

CIVIL LITIGATION

Abstaining From Offensive Personality

by Peter C. Appleby

The general mood these days seems more than a little antinomian. Many of us clearly believe that our lives are unduly constrained by regulations of various kinds ("Get the government off our backs!") and professionals have particular reasons for feeling chafed by the recent proliferation of ethical codes, which often seem to impugn their intelligence and integrity while threatening their autonomy as practitioners. Who needs more rules, it might be asked, when our lives are already so maddeningly hemmed in? After all, lawyers, doctors, academics, and other professionals undergo intense academic training and lengthy apprenticeships before they are permitted to practice on their own. Individual clients who feel mistreated have access to a generous array of institutional and legal remedies. And the public interest is well served by licensing and accreditation processes that protect the overall quality of professional education and practice. So why should we professionals not say, as some early Christians did, "Love the Lord and do what you will"?

Having experienced some of the irritation caused by various rules and laws enacted in recent years, I am more than a little sympathetic to the idea that there should be fewer regulations, rather than more. Nevertheless, I will argue that professional codes in general serve important purposes, and that a specific code of conduct for litigating attorneys might be a very useful addition to the canon. My ideas result from more than a decade of academic work in applied ethics, six years as the public member of the Ethics

Committee of the American Psychological Association, and my participation in the drafting of one professional code and the major revision of another. They do not, however, reflect more than an interested reader's knowledge of the law or the practice of litigation.

The first and perhaps most important consideration is the fact that we (all of us, as far as I can tell) do need instruction in how to conduct ourselves. Whether or not choices were simpler and thus easier in the happier days of sentimental memory, good will, honest intent, and technical skill are simply not enough in the complex world of today's professional practice. Psychotherapists need guidance concerning the gifts they are offered by grateful and emotionally dependent clients. Physicians need help with the inevitable conflicts between patient autonomy and patient well-being. And attorneys need instruction about ethical, as well as legal, constraints on advocacy. Even finely crafted codes can not, of course, resolve substantive issues of any real subtlety. They can, however, provide valuable frameworks for ethical reflection, not only for neophytes, but also for veterans encountering new problems and changing circumstances.

A second important reason for adopting codes is their utility in informing clients, patients, and students about what to expect, and what not to expect or accept, from the professionals they consult. Whatever the game may be, it is likely to be played more fairly, honestly, and with greater finesse when all the players have access to the rules. Students don't know a priori how good professors should conduct themselves, any more than I know what is appropriate for my legal advocate to do (and not do) on my behalf, or most of us

know about the proprieties of cardiovascular surgery. So it's a good idea to have a clearly written handbook readily available. Once again, codes won't answer difficult particular questions for clients and the public, any more than they will for practitioners. But they can give useful information about standards and limits, helping us to appreciate sound practice, showing us what it is not reasonable to expect of the professionals we consult, and warning us away from at least the more egregious forms of misbehavior.

Codes of ethics also offer means of disciplining miscreants without recourse to the complexities and costs of formal legal processes. Relatively minor problems can be resolved informally, by peer review committees for example, and sanctions such as warnings, reprimands, and censures can be imposed fairly, efficiently, and at minimal expense to the parties involved. The number of cases handled by any particular disciplinary agency may be very small in comparison to the likely number of violations committed. But the fact that some malefactors are punished is good in itself. And if professional associations and licensing groups are rightly seen as making substantial and effective efforts to encourage appropriate conduct and correct wrongdoing, their codes will return well deserved dividends in public confidence.

Admittedly, the adoption of sound codes will not by itself secure the benefits I have listed. Members of involved groups must know the documents and feel some sense of ownership in them, and the public, especially the relevant clienteles, must be informed of their central provisions and of available avenues of redress. This means that major efforts must be made to involve affected practitioners in code con-

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struction and later revisions, to train both novice and established professionals in the application of the rules, and to educate the public through large-scale programs. Substantial and continuing commitments of time and money are obviously necessary to do these things well, and support of the required kinds is not easy to obtain. But while it might be better not to try at all than to undertake the enterprise without adequate backing, I am convinced that any professional group is better off policing itself than allowing discipline to become the responsibility of public officials by default.

In Utah, the Rules of Professional Conduct already provide the foundations for a code of conduct for litigators and its effective enforcement. Rule 9 of the Rules of Lawyer Discipline and Disability permits disciplinary action against members who violate the Bar's rules, willfully violate valid disciplinary orders, or are publicly disciplined in other jurisdictions. But apart from injunctions in the Rules for Integration and Management of the Utah State Bar (21, b and e) "To maintain the respect due to the courts of justice and judicial officers," and "To abstain from all offensive personality," there are no specific guidelines for the appropriate conduct of litigation. In effect, Utah attorneys are told not to act like Roberto Alomar, and the rest is left to their discretion. In my view, that is not enough.

What is needed is a litigators' code of conduct articulating, at a minimum, standards of comportment and civility in judicial procedures, including depositions. Much of the public contempt for the profession of law stems from the perception that lawyers are mercenary barbarians with no principled constraints on what they are willing to do to advance the interests of their clients. Television viewers of high-profile trials think they are watching circuses in which the achievement of justice is the last thing on anyone's mind. And people who are deposed or called as witnesses in trials often feel that they are manipulated, treated with contempt, and systematically denied the opportunity to tell their stories by lawyers who care little or nothing about the truth. Admittedly, many of us harbor low opinions of attor-

neys and the law at least in part because we don't fully understand the adversarial character of our own judicial system. But even after allowance is made for this quite general ignorance, the public animosity toward litigating attorneys continues to call for explanation. My suggestion is that the perceived amorality and incivility of trial lawyers is at or near the heart of the problem, and that a conspicuously enforced code of ethics could do much to ameliorate it.

There is no denying that the composition of this code would be a difficult task. Boorishness, like obscenity, may be very hard to define, especially by means of rules, even though most of us recognize it with no difficulty when we encounter it. And while it might be easy to set out a list of platitudes broadly describing professionally appropriate behavior, devising a substantive characterization of such behavior would be another matter altogether. Nonetheless, skillful writers could build a useful code beginning with the central notions of respect for persons and fairness in the legal process. And though interesting cases often do make bad law, it would also be possible to draw lessons from clear instances of misconduct not covered by current regulations. Drafters could survey their own experiences, those of their colleagues, and documents such as court records for examples of both appropriate and inappropriate behavior, and then develop rules to encourage the former and discourage the latter. The draft, preferably accompanied by a case book and/or explanations of the authors' intents, could then be circulated to the membership of the Litigation Section and perhaps to the public for discussion and eventual ratification.

Right from the beginning, it would be useful to include provisions for the review and revision of the initial document within a reasonable time after its adoption, and regularly thereafter. Such a measure would reassure practitioners who might reasonably fear the imposition of untried standards. It would also cover the near certainty that errors and oversights would occur in the first edition. And it would signal the Bar's willingness to adjust to changing circumstances.

Having worked through processes of

this kind, I am not sanguine about the politics involved in securing the ratification of a strong code. Deeply conflicting interests require accommodation, it can turn out that behavior that looks obnoxious to one part of the constituency seems acceptable to another, and there can be serious disputes about the boundaries between duty and supererogation. In mental health care, for example, divisions of opinion concerning the effectiveness of various kinds of treatment make it impossible for the psychologists' code to include substantive standards of competence. Divergence about the acceptability of romantic relationships between professors and students led to the omission of that subject from the new Code of Faculty Rights and Responsibilities at the University of Utah. And readers of this journal will surely remember the intense nationwide debate over pro bono service during the last revision of the Model Code, as well as its unsatisfactory outcome.

The inevitability of problems such as these virtually guarantees that there will be some weaknesses in any document which actually achieves ratification. Compromise is inescapable in democratically structured professional associations, and it is essential to provide as much latitude as possible for diverse opinions about propriety and sound practice. Nor should the rules and arrangements for enforcement be so inflexible as to preclude leniency in special cases. (In this regard, I remember the famously disruptive tactics of William Kunstler and his associates in their efforts to defend the Chicago Seven against the misbehavior of Judge Julius Hoffman.) But if a start could be made on raising the levels of civility and procedural fairness in our courts, and if an initial code were adopted with adequate provision for continuous improvement, the public perception of litigators might well improve, along with the quality of their work. I think it would be worth a try. ■