

**SUPPLEMENTAL REPORT OF THE PROFESSIONALISM  
SUBCOMMITTEE OF THE PROFESSIONALISM  
COMMISSION**

**DATE: November 16, 2005 - TEL**

**INTRODUCTION**

At the request of the Chair and the Commission, we re-examined our report to the Professionalism Commission (the “Commission”) and the Standards and Indicia of Professionalism (the “Indicia”) with an eye toward making them mandatory. This Subcommittee has become increasingly concerned about the task we were assigned by the Commission; i.e., converting Indicia from aspirational standards to prohibitory rules. It is precisely the evolution of the Canons of Professional Responsibility from aspirational and moral standards to disciplinary rules which, in the eyes of some, has undermined the value system inherent in the original Canons. If the Commission seeks to translate the Indicia into mandatory rules that would result in potential discipline, the Commission may end up duplicating, in our view, what has already been done in the Rules of Professional Conduct. Having made this observation, this Subcommittee also has come to the conclusion, articulated at the Commission meeting on October 5, 2005, that it is beyond the scope of this Subcommittee’s charge to purport to describe how the Indicia we have identified should be applied in each potential context. In that regard, the Court of Appeals charged this Commission with the following purpose and mission:

Purposes. The primary tasks of the Commission are to develop a consensus about the definition of professionalism, to examine ways to promote professionalism among Maryland lawyers, and to provide sustained attention and assistance to the task of

ensuring that the practice of law remains a high calling, enlisted in the service of client and public good.

Mission. The mission of the Commission is to support and encourage members of the Judiciary to exhibit the highest levels of professionalism and to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public and to fulfill their obligations to improve the law and the legal system and to ensure access to that system.

Our Subcommittee, in its prior reports, has identified the Indicia. We believe, and perceived that consensus on the point was achieved at our meeting in October, that it is the task of other Subcommittees to determine what steps should be taken to promote the Indicia in various contexts. This Subcommittee remains convinced, however, that our final report to the Commission contains many important thoughts that should be incorporated in the Commission's report that will be presented to the Court of Appeals (the "Court"). With the foregoing background, we provide the following recommendations:

1. The Revised Final Report of the Professionalism Subcommittee describes our efforts to define "professionalism" using the Indicia. After making several changes, the Commission accepted and adopted our Report. We believe that it is important for the Commission to develop a comprehensive work product to be presented to the Court, the Maryland State Bar Association (the "MSBA"), and others to

memorialize the efforts of each subcommittee and the Commission as a whole.

2. To avoid overlap or repetitiveness, we have compared the Indicia the Commission developed against the MSBA Code of Civility and the relevant provisions of the Rules of Professional Conduct. We are presenting that document as an attachment to this supplemental report. There is significant overlap but there are various items that we included in the Indicia which do not precisely correspond to the MSBA Code. We nevertheless believe that such items are important and should not be lost as part of this comparative analysis.
3. We have attached to this document a proposed draft Comment to Rule 8.4 of the Maryland Rules of Professional Conduct. This draft comment is patterned on Comment No. 22 as initially presented by the Rodowsky Committee in the proposed Preamble to the Rules when it submitted its recommendations to the Court. The Court deleted that Comment in order not to usurp the work of this Commission. We recommend that this be made the very first comment to Rule 8.4 for emphasis. The Comment, if adopted, would reaffirm the importance the Court attaches to professionalism and civility of Maryland's lawyers and judges. The Commission, in our view, should recommend that repetitive or egregious violations of the principles of professionalism and civility constitute misconduct that could result in discipline and, if severe enough, could lead to disbarment.

4. The Court of Appeals should charge this Commission to use every possible vehicle, *e.g.*, the media, town hall meetings, etc, to convey to the lawyers and judges of this State the importance that the Court places on professionalism and civility in all aspects of the practice of law.
5. Representatives of the Court and this Commission should visit with the Dean and faculty of each law school in Maryland and the District of Columbia to educate them about the importance that the Court attaches to the Indicia. During these visits, we should encourage the Deans and the faculty to develop courses or components in the curriculum to educate aspiring law students about the significance of these issues. We should urge the Deans and faculty to make full use of the materials that have been developed by the MSBA Professionalism faculty and to create new and improved materials. Part of the law school curriculum should include elements which are critical to professionalism and civility, like stress management, time management, budgeting, life balance, substance abuse, public responsibility, etc.
6. MICPEL should be asked to develop methods to promote mentoring and to provide guidance to experienced members of the Bar to mentor less experienced attorneys effectively in both substantive and professional aspects of the practice of law.

7. Representatives of the Court and the Commission should visit with the leadership of the MSBA and local and specialty bar associations to encourage the creation of a mentoring or a peer review system within these associations to assist lawyers to understand the importance the Court attaches to professionalism and civility. These mechanisms also can be used as alternatives to disciplinary action.
8. The Inns of Court and the Maryland Bar Foundation should be used to help spread the word about the emphasis that the Court places on professionalism and civility.
9. The Court, the Commission, and other groups designated by the Court should be charged with the responsibility of publishing the results of these efforts so that the message is conveyed to businesses, citizenry and public bodies throughout this State.
10. The Commission and this Subcommittee have become increasingly concerned that the Rules of Professional Conduct, as they have evolved over the last 50 years, have lost the values which underlie the Rules as they have been codified into prohibitory-type rules. We strongly recommend that the Court permit the Commission to examine the Rules of Professional Conduct in light of the values that they were intended to promote. This examination should include revisiting the original Canons, Disciplinary Rules, and Ethical Considerations and determining what has been lost in the adoption of ABA and MSBA Model Rules. Particular attention should be paid to the law review

article of BENJAMIN H. BARTON, THE ABA, THE RULES AND PROFESSIONALISM: THE MECHANICS OF SELF-DEFEAT AND A CALL FOR A RETURN TO THE ETHICAL, MORAL AND PRACTICAL APPROACH OF THE CANONS, 83 N.C.L. Rev. 411 (January 2005), which addresses the issue of the evolution of the Rules of Professional Conduct and other efforts to promote professionalism.

11. The Court should convey to the Bench and the Bar the importance of these values and policies and the Court should seek the support of each judge in this State in promoting a greater understanding of when sanctions may be appropriate to police misconduct by lawyers. The input of other Subcommittees may have a bearing on this recommendation.
12. To the extent the discovery process has been a fertile source for unprofessional behavior, mechanisms need to be found, patterned on the federal system, to deal with the issue by Masters, Duty Judges or some other means to address abuses promptly. The Court may want to consider endorsing a set of Guidelines, not unlike those that were developed by Judge Dennis Sweeney, attached hereto, as setting the expectations of judges and lawyers in any judicial setting.

Comment 22

Proposed for inclusion as a Comment to Rule 8.4 of the Maryland Rules of Professional Conduct.

Comment No. [1] (to be made Comment [1] for emphasis)

In May 1997, the Maryland State Bar Association's Board of Governors approved a Code of Civility that encouraged all Maryland lawyers and judges to honor and voluntarily adhere to the standards set forth in that document. This Court, as well as the Maryland State Bar Association, recognizes that civility is a cornerstone of the legal profession. The principles in the Code of Civility were not intended to replace but supplement existing codes, rules and statutes governing lawyers and judges' professional conduct. The Code of Civility is reprinted as an Appendix to these Rules.

Despite the existence of this Code of Civility, members of the Maryland Bench and Bar have expressed continuing concerns about unprofessional behavior by a few lawyers and judges and the apparent absence of repercussions for unprofessional behavior. To address these continuing concerns, the Court of Appeals, by Order dated April 25, 2002, created a Professionalism Task Force to study the concept of professionalism and to make recommendations to the Court to advance the professionalism of the Bench and the Bar. The Court of Appeals, on November 10, 2003, adopted the recommendations of the Task Force, including the recommendation to establish a Professionalism Commission. That Commission was created by Administrative Order of February 17, 2004, which

directed the Commission to develop a consensus about the definition of professionalism, and ways to promote professionalism and sustained attention and assistance to the task of ensuring that lawyers and judges remain true to their high calling to serve the general public. To carry out this purpose, the Court directed the Commission to develop mechanisms to advance professionalism as an important core value of the legal profession and the legal process. The Commission has now completed this task and presented its Report to the Court in which it has articulated Standards and Indicia of Professionalism. The Standards and Indicia also are reprinted as an Appendix to these Rules. Lawyers who fail to observe these Standards and Indicia of Professionalism repeatedly or in an egregious manner demonstrate a lack of character required of members of the legal profession. Such conduct may rise to the level of misconduct warranting investigation and/or action by the Bench, the Grievance Commission or the Commission on Judicial Disabilities, particularly where such conduct is inimical or prejudicial to the administration of justice.