc.</i> , 822 F.2d 320, 323 (2 nd Cir. 1987).	37
<i>Sommers v. McKinney</i> , 287 N.J. Super. 1, 10, 670 A.2d 99 (App. Div. 1996).....	36
<i>South Star Communications, Inc. v. F.C.C.</i> , 949 F.2d 450, 452 (D.C. Cir. 1991).....	37
<i>Spaulding v. Zimmerman</i> , 263 Minn. 346, 116 N.W.2d 704 (1962)	55
<i>State v. Brazile</i> , 75 So.2d 856 (La. 1954).....	17
<i>Stroscher v. Stroscher</i> , 2001-2769 (La.App. 1 Cir. 2/14/03), 845 So.2d 518.....	5
<i>Tech Trans, LLC v. New Jersey</i> , 382 F.3d 295, 309 (3rd Cir. 2004)	6
<i>Toledo Bar Ass'n v. Fell</i> , 51 Ohio St. 2d 33, 364 N.E.2d 872 (1977).....	55
<i>Traveler's Insurance Company v. Liljeberg Enterprises, Inc.</i> , 38 F.3d 1404, 1409 (1994).	38
<i>Travelers Insurance Company v. Liljeberg Enterprises, Inc.</i> , 38 F.3d 1404, 1409 (5 th Cir. 1994)	17
<i>U.S. Bautista</i> , 23 F.3d 726, 732 (2 nd Cir. 1994), <i>cert. den.</i> 513 U.S. 862 (1994)	8
<i>U.S. District Court v. Sandlin</i> , 12 F.3d 861, 866 (9 th Cir. 1993)	17
<i>U.S. v. Plotts</i> , 359 F.3d 247 (3rd Cir. 2004)	4
<i>Virzi v. Grand Trunk Warehouse and Cold Storage Co.</i> , 571 F.Supp. 507 (E.D. Michigan 1983).....	55
<i>Walker v. City of Bogalusa</i> , 168 F.3d 237, 241 (5 th Cir. 1999)	39
<i>Washington v. Davis</i> , 2001 WL 1287125, 13 A.D. Cases 1043 (E.D. La. 2001)	18
<i>Williams v. Phillips Petroleum Company</i> , 23 F.3d 930 (La. 1994)	39
<i>Wilson v. Airtherm Products, Inc.</i> , 436 F.3d 906, 912 (8th Cir. 2006, <i>cert. den.</i> 127 S.Ct. 182, (2006).	3
Other Authorities	
"Sanctions -- Rule 11 -- 'Safe Harbor'" 11 Fed. Litigator 287 (2001)	42
132 N.J. 278, 625 A.2d 458 (1993).	34
21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (Cal. App. 2d 1971).	42
28 U.S.C. §1912	36
28 U.S.C. §1927	7, 36, 39
3 Wage & Hour Cas. 2d (BNA) 1710, 1997 WL 323827 (N.D. Ill. 1997).....	19
463 U.S. at 667. 103 S.Ct. at 3268.....	32
A COURSE OF LEGAL STUDY (2d ed. 1836) by David Hoffman.....	10
ABA Inf. Opinion 86-1518 (1986)	31

Aeschylus, <i>Prometheus Bound</i> , Translation by Paul Roche, Mentor Classics (1962-1964)	28
ALI Lawyer Restatement §51.....	24
ALI Lawyer Restatement §67.....	21, 22, 23
ALI Restatement of the Law Third, The Law Governing Lawyers (2000).	19
Alston, "The Ten Commandments of Professionalism: a Misguided Effort," 4 Prof. Lawyer 24 (2002)	2
Alvarado, "A Radical Proposal For Lifetime Professionalism," 37 St. Mary's L.J. 1053 (2006).....	2
Ames, "Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed," 28 Am. J. Trial Advoc. 531 (2005).....	2
ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Second Edition, pages 1-2 (1992).....	10
Barton, "The ABAA, The Rules, And Professionalism: The Mechanics Of Self Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons," 83 N.C. L. Rev. 411(2005).....	2
Berry, "Civility and Professionalism," Nevada Lawyer (Nov. 2002).....	2
Bien, "A New Way for Courts to Promote Professionalism", 86 Judicature 132 (2002)	2
Bronson, "Professionalism is a Choice," 23 Montana Lawyer (2002)	2
Butler, M. "Rule 11 Sanctions and a Lawyer's Failure to Conduct Competent Legal Research," 29 Cap. U. L. Rev. 681 (2002)	42
C.R. Bowles, Jr., "Noisy Withdrawals: Urban Bankruptcy Legend of Invaluable Ethical Tool?" 20 Oct. Am. Bankr. Inst. J. 26 (2001)	51
Cahn, <i>The Sense of Injustice</i> , Indiana University Press (1964)	31
Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure §1331 <i>History of Rule 11</i> (1990).....	12
Cicero, <i>Selected Works</i> , Grant Translation	29
Cicero, <i>Selected Works</i> , Translated by Michael Grant, Penguin Books, Copyright (1960).....	29, 30
Ciolini, "Redefining Professionalism as Seeking", 49 Loyola L. Rev. 229 (2003)	2
Coleman, "Professionalism Within the Profession," 65 Tex. B.J. 926 (2002)	2
Corn, "Lessons From The Law Of War: A New Perspective On The "Legal Warrior's" Code Of Professionalism," 47 S. Tex. L. Rev. 781 (2006)	2
Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive," 38 S. Tex. L. Rev. 713, 726 (1997).....	33
Craver, 38 S. Tex. L. Rev. 713 (1997).....	25
Creamer, "Professionalism: The Next Level," 79 Tul. L. Rev. 1539 (2005).....	2
Curtis, <i>The Ethics of Advocacy</i> , 4 Stanford L.Rev. 3 (1951)	25
Dahl, <i>Ethics on the Table: Stretching the Truth in Negotiations</i> , 8 Review of Litigation, 173 (1979).	25
Daniel Pope and Helen Whatley Pope, "Ethics and Professionalism: Rule 1.6 and the Noisy Withdrawal," 63 Def. Couns. J. 543 (1996).....	51
Durham, "Promoting The Standards Of Professionalism And Civility," 19 Utah B.J. 8 (2006)	2
Geoffrey C. Hazard Jr., "Rectification of Client Fraud: Death and Revival of a Professional Norm," 33 Emory L.J. 271, 306 (1984).....	54
Gerber, Robert, "Bringing and Resisting Rule 11 Sanctions," 47 AmJur Trials 521	42
Gunnarsson, "Professionalism: Judges' Pet Peeves," 94 Ill. B.J. 20 (2006)	2
H. Sidgwick, <i>The Methods of Ethics</i> , 7 th Ed. (London: Macmillan & Co., 1907).	8
Harris, "The Professionalism Crisis," 3 Prof. Lawyer 1 (2001)	2
Harris, "The Professionalism Crisis--the 'Z' Words And Other Rambo Tactics: The Conference of Chief Justices' Solution," 53 S.C. L. Rev. 549 (2002).....	2
Hodes, <i>Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hiring Guns to Aim Better</i> , 87 Ky. L. J. 1019 (1999).....	25
Johnson, "Applying The Standards Of Professionalism And Civility To The Practice Of Criminal Law, 18 DEC Utah B.J. 28 (2005).....	2
Joseph, G.P., "Recent Decisions: Rule 11, Inherent Power, 28 U.S.C. § 1927," American Law Institute - American Bar Association Continuing Legal Education June 6-7, 2002 21st Century Litigation, SG103 ALI-ABA 293.....	42
Judge Alvin B. Rubin, 35 La.L.Rev. 577, 589, <i>A Causerie on Lawyers' Ethics in Negotiation</i> (1965)	24
Judge Alvin B. Rubin, writing in 35 La.L.Rev. 577 at 589 (1975), <i>A Causerie on Lawyers' Ethics in Negotiation</i> ..	56
Kennedy, Lantin & York, "Professionalism: Dealing With Unprofessional Conduct In Bankruptcy," 36 U. Mem. L. Rev. 575 (2006)	2
Lawry, <i>Central Moral Tradition</i> at 331.....	26
Lawry, <i>The Central Moral Tradition of Lawyering</i> , 19 Hofstra L.Rev. 311, 330	26
LYING, Bok, Sissela, pg. 306 & 307, Vintage Books, Second Edition, 1999	7

Mansfield, <i>Compliance with 1983 Changes In Rules of Civil Procedure</i> , 190 N.Y.L.J. 1 (1983)	12
Maureen Middleton, "Ethical Issues Unique To Appellate Practice," http://www.fmgllaw.com/artapp.htm	36
McMahon, "Declining Professionalism In Court: A Comparative Look At The English Barrister," 19 Geo. J. Legal Ethics 845 (2006).....	2
Michael R. Klein and Alan J. Otsfield, "Noisy Withdrawal," 868 PLI/Corp. 529, Practising Law Institute Corporate Law and Practice Handbook Series, 26 th Annual Institute on Securities Regulation, Nov. 1994.....	51
Morgan, "Real World Pressures on Professionalism," 23 U. Ark. Little Rock L. Rev. 409 (2001).....	2
Morgan, "What Needs Fixing? Toward Abandoning Organized Professionalism, 30 Hofstra L. Rev. 947 (2002)	2
N.Y. County Lawyers' Association Committee on Professional Ethics Op. No. 686 (1991)	31
P.H. Dunn, "How Judges Overrule: Speech Act Theory And The Doctrine Of Stare Decisis," 113 Yale L.J. 493 (2003)	1
Pope and Pope, <i>supra</i> , 63 Def. Counsel J. 543 at 544	51
PROFESSIONAL ETHICS, by Judge George Sharswood (1854).....	10
R. Pothier, <i>Traite Du Contrat de Vente</i> , 2 OEUBRES de Pothier 106 (M.Dupin. Ed. 1823).....	30
Ravenal, "The Contagion of Example: Attacking the Root of the Problem in Lawyer Professionalism 31 Federal Lawyer (2002)	2
Rhode, "Profits and Professionalism," 33 Fordham Urb. L.J. 49 (2005).....	2
Richard W. Painter, "Rules Lawyers Play By," 76 N.Y.U. Law Rev. 665, 696 (2001)	20
Rizzardi, "Defining Professionalism: I Know It When I See It?" 79 Fl. B.J. 38 (2005)	2
Robert J. Condlin, <i>Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role</i> , 51:1 Maryland L.Rev. 1, 71.....	26
Rule 10b-5. 681 F.2d at 846	32
Schofield, "Practice & Professionalism Tips From A Mediator, Arbitrator And Appraiser," 1 Trial Advoc. Quarterly (2006)	2
SE63 ALI-ABA 79; 6 Fed. Litigator 155 (2002), "Remedies Unfiled Document May Lead to Rule 11 Sanctions" ..	42
Soocher, S., "Rule 11 Sanctions in 'Lion Sleeps' Case " 3 Ent. L. & Fin. 1 (2000).....	42
Sowle, <i>Professionalism: Lip Service or Life Style</i> , 59 Jan. Or. St. B. Bull. 33 (1999).	25
Spivey, "Ethics: Lawyering and Professionalism," 33 St. Mary's L.J. 721 (2002).....	2
<i>Studies in Shemot</i> , Book 2, by Nehama Leibowitz.	27
Sturman, "Professionalism: We Know it When We See It," 6 Nevada Lawyer (2002)	2
Uelman, "The Evils Of "Elasticity": Reflections On The Rhetoric Of Professionalism And The Part Time Paradox In Large Firm Practice," 33 Fordham Urb. L.J. 81 (2005).....	2
Vincent, "Aspirational Morality: the Ideals of Professionalism, April Utah B.J. 24 (2002)	2
Wangen, "Professionalism and Other Myths," March Oregon St. Bar Bulletin 78 (1999)	2
Wetlaufer, <i>Lying in Negotiations</i>	27
Wetlaufer, <i>Lying in Negotiations</i> , 75 Iowa L.Rev. at 1272.	26
Wetlaufer, <i>The Ethics of Lying in Negotiations</i> , 76 Iowa L.Rev. 1219 (1990).....	25
White, MacElvelly "Ethical Limitations on Lying in Negotiations," 1980 American Bar Foundation RES.J. 926, 928	8
White, <i>Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation</i> , 1980 Am. B. Found. RES.J. 926.....	25
Wittmann, "Should "Professionalism" Be Mandatory? Can Civility Be Taught?", 45 La. B. Journal 19 (1997)	2
Wright and Miller, <i>id.</i>	12

Rules

E2K Model Rule1.16.....	51, 52
-------------------------	--------

WHY WORRY ABOUT PROFESSIONALISM?

By:

Michael H. Rubin¹

1. ETHICS vs. PROFESSIONALISM – AN OVERVIEW

There has been a rampant rise in regard for the concept of “professionalism.”

There has been reams of paper in journals and law reviews devoted to discussing and parsing the distinctions “ethics” and “professionalism.” The discussion has not been confined to Texas, although the Texas Lawyers Creed stands in contrast to the Texas Disciplinary Rules of Professional Responsibility.²

Across the nation, there are non-binding “codes of conduct” or “codes of civility” or “lawyer’s creeds” or “codes of professionalism.” This mushrooming mound of aspirational goals, ubiquitous promises of mannered behavior, and grand phrases indicate that the legal profession deems itself to be in a crisis. There are a plethora of publications professing the palliative of professionalism as a panacea for the perils of practice.³

¹ Mr. Rubin has an active commercial transaction and litigation practice and has lectured nationally on issues of ethics and professionalism. His writings on ethics have been used at law schools around the country. He received the national Burton Award at the Library of Congress for excellence in legal writing for his publication on ethics. He is a member of the American Law Institute and participated in the debates on the ALI Restatement of the Law Governing Lawyers, and he was a member of the ABA House of Delegates during its deliberations on the Ethics 2000 Revision to the Model Rules. He has served as an Adjunct Professor since 1976, teaching Louisiana real property finance law at LSU Law School and ethics at Tulane Law School. He has served as President of the American College of Real Estate Lawyers, the Louisiana State Bar Association, the Southern Conference of Bar Presidents (covering 17 State Bar Associations), and the Bar Association of the U.S. Fifth Circuit Court of Appeals, and has served on the Board of the National Conference of Bar Presidents. He is a member of the American Academy of Appellate Lawyers, the American College of Commercial Finance Lawyers, and is one of only 50 U.S. attorneys in the Anglo-American Real Property Institute. His numerous legal publications have been cited as authoritative by courts at all levels in Louisiana and by the U.S. Fifth Circuit Court of Appeals. A portion of this paper consists of adaptations of the author’s prior publications, including: “The Ethical Utah Lawyer: What Are The Limits In Negotiation?,” 21 Utah Bar Journal 15 (March/April, 2008); “The Intersection of Conflicts of Interest and Imputation of Knowledge,” 22 ABA Probate and Property 53 (Nov. 08); “Ethics,” The Construction Lawyer, Fall 2006; and “Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?” ALI-ABA Labor Seminar, Spring 2003, “The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties,” 26 The Construction Lawyer 12 (2006); “Breaching the Protective Privilege Wall: Expanding Notions of Real Estate Lawyers’ Liability to Non-Clients,” The ACREL Papers, Fall 2002 (ALI-ABA); “From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and “A Consideration of Some Unanswered Questions,” The ACREL Papers, Fall, 2001 (ALI-ABA); and “The Ethics of Negotiations: Are There Any?” 56 Louisiana Law Review 447 (1995).

² The Texas Disciplinary Rules of Professional Conduct are contained in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995).

³ The reader will note a definite tilt towards alliteration in this paragraph. As Justice Cardozo noted, in discussing legal opinions (but using a concept applicable to all effective writing): “The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim.” P.H. Dunn, “How Judges Overrule: Speech Act Theory And The Doctrine Of Stare Decisis,” 113 Yale L.J. 493 (2003), citing Benjamin N. Cardozo, Law and Literature and Other Essays and

What is the nature of the apparent crisis that has caused the rise in “professionalism” concerns and why does it require the reaction that has been engendered?

A basic problem is in the use of the term “professionalism.” No standard definition of “professionalism” is available. Writers of periodical and law review articles cannot agree on any particular and limited definition;⁴ the reaction is more akin to the famous statement of Justice Potter Stewart, who, in speaking of pornography, said “I know it when I see it.”⁵

On the one hand, there are those who argue that the entire concept of professionalism is illusive and self-defeating, a tacit admission that the Bar either cannot or should not make its members abide by any standards more stringent than that imposed by statutes and the Rules of Professional Conduct.⁶ Contrast these views to those who advocate that professionalism can and should be taught, that professionalism is what you ought to do while ethics are what you are

Addresses 9 (1931).

For essays and articles on professionalism, in addition to those noted in the next footnote, see: Durham, “Promoting The Standards Of Professionalism And Civility,” 19 Utah B.J. 8 (2006); McMahon, “Declining Professionalism In Court: A Comparative Look At The English Barrister,” 19 Geo. J. Legal Ethics 845 (2006); Corn, “Lessons From The Law Of War: A New Perspective On The “Legal Warrior’s” Code Of Professionalism,” 47 S. Tex. L. Rev. 781 (2006); Kennedy, Lantin & York, “Professionalism: Dealing With Unprofessional Conduct In Bankruptcy,” 36 U. Mem. L. Rev. 575 (2006); Schofield, “Practice & Professionalism Tips From A Mediator, Arbitrator And Appraiser,” 1 Trial Advoc. Quarterly (2006); Gunnarsson, “Professionalism: Judges’ Pet Peeves,” 94 Ill. B.J. 20 (2006); Alvarado, “A Radical Proposal For Lifetime Professionalism,” 37 St. Mary’s L.J. 1053 (2006); Johnson, “Applying The Standards Of Professionalism And Civility To The Practice Of Criminal Law,” 18 DEC Utah B.J. 28 (2005); Rhode, “Profits and Professionalism,” 33 Fordham Urb. L.J. 49 (2005); Uelmen, “The Evils Of “Elasticity”: Reflections On The Rhetoric Of Professionalism And The Part Time Paradox In Large Firm Practice,” 33 Fordham Urb. L.J. 81 (2005); Creamer, “Professionalism: The Next Level,” 79 Tul. L. Rev. 1539 (2005); Ames, “Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed,” 28 Am. J. Trial Advoc. 531 (2005); and Barton, “The ABA, The Rules, And Professionalism: The Mechanics Of Self Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons,” 83 N.C. L. Rev. 411(2005).

⁴ Rizzardi, “Defining Professionalism: I Know It When I See It?” 79 Fl. B.J. 38 (2005); Ciolini, “Redefining Professionalism as Seeking,” 49 Loyola L. Rev. 229 (2003); -Ravenal, “The Contagion of Example: Attacking the Root of the Problem in Lawyer Professionalism” 31 Federal Lawyer (2002); Bien, “A New Way for Courts to Promote Professionalism,” 86 Judicature 132 (2002); Coleman, “Professionalism Within the Profession,” 65 Tex. B.J. 926 (2002); Sturman, “Professionalism: We Know it When We See It,” 6 Nevada Lawyer (2002); Bronson, “Professionalism is a Choice,” 23 Montana Lawyer (2002); Vincent, “Aspirational Morality: the Ideals of Professionalism, April Utah B.J. 24 (2002); Harris, “The Professionalism Crisis--the ‘Z’ Words And Other Rambo Tactics: The Conference of Chief Justices’ Solution,” 53 S.C. L. Rev. 549 (2002); Spivey, “Ethics: Lawyering and Professionalism,” 33 St. Mary’s L.J. 721 (2002); Harris, “The Professionalism Crisis,” 3 Prof. Lawyer 1 (2001); Morgan, “Real World Pressures on Professionalism,” 23 U. Ark. Little Rock L. Rev. 409 (2001); Berry, “Civility and Professionalism,” Nevada Lawyer (Nov. 2002).

⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (concurring opinion).

⁶ See, e.g., Wittmann, “Should “Professionalism” Be Mandatory? Can Civility Be Taught?”, 45 La. B. Journal 19 (1997); Alston, “The Ten Commandments of Professionalism: a Misguided Effort,” 4 Prof. Lawyer 24 (2002); Morgan, “What Needs Fixing? Toward Abandoning Organized Professionalism, 30 Hofstra L. Rev. 947 (2002); and Wangen, “Professionalism and Other Myths,” March Oregon St. Bar Bulletin 78 (1999).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Why Worry about Professionalism?

Also available as part of the eCourse

[Ethics: Professionalism; and Avoiding Malpractice in a Down Economy](#)

First appeared as part of the conference materials for the
8th Annual Gas and Power Institute session

"Ethics, Part I: Why Worry about Professionalism?"