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

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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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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

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 rudeness¹⁴ or strategic incivility¹⁵ 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 codes¹⁷ by state bar associations. Perhaps the most

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

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 attorneys, 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

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 because³² (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

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

49. Hung, *supra* note i, 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

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/2007/InsideLSBA/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_willenb_rock_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](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/proldeals.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://sccbar.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, subd. 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. subd. 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. subd. 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 committed [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

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

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 misquoting, 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

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 subd. 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

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

98. See A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. subd. 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. subd. 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, subd. 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, subd. 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

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

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

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

(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

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

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

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, subd. 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. subd. 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. subd. 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

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

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 pmb1. (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 action¹⁷² 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.

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:

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

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

of justice, they not only lower the morale within the profession, but they debase our high calling in the eyes of the public.

. . . [(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.

. . . [(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

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

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

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

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

‘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:

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

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

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. Saylor, *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

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:

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 pmb. ("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

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. 113-15 (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.