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COMMENT: CIVILITY CODES: THE NEWEST WEAPONS IN THE "CIVIL" WAR OVER PROPER ATTORNEY CONDUCT REGULATIONS MISS THEIR MARK

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LexisNexis Summary

The preamble states that the Canons should be adopted as a "general guide" for behavior, and their language and content indicate that they were intended to be mainly aspirational in character. In 1989, the Texas Lawyer's Creed was the first civility code adopted by a state court. The civility codes thus far adopted vary widely not only in title, but also in form and content. In New York, certain provisions of the state's Code of Professional Responsibility comprised the main elements of the proposed civility code. Similarly, the Mississippi State Bar labeled its civility code the "Mississippi Code of Professional Conduct." The regulatory style and content of many civility codes has inevitably led to calls for legal enforcement of their commands. Several courts in jurisdictions that have adopted a type of civility code have referred to the civility codes in their decisions. Since Dondi, the U.S. District Court for the Northern District of Texas has enforced the civility code in its courtroom in different contexts. In these cases, the courts usually attach a copy of the jurisdiction's civility code to illustrate the correct behavior that should be exhibited. Again, although the civility code expressly prohibited its use as a set of enforceable standards, the court nevertheless issued sanctions based upon the code.

Text

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I. Introduction

Strategic non-compliance with discovery requests. Misrepresenting material facts to opposing counsel and judges. Using abrasive, vulgar language and personal attacks in the courtroom. Do attorneys really want the legal profession to be characterized by this kind of behavior? The **[*152]** answer according to committee reports by bar associations and courts alike is an emphatic "no." [1] Undoubtedly, most attorneys would admonish their peers for such tactics. Yet, while many attorneys might easily point the finger at their

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[1] Civility Comm., Seventh Federal Judicial Circuit, Interim Report (1991), reprinted in 143 F.R.D. 371 (7th Cir. 1992) [hereinafter Interim Report]; Civility Comm., Seventh Federal Judicial Circuit, Final Report (1992), reprinted in 143 F.R.D. 441 (7th Cir. 1992) [hereinafter Final Report]; Professionalism Comm'n, Report to Board of Governors and House of Delegates of the ABA: ' . . . In the Spirit of Public Service:' A Blueprint for Professionalism for the Rekindling of Lawyer Professionalism (1986), reprinted in 112 F.R.D. 243 (1986) [hereinafter Blueprint for Professionalism].

peers, when the successful or lucrative outcome of a trial depends upon it, those same attorneys may often engage in behavior that displays a lack of civility and professional courtesy.

A consensus has grown among both attorneys and judges that representational tactics that exhibit a lack of civility and professional courtesy should no longer be tolerated. [2] Although disciplinary rules currently regulate an attorney's ethical behavior, they have not eradicated uncivil and unprofessional tactics, and have led to a call for the development of "higher standards" for attorney conduct by bar associations and courts. These higher standards, voluntarily adopted by attorneys, would function to inform attorneys as to the kind of behavior that is expected, as opposed to required, of them. This idea is based upon the assumption that certain "uncivil" behavior is beyond the reach of disciplinary rules already in effect. Accordingly, the behavior targeted may be legal and ethical, but nevertheless uncivil. [3] But is this really the case? Even if it is, will the recent trend of adopting "civility codes" [4] be the best method to bring civility and professionalism back to the legal profession?

This Comment argues that the adoption of civility codes for the legal profession by courts and mandatory bar associations is not the best means **[*153]** to the end envisioned by leaders of the civility movement. [5] Part II begins with a brief chronology of the regulation of attorney conduct in this country, including the more current introduction of civility codes. [6] Part III examines the drafting and present use of civility codes in the context of existing disciplinary rules. First, in Part III, this Comment argues that the purpose behind the civility movement is actually thwarted by the adoption of civility codes. This is because many of the civility codes have been rendered duplicative and unnecessary by existing disciplinary rules. [7] Those that are not merely redundant have been drafted and implemented ineffectively. [8] Second, in Part III, this Comment proposes several solutions that could more effectively further the goals of the civility movement, such as the more stringent enforcement of disciplinary rules, wider awareness and sensitivity to the problems of uncivil professional behavior and careful amendment of disciplinary rules to require higher standards of professional conduct. [9]

II. Background

Historically, the legal profession itself has largely regulated the conduct of lawyers in the United States. [10] The rationale for this approach is that members of a profession "operate from a distinct and esoteric body of knowledge" and only such individuals are able to "accurately evaluate" the performance of their peers. [11] Professionals have generally felt that because their role in society is primarily client-centered and public service oriented and because they operate within an identifiable community which regulates it-

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[2] Interim Report, supra note 1, at 374-92.

[3] See, e.g., Amy R. Mashburn, Professionalism as a Class Ideology: Civility Codes and Bar Hierarchy, 28 Val. U. L. Rev. 657, 684 (1994). Mashburn indicates: The overlap may, however, be unavoidable because of the drafters' assumptions about the relationship between civility and lawyer regulation. Significantly, they assumed that the objectives of the civility codes could not be accomplished through proper enforcement of the disciplinary rules, rules of civil and criminal procedure, and other existing mechanisms of lawyer regulation. Id.

[4] Although these types of codes of conduct which have been adopted as non-mandatory aspirational creeds or pledges have many different labels, this Comment will refer to them as "civility codes" throughout.

[5] Civility movement" will refer to a general awareness of a lack of civility in the legal profession and a movement toward returning civility to the profession, which started with the ABA's Report on Professionalism in 1986 and has continued with the increasing formation of committees on civility and the adoption of civility codes.

[6] See infra notes 15-73 and accompanying text.

[7] See infra notes 78-101 and accompanying text.

[8] See infra notes 102-63 and accompanying text.

[9] See infra notes 166-204 and accompanying text.

[10] See Criton A. Constantinides, Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions, 25 Ga. L. Rev. 1327, 1333-39 (1991); see also John Leubsdorf, Three Models of Professional Reform, 67 Cornell L. Rev. 1021, 1023 (1982);Blueprint for Professionalism, supra note 1, at 261-62.

[11] Constantinides, supra note 10, at 1334-35.

self by acceptable social norms, there is no need for government regulation. [12] Most professions are presently self-regulated through the use **[*154]** of some type of ethics or professional conduct code. [13] Although the early American legal profession generally regulated itself by means of aspirational precepts, [14] the bar eventually developed enforceable rules that would form a basis for disciplinary action.

A. The Evolution of Professional Conduct Regulation

From its very inception, the United States' legal profession saw the need for some type of conduct regulation. [15] American colonial courts adopted regulations based upon the English tradition that stipulated that attorneys must be "sworn in." [16] These English oaths have been characterized as creating a mixture of minimum enforceable standards and aspirational values. [17] This mixture of standards would later carry over into the development of American conduct codes. [18]

American legal scholars first defined their own proper professional conduct in nineteenth-century essays and treatises that set forth aspirational duties and a "gentleman-lawyer ideal." [19] In the late 1880s, state bar associations began adopting a formal ethical code of conduct. [20] The American Bar Association ("ABA") followed in 1908 with its Canons of Professional Ethics. [21]

The Canons of Professional Ethics ("Canons") presently consist of the original thirty-two canons adopted in 1908, along with fifteen additional canons added over time. [22] The preamble states that the Canons should be adopted as a "general guide" for behavior, [23] and their language and content indicate that they were intended to be mainly aspirational in **[*155]** character. [24] Some have criticized the Canons for expressing only the viewpoint of certain "economically advantaged" attorneys within a specific "social stratum." [25] Nevertheless, the general consensus at the time the Canons were adopted was that they would serve mainly as aspirational ideals rather than enforceable rules. [26]

The perception that the Canons were "'incomplete, unorganized and failed to recognize the distinction between the inspirational and proscriptive'" [27] led to a gradual movement within the bar for more enforceable standards. The results of this movement was the drafting of the Model Code of Professional Respon-

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12 See id. at 1336-37; see also Geoffrey C. Hazard Jr., Ethics in the Practice of Law 15 (1978) [hereinafter Ethics in Practice].

13 Constantinides, supra note 10, at 1333-41. See Ethics in Practice, supra note 12, at 15.

14 James E. Moliterno, Lawyer Creeds and Moral Seismography, 32 Wake Forest L. Rev. 781, 786-88 (1997).

15 Id.; Mashburn, supra note 3, at 668-69.

16 Moliterno, supra note 14, at 786.

17 Id.

18 See infra notes 21-43 and accompanying text.

19 See Moliterno, supra note 14, at 787-88; see also Ethics in Practice, supra note 12, at 18.

20 Moliterno, supra note 14, at 788.

21 Canons of Professional Ethics (1908), reprinted in Thomas D. Morgan and Ronald D. Rotunda, Selected Standards on Professional Responsibility 588 (1995). Thirteen additional canons were adopted in 1928 and the final two canons were added in 1933 and 1937. Jethro K. Lieberman, Crisis at the Bar: Lawyers' Unethical Ethics and What To Do About It 63 (1978).

22 Canons of Professional Ethics, supra note 21, at 588-600.

23 Canons of Professional Ethics Preamble, supra note 21, at 588.

24 Id.

25 See Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1250 (1991). [hereinafter Future of Ethics].

26 Moliterno, supra note 14, at 790.

27 Id. at 792 (quoting Don J. Young & Louise L. Hill, Professionalism: The Necessity for Internal Control, 61 Temp. L. Rev. 205, 208 (1988)).

sibility ("Model Code") in 1969. [28] The Model Code is organized by three types of provisions. Nine "Canons" serve as general postulates for the other more specific provisions. [29] "Ethical Considerations" ("ECs") set forth guidelines for behavior, in aspirational terms. [30] Finally, the "Disciplinary Rules" ("DRs") provide minimum enforceable standards to which attorneys are held accountable under the threat of sanctions. [31] To enhance the acceptance and practical enforcement of the Model Code, the more aspirational character of the Canons of Professional Ethics was abandoned and retained in a more "limited form" in the Ethical Considerations of the Code. [32]

The Model Code states that it "is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of the lawyer falls below required minimum standards." [33] However, the Model Code has been criticized for straddling "the uncomfortable fence between a creed-like system and a code-like system" and for displaying an awkward **[*156]** ambivalence on the issue of whether to wholly depart from aspiration and turn instead to minimum enforceable standards. [34]

That ambivalence led to further reform in the area of professional conduct, only seven short years later. In 1977, the ABA formed a commission on the Evaluation of Professional Standards. [35] The commission developed the Model Rules of Professional Conduct ("Model Rules") which were adopted by the ABA House of Delegates in 1983. [36] Though the six-year development of the Model Rules demonstrates a widespread dissatisfaction with the Model Code, it also indicates the extent of disagreement as to the content of the minimum standards that would be adopted and actually enforced against attorneys in the new Model Rules. [37] While some of the language of the Disciplinary Rules in the Model Code was retained in the Model Rules, [38] the Model Rules abandoned the terms "canon" and "ethical consideration" and adopted language similar to civil statutes. [39]

As the preamble to the Model Rules states: "[s]ome of the Rules are imperatives defin[ing] proper conduct for purposes of professional discipline . . . . Others . . . are permissive . . . defin[ing] areas in which the lawyer has professional discretion . . . . The Rules simply provide a framework for the ethical practice of law." [40] The widespread and rapid adoption of the Model Code by most states was not duplicated with the Model Rules. The Model Rules' adoption by the states has been "slow and widely resisted," with

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[28] Blueprint for Professionalism, supra note 1, at 258; Model Code of Professional Responsibility (1981), reprinted in Thomas D. Morgan & Ronald D. Rotunda, Selected Statutes on Professional Responsibility 146-224 (1995). The adoption of the Model Code met with little resistance as it was published by the drafting committee in 1968, endorsed by the ABA in 1969, promulgated in 1970, and adopted by almost every state by 1974. Future of Ethics, supra note 25, at 1252.

[29] Model Code of Professional Responsibility, supra note 28, at 146-224.

[30] Id.

[31] Id.

[32] See Moliterno, supra note 14, at 793.

[33] Model Code of Professional Responsibility, supra note 28, at 147.

[34] Moliterno, supra note 14, at 794.

[35] Blueprint for Professionalism, supra note 1, at 258.

[36] Model Rules of Professional Conduct (1983), reprinted in Thomas D. Morgan & David D. Rotunda, Selected Statutes on Professional Responsibility 1-107 (1995).

[37] Future of Ethics, supra note 25, at 1254.

[38] Id. Compare Model Rules of Professional Conduct Rule 8.4, supra note 36, at 103, with Model Code of Professional Responsibility DR 1-102, supra note 28, at 151; Model Rules of Professional Conduct Rule 5.5, supra note 36, at 83, with Model Code of Professional Responsibility DR 3-101, supra note 28, at 178 (providing two examples of instances where a significant amount of the language of the Model Rules was copied verbatim from the Model Code's Disciplinary Rules).

[39] See Model Code of Professional Responsibility, supra note 28, at 146-224; Model Rules of Professional Conduct, supra note 36, at 1-107; Moliterno, supra note 14, at 794.

[40] Model Rules of Professional Conduct Preamble, supra note 36, at 5.

many states making revisions before adopting the Model Rules or refusing to adopt them altogether. [41]

The three model codes of conduct promulgated by the ABA show a movement from a mere "aspirational guide" in the Canons, to a combination of aspiration and discipline in the Code, to finally, a more **[*157]** rigid "ethical framework" in the Rules. [42] However, comparison of the three codes also shows that in whatever format, whether as voluntary aspirations or enforceable rules, the content of the codes has not significantly changed over time. [43]

B. The Movement Toward Civility Codes

Even as the adoption of the Model Rules was gaining momentum among the states, a new movement within the field of professional conduct arose. Dissatisfied with both the state of affairs among attorneys and the litigation process itself, legal scholars and attorneys began to formulate codes of conduct which, while aspirational in character, focused not on minimum enforceable standards, but on professional civility.

At the ABA's mid-year meeting in February of 1984, Chief Justice Burger decried the decline in professionalism, concluding that it was a result of attorneys failing to aspire to standards higher than the minimum standards required by the Model Rules. [44] As a result, committees on professionalism and civility [45] met over the next several years to consider **[*158]** the various problems within the profession that needed to be addressed. [46] The ABA's Committee on Professionalism, in August of 1986, produced a report which, among other things, recommended that attorneys "abide by higher standards." [47] The ABA, as well as many state and local bar associations and state and federal courts, took this recommendation as a calling to adopt yet another set of conduct codes, this time setting higher, yet voluntary, aspirational requirements for attorney behavior. [48]

In 1992, the Seventh Circuit created its own committee to report solely on the civility crisis in the legal pro-

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[41] Future of Ethics, supra note 25, at 1252.

[42] See Canons of Professional Ethics, supra note 21, at 588; Model Code of Professional Responsibility, supra note 28, at 146; Model Rules of Professional Conduct, supra note 36, at 1.

[43] A comparison of just one area of regulation that began in the Canons shows that early aspirational values, in some form, stayed intact in the Model Rules. Canon 17 focused on "Ill-Feeling and Personalities Between Advocates." Canons of Professional Ethics, supra note 21, at 592. The Canon proposed that "all personalities between counsel should be scrupulously avoided" and that "personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided." Model Code of Professional Responsibility DR 7-101, supra note 28, at 210. Model Code EC 7-37 states that "ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers" and EC 7-38 indicates, "[a] lawyer should be courteous to opposing counsel." Model Code of Professional Responsibility EC 7-37, 7-38, supra note 28, at 210. In DR 7- 101, the Model Code states that a lawyer can avoid violating the disciplinary rule by "avoiding offensive tactics or by treating with courtesy and consideration all persons involved in the legal process." Model Code of Professional Responsibility DR 7-101, supra note 28, at 210. Further, in the Model Rules, Rule 4.4 states that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden." Model Rules of Professional Conduct Rule 4.4, supra note 36, at 78. Finally, Rule 3.5 indicates, a "lawyer shall not . . . engage in conduct intended to disrupt a tribunal." Model Rules of Professional Conduct Rule 3.5, supra note 36, at 68.

[44] Chief Justice Warren Burger, Remarks at the Midyear Meeting of the ABA (Feb. 13-14, 1984), in 52 U.S.L.W. 2471 (1984).

[45] Generally, the movement toward improvement of attorney behavior became associated with the word "civility." Some confusion may arise as to the meaning of civility within the context of "ethics" and "professionalism." Civility has been defined as "courtesy, dignity, decency and kindness." John W. Frost, The Topic is Civility-You Got a Problem With That?, 71 Fla. B.J., Jan. 1997, at 6. It has also been defined as "professional conduct in litigation proceedings of judicial personnel and attorneys" and not limited to "good manners or social grace." Interim Report, supra note 1, at 374. Civility often becomes confused with "ethics" and "professionalism" because the three concepts often overlap. Frost, supra, at 7. Professionalism has often been characterized as a category that encompasses ethics and civility, as well as other aspects of attorney behavior. Id. Because the meaning of "ethics" may overlap with that of "civility," this Comment refers to the Model Rules and Model Code not as "ethics codes," but rather as "disciplinary rules."

[46] See Blueprint for Professionalism, supra note 1, at 251; Interim Report, supra note 1, at 391.

[47] Blueprint for Professionalism, supra note 1, at 251-52.

[48] See infra notes 69-73 and accompanying text.

fession. [49] Both the ABA and the Seventh Circuit found that changes in the legal profession over the past decade had resulted in many problems, including competition for clients, [50] growing diversity among attorneys, [51] increasing financial pressures, [52] loss of collegiality, [53] client pressures, [54] and increased court filings. [55] These problems within the legal profession have provoked types of attorney behavior that most agree are in need of correction. These abrasive and combative tactics towards opponents, often called "Rambo" tactics, [56] include discovery abuse, [57] a "cottage industry" of Rule 11 sanctions, [58] lack of cooperation and courtesy, [59] and lack of candor. [60]

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In 1988, the Torts and Insurance Practice section of the ABA and its Young Lawyer's Division both adopted their own creeds for professional conduct. [61] The U.S. District Court for the Northern District of Texas took the judicial lead in this area in 1988 by adopting eleven standards of practice to be observed by attorneys in civil actions in its courtrooms. [62] In 1989, the Texas Lawyer's Creed was the first civility code adopted by a state court. [63] The Seventh Circuit, following its comprehensive study of the civility problem in 1992, [64] promulgated its "Standards of Professional Conduct" which it offered to all jurisdictions within the Seventh Circuit as non-mandatory standards. [65] Currently, as many as thirty-six state bar associations and supreme courts and sixty-nine local bar associations have adopted similar creeds or codes, as well as at least thirteen federal district courts and one federal circuit court. [66] The purpose behind adopting civility codes appears to have been two-fold: 1) to end uncivil attorney behavior and 2) to provide guidelines of ex-

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[49] The Seventh Federal Judicial Circuit's Committee on Civility specifically recommended, among other solutions, that courts adopt civility codes and included its own standards of conduct in the report. Interim Report, supra note 1, at 414.

[50] Id. at 382-83.

[51] Blueprint for Professionalism, supra note 1, at 251-52.

[52] Interim Report, supra note 1, at 391-93; Blueprint for Professionalism, supra note 1, at 259.

[53] Interim Report, supra note 1, at 391.

[54] Id. at 393-94.

[55] Id. at 394-95.

[56] Id. at 390. In the Seventh Federal Judicial Circuit's Committee on Civility's Interim Report, such tactics were said to have been manifested by a "'new breed of lawyers who perceive that they are required to fight about everything.'" Id.

[57] Id. at 385-89.

[58] Id. at 385, 389-90;Rule 11(c) of the Federal Rules of Civil Procedure provides that if, after notice and reasonable opportunity to respond, the court determines that subdivision (b) regarding representations to the court has been violated, the court may impose sanctions upon attorneys, law firms or other parties. Fed. R. Civ. P. 11(c).

[59] Interim Report, supra note 1, at 385, 390.

[60] Id. at 390.

[61] See ABA Recommends Creeds for Bar Associations, 75 A.B.A. J., Jan. 1989, at 58; see also Creeds of Professionalism, ABA/BNA Lawyer's Manual on Professional Conduct 1:401 (1997).

[62] Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 287 (N.D. Tex. 1988).

[63] Eugene A. Cook, Fred Hagans, & James H. Holmes, A Guide to the Texas Lawyer's Creed: A Mandate for Professionalism, 10 Rev. Litig. 673, 676-91 (1991).

[64] Interim Report, supra note 1; Final Report, supra note 1.

[65] Interim Report, supra note 1, at 415.

[66] Letter from LaPrica D. Mims, Editorial and Legal Assistant, American Bar Association, Standing Committee on Professionalism, Center for Professional Responsibility, to Brenda Smith, Production Editor, University of Dayton Law Review (Feb. 24, 1998) (on file with the University of Dayton Law Review). Attached to the letter is a list of Professionalism Codes in the United States.

pected, but not required, "higher standards" of behavior to which attorneys can aspire. [67] These aspirational, non-mandatory codes of conduct have been called, among other titles, civility codes, creeds of professionalism, and standards of professional conduct. [68]

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A comparison of the various types of civility codes adopted by bar associations and courts shows that three basic types of civility codes have emerged: 1) "specific duties" codes, 2) "combination" codes, and 3) general statements of aspiration. [69] The primary focus of specific duties codes is to delineate specific standards of conduct regarding the actions of one member of the legal profession towards another or towards the profession itself. [70] The combination codes mix general aspirational statements with specific standards of conduct. [71] These civility codes typically begin with a section containing general aspirations to certain types of behavior or ideals, followed by a section which sets forth specific types of litigation practices for attorneys to emulate. [72] The third category of codes, characterized as general aspirational statements, usually contain very general and comprehensive statements as to the civil behavior **[*161]** expected of attorneys. [73] These statements set forth broad postulates concerning professional integrity, courtesy and civility, and fairness and due consideration, among other things.

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[67] Two main goals have emerged from the bar association and court reports outlining the problems in the profession and proposing civility codes as a solution: 1) to provide a solution to "perceived civility problems" and 2) to "end [uncivil] conduct," Interim Report, supra note 1, at 414.

[68] For example, some of the various titles include "A Lawyer's Creed of Professionalism," "Code of Professional Courtesy," "Litigation Guidelines," "Codes of Professional Conduct," "Standards of Professional Conduct," and "Code of Civility," among many others. See supra note 66 and accompanying text.

[69] In this Comment, the civility codes were assigned labels to better facilitate a comparison of the various types of civility codes. The labels which were chosen have no meaning beyond the discussion within this Comment.

[70] This type can further be divided into two sub- types. The first, as in the ABA Tort and Insurance Practice Section's proposed civility code, divides its standards among a lawyer's duties to: 1) clients, 2) opposing counsel and parties, 3) the courts and other tribunals and 4) the public and system of justice. See Lawyer's Creed of Professionalism, Thomas D. Morgan & Ronald D. Rotunda, Selected Standards on Professional Responsibility 610-12 (1995); see also Creeds of Professionalism, supra note 61, 1:401; A Lawyer's Creed of Professionalism, N.M. Rules of Court (West 1998); The Texas Lawyer's Creed-A Mandate for Professionalism, Tex. Rules of Court 495 (West 1998). The second sub-category divides standards among: 1) a lawyer's duties to other counsel, 2) a lawyer's duties to the court, 3) the court's duties to lawyers, and 4) a judge's duties to other judges. See Civility Principles, U.S. Dist. Ct., E.D. Mich., Mich. Rules of Court (West 1998); Standards for Professional Conduct, Iowa Rules of Court (West 1998); Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, U.S. Dist. Ct., N.D. Ind., Ind. Rules of Court Appendix B (West 1997); La. Rev. Stat. Ann., Sup. Ct. R. General Administrative Rules, Part G, 11 (West 1998); N.Y. Rules of Court Part 1200, Appendix A (McKinney 1998). A few hybrids between those two sub-categories exist. See Memphis Bar Ass'n Guidelines for Professional Courtesy and Conduct, 13th Cir., Shelby County, Tenn. Rules of Court Appendix 1 (West 1997).

[71] For example, the Boston Bar Association's "Civility Standards for Civil Litigation" presents nine general aspirational statements for civil conduct and then provides from two to eleven specific standards for each of the following areas: 1) continuance and extensions of time, 2) service of papers, 3) written submissions to the court, 4) communications with lawyers, 5) depositions, 6) interrogatories, 7) document demands, 8) motion practice, 9) dealing with non-party witnesses, 10) ex parte communications with the court, 11) settlement and alternative dispute resolution, and 12) trials and hearings. See Boston Bar Ass'n Civility Standards for Civility Litigation, 38 Boston B.J., Sept./Oct. 1994, at 11 [hereinafter Boston Civility Standards]; see also Del. Sup. Ct. R. 71 (1997); U.S. Dist. Ct., N.D. Ga., Ga. Court Rules and Procedure Civ. R. 83.1(C) (West 1997); Aspirational Statement on Professionalism, Rules and Regulations for the Organization and Government of the State Bar of Georgia, Ga. Court Rules and Procedure (West 1997); SCCP Professionalism Statement on Professionalism, A Lawyer's Creed, and a Lawyer's Aspirational Ideals, Rules for the Government of the Bar, Ohio Rev. Code Ann. Appendix V (West 1997).

[72] See supra note 71 and accompanying text.

[73] A good example of this third category of civility codes is the ABA Young Lawyer's Section's proposed civility code which contains twelve statements such as "I will encourage respect for the law and our legal system through my words and actions," and "I will resolve matters expeditiously and without necessary expense." Lawyers' Pledge of Professionalism, reprinted in Thomas D. Morgan & Ronald D. Rotunda, Selected Standards on Professional Responsibility 612-13 (1995); Creeds of Professionalism, supra note 61, 1:401. See U.S. Dist. Ct., S.D. Cal., Civ. R. 83.4(a) (West 1998); U.S. Dist. Ct., M.D. Pa., 83.23.2, Appendix D (West 1997); Standards of Practice To Be Observed by Attorneys Appearing in Civil Actions; U.S. Dist. Ct., N.D. Tex., Tex. Rules of Court (West 1998); U.S. Dist. Ct., D. Wyo., Civ. R. 83.12.1 (West 1997).

The civility codes thus far adopted vary widely not only in title, but also in form and content. One notable difference is the vast range of types of behavior the civility codes endorse or condemn. A lack of uniformity among the civility codes may well indicate the profession's continued uncertainty as to the kind of uncivil behavior which needs to be corrected, the kind of behavior which is desired, and the best method to correct such behavior. As will be discussed more fully, this lack of agreement is but one reason that the civility codes have failed to provide an effective solution to the civility crisis within the profession and to meet the major goals of the civility movement.

III. Analysis

A comparison of the substance of the civility codes with the Model Code and Model Rules [74] demonstrates an extensive, substantive overlap which renders the civility codes unnecessary. [75] Those provisions of the civility codes that do not simply restate the current disciplinary rules fail to provide an effective way of achieving the goals of the civility movement. [76] Rather, those goals could be more effectively achieved by stricter enforcement of existing disciplinary rules, wider awareness and sensitivity to the problems of uncivil professional behavior and careful amendment of disciplinary rules to require higher standards of professional conduct. [77]

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A. Civility Codes Are Unnecessary: A Comparison of the Regulation of Attorney Conduct in the Area of Discovery

An examination of the civility codes within state jurisdictions shows that they fail to meet the proposed goals of the civility movement and that they actually serve little purpose. This Comment could not possibly survey the broad spectrum of professional incivility to demonstrate how the civility codes are unnecessary to stem such uncivil behavior. However, an examination of one of the most common incivility problems, discovery abuse, [78] and a comparison of its treatment by the civility codes and the current disciplinary rules should serve to demonstrate that the civility codes fail to actually change attorney behavior or to set higher standards. [79]

Under the ABA's Lawyer's Creed of Professionalism, [80] one of the specific duties lawyers must pledge

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[74] A majority of states which have adopted enforceable rules for regulating attorney conduct have now adopted the Model Rules of Professional Conduct, or their own modified version of the Model Rules. See State Ethics Rules, ABA/BNA Lawyers' Manual on Professional Conduct 1:3-1:4 (1998). Those states which currently retain a version of the Model Code of Professional Responsibility include Georgia, Iowa, Maine, Nebraska, Ohio, Tennessee, and Vermont. Id. A few states have adopted rules which encompass provisions from both the Model Code and the Model Rules, including New York, North Carolina, Oregon, and Virginia. Id.

[75] See infra notes 78-101 and accompanying text.

[76] See infra notes 102-63 and accompanying text.

[77] See infra notes 166-204 and accompanying text.

[78] According to the Seventh Circuit's report, discovery abuse received 94 percent of the vote among lawyers as a "manifestation of incivility" and was considered the "primary context for uncivil conduct." Interim Report, supra note 1, at 386. According to the Report, "[s]cores of the comments zero[ed] in on what may be generally called strategic non-compliance in discovery, including obstructing access to documents, burdensome requests for documents, refusals to make reasonable scheduling agreements . . . sarcasm as a weapon, a failure to cooperate and winning by trick or at any cost." Id.; see Blueprint for Professionalism, supra note 1, at 273 (1986) ("Discovery is one of the principal areas in which problems arise in litigation").

[79] The proposed goals of the civility movement should be recalled: 1) to change attorney behavior and bring an end to uncivil conduct, and 2) to set "higher standards" to which attorneys can aspire. See supra note 61 and accompanying text.

[80] See Lawyer's Creed of Professionalism, supra note 70, at 610-12; see also Creeds of Professionalism, supra note 61, 1:401.

to perform is to "refrain from utilizing delaying tactics." [81] Similarly, New York's "Standards of Civility" require, under a lawyer's duty to other lawyers, litigants, and witnesses, that the "timing and manner of service of papers" should not be designed to take advantage of opposing counsel. [82] Also, New York requires that no aspect of the litigation process be used as a means to prolong the litigation or inflate expenses. [83]

Under the Boston Bar Association's combination civility code, [84] lawyers pledge generally to make representations to opposing counsel in good faith and to "avoid creating animosity or contentiousness" with the **[*163]** other side. [85] Under more specific sections regarding "service of papers," the Boston Bar Association civility codes set forth detailed requirements regarding the timing and manner of such service so as to not take advantage of opposing counsel. [86]

The ABA Young Lawyer's Division's "Lawyer's Pledge of Professionalism" is one of the more general types of civility codes. The Young Lawyer's Pledge does not set forth specific types of conduct, rather, it provides for more aspirational guidance. The Young Lawyer's Pledge has no provision specifically relating to the service of papers or unreasonable delays, but generally provides that "I will resolve matters expeditiously and without unnecessary expense," [87] and "I will work with other participants in the legal system, including . . . opposing counsel . . . , to make our legal system more accessible and responsive." [88] The standards of practice adopted by the court in Dondi similarly provide that a lawyer should not use the scheduling of discovery as a means to harass opposing counsel, but does not proscribe unprofessional behavior. [89]

The provisions of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct prohibit exactly the same types of discovery abuse. Under Model Rule 3.2, the "lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." [90] Under Model Rule 3.4, lawyers are prohibited from, among other things, "fail[ing] to make reasonably diligent effort to comply with a **[*164]** legally proper discovery request by an opposing party." [91] Similarly, under the

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[81] Lawyer's Creed of Professionalism, supra note 70, at 611. More specifically, the civility code requires counsel not to "serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will unfairly limit the other party's opportunity to respond." Id.

[82] Standards of Civility, N.Y. Rules of Court Part 1200, Appendix A (McKinney 1998). Under this more general requirement, the code gives some examples of improper behavior: "A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office. B. Papers should not be served at a time or in a manner designed to inconvenience an adversary." Id.

[83] Id.

[84] Boston Civility Standards, supra note 71, at 11.

[85] Id. at 12.

[86] Id. Under "Service of Papers" the civility code specifically requires, among other things: a. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers. b. Papers should not be served so close to a court appearance that they inhibit the ability of opposing lawyers to prepare for that appearance or, to respond to the papers, where the law permits a response. In making or responding to a motion for preliminary injunction or other emergency matters, a lawyer should make reasonable efforts to comply with the spirit of this rule. Papers should not be served in order to take advantage of a lawyer's known absence from the office or at a time or in a manner designed to inconvenience a lawyer or his/her client, such as late on Friday afternoon or the day preceding a secular or religious holiday. Id.

[87] Lawyers' Pledge of Professionalism, supra note 73, at 613; see also Creeds of Professionalism, supra note 61, 1:401.

[88] Creeds of Professionalism, supra note 61, 1:401.

[89] Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 287 (N.D. Tex. 1988).

[90] Model Rules of Professional Conduct Rule 3.2, supra note 36, at 61. The Comment to this Rule specifically states that "[d]elay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose," but that the attorney's action should have "some substantial purpose other than delay." Id.

[91] Model Rules of Professional Conduct Rule 3.4, supra note 36, at 66.

Model Code, a lawyer is prohibited from conduct that would "harass or maliciously injure another" [92] and is encouraged under DR 7-101(A)(1) to be punctual. [93] Further, under EC 7-38 of the Model Code, a lawyer is encouraged to be courteous in his relations with opposing counsel and follow "local customs of courtesy or practice." [94]

While some of the civility code provisions concerning discovery abuse are more specific, and may seem, in a sense, to set forth higher standards, it does not necessarily follow that the disciplinary rules do not encompass precisely the same type of behavior through their broader language. Model Rule 3.2 specifically uses the term "reasonable" in describing diligent efforts to expedite litigation, [95] and the Comment to that rule further adds that an action taken by an attorney must have some substantial purpose other than delay. [96] These words connote specific legal duties. The civility codes merely require that the timing and manner of service of papers not be designed to take advantage of opposing counsel and set forth specific types of behavior which may fall under this category of "design to take advantage." Such specificity may clarify what actions would constitute uncivil behavior, but it does not constitute a higher standard to which attorneys may aspire. [97] Certainly the general aspiration type civility codes do not add any requirement that is not already covered by the substantive provisions of the Model Rules and the Model Code. To "resolve matters expeditiously and without unnecessary expense" the Young Lawyer's Pledge [98] requires no more than making "reasonable efforts to expedite litigation" under the Model Rules. [99]

[*165]

The relevant civility codes provisions concerning strategic discovery delay are superfluous and unnecessary. Several scholars and commentators have come to a similar conclusion in examining other types of uncivil conduct. In New York, certain provisions of the state's Code of Professional Responsibility comprised the main elements of the proposed civility code. [100] Professor Geoffrey C. Hazard found similar results when comparing the Texas Lawyer's Creed with Texas' disciplinary rules, including both the Code and Rules. He found that, with respect to the subject of harassment, both the creed and the disciplinary rules contained substantially the same language, demonstrating that the civility codes added practically nothing to the existing disciplinary rules. [101]

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92 Model Code of Professional Responsibility DR 7- 102(A)(1), supra note 28, at 210.

93 Model Code of Professional Responsibility DR 7- 101(A)(1), supra note 28, at 209.

94 Model Code of Professional Responsibility EC 7-38, supra note 28, at 209.

95 Model Rules of Professional Conduct Rule 3.2, supra note 36, at 61.

96 Model Rules of Professional Conduct Rule 3.2 cmt., supra note 36, at 61

97 Professor Hazard goes even further in arguing that the civility codes may actually lower the bar on certain conduct. Geoffrey C. Hazard, Jr., Civility Code May Lead to Less Civility, Nat'l L.J., Feb. 26, 1990, at 13 [hereinafter Less Civility]. In comparing the Texas Lawyer's Creed and the Texas Rules, Hazard notes that the creed required intent to be proven before harassment could be charged against an attorney while the disciplinary rules did not. Id. He said, "This involves subjective intent to harass rather than a simply objective harassing effect . . . . The Texas creed can be read as a set of authoritative interpretations of the disciplinary rules, for it would be strange to have a standard of civility having a lower threshold than the disciplinary standard." Id.

98 See Lawyer's Creed of Professionalism, supra note 70, at 610-12; see also Creeds of Professionalism, supra note 61, 1:401.

99 Model Rules of Professional Conduct Rule 3.2, supra note 36, at 61.

100 John B. Harris, Should New York Adopt Code of Civility? No, Nat'l L.J., Aug. 11, 1997, at 2. Harris states: "civility is already a part of the Code of Professional Responsibility (CPR) and court rules . . . . The perception that the Code is necessary reflects the failure of lawyers to abide by the CPR and the failure of judges to insist upon civil conduct." Id. He gave several examples of overlap between the civility code and New York's version of the Model Code, including DR 7-101 and Canon III of the civility code which both refer to granting reasonable requests for extensions, and DR 7-101 and Canon I which both encourage courtesy and civility in attorney behavior. See id.; see also Anthony E. Davis, Standards of Civility, Nat'l L.J., Sept. 11, 1997, at 3.

101 Less Civility, supra note 97, at 13. Hazard found that in the Texas Lawyer's Creed, an attorney should not engage in conduct "intended primarily to harass" whereas DR 7-102(A)(1) also prohibits conduct that "'would serve merely to harass or mali-

Thus, provisions within the civility codes, especially those in the specific duties category or the combination codes are simply not needed to punish the offending attorney or to deter him from such future conduct. Such deterrence can and should take place under the disciplinary rules. Furthermore, civility codes do not cover substantial areas not already governed by the disciplinary rules and as such, fail to set higher standards for professional conduct than those currently in force in most states.

B. The Drafting and Use of Civility Codes Is Ineffective in Fulfilling Their Purpose

Even those civility codes which may be deemed necessary to encourage general aspirational objectives fail to effectively fulfill the goals of the civility movement. While the civility movement purports to be a **[*166]** movement toward aspiration, rather than regulation, [102] a majority of the civility codes are either drafted in a style that is more regulatory than aspirational or are made explicitly enforceable. Some of the civility codes have been used as mandatory codes by courts as a basis for discipline and the assessment of professional conduct. Such use leads to potential problems of vagueness, inadequate procedural due process and, accordingly, further uncivil "satellite litigation." [103]

1. Many Civility Codes Are More Regulatory Than Aspirational

While some of the civility codes are labeled as tenets, creeds and pledges, others purport to be "codes" of civility, "standards" of professional conduct, or a lawyer's "mandate." [104] Jurisdictions in Pennsylvania have actually labeled their civility codes as "rules." [105] Several states have adopted a "Code of Professionalism" or a "Code of Professional Courtesy" which could be easily confused with the Model "Code of Professional Responsibility." [106] Similarly, the Mississippi State Bar labeled its civility code the "Mississippi Code of Professional Conduct." [107] Such labels make it difficult to determine from the titles of the civility codes alone whether they are disciplinary rules or otherwise.

The actual content of most civility codes is also often couched in very specific language resembling a statute or the Model Code's Disciplinary Rules and the Model Rules rather than aspirational canons or creeds. [108] Not only is the language specific, it is frequently mandatory in tone as well: "I will be loyal . . . , I will refrain . . . , I will endeavor . . ." [109] and **[*167]** "We will practice . . . , we will not . . .

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ciously injure another.'" Id. Another commentator looking to the regulation of attorney conduct in Texas, compared the standards adopted by the Dondi court with the Model Rules as adopted in Texas. Paul L. Haines, Restraining the Overly Zealous Advocate: Time for Judicial Intervention, 65 Ind. L.J. 445, 466 (1990). Haines found only one of the twelve litigation standards adopted by the court was not substantially covered by provisions of the Texas Rules and that the one standard was mainly aspirational in nature, unenforceable, and simply an additional meaningless rule. Id.

[102] See Interim Report, supra note 1, at 406 ("According to both the statistical data and the written comments, judges and lawyers do not favor more rules or regulations to handle civility problems"); see also Blueprint for Professionalism, supra note 1, at 296-97 (recommending that attorneys abide by "higher standards"); Moliterno, supra note 14, at 781-85; Mashburn, supra note 3, at 657-62.

[103] See infra notes 144-63 and accompanying text.

[104] See supra note 68 and accompanying text.

[105] Letter from LaPrica D. Mims, Editorial and Legal Assistant, American Bar Association, Standing Committee on Professionalism, Center for Professional Responsibility, to Brenda Smith, Production Editor, University of Dayton Law Review (Feb. 24, 1998) (on file with the University of Dayton Law Review). The Bucks County Bar entitled its civility code "Rules of Professionalism" while both the Pennsylvania Bar and the Philadelphia Bar labeled their civility codes "Working Rules" of or for "Professionalism." Id.

[106] Id.

[107] Id.

[108] See supra notes 81, 82, and 86 and accompanying text.

[109] See Lawyer's Creed of Professionalism, supra note 70, at 610-12; see also Creeds of Professionalism, supra note 61, 1:401.

abuse or indulge . . . , we will adhere. . ." [110] and "I am responsible . . . , I commit myself . . . , I am obligated . . . ." [111]

Further, some of the civility codes have been expressly made enforceable by the state bars or courts that have adopted them. The United States District Court for the Northern District of Texas adopted and made mandatory the standards for attorney conduct set forth in Dondi, [112] ruling that a violation of these standards could result in reprimands, sanctions, or other appropriate measures. [113] The United States District Court for the Northern District of Indiana requires that an applicant to the bar "shall. . . certify that he or she has read and will abide by the Seventh Circuit's Standards for Professional Conduct." [114] Similarly, the United States District Court for the Southern District of California stated that the "code of conduct is not intended to be a set of rules that lawyers can use to incite ancillary litigation . . . , but the court may take any appropriate measures to address violations of the rules." [115] In Wyoming and Pennsylvania, district courts have also made attorneys subject to sanctions, reprimands, or other disciplinary measures for violations of the civility codes. [116]

The regulatory style and content of many civility codes has inevitably led to calls for legal enforcement of their commands. While some codes have in fact been made expressly enforceable by state bars or courts, others have become enforceable despite the contrary content of their drafters.

2. The Use of Civility Codes in United States Courts

Several courts in jurisdictions that have adopted a type of civility code have referred to the civility codes in their decisions. Two main uses by the courts have emerged. First, judges have used civility codes to form a basis for disciplinary action, such as sanctions or disqualification of **[*168]** attorneys, as well as evidence of violations of other standards. [117] Second, judges have used the civility codes to set a proper professional standard for a particular area of conduct, to admonish particularly offensive behavior and perhaps to give notice to attorneys of expected behavior. [118]

The Dondi court [119] became the first court to refer to civility standards and adopt the standards as part of a disciplinary ruling. [120] As previously noted, while most civility codes profess to be merely aspirational and to provide no basis for disciplinary action or civil or criminal litigation, the court in Dondi made its standards enforceable. [121] The court stated that it would address a violation of its proposed code with "an appropriate response . . . including . . . 'a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appro-

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[110] Standards for Professional Conduct, Iowa Rules of Court (West 1998); Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, U.S. Dist. Ct., N.D. Ind., Ind. Rules of Court Appendix B (West 1997); La. Rev. Stat. Ann., Sup. Ct. R. General Administrative Rules, Part G, 11 (West 1998).

[111] The Texas Lawyer's Creed-A Mandate for Professionalism, supra note 70, at 496.

[112] Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

[113] Id. at 288.

[114] U.S. Dist. Ct., N.D. Ind., Ind. Rules of Court 83.5 (West 1997).

[115] U.S. Dist. Ct., S.D. Cal., Civ. R. 83.4 (West 1998).

[116] U.S. Dist. Ct., M.D. Pa., Pa. Rules of Court 83.23.2, Appendix D (West 1997); U.S. Dist. Ct., D. Wyo., Civ. R. 83.12.1 (West 1997).

[117] See infra notes 119-22, 123-28, 134-36, 139-40 and accompanying text.

[118] See infra notes 130, 137, 141, 144 and accompanying text.

[119] Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

[120] Id. at 287.

[121] Id. at 288.

priate to the circumstances.'" [122]

Since Dondi, the U.S. District Court for the Northern District of Texas has enforced the civility code in its courtroom in different contexts. In Lelsz v. Kavanagh, the district court removed a Texas Assistant Attorney General from litigation based on behavior in violation of the Dondi standards. [123] In the decision, Judge Sanders stated that the Dondi standards would "be rigorously enforced in this action." [124] Behavior which included filing a motion in bad faith, bad faith objections to discovery, and combative and improper conduct constituted violations of the Dondi standards and Federal Rule of Civil Procedure 11, and resulted in the removal of the assistant attorney general from the case. [125]

In FDIC v. Cheng, the same court found that an attorney's lack of candor toward opposing counsel and the court offended the letter and the spirit of the Dondi standards. [126] The court, however, declined to dismiss the case or disqualify the attorney based on such behavior. [127] Instead, the court found that the attorney's misconduct warranted an order that the offending attorney bear a portion of the opposing attorney's expenses and the fees associated with filing the motion. [128] In both cases, the disciplinary **[*169]** action taken, removal from the case or payment of fees and expenses, was based primarily on violations of the civility codes themselves.

Other Texas federal district courts have either cited to the Texas Lawyer's Creed [129] as support for disciplinary action, [130] or have used the creed as a method for admonishment. [131] Texas state courts have looked to the Texas Lawyer's Creed in opinions finding misbehavior and many have used the creed itself as a basis for corresponding disciplinary action. [132] Although the Dondi standards were expressly made enforceable by the ruling of the court, the Texas Lawyer's Creed was intended to be enforced only as a last resort. [133]

In a Louisiana state court case, where an attorney had sued his client for fees, the court noted that the Louisiana Supreme Court had approved a "Code of Professionalism" and that "[a]ppellant's groundless allega-

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122 Id. (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc)).

123 137 F.R.D. 646, 655-56 (N.D. Tex. 1991).

124 Id. at 649.

125 Id. at 650-55.

126 832 F. Supp. 181 (N.D. Tex. 1993).

127 Id.

128 Id. at 183.

129 The Texas Lawyer's Creed-A Mandate for Professionalism, supra note 70, at 495.

130 See, e.g., Bullard v. Chrysler Corp., 925 F. Supp. 1180, 1187-88 (E.D. Tex. 1996) (using the Texas Lawyer's Creed along with the disciplinary rules and Supreme Court rules as basis for attorney's responsibility to represent client to the best of his ability); Horner v. Rowan Cos., Inc., 153 F.R.D. 597, 603 (S.D. Tex. 1994) (sanctioning defense attorney for bad faith conduct and using Texas Lawyer's Creed as basis, along with the Texas Code of Professional Responsibility, for standard of bad faith conduct).

131 Exxon Chem. Patents, Inc. v. Lubrizol Corp., 131 F.R.D. 668, 674 (S.D. Tex. 1990) (admonishing counsel for failure to comply with Texas Lawyer's Creed and imposing monetary sanctions based on such failure).

132 See, e.g., Fina Oil & Chem. Co. v. Salinas, 750 S.W.2d 32, 35 (Tex. Ct. App. 1988) (finding that civility code should be adopted by attorneys in their trial practice upon concern with "gamesmanship" in discovery); Owens v. Neely, 866 S.W.2d 716, 720 n.2 (Tex. Ct. App. 1993) (finding attorney's conduct in violation of the Texas Lawyer's Creed); Warrilow v. Norrell, 791 S.W.2d 515, 531 n.3 (Tex. Ct. App. 1989) (sanctioning an attorney and citing the adoption of the Texas Lawyer's Creed as basis for standards of respect and integrity). But see Washington v. McMillan, 898 S.W.2d 392, 394 n.1 (Tex. Ct. App. 1995) (holding that courts are authorized to enforce Rule 11 of the Texas Lawyers' Creed through "'their inherent powers and rules already in existence.'").

133 The Texas Lawyer's Creed-A Mandate for Professionalism, supra note 70, at 497 ("Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.").

tions about the trial judge clearly violate[d] the Code of Professionalism." [134] Although the case was outside the context of a disciplinary review, a concurring judge found it to be "this court's responsibility to remedy such a clear violation." [135] The court then deferred the determination to the Disciplinary Board. [136] Thus, a violation of the Code was indirectly used as a basis for disciplinary action even though the Code of Professionalism adopted by the Supreme Court of Louisiana states that "[t]hese standards **[*170]** shall not be used as a basis for litigation or sanctions or penalties." [137] In Louisiana, some district courts have chosen to use civility codes in their decisions mainly as a means to remind attorneys of their duties as officers of the court. In these cases, the courts usually attach a copy of the jurisdiction's civility code to illustrate the correct behavior that should be exhibited. [138]

Though the Seventh Circuit's Committee on Civility expressly noted that its proposed "Standards of Conduct" were intended to be neither mandatory nor used in disciplinary proceedings or civil or criminal litigation, that intent was short- lived. In In Re Maurice, the Seventh Circuit Court of Appeals reviewed a bankruptcy proceeding in which the attorney representing the debtor was sanctioned by the Bankruptcy Court for, among other things, violating the Standards of Professional Conduct. [139] The court not only affirmed the ruling, but issued orders to the offending attorney to show cause why additional sanctions should not be imposed. [140] Again, although the civility code expressly prohibited its use as a set of enforceable standards, the court nevertheless issued sanctions based upon the code. Other federal courts have followed suit and have used the civility codes as a means to discipline. [141] Even where the civility codes have not **[*171]** been used to impose discipline upon attorneys, they frequently have been cited as evidence of behavior that should be condemned or admonished. [142]

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[134] Fox v. Lam, 632 So. 2d 877, 879 (La. Ct. App. 1994).

[135] Id. at 880 (Brown, J., concurring).

[136] Id. at 879-80.

[137] General Administrative Rules, La. Rev. Stat. Ann., Sup. Ct. R. Part G, 11 (West 1998).

[138] See, e.g., High Tech Communications, Inc. v. Panasonic Co., No. 94-1477, 1994 U.S. Dist. LEXIS 12687, at *3 (E.D. La. Sept. 2, 1994) (holding that parties' future pleadings should be free of personal attacks and ridicule and attaching copy of Louisiana State Bar Association's Code of Professionalism); Smith v. Our Lady of the Lake Hosp., Inc., 135 F.R.D. 139, 150 (M.D. La. 1991) (citing the Fifth Circuit's code of professionalism, but not basing decision to impose sanctions on such code), overruled on other grounds, 960 F.2d 439 (5th Cir. 1992);Southern Pac. Transp. Co. v. Builders Transp., Inc., No. 90-3177, 1991 U.S. Dist. LEXIS 11586, at *1 (E.D. La. Aug. 6, 1991) (denying motion for contempt, but attaching a "Code of Civility" and directing each counsel to "read it thoroughly and conduct himself accordingly."), aff'd, 48 F.3d 531 (5th Cir. 1995); Wood v. New Orleans Nat'l Collection Serv., Inc., No. 95- 1201, 1995 U.S. Dist. LEXIS 17587, at *11 (E.D. La. Nov. 17, 1995) (denying motion for sanctions, but finding that "using the threat of sanctions as a litigation tactic is specifically prohibited by the Louisiana State Bar Association's Code of Professionalism").

[139] In Re Maurice, 69 F.3d 830, 832 (7th Cir. 1995).

[140] Id. at 834-35.

[141] The Fifth Circuit found that, although it had not formally adopted a creed such as the Texas Lawyer's Creed, it commended such efforts and found that the attorney and client in that case failed to meet the standard which the creed set forth. McLeod, Alexander, Powell & Apfell, P.C. v. Quarles, 894 F.2d 1482, 1486-87 (5th Cir. 1990). The court found that a sanction of dismissal was appropriate for violating the standard. Id. In the district court for the Southern District of West Virginia, an attorney was disqualified on the basis of several rules, one of which was the West Virginia Code of Professional Courtesy. Roberts & Schaefer Co. v. San-Con, Inc., 898 F. Supp. 356, 364 (S.D. W. Va. 1995). The Supreme Court of Florida suspended an attorney from the practice of law for a period of 30 days on the basis of a "theme of honest dealing and truthfulness" found in the state's civility codes, as well as its disciplinary rules. Florida Bar v. Poplack, 599 So. 2d 116, 118-19 (Fla. 1992). Two other courts have used the civility codes in a slightly different context. In these cases, the courts used the standards for the reliability of lawyers' representations set forth in the civility codes to show that the parties involved had a right to rely on a lawyers' representations. Bennett v. Andry, 647 N.E.2d 28, 36 (Ind. Ct. App. 1995) (Baker, J., concurring); Fire Ins. Exch. v. Bell, 643 N.E.2d 310, 312-13 (Ind. 1994), aff'd in part and rev. in part, 643 N.E.2d 310 (Ind. 1994).

[142] See, e.g., Lee v. Thomas & Thomas, 109 F.3d 302, 306 n.6 (6th Cir. 1997) (citing Ohio Supreme Court's civility code and finding ideals contained therein "would be ill-served" by attorney's conduct); Intercept Sec. Corp. v. Code-Alarm, Inc., 169 F.R.D. 318, 324 (E.D. Mich. 1996) ("For the benefit of all, this court has attached a copy of the Civility Principles which should be thor-

Aside from the Dondi standards, most of the creeds and codes mentioned in the cases above professed to be voluntary and aspirational and were not intended to provide a basis for discipline or litigation. However, as the above cases indicate, courts have been willing to use the standards as they see fit, arguing that it is within their inherent power to regulate the conduct of attorneys before them. [143] Whether a court uses the civility codes as mere authority for or evidence of a professional standard of conduct, or as a basis for disciplinary action itself, the courts are extending the codes beyond the use for which they were promulgated.

3. The Consequences of Enforceable Civility Codes

From the inception of the civility movement, it has been feared that the civility codes, if made enforceable or actually enforced, could have a further "uncivil" effect on the legal profession. That consequence may soon be realized in the form of vagueness challenges brought against the broad and aspirational language of the codes, allegations of due process based upon unfair notice to attorneys, and the risk that the civility codes **[*172]** could be confused with the already enforceable standards. All of these problems could lead to undesirable satellite litigation.

A statute or rule may be found void for vagueness when the statute or rule does not sufficiently identify the conduct that is prohibited. [144] The statute or rule must be "sufficiently clear so as not to cause persons 'of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application.'" [145] Although in the past courts have been reluctant to find ethical standards vague, [146] in a recent Ninth Circuit case, a provision of the California Business and Professions Code prohibiting "offensive personality" was found to be unconstitutionally vague. [147] Like civility codes, California's "offensive personality" provision was designed and has been used to discourage undesirable attorney conduct. [148] In the Ninth Circuit case, the court found that the term "offensive personality" could refer to any number of types of behavior in which attorneys very regularly engage in the "zealous representation" of their clients and

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oughly examined. Hereinafter, this court expects counsel to act in accordance therewith."); Langer v. Presbyterian Med. Ctr. of Phil., Nos. CIV.A. 87-4000, CIV.A. 91-1814, CIV.A. 88-1064, 1995 U.S. Dist. LEXIS 2199, at *42-43 (E.D. Pa. Feb. 17, 1995) (finding that ABA's Lawyers' Creed of Professionalism falls short of binding authority, but holding that counsel "[should] do well to keep them in mind."), vacated on other grounds, Nos. CIV.A 87-900, CIV.A 91-1814, CIV.A 88-1064, 1995 U.S. Dist. LEXIS 9448 (E.D. Pa. July 3, 1995); Mercer v. Gerry Baby Prod. Co., 160 F.R.D. 576, 577, 579 (S.D. Iowa 1995) (finding "[n]either the letter nor spirit" of state's civility code met and attaching a copy of the civility code to the decision which sanctioned attorney under Rule 37); Redtail Leasing, Inc. v. Bellezza, No. 95 Civ. 5191, 1997 U.S. Dist. LEXIS 1484, at *4 (S.D.N.Y. Feb. 19, 1997) (admonishing counsel for tone in letters and directing attorneys to read the Guidelines on Civility in Litigation); Trust & Inv. Advisors, Inc. v. Hogsett, 830 F. Supp. 463, 468 n.6 (S.D. Ind. 1993) (directing counsel to read Standards of Civility although finding no violation of Rule 11 standards), aff'd in part and vacated in part on other grounds, 43 F.3d 290 (7th Cir. 1994);Vlotho v. Hardin County, 509 N.W.2d 350, 352-53 (Iowa 1993) (finding departure from standards of civility to be condemned because "they severely distract from the quality of justice Iowa citizens have a right to expect when they come to court").

[143] See infra note 165 and accompanying text.

[144] See Gentile v. State Bar of Nev., 501 U.S. 1030, 1048 (1991);United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1996). Although the void for vagueness doctrine has traditionally been applied to criminal statutes, courts have also applied the doctrine when a statute is "quasi-criminal" and civil penalties are imposed, or when an important right, such as free speech, is involved. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-500 (1982); see also Gentile, 501 U.S. at 1048-51.

[145] Wunsch, 84 F.3d at 1119.

[146] See generally In re Bithoney, 486 F.2d 319, 319 (1st Cir. 1973) (declining to find that Federal Rule of Appellate Procedure requiring attorney to "demean himself uprightly and according to law" and to avoid "conduct unbecoming a member of the bar" to be unconstitutionally vague); Committee on Prof'l Ethics & Conduct v. Behnke, 276 N.W.2d 838, 842-43 (Iowa 1979) (finding Ethical Consideration regarding gifts from clients not unconstitutionally vague); In re Frerichs, 238 N.W.2d 764 (Iowa 1976) (declining to find state's disciplinary rules to be impermissibly vague where Ethical Considerations provide further guidance).

[147] Wunsch, 84 F.3d at 1119.

[148] Id. at 1119. See Brian E. Mitchell, Note, An Attorney's Constitutional Right to Have an Offensive Personality? United States v. Wunsch and Section 6068(F) of the California Business and Professions Code, 31 U.S.F. L. Rev. 703, 704 (1997). Mitchell found that the California Business and Professions Code, which establishes certain ethical requirements for attorneys admitted to practice, has been used in the same capacity as that of ethical and civility codes: "to prevent [unprofessional] conduct from having a negative impact on the proper administration of justice." Id.

thus, was deemed unconstitutionally vague and unenforceable. [149]

Similarly, the Supreme Court recently held in Gentile that a disciplinary rule regarding extra-judicial communications was void for vagueness due to its grammatical structure, the absence of any clarifying statement, and the use of general terminology with no settled usage or tradition of interpretation in the law. [150] The Court found that, given the grammatical structure of the sentence, the rule required those seeking to **[*173]** avail themselves of the protections of the Rule to "guess at [the Rule's] contours." [151] As the Court noted: "the prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement." [152]

Many of the civility codes, whether general or specific, employ vague and aspirational words such as integrity, civility, and courtesy, which have been criticized as being "highly contingent, contextual and indeterminate" words. [153] Such words can be subject to many different interpretations and definitions and cover a broad range of behavior. If such broad words would lead a person to question exactly what kind of behavior is prohibited, the civility codes could be found unconstitutionally vague. For example, enforcement of the phrase "[m]y word is my bond," from a provision of the Texas Lawyer's Creed, [154] would be difficult to constitutionally enforce given the number of different interpretations which could result. [155] Whether such challenges would or would not succeed is admittedly uncertain, however the likelihood that such challenges would result in a considerable amount of litigation seems clear. [156]

Similarly, enforcement of the civility codes could be challenged on other due process grounds. Procedural due process requires that an individual be given notice and opportunity to be heard before being deprived of property rights or liberty rights. [157] The adequacy of this notice turns on the "knowledge that the attorney has of the consequences of his own conduct." [158] Furthermore, "fundamental fairness" requires that "some form of prior notice [be given] to an attorney that his conduct may be **[*174]** subject to discipline or sanction by a court." [159] Usually the mere publication of a rule, regulation, or code, by a court is enough to constitute notice. [160] However, if civility codes that purport to be voluntary are in practice enforced as mandates, an attorney could challenge the enforcement of the code for lack of fair no-

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[149] Wunsch, 84 F.3d at 1119-20.

[150] Gentile v. State Bar of Nev., 501 U.S. 1030, 1048- 49 (1991).

[151] Id. at 1048.

[152] Id. at 1051.

[153] See Davis, supra note 100, at 3; Mashburn, supra note 3, at 687.

[154] The Texas Lawyer's Creed-A Mandate for Professionalism, supra note 70, at 496.

[155] Less Civility, supra note 97, at 13. Professor Hazard argued that it would be questionable as to what kind of obligations an attorney would have if such a phrase was enforceable, i.e. whether an attorney could be subject to fraud for nondisclosure if he failed to disclose all facts. Id.

[156] Because civility codes were never intended to be enforceable, the fact that they might be found void, and thus unenforceable, may not appear to be a real problem. However, the amount of litigation required in determining whether the civility code is vague would significantly increase the number of already unnecessary and vexatious litigation proceedings.

[157] See In re Ruffalo, 390 U.S. 544, 550 (1968) (holding that a proceeding in which punishment or penalty is imposed on a lawyer is a quasi-criminal proceeding and entitles a lawyer to procedural due process, which includes fair notice of the charge); see also Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (holding that attorneys fees have been recognized as property interests); Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (holding that attorney's license to practice may also be considered a property right for which due process is invoked).

[158] Bradley W. Foster, Playing Hardball in Federal Court: Judicial Attempts to Referee Unsportsmanlike Conduct, 55 J. Air L. & Com. 223, 251 (1989).

[159] Id.

[160] Id.

tice. [161] Arguably, if the attorney did not know that such a code of professionalism would be mandatory, and then, was subject to it in a disciplinary hearing, the attorney's due process rights would be violated.

Because of the significant overlap between the civility codes and disciplinary rules, there is great potential for confusion among attorneys as to which regulations they must obey. Confusion may arise when the two standards are almost identical, [162] or when civility codes that seem mandatory differ in their requirements from the disciplinary rules. [163] Where a civility code is slightly different from the Model Rules, a great deal of additional, satellite litigation may be necessary to determine just which standard does apply.

Thus, most civility codes have been drafted and used contrary to the very purpose for which they were intended. By using the codes in such a manner, the courts may well render the civility codes ineffective in changing attorney behavior or in setting higher standards of behavior where those codes are unconstitutionally vague, violative of due process or serve only to confuse attorneys as to the proper standards of professional behavior.

C. Better Solutions Exist To Fulfill the Purpose of Civility Codes

Better solutions must be found to solve the real and perceived behavioral problems within the legal profession. The goal of ending uncivil conduct and changing attorney behavior can be better met by the correction or deterrence of existing uncivil behavior through stricter enforcement of the existing disciplinary rules and the prevention of future uncivil behavior through education, training and the encouragement of collegiality among attorneys. The goal of setting higher standards to which attorneys can aspire can best be met by encouraging general aspirational **[*175]** creeds in non-mandatory bar associations or other organizations and raising the minimum standards within the disciplinary rules.

1. The More Stringent Enforcement of Existing Disciplinary Rules

As noted above, the uncivil conduct which civility codes purport to regulate is already regulated by disciplinary rules in effect in most states. The recent calls for more civility in the profession and the subsequent adoption of civility codes are probably best seen as an indication that the existing enforceable disciplinary rules have not been adequately enforced. Such enforcement could provide a successful remedy for uncivil behavior and serve as a better deterrent to future misbehavior.

Since self-regulation is the cornerstone of the legal profession, [164] the best method of ensuring that attorneys are living up to their responsibilities of professional and civil behavior is to ensure that the members of the profession are, in fact, regulating one another. More stringent enforcement of the disciplinary rules can be accomplished by three mechanisms: 1) the duty of judges to report behavior in violation of the disciplinary rules and the inherent power of judges to regulate attorney conduct, 2) the duty of attorneys to report other attorneys in violation of the disciplinary rules, and 3) the duty of supervisory attorneys to take responsibility for the actions of subordinate attorneys.

Judges can play a major role in the civility movement through their inherent power to regulate attorney conduct. Judges have the power to sanction or punish attorneys, or at least remove them from litigation for their uncivil behavior by enforcing the rules of civil procedure, enforcing the disciplinary rules, or holding attorneys in contempt. [165] Not only can judges use their power to regulate attorney conduct, but they also have a **[*176]** duty to report improper conduct when it is brought to their attention and thus, to begin

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[161] One commentator found that attorney "[d]isciplinary cases often give rise to the issue of proper notice." Wilburn Brewer, Jr., Due Process In Lawyer Disciplinary Cases: From the Cradle to the Grave, 42 S.C. L. Rev. 925, 935-36 (1991).

[162] See supra notes 80-94 and accompanying text.

[163] See supra note 97 and accompanying text.

[164] See supra notes 10-14 and accompanying text.

[165] See In re Snyder, 472 U.S. 634, 643 (1985) ("[C]ourts have long recognized an inherent authority to suspend or disbar lawyers . . . . This inherent power derives from the lawyer's role as an officer of the court which granted admission"); see also

the disciplinary proceeding. [166]

Under the ABA's Model Code of Judicial Conduct, [167] a judge has a duty to act if he receives information regarding an attorney's improper conduct. [168] If the judge receives information that there is a "substantial likelihood" that a lawyer has committed a violation of the disciplinary rules, the judge "should take appropriate action." [169] If the judge has "knowledge" that a lawyer has committed a violation of the disciplinary rules that raises a "substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," the judge "shall inform the appropriate authority." [170] While the judge's duty to report depends upon the judge's actual knowledge of substantial wrongdoing, the judge is not limited under the Model Code of Judicial Conduct to reporting an attorney's dishonesty, fraud, deceit or misrepresentation, and may report any violation of the disciplinary rules. [171]

Prior to 1990, this section of the Model Code of Judicial Conduct did not set forth a mandatory duty. However, it was generally recognized even before 1990 that judges are ethically bound to report attorney behavior that is in violation of disciplinary rules. [172] Now that the rule has been amended **[*177]** and the duty to report made mandatory, judges who do not report such conduct can be held in violation of the rules and subject to discipline. [173] Indeed, under Canon 3(D)(1) of the Model Code of Judicial Conduct, judges must report other judges to proper disciplinary authorities for failing to report attorney misconduct. [174] Also, judges may be subject to other judicial action such as contempt for failure to report or for violation

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Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1209 (11th Cir. 1985) (holding that the court has inherent power to impose sanctions, in accordance with due process of law); Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1962) (holding that the court has the inherent authority to dismiss a case based on the attorney's failure to appear); Theard v. United States, 354 U.S. 278, 281 (1957) (holding that a federal district court has the power to disbar an attorney). For cases regarding the court's authority to exercise its contempt power, see Levine v. United States, 362 U.S. 610, 615 (1960) and Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985) (holding that the power to convict for criminal contempt is an inherent power of the courts). See Foster, supra note 158, at 245-46.

166 See infra notes 167-75 and accompanying text.

167 Model Code of Judicial Conduct (1990), reprinted in Thomas D. Morgan & Ronald D. Rotunda, Selected Statutes of Professional Ethics 539 (1995).

168 Id. at 549.

169 Id. The Comment to this Canon states that "appropriate action may include direct communication with the . . . lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body." Id.

170 Id. The Terminology section defines "appropriate authority" as the "authority with the responsibility for initiation of disciplinary process with respect to the violation to be reported." Model Code of Judicial Conduct Canon 3(D), supra note 167, at 540.

171 Leslie W. Abramson, The Judge's Ethical Duty to Report Misconduct By Other Judges and Lawyers and Its Effect on Judicial Independence, 25 Hofstra L. Rev. 751, 769 (1997). Abramson found that although "the Codes do not distinguish between major and minor ethical violations," at least two states have limited the type of conduct that must be reported by judges: "[r]ecent amendments to New York's Rules governing judicial conduct limit the reporting requirement to substantial violations by judges or lawyers. Florida's commentary to Canon 3D indicates that the 'appropriate action' for a judge depends on whether the offending conduct is considered minor." Id.

172 Several federal courts have considered, under Canon 3(B)(3) of the Code of Judicial Conduct or as Canon 3(D)(2) as amended in 1990, the duty to report unprofessional conduct of attorneys to be obligatory. See generally Taylor v. Henson, No. 94-1710, 1995 U.S. App. LEXIS 17068, at *5 (7th Cir. July 11, 1995) (finding Code of Judicial Conduct counseled court to "'initiate appropriate action'"); Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992) ("[w]e are well aware of our responsibility under Canon 3(B)(3)"); Igo v. Coachmen Ind., Inc., 938 F.2d 650, 655 (6th Cir. 1991) ("Therefore, in fulfilling our duty under Canon 3(b)(3) . . . we . . . send a copy of this opinion to the proper disciplinary authority . . . ."); Ryder v. City of Topeka, 814 F.2d 1412, 1427 (10th Cir. 1987) ("The obligation of the judiciary to discipline lawyers for misconduct or to report the misconduct is codified in the ABA Code of Judicial Conduct"); In re Grand Jury Subpoena, Misc. No. 86-738, 1986 U.S. Dist. LEXIS 17185, at *6 (D. Mass. Nov. 26, 1986) (stating "this court takes most seriously its obligation to report professional misconduct"); In re Complaint of Judicial Misconduct, 2 Cl. Ct. 255, 260 (Ct. Cl. 1983) ("Disciplining errant attorneys is never pleasant but judges have a responsibility to the public to police the professional behavior of the officers of their court").

173 In section two of the preamble, it provides that "[w]hen the text uses the word 'shall, . . .' it is intended to impose binding obligations the violation of which can result in disciplinary action." Model Code of Judicial Conduct, supra note 167, at 539.

174 Id. at Canon 3(D)(1), supra note 167 at 539.

of other disciplinary rules. [175]

Attorneys are also ethically bound to report fellow attorneys who they know have violated the jurisdiction's disciplinary rules. Under Rule 8.3 of the Model Rules, an attorney who has knowledge of another attorney's unprofessional behavior "shall inform the appropriate professional authority" [176] unless the attorney gains such knowledge through some type of privilege. [177] The only other limitation on the duty to report under the Model Rules is that the attorney must consider whether the behavior of **[*178]** another attorney raises a "'substantial question' as to that lawyer's honesty, trustworthiness or fitness as a lawyer." [178]

The Model Code similarly provides under DR 1-103 that a lawyer shall report unprivileged knowledge of another attorney's misconduct to a tribunal or other authority. [179] The major difference between the Model Code and Model Rules in this area is that under the Model Rules, the attorney must "decide what types of behavior raise 'substantial' questions as to a fellow attorney's fitness to practice" [180] rather than just report all offenses of which the attorney has knowledge.

Despite the limitation in Model Rule 8.3 as to which offenses must be reported, courts have still interpreted the duty to report broadly under the Model Code. In the most recent case on point, In re Himmel, [181] the Supreme Court of Illinois ruled that an attorney's failure to report misconduct of another attorney violated DR 1-103(a) and that the attorney was subject to a one-year suspension. [182] This court found that "[a] lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code" and that "[a] lawyer may not choose to circumvent the rules by simply **[*179]** asserting that his client asked him to do so."

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[175] State ex rel. Schwartz v. Lantz, 440 So. 2d 446, 450 (Fla. Dist. Ct. App. 1983) (holding judge in contempt where he acted "contrary to an unambiguous order of which he has been made aware"). This court found support for using the contempt power to discipline a judge or unprofessional conduct from the Florida Bar Code of Judicial Conduct Canon 3(B)(3). Id.

[176] Model Rules of Professional Conduct Rule 8.3, supra note 36, at 99. Rule 8.3 specifically states: (a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . . (c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege. Id.

[177] Model Rules of Professional Conduct Rule 1.6, supra note 36, at 17-18. Rule 1.6 provides for "Confidentiality of Information" and prohibits an attorney from revealing information obtained from a client, unless the client consents or in order to prevent the client from committing a criminal act resulting in imminent death or bodily harm or establish a claim or defense in a controversy between the lawyer and client. Id.

[178] Model Rules of Professional Conduct Rule 8.3, supra note 36, at 103. Under the Comment to Rule 8.3, it is stated that "[a] measure of judgment is, therefore, required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." Id. at Rule 8.3 cmt., supra note 36, at 103. Under this requirement, attorneys could be required to report much of the uncivil behavior which is contemplated by the civility codes. For example, an attorney who observes a fellow attorney participating in strategic non-compliance with discovery requests, as previously discussed, would substantially question that attorney's honesty, trustworthiness, and fitness as a lawyer.

[179] Model Code of Professional Responsibility DR 1- 103, supra note 28, at 152. DR 1-103 specifically provides: (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges. Id.

[180] Michael J. Burwick, You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct, 8 Geo. J. Legal Ethics 137 (1994). Burwick found the significant difference between the Model Rules and the Model Code in this area to be that under the Model Code, "attorneys were required to report any and all offenses, provided there was sufficient evidence of a violation," but that under the Model Rules, the attorney need only report substantial offenses. Id.

[181] 533 N.E.2d 790 (Ill. 1988).

[182] Id. at 794-96. In this case, the court interpreted the unprivileged information requirement broadly. Himmel, an attorney, learned of misconduct of another attorney, his client's former attorney, through conversations with his client. Id. The court found that the information was not attorney-client privileged because the information was not communicated in confidence where the client's mother and fiance were present at various times when their discussions took place. Id. at 793-95.

[183] No major cases have been decided under Model Rule 8.3. However, some courts have attached a violation of Model Rule 8.3 to other offenses. [184]

While the duty to report is an ethical duty under both the Model Rules and the Model Code, there is general agreement that this duty has not been observed. [185] But while Himmel is one of only two cases in which a state court disciplined an attorney for no other ethical violation than failing to report misconduct, [186] the evidence indicates that in the wake of Himmel, compliance with Rule 8.3 increased in that court's jurisdiction. [187] When Rule 8.3 or DR 1-103 is actually enforced in a jurisdiction, more misconduct is reported and more attorneys are disciplined for other violations. Such an approach would also increase the deterrent effect of the disciplinary rules and forestall future uncivil conduct encompassed by those disciplinary rules.

A flaw that some perceive in using Rule 8.3 and DR 1-103 as mechanisms to regulate uncivil behavior is that such usage will lead to even more frivolous proceedings, providing attorneys with yet another "Rambo" tactic with which to intimidate opposing parties. [188] However, according to an ABA Formal Ethics Opinion, the use of a disciplinary complaint to obtain advantage in a case or to harass the opposing counsel is "constrained by the Model Rules, despite the absence of an express prohibition on the subject." [189] Furthermore, under Rule 8.3 itself, the **[*180]** attorney reporting the misconduct must show that the conduct raises a "'substantial question' as to that lawyer's honesty, trustworthiness or fitness as a lawyer." [190]

It could also be argued that remedying violations of Rule 8.3 or DR 7-103 by enforcing still other rules would inevitably lead to even more harassment constituting uncivil behavior. Genuine complaints for disciplinary action and the reporting of misconduct could be encouraged by imposing the same level of sanctions and penalties on the attorney who failed to report misconduct as that which would be imposed upon the perpetrating attorney for his or her misconduct. For example, if Attorney A had knowledge that Attorney B had violated one of the disciplinary rules which raised a substantial question as to Attorney B's fitness as a lawyer, and Attorney A did not report it, Attorney A would be subject to the same sanctions for not reporting as Attorney B would face for the actual violation. As for frivolous or vexatious complaints, a similar approach would raise the level of sanctions imposed on those who are found to have filed such complaints in bad faith to an even higher level than the sanctions or penalties imposed for the actual misconduct alleged. Thus, attorneys would be encouraged to make genuine and good faith reports of

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[183] Id. at 792-93.

[184] See generally In re Dowd, 160 A.D.2d 78 (N.Y. App. Div. 1990) (suspending attorneys from practice for paying kickbacks and failing to report demands for kickbacks); see also In re Rivers, 331 S.E.2d 332, 333 (S.C. 1984).

[185] Cynthia L. Gendry, Comment, Ethics-An Attorney's Duty to Report the Professional Misconduct of Co-workers, 18 S. Ill. U. L.J. 603, 606 (1994) (attributing failure to comply to "(1) ambivalent or negative attitudes toward reporting; (2) ignorance of the duty to report or of the reporting procedure; and (3) fear of retaliation"); Michael G. Daigneault, Am I My Brother's Keeper?, 43 Fed. Law. 9, 12 (1996) ("governing authorities have appeared reluctant to enforce the rule, or have enforced it sporadically").

[186] Laura Gatland, The Himmel Effect, 83 A.B.A. J., Apr. 1997, at 24. In 1995 the Arizona Supreme Court punished an attorney solely for not reporting the ethical violations of another attorney. Id.

[187] Id. One year after the ruling in In re Himmel, the Illinois Attorney Registration and Disciplinary Commission received 922 complaints from lawyers reporting other attorneys' misconduct. Id. Though the commission had not kept track of such complaints before the case, the commission did find that the number had skyrocketed. Id. The Illinois Commission continued to receive high numbers of complaints in subsequent years including 681 complaints in 1990 and 570 complaints in 1992 to 1995. Id.

[188] See Michael G. Daigneault, Games Legal Negotiators Play: The Use of Threats, 44 Fed. Law., Sept. 1997, at 46.

[189] ABA Comm. on Professional Ethics and Grievances, Formal Op. 94-383 (1994). The ABA Committee found that Rule 3.1 (prohibiting an advocate from asserting frivolous claims), Rule 4.1 (requiring a lawyer to be truthful in dealing with others on a client's behalf), Rule 4.4 (prohibiting a lawyer from using means that have "'no substantial purpose other than to embarrass, delay or burden a third person'") and Rule 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice) would provide significant barriers to threats of filing disciplinary complaints for settlement purposes, to gain advantage or merely to harass an opponent. Id.

[190] Model Rules of Professional Conduct Rule 8.3, supra note 36, at 103.

their unprofessional peers or face the same or possibly worse sanctions than those imposed on the unprofessional attorneys. Because imposing sanctions or other types of penalties under the disciplinary rules is a matter of judicial discretion, [191] courts in each jurisdiction should take the initiative in encouraging genuine reporting by attorneys and actually enforcing Rule 8.3 and DR 1- 103.

A more critical approach to enforcement of current disciplinary rules should apply to attorneys in firms who supervise other attorneys. Under Model Rule 5.1, partners in a law firm and lawyers having "direct supervisory authority over another lawyer" are also ethically bound to make "reasonable efforts" in assuring that those other lawyers have conformed to the rules of professional conduct. [192] Under section (b) of **[*181]** Rule 5.1, a lawyer is held responsible for another's violation if that lawyer has "knowledge" of the specific conduct that is in violation of disciplinary rules and "orders" or "ratifies" the conduct. [193] An attorney is also held responsible if he or she is in a direct supervisory position over the offending lawyer and knows of the conduct "at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." [194] Some have found that this rule, rather than encouraging more punitive remedies, encourages fellow attorneys to forestall unprofessional conduct before it becomes a problem and instills a "sense of collective responsibility and increased accountability." [195] While there is no direct counterpart to Rule 5.1 under the Model Code, some provisions require a lawyer to exercise reasonable care in preventing employees and associates from disclosing client confidences or from making extrajudicial statements. [196]

Through better utilization of the three main duties among attorneys and judges to report misconduct or to make reasonable efforts to prevent it, existing disciplinary rules would be better and more adequately enforced. Attorneys would report behavior that judges may not know about or do not have the time and resources to investigate. Attorneys who are presently engaging in uncivil and unethical behavior would be held responsible for their actions and thus, deterred from any such future action. Judges would be better equipped to control the litigation process in their courtroom.

As discussed previously, the judiciary has the inherent power to regulate attorney conduct, [197] a power that includes the contempt power; the power to disbar, suspend, or reprimand counsel; the power to disqualify counsel; [198] and the power to regulate attorney conduct through the use of disciplinary rules. The only manner in which to ensure that these reporting and supervisory duties are enforced is to rely on the judiciary to take a more active role in the enforcement of the disciplinary rules.

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2. Education, Training, and Collegiality

Although enforcement of the disciplinary rules can have a deterrent effect on future behavior, the major goal of the disciplinary rules is to ensure that attorneys are held responsible, and sometimes punished, for

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191 See supra note 165 and accompanying text.

192 Model Rules of Professional Conduct Rule 5.1, supra note 36, at 77. Rule 5.1 states: (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct. (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct. Id.

193 Id. at Rule 5.1(b), supra note 36, at 77.

194 Id.

195 Irwin D. Miller, Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties, 70 Notre Dame L. Rev. 259, 262 (1994) ("Each case of professional misconduct that is prevented (by properly exercising attorneys' supervisory duties) potentially means one less client complaint to the bar, one less case of client harm, and one less attorney punished.").

196 Model Code of Professional Responsibility DR 4- 101(D), 7-107(J), supra note 28, at 215-16.

197 See supra note 165 and accompanying text.

198 Id.

their uncivil behavior. Disciplinary rules could therefore be considered a more reactive remedy. There are alternative measures, however, that are proactive or preventative in nature. Three preventative measures that could help retrain attorney thinking, and thus prevent uncivil behavior, include: 1) education on the topic of civility in the law schools, 2) training licensed attorneys in civility through local bar associations, inns of court or law firms, and 3) encouraging more collegiality within the bar.

The ABA should require that accredited law schools incorporate into their curricula courses designed to encourage and demonstrate civil behavior in the profession. Most law schools already require coursework based upon the currently enforceable disciplinary rules. These courses should not only concentrate on the standards of civility within the disciplinary rules, but should also include material centered on the standards of civility and courtesy which are aspirational in nature. [199] This would require that the ABA, or some other group, develop a list of aspirational goals toward civil conduct upon which all can agree. However, the diversity among the various civility codes that have been adopted show that currently many state jurisdictions do not agree upon which perceived problems need to be addressed and how best to address those problems. A "model" creed of general aspirational statements would not only bring more uniformity to the movement, but would facilitate even more discussion and awareness of civility among the members of the profession. Yet, such a model creed would need to be subject to the limitations discussed later in this section. [200]

For attorneys already in practice, state and local bar associations, inns of court, [201] or law firms could and should offer Continuing Legal Education **[*183]** ("CLE") courses in civility. These courses would help educate attorneys as to the civility already expected through the enforceable disciplinary rules and the civility expected above and beyond those rules. Law firms, by virtue of their responsibilities under Model Rule 5.1 and a more general responsibility to the public, could offer mandatory training for its partners and associates, ensuring that attorneys are encouraged to engage in representational tactics which not only focus on the economics of the profession, but on the need for and desirability of civility in the profession. Because the profession has grown more diverse and become more business-oriented, regulating attorney behavior through the management ranks of firms and professional corporations may be the best way to ensure that attorneys see the positive side of maintaining civil relations with opposing counsel and the courts.

Finally, because the loss of collegiality among attorneys has been cited as one of the major reasons attorneys no longer feel the need to maintain civil and courteous relations with one another, [202] some effort toward the encouragement of required collegiality may prove an effective tool in encouraging civility. The mandatory state bar associations that issue attorney licenses could require attorneys to obtain membership in a local professional group, such as a local bar association or inn of court, for the first few years in practice. Such required membership would allow attorneys to develop a greater sense of community through regular meetings, social events, and as mentioned above, further training and educational opportunities. Through these types of functions, attorneys can foster relationships with their peers and develop mentor relationships with more experienced attorneys. Attorneys can also become better acquainted with the judges and other court officials in their jurisdiction, restoring respect for the judicial system and the entire liti-

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[199] Davis, supra note 100, at 9. Davis encouraged law schools "not just to teach advocacy, but to teach civility." Id. He found that law schools should not encourage such a competitive atmosphere, but instead one of cooperation among students and between students and professors. Id. He argued that the Socratic method need not be degrading. Id.

[200] See infra note 203 and accompanying text.

[201] Inns of Court have been adapted to the American legal system from the "traditional English Inns of Court." Joryn Jenkins, The American Inns of Court: Preparing Our Students For Ethical Practice, 27 Akron L. Rev. 175, 181 (1993). "The trademarks of English Inn are civility, integrity and collegiality." Id. "The mission of the American Inns is to unite a cross-section of the bench and bar into an educational forum . . . ." Id. Typically, Inns of Court are comprised of attorneys, judges, and sometimes law students at three levels of experience: 1) masters constituted of judges, law professors, and trial attorneys with twelve or more years of experience; 2) barristers with between three and twelve years of experience; and 3) pupils with less than three years experience. Id. at 184. The Inn usually set up a pupilage made up of a judge, one or two masters, several barristers and several pupils and each month a different pupilage puts on a presentation. Id. at 186.

[202] Interim Report, supra note 1, at 391.

gation process. The more that attorneys get to know one another and develop relationships, the less inclined they will be to engage in uncivil tactics that serve no other purpose than to harass and anger one another.

More stringent enforcement of existing disciplinary rules and preventative measures through education, training and collegiality will meet the first main goal of the civility movement to change attorney behavior and end uncivil conduct. However, they may not adequately address the second main goal of setting higher standards by which attorneys can aspire.

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3. General Aspirational Statements Adopted by Non-mandatory Bar Associations

A minority of the civility codes that have been adopted by the states are more akin to those which the original proponents of civility codes had envisioned: general hortatory and aspirational statements which would not be enforced. These general aspirational statements may indeed provide a benefit to the profession by demonstrating to both attorneys and the public that the profession can aspire to, if not always meet, lofty civil behavior.

However, these statements should not be made enforceable or be enforced by the courts lest they raise the practical and constitutional problems previously discussed. [203] Thus, only local, non-mandatory bar associations, or bar associations that do not issue attorneys' licenses, should adopt these types of creeds. Although the promulgation of these creeds may tempt courts to use them as standards for disciplinary rulings, if the profession must use aspiration, these creeds could prove successful when accompanied by the proposed limitations.

4. The Minimum Standards in the Disciplinary Rules Should Be Raised

Finally, in meeting the goal of higher standards within the profession, one last method must be considered. It has been argued that separation of aspirational and enforceable standards must be maintained for either to be successful in the area of conduct regulation. [204] Therefore, incorporating the general aspirational type of civility codes into existing disciplinary rules has not been considered a viable solution. Thus, if members of the profession are dissatisfied with the level of conduct at which attorneys operate and desire them to not only aspire to, but meet higher goals, then perhaps the profession's required goals should be higher. This would only be successful, however, if the minimum standards were actually enforced.

IV.Conclusion

Though the legal profession agrees on the perceived problems that have led to the civility crisis, and generally agrees with the goals of the civility movement, it has yet to reach a consensus on the most appropriate solutions. The adoption of civility codes has not proved successful. Many **[*185]** of the civility codes, rather than stating aspirational goals, have targeted specific behavior already covered by the disciplinary rules in effect in most states. Furthermore, many of these civility codes have been used contrary to their intended purpose, as mandatory rules rather than aspirational goals.

Thus, the majority of these civility codes prove unnecessary and ineffective in bringing about their intended results. There are more effective ways to bring civility to the profession: the more stringent enforcement of existing disciplinary rules; preventative methods designed to educate, train and promote collegiality; the use of more general-aspirational creeds by non-mandatory bar associations; and higher standards within the currently enforceable disciplinary rules. Individually, none of these proposed solutions may end the civility crisis, but together they may mold the profession to our changing culture and return civil-

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203 See supra notes 144-63 and accompanying text.

204 See Moliterno, supra note 14, at 801-02.

ity to the profession.

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