

Marvin L. Karp Acceptance Speech – June 3, 2010

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On June 3, 2010 Marvin L. Karp received the distinguished Michael Franck Professional Responsibility Award for 2010 given by the American Bar Association (ABA). Below is his acceptance speech.

Thank you, Ellen, for that gracious and generous introduction. And thank you, everyone, for honoring me with your presence here today.

I am enormously appreciative of having been selected to receive this award (even though I must confess that I have now reached the age where I am grateful for almost any nice gesture that comes my way). As some of you are aware, ethics and professionalism have been abiding interests of mine for many years. I therefore feel privileged to have had the opportunity to work on so many projects, and to have served on so many different bar association committees, dealing with those subjects.

Paramount among those committees have been those that were administered and staffed by the ABA Center for Professional Responsibility. For it has been the Center that has enabled me to work with such icons of ethics and professionalism as Don Hilliker, Mark Harrison, Peter Moser, Larry Fox, Ralph Eliot and David Isbell, and to have benefitted from the vast knowledge, and the perceptive tutelage, of the extraordinary George Kuhlman and the extraordinary Jeanne Gray, and to have worked as well with several other outstanding staff members who are here today, including Eileen Libby, John Holtaway, Angie Burke and Art Garwin.

I have also been privileged over the years to have gained the friendships of a number of lawyers outside of the Center who have inspired me with the manner in which they have conducted themselves as lawyers. These role models include Doug Houser of Portland, Oregon; Dudley Oldham of Houston; Hugh Reynolds of Indianapolis; and the late Andrew Hecker of Philadelphia.

And, of course, I would be remiss if I did not acknowledge the contributions of my wife, Lesley, who has faithfully and loyally accompanied and encouraged me through



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these many years of bar association activity, as well as my three children in whom I take such pride: my oldest son, Harlan, who is also a lawyer and soon to be vice-chair of the Ethics and Professionalism Committee of the Cleveland Metropolitan Bar Association; my daughter, Elissa, who lives in Manhattan, where she works in medical advertising; and my youngest son, Doug, who lives in Newtown, Pennsylvania and is a sales vice president of a shoe company. I should further mention the managing partner of my law firm, Kip Reader, who possesses all of the qualities that constitute an ideal lawyer and who, to my mind, epitomizes the consummate professional.

I have also been inspired by a number of judges. Of those, I would specifically mention the late Tom Moyer, Chief Justice of the Supreme Court of Ohio, who passed away, quite suddenly, just two months ago. I had the privilege of working with Chief Justice Moyer on a number of professionalism and ethics projects and of serving on several committees that he appointed, and he never ceased to impress me with his dedication to improving the judiciary and our profession.

It is therefore to all of these lawyers and judges that I am dedicating these remarks, because each of them, in his own way, personifies “professionalism” - - and professionalism is my theme for today.

Many of you will recall that the organized bar began to focus on “professionalism” after the publication, back in 1986, of the Report of the ABA Commission on Professionalism, sometimes referred to as the “Stanley Commission.” Since that was almost a quarter of a century ago, I thought that, as a starting point for these remarks, it might be instructive to go back and review that 1986 Report and consider what progress, if any, has been made since that time.

Thus, the very first recommendation made by the Stanley Commission was that law schools should improve the form and content of their courses in ethics, including using films and videotapes to dramatize ethical problems. The Commission’s Report also urged law schools to adopt Codes of Student Conduct and to “retain high admission



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standards in the face of declining applications” - - a 1986 concern that surely comes as something of a surprise to us today.

The Report also urged **law firms** to establish their own internal ethics committees, and importuned state supreme courts to mandate continuing legal education for all practicing lawyers. Such CLE programs, stated the Report, should include films or videotapes, prepared by the ABA, that would deal with ethical and professionalism issues.

The Commission’s Report also urged lawyers to “avoid identifying too closely with their clients” and to inform clients that a lawyer’s obligations to the courts and our system of justice may preclude the lawyer from carrying out certain of the client’s wishes. For example, lawyers should dissuade their clients from “pursuing matters that should not be in court in the first place,” from “using tactics geared primarily to drain the financial resources of the other side,” from filing dilatory and frivolous pleadings, and from exaggerating or falsifying facts in negotiations. The Report also expressed concern over law firms operating ancillary businesses and the potential conflicts of interest that can arise from lawyers investing in their client’s business activities and from serving on a client’s board of directors. The Report further recommended that fee arrangements be in writing, “where feasible,” and that impartial fee review committees be established to handle fee disputes.

The report also urged bar associations to support the “expanded use of alternative methods of dispute resolution.” In addition, the Report recommended that lawyers who failed to report professional misconduct to disciplinary bodies should themselves be disciplined.

The Report also argued that there is a need to “increase the participation of lawyers in *pro bono* activities.” And, finally, the Report urged lawyers to “resist the temptation to make the acquisition of wealth a primary goal of law practice.”

Now, as you listened to this summary, all of you, I am sure, noted that many of the Stanley Commission’s recommendations have been addressed, to some degree at



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least, by the organized bar since 1986, but that certain of the commission's concerns still endure.

What, however, was most striking to me was what was missing in the Commission's Report. Former Chief Justice Norman Veasey of the Delaware Supreme Court - - who is here today - - on the occasion of his receiving the Michael Franck Award five years ago, stated that professionalism "includes ethics, personal integrity, intellectual honesty, independence, civility, excellence and courage." In my view, the principal element in that mix listed by Chief Justice Veasey is - - and always has been - - "civility." Yet if you go back and read the Stanley Report, you will find that that particular word nowhere appears.

Why do I find that omission surprising? Because by the mid-1980s - - when the Stanley Report was published - - many lawyers, particularly those in litigation, when they heard complaints about "lack of professionalism" almost invariably thought of the so-called "Rambo litigator."

Whether because there were too many lawyers, or because the geographical scope of lawyers' practices had become so wide-spread that the same lawyers no longer opposed each other on a regular basis, or whether there was simply too much economic pressure or too much competition, litigation had become, for many lawyers, something that was akin to all-out war. The primary objective of such lawyers was to win at any cost. And if in the process they could humiliate the opposing lawyer, so much the better.

For such lawyers, deliberate rudeness had become their operating norm; requests for reasonable accommodations in scheduling were rejected out of hand or acceded to only grudgingly; witnesses, opposing parties and opposing counsel were verbally abused in depositions. And, not surprisingly, such conduct often provoked retaliation by the other side in the same mean spirit.

The result was an enormous escalation in the financial and emotional costs of litigation and the creation and hardening of animosities between counsel so bitter that an



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early, let alone amicable, resolution of the underlying dispute became almost impossible. In short, rather than helping their clients achieve a reasonable solution to a particular dispute, the lawyers themselves became part of the problem.

As a consequence, lawsuits were clogging up the courts when they should have long since been resolved; clients spent small fortunes in order to fund the “litigation” that had become an end in itself: an unrelenting war between platoons of so-called “litigators” who generated excessive discovery, filed countless motions, and who engaged in virulent *ad hominem* attacks on the character, competence and integrity of the opposing lawyer.

Why? “Because,” we were told, “this is how you play hard ball. This is what the client wants, a lawyer who is mean and tough. So either you play hard ball, or you won’t be able to play at all - - because the client will go down the street and hire another lawyer who will do exactly as the client asks.”

These attitudes created what was, in my opinion, the most vexing professionalism problem that practicing lawyers had to cope with in the mid-1980s. If you are looking for a shorthand phrase to describe it, let’s call it “a lack of civility.” And, regrettably, that problem is still with us today. So, to you, the attendees at this 36th National Conference on Professional Responsibility (and to those other lawyers who may read the published version of these remarks in [The Professional Lawyer](#) a few weeks from now), I put the question that was never even alluded to by the Stanley Commission, which is: what can we do to help restore civility among practicing lawyers?

Now the answer that you may receive from some quarters is that we need to improve the teaching of ethics in law school. Indeed, you may recall (from what I said a few minutes ago) that that was the very first recommendation of the Stanley Commission. But such an answer misses the point. After all, law school is not “lawyer school.” Law students are taught many things in law school, but how to practice law, and how to deal with other lawyers and with clients on an everyday basis, is not a subject that is given much emphasis.



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Rather, it is **law firms**, not law schools, that teach neophyte lawyers how to practice law. And by “law firms” I include not just 200-attorney institutions, but also two-or three person firms.

If, then, those of us who are partners or principals in law firms have that responsibility, do we ever stop and ask ourselves: “What manner of lawyer is it that we are training?” Yes, we are careful to teach our new lawyers the rudimentary mechanics of everyday practice, like how to keep time records, how to craft pleadings, how to draft contracts, how to compose briefs, how to organize their time, etc., etc. But what about the other things that go into being a professional in the practice of law?

For example, do we discuss with our new associates the importance of professional behavior? Do we teach them to be courteous and civil and honest with lawyers on the other side?

Let me give you a few examples.

Most young lawyers become involved, at some point, in the tedium of discovery. They draft interrogatories and requests for production; they examine and produce documents; they draft answers to interrogatories; they sit in on meetings with witnesses, prior to depositions; they themselves, in time, take and defend depositions. But do we explain to those young lawyers that there is a difference between a professional and an unprofessional approach to discovery? What do we tell them about obstructing depositions or coaching witnesses on how to evade questions or feign ignorance? Do we teach them to be disingenuous or evasive when responding to interrogatories and requests for production? Do we train them to serve burdensome and irrelevant interrogatories, or do we instruct them to craft questions that focus on the relevant issues in the case at hand? Do we encourage our new associates to use discovery as a means of harassing and draining the resources of the other side? Or do we firmly instruct them **against** such tactics and tell them to “play the game straight?”



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We can ask similar questions about the training of transactional lawyers. Do we caution them against making linguistic changes in the latest draft of a contract without calling those changes to the attention of the lawyer on the other side? And do we instruct them that they should not make demeaning, sexist or insulting remarks during the course of face-to-face negotiations? And do we warn them against falsifying facts during those negotiations?

And what, if anything, do we say to our associates about the importance of keeping one's word when it has been given to another lawyer? Do we teach them the value of establishing for themselves not only a reputation for being a skilled practitioner, but also a reputation for professional integrity? And do we let them know that being the "meanest lawyer in town" is not a badge of honor in the legal community?

And what instructions do we give our new lawyers on how they should respond to the demands of that somewhat intimidating personage known as "the client?" A long time ago, a very prominent and renowned attorney remarked that "the ideal client is rich, angry and wrong." Do we therefore tell our beginning lawyers that their job is to function as the client's hired guns and that they are to do whatever the client asks? Do we reinforce the notion (which many of them may have learned in law school) that their responsibility to the client supersedes all other professional responsibilities? Or do we teach them that a lawyer must remain professionally independent, that the very essence of the lawyer-client relationship is that the client is entitled to receive from his attorney objective advice - - and if what the client proposes to do is wrong, the lawyer has a duty to tell him so? And do we try to make them understand that regardless of the **client's** personal antagonism towards the other side, civility and courtesy on the part of the lawyer will ultimately redound to the client's benefit, financially and result-wise?

In short, I suggest to you that every new lawyer should be made to understand that he or she has entered into a **learned profession**, which has standards and ideals and values that are cherished by many of its members - - and which the new lawyer



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has an obligation to maintain and perpetuate. If, however, those of us who are leaders of our firms don't teach these concepts to our new associates, who will?

Which brings me to the organized bar - - in which I include not only the ABA, but also, most particularly, state and local bar associations. Do those organizations have any role to play in all of this?

Indeed they do. Starting in the late 1980s, a number of bar associations took steps in this regard. Indeed, that is how I personally became active in the professionalism movement. Back in 1987 and 1988, shortly after the Stanley Commission Report was published and circulated, I found myself chairing, simultaneously, two committees on professionalism, one appointed by the President of the Cleveland Bar Association and the other one established by the Torts and Insurance Practice Section of the ABA, commonly known as "TIPS." At the initial meeting of each of those committees, I put forward the idea of developing what I called a "Lawyers Creed of Professionalism," which would be comprised of a list of very specific "dos" and "don'ts" as to how lawyers should deport themselves in their every-day dealings with each other, with judges and with their own clients. Both committees accepted that idea with enthusiasm and set to work on drafting such a Creed. The end result was a single document that was the joint work product of both groups, although they met independently. In early 1988, the Board of Trustees of the Cleveland Bar Association formally adopted the Creed and printed up over 5,000 multi-colored copies. Those copies were then mailed out to every member of the Cleveland Bar Association and to all judges in the Cleveland area. The mailing asked each recipient to frame the Creed and hang it on his or her office wall, where it would serve as a constant reminder to the lawyer, the lawyer's colleagues and, yes, the lawyer's clients as to how that lawyer intended to conduct himself (or herself) in the day-to-day practice of law. Many of the lawyers and judges who received copies of the Creed did exactly that.

The TIPS Section of the ABA, for its part, circulated "The Lawyer's Creed of Professionalism" to every state and local bar association in the country. TIPS then urged



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those state and local bar associations to adopt similar Creeds of their own and to then disseminate copies to their members, suitable for framing, just as the Cleveland Bar Association had done. And quite a number of state and local bar associations proceeded to do so. (I read somewhere recently that, over the years, more than one hundred fifty state, county and city bar associations have adopted professionalism codes or creeds of one kind or another.)

In addition, many state supreme courts became concerned about these problems and appointed commissions on professionalism. Some of those courts also made professionalism a regular part of mandatory CLE in their states. And some of them even adopted a version of the Lawyers Creed of Professionalism that could then be used as a primer.

So, yes, there has been an ongoing effort on the part of the organized bar (and the courts) to re-instill among lawyers a culture of civility and courtesy. But that goal is still a long way from being realized. There are still a lot of lawyers out there who haven't "gotten the word," or who have a tendency to back-slide. Accordingly, it remains incumbent upon **all of us**, not only as practicing lawyers but also as bar association leaders and members, to not only push forward with existing programs but also to institute new steps and procedures in this regard.

Let me give you a couple of examples of the sort of things I am talking about. Example one: I am personally concerned over the ways in which professionalism is taught at CLE or bar association programs and at "in-house" office training seminars. I do not believe that a "talking head" speech on professionalism - - much like the one I am giving at this moment - - is the most effective method, since many listeners will simply nod their heads in agreement and then allow their minds to wander off to more pleasant reveries. My view is that a more productive way of teaching professionalism is to present to the attendees a series of hypothetical fact situations, of the kind that often occur in day-to-day practice, and to then ask the attendees, "What should a lawyer do in these situations if he or



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she wants to be professional?” When led by a good moderator, the ensuing discussion will help the attendees recognize the conflicting pressures that are involved in everyday practice (including, in particular, pressures from clients) and then consider how those pressures, or tensions, can be reconciled with the lawyer’s obligation to maintain his or her professionalism.

Another example: state and local bar associations need to prod local trial judges to take a more active role in mitigating some of the more egregious abuses that occur during discovery. Bullying and obstreperous conduct at depositions continues to be among the most exasperating professionalism problems faced by practicing lawyers. Such conduct not only makes depositions an extremely unpleasant and difficult experience for both lawyers and witnesses, but it also frustrates the fact-finding function that depositions are supposed to serve. To effectively rein in such conduct often requires the active involvement of trial judges, but that active involvement is unlikely to occur unless state and local bar associations exert some initiative.

Specifically, bar associations should urge trial courts to draft and adopt local court rules relating to the conduct of depositions, which rules, I would hasten to add, should focus on “both sides of the table.” In other words, portions of such rules should relate to the conduct of the attorney who is conducting the deposition - - such as the scope of the questions that can be asked and the manner in which they are asked - - while other portions should relate to the conduct of the attorney who is “defending” the deposition, like prohibiting speaking objections and otherwise giving “signals” or suggestions to the witness and interfering with the pace of the questioning. A number of courts in different areas of the country have already promulgated such rules, and there is no reason why other courts should not do the same.

In addition, trial judges should be urged to clamp down on those lawyers who refuse to abide by such rules. Judges should be willing to accept phone calls from lawyers who are being victimized by their opponent’s misconduct during a deposition, and they



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should be prepared to take appropriate action to put a stop to it. The need for such active judicial involvement should therefore be stressed in CLE programs for trial judges.

Now I realize that there are some practicing lawyers who will attempt to minimize the things that I have been talking about. They will deprecate these comments as nothing more than importuning lawyers to “be nice” to each other, a Pollyanna-ish approach that, in their view, is directly at odds with a lawyer’s **purported** professional obligation to be a “zealous advocate” on behalf of his or her client. Now most of you in this audience are well aware that the “zealous advocacy” notion is not among the black-letter Rules of Professional Conduct. Nor is there anything in the Comments to any of those Rules that justifies abusiveness, intimidation, rudeness and improper conduct.

But let me add a further counter-argument, and that is this: a lawyer who has a reputation for “being nice” is not necessarily a loser, a milquetoast, or an also-ran at the bottom of the legal totem pole. One of the best, and most effective, lawyers that I have ever known has tried countless cases across the country and he has been highly successful in doing so. One day, a few years back, I was chatting with a jury consultant from that lawyer’s home city - - which happens to be out here on the West Coast - - and she told me that a number of other trial lawyers had informed her that this particular lawyer was the one adversary that they most dreaded going up against in court. And why? For a very simple reason: “Because he’s so nice.”

In other words, being courteous and civil and professional - - “being nice,” if you would - - can produce its own tangible rewards other than simply being the right way to practice law. Judges and juries appreciate those qualities in a lawyer, for those qualities cause them to respect that lawyer and rely on what that lawyer tells them. And once a lawyer gains that kind of respect from judges and juries - - and, yes, opposing lawyers - - hasn’t he or she gone a long way towards achieving the result that the lawyer’s client is seeking?



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So let me conclude by expressing that hope that, after you leave here today, each of you will continue to think about some of the concept that we have just been discussing. And let me express the further hope that you will then share some of those thoughts with other lawyers in your firm and with your local bar associations. For if you take such steps, you will be doing something very important for our profession: You will be helping to restore, to the practice of law, civility, courtesy and mutual respect - - in a word, "professionalism."



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