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Ben W. Heineman, Jr. [a1]

*58 THE GC'S GREATEST CHALLENGE: RESOLVING THE PARTNER-GUARDIAN TENSION

WESTLAW LAWPRAC INDEX

INH--In-House Counsel & Corporate Law Departments

*59 CHEAT SHEET

• *Aligning C-suite and legal objectives. Optimally*, the CEO explicitly issues authority to the GC to manage a broad spectrum of ethical issues beyond mere compliance.

• *Changing attitudes*. The myth of legal as the "Department of No" still persists in some boardrooms, and it's the GC's job to advocate for themselves and their legal department.

• *Freedom at all costs*. Independent and credible GCs must resist perverse incentives and the influence of the CEO or the board over legal recommendations.

• *The revolution rumbles on*. As the business and legal functions converge, the critical fusion of the partner and guardian roles in the business will continue to gain support.

Over the last 30 years, there has been an inside counsel revolution of increasing scope and power that has transformed both business and law in two important ways. Inside the corporation, the general counsel has often replaced the law firm senior partner as the primary counselor for the CEO and board of directors on core issues like performance, compliance, ethics, risk, governance, and citizenship. The GC's stature is now comparable to the chief financial officer because the health of the corporation requires that it navigate complex and fast-changing law, regulation, litigation, public policy, politics, media, and interest group pressures across the globe. Outside the corporation, the role of the general counsel has also grown in importance with a significant shift in power from outside law firms to inside law departments over both matters and money. As a result of both trends, the expertise, quality, breadth, power, and compensation of the general counsel and inside counsel have significantly increased.

***60** This revolution is built on two aspirational but practical roles of the general counsel and inside lawyers. First, the general counsel must be a lawyer-statesperson who is an outstanding technical expert, a wise counselor, and an accountable leader. She has a major role assisting the corporation achieve its fundamental mission: the fusion of high performance with high integrity and sound risk management. For the lawyer-statesperson, the first question is: "Is it legal?" But the ultimate question is: "Is it right?" As a lawyer-statesperson, the general counsel must engage in robust debate on all major corporate initiatives about what are the "ends" of that action, not just about "the means" for carrying it out; about "purpose" not just "process;" about consequences, not just acts. The general counsel is well positioned as counselor and leader to introduce a dose of "constructive challenge" to such discussions about "what is right" on key ethical duties to the corporation, to stakeholders, to the rule of law, and to society.

But to function effectively as a lawyer-statesperson, the general counsel must assume a second aspirational position by meeting the greatest challenge for inside lawyers: She must reconcile the dual--and at times conflicting-- roles of being both a partner to the business leaders and a guardian of the corporation's integrity and reputation.

The tension

General counsel have failed as guardians. In the 21st century's first great wave of scandals, beginning with the collapse of Enron and WorldCom, the recurring question was, “Where were the lawyers?” In-house counsel were excluded from key decisions; failed to ask probing questions; and rubber-stamped improper business decisions. But, compared to CFOs, they generally escaped formal sanctions. In subsequent options backdating investigations, GCs were once again squarely in the middle of corporate improprieties--and in the line of fire. Indictments, settlements, pleas, and convictions of inside lawyers resulted, including SEC sanctions for the GCs of both Apple and Google. Then, the Hewlett-Packard GC resigned after taking the Fifth Amendment at a Congressional hearing because the HP board chair had pressured her to use unethical and illegal “pretexting” to investigate leaks from its board of directors, secretly obtaining director phone records through subterfuge and misrepresentations.

The Enron debacle, the back-dating scandal, and the HP “pretexting” case are just part of a burgeoning parade of misdeeds where inside lawyers, in their eagerness to “partner” with business leaders and appease them, utterly failed in their responsibilities as guardians. They have been found culpable in criminal investigations, in SEC inquiries, in other enforcement actions, and in private civil actions because they were supine in the face of business pressure and complicit in improper acts. To critics, exemplified by Professor John Coffee in his book, “Gatekeepers: The Professions and Corporate Governance,” the unceasing stream of major corporate scandals demonstrates that inside lawyers will inevitably be weak and compromised: They simply lack “independence,” because they are subject to “pressure and reprisals” from business leaders.

By contrast, the New York City Bar Association “Report of the Task Force on the Lawyer's Role in Corporate Governance,” issued in November 2006, states that “the role of the general counsel of a public company is central to an effective system of corporate governance.” (Disclosure: I was one of many people interviewed and cited by the Task Force.) The Task Force used corporate scandals, not to argue that general counsel were always compromised, but rather to argue that these events demonstrated the need for strong internal disciplines and for a strong general counsel to help integrate those regimens into business operations. Similarly, the former Chief Justice of the Delaware Supreme Court, in a recent book, has argued powerfully for the general counsel's essential role as a guardian of a corporation's integrity, endorsing the partner-guardian fusion I have long advanced. Many other voices maintain that a strong guardian role for the general counsel is both desirable and feasible.

I do not believe that the choice for general counsel and inside lawyers is to go native as a “yea-sayer” for the business side and be legally or ethically compromised, or to be an inveterate “nay-sayer” excluded from key corporate discussions, decisions, and actions. Indeed, I think being both an effective partner of business leaders and respected guardian of the corporation is critical to the performance of each role. I deeply believe that this fusion is possible. But, certain key conditions inside the company must exist and very real obstacles must be overcome for this to occur.

The fusion

In the optimal situation, the CEO and board of directors *explicitly* ***61** authorize the GC to help create value, protect integrity, and manage risk as expert, counselor, and leader on core issues: business, law, ethics, reputation, communications, risk, public policy, governance, and corporate citizenship. This authorization occurs in the following ways.

As partner-guardian, the general counsel *must have a deep and broad understanding of the corporation's business activities in the context of the broader geopolitical environment*. Increasingly, CEOs and boards of directors are seeking GCs with business knowledge and acumen relating to such issues as finance, technology, products, markets, geographies, and competitors.

As partner-guardian and as a senior officer of the corporation, the general counsel *must be fully engaged in the high level and high priority planning and decisions facing the company* both in the near and longer term to obtain that understanding. The general counsel should have an immutable standing invitation to attend the key business meetings that occur on a regular rhythm at the CEO level: annual strategic and budget reviews of business units; regular (often quarterly) updates with senior business

leaders; regular meetings of the corporate executive committee to review top company priorities; and key decision meetings on discrete issues.

As partner-guardian, in *planning and decision meetings* with the CEO and top business leaders, the general counsel *can function both as a lawyer and as a business person*. As a lawyer, the GC is being a "partner-guardian" in finding effective, lawful ways to achieve legitimate corporate goals. But, as a smart, informed generalist, the general counsel can also be a "partner" by bringing to discussion and debate other "wise counselor" perspectives--from ethical and reputational issues to broader corporate strategy and business issues (e.g., identification of risk, assessment of counter-party motives, or helping define the key trade-offs). The GC must, of course, know when she is crossing over from being a lawyer proffering legal advice to a broader business counseling role, giving up the attorney-client privilege and making her comments subject to private discovery or government inquiry.

As partner-guardian, the general counsel and inside lawyers *also play a vital role in implementing major strategic and operational objectives that create value and competitive advantage*. Indeed, properly analyzed, virtually every legal area in the corporation creates value and is vital to commercial performance: e.g., outstanding due diligence, negotiating key deal terms, simplifying sales contracts, aiding product development, mitigating country risk, and achieving public policy objectives.

As partner-guardian, the general counsel *has a vital job in all corporate settings to help devise and then to implement measures to protect the corporation's integrity and manage its risk*. It involves raising hard, uncomfortable issues in discrete settings. But, importantly, it involves playing a key role so that integrity and risk issues are systematically addressed and integrated into business processes that are owned by business leaders. The trust built up by the general counsel and inside lawyers as partners on business decisions and execution give them great credibility to work with executives as guardians and integrate integrity issues into business processes. As partner-guardian, the general counsel, along with the CEO and other senior officers, ultimately needs *to define the proper approach to checks and balances* in all aspects of corporate decision-making and corporate action--to find the right balance between creativity/innovation and risk assessment/risk mitigation.

The obstacles

There are many potential obstacles inside corporations that might undercut a seamless partner-guardian fusion for the general counsel and other inside lawyers. Business people may lack understanding about law and policy. Top execs or mid-level P&L leaders can hold antediluvian attitudes about lawyers (as "Dr. No's" or "just cost centers"). Negative group pressures may exist in decision meetings when the CEO is in a hurry and other senior officers want to curry the CEO's favor. More general group pressures may exist when GCs work for a single client and are socialized into a corporation's pure performance ethos (short term shareholder value). The GC can be caught in tense conflict if she feels constrained to advise the board, as representatives of the whole company, about an important disagreement with the CEO. The GC can fear the CEO: being fired, losing present or future financial benefits, being excluded from meetings, or being humiliated. The GC's guardian role can also be compromised due to conflicts of interest stemming from her compensation package which may stimulate improper acts to pump up stock price.

***62 Overcoming the obstacles**

To obviate these problems, the general counsel needs key *personal qualities*: a strong character, a strong reputation outside the corporation, and a strong sense of identity. I consider the following character traits key. The general counsel must have a strong sense of *independence*. She must have the *courage* to speak out, even in pressured situations and even when she may be a lone voice in a group of powerful people. The GC must have *tact* in expressing her views and must act in a constructive manner that is firm but not offensive. Finally, she must have *credibility* that engenders trust so that her business superiors and peers believe, although they may disagree, that the GC is trying to do the right thing for the corporation--and for them.

In addition to these character traits, the *professional reputation* of the general counsel outside the company generates respect and enhances her capacity to function as partner-guardian inside the corporation. This professional reputation can exist because of prior positions either in the public sector or in private practice or in other inside counsel jobs. It can also obtain by and because of national expertise on issues (e.g., litigation, tax, trade, labor, and employment). Finally, in addition to character and professional reputation, the general counsel *needs to be explicit with her peers and her superiors about the core identity as partner-guardian* that she and other lawyers aspire to assume inside the corporation. The GC must not shy away from articulating her vision of her role in the company.

In addition to leveraging these personal qualities, the GC can overcome the obstacles to fusing the partner/guardian roles through alliances with peer staff leaders. The finance, human resources, compliance, and risk functions have the similar involvement in some or all of the corporation's core activities. They have partner-guardian responsibilities analogous to those of the legal department--and face similar obstacles to fusing the roles. Legal, finance, HR, compliance, and risk are essential elements of the company's nervous system. They connect, and signal to, all extremities of the corporate corpus on key issues of integrity and risk. If they can act in concert and support each other, the chances are greatly enhanced that these separate staffs functions ***63** can overcome the obstacles to the partner-guardian fusion each faces alone. The GC-CFO relationship is especially important because the first element of corporate integrity is adherence to formal rules legal *and* financial. The integrity of a company has as its foundation on both the accuracy of its financials and on its compliance with law. Both GC and CFO must be jointly committed to performance in the right way. Close collaboration, coordination, and friendship among these staff leaders are critical aspects of real, effective corporate governance. But there is always a risk that the occupants of these critical positions--finance, compliance, risk, and HR--will be courtiers and sycophants, subservient to CEO whims.

The board of directors plays a critical role in overcoming the obstacles by making clear that its CEO selection process values high performance, high integrity, and sound risk management. The mission of the new chief executive and the company's top staff, including the GC, is to have a partner-guardian role. In addition, there are key aspects of the board-GC relationship that promote the partner-guardian fusion. Although the GC should not be on the board, she should be part of the board culture (committee meetings, events, dinners) and have personal relationships with individual board members. The board of directors should have oversight of both the hiring--and any firing--of the top staff officers, including the general counsel. This meaningful advisory role stems, of course, from the basic principle that the GCs' client is the corporation as embodied by the board of directors. The general counsel should report to the full board or to committees on key performance, integrity, and risk issues as part of regular board processes. But the general counsel *should meet alone with the board as a whole or with the Audit or Risk Committee at least two times per year* to raise privately any issues of concern or to answer any director questions. The board, not the GC, should establish this private meeting--just as the Audit Committee may meet alone with the CFO, the internal audit staff, and the external auditors--to avoid, or at least mitigate, erosion of the critical CEO trust in the GC. And the board should be intimately involved in setting GC compensation to ensure proper rewards for advancing integrity, risk management, and proper compensation recovery policies if the GC fails on that core set of issues.

The CEO

The CEO's explicit recognition and support of the dual partner and guardian roles for the general counsel and other top staff leaders is necessary, at the end of the day, to overcome the obstacles to their fusion. This requires complete integration of the GC into the affairs of the corporation, as described above. But this recognition is shown in the genuine attitude of the CEO and his relationship with the GC. The CEO must make clear to the company the deep belief that the general counsel and key inside lawyers are strongly motivated and highly effective in helping the CEO “win” in the company, the marketplace, and society, according to appropriate performance, integrity, and risk standards. The CEO must make clear to all that the GC should be neither a “yea-sayer” nor “nay-sayer,” but a strong, independent, and courageous voice to speak out about the GC's vision of what is the right long-term, enlightened self-interest of the company. The complex elements of chemistry and trust that must exist between the CEO and the general counsel in support of the partner-guardian roles in a hard-charging global company are hard to describe and impossible to mandate. But, the hard guardian discussions about limitations and constraints in the present are made easier by business partnership accomplishments in the past.

Nonetheless, the greatest problem GCs face is the risk that a CEO will undermine the partner-guardian role. I strongly believe that being a GC is far better job today than being in a law firm. But law firms can “fire clients.” GCs cannot “fire CEOs.” CEOs have an endless capacity to make life miserable for GCs. To mitigate this risk, GCs can conduct some due diligence at the “front end” between being offered the job and accepting it. This is a period when a GC candidate can ask to meet with officers and directors and can talk privately with third parties who know the CEO and the corporation. Such diligence is not going to be perfect, but it is surely an important step to take before saying “yes.” But, at the “back-end,” *GCs must know going in that they may have to resign to preserve their integrity, even if that means loss of a prestigious position and significant financial benefits*. With a good board/good CEO or a good board/bad CEO, the GC can often work out CEO problems or have a graceful exit due to board intervention. But with a bad board/bad CEO, GCs must look in the mirror and say “time to go.” They must truly confront the resignation possibility before they start, not just when bad things happen.

Prospects

Nonetheless, I am optimistic that the board and CEO attitudes about high performance with high integrity and about the lawyer-statesperson and partner-guardian roles can--and will-- exist. This is so not because of nice theory, but because of hard necessity. The inside counsel revolution occurred, in part, as a ***64** reaction to the excesses and acquisitiveness of outside law firms. But the key driver was the dramatic increase in global commercial complexity and in related "business in society" issues that sophisticated inside lawyers can handle with speed and skill. Astute CEOs and boards know that successful performance that engenders trust depends importantly on navigating effectively and fairly myriad laws, regulations, investigations, enforcement, and public criticism. They know that a highly talented, broadly experienced, analytically rigorous, and consistently innovative general counsel--and an outstanding law department--are needed to deal in a systematic and rigorous way with the core issues of business strategy, value creation, culture, compliance, ethics, risk, governance, and citizenship. Because these necessities, and the external pressures on corporations, are only going to increase, I believe that the inside counsel revolution--and support for the critical fusion of the partner and guardian roles--will continue to gain board and CEO adherents in companies of all sizes, both in in the United States and in the rest of the world.

Excerpted from Heineman's newly published book, "The Inside Council Revolution: Resolving the Partner-Guardian Tension" (Ankerwycke 2016).

The partner/guardian conflict in small- and medium-sized companies

At virtually every presentation I have given on high performance with high integrity, and the lawyer-statesman and partner-guardian roles, I am admonished by the audience: "You worked for a mega-company with a huge balance sheet, but what should a smaller company do?" Here is my answer.

With respect to compliance with externally mandated formal rules, small-and medium-sized companies have the same obligation to obey the law as large companies. They must prioritize their compliance risks and spend more where the risks are higher. But they cannot ignore the law. A failure to be compliant can have two adverse consequences. First, if a small or medium-sized company takes a compliance torpedo amidship, it can sink when the matter is serious. A Siemens or a JP Morgan can seal the area, fix the engines, and sail on. A major compliance issue can send a small or medium-sized company to the bottom of the sea. Second, many small companies want a nice payday by selling themselves to big companies. But due diligence techniques of large acquirers on compliance issues have become more sophisticated. If the acquirer finds a problem, it may tell the target: "Drop the purchase price," or "Turn yourself in or deal is off," or simply "Sayonara." So, not addressing the compliance issues creates deal risk as well as enforcement risk for small- and medium-sized companies.

With respect to ethics, small- and medium-sized companies may not have the same discretionary resources as large companies. They will almost surely need to be more selective in deciding what standards of conduct--beyond what the formal rules require--they can or will adopt. Just like larger companies, they will need a process for identifying ethical issues of great salience for their type of business. But the CEO, business leaders, and staff leaders, including the GC, will need to perform triage--deciding, for example, that a voluntary action protecting consumers is more important than a voluntary action protecting the environment. Their ethical actions--what is "right" in a voluntarily sense--may thus be of smaller scope. But, at the end of the day, people who run small businesses--and general counsel who work in them--have to look in the mirror and decide what kind of company they want to operate.

One of the great business school cases is about the Indian founder of Infosys, Narayana Murthy, who simply refused to pay a small bribe to get telephones installed so his new company could start operations. For months, employees in this promising start-up had to go outside the premises and use pay phones. Infosys lost orders. But Murthy wouldn't bend because he believed so strongly in doing business the right way. He is a wonderful example of looking in the mirror and deciding on integrity even at the cost of lost business (eventually he got the phones installed without the bribe).

ACC EXTRS ON ... The inside counsel revolution

ACC Docket

Interview with Ben Heineman (Apr. 2016). *www.acc.com/legalresources/resource.cfm?show=1427234*

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Lawyers as a Catalyst for Change in Early Issue Business Conflict Management (July 2012). *www.acc.com/legalresources/resource.cfm?show=1313392*

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Top Ten

Top Ten Roles of the Law Department Business Operations Director (Sep. 2012). *www.acc.com/legalresources/publications/topten/ttrotldbod.cfm*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

Footnotes

a1 **Ben W. Heineman, Jr.,** former General Electric Company senior vice president and general counsel, is a senior fellow at Harvard's schools of law and government and a lecturer at Yale Law School. He teaches and writes on business, law, policy, ethics, risk, and organization in the context of globalization. *benheineman@gmail.com*

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Professional Perspective

Avoiding Human Bias in Artificial Intelligence

Heather J. Meeker and Amit Itai, O'Melveny & Myers

Bloomberg Law

Avoiding Human Bias in Artificial Intelligence

Contributed by Heather J. Meeker and Amit Itai, O'Melveny & Myers

Today, AI systems help create efficiencies and business opportunities in financial services, marketing, health care, and government. However, AI systems are only as good as they are designed to be, and lately, we have begun to understand how our human biases can creep into AI. Accordingly, lawmakers, regulators, and civil activists have begun to focus on AI biases and how they might affect our society. As they do so, they have demanded that businesses be held accountable for their use of AI. Put simply, bias in AI has now become a legal issue that companies must address.

What is Bias?

While human bias is a well-documented and widely understood concept, what exactly is AI bias?

Bias, when applied to statistical analysis, means an error introduced into sampling or testing by selecting or encouraging one outcome or answer over others. In statistics, bias does not imply human bigotry, or even bad intent–just faulty experimental design. For example, if you want to measure whether people prefer coffee or tea, it is probably not best to do your polling in a coffee shop.

But bias can be subtle and difficult to avoid. You could poll people on the street, but you might get a skewed result if you polled near a coffee shop or in a neighborhood populated with people from a culture that traditionally drinks coffee. That bias may not be evident until you understand more about the population you are measuring.

Recently, various stakeholders have started to acknowledge how much of our human biases make their way into AI. AI systems are only as good as the data we put into them. For example, the data that we use to train AI may be selected in a biased way, or the "ground truth" against which AI models are measured might have been created in a biased way. Moreover, we often do not recognize that the data is biased until after it is used to train an AI system, which makes AI bias an ongoing problem that can be difficult to undo.

Even if companies building AI systems do not intend to discriminate, the tools they use can still have discriminatory outcomes. And because software controls so much of our day-to-day lives, the result is systemic bias that can be challenging to eradicate. Being aware of the risk of bias and working to mitigate it should be a top priority for anyone designing automated systems.

As companies work to develop AI systems that we can trust, it is critical to ensure that AI algorithms and systems can be easily audited. If the AI is a "black box" that cannot be re-engineered, the only solution may be to throw it away and start over, discarding useful insights along with the biases, or avoiding the technology altogether.

But improving technological design is not enough. Companies that implement and rely on AI systems need to take proactive measures to avoid bias–whether intentional or not. Many companies today are adopting corporate AI compliance policies with a view to bias prevention and the proper use of AI. Companies should also consider preparing an AI incident plan to address and mitigate any biases as soon as they are uncovered by internal or external stakeholders.

AI Tutorial

Since renowned computer scientist John McCarthy first coined the term AI in 1955, many products and services have been touted as using AI. But what exactly is AI?

Not All 'AI' Is AI

Lately, AI has become a buzzword that is often misused. According to a survey conducted last year by London-based venture capital firm MMC Ventures, 40% of European startups that are classified as AI companies do not actually use AI in a way that is "material" to their businesses.

AI is a subfield of computer science that aims to build systems capable of gathering data and using that data to make decisions and solve problems. However, in practice, the term is used in ways that are often imprecise or even misleading. AI comes in two forms–"simple" or non-machine learning AI, and machine learning AI.

Simple AI is capable of solving a specific problem, but cannot learn by itself, and requires explicit human intervention to learn. Simple AI systems may mimic human interaction, such as troubleshooting guides or automated help desk systems, and are sometimes called expert systems.

While these systems may perform some kinds of natural language processing, they usually do not have the ability to learn and improve from the accuracy of past answers. Bias in simple AI is relatively easy to fix, because humans control each step of the process. A simple AI also will not change due to a biased data set. Discard the faulty data set and the system will work as initially planned.

On the other hand, machine learning AI means any computer-based system that observes, analyzes, and learns without human intervention. These systems can learn and improve from experience without human intervention. The key feature of machine learning AI systems is that they are iterative—they get better and more powerful as they collect and analyze additional data.

Using them at different time points will often yield different results. But as a result, it is not always possible to explain how they made their decisions. This is especially true of a specific subset of machine learning AI called deep learning. Providing data to a machine learning system usually cannot be undone, as the AI system literally re-codes itself following the analysis of the new data, and so all data provided to it must be vetted for potential bias.

AI Bias

Over the past few years, AI experts and other stakeholders have started to explore the different ways that AI bias can occur.

For example, Amazon famously pulled the plug on its AI recruitment tool because it could not stop it from discriminating against women. Amazon's computer models were trained to vet applicants by observing patterns in resumes submitted to the company over a decade. However, due to male dominance in the tech industry, most of these resumes came from men. Amazon tried to edit the programs to make them gender-neutral, but they could not ensure that the AI would not devise other ways of sorting candidates based on the existing data that could prove discriminatory. Amazon eventually disbanded the team as executives lost hope for the project.

But Amazon is not alone. There have been numerous cases of AI causing, or perpetuating, racial biases, from police profiling to where your kids go to school. Recent studies showed that AI also led to biases in financial services where credit algorithms may violate anti-discrimination laws even when they are designed not to, as well as other consumer lending-related biases. In health care, concerns have been growing regarding potential AI biases, such as misdiagnosis of melanoma in African Americans and disparities in health care based on socioeconomic factors.

Data Bias

The first and most common type of AI bias arises from the data itself. AI systems are only as good as the data we put into them.

The clearest example of AI bias stemming from data is when the data contains implicit racial or gender biases. This type of bias usually occurs when a pre-existing database is being fed to an AI in its entirety to be distinguished from situations where data is collected for the purpose of training the AI. For example, if we were to train an AI system with data from police records and prior arrests, the relevant AI system may very well learn and adopt biases that already exist in the data, such as discrimination against minorities.

In other words, even if the AI itself was designed properly but was fed with information that reflects existing societal biases, e.g., that the police in a certain city arrested more African Americans than White Americans—even when the alleged offense was identical—then the AI will become biased as well.

Similarly, if, in most tech companies, certain roles are predominantly filled by men, this gender bias will creep into any AI recruiting model that uses existing employee data. From the AI perspective, the data that it is being fed to it is the "truth," and it will try to extract insights from it. If the data is flawed, i.e., biased, the insights will be flawed as well.

Data Collection Bias

Bias can also be introduced into AI systems through data collected for the purposes of training the AI. For example, if a facial recognition algorithm is trained with data sets that mostly consist of photos of light-skinned faces rather than dark-

skinned faces, the resulting facial recognition system would unsurprisingly be worse at recognizing darker-skinned faces. This can not only include AI that produces biased results, but products that systemically underserve certain groups or communities.

In criminal justice models, oversampling certain neighborhoods because they are over-policed can lead to recording more crime, which may then result in the AI recommending more policing in those exact neighborhoods. For example, if officers patrol areas that they believe are "suspected areas" and observe new criminal acts that confirm their prior beliefs regarding the suspected neighborhoods, the newly observed criminal acts that police document as a result of these targeted patrols then feed into the predictive AI system.

This, in turn, creates a feedback loop where the model becomes increasingly confident that the locations most likely to experience further criminal activity are exactly the locations that police officers had previously believed to be high in crime.

Design Bias

It is also possible for humans to introduce bias into AI systems at the design stage. AI design includes selecting which variables and attributes the AI system will consider. For example, a credit card company may want to predict a consumer's "creditworthiness." But in order to translate such a vague concept into something that can be modeled and computed, the company must define creditworthiness within the context of a specific goal—for example, minimizing loan defaults or maximizing profit margins. In modeling creditworthiness, a company could use as inputs the customer's age, income, or number of paid-off loans.

On the other hand, in the case of a health-care model or an insurance company, inputs could include how many visits a patient makes to the ER or the pharmacy in the past year. These choices may track the implicit bias of the designers. Choosing which variables to consider and which to ignore can significantly influence a model's accuracy.

While the impact of design choices on accuracy is easy to measure, its impact on the model's bias is not. Often, such bias can only be detected and measured in hindsight, after the model has been deployed and scaled, and the "tainted" data has already been integrated into the AI system.

Legal Risks Due to AI Bias

As lawmakers, regulators, and civil rights activists have begun to focus on potential AI-related biases and how they may affect our society, AI bias can no longer be considered as a mere academic or technological issue. AI bias has now become a legal issue that companies and investors must address or deal with significant consequences later.

State and federal legislators have already started introducing laws regarding the regulation of AI. For example, in early 2018, New York City introduced its first algorithm accountability law, and similar bills were later introduced in Washington State and California. On the federal level, in 2019, new legislation was introduced in Congress that would require companies to audit their AI for potential biases and submit such assessments to the FTC.

As AI-related legislation becomes prevalent and regulators become more active in this field, companies should expect increased scrutiny with respect to how they are deploying their AI as well as the direct and indirect effects of their AI systems.

Moreover, due to the broad implications of AI-related biases, companies should expect class actions to be filed as these laws become widely available across states. Class action and civil rights lawyers may also attempt to use existing anti-discrimination laws to sue for AI biases. In fact, a class action against YouTube alleging that it uses AI, algorithms, and other tools to profile, target, and censor users based "wholly or in part" on race has already been filed.

Finally, in addition to the legal consequences, companies should be aware that AI bias incidents could have far-reaching PR implications.

Best Practices and Solutions

Companies deploying AI should take proactive measures and adopt tools to prevent and address potential biases. For larger companies, this usually includes adopting a written AI policy that assigns responsibility for ethical use of AI to specific stakeholders within the organization, establishing protocols to avoid use of biased AI, and to respond to any claims of bias.

Read more about bias in AI on Bloomberg Law

Patent Venue Reform: Forum Shopping In A Bear Market

While arguing that server locations alone constitute proper venue will likely be difficult in light of 'Google', the court in 'Google' left open issues such as what constitutes “maintenance” or actual “conducting business,” and whether other computer or machinery could eventually be construed to be the act of an agent, says O'Melveny's John Kappos and Hana Oh.

By **John Kappos and Hana Oh** | December 02, 2020

O’Melveny’s John Kappos and Hana Oh (Photo: Courtesy Photo)

In *TC Heartland*, the U.S. Supreme Court ruled that for patent cases, venue is proper in the accused infringer’s state of incorporation or in any judicial district where defendant has infringed and has a “regular and established place of business.” As expected, this ruling produced a flood of venue transfer motions focused on the issue of what qualifies as a “regular and established place of business” under 28 U.S.C. §1400(b). Moreover, patent owners who want access to popular courts in the Eastern and Western Districts of Texas remain undeterred—they continue to initiate suit in these courts and thereby test the limits of *TC Heartland*.

In an effort to secure venue in these popular courts, patent owners have advanced theories for venue based on the physical location of the defendant's parents or subsidiaries, the defendant's online presence through computers and servers, and facts showing that defendant has ratified as its place of business the location of an employee or third party. In this article, we examine how the Federal Circuit and district courts construe "regular and established place of business" in the face of these efforts to expand the reach of courts in these popular venues.

Venue After 'TC Heartland'

Venue for patent cases is governed under Title 28, U.S.C. §1400(b), which provides that patent infringement cases "may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." The Supreme Court interpreted (//www.supremecourt.gov/opinions/16pdf/16-341_8n59.pdf) the first prong in *TC Heartland*, holding that a corporation "resides" where it is incorporated. This decision led to a number of predictable developments. For example, the number of cases filed in Delaware surged, where many companies are incorporated. Before *TC Heartland*, about 39% of all new patent cases were filed in the Eastern District of Texas, compared to 13% filed in Delaware. About a year after *TC Heartland*, the percentage of cases filed in EDTX fell to 15%, while Delaware took the top position with 25% of all new patent cases. As of September 2020, Delaware remains the leading venue choice for patent plaintiffs—2,936 cases were filed there after *TC Heartland*, compared to 1,437 cases in EDTX.

TC Heartland also fostered litigation surrounding what constitutes a "regular and established place of business." Courts have grappled with the question of whether business facilities of wholly-owned subsidiaries should be imputed to the parent company—i.e., whether subsidiaries in a given district can be considered alter-egos of the parent company being sued. Courts have also struggled with the question of whether to construe defendants' online activities as regular business activity in the district.

'In re Cray'

The Federal Circuit provided guidance on what constitutes a "regular and established place of business" under §1400(b) in *In re Cray* (//foiadocuments.uspto.gov/federal/17-129_1.pdf). Cray Inc. petitioned for a writ of mandamus, arguing that the District Court for the Eastern District of Texas erred in denying its motion to transfer the case to the Western District of Wisconsin. The Federal Circuit agreed, holding that the district court "misinterpreted the scope and effect of our precedent" under 28 U.S.C. §1400(b). The Federal Circuit thus held that the district court's denial of venue transfer was an abuse of discretion.

Acknowledging that district courts have noted the "uncertainty surrounding and the need for greater uniformity on this issue," the Federal Circuit provided guidance on the venue inquiry. Under *Cray*, three requirements must be met: (1) there must be a "physical place" in the district, which is (2) a "regular and established place of business" and (3) the place of the defendant." Looking to the dictionary definitions of "place," the court stated that the "statute requires a 'place,' i.e., '[a] building or a part of a building set apart for any purpose' or 'quarters of any kind,'" and thus a "virtual space" or "electronic communications from one person to another" would not qualify. The physical place does not have to be a formal office or store, and can include an employee's house where company inventory is stored. "[R]egular and established" requires "steady, uniform, orderly, and methodical" activity. Such activity must be "stable" and "established" for a meaningful period of time and does not include sporadic business activity.

The key prong that district courts have frequently addressed is the final prong requiring that "the "place of business" must be the defendant's. The Federal Circuit held that "[a]s the statute indicates, it must be a place of the defendant, not solely a place of the defendant's employee." It is not enough that a place belongs to a company's employee—the defendant must ratify or establish it. Relevant factors include "whether the

defendant owns or leases the place, or exercises other attributes of possession or control over the place," and "whether the defendant conditioned employment on an employee's continued residence in the district or the storing of materials at a place in the district … ."

In *Cray*, the Federal Circuit transferred the case, holding that a company salesperson's home did not constitute a "regular and established place of business" of the company, because the company did not own or lease any portion of the employee's house and did not require any inventory or marketing materials to be stored there. The employees were free to work and live where they chose, so the defendant did not ratify the home offices.

In other words, the fact that defendant's employees reside in the district alone is insufficient to establish venue under *Cray*—courts must look to other factors. Companies that seek to avoid certain venues should consider, e.g., whether their employment agreements require their employees to live in a particular district, and whether their employees are obligated to store certain company material or equipment at their home in the district.

Cray helped clarify the factors in evaluating whether an employee's home can satisfy venue requirements under §1400(b). But while recognizing that this is a "new era" in which "business can be conducted virtually," "employees increasingly telecommute," and "the just-in-time delivery paradigm has eliminated the need for storing some inventory," the *Cray* court did not fully address how these changing circumstances would impact the venue analysis. This lack of guidance led to conflicting district court decisions, which the Federal Circuit sought to address recently in *In re Google*.

'In re Google'

In *Google*, the Federal Circuit addressed (//www.cafc.uscourts.gov/sites/default/files/opinions-orders/19-126.Order.2-13-2020.1_1532629.pdf) conflicting district court decisions regarding whether a server can be a "place of business," and whether a "regular and established place of business" requires the regular presence of an employee or agent of the defendant conducting business. Google petitioned for a writ of mandamus ordering the District Court for the Eastern District of Texas to dismiss the case for lack of venue. The Federal Circuit agreed and ordered that the case either be dismissed or transferred.

Under the first *Cray* element, the *Google* court held that a physical "place" of a defendant does not require that the defendant have "real property ownership or a leasehold interest in real property." Shelf space or rack space can be a "place" under §1400(b). Analyzing the second *Cray* element, the court held that a "regular and established place of business" requires "regular, physical presence of an employee or other agent of the defendant conducting the defendant's business" at the place of business.

In the *Google* case, Google had contracted with different internet service providers (ISPs) in the district to host servers that could be used to locally cache digital content that is popular with the ISP's subscribers. The court considered the question of whether those ISPs were acting as agents of Google for purposes of establishing venue under §1400(b). The court held that the ISP's installation and maintenance work on servers and similar activities attenuated from the defendant's business do not amount to agency presence in the location, because the legislative history indicates the statute should be narrowly interpreted. Excluded activities are "maintenance" and activities "that are merely connected to, but do not themselves constitute, the defendant's conduct of business in the sense of production, storage, transport, and exchange of goods or services." The court thus concluded that venue was improper in the district.

While Google provided further clarification on the issue, it did not fully resolve the conflicting court decisions. Though the court addressed whether servers can be construed as a "place" of business, it left district courts to determine, e.g., what constitutes "maintenance" and what constitutes actual "conducting business." The *Google* court noted that installation is a one-time activity and that maintaining equipment is "meaningfully

different" from the "actual producing, storing, and furnishing to customers of what the business offers." While that distinction may be clear where "what the business offers" are widgets, it becomes a much more complex issue where "what the business offers" is internet-related services and products—such as online video streaming or social media platforms. In that context, what would amount to "producing, storing, and furnishing" is not directly answered in *Google*.

Notably, the court also left open the question of whether a "regular and established place of business" always requires the presence of a human agent or whether a computer or machinery could eventually be interpreted as serving as an "agent."

In a concurring opinion, Judge Evan Wallach questioned whether end users who share information on servers could be considered agents of the company ("…the question remains for the District Courts to determine whether Google's end users become agents of Google in furtherance of its business by virtue of voluntarily or involuntarily sharing information generated on Google's servers. If, for example, by entering searches and selecting results a Google consumer is continuously providing data which Google monetizes as the core aspect of its business model, it may be that under the analysis in which I today join, Google is indeed doing business at the computer of each of its users/customers.").

This may pose additional challenges in situations where the computer or machinery is performing functions that may constitute "conducting business" of the company—such as automated self-checkout stations—if they were performed by a human acting as an employee or agent of the company.

Eastern District of Texas

In light of *In re Cray* and *In re Google*, we look at recent decisions regarding venue transfer in the Eastern District of Texas. Although the case filings have dropped significantly after *TC Heartland*, EDTX remains the second most popular venue for patent cases. Motions to dismiss or transfer for improper venue have increased in that district after *TC Heartland*. Courts in EDTX tend to deny those motions more frequently than courts in other districts (courts in EDTX have denied 83% of such motions, compared to 52% in CDCA, 58% in DDE, and 65% in WDTX). Whether venue transfers from EDTX will increase after *In re Google* remains to be seen, since *Google* was decided only months ago. Though recent cases in that district appear to follow the *Cray* and *Google* analysis, they suggest that it continues to be a challenging issue.

For example, in a July 2020 case involving Personalized Media, Judge Gilstrap from the Eastern District of Texas denied Google's motion to dismiss for improper venue, finding that Google's agreement with one of its third-party service providers, CTDI, gave rise to an agency relationship. CTDI had a repair facility within the district at Flower Mound, Texas, where Google customers could ship devices for repair and refurbishment. The court concluded that this satisfied the "physical place" requirement of *Cray* and that the Flower Mound facility was a "regular and established place of business" for Google.

The court found that under the parties' agreement, CTDI employees handle and warehouse Google products within a "Google Secured Area" at the Flower Mound facility, and that "Google controls and oversees virtually every aspect of how CTDI performs its services," including requiring daily reports of returned products, and dictating "how it receives, diagnoses, repairs, warehouses, packages, and ships the Google devices." The court distinguished this refurbishment activity from the storage and maintenance activities in *In re Google*.

The court also found that Google authorized CTDI to act on its behalf, and told "customers to send their products to 'us'—Google—at the [CTDI address]." Based on these findings, the court reasoned that Google had ratified CTDI's place of business in the district by holding the facility and its operations out as its own. In September 2020, in a non-precedential order, the Federal Circuit denied Google's petition for a writ of mandamus seeking an order for the EDTX to vacate and reconsider its decision denying Google's motion to dismiss or transfer the case for improper venue. While recognizing that "Google raises viable arguments

based on the law of agency and this court's precedent," and expressing concern "that the district court did not move more quickly to resolve Google's motion," the Federal Circuit held that Google nonetheless failed to show that its right to a writ is "clear and indisputable."

In contrast, in *AptusTech*, Judge Amos Mazzant held that a company's independent retailer or distributor does not satisfy the "regular and established place of business" prong of §1400(b), and transferred the case. This case concerned the "of the defendant" element from *In re Cray*. Independent retailers, not the defendant, owned the stores and sold the products at issue in the case. The defendant did not rent any space at the stores and did not exercise control over the stores. Further, the defendant had very little input on product display, and had no control over its products once they were sold to retailers. Though the stores were listed under the "Store Locator" tab on the defendant's website, the location listings included the names of the independent retailers, so the defendant was not holding out the stores as its own.

Thus, two distinctions appear to be important between the *Personalized Media* and *AptusTech* decisions in the Eastern District of Texas. First, the degree of control defendant exerts on the third party and its operations is a key factor. Even if the "place" is owned by a separate third party entity, not the defendant, it might still be considered a place "of the defendant" for venue purposes if the defendant controls how business is conducted at that place, such as how operations and services are performed there. Second, whether the defendant holds out the third party facility as its own is also important. From the customer or end user's perspective, if the defendant represents the place as its own (regardless of actual ownership), courts in the Eastern District of Texas are more likely to find that the place is the defendant's and that the facility at that location was acting on defendant's behalf.

Western District of Texas

WDTX has emerged as an increasingly popular venue among plaintiffs asserting patent infringement claims, particularly after the appointment of Judge Alan Albright in 2018 and his efforts in "[b]uilding Waco as an attractive patent venue." As of August 2020, WDTX is number four in terms of the number of patent cases filed, whereas before 2017, it was not even in the top 10.

In a recent case in that district, *National Steel*, Judge Alan Albright granted the defendant's motion to transfer venue to the District of Oregon. The plaintiff sought to impute defendant's subsidiary's place of business to the parent (defendant). The court examined the factors of an alter-ego analysis, including observing corporate formalities and undercapitalization of the subsidiary. The court found that corporate formalities were observed, because the agreements expressly required that the subsidiary obtain the defendant's consent before, e.g., distributing assets or entering into credit agreements.

The court also found that the subsidiary was well-funded and able to pay a final judgment if necessary. Additionally, the subsidiary received only 5% of its business from the defendant, prepared its own budgets and financials, and monitored its own performance. Ultimately, the court found that the most important factor was a clause in their agreement that gave the subsidiary full discretion in accepting monetary distributions from the defendant. The full discretion clause and other factors were sufficient to overcome factors that favored imputation—e.g., the defendant wholly owned the subsidiary and filed tax returns on its behalf, and the defendant and subsidiary shared certain departments, executive officers, and bank accounts.

In another recent WDTX case, *Optics153*, Judge Albright granted a motion to dismiss for improper venue under §1400(b). Similar to National Steel, the court held that the presence of the defendant's wholly-owned subsidiary was insufficient to establish venue for the parent-defendant except where they "lack formal corporate separateness … ." Though the defendant owned the subsidiary, having the same phone numbers and email addresses were insufficient to establish that the defendant and its subsidiary were ignoring corporate formalities. Therefore, the court did not impute the subsidiary's location to the parent-defendant.

These cases may seem difficult to reconcile with Personalized Media in EDTX discussed above, in which the court found that venue was proper because defendant Google ratified and controlled the independent third party facility in that district. In *National Steel* and *Optics153*, the in-district facility belonged to defendant's wholly-owned subsidiary, over which the defendant exerted a significant measure of control by reason of being its parent corporation. Yet relying on corporate separateness factors, the court held that the degree of control was insufficient to establish venue.

These cases exemplify the tension on this issue, and highlight that this inquiry is both highly fact-specific (meaning that it leaves significant discretion to the judge) and dependent on the legal doctrine applied (agency theory where the in-district facility belonged to an independent third party versus alter ego theory where the in-district facility is a related corporate entity such as a parent or subsidiary). Together, these cases also show that the degree of control exerted over the third party is a key factor.

District of Delaware

Post-*TC Heartland*, Delaware is now the most popular venue for patent infringement cases. In the nearly 16 months before *TC Heartland*, about 13% of all patent cases were filed in Delaware. In a similar period after *TC Heartland*, that percentage increased to 25%. As described below, Delaware courts have also continued to grapple with the issue of what constitutes a "regular and established place of business."

In *Koninklijke*, Judge Leonard Stark found that venue was not proper in the district for one of the defendants, Kyocera International, under the "regular and established place of business" prong of §1400. The defendant was not incorporated in Delaware and had no physical location or facility in Delaware. Further, though the defendant had one employee who lived in the district, that employee's office was in defendant's New Jersey facility, and the employee had no business responsibilities in Delaware.

Similarly, Judge Stark held in *Boston Scientific* that the defendant Indiana Corporation did not have a "regular and established place of business" in Delaware and was lacking under the "place" prong of *Cray*. The court found that the law does not require a fixed office or store location, but there needs to be at least a "meaningful physical manifestation." The defendant corporation sold the allegedly infringing products in Delaware and had sales representatives occasionally in Delaware, though they did not live there. Ultimately, the court found that having a website that allowed people to purchase products in the district, without some other physical manifestation, was insufficient to establish venue under §1400(b).

In another Delaware case, *Treehouse Avatar*, Judge Sherry Fallon granted the defendant's motion to transfer venue in a patent infringement suit involving video game producers. The plaintiff argued that since the vast majority of the defendant's business took place online, there was "constant communication between a player's computer and [the defendant's] servers while someone is playing one of [the defendant's] games," which creates a place of business online in Delaware. The plaintiff argued that venue law should evolve as online-only business models develop and become more prevalent. The court expressed concern about turning "any cell phone, laptop, or computer" into a regular and established place of business, opening up corporations to litigation in every jurisdiction. Further, the court emphasized the need to avoid making "corporations suable, in patent infringement cases, where they are merely 'doing business.'" The court found that customers "hosting" the defendant's servers online while in Delaware was too remote to establish the physical presence required by §1400(b).

Conclusion

TC Heartland has resulted in significant shifts in patent case filings, particularly for the Eastern and Western Districts of Texas and the District of Delaware. Subsequent Federal Circuit cases such as *In re Cray* and *In re Google* have addressed how to construe "regular and established place of business" under §1400(b). In light of these cases, district courts look closely at whether or a not an alleged place of a defendant or, more

frequently, the place of a wholly-owned subsidiary or third-party, has been ratified by a defendant. Courts do so by examining, e.g., the defendant's degree of control over the subsidiary, and whether the defendant holds out the subsidiary's location as its own.

Following *In re Google*, computer servers alone likely are not enough for a plaintiff to establish venue under §1400(b), and subsequent cases find that the end user's online activity or defendants' website alone are insufficient. Further, more than maintenance activities by a third party are required—there needs to be more significant business conduct occurring at a location for it to be defendant's "regular and established place of business."

The effect of *In re Google* on venue analysis remains to be seen. While arguing that server locations alone constitute proper venue will likely be difficult in light of *Google*, the court in *Google* left open issues such as what constitutes "maintenance" or actual "conducting business," and whether other computer or machinery could eventually be construed to be the act of an agent. Given the ongoing tension between *Personalized Media* in EDTX and other cases such as the WDTX cases discussed above, the venue inquiry under §1400(b) will continue to evolve.

John Kappos *is a partner and* **Hana Oh** *is counsel in O'Melveny's intellectual property & technology practice. Both are based in the firm's Newport Beach office.*

O'Melveny

Alerts & Publications

SEC Adopts Amendments to MD&A and Financial Disclosures

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KEY CONTACTS

John-Paul Motley
Los Angeles
D: +1-213-430-6100

Shelly Heyduk
Newport Beach
D: +1-949-823-7968

Robert Plesnarski
Washington, DC
D: +1-202-383-5149

Su Lian Lu
Century City
D: +1-310-246-6746

Access a PDF of this alert here.

On November 19, 2020, the Securities and Exchange Commission (SEC) adopted amendments to Regulation S-K to modernize, simplify and enhance certain financial disclosure requirements in the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) section of applicable SEC filings, including Form 10-Ks, Form 10-Qs and registration statements on Form S-1. As part of these amendments, the SEC removed a number of prescriptive items required by Regulation S-K and replaced those items with a more principles-based framework for MD&A disclosures. The adopting release is available here.

Companies will be required to comply with the amended rules for their first fiscal year ending on or after 210 days after publication in the Federal Register, which is referred to as the "mandatory compliance date." As a result, calendar year-end companies will need to start complying with the amended rules for their annual reports on Form 10-K for the year ending December 31, 2021. Companies will be required to apply the amended rules in a registration statement and prospectus that on its initial filing date is required to contain financial statements for a period on or after the mandatory compliance date. Companies may voluntarily elect to provide disclosure consistent with the final rules any time after the effective date (which is 30 days after publication in the Federal Register), so long as they provide disclosure responsive to an amended item in its entirety and provide such disclosure in all applicable filings going forward.

The amendments were adopted by the SEC by a vote of 3-2, with Commissioners Lee and Crenshaw dissenting. The dissenting Commissioners, in a joint statement, noted their objection to two significant aspects of the rule. First, they noted that the final rule eliminates the contractual obligations table which they believe "currently provides investors with critical insight into supply chain and risk management." Second, they noted that the amendments fail "completely to address climate risk." In their statement, the dissenting Commissioners urge the SEC to engage in new rulemaking specific to climate, human capital and other ESG risks going forward. While acknowledging that some commenters had provided input addressing whether there is a need for additional disclosure requirements related to ESG and sustainability matters, the final amendments adopted by the SEC did not add any new requirements for MD&A disclosures

with respect to ESG or sustainability matters, noting the SEC's principles-based approach to MD&A and the SEC's existing interpretive guidance regarding disclosure related to climate change (*see* Release No. 33-9106 (February 8, 2010)).

Final Amendments

The SEC had proposed amendments on January 30, 2020 as part of the SEC's "Disclosure Effectiveness Initiative," informed by the objectives of the Fixing America's Surface Transportation Act, which, among other things, required the SEC to study ways that Regulation S-K can be modernized and simplified. The amendments, which were adopted substantially as proposed with certain modifications, reflect the SEC's long-standing commitment to a principles-based, registrant-specific approach to disclosure. The amendments are summarized in Appendix A to this alert (available here).

The more significant amendments to Regulation S-K include:

- eliminating *Item 301 (Selected Financial Data)*, which generally requires companies (with exceptions for smaller reporting companies and emerging growth companies) to furnish selected financial data in comparative tabular form for each of the last five fiscal years;
- streamlining *Item 302 (Supplementary Financial Information)*, which requires disclosure of selected financial data for each quarter within the two most recent fiscal years, to require disclosure only when there are one or more retrospective changes that pertain to the statements of comprehensive income for any of the quarters within the two most recent fiscal years and any subsequent interim period;
- enhancing *Item 303(a)(2)(i) in a newly captioned Item 303(b)(1)(ii) (Capital Resources)* to require discussion of material cash requirements of the company, including but not limited to capital expenditures (currently the requirement is to discuss material commitments for capital expenditures only);
- replacing Item *303(a)(4) (Off-Balance Sheet Arrangements)*, which requires disclosures about off-balance sheet arrangements in a separately captioned section, with an instruction regarding the need to discuss such obligations in the broader context of MD&A;
- eliminating *Item 303(a)(5) (Contractual Obligations Table)*, which generally requires companies (other than smaller reporting companies) to disclose in tabular format their known contractual obligations by type of obligations and overall payments due, and amending *Item 303(b)* to specifically require disclosure of material cash requirements from known contractual and other obligations as part of the liquidity and capital resources discussion;
- adding a new *Item 303(b)(3)* to expressly require disclosure of critical accounting estimates and including an instruction specifying that the disclosure of critical accounting estimates should supplement, but not

duplicate, the description of accounting policies in the notes to the financial statements; and
- amending *Item 303(b) (Interim Periods)* to permit companies to compare their most recently completed quarter to either the corresponding quarter of the prior year or the immediately preceding quarter.

Other amendments to Regulation S-K include: adding a new Item 303(a) to state the principal objectives of MD&A; amending Item 303 to add "product lines" of the company as an example of other subdivisions that the company should discuss if appropriate to an understanding of the company's business; clarifying that a company should discuss "*material changes*" (as opposed to only "*material increases*") from period to period in net sales and revenues and "*underlying reasons*" (rather than only the "*cause*") of material changes from period-to-period in one or more line items in quantitative and qualitative terms; and eliminating Item 303(a)(iv), which requires companies to discuss the impact of inflation and changing prices. The SEC also made other corresponding changes, such as eliminating unnecessary cross-references to industry guides, eliminating certain instructions and making other conforming changes. Although not specifically described here or in Appendix A, the final rules also include certain parallel amendments to Forms 20-F and 40-F applicable to disclosures provided by foreign private issuers.

September 18, 2014

Civility as the Core of Professionalism

Jayne R. Reardon

Civil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal.

What Exactly Is "Civility"?

The concept of civility is broad. The French and Latin etymologies of the word suggest, roughly, "relating to citizens." In its earliest use, the term referred to exhibiting good behavior for the good of a community. The early Greeks thought that civility was both a private virtue and a public necessity, which functioned to hold the state together. Some writers equate civility with respect. So, civility is a behavioral code of decency or respect that is the hallmark of living as citizens in the same state.

It may also be useful at the outset to dispense with some widely held misconceptions about civility, likening it to: (1) agreement, (2) the absence of criticism, (3) liking a person, and (4) good manners. These are all myths.

Civility *is not the same as agreement*. The presence of civility does not mean the absence of disagreement. In fact, underlying the codes of civility is the assumption that people will disagree. The democratic process thrives on dialogue and dialogue requires disagreement. Professor Stephen Carter of Yale Law School has stated, in one of his many writings on civility, "[a] nation where everybody agrees is not a nation of civility but a nation without diversity, waiting to die."

Civility *is not the absence of criticism*. Respect for the other person or party may in fact call for criticism. For example, a law firm partner who fails to point out an error in a young lawyer's brief isn't being civil – that partner isn't doing his or her job.

Civility *is not the* same *as liking someone*. It is a myth that civility is more possible in small communities where everyone knows each other. Knowing or liking the other person is not a prerequisite for civility. Civility compels us to show respect even for strangers who may be sharing our space, whether in the public square, in the office, in the courtroom, or in cyberspace.

Civility *should not be equated with politeness or manners alone*. Although impoliteness is almost always uncivil, good manners alone are not a mark of civility. Politely refusing to serve someone at a lunch counter on the basis of skin color, or cordially informing a law graduate that the firm does not hire women, is not civil behavior.

Civility is a code of decency that characterizes a civilized society. But how is that code reflected in the practice of law?

Civil Conduct is a Condition of Lawyer Licensing

A civility imperative permeates bar admission standards. The legal profession is largely self-governing, with ultimate authority over the profession resting with the courts in nearly all states. Courts typically set the standards for who becomes admitted to practice in a state and prescribe the ethical obligations that lawyers are bound, by their oath, to fulfill.

Candidates for bar admission in every state must satisfy the board of bar admissions that they are of good moral character and general fitness to practice law. The state licensing authority's committee on character and fitness will recommend admission only where the applicant's record demonstrates that he or she meets basic eligibility requirements for the practice of law and justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. Those eligibility requirements typically require applicants to demonstrate exemplary conduct that reflects well on the profession.

Capacity to act in a manner that engenders respect for the law and the profession – in other words, civility – is a requirement for receiving a law license and, in some jurisdictions, for retaining the privilege of practicing law. It follows that aspiring and practicing lawyers should be disabused of the notion that effective representation ever requires or justifies incivility.

Beyond Client Representation: Lawyer as Public Citizen

Notions of a lawyer's core civility duty also are rooted in ethical principles informing and defining the practice of law. Those principles, having evolved over the centuries to lend moral structure and a higher purpose to a life in the law today, speak plainly to a lawyer's dual duties as officer of the legal system and public citizen, beyond the role client advocate. At the very top of the lawyer's code of ethics – in the Preamble to the Model Rules of Professional Conduct – we read of those larger civic duties binding every practicing lawyer.

Civility concepts suffuse the hortatory language of the Preamble. For example, the Preamble makes clear that even in client dealings, counsel is expected to show respect for the legal system in his or her role as advisor, negotiator, or evaluator (Preamble Cmt. 5). In addition, lawyers should resolve conflicts inherent in duties owed to client, the legal system, and the lawyer's own interest through the exercise of discretion and judgment "while maintaining a professional, courteous, *and civil attitude* toward all persons involved in the legal system" (Preamble Cmt. 9, emphasis added).

Tension Between Zealous Advocacy and Civility

Even for the most ethically conscientious lawyers, there is seemingly ubiquitous tension between the duty of zealous advocacy and the duty to conduct oneself civilly at all times. Model Rule 1.2 compels zealous advocacy, and Comment 1 to the Rule speaks to the depth of that duty, noting that a lawyer

> should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to a lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. (Rule 1.2 Cmt. 1)

The distorted image in popular culture of lawyer as a partisan and combative zealot would seem to preclude civil behavior as the preferred approach to legal practice. Not so. That same comment goes on to explain:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. (Rule 1.3 Cmt. 1)

Thus, there are firm limits to the lawyer's duty to act with zeal in advocacy, but the precise location of those limits is not always easy to discern. Therein lies the tension. Appropriate zeal, however, never extends to offensive tactics or treating people with discourtesy or disrespect.

The individual lawyer is the guardian of the tone of interactions that will serve both the client and the legal system well. Clients may not understand these limits. Many clients are under the misconception that because they hired the lawyer, they have the power to

dictate that lawyer's conduct. It falls to the lawyer to manage and correct that expectation and to let the client know the lawyer is more than a "hired gun." In practice, that often means refusing a client's demand to act uncivilly or to engage in sharp or unethical practices with other parties in a case or matter.

The rules themselves make it clear, of course, that the lawyer is not just a hired gun. Model Rule 1.16(b)(4) of the ABA Model Rules of Professional Conduct provides that a lawyer may withdraw if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has fundamental disagreement, and Rule 3.1 provides that a lawyer cannot abuse legal procedure by frivolously bringing or defending a proceeding, or asserting or defending an issue. Egregious forms of uncivil behavior in a court proceeding also may constitute conduct prejudicial to the administration of justice, within the meaning of Rule 8.4(d).

The Problem of Declining Civility in the Legal Profession

Although civility is central to the ethical and public-service bedrock of the American legal profession, substantial evidence points to a steady rise in incivility within the American bar. It is problematic to pin down the incidence of incivility and unprofessional conduct because incivility, without some associated violation of the ethical rules, historically has not been prosecuted by the regulatory authorities. Thus there is no good systemic data on incivility's prevalence. There have been countless writings, however, about widespread and growing dissatisfaction among judges and established lawyers who bemoan what they see as the gradual degradation of the practice of law, from a vocation graced by congenial professional relationships to one stigmatized by abrasive dog-eat-dog confrontations.

Discussion of the problem tends to dwell on two areas: (1) examples of lawyers behaving horribly, from which most of us easily distinguish ourselves; and (2) possible causes and justifications of that behavior – rather than possible solutions. Traditional media and social media carry countless accounts of lawyers screaming, using expletives, or otherwise being uncivil. Lawyers who reflect on the trend generally pin the cause on any of a combination of factors, including the influence of outrageous media portrayals; inexperienced lawyers who increasingly start their own law practices without adequate mentoring; and the impact of modern technology that isolates lawyers and others behind their computers, providing anonymous platforms for digital expression.

The scattered data that is available tends to confirm that uncivil lawyer conduct is pervasive. A 2007 survey done by the Illinois Supreme Court Commission on Professionalism, for example, took a close look at specific behaviors of attorneys across the state and concluded that the vast majority of practicing lawyers experience unprofessional behavior by fellow members of the bar. Over the prior year, 71 percent had reported experiencing rudeness – described as sarcasm, condescending comments, swearing, or inappropriate interruption. An even higher percentage of respondents reported being the victim of a complex of more specific behaviors loosely described as "strategic incivility," reflecting a perception that opposing counsel strategically employed uncivil behaviors in an attempt to gain the upper hand, typically in litigation. The complained-of conduct included, for example, deliberate misrepresentation of facts, not agreeing to reasonable requests for accommodation, indiscriminate or frivolous use of pleadings, and inflammatory writing in briefs or motions.

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.

Benefits of Civility

Aside from the most obvious reasons that lawyers should act civilly – that is, that the profession requires it of them and it's just the right thing to do – a number of tangible benefits accrue from civil conduct in terms of reputational gain and career damage avoidance, as well as strategic advantage in a lawyer's engagement.

Lawyers who behave with civility also report higher personal and professional rewards. Conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. In the 2007 Survey on Professionalism of the Illinois Supreme Court Commission, 95 percent of the respondents reported that the consequences of incivility made the practice of law less satisfying.

Other research shows that lawyers are more than twice as likely as the general population to suffer from mental illness and substance abuse. Law can be a high-pressure occupation, and it appears that needless stress is added by uncivil behavior directed to counsel. "Needless" is used as a descriptor here because the consequences of incivility, as acknowledged by over 92 percent of the survey respondents, often add nothing to the pursuit of justice or to service of client interests. Consequences include making it more difficult to resolve our clients' matters, increasing the cost to our clients, and undermining public confidence in the justice system. They are the exact opposite of the goals we should strive to accomplish as lawyers.

Moreover, judges are not fond of being asked to decide disputes between opposing counsel extraneous to deciding the merits of the respective clients' case. Judges will tell you that mediating bickering between counsel is the least tasteful part of their job. Even if a judge avoids wading into a dispute between counsel, the fact that a lawyer was disrespectful or used bad behavior cannot help but register on the judge's consciousness. Then, if there is a close call on a motion or other issue, and the judge has a choice between ruling in favor of the client whose lawyer was civil and professional or in favor of the client whose lawyer has been a troublemaker, the Judges-Are-Human rule may well control. Similarly, juries also report being negatively affected by rude behavior exhibited by trial attorneys. In sum, lawyer conduct can and does affect the results lawyers deliver to their clients, and ultimately the success of their practices.

It naturally follows that a lawyer's reputation for professional conduct is part and parcel of his or her reputation for excellence in practice. Before the advent of the Internet, evaluations of attorneys were conducted and disseminated largely by and for lawyers and published yearly in books with entries listing an attorney's achievements by name, geographic region, and specialty. Now, any person who has contact with an attorney may rate and comment on the attorney's performance and professionalism on websites devoted to rating and ranking attorneys or through general social media channels. In the realm of the Internet, one uncivil outburst may haunt an attorney for years; and reputations may be built and destroyed quickly. Even a cursory search of some of these websites shows that clients regularly comment (especially if they are displeased) about an attorney's communication style and respect for his or her clients and the system of justice.

Not surprisingly, research shows that clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer. If clients evaluate their lawyers as being effective, they stay with them; if they see their lawyers as ineffective, they will go elsewhere for legal services, particularly in a climate in which the supply of lawyers exceeds the demand for legal services. Research also shows that superior service, in which relationship abilities are central, increases client retention rates by about one third. Effective client service and positive relationships, in turn, increase profit to the lawyers by about the same rate.

Bad Behavior/Bad Consequences

Historically, incivility per se has by and large not been prosecuted by attorney regulatory authorities. Since 2010, however, several attorneys have been suspended by their states' high courts for uncivil conduct implicating a lawyer's duty to uphold the administration of justice and other ethics rules.

The Supreme Court of South Carolina has disciplined several attorneys for incivility, citing not only ethics rules but that state's Lawyer's Oath, taken upon admission to the bar. The oath contains a pledge of civility. In Illinois, an attorney was prosecuted by disciplinary authorities for oral and written statements made to judges and an attorney that violated various ethical rules, including Illinois Rule 8.4(a) (modeled after the corresponding ABA Model Rule).

Outside of the courtroom, much of the uncivil arrow-slinging between counsel historically has occurred during discovery disputes in litigation. However, the growing influence of technology in litigation, with its potential for marshaling exponentially more information and data at trial than ever, and the commensurate need to control and limit that information to what is relevant and manageable, suggests courts will grow even less tolerant of lawyers trying to manipulate the pre-trial fact discovery process or engaging in endless, contentious discovery disputes. Moreover, while never wise or virtuous, it is no longer profitable to play "hide the ball" in litigation as clients are demanding better results at reduced costs.

Movement Toward Systemic Solutions to Incivility

There have been programmatic efforts, largely led by judges, to address and curb spreading incivility in the legal profession. In 1996, the Conference of Chief Justices adopted a resolution calling for the courts of the highest jurisdiction in each state to take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism. In response, the supreme courts of 14 states have established commissions on professionalism to promote principles of professionalism and civility throughout their states.

Many more states have, either through their supreme courts or bar associations, formed committees that have studied professionalism issues and formulated principles articulating the aspirational or ideal behavior the lawyers should strive to exhibit. These professionalism codes nearly all state at the outset that they do not form the basis of discipline but are provided as guidance – attorneys and judges should strive to embody professionalism above the floor of acceptable conduct that is memorialized in the attorney rules of ethics. They also typically echo a theme found in the Preamble to the Model Rules of Professional Conduct: that lawyers have an obligation to improve the administration of justice.

In 2004, a relatively aggressive stance was taken by the Supreme Court of South Carolina. The South Carolina high court amended the oath attorneys take upon admission to the bar to include a pledge of civility and courtesy to judges and court personnel and the language "to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." It also amended the disciplinary rules to provide that a violation of the civility oath could be grounds for discipline. Similar civility pledges were added to the lawyers' oath of admission by the Supreme Court of Florida in 2011 and by the Supreme Court of California in 2014.

Some jurisdictions, in states including New Jersey, Georgia, Illinois, Florida, Arizona, and North Carolina, have taken the voluntary aspirational codes further and have adopted an intermediary or peer review system to mediate complaints against lawyers or judges who do not abide by the aspirational code. It is challenging to implement an enforcement mechanism in a way that inspires voluntary compliance with an aspirational code and the success of these mechanisms has been inconsistent.

Without question, the most effective ways of addressing incivility entail bringing lawyers together for training and mentoring. Mentoring programs are being offered by an increasing number of state commissions and bar associations. The American Inns of Court, modeled after the apprenticeship training programs of barristers in England, brings seasoned and newer attorneys together into small groups to study, present, and discuss some of the pressing issues facing the profession.

Conclusion: A Time to Recommit to Civility

The needed rebirth of civility, at a critical juncture in the evolution of the legal profession, should be seen by lawyers not as pain, but as gain. Technology and globalization are facilitating greater client influence and requiring increased transparency; civil behavior is more important than ever. As the research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civility breeds job satisfaction; and (4) incivility may invite attorney discipline. Not only does our profession require us to be civil, and it is simply the right thing to do, but professionalism among lawyers is required by the larger American society in order to preserve a great profession and survive as a civil society bound to the Rule of Law.

Additional Resources

For other materials on this topic, please refer to the following.

ABA Web Store

Essential Qualities of the Professional Lawyer (Print or Ebook)
Product Code: 2150048
2013, 260 Pages, 6 x 9

This volume will help students and new lawyers meet the challenge of developing a sense of direction and competencies for navigating uncertainty, as well as a sense of purpose in identifying with the larger values of the profession, including access to justice and service to society.

Authors

US Law Week

Professional Civility Is Essential in the Pandemic

By Elizabeth Holt Andrews and Andrew Trask

Sept. 30, 2020, 4:00 AM

The pandemic is putting extraordinary home and work stresses on all employees, including attorneys. Elizabeth Holt Andrews, with Troutman Pepper, and Andrew Trask, with Williams & Connolly LLP, say that whether attorneys are in the midst of contentious litigation or protracted contract negotiations, they should consider unseen burdens colleagues may be carrying and showcase the profession's commitment to civility.

We've all come to learn that nearly every aspect of life is more difficult in a pandemic. We rarely leave the house. We fret about the health of loved ones. We've canceled or scaled back vacation plans. Simple but profound sources of enjoyment—like date nights or coffee with friends—are nonexistent or severely curtailed. Those living alone may struggle with isolation. Those with young children at home, like the two of us, have transformed our dwellings into full-time offices, daycares, and schools rolled into one.

On top of all that, there is work. Employees in general are facing more meetings and longer workdays during the pandemic, and lawyers are no exception. Our rigorous pre-pandemic schedules, filled with late-night emails, midnight filing deadlines, and conference calls during vacations, now seem comparatively quaint.

Practically overnight, lawyers with young children have found ourselves balancing full-time law practice with full-time family responsibilities. For some, it simply can't be done. For our part, our respective families have crafted elaborate schedules for childcare and household tasks, all with an eye toward carving out precious time to meet clients' needs.

If we're lucky, an important meeting may coincide with naptime. If not, we may find ourselves joining the videoconference with a baby in tow, while a toddler gleefully empties a box of paper clips behind us.

But for members of the bar, this extraordinary time may have a silver lining: Given the challenges we all face, there is no better time to recommit ourselves to our profession's deep-rooted ideals of civility and professional courtesy.

ABA Code of Legal Ethics Dates to Pre-1918 Pandemic

Our profession has long maintained that civility among counsel is critical to our system of justice. A decade before the 1918 flu pandemic, the American Bar Association promulgated its first national code of legal ethics, which included this directive: “Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case.”

The wisdom of those words persists today, with efforts to encourage civility in the legal profession proliferating in recent decades among courts and bar associations.

The current pandemic thus pairs unprecedented challenges with an unrivaled opportunity. Whether in the midst of contentious litigation or protracted contract negotiations, we cannot know all the burdens our colleagues may be carrying. But we can recognize these trying times as an opportune moment to showcase our profession’s commitment to civility.

So, if opposing counsel requests a reasonable extension of time, we should consider consenting if doing so would not adversely affect our client. In scheduling calls and videoconferences, we should avoid creating unnecessary calendar conflicts for others.

And above all, we must strive to practice courtesy, consideration, and civility in all professional settings. In court, as the late Justice Ruth Bader Ginsburg sagely advised, “[y]ou should aim to persuade the judge by the power of *your* reasoning and not by denigrating the opposing side.”

Likewise, outside the courthouse, our communications should reflect our collective commitment to civility. These small, meaningful acts ultimately benefit our clients and our profession—and, perhaps, may help lessen the difficulties we all are now experiencing.

Law Firms Should Exemplify Courtesy, Respect

By a similar token, law firms can foster collegiality among employees during this unprecedented period.

Many firms have hosted virtual happy hours, established focus groups, and formed parents’ committees. Others have covered in-home tutoring costs. Firms have arranged online story times and magic shows, giving attorney parents time to take a call or focus on drafting a few emails. Some have provided special treats, like cupcake deliveries on the first day of virtual school.

With such acts, our own firms and others have exemplified the courtesy and respect that is needed now more than ever.

Amidst the hardships that many of us now face, finding pleasure in the practice of law can seem like a distant goal. But as Justice Sandra Day O’Connor observed, "[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice.”

That seems like a worthwhile objective on any occasion, most especially in a global pandemic.

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Write for Us: Insight Guidelines

Author Information

Elizabeth Holt Andrews is an attorney at Troutman Pepper Hamilton Sanders LLP in San Francisco. She specializes in appellate and business litigation.

Andrew Trask is an attorney at Williams & Connolly LLP in Washington, D.C. He focuses his practice on litigation and appeals involving intellectual property and technology.

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Raise Your Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility

Donald E. Campbell
Mississippi College School of Law, dcampbe@mc.edu

Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility

Donald E. Campbell*

ABSTRACT

The need to reclaim "civility" in the practice of law has become a rallying cry in the profession. Lack of civility has been blamed on everything from an increase in the cost of litigation to the cause of the public's lost faith in the legal profession. Further, courts are increasingly willing to sanction a lawyer solely for "uncivil" conduct. This article examines the puzzle of civility by addressing two fundamental questions. First, what are the obligations of civility? This question is answered using content analysis to analyze civility codes adopted by thirty-two state bar associations. From this analysis ten core tenets of civility are identified which are common across all jurisdictions. The second question addresses how civility is distinct from other professional obligations, such as legal ethics and professionalism. Examining the history and development of these professional obligations, this paper demonstrates that civility is distinct and should be treated as a unique obligation of professional responsibility.

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* Donald E. Campbell, Visiting Assistant Professor of Law, Mississippi College School of Law. This article would not have been possible without the tireless work of my research assistants Robert Quimby and Ben Morgan. I would also like to thank Professor Jeffrey Jackson, Dr. Melinda Mullins, and Kenneth Farmer for their insightful comments.

I. INTRODUCTION

The need to reclaim "civility" in the practice of law has become a rallying cry in the profession. Lack of civility has been blamed on everything from an increase in the cost of litigation to the cause of the public's lost faith in the legal profession.[1] Claiming a causal connection between reduced civility and the ills of the legal profession raises questions about the nature of civility and its place among the professional responsibility obligations of lawyers. This article examines the puzzle of civility by addressing two fundamental questions. First, what are the obligations of civility? Second, how is civility distinct from other professional obligations of lawyers, such as ethics and professionalism?

These questions have become particularly salient as civility has moved from an aspirational goal to an enforceable norm. Citing the need for a return to "civility," courts have become increasingly willing to sanction lawyers solely for being uncivil. An example is *Sahyers v. Prugh, Holliday & Karatinos*.[2] Sahyers, a paralegal, left her job at a law firm and believed the firm owed her back pay for uncompensated overtime.[3] She retained an attorney who sued her former firm to recover the overtime wages.[4] The lawyer brought suit against the former firm without giving any pre-suit notice.[5] After discovery, the defendant law firm made an offer of judgment for $3500 plus any attorney's fees or costs the court imposed.[6] The plaintiff accepted the offer, and her attorney sought $13,800 in attorney's fees and costs, to which the defendant objected.[7] After a hearing, the district court refused to award any fees even though a prevailing plaintiff in a Fair Labor Standards Act ("FLSA") case is ordinarily entitled to reasonable fees and costs.[8] The court held that the failure of the attorney to contact the defendant law firm prior to filing suit was a "conscious disregard for lawyer-to-lawyer collegiality and civility [which] caused ... the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court."[9] On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed the denial of fees, citing the district court's inherent "authority to police lawyer conduct and to guard and promote

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1. Melissa S. Hung, Comment, *A Non-Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism*, 48 SANTA CLARA L. REV. 1127, 1144 (2008).

2. Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241 (11th Cir. 2009).

3. *Id.* at 1243.

4. *Id.*

5. *See id.* at 1244, 1246 ("We do not say that pre-suit notice is usually required or even often required under the FLSA to receive an award of attorney's fees or costs.").

6. *Id.* at 1243.

7. *Id.*; *see also id.* at 1244 ("In general, a prevailing FLSA plaintiff is entitled to an award of some reasonable attorney's fees and costs.").

8. *Sahyers*, 560 F.3d at 1244 (construing 29 U.S.C. § 216(b) (2006)).

9. *Id.* at 1245.

civility and collegiality among the members of its bar."[10] *Sahyers*, and cases like it, represent the increasing willingness of courts to sanction lawyers based solely on a lack of "civility."

The increased attention to civility is not limited to the bench. In December 2007, the Illinois Supreme Court Commission on Professionalism approved a study of lawyers to ascertain how Illinois lawyers perceived civility.[11] The survey, which sampled 1079 lawyers at random, was less than encouraging.[12] Ninety-five percent of the respondents stated that they had experienced or witnessed unprofessional behavior throughout their careers.[13] In fact, seventy-nine percent of the respondents stated that they had experienced rudeness[14] or strategic incivility[15] within the last month. Even aside from these specific claims of uncivil conduct, seventy-two percent of respondents categorized incivility as a serious or moderately serious problem in the profession.[16]

With its increasing importance, it is worth considering the nature and parameters of the obligation of civility. This article proposes that civility must be considered a unique obligation distinct from "ethics" and "professionalism," and sets out to identify and define the core concepts of civility. To this end, Part II details the rise of the civility movement. Part III identifies ten overarching concepts of civility derived from a content analysis of civility codes adopted by thirty-two state bar associations. Finally, Part IV discusses how the obligations of civility are distinct from other professional obligations, specifically legal ethics and professionalism.

II. THE DEATH OF CIVILITY AND THE RISE OF CIVILITY CODES

Before defining civility, it is helpful to trace the rise of the call for civility that led to the adoption of civility codes[17] by state bar associations. Perhaps the most

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10. *Id.* at 1244.

11. COMM'N ON PROFESSIONALISM, ILL. SUPREME COURT, SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS (2007), *available at* http://ilsccp.org/pdfs/surveyonprofessionalism_final.pdf.

12. *Id.* at 4.

13. *Id.* at 21.

14. The survey defined "rudeness" to include "behavior such as displaying a sarcastic or condescending attitude, swearing, verbal abuse or belittling language, and inappropriate interruption of others." *Id.* at 22.

15. The survey defined "strategic incivility" to include "misrepresenting or stretching the facts, playing hardball (such as not agreeing to reasonable requests for extensions), indiscriminate or frivolous use of pleadings or motions, inflammatory writing in briefs or motions, and inappropriate language or comments in letters or emails." *Id.* The survey emphasized that this type of incivility is "designed to give a lawyer a leg up over opposing counsel." *Id.*

16. COMM'N ON PROFESSIONALISM, *supra* note 11, at 30.

17. The titles of these enactments vary from jurisdiction to jurisdiction. This article uses the terms "civility codes" or "civility guidelines" generically, referencing these

common argument is that civility once existed in the bar, but has eroded over time.[18] This was the central concern of the U.S. District Court for the Northern District of Texas, which stated in an opinion adopting a code of professionalism:

> We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.
>
> As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice. We now adopt standards designed to end such conduct.[19]

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enactments collectively. The first civility code was adopted in 1986 and the most recent was enacted in 2007. Ctr. for Prof'l Responsibility, *Professionalism Codes*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited Oct. 10, 2011). With so many jurisdictions acting to adopt civility codes, one would expect that there would be a uniform standard that jurisdictions could modify. In fact, while some jurisdictions borrowed language from others, developments have been made largely within the unique context of each jurisdiction. An example of such a development is a report by the Maryland State Bar Association's "Character Counts" Subcommittee that analyzes various civility codes adopted in the state and identifies the common "indicia of professionalism." MD. STATE BAR ASS'N, IDENTIFYING THE INDICIA OF PROFESSIONALISM: "CHARACTER COUNTS" SUBCOMMITTEE (2006), *available at* http://www.courts.state.md.us/professionalism/pdfs/appendices/conduct2app1.pdf.

18. Jan Frankel Schau, *Civility Amongst Lawyers: Does our Conduct Need the State Bar's New Guidelines?*, ORANGE COUNTY LAW., Mar. 2008, at 38, 38 ("[M]ost of us who have been in practice for more than 20 years have witnessed a cultural shift to an apparent acceptance of 'misbehavior' in the practice of law, in the treatment of clients and opponents, and even in the casual demeanor seen in court and in mediations.").

19. Dondi Props. Corp. v. Commerce Savings & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (footnote omitted).

The question of whether lawyer incivility is truly of "recent origin" is debatable.[20] Some argue that, in fact, there was no Golden Age of civility, but instead a time when the legal community was small, closed, and discriminatory.[21] According to this argument, civility was maintained by barring entry to those who would bring diverse viewpoints to the bar.[22]

Regardless of how recent the rise of incivility may be, a number of authors presume the existence of incivility and put forward rationales to explain its origins. One argument is that the rise of incivility is a matter of ignorance on the part of both lawyer and client who do not understand that civility is expected.[23] Others argue that lawyers, being the product of an individualistic and uncivil society, will be uncivil

20. *See* Act of 1402, 4 Hen. 4, c. 18 (Eng.) (noting the problem of "sundry damages and mischiefs that have ensued before this time to divers persons of the realm by a great number of attornies, ignorant and not learned in the law, as they were wont to be before this time," and thus mandating that all attorneys be "examined by the justices" and found to "be good and virtuous, and of good fame"), *as quoted in* State v. Cannon (*In re* Cannon), 240 N.W. 441, 446 (Wis. 1932), *and* ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS 9 (1952), *and* Ross L. Malone, *The Lawyer and His Professional Responsibilities*, 17 WASH. & LEE L. REV. 191, 195 (1960); *see also* Ashley Cockrill, *The Shyster Lawyer*, 21 YALE L.J. 383, 383 (1912) (tracing the long history of the "shyster lawyer"); Book Note, 21 HARV. L. REV. 553, 554 (1908) (reviewing GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (Phila., T. & J.W. Johnson Co. 5th ed. 1884), *reprinted in* 32 REPORTS OF THE AMERICAN BAR ASSOCIATION (1907)) ("[T]oday lawyers are often actually objects of public distrust. This fall of the profession from the high prestige of the past has been accomplished by the influx of many who seek admission to the bar mainly for its emoluments."); T.L. Edelen, Ideals of a Lawyer, Address Before Students of the University of Kentucky College of Law (Mar. 11, 1925), *in* 14 KY. L.J. 3, 4 (1925) ("I regret very much to say that in the years which have elapsed since I have begun the practice of law, there has been a vast change in the ideals which measure the conduct of lawyers in their dealings with their clients, with their fellow lawyers and with the courts. Certain principles . . . which were regarded, within my memory, as elementary, have gradually changed in their apparent obligation and I think we no longer measure our obligations by the same standards which were in vogue forty or fifty years ago.").

21. Robert Stevens, *Democracy and the Legal Profession: Cautionary Notes*, LEARNING & L., Spring 1976, at 12, 16.

22. Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1380-81 (2007) ("Not only has the bar become more diverse, but its numbers have significantly increased as more and more lawyers enter the profession. As these changes occur, the bar reflects the vast array of traditions, cultures, and ethical and moral norms of its members and agreeing to a uniform definition of professionalism becomes impossible.").

23. Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31, 35 (2005) ("'[T]he tradition of civility that used to be transmitted to young lawyers is [now] gone.'" (quoting Thomas E. Humphrey, *'Civil' Practice in Maine*, ME. B.J., Winter 2005, at 6, 7)); Hung, *supra* note 1, at 1145 ("Both attorneys and clients need to be educated about what constitutes acceptable behavior.").

themselves.[24] Another explanation is that law firms, where a young lawyer often learns his or her values, foster incivility.[25] Underlying this rationale is the belief that law firms create a culture where finding and retaining work, billing, and collecting fees result in a narrow focus on winning at all costs, and thus, the sacrifice of civility.[26] Continuing the litany of explanations, some point to the "imbalance" in a lawyer's view of her role in the legal process.[27] Lawyers who view their duties as primarily to their client—as opposed to the integrity of the legal system as a whole—increase incivility in the bar.[28]

Some point to demographic factors, such as the "decline in lawyers' wages [and] ... the growth in the percentage of lawyers in the population" as contributing causes.[29] Prevalence of lawyer advertising has also received blame,[30] as has the failure of law schools to provide an adequate model of civility for students.[31] Still others argue that the increasingly non-local nature of the legal practice increases

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24. COMM. ON CIVILITY, SEVENTH JUDICIAL CIRCUIT, FINAL REPORT (1992), *in* 143 F.R.D. 441, 445 (1992) [hereinafter FINAL REPORT]; *see also* Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177, 184 (1995) (noting that the counterculture of the 1960s "may have left its mark in a subtle way, by attacking the etiquette of our judicial system, which had previously been accepted with a simple and widespread approval").

25. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 255 (1998).

26. Mark D. Nozette & Robert A. Creamer, *Professionalism: The Next Level*, 79 TUL. L. REV. 1539, 1547-48 (2005).

27. *Id.* at 1545 ("[T]he civility crisis was a clear example of an imbalance among the separate roles of lawyers as professionals. In the case of incivility, it involved lawyers justifying their behavior as required by their duty to their clients.").

28. *Id.*; Gee & Garner, *supra* note 24, at 185 ("Clients often encourage uncivil behavior. And they are perhaps doing so now more than ever because lawyers are so numerous and so visible in everyday life. Lawyers as a class have lost a mystique that they once enjoyed—and that often means more overt pressure from clients.");

29. Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1079 (2005).

30. Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 712-13 (2006).

31. *Id.*; Warren E. Burger, Chief Justice, U.S. Supreme Court, The Necessity for Civility, Address Before the American Law Institute (May 18, 1971), *in* LITIGATION, Winter 1975, at 8, 10. In his address, then Chief Justice Burger noted the importance of law professors in developing civility:

> I suggest this is relevant to law teachers because you have the first and best chance to inculcate in young students of the law the realization that in a very hard sense the hackneyed phrase 'order in the court' articulates something very basic to the mechanisms of justice. Someone must teach that good manners, disciplined behavior and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat. More than that [civility] is really the very glue that keeps an organized society from flying apart.

Id.

incivility because[32] (1) with an increased market area, a lawyer is less likely to deal repeatedly with the same players, and there is less cost to attorneys who act uncivilly because they will likely not interact with opposing counsel on a regular basis;[33] (2) the expanded market increases the out-of-court interactions (such as depositions) between lawyers without commensurate supervision by courts or other regulatory bodies;[34] and (3) the increase in the heterogeneity of the bar has led to less camaraderie among lawyers and a corresponding decrease in civility.[35] Yet this is only a partial list of the alleged culprits of practitioner incivility; indeed, the causes are seemingly endless.[36]

Those citing to one of the foregoing as a cause of the rise of incivility call for an enforcement mechanism to reclaim civility.[37] Others, however, are skeptical of the civility movement and see the effort as motivated by the self-interest of a select few to keep the bar as insulated as possible. For example, Professor Amy R. Mashburn argues that civility codes are attempts by an increasingly isolated legal elite to impose their values on other lawyers that they consider less prestigious.[38]

With the range of reactions to the supposed decline in civility, perhaps the only agreement is that there is a perception that something called "civility" is alleged to be lacking in lawyers today. Those who argue that a decline in civility has occurred assert that it has more than theoretical consequences. They argue that a decrease in civility results in an increase in litigation costs—an uncivil lawyer opposes every suggestion of her opponent, delays resolution of the claim, and incurs additional fees in the process.[39] Costs are also imposed on judicial resources because frivolous

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32. Macey, *supra* note 29, at 1080.

33. Gee & Garner, *supra* note 24, at 181-82; Macey, *supra* note 29, at 1080.

34. Jonathan J. Lerner, *Putting the "Civil" Back in Civil Litigation*, N.Y. ST. B.J., Mar.-Apr. 2009, at 33, 34 ("Whether it is because clients expect obnoxious tactics to advance their interests, or because some lawyers believe they help to achieve better results, or because the Bar, especially in large cities, has grown so competitive and impersonal, our civility and professionalism seem to be continually declining and at a rapid pace."); Macey, *supra* note 29, at 1080.

35. Gee & Garner, *supra* note 24, at 182-83; Macey, *supra* note 29, at 1080.

36. *See* Hung, *supra* note 1, at 1133 ("Other culprits of incivility within the profession include frequent malpractice suits, decreased mentoring, inadequate training, greater misuse of discovery, commercialization of law practice, and increased competition for clients. Decreased client loyalty, the intrusion of accounting firms and other businesses into conventional legal arenas, and the changing role of law in our society are contributing external factors." (footnotes omitted)); *see also* Gee & Garner, *supra* note 24, at 183 (positing that increases in the use of technology create distance between lawyers and increase the likelihood of incivility).

37. *See* Gee & Garner, *supra* note 24, at 192-93.

38. Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 663 (1994).

39. FINAL REPORT, *supra* note 24, at 445 ("When a lawyer behaves uncivilly, contentiously opposing everything his opponent proposes, both litigants suffer because they must pay even higher attorneys' fees and the disposition of the case is delayed.").

motions and unmeritorious conduct require frequent intervention by judicial officers.[40] The cumulative effect harms the profession's image in the eyes of the public.[41]

The current method for addressing incivility is through the education of lawyers.[42] An education in civility allows lawyers to change the culture by acting in a civil manner and mentoring young lawyers to do the same.[43] The first step in this process was the adoption of standards of civility by courts and bar associations.[44] This introduction of civility codes as teaching tools is similar to the introduction of the *Canons of Ethics* in 1908,[45] which were not originally adopted as disciplinable obligations, but rather as means to inform new lawyers of the ethics of the profession.[46] To this end, the stated purpose of civility codes is to "clarify and to articulate important values held by many members of the bench and the bar" by placing expected standards of civility in one document.[47] These civility standards are not meant to be a substitute for ethical codes, but to "impose obligations above and beyond the minimum requirements" of ethical rules.[48] As one author noted, the

40. Josh O'Hara, Note, *Creating Civility: Using Reference Group Theory to Improve Inter-Lawyer Relations*, 31 VT. L. REV. 965, 970 (2007) ("Lawyers who act uncivilly not only sully their reputations but also waste judicial resources. . . . Frivolous Rule 11 motions are a prime example of how incivility can cost time and money. As discussed earlier, a frequent and favorite tactic of uncivil lawyers is to bring frivolous motions, specifically Rule 11 motions, to delay and hinder discovery.").

41. John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93, 93 (1999) ("Our basic civic order relies on the legal system and public respect for it. If the public cannot trust the lawyers who are entrusted with the legal system, there is a problem that casts a shadow on the integrity of the very concept of rule of law."); O'Hara, *supra* note 40, at 968 ("Among the problems that can result from the adversarial excesses are losses of credibility, a waste of judicial resources, and a serious loss of public esteem for the legal profession in general." (footnotes omitted)).

42. *See* Gee & Garner, *supra* note 24, at 185, 196.

43. *See id.* at 194-96.

44. *See* discussion *infra* Part IV.B.

45. CANONS OF ETHICS (1908), *in* 33 ANN. REP. A.B.A. 575 (1908). Over the years, the *Canons of Ethics* have commonly been called the *Canons of Professional Ethics*, although that is not an official name. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 n.7 (1992).

46. *See* discussion *infra* Part IV.B.

47. FINAL REPORT, *supra* note 24, at 446.

48. Mashburn, *supra* note 38, at 684; *see also* O'Hara, *supra* note 40, at 972 (arguing that civility codes, unlike the *Model Rules of Professional Conduct*, do more than outline the minimum standards of professional conduct, but also instruct attorneys on how to conduct themselves among other professionals); Christopher J. Piazzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1235 (2002) (noting the danger of conflicting obligations that may arise from a dual system of professional ethics with ethical rules on the one hand and civility codes on the other hand).

purpose of the codes is to provide "unifying, clarifying, and anchoring standards" that articulate "best practices" or "values" for practitioners.[49] This recognition that the obligations of civility are not commiserate with ethical obligations is important. For example, a lawyer's ethical obligation to zealously pursue a client's interests may be inconsistent with the obligation to cooperate and to forego certain advantages that may arise in the course of litigation.[50]

The concern that lawyers may feel ethically constrained by civility codes has not gone unnoticed. Sanctioning lawyers for incivility runs the risk of chilling zealous advocacy.[51] A lawyer who is afraid of incurring sanctions for acting in an uncivil manner is likely to refrain from commenting, even if the statement is true and would be in the client's best interests.[52] This makes a clearly delineated set of civility concepts crucial to ensure that lawyers know what is and is not allowed under the nomenclature of civility.

III. IDENTIFYING CORE CONCEPTS OF CIVILITY

With conflicting views on the presence and value of the civility movement, it is helpful to understand what is commonly meant by the term "civility." This part thus defines the core aspects of civility. These concepts are distilled from the unique codifications of guidelines of civility adopted by bar associations in thirty-two states.[53] Analyzing these codes provides both a challenge and an opportunity. First, it

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49. Hung, *supra* note 1, at 1152.

50. Piazzola, *supra* note 48 (proposing that ethical rules incorporate an enforceable obligation to treat others with respect); *see also* MODEL RULES OF PROF'L CONDUCT pmbl. (2009) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

51. *See* Alice Woolley, Commentary, *Does Civility Matter?*, 46 OSGOOD HALL L.J 175, 175-76, 179-82 (2008).

52. *See id.*

53. Only state civility codes available online were utilized. The following is a listing of the jurisdictions and the civility codes analyzed: (1) ALA. STATE BAR CODE OF PROF'L COURTESY (Ala. State Bar 1992), *available at* http://www.alabar.org/members/professional_courtesy.cfm; (2) A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. (State Bar of Ariz. 2005), *available at* http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism; (3) CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM (State Bar of Cal. 2007), *available at* http://nevadacountycourts.com/documents/public/CalBar%20Guidelines%20of%20Civility.pdf; (4) LAWYERS' PRINCIPLES OF PROFESSIONALISM (Conn. Bar Ass'n 1994), *available at* https://www.ctbar.org/Sections%20Committees/Committees/StandingCommitteeOnProfessionalism/LawyersPrincipleOfProfessionalism.aspx; (5) PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS (Del. State Bar Ass'n 2003), *available at* http://courts.state.de.us/forms/download.aspx?id=39428; (6) LAWYER'S CREED & ASPIRATIONAL STATEMENT ON PROFESSIONALISM (State Bar of Ga. 1990), *available at* http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/lawyers_creed/; (7) GUIDELINES OF PROF'L COURTESY & CIVILITY FOR HAW. LAWYERS (Haw. State Bar Ass'n 2004), *available at* http://www.state.hi.us/jud/ctrules/gpcc.pdf; (8)

is a challenge because, for the most part, each of these jurisdictions has adopted unique, jurisdiction-specific codes, so it is impossible to identify one civility code as a model. The idiosyncratic nature of the codes, however, provides an opportunity to identify those concepts that are consistent across all jurisdictions.

Content analysis was used to identify these concepts. First, the thirty-two civility codes were identified and located. The American Bar Association

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STANDARDS FOR CIVILITY IN PROF'L CONDUCT (Idaho State Bar 2001), *available at* http://isb.idaho.gov/pdf/general/standards_for_civility.pdf; (9) HALLMARKS OF PROFESSIONALISM (Kan. Bar Ass'n 1987), *available at* http://www.ksbar.org/pdf/hallmarks.pdf; (10) CODE OF PROF'L COURTESY (Ky. Bar Ass'n 1993), *available at* http://www.kybar.org/228; (11) CODE OF PROFESSIONALISM (La. State Bar Ass'n 1992), *available at* http://www.lsba.org/2007InsideLSBA/professionalismcode.asp; (12) MD. STATE BAR ASS'N CODE OF CIVILITY (Md. State Bar Ass'n 1997), *available at* http://www.msba.org/departments/commpubl/publications/code.htm; (13) STATEMENT ON LAWYER PROFESSIONALISM (Mass. Bar Ass'n 1989), *available at* http://www.massbar.org/media/725247/final%20statement%20on%20lawyer%20professionalism.pdf; (14) PROFESSIONALISM ASPIRATIONS (Minn. State Bar Ass'n 2001), *available at* http://www2.mnbar.org/committees/professionalism/aspirations-final.htm; (15) A LAWYER'S CREED (Miss. Bar Ass'n 1990), *available at* http://www.msbar.org/admin/spotimages/2027.pdf; (16) TENETS OF PROF'L COURTESY (Mo. Bar 1987), *available at* http://members.mobar.org/ssf2010-course-materials/pdfs/tenets_of_professional_courtesy_willenbrock_lynch.pdf; (17) PLEDGE OF PROFESSIONALISM (Clark Cnty., Nev. Bar Ass'n 1997), *available at* http://www.clarkcountybar.org/index.php?option=com_content&task=view&id=22&Itemid=181; (18) LITIG. GUIDELINES (N.H. Bar Ass'n 1999), *available at* http://www.nhbar.org/uploads/pdf/litguide(1).pdf; (19) PRINCIPLES OF PROFESSIONALISM (N.J. State Bar Ass'n 1997), *available at* http://www.njsba.com/resources/njcop/njcop-principle-prof.html; (20) CREED OF PROFESSIONALISM (State Bar of N.M. 1989), *available at* http://www.nmbar.org/Attorneys/creed.html; (21) GUIDELINES ON CIVILITY IN LITIG. (N.Y. State Bar Ass'n 1994), *available at* http://www.nynd.uscourts.gov/documents/CivilityinLitigationAVoluntaryCommitment.pdf; (22) N.C. LAWYER PROF'L CREED (N.C. Bar Ass'n 1989), *available at* http://www.ncbar.org/media/124544/lawyerscreed.pdf; (23) A LAWYER'S ASPIRATIONAL IDEALS (Supreme Court of Ohio 1997), *available at* http://www.sconet.state.oh.us/publications/proIdeals.pdf; (24) STANDARDS OF PROFESSIONALISM (Okla. Bar Ass'n 2006), *available at* http://www.okbar.org/ethics/standards.htm; (25) STATEMENT OF PROFESSIONALISM (Or. State Bar 2006), *available at* http://www.osbar.org/_docs/forms/Prof-ord.pdf; (26) 204 PA. CODE § 99.3 (2011), *available at* http://www.pacode.com/secure/data/204/chapter99/subchapDtoc.html; (27) S.C. BAR STANDARDS OF PROFESSIONALISM (S.C. Bar 2011), *available at* http://scbar.org/public/files/docs/professionalism_standards.pdf; (28) TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989), *available at* http://www.supreme.courts.state.tx.us/pdf/TexasLawyersCreed.pdf; (29) UTAH STANDARDS OF PROFESSIONALISM & CIVILITY (Utah Supreme Court 2003), *available at* http://www.utcourts.gov/courts/sup/civility.htm; (30) GUIDELINES OF PROF'L COURTESY (Vt. Bar Ass'n 1989), *available at* http://www.vtbar.org/Upload%20Files/attachments/guidelinesofprofessionalcourtesy.pdf; (31) PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS (Va. Bar Ass'n 2009), *available at* http://www.vsb.org/docs/2009-10-pg-professionalism.pdf; (32) CREED OF PROFESSIONALISM (Wash. State Bar Ass'n 2001), *available at* http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~/media/Files/Legal%20Community/Commtees_Boards_Panels/Professionalism%20Committee/Creed%20of%20Professionalism.ashx.

("ABA") maintains an updated listing of all civility codes and provides hyperlinks to those codes that are available online.[54] After gathering the codes, each code was analyzed and the provisions for each jurisdiction were placed into a chart divided by the overarching concern of each provision. As provisions arose that did not fit into a preexisting category, a new category was added. After the initial analysis was completed, the collected provisions were analyzed to determine which provisions were common across all jurisdictions. These common provisions provided the basis of the core common concepts of civility discussed below.

Analysis of the data gathered from the civility codes indicates that the most common provisions can be categorized into ten overarching themes. Although some codes have more detail than others, the goal here is to distill the common aspects of civility across jurisdictions. The ten common concepts include the obligation to (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions; (2) be respectful and act in a courteous, cordial, and civil manner; (3) be prompt, punctual, and prepared; (4) maintain honesty and personal integrity; (5) communicate with opposing counsel; (6) avoid actions taken merely to delay or harass; (7) ensure proper conduct before the court; (8) act with dignity and cooperation in pre-trial proceedings; (9) act as a role model to the client and public and as a mentor to young lawyers; and (10) utilize the court system in an efficient and fair manner. Each of these concepts is discussed in detail below.[55]

A. *Recognize the Importance of Keeping Commitments and of Seeking Agreement and Accommodation with Regard to Scheduling and Extensions*

Codes provide detailed obligations regarding keeping commitments and seeking accommodation with opposing counsel when scheduling or rescheduling matters or seeking extensions. The general obligation is to agree only to commitments that the lawyer reasonably believes she can honor.[56] In addition to ensuring her availability, the lawyer must also ensure that others involved in the proceeding are available before scheduling an event.[57] This includes scheduling matters by agreement (as opposed to mere notice), and refraining from requesting scheduling changes for

54. *See* Ctr. for Prof'l Responsibility, *supra* note 17.

55. The concepts identified are overarching themes found in all codes. Specific codes address these themes in different ways. The code provisions cited in this section of the paper were selected as exemplars of particular concepts.

56. *See* ALA. STATE BAR CODE OF PROF'L COURTESY § 2 ("A lawyer must honor promises and commitments made to another lawyer."); STATEMENT ON LAWYER PROFESSIONALISM art. I, subdiv. B(2) (Mass. Bar Ass'n) ("A lawyer should not accept professional commitments which he or she knows or should know he or she will be unable to honor.").

57. *See* ALA. STATE BAR CODE OF PROF'L COURTESY § 3 ("A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.").

tactical or unfair purposes.[58] Agreement is particularly important on procedural matters, preliminary matters, discovery issues, and dates for meetings, depositions, and trial.[59] The justification for emphasizing agreement is to ensure that lawyer and court resources are expended on matters of substance, and not on delays caused by failure to coordinate schedules or procedural disputes.[60]

In addition to scheduling by agreement, a lawyer should seek to accommodate opposing counsel throughout representation.[61] This includes accommodations with regard to meetings, depositions, hearings, and trial.[62] Proper accommodation includes granting requests for extensions of time and for waiver of procedural formalities, even if the same courtesy has not previously been extended to the lawyer.[63] Accommodation should be granted unless such an accommodation will

58. *See* CODE OF PROF'L COURTESY § 3 (Ky. Bar Ass'n) ("A lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates and court appearances (other than routine motions) rather than merely serving notice."); PROFESSIONALISM ASPIRATIONS art. III cmt. C(1) (Minn. State Bar Ass'n) ("We will not arbitrarily schedule a meeting, deposition, court appearance, hearing, or other proceeding until a good faith effort has been made to schedule it by agreement. If we are unable to contact the other lawyer, we will send written correspondence suggesting a time or times that will become operative unless an informal objection is directed to us within a set reasonable time."); PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH OTHER COUNSEL Princ. 2 (N.J. State Bar Ass'n) ("A lawyer should respect a colleague's schedule. Agreement should be sought on dates for meetings, conferences, depositions, hearings, trials and other events.").

59. *See* ALA. STATE BAR CODE OF PROF'L COURTESY § 9 ("A lawyer should seek informal agreement on procedural and preliminary matters.").

60. *See* PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 4 (Va. Bar Ass'n 2009) ("In my conduct toward opposing counsel, I should . . . [c]ooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements."); A LAWYER'S ASPIRATIONAL IDEALS: AS TO THE COURTS & OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM subdiv. a(3) (Supreme Court of Ohio 1997) ("I should . . . [s]eek noncoerced agreement between the parties on procedural and discovery matters . . . ."); CODE OF PROFESSIONALISM para. 10 (La. State Bar Ass'n 1992) ("I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.").

61. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. B (State Bar of Ariz. 2005).

62. *See id.* subdiv. B(4) ("I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested . . . .").

63. *See* CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 6 (State Bar of Cal. 2007) ("Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension."); PLEDGE OF PROFESSIONALISM art. II, § 2 (Clark Cnty., Nev. Bar Ass'n 1997) ("I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate substantive interests of my client will not be adversely affected . . . .").

adversely affect the client.[64] The decision to grant an accommodation to opposing counsel with regard to matters that do not directly affect the merits of the case (for example, extensions, continuances, adjournments, and admissions of facts) rests with the lawyer and not the client.[65] It is improper to withhold consent to accommodation or extensions on arbitrary or unreasonable bases, or to place unwarranted or irrelevant conditions when granting an extension of time.[66]

B. *Be Respectful and Act in a Courteous, Cordial, and Civil Manner*

Civility codes use various terms to describe a lawyer's obligation to remain courteous to those involved in the legal system. The codes use combinations of words such as "courteous," "cordial," "respectful," "fair," or "civil."[67] The obligation

64. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. B(3) ("In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected . . . ."); PROFESSIONAL ASPIRATIONS art. III cmt. H (Minn. State Bar Ass'n 2001) ("During trial or hearing we will honor reasonable requests of opposing counsel that do not prejudice the rights of our clients or sacrifice tactical advantage.").

65. *See* STANDARDS OF PROFESSIONALISM § 2.5 (Okla. Bar Ass'n 2006) ("We will reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect a client's lawful objectives."); UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 14 (Utah Supreme Court 2003) ("Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts."); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. II, § 10 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989) ("A client has no right to instruct me to refuse reasonable requests made by other counsel.").

66. *See* GUIDELINES ON CIVILITY IN LITIG. art. III, subdiv. C (N.Y. State Bar Ass'n 1994) ("A lawyer should not attach unfair and extraneous conditions to the extension of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize or to seek reciprocal scheduling concessions."); GUIDELINES OF PROF'L COURTESY para. 10 (Vt. Bar Ass'n 1989) ("If a fellow attorney makes a just request for cooperation, or seeks scheduling accommodation, a lawyer shall not arbitrarily or unreasonably withhold consent.").

67. CREED OF PROFESSIONALISM para. 2 (Wash. State Bar Ass'n 2001) ("In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness."); ALA. STATE BAR CODE OF PROF'L COURTESY § 4 (Ala. State Bar 1992) ("A lawyer should maintain a cordial and respectful relationship with opposing counsel."); CODE OF PROFESSIONALISM para. 4 (La. State Bar Ass'n 1992) ("I will conduct myself with dignity, civility, courtesy and a sense of fair play."); GUIDELINES OF PROF'L COURTESY para. 5 (Vt. Bar Ass'n) ("Lawyers should treat each other, their clients, the opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times.").

of courteousness extends to other lawyers, clients, the court, office staff, the public, and even the law.[68] It applies to written *and* oral communications.[69]

Courteous behavior is often defined by its opposite. For example, South Carolina provides that "[a] lawyer should avoid all rude, disruptive, and abusive behavior and should, at all times, act with dignity, decency and courtesy consistent with any appropriate response to such conduct by others and a vigorous and aggressive assertion to appropriately protect the legitimate interests of a client."[70] Courteousness requires a losing lawyer to avoid expressing disrespect for the court, adversaries, or parties.[71] Alabama's code goes so far as to say that, to demonstrate courteousness, lawyers should shake hands at the conclusion of a matter.[72]

A number of codes imply that incivility may arise because a lawyer adopts the client's dislike or disapproval of others in the proceeding.[73] Specifically, codes make it clear that a lawyer should maintain their objective independence in the course of

68. *See* PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 3 (Va. Bar Ass'n 2009) ("In my conduct toward courts and other institutions with which I deal, I should . . . [t]reat all judges and court personnel with respect and courtesy."); PLEDGE OF PROFESSIONALISM art. III, § 1, art. IV, § 3 (Clark Cnty., Nev. Bar Ass'n) ("I will conduct myself in a professional manner and demonstrate respect for the court, other tribunals and the law . . . . I will treat my office staff with courtesy and respect, and will encourage them to treat others in the same manner . . . .").

69. *See* STANDARDS OF PROFESSIONALISM § 3.1(a) (Okla. Bar Ass'n) ("We will be civil, courteous, respectful, honest and fair in communicating with adversaries, orally and in writing."); A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. B(1) ("I will be courteous and civil, both in oral and in written communication . . . ."); CODE OF PROF'L COURTESY § 8 (Ky. Bar Ass'n 1993) ("A lawyer should strive to maintain a courteous tone in correspondence, pleadings and other written communications.").

70. S.C. BAR STANDARDS OF PROFESSIONALISM Princ. 6 (S.C. Bar 2011).

71. *See* CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM intro., paras. 1-2 (State Bar of Cal. 2007); PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS Princ. A(4) (Del. State Bar Ass'n 2003).

72. *See* ALA. STATE BAR CODE OF PROF'L COURTESY § 10 ("When each adversarial proceeding ends, a lawyer should shake hands with the fellow lawyer who is the adversary; and the losing lawyer should refrain from engaging in any conduct which engenders disrespect for the court, the adversary or the parties.").

73. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. A(1) ("I will be loyal and committed to my client's cause, but I will not permit that loyalty and commitment to interfere with my ability to provide my client with objective and independent advice . . . ."); *see also* PROFESSIONALISM ASPIRATIONS art. II cmt. A(1) (Minn. State Bar Ass'n 2001) ("We will be loyal and committed to our clients' lawful objectives, but will not permit that loyalty and commitment to interfere with our duty to provide objective and independent advice."); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. II, § 3 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989) ("I will be loyal and commited [sic] to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.").

representation.[74] Lawyers should not allow "ill feelings" between the parties to affect the actions of the lawyer.[75]

The lawyer's obligation of courteousness extends beyond the obligation of a lawyer to regulate his or her own conduct. It also includes a duty on the part of the lawyer to educate clients and others, such as office staff, of the importance of civility in the legal process.[76] Part of this education includes explaining to the client that courteous conduct "does not reflect a lack of zeal in advancing [the client's] interests, but rather is more likely to successfully advance their interests."[77] The recurring theme is that lawyers should inform their clients that weakness does not necessarily follow from courtesy and civility, and ensure that clients understand that "uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive, or obnoxious" behavior is not a valid part of effective or zealous representation.[78] Minnesota goes even further

74. *See* PLEDGE OF PROFESSIONALISM art. I, § 5 (Clark Cnty., Nev. Bar Ass'n 1997) ("I will not permit my commitment to my client's cause to interfere with my ability to provide my client with objective advice."); *see also* S.C. BAR STANDARDS OF PROFESSIONALISM Princ. 9 (S.C. Bar) ("A lawyer should exercise independent judgment without compromise of a client and should not be governed by a client's ill will or deceit."); A LAWYER'S ASPIRATIONAL IDEALS: AS TO CLIENTS subdiv. b(3) (Supreme Court of Ohio 1997) ("I should . . . [m]aintain the sympathetic detachment that permits objective and independent advice to clients.").

75. PROFESSIONALISM ASPIRATIONS art. III (Minn. State Bar Ass'n 2001) ("As professionals, ill feelings between the clients should not influence our conduct, attitude, or demeanor toward opposing counsel."); *see also* PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 4 (Va. Bar Ass'n 2009) ("In my conduct toward opposing counsel, I should . . . [r]esist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers."); UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 1 (Utah Supreme Court 2003) ("Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another."); GUIDELINES OF PROF'L COURTESY para. 7 (Vt. Bar Ass'n 1989) ("In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feelings should not influence a lawyer's conduct, attitude, or demeanor toward opposing lawyers.").

76. *See* PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH CLIENTS Princ. 4 (N.J. State Bar Ass'n 1997) ("Clients should be advised that professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy and zealous representation.").

77. PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 2.

78. STANDARDS OF PROFESSIONALISM § 2.7 (Okla. Bar Ass'n 2006) ("We understand, and will impress upon our client, that reasonable people can disagree without being disagreeable; and that effective representation does not require, and in fact is impaired by, conduct which objectively can be characterized as uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious."); *see also* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. A(5) ("I will advise my client that civility and courtesy are not to be equated with weakness . . . ."); UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 2 ("Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no

to state that "uncivil, abrasive, abusive, hostile, or obstructive" conduct undermines the rational, peaceful, and efficient resolution of disputes—the very attributes of an effective legal system.[79]

C. *The Obligation to be Prompt, Punctual, and Prepared*

Civility includes obligations of promptness, punctuality,[80] and preparedness.[81] Underlying these elements are issues of efficiency and respect for those involved in a proceeding. A lawyer who is not prompt, punctual, or prepared wastes the time and resources of those involved (including the judicial system), and also demonstrates disrespect.[82]

A lawyer should be punctual in attendance at events that occur in the course of proceedings, as well as in communications with clients, with other attorneys, and with the court.[83] The duty of promptness applies to all aspects of litigation.[84] In its most general sense, a lawyer has an obligation to promptly dispose of disputes.[85] In a

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right to demand that lawyers abuse anyone or engage in any offensive or improper conduct."); PROFESSIONALISM ASPIRATIONS art. II cmt. A(4) (Minn. State Bar Ass'n) ("We will advise our clients, if necessary, that they do not have a right to demand that we engage in abusive or offensive conduct and we will not engage in such conduct."); GUIDELINES ON CIVILITY IN LITIG. art. I, subdiv. B (N.Y. Bar Ass'n 1994) ("Lawyers can disagree without being disagreeable. They should recognize that effective representation does not require antagonistic or acrimonious behavior."); CREED OF PROFESSIONALISM: LAWYER'S CREED subdiv. B (State Bar of N.M 1989); PLEDGE OF PROFESSIONALISM art. I, § 4 (Clark Cnty., Nev. Bar Ass'n) (providing the same as above); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. II, § 4 ("I will advise my client that civility and courtesy are expected and are not a sign of weakness.").

79. PROFESSIONALISM ASPIRATIONS art. III (Minn. State Bar Ass'n).

80. *See* PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 3 ("In my conduct toward courts and other institutions with which I deal, I should . . . [b]e punctual in attending all court appearances and other scheduled events."); ALA. STATE BAR CODE OF PROF'L COURTESY § 8 (Ala. State Bar 1992) ("A lawyer should always be punctual.").

81. STATEMENT OF PROFESSIONALISM para. 11 (Or. State Bar 2006) ("I will always be prepared for any proceeding in which I am representing my client.").

82. *See* MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 8 (Md. State Bar Ass'n 1997) ("We will be punctual and prepared for all scheduled appearances so that all matters may begin on time and proceed efficiently.").

83. CODE OF PROFESSIONALISM para. 11 (La. State Bar Ass'n 1992) ("I will be punctual in my communications with clients, other counsel and the court, and in honoring scheduled appearances.").

84. *See* STANDARDS OF PROFESSIONALISM § 1.9 (Okla. Bar Ass'n 2006) (providing that an attorney should promptly return telephone calls to clients and others); A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. C(7) (State Bar of Ariz. 2005) (providing that an attorney should promptly notify the court and opposing counsel of any scheduling matters).

85. *See* STATEMENT ON LAWYER PROFESSIONALISM art. I, subdiv. D(5) (Mass. Bar Ass'n 1989) ("A lawyer should be guided by the proposition that the interests of justice are

more specific sense, it obligates a lawyer to respond in a timely manner to communications from clients, opposing counsel, or others involved in the legal process.[86] It is improper for a lawyer to fail to promptly respond to a communication merely to seek tactical advantage or solely because the lawyer disagrees with the communication.[87] In addition, a lawyer has an obligation to promptly notify all those interested if a scheduled hearing, deposition, or other event has been cancelled.[88]

A lawyer's obligation to be prepared requires adequate preparation by the lawyer prior to hearings, trials, depositions, and other commitments.[89] A lawyer must remain educated with regard to the area of law in which she practices.[90] This obligation has two primary justifications. First is the need to ensure that the client maintains respect for her lawyer and the legal system. Second, without proper preparation, an attorney leaves her client underrepresented and compromises the adversarial, truth-seeking process underlying the legal system.[91]

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best served by the prompt disposition of disputes."); N.C. LAWYER PROF'L CREED: COURTESY TOWARD OTHER COUNSEL para. 3 (N.C. Bar Ass'n 1989) ("If a lawyer knows that his client is going to submit a voluntary dismissal of a matter, the lawyer should promptly notify opposing counsel to avoid unnecessary trial preparation and expense.").

86. *See* STANDARDS OF PROFESSIONALISM § 1.9 (Okla. Bar Ass'n) ("We will promptly return telephone calls and respond to correspondence from clients, opposing counsel, unrepresented parties and others."); CODE OF PROF'L COURTESY § 2 (Ky. Bar Ass'n 1993) ("A lawyer should promptly return telephone calls and correspondence from other lawyers.").

87. PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 4 (Va. Bar Ass'n 2009) ("In my conduct toward opposing counsel, I should . . . [r]eturn telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.").

88. A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. C(7) ("When scheduled hearings or depositions have to be canceled, I will notify opposing counsel and, if appropriate, the court (or other tribunal) as early as possible . . . .").

89. PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS Princ. A(5) (Del. State Bar Ass'n 2003) (addressing attorney diligence by providing that "[a] lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task").

90. STANDARDS OF PROFESSIONALISM § 2.4 (Okla. Bar Ass'n) ("We will continually engage in legal education and recognize our limitations of knowledge and experience.").

91. PROFESSIONALISM ASPIRATIONS art. II (Minn. State Bar Ass'n 2001) ("A lawyer owes allegiance, learning, skill, and industry to a client. As lawyers, we shall employ appropriate legal procedures to protect and advance our clients' legitimate rights, claims, and objectives. In fulfilling our duties to each client, we will be mindful of our obligation to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.").

D. *Maintain Honesty and Personal Integrity*

Civility codes admonish lawyers to maintain integrity and to be honest. Delaware explicitly identifies personal integrity as a lawyer's most important quality and states that personal integrity is maintained by "rendering . . . professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause."[92] While other codes mention the obligation to maintain "integrity," none give this type of detailed explanation.[93]

With regard to honesty, several codes state that a lawyer's word is her bond.[94] While honesty, as a general matter, is mentioned repeatedly,[95] the codes cite specifically the obligation to avoid intentionally deceiving other lawyers and the court. For example, a lawyer should refrain from misciting, distorting, or exaggerating facts or the law and should correct inadvertent misstatements of law or fact.[96] Oklahoma states that it is dishonest for a lawyer to exaggerate "the amount of

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92. PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS Princ. A(1).

93. The following statement is common among civility codes: "As a lawyer, I will aspire . . . [t]o preserve the dignity and integrity of our profession by my conduct. The dignity and integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers." A LAWYER'S CREED: ASPIRATIONAL IDEALS AS A LAWYER subdiv. g (Miss. Bar Ass'n 1990); *see also* CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM intro., para. 1 (State Bar of Cal. 2007) (stating that the obligation of professionalism includes "civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation"); STATEMENT OF PROFESSIONALISM para. 1 (Or. State Bar 2006) ("I will promote the integrity of the profession and the legal system."); PROFESSIONALISM ASPIRATIONS art. I (Minn. State Bar Ass'n 2001) ("A lawyer owes personal dignity, integrity, and independence to the administration of justice. A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms."); GUIDELINES OF PROF'L COURTESY para. 4 (Vt. Bar Ass'n 1989) ("A lawyer should act with personal dignity and professional integrity.").

94. Jurisdictions that expressly state a lawyer's word is her bond include Louisiana, Minnesota, Nevada, Oklahoma, South Carolina, Texas, Virginia, and Washington. S.C. BAR STANDARDS OF PROFESSIONALISM Princ. 10 (S.C. Bar 2011); PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 1 (Va. Bar Ass'n 2009); STANDARDS OF PROFESSIONALISM § 1.2 (Okla. Bar Ass'n); PROFESSIONALISM ASPIRATIONS art. I cmt. B (Minn. State Bar Ass'n); CREED OF PROFESSIONALISM para. 3 (Wash. State Bar Ass'n 2001); PLEDGE OF PROFESSIONALISM art. II, § 1 (Clark Cnty., Nev. Bar Ass'n 1997); CODE OF PROFESSIONALISM intro. note (La. State Bar Ass'n 1992); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. I, § 1 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989).

95. *See* CREED OF PROFESSIONALISM para. 8 (Wash. State Bar Ass'n) ("I will be forthright and honest in my dealings with the court, opposing counsel and others.").

96. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 7 (Md. State Bar Ass'n 1997) ("We will not knowingly misrepresent, mischaracterize, or misquote fact or authorities cited.").

damages sought in a lawsuit, actual or potential recoveries in settlement or the lawyer's qualifications, experience or fees."[97]

E. *Proper Interactions with Opposing Counsel*

Codes provide detailed guidance with regard to common interactions between lawyers.[98] The key to evaluating inter-lawyer interactions is whether the interaction is geared toward legitimately resolving a dispute, or is instead intended to gain an unfair advantage or personally attack an opponent.[99] Underlying this concept is a belief that open, fair, respectful, and honest communication between opposing lawyers will not only assist in quickly resolving litigated disputes, but will also help avoid litigating some disputes all together.[100] On the other hand, failure of lawyers to interact civilly can delay resolution of claims and compromise the public's view of the legal profession.[101]

Lawyers ought to "avoid hostile, demeaning, or humiliating words in written and oral communications" to opposing counsel.[102] Lawyers should also avoid personal criticism of other lawyers and statements made solely to embarrass, including statements or insinuation related to "personal peculiarities or idiosyncrasies" of other lawyers.[103] Kentucky sees this problem as lawyers becoming too personally involved

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97. STANDARDS OF PROFESSIONALISM § 1.8 (Okla. Bar Ass'n).

98. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. B (State Bar of Ariz. 2005) (offering guidance on communication, litigation, scheduling hearings, discovery, and negotiations); CREED OF PROFESSIONALISM paras. 6-7 (State Bar Ass'n) (discussing the manner, timing, and scheduling of hearings, as well as professional conduct during negotiations, depositions, and other interactions with opposing counsel).

99. *See, e.g.*, GUIDELINES ON CIVILITY IN LITIG. art. III (N.Y. Bar Ass'n 1994) ("A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the clients' interests.").

100. A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. C(2) ("Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced . . . ."); ALA. STATE BAR CODE OF PROF'L COURTESY § 11 (Ala. State Bar 1992) ("A lawyer should recognize that adversaries should communicate to avoid litigation and remember their obligation to be courteous to each other."); STATEMENT ON LAWYER PROFESSIONALISM art. II, subdiv. A(a)-(b) (Mass. Bar Ass'n 1989) ("[A] lawyer should . . . maintain open communication with opposing counsel [and] communicate respectfully with other attorneys . . . .").

101. STATEMENT ON LAWYER PROFESSIONALISM art. I, subdiv. A(4) (Mass. Bar Ass'n) ("Lawyers and judges should deal with one another respectfully because the attitude of the public toward the judicial process is influenced by the relationship among lawyers and judges.").

102. UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 3 (Utah Supreme Court 2003).

103. 204 PA. CODE § 99.3(5) (2011) ("A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward

in their client's case and acting inappropriately toward other lawyers. Kentucky's advice is to leave the conflict in the courtroom: "A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, 'leave the matter in the courtroom.'"[104]

In situations where lawyers exchange documents, they should identify changes made to the document, and, when changes are agreed to, the lawyers must make only the agreed changes.[105] Furthermore, when communicating understandings or agreements, a lawyer must state the agreement correctly and should not include substantive matters in the document that were not previously agreed upon.[106] Similarly, a lawyer should not set out in a communication a position that opposing counsel "has not taken, thus creating a record of events that have not occurred."[107] With regard to the need to communicate fairly, Utah, Texas, and Minnesota require lawyers, when practical, to notify the other side before seeking an entry of default.[108] Finally, the obligation to communicate civilly includes the delivery of the communication. Thus, when it is appropriate to send communications to a court, a

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opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration."); ALA. STATE BAR CODE OF PROF'L COURTESY § 7 ("A lawyer should never intentionally embarrass another lawyer and should avoid personal criticism of another lawyer."); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. III, § 10 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989) ("I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.").

104. CODE OF PROF'L COURTESY § 10 (Ky. Bar Ass'n 1993).

105. CODE OF PROFESSIONALISM para. 3 (La. State Bar Ass'n 1992) ("I will clearly identify for other counsel changes I have made in documents . . . .").

106. UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 7 ("When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.").

107. *See* STANDARDS OF PROFESSIONALISM § 3.1(d) (Okla. Bar Ass'n 2006); *see also* CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 4(g) (State Bar of Cal. 2007) ("An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.").

108. *See* UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 16 ("Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected."); PROFESSIONALISM ASPIRATIONS art. III cmt. F(2) (Minn. State Bar Ass'n 2001) ("We will not cause a default or dismissal to be entered, when we know the identity of an opposing counsel, without first making a good faith attempt to inquire about the counsel's intention to proceed."); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. III ("I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.").

lawyer should, if possible, deliver copies to opposing counsel at the same time and by the same means.[109]

A lawyer should not seek sanctions or disqualification of opposing counsel unless the action is necessary to protect a client and is fully justified after investigation.[110] This recognizes that a motion for sanctions can destroy the working relationships between lawyers and encourage tit-for-tat uncivil conduct.[111] Motions seeking sanctions or disqualification filed solely for tactical advantage or other improper reasons are not appropriate.[112] Threats of sanctions are also inappropriate as a litigation tactic.[113] Lawyers who engage in such tactics bring the legal profession into disrepute by advancing unfounded arguments.[114]

F. *Avoid Actions Taken Merely to Delay or Harass*

A fundamental tenet of civility is the engagement in fair and efficient litigation or negotiation.[115] This means lawyers should take steps to avoid costs, delay, inconvenience, and strife—that is, tactics that do not aid in truth-finding or the timely and efficient resolution of disputes.[116] Actions taken solely to delay or to harass, or to gain an unfair advantage in litigation, reflect poorly on the legal profession in the eyes of the public. In fact, advocacy does not include the right of unjustified delay or

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109. *See* PROFESSIONALISM ASPIRATIONS art. III cmt. F(1) (Minn. State Bar Ass'n).

110. ALA. STATE BAR CODE OF PROF'L COURTESY § 5 (Ala. State Bar 1992) ("A lawyer should seek sanctions against opposing counsel only where required for the protection of the client and not for mere tactical advantage.").

111. CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 10(f) ("Because requests for monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.").

112. UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 5 ("Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.").

113. CODE OF PROFESSIONALISM para. 9 (La. State Bar Ass'n 1992) ("I will not use the threat of sanctions as a litigation tactic.").

114. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 4 (Md. State Bar Ass'n 1997) ("We will not bring the profession into disrepute by making unfounded accusations of impropriety or attacking counsel, and absent good cause, we will not attribute bad motives or improper conduct to other counsel.").

115. *See* PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH THE COURT Princ. 1 (N.J. State Bar Ass'n 1997) ("A lawyer has a duty to act in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.").

116. *See* PROFESSIONALISM ASPIRATIONS art. III (Minn. State Bar Ass'n 2001) ("Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently.").

harassment.[117] This obligation essentially places a duty of good faith and fair dealing on lawyers in the course of litigation or negotiation.[118]

Civility codes provide specific examples of conduct that either results in or avoids delay and harassment. Lawyers should not seek an extension of time solely to delay resolution of a matter.[119] Similarly, lawyers should not "falsely hold out the possibility of settlement" to delay resolution of a matter.[120] To avoid such delays, lawyers should stipulate to civil matters not in dispute and withdraw claims or defenses when it becomes clear to the lawyer that they have no merit.[121] Improper delay occurs when a lawyer refuses to consider an opportunity to resolve a dispute by settlement or alternative dispute resolution.[122]

A lawyer should not engage in conduct designed to harass opposing counsel and opposing counsel's client. Of course this means in the most literal sense that lawyers should "not engage in personal attacks" on opposing counsel or others in the judicial process.[123] Harassment, however, also includes conduct in which the sole purpose is not to resolve a claim, but merely to annoy or impose additional costs on those involved in the litigation process. Thus, a lawyer should not engage in conduct solely for the purpose of "drain[ing] the financial resources of the opposing party."[124] A

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117. ALA. STATE BAR CODE OF PROF'L COURTESY §§ 12-13 (Ala. State Bar 1992) ("A lawyer should recognize that advocacy does not include harassment. . . . A lawyer should recognize that advocacy does not include needless delay.").

118. *See* PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH OTHER COUNSEL Princ. 4 (N.J. State Bar Ass'n) ("In the conduct of negotiations, or litigation, a lawyer should conduct himself or herself with dignity and fairness and refrain from conduct meant to harass the opposing party.").

119. PROFESSIONALISM ASPIRATIONS art. III cmt. C(4) (Minn. State Bar Ass'n) ("We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.").

120. *Id.* art. III cmt. G(2) ("We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.").

121. *See* STANDARDS OF PROFESSIONALISM § 2.9 (Okla. Bar Ass'n 2006) ("We will readily stipulate to undisputed facts in order to avoid needless costs, delay, inconvenience, and strife."); LAWYERS' PRINCIPLES OF PROFESSIONALISM para. 22 (Conn. Bar Ass'n 1994) ("In civil matters, I will stipulate to facts as to which there is no genuine dispute . . . .").

122. STATEMENT OF PROFESSIONALISM para. 14 (Or. State Bar 2006) ("I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.").

123. CODE OF PROFESSIONALISM para. 8 (La. State Bar Ass'n 1992) ("I will not engage in personal attacks on other counsel or the court."); *see also* PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 4 (Va. Bar Ass'n 2009) ("In my conduct toward opposing counsel, I should . . . [a]void ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients."); PROFESSIONALISM ASPIRATIONS art. III cmt. A(6) (Minn. State Bar Ass'n) ("We will not ask a witness or an opposing party a question solely for the purpose of harassing or embarrassing that individual.").

124. PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH CLIENTS Princ. 3

lawyer also should not serve motions or pleadings on an opposing party at a time or in a manner that unfairly limits the opportunity to respond, for example, "late on Friday afternoon or the day preceding a . . . holiday."[125]

G. *Ensure Proper Conduct Before the Court*

A lawyer's obligation of civility extends to conduct before the court and is two-fold: First, a lawyer should respect the court and the system of justice for which it stands.[126] Second, a lawyer should be a model for clients and others in showing respect for the role of courts in the legal system.[127] By protecting and respecting the dignity, integrity, and independence of the judiciary, lawyers help maintain the legitimacy of the legal system as a whole.[128] Further, a lawyer's display of civil conduct helps ensure that other participants in the legal process also maintain due respect for the judiciary and the symbolism associated with the legal process.[129]

At the most fundamental level, a lawyer should act with respect and deference when interacting with the bench. Some civility codes provide detailed examples of what is expected. For example, Alabama states that a lawyer should "dress in proper

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(N.J. State Bar Ass'n 1997) ("Clients should be advised against pursuing a course of action that is without merit, and should avoid tactics that are intended to harass, or drain the financial resources of the opposing party.").

125. GUIDELINES ON CIVILITY IN LITIG. art. V, subdiv. B (N.Y. State Bar Ass'n 1994); *see also* STANDARDS OF PROFESSIONALISM § 3.1(c) (Okla. Bar Ass'n) ("The timing and manner of service of papers will not be designed to annoy, inconvenience or cause disadvantage to the person receiving the papers; and papers will not be served at a time or in a manner designed to take advantage of an adversary's known absence from the office."); LAWYERS' PRINCIPLES OF PROFESSIONALISM para. 13 (Conn. Bar Ass'n) ("I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond . . . .").

126. PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH THE COURT Princ. 1 (N.J. State Bar Ass'n) ("To the court, a lawyer owes honesty, respect, diligence, candor and punctuality. A lawyer has a duty to act in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.").

127. *See* PROFESSIONALISM ASPIRATIONS art. IV cmt. A(4) (Minn. State Bar Ass'n) ("We will not engage in any conduct that brings disorder or disruption to the courtroom or administrative hearing area. We will advise our clients and witnesses appearing in these settings of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.").

128. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 6 (Md. State Bar Ass'n 1997) ("We will not engage in conduct that offends the dignity and decorum of judicial and administrative proceedings, bring [sic] disorder to the tribunal or undermines the image of the legal profession, nor will we allow clients or witnesses to engage in such conduct.").

129. TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. IV, § 1 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989) ("I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.").

attire" and should stand when addressing the court.[130] Pennsylvania goes further to provide specific direction to lawyers appearing before a court, stating that a lawyer should be courteous to the court and court personnel.[131] This includes addressing the judge as "Your Honor" or "the Court" and by beginning an argument with "May it please the court."[132] Pennsylvania adds that while in court, "lawyer[s] should refer to opposing counsel by [their] surname preceded by the[ir] preferred title."[133] Generally stated, a lawyer should act in a manner that respects the court and its decisions.[134]

A lawyer "should avoid visual [and] verbal displays of temper toward the court [and bench]," especially when the lawyer is on the losing side of a matter.[135] Furthermore, when appearing before a court, a lawyer should direct her arguments to the court, not opposing counsel, and should avoid embarrassing or personal criticism of opposing counsel or the court.[136] In addition, a lawyer should avoid "unfounded, unsubstantiated, or unjustified public criticism"[137] of the judiciary, and should actively protect the court system "from unjust criticism and attack."[138]

Obligations to courts extend beyond the duty of decorum and the appearance of the court; they also extend to substantive concerns. Lawyers should communicate

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130. ALA. STATE BAR CODE OF PROF'L COURTESY §§ 16-17 (Ala. State Bar 1992) ("A lawyer should stand to address the court, be courteous and not engage in recrimination with the court. . . . During any court proceeding, whether in the courtroom or chambers, a lawyer should dress in proper attire to show proper respect for the court and the law.").

131. 204 PA. CODE § 99.3(13) (2011).

132. *Id.*

133. *Id.* at § 99.3(12). North Carolina also gives specific guidance to lawyers in the courtroom:

> A lawyer in the courtroom should do the following whenever reasonably possible: [(1)] avoid interruption of opposing counsel except when necessary to voice an objection. [(2)] unless otherwise directed by the court, present an exhibit to opposing counsel before presenting the exhibit to a witness. [(3)] avoid standing between the witness and opposing counsel during examination. [(4)] provide opposing counsel with a copy of any opinion or document given to the court. [(5)] encourage appropriate courtroom behavior by clients and witnesses.

N.C. LAWYER PROF'L CREED: COURTESY TOWARD OTHER COUNSEL para. 6 (N.C. Bar Ass'n 1989).

134. TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. IV, § 7 ("I will respect the rulings of the Court.").

135. N.C. LAWYER PROF'L CREED: COURTESY TOWARD THE COURT para. 7 (N.C. Bar Ass'n) ("A lawyer should avoid visual or verbal displays of temper toward the court, and especially upon a bench ruling against him.").

136. 204 PA. CODE § 99.3(13).

137. A LAWYER'S CREED: ASPIRATIONAL IDEALS AS TO THE COURTS, OTHER TRIBUNALS, & TO THOSE WHO ASSIST THEM subdiv. b(5) (Miss. Bar Ass'n 1990).

138. PRINCIPLES OF PROFESSIONALISM: LAWYER'S RELATIONS WITH THE COURT Princ. 4 (N.J. State Bar Ass'n 1997) ("A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack."); *see also* TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. IV ("Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.").

honestly with the court on factual and legal issues because the court is relying on the lawyer's representations when resolving disputes.[139] For example, if a court requests a lawyer to draft an order, the lawyer should draft the order in a manner that correctly states the court's holding, should circulate the order to opposing counsel, and should seek to resolve issues before presenting the order to the court.[140] In addition, a lawyer must not engage in improper ex parte contacts with members of the judiciary.[141]

The obligation of the lawyer to inform clients and others about the needs to demonstrate deference and respect to the court, and to act to prevent clients and witnesses from disturbing courtroom decorum, is the second element of a lawyer's obligation to ensure proper conduct before courts.[142] This duty actually has two different components. The first is an obligation not to advise a client to engage in conduct that demonstrates disrespect for the court.[143] The second is a requirement to educate those involved in the legal process about the obligation of demonstrating respect for the court and explaining what conduct is expected.[144] Washington State's *Creed of Professionalism* puts the obligation succinctly:

> As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and of the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation process and the legal profession.[145]

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139. STATEMENT ON LAWYER PROFESSIONALISM art. I, subdiv. D(1) (Mass. Bar Ass'n 1989) ("A lawyer should conduct himself or herself in a manner which recognizes that the judge is obligated to resolve conflicting claims and must rely, in large measure, upon the lawyer for the representation of evidence to be used in resolving disputes; accordingly, a lawyer should strive to ensure that the judge is not burdened with a misapprehension of fact or law.").

140. HILLSBOROUGH CNTY. STANDARDS OF PROF'L COURTESY subdiv. H(3).

141. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 10 (Md. State Bar Ass'n 1997) ("We will avoid *ex parte* communications with the court, including the judge's staff, on pending matters in person (whether in social, professional, or other contexts), by telephone, and in letters and other forms of written communication, unless authorized.").

142. PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 3 (Va. Bar Ass'n 2009) ("In my conduct toward courts and other institutions with which I deal, I should . . . [e]xplain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions."); MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 6 ("We will educate clients and witnesses about proper courtroom decorum and to the best of our ability, prevent them from creating disorder or disruption in the courtroom.").

143. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 3 ("We will not encourage any person under our control to engage in conduct that would be inappropriate under [the civility code] if we were to engage in such conduct.").

144. A LAWYER'S ASPIRATIONAL IDEALS: AS TO THE COURTS & OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM subdiv. a(6) (Supreme Court of Ohio 1997) ("I should . . . [a]dvise clients about the obligations of civility, courtesy, fairness, cooperation and other proper behavior expected of those who use our system of justice.").

145. CREED OF PROFESSIONALISM para. 10 (Wash. State Bar Ass'n 2001).

H. *Act with Dignity and Cooperation in Pre-Trial Proceedings*

There is no aspect of litigation that prompts more allegations of incivility than pre-trial practice, and in particular, discovery.[146] Pre-trial is the period in which there exists the least amount of court supervision and lawyers tend to be willing to press the limits of zealous representation. Pre-trial is also a period in which the disclosure of potentially damaging or costly information takes place and attempts to limit, delay, or compel disclosure occur.[147] These types of disputes can be contentious. Therefore, it is no surprise that civility codes contain much guidance regarding conduct during pre-trial proceedings.

Overall, there is an obligation to utilize pre-trial processes to accomplish the just and efficient resolution of a dispute.[148] This includes the obligations to avoid "engag[ing] in excessive and abusive discovery" and to "comply with all reasonable discovery requests."[149] For example, depositions should be scheduled only to obtain needed facts or to perpetuate testimony; they should not be used as a tool to harass or increase litigation costs.[150] The same standard of need applies to both proposing and responding to interrogatories.[151] Pre-trial tactics should not be utilized merely to increase the litigation costs of the opponent.

Between counsel, there is an obligation of cooperation, truthfulness, and fair play. Lawyers should act in a courteous and respectful manner in pre-trial procedures.[152] In fact, a lawyer should not do anything in a deposition or negotiation

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146. *See* Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359, 362-63 (2001).

147. *See generally* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505 (2000).

148. *See* STATEMENT ON LAWYER PROFESSIONALISM art. I, subdiv. D(3) (Mass. Bar Ass'n 1989) ("A lawyer should not use the discovery process to accomplish ends other than the reasonable discovery of information necessary to a just resolution of the dispute.").

149. A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. B(6) (State Bar of Ariz. 2005) ("I will not engage in excessive and abusive discovery, and I will comply with all reasonable discovery requests . . . .").

150. PROFESSIONALISM ASPIRATIONS art. III cmt. D(5) (Minn. State Bar Ass'n 2001) ("We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.").

151. *Id.* art. III cmt. D(7)-(8) ("We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party. . . . We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.").

152. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. B(8) ("In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful . . . .").

that a lawyer would not do before a judge.[153] Specific examples of improper conduct in deposition include making improper objections, or instructing a witness not to answer merely to delay or obstruct.[154] Lawyers should not assert "speaking objections" that are intended to coach a witness how to answer a question.[155]

Agreement should be sought with regard to the exchange of information, and lawyers should seek to resolve objections by agreement.[156] Lawyers should not seek court intervention in an attempt to obtain discovery that is "clearly improper."[157] Lawyers should comply with reasonable discovery requests that are not subject to valid objection.[158] This includes an obligation to interpret document requests and interrogatories in a reasonable manner, and avoid overly narrow interpretations to evade disclosure of relevant and non-privileged information.[159] It also includes an obligation to produce documents in an orderly manner, and not in any way designed to be confusing or to make the document's discovery difficult.[160]

If the matter involves negotiation, lawyers should focus on matters of substance and not issues of form or style.[161] A lawyer should deliver to all counsel every written communication she sends to the court And, if feasible, the lawyer should send the communication at the same time and in the same manner as was sent to the court.[162]

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153. CREED OF PROFESSIONALISM para. 7 (Wash. State Bar Ass'n 2001) ("I will conduct myself professionally during depositions, negotiations and any other interaction with opposing counsel as if I were in the presence of a judge.").

154. *See* TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. III, § 17 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989).

155. UTAH STANDARDS OF PROFESSIONALISM & CIVILITY No. 18 (Utah Supreme Court 2003).

156. PLEDGE OF PROFESSIONALISM art. III, § 6 (Clark Cnty., Nev. Bar Ass'n 1997) ("I will make every effort to agree with other counsel as early as possible on the voluntary exchange of information and a plan for discovery . . . ."); CREED OF PROFESSIONALISM: LAWYER'S CREED subdiv. D (State Bar of N.M. 1989) ("I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests . . . .").

157. TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. III, § 18.

158. PROFESSIONALISM ASPIRATIONS art. III cmt. D(3) (Minn. State Bar Ass'n 2001) ("We will comply with all reasonable discovery requests. We will not resist discovery requests that are not objectionable.").

159. *See* UTAH STANDARDS OF PROFESSIONALISM & CIVILITY Nos. 17, 19 .

160. *See id.* No. 19.

161. CREED OF PROFESSIONALISM: LAWYER'S CREED subdiv. C (State Bar of N.M.) ("In the preparation of documents and in negotiations, I will concentrate on substance and content . . . .").

162. 204 PA. CODE § 99.3(14) (2011).

I. *Act as a Role Model to Client and Public and as a Mentor to Young Lawyers*

Throughout civility codes there is an underlying obligation on the lawyer to ensure that those the lawyer comes in contact with understand the definition of civility.[163] Of course, underlying this obligation is a belief by the drafters of the codes that there is a lack of understanding by those involved in the legal process of what civility entails.[164] Minnesota and Texas both broadly state this responsibility, providing that it is an obligation of a lawyer to "educate . . . clients, the public, and other lawyers regarding the spirit and letter" of the civility codes.[165]

A lawyer has two obligations related to educating others about civility. First, the lawyer must model proper conduct for clients and third parties.[166] In this way the lawyer can demonstrate that the legal system should not operate as a television drama. This obligation also seeks to instill in the client respect for the place of the judicial system in the dispute resolution process.[167] Lawyers likewise have the obligation to inform clients and others under the lawyer's direction or control what civility requires,[168] and to refrain from directing others to engage in conduct that would be uncivil if performed by a lawyer.[169]

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163. This article later discusses in greater depth the lawyer's duty to educate others on the rules of civility. *See* discussion *infra* Part III.G, I. However, it is worth noting here that this duty usually requires an attorney to "educate," "advise," or "encourage" others on specific and discrete obligations only. *See, e.g.*, 204 PA. CODE § 99.3(4) (providing that attorneys "should advise clients and witnesses of the proper dress and conduct expected"); MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 8 (Md. State Bar Ass'n 1997) (providing that attorneys ought to "educate . . . concerning the need to be punctual and prepared"); PLEDGE OF PROFESSIONALISM art. IV, § 1 (Clark Cnty., Nev. Bar Ass'n 1997) (suggesting attorneys should act so as to "encourage trust of the legal profession by members of the public . . . .").

164. *See, e.g.*, MD. STATE BAR ASS'N CODE OF CIVILITY pmbl. (explaining that "[c]ivility is the cornerstone of the legal profession" and implying that a code of civility is necessary to help the legal community realize that fact).

165. PROFESSIONALISM ASPIRATIONS art. I cmt. D (Minn. State Bar Ass'n 2001); *see also* TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. I, § 4 (Supreme Court of Tex. & Tex. Court of Criminal Appeals 1989) .

166. CREED OF PROFESSIONALISM: LAWYER'S CREED subdiv. E (State Bar of N.M.) ("I will strive to set a high standard of professional conduct for others to follow . . . ."); A LAWYER'S CREED: ASPIRATIONAL IDEALS AS A LAWYER subdiv. b (Miss. Bar Ass'n 1990) ("As a lawyer, I will aspire . . . [t]o model for others, and particularly for my clients, the respect due to those who we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.").

167. LAWYER'S CREED & ASPIRATIONAL STATEMENT ON PROFESSIONALISM: GEN. ASPIRATIONAL IDEALS subdiv. b (State Bar of Ga. 1990) ("To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.").

168. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 2 ("We will advise our clients and witnesses to act civilly and respectfully to all participants in the legal

Experienced lawyers also have an obligation to young lawyers who may not know the contours of the obligation of civility that a lawyer assumes. In this regard, more experienced lawyers must act as both a role model and a mentor to less experienced lawyers to ensure that they are aware of their obligations of civility.[170]

J. *Utilize the Court System in an Efficient and Fair Manner*

The final concept of civility is, in a sense, an overarching catchall provision. Lawyers should strive for orderly, economically efficient, and expeditious disposition of litigation and transactions.[171] Efficiency is a broad obligation that underlies a number of the civility obligations and multiple aspects of the legal process. Lawyers should advise clients early on regarding the costs and benefits of pursuing a particular cause of action[172] and should seek to articulate the disputed issues so the dispute can be resolved in a timely manner.[173] One aspect of efficiency is to pursue only those claims or defenses that have merit. Pursuing frivolous claims or defenses costs money and delays resolution of meritorious claims.[174] In addition, lawyers should consider whether pursuing an alternative form of dispute resolution would be a more expeditious and economical method to resolve disputes than litigation, and should

process."); PLEDGE OF PROFESSIONALISM art. III, § 7 (Clark Cnty., Nev. Bar Ass'n) ("I will advise my clients of the behavior expected of them before the court and other tribunals."); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM art. II, § 1 ("I will advise my client of the contents of this Creed when undertaking representation.").

169. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 3 ("We will not encourage any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.").

170. *See* PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS Princ. 1 (Va. Bar Ass'n 2009) ("In my conduct toward everyone with whom I deal, I should . . . [a]ct as a mentor for less experienced lawyers and as a role model for future generations of lawyers.").

171. MD. STATE BAR ASS'N CODE OF CIVILITY: LAWYERS' DUTIES § 5 ("We will strive for orderly, efficient, ethical and fair disposition of litigation, as well as disputed matters that are not yet the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of business transactions.").

172. STATEMENT OF PROFESSIONALISM para. 8 (Or. State Bar 2006) ("I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.").

173. STATEMENT ON LAWYER PROFESSIONALISM art. II, subdiv. A(d) (Mass. Bar Ass'n 1989) (providing that an attorney should "present issues efficiently without unnecessarily burdening opposing counsel by discovery or otherwise"); HALLMARKS OF PROFESSIONALISM No. 7 (Kan. Bar Ass'n 1987) (suggesting that an ethical professional "[e]xpedites the resolution of disputes through research, articulation of claims, and clarifying the issues").

174. PLEDGE OF PROFESSIONALISM art. I, § 1 (Clark Cnty., Nev. Bar Ass'n 1997) ("I will achieve my client's lawful objectives as expeditiously and economically as possible, and I will advise my client against pursuing any matter that is without merit . . . .").

advise clients accordingly.[175] Similarly, lawyers should always be open to the possibility of settlement of disputes so they can be resolved as soon as possible.[176]

IV. CIVILITY AS DISTINCT FROM LEGAL ETHICS AND PROFESSIONALISM

The identification of the core concepts of civility is the first step to identifying civility as a unique professional responsibility obligation. The next task is to show how civility interacts with, and is distinguished from, other established obligations of professional responsibility—specifically, legal ethics and professionalism. This part seeks to identify these similarities and differences.

As an initial matter, it is impossible to study a lawyer's professional obligations as a monolithic and consistent topic. For example, the meaning of the phrase "legal ethics" has shifted over time; a lawyer from the year 1900 would hardly recognize how the modern lawyer uses the term.[177] To understand how "civility" relates to these established professional responsibilities, it is important to understand the development and interaction of these obligations. This is particularly true with regard to legal ethics, the most evolved professional responsibility.

To understand how legal ethics differs from what we consider civility today, it is important to explore the meaning of the term "legal ethics" as developed over time. The development does not follow a neat linear path. Instead, certain significant events can be seen as markers that changed the definition of legal ethics. These events roughly coincide with codification of lawyer regulations by the ABA. Thus, the change in the conception of legal ethics can be roughly traced as follows: (a) the personal ethos era (pre-1908); (b) the *Canons of Ethics* era (1908-1970); and (c) the *Model Code of Professional Responsibility* and *Model Rules of Professional Conduct* era (1970-present).

A. *Personal Ethos Era (Pre-1908)*

The personal ethos era, which existed prior to 1908, was marked by two defining characteristics. First, there was a decentralized regulation of the legal profession.

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175. CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 13(a) (State Bar of Cal. 2007) ("An attorney should advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution."); STANDARDS OF PROFESSIONALISM § 2.10 (Okla. Bar Ass'n 2006) ("We will consider whether the client's interests can be adequately served and the controversy more expeditiously and economically resolved by arbitration, mediation or some other form of alternative dispute resolution, or by expedited trial; and we will raise the issue of settlement and alternative dispute resolution as soon as a case can be evaluated and meaningful compromise negotiations can be undertaken.").

176. *See* STANDARDS OF PROFESSIONALISM § 2.10 (Okla. Bar Ass'n).

177. *See* 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, 426 (2005).

Prior to the adoption of the ABA *Canons of Ethics* in 1908, most states did not have codified ethical rules or guidelines.[178] During this time, "ethical norms developed largely through professional traditions and informal community oversight."[179] Deviant lawyers were constrained by the norms of the profession,[180] and were disciplined by voluntary bar associations and ad-hoc evaluations by judges as a matter of inherent power.[181] Second, lawyer ethics during this era was viewed through the prism of morality:

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178. At the time the ABA adopted the *Canons of Ethics* in 1908, only eleven states had enacted some form of ethical guidelines: Alabama (1887); Georgia (1889); Virginia (1889); Michigan (1897); Colorado (1898); North Carolina (1900); Wisconsin (1901); West Virginia (1902); Maryland (1902); Kentucky (1903); and Missouri (1906). George P. Costigan, Jr., Dean, Univ. of Neb. Coll. of Law, The Canons of Legal Ethics, Address Before the Lancaster County, Nebraska Bar Association (Mar. 27, 1909), *in* 21 GREEN BAG 271, 274 (1909).

179. DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY 43 (2d ed. 1998); *see also* Barton, *supra* note 177 ("In the earliest days of American lawyers there was little consideration of 'legal ethics' as a distinct entity. The ethical and moral obligations of lawyers derived largely from religious principles, and lawyer conduct was regulated through the natural peer pressure of a small, homogeneous group or through the common law 'summary jurisdiction' each court retained over the lawyers who practiced before them." (footnotes omitted)).

180. Edwin Baker Gager, Judge, Conn. Superior Court, Professor, Yale Law Sch., The Duties of Attorney, Address Before Connecticut Bar Applicants (June 20, 1911), *in* 21 YALE L.J. 72, 74-75 (1911) ("What I want you to note here for a moment is that these rules of common honesty grouped together under the term 'legal ethics' are not by authority imposed upon lawyers from without, but they are drawn from observation of the actual conduct and practice of the honorable, high minded members of the profession. They are, so to speak, the customary law of lawyers in their professional relations, and their binding force lies in the fact that for hundreds of years they have in practice been recognized as vital to the usefulness and the continued existence, even, of the legal profession."); *see also* Book Note, 20 YALE L.J. 336, 336 (1911) (reviewing GLEASON L. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER (1910)) ("A lawyer should depend, not only on his personal notion of right and wrong, but also on the long established customs and traditions of the profession.").

181. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 intro. note (1998) ("From colonial times until late in the 19th century, lawyer discipline was almost entirely a function of courts and voluntary bar associations. A lawyer would be proceeded against in a show-cause proceeding before a court, at the suit either of an injured client, an adversary lawyer, or a voluntary bar association."); *see also Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1857) ("[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."); Orrin N. Carter, *Ethics of the Legal Profession* (pt. 3), 9 ILL. L. REV. 453, 463 (1915) ("The advantage of some method of disciplining lawyers who do not

> [L]et me remind you that legal ethics is not strictly a special kind of ethics or morals, but it consists in the application of those general moral rules which should govern the conduct of us all, to those special relations arising from the nature of the lawyer's business. If, in the broad sense, a man is sound morally, his legal ethics will cause him little difficulty.[182]

In sum, during this era legal ethics were viewed largely as a matter of personal and professional morality learned through a proper upbringing and enforced through a desire to remain in good standing with the legal guild. Legal ethics was defined as the personal ethos (or character) of the lawyer, and this character guided the lawyer's decisions in a particular case.[183] In fact, there was a belief that what was morally wrong could not be ethically or professionally right.[184] This philosophy held so long as the legal profession was a closed society and lawyers operated as solo practitioners or in small firms and communities. The changing nature of the legal profession and of law practice in the early twentieth century, however, resulted in a movement to codify ethical standards.[185]

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comply with the ethics of the profession has always been appreciated. The right to discipline attorneys by suspension or disbarment, as well as by contempt proceedings, has been exercised from the earliest times by the courts. Because attorneys are officers of the court, this power has always been exercised, in the absence of constitutional or statutory restrictions, by all courts of general or superior jurisdiction.").

182. Gager, *supra* note 180, at 75.

183. *See id.* at 77.

184. *See id.* at 75.

185. Costigan, *supra* note 178, at 271. In 1909, the Dean of the University of Nebraska College of Law noted an emerging need for new ethical standards:

> The changing conditions of professional practice, tending in the direction of commercializing a large part of the bar of the country, both in and out of our cities, and in particular the weakening of an effective professional public opinion due chiefly to the growth of large cities with their infinite possibilities of concealed wrongdoing, have combined, in the opinion of reflective lawyers, to create a situation calling for something more definite in the way of rules of professional ethics than we have had in the past.

Id. The ABA itself noted four reasons for adopting the 1908 *Canons:*

> [(1)] We know [the republic] cannot be so maintained unless the conduct and motives of the members of our profession . . . are what they ought to be. It therefore becomes our plain and simple duty, our patriotic duty, to use our influence in every legitimate way to help make the American bar what it ought to be. A code of ethics, adopted after due deliberation, . . . is one method in furtherance of this end.
>
> . . . [(2)] We cannot be blind to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past, and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood, or of personal aggrandizement. . . . Never having realized or grasped that indefinable ethical something which is the soul and spirit of law and

This changing mindset toward professional responsibility and ethics coincided with a larger philosophical mood of the time. During the late nineteenth and early twentieth centuries, there was a movement in the fields of law, politics, and government—promoted by the progress of the natural sciences through the scientific method—to develop uniform laws or rules that could provide, with scientific certainty, what was and was not appropriate behavior.[186] This philosophical movement, combined with changes in the profession itself, led to a belief that the proper ethos could be distilled into a certain number of rules or laws.[187] This concept

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> of justice, they not only lower the morale within the profession, but they debase our high calling in the eyes of the public.
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> . . . [(3) The standards of] "[g]ood behavior" [for lawyers] should be defined and measured by such ethical standards, however high, as are necessary to keep the administration of justice pure and unsullied . . . . [T]he adoption and promulgation of a series of reasonable canons of professional ethics, in the form of a code by the American Bar Association, cannot but have a salutary effect upon the administration of justice, and upon the conduct of lawyers generally, whether on the bench or at the bar.
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> . . . [(4) M]any men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation.

Henry St. George Tucker et al., *Report of the Committee on Code of Professional Ethics*, 29 ANN. REP. A.B.A. 600, 600-03 (1906).

186. *See* George Trumbull Ladd, Professor, Yale Univ., Ethics and the Law, Lecture Before the Yale Law Sch. (Mar. 10, 1909), *in* 18 YALE L.J. 613, 614 (1909). In his 1909 discussion on ethics, Professor Ladd noted:

> Ethics is the science of human conduct—its sources, its development, its sanctions, and its most general principles—as related to a rational ideal. Or, to define more strictly this science . . . by ethics we mean the collective sentiments, judgments, and approved practices of the body of the people, with respect to what is deemed right and wrong in conduct, as measured by a certain ideal standard of character—in a word, the public conscience or moral consciousness.

Id. (internal quotation marks omitted). For more information regarding this movement, see JOHN G. GUNNELL, THE DESCENT OF POLITICAL THEORY: THE GENEALOGY OF AN AMERICAN VOCATION (1993). This infatuation with the scientific method operated in professions throughout the society at the time. *See* MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 5-6 (1978). Professor Schudson defines the difference between fact and value in journalism this way:

> Facts . . . are assertions about the world open to independent validation. They stand beyond the distorting influences of any individual's personal preferences. Values . . . are an individual's conscious or unconscious preferences for what the world should be; they are seen as ultimately subjective and so without legitimate claim on other people.

Id. Journalists responded to the divide between facts and values by adopting "objectivity" as their standard. *See id.* at 6-7.

187. *See* Ladd, *supra* note 186; Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1310 (1992).

provided the groundwork for the ABA's 1908 codification of the *Canons of Ethics* ("*Canons*").

B. *The 1908 Canons of Ethics Era*

In 1908, after two years of study, the ABA adopted the *Canons of Ethics*.[188] The *Canons*, as adopted, contained thirty-two provisions which were intended to be a codification of the "unwritten law," and to set out "statements of principles and rules accepted and acknowledged by reputable attorneys . . . ."[189] Justification for adopting the *Canons* in a codified form was to inform the new (and ever more diverse) members of the bar, who were viewed as not having the same moral compass as prior generations, of their ethical obligations.[190] In this sense, the *Canons* were adopted primarily as a primer on morality, and not as a set of disciplinary rules.[191] In fact, in *An Essay on Professional Ethics*, a seminal work on which the *Canons* were based, Chief Justice George Sharswood of the Pennsylvania Supreme Court noted that "[t]here is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."[192] Thus, Chief Justice Sharswood recognized early on the need "to arrive at some accurate and intelligible rules by which to guide and govern the conduct of professional life."[193] Following this notion, the 1908 *Canons* were perceived as setting out "common

188. Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW. 483, 496 (1932).

189. Hepp v. Petrie, 200 N.W. 857, 859 (Wis. 1924).

190. *See* Comment, *Declaration Concerning Professional Ethics Recently Adopted by the State Bar Association of Connecticut*, 19 YALE L.J. 571, 571-72 (1910) ("If all men were endowed with [sound wisdom and high moral character] at the beginning of their professional lives, such codes would be of little value, save to indicate to the outside world what standards prevail within the profession, and thereby enhance the confidence in and respect for those who conform to those requirements, and are in good standing in their respective professions. . . . Unfortunately, however, this is not the case, and many young men come to the Bar lacking the benefits of sound home, social and religious training. Sometimes—though rarely—in such men we find a strong innate sense of right, and of consideration for others, with whom all that may be found in a code of ethics would be intuitive."); Robert Sprague Hall, *The Ethics of the Law*, LAW STUDENT'S HELPER, Apr. 1913, at 10, 10 ("[T]his condition of affairs, I mean the popular estimate of the moral standard of lawyers, has been the chief incentive to the drawing up of codes of ethics like the Canons, by men who look upon the profession of the law as something better than a trade, and whose pride has felt the sting of the widely-current distrust of the legal practitioner."). The *Canons* were also seen as a benefit, even for lawyers of "highest training," because they reminded attorneys of the rules and the need to measure professional conduct against them. *See* Comment, *supra*, at 572.

191. *See* Comment, *supra* note 190.

192. SHARSWOOD, *supra* note 20, at 55.

193. *Id.* at 56.

sense and common ideas of right and wrong," thereby providing the essence of what it meant to be an ethical lawyer.[194]

Because of their status as statements of moral guidance, the 1908 *Canons* were general and broad. The tenor was explicitly aspirational, with more emphasis on guidance than the specificity needed for enforcement. Over time, however, bar associations and courts began to rely on the provisions of the *Canons* to impose discipline on attorneys.[195] As the *Canons* developed into enforceable obligations, lawyers expressed concern that the *Canons* were too general and vague to both guide lawyers in appropriate conduct and inform courts and disciplinary authorities on what could be enforced as unethical.[196] In addition, scholars, jurists, and lawyers began to question whether the rules regulating lawyer conduct should be statements of morality or more specific statements regulating the practice of law.[197] In 1930 it was observed: "It is submitted that there is much in the canons of professional ethics that can be called 'ethics' only at the expense of confusing ethics and morality on the one hand with approved standards of professional decorum on the other."[198]

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194. Hall, *supra* note 190, at 13.

195. Barton, *supra* note 177, at 431-34.

196. *See id.* at 434-35 n.89; Edward L. Wright, *Study of the Canons of Professional Ethics*, 11 CATH. LAW. 323, 323 (1965) ("[T]he canons of Professional Ethics of the American Bar Association need revision in four principal particulars: (1) there are important areas involving the conduct of lawyers which are either partially covered or totally omitted; (2) many Canons which are sound in substance have been awkwardly or deficiently stated; (3) practical sanctions for violations are virtually non-existent; and (4) changing conditions in an urbanized society require new statements of professional responsibility."); Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, The Public Influence of the Bar, Address at the Dedication of the University of Michigan Law Quadrangle (June 15, 1934), *in* 48 HARV. L. REV. 1, 10 (1934) (stating that revisions to the 1908 Canons "must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole"); *see also* RHODE, *supra* note 179, at 44; Philbrick McCoy, *The Canons of Ethics: A Reappraisal by the Organized Bar*, A.B.A. J., Jan. 1957, at 38, 38.

197. *See, e.g.*, Will Shafroth, *The Forty-Five Commandments of a Lawyer*, A.B.A. J., June 1932, at 412, 413 ("[T]he subject of legal ethics divides itself into two distinct categories. It consists first of a body of moral principles, such as those which forbid a lawyer . . . to act in any way in which an honorable man would not act. On the other hand, there are a number of principles which deal with what may be termed the etiquette of the profession, and which are not concerned with morality . . . ."); Olin E. Watts, Chairman, Nat'l Conference of Bar Exam'rs, Advancement of Professional Ideals in Law Students, Address Before the National Conference of Bar Examiners and the American Bar Association Section of Legal Education and Admissions to the Bar (Aug. 25, 1955), *in* 33 U. DET. MERCY L. REV. 314, 317 (1956) ("Too often legal ethics connotes the subject matter contained in the canons of professional ethics. An understanding of these rules does not insure ethical conduct.").

198. Charles H. Kinnane, *Compulsory Study of Professional Ethics by Law Students*, A.B.A. J., Jan. 1930, at 222, 223.

The assaults on the base of the *Canons* were an attack on their morality and ethos-based emphasis. The *Canons* were characterized as "generalizations designed for an earlier era" that focused disciplinary action on the "inconsequential."[199] The feeling was that, with changes in the nature of society and the legal profession, the *Canons* should be reevaluated.[200] The shift from rural to more urban practices as the country industrialized called for rules that specifically addressed issues faced by urban lawyers.[201] In addition, practice was evolving beyond the sole practitioner primarily involved in litigation. Development of new areas of law (such as taxation, transportation law, regulation of business, security transactions, workers' compensation, administrative law, and labor law) led away from the general, sole practitioner to lawyers who practiced in firms or who were employed by government agencies.[202] Another development was the rise of pre-trial discovery techniques, as well as various specialty courts and the use of arbitration and mediation.[203] With these developments, a code of ethics focusing on the "individual courtroom advocate" was viewed as inadequate and outdated.[204]

In sum, changes in society and the way law was practiced led to the need to reevaluate the 1908 *Canons* and this debate had a significant impact on how "legal ethics" was perceived by members of the bar. While the 1908 *Canons* were presented as fundamental and unchanging core tenets of legal ethics, by the mid-1960s the view was that the rules of ethics should reflect the more practical realities of the legal profession.[205] One author noted in 1965 that ethical obligations changed

199. Wright, *supra* note 196, at 324; *see also* Harry Cohen, *Ambivalence Affecting Modern American Law Practice*, 18 ALA. L. REV. 31, 31 (1965) ("Many rules and principles which purport to guide professional conduct today are based on the premise that the American lawyer is in the same economic and professional environment as his predecessors who practiced in the nineteenth century or as barristers in the English system.").

200. Donald T. Weckstein, *A Re-Evaluation of the Canons of Professional Ethics – Evaluated*, 33 TENN. L. REV. 176, 180 (1966) (listing numerous changes in contemporary society and law practice that justified reevaluating the *Canons* at that time).

201. *See* Cohen, *supra* note 199, at 35; McCoy, *supra* note 196, at 39.

202. Cohen, *supra* note 199, at 35 ("In marked contrast to the prior century's typical one or two man office, lawyers began organizing large law firms in which teams of specialists could take a comprehensive view of clients' problems. This produced a new type of lawyer who was an expert in planning, manipulation, and negotiation to achieve desired ends while advocating legal conflict, and who was more interested in results than in litigation." (footnotes omitted)); McCoy, *supra* note 196, at 39.

203. *See* Edwin W. Tucker, Brotherhood of R.R. Trainmen v. Virginia*: A Call to Realism in Legal Ethics*, 14 EMORY J. PUB. L. 3, 18 (1965) ("While the pre-trial procedure has found a great deal of support as a tool in clearing congested trial calendars, one cannot help but recognize the fact that, in effect, there has to some extent been an admission that the long established rules underlying the legal process in some respects have proved to be less than satisfactory under the present environmental conditions."); McCoy, *supra* note 196, at 39.

204. McCoy, *supra* note 196, at 40.

205. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239,

over time: "What may be viewed as ethically improper at one time may be considered appropriate at another."[206] This mindset was a significant break from the personal ethos era of legal ethics.

C. *The Code of Professional Responsibility and the Rules of Professional Conduct Era*

With rising discontent over the 1908 *Canons*, members of the bar (voiced through state bar associations and the ABA) faced the following question: if the morality-driven *Canons* were insufficient, what should replace them? The solution, adopted in the 1969 *Code of Professional Responsibility* ("*Code*"), was to combine the rules of morality and rules of ethics:

> A code of professional responsibility for lawyers should serve a two-fold purpose. First, the code (or Canons) should be fully stated to aid the lawyer in his search for appreciation and understanding of the ethics, high principles and dedicated aspirations of the legal profession. In this sense it is truly a moral code, addressed primarily to the lawyer's conscience. Secondly, it should be a statement of the commonly accepted minimum standards of professional responsibility, in which sense it is a binding legal code enforceable by disciplinary action of the courts.[207]

This dual response was achieved by dividing the *Code* into three parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons constituted broad "statements of axiomatic norms."[208] The morality-based Ethical Considerations were "aspirational in character and represent[ed] the objectives toward which every member of the profession should strive."[209] In contrast, "[t]he Disciplinary Rules state[d] the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[210]

The *Code*'s attempt to serve a dual role of providing moral and ethical guidance was criticized almost immediately. One author described the *Code* as the adolescent stage in the development of rules of professional responsibility with the next stage being a bright-line set of obligations and prohibitions.[211] The *Code* was not only

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1257-60 (1991).

206. Tucker, *supra* note 203, at 19.

207. Wright, *supra* note 196, at 325; *see also* Barton, *supra* note 177, at 436-37 ("[T]he Code is the ABA's first explicit division between 'professionalism' and minimum Rules: the Disciplinary Rules govern lawyer conduct, and the Canons and the Ethical Considerations are relegated to food for thought.").

208. MODEL CODE OF PROF'L RESPONSIBILITY preliminary statement (1969).

209. *Id.*

210. *Id.*

211. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, A.B.A. J.,

criticized for its structure and emphasis, but also faulted for numerous "discrepancies" that were discovered: discrepancies within the *Code*, between the *Code* and substantive law, and between what the *Code* provided and what lawyers and the public expected.[212] In addition, courts were becoming involved with issues of attorney regulation such as "minimum fees, advertising, solicitation, group legal services, and pre-trial publicity."[213] These cases further emphasized the need to make clear the ethical ramifications of these rulings.

In response, a committee was established to propose revisions to the *Code* in 1977 (less than a decade after the *Code*'s adoption), and the ABA approved a significantly revised and reorganized *Code* in 1983.[214] The new standards, titled the *Model Rules of Professional Conduct*, adopted the structure of the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*.[215] The new ABA rules abandoned the "Ethical Considerations" and "Disciplinary Rules," and instead opted for black-letter rules with accompanying comments.[216] Today, almost all states have adopted a version of the 1983 standards.[217] Adoption of the *Model Rules of Professional Responsibility* and the omission of statements of morality marked a final break between the concepts of legal ethics and morality.[218]

As legal ethics moved from moral guidelines to disciplinable rules, the phrase "legal ethics" lost its moral context and became a question of compliance with

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May 1977, at 639, 639 ("[The Code is] a transitional document, representing a middle stage in the development of law for lawyers. The hortatory tone of the canons, the undue concern for protecting the profession in many of the ethical considerations, and the self-serving nature of many of the disciplinary rules are points to criticize, but they should not obscure the fact that the code is a major step forward.").

212. Robert J. Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, A.B.A. J., Sept. 1981, at 1116, 1116.

213. *Id.*; *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a blanket restriction on in-person solicitation); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (invalidating a blanket ban on lawyer advertising); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (striking down minimum fee schedules); United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) (striking down a restriction on group legal services); Sheppard v. Maxwell, 384 U.S. 333 (1966) (addressing issues of pretrial publicity).

214. *See* AM. BAR ASS'N, ABA ANNUAL REPORT 1982-1983, at 13 (1983), *in* A.B.A. J., Jan. 1984, at 79.

215 Kutak, *supra* note 212, at 1117 (recommending the adoption of the Restatement format, calling it more "familiar and convenient").

216. *Id.*; *see also* AM. BAR ASS'N, *supra* note 214, at 13 ("The Model Code of Professional Responsibility had been passed in 1969, but quickly became outdated as the practice of law changed dramatically during the 1970s.").

211. Ctr. for Prof'l Responsibility, *Alphabetical List of States Adopting Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Oct. 10, 2011). As of October 2011, California is the only state that has not adopted a version of the *Model Rules of Professional Conduct*. *Id.*

218. Barton, *supra* note 177, at 440-41.

minimal regulatory standards.[219] Today when lawyers speak of "ethical" conduct, the most likely connotation is the minimal behavior required to avoid sanction—not whether the conduct is morally right or wrong. This is a far cry from the 1908 *Canons of Ethics*.

In sum, the evolution from a consideration of ethos to the current reliance on minimum guidelines to avoid discipline has given the term "legal ethics" a uniquely narrow meaning, largely stripped of its moral context.[220] The rules set out in disciplinary codes today are "mainly concerned with lawyer functions performed by a lawyer in the course of representing a client and causing harm to the client, to a legal institution such as a court, or to a third person."[221] While these rules set out a lawyer's obligations to the court, client, or third person, it is now left to the individual lawyer to consider the morality of her actions—apart from ethical considerations.[222]

D. *Defining Professionalism*

The focus until now has been to set out the development of the current understanding of legal ethics.[223] There remains another commonly cited obligation of lawyers—professionalism. Do lawyers have unique professional obligations that are different from those required as a matter of ethics? It is difficult to pin down a definition of "professional" and "professionalism" because the terms are used interchangeably to refer to a number of different concepts.[224] For example, the

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219. *Id.* ("[I]n legal parlance 'legal ethics' has become synonymous with the *minimum* rules governing attorney conduct. In light of the explicitly moral use of 'ethics' in common parlance, the application of the phrase 'legal ethics' to minimum rules carries substantial interpretive freight. The phrase 'legal ethics' imbues the Rules with a depth and a meaning they no longer have." (footnotes omitted)).

220. *See* Allen K. Harris, *The Professionalism Crisis—the 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 567 (2002).

221. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. b (1998).

222. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15-16 (1951) ("[T]here is nothing unethical in taking a bad case or defending the guilty or advocating what you don't believe in. . . . We are not dealing with the morals which govern a man acting for himself, but with the ethics of advocacy. We are talking about the special moral code which governs a man who is acting for another. Lawyers in their practice—how they behave elsewhere does not concern us—put off more and more of our common morals the farther they go in a profession which treats right and wrong, vice and virtue, on such equal terms.").

223. In highlighting the distinction between ethics and morals, this article makes no normative claims about the division but merely emphasizes how that distinction impacts professional responsibility as a whole. Professor Barton, by contrast, identifies normative problems and solutions relating to the current rules' division of "minimalist" obligations on the one hand and "broadly ethical" (what I have called "moral") obligations on the other hand. *See generally* Barton, *supra* note 177.

224. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995) ("No term in the legal lexicon has been more abused than

practice of law is a profession—an "organized group pursuing a learned art in the public service."[225] Therefore, professionalism can refer generally to the nature of the profession. Professionalism can also refer to conduct—a lawyer who is rude or uncivil may be said to be acting "unprofessionally."[226] Professionalism is also used to indicate a violation of a lawyer's ethical obligations—a lawyer who is disciplined is likewise said to have acted "unprofessionally."[227] In fact, the most current version of the ABA's model rules includes the term "professional" in its title.[228] These varying views of professionalism are not inherently incorrect—the concept certainly can encompass all of these concerns.[229] The risk, however, is that by taking on too many meanings, "professionalism" becomes a generic phrase with no deeper substantive meaning that fits any occasion.

The goal here is to present a narrow definition of "professionalism." First, what professionalism is not: it is not the same thing as legal ethics. Professor Roger

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'professionalism.'").

225. Robert F. Drinan, *The Responsibility of the Lawyer to His Profession*, 42 J. AM. JUDICATURE SOC'Y 192, 192 (1959) (internal quotation marks omitted); Luther W. Youngdahl, Judge, U.S. Dist. Court for the D.C., The Lawyer's Responsibilities, Address at the University of Missouri School of Law Annual Banquet, *in* 20 MO. L. REV. 307, 311 (1955) ("Rightly conceived, . . . [the legal] profession is a branch of the public service rather than an ordinary business vocation. . . . The prime object of the profession should be the service it can render to humanity—reward of financial gain should be a subordinate consideration, and the lawyer with the proper conception of the profession need have no fear of financial reward.").

226. Joseph J. Ortego & Lindsay Maleson, *Incivility: An Insult to the Professional and the Profession*, BRIEF, Spring 2008, at 53, 54 ("While both professional and unprofessional behavior can readily be identified when witnessed, various authors have attempted to define professionalism, which is also known as civility."); *see also* Barton, *supra* note 177, at 445 n.127 (discussing various uses of the term "professionalism"). *See generally* Orrin K. Ames III, *Concerns About the Lack of Professionalism: Root Causes Rather than Symptoms Must Be Addressed*, 28 AM. J. TRIAL ADVOC. 531 (2005) (examining the root causes of unprofessional conduct).

227. Barton, *supra* note 177, at 441 ("In a further unlikely turn of nomenclature, professionalism has come to embody what a lawyer 'should' do, *i.e.*, professionalism has come to cover a lawyer's ethical duties. The dictionary and common parlance meaning of professionalism, however, is devoid of any moral significance; it simply embodies the 'qualities or features, as competence, skill, etc., characteristic of a profession or a professional.'" (footnote omitted) (quoting 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2368 (Lesley Brown ed., 1993))).

228. MODEL RULES OF PROF'L CONDUCT (2009).

229. COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, ... IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) ("'Professionalism' is an elastic concept the meaning and application of which are hard to pin down. That is perhaps as it should be. The term has a rich, long-standing heritage, and any single definition runs the risk of being too confining."); Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 139 (2011).

Cramton puts it this way: "[T]he contemporary evolution of ethical codes into quasi-criminal rules of minimum conduct largely abandons their role as a source of vocation or calling. The morality of aspiration, central to professionalism, is eclipsed by the morality of duty."[230] To put it another way, ethical obligations can be seen as the shall-nots of lawyering, and professionalism as creating affirmative obligations of the lawyer to the broader society.

What professionalism does encompass is "the full measure of the profession's aspiration and of society's legitimate expectations."[231] The *professional* obligations of lawyers are those responsibilities assumed, not on behalf of the client or even the court, but rather on behalf of society as a whole. Attorney and scholar Walter E. Craig states: "Today, as never before, ... [it is] incumbent upon the members of the legal profession to assert leadership in the struggle to maintain the philosophy of freedom under law, respect for law and property rights, and respect for the inalienable rights of the individual citizens."[232] Thus, it is the obligation of the lawyer to society, and more specifically, the fundamental tenets of democratic society, that set professionalism apart from morality or ethics.[233]

Adoption of the current rules of ethical conduct placed a particular strain on consideration of the ideals of professionalism. With specific ethical obligations in place, law schools began offering professional responsibility courses in which the primary focus was on the ethical rules themselves—neglecting discussions of lawyers' obligations to overarching societal interests.[234] In questioning the neglect of the teaching of professional responsibility beyond the *Canons*, one author commented as follows:

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230. Roger C. Cramton, *Teaching and Learning Professionalism*, *in* TEACHING AND LEARNING PROFESSIONALISM 7, 10 (1996).

231. Walter E. Craig, *Ethical Responsibilities of the Individual Lawyer*, 17 ARK. L. REV. 288, 289-90 (1963) (internal quotation marks omitted).

232. *Id.* at 291; *see also* Drinan, *supra* note 225, at 194 ("Lawyers by their very nature are dedicated to the public interest. Lawyers are the servants of the ministry of justice.").

233. *See* Youngdahl, *supra* note 225, at 313 (calling for the "rebirth of the professional spirit" and describing the lawyer's duty of professionalism as the duty "to see that the foundations of free government are not shaken; that sound thinking and action prevail; that the citizens are aroused to constant dangers that lurk at every turn and to the necessity of eternal vigilance"); *see also* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, A.B.A. J., Dec. 1958, at 1159, 1159 ("The legal profession has its traditional standards of conduct, its codified Canons of Ethics. The lawyer must know and respect these rules established for the conduct of his professional life. At the same time he must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility."); *cf.* Ross L. Malone, *The Lawyer and His Professional Responsibilities*, 17 WASH. & LEE L. REV. 191, 191 (1960).

234. Maksymilian Del Mar, *Beyond Text in Legal Education: Art, Ethics, and the Carnegie Report*, 56 LOY. L. REV. 955, 976-77 (2010) (noting that law school ethics courses focus on the technical aspects of law practice without addressing its moral aspects).

> Inculcation of professional standards is far more than a study of the rules laid down in the canons of professional ethics and a few court decisions involving disciplinary proceedings. It must be an attempt to develop professional character. While the term 'legal ethics' is used frequently by leaders seeking an improvement in the instilling of professional attitudes and ideals, the objective sought is an 'intelligent and whole-hearted attempt to develop Professional Character.'[235]

In 1986, the ABA issued a report defining professionals as those "pursuing a learned art . . . in the spirit of public service. . . ."[236] The emphasis on public service or the social responsibility of the lawyer is at the heart of the definition of professionalism.[237] A lawyer's "social conscience" is defined as

> a sympathetic understanding of one's age, openness of mind, courage, independence, hatred of oppression, and an abiding determination to do one's bit, as opportunity offers, toward making the world a more decent habitation for the human spirit, and the administration of justice a fitter and more perfect instrument for the consummation of that greater end.[238]

To demonstrate the relationship between the practice of law and professionalism, the right to practice in the legal profession entails an agreement

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235. Watts, *supra* note 198, at 318 (quoting Bernard C. Gavit, *Legal Ethics and the Law Schools*, A.B.A. J., May 1932, at 326, 326). In this same article, Watts quotes Justice Harlan Stone as saying:

> [T]here is grave danger to the public if this proficiency [in obtaining qualified law students] be directed wholly to private ends without thought of social consequences, and we may well pause to consider whether the professional school has done well to neglect so completely the inculcation of some knowledge of the social responsibility which rests upon a public profession. I do not refer to the teaching of professional ethics.

Id. at 314 (quoting Stone, *supra* note 196, at 13-14). Watts also relates the experiences of a legal ethics professor who "felt that instead of conveying to the student some idea of the dignity of the legal profession he was simply laying down ground rules which, if the student followed, would enable him to avoid trouble." *Id.* at 318.

236. COMM'N ON PROFESSIONALISM, *supra* note 229 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)).

237. Jack R. Frymier, *Professionalism in Context*, 26 OHIO ST. L.J. 53, 53 (1965) ("Four distinguishing characteristics are evident for those persons and groups recognized as truly professional: professionals perform an essential service for their fellow man; they make special judgments which affect these other beings; they have a code of ethics; and they exercise control of their professional peers to achieve the service ends toward which they aspire.").

238. Lloyd K. Garrison, Dean, Univ. of Wis. Law Sch., Character Training of Law Students from the Point of View of the Law Schools and the Bar, Address Before the American Bar Association Section of Legal Education and Admissions to the Bar, *in* 8 AM. L. SCH. REV. 592, 596-97 (1936).

between the lawyer and society where, in return for obtaining a license to practice law, lawyers agree to ensure that their actions serve the public good (even if those interests conflict with those of an individual client).[239] In short, professionalism is defined not as what a lawyer must do (obey ethics rules while acting zealously on behalf of a client), but by what a lawyer *should* do to protect the integrity of the legal system.[240]

The focus of professionalism is different not only from ethics, but also morality. While morality focuses on a lawyer's obligation to bring his personal beliefs of right and wrong to bear in his practice, professionalism is concerned with broader concerns of how the lawyer's actions will impact the profession itself. As one commentator put it, "[t]o us it makes no difference that John Doe is bound for Hell, if his sins *en route* do not besmirch the fair name of our calling."[241] While hyperbolic, this quote makes the fundamental distinction between morality and professionalism clear: morality represents a *personal conscience*, whereas professionalism represents a *social conscience.*

E. *Viewing Civility in the Light of Legal Ethics and Professionalism*

Prior studies have found it difficult to define the parameters of civility.[242] In attempting a definition, one author went so far as to suggest that the best that can be said about uncivil behavior is, like Justice Stewart's assessment of pornography,[243] that "you know it when you see it."[244] With the continuing press for more civility by the bench and bar,[245] however, nebulous definitions are not useful. The adoption of

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239. Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW., no. 4, 2008 at 4, 4-5.

240. *The Practice of Law—Is There Anything More to It than Making Money?*, 1988 PROC. FIRST ANN. GA. CONVOCATION ON PROFESSIONALISM 28, 30 (statement of Harold G. Clarke, Justice, Ga. Supreme Court) ("[E]thical conduct is the minimum standard demanded of every lawyer while professional conduct is a higher standard that is expected of every lawyer."); *see also* Harris, *supra* note 220.

241. Garrison, *supra* note 238, at 599.

242. *See* Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 366 (2011) ("While it is easy to catalog uncivil conduct, its opposite, *civility*, is more difficult to pin down."); Hung, *supra* note 1, at 1131.

243 . Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

244. Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79, 79.

245. *Id.*; E. Norman Veasey, *Making it Right—Veasey Plans Action to Reform Lawyer Conduct*, BUS. L. TODAY, Mar.-Apr. 1998, at 42, 42) ("Abusive litigation in the United States is mostly the product of a lack of professionalism. Lawyers who bring frivolous lawsuits and lawyers who engage in abusive litigation tactics are unprofessional. They need to be better regulated by state supreme courts and better controlled by the trial judges who, in turn, are supervised by state supreme courts."); *see also* Grinder v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 123 (3d Cir. 2009) (affirming an entry of sanctions and expressing

civility codes by no less than 140 state or local bar associations aids in the attempt to reach a consensus definition.[246] As courts and bar associations look to develop specific definitions of "civility," they should be cognizant of the distinct nature of the obligations of civility, specifically how civility differs from ethics and professionalism. The legal profession is not well-served if civility continues to be a term whose meaning exists only in the eye of the beholder or whose tenets create obligations that are inconsistent with a lawyer's preexisting professional obligations.

As set out above, civility is best viewed as a set of core obligations that deal with what may be described as common sense or manners.[247] Unlike ethical standards, civility codes are not intended to be a method of disqualification or sanction by a bar association. Instead, the civility codes are intended to provide guidance to lawyers regarding how to conduct themselves in dealings with opposing counsel, clients, courts, and third parties.[248] Their purpose is also to ensure that the image of the legal process is preserved and respected by the public, and to ensure that disputes are resolved in a timely, efficient, and cooperative manner.[249] These obligations are quite different from both professionalism and ethics.

Civility is often viewed as an element or characteristic of professionalism; however, civility does not neatly fit within the definition.[250] Professionalism

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frustration that attorneys for both parties, although experienced litigators, were unable to agree on minor matters of discovery or cooperate effectively with the district court judge); Grant v. Omni Health Care Sys. of N.J., Inc., No. 08-306 (RMB/AMD), 2009 WL 3151322, at *18 (D.N.J. Sept. 24, 2009) (requiring an attorney to personally pay his opposing counsel's fees and reasoning that, perhaps doing so would "finally put an end to [his] practice of flouting [court] orders and help him internalize the consequences of flagrantly ignoring the rules of procedure as well as the rules of professional conduct"); Szoke v. Geotech Envtl., Inc., No. 09-60077-CIV, 2009 WL 2589149, at *4 (S.D. Fla. Aug. 19, 2009) (disdaining the "shameless mill of needless litigation" and "utter disregard for the standards of professionalism" displayed by some, and warning that "more severe and permanent sanctions" will inevitably result from future misconduct); Stephanie Francis Ward, *Sanctioned for 'Disrespect,'* A.B.A. J. E-REP., Jan. 26, 2007, *available at* 6 No. 4 A.B.A. J. E-Report 2 (Westlaw) (discussing the Utah Supreme Court's refusal to hear an appeal because the lawyer's briefs contained disrespectful and offensive material).

246. *See* Ctr. for Prof'l Responsibility, *supra* note 17.

247. *See* Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1320-21 (11th Cir. 2002)..

248. *See* discussion *supra* Part III.A-J (identifying particular core concepts of civility).

249. *See* discussion *supra* Part III.A, C, F (identifying particular core concepts of civility).

250. *See* Cramton, *supra* note 230, at 14 (describing civility as a relatively minor aspect of professionalism that "is not the core of the enterprise" but more "like an elegant dessert, which dresses up and completes a good meal"); *see also* Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 306 (2003) ("[P]rofessionalism embraces the realm of ethics, but also reaches far beyond. Professionalism also encompasses principles of appropriate attorney conduct and aspirational ideals for an effective advocate, counselor, officer of the

addresses societal consciousness, and requires consideration of society's interests or the integrity of legal institutions in the course of lawyer decision-making. While some civility codes contain a provision emphasizing that civility encompasses a consideration of a public good,[251] the "public good" here is equated with the interests of the client as opposed to the self-interest of the lawyer.[252] This is distinct from the obligations of professionalism, which would require a lawyer to forego the interests of a client if necessary to respect the fundamental tenets of society.

Civility is also distinct from legal ethics. It is true that extreme incivility can be a basis for discipline. "[C]onduct involving dishonesty, fraud, deceit or misrepresentation," or "conduct that is prejudicial to the administration of justice," for example, violates Rule 8.4 of the Model Rules of Professional Conduct.[253] Similarly, extreme incivility may violate Rule 3.5, which requires decorum in tribunal proceedings, including depositions.[254] The civility codes may be seen as providing guidance to lawyers on how to avoid discipline under these rules. However, the tenets of civility also exist in tension with a lawyer's ethical obligations. Lawyers accused of incivility cite their ethical obligation to be a zealous advocate for their client's interest and note that what is incivility in the eyes of one person is zealous advocacy in the eyes of another.[255] This places courts in the "unenviable" position of having to determine whether particular conduct is to be characterized as advocacy or incivility:

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court, and member of the bar. Although ethical rules provide a minimum level of professionalism, there is substantial debate over standards of professionalism beyond the mandatory rules. What may seem like civility to one lawyer may seem like a breach of the ethical duty of zealous advocacy to another.")

251. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subdiv. D(1) (State Bar of Ariz. 2005) ("I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good . . . ."); CREED OF PROFESSIONALISM: LAWYER'S CREED subdiv. E (State Bar of N.M. 1989) ("I will be mindful of my commitment to the public good . . . .").

252. LAWYER'S CREED & ASPIRATIONAL STATEMENT ON PROFESSIONALISM: GEN. ASPIRATIONAL IDEALS subdiv. a (State Bar of Ga. 1990) ("As a lawyer, I will aspire . . . [t]o put fidelity to clients and, through clients, to the common good, before selfish interests."); A LAWYER'S CREED: ASPIRATIONAL IDEALS AS A LAWYER subdiv. a (Miss. Bar Ass'n 1990) ("As a lawyer, I will aspire . . . [t]o put fidelity to clients and, through clients, to the common good, before my personal interests.").

253. MODEL RULES OF PROF'L CONDUCT R. 8.4(c), (d) (2009).

254. MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. 5; *In re* Estiverne, 99-0949, pp. 4-5, 7-8 (La. 9/24/99); 741 So. 2d 649 (suspending a lawyer for one year and a day because he violated the state equivalent of Model Rules 4.4 and 8.4 when he left a deposition, retrieved a gun from his car, and threatened to kill opposing counsel after opposing counsel suggested the two step outside and settle their disagreement "man to man").

255. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

> We are cognizant of the unique dilemma that sanctions present. On the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.[256]

This quote nicely demonstrates the unique character of civility. On the one hand, a lawyer has an ethical obligation to pursue the interests of the client or suffer sanctions such as discipline or malpractice. On the other hand, over-zealous representation may lead to sanctions as a violation of the obligation of civility. The Nevada civility code states this duality clearly (this statement is implicit in most other codes): "I recognize my conduct is governed by standards of fundamental decency and courtesy, *in addition to* the Nevada Rules of Professional Conduct."[257] In sum, courts and lawyers alike should be conscious of the distinction between civility and other professional responsibilities placed on lawyers and the consequences of these distinctions.

F. *Looking Ahead: The Role of Civility as an Element of Professional Responsibility*

The ten core concepts of civility answer the question asked at the beginning of the article: what are the distinct obligations of civility? These provisions are distinct from ethical obligations and professional obligations both in substance (although there is certainly some overlap) and in enforcement. Ethical violations are enforced through the traditional disciplinary process, while all but the most extreme violations of the obligation of civility are enforced by courts. Lawyers should be aware that, even if a particular jurisdiction has not adopted a civility code, a court could rely on the provision of a civility code from another jurisdiction to impose the obligation as a matter of inherent court authority.[258] In addition, lawyers should be conscious of the possibility that uncivil behavior could be used as evidence in an allegation of malpractice or misconduct.[259]

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256. Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 341 (2d Cir. 1999).

257. PLEDGE OF PROFESSIONALISM art. IV, § 4 (Clark Cnty., Nev. Bar Ass'n 1997) (emphasis added); *see also* CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM intro., para. 3 (State Bar of Cal. 2007) ("These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California.").

258. *See generally* sources cited *supra* note 181 regarding the inherent authority of courts to sanction attorney incivility.

259. *See* Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1614 (2002).

Courts should also be aware of these core obligations of civility. The fact that issues of civility are addressed by courts, and issues of ethics are addressed by a central disciplinary body, makes this distinction particularly salient for two reasons. First, courts continue to have an obligation to report certain unethical conduct to the appropriate disciplinary body.[260] Civility guidelines should not be used as a means to avoid this obligation, and knowing the difference between the obligations of civility and legal ethics aids in a determination of the nature of the conduct. Second, courts enforcing civility through sanction should be particularly careful that they are not chilling a lawyer's valid advocacy. Identifying the parameters of civility will hopefully encourage courts to consciously consider whether particular conduct is best described as a breach of civil conduct or something else (ethics or professionalism).

There is an additional, pragmatic significance to defining civility. Recognizing that there are commonalities underlying civility codes provides courts with confidence that obligations placed on attorneys are not unusual or unique. This will become increasingly relevant as the demand to curb uncivil conduct rises and courts seek to limit such conduct through the use of inherent powers. Lawyers have the right to expect that the basic obligations of civility are the same across jurisdictions. Unlike ethical obligations, some of which vary from jurisdiction to jurisdiction, there is an expectation that the obligations of civility are universal in nature and should be enforced as such.

While these concepts provide a unifying framework for the study of civility, they also raise issues that are deserving of additional evaluation. First is the need to identify precisely what conduct crosses the line from effective or zealous advocacy to uncivil behavior. This is particularly true with regard to those obligations that are laudable but vague (such as the obligation to engage in "fair" and "just" litigation tactics). The concern that the call for civility could operate to chill effective advocacy is real,[261] and those seeking to enforce these standards should be cognizant of this concern. To this extent, courts should put in writing any specific obligations relating to civility to ensure that everyone involved in the process is aware of such civility requirements.

A second, but related, concern is the likely response to the lack of specificity of some of the concepts. While the concepts of civility are not as broadly written as the 1908 *Canons of Ethics*—and, in fact, some of the provisions are extraordinarily specific—there are enough vague provisions that the unwary lawyer can find herself at the mercy of an idiosyncratic judge's view of civility. It is safe to expect that if courts are willing to discipline lawyers for lack of civility based on vague provisions,

260. MODEL CODE OF JUDICIAL CONDUCT R. 2.15(B) (2008) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.").

261. *See* Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 113-15 (1995).

a demand will arise for more specific delineations. This occurred with the model rules of ethics and is likely to occur with codes of civility as well. This issue can be addressed in one of three ways. First, courts can essentially develop a common law of civility by setting out, on a case-by-case basis, a definition of what is "civil." Second, the codes themselves can be made more specific and the vague provisions removed. However, this would defeat the purpose of the civility codes, which is, in effect, to educate lawyers about these general guidelines. A third option is for state bar associations to issue ethics opinions related specifically to issues of civility. If this approach were adopted, both lawyers and courts will benefit from such opinions that, while not binding on a court, would provide guidance to lawyers and persuasive authority to courts.

V. CONCLUSION

Two questions were proposed at the beginning of this article, the first of which was to identify the core tenets of civility. The article examined the civility codes of thirty-two jurisdictions. From these codes, ten core concepts of civility were distilled. The concepts are the obligation to (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions; (2) be respectful and act in a courteous, cordial, and civil manner; (3) be prompt, punctual, and prepared; (4) maintain honesty and personal integrity; (5) communicate with opposing counsel; (6) avoid actions taken merely to delay or harass; (7) ensure proper conduct before the court; (8) act with dignity and cooperation in pre-trial proceedings; (9) act as a role model to client and public and as a mentor to young lawyers; and (10) utilize the court system in an efficient and fair manner. These overarching themes provide a much-needed definition of attorney civility.

The second question was whether civility was distinguished from other professional obligations of a lawyer, particularly ethics and professionalism. Examining the history and development of the obligations of legal ethics and professionalism, the nature of these responsibilities are complementary, but distinct, from the obligations associated with civility. In short, ethics addresses minimal obligations placed on lawyers under rules of professional conduct. Professionalism is identified as a lawyer's obligations to society as a whole, apart from a lawyer's obligations to her client. Civility is identified as those obligations that lawyers owe to other lawyers, their clients, and the court generally.

It appears certain that the call for an increase in civility will continue to be an area of emphasis for bar associations and courts. It is important to understand that civility, as defined by civility codes, is a duty to conform to a particular type of conduct. While the justification for adopting these codes may be questioned, what cannot be questioned is a need to understand what it means to be a "civil" lawyer. This will assist both lawyers and courts when contemplating particular conduct and when evaluating such conduct after allegations of incivility are raised.