

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

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-

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-

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

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 civility⁴⁵ 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-

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-

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 LaPrice 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.

