Beyond the Model Rules: Aristotle, Lincoln, and the Lawyer's Aspirational Drive to an Ethical Practice

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TABLE OF CONTENTS

Introduction ......................................................................................................................... 2
I. Lawyer Regulation In The Last 100 Years ................................................................. 6
II. Expressions Of The Aspirational Drive
   A. Professionalism Movement ............................................................................... 9
   B. The Limitations Of A “Code/Creed” Approach .............................................. 10
III. Aristotle’s Theory .................................................................................................. 11
IV. Lincoln As A Role Model ..................................................................................... 13
V. Lincoln And The Model Rules ............................................................................. 18
   A. Model Rules 1.1 and 1.3 – Competence and Diligence ................................. 19
   B. Model Rule 1.5 – Fees ................................................................................... 24
      1. The Fees Rule Defined ................................................................................ 24
      2. Lincoln and the Fees Rule .......................................................................... 27
      3. Lesson Learned: Differentiating Between Reasonable and Fair Fees ....... 31
IV. Conclusion ................................................................................................................. 36
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By Billie J. Ellis¹ and William T. Ellis²

INTRODUCTION

The legal profession suffers from an ethical crisis. This belief, so often mentioned, debated, and mulled over, has devolved into a disheartening platitude. Despite the onslaught of discussion and opinion, or perhaps as a result of it, the precise nature of this ethical crisis is nebulous. It is uncertain when this ethical crisis began. Its causes are unclear, its effects disputed, and its suggested remedies boundless.

Amidst this ambiguity, the term “crisis” becomes a slippery designation. A crisis implies a temporary turning point; a moment in time when problems escalate to a climax. Yet even in the profession’s infancy, the practice of law was often viewed an ethically bankrupt vocation.³ Lawyers were often considered parasitic.⁴ In the days of the Founding Fathers, lawyer jokes ridiculing lawyers for their lack of morality and purpose abounded.⁵

These early ethical criticisms were not always provided by the public-at-large. They also emanated from lawyers themselves, who frequently questioned their role in society and the greater purpose behind their profession.⁶ As a result, our predecessors experienced what many

¹Partner, Locke Lord Bissell & Liddell, Dallas, Texas; J.D. University of Houston Law Center, 1978; M.B.A. Southern Methodist University, 1977; B.A. University of Texas at Austin, 1974.


³See Brian R. Dirck, Lincoln the Lawyer 35 (University of Illinois Press 2007) (stating that lawyers were seen as “men who failed to produce anything tangible, who seemed to earn their pay by preying on the misfortunes of those who did work for a living. Some of those farmers, merchants, mill owners, and raftsmen lost the things they produced because of words, in trials where the other side’s lawyer could write a better pleading or give a better speech.”).

⁴Id.

⁵See Marc Galanter, Lowering the Bar: Lawyer Jokes and Legal Culture 97, 99, 162, 201 (University of Wisconsin Press 2005). Galanter’s text cites to a series of illustrations criticizing and mocking lawyers. Take for example a 1760 cartoon entitled “A Lawyer and His Agent,” where a “smiling devil pays friendly visit to lawyer, possibly admonishing him for overreaching in his wickedness;” this early American illustration associates the lawyer with the “devil, sin, hell, and irreligion.” A 1768 illustration entitled “Counsellor Double-Fee,” showcases a lawyer who takes fees from opposing parties in a lawsuit: his speech-balloon says “Open to all parties,” his hands are tattooed “Open to All,” and, on his desk are briefs for the plaintiff and defendant in the same case. Galanter also references a 1819 cartoon titled “Villagers Shooting out their Rubbish,” in which “the professional triad—parson, apothecary, and lawyer—are summarily expelled by villagers.” Id.

lawyers today undergo: a professional malaise, a loss of meaning, and lack of faith in their calling and themselves.\footnote{Marc Galanter, \textit{Lawyers in the Mist: The Golden Age of Legal Nostalgia}, 100 \textit{Dick. L. Rev.} 549, 555 (1996) (quoting \textit{The Commercialization of the Profession}, 3 Am. Law 84 (1895) (warning that “[the bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor . . . . [F]or the past thirty years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.”)).}

Although the public has long been critical of lawyers’ self-regulation, these stringent critiques – from the public and the legal community itself – of the American Bar Association (ABA) originated and evolved at the same pace as the ABA itself.\footnote{See Andrews, supra note 4, at 1442-51.} Predictably, every new set of ethical Codes or Canons promulgated by the ABA standard for ethical conduct undergoes scrutiny, thereby paving the way for the current standard’s demise and the creation of its successor.\footnote{Id.}

In 1905, former President of the ABA, George St. Tucker, urged the bar to explore “whether the ethics of our profession has risen to the high standards which its position of influence in this country demands.”\footnote{Id. at 1439 (quoting 33 \textit{REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION}, at 575-84 (1908) (“Tucker Address”) [hereinafter ABA REPORTS]).} Three years later, the ABA passed the seminal, nationally-endorsed standard of conduct in the form of the 1908 Canons of Professional Ethics (the “Canons”).\footnote{33 ABA \textit{REPORTS}, supra note 8, at 575-84 (reprinting original 1908 Canons).} The Canons were unabashedly inspirational and idealistic in nature and were born out of the efforts of 19th century legal scholars, academics, and the influence of other societal commentators on the commercialization of the legal practice.\footnote{See Andrews, supra note 4, at 1424-26 (noting that the Field Codes, which originated shortly prior to the Canons, included, among other things, statutory requirements to “abstain from offensive personality … incit[ing] passion or greed” in addition to introducing the Confidentiality concept for the first time.).}

Over the ensuing years, members of the bar debated the significance and viability of the Canons.\footnote{Id. at 1440-43.} Pressure increased to make them more relevant to contemporary practice. The ABA amended and added new canons as the legal profession grew and became more specialized.\footnote{Id. (citing American Bar Association, \textit{COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS} 331, 342-45 (2002)).} The ABA’s current standard for professional conduct, the Model Rules of Professional Conduct (the “Model Rules”), faces the same attacks as the Canons before them. The Model Rules are accused of helping precipitate an ethical crisis in the legal profession by removing the
aspirational content of the Canons and replacing them with only bare minimum standards for conduct.\textsuperscript{15}

Since the enactment of the Model Rules, a professionalism movement coalesced, aiming to fill the aspirational void at the core of the ethical crisis.\textsuperscript{16} From this unofficial legion of concerned lawyers and members of the bar came mandatory ethics courses in law schools, legal ethics journals, and a host of voluntary creeds to guide lawyer conduct. However, as the profession has been plagued by ethical problems long before the Model Rules, then the Model Rules are not entirely to blame; there must be more fundamental causes.

Cycles of criticism against, and within, the legal profession are both perennial and inevitable. In the broadest sense, this criticism is partly the result of the nature of the law itself. Despite its necessity, the legal system remains an imperfect institution that not only fosters justice, but in so doing, must interact and become intimate with every breed of criminality and injustice. There is also the age old criticism of relativism, originally conceived by Plato and contemporaries who railed against attorneys for their sophistry and their abuses of rhetoric.\textsuperscript{17} This ancient fear of a group of people trained to argue both sides of an issue has, in modern times, morphed into a critique of the adversarial system itself. Finally, one must consider the nature of lawyers as inherently highly critical and fault finding. Lawyers are trained to identify problems, and, therefore, it is predictable that lawyers are frequently the standard-bearers in the critical war against its own profession.

This is not to say the profession doesn’t have serious problems, unique to this time in history, which must be honestly faced. These troubles are discussed constantly: the growing commercial aspect of the law, the increasing importance of firm profits, the “arms race” of billable hours. In short, the legal practice faces new economic conditions that tear at its ethical fabric.\textsuperscript{18} An enticing view has thus emerged, which identifies the current legal profession as a soulless corporate machine, a shadow of the legal practice of old, when lawyers like John Adams


The transition from the Canons to the Code to the Model Rules was paralleled by the development of disciplinary enforcement machinery in several states. As a consequence, lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. However, lawyers have also tended to look at nothing but the rules; if conduct meets the minimum standards, lawyers tend to ignore exhortations to set their standards at a higher level. \textit{Id.} (quoting ABA Comm’n on Professionalism, ‘... \textit{In the Spirit of Public Service’}: A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1986) [hereinafter \textit{Spirit of Public Service}].

\textsuperscript{16} Crystal, \textit{supra} note 13, at 844.

\textsuperscript{17} 3 W. K. C. Guthrie, \textit{History of Greek Philosophy} 399 (Cambridge University Press 1969).

\textsuperscript{18} See generally Deborah Rhode, \textit{Ethics in Practice} (Oxford University Press 2003).
were beacons of gentlemanly virtue, honesty and principle.\textsuperscript{19} This view stems from a dismissal of history; a classic "lost-golden-years" fallacy.\textsuperscript{20}

Even among those observers that do not subscribe to the above view of the legal profession, most agree the profession needs an ethical overhaul, but there is no consensus as to how this should be brought about.\textsuperscript{21} This article contends the responsibility to foster and maintain an ethical legal profession cannot rest solely with those bodies who currently drive the ethical movement - the ABA, law schools, the drafter of professional standards, or other regulating bodies. This responsibility must also rest with each individual lawyer. True ethical action can only come from a freely acting agent. The ABA can force individual attorneys to follow mandatory, albeit minimum, standards, but it cannot force that attorney to exceed those standards and strive for a higher ethical ground.

Many doomsayers suggest that only major structural changes to the legal profession as it exists today can mitigate the ethical erosion at issue. Some of these critics propose solutions through wholesale restructuring of the legal profession and its education system.\textsuperscript{22} This article is not suggesting any such structural changes. Major reforms might be necessary, but it should be remembered the profession is not a homogenized entity that, once reformed, will suddenly ensure the practicing lawyers within the profession will be reformed as well. Another approach is to attempt change from within, beginning not with the structures of the legal system, but with the individual lawyers who comprise it.

Voluntary, aspirational creeds created by the professionalism movement represent a step in the right direction. Such creeds aim to evoke change from within the system, by appealing to each individual lawyer through persuasion, rather through fear of censure brought about by a complex legal framework. These types of standards aim to inspire the individual's conscience. In practice however, such creeds often miss their mark. This article attempts to appeal to the individual lawyer through an individual role model. To understand why the use of a role model is a more effective source of personal inspiration and guidance than codes and creeds, we will first consider the ideas of Aristotle. Although many critics may deem such an ancient figure irrelevant to today’s lawyer and the present ethical quandary, Aristotle conceived what many believe to be the first treatise on ethics known to the western world. A brief consideration of Aristotle will help achieve a bird’s eye perspective: a macro, forest-through-the-trees vision that seems missing in hyper technical debates about today’s professional standards.


\textsuperscript{20} Galanter, \textit{supra} note 5, at 555 (providing a more thorough analysis of this subject).


\textsuperscript{22} See generally Edwards, \textit{supra} note 21.
A key component of Aristotle’s teachings is the argument that people are not ultimately inspired by laws or institutions, but by other people. Following this insight, this article presents Abraham Lincoln, a lawyer—as opposed to Abraham Lincoln, the 16th President of the United States—who acted on his own conscience. Although such a figure may not appear to be the ethical attorney par excellence, this Article attempts to illustrate why he is an ideal choice. This is not to suggest that Lincoln need be mirrored to achieve ethical balance; there are many ways of being an ethical lawyer, just as there are many ways of being an ethical person. Rather, this article offers Lincoln, the lawyer, as a figure worth observing, studying, reflecting upon, and drawing inspiration from. By studying how like Lincoln found his own solutions to his ethical crises, lawyers can follow Lincoln’s in footsteps as they address their own ethical quandaries, as well.

To help review Lincoln’s appraisal of ethical problems within his practice, and to link his solutions to these problems with contemporary practice, this article will juxtapose Lincoln’s actions and decisions with four especially important model rules. Features of Lincoln’s practice will be examined in light of Rule 1.1 and 1.3, dealing with competence and diligence, Rule dealing with fees, and finally, Rule covering the lawyer’s role as advisor. Lincoln, without the guide of any regulation, not only complied with these rules, but aspired beyond them. Despite the obvious fact that Lincoln practiced law more than 150 years ago, it will be shown his ethical aspiration provides a powerful model for twenty first century lawyers.

PART I LAWYER REGULATION IN THE LAST 100 YEARS

In 1908, the ABA passed the seminal, nationally endorsed standards of conduct for its members with The Canons of Professional Ethics. These Canons provided both moral and ethical advice along with practical suggestions for the legal profession. In comparison to the current Model Rules of professional conduct, the Canons were idealistic in that many of their guidelines were purely aspirational. For over half a century the ABA tinkered and toiled with the Canons due to a flood of criticism. Some complained the Canons were too general; others complained they were too specific. In the view of Justice Fiske Stone, the Canons were “generalizations designed for an earlier era.”

In 1964, ABA President Lewis Powell oversaw the appointment of a committee to review the “adequacy and effectiveness” of the Canons. The committee concluded the ABA Canons did not distinguish the “inspirational” from the “proscriptive” and did not effectively allow for

23 See quoted passage infra note 61.

24 See 33 ABA REPORTS, supra note 8, at 575-84.

25 See Andrews, supra note 4, at 1442-51.

26 See generally id. at 1440-47.

27 Id. at 1443 (quoting The Public Influence of the Bar, 48 HARV. L REV. 1, 10 (1934) (a speech by Chief Justice Harlan Fiske Stone to the University of Michigan Law School)).

28 89 ABA REPORTS, supra note 8, at 381-83.
the enforcement of non-compliance.\textsuperscript{29} This is a rather uninspired observation when one understands the origins of the Canons as an inspirational and non-binding set of standards. In 1969, the ABA House of Delegates approved the Professional Code of Responsibility (the “Professional Code” or “Code”).\textsuperscript{30} The Professional Code served as a detailed set of standards that attempted to clarify the distinction between aspirational and minimum standards of conduct.\textsuperscript{31}

The new Professional Code was comprised of three sections— the canons, disciplinary rules, and ethical considerations.\textsuperscript{32} The Canons, authored in 1908, were axioms of lawyer obligations, encapsulating the basic principles of legal ethics. Each of the nine Canons was split into two subparts -- disciplinary rules and ethical considerations.\textsuperscript{33} The Professional Code listed the detailed minimum standards, the violation of which would bring disciplinary action, while the ethical considerations listed the aspirational norms the lawyer should strive for. The Professional Code aimed to express two basic guidelines --what lawyers must do to avoid censure, and what they should do be ethically exemplary.

However, like the 1908 Canons, the Professional Code was soon subject to several criticisms.\textsuperscript{34} Many argued, for instance, that the Professional Code favored the elite elements of the bar and placed too much emphasis on litigation.\textsuperscript{35} Many also found it to be confusing. The unique format of the Code, which intertwined ethical aspirations, broad ethical principles, and detailed rules of conduct, left some confused as to what behavior was aspirational and what was mandatory.\textsuperscript{36}

These criticisms of the Code led to the adoption of the current Model Rules of Professional Conduct in 1983 (the “Model Rules”).\textsuperscript{37} The Model Rules departed from the Code in several ways. The Model Rules added a number of new provisions that better addressed the realities of modern law practice. The Model Rules were the first set of ethical standards to address precise ethical issues arising within law firms, such as the responsibilities and conduct of

\begin{itemize}
\item \textsuperscript{30} 94 ABA REPORTS, supra note 8, at 389-92.
\item \textsuperscript{31} Andrews, supra note 4, at 19.
\item \textsuperscript{32} MODEL CODE OF PROF’L RESPONSIBILITY (1980).
\item \textsuperscript{33} See generally id.
\item \textsuperscript{35} Charles W. Wolfram, \textit{MODERN LEGAL ETHICS} 60 & n.69 (West 1986) (drawing attention to the combined criticisms of the Professional Code).
\item \textsuperscript{36} Andrews, supra note 4, at 3.
\item \textsuperscript{37} Id.
\end{itemize}
supervising and subordinate lawyers.\textsuperscript{38} Also, the emphasis on litigation was lessened.\textsuperscript{39} For the first time, the Model Rules recognized that a client is not always an individual, but often an organization.\textsuperscript{40} Although the Model Rules was simpler than its predecessor, this simplicity came at a price. The Model Rules were thought to be incomplete.\textsuperscript{41} First, the Model Rules, by and large, included only the minimum standards for conduct, the neglect of which resulted in disciplinary action.\textsuperscript{42} The aspirational content of the Professional Code was conspicuously removed.

Without an aspirational drive, too many of the Model Rules become lifeless and uninspiring. Guided only by mandatory, minimum standards, a lawyer may not feel motivated to foster his own system of judgment and conscience. The Model Rules, to be fair, make a brief concession to this argument.\textsuperscript{43} The Preamble to the Model Rules admits a lawyer, in addition to adherence to the Model Rules, is also “guided by personal conscience.”\textsuperscript{44} Difficult cases “must be resolved through the exercise of sensitive professional and moral judgment.”\textsuperscript{45} In previous standards, however, the use of personal conscience was not resigned to a preamble, but served as a major theme throughout.\textsuperscript{46} In any event, these minor concessions were not enough to stem the wave of criticisms against it.\textsuperscript{47}

In response to these criticisms, it should be remembered that it is impossible to legislate aspirational behavior, since such behavior, by definition, requires one to aspire beyond the applicable standard. While the Model Rules could be modified so that, like previous standards of conduct, it encourages lawyers to foster ethical aspirations, in all likelihood, attorneys will not be so motivated unless they already possess a desire to act ethically. For that reason, it makes sense that the Model Rules only prescribe the minimum standards for conduct.

In a sense, the Model Rules are a metaphor for the entire legal system. Like the Model Rules, the American legal system asks only that our fellow citizens follow minimum standards of

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\textsuperscript{38} Model Rules of Prof’l Conduct R. 5.1, 5.2, 5.3 (2008).
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\textsuperscript{39} Id. at R. 2.1, 2.3 (emphasizing the lawyer’s role as an advisor and an intermediary).
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\textsuperscript{40} Id. at R. 1.13.
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\textsuperscript{41} See Crystal, supra note 13, at 842 (“[While the Model Rules are] incomplete,...the word ‘incomplete’ is not intended as a criticism of the Model Rules. It would be extremely difficult, if not impossible, to prepare a complete statement of lawyers’ obligations.”).
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\textsuperscript{42} See Model Rules of Prof’l Conduct, pmbl. (2008).
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\textsuperscript{43} Id.
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\textsuperscript{45} Id.
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\textsuperscript{46} See Andrews, supra note 4, at 1439-46 (discussing the origins and evolution of the Canons and the Model Code).
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\textsuperscript{47} Id.
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conduct. Our legal system does not mandate that one aspire beyond these standards and be an ethical or moral person. That decision – to aspire beyond what is minimally required – is reserved for the individual; the individual’s decision is the product of their values, religion, worldview, or culture. The legal system was not devised to create or foster a utopia, or to force citizens to follow a stringent moral code.

But this shouldn’t imply that lawyers should not feel compelled to aspire beyond the minimum standards, or even that it’s not their nature as lawyers to do so. We can extend the metaphor further, and see that from another angle, the legal system implies several normative, notions—that justice exists, that it should be striven for, that the public good must be maintained, that all citizens have equal rights, and so on. So too, beyond the minimum standards of conduct represented by the Model Rules, the lawyer’s profession stands out as a calling demanding service to justice, to society, and to the well being of its citizens. Given this, it is natural that, beyond the Model Rules or any other standard of conduct, there should be an aspirational drive within the profession, there should exist professionalism movements and voluntary creeds of conduct. In the same way, it’s natural for a society governed by a democratic legal system, intended to administer justice neutrally, to nonetheless harbor religions, normative associations, and other value based organizations that encourage individuals to aspire beyond the minimum requirements of the law.

II. EXPRESSIONS OF THE ASPIRATIONAL DRIVE

A. Professionalism Movement

Efforts have been underway to meet this aspirational drive since the adoption of the Model Rules. We see today a proliferation of ethics courses in law schools and ethics articles in law journals. According to the Association of American Law Schools, there has been a six-fold increase in the number of law professors teaching courses in legal ethics in the past ten years. Twenty years ago, the Georgetown Journal of Legal Ethics was created, which was the first legal periodical dedicated solely to the topic of ethics. There are currently four other journals dedicated to ethics: The Journal of the Legal Profession, The Journal for the Institute for the Study of Legal Ethics, The Notre Dame Journal of Law, Ethics, and Public Policy, and The Professional Lawyer. All of these journals were created within the last three decades. Other recent journals, while not focusing exclusively on ethics, highlight its importance, including the Lawyers Manual on Professional Conduct, the Hazards and Mode treatise, Ronald Rotunda's recent one-volume book for the ABA; and Tom Morgan's book comparing the Restatement of Law Governing Lawyers with the ABA Model Rules. The number of law review articles dealing with legal ethics has also been on the rise. It is worth noting that these articles increasingly propose idealistic concepts, perhaps compensating for the lack of ethical drive observed in practice. One such article goes so far as to introduce an atonement theory to legal

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49 Id. at 326.
ethics, a self sacrifice concept borrowed from medieval Christian theology.\textsuperscript{50} Another argues that the modern lawyer should find guidance in bushido, the warrior code of the samurai.\textsuperscript{51}

In addition to the surge in ethically centered legal publications, the Stanley Commission Report ushered in a new enthusiasm for ethics in law among legal practitioners. The report bemoaned the imminent consequences of the Model Rules: an increasing fear over breaking mandatory standards coupled with a decline in personal, higher standards.\textsuperscript{52} The professional movement produced a series of purely aspirational codes, most notably the Lawyer’s Creed of Professionalism.\textsuperscript{53} The Lawyer’s Creed maintains that the lawyer, in addition to zealous advocacy on behalf of the client, must adhere to the system of justice and the common good:

\begin{quote}
I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client’s interests as well as to the proper functioning of our system of justice:...I will remember that, in addition to commitment to my client’s cause, my responsibilities as a lawyer include devotion to the public good.\textsuperscript{54}
\end{quote}

While the Model Rules are expected to be carried out as law, the Lawyer’s Creed, with its aspirational undertones, is not. The Lawyer’s Creed is meant to influence and persuade lawyers to elevate their personal ethical standards. If this is the intention, it begs the question as to whether or not the creeds are actually persuasive. Although a definitive answer is impossible, most would agree the rise of these creeds has failed to create an ethical renaissance in the legal profession.

\textbf{B. The Limitations of a “Code/Creed” Approach}

The Model Rules remain the official form of guidance for lawyer behavior. In light of this, other codes and creeds easily end up appearing superfluous. The obligatory Model Rules encourage those referring to them to think a certain way: in terms of what’s allowed, and what isn’t. The aspirational documents like the Lawyers Creed, however, are voluntary, and wish to encourage one to not only avoid discipline, but to strive for virtue, above the required minimum standard for conduct. Yet the fact that these creeds are separate from the Model Rules frustrates this attempt. To a mindset already conditioned by mandatory black letter statements, voluntary creeds often seem less than compelling. For lawyers to actually follow the guidelines of something like the Lawyer’s Creed, they must be inspired, or personally motivated, to do so. And because the Creed is voluntary and not legally enforceable, the source of this inspiration


\textsuperscript{52} See generally \textit{Spirit of Public Service}, supra note 13 (the Stanley Report).

\textsuperscript{53} See Crystal, supra note 13, at 841.

\textsuperscript{54} ABA Lawyer’s Creed of Professionalism (1988), in \textit{PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES}, §§ C.1, D.1, at 497-99 (John S. Dzienkowski ed., 2007-2008 ed.).
must be old fashioned conscience. In other words, the lawyer must be inspired to act ethically for the sake of acting ethically. Herein lies the difficulty. A lack of conscience and ethical drive are the very problems the aspirational Creeds try to solve. These creeds, therefore, aren’t a remedy, but rather a symptom of the disease. Outside the classroom and CLE hypotheticals, with clients at stake, a lawyer is unlikely to be motivated by any document such as the Lawyer’s Creed unless he already posses a strong ethical conscience.

III. ARISTOTLE’S THEORY

The argument proffered above – that voluntary, aspirational creeds are unlikely to affect any but the most ethical attorneys, and therefore have a minimal impact on attorneys at large –is based on a rationale that can be traced back to ancient Greece. The word ethics derives from the Greek “ethos,” meaning habit. Of course, a habit is an internalized, repeated, or innate principle that naturally springs from within a person, without reference to an outside rule or commandment. Many of us tend to think of an ethical person as someone whose has ethical habits, such as honesty and fairness. This belief finds expression in the common parlance “conscience.” Ethical people have an ethical conscience, an innate moral reasoning capacity. We would not consider a person ethical who, lacking conscience, had to consult a manual on how to behave every time an ethical situation arose.

The idea that an ethical person must possess ethical habits is common sense today, but it was cutting-edge philosophical theory when originally espoused by Aristotle. Aristotle, of course, was never a lawyer, but his ideas on ethics have certainly influenced the modern legal system. Aristotle believed in a general set of moral principles or maxims, what were called nomoi, or established law. Nomoi were statutes that rational people, in a free society, would naturally find agreeable, but Aristotle did not believe the nomoi were the foundation for ethical action. The true foundation, according to Aristotle, is phronosis - practical wisdom. Today, phronosis would be referred to as sound judgment, the ability to determine how to apply these laws, and when to depart from them, in particular situations. This is a much different approach to ethics than that of philosopher Immanuel Kant, who argued ethical principles were categorical and must be adhered to regardless of the situation. In contrast, Aristotle believed that the situation involved in any ethical decision was crucial; common sense agrees. For Aristotle, all declared virtues, moral rules and commandments are merely guideposts for judgment and reflection.

The centrality of judgment is also crucial for the practice of law. The law operates on the basic assumption that each particular situation can and must be studied; every case must be carefully examined on its own merits. Attention is given to the nuances of the context, for as Aristotle argued and experience verifies, context in crucial. In the case of murder, penalties differ depending on the circumstances. Questions are asked: was it premeditated, or was it a crime of passion? The Roman dramatist Terence expressed this Aristotelian mindset when he said: “The extreme rigor of the law is oftentimes extreme injustice.”

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55 Terence, HEAUTONTIMORUMENOS 50 (Oxford Co. 1777).
Only practical judgment can ensure the letter of the law does not cloud the law’s purpose. This was Aristotle’s thesis, and it is also an assumed truth behind our legal system. And though legal practitioners often forget, it is also true of legal ethics. In the end, documents like the Model Rules or the Lawyer’s Creed both delineate sets of prohibited and favored conduct. The former includes minimum standard, mandatory prescriptions, and the latter proposes voluntary, aspirational ones. But both documents prescribe rules. Aristotle would say these are a good start, but they are not enough to ultimately solve moral and ethical dilemmas. One must apply these rules effectively in real situations that the rules do not mention. One must ask how the abstract rules inform the concrete reality.

And this is a rare and complicated skill, argued Aristotle. It is an acumen which involves not only intelligence, but imagination, and above all, empathic knowledge of human nature. Good judgment is grounded on the rational insight that most people, very often, act irrationally. Practical wisdom requires one to understand the nuanced web of aversions, desires, and prejudices that drive human action.

If this is true, and one cannot be truly engaged in the rational world without empathizing and synching with the world around oneself, how is one to obtain such knowledge? It should be clear to us, as it was to Aristotle, that it cannot be learned from mere books, codes, or law school classes. It must be gained from experience, from participating in imperfect situations amongst flawed men who act out the full range of their humanity, when the “better angels of our nature” cannot be summoned. It is a kind of street smarts coupled with a genuine desire to do good. Outside of abstract discussions of legal ethics, there awaits the ethical lawyer an arena of demanding clients, not to mention ethically compromised allies and adversaries. When sent out as a lamb amongst the wolves, one must have the innocence of a dove, and the cleverness of a snake.

But Aristotle goes further in discussing how ethics should be learned. It is not enough to merely gain experience in the world of men. Because in this world, all too few are truly ethical. While gaining experience, one could easily be learning to act worse, not better. It stands to reason that one needs ethical role models. Such role models should possess the practical

56 See ARISTOTLE, THE NICOMACHEAN ETHICS 1.3[1094b30-1095] at 3, 1.4[1095b2-85] at 5, 10.9[1179b24-26] at 270 (David Ross trans., Oxford University 1975) (1925) [hereinafter cited as NE].


58 Id.


60 Abraham Lincoln, 16th U.S. President, First Inaugural Address (Mar. 4, 1861), http://showcase.netins.net/web/creative/lincoln/speeches/1inaug.htm (last visited Jan. 21, 2009).

61 Matthew 10:16 (New International Version).

62 REINHOLD NIEBUHR & ROBIN W. LOVIN, 2 THE NATURE AND DESTINY OF MAN 302 (New York: Charles
wisdom necessary to navigate in potentially dirty water. The judgment these role models possess, that the rest of us desire to learn, is an insight which defies analysis. President John F. Kennedy observed that “The essence of ultimate decision remains impenetrable to the observer – often, indeed, to the decider himself....There will always be the dark and tangled stretches in the decision-making process – mysterious even to those who may be most intimately involved.” The role model’s judgment must demonstrate “a self-reflective ability to...shift her style of reasoning in response to situational demands.” The role model must be able and willing to constantly respond to a world in flux. And they must have the will to marshal this ability not only for themselves, but for the common good. Considering this, it becomes clear that true ethical role models in the field of law, or any other profession, are scarce.

Choosing a lawyer who naturally encompasses such practical wisdom is a difficult task. The task is not challenging because the bar lacks historical or contemporary members who possess the necessary traits that Aristotle believed important. Fortunately, the bar was, and is, replete with these women and men. The difficulty lays in finding a role model whose development of practical wisdom can be traced and documented throughout their career, and whose career has relevance for today’s lawyer. Further, the challenge is choosing an individual with a track record of not only making ethical decisions, but inspirational decisions. And above all else, this individual must be relatable. In essence, the best role model should be a “legal everyman” who nonetheless goes beyond the profession’s ethical milieu. A first instinct is to choose a woman or man that might appear on the cover of The American Lawyer, a president of the American Bar Association, or perhaps, a Supreme Court justice who had a private practice before his well touted judicial career. We decided on someone much different. While there are many examples of ethical lawyers past and present, few meet Aristotle’s requirements as well as Abraham Lincoln.

IV. LINCOLN AS A ROLE MODEL

“The law is a compromise between moral ideas and practical possibilities.” This tension, between absolute moral principles and the relativity of situations, strongly intuited by Aristotle, was a dichotomy personified by Abraham Lincoln. Throughout his life, Lincoln was thoroughly practical. Lincoln’s legal practice was not driven by advocacy for the common man, as some have argued, or for big business, as others have claimed. Lincoln defended the

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Scribner’s Sons, 1941).

63 See Johnston, supra note 57. Aristotle writes in Nicomachean Ethics:

‘A mean defined by a rational principle, such as a man of practical wisdom would use to determine it.’ This seems to be saying that our benchmark for understanding the mean should be a role model, a man of practical wisdom, someone recognized for his moral quality. As we shall see, this is an important principle (that our moral understanding must use role models), but at this stage it still leaves open what a person has to do to display practical wisdom. We might note, in passing, what Aristotle does not do here: he does not offer any sense that there is a theoretical route to understanding the doctrine of the mean. Whatever we are to make of this central tenet of his moral teaching, it is something practical, something acquired in the world of experience and daily living. It is not something we can pick up by private study. Id. (citation omitted).

64 See DIRCK, supra note 1, at 159-60.

DAL:0980000/70000:1840210v1
railroads, but he also defended workers who sued the railroads.\textsuperscript{65} In the end, Lincoln was an advocate for his clients. Although he had a great interest in and ambition for politics, he was not overly political when it came to his law work—he chose to fight for people as opposed to a particular ideology. At the same time, Lincoln possessed a Whig’s desire for a smoothly functioning society and he saw his practice as a contribution to that goal.

But unlike many practical men, he buffeted his prudence with a strong, idealistic moral drive. In situations demanding clear, morally astute judgment, he was unbending while fighting for his beliefs without regard of the consequence. For example, on the issue of whether to implement the institution of slavery in new American territories, Lincoln, throughout his political career, adamantly refused to compromise.\textsuperscript{66} And when it came to the preservation of the union, even at the cost of a terrible war that many believed could not be won, Lincoln did not entertain any compromises.\textsuperscript{67} In these two cases, his clear sense of moral urgency outweighed all other concerns.\textsuperscript{68}

This intellectual juxtaposition within Lincoln, constantly weighing idealism and pragmatism, mirrors a similar divide in Lincoln’s character. On the one hand, he was stoic and incredibly self-disciplined.\textsuperscript{69} On the other hand, he was a man of passion.\textsuperscript{70} This split represents yet another reason why Lincoln is the perfect role model for lawyers: he was no saint.\textsuperscript{71} He was ethical without being perfect, which means that despite the myth and majesty surrounding his name, he is relatable. Lincoln’s flaws and worldly attributes add to his suitability as a role model.

\textsuperscript{65}Id.

\textsuperscript{66}WILLIAM LEE MILLER, LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY 434 (Alfred A. Knopf 2002).

\textsuperscript{67}Id. at 442-56.

\textsuperscript{68}See e.g., id. at 442-56 (detailing Lincoln’s refusal to compromise in regards to the Union); id. at 434 (outlining Lincoln’s refusal to compromise on the extension of slavery).

\textsuperscript{69}Id. at 77-79 (providing an interesting example of Lincoln’s stoicism). When Lincoln was a young man, he fell in love with the beautiful Matilda Edwards. Lincoln had mentioned to confidants that he did not love Mary Todd, but nonetheless agonized over who to marry because he had previously promised Mary he would marry her; and, regardless of the consequences, and despite his feelings, Lincoln wanted to keep his word. Id.

\textsuperscript{70}Id. at 77 (“[Lincoln’s friend and partner commented that Lincoln] had a terribly strong passion for women, could hardly keep his hands off of them. And yet he had honor and a strong will, and these enabled him to put out the fires of his terrible passions.…”).

\textsuperscript{71}Bishop Anthony Fisher, Auxiliary Bishop of Sydney, Australia, Red Mass Homily: Can Lawyers be Saints?, http://www.ad2000.com.au/articles/2004/mar2004p3_1553.html (last visited Jan. 21, 2009) (citing historical examples of lawyers who were canonized saints. “The early Church. . . knew many lawyer-saints. Cyprian, Ambrose, Jerome, Benedict, Thomas A. Becket and many others were all lawyers before they became clerics, monks, preachers and saints. Many more recent saints had a legal background, e.g., Thomas More, Charles Borromeo, Peter Canisius, Francis de Sales, Alphonsus Ligouri and [Blessed] Frederick Ozanam…. All in all - and here's the surprising thing given the image in the popular culture - lawyers seem to be the most represented profession amongst the ranks of canonized saints after the professionally religious.”)
because such imperfections make him relevant to people involved with the law, which after all, is not a religion and doesn’t ask for saintly guardians. The ethical lawyer aspires to contribute to the public good, but the law does not mandate that he feed the homeless, love his enemies, or sacrifice worldly ambition. Those virtues spring from men’s faith and their hearts.

In one sense, Lincoln’s practice, though successful, was typical for his day. The exercise of virtue and conscience did not prevent Lincoln from being a fierce advocate. He won many cases, of which, many were very lucrative. If alive today, Lincoln might be the equivalent of a senior partner at a large, prestigious corporate law firm. His practice was also thoroughly adapted to the realities of his day. Although the incredibly competitive environment of the current legal profession is often cited as a reason for today’s ethical problems, Lincoln’s practice was highly competitive as well. He had to compete with a relatively large number of lawyers in his legal market. He often had to take his practice on the road, touring through the circuit in a voracious attempt to solicit clients. His practice mirrored the modern legal practice in that it included trials and tribulations. He was forced to sue nineteen clients who refused to pay him. He agonized over the decision to remain in a safe and comfortable practice or to join a blue blood partnership in Chicago.

Even though Lincoln’s practice may be more typical than one might imagine, he may nonetheless strike many as an odd choice for a modern lawyer’s ethical role model. One possible disadvantage to using Lincoln as a figure of inspirational study is that the reality of Lincoln the man is often replaced with the platonic form of Lincoln as a mythical hero. When history is mixed with myth, tall tales and imagination, it is difficult to discern fact from fiction. Immortal-Lincoln, the mythical log cabin president, certainly overshadows mortal-Lincoln, the driven,

72 See e.g., Mark E. Steiner, An Honest Calling: The Law Practice of Abraham Lincoln 72 (Northern Illinois University Press 2006) (noting that in one large case, Lincoln retained 5,000 dollars, a very considerable sum in those days).

73 Id. at 72 (Lincoln was, after all, involved in many cases of the railroads, the largest corporations of the time).

74 See id. at 73.

75 Id. (“[A]n 1849 article in the Western Law Journal observed that ‘the profession of the bar has a large number of members in proportion to the business, and that they are constantly increasing.’ . . . A Virginia lawyer in 1853 echoed this complaint. Richard Hawes believed ‘there is a super abundance of Lawyers, but a dearth of clients.’”).

76 See Dirck, supra note 1, at 43-53.

77 See Steiner, supra note 70, at 161 (discussing how Lincoln’s discontent with the new, fast-paced style of lawyering demanded by corporate clients); see also Dirck, supra note 1, at 39 (describing Lincoln’s battle with boredom); John J. Duff, A. Lincoln, Prairie Lawyer 325-32 (Rinehart 1960) (describing one case where, Edwin B. Stanton, a famous lawyer serving as Lincoln’s co-counsel, became enraged when he found out that incoln had been retained to make the closing argument. Stanton insulted Lincoln, whom he considered to be a nobody, calling him a “long armed baboon.” He also claimed “if that giraffe appears in the case, I will throw up my brief and leave.” Lincoln was told his services were no longer required.).

78 See Steiner, supra note 70, at 71.

79 See id. at 167.
practical and honorable lawyer. Indeed, this former Lincoln is the object of a fascination so excessive and voracious it is almost inexplicable, despite his many accomplishments. More books have been written about Lincoln than any other figure in human history, except for Shakespeare, Jesus, and the Virgin Mary. He has been the subject of almost 15,000 works.\textsuperscript{80}

Judging Lincoln through an Aristotelian perspective results in an interesting conclusion. Aristotle believed that a role model must be someone who can be emulated and understood; they must be real, tangible, or attainable. If Lincoln is to qualify as an Aristotelian role model, he must be rediscovered as a flawed man more ordinary than he is normally depicted. We can most easily find this quality in Lincoln the lawyer. In recent years, there has been a surge of scholarship dedicated to this often overlooked aspect of Lincoln’s life. His legal career is now well documented. The Law Practice of Lincoln: The Complete Documentary Edition was published in 2000.\textsuperscript{81} This was a state of the art electronic collection of over 100,000 legal documents that ended a ten year project by the Illinois Historic Preservation Agency.\textsuperscript{82} David Donald, an important Lincoln biographer, and one of the first to use the materials from the Lincoln Legal Papers Project, referred to it as “perhaps the most important archival investigation now under way in the United States.”\textsuperscript{83} Prior to this documentation, instead of a case by case look at his practice, it was easier to use Lincoln’s "Honest Abe" mantra to promote the profession and enrich his image than to see if his twenty-four years offered any real lessons to those interested in how he practiced law. However, it is by examining the everyday issues he faced that we can not only learn about him, but learn from him.

Another objection to using Lincoln as a role model for contemporary lawyers is that, of course, he is not at all contemporary, having lived over 200 years ago when the American legal system was in its infancy. There is no doubt that the legal profession and the role of lawyers therein has undergone dramatic changes since Lincoln’s day. The law has become far more complex and specialized. In the arena of professional standards, the ABA has created four different codes since Lincoln.\textsuperscript{84} Specific areas of practice now have their own standards for conduct.\textsuperscript{85} Yet despite the many changes in the law, and the many changes in its appurtenant professional standards, little else has changed in regards to legal ethics \textit{per se}.\textsuperscript{86} All of the codes

\textsuperscript{80} A worldwide catalogue search in 2002 found 14,985 books on Lincoln, making him the fourth-most popular subject of authors in world history after Jesus, Shakespeare, and the Virgin Mary. \textit{See GERALD J. PROKOPOWICZ, DID LINCOLN OWN SLAVES?} (Random House Inc. 2008).

\textsuperscript{81} \textit{THE LAW PRACTICE OF LINCOLN: THE COMPLETE DOCUMENTARY EDITION} (Martha L. Benner & Cullom Davis eds., University of Illinois Press, 2000).

\textsuperscript{82} STEINER, supra note 70, at 17.

\textsuperscript{83} Id.

\textsuperscript{84} Andrews, \textit{supra} note 4, at 1 & n.2.

\textsuperscript{85} \textit{See id.} at 1453 (addressing the separate codes and standards applicable to entire legal practices or to the minutiae of a single lawyer’s particular practice).

\textsuperscript{86} Id. at 1.
now existing, and those in existence since Lincoln, express the same basic principles. At least six core duties of attorneys remain unchanged in the professional standards of the legal profession dating back 800 years to England: litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service.\textsuperscript{87} When it comes to virtues like honesty and fairness, Lincoln’s place in time doesn’t hinder him from providing inspiration. Still, some will argue that the current profession offers different obstacles to ethical behavior than did Lincoln’s.\textsuperscript{88} This is partly true, but the important fact to consider is that Lincoln’s time came with its own obstacles. In the legal profession, obstacles for ethical action abound, otherwise, ethics wouldn’t be so heavily discussed and fought for. Because these hindrances are always changing, their specifics are secondary. Far more important is learning, and being motivated, to overcome whatever particular obstacles stand between an individual and an ethical practice.

The fact that Lincoln lived in an age when the American legal landscape was young also provides us with an advantage. In the 19\textsuperscript{th} Century, legal regulation as we know it didn’t exist. No national consensus concerning ethical legal conduct existed, and even if it did, there was no nationally sanctioned body to propose and endorse such a standard. Lawyers, by and large, were left to their own devices. When Lincoln acted ethically, it was on principle, not because he feared censure. Although worried about maintaining his reputation as a moral citizen, he had very little to fear in terms of malpractice suits, compared to today’s attorneys, due to the lack of formal standards to be breached. He followed his own moral compass. This self-direction, unhindered by regulatory constraints, allows his ethical personality to come into a more clear focus.

Finally, the sheer volume and range of Lincoln’s practice allow him to stand out as an ideal legal role model. Lincoln practiced day in and day out for almost twenty-four years, with periodic sabbaticals to engage in the political realm. In his career, Lincoln practiced with three partners\textsuperscript{89} and had a career that was by all accounts financially and professionally successful.\textsuperscript{90} His career evolved over the years, and the need to constantly adapt to changes helped mold Lincoln’s practical wisdom. At the outset of his career, he represented rural farmers in small cases. A typical case might have involved a cow that damaged a neighbor’s crops, or the filing of suit over a small promissory note.\textsuperscript{91} Yet, over the years, Lincoln and his partners came to handle

\textsuperscript{87} Id.

\textsuperscript{88} See generally Ethan S. Burger, The Future of Legal Ethics: Some Potential Effects of the Globalization & Technological Change on Law Practice Management in the Twenty-First Century, 15 WIDENER L. J. 267, 279-81 (2006) (suggesting solutions from decreasing billable hour requirements for lawyers so that more emphasis can be placed on ethics to integrating ethics in to the substantive subjects being taught in law schools, instead of segregating ethics to a two-hour standalone course).


\textsuperscript{90} DUFF, supra note 75, at 228 (noting that at the end of Lincoln’s law career, he was worth 20,000 dollars, a large sum at the time).

\textsuperscript{91} DIRCK, supra note 1, at 59-60 (identifying Lincoln as primarily specializing as a “debt collection attorney.” In his first year as a lawyer, 1837, 65 of Lincoln’s 91 cases were debt collections. Five years later, 175 of 219 cases, nearly 80 percent, involved debt collection.).
over 400 cases before the state’s highest court, 340 cases in the US Circuit and District Court, and 2,400 cases in the Sangamon Country Circuit Court. In 1850, in a country with a large number of lawyers per capita, Lincoln was involved in eighteen percent of all cases brought before the Sangamon County Circuit Court. In 1853, he was involved in thirty-three percent of all the cases in that county. In addition to the work he did with his three partners, Lincoln personally took on several important cases that involved admiralty, intellectual property, real estate, tax and political subdivision cases. He had several cases involving the most powerful economic machine of the 19th Century, the railroads. In addition, Lincoln was the attorney on record for four cases before the United States Supreme Court. All told, Lincoln and his partners handled over 5,600 cases.

V. LINCOLN AND THE MODEL RULES

Once the mythology has been appropriately addressed, it becomes clear that Abraham Lincoln, the lawyer, was simply an ordinary man dealing with the same unexceptional problems facing any contemporary attorney. While his trials became front-page news, his tribulations were shared by his peers not only in the mid-Nineteenth Century, but are now shared by lawyers in the 21st Century. Lincoln earned his reputation as an astute and ethical attorney by facing these tribulations over the course of many years. Without a code to abide by—voluntary or otherwise—Lincoln showed his legal descendants how an honest attorney should conduct themselves. His ethical fortitude produced within him the same type of aspirational drive that the voluntary, idealistic codes aim to instill within each of today’s attorney’s. Lincoln, guided only by his own moral compass, charted a course that today’s lawyers have trouble finding, despite a cornucopia of codes, regulations and standards at their fingertips.

When Lincoln was faced with difficult decisions, he relied on his conscience; whereas many of today’s lawyers, when in ethical doubt, consult the Model Rules. But when we compare

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92 1 LINCOLN, supra note 87, at xxxvi.
93 DAVID HERBERT DONALD, LINCOLN 44 (Simon and Schuster 1995).
94 Id.
95 See STEINER, supra note 70, at 8.
96 DIRCK, supra note 1, at 87-91.
97 1 LINCOLN, supra note 87, at xxxiv.
98 DONALD, supra note 91, at 154.
99 DIRCK, supra note 1, at 148.
100 Id.
101 1 LINCOLN, supra note 87, at xxxix.
102 STEINER, supra note 70, at 71; accord 4 LINCOLN, supra note 87, at 193.
Lincoln’s actions and behavior when mired in moral grey-areas, with those actions suggested by the Model Rules, a surprising commonality between Lincoln and modern attorneys becomes apparent. Although so much of the legal environment was different in Lincoln’s day, the same can not be said for the definition of ethical conduct. The aspirational principles, implicitly informing the Model Rules, though conspicuously omitted, were consistently evident in Lincoln’s actions. Ironically, this astute moral quality did not result from Lincoln’s desire to be a paragon of virtue. In fact, Lincoln did not see himself as aspiring beyond the black letter rules at all, simply because these rules didn’t exist at the time. He simply did what he thought a good lawyer should do. By linking some of the major Model Rules with documented cases and situations from Lincoln’s practice, we can examine how Lincoln’s actions would not only have complied with today’s rules, but exceeded them. These cases, and their connection to contemporary standards of conduct, illustrated below, are not only instructive, but hopefully inspiring to today’s lawyer.

A. Model Rules 1.1 and 1.3 - Competence and Diligence

Two of the most fundamental of the Model Rules are, interestingly, also two of the most succinct. Rule 1.1 (or the “Competence Rule”) states: “A lawyer shall provide competent representation of a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In common parlance, a competent person is adequate, but not exceptional. Several comments to the Competence Rule reinforce this view:

[2] A lawyer should not necessarily have special training or prior experience to handle legal problems of a type which the lawyer is unfamiliar. A lawyer can provide adequate representation in a wholly novel field through necessary study.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.


[6] To maintain the requisite knowledge and skill a lawyer should keep abreast of changes in the law and its practice engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Given this commentary’s focus on adequacy, it seems that complying with Rule 1.1 poses little difficulty. To someone unfamiliar with contemporary legal practice, the sixth comment appears to pose the greatest challenge. However, modern legal competence is defined by only the

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most minimal and easily followed standard; the Competence Rule, in many states, only demands fifteen annual hours of continuing legal education, which may include attending or teaching a course, writing a legal article, or self-study. As any practicing attorney can attest, aspiring beyond competence requires much more than fifteen hours per year.

Model Rule 1.3 (or the “Diligence Rule”) defines diligence is defined in a similarly succinct fashion: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Interestingly, Comment 2 to the Diligence Rule underscores the fact that the Competence and Diligence Rules are inextricably intertwined. The comment reads: “A lawyer’s work load must be controlled so that each matter can be handled competently.” In other words, a lawyer must be diligent to maintain competence, and vice versa. Though this seems like an easily followed standard, it can pose a challenge to even the most renowned or successful attorneys. Maintaining both diligence and a successful legal practice is a difficult juggling act, but with dedication and focus, the balance can be achieved.

Lincoln’s twenty-four years as a practicing attorney offer concrete examples of how one can aspire to and exceed the minimum definitions of competence and diligence provided in the Model Rules. As previously discussed, Lincoln achieved several notable professional successes. Lincoln’s desire to maintain and develop a thorough legal understanding is best illustrated by a case that, at first glance, seems hardly more than a footnote in his storied biography. Not only did Lincoln not win this case, he did not even argue it. The case was McCormick vs. Manny, a seminal patent case in the 19th Century. Yet, by dutifully watching from the sidelines, he embodied a level of devotion to his continued legal education that dwarfs today’s mandatory fifteen hour minimum requirement.

In 1834, Cyrus H. McCormick invented a reaping machine that revolutionized the farming industry. In 1854, McCormick sued John H. Manny for infringement of his patents. This was an extremely important case given that Manny was only one of several manufactures who had begun to make reapers similar to McCormick’s, An elite team of patent and trial lawyers retained Lincoln as local counsel. Manny enlisted the services of George Harding, one of


108 Id. R. 1.3 cmt. 2.

109 CHARLES B. STROZIER, LINCOLN’S QUEST FOR UNION 141-42 (Basic Books, Inc. 1982) (noting that Lincoln “had no bookkeeping system to speak of, except his hat,” and that after buying a new hat and thereby misplacing a client’s letter, he apologized: “[W]hen I received the letter I put it in my old hat, and buying a new one the next day, the old one was set aside, and so, the letter lost sight of for a time.”) (internal quotations and citations omitted).


111 Id. at 585.

112 Id. at 322-23.
the most renowned patent lawyers at the time. 113 The case was set for Chicago, and Harding believed that retaining a local lawyer, with a good reputation in the Chicago courts, was pivotal to their case.114 Manny and Harding chose Lincoln, with some reservation, to serve this role.115 At the time of the McCormick case, Lincoln, although not attaining the national stature of the other attorneys involved in the case, had established a successful legal practice. Thus, he was excited and eager to be involved in such a prominent case.116 To prepare himself for the trial, he poured himself into his work. Before traveling to Cincinnati, he worked exceedingly hard in preparation for the case, including personal visits to Manny’s factories.117 Lincoln prepared to give the best and most important argument of his career in the McCormick case, and, still smarting from his recent defeat in the United States Senatorial election of 1856, his morale and famous depression needed the boost.118

Nonetheless, as the trial date grew nearer, Lincoln’s anticipation and excitement succumbed, as was frequently the case with Lincoln, to worry and embarrassment. First, Lincoln began to wonder why he had not received copies of any legal papers, as had been previously discussed with Harding’s representatives who engaged his legal services as co-counsel.119 Even more disheartening, the trial had moved from familiar surroundings of Chicago to Cincinnati, and he learned about this transfer in the newspaper.120 Disregarding this snub, Lincoln traveled to Cincinnati anyway. Upon his arrival in Cincinnati, Harding, and the high-profile Philadelphia attorney Edwin McMasters Stanton, who had been added to the defense team, bluntly informed him that he would no longer be involved in the litigation at all.121 In fact, Stanton, regarded Lincoln as a country yokel, a “long armed baboon” who had no business being involved in such an important, complex case.122 Underscoring their disrespect for Lincoln, Manny’s defense team not only refrained from using any of Lincoln’s pre-trial work, they returned his trial briefs to Lincoln unopened. Finally, even though Lincoln was staying at the same hotel as Harding and Stanton, neither of the distinguished attorneys, according to Harding, “ever conferred with him,

113 Id. at 576.

114 DUFF, supra note 75, at 323.

115 Id. at 577-78. See also, DONALD, supra note 91, at 185-86 (noting that Lincoln was not the first choice as the Chicago attorney, though, Harding likely did not worry himself with Lincoln’s engagement in this case, considering that he noted “in his superior Eastern way ‘we were not likely to find a lawyer there who would be of real assistance in arguing such a case.’”).

116 DUFF, supra note 75, at 578.

117 Id.; see also DONALD, supra note 91, at 186.

118 DONALD, supra note 91, at 178-85.

119 Id. at 186.

120 Id. (emphasis added).

121 DUFF, supra note 75, at 579.

122 Id. at 323.
ever had him at our table, or sat with him, or asked him to our rooms, or walked to and from the
court with him.” When Supreme Court Justice John McLean, who presided over this case,
invited counsel on both sides to his house for dinner, Lincoln was not included. In short,
Lincoln was harshly and unjustifiably rebuked by nearly everyone involved in *McCormick v.
Manny*.

At first glance, *McCormick v. Manny* appears to show very little, if anything, about
Lincoln’s abilities as a lawyer, nor his ethical qualities. Lincoln never argued, nor did he even
participate in the case. Yet, the background details of the trial speak volumes. After suffering
professional and personal disgrace, Lincoln made an unlikely decision. Instead of expressing his
outrage and storming back to Springfield, he choose to stay for an entire week in Cincinnati and
observe the trial. After a week, he admitted that counsel on both sides, including Stanton, were
indeed great lawyers. He concluded they were far better than he, and he aimed to learn from
them. Amidst humiliating circumstances, he concerned himself with improving his lawyering
ability, and remained in Cincinnati despite the harsh rebuke from his former co-counsel. He
further commented that when he did go home, he was going to re-commit himself to the study of
law, further his evolution as a lawyer.

In addition to illustrating Lincoln’s desire to foster his own knowledge of the law, this
example also serves as a manifestation of the method through which Lincoln intended to build
his legal knowledge: hard work. Lincoln, never considered himself one of the premier legal
scholars of his time, but he compensated for that by outworking his peers. He once advised an
aspiring lawyer that he should “[a]lways bear in mind that your own resolution to succeed, is
more important than any other one thing.” “Work, work, work is the main thing.” Lincoln
counseled another. Diligence, to Lincoln, meant more than following up in situations where,
as in *McCormick v. Manny*, he otherwise would have been forgotten. Lincoln believed and
showed that through sheer force of determination and will, he could be a successful lawyer.

Lincoln’s actions in this case demonstrate his humility, an unlikely attribute to be so
fundamental to moving beyond competence. As in many high-profile professions, the bar breeds
its share of arrogance. Being more than competent, as defined in the Competence Rule, however,
is not based in the proper application of an attorney’s superior skill and talent, but rather in a the

123 1 BEVERIDGE, supra note 108, at 580.
124 Id.
125 Id. at 580-81.
126 Id. at 582.
127 Id.
128 STROZIER, supra note 107, at 139-40.
129 Id. at 140.
130 Id.
attorney’s humble recognition of what he lacks. Without humility, he will likely not be driven to improve nor study on his craft. Lincoln exemplifies the type of humility that is conspicuously absent from the Model Rules. Lincoln exhibited a raw will to progress, and from this will comes an impressive diligence.

Lincoln’s oft mentioned diligence was not born out of a protestant work ethic that extols work for its own sake, but out of a passionate desire to advocate well. In fact, the determination and attention to detail required in legal work did not come naturally to Lincoln. He very often grew bored, his attention waned, and he “detested the mechanical work of the office.”131 Yet he forced himself to overcome these obstacles. A diary entry from one of Lincoln’s colleagues expressed his steadfastness:

Spent the morning in the law library at work—dined at my boarding house. Lincoln put in many evenings there, coming from home around seven or eight o’clock and working until midnight. Another more important place of refuge when in need of solitude while preparing his more important cases was the office of his friend Governor Bissell, where, concealed in of the recesses, he would think and write for hours.132

An excerpt from one of Lincoln’s lectures offers a clear picture of how Lincoln might view the Competence Rule as intertwined with the Diligence Rule:

I am not an accomplished lawyer. I find quite as much material for a lecture, in those points wherein I have failed, as in those wherein I have been moderately successful. The leading rule for the lawyer, for the man of every other calling, is diligence. Leave nothing for tomorrow, which can be done today. Never let your correspondence fall behind. Whatever pieces of business you have in hand, before stopping, do all the labor pertaining to it, which can then be done. When you bring a common lawsuit, if you have the facts for doing so, write the declaration at once. In business not likely to be litigated, make all examinations of titles and note them and even draft orders and decrees in advance. . .And there is not a more fatal error to young lawyers, than relying on too much on speech making. If any one, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance.133

Here we find Lincoln’s simple calculus for moving beyond competence. From the first sentence, Lincoln expresses humility. This humility then spurs one to diligence. Attorneys learn from their mistakes and shortcomings. In this process, will power serves as the driving force, as opposed to raw talent or skill. Finally, Lincoln honestly faces the practical demands involved in moving beyond competence, the “drudgery,” which attention to detail sometimes requires. The advice itself is not particularly striking, but therein lies its quality. Moving beyond competence

131 DIRCK, supra note 1, at 39.
132 1 LINCOLN, supra note 87, at 12.
133 Id.
does not require glamour or elegance, daring or esoteric knowledge—attributes often associated with excellence. It requires a quiet, modest mastering of the basics.

B. Model Rule 1.5 - Fees

Throughout the history of the legal profession there is probably no greater source of consternation, skepticism, or fodder for pundits than the amounts of fees lawyers charge. Thus, the Fees Rule has been and will be scrutinized and studied unlike many others, as the Fees Rule governs a subject that elicits a visceral reaction from clients and lawyers alike. With concerns similar to their clients, who do not want to be overcharged or treated unfairly by their attorneys, lawyers want to be paid fully and promptly for their services. The Reporter to the Ethics 2000 Commission poignantly observed that the Fees Rule “is likely to be controversial, no matter what we do.”

1. The Fees Rule Defined

Whereas the aforementioned Competence and Diligence Rules are two of the most concise Model Rules, Model Rule 1.5: Fees (the “Fees Rule”) is substantially longer. There are several subsections of the Fees Rule, each dealing with important circumstances pertaining to fees and billing methods. The crux of the Fees Rule is found in its detailed definition of “reasonableness,” which states:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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136 Id.

137 Compare MODEL RULES OF PROF'L CONDUCT R. 1.5 (2008), with id. R. 1.1, and id. R. 1.3.
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) whether the fee is fixed or contingent.\textsuperscript{138}

In addition to the detail devoted to the definition of reasonableness, the importance of the Fees Rule is further emphasized by the disproportionate level of treatment given to the Fees Rule by the comments, treatises and commentaries when compared to the coverage given to the previously discussed Competence and Diligence Rules.\textsuperscript{139} For example, the Fees Rule has six times as many subsections as the Competence and Diligence Rules have sentences combined.\textsuperscript{140} Similarly, the treatment afforded to the Fees Rule provides an overwhelming amount of detail. Whereas the Lawyer’s Deskbook on Professional Responsibility discusses the Competence and Diligence Rules in eight pages each, the same treatise uses seventy-one pages to discuss and comment on the Fees Rule.\textsuperscript{141} Despite this attempt to clarify and delineate the standard for a reasonable fee, Comment 1 to the rule addresses lawyers’ need for certainty and informs them that there is none to be found: “The factors specified in (1) through (8) are not exclusive. Nor

\textsuperscript{138} Model Rules of Prof’l Conduct R. 1.5 (2008) (Subsections (b), (c), (d) and (e) of the Fees Rule – dealing with, respectively, communicating the fees to the client, situations wherein contingent fees are acceptable, two types of fees against public policy and division of fees between lawyers in different firms – are not relevant to this paper’s analysis of how lawyers should aspire beyond the Model Rules. Such rules, while important, serve primarily as compliments to the Fees Rule’s overarching goal: defining and prohibiting an “unreasonable fee.”).


\textsuperscript{140} See Andrews, supra note 4.

\textsuperscript{141} John S. Dzienkowski & Ronald D. Rotunda, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility 83-90, 122-29, 141-211 (Thomson West 2005-2006) (devoting eight pages to each of the Competence and Diligence Rules and seventy-one pages to the Fees Rule).
will each factor be relevant in each instance.”142 Clearly, the Fees Rule and its comments are written to ensure that a lawyer’s fees are “reasonable under the circumstances.”143 Yet, the Fees Rule represents an inexact formula with many elements used to determine such a reasonable fee.

The above discussion focuses on the Fees Rule’s subject matter; however, it may be more important to discuss the justifications behind it. Analysis of the Fees Rule leads one to wonder why such an exhaustive treatment of the amounts and methods by which lawyers can charge a client is needed. Is the ABA, comprised wholly of attorneys, seeking to protect itself? Or, on the other hand, did the drafters of the Fees Rule craft a subjective standard so that clients could be protected against unscrupulous lawyers? The answer is unclear. One could argue that the detailed scheme embodied in the Fees Rule protects the profession by giving attorneys a plethora of ways to justify their fees as “reasonable.” Alternatively, the complex, enumerated structure of Model Rule 1.5(a) could be seen as a method to prevent unscrupulous lawyers from taking advantage of their clients by specifically listing several factors than should be considered when charging a fee. The bottom line is that the ABA would be as likely to take up arms against clients on behalf of attorneys as it would be likely to create a myriad of problems for its own constituents simply to simplify matters for their clients. Understandably, saddled with conflicting goals, the ABA’s attempt to find a middle-ground between protecting both its members and the public-at-large resulted in a continuation of the understandable, longstanding tension between attorneys and their clients over attorney’s fees.

As the likely result of the competing interests behind the creation of the Fees Rule, the drafters of the Model Rules declined to favor either their constituents or their clients, and, instead, drafted a subjective, flexible standard based on the idea of reasonable fees. Yet, little has been settled since the Fees Rule was drafted. The tension between clients and lawyers over the amount of a “reasonable” fee still drives most discussions about legal fees.144 Of course, the ABA and its members—whether they be solo practitioners, members of a law firm, or card-carrying members of the professionalism movement who are working to fill the aspirational void in lawyers’ ethical conduct—rightfully insist on being paid fairly for their services. However, reaping the benefits of their work is not always an easy task for attorneys. The quality, difficulty and novelty of legal work are difficult to evaluate, and, when coupled with a consumer base that has become aggressive in dealing with the legal profession, justifying legal fees to clients is always an unpleasant chore.

142 MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. 1 (2008); see also Nat’l Info. Servs. v. Gottsegen, 737 So. 2d 909, 98-528 (La.App. 5 Cir. 6/1/99) (listing ten factors “derived from” the Fees Rule including the result obtained, responsibility incurred, importance of litigation, amount of money involved, extent and character of work performed, number of appearances made, intricacies of facts involved, counsel’s diligence and skill, court’s own knowledge, and counsel’s legal knowledge, attainment, and skill).

143 See generally MODEL RULES OF PROF’L CONDUCT R. 1.5 cmts. 1, 3 (2008).

144 See e.g., Parekh & Pelkofer, supra note 133, at 767, 769 (addressing the evolution of the Fees Rule and noting that the definition of reasonableness, and its use in the Fees Rule and its predecessor rule, remained at the forefront of the Fees Rule’s evolution).
Thus, in light of the difficulty in justifying and collecting legal fees, a flexible standard, subject to multiple interpretations concerning the definition of a reasonable fee, seems to simply make life more difficult for attorneys and clients alike. An objective standard for determining legal fees—one that provides that a divorce costs X and a will costs Y—would appear to solve these problems; however, upon reflection and analysis the Fees Rule’s definition of reasonableness is subjective for good reason. An objective, inflexible standard can be used by lawyers and their clients to take advantage of the other. For example, if a will simply cost $1,000, an attorney could fleece its client by charging the reasonable $1,000 fee for a will that required merely thirty minutes of the lawyer’s attention. Alternatively, a client could use the rule to its advantage by only paying $1,000 for a massive, complex will that took their lawyer four days to draft.

Whether or not a subjective standard is ideal, one fact shines through: a reasonable fee and a fair fee are not always synonymous. Any standard for determining the proper amount to charge for legal services must take this reality into account. Looking beyond the Fees Rule is often necessary because the black letter law, alone, only prohibits lawyers from charging and collecting an unreasonable fee, as the Fees Rule attempts to define reasonableness, and thus implies that a firm and its lawyers can charge any fee as long as the fee is below the unreasonable fee threshold. This hardly seems to fit in the spirit of the Model Rules, or at the least, would require those who want to aspire to move beyond mere compliance to reexamine how they charge clients for services. Such an analysis proves difficult for a variety of reasons and requires practical wisdom and a keen sense of fairness.

2. Lincoln and the Fees Rule

As noted above—if it needed to be noted at all—fees represent the life blood of today’s law firm, but it must be understood that fee collection was just as critical in Lincoln’s time as it is now. Yet, Lincoln often regarded legal fees in a different way than both his contemporaries and today’s lawyers. Lincoln charged what he believed to be fair fees to his clients, which, with respect to the issue of fee charging and collection, granted him a level of confidence that many other lawyers did not enjoy. He believed his fees were fair, without the aid of arbitrary or rigid standards. Therefore, he tended to be equally resolute when seeking to recover delinquent fees from his clients. Because he felt his fees were inherently fair, he felt comfortable asking

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145 In fact, Lincoln himself agreed that a strict, all encompassing rule would be inappropriate. Lincoln wrote “[a]s to fees, it is impossible to establish a rule that will apply in all, or even a great many cases.” PAUL McCLELLAND ANGLE, THE LIVING LINCOLN: THE MAN, HIS MIND, HIS TIMES, AND THE WAR HE FOUGHT 69 (Barnes & Noble 1992).

146 See e.g., DONALD, supra note 91, at 106-07 (discussing the difficulties of maintaining and supporting a family while traveling the circuit for twenty weeks each year).

147 Id. at 156 (noting that in the McLean County case, which Lincoln regarded as the “largest law question” of his time, Lincoln originally received a $250 retainer, then, once victorious in the suit, requested a $2,000 fee for his services and only raised this amount to $5,000 after consulting with six prominent Illinois attorneys).

148 Id. (pointing out that Lincoln brought suit against his own client to recover a fee that was 250 percent larger than the client intended and 2,000 percent more than his retainer, and, because the fee was fair, “[t]he action did not interrupt his amicable relationship with the Illinois Central Railroad, which he continued to represent in numerous
his clients for the fees he rightfully earned. He was willing to sue his clients to recoup these fees and suffer the consequences of doing so, including losing some of his clients. To Lincoln, determining the correct amount of legal fees to charge in a particular case involved careful critical analysis about his own legal work on a particular matter. This honest introspection, if systematically practiced by lawyers and applied in their firms, would promote a new level of openness between lawyers and their clients and greatly decrease the strife that necessarily follows the discussion of legal fees. Lincoln’s decisions over the proper amount of fees to charge his clients involved a calculus beyond merely aligning his fees with those charged by his contemporaries for similar services. As was typical with Lincoln, his words and actions over the course of his career illustrated his uncanny understanding of the difference between a reasonable fee—the types of fees that the Model Rules dictate should be charged to clients—and a fair fee. I think we need an example of this difference here. At this point, the reader is still unclear what the difference is. I think you mean to say reasonable is simply whatever you can get away with. Importantly, he also knew that fair fees are good for business. Clearly, no one needs a legal consultant to know that a satisfied client is more likely to be a repeat client than one who feels taken advantage of.

As fees are important to all lawyers, including Lincoln, it is understandable that the subject of fees is a frequently discussed topic in biographies and analyses pertaining to his legal career. Fees, to Lincoln, were more than grease used to keep his legal practice running; he viewed his fees as a barometer of his own value in the legal community. This unique perspective caused one historian to proclaim that “[o]ne way to understand Lincoln’s work and as a lawyer is through his fees.” Lincoln identified the corrupting nature of fees and was not shy in warning that “an exorbitant fee should never be claimed.” Of course, a fee can be both exorbitant and reasonable under the current Fees Rule, (perhaps an example here demonstrating how a fee can be both exorbitant and reasonable under the fees rules.) but Lincoln’s actions show that he completely disregarded that type of analysis. Exorbitant, yet reasonable, fees were, to Lincoln, not always fair, and to Lincoln fairness always prevailed.

This section presents several concrete examples of Lincoln’s approach to fees and fee collection, but, first, it is important to address and several objections to using Lincoln’s approach to fees to help guide today’s lawyers. One objection is that the mechanics of billing,
charging and collecting fees are vastly different from methods used in Lincoln’s time.\(^\text{154}\) One notable example, noted above, is that Lincoln took note for services when accepting an engagement. Of course, the fee note is now ancient history.\(^\text{155}\) But the purpose for using Lincoln as a guide lies in his attitude and sensibility towards fees, not on his actual method for charging and collecting fees, which are obviously different from those used now.\(^\text{156}\)

A justification for dismissing Lincoln’s advice and admonitions about not overcharging the client is that Lincoln and his contemporaries were not engaged in constant and expensive attempts to lure clients and new attorneys into their fold. Lincoln did not have to pay $160,000 for a first year associate with no experience. He also did not have to pay exorbitant rent in San Francisco or Chicago or purchase a sky box so his clients could eat sushi and drink chardonnay while watching their favorite NFL team. Although contemporary firms must pay more for rent and associates, it does not follow that they are under more financial stress than the lawyers of Lincoln’s day. Indeed, the contemporary law firm often posseses a degree of luxury and profit that lawyers in Linconl’s day wouldn’t be able to imagine. One cannot discuss Lincoln’s life as a lawyer without understanding the economic pressures and the realities of living in the mid-1800’s:

Lincoln’s legal practice was not confined to Sangamon County. No lawyer could make his living from the two terms that the circuit court met in Springfield each year and Lincoln, like most of the other attorneys, traveled on the huge circuit that the judges were obligated to make going from one country seat to another and holding sessions that lasted from two days to a week.\(^\text{157}\)

Donald’s analysis of Lincoln’s travails sheds some light on the wholly different environment in which Lincoln operated. For example, Lincoln never submitted a reimbursement request to his firm for his federally reimbursed mileage expenses; nor was Lincoln able to make as efficient use of his time as today’s lawyers. Imagine reviewing a document on horseback or in a carriage; then remember that Lincoln’s frequent travels took much, much longer than today’s relatively short jaunts to and from a distant county.\(^\text{158}\) These realities of practicing law in Lincoln’s era

\(^{154}\) 4 LINCOLN, supra note 87, at 232 (Lincoln exchanged legal services for goods with local craftsmen); see also Harry J. Lambeth, Practicing Law in 1878, in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 164 (Dennis R. Nolan ed., University of South Carolina, 1980) (“Legal fees a century ago varied as they do today. A minimum fee schedule adopted by the Bar Association of the District of Columbia in 1873 suggested these fees: Arguing a case in the Superior Court of the District of Columbia, $50; circuit court trials, $25; police court, $10; written contract or deed, $10; printed contract, $5; preparing a will, $25; examination of title abstract, $25; collections, 10 per cent up to $5,000, more than $5,000, 10 per cent on the first $5,000 and 5 per cent on the excess….”).

\(^{155}\) 2 EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW §446 (Edward Thompson Co. 1914) (explaining a fee note).

\(^{156}\) Id. (explaining that a fee note is in the “nature of an indemnity contract and, as a general rule, the promisee can recover thereunder only such sums as he has actually and necessarily expended or become liable for on account of the default of the promisor, and then only when they are reasonable, and proven to be so…..”).

\(^{157}\) DONALD, supra note 91, at 73.

\(^{158}\) Id. at 104-06 (detailing the extent to which life on the circuit was difficult, crowded and exhausting).
pervade every aspect of his life, marriage, political and legal career and can hardly be discounted.

Another objection against fully accepting Lincoln’s advice as pertinent in today’s society is that today’s legal environment is more competitive than at any other time. However, a close examination of Lincoln and his contemporaries reveals a very competitive legal environment with more than enough lawyers to service the area in which he practiced. Accordingly, Lincoln’s legal environment involved fierce competition for clients and legal fees were small, even by historical standards. Even if one adjusts Lincoln’s fees to reflect their present day value, the fees Lincoln charged for a lease or an argument before the Illinois Supreme Court were notably smaller than similar fees charged by today’s attorneys. For a majority of the cases Lincoln handled in his early career, the fee was $5.00 (Present Value, or “PV,” of $867.83) and often the range was from $2.50 (PV $433.92) to $10.00 (PV $1735.67). Later in his career, with Herndon as his partner, a typical fee for representing a client in the circuit court ranged from $10 (PV $1735.67) to $25 (PV $4339.18). In one case, he collected a debt of $600 (PV $104,140.20); his fee was a meager $3.50 (PV $607.48) – or .05 percent of the debt he collected. Fee collection is difficult for today’s lawyer, but, it is important to note that the fees charged by Lincoln and his contemporaries represented a much smaller percentage of the value underlying the charge compared to today’s lawyers’ fees.

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159 STEINER, supra note 70, at 73 (“In 1830, Illinois had 73 lawyers among its population of 157,445 (1;2,156); by 1840, lawyers numbered 429 and the population 476,183 (1:1,110). The population had grown 300 percent; the number of lawyers nearly 600 percent. In 1850, Illinois had one lawyer for every 1,042 people….”).

160 DONALD, supra note 91, at 73. Donald notes that “Springfield was a town full of lawyers, and all were obligated to charge modest fees….” Id. He also notes that their clients, despite paying small fees, offered to compensate Lincoln and his partner by, among other things, “making a coat” and “giving Lincoln board for $6.00.” Id.

161 There are numerous ways to determine the value of a sum of money over time. Popular methods are to follow the consumer price index, the consumer bundle, or the value of unskilled labor. While each method is of course viable, there are instances where the use of one is more appropriate than another. The authors have chosen to use the value of unskilled labor for this article, as it allows for the comparison of one’s income to the value of unskilled labor at designated points in time. Through the use of this calculation, we have a better indication of the relative value of the fees charged and income earned by Lincoln. For the purposes of this article, the authors have chosen to use the U.S. unskilled wage calculator provided at MeasuringWorth.com, which is supported by a wealth of research. See Samuel H. Williamson, Measuring Worth Website, Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present, http://www.measuringworth.com/uscompare/# (last visited Jan. 21, 2009).

162 For the purposes of this article, the present value of any financial amounts referenced in this article will be included in parentheses after its earlier counterpart if necessary. Such terms shall be current as of 2007 unless otherwise noted.

163 DONALD, supra note 91, at 73.

164 Id. at 104.

165 Id. at 148.

166 See supra note 152.
Once these arguments against taking Lincoln’s advice seriously are dismissed, one must look to his message. Lincoln made a career of letting his actions speak for him, but, from time-to-time, Lincoln chose to speak directly in order to get his message across. In one instance, Lincoln spoke on the impropriety of and corrosive effect of taking advance payment in a matter. In a lecture to students given in 1850, he admonished that “as a general rule, [you should] never take your whole fee in advance, nor any more than a small retainer.” Understanding the nature of men, Lincoln lectured that “when fully paid beforehand, you are more than a common mortal if you can feel the same interest in the case, is if something was still in prospect for you, as well as for your client. And when you lack interest in the case, the job will very likely lack skill and diligence in the performance.” This is an honest examination of the motivations behind lawyering in his era, and these forces are still at play in today’s community as well. With respect to fees, Lincoln proved himself to be astutely prescient, rational and practical; and he maintained this mindset while practicing law in a harsh, competitive environment, void of any regulations to guide his hand.

3. Lesson Learned: Differentiating between Reasonable and Fair Fees

As was the case with the Diligence and Competence Rules, Lincoln’s actions and motivations with respect to fees embodied the type of introspective ethical thought process necessary to filling the aspirational void at the root of today’s ethical crisis. Nearly two centuries before the Fees Rule’s inception, Lincoln’s actions in relation to his fees traced and exceeded its standards. He made sure his clients’ fees were fair; not merely reasonable under the circumstances, even if his clients could afford larger fees. Fairness was always paramount for Lincoln. Such a shining example is found in one of Lincoln’s cases from 1856. After practicing law for nearly twenty years, and only four years from being President of the United States, he was being heralded as an attorney “at the head of his profession” in Illinois. Lincoln was called upon to draft a lease for a client in Quincy, Illinois. Following the conclusion of this matter, the client, satisfied with Lincoln’s work on the lease, sent Lincoln a check for $25.00 (PV $4339.18). Lincoln kept $15.00 (PV $2603.51) and returned $10.00 (PV $1735.67) with a note that said: “You must think I am a high price man. You are too liberal with your money.”

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167 ANGLE, supra note 143, at 143.
168 Id. at 143-44.
169 DONALD, supra note 91, at 148.
170 Id. at 151 (quoting an Illinois journalist, who continued that “though he may have his equal, it would be no easy task to find his superior.”).
171 Id. at 148.
172 ANGLE, supra note 143, at 193 (adding that “Lincoln cherished the right of the professional man to set his own fees.”).
Another example is evident from Lincoln’s treatment of the fee he received following the *McCormick v. Manny* fiasco discussed in the prior section.\(^ {173} \) As discussed, Lincoln was originally retained by a very toney and prominent Eastern law firm. Upon being retained, Lincoln received a $400 (PV $64,426.80) retainer and arranged a fee of $1,000 (PV $173,567.00).\(^ {174} \) After returning from his humbling experience in Cincinnati where his services were both not needed nor wanted, Lincoln received the balance of his fee. He sent the fee back to his co-counsel reminding them that his services had not been used and that he had provided no services of value and, accordingly, did not feel he had earned anything beyond the original payment. Several days later the check was sent back to Lincoln with a note that the lawyers and their client felt he was still entitled to the large balance. The ever practical Lincoln kept and cashed the check.\(^ {175} \)

As Lincoln's career evolved, his clients became more sophisticated and capable of paying a healthy fee.\(^ {176} \) One of the best examples of his increasingly sophisticated and financially capable clientele—as well as Lincoln’s pristne ethical compass in the realm of fees—is evident in the Illinois Central Railroad case. The railroad industry represented one of the most powerful economic and political influences of the second half of the 19th Century. Lincoln hungered for the challenges inherent in involvement in railroad work, whether he represented the railroad or its opponents.\(^ {177} \) Lincoln offered his services to each of the parties, and the railroad accepted, subject to a $250 retainer (PV $43,391.75).\(^ {178} \)

Unlike the landmark *Manny* case, Lincoln not only argued the case, but received all the top billing for this important decision. He was very excited to be involved, but the joy was fleeting. This landmark case, argued successfully by Lincoln, produced the largest legal fee of his career.\(^ {179} \) However, collecting the fee proved to be equally as arduous as the case itself.

\(^ {173} \) See *supra* pp. 19-22.

\(^ {174} \) DONALD, *supra* note 91, at 185-87

\(^ {175} \) *Id.*

\(^ {176} \) Compare *id.* at 70-74 (discussing the early days of Lincoln’s law practice and his typical clientele), with *id.* at 155-58 (noting that, while Lincoln still represented clients with small matters, he increasingly found himself in legal matters of great consequence).

\(^ {177} \) Lincoln correctly identified this case as one of the most important of his time. The background facts involved the State of Illinois chartering the Illinois Central Railroad, which the State granted an exemption from all taxation, contingent on the company paying the state an annual “charter tax.” Though clearly advantageous to both the state—searching for economic growth—and to the new railroad ventures, several counties saw the deleterious ramifications of the lack of additional income to their tax bases. The authorities for McLean County understood the economic importance of the exempt taxation and assessed a levy on the Illinois Central Railroad property, asserting that the Illinois Legislature lacked the authority to exempt the road from county taxes. This case, Lincoln said, “in its magnitude, to the Co. on the one hand, and the counties in which the Co. has land, on the other, is the largest law question that can now be got up to the State; and therefore, in justice to myself, I can not afford it, I can help it, to miss a fee altogether.” *Id.* at 155.

\(^ {178} \) *Id.*

\(^ {179} \) *Id.* at 156.
Lincoln’s client stood victorious after an historic decision, yet, while pleased with the result of the case, the Illinois Central Railroad felt that Lincoln’s proposed fee far exceeded the value of his services.\textsuperscript{180} Lincoln’s client refused his fee of $2,000 (PV $347,134.00), even though this victory had saved the railroad hundreds and hundreds of thousand dollars.\textsuperscript{181} Whether one abided by the circumstances in 1856 or the calculus of the Fees Rule, Lincoln was entitled to a generous fee for his services. When Lincoln presented his client with a bill of $2,000, it was flatly rejected. One company official remarked “this is as much as Daniel Webster himself would have charged….We cannot allow such a claim.”\textsuperscript{182} A disheartened Lincoln surveyed the market. He consulted with six other notable Illinois attorneys and submitted a revised bill for $5,000 (PV $867,835.00) – 250 percent of his original fee request.\textsuperscript{183} As the Illinois Railroad Company saw their situation, despite reaping the rewards of future tax savings, the company was still a new venture and lacked the cash flow to pay the bill. On that basis, the railroad again refused to pay. Lincoln sued and the court returned a verdict for the full amount of $5,000 less the retainer of $250.\textsuperscript{184}

A couple of lessons can be learned from Lincoln’s actions following the Illinois Railroad collection suit. In this case, Lincoln’s inherent sense of fairness worked to his advantage. He was comfortable that he had presented a fair fee to his clients; in fact, Lincoln’s original fee was beyond fair, it was generous. That sense of being fair with his client from the onset of the attorney-client relationship gave him the fortitude to stand his ground in the face of accusations of overcharging his client and even allowed Lincoln to reevaluate his position in order to secure an even larger fee. Lincoln’s sense of what is right did not hurt his reputation with his client or the powerful railroad industry. Shortly after Lincoln collected his fee he was retained to handle two important cases involving what taxes were to be paid by the Illinois Railroad to the state. Furthermore, reputedly, Lincoln was offered the position of General Counsel to the New York Central Railroad in February 1860, on the occasion of his Cooper Union speech for an annual retainer of $10,000 (PV $1,735,670).\textsuperscript{185}

Lincoln believed that clients should be treated not just reasonably, but fairly. Further, he believed that fees were an essential extension of an attorney’s desire to be fair.\textsuperscript{186} Lincoln pursued his fees openly and aggressively for one main reason: he could fearlessly stand before a court and show that his fees accurately represented the value of his legal services. This represents a wholly different sentiment when compared to today’s law firms, who are reluctant to expose their records to a court, even if this means forgoing certain fees.

\begin{footnotes}
\item[180] Id.
\item[181] Id.
\item[182] Id.
\item[183] Id.
\item[184] Id.; 2 LINCOLN, supra note 87, at 409-412.
\item[185] DUFF, supra note 75, at 318.
\item[186] ANGLE, supra note 143, at 144.
\end{footnotes}
Practicing law, whether in 1856 or 2009, requires a strong work ethic. Lincoln, like many of his predecessors, contemporaries and successors, worked diligently for his clients. He demanded to be treated fairly in return. Whether it represented his business-oriented philosophy or resulted from his psychological background, Lincoln wanted his clients to compensate him for services performed, fully and promptly. In fact, Lincoln and his partners sued at least nineteen clients for delinquent fees throughout Lincoln’s career.\(^{187}\)

Similar lawsuits are very unusual today. On its face, the reason appears simple. Clients, once they’ve been sued by their former counsel, will often countersue, claiming malpractice or other claims and, in response, the firm trying to collect its fees will be told by its malpractice carrier or general counsel that it should not pursue the matter any further. In complete opposition to actions taken by Lincoln, firms often forgo its rightfully-earned fees. However, there may be a darker reason that firms often choose not to pursue delinquent fees via litigation. Law firms may be hesitant to sue their clients for their fees because of the fear that, during the ensuing litigation, the court will ask the law firm to produce its billing records and other similar memoranda documenting the work performed on behalf of the client. As discussed throughout this paper, Lincoln would encourage the court to look at his records and examine his efforts, which would likely show that Lincoln’s fee was fair. Yet typically, today’s law firms appear reluctant to share Lincoln’s sentiment. This reluctance to allow the court and former client to examine its records is likely not due to the fear that some small administrative errors will be unearthed. Quite the contrary, firms appear terrified to reveal—or learn for the first time—that their records might be replete with either negligence or, far worse, systematic billing inconsistencies.

This is the conundrum facing today’s firms, and it is a headache that Lincoln rarely suffered from. Of course, these problems exist even for those who carefully adhere to the Fees Rule because certain clients do not hesitate to “slow-pay” or negotiate a reduced fee under any number of circumstances, including those where the client simply does not want to pay for services that were timely and properly performed. And, while it is true today’s lawyer does not pursue their clients with the same zeal as in Lincoln’s time, getting paid promptly and fully is a constant source of frustration and expense for many lawyers and law firms, especially for those firms that have clean hands, who are diligent in their billing practices and whose fees accurately represent the value of their legal services.

While Lincoln practiced close to 150 years ago, one last act by Lincoln shows how well he understood the timeless concepts of equity and fairness with respect to fees. In a speech given in 1853 Lincoln stated:

Are, or are not the amount of labor, the doubtfulness and difficulty of the question, the degree of success in the result; and the amount of pecuniary interest involved, not merely in the particular case, but covered by the principle decided,

\(^{187}\) 2 Lincoln, supra note 87, at 412 (having only two suits dismissed, Lincon won seventeen favorable judgments with an average award of $69.76).
and thereby secured, to the client, all proper elements, by the custom of the profession to consider in determining what is a reasonable fee in a given case?\textsuperscript{188}

Here, Lincoln provides a roadmap to determine when a fee is appropriate in a given case, but, most importantly, the factors Lincoln identifies correspond with those factors identified in the Fees Rule:

<table>
<thead>
<tr>
<th>Lincoln in 1853</th>
<th>Model Rule 1.5</th>
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<tbody>
<tr>
<td>The amount of labor involved</td>
<td>- 1.5(a)(1) - “the time and labor involved”</td>
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<tr>
<td>The doubtfulness of the question</td>
<td>-1.5(a)(1) – “the skill requisite to perform the legal service properly”</td>
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<tr>
<td>The difficulty of the question</td>
<td>- 1.5(a)(1) – “the novelty and difficulty of the questions involved”</td>
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<tr>
<td>The amount of pecuniary interest involved\textsuperscript{189}</td>
<td>- 1.5(a)(3) – “the amount involved and the results obtained”\textsuperscript{190}</td>
</tr>
</tbody>
</table>

Lincoln consistently embodied and espoused a set of ethical standards that if described and written concisely, would likely mirror the Fees Rule in place today, and even aspire beyond it. In a microcosm, the examples presented earlier in this section highlight the differences between today’s Fees Rule–touting reasonableness, defined as that which one can get away with, and the aspirational standard embodied by Lincoln, which emphasizes fairness. Lincoln walked the walk in the ethical realm and did so at a time when there was no professionalism movement; no Lawyer Creeds displayed prominently in the lawyer’s office, and, no black letter requirements that define the minimal standards for reasonableness. Lincoln returned the portion of a fee that he deemed to be excessive, despite the fact that his client believed the fee to be reasonable. Embodying the essential principles of the Professionalism Movement, Lincoln held himself to a higher standard than that imposed upon him by his clients. Even though his clients could tolerate paying the full fee, Lincoln, if his work did not warrant such a fee would attempt to return it. Compare this to his actions in the Illinois Railroad case, where Lincoln’s sense of fairness drove him to ask for more, not less, compensation following a landmark and lucrative court victory. Whether his motives were to foster a continued relationship with the client or whether he was purely driven by his internal ethical compass is unknown. The critical point is that, without guidance, Lincoln looked not at what he could do; he did what he thought he should do. That, in a nutshell, is the difference between a fair fee and a fee that is not unreasonable. It is also the difference between the minimum standard set by the Fees Rule and aspiring beyond the rule.

\footnotetext{188}{\textit{2 Collected Works of Abraham Lincoln} 398 (Roy P. Basler, ed., Rutgers University Press 1953).}
\footnotetext{189}{\textit{Id.}}
\footnotetext{190}{\textit{Model Rules of Prof’l Conduct R.} 1.5(a) (2008).}
VI. CONCLUSION

The goal of this article has not been to persuade lawyers to model their behavior after Lincoln, or to ask themselves, when faced with an ethical dilemma, what Lincoln would do. The first problem with asking what Lincoln would do in a contemporary legal situation is that, quite simply, we do not know what he would do. We only know what he did. The second problem with asking this question is that Lincoln’s practice should not be made into a kind of personified aspirational code of ethics. Codes and creeds, even if modeled after the decisions and actions of a particular person, betray the spirit of Aristotle permeating this article. Aristotle does not argue that we should learn from the decisions of ethical role models so that we can codify those decisions into some kind of guidebook or manual. He believes we should learn from ethical role models so that we can eventually make ethical decisions for ourselves, following our own judgment.

The ultimate purpose of looking to Lincoln is that he can remind us of self-evident truths nevertheless forgotten or ignored—the legal profession is made up of individuals, each one of them possessing deep responsibility, agency, and the ability for self-determination. Lawyers make decisions. They advise and provide counsel. Yet very often there is no single, obvious direction to take. At times, there is not even a map. Lincoln calls to mind the presence of this forgotten possibility, and thus overlooked responsibility, because in his day the lack of a map was obvious. There was no national code of conduct, no national bar, virtually no regulations for lawyers of any kind.

In our day, regulations of conduct are ubiquitous, in both their mandatory and voluntary forms. The sheer volume of these regulations, and the obsession often given to them in legal and scholastic debates, obscures the simple fact that lawyers must often regulate themselves. The reason some lawyers act unethically, while still staying within the bounds of the minimum standards of conduct, may have little to do with bad intentions. Their behavior represents an attempt to avoid agency altogether, be it moral or immoral. By simply consulting the black letter guidelines of the Model Rule whenever an ethically dilemma arises, they avoid struggling with the dilemma at all. They fail to see it through the lens of their own judgment. They fail to approach it with a sense of their own agency. Behind this failure is an assumption that their profession allows them an ethically neutral innocence, a naïve, child-like role in which all they need to do is dutifully serve their client without breaking the law.

In this article, we have examined Lincoln not so lawyers can be inspired to mimic him or in some way continue his legacy. In shedding light on the kind of lawyer Lincoln was, we can reflect on what kind of lawyers we are and imagine what kind of lawyers we want to be. And, most importantly, we can discover that moving from the one to the other is always within our power.