Our Professionalism

Remarks of U.S. Senior Circuit Judge
Frank M. Coffin
1999 First Circuit Judicial Conference
The Summit at Sunday River Hotel
Bethel, Maine, Oct. 12, 1999

In introducing this panel on professionalism, I am charged with setting the stage for our panel's discussion of scenarios bringing to life problems of professionalism that will not be unfamiliar to you. What I shall attempt is to retrieve the concept from its usually fuzzy cocoon and pull together its essential threads.

As I have mused over the essence of our work, several thoughts occur to me at the threshold. First, we don't get very far by seeking a generic, all-inclusive definition of "profession." Each profession is unique, particularly ours, partly because of our centuries-old tradition, and partly because we — law teachers, practicing lawyers, and judges — have been vested with the task of superintending one of the three branches of our governments. This is why I am casting these remarks under the rubric, "Our Professionalism." Second, what it means to be truly professional in the law is not a static concept. It is an evolving one. Finally, the concept has levels. The various rules and codes of conduct set minimum standards. One can qualify as "professional" by meeting them. But the edifice of our profession is not a one story building. Only the lawyer and judge who aspire to rise above the floor can realize a sense of fulfillment and become a Professional, spelled with a capital "P."

I see seven basic measures of our professionalism. All of them place stress on all of us who strive to live up to or exceed the standards, partly because of their inherent tension and partly because of the grinding demands of contemporary law practice and adjudication. In the interest of saving time, I shall mention three only briefly, then focus on the four which will probably dominate our panel's presentation and your discussions.

The three are competence, involvement in improving the justice system, and serious acceptance of a pro bono responsibility. Competence in this age of specialization, sophisticated technology, and continuing education is more demanding than ever. As for our duty to the justice system, our delegated job as Gatekeepers at the Hall of Justice imposes on us the duty of keeping a watching brief on its workings. Such a brief today would target a shocking number of ill advised, harmful, or simply unworkable laws and underfunded court systems. Our third obligation, to help those with limited means to gain meaningful access to the justice system is new in the sense that the combination of a proliferation of statutes, regulations, rights, and entitlements, the persistence of a large underclass of the indigent and otherwise needy, and governmental retreat from funding legal services makes pro bono more important than ever.

Relevant to today's work, the fourth element of our professionalism is our dual commitment to client and court. These are equally ancient, deep-seated, and often warring commitments of a lawyer. Much of our discussion today will focus on the tension between these two. They are quite unlike those in any other profession. As to the first, Model Rule 1.3 sets only a floor; it contents itself with the command that lawyers exercise "reasonable diligence" in serving clients. As to the second, Model Rule 3.3 requires only candor to the tribunal. But there are spacious areas reaching beyond reasonable diligence and candor. Virtually all lawyers worth their salt accept the fact that their unwritten contract with the client includes no 9 to 5 limit and

no regularity of hours to be called upon. And duty to the court has at least two other dimensions. When egregious judicial overreaching is observed or experienced, a lawyer's duty is to bring it in a dignified way to the attention of the reviewing court or an appropriate oversight body. And when unjustified and corrosive criticism of a judge or court takes place, the bar as an institution should be ready to rise to the defense.

Implicit in this dual commitment, but of broader scope, is the fifth element of our professionalism — our continually evolving superstructure of ethical standards. The Model Rules now devote 109 pages to 50 separate rules of conduct with many subsections. I want to say two things about the Rules. The first is that they set only minimum standards. Augusta, Maine, attorney Robert Stolt, writing in the Maine Lawyers Review, comments on a recent ethics opinion, holding that Maine Bar Rules do not prohibit an attorney from taping telephone calls and adding that nevertheless it is a "rotten" thing to do. Perhaps the subject doesn't lend itself to a flat rule, but a real Professional will think long and hard before doing it. Attorney Stolt believes we should "expand" our professionalism — our inner sense of right and wrong."

My second comment on the Model Rules is that the Rules, if observed, would go far toward alleviating some of the concern over professionalism. Indeed, Lawrence Fox, past chair of the ABA Committee on Ethics and Professional Responsibility, has criticized the recent emphasis on professionalism as diverting attention from the fact that the basic ethics rules are violated all too often. He fingers discovery, which, he says, "brings out the worst in us," calling document production a "shame" and depositions a "scandal."[1] Just observing Model Rules 3.1 to 3.4, 4.1, and 8.4 would clean this particular Augean stable.

A new facet of our professionalism, in its formal recognition, is civility. It is obliquely approached in Rule 3.4, "Fairness to Opposing Party and Counsel," and in Rule 3.5, relating to preserving decorum in the tribunal. In simpler times, when a bar was small and intimate, enlightened self interest sustained the appearance and very often the reality of respect toward one's adversary. Today there is a perception of a rising tide of incivility on the part of both lawyers and judges.

In 1992 the Seventh Circuit adopted the first Civility Code. It contains 30 duties to other counsel, 8 to the court, 12 duties of court to counsel, and 3 of judges to each other. In 1998 the ABA adopted a slightly modified version as "Guidelines for Litigation Conduct." Civility, as Judge Marvin Aspen, drafter of the Seventh Circuit Code, has recently said, is "the current hot topic of the legal lecture circuit." A large and increasing number of jurisdictions have adopted such codes.[2]

But there are some who do not go gentle into the night. A trial lawyer from Illinois wrote in a September National Law Journal, "All you really need to know about me is this: I'll beat you if there's any way the rules will let me." And in an October issue, the Journal included as one of ten of the nation's top litigators a Michigan lawyer who describes his own take-no-prisoners approach to witnesses: "I'm condescending, cynical and short with them. They're against me and they've got to go down. This is war."

Whether this works everywhere may be doubted. In the July issue of the Maine Bar Journal, Judge Hornby reports on a survey of 1650 juror assessments of some 297 lawyers since 1990. He found that lawyers' courtroom conduct was the third most frequent area of concern,

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[1] Lawrence J. Fox, "Setting the Priorities: Ethics Over Expediency," Stetson Law Review, Vol. XXVIII, Fall 1998, p. 275.

[2] Marvin E. Aspen, "A Response to the Civility Naysayers, " Stetson Law Review, Vol. XXVIII, Fall 1998, p. 253.

after case presentation and attitude. While positive evaluations outnumbered negative ones, 225 to 120, the negatives stressed "lawyers' disrespect for witnesses or opposing counsel . . . name calling . . . mocking behavior [such as] rolling one's eyes at a witness's testimony, smirking, or making faces . . . ."

A particularly important component of civility is freedom from bias, whether directed against gender, race, or ethnic origin. In June, the First Circuit Task Forces under Judge Selya's chairmanship of the Steering Committee issued their report after a lengthy study. Survey questionnaires were sent to some 4,200 attorneys. Almost 1,500 attorneys completed the survey. Of those, two thirds, over 1,000, responded on their experience with demeaning or derogatory comments. Something of a civility report card lies in the findings that 34.3 per cent reported such comments from other attorneys and that 13 per cent reported such comments from judges. Of the attorney comments, twice as many were made outside the presence of a judge than were made in court or informal proceedings. A third of the responders reported that the judge intervened in at least some of the incidents occurring in his or her presence, but two-thirds answered that the judge never intervened.

Finally, beyond all the other elements of our professionalism, there is an old, even antique, aspiration that has always haloed our best lawyers — a broadly grounded sense of the situation. Dean Kronman of Yale Law School in his book, "The Lost Lawyer," similarly refers to the outstanding lawyer as "not simply an accomplished technician but a person of prudence or practical wisdom as well. . . a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess."

Such a lawyer he calls the "lawyer-statesman." Such a person possesses the precious jewel, "a certitude about the worth of [his or her] existence." This kind of situation sense is the fertile soil in which creative wisdom flourishes. Kronman sees this kind of exemplar vanishing from our pressured, commercial, specialized, bureaucratic, and high tech scene. But in the jurisdictions of this circuit, I see a greater chance for individualism and large-minded professionalism to survive.

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So here are seven elements of Our Professionalism: (1) a competence based on structured and continued learning; (2) a sustained involvement in improving the justice system; (3) a willing acceptance of a pro bono obligation; (4) a deep dual commitment to client and court; (5) a devotion to ethical principles; (6) a sensitive concern and respect for others reflected in civility; and (7) an openness to and search for creative situational wisdom. How do we dare hope to realize all these aspirations?

The answer does not lie in black letter text, but in bringing to these issues the same skill and energy you invest in handling your clients' problems. My prescription is that our professionalism deserves at least a non-billable hour or so every month in every firm or group of lawyers, an hour in which you can address these issues, engage in self examination, exchange war (or peace) stories, and seek perspective and right answers for vexing tensions. We judges should also take time in our conferences and retreats to think about what professionalism demands from us and be open and receptive to feedback and criticism.

And every once in a while there should be sessions like this, involving both lawyers and judges. You are about to discuss problems of resolving duty to client and duty to court, of dealing with a rash, devious, or carnivorous adversary, a perjurious client, a hard-nosed, imperious one, a fractious trial judge, and a vituperative appellate judge. Now let the play begin.