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N. Gregory Smith
Louisiana State University Law Center

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Ethics v. Professionalism and the Louisiana Supreme Court

N. Gregory Smith*

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."¹

This article is about some words. It is about "legal ethics" and "professionalism." These words figure prominently in a 1997 order of the Louisiana Supreme Court dealing with mandatory continuing legal education. Prior to the 1997 order, most² Louisiana lawyers were required to obtain fifteen hours of continuing legal education credit each year, with one hour devoted to "legal ethics, professional responsibility, and rules of conduct." This has now changed. Most lawyers will still be required to obtain fifteen hours of credit, but one of those hours must now concern "legal ethics," and one hour must now concern "professionalism." This article considers the change and the meaning of the words.

I. THE PERCEIVED DECLINE IN LAWYER PROFESSIONALISM

A number of recent books,³ articles,⁴ and bar association reports⁵ have

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* Associate Professor of Law, Louisiana State University; B.A., 1975, Yale University; J.D., 1978, Brigham Young University. I would like to thank my colleagues Christopher L. Blakesley, Patrick H. Martin, and Warren L. Mengis for their comments on earlier drafts of this article. I am indebted to my colleague William R. Corbett for his ideas about tort liability in the *Spaulding v. Zimmerman* case. I acknowledge, and appreciate, the research assistance of Jason M. Welborn and Stacey Allen Suazo.

1. Lewis Carroll, *Through the Looking Glass* 75 (1962).

2. Some lawyers are exempt. These include members of Congress, members who are 65 or older, lawyers in their first two years of practice, active duty members in the armed forces, federal judges and magistrates, members who reside outside the state and who do not practice here, and members who can show that compliance with the mandatory CLE requirements would work an undue hardship by reason of sickness, disability, or other "clearly mitigating circumstances." La. Rules for Continuing Legal Education 2 & 3.

3. See, e.g., Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (1994); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994).

4. See, e.g., Carl T. Bogus, *The Death of an Honorable Profession*, 71 Ind. L.J. 911 (1996); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 Val. U. L. Rev. 563 (1994); Warren E. Burger, *The Decline of Professionalism*, 61 Tenn. L. Rev. 1 (1993); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 St. John's L. Rev. 85 (1994).

5. See, e.g., *Teaching and Learning Professionalism*, Report of the Professionalism Committee, American Bar Association Section of Legal Education and Admissions to the Bar (1996); "... In the Spirit of Public Service:" *A Blueprint for the Rekindling of Lawyer Professionalism*,

concluded that there are serious problems with the American legal profession. Many of them say that there has been a decline in professionalism.⁶ A recent report by the Professionalism Committee of the American Bar Association notes that, although descriptions of "the causes and symptoms" of the decline "vary greatly," there are several prevalent themes in the writings. These include a loss of understanding of law practice as a "calling," economic changes that have "converted law practice from a profession to a business," a "loss of civility," and a "loss of a sense of the ultimate purpose of lawyers."⁷ The committee

Report of the Commission on Professionalism, American Bar Association, *reprinted in* 112 F.R.D. 243 (1987) [hereinafter *In the Spirit of Public Service*].

6. *But see* Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 Emory L.J. 403, 432 (1992) ("[T]he truth of the matter is that lawyers today accept and honor the basic values of professionalism as much as they ever have.").

Most of the illustrations that are offered to show departures from professionalism feature instances of incivility, abusive conduct in litigation, and questionable advertisements by lawyers. *See* Roger C. Cramton, *On Giving Meaning to "Professionalism,"* in *Teaching and Learning Professionalism, Symposium Proceedings*, at 9 (ABA 1997).

Lawyer incivility may have been the principal impetus for the generation of Louisiana's new CLE rule. Shortly after the supreme court issued its order, the chair of the Committee on Professionalism and Quality of Life wrote an article about the new rule, which stated:

Civility and professionalism are contagious, but so are incivility and unprofessional conduct. Bar journals, legal periodicals and discussions with fellow practitioners reveal that incivility and unprofessional conduct are far more pervasive problems than lawyer incompetence or dishonesty. These same sources tell us that incivility and unprofessional conduct have a greater impact on the practice of law, the reputation of the legal profession and our quality of life than does a lack of knowledge or substantive legal issues or illegal acts. Something must be done to curb it!

In an effort to promote civility and discourage unprofessional conduct, the Louisiana State Bar Association's Mandatory Continuing Legal Education Committee, the Professionalism and Quality of Life Committee and the House of Delegates have overwhelmingly endorsed a resolution asking the Louisiana Supreme Court to amend the mandatory continuing legal education (CLE) requirements to require one hour of CLE on professionalism. With the court's adoption of a mandatory hour of CLE on professionalism, Louisiana will join 20 other states in requiring more than one hour of CLE annually on ethics and/or professionalism.

Frank X. Neuner, Jr., *Mandatory Professionalism: A Cure for an Infectious Disease*, 45 La. B.J. 18-20 (1997).

7. Professionalism Committee, American Bar Association Section of Legal Education and Admissions to the Bar, *Teaching and Learning Professionalism* 3-4 (1996) [hereinafter Report].

The specific "themes" identified by the committee were:

1. the loss of an understanding of the practice of law as a "calling";
2. changes in the economics of the practice of law which have converted law practice from a profession to a business—making it more difficult for lawyers to devote significant amounts of time to public service activities and generating a growing sense of dissatisfaction with law practice as being incompatible with personal values and goals;
3. perceived excesses of the adversarial process, including the loss of civility, permitted by the existing rules governing litigation;
4. an undermining of the traditional independent counseling role of lawyers;

concluded that "lawyer professionalism has declined in recent years and increasing the level of professionalism will require significant changes in the way professionalism ideals are taught and structural changes in the way law firms operate and legal services are delivered."⁸ The committee said this would not be easy.⁹

Unsurprisingly, the committee had many recommendations for change. The recommendations covered changes in undergraduate education,¹⁰ law school education,¹¹ bar association endeavors,¹² law firm behavior,¹³ and the judicial

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5. concerns about the competency of lawyers and their compliance with applicable ethical codes; and
 6. the loss of a sense of the ultimate purpose of lawyers resulting from a change in the traditional concept of lawyers serving the public good as the intermediaries between the conflicting interests in our society.

Id.

8. *Id.* at 4-5.

9. *See id.*

10. The committee recommended:

1. Each college or university should be encouraged to offer general or survey courses involving ethical and value issues and basic principles of ethical decision-making.
2. Colleges and universities should be encouraged to adopt ethics courses specifically designed for their various undergraduate programs.
3. Colleges and universities should be encouraged to increase the number of symposia, lectureships, and similar programs which give specific attention to ethics and value issues.

Id. at 12.

11. The committee recommendations regarding law schools were:

1. Faculty must become more acutely aware of their significance as role model for law students' perception of lawyering.
2. Greater emphasis needs to be given to the concept of law professors as role models of lawyering in hiring and evaluating faculty.
3. Adoption of the pervasive method of teaching legal ethics and professionalism should be seriously considered by every law school.
4. Every law school should develop an effective system for encouraging and monitoring its ethics and professionalism programs.
5. The use of diverse teaching methods such as role playing, problems and case studies, small groups and seminars, story-telling and interactive videos to teach ethics and professionalism, should be encouraged.
6. Law book publishers should consider adopting a policy requiring that all new casebooks and instructional materials incorporate ethical and professionalism issues. Law book publishers should also publish more course-specific materials on legal ethics and professionalism issues as part of new casebooks, new editions of old casebooks, supplements to casebooks, compilations of supplemental readings, and compendiums.
7. Law schools need to develop more fully co-curricular activities, policies, and infrastructures that reflect a genuine concern with professionalism.

Id. at 16-25.

12. The committee recommended the following with respect to bar associations:

National, state, local, and speciality bar associations must assume a leadership role in defining and promoting professionalism ideals and in implementing professionalism programs that reach all their members.

Id. at 27.

13. For law firms, the committee recommended:

role.¹⁴ Two recommendations that are pertinent to the subject of this article concern the role of the bar association and the role of judges. As to the first of these, the committee recommended: "National, state, local, and specialty bar associations must assume a leadership role in defining and promoting professionalism ideals and in implementing professionalism programs that reach all their members."¹⁵ As to the second, the committee recommended: "Judges and judicial organizations must take a greater leadership role in raising the level of professionalism among practicing lawyers."¹⁶

If there has been a serious decline in professionalism among lawyers, it seems appropriate enough for bar associations and judges to be involved in efforts to reverse it. It is interesting, however, that the committee thought that the bar association needs to be involved in "defining" professionalism ideals. If those ideals require definition, how clear is it that professionalism is in decline? In fact, there has been some dissent on this point.¹⁷ Of course, even if the few dissenters are right, and professionalism may not be in decline, there could be considerable virtue in trying to do better. But it would still be useful to come up with a commonly-accepted definition of professionalism.

II. WHAT IS PROFESSIONALISM?

As it turns out, there is uncertainty about the meaning of "professionalism." In a 1986 report, the American Bar Association Commission on Professionalism observed that "professionalism is an elastic concept the meaning and application of which are hard to pin down."¹⁸ Does this matter? Professor Roger Cramton

[1]. Practicing lawyers must become more acutely aware of the need to nurture and to renew their professionalism ideas on a continuing basis, always aspiring to maintain the highest standards of the lawyer-statesman paradigm.

[2]. Law firms should adopt standards of practice and risk management procedures that enhance the level of competence and efficiency of all the lawyers in their law firm.

[3]. Practicing lawyers need to become more sensitive to important quality of life issues and implement in their law firms enlightened working conditions that are compatible with the personal as well as the professional goals of the firm's lawyers.

[4]. All law firms should have one or more committees that monitor the firm's compliance with ethical rules, continuing legal education requirements, risk management procedures, pro bono activities, quality of life, and other professionalism issues.

Id. at 31-33.

14. The committee recommended:

Judges and judicial organizations must take a greater leadership role in raising the level of professionalism among practicing lawyers.

Id. at 33.

15. *Id.* at 27.

16. *Id.* at 33.

17. Not all commentators agree that professionalism is in decline. See Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 Emory L.J. 403, 432 (1992) ("[T]he truth of the matter is that lawyers today accept and honor the basic values of professionalism as much as they ever have").

18. *In the Spirit of Public Service, supra* note 5, at 261.

thinks so. He has said: "[A]lthough everyone talks about professionalism as an icon or goal of lawyering, no one has been able to define it in ways that others could accept. The result is that bar pronouncements rely on abstractions of immense generality—concepts so vague and uncertain that they lack the power to guide lawyer conduct in particular situations or to motivate commitment by a would-be believer."¹⁹ This, he thinks, is a "critical problem."²⁰

There have been attempts at definition. For example, in its 1996 report, the Professionalism Committee of the American Bar Association offered the following: "A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good."²¹ The committee also identified the following "essential characteristics of the professional lawyer":

1. Learned knowledge
2. Skill in applying the applicable law to the factual context
3. Thoroughness of preparation
4. Practical and prudential wisdom
5. Ethical conduct and integrity
6. Dedication to justice and the public good.²²

But even these characteristics suffer from vagueness. Again, in the words of Professor Cramton: "[I]n today's world of moral relativism, deconstruction and denial of foundational truth, it is not enough to be for 'justice' and 'the public good' because they lack agreed-upon content."²³

One of the challenges, then, when we speak of professionalism, is to give some meaning to the expression. The Louisiana Supreme Court sought to do so in its order of May 23, 1997.

III. THE MAY 23 ORDER

On May 23, 1997, the Louisiana Supreme Court entered an order that requires Louisiana lawyers to include one hour of "professionalism" in their fifteen hours of annual continuing legal education credits. The order also requires Louisiana lawyers to obtain an hour of credit in "legal ethics." The order represents a significant change in mandatory continuing legal education requirements.

19. Cramton, *supra* note 6, at 8.

20. *Id.*

21. Report, *supra* note 7, at 6.

22. *Id.* at 6-7.

23. Cramton, *supra* note 6, at 13.

A. The Old Rule

Mandatory continuing legal education came to Louisiana in the 1980's. At the urging of the Louisiana Supreme Court, a Louisiana State Bar Association task force drafted some continuing legal education rules that were subsequently approved by the House of Delegates and by the Board of Governors. In the end, the supreme court did not adopt the Bar Association's precise proposal, but it did adopt a continuing legal education program that has been binding on Louisiana lawyers since 1988.²⁴ From the beginning, the scheme required lawyers to obtain fifteen hours of annual CLE credit. And it further provided: "Of the fifteen (15) hours of CLE required annually, not less than one of such hours shall concern legal ethics, professional responsibility, and rules of conduct."²⁵

The old rule appears to have contemplated some differences among the expressions "ethics," "professional responsibility," and "rules of conduct,"²⁶ but it did not specify what the differences were. However, a couple of the regulations that were adopted in connection with the rule also referred to this hourly obligation by a shorthand expression. They called it "the Ethics requirement."²⁷ Lawyers and CLE providers tended to use the shorthand expression as well.

B. The New Rule

1. Origins

The new rule appears to have had its origins in work by the State Bar Committee on Professionalism and Quality of Life. In the fall of 1995, the committee began to discuss the possibility of requiring a CLE hour in professionalism. Initially, the committee gave some thought to proposing that Louisiana lawyers be required to obtain sixteen credit hours of continuing legal education each year, with the additional hour to be on the subject of professionalism.²⁸

24. *An Interview with LSBA President Wood Brown III*, 36 La. B.J. 81 (1988).

25. La. Rules for Continuing Legal Education 3(c). The rule was adopted effective January 1, 1988. Regulation 4.7, adopted in connection with the CLE rules, required the State Bar Association to provide CLE courses at least once a year, and, among other things, provide coverage of:

Legal ethics, professional responsibility, rules of conduct governing attorneys, and opinions thereon, including a summary of the most numerous violations of the disciplinary rules for the past twelve months.

La. Rules for Continuing Legal Education, Reg. 4.7.

26. A similar distinction also appeared in one of the regulations on standards for CLE programs: "The activity must deal primarily with matters related to the practice of law, professional responsibility, or ethical obligations of attorneys." See La. Rules for Continuing Legal Education, Reg. 4.1(b).

27. See La. Rules for Continuing Legal Education, Regs. 3.17, 3.18.

28. Telephone conversation with Frank X. Neuner, Jr. (Sept. 18, 1997) (notes of conversation on file with author). See the Minutes of the November 30, 1995 meeting of the Committee on

However, in November 1995, the committee began to focus on a proposal to designate one of the existing fifteen credit hours as a professionalism hour.²⁹ A proposal along these lines was generated, but it did not enjoy the support of the State Bar Committee on Mandatory Continuing Legal Education.³⁰ The proposal was eventually "tabled" when it came before the State Bar's House of Delegates in January 1996.³¹

After this initial failure, the Professionalism Committee began work on another alternative: incorporating "professionalism" into the existing credit hour for "ethics." This idea was supported by the Mandatory Continuing Legal Education Committee as well, and a proposal to that effect was brought before the Louisiana Supreme Court in August 1996.³² However, the supreme court did not approve. It was apparently concerned that the proposal would result in unfavorable dilution of the "ethics" hour.³³

Thereafter, the Professionalism Committee worked with the Mandatory Continuing Legal Education Committee on a further effort, one that was reminiscent of the 1995 proposal. The two committees ended up co-sponsoring a proposal that professionalism be given a separate credit hour, but that the overall hourly credit requirement remain at fifteen.³⁴ The proposal went before

Professionalism and Quality of Life. Mr. Neuner was the chair of the Committee on Professionalism and Quality of Life at the time the supreme court issued its May 23, 1997 order.

29. *Id.*

30. Telephone conversation with Frank X. Neuner, Jr. (Sept. 18, 1997). Members of the Mandatory Continuing Legal Education (MCLE) Committee were not opposed to professionalism as such, but they were concerned about implementation problems. Telephone conversation with S. Guy deLaup (Oct. 14, 1997) (notes of conversation on file with author). Mr. deLaup was the chair of the MCLE Committee during 1995 and 1996.

The MCLE Committee had already noticed problems with the implementation of the then-existing requirement for an annual credit hour in "legal ethics, professional responsibility, and rules of conduct." Some Louisiana lawyers, particularly in rural areas of the state, were having trouble getting their "ethics" hour, and the MCLE Committee staff was spending a considerable amount of time dealing with requests for extensions and non-compliance issues. Members of the MCLE Committee feared that compliance problems would be exacerbated if there were to be a second dedicated hour of professionalism. Telephone conversation with S. Guy deLaup (Oct. 14, 1997).

31. Telephone conversation with Frank X. Neuner, Jr. (Sept. 18, 1997). See the Minutes of the January 31, 1996 meeting of the Committee on Professionalism and Quality of Life.

32. The language of the proposal sought to revise Rule 3(c) of the Rules for Continuing Legal Education, as follows:

Of the fifteen (15) hours of CLE required annually, not less than one (1) of such hours shall concern legal ethics or professionalism (hereafter collectively referred to as "Ethics requirement").

See Memorandum from Kitty Hymel to Frank X. Neuner, Jr. and others (May 3, 1996). Ms. Hymel is the Administrator of the Louisiana State Bar Association's mandatory CLE program.

33. Telephone conversation with Frank X. Neuner, Jr. (Sept. 18, 1997). See the Minutes of the October 16, 1996 meeting of the Professionalism and Quality of Life Committee and a letter of July 23, 1996 from S. Guy deLaup to Frank X. Neuner, Jr.

34. Telephone conversation with Frank X. Neuner, Jr. (Sept. 18, 1997). See Letter from Frank X. Neuner, Jr., Chair of the Committee on Professionalism and Quality of Life, to the House of

the House of Delegates in January 1997. After some discussion, and on a narrow vote, the proposal was amended to incorporate a two-year trial period.³⁵ The House of Delegates thereafter approved the amended proposal.³⁶ The proposal then went before the supreme court. On May 23, 1997, the supreme court entered its order requiring an hour of professionalism, but it dropped the two-year trial period that had been recommended by the House of Delegates.³⁷

2. *Specifics of the New Rule*

The May 23 order substantially amended Rule 3(c) of the Rules for Continuing Legal Education. First, it added professionalism as a required CLE topic: "Of the fifteen (15) hours of CLE required annually, not less than one (1) of such hours shall concern legal ethics, and not less than one (1) of such hours shall concern professionalism."³⁸

Second, the order attempted to distinguish "legal ethics" from "professionalism":

Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer. It includes courses on professional responsibility and malpractice. It does not include such topics as attorneys' fees, client development, law office economics, and practice systems, except to the extent that professional responsibility is discussed in connection with these topics.

Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations.

Legal ethics sets forth the standards of conduct required of a lawyer; professionalism includes what is more broadly expected. The professionalism CLE requirement is distinct from, and in addition to, the legal ethics CLE requirement.³⁹

The court's effort to distinguish legal ethics from professionalism was not confined to the changes in Rule 3(c). The court's order also dealt with the

Delegates (Jan. 8, 1997) (enclosing proposed Resolution of the Committee on Professionalism and Quality of Life and the Mandatory Continuing Legal Education Committee).

35. See Minutes of the House of Delegates of the Louisiana State Bar Association, January 25, 1997, at 3.

36. See *MCLE Requirement in Professionalism? Should "Professionalism" be MCLE Requirement?*, 45 La. B.J. 17 (1997).

37. See *id.*

38. La. S. Ct. Order of May 23, 1997.

39. *Id.*

distinction in amendments to Regulation 4.1(b) of the Rules for Continuing Legal Education:

Topics eligible for CLE credit in satisfaction of the Ethics requirement include the independence of the lawyer in the context of the lawyer-client relationship; conflict between duty to client and duty to the system of justice; conflict in the duty to the client versus the duty to the other lawyer; the responsibility of the lawyer to employ effective client communication and relation skills to increase service to the client and foster understanding of expectations of the representation; and other programs involving disciplinary rules, rules of professional conduct, and malpractice avoidance.

Topics eligible for CLE credit in satisfaction of the Professionalism requirement include the lawyer's responsibility as an officer of the court; the lawyer's responsibility to treat fellow lawyers, members of the bench, and clients with respect and dignity; misuse and abuse of discovery and litigation; the lawyer's responsibility to protect the image of the profession; the lawyer's responsibility generally to the public service; the lawyer's duty to be informed about methods of dispute resolution and to counsel clients accordingly.⁴⁰

It seems clear enough that the Louisiana Supreme Court wants CLE providers to offer, in the new required credit hour on professionalism, something other than "Ethics, Part Two." So it labored, in the May 23 order, to distinguish the contents of the two dedicated credit hours. In the process, the court defined "legal ethics" in a rather odd fashion. At the same time, it defined "professionalism" in a way that incorporates some topics from the traditional realm of legal ethics.

3. *An Odd Definition of Legal Ethics*

In one portion of its order, the court states that legal ethics includes "courses on professional responsibility and malpractice." In isolation, this formulation of legal ethics is extremely broad. "Professional responsibility" is not defined, but it is an expression that might reasonably be thought to be larger than, and inclusive of, codified standards of lawyer conduct.⁴¹ Indeed, there is no compelling reason

40. *Id.* An earlier version of the "courses" included the "history, concept, theory and philosophy of the legal profession," but these obviously did not survive. See Memorandum from Kitty Hymel, Administrator of the Mandatory CLE program, to Frank X. Neuner, Jr., Chair of the Committee on Professionalism and Quality of Life, and others (May 3, 1996). That is too bad. Although the rejected list might seem a little "squishy" for a continuing legal education program, a little focus on history and philosophy relating to the profession would help give meaning to "professionalism."

41. In 1969, the American Bar Association issued its "Model Code of Professional Responsibility." This included specific disciplinary rules as well as aspirational standards for

to think, in the abstract, that "professional responsibility" should mean anything vastly different than, say, "professionalism." But the court did not stop here. It said that legal ethics also incorporates the idea of "legal malpractice." This is an interesting inclusion. Malpractice is principally about the attorney's liability for negligence, not about compliance with codes of conduct, or standards of morality, as such. At this point in the court's order, we seem to have an extremely broad notion of "legal ethics."

However, in the larger context of the May 23 order, it is apparent that the supreme court's purpose is to give a rather narrow meaning to "legal ethics." In the key portion of the order that contrasts legal ethics and professionalism, the court says: "Legal ethics sets forth the standards of conduct required of a lawyer; professionalism includes what is more broadly expected." Similarly, the court says: "Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer." The basic idea seems to be that "legal ethics" consists of a collection of "required" duties. What are they? No doubt the collection would include duties arising under the Rules of Professional Conduct that are enforceable by formal discipline. The court also tells us that the collection includes duties arising under malpractice law. Are there others? Perhaps the court would include duties arising under specific statutes regulating lawyers⁴² or duties arising under ordinary rules of court.

Whatever is included, though, must be "required." Apparently the court is talking about duties whose breach could result in some sanction. Such a concept of legal ethics actually excludes some provisions of the Rules of Professional Conduct,⁴³ offers little or nothing in the way of an aspirational reach, and contains no hint of general moral obligation beyond minimal standards of conduct. But it picks up malpractice liability. All in all, this is a rather odd conception of legal ethics.⁴⁴

lawyers. The aspirational standards cover much of the ground that is sometimes accorded to "professionalism."

42. Two such statutes come to mind. Louisiana Revised Statutes 37:217 (1988) provides for liability of an attorney to a client if a nonsuit is entered against the client "owing to the absence or neglect of the attorney without a reasonable cause." Louisiana Revised Statutes 37:219 (1988 & Supp. 1997) sets forth criminal sanctions for an attorney who pays "money or give[s] any other thing of value to any person for the purpose of obtaining representation of any client."

43. For example, Rule 6.1, which deals with pro bono service, is not mandatory. La. Rules of Professional Conduct 6.1 (1988). It says that a lawyer "should render public interest legal service." And Rule 2.1, on the lawyer's role as advisor, says that, in giving advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors." (emphasis supplied). La. Rules of Professional Conduct 2.1 (1988).

44. Which is not to say that this is the first time such a concept has surfaced. A similar formulation shows up in the Georgia regulations on mandatory continuing legal education:

....

(3) Legal Ethics. Legal ethics includes instruction on professional responsibility and malpractice. It does not include such topics as attorney fees, client development, law office economics, and practice systems except to the extent that professional responsibility is directly discussed in connection with these topics.

Before looking further at the court's definitional work, it would be useful to consider some other perspectives on the meaning of legal ethics.

IV. THE MEANING OF LEGAL ETHICS

A. *Legal Ethics and Moral Philosophy*

Charles Wolfram observed that the term "legal ethics" is used in at least two different ways. The first is as a description of the "so-called self-regulatory system out of which the legal profession's codes emerge."⁴⁵ The second is "in the quite different sense of applied moral philosophy in the field of legal service."⁴⁶ Professors Deborah Rhode and David Luban have written that, in this second, broader sense, legal ethics represents "a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion."⁴⁷ In this second, broader perspective, "legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers. As Socrates noted about the subject of ethics, it 'is not about just any question, but about the way one should live.'"⁴⁸

According to this view, there is a connection between legal ethics and moral philosophy; between legal ethics and questions of good and bad, right and wrong.⁴⁹ Legal ethics, in this sense, is larger than a code of required conduct.

(4) Professionalism. Professionalism is knowledge and skill in the law faithfully employed in the service of client and public good. It includes, but is not limited to, courses on (a) the duties of attorneys to the judicial system, courts, public, clients, and other attorneys, (b) competency, (c) pro bono, (d) the concept of a profession, (e) history of the legal profession, (f) comparison of the legal profession in different nation's [sic] systems of advocacy, and (g) jurisprudence of philosophy of law. *Ethics sets forth the standards of professional conduct required of a lawyer; professionalism includes what is more broadly expected. The professionalism CLE requirement is distinct from, and in addition to, the ethics CLE requirement. . . .*

State Bar of Georgia Directory and Handbook 104-H (1994-95) (emphasis added). The same language appears in the 1996-97 Georgia Handbook. The Louisiana Committee on Professionalism and Quality of Life was aware of the Georgia regulations at the time it was working on its proposals for Louisiana. Telephone Conversation with Frank X. Neuner, Jr. (Sept. 18, 1977). Some of the language from the Georgia regulations seems to have been included in the Louisiana Supreme Court's order of May 23, 1997.

45. Charles W. Wolfram, *Modern Legal Ethics* v (1996).

46. *Id.*

47. Deborah L. Rhode & David Luban, *Legal Ethics* 3 (1995).

48. *Id.* (quoting from Plato, *The Republic of Plato* 31 (Allan Bloom trans., 1968)).

49. *See Ethics and the Legal Profession* 23 (Michael Davis & Frederick A. Elliston eds., 1986).

The editors wrote:

As "moral philosophy," that is, the study of the norms that should guide the conduct of rational agents, ethics is concerned with what makes acts right or wrong, good or bad, virtuous or vicious, and with the reasons properly offered to justify conduct. Ethics makes explicit our understanding of norms, opening them to criticism and revision. Although ethics cannot make people good, it can help people to see better what the good is.

Such a code might well be a part of legal ethics, but it is not the end of it. Indeed, it should be possible to evaluate the standards of such a code against the underlying values of legal ethics.

B. Henry S. Drinker and Legal Ethics

In 1953, Henry S. Drinker published an influential book called *Legal Ethics*.⁵⁰ In the preface to the book he asked a basic question: "What . . . is meant by Ethics, as applied to the legal profession?"⁵¹ Drinker thought that it was "impossible" to come up with an exact definition, but he accepted the view that legal ethics represented a "branch of moral science,"⁵²—one that "treats of the duties which a member of the legal profession owes to the public, the court, to his professional brethren and to his client."⁵³ Drinker believed that many, but not all, of the "principles governing the propriety of the lawyer's conduct" could be found in statutes, court decisions, and the Canons of Ethics, but he thought it might be all right to consider some standards of conduct as being outside the scope of legal ethics. Mere "customs of the bar,"⁵⁴ he supposed, might be considered "Legal Etiquette rather than Ethics."⁵⁵

Much of Drinker's book deals with the Canons of Ethics. But he did not think that the Canons represented the entire substance of legal ethics. He saw them as "a general guide"⁵⁶ that would be amended over time.⁵⁷ The Canons were useful in the sense that a lawyer could avoid serious lapses in ethical conduct if the lawyer studied the Canons carefully and "wholeheartedly respect[ed] and abide[d] by their substance and spirit."⁵⁸ But it was not enough for the lawyer to "comply literally with the Canons":

The traditions of an honored profession bind him to a higher and much more difficult duty. . . .

The lawyer must not only be honest and upright, but must be believed to be so by clients, courts, colleagues, and by his fellow citizens.

Id.

50. Henry S. Drinker, *Legal Ethics* (1953).

51. *Id.* at xi.

52. *Id.*

53. *Id.*

54. Canon 25 states:

A lawyer should not ignore known customs or practice of the Bar of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

American Bar Association, *Canons of Professional Ethics* (1908) [hereinafter "Canons of Ethics"].

55. Drinker, *supra* note 50, at xi.

56. *Id.*

57. *Id.*

58. *Id.*

Nor can he prove himself thus deserving of the confidence of the community which he serves merely by observing scrupulously the letter of the law. He must be recognized as one of those exponents of true civilization who, by their lives, continually render "Obedience to the Unenforceable" . . .

To maintain the position to which our traditions, our training, and our duties and responsibilities entitle us, we lawyers must live and act in the way which we know is right, irrespective of statutes, court decisions, canons of ethics, and disbarment proceedings.⁵⁹

These are some of Drinker's thoughts on what lawyers should do, and be. He said that these things were part of the lawyer's "duty." And he accepted a definition of legal ethics that incorporates duties that lawyers owe. For Drinker then, it appears that the expression "legal ethics" was a broad one indeed. It apparently would include what is "expected" of lawyers, not just what is "required." Indeed, Drinker's conception seems broad enough to cover a considerable part of the territory that the Louisiana Supreme Court would now fence in by professionalism. And it appears to cover more than that as well, because it incorporates what is good, what is morally right.⁶⁰

It is not the purpose of this part of this article to contend that what Drinker thought about "legal ethics" should be the only true way of thinking about it. At this point, I want only to point out that his notion of legal ethics is quite different from the one reflected in the Louisiana Supreme Court's order of May 23, 1997.⁶¹

59. *Id.* at 3-4. In an article entitled "The Ethical Lawyer," Drinker elaborated on this point: Obedience to the unenforceable is the true characteristic of civilization. It is this concept which lawyers must constantly have before them if they are to be truly ethical. Concern must be not with whether an act is subject to discipline by an ethics committee but whether such behavior is that which the conscience directs.

Henry S. Drinker, *The Ethical Lawyer*, 7 U. Fla. L. Rev. 375 (1954).

60. *Cf.* George W. Warvelle, *Essays in Legal Ethics* 21 (1902):

It may be said, and with much truth, that a man called to the honorable position of an advocate should exhibit, both in and out of his profession, the sterling qualities that constitute the highest excellence of righteous living. But his is a duty incumbent on all men, whatever may be their avocation or their position in society. The law does not concern itself with moral duties, however much they may serve to influence legislation, nor does legal ethics properly extend to individual character. It is upon this theory that the present work has been constructed, and in the chapters that follow a consistent effort has been made to confine the subject within its legitimate channel. The writer does not assume to be a mentor nor to teach morals.

61. Nor do I mean to suggest that the Louisiana Supreme Court is the only institution or person to have adopted the vision of "legal ethics" revealed in the order of May 23. Justice Harold G. Clarke of Georgia has written: "[E]thics is a minimum standard which is *required* of all lawyers while professionalism is a higher standard *expected* of all lawyers." Harold G. Clarke, *Professionalism, Repaying the Debt*, in *Teaching and Learning Professionalism*, Symposium Proceedings, at 82 (ABA 1997).

C. *The Shrinking of Legal Ethics: From the Canons to the Rules*

A number of commentators have written about the significance of the changes that have taken place, over time, in the profession's "codes." One of the principal changes has been that the codes have moved from general statements of principle to enforceable rules of conduct. Another way to say this is that the codes once focused on what was expected of lawyers; now the Rules focus principally on what is required, or prohibited. To some extent, the notion of "legal ethics" reflected in the supreme court's order of May 23 mirrors this development.

1. *The Canons*

The American Bar Association promulgated the Canons of Ethics in 1908.⁶² They were adopted in Louisiana in 1910.⁶³ The Preamble to the ABA Canons indicated that they were intended to be more statements of principle than to represent a comprehensive codification of disciplinary rules.⁶⁴ Indeed, the Canons had an aspirational or hortatory thrust, rather than a disciplinary focus.

For example, the Canons said that lawyers should have a "respectful attitude" toward the courts;⁶⁵ that it was "indecent" for a lawyer in trial to mention the "personal peculiarities and idiosyncrasies of counsel";⁶⁶ that the "client cannot be made the keeper of the lawyer's conscience";⁶⁷ that the client has "no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities";⁶⁸ that it was "unprofessional and dishonorable" to be less than candid in taking witness statements and in preparing affidavits;⁶⁹ and that the lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."⁷⁰ Canon 32 said that "a lawyer will find his highest honor in a deserved

62. Canons of Ethics, *supra* note 54. The Canons were not the first ethics code for American lawyers. The Alabama State Bar Association had issued a Code of Ethics in 1887. The concepts and language of the Canons owed much to the Alabama Code. See Wolfram, *supra* note 45, at 54 n.21. The Alabama Code, in turn, relied heavily on an Essay on Professional Ethics by George Sharswood. *Id.* Sharswood's essay was first published in 1854. See L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 929 (1980).

63. See Louisiana Bar Association, 1910 Annual Report 208 (1910).

64. It stated:

The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

Preamble, Canons of Ethics, *supra* note 54.

65. See Canon 1, Canons of Ethics.

66. See Canon 17, Canons of Ethics.

67. See Canon 18, Canons of Ethics.

68. See *id.*

69. See Canon 22, Canons of Ethics.

70. See Canon 29, Canons of Ethics.

reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."⁷¹

I have already noted that the Canons were thought to be more in the nature of guidelines than hard-and-fast rules of conduct. These examples show that the Canons also had a moralistic tone. They called upon lawyers to be honorable and honest—people of conscience. They also called upon lawyers to be respectful and courteous. With respect to the latter two qualities, we might say that the Canons encouraged civility.

2. *The Code of Professional Responsibility*

The Model Code of Professional Responsibility was adopted by the American Bar Association in 1969.⁷² It was adopted, with some modifications, by the Louisiana Supreme Court, effective July 1, 1970.⁷³ Unlike the Canons, the Model Code incorporated distinct rules that could be the basis of lawyer discipline. At the same time, it expressly incorporated aspirational principles. Nonetheless, the Code contemplated that the ultimate measure of lawyer honor was something outside of the Code itself. The Preamble thus encouraged lawyers to seek the "highest possible degrees of ethical conduct," but it acknowledged that "[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."⁷⁴

The Model Code included Canons,⁷⁵ Ethical Considerations, and Disciplinary

71. See Canon 32, Canons of Ethics.

72. American Bar Association, Model Code of Professional Responsibility (1969) [hereinafter "Model Code"].

73. See A. Leon Hebert, *Professional Responsibility*, 19 La. B.J. 199 (1971).

74. Preamble, Model Code.

75. Only nine in number, here is what the Canons said:

Canon 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

Canon 2

A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available

Canon 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

Canon 6

A Lawyer Should Represent a Client Competently

Canon 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

Canon 8

A Lawyer Should Assist in Improving the Legal System

Canon 9

Rules. These three things, said the Preliminary Statement to the Code, "define the type of ethical conduct that the public has a right to expect."⁷⁶ But the three were very different. The Canons were described as "statements of axiomatic norms."⁷⁷ They expressed standards of conduct in very general terms. The Ethical Considerations were much more specific, but were aspirational in character. They were said to "represent the objectives toward which every member of the profession should strive."⁷⁸ The Disciplinary Rules, in contrast to the Ethical Considerations, were "mandatory in nature." They set forth "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."⁷⁹

The aspirational, and moral, dimensions of the Ethical Considerations can be readily illustrated by a few examples. Among other things, the Ethical Considerations said that a lawyer "should be temperate and dignified";⁸⁰ "should refrain from all illegal and morally reprehensible conduct";⁸¹ "should find time to participate in serving the disadvantaged";⁸² "should treat with consideration all persons involved in the legal process";⁸³ "should not engage in conduct that offends the dignity and decorum" of judicial hearings;⁸⁴ "should be courteous to opposing counsel"⁸⁵ and "not make unfair or derogatory personal reference to opposing counsel" in adversary proceedings.⁸⁶ Some of the Ethical Considerations included elements that are commonly wrapped up in the current label of "professionalism." For example, EC 9-6 said that a lawyer "owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; . . . to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar . . . ; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public." It also said that the lawyer owes a solemn duty "to strive to avoid not only professional impropriety, but also the appearance of impropriety."

Many of the Ethical Considerations were reminiscent of statements in the Canons. Although somewhat less moralistic in tone, they were even more overtly aspirational, clearly dealing with what is expected rather than what is required. Even more obviously than the expressions in the Canons, the Ethical Considerations dealt with topics that many today would allocate to the subject of

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

76. See Preliminary Statement, Model Code.

77. See *id.*

78. See *id.*

79. See *id.*

80. See EC 1-5, Model Code.

81. See *id.*

82. See EC 2-25, Model Code.

83. See EC 7-10, Model Code.

84. See EC 7-36, Model Code.

85. See EC 7-38, Model Code.

86. See EC 7-37, Model Code.

professionalism. But the Code described these expectations as *ethical* considerations.

3. *The Model Rules of Professional Conduct*

The Model Rules of Professional Conduct were promulgated by the American Bar Association in 1983,⁸⁷ and were adopted, with significant modifications, by the Louisiana Supreme Court effective January 1, 1987.⁸⁸ The Model Rules represent a substantial departure from the earlier codes.⁸⁹ Gone were the Canons. Gone were the Ethical Considerations. There were a few aspirational statements in the Preamble to the Model Rules, but the thrust of the Model Rules was reflected in this statement from a preliminary section called "Scope": "Failure to comply with an obligation or prohibition imposed by the Rules is a basis for invoking the disciplinary process." The Model Rules included "Comments," but these were intended principally to explain and to illustrate "the meaning and purpose of the Rule."⁹⁰ The emphasis was on standards for invoking discipline.⁹¹

The Model Rules actually do a bit more than define minimum levels of performance, whose violation may result in discipline. The Scope section of the Model Rules notes that some rules are "imperatives, cast in the terms 'shall' or 'shall not.'" Violation of those rules could result in discipline. Still other rules, "generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion." The Scope indicates that no discipline should result for a choice that is within the bounds of such discretion.

87. See Model Rules of Professional Conduct, Preface (ABA 1997) [hereinafter "Model Rules"].

88. See *Louisiana Rules of Professional Conduct*, in La. R.S. tit. 37, Ch. 4 App., art. XVI, Rules 1.1-8.5 (1988) [hereinafter "Louisiana Rules of Professional Conduct"].

89. Why the change? There was dissatisfaction with the Model Code. Robert J. Kutak, who chaired the American Bar Association Commission on Evaluation of Professional Standards (the "Kutak Commission"), said that lawyers and scholars found the "three-part structure of Canons, Ethical Considerations, and Disciplinary Rules cumbersome and confusing." Robert J. Kutak, *Model Rules of Professional Conduct: Why Do We Need Them?*, 36 Okla. L. Rev. 311, 311 (1983). One of the problems here was that "when no Disciplinary Rule governed the facts at hand, courts were increasingly reaching beyond those minimum standards and applying Canons and Ethical Considerations as enforceable rules." Robert J. Kutak, *How the New Ethics Code Will Affect Your Law Practice*, Barrister, Fall 1981, at 5. In the context of making a similar point, Geoffrey C. Hazard, Jr., the reporter for the Kutak Commission, called the structure of the Model Code "disastrous." Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 Clev. St. L. Rev. 571, 572 (1982). Hazard said that he supported continuance of the "aspirational aims of the Canons and Ethical Considerations," but he thought it was a mistake to do so in the rules themselves. *Id.*

90. *Scope*, Model Rules.

91. This is even more true in Louisiana than under the ABA's "model." When the Louisiana Supreme Court adopted the Rules of Professional Conduct, it did not include the Preamble, the Scope, or the Comments. See *La. Rules of Professional Conduct*. It adopted only the "rules" themselves.

Still other rules "define the nature of relationships between the lawyer and others." Finally, the Rules contemplate the existence of "moral and ethical considerations" that are beyond the Rules themselves, and that those considerations should also "inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."⁹²

The Model Rules contemplate the existence of moral and ethical considerations that are relevant to lawyer conduct, but give little attention to them. Instead, the Rules focus on standards of conduct for disciplinary purposes. The very nature of the Rules draws the attention of a reader to those minimum standards of conduct.⁹³ For many lawyers, those standards are the universe of "legal ethics." Given the nature of the Model Rules, it is not entirely surprising that some might consider "legal ethics" to be equivalent to that which is required of lawyers, under threat of discipline.

The profession has thus moved from codes that exhort lawyers to be good people to a group of rules that tell lawyers what to do (or not to do) to avoid punishment. In terms of the "codes" themselves, there could be said to have been a shrinkage in the territory of legal ethics. Whatever their other virtues are, the Model Rules seem to have come with a price. If codes are teachers (and I think they are), the Model Rules have failed to teach lawyers very much about the higher ideals of the legal profession. The professionalism "movement" itself may be, at least in part, a response to that failure.⁹⁴

V. ETHICS V. PROFESSIONALISM

We have already considered how the supreme court's order of May 23 did something odd with the definition of "legal ethics." We now might observe that the court's concept of legal ethics reflects the shrinkage of legal ethics that has just been discussed. But that is not the whole story, because the court's order also says that legal ethics includes legal malpractice. The court's order has placed an ethics label on something that is fairly far removed from traditional notions of ethics. Why? It seems that "legal ethics" has had to pay the price for the uncertain meaning of "professionalism." In order to require Louisiana lawyers to have a discrete credit hour in professionalism, the court had to make some room for the

92. *Scope*, Model Rules.

93. Professor Stephen Gillers said that the Model Rules of Professional Conduct "impose few significant duties on lawyers . . . not already present in law." Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 Ohio St. L.J. 243, 274 (1985).

94. Professor Cramton has observed:

[T]he contemporary evolution of ethical codes into quasi-criminal rules of minimum conduct largely abandons their role as a source of vocation or calling. The morality of aspiration, central to professionalism, is eclipsed by the morality of duty. The recent emphasis on lawyer oaths, creeds and civility resolutions is an appropriate effort to fill this gap.

Cramton, *supra* note 6, at 10.

new topic. It basically did so by defining legal ethics in an odd way and by saying that professionalism starts where ethics leaves off.⁹⁵

A. *The May 23 Order and the Meaning of Professionalism*

1. *An Indistinct Line?*

Of course, the court also endeavored to provide some specific content to the word "professionalism." Unfortunately, the specifics give rise to some difficulties. That is because some of the topics that the court allocates to professionalism are topics that are themselves subjects of provisions of the Model Rules of Professional Conduct. In short, it appears that the court has defined "professionalism" in a way that picks up some things from the court's own concept of "legal ethics."

In particular, the court's order tells us that "professionalism" includes "courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations." In fact, there are a number of duties on these topics set forth in the Rules of Professional Conduct. Many of those duties are "required," in the sense that their violation can result in formal discipline. But if these same duties are picked up by the term "professionalism," the line between "legal ethics" and "professionalism" becomes rather indistinct. An indistinct line here would have troubling implications for the practicability of the new rule.

2. *Overlapping Duties*

As the next few paragraphs show, it does not take much effort to find "duties" in the Rules of Professional Conduct that seem to be covered by the court's description of acceptable professionalism "courses."

With respect to duties to the judicial system, for example, the Louisiana Rules of Professional Conduct provide, among other things, that "[a] lawyer shall not . . . [s]eek to influence a judge, juror, prospective juror or other official by means prohibited by law,"⁹⁶ and that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice."⁹⁷

On the subject of respect to the courts, the Louisiana Rules provide, among other things, that "[a] lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a tribunal," "[f]ail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel," or "[o]ffer evidence that the lawyer knows to be false."⁹⁸

95. See Marvin L. Karp, *Some Reflections on Change—and Professionalism*, 24 *The Brief* 9, 76 (Summer 1995) ("'[P]rofessionalism' really picks up where 'ethics' leave off.").

96. La. Rules of Professional Conduct 3.5(a) (1988).

97. *Id.* Rule 8.4(d).

98. *Id.* Rule 3.3 (a)(1), (a)(3), (a)(4).

The Louisiana Rules also contain duties that might be said to relate to the public. For example, one rule provides that "[i]n the course of representing a client a lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a third person."⁹⁹ Another rule prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."¹⁰⁰ And there are also rather detailed provisions dealing with advertising and solicitation of clients.¹⁰¹ The basic rule with respect to lawyer advertising is that lawyers are not to make "false, misleading or deceptive communication[s]" about their services.¹⁰² This basic rule has an element of public protection about it. Other rules that engage a duty to the public are discussed below in connection with pro bono obligations.

The Rules of Professional Conduct set forth numerous obligations concerning clients. These include an affirmative obligation to provide competent representation,¹⁰³ a duty to represent clients "with reasonable diligence and promptness,"¹⁰⁴ a duty to keep the client "reasonably informed,"¹⁰⁵ a duty of confidentiality,¹⁰⁶ a duty to safeguard client property in the lawyer's possession,¹⁰⁷ and a duty of loyalty that takes form in various rules on conflicts of interest.¹⁰⁸

The Rules of Professional Conduct also include several duties relating to other attorneys. We have already noted the existence of a rule that prohibits a lawyer who represents a client from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person."¹⁰⁹ There is also a series of rules on "Fairness to opposing party and counsel." These rules deal with obstructing an opponent's access to evidence, falsifying evidence, making frivolous discovery requests, and lack of diligence in complying with discovery requests of an opponent.¹¹⁰

Competency is the subject of the first of the Rules of Professional Conduct. Rule 1.1 provides, in part, that a "lawyer shall provide competent representation to a client."¹¹¹ The rule also says that "[c]ompetent representation requires the

99. *Id.* Rule 4.1(a).

100. *Id.* Rule 4.4.

101. *See id.* Rules 7.1, 7.2.

102. *Id.* Rule 7.1(a).

103. *Id.* Rule 1.1.

104. *See id.* Rule 1.3.

105. *See id.* Rule 1.4.

106. *Id.* Rule 1.6.

107. *Id.* Rule 1.15.

108. *See id.* Rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12.

109. *Id.* Rule 4.4.

110. *Id.* Rule 3.4(a), (b), (d).

111. *Id.* Rule 1.1(a). The Rule also requires lawyers to comply with mandatory CLE rules. *Id.* Rule 1.1(b).

legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹¹²

Finally, there is a rule about pro bono obligations, although it does not have a mandatory nature. It provides that "[a] lawyer should render public interest legal service," and it describes different ways in which the lawyer may do so.¹¹³ A separate rule also prohibits a lawyer from seeking "to avoid appointment by a tribunal."¹¹⁴

Most of the rules that are listed in the foregoing paragraphs are of a mandatory nature—they say what is "required" of the lawyer.¹¹⁵ To the extent that they deal with what is "required," such rules would seem to fall within the court's definition of "legal ethics." But the rules also concern subjects that the court's order says are under the umbrella of professionalism. This seems to be a problem.

3. Broader Expectations

Does this mean that the distinction that the court is attempting to draw between "legal ethics" and "professionalism" is illusory? No. Even if the Rules of Professional Conduct contain "disciplinary" rules on subjects that are thought to come under the umbrella of professionalism, it is still possible to say more about those subjects. In this connection, we should recall the statement in the May 23 order about professionalism including "what is more broadly expected." And the court provides further relevant information in Regulation 4(b)(iv), which was adopted as part of its May 23 order. That regulation, which is quoted in full above, identifies the following topics as eligible for professionalism credit: (1) "the lawyer's responsibility as an officer of the court"; (2) "the lawyer's responsibility to treat fellow lawyers, members of the bench, and clients with respect and dignity"; (3) "misuse and abuse of discovery and litigation"; (4) "the lawyer's responsibility to protect the image of the profession"; (5) "the lawyer's responsibility generally to the public service"; and (6) "the lawyer's duty to be informed about methods of dispute resolution and to counsel clients accordingly."

Even this list does not tell us how "attorney competency," something that the supreme court includes in its catalog of professionalism "courses,"¹¹⁶ fits within the court's own concept of professionalism.¹¹⁷ And the list seems to incorporate

112. *Id.* Rule 1.1(a).

113. *Id.* Rule 6.1.

114. *Id.* Rule 6.2.

115. *See supra* authority cited in notes 96-114. The obvious exception is the pro bono rule. It may be said to deal with what is "expected" rather than what is required. La. Rules of Professional Conduct 6.1 (1988 & Supp. 1997).

116. *See* La. S. Ct. Order of May 23, 1977.

117. Competency is problematic as a professionalism topic because it is "required" by Rule 1.1 of the Rules of Professional Conduct. Moreover, incompetent performance by an attorney may give rise to malpractice liability. Malpractice liability, of course, is part of the court's definition of "legal ethics."

some things that are "required" of lawyers.¹¹⁸ But the list also clearly incorporates expectations that go beyond what is disciplinable or sanctionable. For example, relative to the duty of an attorney to the judicial system, a CLE speaker might go beyond a discussion of behavior that is prejudicial to the administration of justice and talk about opportunities for alternative dispute resolution. With respect to the lawyer's duty to the court, it would be appropriate to develop what it means to be an officer of the court. Regarding the lawyer's duty to clients and other attorneys, a CLE speaker could refer to the responsibility to treat them with civility and to avoid sharp practice in discovery and litigation. The new regulation does not provide much help on the lawyer's duty to the "public," but it might be appropriate here to focus on the positive aspects of accepting court appointments and on the benefits of voluntary service in civic affairs.¹¹⁹ Pro bono obligations also seem relevant to public service, but the court listed those separately from the duty to the public in amended Rule 3(c). In any event, Louisiana attorneys are not "required" to perform pro bono service as such, so this would be a topic that would clearly be appropriate for discussion in a professionalism presentation.¹²⁰ In the end, though there are some areas of overlap, it is apparent that the court's definition of "professionalism" has some content that is distinct from its definition of "legal ethics."

VI. PRACTICAL CONCERNS: THE NEW RULE AND CLE PROGRAMS ON PROFESSIONALISM

A. *Overlap*

There are a few practical concerns that arise from the court's order of May 23. One of these relates to the problem of overlap. As explained above, even though

118. One example is the inclusion of the "lawyer's responsibility to treat" others "with respect and dignity." The Louisiana Code of Judicial Conduct requires judges to "require" lawyers who appear before them to be "patient, dignified, and courteous" to litigants, jurors, witnesses and lawyers. See Canon 3(A)(3), Code of Judicial Conduct, 8 La. R.S. (1991). To the extent that the judge requires such conduct of a lawyer, such conduct may be thought to be "required," and not just "expected."

Another example comes out of the discovery rules. Those rules require an attorney to certify that discovery requests or responses are "[n]ot interposed for any improper purpose, such as to harass or to cause unnecessary or needless increase in the cost of litigation," and are "[n]ot unreasonable, unduly burdensome, or expensive, given the needs of the case." La. Code Civ. P. art. 1420(B)(2), (B)(3). The rules might be said to "require" attorneys to avoid discovery abuses. An attorney who violates the rules is subject to sanctions. See La. Code Civ. P. art. 1420(D).

119. The court's May 23 order is probably most vague on this aspect of "professionalism." Regulation 4.1(b)(iv), which was adopted in the court's order, merely refers to "the lawyer's responsibility generally to the public service." This might well include pro bono service, of course, but the court's order listed pro bono obligations separate from the lawyer's duties to the public. See La. S. Ct. Order of May 23, 1997.

120. Rule 6.1 says that Louisiana lawyers "should" render "public interest legal service." La. Rules of Professional Conduct 6.1 (1988).

professionalism has content that is distinct from legal ethics, it appears that there are some professionalism subjects that incorporate duties under the Rules of Professional Conduct—duties that would also come within the court's definition of legal ethics.¹²¹ Would it be acceptable for a CLE speaker to talk about those "incorporated" duties in a presentation on professionalism? Maybe not. However, even if the court actually intends there to be no overlap between legal ethics and professionalism, even if the court intends that a CLE presentation on "professionalism" deal *only* with conduct that is expected rather than required, it should be anticipated that a speaker might at least refer to a corresponding requirement under the Rules of Professional Conduct to give proper orientation to the presentation. For example, a speaker might say, in discussing the expectation that a lawyer treat other lawyers with respect and dignity:

I will now talk about our duty as lawyers to treat each other with respect and dignity. You are no doubt aware that the Rules of Professional Conduct prohibit us from using means, in representing our clients, that "have no substantial purpose other than to embarrass, delay or burden a third person." Such conduct may be the subject of discipline. That's not what I want to talk about today. Rather, I want to talk about some broader issues related to our treatment of opposing counsel. Avoiding discipline is one thing, but we can do better. And we should, because if we treat opposing counsel with respect and dignity we will be showing honor to an officer of the court, and to the system of justice itself. Moreover, we will be providing better service for our clients in the long run. As a practical matter, your opponent will be more likely to treat you with dignity and respect if you behave in a professional manner yourself. I have some examples to illustrate what I am talking about. . . .

The speaker might even draw some examples from cases in which lawyers were disciplined. However, the point would be to discuss the higher expectations associated with treatment of opposing counsel, not minimal modes of behavior that avoid discipline.

This sort of reference to the "rules" seems perfectly appropriate. One would hope the Continuing Legal Education Committee would not be too pharisaical about denying credit to programs on professionalism that acknowledge, or even discuss, the fact that several of the topics identified with professionalism are simply part of a continuum of conduct that incorporates disciplinary rules, malpractice liability, criminal sanctions, and moral standards.

B. Ethics Lite

The supreme court's definition of legal ethics permits it to carve out a separate sphere for professionalism that may be the principal focus of a CLE

121. See *supra* Section V(A)(2).

program. However, this does not mean that the average lawyer who attends a CLE program will see a tremendous distinction between professionalism and what he or she personally thinks of as "legal ethics." To the extent that the average lawyer sees a distinction, however, it seems possible that he or she might obtain the impression that one of the two required hours of CLE deals with "ethics" and the other hour deals with "ethics lite."

A CLE program that emphasizes "more broadly expected" things should not deal primarily with codified rules, with decisions of "ethics" committees, or with cases involving discipline or malpractice liability. In contrast, such rules, decisions, and cases are likely to receive substantial attention in a presentation on "legal ethics." Another way to say this is that a presentation on legal ethics will tend to deal, at least in part, with a type of law—what some have called "the law of lawyering."¹²² Written materials on "legal ethics" could easily incorporate rules, decisions, or cases. Written materials on professionalism would not be likely to do so, and would probably appear to be "thinner" in comparison. As a result, it is possible that CLE attendees may not be as serious about the hour of professionalism as they are about the hour of legal ethics. However, if the professionalism program is done well, and is interesting, this should not be a serious problem.

C. Program Availability and Program Content

There are two potential problems that are more likely to arise in the early years under the new rule than after the rule has been in place for a while. First, it is likely that professionalism programs will be harder to find than programs on legal ethics. CLE providers have a good deal of experience in setting up programs whose contents, at least in part, come close to the new definition of "legal ethics." They will have little or no experience with programs on professionalism. If the result is fewer programs on professionalism, this could present hardships for Louisiana lawyers, particularly rural Louisiana lawyers, who are required to obtain the new credit hour.

Second, it may be difficult to put together an effective CLE program on professionalism. In part, this is a matter of inexperience. Because CLE providers generally have not been offering programs on professionalism, they may not know how to do that very well at the outset. But the problem is larger than that, because it will probably be less obvious how or what to cover in a professionalism program than it would be in a program on, say, family law. One thing that could be brought up in a professionalism program is the Louisiana Code of Professionalism.¹²³ It certainly would be relevant. But a CLE speaker who spent much time

122. See, e.g., Robert J. Kutak, *The Law of Lawyering*, 22 Washburn L.J. 413 (1983); Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 1 (2d ed. 1994).

123. The Code of Professionalism states:

My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

reading that code out loud to a group of Louisiana lawyers would probably not do much for the cause of professionalism. Other approaches might include telling "stories" about incivility, or civility; providing accounts of professional behavior by great lawyers from the past or present; or making references to statistical data on perceptions of incivility. There might be role-playing or other demonstrations of appropriate or inappropriate behavior. Panel discussions might be offered. Film clips might be shown. More creativity will probably be required for the professionalism credit hour than for other CLE credit hours, but it should be possible to offer programs on professionalism that are interesting and are of reasonably good quality.¹²⁴ Even so, it would not be entirely surprising if some lawyers come to think of professionalism programs as being somewhat

I will clearly identify for other counsel changes I have made in documents submitted to me.

I will conduct myself with dignity, civility, courtesy and a sense of fair play.

I will not abuse or misuse the law, its procedures or the participants in the judicial process.

I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.

I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.

I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.

I will not use the threat of sanctions as a litigation tactic.

I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.

I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

See Denise C. Redmann, *Has the Golden Rule Tarnished? Put Professionalism Back into the Profession*, 43 La. B.J. 370 (1995).

The Code originated in work by the Professionalism and Quality of Life Committee of the Louisiana State Bar. It was approved by the Louisiana State Bar Association House of Delegates in 1991. It was approved by the Louisiana Supreme Court in 1992. See *id.*; Neuner, *supra* note 6, at 20. More recently, on August 5, 1997, the Louisiana Supreme Court adopted a separate "Code of Professionalism in the Courts." See La. S. Ct. Order of August 5, 1997.

124. The following suggestions emerged from some small group discussions at the October 1996 Symposium on Teaching and Learning Professionalism.

[T]he talking heads approach doesn't work. Interactive programs that involve discussion of vignettes are much more effective. To ensure a good group experience, be certain to employ first-class teachers and teaching materials.

Teaching and Learning Professionalism, Symposium Proceedings, at 134 (ABA 1997).

"preachy,"¹²⁵ somewhat light on substantive content,¹²⁶ and even somewhat pointless.¹²⁷

VII. HAVE WE LOST ANYTHING?

Finally, it would be well to consider a larger issue: Have we lost anything as a result of the court's order of May 23? Does the limited scope of legal ethics that is reflected in the order really matter very much if we now have a professionalism concept that takes up where legal ethics leaves off? Instead of losing anything, maybe we have made a substantial gain. For most lawyers, legal ethics has come, in practice, to have a somewhat limited meaning. They tend to think of legal ethics as the things that are covered in the "rules." Now professionalism is available to raise our sights to some of the ideals of the profession, perhaps to some of the same ideals that used to be set forth in the Canons, and in the Model Code, but that did not make it into the Model Rules. This is a gain, is it not?

It seems to me that the court's order involves both a potential gain and a potential loss. The potential gain is the overtly aspirational promise of professionalism. If there is to be an improvement in civility, an improvement in respect for

125. Which is not to suggest that preaching is a bad thing. Ministers of religion do a fair amount of this, often with good results. If the profession hopes to improve the behavior of its lawyers, a little preaching might be helpful.

126. One observer has noted:

[T]he focus of much of the current wave of professionalism is really on civility—how you treat your opponent, your client and the court. Civility is nothing more or less than common courtesy and decency in dealing with others. The Virginia Bar Association's Creed defines it as follows:

Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being.

Not a bad definition, but neither does it require an annual hour of CLE to become ingrained in our professional conduct. In fact, the Louisiana Code of Professionalism could be committed to memory in a fraction of that time.

Phillip A. Wittmann, *Should "Professionalism" Be Mandatory? Can Civility Be Taught?*, 45 La. B.J. 19, 23 (1997) (footnote omitted).

127. One complaint here might be that professionalism cannot be taught. On that point, the President of the Louisiana State Bar Association recently said: "I disagree. I believe that professionalism can be taught, professionalism can be reinforced, and professionalism should be the practice of all members of the bar." *One on One, The New LSBA President Discusses Pro Bono, Professionalism, Projects and Plans*, 45 La. B.J. 13, 15 (1997) (interview of David Bienvenu).

A larger question here, of course, is whether mandatory continuing legal education does any good at all. At least some commentators have raised questions about the effectiveness of mandatory CLE programs. See, e.g., Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 Md. L. Rev. 274, 291 (1986) ("[S]urely it is not self-evident that requiring passive attendance at a few intermittent lectures will have substantial effects."); Paul A. Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A. J. 574, 576 (1975) ("What may likely come about is that ten or fifteen hours a year of required professional education for all will entail big business for some continuing legal education entities, rote programming for others, and an exercise in frustration for most.").

the legal system, an improvement in public service by lawyers, and in the other values that may be incorporated into professionalism, some continuing legal education on those topics could be helpful. The potential loss, however, is troubling. Professionalism may incorporate a number of professional values, but it is not clear that it incorporates "legal ethics" in its broader sense.¹²⁸ It is not clear that professionalism is concerned with larger matters of right and wrong, good and evil.¹²⁹ On the other hand, the very expression "legal ethics"—vague though it may be—seems to be concerned, at least in part, with those matters. But the court's order of May 23 serves up a concept of legal ethics that is too limited to incorporate them. It seems to me that if we are ultimately concerned about lawyer behavior, and if we believe that continuing legal education can help, it is a mistake to take questions of right and wrong, good and evil, out of the curriculum.¹³⁰

To be sure, there are disagreements about fundamental questions of morality. But that does not mean that moral questions should not even be considered. They are among the most important questions that there are.

An illustration may be in order. In *Spaulding v. Zimmerman*,¹³¹ some defense lawyers ran into an "ethical" issue. They represented the defendants in a personal injury action brought by the father and natural guardian of David Spaulding, a young man who had been severely injured in an automobile accident. As is customary in such litigation, David was examined by a physician who had been hired by the defendants. This physician, a neurologist named Hannah, noticed something that had eluded David's own doctors: the young man was suffering from a potentially life-threatening aneurysm of the aorta. Dr. Hannah

128. Indeed, the court's order of May 23 strives diligently to make a distinction between legal ethics and professionalism.

129. Professor Cramton has argued that a "fully adequate conception of professionalism . . . rests upon a morality transcending any professional role or traditions." Cramton, *supra* note 6, at 18. However, he has also observed that there is disagreement about the meaning of professionalism, that it has several "false faces," and that the profession as a whole "cannot agree on matters of foundational truth." *Id.* at 7, 14, 18.

Timothy P. Terrell and James H. Wildman wrote: "Recent attempts to define the demands of legal professionalism have often been unsatisfactory because they reflect one of two extremes. One reduces professionalism to the level of professional etiquette—pleasantness, returning phone calls, and the like—so that it appears to lack any real moral content at all. The other vehemently gives professionalism moral content, but reduces it to a single, politically biased value—helping the poor." Terrell & Wildman, *supra* note 17, at 419.

130. Cf. Eleanor W. Myers, "Simple Truths" *About Moral Education*, 45 Am. U. L. Rev. 823, 851 (1996) ("If we avoid using words such as ethical, professional, right, wrong, and truth, we send a message that those concepts are irrelevant to the enterprise.") (Professor Myers was writing about law school education at this point).

Professor Robert Cochran has observed: "It may be that the problem in the legal profession is not too little attention to rules, but too little attention to character." Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon's A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society and Anthony T. Kronman's The Lost Lawyer: Failing Ideals of the Legal Profession*, 71 Notre Dame L. Rev. 707, 707 (1996).

131. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

did not know whether the aneurysm had developed in consequence of the accident, but the neurologist wrote a report to defense counsel about it. Dr. Hannah wrote that the aneurysm was "[t]he one feature of the case which bothers me more than any other."¹³²

Defense counsel did not tell David, his father, or opposing counsel about the aneurysm. Why? It would have changed the settlement calculus. And the case did settle—for \$6500. Later, when David took an army reserve physical, he learned of the aneurysm, and brought a successful motion to reopen the settlement. The trial court said that "when the parties were in an adversary relationship, no rule required or duty rested upon defendants to disclose" the aneurysm; however, defendants "must be here charged with knowing, that plaintiff under all the circumstances would not accept the sum of \$6500.00 if he or his representatives knew of the aneurysm and its possible serious consequences."¹³³ Defendants appealed the decision to reopen the settlement, but they lost. In its opinion affirming the decision of the trial court, the Minnesota Supreme Court said that "[w]hile no canon of ethics or legal obligation may have required" defense counsel to tell David about the aneurysm, it was obvious that the earlier settlement had not taken the aneurysm into account.¹³⁴

Should defense counsel have told David about the aneurysm? The "canon of ethics" may not have *required* them to do so. Indeed, absent client consent to disclosure, the confidentiality rules would have pointed to a "no" answer to the disclosure question. But moral considerations, ethical considerations, would have pointed to a "yes."¹³⁵ The case presented not just a question under the "rules," but also a question of right and wrong. Is it appropriate to consider such moral questions under the rubric of "legal ethics"? I think it should be. But I do not see room for such considerations under the concept of "legal ethics" reflected in the May 23 order. I question the wisdom of teaching a version of legal ethics that is limited to malpractice and things that are "required" of lawyers. This is a version of ethics that is divorced from its larger ethical moorings.

VIII. CONCLUSION

The Louisiana Supreme Court has given Louisiana lawyers an annual opportunity to hear about something called "professionalism" as part of their mandatory continuing legal education obligations. The court also wants Louisiana

132. *Id.* at 707.

133. *Id.* at 709.

134. *Id.* at 710.

135. Other considerations also pointed in favor of disclosure. First, there was the risk (actually realized) that the settlement could be set aside. Second, there was a risk of tort liability for the nondisclosure. The general rule in tort is that a stranger has no duty to rescue someone else from danger. However, an exception to this rule arises when the defendant's own negligence places the plaintiff in danger. In that situation, tort law imposes a duty to give assistance and to avoid further harm. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 375-77 (5th ed. 1984).

lawyers to have an annual hour of CLE credit in "legal ethics." To achieve its purposes, the court issued an order that seeks to distinguish "professionalism" from "legal ethics." The result is an odd definition of "legal ethics," a definition of "professionalism" that seems to overlap with "legal ethics" in some respects, and some uncertainty about the substantive content of "professionalism."

To the extent that human behavior can be positively influenced by "teachers,"¹³⁶ the court's order of May 23 should contribute to an increase in professionalism among members of the bar. That would be good. My principal concern with the court's order is that it does injury to the notion of "legal ethics." In its broadest sense, legal ethics has been thought to deal with more than minimal standards of conduct, with more than things that lawyers must do, or not do, to avoid punishment. Legal ethics has also been thought to deal with what is right. But that is not the concept of legal ethics reflected in the court's order. The court's concept of legal ethics, the concept that it wants all Louisiana lawyers to hear about every year, is limited to legal malpractice and standards of required conduct. This is a loss.

Does the new professionalism hour make up for that loss? That is not apparent from the court's order. Unfortunately, professionalism remains a rather uncertain term, with an uncertain meaning. It is not clear at all that it incorporates fundamental considerations of right and wrong. If it does not, I think the May 23 order represents a wrong turn for the profession.

136. I think it can.

