

Professionalism Counseling Programs

Directive #1-97
Issued by:

January 13, 1997
James J. Ciania
Administrative Director of the Courts

By Order of the Supreme Court dated January 6, 1997 (attached), a county bar association may establish, pursuant to guidelines promulgated by the New Jersey Commission on Professionalism in the Law and approved by the Supreme Court, a Professionalism Counseling Program. The purpose of such a program is to offer educational counseling and other advice to lawyers whose conduct falls short of accepted levels of professional behavior. The goals of the program are to improve the legal profession and to bolster public confidence in the administration of justice.

Having agreed that the Professionalism Counseling Program should be established, the Supreme Court directs that the program be operated in accordance with the following standards:

Administration

Following the establishment of a Professionalism Counseling Program, a county bar association shall be responsible for the management and operation of the program, in accordance with guidelines promulgated by the New Jersey Commission on Professionalism in the Law. Records containing the names of lawyers counseled, or the results of discussions, meetings, and counseling sessions, need not be retained. The Commission shall provide general guidance and assistance, and serve as a clearinghouse for information about the operation of the program statewide.

Participation

A Professionalism Counseling Program established by a county bar association may seek assistance from the assignment judge in encouraging lawyers to participate in the program.

Any judge having knowledge of unprofessional behavior on the part of an attorney may request a Professionalism Counseling Program to provide counseling to the attorney. A Professionalism Counseling Program is not authorized to handle violations of the disciplinary rules. Judges shall continue to refer instances of unethical conduct to a district ethics committee, or other appropriate authority.

SUPREME COURT OF NEW JERSEY

IT IS ORDERED that a Professionalism Counseling Program shall be established to be administered by the New Jersey Commission on Professionalism in the Law pursuant to the attached guidelines promulgated by the Commission and hereby approved by the Court; and it is further

ORDERED that the purpose of such a program is to offer educational counseling and other advice to lawyers whose conduct falls short of accepted levels of professional behavior, improve the legal profession, and bolster public confidence in the administration of justice; and it is further

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ORDERED that a Professionalism Counseling Program established by a county bar association may seek assistance from the assignment judge in encouraging lawyers to participate in the program and that any judge having knowledge of unprofessional behavior on the part of an attorney may request a Professionalism Counseling Program to provide Counseling to the attorney; and it is further

ORDERED that a Professionalism Counseling Program is not authorized to handle violations of the disciplinary rules and that judges shall continue to refer instances of unethical conduct to a district ethics committee or other appropriate authority.

This Order is effective immediately, until further Order of the Court.

For the Court:

C.J.

Dated: January 6, 1997

PROFESSIONALISM COUNSELING PROGRAM

INTRODUCTION

The Commission on Professionalism in the Law believes that it must attempt to foster within the legal community a climate of responsibility, appropriate conduct, and respect for others. Many members of the bench and bar have decried the fact that the professional traditions of the bar are becoming lost, or ignored. Certainly, the majority of the practicing bar conduct themselves in a way that reflects adherence to fundamental values and respect for the legal system. However, there are others that practice law in a manner that often shows little regard for colleagues, clients, or the courts. The problem is widespread enough to deserve immediate attention.

Civility, fair dealing, good judgment, and competence are standards that must not be ignored. For whatever reasons -- business demands, increased competition, the pressure to move cases -- for some lawyers professional responsibility has become nothing more than a quaint, forgotten notion.

The Commission suggests a novel approach aimed at helping to curb unprofessional conduct and restoring public confidence in the bar, set forth in this proposal for a Professionalism Counseling Program. We call on the county bar associations to take the lead in this effort by establishing Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence. The Professionalism Committees might also provide advice to lawyers who voluntarily seek the committees' assistance. Our proposal contains guidelines for county bar associations, and program options they might wish to adopt.

It is not the intention of the Commission to create a bureaucracy dedicated to further policing the bar. The program we suggest would operate independently from the disciplinary system, and would not be subject to Supreme Court control. It would be a bar initiative, aimed directly at improving the profession and bolstering public confidence in the legal system.

A. PURPOSE

The Professionalism Counseling Program would address unprofessional conduct by lawyers that does not constitute a violation of the Rules of Professional Conduct. Thus, it would not handle matters that are within the jurisdiction of the District Ethics Committees. Anyone who contacts the program about a matter involving conduct within the scope of the Rules of Professional Conduct must be advised to contact the District Ethics Committee.

For instance, the program would deal with such matters as harassing conduct or lack of appropriate respect, abusive discovery practices, incivility, failure to understand the basics of the professional practice of law, communications problems, deficient practice skills and questionable courtroom conduct to list but a few examples. These problems are now dealt with by some county bar associations on an ad hoc basis.

In addition to this type of remedial counseling, county bar associations might also offer advice and guidance to lawyers who contact Professionalism Committees for help with practice related problems that concern professional obligations. This may be helpful to inexperienced practitioners.

However, there is no existing model or recommended structure that can be used as a guide by a bar association wishing to provide this type of assistance. The Commission on Professionalism seeks to offer such guidance through this proposal. Our model is intended to be a framework, which can be modified by a county bar association in accordance with its particular needs.

B. BACKGROUND

The suggested Professionalism Counseling Program is based, in part, on a Peer Review Program operated by the State Bar of Arizona, a similar program that was suggested by the State Bar of New Mexico, and an ethics diversionary program of the Texas State Bar, known as the Professionalism Enhancement Program.

The programs in other states, however, differ significantly from the Commission's plan because they are run by bar associations with mandatory membership. As a result, these associations also operate the lawyer disciplinary systems in their states and the peer review mechanisms they have devised are closely aligned with the disciplinary process. According to Bar Counsel in Arizona, it was for this reason that the program there met with some opposition from the bar.

Even though the Arizona Peer Review Program is careful to state that it is educational in nature and permits no disciplinary sanctions, all complaints are first screened by Bar Counsel (the equivalent of New Jersey's Office of Attorney Ethics) to determine their appropriateness for peer review. Almost all of Arizona's peer review matters are referrals from Bar Counsel following the dismissal of ethics complaints.

The State Bar of New Mexico devised a Peer Review Program in 1993 modeled after the Arizona program. According to the State Bar there, the New Mexico Supreme Court has considered the program but has not approved it due to the concerns of many lawyers (and some of the members of the Court) that the program, as proposed, would create an unnecessary layer of lawyer oversight. Under the New Mexico proposal, matters would be referred to the Peer Review Program by the Supreme Court's Disciplinary Board, following screening of complaints. Because of a perceived close connection between the Board and the program, peer review was viewed by many New Mexico lawyers as disciplinary in nature.

The Texas Professionalism Enhancement Program, begun in early 1995, is also discipline related and permits ethics complaints to be put on hold when a lawyer is referred to one of the program's components, which include substance abuse counseling, mediation, an ethics seminar and lawyer to lawyer assistance, which pairs a lawyer in the program with a volunteer lawyer who can provide counseling on professional behavior and client relations.

As far as we are aware, our suggested program may be the only one in the nation that would be implemented through local bar associations.

Unlike the programs mentioned above, the Commission's proposal for New Jersey purposely avoids any direct oversight by agencies of the lawyer disciplinary system. An appearance of a close tie between the two might deter lawyer acceptance of, and participation in, the program.

C. OPERATION OF THE PROGRAM

It is recommended that the Program operate through Professionalism Committees to be appointed by each county bar association. The precise composition, structure, and operation of the committees should be determined by the county bar associations. It may be that pilot programs will emerge that will test different types of programs. However, the Commission offers some basic guidelines:

1. Each committee, and a committee chair, would be appointed by the president of the county bar association. The assignment judge should be advised of the appointments.
2. Lawyer members of a Professionalism Committee should be highly regarded members of the bar who possess a reputation for competence, integrity and collegiality. Retired judges should also be encouraged to participate.
3. The Counseling Program would offer assistance in a variety of circumstances, such as when:
 - * a lawyer personally requests assistance in dealing with a problem
 - * a lawyer requests assistance in dealing with another lawyer
 - * a judge requests assistance in dealing with a lawyer

D. PROGRAM OPTIONS

The county bar associations should be free to fashion a program that best fits their needs. Such a program might take any of a number of forms, a few of which are:

1. Individual Counseling

The basic program would involve counseling of individual lawyers whose conduct is brought to the attention of a county bar Professionalism Committee. Inquiries and requests for assistance would be directed to the chair of the county bar Professionalism Committee who would refer the matter to a committee member for appropriate action. It would be the obligation of the member to address the matter as quickly as possible and determine whether the incident or course of conduct in question merits a discussion with the lawyer. If so, the committee member should contact the lawyer, determine the

seriousness of the conduct in question and offer advice or counseling appropriate under the circumstances. It may be that a phone call or meeting may be all that is needed to address the situation. The committee member should report back to the chair regarding the action taken and the outcome of the discussion.

2. Practice Related Problems

As noted previously, counseling might also include assistance to lawyers who contact the Professionalism Committee for advice about practice related problems that touch upon professional responsibilities. Such inquiries might concern a variety of topics such as client relations, dealing with colleagues, or obligations to the judiciary. Such advice should not include ethics questions more properly handled by the Supreme Court's Advisory Committee on Professional Ethics, or the Ethics Hotline. The Commission leaves it to the county bar associations to determine the nature and extent of this aspect of a counseling system. We suggest, however that this will be a way for county bar associations to offer another positive service to lawyers, and perhaps may be another inducement to membership.

3. Committee Appearance

In addition to individual counseling, a county bar program may wish to permit a Professionalism Committee to call in a lawyer for a meeting to discuss the incident or course of conduct in question. This alternative may serve to emphasize the importance of the situation; we expect it would be used where repeated unprofessional conduct is found.

4. Participation

The Court Directive #1-97 authorizing the program would permit a county bar association Professionalism Committee to seek the assistance of the assignment judge in encouraging lawyer participation in the program.

5. Referral to Other Counseling

Another option for possible use by a committee would be to suggest to a lawyer that professional counseling be considered. It is anticipated that this option would be utilized in very few situations, such as where a lawyer engages in abusive conduct that is repetitive, not capable of being addressed adequately by the committee, and may be evidence of a persistent underlying problem.

6. Referral to Other Programs

A county bar program may also opt to permit referrals to other programs that provide assistance to lawyers. Based on the facts and circumstances, the committee member may conclude that a problem exists that might be better handled by another program. Such a recommendation should be discussed with the committee chair and either the chair or the committee member would then contact the lawyer and encourage participation in the alternative program. Potential places of referral include, but should not be limited to:

- * The New Jersey State Bar Association's Lawyers' Assistance Program, or similar programs, where there are signs of alcohol or drug abuse.
- * Bar association sponsored law practice assistance programs or seminars, where it is evident that a lawyer is having difficulty maintaining a law practice, to the potential detriment of clients.
- * Bar association sponsored programs or seminars on professionalism, where it appears that the lawyer does not understand, or follow, accepted standards of professional responsibility.
- * The New Jersey State Bar Association's Lawyer Dispute Resolution Program (or similar program sponsored by another bar association), in the case of lawyer to lawyer disagreements over law firms dissolution, partnership withdrawals, or fee disputes between lawyers.

7. Mediation

In addition to the options noted above, a county bar program may wish to provide mediation of practice related disputes between lawyers that have led to complaints of unprofessional behavior. If circumstances warrant, and the parties are amenable, a committee member could be designated informally to mediate the dispute. The goal of this alternative process would be to resolve the matter as quickly as possible, and to attempt to preserve the professional relationship between the lawyers.

8. Pending Litigation

A county bar Professionalism Committee may defer consideration of matters that arise during the course of litigation, at its sole discretion.

9. Lawyers From Other Counties

A county bar Professionalism Committee may encounter matters involving lawyers from other counties whose conduct falls short of professional standards. At the option of the party who brought the matter before the committee, the committee where the offending conduct occurred may handle the matter, or report to the county bar association in the county where the lawyer maintains his other principal office.

E. FOLLOW-UP

Depending on the nature of the complaint, and the complexity of the problem addressed, the committee member should consider whether follow-up is necessary. This might be by way of telephone call, a meeting, or confirming correspondence with the lawyer in question. Follow-up should be done as a matter of course when a lawyer agrees to a referral to another program.

F. RECORDS

The Commission suggests that committees maintain some information about the types of matters that are handled. Data regarding the types of professionalism complaints that are most prevalent will help bar associations, and the Commission, target common problems that can be the subject of CLE programming and other preventive programs.

In keeping with the information nature of the program, and its educational purpose, the names of lawyers who are counseled need not be retained by the committee. Similarly, records of discussions, meetings, and counseling sessions held by the Professionalism Committee, or any of its members, need not be kept. The Commission leaves this to be determined by the committee.

G. DIVERSION OF ETHICS CASES

In its July 1994 response to the report of the New Jersey Ethics Commission (the Michels Commission), the Supreme Court urged the New Jersey State Bar Association to develop diversionary programs, to which lawyers charged with minor acts of ethical misconduct might be referred. Although the Professionalism Counseling Program is not now intended to address such matters, the Commission suggests that the program may ultimately be expanded so as to accept matters diverted from the disciplinary system.

The State Bar Association will soon launch an Ethics Diversionary Program, which will receive respondents from the disciplinary system for placement in educational programs. It may be possible, at some future date, to refer certain respondents to the Professionalism Counseling Program. This would presume, however, the successful implementation of the program, coupled by adequate oversight by the Commission and coordination with the State Bar Association diversionary effort. The Commission intends to monitor the progress of the program, discuss with the State Bar a possible linkage, and at the appropriate time bring this matter to the attention of the Supreme Court.

H. COMMISSION OVERSIGHT

As noted above, the Commission urges the twenty-one county bar associations to adopt some form of a Professionalism Counseling Program. It is the intention of the Commission to leave the day-to-day operation of the program in the hands of the bar associations, and the committees appointed to implement the program.

The Commission intends, however, to monitor the progress of the Professionalism Counseling Program. By doing so the Commission can offer assistance and guidance, and can gather information about the program models that are developed. In this way, the Commission can provide each county bar association with the tools needed to operate a successful program.

CONCLUSION

The Commission recognizes that an effort to advance the cause of professionalism must proceed on many fronts. The Professionalism Counseling Program is but one component of a comprehensive plan that will be advanced by the

Commission. However, we consider the Professionalism Counseling Program to be a significant step that has much potential. It will provide the organized bar with an opportunity to fashion and implement a mechanism that will help restore pride and traditional values within the profession, encourage civility, and improve public respect for lawyers and the administration of justice.

EDITOR=S NOTE

No change has been to the original text.