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

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

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ABSTRACT

The need to reclaim “civility” in the practice of law has become a rallying cry in the profession. Lack of civility has been blamed on everything from an increase in the cost of litigation to the cause of the public’s lost faith in the legal profession. Courts are increasingly willing to sanction a lawyer solely for “uncivil” conduct. This article examines the puzzle of civility by addressing two fundamental questions. First, what are the obligations of civility? This question is answered using content analysis to analyze civility codes adopted by 32 state bar associations. From this analysis ten core tenets of civility are identified which are common across all jurisdictions. The second question addressed is how civility is distinct from other professional obligations such as legal ethics and professionalism. Examining the history and development of these professional obligations, the paper demonstrates that civility is distinct and should be treated as a unique obligation of professional responsibility.

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I. INTRODUCTION

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

These questions have become particularly salient as civility has moved from an aspirational goal to an enforceable norm. Citing the need for a return to “civility,” courts have become increasingly willing to sanction lawyers solely for being incivil. An example of this is Sahyers v. Prugh, Holliday & Karatinos.\(^2\) Sahyers, a paralegal, left her job at a law firm and believed the firm owed her back pay for uncompensated overtime.\(^3\) She retained an attorney who sued her former firm to recover the overtime wages.\(^4\) The lawyer brought suit against the former firm without giving any pre-suit notice.\(^5\) After discovery, the defendant law firm made an offer of judgment for $3,500 plus any attorney’s fees or costs the court imposed.\(^6\) The plaintiff accepted the offer and her attorney sought $13,800 in attorney’s fees and costs to which the defendant objected.\(^7\) After a hearing, the district court refused to award

\(^3\) Id. at 1243.
\(^4\) Id.
\(^5\) See id. at 1244 (“We do not say that pre-suit notice is usually required or even often required under the FLSA to receive an award of attorney’s fees or costs.”).
\(^6\) Id. at 1243.
\(^7\) See id. at 1244 (“In general, a prevailing FLSA plaintiff is entitled to an award of some reasonable attorney’s fees and costs.”).
any fees – even though ordinarily a prevailing plaintiff in a Fair Labor Standards Act ("FLSA") case is entitled to reasonable fees and costs. The court held that the failure of the attorney to contact the defendant law firm prior to filing suit was a "conscious disregard for lawyer-to-lawyer collegiality and civility [which] caused the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court."\(^8\) On appeal the United States Court of Appeals for the Eleventh Circuit affirmed the denial of fees, citing the district court’s inherent “authority to police lawyer conduct and to guard and promote civility and collegiality among the members of its bar.”\(^9\) Sahyers, and cases like it, represent the increasing willingness of courts to sanction lawyers based solely on a lack of "civility."

The increased attention to civility is not limited to the bench. In December, 2007 the Illinois Supreme Court Commission on Professionalism commissioned a study of lawyers to ascertain how Illinois lawyers perceived civility.\(^10\) The survey, including a sample of 1,079 lawyers, was less than encouraging. Ninety-five percent of the respondents stated that they have experienced or witnessed unprofessional behavior in the course of their careers.\(^11\) In fact, seventy-three percent of the respondents stated that they had experienced rudeness\(^12\) or strategic incivility\(^13\) within the last month. Even aside from these specific claims of uncivil conduct, seventy-two percent of respondents categorized incivility as a serious or moderately serious problem in the profession.\(^14\)

With its increasing importance, it is worth considering the nature and parameters of the obligation of civility. This article proposes that civility must be considered a unique obligation distinct from "ethics" and "professionalism" and sets out to identify and define the core

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8 \textit{Id.} at 1245.  
9 \textit{Id.} at 1244.  
11 \textit{Id.} at 21.  
12 Rudeness was defined by the survey as behavior such as “sarcastic or condescending attitude, swearing, verbal abuse or belittling language, and inappropriate interruption of others.” \textit{Id.} at 22.  
13 Strategic incivility included misrepresenting or stretching the facts, not agreeing to reasonable requests for extensions, frivolous use of pleadings or motions, inflammatory writing in briefs/motions, or inappropriate language or comments in letters/emails. \textit{Id.}  
14 \textit{Id.} at 30.
concepts of civility. To this end, Part II details the rise of the civility movement. Part III identifies ten overarching concepts of civility derived from a content analysis of civility codes adopted by thirty-two state bar associations. Finally, Part IV discusses how the obligations of civility are distinct from other professional obligations – specifically legal ethics and professionalism.

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

Before defining civility, it is helpful to trace the history of the rise of the call for civility that led to the adoption of civility codes by state bar associations. Perhaps the most common argument is that civility once existed in the bar, but has eroded over time. This was the central concern of a district court for the northern district of Texas, which stated in an opinion adopting a code of professionalism:

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.

As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the

\[15\] Jan Frankel Schan, Civility Amongst Lawyers: Does our Conduct Need the State Bar’s New Guidelines?, 50 ORANGE COUNTY LAW 38, 38 (March 2008) ("[M]ost of us who have been in practice for more than 20 years have witnessed a cultural shift to an apparent acceptance of ‘misbehavior’ in the practice of law, in the treatment of clients and opponents, and even in the casual demeanor seen in court and in mediations.")
bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice. We now adopt standards to end such conduct. 16

The question of whether lawyer incivility is truly of “recent origin” is debatable. 17 Some argue that in fact there was no Golden Age of civility, but instead a time when the legal community was small, closed, and discriminatory. 18 According to this argument, civility was maintained by barring entry to those who would bring diverse viewpoints to the bar. 19


17 See Ashley Cockrill, The Shyster Lawyer, 21 YALE L.J. 383 (March 1912) (tracing the long history of the “shyster” lawyer); M.F., Book Review, 21 HARV. L. REV. 553, 553 (May 1908) (reviewing A.B.A., REPORTS OF THE AMERICAN BAR ASSOCIATION. VOL. XXXII. AN ESSAY ON PROFESSIONAL ETHICS,” 21 Harv. L. Rev. 553, 553 (T. & J. W. Johnson Co. May 1908)) (“[T]oday lawyers are often actually objects of public distrust. This fall of the profession from the high prestige of the past has been accomplished by the influx of many who seek admission to the bar mainly for its emoluments.”); T.L. Edelen, Ideals of a Lawyer, 14 KY. L.J. 3, 4 (Nov. 1925) (“I regret very much to say that in the years which have elapsed since I have begun the practice of law, there has been a vast change in the ideals which measure the conduct of lawyers in their dealings with their clients, with their fellow lawyers and with the courts. Certain principles . . . which were regarded, within my memory, as elementary, have gradually changed in their apparent obligation and I think we no longer measure our obligations by the same standards which were in vogue forty or fifty years ago.”); Ross L. Malone, The Lawyer and His Professional Responsibilities, 2 WASH. & LEE L. REV. 191, 195 (Fall 1960) (quoting a law from 1402 which stated that because of “sundry damages and mischiefs that have ensured before this time to divers persons of the realm by a great number of attornies, ignorant and not learned in the law, as they were want to be before this time. . . . That all attornies shall be examined by the justices, and by their discretions their names put in the roll, and they that be good and virtuous, and of good fame, shall be received and sworn well and truly to serve their offices.”).

18 Robert Stevens, Democracy and the Legal Profession: Cautionary Notes, 3 LEARNING AND THE LAW 12, 16 (Spring 1976).

19 Jack T. Camp, Thoughts on Professionalism in the Twenty-First Century, 81 TUL. L. REV. 1377, 1380-81 (June 2007) (“Not only has the bar become more diverse, but its numbers have significantly increased as more and more lawyers enter the profession. As these changes occur, the bar reflects the vast array of traditions,
Regardless of how recent the rise of incivility may be, a number of authors presume the existence of incivility and put forward rationales to explain its origins. One argument is that the rise of incivility is a matter of ignorance on the part of the lawyer and client who does not understand that civility is expected.20 Others argue that lawyers, being the product of an individualistic and uncivil society, will be uncivil themselves.21 Another explanation is that law firms – where a young lawyer learns his or her values – fosters incivility.22 Underlying this rationale is the belief that law firms create a culture in which finding and retaining work and billing and collecting fees results in a narrow focus on winning at all costs, which comes at the expense of civility.23 Continuing the litany of explanations, some point to the “imbalance” in a lawyer’s view of her role in the legal process.24 Lawyers who see their primary duty to their client – as opposed to making decisions that uphold the integrity of the legal system – increase incivility in the bar.25

These are just a few of the alleged culprits – the stream of alleged causes is endless.26 Prevalence of lawyer advertising has also re-
ceived blame as does the failure of law schools to provide an adequate model for law students. Still others argue that the increasingly non-local nature of the practice increases incivility because: (1) with an increased market area, a lawyer is less likely to deal repeatedly with the same players and there is less cost to attorneys who act uncivilly because they will likely not come upon opposing counsel on a regular basis; (2) the expanded market increases the out-of-court interactions (such as depositions) between lawyers without commensurate supervision by courts or other regulatory bodies; and (3) the increase in the heterogeneity of the bar has led to less camaraderie among lawyers and commensurately an increase in incivility. And this is only a partial list of the alleged causes.

visible in everyday life. Lawyers as a class have lost a mystique that they once enjoyed – and that often means more overt pressure from clients.


Then Chief Justice Burger, in addressing the American Law Institute in 1971, noted the importance of law professors in developing civility:

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

WARREN E. BURGER, The Necessity for Civility, 1 LITITG. 8, 10 (1975).

Macey, supra note 26, at 1080.

Id.; Gee & Garner, supra note 26, at The Uncivil Lawyer, 181-82.

Macey, supra note 26, at 1080; Jonathan J. Lerner, Putting the "Civil" Back in Civil Litigation, N.Y. ST. B. J. 34 (Mar./Apr. 2009) ("Whether it is because clients expect obnoxious tactics to advance their interests, or because some lawyers believe they help to achieve better results, or because the Bar, especially in large cities, has grown so competitive and impersonal, our civility and professionalism seem to be continually declining at a rapid pace.").

Macey, supra note 26, at 1080; Gee & Garner, supra note 26, at 182-83.

See Hung, supra note 1, at 1132-33 ("Other culprits of incivility within the profession include frequent malpractice suits, decreased mentoring, inadequate training, greater misuse of discovery, commercialization of law practice, and increased competition for clients. Decreased client loyalty, the intrusion of accounting firms and other businesses into conventional legal arenas, and the changing role of law in our society are contributing external factors."). Bryan Garner and Thomas Gee add the increase in technology that creates distance between lawyers and increases the likelihood of incivility.

Gee & Garner, supra note 26, at 183.
Those citing to one of the foregoing as a cause of the rise of incivility, call for an enforcement mechanism to reclaim civility. Others, however, are skeptical of the civility movement and see the effort as motivated by the self-interest of a select few to keep the bar as insulated as possible. For example, Professor Mashburn argues that civility codes are attempts by an increasingly isolated legal elite to impose their values on other lawyers that they consider less prestigious.  

With the range of reactions to the supposed decline in civility, perhaps the only agreement is that there is a perception that something called "civility" is alleged to be lacking in lawyers today. Those who argue that a decline in civility has occurred argue that it has more than theoretical consequences. They argue that a decrease in civility results in an increase in litigation costs – an uncivil lawyer opposes every suggestion of her opponent, delays resolution of the claim, and incurs additional fees in the process. Costs are also imposed on judicial resources because frivolous motions and unmeritorious conduct require frequent intervention by judicial officers. The cumulative effect is to harm the profession's image in the eyes of the public.

The current method to address incivility is through education of lawyers. Being educated about civility, lawyers themselves can change the culture by acting in a civil manner and mentoring young lawyers to

35 Final Report, supra note 85, at 445-46 ("When a lawyer behaves uncivilly, contentiously opposing everything his opponent proposes, both litigants suffer because they must pay even higher attorneys' fees and the disposition of the case is delayed.").
36 Josh O'Hara, Creating Civility: Using Reference Group Theory to Improve Inter-Lawyer Relations, 31 VT. L. REV. 965, 971 (Summer 2007) ("Lawyers who act uncivilly not only sully their reputations but also waste judicial resources . . . . Frivolous Rule 11 motions are a prime example of how incivility can cost time and money. As discussed earlier, a frequent and favorite tactic of uncivil lawyers is to bring frivolous motions, specifically Rule 11 motions, to delay and hinder discovery.").
37 John A. Humbach, The National Association of Honest Lawyers: An Essay on Honest Lawyers: An Essay on Honesty, 'Lawyer Honesty' and Public Trust in the Legal System, 20 PACE L. REV. 93, 94 (Fall 1999) ("Distrust of lawyers is not, however, just an image problem of an insular profession. Our basic civic order relies on the legal system and public respect for it. If the public cannot trust the lawyers who are entrusted with the legal system, there is a problem that casts a shadow on the integrity of the very concept of rule of law."); O'Hara, supra note 36, at 966 ("Among the problems that can result from the adversarial excesses are losses of credibility, a waste of judicial resources, and a serious loss of public esteem for the legal profession in general.").
do the same.\textsuperscript{38} The first step in this process was adoption of standards of civility by courts and bar associations. This introduction of civility codes as teaching tools is similar to the introduction of the Canons of Professional Ethics in 1908, which were not originally adopted as disciplinable obligations but rather as means to inform new lawyers of the ethics of the profession.\textsuperscript{39} To this end the stated purpose of civility codes is to “clarify and articulate important values held by many members of the bench and bar” by placing in one document expected standards of civility.\textsuperscript{40} These civility standards are not meant to be a substitute for ethical codes, but to “impose obligations above and beyond the minimum requirements” of the ethics rules.\textsuperscript{41} As another author noted, the purpose of the codes is to provide “unifying, clarifying, and anchoring standards” that articulate “best practices” or values for practitioners.\textsuperscript{42} This recognition that the obligations of civility are not commiserate with ethical obligations is an important consideration. For example, a lawyer's ethical obligation to pursue a client’s interests zealously may be inconsistent with the obligation to cooperate and to forego certain advantages that may arise in the course of litigation.\textsuperscript{43}

The concern that lawyers may feel ethically constrained by civility codes has not gone unnoticed. Sanctioning lawyers for incivility runs the risk of chilling zealous advocacy. A lawyer who is afraid of incurring sanctions for acting in an uncivil manner is likely to refrain from commenting even if the statement is true and would be in the client's best interests.\textsuperscript{44} This makes a clearly delineated set of civility concepts crucial to ensure that lawyers know what is and is not allowed under the nomenclature of civility.

\textsuperscript{38} Gee & Garner, \textit{supra} note 26, 182-83.
\textsuperscript{39} See infra Part IV.B.
\textsuperscript{40} Final Report, \textit{supra} note 21, at 446.
\textsuperscript{41} Christopher J. Piazzola, \textit{Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule}, 74 U. COLO. L. REV. 1197, 1235 (2002). See also O’Hara, \textit{supra} note 36, at 972 (“Civility codes are born of a general dissatisfaction with the Model Rules of Professional Conduct, which outline only the floor of professional conduct. While the Model Rules are useful, they provide lawyers with little instruction regarding what they should do when interacting with other professionals. Civility codes aim to do just that.”).
\textsuperscript{42} Hung, \textit{supra} note 1, at 1152.
\textsuperscript{43} Christopher J. Piazzola, \textit{supra} note 41 (proposing that ethical rules incorporate an enforceable obligation to treat others with respect). See also CODE OF PROF’L RESPONSIBILITY Preamble (1980), which states that as an advocate, “a lawyer zealously asserts the client’s position under the rules of the adversary system.”
\textsuperscript{44} Alice Woolley, \textit{Does Civility Matter?}, 46 Osgoode Hall L. J. 175 (2008).
III. IDENTIFYING CORE CONCEPTS OF CIVILITY

With conflicting views on the presence and value of the civility movement, it is helpful to understand what is commonly meant by the term "civility." This part defines the core aspects of civility. These concepts are distilled from the unique codifications of guidelines of civility adopted by bar associations in thirty-two states.\(^4\) Analyzing these codes provides both a challenge and an opportunity. First, it is a challenge because for the most part each of these jurisdictions has adopted unique, jurisdiction-specific codes, so it is impossible to identify one civility code as a model. The idiosyncratic nature of the codes, however, provides an opportunity to identify those concepts which are consistent across all jurisdictions.

Content analysis was the methodology used to identify the concepts. First, the 32 civility codes were identified and located. The ABA maintains an updated listing of all civility codes and hyperlinks to those codes that are available online. After gathering the codes, each code

\(^4\) Only civility codes from state bar associations were utilized, and only those codes available online were used. The following is a listing of the jurisdictions and the civility codes analyzed: (1) Alabama, CODE OF PROFESSIONAL COURTESY (Alabama 1992); (2) Arizona, A LAWYER’S CREED OF PROFESSIONALISM (2005); (3) California, CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM (2007); (4) Connecticut, LAWYERS’ PRINCIPLES OF PROFESSIONALISM (1994); (5) PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS (2003); (6) Georgia, LAWYER’S CREED AND ASPIRATIONAL STATEMENT ON PROFESSIONALISM (1990); (7) Hawaii, GUIDELINES FOR PROFESSIONAL COURTESY AND CIVILITY FOR HAWAIIAN LAWYERS (2004); (8) Idaho, STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (2001); (9) Kansas, HALLMARKS OF PROFESSIONALISM (1987); (10) Kentucky, CODE OF PROFESSIONAL COURTESY (1993); (11) Louisiana, CODE OF PROFESSIONALISM (1992); (12) Maryland, CODE OF CIVILITY (1997); (13) Massachusetts, STATEMENT ON LAWYER PROFESSIONALISM (1989); (14) Minnesota, PROFESSIONAL ASPIRATIONS (2000); (15) Mississippi, THE LAWYER’S CREED (1990) (1990); (16) Missouri, TENETS OF PROFESSIONAL COURTESY (1987); (17) Nevada, THE LAWYER’S PLEDGE OF PROFESSIONALISM (1997); (18) New Hampshire, LITIGATION GUIDELINES (1999); (19) New Jersey, PRINCIPLES OF PROFESSIONALISM (1997); (20) New Mexico, CREED OF PROFESSIONALISM (1989); (21) New York, GUIDELINES ON CIVILITY IN LITIGATION (1994); (22) North Carolina, PROFESSIONAL CREED (1989); (23) Ohio, A LAWYER’S ASPIRATIONAL IDEALS (1997); (24) Oklahoma, STANDARDS OF PROFESSIONALISM (2006); (25) Oregon, STATEMENT OF PROFESSIONALISM (2006); (26) Pennsylvania, CODE OF CIVILITY Ch. 99 (2000); (27) South Carolina, SOUTH CAROLINA BAR STANDARDS OF PROFESSIONALISM, STATEMENT OF PRINCIPLES; (28) Texas, THE TEXAS LAWYER’S CREED (1989); (29) Utah, UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY (2003); (30) Vermont, GUIDELINES OF PROFESSIONAL COURTESY (1989); (31) Virginia, PRINCIPLES OF PROFESSIONALISM (2009); (32) Washington, CREED OF PROFESSIONALISM (2001).
was analyzed and the provisions for each jurisdiction were placed into a chart divided by the overarching concern of each provision. As provisions arose that did not fit into a preexisting category a new category was added. After the initial analysis was completed, the collected provisions were analyzed to determine which were common across all jurisdictions. These common provisions provided the basis of the core common concepts of civility discussed below.

Analysis of the data gathered from the civility codes indicates that the most common provisions can be categorized into 10 overarching themes. Although some codes have more detail than others, the goal here is to distill the common aspects of civility across jurisdictions. The ten common concepts of civility include the obligation to: (1) recognize the importance of seeking agreement and accommodation with regard to scheduling and extensions; (2) be respectful and act in a courteous, cordial, and civil manner; (3) be punctual, prepared, and keep commitments; (4) maintain honesty and personal integrity; (5) communicate with opposing counsel; (6) avoid actions taken merely to delay or harass; (7) ensure proper conduct before the court; (8) act with dignity and cooperation in pre-trial proceedings; (9) act as a role model to the client and public and as a mentor to young lawyers; and (10) utilize the court system in an efficient manner. Each of these concepts is discussed in detail below.46

(1) Recognize the Importance of Keeping Commitments and of Seeking Agreement and Accommodation with Regard to Scheduling and Extensions. Codes provide detailed obligations regarding keeping commitments and seeking accommodation with opposing counsel when scheduling or rescheduling matters or seeking extensions. The general obligation is to agree only to commitments that the lawyer reasonably believes she or he can honor.47 In addition to ensuring his or her availability, the lawyer must also ensure that others involved in the proceeding will be available before scheduling an event.48 This in-

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

47 See Statement on Lawyer Professionalism IB(2) (Massachusetts 1989) ("A lawyer should not accept professional commitments which he or she knows or should know he or she will be unable to honor."); Code of Professional Courtesy 2 (Alabama 1992) ("A lawyer must honor promises and commitments made to another lawyer.").

48 See Code of Professional Courtesy 3 (Alabama 1992) ("A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.").
cludes scheduling matters by agreement (as opposed to mere notice), and to refrain from requesting scheduling changes for tactical or unfair purposes. Agreement is particularly important on procedural matters, preliminary matters, discovery issues, and dates for meetings, depositions, and trial. The justification for emphasizing agreement is to ensure that lawyer and court resources are expended on matters of substance and not on delays caused by failure to coordinate schedules or procedural disputes.

In addition to scheduling by agreement, a lawyer should seek to accommodate opposing counsel throughout representation. This includes accommodations with regard to meetings, depositions, hearings, and trial. Proper accommodation includes granting requests for extensions of time and for waiver of procedural formalities – even if the same courtesy has not previously been extended to the lawyer.

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49 See CODE OF PROFESSIONAL COURTESY 3 (Kentucky 1993) ("A lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates and court appearances (other than routine motions) rather than merely serving notice."); PROFESSIONAL ASPIRATIONS, STANDARDS III.C.1 (Minnesota 2000) ("We will not arbitrarily schedule a meeting, deposition, court appearance, hearing, or other proceeding until a good faith effort has been made to schedule it by agreement. If we are unable to contact the other lawyer, we will send written correspondence suggesting a time or times that will become operative unless an informal objection is directed to us within a set reasonable time."); PRINCIPLES OF PROFESSIONALISM, LAWYER'S RELATIONS WITH OTHER COUNSEL 2 (New Jersey 1997) ("A lawyer should respect a colleague's schedule. Agreement should be sought on dates for meetings, conferences, depositions, hearings, trials and other events.")

50 CODE OF PROFESSIONAL COURTESY 9 (Alabama 1992) ("A lawyer should seek informal agreement on procedural and preliminary matters.").

51 PRINCIPLES OF PROFESSIONALISM (Virginia 2009) ("Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements."); CODE OF PROFESSIONALISM (Louisiana 1992) ("I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute."); A LAWYER'S ASPIRATIONAL IDEALS, AS TO COURTS (a)(3) (Ohio 1997) ("Seek noncoerced agreement between the parties on procedural and discovery matters.").

52 A LAWYER'S CREED OF PROFESSIONALISM B.4 (Arizona 2005) ("I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested.").

53 CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM 6(a) (2007)("Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension."); THE LAWYER’S PLEDGE OF
commodation should be granted unless such an accommodation will adversely affect the client. The decision to grant an accommodation to opposing counsel with regard to matters that do not directly affect the merits of the case (for example, extensions, continuances, adjournments, and admissions of facts) rests with the lawyer and not the client. It is improper to withhold consent to accommodation or extensions on arbitrary or unreasonable bases or to place unwarranted or irrelevant conditions when granting an extension of time.

(2) Be Respectful and Act in a Courteous, Cordial, and Civil Manner.

Civility codes use various terms to describe a lawyer's obligation to remain courteous to those involved in the legal system. The codes use combinations of words such as courteous, cordial, respectful, fair, or civil. The obligation of courtesy extends to other lawyers, clients, and court personnel.

PROFESSIONALISM II.B (Nevada 1997) ("I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate substantive interests of my client will not be adversely affected.")

54 A LAWYER'S CREED OF PROFESSIONALISM B.3 (Arizona 2005) ("In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected."); PROFESSIONAL ASPIRATIONS, STANDARDS III.H (Minnesota 2000) ("During trial or hearing we will honor reasonable requests of opposing counsel that do not prejudice the rights of our clients or sacrifice tactical advantage.")

55 See STANDARDS OF PROFESSIONALISM 2.5 (Oklahoma 2006) ("We will reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect a client's lawful objectives."); UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY 14 (2003) ("Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts."); THE TEXAS LAWYER'S CREED II (1989) ("A client has no right to instruct me to refuse reasonable requests made by other counsel.").

56 GUIDELINES ON CIVILITY IN LITIGATION II.C (New York 1994) ("A lawyer should not attach unfair and extraneous conditions to the extension of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize or to seek reciprocal scheduling concessions."); GUIDELINES OF PROFESSIONAL COURTESY (Vermont 1989) ("If a fellow attorney makes a just request for cooperation, or seeks scheduling accommodation, a lawyer shall not arbitrarily or unreasonably withhold consent.").

57 CREED OF PROFESSIONALISM (Washington 2001) ("In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness."); CODE OF PROFESSIONAL COURTESY 4 (Alabama 1992) ("A lawyer should maintain a cordial
ents, the court, office staff, the public, and even the law.\textsuperscript{58} It applies to written and oral communications.\textsuperscript{59} Courteous behavior is often defined by its opposite. For example, South Carolina provides that a lawyer should "avoid all rude, disruptive, and abusive behavior and should, at all times, act with dignity, decency and courtesy consistent with any appropriate response to such conduct by others and a vigorous and aggressive assertion to appropriately protect the legitimate interests of a client."\textsuperscript{60} Courteousness requires a losing lawyer to avoid expressing disrespect for the court, adversaries, or parties. Alabama's code goes so far as to say that, to demonstrate courteousness, lawyers should shake hands at the conclusion of a matter.\textsuperscript{61} A number of codes imply that incivility may arise because a lawyer adopts the client's dislike or disapproval of others in the proceeding. To this end the codes make it clear that a lawyer should maintain their objective independence in the course of representation.\textsuperscript{62} Lawyers should not allow ill feelings between the parties to affect the actions of the lawyer.\textsuperscript{53}

and respectful relationship with opposing counsel."); CODE OF PROFESSIONALISM (Louisiana 1992) ("I will conduct myself with dignity, civility, courtesy and a sense of fair play."); GUIDELINES OF PROFESSIONAL COURTESY (Vermont 1989) ("Lawyers should treat each other, their clients, the opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times.").

\textsuperscript{58} THE LAWYER'S PLEDGE OF PROFESSIONALISM III.A (Nevada 1997) ("I will conduct myself in a professional manner and demonstrate respect for the court, other tribunals and the law."); \textsuperscript{id at IV.C ("I will treat my office staff with courtesy and respect, and will encourage them to treat others in the same manner.")); PRINCIPLES OF PROFESSIONALISM (Virginia 2009) ("Treat all judges and court personnel with respect and courtesy.").

\textsuperscript{59} A LAWYER'S CREED OF PROFESSIONALISM B.1 (ARIZONA 2005) ("I will be courteous and civil both in oral and in written communication."); CODE OF PROFESSIONAL COURTESY 8 (Kentucky 1993) ("A lawyer should strive to maintain a courteous tone in correspondence, pleadings and other written communication."); STANDARDS OF PROFESSIONALISM 3.1(a)(Oklahoma 2006) ("We will be civil, courteous, respectful, honest and fair in communicating with adversaries, orally and in writing.").

\textsuperscript{60} SOUTH CAROLINA BAR STANDARDS OF PROFESSIONALISM, STATEMENT OF PRINCIPLES 6.

\textsuperscript{61} CODE OF PROFESSIONAL COURTESY 10 (Alabama 1992).

\textsuperscript{62} THE LAWYER'S PLEDGE OF PROFESSIONALISM I.E (Nevada 1997) ("I will not permit my commitment to my client's cause to interfere with my ability to provide my client with objective advice."); SOUTH CAROLINA BAR STANDARDS OF PROFESSIONALISM, STATEMENT OF PRINCIPLES 9 ("A lawyer should exercise independent judgment without compromise of a client and should not be governed by a client's ill will or deceit."); A LAWYER'S ASPIRATIONAL IDEALS, AS TO CLIENTS
The lawyer’s obligation of courteousness extends beyond the obligation of a lawyer to regulate their own conduct. It also includes a duty on the part of the lawyer to educate clients and others such as office staff, of the importance of civility in the legal process. Part of this education includes explaining to the client that courteous conduct "does not reflect a lack of zeal in advancing [the client’s] interests, but rather is more likely to successfully advance their interests." The recurring theme is that lawyers should inform their clients that courtesy and civility is not to be equated with weakness, and ensure that clients understand that uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive, or obnoxious behavior is not a valid part of effective or zealous representation. Minnesota goes even further to state that
"uncivil, abrasive, hostile, or obstructive" conduct undermines the rational, peaceful, and efficient resolution of disputes – the very attributes of an effective legal system.67

(3) The Obligation to be Prompt, Punctual and Prepared. Civility includes obligations of promptness, punctuality68 and preparedness69. Underlying these elements are issues of efficiency and respect for those involved in a proceeding. A lawyer who is not prompt, punctual or prepared wastes the time and resources and demonstrates disrespect of those involved as well as the judicial system itself.70

A lawyer should be punctual in attendance at events that occur in the course of proceeding as well as in communications with clients, other counsel, and the court.71 The duty of promptness applies to all aspects of litigation. In its most general sense, a lawyer has an obligation to promptly dispose of disputes.72 In a more specific sense, it obligates a lawyer to respond in a timely manner to communications from clients, opposing counsel, or others involved in the legal process.73 It is

nistic, obstructive or obnoxious.”);THE TEXAS LAWYER’S CREED II (1989) (same);UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY (2003) (“Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in offensive or improper conduct.”).

67 PROFESSIONAL ASPIRATIONS, STANDARDS III. LAWYER TO LAWYER (Minnesota 2000).
68 CODE OF PROFESSIONAL COURTESY 8 (Alabama 1992) (“A lawyer should always be punctual.”); PRINCIPLES OF PROFESSIONALISM (Virginia 2009) (“Be punctual in attending all court appearances and other scheduled events.”)
69 STATEMENT OF PROFESSIONALISM (Oregon 2006) (“I will always be prepared for any proceeding in which I am representing my client.”)
70 CODE OF CIVILITY, LAWYERS’ DUTIES 8 (Maryland 1997) (“We will be punctual and prepared for all scheduled appearances so that all matters may begin on time and proceed efficiently.”)
71 CODE OF PROFESSIONALISM (Louisiana 1992) (“I will be punctual in my communications with clients, other counsel and the court, and in honoring scheduled appearances.”)
72 STATEMENT ON LAWYER PROFESSIONALISM I(D)(5) (Massachusetts 1989) (“A lawyer should be guided by the proposition that the interests of justice are best served by the prompt disposition of disputes.”). See also PROFESSIONAL CREED (North Carolina 1989) (“If a lawyer knows that his client is going to submit a voluntary dismissal of a matter; the lawyer should promptly notify opposing counsel to avoid unnecessary trial preparation and expense.”).
73 CODE OF PROFESSIONAL COURTESY 2 (Kentucky 1993) (“A lawyer should promptly return telephone calls and correspondence from other lawyers.”); STANDARDS OF PROFESSIONALISM 1.9 (Oklahoma 2006) (“We will promptly return
improper for a lawyer to fail to promptly respond to a communication merely to seek tactical advantage or solely because the lawyer disagrees with the communication.\footnote{PRINCIPLES OF PROFESSIONALISM (Virginia 2009) ("Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.")} In addition, a lawyer has an obligation to promptly notify all those interested if a scheduled hearing, deposition, or other event has been cancelled.\footnote{A LAWYER’S CREED OF PROFESSIONALISM C(7) (Arizona 2005) ("When scheduled hearings or depositions have to be canceled, I will notify opposing counsel and, if appropriate, the court (or other tribunal) as soon as possible.")}

A lawyer’s obligation to be prepared requires adequate preparation by the lawyer prior to hearings, trials, depositions, etc.\footnote{PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS Principles A. 5. (2003) ("Diligence. A lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task.")} A lawyer must remain educated with regard to the area of law in which she practices.\footnote{STANDARDS OF PROFESSIONALISM 2.4 (Oklahoma 2006) ("We will continually engage in legal education and recognize our limitations of knowledge and experience.")} This obligation has two primary justifications. First is the need to ensure that the client maintains respect for her lawyer and the legal system. Second, without proper preparation, an attorney leaves her client underrepresented and undermines the truth-seeking process that underlies the legal system that relies on lawyers to present both sides of an argument to the court.\footnote{PROFESSIONAL ASPIRATIONS, STANDARDS II. LAWYER TO CLIENT (Minnesota 2000) ("A lawyer owes allegiance, learning, skill, and diligence to a client. As lawyers, we shall employ appropriate legal procedures to protect and advance our clients legitimate rights, claims and objectives. In fulfilling our duties to each client, we will be mindful of our obligation to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.")}

\section*{(4) Maintain Honesty and Personal Integrity} Civility codes admonish lawyers to maintain integrity and to be honest. Delaware explicitly identifies personal integrity as a lawyer's most important quality and states that personal integrity is maintained by "rendering of professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with telephone calls and respond to correspondence from clients, opposing counsel, unrepresented parties and others."}
conviction and courage in advocating a lawful cause.” 79 While other codes mention the obligation to maintain “integrity” none give this type of detailed explanation. 80

With regard to honesty, several codes state that a lawyer’s word is her bond. 81 While honesty as a general matter is mentioned repeatedly, 82 the codes cite specifically the obligation to avoid intentionally deceiving other lawyers and the court. For example, a lawyer should refrain from misciting, distorting or exaggerating facts or the law and should correct inadvertent misstatements of law or fact. 83 Oklahoma states that it is dishonest for a lawyer to exaggerate “the amount of damages sought in a lawsuit, actual or potential recoveries in settlement or the lawyer’s qualifications, experience or fees.” 84

(5) Proper Interactions With Opposing Counsel. Codes provide quite a bit of guidance with regard to common interactions between lawyers. The key to evaluating inter-lawyer interactions is whether the interaction is geared toward legitimately resolving a dispute or is instead intended to gain an unfair advantage or personally attack an opponent. Underlying this concept is a belief that open, fair, respectful and honest communication between opposing lawyers will not only

80 Common is the statement from Mississippi stating that a lawyer has an obligation to “preserve the dignity and integrity of our profession by my conduct. The dignity and integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.” THE LAWYER’S CREED, ASPIRATIONAL IDEALS: AS A LAWYER (g) (1990). See also CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM, Introduction (2007) (obligation of professionalism includes “civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation . . . .”); PROFESSIONAL ASPIRATIONS, STANDARDS I. OUR LEGAL SYSTEM (Minnesota 2000) (“A lawyer owes personal dignity, integrity, and independence to the administration of justice. A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.”); STATEMENT OF PROFESSIONALISM (Oregon 2006) (“I will promote the integrity of the profession and the legal system.”); GUIDELINES OF PROFESSIONAL COURTESY (1989) (“A lawyer should act with personal dignity and professional integrity.”).
81 Jurisdictions that expressly state that a lawyer’s word is her bond are Louisiana, Minnesota, Nevada, Oklahoma, South Carolina, Texas, Virginia, and Washington.
82 See CREED OF PROFESSIONALISM (Washington 2001) (“I will be forthright and honest in my dealings with the court, opposing counsel and others.”)
83 CODE OF CIVILITY, LAWYERS’ DUTIES 7 (Maryland 1997) (“We will not knowingly misrepresent, mischaracterize, or misquote fact or authorities cited.”)
84 STANDARDS OF PROFESSIONALISM, 1.8 (Oklahoma 2006).
assist in quickly resolving litigated disputes but also to avoid litigating some disputes all together.\textsuperscript{85} On the other hand, failure of lawyers to interact civilly can delay resolution of claims and compromises the public’s view of the legal profession.\textsuperscript{86}

Lawyers should avoid hostile, demeaning, or humiliating words in written or oral communications to opposing counsel.\textsuperscript{87} Lawyers should also avoid personal criticism of other lawyers and statements made solely to embarrass – including statements or insinuation related to personal peculiarities or idiosyncrasies of other lawyers.\textsuperscript{88} Kentucky sees this problem as lawyers becoming too personally involved in their client’s case and acting inappropriately towards other lawyers. Kentucky’s advice – leave the conflict in the courtroom:

A lawyer should recognize that conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, “leave the matter in the courtroom.”\textsuperscript{89}

In situations where lawyers exchange documents, they should identify changes made to the document, and, when changes are agreed

\begin{footnotes}
\item[85] \textsc{Code of Professional Courtesy 11} (Alabama 1992) ("A lawyer should recognize that adversaries should communicate to avoid litigation and remember their obligation to be courteous to each other."); \textsc{A Lawyer’s Creed of Professionalism C(2)} (Arizona 2005) ("Where consistent with my client’s interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced."); \textsc{Statement on Lawyer Professionalism II(A)(a)&(b)} (Massachusetts 1989) ("communicate respectfully with other attorneys" and "maintain open communication with opposing counsel.").

\item[86] \textsc{Statement on Lawyer Professionalism I(A)(4)} (Massachusetts 1989) ("Lawyers and judges should deal with one another respectfully because the attitude of the public toward the judicial process is influenced by the relationship among lawyers and judges.").

\item[87] \textsc{Utah Standards of Professionalism and Civility 3} (2003).

\item[88] \textsc{Code of Professional Courtesy 7} (Alabama 1992) ("A lawyer should never intentionally embarrass another lawyer and should avoid personal criticism of another lawyer."); \textsc{Code of Civility 99.3(5)} (Pennsylvania 2000) ("A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration."); \textsc{The Texas Lawyer’s Creed III} (1989) ("I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.").

\item[89] \textsc{Code of Professional Courtesy 10} (Kentucky 1993).
\end{footnotes}
to, the lawyers must make only the agreed changes.\textsuperscript{90} Furthermore, when communicating understandings or agreements, a lawyer must state the agreement correctly and should not include substantive matters in the document that were not agreed to.\textsuperscript{91} Similarly, a lawyer should not set out in a communication a position that opposing counsel has not taken, thus creating a "record" of things that have not occurred.\textsuperscript{92} With regard to the need to communicate fairly, Utah, Texas, and Minnesota goes as far as to require lawyers to notify the other side before seeking an entry of default (unless the client’s legitimate rights will be adversely affected).\textsuperscript{93} Finally, the obligation to communicate civilly includes the delivery of the communication. Thus, when it is appropriate to send communications to a court, a lawyer should deliver copies to opposing counsel at the same time and by the same means.

A lawyer should not seek sanctions or disqualification of opposing counsel unless necessary to protect a client and the action is fully justified after investigation.\textsuperscript{94} This recognizes that a motion for sanctions can destroy the working relationships between lawyers and encourage tit-for-tat uncivil conduct.\textsuperscript{95} Motions seeking sanctions or disqualification filed solely for tactical advantage or other improper rea-

\textsuperscript{90} \textsc{Code of Professionalism} (Louisiana 1992) ("I will clearly identify for other counsel changes I have made in documents.").

\textsuperscript{91} \textsc{Utah Standards of Professionalism and Civility} 7 (2003) ("When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.").

\textsuperscript{92} \textsc{Standards of Professionalism} 3.1(d) (Oklahoma 2006). \textit{See also} \textsc{California Attorney Guidelines of Civility and Professionalism} 4(g)(2007) ("An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.").

\textsuperscript{93} \textsc{Utah Standards of Professionalism and Civility} 16 (2003). \textit{See also} \textsc{Professional Aspirations, Standards III. Lawyer to Lawyer} (F)(2) (Minnesota 2000) (same); \textsc{The Texas Lawyer’s Creed} III (1989) (same).

\textsuperscript{94} \textsc{Code of Professional Courtesy} 5 (Alabama 1992) ("A lawyer should not seek sanctions against or disqualification of another attorney unless necessary for the protection of a client and fully justified by the circumstances, not for the mere purposes of obtaining tactical advantage.").

\textsuperscript{95} \textsc{California Attorney Guidelines of Civility and Professionalism} 10(f) (2007) ("Because requests for monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client’s legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.").
sons are not appropriate. Threats of sanctions are also inappropriate as a litigation tactic. Lawyers who engage in such tactics bring the legal profession into disrepute by advancing unfounded arguments.

(6) Avoid Actions Taken Merely to Delay and Harass. A fundamental tenet of civility is engaging in litigation and negotiation in a fair and efficient manner. This means lawyers should take steps to avoid costs, delay, inconvenience, and strife – tactics that do not aid in truth finding or the timely and efficient resolution of disputes. Actions taken solely to delay or to harass to gain an unfair advantage in litigation reflect poorly on the legal profession in the eyes of the public. In fact, advocacy does not include the right of unjustified delay or harassment. This obligation essentially places a good faith and fair dealing obligation on lawyers in the course of litigation or negotiation.

Civility codes provide specific examples of conduct that either results in or avoids delay and harassment. Lawyers should not seek an extension of time solely to delay resolution of a matter. Similarly, lawyers should not falsely hold out the possibility of settlement to delay resolution of a matter. To avoid delay in resolution of a matter, lawyers should stipulate to civil matters not in dispute and withdraw claims/defenses when it becomes clear to the lawyer that they have no

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96 UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY 5 (2003) ("Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.")
97 CODE OF PROFESSIONALISM (Louisiana 1992) ("I will not use the threat of sanctions as a litigation tactic.")
98 CODE OF CIVILITY, LAWYERS' DUTIES (4) (Maryland 1997) ("We will not bring the profession into disrepute by making unfounded accusations of impropriety or attacking counsel, and absent good cause, we will not attribute bad motives or improper conduct to other counsel.")
99 CODE OF PROFESSIONAL COURTESY 12 (Alabama 1992) ("A lawyer should recognize that advocacy does not include harassment."); Id. at 13 ("A lawyer should recognize that advocacy does not include needless delay.").
100 PRINCIPLES OF PROFESSIONALISM, LAWYER'S RELATIONS WITH OTHER COUNSEL 4 (New Jersey 1997) ("In the conduct of negotiations, or litigation, a lawyer should conduct himself or herself with dignity and fairness and refrain from conduct meant to harass the opposing party.").
101 PROFESSIONAL ASPIRATIONS, STANDARDS III(C)(4) (Minnesota 2000) ("We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.").
102 PROFESSIONAL ASPIRATIONS, STANDARDS III (G)(2) (Minnesota 2000) ("We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.").
merit. Improper delay occurs when a lawyer refuses to consider an opportunity to resolve a dispute by settlement or alternative dispute resolution.

A lawyer should not engage in conduct designed to harass opposing counsel and opposing counsel's client. Of course this means in the most literal sense that lawyers should not engage in personal attacks on opposing counsel or others in the judicial process. Harassment however, also includes conduct whose sole purpose is not resolution of a claim but merely to annoy or impose additional costs on those involved in the litigation process. For example, a lawyer should not engage in conduct solely for the purpose of draining the financial resources of the opposing party. A lawyer also should not serve motions or pleadings on an opposing party at a time or in a manner that unfairly limits the opportunity to respond – for example, late on Friday afternoon or the day preceding a holiday.

103 STANDARDS OF PROFESSIONALISM 2.9 (Oklahoma 2006) ("We will readily stipulate to undisputed facts in order to avoid needless costs, delay, inconvenience, and strife."); LAWYERS’ PRINCIPLES OF PROFESSIONALISM (Connecticut 1994) ("In civil matters, I will stipulate to facts as to which there is no genuine dispute.")

104 STATEMENT OF PROFESSIONALISM (Oregon 2006) ("I will explore all legitimate methods and opportunities to resolve disputes at every state in my representation of my clients.").

105 CODE OF PROFESSIONALISM (Louisiana 1992) ("I will not engage in personal attacks on other counsel or the court."); PRINCIPLES OF PROFESSIONALISM (Virginia 2009) ("Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my client's interests."); PROFESSIONAL ASPIRATIONS, STANDARDS III. LAWYER TO LAWYER (A)(6) (Minnesota 2000) ("We will not ask a witness or an opposing party a question solely for the purpose of harassing or embarrassing that individual.").

106 PRINCIPLES OF PROFESSIONALISM, LAWYER’S RELATIONS WITH CLIENTS 3 (New Jersey 1997) ("Clients should be advised against pursuing a course of action that is without merit, and should avoid tactics that are intended to harass, or drain the financial resources of the opposing party.").

107 LAWYERS’ PRINCIPLES OF PROFESSIONALISM (Connecticut 1994) ("I will not serve motions and pleadings on the other party or counsel at such a time or in such manner as will unfairly limit the other party's opportunity to respond."); GUIDELINES ON CIVILITY IN LITIGATION V.B (New York 1994) ("Papers should not be served at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday."); STANDARDS OF PROFESSIONALISM 3.1(c) (Oklahoma 2006) ("The timing and manner of service of papers will not be designed to annoy, inconvenience or cause disadvantage to the person receiving the papers; and papers will not be served at a time or in a manner designed to take advantage of an adversary's known absence from the office.").
(7) Ensure Proper Conduct Before the Court. A lawyer's obligation of civility extends to conduct before the court. Obligations to the court are two-pronged. First, a lawyer should respect the court and the system of justice it stands for. By protecting and respecting the dignity, integrity and independence of the judiciary, lawyers aid in ensuring the public at large shows respect to the legal system and maintain the legitimacy of the court system. Second, a lawyer should be a model for clients and others with regard to respect for the place of courts in the legal system. This obligation is based in similar concerns of maintaining respect and legitimacy of the court system by ensuring that participants in the legal process maintain due respect of the judiciary and the symbolism associated with the legal process.

At the most fundamental level a lawyer should act with respect and deference when interacting with the bench. The civility codes provide fairly detailed examples of what is expected. For example, Alabama states that a lawyer should "dress in proper attire" and should stand when addressing the court. Pennsylvania goes further to provide specific direction to lawyers appearing before a court, providing that a lawyer should dress appropriately and should stand and be courteous to the court and court personnel. This includes addressing the judge as "Your Honor" or "the Court" and by beginning an argument with "May it please the court." Pennsylvania adds that in court lawyers should refer to opposing counsel by their surname preceded by their preferred title. Generally stated a lawyer should act in a manner that respects the court and its decisions.

108 PRINCIPLES OF PROFESSIONALISM, LAWYER’S RELATIONS WITH THE COURT 1 (New Jersey 1997) ("To the court, a lawyer owes honesty, respect, diligence, candor and punctuality. A lawyer has a duty to act in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.").

109 CODE OF CIVILITY, LAWYERS’ DUTIES (6) (Maryland 1997) ("We will not engage in conduct that offends the dignity and decorum of the judicial and administrative proceedings, brings disorder to the tribunal or undermines the image of the legal profession, nor will we allow clients or witnesses to engage in such conduct.").

110 THE TEXAS LAWYER’S CREED IV (1989) ("I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.").

111 CODE OF PROFESSIONAL COURTESY 16 (Alabama 1992) ("A lawyer should stand to address the court, be courteous and not engage in recrimination with the court."); Id. at 17 ("During any court proceeding, whether in the courtroom or chambers, a lawyer should dress in proper attire and show respect for the court and the law.")

112 204 PA. CODE § 99.3 (2011). North Carolina also gives specific guidance to lawyers in the courtroom:
A lawyer should avoid visual and verbal displays of temper toward the court and bench, especially when the lawyer is on the losing side of a matter. Furthermore, when appearing before a court, a lawyer should direct her arguments to the court and not opposing counsel and should avoid embarrassing or personal criticism of opposing counsel or the court. In addition, a lawyer should avoid "unfounded, unsubstantiated, or unjustified public criticism" of the judiciary and should actively protect the court system from unjust criticism and attack.

Obligations to courts extend beyond the duty of decorum and the appearance of the court – they also extend to substantive concerns. Lawyers should communicate honestly with the court on factual and legal issues because the court is relying on the lawyer’s representations when resolving disputes. For example, if a court requests a lawyer to draft an order, the lawyer should draft the order in a manner that correctly states the court’s holding, should circulate them to opposing counsel, and should seek to resolve issues before presenting them to the court.

A lawyer in the courtroom should whenever reasonably possible:

1. Avoid interruption of opposing counsel except when necessary to voice an objection.
2. Unless otherwise directed by the court, present an exhibit to opposing counsel before presenting the exhibit to a witness.
3. Avoid standing between the witness and opposing counsel during examination.
4. Provide opposing counsel with a copy of any opinion or document given to the court.
5. Encourage appropriate courtroom behavior by clients and witnesses.

PROFESSIONAL CREED (North Carolina 1989)

PROFESSIONAL CREED (North Carolina 1989)j ("A lawyer should avoid visual or verbal displays of temper toward the court, and especially upon a bench ruling against him.")

THE LAWYER’S CREED, ASPIRATIONAL IDEALS; AS TO THE COURTS, OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM (b)(5) (Mississippi 1990).

PRINCIPLES OF PROFESSIONALISM, LAWYER’S RELATIONS WITH THE COURT 4 (New Jersey 1997) ("A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.");

THE TEXAS LAWYER’S CREED IV (1989) ("Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.")

STATEMENT ON LAWYER PROFESSIONALISM I.D.1 (Massachusetts 1989) ("A lawyer should conduct himself or herself in a manner which recognizes that the judge is obligated to resolve conflicting claims and must rely, in large measure, upon the lawyer for the representation of evidence to be used in resolving disputes; accordingly, a lawyer should strive to ensure that the judge is not burdened with a misapprehension of fact or law.")
the court. In addition, a lawyer must not engage in improper ex parte contacts with members of the judiciary. \footnote{CODE OF CIVILITY, LAWYERS’ DUTIES 10 (Maryland 1997) ("We will avoid ex parte communications with the court, including the judge’s staff, on pending matters in person (whether in social, professional, or other contexts), by telephone, and in letters and other forms of written communication, unless authorized.")}

The obligation of the lawyer to inform clients and others about the need to demonstrate deference and respect to the court and to act to prevent clients and witnesses from disturbing courtroom decorum is the second element of a lawyer’s obligation to ensure proper conduct before courts. \footnote{PRINCIPLES OF PROFESSIONALISM (Virginia 2009) ("Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions."); CODE OF CIVILITY, LAWYERS’ DUTIES 6 (Maryland 1997) ("We will educate clients and witnesses about proper courtroom decorum and to the best of our ability, prevent them from creating disorder or disruption in the courtroom.")}

This actually has two different components. The first is an obligation not to advise a client to engage in conduct that demonstrates disrespect for the court. \footnote{CODE OF CIVILITY, LAWYERS’ DUTIES 3 (Maryland 1997) ("We will not encourage any person under our control to engage in conduct that would be inappropriate under [the civility code] if we were to engage in such conduct"")}

The second is a requirement to educate those involved in the legal process about the obligation of demonstrating respect for the court and explaining what conduct is expected. \footnote{A LAWYER’S ASPIRATIONAL IDEALS, AS TO COURTS (a)(6) (Ohio 1997) ("Advise clients about the obligations of civility, courtesy, fairness, cooperation and other proper behavior expected of those who use our system of justice.")}

Washington state’s code puts the obligation succinctly: "As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation, and the legal profession." \footnote{CREED OF PROFESSIONALISM (Washington 2001).}

\section*{(8) Act with Dignity and Cooperation in Pre-trial Proceedings.}

There is no aspect of litigation that prompts more allegations of incivility than pre-trial practice and particularly discovery. Pre-trial is when there is the least amount of court supervision and lawyers tend to be willing to press the limits of zealous representation. It is also a time during litigation when the disclosure of potentially damaging or costly information takes place and attempts to limit or delay (or to compel) disclosure occur. These types of disputes can be contentious. Therefore it is no surprise that civility codes contain a lot of guidance about conduct during pre-trial proceedings.
Overall there is an obligation to utilize pre-trial processes to accomplish just and efficient resolution of a dispute.\textsuperscript{123} This includes the obligation to avoid engaging in excessive or abusive discovery and to comply with all reasonable discovery requests.\textsuperscript{124} For example, depositions should be scheduled only to obtain needed facts or to perpetuate testimony, they should not be used as a tool to harass or increase litigation costs.\textsuperscript{125} The same standard of need applies to both proposing and responding to interrogatories.\textsuperscript{126} Pre-trial tactics should not be utilized merely to increase the litigation costs of the opponent.

Between counsel, there is an obligation of cooperation, truthfulness, and fair play. Lawyers should act in a courteous and respectful manner in pre-trial procedures.\textsuperscript{127} In fact, a lawyer should not do anything in a deposition or negotiation that a lawyer would not do before a judge.\textsuperscript{128} Specific examples of improper conduct in deposition include making improper objections or instructing a witness not to answer merely to delay or obstruct.\textsuperscript{129} Lawyers should not assert "speaking objections" that are intended to coach a witness how to answer a question.\textsuperscript{130}

\textsuperscript{123} STATEMENT ON LAWYER PROFESSIONALISM I.D(3) (Massachusetts 1989) ("A lawyer should not use the discovery process to accomplish ends other than the reasonable discovery of information necessary to a just resolution of the dispute.")

\textsuperscript{124} A LAWYER’S CREED OF PROFESSIONALISM B(6) (Arizona 2005) ("I will not engage in excessive and abusive discovery, and I will comply with all reasonable discovery requests.")

\textsuperscript{125} PROFESSIONAL ASPIRATIONS, STANDARDS III.D(5) (Minnesota 2000) ("We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.")

\textsuperscript{126} PROFESSIONAL ASPIRATIONS, STANDARDS III.B(4) OUR LEGAL SYSTEM (Minnesota 2000) ("We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party."); \textit{id} at III.D(7) ("We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.").

\textsuperscript{127} A LAWYER’S CREED OF PROFESSIONALISM B(8) (Arizona 2005) ("In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful.")

\textsuperscript{128} CREED OF PROFESSIONALISM (Washington 2001) ("I will conduct myself professionally during depositions, negotiations and any other interaction with opposing counsel as if I were in the presence of a judge.")

\textsuperscript{129} THE TEXAS LAWYER’S CREED III.17 (1989).

\textsuperscript{130} UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY 18 (2003).
Agreement should be sought with regard to exchange of information and lawyers should seek to resolve objections by agreement. Lawyers should not seek court intervention in an attempt to obtain discovery that is "clearly improper." Lawyers should comply with reasonable discovery requests that are not subject to valid objection. This includes an obligation to interpret document requests and interrogatories in a reasonable manner and avoid overly narrow interpretations to evade disclosure of relevant and non-privileged information. It also includes an obligation to produce documents in an orderly manner and not in a way designed to be confusing or to make the document’s discovery difficult.

If the matter involves negotiation, lawyers should focus on matters of substance and not issues of form or style. A lawyer should deliver to all counsel written communication sent to the court (and a lawyer should not send the court any communications not sent to opposing counsel). In addition, the lawyer should send the communication at the same time and in the same manner as was sent to the court.

(9) Act as a Role Model to Client and Public and as Mentor to Young Lawyers. Throughout civility codes there is an underlying obligation on the lawyer to ensure that those the lawyer comes in contact with understand the definition of civility. Of course underlying this obligation is a belief by the drafters of the civility codes that there is a lack of understanding by those involved in the legal process of what civility entails. Minnesota and Texas are two states with the broadest statement of this responsibility, stating that it is an obligation of a lawyer to

131 THE LAWYER’S PLEDGE OF PROFESSIONALISM III.F (Nevada 1997) (“I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a for discovery.”); CREED OF PROFESSIONALISM D (New Mexico 1989) (“I will attempt to resolve, by agreement, my objections to matters contained in my opponent’s pleadings and discovery requests.”).
133 PROFESSIONAL ASPIRATIONS, STANDARDS III.D(3) (Minnesota 2000) (“We will comply with all reasonable discovery requests. We will not resist discovery requests that are not objectionable.”)
134 UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY 17 (2003).
135 Id.
136 CREED OF PROFESSIONALISM C (New Mexico 1989) (“In the preparation of documents and in negotiations, I will concentrate on substance and content.”).
137 CODE OF CIVILITY 99.3(14) (Pennsylvania 2000).
"educate ... clients, the public, and other lawyers regarding the spirit and letter" of the civility codes.138

A lawyer has two obligations related to educating others about civility. First, the lawyer must model proper conduct for clients and third parties.139 In this way the lawyer can demonstrate that the legal system should not operate as a television drama. It also seeks to instill in the client respect for the place of the judicial system in the dispute resolution process.140 Lawyers also have the obligation to inform clients and others under the lawyer’s direction or control what is required as a matter of civility141 and to refrain from directing others to engage in conduct that would be uncivil if performed by a lawyer.142

Experienced lawyers also have an obligation to young lawyers who may not know the contours of the obligation of civility that a lawyer assumes. In this regard, more experienced lawyers must act as both a role model and a mentor to less experienced lawyers to ensure that they are aware of their obligations of civility.143

(10) Utilize the Court System in an Efficient and Fair Manner. The final concept of civility is in a sense a overarching catch-all provision. Lawyers should strive for orderly, economically efficient, and expedi-

139 Creed of Professionalism E (New Mexico 1989) ("I will strive to set a high standard of professional conduct for others to follow."); The Lawyer’s Creed, Aspirational Ideals: As a Lawyer (b) (Mississippi 1990) ("To model for others, and particularly for my clients, the respect due to those who we call upon to resolve our disputes and with the regard due to all participants in our dispute resolution processes.")
140 Lawyer’s Creed and Aspirational Statement on Professionalism (Georgia 1990) ("To model for others, and particularly for my clients, the respect due to those we call upon to resolve the disputes and the regard due to all participants in our dispute resolution process.")
141 Code of Civility, Lawyers’ Duties 2 (Maryland 1997) ("We will advise our clients and witnesses to act civilly and respectfully to all participants in the legal process . . . ."); The Lawyer’s Pledge of Professionalism III.G (Nevada 1997) ("I will advise my clients of the behavior expected of them before the court and other tribunals."); The Texas Lawyer’s Creed II.1 (1989) ("I will advise my client of the contents of this Creed when undertaking representation.").
142 Code of Civility, Lawyers’ Duties 3 (Maryland 1997) ("We will not encourage any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.").
143 Principles of Professionalism (Virginia 2009) ("Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.")
tious disposition of litigation and transactions. Efficiency is a broad obligation that underlies a number of the civility obligations and covers a number of aspects of the legal process. Lawyers should advise clients early on regarding the costs and benefits of pursuing a particular cause of action and should seek to articulate the disputed issues so the dispute can be resolved in a timely manner. One aspect of efficiency is pursuing only those claims or defenses that have merit. Pursuing frivolous claims/defenses costs money and delays resolution of claims with merit. In addition, lawyers should consider whether pursuing an alternative form of dispute resolution would be a more expeditious and economical method to resolve disputes than litigation and should advise clients of this option. Similarly, lawyers should always be open to the possibility of settlement of disputes so they can be resolved as soon as possible.

IV. CIVILITY AS DISTINCT FROM LEGAL ETHICS AND PROFESSIONALISM

The identification of the core concepts of civility is the first step to identifying civility as a unique professional responsibility obligation. The next task is to show how civility interacts with, and is distinguished from, legal ethics and professionalism.

144 Code of Civility, Lawyers' Duties 5 (Maryland 1997) ("We will strive for orderly, efficient, ethical and fair disposition of litigation, as well as disputed matters that are not yet the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of business transactions.")

145 Statement of Professionalism (Oregon 2006) ("I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.")

146 Hallmarks of Professionalism 7 (Kansas 1987) ("Expedites the resolution of disputes through research, articulation of claims, and clarifying the issues."); Statement on Lawyer Professionalism II(A)(d) (Massachusetts 1989) ("[P]resent issues efficiently without unnecessarily burdening opposing counsel by discovery or otherwise.")

147 The Lawyer's Pledge of Professionalism I.A (Nevada 1997) ("I will achieve my client's lawful objectives as expeditiously and economically as possible, and I will advise my client against pursuing any matter that is without merit.")

148 California Attorney Guidelines of Civility and Professionalism 13(a) ("An attorney should advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution."); Standards of Professionalism 2.10 (Oklahoma 2006) ("We will consider whether the client's interests can be adequately served and the controversy more expeditiously and economically resolved by arbitration, mediation, or some other form of alternative dispute resolution, or by expedited trial; and we will raise the issue of settlement and alternative dispute resolution as soon as a case can be evaluated and meaningful compromise negotiations can be undertaken.")

149 Standards of Professionalism 2.10 (Oklahoma 2006).
from, other established obligations of professional responsibility – specifically legal ethics, and professionalism. This part seeks to identify these similarities and differences.

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

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

A. Personal Ethos Era (Pre-1908)

The Personal Ethos Era, which existed prior to 1908, was marked by two defining characteristics. First, there was decentralized regulation of the legal profession. Prior to the adoption of the ABA Canons of Professional Ethics in 1908, most states did not have codified ethical rules or guidelines. During this time “ethical norms developed largely through professional traditions and informal community oversight.” Deviant lawyers were constrained by the norms of the

150 At the time the ABA adopted the Canons of Professional Ethics in 1908, only 11 states had adopted some form of ethical guidelines: Alabama (1887); Georgia (1889); Virginia (1889); Michigan (1897); Colorado (1898); North Carolina (1900); Wisconsin (1901); West Virginia (1902); Maryland (1902); Kentucky (1903); and Missouri (1906). George P. Costigan, Jr., The Canons of Legal Ethics, 21 GREEN BAG 271, 274 (1909).

profession and were disciplined by voluntary bar associations and ad-hoc evaluations by judges as a matter of inherent power. Second, lawyer ethics during this era was viewed through the prism of morality:

Let me remind you that legal ethics is not strictly a kind of ethics or morals, but it consists in the application of and moral obligations of lawyers derived largely from religious principles, and lawyer conduct was regulated through the natural peer pressure of a small, homogeneous group or through the common law 'summary jurisdiction' each court retained over the lawyers who practiced before them.

Consider the following speech given to newly admitted members of the Connecticut state bar:

What I want you to note here for a moment is that these rules of common honesty grouped together under the term 'legal ethics' are not by authority imposed upon lawyers from without, but they are drawn from observation of the actual conduct and practice of the honorable, high minded members of the profession. They are, so to speak, the customary law of lawyers in their professional relations, and their binding force lies in the fact that for hundreds of years they have in practice been recognized as vital to the usefulness and the continued existence, even, of the legal profession.

Hon. Edwin Baker Gager, *The Duties of Attorney*, 21 YALE L.J. 72, 74-75 (Nov. 1911). See also E.A.I., *Book Review*, 20 YALE L.J. 336 (Feb. 1911) (reviewing GLEASON L. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* (Little, Brown and Co. 1910)) ("A lawyer should depend, not only on his personal notion of right and wrong, but also on the long established customs and traditions of the profession.").

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 Introductory Note (2000) ("From colonial times until late in the 19th century, lawyer discipline was almost entirely a function of courts and voluntary bar associations. A lawyer would be proceeded against in a show-cause proceeding before a court, at the suit either of an injured client, an adversary lawyer, or a voluntary bar association.").

See *Ex Parte Secombe*, 60 U.S. 9, 14 (1856) ("[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."). See also Orrin N. Carter, *Ethics of the Legal Profession*, 9 U. ILL. L. REV. 453, 463 (1915) ("The advantage of some method of disciplining lawyers who do not comply with the ethics of the profession has always been appreciated. The right to discipline attorneys by suspension or disbarment, as well as by contempt proceedings, has been exercised from the earliest times by the courts. Because attorneys are officers of the court, this power has always been exercised, in the absence of constitutional or statutory restrictions, by all courts of general or superior jurisdiction.").
those general moral rules which should govern the conduct of us all, to those special relations arising from the nature of the lawyer's business. If, in the broad sense, a man is sound morally, his legal ethics will cause him little difficulty.\footnote{Gager, supra note 152, at 75.}

In sum, during this era legal ethics were viewed largely as a matter of personal and professional morality learned through a proper upbringing and enforced through a desire to remain in good standing with the legal guild. Legal ethics was defined as the personal ethos (or character) of the lawyer, and ethos/character guided the lawyer's decisions in a particular case. In fact, there was a belief that that which was morally wrong could not be ethically or professionally right.\footnote{Id. at 70.} This philosophy held so long as the legal profession was a closed society and lawyers operated as solo practitioners or in small firms and in small communities. The changing nature of the legal profession and of law practice in the early twentieth century, however, resulted in a movement to codify ethical standards.\footnote{Costigan, Jr., supra note 150, at 271(“The changing conditions of professional practice, tending in the direction of commercializing a large part of the bar of the country, both in and out of our cities, and in particular the weakening of an effective professional public opinion due chiefly to the growth of large cities with their infinite possibilities of concealed wrongdoing, have combined, in the opinion of reflective lawyers, to create a situation calling for something more definite in the way of rules of professional ethics than we have had in the past.”). The ABA itself noted four reasons for the adoption of the 1908 Canons: (1) “We know [the republic] cannot be so maintained unless the conduct and motives of the members of our profession . . . are what they ought to be. It therefore becomes our plain and simple duty, our patriotic duty, to use our influence in every legitimate way to help make the American bar what it ought to be. A code of ethics, adopted after due deliberation . . . is one method in furtherance of this end.”; (2) “We cannot be blind to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past, and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood, or of personal aggrandizement. . . . Never having realized or grasped that indefinable ethical something which is the soul and spirit of law and of justice, they not only lower the morale within the profession, but they debase our high calling in the eyes of the public.”; (3) the standards of “good behavior” for lawyers “should be defined and measured by such ethical standards, however high, as are necessary to keep the administration of justice pure and unsullied. . . . [T]he adoption and promulgation of a series of reasonable canons of professional ethics, in the form of a code by the American Bar Association, cannot but have a salutary effect upon the
This changing mindset toward professional responsibility and ethics coincided with a larger philosophical mood of the time. During the late nineteenth and early twentieth century, there was a movement in the fields of law, politics, and government – prompted by the progress of the natural sciences through the scientific method – to develop uniform laws or rules that could provide, with scientific certainty, what was and was not appropriate behavior.\textsuperscript{157} This philosophical movement, combined with changes in the profession itself, led to a belief that the proper ethos could be distilled into a certain number of rules or laws. This concept provided the groundwork for the ABA's 1908 codification of the Canons of Professional Ethics.

\textbf{B. The 1908 Canons of Professional Ethics Era}

In 1908, after two years of study, the ABA adopted the Canons of Professional Ethics. The Canons, as adopted, contained thirty-two provisions which were intended to be a codification of the "unwritten law" and to set out the "statement of principles and rules accepted and acknowledged by reputable attorneys . . . ."\textsuperscript{158} Justification for adopting the Canons in a codified form was to inform the new (and ever more diverse) members of the bar – who were viewed as not having the same administration of justice, and upon the conduct of lawyers generally, whether on the bench or at the bar; and (4) "[M]any men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation."

\textit{Id.} at 272-73.

\textsuperscript{157} See George Trumbull Ladd, \textit{Ethics and the Law}, 18 \textit{Yale L.J.} 613, 613 (1909) ("'Ethics is the science of human conduct – its sources, its development, its sanctions, and its most general principles – as related to a rational ideal.' Or, to define more strictly this science . . . by ethics we mean the collective sentiments, judgments, and approved practices of the body of the people, with respect to what is deemed right and wrong in conduct, as measured by a certain ideal standard of character – in a word, the public conscience or moral consciousness."). \textit{See generally} JOHN G. GUNNELL, \textit{THE DESCENT OF POLITICAL THEORY} (Univ. of Chicago Press 1993). This infatuation with the scientific method operated in professions throughout the society at the time. \textit{See MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS} (Basic Books 1978). Schudson defines the difference between fact and value this way: "Facts . . . are assertions about the world open to independent validation. They stand beyond the distorting influences of any individual’s personal preferences. Values . . . are an individual’s conscious or unconscious preferences for what the world should be; they are seen as ultimately subjective and so without legitimate claim on other people." \textit{Id.} at 5-6. Journalism’s response to the fact/value divide was to adopt “objectivity” as its standard.

\textsuperscript{158} Hepp v. Petrie, 200 N.W. 857, 859 (Wis. 1924).
moral compass as prior generations – of their ethical obligations. In this sense, the Canons were adopted primarily as a primer on morality and not as a set of disciplinary rules.\footnote{Robert Sprague Hall, The Ethics of the Law, 21 The Law Student’s Helper 10, 10 (1913) ("Indeed, this condition of affairs, I mean the popular estimate of the moral standard of lawyers, has been the chief incentive to the drawing up of codes of ethics like the Canons, by men who look upon the profession of the law as something better than a trade, and whose pride has felt the sting of the widely-current distrust of the legal practitioner."); G.D.W., Comment, Declaration Concerning Professional Ethics Recently Adopted by the State Bar Association of Connecticut, 19 Yale L.J. 571, 571-72 (May 1910) ("If all men were endowed with [sound wisdom and high moral character] at the beginning of their professional lives, such codes would be of little value, save to indicate to the outside world what standards prevail within the profession, and thereby enhance the confidence in and respect for those who conform to those requirements, and are in good standing in their respective professions . . . . Unfortunately, however, this is not the case, and many young men come to the Bar lacking the benefits of sound home, social and religious training. Sometimes – though rarely – in such men we find a strong innate sense of right, and of consideration of others, with whom all that may be found in a code of ethics would be intuitive."). The Canons were also seen as a benefit for those lawyers of “highest training” to remind them of the rules and to measure their conduct against them.}

In fact, Professor Sharswood, in his Essay on Professional Ethics – on which the Canons were based – noted:

\[\text{[t]here is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. . . . The object of this Essay, is to arrive at some accurate and intelligible rules by which to guide and govern the conduct of professional life.}\footnote{Hon. George Sharswood, Essay on Professional Ethics 55-56 (T. & J. Johnson & Co. 1854).}

In this way, the 1908 Canons were perceived as setting out “common sense and common ideas of right and wrong” – which set out the essence of what it meant to be an ethical lawyer.\footnote{Hall, supra note 159, at 13; Gager, supra note 152, at 75 (“Here let me remind you that legal ethics is not strictly a special kind of ethics or morals, but it consists in the application of those general moral rules which should govern the conduct of us all, to those special relations arising from the nature of the lawyer’s business. If, in the broad sense, a man is sound morally, his legal ethics will cause him little difficulty.”).}

Because of their status as statements of moral guidance, the 1908 Canons were general and broad. The tenor was explicitly aspirational, with more emphasis on guidance than the specificity needed for
enforcement. Over time, however, bar associations and courts began to rely on the provisions of the Canons to impose discipline on attorneys.\textsuperscript{162} As the Canons developed into enforceable obligations, lawyers expressed concern that the Canons were too general and vague to both guide lawyers in appropriate conduct and to inform courts and disciplinary authorities on what could be enforced as unethical.\textsuperscript{163} In addition, scholars and lawyers began to question whether the rules regulating lawyer conduct should be statements of morality or more specific statements regulating the practice of law. In 1932 it was observed: “It is submitted that there is much in the canons of professional ethics that can be called ‘ethics’ only at the expense of confusing ethics and morality on the one hand with approved standards of professional decorum on the other.”\textsuperscript{164}

The assaults on the Canons at base were an attack on their morality/ethos-based emphasis. The Canons were characterized as “generalizations designed for an earlier era” that focused disciplinary action on the “inconsequential.”\textsuperscript{165} The feeling was that with change in the na-

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\item[\textsuperscript{162}] Barton, \textit{supra} note 151, at 431-34.
\item[\textsuperscript{163}] See id. at n.89; Edward L. Wright, \textit{Study of the Canons of Professional Ethics}, 11 CATH. L. W. 323, 323 (1965) (“[T]he canons of Professional Ethics of the American Bar Association need revision in four principal particulars: (1) there are important areas involving the conduct of lawyers which are either partially covered or totally omitted; (2) many Canons which are sound in substance have been awkwardly or deficiently stated; (3) practical sanctions for violations are virtually non-existent; and (4) changing conditions in an urbanized society require new statements of professional responsibility.”); Philbrick McCoy, \textit{The Canons of Ethics: A Reappraisal by the Organized Bar} 43 A.B.A. J. 38, 38 (1957) (revisions to the 1908 Canons “must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole.”)(quoting Harlan F. Stone, \textit{The Public Influence of the Bar}, 48 HARV. L. REV. 1 (Nov. 1934). \textit{See also} Rhode, \textit{supra} note 16, at 44.
\item[\textsuperscript{164}] Will Shafroth, \textit{“The Forty-Five Commandments of a Lawyer,”} 18 A.B.A. J. 412, 413 (1932)(quoting Charles H. Kinnane). \textit{See also} Olin E. Watts, \textit{Advancement of Professional Ideals in Law Students}, 33 U. DET. MERCY L. REV. 314, 318 (1955-56) (“[t]oo often legal ethics connotes the subject matter contained in the canons of professional ethics. An understanding of these rules does not insure ethical conduct.”).
\item[\textsuperscript{165}] Wright, \textit{supra} note 163, at 324; Harry Cohen, \textit{Ambivalence Affecting Modern American Law Practice}, 18 ALA. L. REV. 31, 31 (1965-66) (“Many rules and principles which purport to guide professional conduct today are based on the premise that the American lawyer is in the same economic and professional environment as his predecessors who practiced in the nineteenth century or as barristers in the English system.”).
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ture of society and the legal profession, the Canons should be reevaluated.\textsuperscript{166} The shift from rural to more urban practices as the country industrialized called for rules that specifically addressed issues faced by urban lawyers.\textsuperscript{167} In addition, practice was evolving beyond the sole practitioner primarily involved in litigation. Development of new areas of law (such as taxation, transportation law, regulation of business, security transactions, workmen’s compensation, administrative law and labor law) led away from the general sole practitioner to lawyers who practiced in firms or who were employed by government agencies.\textsuperscript{168} Another development was the rise of pre-trial discovery techniques, as well as various specialty courts and the use of arbitration and mediation.\textsuperscript{169} With these developments, a code of ethics focusing on the “individual courtroom advocate” was viewed as inadequate and outdated.\textsuperscript{170}

In sum, changes in society and the way law was practiced led to the need to reevaluate the 1908 Canons – and the debate had a significant impact on how “legal ethics” was perceived by the members of the bar. While the 1908 Canons were presented as fundamental and unchanging core tenets of legal ethics, by the mid-1960’s the view was that the rules of ethics should reflect the more practical realities of the legal profession. One author noted in 1965 that ethical obligations changed over time: “What may be viewed as ethically improper at one time may be considered appropriate at another.”\textsuperscript{171} This mindset was a significant break from the personal ethos era of legal ethics.

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

A code of professional responsibility for lawyers should serve a two-fold purpose. First the code (or Canons) should be fully stated to aid the lawyer in his search for appreciation of and understanding of the ethics, high principles and dedicated aspirations of the legal profession. In this sense, it is truly a moral code, addressed primarily to the lawyer’s conscience. Secondly, it should be a statement of the commonly accepted minimum standards of professional responsibility, in which sense it is a binding legal code enforceable by disciplinary action of the courts.172

This dual response was achieved by dividing the Code into three parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons constituted broad statements of “axiomatic norms.”173 The morality-based Ethical Considerations were “aspirational in character and represented the objectives toward which every member of the profession should strive.”174 The Disciplinary Rules “state[d] the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”175

The Code’s attempt to serve a dual role of providing moral and ethical guidance was criticized almost immediately. One author described the Code as the adolescent stage in the development of rules of professional responsibility – with the next stage in the development

172 Wright, supra note 29, at 325. See also Barton, supra note 151, at 436-37 (“Thus, the Code is the ABA’s first explicit division between ‘professionalism’ and minimum Rules: the Disciplinary Rules govern lawyer conduct, and the Canons and the Ethical Considerations are relegated to food for thought.”).
174 Id.
175 Id.
being a more bright-line set of obligations and prohibitions.\textsuperscript{176} The Code was not only criticized for its structure and emphasis, but also faulted for numerous "discrepancies" that were discovered – discrepancies within the Code, between the Code and substantive law, and between what the Code provided and what lawyers and the public expected.\textsuperscript{177} In addition, certain provisions of the Code dealing with minimum fees, advertising, solicitation, group legal services, and pretrial publicity were invalidated on Constitutional grounds.\textsuperscript{178}

In response, a committee was established to propose revisions to the Code in 1977 (less than a decade after the Code’s adoption), and the ABA approved a significantly revised and reorganized Code in 1983. The new standards, titled the ABA Model Rules of Professional Responsibility, adopted the structure of the American Law Institute Restatement (Third) of The Law Governing Lawyers. The Rules abandoned the “Ethical Considerations” and “Disciplinary Rules,” instead they opted for black-letter rules with accompanying comments.\textsuperscript{179} Today, almost all states have adopted a version of the 1983 standards.\textsuperscript{180} Adoption of the Model Rules of Professional Responsibility and the omission of statements of morality marked a final break between the concepts of legal ethics and morality.\textsuperscript{181}

\textsuperscript{176} L. Ray Patterson, \textit{Wanted: A New Code of Professional Responsibility}, 63 A.B.A. J. 639, 639 (May 1977)( “[The Code is] a transitional document, representing a middle stage in the development of law for lawyers. The horatory tone of the canons, the undue concern for protecting the profession in many ethical considerations, and the self-serving nature of many of the disciplinary rules are points to criticize, but they should not obscure the fact that the code is a major step forward.”).


\textsuperscript{178} Id.


\textsuperscript{180} As of April, 2011, the only state that has not adopted a version of the ABA Model Rules of Professional Conduct is California. \textit{See} http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpaca_list_state_adopting_model_rules.html (chart listing states adopting the ABA Model Rules and date of adoption)(last visited April 9, 2011).

\textsuperscript{181} Barton, \textit{supra} note 151, at 440-41 (“[I]n legal parlance ‘legal ethics’ has become synonymous with the minimum rules governing attorney conduct. In light of the explicitly moral use of ‘ethics’ in common parlance, the application of the phrase
As legal ethics moved from moral guidelines to disciplinable rules, the phrase “legal ethics” lost its moral context and became a question of compliance with minimal regulatory standards. Today when lawyers speak of “ethical” conduct the most likely connotation is the minimal behavior required to avoid sanction – not whether the conduct is morally right or wrong. This is a far cry from the 1908 Canons of Professional Ethics.

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

D. Defining Professionalism

The focus until now has been to set out the development of the current understanding of legal ethics. There remains another comm
monly cited obligation of lawyers – professionalism. Do lawyers have unique professional obligations that are different from those required as a matter of ethics? It is difficult to pin down a definition of “professional” and “professionalism” because the terms are used interchangeably to refer to a number of different concepts. For example, the practice of law is a profession – an “organized group pursuing a learned art in the public service.” Therefore, professionalism can refer generally to the nature of the profession. Professionalism can also refer to conduct – a lawyer who is rude or uncivil may be said to be acting “unprofessionally.” Professionalism is also used to indicate a violation of a lawyer’s ethical obligations – a lawyer who is disciplined is said to have acted “unprofessionally.” In fact, the most current version of the ABA’s model rules is titled “Rules of Professional Conduct.” These varying views of professionalism are not inherently incorrect – the concept certainly can encompass all of these concerns. The risk, however, is

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188 Robert F. Drinan, *The Responsibility of the Lawyer to His Profession*, 42 JUDICATURE 192, 192 (1958); Luther W. Youngdahl, *The Lawyer’s Responsibilities*, 20 MO. L. REV. 307, 311 (1955) (“Rightly conceived . . . his profession is a branch of the public service rather than an ordinary business vocation. . . . The prime object of the profession should be the service it can render to humanity – reward of financial gain should be a subordinate consideration, and the lawyer with the proper conception of the profession need have no fear of financial reward.”).

189 Joseph J. Ortego & Lindsay Maleson, *Incivility: An Insult to the Professional and the Profession*, 37 BRIEF 53, 54 (Spring 2008) (“While both professional and unprofessional behavior can readily be identified when witnessed, various authors have attempted to define professionalism, which is also known as civility.”); Orrin K. Ames, 28 AM. J. OF TRIAL ADVOC. 531 (Spring 2005) (addressing the root cause of “professionalism” defined as lack of courtesy or incivility). See also Barton, supra note 151, at 444 n. 127 (discussing various uses of “professionalism”).

190 Barton, supra note 151, at 441 (quoting *THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES* (Lesley Brown ed., 1993)) (“In a further unlikely turn of nomenclature, professionalism has come to embody what a lawyer ‘should’ do, i.e., professionalism has come to cover a lawyer’s ethical duties. The dictionary and common parlance meaning of professionalism, however, is devoid of any moral significance; it simply embodies the ‘qualities or features, as competence, skill, etc., characteristic of a profession or a professional.’”).

191 A.B.A. COMM’N ON PROFESSIONALISM, …. IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 8 (1986) (“‘Professionalism is an elastic concept the meaning and application of which are hard to
that by taking on too many meanings, “professionalism” becomes a generic phrase that fits any occasion with no deeper substantive meaning.

The goal here is to present a narrow definition of “professionalism.” First, what professionalism is not—it is not the same thing as legal ethics. Professor Cramton puts it this way: “the contemporary evolution of ethical codes into quasi-criminal rules of minimum conduct largely abandons their role as a source of vocation or calling. The morality of aspiration, central to professionalism, is eclipsed by the morality of duty.” To put it another way, ethical obligations can be seen as the shalt-nots of lawyering and professionalism as creating affirmative obligations of the lawyer to the broader society.

What professionalism does encompass is “the full measure of the profession’s aspiration and of society’s legitimate expectations.” The professional obligations of lawyers are those responsibilities assumed, not on behalf of the client or even the court, but rather on behalf of society as a whole: “Today, as never before, it seems to me to be incumbent upon the members of the legal profession to assert leadership in the struggle to maintain the philosophy of freedom under law, respect for law and property rights, and respect for the inalienable rights of the individual citizens.” It is the obligation of the lawyer to society and more specifically the fundamental tenets of democratic society that sets professionalism apart from morality or ethics.

pin down. That is perhaps as it should be. The term has a rich, long-standing heritage, and any single definition runs the risk of being too confining.”). See also Neil Hamilton & Verna Monson, The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law, 24 GEO. J. LEGAL ETHICS 137 (Winter 2011).


194 Id. at 291. See also Drinan, supra note 188, at 194 (“Lawyers by their very nature are dedicated to the public interest. Lawyers are the servants of the ministry of justice.”).

195 In calling for the “rebirth of the professional spirit,” Judge Youngdahl describes the lawyer’s duty of professionalism as the duty “to see that the foundations of free government are not shaken; that sound thinking and action prevail; that citizens are aroused to constant dangers that lurk at every turn and to the necessity of eternal vigilance.” Youngdahl, supra note 55, at 313. See also Ross L. Malone, The Lawyer and His Professional Responsibilities, 17 WASH & LEE L. REV. 191, 191 (1960) (quoting Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159 (1958) (“The legal profession has its traditional standards of conduct, its codi-
Adoption of the current rules of ethical conduct placed a particular strain on consideration of the ideals of professionalism. With specific ethical obligations in place, law schools began offering courses covering the standard of lawyers' professional responsibility with primary focus on the ethical rules themselves – neglecting discussions of lawyers' obligations to overarching societal interests. In questioning the neglect of the teaching of professional responsibility beyond the Canons, one author commented:

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

In 1986 the ABA issued a report defining professionals as those who “pursue a learned art . . . in the spirit of public service.” The emphasis on public service or the social responsibility of the lawyer is at

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196 Watts, supra note 164, at 318 (quoting Bernard C. Gavit, Legal Ethics and the Law Schools, 18 A.B.A. J. 326 (1932)). In this same article, Watts quotes Justice Harlan Stone as saying: “[T]here is grave danger to the public if this proficiency [in obtaining qualified law students] be directed wholly to private ends without thought of social consequences, and we may well pause to consider whether the professional school has done well to neglect so completely the inculcation of some knowledge of the social responsibility which rests upon a public profession. I do not refer to the teaching of professional ethics.” Id. Watts also quotes a professor of legal ethics who opined that “he felt that instead of conveying to the student some idea of the dignity of the legal profession he was simply laying down ground rules which, if the student followed, would enable him to avoid trouble.” Id.

197 A.B.A. COMM’N ON PROFESSIONALISM, supra note 191, at 10 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES 5 (West Pub. Co. 1953)).
the heart of the definition of professionalism. A lawyer’s “social conscience” is defined as:

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

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

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

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


201 Harris, supra note 183, at 567 (quoting former Georgia Supreme Court Justice Harold G. Clarke, First Annual Georgia Convocation on Professionalism 31 (Oct. 14, 1988) (“[E]thical conduct is the minimum standard demanded of every lawyer while professional conduct is a higher standard that is expected of every lawyer.”)).

202 Garrison et al., supra note 66, at 599.
rality and professionalism clear: morality represents a personal conscience whereas professionalism represents a social conscience.

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

Prior studies of civility found it difficult to define the parameters of civility. In attempting a definition, one author went so far as to say that the best that can be said about incivil behavior is, like Justice Stewart’s assessment of pornography, that you know it when you see it. With the continuing press for more civility by the bench and bar, nebulous definitions are not useful. The adoption of civility codes by no less

203 Harris, supra note 183.
204 Id. (quoting Chief Justice E. Norman Veasey, Making it Right - Veasey Plans Action to Reform Lawyer Conduct, BUS. L.J., 42, 44 (March-April 1998) (“Abusive litigation in the United States is mostly the product of a lack of professionalism. Lawyers who bring frivolous lawsuits who engage in abusive litigation tactics are unprofessional. They need to be better regulated by state supreme courts and better controlled by the trial judges who, in turn, are supervised by state supreme courts . . .”). See also Grant v. Omni Healthcare Sys. of N.J., Inc., 2009 WL 3151322, at *18 (D.N.J. Sept. 24, 2009) (in ruling on a motion for sanctions: “Although the record reflects that Plaintiff herself likely had some involvement in the discovery misconduct, the vast majority of failures in this case are more fairly attributable to Mr. Williams. Thus, the Court finds it appropriate to impose the entire load of these sanctions on Mr. Williams HIMSELF. Perhaps the burden of paying Defendants' attorney’s fees will finally put an end to Mr. Williams' practice of flouting this Court’s orders and help him internalize the consequences of flagrantly ignoring the rules of procedure as well as the rules of professional conduct.”); Grinder v. Omni Healthcare Systems of N.J., Inc., 2009 WL 2750450, at *1 (3d Cir. Sept. 1, 2009) (although overturning district court sanctions for lack of sufficient evidentiary basis, the United States Court of Appeals for the Third Circuit stated: “The promulgation of the Federal Rules of Civil Procedure ushered in a new era of federal litigation, directed to the goal of securing “the just, speedy, and inexpensive determination of every action and proceeding.” Fed.R.Civ.P. 1. It would be reasonable to expect, in light of all the applicable rules and governing precedents, that experienced attorneys, especially those who have handled major litigation, would be able to proceed through the discovery and pretrial stages with a conciliatory attitude and a minimum of obstruction, and that, under the guiding hand of the district court, the path to ultimate disposition would be a relatively smooth one. The record of the case before us shows exactly the opposite. The parties were unable to reach agreement on even minor matters and the discovery was noncompliant, delayed, or protracted, leading to the District Court’s entry of the sanction orders that are the subject of these appeals. We conclude, without enthusiasm, that none of the players is without responsibility for the unfortunate state of affairs that developed, but we view with particular concern the lawyers’ attitude and conduct toward the district judge who, if given more cooperation, would undoubtedly have been able to pre-
than 140 jurisdictions aids in the attempt to reach a consensus definition. As courts and bar associations look to develop specific definitions of “civility,” they should be cognizant of the distinct nature of the obligations of civility – specifically how civility differs from ethics and professionalism. The legal profession is not well served if civility continues to be a term whose meaning exists only in the eye of the beholder or whose tenets create obligations that are inconsistent with a lawyer’s preexisting professional obligations.

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

(continued)
Civility is often viewed as an element or characteristic of professionalism; however, civility does not neatly fit within the definition. Professionalism addresses societal consciousness and requires consideration of society's interests or the integrity of legal institutions in the course of lawyer decision making. While some civility codes contain a provision emphasizing that civility encompasses a consideration of a public good, the public good referred to here is equated to the interests of the client as opposed the self-interest of the lawyer. This is distinct from the obligations of professionalism, which would require a client to forego the interests of a client if necessary to respect the fundamental tenets of society.

Civility is also distinct from legal ethics. It is true that extreme incivility can be a basis for discipline. For example, extreme incivility might violate Model Rule of Professional Conduct 8.4 – engaging in conduct involving dishonesty, trustworthiness, or fitness as a lawyer or engaging in conduct that is prejudicial to the administration of justice. This same lawyer might violate Model Rule 3.5, which requires decorum before the tribunal. The civility codes may be seen as providing

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206 In fact, Professor Cramton views civility as a minor aspect of professionalism. Cramton, supra note 59, at 14 ("[c]ivility . . . is not the core of the enterprise. It is like an elegant dessert, which dresses up and completes a good meal."). See also Melissa L. Breger, Gina M. Calabrese & Theresa A. Hughes, Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges, 55 S.C. L. REV. 303, 306 (Winter 2003):

Nonetheless, we have come to some conclusions about the fundamentals of professionalism. For example, we agree that professionalism embraces the realm of ethics, but also reaches far beyond. Professionalism also encompasses principles of appropriate attorney conduct and aspirational ideals for an effective advocate, counselor, officer of the court, and member of the bar. Although ethical rules provide a minimum level of professionalism, there is substantial debate over standards of professionalism beyond the mandatory rules. What may seem like civility to one lawyer may seem like a breach of the ethical duty of zealous advocacy to another.

207 A LAWYER’S CREED OF PROFESSIONALISM D(1) (Arizona 2005) ("I will remember that, in addition to commitment to my client’s cause, my responsibilities as a lawyer include a devotion to the public good."); CREED OF PROFESSIONALISM E (New Mexico 1989) ("I will be mindful of my commitment to the public good.")

208 THE LAWYER’S CREED, ASPIRATIONAL IDEALS: AS A LAWYER (a) (Mississippi 1990) ("To put fidelity to clients and, through clients, to the common good, before my personal interests."); LAWYER’S CREED AND ASPIRATIONAL STATEMENT ON PROFESSIONALISM (Georgia 1990) (same but substituting “selfish” for “personal” interests).

209 See In re Estiverne, 741 So. 2d 649 (La. 1999) (suspending lawyer for one year plus a day for violation of state equivalent of Model Rules 8.4 and 4.4 for leaving a deposition, going to his car and retrieving a gun and threatening to kill opposing
guidance to lawyers on how to avoid discipline under these rules. However, the tenets of civility also exist in tension with a lawyer's ethical obligations. Lawyers accused of incivility cite their ethical obligation to be a zealous advocate for their client's interest, and note that what is incivility in the eyes of one person is zealous advocacy in the eyes of another. This places courts in the "unenviable" position of having to determine whether particular conduct is to be characterized as advocacy or incivility:

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

This quote nicely demonstrates the unique character of civility. On the one hand, a lawyer has an ethical obligation to pursue the interests of the client or suffer sanctions such as discipline or malpractice. On the other hand, over-zealous representation may lead to sanctions as a violation of the obligation of civility. The Nevada civility code states this duality clearly (this statement is implicit in most other codes): "I recognize that my conduct is governed by the standards of fundamental decency and courtesy, in addition to the Nevada Rules of Professional Conduct." In sum, courts and lawyers alike should be conscious of counsel after opposing counsel suggested stepping outside and settling the matter man to man.). In addition, MODEL RULES OF PROF’L CONDUCT R. 3.5 cmt. 5 now provides that the "duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."  

210 See MODEL RULES OF PROF’L CONDUCT Preamble 3 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

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

212 THE LAWYER’S PLEDGE OF PROFESSIONALISM IV.D (Nevada 1997) (emphasis added). See also CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM, Introduction (2007)(“These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California.”)
the distinction between civility and other professional responsibilities placed on lawyers and the consequences of these distinctions.

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

The ten core concepts of civility answer the question asked at the beginning of the article: what are the distinct obligations of civility? These provisions are distinct from ethical obligations and professional obligations both in substance – although there is certainly some overlap – and in how they are enforced. Ethical violations are enforced through the traditional disciplinary process, while all but the most extreme violations of the obligation of civility are enforced by courts. Lawyers should be aware that, even if a particular jurisdiction has not adopted a civility code, a court could rely on the provision of a civility code from another jurisdiction to impose the obligation as a matter of inherent court authority. In addition, lawyers should be conscious of the possibility that uncivil behavior could be used as evidence in an allegation of malpractice or misconduct.\textsuperscript{213}

Courts should also be aware of these core obligations of civility. The fact that issues of civility are addressed by courts and issues of ethics are addressed by a central disciplinary body makes this distinction particularly salient for two reasons. First, courts continue to have an obligation to report certain unethical conduct to the appropriate disciplinary body.\textsuperscript{214} Civility guidelines should not be used as a means to avoid this obligation, and knowing the difference between the obligations of civility and legal ethics aids in a determination of the nature of the conduct. Second, courts enforcing civility through sanction should be particularly careful that they are not chilling a lawyer’s valid advocacy. Identifying the parameters of civility will hopefully encourage courts to consciously consider whether particular conduct is best described as a breach of civility or something else (unethical or unprofessional).


\textsuperscript{214} ABA Model Code of Judicial Conduct 2.15(B) (2007) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.")
There is an additional, pragmatic significance to defining civility. Recognizing that there are commonalities underlying civility codes provides courts with confidence that obligations placed on attorneys are not unusual or unique. This will become increasingly relevant as the demand to curb uncivil conduct rises and courts seek to limit such conduct through the use of inherent powers. Lawyers have the right to expect that the basic obligations of civility are the same across jurisdictions. Unlike ethical obligations – some of which vary from jurisdiction to jurisdiction – there is an expectation that the obligations of civility are universal in nature and should be enforced as such.

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

A second, but related, concern is the likely response to the lack of specificity of some of the concepts. While the concepts of civility are not as broadly written as the 1908 Canons of Professional Ethics – and in fact some of the provisions are extraordinarily specific – there are enough vague provisions that the unwary lawyer can find herself the duty of civility as interpreted by a particular judge. It is safe to expect that if courts are willing to discipline lawyers for lack of civility based on vague provisions, a demand will arise for more specific provisions. This occurred with the model rules of ethics, and is likely to occur with codes of civility as well. This issue can be addressed in one of three ways. First, courts can essentially develop a common law of civility – setting out on a case-by-case basis what is civil. Second, the codes themselves can be made more specific and the vague provisions removed. However, this would defeat the purpose of the civility codes, which is in effect to educate lawyers about these general guidelines. A third option is for state bar associations to issue ethics opinions related specifically to issues of civility. If this approach were adopted, both lawyers and courts will benefit from such opinions that, while not binding on a court, would provide guidance to lawyers and persuasive authority to courts.

V. CONCLUSION
Two questions were proposed at the beginning of this article. The first was to identify the core tenets of civility. The article examined the civility codes of thirty-two jurisdictions. From these codes, ten core concepts of civility were distilled. The concepts are the obligation to: (a) recognize the importance of seeking agreement and accommodation with regard to scheduling and extensions; (b) be respectful and act in a courteous, cordial, and civil manner; (c) be punctual, prepared, and keep confidences; (d) communicate with opposing counsel; (e) maintain honesty and personal integrity; (f) avoid actions taken merely to delay or harass; (g) ensure proper conduct before the court; (h) act with dignity and cooperation in pre-trial proceedings; (i) act as a role model to client and public and as a mentor to young lawyers; and to (j) utilize the court system in an efficient and fair manner. These overarching themes provide a much-needed definition of attorney civility.

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

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