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PROFESSIONALISM
Are We Losing It?

by the Honorable Edwin J. Peterson
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I was elected Chief Justice of the Supreme Court on July 19, 1983, and took office September 1.

Shortly after my election, I began to receive requests for speeches. I determined to discuss what I choose to call "professionalism," a term which, I suspect, has a different meaning for each of us. I have in mind that indefinable ingredient which goes toward making the practice of law a truly uplifting experience; an ingredient which arises from unwritten, but nevertheless always present rules, the violations of which create no penalties or liabilities and little or no social stigma, but are still violations.

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For years, as I would travel around the country to a bar meeting or deposition, I would hear horror stories about the practice of law in New York or Chicago, or elsewhere. The stories concerned the way in which lawyers treated each other in representing their clients. Continual mistrust permeated the legal profession, I was told, and I always returned home with the feeling that Oregon was a better place to practice law.

I am not as confident in that feeling anymore. I perceive a trend toward the breakdown of the mores which have made the practice of law in Oregon truly outstanding. If this trend continues, it will affect more than the atmosphere in which we live and work. I see the breakdown of mutual respect as a threat to the effectiveness of the legal profession and as an obstacle to our ability to effectively represent the public.

Let me give some specific examples. While some of us were at the bar's annual meeting in September we received, at the beginning of the business session, a handout from the Professional Liability Fund concerning their caseload, the nature of their claims, and the cost of administering and settling the claims. I was astounded to learn that in about 90 percent of the cases involving lawsuits against lawyers for malpractice, the first notice of the claim by the PLF was the actual filing of the summons and complaint.

It is not illegal to sue someone without first putting them on notice, nor is it unethical or immoral. Why, then, should I be concerned?

Let me give a more concrete example, one more familiar to each of us. For years, it was the custom in the state, absent good reason to the contrary, for lawyers who wished to take deposition of their opponent's client, to call their opponent and agree to a setting at a mutually convenient time and place.

During the last several years, however, the trend seems to be toward depositions by notice, with lawyers setting the deposition of their opponent's client at their own convenience, sometimes at a time or place which the noticing lawyer knows to be inconvenient to his or her opponent or to the opponent's client. In one case, an Oregon attorney noticed the deposition of his opponent's client, who lived in the midwest, for December 24.

I again ask: is such conduct illegal? No. Unethical? I'm not sure. See DR 7-102 (A) (1). Is such conduct immoral?

There has been a noticeable change in attitude in the bar toward the assertion of claims and toward the procedures which

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should be followed in resolving those claims. My perception is that the change in attitudes and practices *in no way increases the likelihood that the client will prevail.* Why, then, should such conduct be pursued? Why does such conduct exist at all?

Let me state what I think we would all agree to be the appropriate rule:

When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail.

Over the decades, there has developed a body of rules, largely unwritten rules, which create a professional atmosphere within the legal profession, resulting in a better legal and social environment, and which benefit the public and clients.

Here's an example. Many of you know of a body known as the American College of Trial Lawyers, a group of outstanding lawyers. Membership in the American College of Trial Lawyers is by invitation only. Some 20 years ago the College of Trial Lawyers promulgated a Code of Trial Conduct, paragraph 13 of which reads:

> *"The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments and admission of facts. In such matters no client has a right to demand that his counsel shall be illiberal or that he do anything therein repugnant to his own sense of honor and propriety."*

Another section, 14, reads:

> *"A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom."*

These paragraphs codify a small part of the largely unwritten body of rules which govern the conduct of lawyers in their profession. The existence of these rules makes the resolution of disputes more efficient, and makes the practice of law an indescribably better profession.

Let me return to the example of the inconvenient notice of deposition. Does such conduct "maximize the likelihood that the client will prevail?" Of course not. Is it ethical for the lawyer to act in a manner which is accommodating to the opponent and to the opponent's client? Of course it is, because the result of such conduct on the part of the lawyer is to make the resolution of disputes, *for all persons*, more efficient.

Let me restate the rule: When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, *maximize the likelihood that the client will prevail.* Actions taken to make life miserable for others do not normally "maximize the likelihood that the client will prevail." The truth is that such actions tend to reduce the likelihood of settlement short of trial, and seldom increase the likelihood of success in trial.

Underlying the high requirements of absolute honesty and integrity upon which our profession is founded is the tier of rules — unwritten, for the most part — which enrich our professional lives and make the performance of our services less costly to those we serve. If we proceed with a dog-eat-dog attitude, as is the case in some areas of the country, the simple courtesies which lubricate our actions and enrich our daily lives will cease to exist. And we will creak along, with ever-larger costs to our clients being one inevitable result, growing resentment of lawyers another, and even more public disenchantment with the legal profession a third consequence of our actions.

The point is that a lawyer can be a firece fighter without being a disagreeable dastard.

I speak of more than group etiquette or lawyers' customs of behavior. Economists tell us that in other economic groups, informal rules arise because ethical behavioral codes have favorable economic aspects if four conditions are met:

1) Members of the group must perceive benefits from adherence to the rules.

2) The informal rules must be relatively stable.

3) The informal rules and customs of behavior must be fairly simple and unambiguous.

4) There must exist some adequate means for enforcing the informal rules, usually group social pressure.

If the conditions are met, the economists tell us, the entire group will have lower transaction costs, lower costs of policing, lower prices, greater profits, and ultimately, more effective service to the public.

These are economic realities, not pious preachments. These realities are of particular importance to lawyers, for much of our work is involved in disputation — the precursor to the resolution of disputes — and almost all of our work, even office practice, involves the assertion or protection of our clients' rights and interests.

I am not lamenting the passage of some outmoded nineteenth century legal chivalry. I maintain that the representation of clients is best made and most effective in an environment in which mutual respect, trust, and courtesy by lawyers are the permeating ingredients.

Quite honestly, the foregoing discourse is the vestigial remains of what began as a "give-'em-hell" oration. The more I thought about the subject the more I became convinced that the subject involved more than simple lawyer courtesy. Some of us, out of a misperception of our role as advocates, are forcing other lawyers and their clients to perform unnecessary or inconvenient tasks. Our services to our clients are no more effective as a result. Indeed, the cost to our own clients is greater.

So, let us knock off the useless interrogatories, the silly subpoenas duces tecum, and get to the business at hand — effective resolution of our clients' problems.