

Spring 2001

Public Declaration of Professionalsim

Bruce A. Green

Fordham University School of Law

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Bruce A. Green, Public Declaration of Professionalsim, 52 S. C. L. Rev. 729 (2001).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

Green: Public Declaration of Professionalism
PUBLIC DECLARATIONS OF PROFESSIONALISM

BRUCE A. GREEN*

I. INTRODUCTION: THE CHALLENGE OF PROMOTING “PROFESSIONALISM”	729
II. A PROPOSAL: INDIVIDUALIZED PROFESSIONALISM CODES	734
III. WHY “DO IT YOURSELF” IS BETTER THAN “OFF THE SHELF”	739
IV. A CODE OF PROFESSIONAL VALUES IS PREFERABLE TO A PHILOSOPHY OF LAWYERING	742
V. A CHALLENGE TO THE LEADERSHIP OF THE BAR: PROFESSIONALISM BEGINS AT HOME	745
VI. CONCLUSION	746

“‘Profession’ comes from the Latin, *professionem*, meaning to make a public declaration. The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling.”—Deborah L. Rhode¹

I. INTRODUCTION: THE CHALLENGE OF PROMOTING “PROFESSIONALISM”

When it comes to the subject of “professionalism,” there is a gap between the leaders of the organized bar and its members. Bar leaders are eager to discuss the subject. For example, this year’s annual meeting of the American Bar Association (“ABA”) afforded bar leaders, as well as legal academics, a host of opportunities to share strategies to promote “professionalism” and “professional values.” The Section of Legal Education and Admissions to the Bar sponsored a program on “Professionalism in Law Schools and the Profession.” Organizations representing bar executives, bar presidents, and bar foundations jointly presented a program called “Tough Talk, Tough Solutions—Re-establishing Lawyers’ Values.” The Texas Center for Legal Ethics and Professionalism convened a meeting of the National Consortium of

* Louis Stein Professor, Fordham University School of Law. This article benefitted from suggestions made by many, including family members, friends, and colleagues. Special thanks to Roy Stuckey, who organized the National Conference on Professionalism for which this article was prepared and made many thought-provoking comments and suggestions along the way.

1. DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 37 (Aspen Publishers 1994) [hereinafter ETHICS BY THE PERVASIVE METHOD].

Professionalism Initiatives, comprised of representatives of bar associations and ethics and professionalism centers, whose mission includes encouraging lawyer professionalism.

In contrast, most practicing lawyers at the annual meeting did not come to discuss professionalism. They came to learn something that they considered useful to their practice, to network with other lawyers, or to enjoy a tax-deductible vacation. In the many programs designed for practitioners, professionalism does not appear to have received much play even when there were opportunities to discuss it.²

2. That was my experience, in any event, as a panelist in a program entitled: "Ethical Considerations in Asset Protection—Views From the Bench and Bar." The program, which generally deserved high marks, was designed for lawyers who advise clients on how to protect their assets by, for example, transferring money to off-shore trusts in order to keep it out of the reach of potential creditors. Although the subject of the program was "ethical considerations," the first two speakers confined their remarks almost exclusively to legal questions. In particular, they discussed whether a transfer of assets will be viewed as a "fraudulent transfer" or a "fraudulent conveyance" under the law, so that a creditor may bring a lawsuit to void the transaction or a bankruptcy judge may deny the debtor a voluntary discharge of debts. Building on this foundation, the next speaker addressed the professional conduct of lawyers. He maintained that a "fraudulent transfer" is a voidable transaction but is not a prohibited one, nor is it a "fraud" under tort law because it does not involve deceit. Therefore, the speaker urged, disciplinary provisions forbidding a lawyer from knowingly assisting a client in a "crime" or "fraud" would not bar the lawyer from helping a client to set up a trust that the lawyer knows could be set aside as a fraudulent transfer. Although the client's conduct might be morally questionable, the speaker suggested, it was not prohibited by law, and therefore the lawyer could lend assistance.

As the final speaker, I identified several other disciplinary provisions that might bear on the work of lawyers in the area of asset protection and described some disciplinary decisions and ethics opinions applying the rules to situations these lawyers might face. Only in the end, and fleetingly, did I address the separate subject of professionalism. I noted that a lawyer is not required to represent every client who offers to pay the lawyer's fee and that, as a matter of professionalism, the asset-protection lawyer might therefore consider declining the representation if the lawyer believes it is morally questionable for a particular would-be client to move money into a trust in order to deprive creditors of what they are owed. It might have been interesting, at least to me, to explore this "professionalism" question further. Should lawyers be morally accountable—at least to themselves and perhaps to the profession and/or the public—for their decisions about which clients they represent and the objectives they seek to achieve on their clients' behalf? See, e.g., Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 611 (1994), quoted in A.B.A. SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 8 (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM] (identifying accountability to clients, engaging in moral dialogue with clients, and bringing one's moral conscience to bear on one's professional work, as among the elements of a new vision of the legal practice); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 49 (1990) (opining that "the choice of a client is an aspect of the lawyer's free will, to be exercised within the realm of the lawyer's moral autonomy"). Should lawyers put themselves in the position of judging whether their prospective clients' legal objectives are moral ones and decline to take on certain clients whose own moral compass points in a different direction? If so, what are the implications of this principle when a client seeks legal assistance in transferring assets? When, if ever, is it wrong to try to preserve one's assets for one's family rather than creditors? There was little time to explore these questions and, I believe, little interest among the other panelists or the audience.

It is hard enough to get practitioners to talk about legal ethics. Although the subject is largely about the law of lawyer regulation, lawyers are uncomfortable with the subject's moral overtones. Moreover, lawyers may be concerned that the "dirty little secrets" of their area of practice—the ways in which their real-world practices appear to depart from the disciplinary rules as written and interpreted by ethics committees—will be revealed and criticized. It is infinitely harder to get practitioners to talk about professionalism. Here, the touchy concept of morality is front and center. Lawyers' practices are even more vulnerable to criticism since lawyers are more likely to disregard "professional values" than disciplinary rules. Further, unlike the question of how to avoid sanctionable conduct, the question of how to act professionally has no direct relevance to lawyers' livelihood since lawyers are not at risk of losing their licenses for conduct that is merely "unprofessional."³ At best, practitioners may perceive that a discussion of professionalism is of no value; at worst, they might resent paying good money to be preached to or to have their moral judgment impugned. It is much easier to talk to law students about professionalism since they are a captive audience.⁴ Practitioners do not have to show up. One can therefore understand why there has been little effort to infuse "professionalism" into bar programs generally, why programs specifically dealing with "professionalism" are clearly labeled, and why participants in those programs perceive that they are preaching to the choir.⁵

Compounding the problem is that "professionalism" is a subject on which we lack a shared vocabulary and shared understanding. The ABA's 1996 report, *Teaching and Learning Professionalism*, underscored this difficulty,⁶ as did the ABA's report, "... In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism"⁷ a decade earlier. Perhaps, at one time, there was a set of professional ideals, values and aspirations that were generally shared, at least among lawyers in the profession's elite. If so, that is no longer true. The legal profession has grown in size, spread geographically,

3. See, e.g., *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 73 (2d Cir. 2000) (holding lawyer's conduct in writing a harsh letter was not sanctionable).

4. Hence, the ABA report on *Teaching and Learning Professionalism* included more than twelve pages of recommendations about law school professionalism training but less than ten pages of recommendations about promoting professionalism among practitioners. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 2, at 13-34.

5. This is not to say that practitioners throughout the country avoid all public discussions of professionalism. In Georgia, for example, the Chief Justice's Commission on Professionalism, founded in 1989, has successfully overcome whatever reluctance many of its state practitioners might have had to talk about this subject. Its state-wide convocations on professionalism, town hall meetings, and continuing legal education programs have engaged hundreds of Georgia lawyers in discussions of lawyer professionalism. A.B.A. STANDING COMMITTEE ON PROFESSIONALISM, A GUIDE TO PROFESSIONALISM COMMISSIONS 5 (2001).

6. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 2, at 27 n.80.

7. A.B.A. COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) (noting elasticity of concept of "professionalism") [hereinafter "... IN THE SPIRIT OF PUBLIC SERVICE"].

and become democratized, heterogenous, and specialized.⁸ “Professionalism” does not mean the same thing to all lawyers. Some identify it with “an unrealistic, nostalgic vision of nineteenth-century practitioners”⁹ and therefore have little use for it. In part for these reasons, lawyers may not necessarily agree that professionalism is important, that it is on the decline, or that special efforts should be made to promote it.

Some might fear that in order to encourage lawyers to act “professionally,” one must first identify a set of professional values that are universal, identify a set of professional aspirations toward which all lawyers should strive, convince lawyers to subscribe to these values and aspirations, and develop a common understanding of what it means to act in accordance with these values and aspirations.¹⁰ Otherwise, efforts to promote professionalism will run aground on the criticism that the wrong values and aspirations are being encouraged.¹¹ However, if that is true, then the task of promoting lawyer

8. See generally *id.* at 1-2 (noting the growth and diversification of the legal profession in the twentieth century).

9. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 2, at 4; see also Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995) (discussing the nineteenth century “Professional Paradigm” which placed altruism above self-interest). Professor Russell Pearce has stated:

[M]any people would say that today, no matter what big firms say about professionalism, their credo is let’s make as much money as we can.

I don’t think the answer to that is more professionalism. I think it’s been demonstrated that professionalism is not a persuasive way to motivate the interests of the common good; it is no longer a powerful socialization tool.

Defining and Refining Professionalism: Assessing the Roles and Regulation of Lawyers in the Twenty-First Century, Transcript: Panel Discussion and Audience Comments, 27 FLA. ST. U. L. REV. 205, 225 (1999).

10. For example, Professor Milton C. Regan, Jr. has identified the following three values that he believes to be “expressed by the idea that the lawyer is a professional”: “devotion to client”; “the idea that the lawyer is a craftsman who is committed to producing the best work possible as determined by standards internal to the profession”; and “the exercise of independent judgment as a steward of the legal system.” Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 33-34, 36 (1999). By way of comparison, the MacCrate report identifies four “fundamental values of the profession” which include various subparts: providing competent representation; striving to promote justice, fairness and morality; striving to improve the profession; and continuing professional self-development. A.B.A. SECTION OF LEGAL EDUC. ON L. SCHOLARSHIP AND THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 207-21 (1992).

11. Bradley Wendel observed:

Religious preachers can appeal to a sacred text or revealed truth to ground their claims that their parishioners ought or ought not to do something. But preaching to lawyers in a pluralistic society is a different matter altogether, and the success of secular preaching by bar association leaders and judges depends on locating the authority for moral propositions.

W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 4 (1999).

professionalism must take a back seat to the debate about what professionalism means—a debate that may never be resolved to all lawyers' satisfaction.

All in all, bar leaders and academics who are concerned about lawyer professionalism face a difficult task in their efforts to bridge the professionalism gap—the gap between the high-minded ideals of the bar leadership and the work-a-day concerns of ordinary practitioners.¹² How do you encourage lawyers, individually, to reflect on professional values, to discuss matters of professionalism with each other, and to participate in a profession-wide discussion of this subject? And, can this type of reflection and conversation be promoted without a shared understanding of what it means for a lawyer to be “professional”?

One possible answer is to stop talking to, or at, lawyers about professionalism and professional values and to stop trying to dictate a set of professional values with which some lawyers may lack sympathy. Let the term “professionalism” remain vague and contested. Even if lawyers have different understandings of what it means to be “professional,” almost all understand the importance of *being* “professional.” Legal institutions should therefore encourage lawyers, individually or collectively, to reflect on what professionalism means to them; to articulate, and periodically re-articulate, their own values and aspirations as lawyers; and, once having done so, to strive to conduct themselves accordingly. In essence, lawyers should be encouraged to take out their own moral compass and consult it regularly to chart the course of their own professional lives.

With the idea of encouraging lawyers to engage in independent moral reflection and decisionmaking, this Article offers a proposal and a challenge. The proposal is simple: Law firms should develop, adopt, and implement their own individualized codes of professionalism. The challenge, intended to promote implementation of this proposal, is directed to leaders of the bar whose mission includes promoting professionalism. It, too, is simple: Persuade your own law firm to develop, adopt, and implement a professionalism code.

II. A PROPOSAL: INDIVIDUALIZED PROFESSIONALISM CODES

The proposal is directed at all law firms—law partnerships, solo practices, in-house corporate law departments, government law offices, and other offices in which lawyers practice.¹³ First, each law firm should develop a “code of professionalism” to govern the conduct of its lawyers in areas of professional discretion. In effect, lawyers in each law firm should ask, “What does it mean

12. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 2, at 8 (noting “the gap between the ideal and reality” of the legal profession).

13. Cf. MODEL RULES OF PROF'L CONDUCT, Terminology (1998) (defining “law firm” to include a private firm, the legal department of a corporation or other organization, or a legal services organization).

for us to conduct our practice in a highly professional manner?” and then answer the question for themselves. Second, through this process, each law firm should adopt an individualized professionalism code; make it available to the office, clients, and to other members of the public; periodically reconsider it; and, where appropriate, add to it or change it. Finally, each law firm should adopt policies to implement its code. These policies should encourage lawyers in the firm to act consistently with the office’s code of ethics and measure their own and each others’ professional conduct based, in part, upon their success in following the direction of their collective moral compass.

How would professionalism codes be developed? The process would vary, depending on the nature and size of the law firm and the nature of its internal governance. In a large law firm, the initial task of drafting a professionalism code might be delegated to a small committee whose work product would then be circulated, discussed, and refined. In a small firm, all lawyers might participate. Although lawyers in an individual practice might work alone, it would be preferable for them to collaborate with other practitioners in their community who have similar practices and similar values, while anticipating the possibility of individual variations. The ideal is for lawyers to work collectively in professional communities of lawyers with shared values. At one time, a lawyer’s professional community might have been comprised of all the lawyers in the jurisdiction. Today, a lawyer’s “community” may simply be the law firm, in-house legal department, or government law office where the lawyer works with others who share responsibilities and, ideally, a professional culture.¹⁴

As law firms make their individual codes available to the public, the process of developing professionalism codes can become a dynamic one within the profession at large. Legal publications such as the *American Lawyer* or the *National Law Journal* might examine and compare different professionalism codes to identify variations. Law firms might proceed with care because of the possibility of being criticized for what they include or omit. Eventually, publications might not only evaluate the codes but evaluate how lawyers and law firms live up to their professional aspirations. The publications that currently rank law firms based on associate satisfaction and commitment to pro bono work and the publications that list top litigators and most influential lawyers might also rank law firms based on their level of professionalism and list the “One Hundred Most Professional Lawyers.”

What would the codes look like? The answer to that question would be left entirely to the individual law firms. The idea would be for each office to develop a statement that articulates its lawyers’ collective values and aspirations. The statements would vary, in part, because lawyers have different practices. A government law office might refer to values such as “rendering impartial justice,” which one would not expect to find in the code of a private

14. See *id.* at 27.

practitioner. Lawyers who work in commercial areas might acknowledge a responsibility to consider the moral implications of the ends they serve, whereas a public defender's office probably would not do so. The statements would also vary because lawyers sometimes have different values and because they might express similar values in different ways.

What kinds of values and aspirations would the codes articulate? Ideally, the professionalism codes would articulate values and aspirations that are not codified in the rules of professional conduct or in other aspects of the "law governing lawyers." The codes would offer guidance to lawyers in how to conduct their professional lives within the bounds of existing regulation.¹⁵ For example, there is little need for lawyers to say, "We will strive to comply with the disciplinary rules." As to disciplinary rules, they have no choice. Following the rules is not acting professionally, it is acting lawfully. Professionalism codes should go beyond disciplinary and legal obligations to address areas where lawyers do have a choice.

Among other things, the professionalism codes could invoke values that seem important but have lost prominence or have disappeared entirely in the ABA's transition from the *Canons of Professional Ethics* to the *Model Code of Professional Responsibility* to the *Model Rules of Professional Conduct*.¹⁶ The codes might invoke values that the particular lawyers identified with the legal practice even before deciding to enter the profession and that, indeed, inspired them to become lawyers. Or, they might invoke values that were inculcated by law schools, bar associations, courts, and other organizations within the legal profession.

Because the professionalism codes would be *public* declarations, there are some values they would not include—namely, values with which the particular lawyers are embarrassed to be publicly identified. Some lawyers may be driven by avarice and, in their heart of hearts, believe that making money is all that

15. Cf. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 56 (1997) (noting the porousness of professional norms and the impact of personal values).

16. The *ABA Canons of Professional Ethics* identified various standards of professional comportment that would not have been appropriate for a disciplinary code because they were essentially aspirational or because they were at a level of generality too broad for fair and effective use in disciplinary contexts. See, e.g., CANONS OF PROFESSIONAL ETHICS Canon 1 (1957) (identifying the duty to "maintain toward the Courts a respectful attitude"); *id.* Canon 2 (identifying "the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges"); *id.* Canon 7 (condemning "[e]fforts, direct or indirect, in any way to encroach upon the business of another lawyer"); *id.* Canon 11 (enjoining a lawyer from "any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client"). Although some general standards were carried over into the "Ethical Considerations" of the *Model Code of Professional Responsibility*, they were largely expunged from the *Model Rules of Professional Conduct*, which contains disciplinary provisions and interpretive commentary but avoids broad statements of principle that are merely aspirational. See MODEL CODE OF PROF'L RESPONSIBILITY (1980).

matters. Others may believe in winning for their clients at all cost. Presumably, lawyers would not incorporate these values into a professionalism code.

Among the topics that a professionalism code might address are the following: How lawyers should treat other lawyers, nonlawyer personnel, and others in the office; how lawyers should balance their professional lives against their responsibilities to their family and the community;¹⁷ how the office conceptualizes its lawyers' responsibility to the legal profession and to the public; the lawyers' responsibility to develop and expand their skills and knowledge; the standards to which the lawyers will aspire in representing clients; the role of moral values in the lawyers' professional work on behalf of clients; the importance of integrity; and the importance of promoting public respect for the law and the legal profession.

Law firms might opt to describe their professional values in open-textured, aspirational terms. For example, with respect to some of the subjects noted above, a professionalism code might state simply:

We will strive at all times to treat others with civility and respect.

Although we will strive to perform our work diligently, we will not allow work to so dominate our lives that we are unable to fulfill our responsibilities to our families, communities, and others outside the workplace.

We will dedicate a significant part of our professional lives and resources to improving the profession, to engaging in public service, and to assisting those who cannot afford legal services.

We recognize that lawyers should continually work to improve their skills and develop better understandings of the law and legal institutions, and therefore, we will make time in our professional lives, and allow time in the professional lives of those working under our supervision, for ongoing legal education.

We will strive to represent clients to the best of our professional ability.

We will consider the moral implications of the decisions we make and encourage our clients to do the same.

We will be honest and keep our word.

We will strive to promote public respect for the law and for the legal profession.

17. See generally Patrick J. Schiltz, *On Being A Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 895 (1999) (explaining how the long hours associates work at law firms take away from time spent with family, time spent traveling and doing other leisurely activities, and time spent getting involved in the community).

Alternatively, lawyers might opt to craft a professionalism code that deals concretely with specific topics. For example, civil litigators, in elaborating on the concept of civility, might incorporate provisions like those now contained in bar association civility codes. One such provision might state that a lawyer will not use discovery to harass, will make good faith efforts to resolve discovery disputes, will not request an extension of time solely for unjustified delay or tactical advantage, and the like. Similarly, law firms might elaborate on the concept that others should be treated respectfully by identifying specific language that the law firm considers appropriate and inappropriate. Greater specificity might be preferable, either because some lawyers view open-textured statements as mere platitudes or because some lawyers perceive a need to elaborate on how the broad statements apply in particular situations.

A professionalism code may articulate values that do not grow out of the tradition of the legal profession. Instead, the code may reflect common societal values.¹⁸ A professionalism code may also reflect other moral traditions. For example, religiously observant lawyers might draw on their religious traditions, crafting a statement that integrates religious and professional values.¹⁹ A professionalism code may reflect a personal view of what good lawyering entails. Consequently, it may articulate values that are debatable: "We respect our clients' autonomy, and we believe that our clients are capable of independent moral decisionmaking. Therefore, we will not disparage our clients' values or attempt to impose our own on them." Professionalism codes that value civility over the adversary ethic may, at least in the view of litigators, appear to be particularly debatable. Debate within the profession would be healthy.

Debate may also be internal within a law firm, as lawyers identify a tension between different values or between their articulated values and their practices. For instance, a law firm may espouse the value of fierce loyalty to its clients but discover that the ideal, as articulated, seems to be inconsistent with its practice of asking clients for "advance waivers" of conflicts of interest, in order

18. It may fairly be argued that most, if not all, of the values conventionally associated with professionalism are simply common values given specific application in the context of legal practice. For example, my nine-year-old son, Zack, could not believe I was attending a conference at which lawyers would discuss the importance of treating others with respect, spending time with their families, not working too hard, and making the world a better place. His response was "Doesn't everyone already know that?" Our conversation underscored that the professionalism movement is bottomed on a pessimistic, yet possibly accurate, assessment of contemporary legal practice: How dysfunctional are we lawyers if we have to be continually reminded, over the course of decades, to behave in our professional lives in the way people are ordinarily expected to behave in their lives and work? See TRANSCRIPT, 52 S.C. L. REV. 481, 544 (2001).

19. For recent discussions of the relevance of religion to lawyers' work, see Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999) and Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

to enable the firm to represent one client adversely to another.²⁰ Or a law firm might espouse a commitment to family and community but find that the demands the firm places on its lawyers allow too little time to fulfill either commitment.

Once adopted, how would a law firm implement its code? Obviously, an office should make the professionalism code available to its lawyer and nonlawyer personnel, to its present and prospective clients, and others. In a large law firm, the code should be incorporated into the training of new lawyers. Indeed, a large firm might use it to educate prospective associates about the values of the firm. At present, law students may have a hard time learning what values a law firm regards as important; a professionalism code might give them useful information.

Lawyers individually should assume the responsibility to conduct their professional lives in accordance with the professional values of their office—or to rewrite the code. Furthermore, law firms should develop policies to give effect to their professionalism codes and to measure each other's conduct, in part, based on their adherence to the articulated values and ideals of the office. Law firms might identify the consequences for lawyers who transgress. For example, lawyers who treat others without civility or respect will be expected to promptly apologize for having done so.

Although clients and others outside the firm might take lawyers to task when they act inconsistent with their publicly declared ideals,²¹ enforcement should be primarily internal. Further, enforcement should be primarily informal. The professionalism codes will serve a function like a sign on a shop wall, "Service with a smile," which reminds shop personnel to provide friendly service and invites customers to comment when they act brusquely. So, too, individualized professionalism codes will educate and remind lawyers about what they expect of themselves. When lawyers fall far short, the professionalism code will give fellow lawyers an articulated standard on which to base criticism or encouragement to do better.

III. WHY "DO IT YOURSELF" IS BETTER THAN "OFF THE SHELF"

More than a decade ago, two different sections of the ABA developed models—one a "creed"²² and the other a "pledge" of professionalism.²³ Around

20. For a recent examination of advance conflict waivers, see Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289 (2000).

21. Sophisticated clients, such as large corporations which interact with law firms through their in-house counsel, might particularly have occasion to remind their lawyers of the lawyers' own stated principles of practice.

22. The ABA Torts and Insurance Practice Section developed a "Lawyer's Creed of Professionalism." See THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 640 (1999).

23. The ABA Young Lawyer's Section adopted a "Lawyers' Pledge of Professionalism." See *id.* at 642.

the same time, rather than adopting either model, the ABA recommended that state and local bar associations should “encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyers’ creed of professionalism.”²⁴ The 1996 ABA report described “professionalism codes and creeds” as “[t]he most prominent work products of [bar association professionalism committees].”²⁵

While the ABA offers “off the shelf” codes, the proposal in this Article is for “do it yourself” codes. This proposal reflects several considerations. The obvious one, already noted, is that if lawyers develop their own codes, the codes are more likely to articulate values that are meaningful to them, and the lawyers would be more fairly held accountable for conduct that, measured against their personal statement, is unprofessional. For many lawyers, the model creeds or pledges will contain provisions that are irrelevant to their areas of practice. For example, a transactional lawyer need not pledge to “refrain from filing frivolous motions” and a litigator need not pledge that “in business transactions I will not quarrel over matters of form or style.” Further, a lawyer may view many of their provisions as either too detailed or too vague.

Additionally, the ongoing process of developing and refining a code is possibly more important than the product. Through this process, lawyers will reflect personally on the substance of their professional values and, ideally, engage in dialogue within their offices and legal community. Lawyers who engage in the process of discussing, articulating, and publicly affirming their own values are far more likely to act in conformity with those values than lawyers who simply tack a model creed on the wall. In addition, the dialogue among lawyers about their respective professionalism codes will at once promote community and reinforce the importance of acting professionally.²⁶

24. *Id.* at 640.

25. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 2, at 28. Of course the professionalism code, creed, or pledge is not to be confused with a civility code. *See, e.g.*, COMM. ON CIVILITY OF THE SEVENTH FED. JUDICIAL CIRCUIT, FINAL REPORT, 143 F.R.D. 441 (1992) (promulgating the Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit); STANDARDS OF CIVILITY FOR NEW YORK STATE, *reprinted in* ROY SIMON, SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 967 (2000). The professionalism code, creed, or pledge should also not be confused with the *Model Rules of Professional Conduct*. *See* MODEL RULES OF PROF’L CONDUCT (1998); MODEL CODE OF PROF’L RESPONSIBILITY (1980).

26. For law schools, an analogue of the process of developing a law firm professionalism code is the development of a mission statement and self-study. As part of the re-accreditation process, law schools periodically engage in a self-reflection, which culminates in the drafting of a self-study. The process includes revisiting and possibly revising the law school’s mission statement, measuring the law school’s success in accomplishing its mission, identifying areas where it has fallen short, and identifying plans for succeeding in the future. However, this is not to say that law school mission statements and self-studies serve the same function as professionalism codes or that law professors would not benefit from professionalism codes that describe their collective values as law faculty, including their understanding of how to interact with one another, with students, and with others. An example of what might be considered an off-the-shelf professionalism code for law faculty is the *AALS Statement of Good Practices* by

But the end product is also important. As a law firm develops, drafts, and implements its professionalism code, the code may serve not only as a reflection of the particular office's culture but also as a device for reshaping the culture of the office and moving it in a direction consistent with its individual lawyers' highest professional aspirations. This is important for those committed to promoting lawyer professionalism because one of the most important influences on a lawyer's professional conduct is the culture of the office in which the lawyer works.²⁷ Obviously, many factors go into shaping the culture of the office, but recent experience suggests that self-produced professionalism codes may have a meaningful role.

For example, a 1989 article in the *ABA Journal* described the significance of a law firm creed that a Seattle law firm developed on its own.²⁸ Reflecting the conception of a "firm of professionals," the creed identified the goal of "provid[ing] excellent legal services," a commitment to both continual improvement and to enabling employees "to grow to their highest potential."²⁹ The creed also vowed that the firm would "provide a quality working environment" and would recognize "obligations to our families and to the community in which we live and work."³⁰ After adopting the creed, the firm referred to it for guidance when making a variety of decisions.³¹

More recently, in her keynote address to this symposium, ABA President, Martha Barnett, described how, more than a decade ago, a respected partner of her law firm, Holland & Knight, initiated the development of a law firm creed that elaborated upon the three "Cs" of character, competence, and commitment.³² Ms. Barnett observed that the creed has since been referenced for decisions regarding matters of compensation, promotion, and planning and that the creed has helped the firm become an institution with values that everyone has accepted and viewed with pride.³³

Law Professors in the Discharge of their Ethical and Professional Responsibilities. But there is much to be said in favor of a law faculty engaging in the independent exercise of developing its own code and focusing specifically on the question of "professionalism."

27. See, e.g., Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 306, 309-10 (1996) (citing survey results and secondary literature regarding effect of firm culture on use of peer review).

28. David Gering, *Law Firms Adopt Credo*, A.B.A. J., Jan. 1989, at 56, 56-58.

29. *Id.* at 57.

30. *Id.*

31. *Id.* at 56.

32. Martha W. Barnett, *Keynote Address*, 52 S.C. L. REV. 453 (2001).

33. The law firm's creed, which is publicized to clients and the public, is expressed as a "commitment" in its current incarnation. See Holland and Knight L.L.P., *Our Commitment*, at <http://hkllaw.com/commitment.asp> (last visited Feb. 1, 2001). The firm's commitment begins with the recognition that "[w]e think it is important for clients to understand the values that guide and direct how Holland & Knight operates as a firm and by which we ask and expect our clients to judge us." *Id.* It then identifies the following conduct, expressive of the firm's values, to which the firm is committed: "[p]roviding superior legal services"; "[c]herishing and nurturing the firm's relationships"; "[e]ncouraging cross-utilization and support between different specialties,

As these experiences suggest, a law firm is likely to take its self-produced professionalism code more seriously than the product of a bar association. Lawyers who participate in the creation of a code or its ongoing reconsideration and refinement are more likely to perceive the code as meaningful to their professional lives. Lawyers in the leadership of the office are more likely to implement the code because it will embody the particular values shared by those within the office.

IV. A CODE OF PROFESSIONAL VALUES IS PREFERABLE TO A PHILOSOPHY OF LAWYERING

An important inspiration for the proposal offered in this Article is Professor Nathan Crystal's recent article³⁴ advocating that all applicants to the bar be required "to file a statement of their philosophy of lawyering."³⁵ Professor Crystal observes that the ethics rules afford lawyers substantial discretion concerning a variety of professional decisions³⁶ and identifies three types of philosophies that might guide the exercise of discretion: (1) "a client-centered philosophy" (also referred to as "neutral partisanship" or a hired-gun approach);³⁷ (2) a "philosophy of morality," under which "lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do";³⁸ and (3) "a philosophy of social value . . . grounded in norms expressed in social institutions."³⁹ He suggests that a lawyer's philosophy could combine elements from each philosophy,⁴⁰ that any individual lawyer's philosophy may vary from context to context, "depending on the type of practice or the sophistication of the client,"⁴¹ and that lawyers "may adopt a philosophy articulated by someone else

offices and other elements of the firm"; "[a]dvancing the interests of the legal profession and our judicial system"; and "[s]taying ahead of the competition." *Id.* Finally, the statement identifies ways in which its commitment in each of these areas will be measured. It provides that the commitment to "[p]roviding superior legal services" is measured by the following:

The quality of our efforts as legal counselors, advocates and draftsmen . . . ;
[o]ur success in advancing or protecting the lawful interests of our clients;
[o]ur ability to match the requirements of the client's matter (its significance, complexity and urgency) with an efficient mix and amount of lawyer effort and other resources; and [o]ur faithfulness to the ethical principles and other standards of responsibility for the legal profession.

34. Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (2000).

35. *Id.* at 95.

36. *Id.* at 76-83; see also Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 20 (1997).

37. Crystal, *supra* note 34, at 86, 88.

38. *Id.* at 89.

39. *Id.* at 90.

40. *Id.* at 91.

41. *Id.* at 95.

or may craft their own philosophies.”⁴² Lawyers then would make these statements available to clients and would revise or reaffirm them each time they pay their annual bar dues.⁴³

Although a lawyer’s “code of professionalism” may sound less portentous than a “philosophy of lawyering,” it is unclear whether it is necessarily different in substance or simply different in name. Professor Crystal responds to concerns about professionalism and professional malaise⁴⁴ and envisions the articulation of one’s professional values or philosophy as “part of the professional process.”⁴⁵ If we have the same thing in mind, I am happy to acknowledge that Professor Crystal got there first and to simply add my voice to the choir. However, I suspect that Professor Crystal and I contemplate something at least slightly different.

Professor Crystal considers the “core” of his proposal to be “disclosure regulation, allowing clients to scrutinize lawyers’ philosophies of lawyering.”⁴⁶ Although he notes that a person’s philosophy may have implications for how one balances one’s personal and professional lives,⁴⁷ Professor Crystal’s discussion of the three types of philosophies suggests that he is largely concerned with how, in the context of a particular representation, a lawyer strikes a balance between duties to the client and duties to the public, the court, or others. He suggests that the lawyer should put others, especially clients, on notice of how, as a philosophical matter, the lawyer will strike this balance when given leeway under the law and disciplinary rules.⁴⁸

What Professor Crystal describes sounds very different from a set of professional values and aspirations and more difficult to honestly articulate. In effect, Professor Crystal asks lawyers to describe how they approach discretionary decisions and how they plan to do so in the coming year.⁴⁹ He assumes that any given lawyer actually has a philosophy to address the tension between client and public interests across the full range of professional decisionmaking and that the lawyer can articulate that philosophy. However, it is questionable whether most lawyers truly have a philosophy, much less one that can be articulated, regarding these kinds of decisions.

Most lawyers make discretionary decisions on an ad hoc basis. Professor Crystal acknowledges this possibility, to some degree, when he suggests that a person’s philosophy may vary with the practice setting and nature of a particular client.⁵⁰ But the more one’s approach varies with the context, the harder it is to capture and the less, in the end, it can be said to be a

42. *Id.*

43. Crystal, *supra* note 34, at 97.

44. *Id.* at 98.

45. *Id.* at 101.

46. *Id.* at 99.

47. *Id.* at 84.

48. *Id.* at 97.

49. See Crystal, *supra* note 34, at 97.

50. *Id.* at 91.

“philosophy” in the sense of a coherent benchmark for decisionmaking over time. Ultimately, lawyers may be driven by the difficulty of articulating their own “philosophy” to take a model philosophy off the shelf. But when they do, it is unlikely that the model will fairly describe how those lawyers actually approach discretionary decisionmaking.

In contrast, a code of professionalism does not have to describe how one approaches decisions—only how one would like to do so. Nor does it have to be coherent. Nor is it meant primarily for clients or, for that matter, to put opposing counsel on notice.⁵¹ Nor would it necessarily focus on areas of tension between client and public interests. Like the 1908 *Canons of Professional Ethics*,⁵² professionalism codes would essentially be statements of lawyers’ values and aspirations. They would be adopted primarily for the self-governance of the lawyer or law firm as reinforced informally by others within the lawyer’s professional community. Lawyers should have a far easier time articulating individual statements of professional aspiration than developing a philosophy that either captures how they actually approach decisionmaking, on one hand, or that is relatively coherent, on the other.

Fundamentally, the core of my proposal is not “disclosure regulation” but professional reflection and dialogue. Its purpose would largely be served—indeed, might be better served—if every individual lawyer and law firm periodically endeavored to develop a professionalism code but never completed the task. The legal profession and, ultimately, the public will benefit if lawyers regularly reflect on their own professional values and discuss their values with others, regardless of whether their values are ultimately put in writing and publicized. The principal virtue of writing and publicizing a code is that doing so provides the occasion for reflection and dialogue that is not consistently occurring in law firms, bar associations, or elsewhere. Secondly, a professionalism code, once completed, will recapture the concept of a public

51. Thus, professionalism codes should be distinguished from law firm mission statements that are developed to be included in promotional material. At least at present, although mission statements may address some aspects of “professionalism,” they are not developed in the course of professional self-reflection and are not intended as full expressions of the firm’s professional values and aspirations. Law firms often post a mission statement or “firm objective” statement on their websites; however, these statements are geared toward attracting clients and assuring clients that they will get the best representation possible. See Thomas C. Clay, *What are the Obligations of Law Firm Partners?*, 35 TENN. B.J., June 1999, at 25 (noting that “[l]aw firm mission statements and similar documentation are crowded with platitudes regarding ‘highest quality legal services’”). For example, Flemming Zulack & Williamson L.L.P.’s website contains a mission statement explaining the firm’s goals of cost efficiency and low billing policies. Fleming, Zulack & Williamson, L.L.P., at http://www.fzw.com/html/mission_r.htm (last visited Mar. 9, 2001). Carter, Ledyard & Milburn’s website contains a statement about the firm’s dedication to making effective and quality client representation its top priority. Carter, Ledyard & Milburn, at <http://www.clm.com/introduction.html> (last visited Mar. 9, 2001).

52. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54 (1986) (discussing how original purpose of Canons was not for disciplinary enforcement but as guidelines legitimizing elite lawyers’ “claim to professional stature”).

declaration of the ideals associated with one's calling.⁵³ Of course, a professionalism code will not necessarily reflect universally shared ideals, but it will embody the ideals that a particular lawyer associates with being "professional" and, by its existence, will reinforce those ideals.

V. A CHALLENGE TO THE LEADERSHIP OF THE BAR: PROFESSIONALISM BEGINS AT HOME

The most obvious criticism of this Article's proposal is: "It'll never happen. With rare exception, law firms haven't adopted their own professionalism codes. They don't perceive it to be in their interest to do so. And, if it's not in their interest, they never will." If one believes, as the ABA officially does, that professionalism codes are a good idea, how does one ignite the process? More than a decade after the ABA endorsed such codes,⁵⁴ it is unlikely that many lawyers and law firms have adopted them. If bar leaders cannot persuade their members to tack a model creed to the wall, one might ask, how can they persuade their members to develop and adopt individual codes?

The answer is for bar leaders to lead by example. Hence, the following challenge: Leaders of the ABA and state and local bar associations who have declared their own commitment to professionalism and professional values should persuade their own law firms to develop and adopt a professionalism code, as described in this Article.

This proposal recaptures the notion of bar leaders as a "professional elite" who are, as Professor Crystal suggests, professional exemplars.⁵⁵ However, it is not enough for bar leaders to act "professionally" in their professional lives, in the hope that those with whom they interact will be influenced positively by their example. If they practice alone, they should publicly declare their professional values. If they practice with other lawyers, they should persuade their law firm to do so. The process of developing and adopting a professionalism code will have significance for all the lawyers in the office, including those with whom the bar leaders do not daily interact. Moreover, as the "elite" law firms adopt professionalism codes, and receive publicity for doing so, others will be influenced to follow suit. In other words, bar leaders need to start the ball rolling.

No doubt, a bar leader's law firm might say that it has no need for a professionalism code because professionalism is bred in the bone and courses through the veins of the firm. While this assertion might go unchallenged, at least with respect to senior lawyers in the firm, several rejoinders might be given. As law firms expand and mobility among firms heightens, there is an increasing need to articulate the professional ideals of a firm for the benefit of

53. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 2, at 5.

54. See *supra* notes 22 & 23 and accompanying text.

55. See Crystal, *supra* note 34, at 99.

new lawyers. The firm itself can be a moral beacon, leading by example for the benefit of the rest of the profession. A professionalism code will serve as a tribute to senior lawyers who are exemplars of professionalism and will serve as part of their legacy to the firm and the profession. A code will also serve as a source of professional pride for the firm and a selling point for law students whom the firm is trying to recruit and prospective clients that the firm is trying to attract.

The motto for this movement, to be ignited by the leadership of the organized bar, might be: "Professionalism begins at home." Once committed to this movement, bar leaders might inspire each other and be encouraged by their members to lead by example. When bar leaders speak about professionalism, they might be asked to address certain questions: "What have you done in your own firm to encourage reflection on professional values and the articulation of shared principles? Does your own firm have its own code of professionalism, and how is it implemented?" When others seek positions in bar leadership and promise to continue their predecessors' work in promoting professionalism, they might be asked the same questions. Bar leaders will be encouraged to tend to the fires of professionalism at home, with the hope that the sparks will fly and travel through the professional community.

Of course, there is no guarantee that other law firms will follow suit. But lawyers have already demonstrated that they are virtually immune to exhortation. Therefore, it is worth exploring an alternative process whereby a small coterie of senior leaders of the bar can potentially make a big difference.

VI. CONCLUSION

Many lawyers are skeptical of the high-minded rhetoric of bar leaders who extol the virtues of professionalism. Yet, the concept of professionalism still has force for many lawyers. After all, most would be stung by a charge of acting "unprofessionally" and, conversely, flattered by being recognized as "highly professional." Therefore, the goal of bar leaders who are concerned with professionalism would be well served if lawyers could be persuaded to reflect periodically on what it means to them to be professional, to declare publicly their professional values and aspirations through the medium of individualized professionalism codes, and to strive to be guided by these declarations.

But how can busy lawyers be convinced to undertake this project? Here is where bar leaders can lead not by words but by deeds. A bar leader who is concerned about promoting professionalism could undertake to persuade her colleagues to develop, adopt, and implement a professionalism code for the benefit of all the lawyers within the particular law firm. A public declaration by bar leaders and their offices would speak volumes to other members of the bar and could prove far more potent than any number of exhortatory speeches, panel discussions, symposia, and writings on the importance of professionalism.

