

REFLECTIONS ON STRIVING FOR THE ETHICAL AND PROFESSIONAL PRACTICE OF LAW

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December 5, 2014

As I have been preparing for what I expect to be the last ethics program I will teach here in Arizona, as well as the closing of my private law practice, I have spent a great deal of time thinking about what it has meant for me to be a lawyer. Such reflections for me inevitably lead to thoughts about what it means in the world we live in today to be an ethical and professional lawyer.

It is not easy. There are many things that pull and tug at lawyers that make consistently ethical and professional practice a challenge at best and overwhelming at worst. This is not intended to provide an excuse from unethical and unprofessional conduct, but rather a recognition that it is something that takes attention, thought and effort. Over the course of this reflective essay I will talk about why, and I will talk about things that lawyers can do to get there.

Having now stated my purpose I want to be very clear about two things that I will not do here. First, I have no intention of preaching any particular course of action. Such an approach requires one to sit in judgment of others, believing that he or she knows the answer and has the right to tell others how they must act. I believe in the ethics rules and the professionalism principles, and further believe that they are the proper guides to ethical and professional conduct. But I recognize as well that there is more to life and to

the life of a lawyer than those rules and principles and that what in the end drives the behavior of any particular person is a complicated combination of personal beliefs about right and wrong, the genetics and biology that set us in motion and constrain our behavior, the demands of everyday life, personal and professional, and a myriad of other idiosyncratic factors. In my teaching I have always constrained myself to talk about the rules and principles in the context of the challenges to abiding them, and to talk about the consequences for the client, the public and the lawyer of deviating from them. The goal in the end is to be thoughtful about the choices we make and to be prepared to be held accountable for those choices.

Second, I am not in this reflective essay holding myself out as an example of anything. I am just a person, and pretty average at that as I look out and compare myself with my colleagues. I have my own strongly held beliefs about right and wrong, capabilities and limitations set by my own genetics and biology, and pressures on me to act and forebear in any given instance. I cannot say and would not for a moment suggest that in twenty-nine years of practice I have always complied with every rule and abided every principle. What I can say, and what I would urge on others as a goal, is that I have tried very hard to make compliance and abidance part of my everyday life as a lawyer; that I have taken responsibility for and expressly acknowledged my deviations, that I have tried not to make the same mistake too many times, and further always to make amends when the circumstances presented an opportunity to do so.

Holding myself out as I do as a teacher of ethics I have had to deal from time to time with lawyers chiding me, and worse, for what they construed as unethical or professional practice. Who am I, they would say or imply, to teach ethics and professionalism but not to practice it? I cannot think of an instance, even now upon reflection, where I agreed with them that the conduct in issue was unethical or unprofessional. At the same time, the criticism was then and continues now in each instance to be extraordinarily painful and to lead me into days, literally for self-doubt and self-criticism for what I did to bring on such accusation. Each time I came out of that experience determined more than ever to comply and abide, and hopefully at some level I have been true to that determination.

I also came out of that experience each time with three observations and lessons: first, how hesitant we should all be to sit in judgment of others; second, to see, regrettably, how readily lawyers will use the rules and principles as swords to attack others; and third to appreciate how valuable the rules and principles are as guides to actions which make us better lawyers individually and a better profession collectively.

The remainder of this reflective essay will try to express in more detail what I have learned as I have watched myself and others over twenty-nine years of practice, as I have listened to questions and comments in the hundreds of ethics and professionalism seminars and many law school ethics courses I have taught over the past fifteen years, and as I have reflected over the past few months as I have prepared for this, my final day

teaching ethics in Arizona.

1. What Does it Mean to be a Lawyer?

The simplest and obvious answer to this question is that a licensed attorney can represent individuals and organizations in court. This is, as a practical matter, what distinguishes being a lawyer from every other profession.

My purpose in raising this issue, however, is not to focus on this legalistic distinction between the permissible scope of the practice of law as compared with the permissible scope of the practice of other professions. Rather, it is to think about why we practice law in the first place and how the personal goals of lawyers bear on ethical and professional practice.

The ethical rules and professionalism principles are not that challenging as guidelines for practice. There are levels of complexities to the rules and subtleties, to be sure. But no lawyer would argue about the most basic things the rules and principles ask of us: keep secrets, avoid conflicts, be honest, don't steal, show respect for the dispute resolution process (especially the courts). Yet lawyers run afoul of even these most basic rules and principles, and we are left to ask why.

Certainly the goals lawyers have in mind for themselves as they enter and then engage in the practice of law play an important role here. The acquisition of wealth, the pursuit of power, the ability to be in control over one's life, recognition among peers, accolades in the public media and the like can be achieved practicing within the rules and

principles.

But the rules and principles can get in the way as well, if not generally then certainly in the moment. The media, fiction and non-fiction, is awash with illustrations of lawyers seeking advancement toward such goals being frustrated by even the most basic of the rules and principles. There is nothing sinister about Vinnie Gambini wanting to help his nephew out of a terrible situation, and in the process prove to himself and others that he is capable of being a good lawyer. In order to do so, however, he must first be permitted to represent his nephew in the Alabama criminal courts. Fearing that having failed the Bar five times and having practiced only civil law, and that for a short period of time, would not impress the Judge sufficiently to allow him to appear pro hoc vice in an Alabama criminal court he takes the expedient step of exaggerating to the point of lying about his credentials. The lie is successful, and he is allowed to represent his nephew. He then proceeds to demonstrate great cunning and skill in achieving real justice. We are left to applaud, literally, his accomplishments, having forgotten or forgiven the fact in order to achieve his great goals he had to lie to the Court.

We all talk in terms of sacrifices that we have to make to achieve our goals. That internal discourse we have about sacrifices should include how we deal with the impediments the ethical rules and professionalism principles present in accomplishing those goals. These impediments confront goal seeking behavior inevitably. They cannot be avoided. When that happens lawyers must ask themselves how important the goals

they are seeking are relative to rules we agree to follow and the principles to which we are asked to aspire when we accept the license to practice law.

2. Everyday Challenges to Ethical and Professional Practice

The goals lawyers set for themselves are the macro-level challenges to ethical and professional practice. Every day lawyers confront micro-level challenges in the details of the daily practice of law.

When I teach ethics to law students, something I have been doing two semesters a year for the past ten years or more, I start out most every class with what I call the “ethical issue of the day.” These are hypotheticals or illustrations based loosely on an ethical issue I confronted myself, an ethical issue about which another lawyer sought my suggestion, or something I witnessed another lawyer doing. There were many reasons I used these illustrations in class, not the least of which is to give the students a chance to see how ethical issues arise and can be dealt with in everyday practice.

The most important reason I bring up the “ethical issue of the day,” however, is that I want the students to appreciate just how readily and frequently lawyers are confronted with ethical and professionalism issues in their practice. Ethics and professionalism are not abstract concepts that we have to deal with just occasionally or from time to time. They come up continuously in practice, perhaps not every day but certainly with great frequency.

Most lawyers attend to the large and unavoidable problems, like questions

about whether taking on a new client is permitted when the new client's interests may be in conflict for a former client the attorney represented. Lawyers may give less thought to things they do more reflexively, like meeting with a client in a busy restaurant to talk about progress in a case, billing a client an extra and unearned tenth of an hour or two for amorphous activities like file review and legal research, avoiding an unwanted telephone call by instructing a staff person to say the lawyer is busy or out of the office when in fact the lawyer is neither, and encouraging a witness not to talk with the other side.

Few lawyers spend time reading the rules and principles. It is not particularly realistic to expect lawyers to do so. Indeed, that is one of the main reasons, if not the main reason for the requirement to earn three hours of ethics credits a year. Lawyers do well to be reminded of their obligation to act ethically and to aspire to be professionals in their everyday practice.

These brief experiences with the things that satisfy the ethics requirement may not be enough to remind the lawyer when they come across the myriad of situations in the everyday practice of law that raise ethical and professionalism principles. Better that lawyers have a working understanding or at least appreciation of the principles that underlie ethics and professionalism. Such understanding may not always lead to ethical and professional behavior, but it may cause a red flag to pop up when a lawyer is about to take action and lead to the momentary thought in the situation presented that will result in a choice consistent with the rules and principles.

This is not the place to set forth those principles; that is left to another writing or presentation. One example will make the point. The “3” series of rules, the advocacy rules, guide lawyers in their role as litigants in dispute resolution proceedings, and particularly the courts. The rules in this section are plentiful, detailed and in some instances rather complicated. There is a core interest that underlies all of these rules, however, an interest in cases being decided on their merits. When confronted with an issue in the course of being an advocate lawyers who keep this core interest in mind will be sensitive to ethical and professionalism issues when they arise and will have at least an idea about the course of action required or encouraged by the ethics rules and professionalism principles.

3. Genetic and Biological Limitations

The first instinct most people have when presented by potentially or actually troubling conduct by a lawyer, whether unethical or unprofessional, is to attribute purposeful or intentional action on the part of the lawyer. This is certainly the image created by the fictional media about lawyers, as bad people seeking to advance their own interest to the detriment of others. That certainly is true of some lawyers, but does it explain all of the behavior that concerns us when we think about the ends being sought by the ethics rules and the professionalism principles.

As I have studied neurology over the years, and especially recently with the greater appreciation of the genetically based and biologically discreet differences among

individuals in how the brain drives behavior, I have become more inclined to look past the attribution of someone as a “bad” person and more inclined to think about what is driving the concerning behavior. This is not to excuse unethical and unprofessional behavior when it happens. Rather, the point is to recognize that there may well be more to concerning behavior than ill motivation and therefore the need to think about explanations and solutions that consider the totality of the individual.

For example, over the course of my practice I have from time to time caused some consternation on the part of co-counsel and clients by doing things that need to be done at the last minute. Such behavior on my part could implicate E.R. 1.3, concerning diligence in the handling of client cases, or E.R. 3.2, diligence in processing cases through the dispute resolution mechanism. For many years I chided myself to get things done sooner and the timing of my work has improved as I have pressed myself toward that end. Yet there continue to be times when I find myself pressed at deadlines, completing motions, drafting letters and like activities. In reflecting on why that happens I find some solace in the fact that I have good intentions, work hard as a general proposition and like most lawyers have to prioritize things that need to be done, leaving some things to be done last.

But as I have looked more closely at myself I have recognized that there is something else at work, something over which I seem to have less ability to manage away as a problem. There is something about the way that I think about problems that is

potentiated by the demands of an approaching deadline. Try as I might to work through a problem or issue early, I find in some instances that I have difficulty thinking the matter through very much in advance of the deadline. I have not sought a clinical explanation for why this is so. I have speculated that probably I suffer from some aspect of attention deficit disorder, not much thought about and certainly not something regularly diagnosed during the era when I went to primary and secondary school, in the 1950's and 1960's.

There are solutions to problems grounded in biological and genetic sources. There are compensatory techniques one might try, behavioral counseling that may be helpful, medications that can help with planning and attentiveness. Or perhaps just knowing that this underlying conditions are present may help the lawyer understand his or her own behavior and organize themselves more productively. The point is to take these matters into consideration as we think about how we can abide our ethical and professionalism obligations and, over the long run, expand our collection of solutions when ethical violations do occur so they we fashion solutions that really will deal with the underlying problem.

4. Practicing Law is Emotionally Wearing

Emotional wear and tear is such a fundamental reality of the everyday practice of law that lawyers rarely talk about it. There are some, and an increasing number it seems, of continuing legal education classes about stress, but nothing that even begins to address the pervasiveness of the emotional damage lawyers experience daily in

their practices.

The consequences of this emotional wear and tear have not gone unnoticed. Addictive behaviors, most prominently among them substance abuse, are recognized by the Bar and addressed both through voluntary and diversion programs. In other words, we deal with the results of emotional wear and tear when they reach the point of seriously dysfunctional behavior.

One could make an argument for trying to recognize the consequences of emotional wear and tear sooner, and come up with solutions to these problems. Sensible as this may seem in the abstract, it raises privacy issues that would be and should be of great concern. We are already a highly regulated profession. It would be fair for lawyers to ask how much more of their Constitutional and civil rights they should be asked to give up to engage in this profession. This is another debate for another time.

My point here is for lawyers to consider the impact of emotional wear and tear far sooner than when the consequences begin manifesting themselves in dysfunctional behavior. In its earliest stages it is entirely predictable that lawyers will seek means of dealing with the activities that cause emotional damage as they try to regulate their lives to a point where the emotional damage is lessened generally. Such activities may well involve conduct that approaches or crosses the border into unethical and unprofessional activity. For example, not returning calls to avoid dealing with challenging clients or lawyers; exaggerating the risk a client faces if a case goes to trial to

encourage settlement and so the removal of a case from the caseload and the receipt of funds to deal with a challenging financial circumstance; doing superficial work on a motion just to get it done and out rather than put in the hours that really are needed to produce the quality product that the circumstance requires.

The solution in these situations is to evaluate the resources available relative to the volume of work generally and the level of stress presented by the collection of cases specifically. The result of that evaluation may lead to the adoption of such simple solutions as reducing the volume and content of the caseload, to more challenging solutions like spending more funds on resources to do the work at the loss of profit, to the most challenging solutions like recognition that a change in practice setting is needed. The point is to be thoughtful about how emotional wear and tear may drive one to unethical and unprofessional practices.

5. The Most Common Conflict Problem

We have six rules dealing with conflicts of interest, E.R. 1.7 through E.R. 1.12. This reflects a recognition of both the pervasiveness of conflicts of interests and the complexity conflict of interest issues presented.

It seems that the greatest attention is paid to conflicts arising where two current clients have conflicting interests (E.R. 1.7(a)(1)) or when the interests of a current client conflicts with the interest of a former client (E.R. 1.9). My impression, however, is that far and away the most common conflict of interest problem is presented when the

interests of the client are in conflict with the interests of the lawyer. (E.R. 1.7(a)(2))

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or **by a personal interest of the lawyer.**

(Emphasis added). When the breadth and depth of a lawyer's personal interests are considered, extending as they do across the lawyer's personal and professional lives, it is easy to see how this very likely is the most prevalent of the conflict of interest problems.

There are two important points to be made here. First, the fact that a lawyer has a personal interest bearing on a representation does not mean this ethical rule is implicated. As set forth in the rule, there must be a "significant risk" that the lawyer's representation of the client will be "materially" limited by the lawyer's personal interest. Thus, when these personal interest issues arise the lawyer may consider whether the risk is significant and whether the quality and content of the representation will be limited in a material way.

As an aside, this is a good point to remind lawyers that we have a rule, E.R. 1.0, that provides definitions that may be more or less helpful in understanding the scope of an ethical rule. Unfortunately, neither the term "significant" nor the term "material" are defined in E.R. 1.0.

The second important point is that when the risk is significant and the representation may indeed be materially limited, then the lawyer should proceed to engage in a conflict of interest analysis to determine whether waiver is possible, and, if

so, seek consent for waiver of the conflict. To that end lawyers will benefit from the guidance provided by comment 2 to E.R.1.7:

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

The best advice to lawyers, from a risk management standpoint, is to err on the side of caution and address these “personal interest” problems with the client when they arise in practice, even when there may be uncertainty on the part of the lawyer about whether the risk is significant and whether the limitation is material.

6. People Centered Practice

Over the course of a semester long course on ethics there is time to explore with law students how some concepts and conceptualizations work themselves through the ethics rules and professionalism principles. One such conceptualization I find to be especially helpful is to think about the practice of law generally, and about ethics and professionalism in particular, from the perspective of the public, the client and the lawyer.

All of the ethics rules and professionalism principles can be understood in the context of the policy interests they embody and reflect. For example, confidentiality,

E.R. 1.6, is important because it provides a context in which clients, feeling secure in their privacy, will be forthcoming with the full scope of information lawyers need to assist them with their troubles. From the public's perspective it serves the policy goal of disputes being resolved on their merits. We can be confident if all of the applicable evidence is before the decision maker then the outcome is credible because all interests have been considered. Individual disputes can be and are resolved and social unrest is minimized or avoided. The reporting rule, E.R. 8.3, serves the policy goal of gaining confidence with the public in the integrity of the legal profession, with lawyers required where egregious circumstances warrant to report misconduct to the Bar for assessment and, if appropriate, corrective action and/or sanctions.

My experience has been, though, that it is a challenge to get law students during ethics courses and lawyers in ethics CLE programs, to look at the rules and principles, and violations of the rules and principles, from these different points of view. They readily see how their conduct as lawyers may be affected by the rules and principles, and they can relate to the impact of the consequences of rule violations on their own lives. They have trouble seeing the rules and principles from the perspective of the clients and the public however, even when pressed to think about it in those terms.

Years ago I thought how educational and insightful it would be to have law students taking ethics courses make journal entries about depictions of lawyers in the fiction and non-fiction media engaged in activities that implicated ethics rules and

professionalism principles. The assignment required students to describe briefly in their journal entries the lawyer's behavior, identify the applicable rule(s) and principle(s) and then project how the depiction might affect how clients, prospective clients, or the public generally might view lawyers and the legal profession in light of what was depicted. The vast majority of the students did very well with the first two parts of the journal assignment, but had extraordinary difficulty looking at these media depictions from the perspective of clients, prospective clients and the public generally. Indeed, the exercise was so challenging for them that I had to resort to passing out examples of what I was seeking, going over with them multiple times what I was looking for in the last section and then inviting them to submit drafts so I could comment on the inevitable problems they had with seeing the events through these other perspectives. In the years that followed I learned to do better at helping the law students understand what I was seeking and why I thought the assignment was a useful exercise, but the journal entries have continued to be challenging assignments for them,

I have never experimented with a like exercise with lawyers, lacking the context in which to do so. I have listened carefully to what lawyers have to say in the hundreds of ethics CLE courses I have taught across the country during the past fifteen years or so. My impression is that lawyers can see readily the intent of the rules from a legalistic perspective and they certainly are sensitive to how violations can affect their own lives. Like the students, though, many lawyers have trouble seeing the impact of

reported and depicted violations on how clients and prospective clients think about us and what they expect from us.

I think lawyers would be well served in their practices to give consideration when confronted with circumstances that draw them close to or over the borders of required ethical conduct or aspired professional behavior to consider how non-lawyers may feel about them as lawyers and about our profession generally when they see or learn about these kinds of happenings. Such a person-centered approach to the practice of law would encourage a deeper respect for why the rules exist. Such respect would go beyond mere concern for the consequences of the discipline process, and to what the rules and principles are trying to accomplish in promoting faith and confidence in our profession as a source of help for individuals dealing with troubles in their everyday lives and as a source of fair outcomes and justice.

7. Suspending the Ego

As lawyers we spend the majority of our time working to achieve the client's ends. Inevitably we take sides on the question of who is right and who is wrong. Cases that cannot be resolved on mutually acceptable terms are resolved through a zero-sum process in which there are decided winners and losers. It should come as no surprise, then, that in their daily work lawyers get very much engaged in pressing positions they believe must be accepted and fighting against positions they believe should be rejected.

The substantive aspects of this process are inevitable in our profession.

Less inevitable, and in important respects counter-productive, is the internal need some lawyers have to be seen as the victor, the prevailer, the stronger, the more powerful, the smarter and the like. These ego driven needs can drive lawyers to be excessively demanding in their dealings with other lawyers, to be abusive in their interactions with third parties, to be disrespectful to the Court, and to be insensitive to their clients anxieties and stresses.

Suspending one's ego can be an extraordinarily liberating experience. The mental and emotional energy reserved alone permits greater focus on what needs to be done for the client and so more time for the lawyer to do other things that matter in the lawyer's personal and professional lives. The point here is not to care less about the quality of one's work or to draw less pleasure from one's successes in practice. Rather, it is not to worry any longer, or at least not to worry as much about how other people think about you. In the process lawyers are likely to find themselves held in even higher regard and enjoy greater esteem when it is the quality of the work performed and the outcomes achieved that do the speaking for the lawyers, rather than actions by the lawyer that insist upon a certain kind of regard and respect.

8. Respect for the Rights of Third Parties

When we decided to go to law school and signed on to be lawyers our expectation was that our central focus would be to advance the interests of the clients we served. This is the area of practice covered by the "1" series of rules.

At some point in our respective practices, earlier for some and later for ours, depending the kind of work we did, we discovered our responsibilities to the advocacy process. This is the area of practice covered by the "3" series of rules. Much to our surprise we further discovered in the course of practice not only that some of the "3" series rules conflicted with duties and obligations we had under the "1" series of rules, but that sometimes we were required or expected to attend to our obligations to the advocacy process even at the expense of the obligations we owed our clients. Indeed, there is an argument to be made that our duty of candor to the Court. E.R. 3.3, may require that we breach the most fundamental of duties we owe our clients, the duties of confidentiality and loyalty, and in the process put the client in harms way.

We tolerate the precedence given the advocacy process, at the expense of the client, because of the importance of the advocacy process in avoiding social unrest and maintaining social cohesion. It is far more difficult to accept the idea that duties we may owe others, third parties, with whom we have no formal relationship and who's paths we cross only as we pursue the interests of our clients, should enjoy some precedence as well.

For example, E.R. 4.3 provides that in dealing in the course of a representation with an unrepresented third party we must communicate the fact that we are representing a client, so the third party will know the context in which we are dealing with that person. Further, if the third party seek advice or direction, we are limited to

advising the third party, if we give any advice at all, to consult with a lawyer. The policy interest in this rule is to respect the rights of others and to prevent the lawyer from using greater knowledge about substance and process and greater resources to put the third party at risk of harm. This rule prevents the lawyer from taking action that would benefit the client, such as extracting information from the third party without the filters the third party may use when the third party comes to understand why the lawyer is there.

It is fair to ask why the duties set forth in the "4" series of rules were imposed on lawyers in the first place. There can be no doubt that these rules are impediments to the zealous representation of the client. Of course, in Arizona, the concept of zealous representation was replaced long ago with representation that "conforms to the requirements of the law." The "4" series of rules may be well be seen as impediments to that as well, though, putting in certain instances the interests of third parties ahead of the interests of the client.

It is not hard to imagine how such other-regarding rules came into being. Certainly one reason had to be too many instances of disrespectful, abusive and unfair conduct by some lawyers in their dealings with third parties. Whatever their source lawyers are as bound to abide these rules as they are the other rules that impose duties and obligations on lawyers.

My experience teaching ethics CLE programs is that this "4" series of rules is the one with which lawyers are least familiar and with which, frankly, they have the

most disagreement. Nevertheless, whether to the end of avoiding discipline or to the end of advancing the integrity of the profession lawyers need to familiarize themselves with these rules and conduct their practices consistent with them,

9. Thieves Always Worry that Others Are Stealing from Them

My father, who died at age 92 about a year and a half ago, was a marginally educated person who through his life paid surprisingly close attention to the goings on in the world around him. He was deeply religious, and from the beliefs in his faith and drawing on the experiences in his culture, offered what I think to this day was his most profound observation on life, spoken usually in Yiddish: People Plan and God Laughs. I have confronted that reality so many times in my life, having made great plans only to see things go awry. Perhaps that is why when people ask me now what I plan to do when I leave private practice I tell them that I really do not know, that at this point my focus is not on the outcome, but on the adventure itself.

It is not that observation on life that I want to address here today, though. My father was by trade a shoe salesman. He rose to the level of designing, merchandising, marketing and operating shoe concessions in department stores. In that context he had the opportunity to observe customers, employees, department and store managers. He had a variety of other life experiences, including growing up a victim of intense bigotry to the point of fending off physical attacks on a daily basis, and service during World War II in a communications unit that was always the first wave in any battle

plan. From those experiences he offered an observation which I found amusing when he first said it, but later became for me an invaluable way to understand one aspect of ethical and professional behavior.

Thieves Always Worry that Other People are Stealing From Them

The point of course is that people who in their own lives victimize others are especially sensitive to the possibility that they may be victimized themselves.

I think about this observation in many different kinds of situations when trying to understand what has motivated another lawyer, and sometimes a judge, to act as they do in readily criticizing the conduct of others, often with great emotional intensity. It is especially noteworthy when this comes as a knee jerk reaction to be confronted with the reality of their own misconduct in a situation. This observation has particular application to situations that raise ethical and professionalism issues.

We have all had the experience, and I have had a couple of them very recently, of dealing with lawyers who's conduct is counterproductive in dealing with an issue, potentially destructive and harmful of one's own client's interests, and perhaps even beyond the bounds of ethical and professional practice. When such actions are called to their attention, not with any tag lines about unethical or unprofessional conduct, but toward the end of resolving the issue and moving in a more productive direction, the quick response includes accusations back of misconduct, including unethical and unprofessional behavior. Such response are invariably unproductive and can lead to a

deterioration of the situation to the point of name-calling, threats and like unproductive behaviors from both sides to the other

Recognition that this may well be a situation of “thieves worrying that other people are stealing from them” may help the lawyer confronted with such situations put the events in a context where a more productive response may be helpful. Rather than engage in the name calling and reciprocating accusations level, the better course may be to ignore the initial volley of threats and stay focused on a constructive outcome that is in the client’s best interests. We all know from our earliest of experiences that bullies thrive on conflict, and that if you do not react to the provocation and either disengage or focus on something productive moving forward, there is the chance for a positive outcome. The bully goes off to look elsewhere to for the pleasure the bully derives fromof making trouble.

10. Why Practice Ethically and Professionally?

A student approached me on the last day of my most recently completed ethics class and asked why a lawyer would strive to consistent ethical and professional behavior in practice. I knew the student had something more in mind than avoiding sanctions. I had spent a great deal of time during class talking about all of the things, large and small, subtle and overt, that pull and push at the lawyer to violate ethical rules and professionalism principles. We had talked at length as well about the challenges Bars face in trying to regulate behavior, both in terms of the resources available to the Bar for

lawyer regulation and the difficulty of observing the concerning behaviors in issue, especially where that assessment of the behavior requires consideration of what the lawyer was thinking at the time of the behavior in issue.

The answer I gave the student is rather pollyannaish, but it is what I truly believe. The ethical rules and professionalism principles exist to encourage lawyers to courses of behavior that will maximize the potential for just outcomes while treating those with whom lawyers deal along the way, including clients, counsel, the judiciary, third parties and others, with the respect and dignity to which they are entitled.