

SOME THOUGHTS ON LEGAL ETHICS AND LAWYER ETIQUETTE: A SYMBIOTIC RELATIONSHIP¹

Justice Jim Kitchens
Mississippi Supreme Court
Carroll Gartin Justice Bldg.
450 High St.
PO Box 117
Jackson, MS 39205
(601) 359-2180
jkitchens@mssc.state.ms.us

Foreword

During 2009—my first year on the bench—I wrote this paper, and since then have presented it several times. As I was drafting it, my old friend Howard Twiggs, who was alive then, was in the forefront of my mind. Why? Because Howard epitomized everything about the legal professionalism that I was struggling to compress into meaningful and concise thoughts. Over the years Howard and I had talked many times about the major themes of this presentation, usually amid our lamentations over the decline of genuine collegiality and mutual respect among lawyers of all persuasions.

Many of you knew him. To those who did not, I can but wish that you had, because then you would know at least as much as I about conducting your life as a lawyer should. Howard Twiggs was the ultimate role model. He saw the formal *Rules of Professional Conduct* as the *minimum* standard for a lawyer's interaction with clients, colleagues, adversaries, jurists, and mankind at large. He had his own Code, and here is his outline of it, written shortly before he died:

Adopt a Supplemental Code of Professionalism, one that is personal to you. Each of us has arrived having traveled our own route and have developed our own code of civility. I have mine, which may not be perfect, but it has worked for me. It is not written in stone but is a work in progress, which includes:

1. Be quick to compliment, slow to criticize;
2. In confrontation, be gentle in manner, firm in deed;

¹Copyright © 2011 Justice Jim Kitchens.

3. Never compromise your principles. What is morally wrong cannot be professionally right;
4. Take the high road if your opponents get unprofessional. Two wrongs do not make it right;
5. Have the courage to be honest and to follow your heart and intuitions;
6. Get to know opposing counsel. What are their hobbies, their interests, where did they go to law school, do they have children, how do they spend their holidays and leisure time? It is easier to work with someone you know;
7. Finally, on my second day of law practice, Charles Young, one of the most respected lawyers in America, told me: “You should not file a grievance or motion for sanctions until you have called the lawyers on the other side and discussed the problem. If necessary, invite them to lunch. I have taken two lawyers to lunch in over fifty years. It has worked for me.”

Being asked to make this inaugural presentation at the launching of the *Howard Twigg Lectures on Legal Professionalism* is high on my list of the greatest honors of my life. I hope that I can be a fraction as convincing as Howard would if he were here to make it himself.

Introduction

I was on a CLE panel with three other appellate jurists in a hotel ballroom full of Mississippi lawyers. After we panelists, each in his turn, had completed the usual, and entirely predictable, posturing and bragging about the good work our respective courts were doing, we took questions. The subject in which the lawyers in that audience expressed the most interest was a restoration of civility within the legal profession.

Several of us in that room were old enough to recall when courtesy and civility were the norm, rather than the exception, among members of the Bench and Bar. These days, the term *professional courtesy* most often arises, as regards our profession, when some layperson attempts to be funny by relating his or her idea of a joke involving ravenous sharks who abstain from devouring a swimming lawyer because of, you guessed it, professional courtesy. Personally, I think that sort of joke is more offensive than humorous, and my guess is that you may share that view. A very long time ago, I stopped feigning amusement at “jokes” intended to ridicule and demean the profession to which I’ve devoted most of my life.

Our superb Mississippi law schools, Mississippi College School of Law and the University of Mississippi School of Law, have separately asked me to speak to their third-year students on the subject of professionalism. I decided to use those opportunities to try to instill some sense of the importance of civility and professional courtesy into these soon-to-be-lawyers. I want to

incorporate some of those ideals into my presentation today, as I believe that they are closely related to, and should complement, my state's *Rules of Professional Conduct* and *Rules of Discipline*. By whatever names they may be called, similar rules are in effect throughout the United States.

*A Lawyer's Creed*²

To my clients: I offer faithfulness, competence, diligence and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel: I offer fairness, integrity, and civility. I will seek to fairly resolve differences and, if we fail to reconcile disagreements, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them: I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law: I offer concern for your reputation and well being. I will extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me. I will strive to make our association a professional friendship.

To the profession: I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice: I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through effective and ethical representation of my clients.³

Who could find fault with such praiseworthy ideals? Surely, they already have met with universal acceptance and joyous approval by Bench and Bar of Mississippi and are being embraced and implemented in the lives and conduct of those who ply our ancient profession in the courthouses and conference rooms, yea, even the highways and hedges of our great state, from the Tennessee border to the Barrier Islands, and all other

²At the June 25, 2009, meeting of the Board of Bar Commissioners, a new Lawyers' Creed was adopted for the Mississippi Bar. It was recommended by the Bar's Professionalism Committee, and replaces the 1986 version of the creed. It is included as an [Attachment](#).

³Accompanying a copy of Lawyer's Creed is a more expansive list entitled Aspirational Ideals, a copy of which is included in the Attachment.

jurisdictions with similar precepts. You have noticed the change, haven't you? If you suspect that I'm being more than a little facetious, you're more than a little right!

What Did We Four "Wise Men" Say?

Now, let's go back to that seminar for a moment, when the lawyers in the audience asked us appellate judges on the platform how to go about restoring civility to our profession. What did we say?

Well, first, let's establish this: just because we're appellate judges, we're not any wiser than anybody else. To keep myself in touch with reality, I often harken back to the best advice anyone ever gave me on the subject of wisdom: a wise old circuit judge⁴ told me more than 40 years ago, "Boy, when you don't know nothing, just sit there and try to look wise."

That sage advice has served me well. But, as we sat there, ever so conspicuously, atop that platform, the other three judges and I were really on the spot. We had to do more than try to look wise. These lawyers genuinely wanted to know what they could do to help our profession return to a better place than the one in which we find ourselves today.

As we searched our own souls for a worthy answer to the lawyers' worthy question, I think we reached this consensus: all the rules in the world, all the lectures, all the lofty pronouncements from the Bench, all the Bar complaints, all the ethics opinions, aren't worth as much as each and every lawyer's coming to a sincere and irrevocable personal decision to be unfailingly civil to all other lawyers, and to everyone else with whom we have professional contact. Of course, that goes for judges, too—*Big time!*

Judges Set the Tone

I haven't been a judge very long.⁵ For the first 41-plus years of my career, I wasn't a member of the judiciary, I was a practicing lawyer. During those years, the most cantankerous, quarrelsome, heavy-handed, contentious, irascible, self-centered, arrogant, disagreeable, and downright uncooperative people I encountered wore black robes. Mercifully, I can hasten to say that judges of that genre were definitely in the minority. But there were more than enough of them for them to be memorable, and unpleasantly so.

Judges should recognize that the attorneys who practice before them are officers of the court, just as the judge is an officer of the court. While the judge unquestionably must be in charge, he or she does not have to be a tyrant in order to conduct court proceedings in an orderly and productive manner. The presiding judge should set the tone for civility in the courtroom.

⁴Honorable J. Gordon Roach (1903-1979), of McComb, Mississippi.

⁵I have been a member of the Mississippi Supreme Court since January of 2009.

Courtesy breeds courtesy. Respect breeds respect. Dignity breeds dignity. A judge who unnecessarily demeans, belittles, and shows disrespect for respectful lawyers should not be surprised when the lawyers become rude and contentious toward each other.

In the Pet Peeve Department, as a practicing attorney I was always wary of a jurist who pontificated about what was or was not going to be done in “*My court.*” Courts have judges, but judges don’t have courts; judges don’t *possess*, they don’t *own* the courts over which they are privileged to preside. It goes without saying that, in the United States of America, the courts, in every sense, belong to the people, not to the judges. When judges forget that, or never recognize it in the first place, they and everyone around them are in trouble.

Back to the Creed

Let’s think about that Lawyer’s Creed some more.

In Mississippi civil jury trials, the so-called Golden Rule argument is not permitted; i.e., advocates can’t urge jurors to put themselves in the place of the person they’re in court representing.

But take another look at the first paragraph of that creed, which says in part, “I will strive to represent you *as I would want to be represented . . .*” That sounds a lot like the Golden Rule to me; and while its concept is off-limits in jury arguments, it’s a mighty good way to think of the level of commitment lawyers ought to have to their clients.

There are times when a lawyer needs a lawyer. On several occasions, I’ve hired lawyers to represent me, or members of my family, in legal matters that were outside my areas of practice, or in which I did not think I could be objective. So, this old lawyer has been a *client* several times. Perhaps you have, too. Those of us who’ve been in that position understand what it means to be “in the hands of a lawyer.”

Now, ask yourself: Do I always treat my clients the way I’d want to be treated if I were in their position? Do I really care as much about them, and their problems, as I’d want to be cared for if I were the client? Think of someone you represent now. Think of a client you don’t particularly like. Are you treating that person the way you’d want to be treated?

Of course, when I speak of how you’re “treating” someone, I’m focusing on the level of skill and competency you’re bringing to bear on that person’s behalf. I’m also thinking of the level of dignity and respect you’re giving that person. I’m talking about the level of courtesy you’re showing that person. Engage in a little self-examination. How are you really *treating* your clients, Counselor? And, as long as you’re examining yourself, are you really *worthy of their trust* in every respect?

Fairness, Integrity, and Civility

Now, take a look at that next paragraph, which embodies the promise that subscribers to the Lawyer's Creed make to opposing parties and their lawyers. Of course, your first duty is to your own client; and, without question, implicit in duty to one's client is an obligation to be *fair* to him or her.

But we lawyers, as ministers of justice, also have a duty of fairness to the person or persons on the other side of the dispute, or the transaction, we're handling for our own client. While we should always press toward goals that are to the advantage of our client, that quest should never include objectives or strategies that would take *unfair* advantage of the other parties, or their lawyers. To do so would violate the companion duty of *integrity* that we also owe them. And joined with the noble concepts of fairness and integrity is their just-as-noble relative, *civility*, which can embody many of the finer human qualities, including courtesy, decency, and just plain being *nice* to people. Indulge in a little introspection: what kind of grade do you give yourself, in your professional interaction with opposing parties and opposing counsel, in the realm of civility? An A-plus, I hope. No? If not, why not?

Now, what about this business of *fairly resolving differences*? And when differences don't get resolved, and disagreements don't get reconciled, are you really going to “. . . strive to make our dispute a dignified one”?

Have you ever heard anyone say of an argumentative, disagreeable child, “That kid would really be a great lawyer, because he/she would rather argue than eat!”? People tend to think that good lawyering is all about good arguing. Now, granted, arguing does have a prominent place in lawyering. But the longer you lawyer, the more you understand that, in many cases, if not most, good lawyering is more about looking for ways to agree than it is about arguing. Obviously, that doesn't mean that a good lawyer “caves in,” or “throws in the towel” rather than persisting in his or her client's position and tenaciously pursuing his client's interests. It simply means that it's often to the best advantage of one's client to find as much common ground with the opposing party as possible, thereby minimizing expense and risk for the client. And when impasses occur and matters that are irreconcilable by the parties have to be decided by a court or some other tribunal, good lawyers will do all within their power to assure that they, and those they represent, disagree agreeably.

As an impressionable law student in the mid-1960s, I witnessed a spontaneous, very low-key exchange between two gentlemen who, though I didn't realize it at the time, had a huge impact on my own interaction with fellow lawyers for decades to come. One of those gentlemen was my father, a businessman, who was litigating a contract dispute in federal court in Jackson, Mississippi. I had tagged along to watch the trial, and found myself in a courthouse elevator with my dad, his boyhood friend and longtime lawyer, Mr. Julius Lotterhos, and the opposing party's lawyer, Mr. Frank Williams. All three of these men have been dead for a long time now. But during their lifetimes, they were, each one of them, true gentlemen, in every sense; they were polite, and they were civil, to *everyone*.

As we rode down in that elevator, my father shook hands with Mr. Williams, who had done everything he could legally and ethically do to win his client's case, and said to him, "Mr. Williams, even though we're opposed to each other in this case, you've been extremely fair and courteous to me, and I want to thank you for that," to which Mr. Williams replied, with a smile, "Think nothing of it, Mr. Kitchens; it's just a legal matter." They remained friends for the rest of their lives.

That taught me a lot about how lawyers ought to view litigation. Though we should take it seriously, we never should take it personally. The ability to do that—an ability which must be acquired and cultivated, because it's probably not consistent with basic human nature—is part and parcel of *professionalism*. It sets us apart, and distinguishes us, from those out there in the cutthroat market places of the world who are unable to engage in differences of opinion in the absence of anger and ill will.

In that regard, I implore you, as you exercise the privilege of practicing this noble profession of ours, never to allow anyone to hire you for the purpose of getting revenge against another person, or for the purpose of harassing someone.

Respect, Candor, and Courtesy to the Courts

Remember those cantankerous judges we were talking about? The ones who, habitually and routinely, were 24-karat jerks? Is it hard to respect someone like that? Often, yes. But, without fail, it is incumbent upon lawyers to respect the *position*, the *office*, that person occupies, jerk or no jerk, even when the *respect* shown by the lawyer is met with a complete absence of reciprocity.

Consider this: it takes lawyers, and it takes judges, to make America *work*. I earnestly believe that. If you think seriously about it, I think you'll believe it, too. Our whole constitutional system contemplates, *requires*, that we have a government of *laws*. Such a government can't function without courts, and courts can't function without lawyers and judges. We are, in an indispensable sense, the glue that holds the country together.

A vital part of our responsibility, as a profession, is to build and preserve public confidence in, and respect for, our nation's courts. The sad truth is that now, in the early part of the 21st Century, many people in foreign countries tend to have more respect for American courts than most U.S. citizens do. Our system of justice, while it may be the envy of the world, is largely misunderstood, underappreciated and often mistrusted by vast numbers of our own people. It is incumbent upon us as lawyers to conduct our professional and our personal affairs in ways that will help instill public confidence in the courts of our nation and those of its several states.

Part of what we do in that regard involves our showing proper respect for the judiciary, without regard to whether we like or agree with particular judges. When we encounter a judge in public, even if we grew up with that judge and he or she is our close friend, we should rise if we're

seated and address the jurist as Your Honor, or *Judge So-and-So*, and not as Ann, Tom, Suzy, or Fred.

When we're talking about a judge with a client or with a friend or other acquaintance, we should refer to him or her as Judge "So-and-So," not because the judge is better than anybody else, or because we jurists want people to suck up to us, but because it's important to the strength and fabric of the United States of America for the people to respect our courts and those we've put in charge of them.

I know that we all understand that. But every now and then, we need to be reminded. Remember: You're *an officer of the court!* Act like one—all the time! You're *always* a lawyer. You should look, think, speak, and act like a lawyer 24 hours a day, because that's the way other people are going to think of you. You will never be able to work an eight-hour shift, punch out, go home, and not think about legal things again until you punch back in the next morning. Wherever you go, whatever you do, whomever you see, whatever you say, you'll be representing your profession and mine, and you must resolve to represent it honorably. Somebody will always be watching. The way that you conduct yourself in public can hurt or help your clients, and it can hurt or help the profession to which you've sworn fidelity.

And That Brings Up More of the Creed

The next paragraph of the Lawyer's Creed calls on you to make commitments to your "colleagues in the practice of law." Who are those colleagues? Your law partners? Associates in your firm? Lawyers from other practices with whom you're associated in one or more cases? If you're a government lawyer, are your colleagues the other lawyers in your office? Yes, yes—all of the above—and your colleagues include opposing counsel, and lawyers you don't even know.

This is another one of those "Golden Rule"-type commitments, and goes so far as to promise concern for your colleagues' reputations and for their well-being. Wow! That means we lawyers should all be genuinely concerned for each other. As one of my friends⁶ puts it, "When one's cut, we all bleed." So, this means that I shouldn't go around bashing other lawyers, especially if my words might damage his or her reputation, or undermine his or her well-being.

And the "Golden Rule" part? I quote: "I will extend to you [my colleagues in the practice of law] the same courtesy, respect, candor and dignity that I expect to be extended to me." Sounds like a "do unto others" to me; and it goes on to say, "I will strive to make our association a professional friendship." That's hard to do if you set out to be an "in-your-face" sort of practitioner whose main passion is always to make the other lawyer look bad.

⁶Russ M. Herman, Esq., of New Orleans, former president of the American Association for Justice (formerly the Association of Trial Lawyers of America (ATLA®)).

The Profession

A couple of centuries ago, “the professions” were, in the minds of the intelligentsia, the clergy, the military, and the law. Today, the definition of profession has been expanded considerably and now includes various athletic endeavors, sundry branches of medical and other healing arts, teaching—the list is almost endless. But for centuries, lawyering has been universally recognized in almost every human society as a profession. Nevertheless, some lawyers are fond of opining that it’s “just another business.”

To be sure, lawyers who are inattentive to the financial aspects of their practices unwisely endanger their livelihoods. At the same time, lawyers who are obsessed with enriching themselves with little or no regard for actual service to their clients, to their communities, and to their profession greatly enhance the likelihood that their careers will not end well. Those who subscribe to the Lawyer’s Creed pledge, *inter alia*, “. . . to strive to keep our business a profession and our profession a calling in the spirit of public service.” A calling? If you’re practicing law, you’re doing your dead-level best to serve your clients as you’d want to be served if you were the client, you’re conducting yourself ethically and honorably, and you’re doing everything you can to bring credit to the legal profession; sooner or later it’s going to dawn on you that you’re where you were meant to be and you’re doing what you’re supposed to be doing. If you haven’t had that feeling yet, it’s only because you have not been at it long enough. Keep plugging. One of these days, it’ll hit you.

And Finally . . .

If we subscribe to the Lawyer’s Creed, we take upon ourselves a solemn obligation to the public. That’s *everybody*, whether we like them or not, and regardless of whether we think they’re really worthy of all the hell we go through to become lawyers, and all the sacrifices we, and often our families, make so we can keep on being lawyers.

We say in the final lines of the creed that we offer service to the public. What does that mean? Are we a service industry? Well, in a very real sense, yes. Only, remember: we’re a *profession*, which is better than an industry. When we promise to “improve the law and our legal system,” we’re not making that commitment for ourselves alone, but for *everyone* in general—yes, for the public. And we strive to make those improvements without any real expectation of getting paid for it. It’s just something we do, because it’s the right thing to do.

When we pledge “to make the law and our legal system available to all,” that means, in part, that you and I are going to help assure that the poor person has as much access to the courts as the rich person, and that we’ll represent some people free of charge, and that the services we provide them will be of the same high quality as the services we provide to those who pay us handsomely.

And when we say that we’re going “to seek the common good through effective and ethical representation of our clients,” we understand what that means, even though most people don’t;

and we realize that if our system of justice doesn't work for everybody, then we really can't expect it to work for anybody; and deep down in our hearts we know that, even as some vilify, demean and ridicule us, sooner or later those very people are going to need us, and when they do, they'll thank God in Heaven that we're there for them.

So we'll keep plugging, keep fighting the good fight. Only we'll always do it better next time than we did it the last time.