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**An Ethical Evening at the Movies**

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## The Ethical and Professional Responsibility of Lawyers to Third Parties

When in 2015 I prepared the attached materials my goal was simply to encourage lawyers to think about how the work we do on behalf of clients affects others, third parties, who we deal with or even just come across in the course of the representation. I had seen over thirty years of practice many instances of the abuse of third parties. But what troubled me even more as I prepared to write these materials was the lack of thoughtfulness about how what we do as lawyers might affect others.

Two years later the justification for my concerns seem all that much greater. Regardless of one's political views the present environment in our country seems rife with instances of causes being pressed that can and do have immediate and significant consequences for 3<sup>rd</sup> parties. It is for this reason that I am attaching the materials you will see here.

The materials were grounded in the ABA Model Rules, but they apply for the most part to Vermont practice as well. There are two notable differences between the applicable Model Rules then in effect and the Vermont Rules:

1. Both Vermont Rule 4.1 and Model Rule 4.1 prohibit the making of a false statement of material fact or law. Model Rule 4.1 in (b) goes on to address the failure to disclose a material to a third party when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. The Vermont Rules deal with the issue in connection with the discussion of confidentiality, at Rule 1.6(b)(2):

**(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary: (1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services...**

2. There is no counterpart in the Model Rules for Vermont Rule 4.5.

**A lawyer shall not present, participate in presenting, or threaten to present criminal charges in order to obtain an advantage in a civil matter.**

The commenters noted that threatening criminal charges to advance civil interests is a “subversion” of the civil process. I have observed the making of such threats over the years I have been a lawyer, as well as analogous threats to report supposed misconduct to “the bar” in order to gain some advantage. I do not deal with these issues in the attached materials. They are certainly worthy of attention, and will go onto my life of things I hope to write about when day when the press of legal practice is lighter or a thing largely of my past.

I commend the spirit as well as the substance of the attached materials for you. My purpose in providing you with these materials supports my purpose generally in presenting this continuing legal education program the way that I do. That purpose is less to teach the content of the rules, though certainly that is part of it. My main purpose is to raise the consciousness of lawyers about the spirit and intent of the rules in guiding our actions as lawyers, so they will think about these things in the everyday practice of law.

**The Ethical and Professional Responsibilities  
of Lawyers to Third Parties**

Larry J. Cohen, Esq.  
March, 2015

When lawyers think about ethics their first thoughts are to duties owed to clients, and then specifically to confidentiality, fees, conflicts of interest and like lawyer-client issues, and not necessarily in any particular order. Lawyers tend not to think about duties owed to third parties. Historically, third party interests were not something lawyers thought much about as their sole concern was the lawyer's relationship with and duty to the client. This central concern with the lawyer-client relationship is still reflected in the fact that the set of rules dealing with lawyer-client relationships is by far the largest section of the ethics rules. See Model Rules of Professional Conduct (MRPC), including MRPC Rules 4.1 - 4.4.<sup>1</sup>

In more recent years there has been an evolution in the concerns of courts, bar associations and ethics rule writers about the impact of lawyer conduct on third parties or "others." This reflects a sensitivity to the long appreciated reality that what lawyers do in the course of representing their clients can and does have a significant and even powerful impact on third parties. The question presented is how much protection do we afford third parties who come in contact with lawyers as lawyers carry out the activities involved in representing their clients.

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<sup>1</sup> I am referencing the Model Rules because of the diverse geographic locations represented by the attendees at this conference. You should look to your own jurisdiction for the ethical rules and professionalism principles that apply.

Inevitably, whatever protection that is afforded will present at least some potential of conflicting with the lawyer's actions in furtherance of the client's interests, and may even present a conflict for the lawyer in dealing with the interests of the client and the interests of the third party.

**Principles and Goals: Professionalism Aspirations**

It is fair and accurate to say at this point that the answer reached by courts, bar associations and rule writers, is to afford consideration of and provide some protection for the interests of third parties. This state of resolution is reflected, for example, in the Preamble to the MRPC:

A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.<sup>2</sup>

This specific reference to harassment and intimidation in the *Preamble* is certainly understandable in the light of the power differential that exists between lawyers and others, and especially unrepresented persons. Lawyers have knowledge, skills, and resources that such third parties do not have, putting lawyers in the position to take advantage of third parties insufficiently informed and insufficiently equipped with resources to protect themselves from the consequences of aggressive actions by the lawyers.

Confronted with such expressed concern about third parties,

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<sup>2</sup> *Preamble*, MRPC at paragraph 5.

lawyers typically respond that their first duty is and should be to their client, and to the ends the client has retained the lawyer to accomplish. Moreover, the reality of the everyday practice of law is the pressure lawyers receive from their clients to accomplish the client's goals, at the implicit and sometimes explicit risk of receiving compensation, getting further work, being threatened with a bar complaint and being sued for malpractice. It is a difficult challenge for lawyer, when confronted with the assumed first priority of duty to the client and these pressures of everyday law practice, to then consider the interests of third parties and others with whom the lawyer has no direct relationship at all, much less an obvious interest at law in protecting.

The *Preamble* to the MRPC anticipates this response and addresses it directly:

Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying these Rules. These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bound of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.<sup>3</sup>

The resolution, in other words, is not to back away from the duty to the client, but rather to proceed in ways that are sensitive

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<sup>3</sup> *Preamble*, MRPC at paragraph 9.

to the third parties and others the lawyer deals with in the course of acting in furtherance of the duty to the client.

A lawyer committed to acting professionally, courteously and civilly will have at least three questions:

1. To whom do I owe these duties?
2. What exactly am I supposed to do?
3. How much do I trade off the interests of the client to the interests of these third parties?

The MRPC's *Preamble* and to a lesser extent the MRPC's *Scope* state appropriate goals, but lawyers understandably want and reasonably need further guidance. Accordingly, we look to specific rules in the MRPC for the current answers to these questions.

#### **MRPC Rules**

Unlike the professionalism principles in the MRPC's *Preamble* and *Scope*, that address with lawyers the conduct to which they should aspire, the MRPC tell lawyers how they are to behave in various circumstances. Working through these rules one can find many places where the rules have implications for how lawyers should interact with third persons. For example, in the Second Section of the MRPC, dealing with the lawyer as counselor, there are concerns implicit in Rule 2.3 about the potential adverse consequences for a third party who does not know that an evaluation the lawyer has prepared for that third party's use may be affected by the lawyer's representation of a client. Rule 2.4 addresses the risk of an unrepresented third party not

understanding the role of the lawyer as a neutral in trying to help the parties resolve a dispute. Rule 7.1 directs lawyers not to engage in false or misleading communications so third parties will not be misguided or misdirected in their understanding of the services a lawyer is offering to provide potential clients. Finally, Rule 8.4 prohibits lawyers from certain kinds of actions, regardless of whether those actions are in furtherance of the client and regardless of whether the lawyer is acting in the lawyer's personal or professional capacities. The various actions prohibited can bear on the lives and interests of third parties.

There are two sets of rules that have clear and immediate consequences for the interests of third parties. The first are the rules set forth in Section 3, dealing with the advocacy process. Indeed, certain of these rules are in direct conflict with the lawyer's duties to the client. For example, Rule 3.3, dealing with candor to the tribunal, provides for the lawyer to reveal confidential communications under some circumstances if doing so is necessary to correct a false statement concerning material evidence.<sup>4</sup> That same Rule also provides for the lawyer to report legal authority from the controlling jurisdiction that is adverse to the client's interests in the event that authority

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<sup>4</sup> This Rule sets forth a series of steps or actions for the lawyer to take to try to resolve this problem short of revealing confidential information, but provides for revealing confidential information when those other steps have failed.

has not been revealed by the opposing party, and, presumably, is believed not to be known by the Court.

Most lawyers are already familiar with these rules and understand what they have to do to abide them. Lawyers may not appreciate, and so it bears stating here, that the underlying purpose of these rules is to ensure that cases are decided fairly and on their merits. Accordingly, such conflicts as exists, and even tradeoffs between duties owed the client (like confidentiality and loyalty) and duties owed the advocacy process (like disclosure of facts and law) reflect a resolution in context of the relative importance of the client's interests as compared with the interest in resolving cases fairly and on their merits.<sup>5</sup>

Lawyers generally are much less familiar with the Section 4 rules dealing with Transactions with Persons Other Than the Client. This group of 4 rules is noteworthy for their concern with persons unrelated to the lawyer and, at least potentially, outside of the adversary process. It would not be surprising, and certainly it would be reasonable, for a lawyer to inquire why they should act in a way dealing with these third parties that may not further the interests of their clients and may even be adverse to the interests of their clients. The obvious response

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<sup>5</sup> The thorough discussion these conflicts and tradeoffs deserve is beyond the scope of this discussion.

is that in drafting the rules the rule makers believed that the risk of harm to third parties from lawyers is sufficiently great that some specific guidelines had to be put in place to protect them. The amount of protection afforded by these rules, and the extent to which the interests of clients are affected or compromised, tells us how important the rule makers believe these third party interests are. The future evolution of these rules, whether in contracting or expanding the protection afforded third party interests, will tell us the extent of future regard for the risks third parties confront from lawyers using their greater knowledge, skill and resources in dealing with third parties when lawyers are acting in furtherance of their clients' interests.

#### Rule 4.1

This rule provides that a lawyer shall not in the course of representing a client

1. Make a false statement of material fact or law to a third person; or
2. Fail to disclose a material fact to a third party when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless that disclosure is prohibited by Rule 1.6.

The reference in this Rule to Rule 1.6 is noteworthy. We saw previously that disclosure to a tribunal to correct a false statement of material fact permitted, if necessary, a disclosure

that would otherwise be prohibited by Rule 1.6. Here the disclosure cannot be made if the disclosure is otherwise prohibited by Rule 1.6. This demonstrates the relative importance for the rule makers of the interest in resolving disputes in the advocacy process fairly and on their merits, relative to the importance of protecting the interests of third parties. The rules provide protections of interests in both instances, but the importance of the goals of the advocacy proceedings are obviously greater than those of protecting third parties because in the former the rule makers are willing to compromise one of the most if not the most important aspects of the lawyer-client relationship, confidentiality, whereas in the latter the rule makers are not willing to compromise it.

#### Rule 4.2 Communications with Persons Represented by Counsel

This rule prohibits a lawyer representing a party to communicate with a third person about that representation if that third person is represented by counsel. There are exceptions to this prohibition, where the lawyer seeking the communication has permission of the third party's lawyer to engage in the communication and where the communication is authorized by law or court order. This rule does not preclude the lawyer from having any communications with the third party, only communications dealing with the lawyer's representation of the lawyer's client.

The clear purpose of the rule is to enforce the lawyer's

respect for the fact that the third person has retained a lawyer to protect the third person from whatever risk of harm that may come from the lawyer communicating with the third party about the subject of the representation. In other words, the third party has acted in an affirmative way, by retaining counsel, to protect the third party's interests. This Rule prohibits lawyers from undermining that affirmative act to the detriment of the third party.

#### Rule 4.3 Dealing with an Unrepresented Person

This rule imposes several restrictions on lawyers when in the course of representing a client they deal with unrepresented third parties:

1. The lawyer shall not state or imply that the lawyer is disinterested.

In other words, the lawyer cannot through direct action or by omission from acting have the third party believe that the lawyer is neutral or even acting in furtherance of the third party's interests. The third party needs to know, for purposes of protecting the third party's own interests, that the lawyer has the interests of the lawyer's client in play, either directly or indirectly, for purposes of the communication.

2. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable

efforts to correct the misunderstanding.

This rule recognizes that regardless of anything the lawyer affirmatively or even impliedly does the unrepresented person may misunderstand the lawyer's reason for or purpose in the communication. In that instance the lawyer must act affirmatively to inform the third party of what the lawyer is doing in this communication. In this way, again, the third party is put in a position to take action to protect the third party's own interest.

These prohibitions have the clear potential to compromise or undermine the lawyer's effort on behalf of the client. In providing the information required by this rule to the third party the lawyer can expect that in at least some situations the third party either will not communicate information the lawyer otherwise would have obtained or the lawyer may not be able to have the communication at all. In either event the lawyer will not have information the lawyer otherwise would have had to advance the client's interests. One can readily expect that a client would prefer the lawyer not provide the disclosures required by this rule. However, the rule makers, recognizing again the power disparity between the lawyer and the unrepresented third party, impose disclosure requirements that give the third party at least the opportunity to protect the third party's own interests, to the detriment, very likely, of

the interests of the client.

3. The lawyer shall not legal advice to an unrepresented third person other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Note that this restriction only applies when the lawyer knows or reasonably should know that there is a conflict in the interests of the client and the unrepresented third party. When there is such a conflict there is the risk that any substantive advice the lawyer gives will be tainted, wittingly or unwittingly, by the lawyer's interest in advancing the goals of the client. One would anticipate that most lawyers would try very hard not to allow the interests of the client affect the advice given. One could further anticipate that unrepresented third parties would readily welcome any advice they could get, especially if they lack the resources to retain counsel or do not have the skills and network to obtain counsel. Notwithstanding these considerations, the risk is so great of even inadvertently given advice in furtherance of the interests of the client and contrary to the interests of the third party that the rule makers determined it is best to impose the simple and bright line restriction that is imposed here.

Rule 4.4 Respect of Rights for Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third party, or use methods of obtaining evidence that violate the legal rights of such person.

This rule implements the professionalism principle noted previously in the MRPC *Preamble*. It is at once a very broad rule, covering a wide range of conduct, and a very simple rule in telling lawyers what they must do, or forebear from doing, to respect the rights of third parties generally.

The comment to this Rule bears noting in that it expressly recognizes that this rule is subordinating the interests of the client to some degree in favor of the interests of a third party. The comment acknowledges that lawyers owe duties to their clients, and though not specifically referenced these include the rules in Title 1. However, those duties owed to clients cannot be pursued in disregard of the rights of third parties, both under applicable law and, apparently, simple civility.

- (b) A lawyer who receives a document or electronically stored information relating to the representation of the client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

This issue is discussed further below.

For the present it bears noting that neither this rule nor the accompanying comments impose further requirements on the lawyer beyond notifying the sender. One could imagine other responsibilities, and some other jurisdictions impose other responsibilities, like stabilizing the situation to give the sender a reasonable opportunity to take protective measures.<sup>6</sup> In stopping short of specifying such action and either encouraging consideration of that action (as through a "may" requirement) or requiring such action (as in a "shall" requirement) the rule makers are limiting the protection afforded the third person's interests relative to the lawyer's interests in and duty owed to the client.

In summary, the rules in Section 4 clearly show a specific concern by the rule makers in the issues and problems third parties confront when they interact with lawyers representing clients. The rule makers acted on these interests by imposing certain requirements for and setting certain restrictions on how lawyers act in dealing with third parties. These requirements and restrictions are measured for how they resolve the lawyer's duties owed to clients and the rule maker's concerns for third parties, but they are applicable rules to be abided. The point,

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<sup>6</sup> See, for example, Ethical Rule 4.4, Arizona Rules of Professional Responsibility.

in closing, that lawyers are equally obliged to take note of and act consistent with these third party protection rules as they are the rules governing their relationships with their clients, as well as the remaining rules in the MRPC.

### **Other Commentators on Duties Owed Third Parties**

There are remarkably few discussions of the lawyer's duty to others in the literature generally accessed by and accessible to practicing lawyers.<sup>7</sup> There is a very brief discussion about a lawyer's duty of honesty to others in an Iowa Practice series dealing with lawyering.

As the Iowa Supreme Court maintained in *Committee on Professional Ethics & Conduct v. Bauerle*,<sup>[1]</sup> "[f]undamental honesty is the base line and mandatory requirement to serve in the legal profession." While a lawyer owes more than simple honesty to a client and has an affirmative duty to keep the client fully informed and candidly counseled,<sup>[2]</sup> the lawyer is obliged to refrain from direct dishonesty and deliberate deception when dealing with persons other than clients. In sum, a lawyer need not volunteer information to a third person, but when the lawyer does speak, he or she may not lie.

Under paragraph (a) of Rule 4.1 of the Iowa Rules of Professional Conduct, the lawyer is prohibited from making "a false statement of material fact or law" to a person other than a client. Under paragraph (b) of Rule 4.1, the lawyer is forbidden to remain silent when failure to disclose "a material fact" would assist a criminal or fraudulent act by the client. The obligation of disclosure imposed by paragraph (b) of

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<sup>7</sup> This observation is based on an April, 2013 search of the Westlaw database for journal and periodical articles dealing with the lawyer's duty to others. It does not consider text chapters, and particularly law school text chapters, addressing this issue.

Rule 4.1 is lifted when revelation would violate a duty of confidentiality under Rule 1.6.[3] However, the recent addition of new exceptions to confidentiality in Rule 1.6[4] has drained some, perhaps most, of the force from the confidentiality qualification to the mandatory duty to disclose stated in Rule 4.1(b).<sup>8</sup>

This obligation to communicate honestly when dealing on behalf of a client with third parties is part of the lawyer's broader duty to conduct the lawyer's practice at all times with honesty.

Before leaving the subject of honesty, observations in an older commentary about honesty in trial practice bear consideration.<sup>9</sup>

As you know, our profession in general, but particularly that branch of it occupied by those of us who try cases, suffers from a dismal reputation. To put it bluntly, the public believes that we are liars.

Our usual response to surveys, jokes, and other indications that the citizenry does not trust us, is to attack the knowledge of those who judge our trustworthiness so harshly. They simply do not understand us, and what we do, right? In an appropriately legalistic phrase, they know not of what they speak.

Or do they? It is time for us to consider this possibility. Maybe, just maybe, they are right. Do we lie?

As is often the case with an interesting question involving the law and lawyers, the answer depends largely upon the definition of the critical term. "Lie"

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<sup>8</sup> Gregory C. Sisk, *Truthfulness in Statements to Others*, Iowa Practice, Lawyering and Judicial Ethics §8.1(b)

<sup>9</sup> Stephen D. Easton, *The Truth about Ethics and Ethics about the Truth: An Open Letter to Trial Attorneys*, 13 Gonzaga Law Review 463 (1997-1998)

is a word that is both harsh and imprecise. Does it include saying something when you do not really believe it? To many, if not most, non-lawyers, such a statement would be within the boundaries of the term "lie." If it is, those non-lawyers are right when they suggest we lie regularly.

We often take positions in court we do not really believe are fully, or even substantially, correct. Examples are easy to find. When we represent a plaintiff with a solid case for \$250,000 in damages, we stretch a minor injury into a disabling condition in an effort to convince jurors to award millions. When we represent a defendant who is clearly responsible for an accident, we contest liability. When we prosecute, we overcharge and push for a conviction on the maximum offense, sometimes calling law enforcement witnesses who exaggerate on the stand. When we defend, we forego an effort to limit the conviction to a legitimate lesser included offense and try to convince the jurors the defendant is innocent, often relying upon testimony with little validity.

Certainly, our ethical standards regarding candor contain little, if anything, to restrict us from taking positions we do not fully believe in. In its strictest restraint upon our statements in court, the relevant ABA Model Rules of Professional Conduct merely prohibit us from "knowingly . . . mak[ing] a false statement of material fact or law to a tribunal." In what amounts to a restatement of this provision, the Rules also state, "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

Let us be honest, at least about this. Those "restrictions" contain two major loopholes that leave savvy trial attorneys sufficient room to make almost unlimited statements, even when we do not really believe them, and to present plenty of evidence.

The first loophole is materiality. What, after all, is material, especially in the eyes of a trial attorney? Certainly a slight twist, a little exaggeration, or a harmless minimization of what we really believe does not count. After all, who are we

to judge the truth? That is not our job, right?

That leads to the second ethical restriction loophole, potentially even wider in scope than the first, which is provided by the qualifier "knowingly." All of us know how to play that game. We avoid acquiring any knowledge that would prevent us from pursuing the strategies our clients want us to pursue. In a broader sense, we can even convince ourselves that there is no "truth," or at least no truth that is ascertainable by attorneys. Because it is the jury's job to determine the truth, we tell ourselves, attorneys neither can nor should determine it.

Indeed, many would and have argued that our ethical obligation to zealously represent our clients' interests prevents us from shackling ourselves with independent determinations about the truth. If we make determinations about the truth, those determinations may prevent us from pursuing the theories our clients want us to pursue in court. The protection of the "knowingly" loophole may be removed. In other words, as trial attorneys, we dare not even concern ourselves with determining what is true, lest we limit our opportunity to pursue

With all due respect to the long history of this logic, it is hogwash. Of course we make determinations about what is true. In fact, such determinations are perhaps the most important judgments that we make for our clients. We investigate fact witnesses. We conduct extensive discovery to find and evaluate potential evidence. We check backgrounds of potential expert witnesses. We use the instincts honed through the rigors of previous trials and our good old common sense to analyze our cases, and to determine the believability of potential witnesses and evidence. Before we enter the courtroom, we make dozens of determinations about the truth.

Try as we might, we cannot simply pretend that we have not made those determinations about truth once the trial starts. Instead, these determinations color our view of the case and the justness of the cause we are pursuing in the courtroom. When we pursue arguments, present evidence, or make statements that are not consistent with our core belief about the truth in the case, it shows.

Long ago, Ralph Waldo Emerson said:

I have heard an experienced counsellor [sic] say that he never feared the effect upon a jury of a lawyer who does not believe in his heart that his client ought to have a verdict. If he does not believe it, his unbelief will appear to the jury, despite all his protestations, and will become their unbelief.

Emerson's friend was right. Think back to the cases that you have tried. When were you most effective? When you believed, to the very core of your being, that the verdict must be for your client. That belief gave you the power to present a sincere, impassioned, and effective case.

The problem with sincerity, of course, is that it is tough to fake! Sure, there are a few, but only a very few among us, who can actually pull it off. The rest of us will give ourselves away when we stretch or stray from our core beliefs about the truth.

That gets us back to the fundamental ethical requirement of representing our clients' interests zealously. What good is zealousness if it is ineffective? Indeed, it is instructive that the word "zealous" no longer appears in the ABA's outline of our professional responsibilities. While [Canon 7](#) of the old Model Code stated that "a lawyer should represent a client zealously," the new Model Rules of Professional Conduct simply state that "[a] lawyer shall act with reasonable diligence." The term "diligence" certainly includes the concept of effectiveness. Because we lose effectiveness when we stray from our determinations about truth, our ethical requirement of diligence may tie us more to the truth than the ethical provisions about candor.

But, you ask, how can we be wedded to the truth when our opponents refuse to be? From our earliest days in law school, we believed that when an opponent takes an extreme position, we must take an equally extreme position. We believe that only such a counter will lead to the correct decision, which lies somewhere between the two equally extreme positions.

This logic ignores the tremendous opportunity presented by the overwhelming percentage of jurors who expect attorneys to lie to them. After all, you are not the only attorney in the courtroom. If your opponent stretches, distorts, and otherwise "lies," she will simply meet the jurors' expectations, and she will have little credibility. If you are willing to stake out a reasonable position, make only absolutely correct statements, and present credible witnesses and evidence, you will gain a tremendous advantage over an exaggerating opponent.

It is not easy to overcome the jurors' inherent mistrust in attorneys. You cannot demand credibility. You must earn credibility by constantly resisting the temptation to fight fire with fire when your opponent strays from the truth. But the prize of credibility is worth the effort. If the jurors have come to trust you, they will believe you when you tell them in final argument that they must return a verdict for your client.

Until we decide that the ethical and effective way to try cases is to stick to positions in which we honestly believe, we cannot legitimately complain about the public's dismal view of our profession. Once enough of us decide to try cases that way, we just might change that reputation.

Our conduct in public settings like trials and other hearings provides others with a window on what they can expect from lawyers. Such conduct should be consistent with the rules of ethics and principles of professional responsibility so they send the message we want to send about what others should expect in their dealings with us on this central issue of honesty.

Another publication deals with an issue lawyers confront not infrequently in practice, the inadvertent receipt of written communications directed to third persons. The frequency with which this issue arises for private practitioners has greatly

increased with the advent and now common use of email communications. This is in part a function of the explosion of written communications that has come with the use of email, but also because of the ease with which it is possible to make mistakes in identifying recipients of email in the course of preparing an email letter. In this context, the following abridged excerpts from a 2006 article in *Inadvertent Disclosures* bear reading.<sup>10</sup>

"Gentlemen do not read each other's mail." This was Secretary of State Henry Stimson's post-Pearl Harbor justification for closing the State Department's code-breaking office in 1929. As this paper will show, some courts have applied similar reasoning in sanctioning lawyers for using inadvertently disclosed, privileged information.

Imagine the following scenario. In response to a request for production of documents, you have just received electronic data that include thousands of emails. A quick search discloses damaging admissions by the opposing party's CEO. Unfortunately, the admissions are contained in a series of emails to the opposing party's former counsel, and the emails were clearly privileged at the time they were sent. The emails were not included in the privilege log that accompanied the document production. It therefore seems likely that your opposing counsel did not know of their existence and that they were inadvertently produced.

What should do you do? Can your firm be disqualified because you looked at the privileged information? Do you have to tell opposing counsel what you found? Do you have to delete or return the emails? Or has the opposing party waived the attorney-client

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<sup>10</sup> Joseph L. Paller, Jr., *"Gentlemen Do Not Read Each Other's Mail: A Lawyer's Duty Upon Receipt of Inadvertently Disclosed Information"*, 21 *Labor Lawyer* 247 (Winter/Spring, 2006).

privilege by providing the documents?

....ABA Formal Ethics Opinion 05-437—deals indirectly with these issues. The new Opinion is grippingly titled "Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992)." It consists of a single sentence:

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures. To the extent that Formal Opinion 92-368 opined otherwise, it is hereby withdrawn.

The withdrawn 1992 Opinion required recipients of inadvertently disclosed information to shut their eyes, call opposing counsel, and follow his or her orders:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

In contrast, the new Opinion merely requires the recipient to "promptly notify the sender" of the error, leaving it to the sender to "take protective measures" (presumably by running to court).

The new Opinion brings the ABA's ethics opinions in line with the Model Rules of Professional Conduct (Model Rules). Model Rule 4.4(b), added in 2002, provides:

A lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

According to the ABA, a lawyer's obligation to notify the sender applies "regardless of whether the document appears confidential." The drafters of Rule 4.4(b) punted on other critical issues, however, such as whether the recipient can use the document or must return or destroy it.

Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.

Comment [3] provides a measure of comfort for lawyers who would choose, as a matter of personal ethics, to return inadvertently transmitted documents when state and ethics rules do not require them to do so. "[T]he decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer."

In addition, the commentary makes it clear that Rule 4.4(b) applies to inadvertent, not unauthorized, disclosures. Where unauthorized disclosures have occurred, another ABA ethics opinion requires that if the lawyer knows that documents were misappropriated or otherwise improperly obtained, the lawyer should refrain from reviewing them or limit review to the extent required to determine how to proceed appropriately. The lawyer should also notify opposing counsel of the receipt of the materials and either follow that lawyer's instructions with respect to their disposition or refrain from using them pending judicial review. These duties are similar to those imposed by withdrawn Formal Opinion No. 92-368.

The 1994 Opinion permits the receiving attorney to ignore these requirements, however, if the documents were obtained "from someone acting under the authority of a whistleblowing statute" or if the receiving lawyer can legitimately assert "that the documents should have been, but were not, produced" in discovery.

What are the obligations of the attorney who inadvertently discloses privileged information to opposing counsel? Under the *Model Rules*, the lawyer

must notify the client when confidential information has been inadvertently transmitted to opposing counsel. The *Model Rules* and ABA ethics opinions offer no further guidance for the disclosing attorney.

Unfortunately for proponents of the 2005 Opinion, the 1992 Opinion may prove difficult to bury. Courts and disciplinary bodies in a number of jurisdictions have disqualified or sanctioned lawyers in other ways for using, failing to return or merely reading inadvertently obtained documents that they knew or should have known contained confidential information.

For example, the California Supreme Court has just granted review of an appellate court decision upholding the disqualification of the plaintiffs' legal team for failing to disclose their acquisition of inadvertently disclosed notes protected by the work-product doctrine and for then using the notes to impeach an expert witness in a deposition.

*Rico* was a personal injury and products liability action arising out of an SUV rollover. The passengers' attorney obtained a twelve-page memo when a defense attorney unintentionally left the document in a conference room following a deposition of an expert witness for the defense. The memo was a summary of a highly confidential six-hour meeting between the defense attorneys and their team of experts. It contained statements by defense experts that allegedly contradicted their deposition testimony, leading plaintiffs to later "accuse the defense experts of lying about the technical evidence involved in the case."

How the passengers' lawyer obtained the document was disputed. He claimed that a court reporter accidentally delivered the document to him. The defense attorney insisted that this was untrue and "that the document was taken from his files when [the passengers' attorney] temporarily commandeered the deposition room for a personal meeting."

It was undisputed that the passengers' attorney, "[r]ealizing that he had in his hand a 'powerful impeachment document,' ... made a copy for himself before returning the original to the court reporter. [He] then made additional copies and sent them to

plaintiffs' experts and the other [plaintiffs'] attorneys."

Plaintiffs' possession of the document came to light when the passengers' attorney used it for impeachment purposes during the deposition of a defense expert witness. When defense counsel learned that the passengers' counsel had the document, they informed him that the document was confidential and privileged. Two days after the document was used at the deposition, defense counsel moved the trial court to disqualify the plaintiffs' entire legal team (not just the passengers' attorney), including their experts.

The trial court granted the motion, finding that although the document was obtained through inadvertence rather than theft, the passengers' attorney "violated his ethical duty by failing to notify opposing counsel and using the document." The trial court stayed further proceedings in the case to give plaintiffs an opportunity to retain new attorneys and experts.

The court of appeal affirmed the disqualification order. The appellate court found that the document was protected by the attorney work-product privilege because it contained the defense attorney's thoughts and impression, but not by the attorney-client privilege because it contained no client communications.

The decision concludes that the passengers' lawyer, upon his discovery of the notes "which were plainly privileged," should "not have examined the document any more than was necessary to determine that it was privileged, and should have notified [defense counsel] immediately to avoid any potential prejudice."

In reaching this conclusion, the *Rico* court relied on now-repealed Formal Ethics Opinion 92-368 (1992), as filtered through an earlier California decision, *State Compensation Insurance Fund v. WPS, Inc.* According to *Rico*:

[T]here is an ethical duty immediately to disclose inadvertently received privileged information. More precisely, an attorney who inadvertently receives plainly privileged documents must refrain from examining the

materials any more than is necessary to determine that they are privileged, and must immediately notify the sender, who may not necessarily be the opposing party, that he is in possession of potentially privileged documents.

The court of appeal upheld the disqualification of plaintiffs' legal team because "the damage was irreversible" inasmuch as "plaintiffs' counsel and experts had information that inevitably would have been used in preparing for trial."

*Another Case Ordering Disqualification: Abamar Housing & Development v. Lisa Daly Lady Décor*

*Rico* is not the only published decision upholding disqualification as a sanction for use of inadvertently disclosed information. A Florida court disqualified plaintiffs' counsel after he received a privileged document mistakenly sent by opposing counsel. The disqualification order was based on the unfair tactical advantage plaintiffs' counsel gained from the disclosure.

According to an earlier decision involving the same issue, approximately seventy boxes containing over 100,000 documents were produced in the course of discovery, including two files containing twenty-three privileged documents that had not been listed in the privilege log. Unlike the appellate court in *Rico*, the *Abamar* opinions do not describe the nature of the privileged documents or why they were important to the litigants.

In *Abamar Housing I*, the appellate court instructed the trial court:

[T]o enter an order requiring the return of all copies of the privileged documents outlined in petitioners' motion before the trial court, including copies disseminated by respondents to third parties, striking the use of the documents for any purpose, and forbidding respondents any further use of, reference to, or reliance on the privileged documents.

In *Abamar Housing II*, the appellate court ordered the attorney's disqualification based on "the plaintiffs' recalcitrance in rectifying the disclosure, and the unfair tactical advantage gained from such disclosure." In addition, "[t]here was no requirement to demonstrate prejudice" as a prerequisite for disqualification. The decision suggests that disqualification can be avoided if the recipient of the inadvertently disclosed information promptly notifies opposing counsel of his or her receipt of the information and returns the inadvertently produced documents without taking unfair advantage by, for example, copying the documents.

Other courts have refused to disqualify or sanction counsel. For example, a California case overturned an award of sanctions against the plaintiffs' attorney for examining and utilizing a memorandum from opposing counsel to the defendant that had been inadvertently disclosed. The plaintiffs' attorney did not inform anyone that he had received the memorandum, which revealed the existence of a secret witness. The appellate court concluded that there was no duty to disclose the receipt of the document since the identities of witnesses are not privileged information under California law. In addition, the defendant should have revealed the identity of the witness in the course of discovery.

The decision also holds that the plaintiffs' attorney was ethically *obligated* to use the information, stating that "[o]nce he had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf."

Another California court ruled that sanctions were inappropriate when inadvertently disclosed documents would have been discoverable through normal channels.

Other courts have denied disqualification and other sanctions when it appears possible to limit the potential harm caused by the inadvertent disclosure. In *Transportation Equipment Sales Corp. v. BMY Wheeled Vehicles*, for example, the court ordered plaintiff's

counsel to return the document and to identify all to whom the document had been made available or who had learned of its contents. Those persons were to be given a copy of the order and instructed to deliver all copies of the document and any documents directly or indirectly referring to it to plaintiff's counsel, who was then to file the documents under seal.

Some courts have issued more limited orders, simply precluding the recipient from using or further disclosing the document's contents. The argument that disqualification is warranted because the "bell has already been rung" was found untenable by one federal judge because it "rests on an unduly narrow conception of the interests protected by the privilege." The attorney-client privilege "protects against both disclosure and use" and "preventing the latter is sufficient to promote at least one of the purposes of the privilege."

Does inadvertent disclosure waive the attorney-client privilege? The courts are split.

Some federal courts take a strict liability approach, finding that inadvertent disclosure waives the privilege regardless of whether the sender was conscientious or careless in preserving the confidentiality of the information.

Other courts have taken a more lenient approach, ruling that the privilege cannot be waived through an attorney's inadvertent disclosure because waiver requires a knowing relinquishment by the client. Under this approach, inadvertently produced documents that are otherwise protected by attorney-client privilege remain protected.

California follows this "lenient rule." An attorney's inadvertent disclosure of privileged information ordinarily does not waive the privilege absent the privilege holder's intent to waive. In contrast, a waiver of the privilege by the *client* may occur "either by disclosing a significant part of the communication or by manifesting through words or conduct consent that the communication may be disclosed."

Most courts take a middle ground, focusing on the

adequacy of the precautions taken against inadvertent disclosure. These courts have adopted a five-part test, examining (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) any delay and measures taken to rectify the disclosures, and (5) whether the overriding interests of justice would be served by relieving a party of its error.

The first of these five elements is typically the most important. In fact, a few courts have held that an inadvertent disclosure of confidential communications that resulted from a failure to take reasonable steps to maintain the confidentiality of the information is sufficient to waive the attorney-client privilege.

The ABA Committee's withdrawal of Formal Opinion 92-368 may have come too late to undo judicial decisions holding that it is not enough to notify opposing counsel of the receipt of inadvertently disclosed documents containing privileged communications and then to await further direction from the court. Several jurisdictions, including California, have relied on Formal Opinion 92-368 to require that the attorney also must refrain from examining and using inadvertently obtained documents for any purpose, and must return them upon opposing counsel's request.

Other courts (mostly federal courts) long ago rejected Formal Opinion 92-368 and shifted to the other extreme, holding that an inadvertent disclosure waives the attorney-client and work product privileges.

It bears reviewing Rule 4.4, MRPC, and the comments therein to compare this commentator's views and observations with what is required of lawyers subject to the MRPC.

Finally, it bears recalling that our conduct as lawyers is informed not just by the ethical rules we are obliged to abide, but also by professionalism principles to which we are expected to aspire in the everyday practice of law. A recent article

urges lawyers to make civility a part of their practice. In doing so lawyers would take a long step forward in interacting with others as the Bar intends them to do.

Citing the need for a return to "civility," courts have become increasingly willing to sanction lawyers solely for being uncivil. An example is *Sahyers v. Prugh, Holliday & Karatinos*. Sahyers, a paralegal, left her job at a law firm and believed the firm owed her back pay for uncompensated overtime. She retained an attorney who sued her former firm to recover the overtime wages. The lawyer brought suit against the former firm without giving any pre-suit notice. After discovery, the defendant law firm made an offer of judgment for \$3500 plus any attorney's fees or costs the court imposed. The plaintiff accepted the offer, and her attorney sought \$13,800 in attorney's fees and costs, to which the defendant objected. After a hearing, the district court refused to award any fees even though a prevailing plaintiff in a Fair Labor Standards Act ("FLSA") case is ordinarily entitled to reasonable fees and costs. 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." On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed the denial of fees, citing the district court's inherent "authority to police lawyer conduct and to guard and promote civility and collegiality among the members of its bar." *Sahyers*, and cases like it, represent the increasing willingness of courts to sanction lawyers based solely on a lack of "civility."

The increased attention to civility is not limited to the bench. In December 2007, the Illinois Supreme Court Commission on Professionalism approved a study of lawyers to ascertain how Illinois lawyers perceived civility. The survey, which sampled 1079 lawyers at random, was less than encouraging. Ninety-five percent of the respondents stated that they had experienced or witnessed unprofessional behavior throughout their careers. In fact, seventy-nine percent of the

respondents stated that they had experienced rudeness or strategic incivility 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.

With its increasing importance, it is worth considering the nature and parameters of the obligation of civility. This article proposes that civility must be considered a unique obligation distinct from "ethics" and "professionalism," and sets out to identify and define the core concepts of civility. To this end, Part II details the rise of the civility movement. Part III identifies ten overarching concepts of civility derived from a content analysis of civility codes adopted by thirty-two state bar associations. Finally, Part IV discusses how the obligations of civility are distinct from other professional obligations, specifically legal ethics and professionalism.

Before defining civility, it is helpful to trace 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 the U.S. District Court for the Northern District of Texas, which stated in an opinion adopting a code of professionalism:

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

litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.

As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice. We now adopt standards designed to end such conduct.

The question of whether lawyer incivility is truly of "recent origin" is debatable. 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. According to this argument, civility was maintained by barring entry to those who would bring diverse viewpoints to the bar.

Regardless of how recent the rise of incivility may be, a number of authors presume the existence of incivility and put forward rationales to explain its origins. One argument is that the rise of incivility is a matter of ignorance on the part of both lawyer and client who do not understand that civility is expected. Others argue that lawyers, being the product of an individualistic and uncivil society, will be uncivil themselves. Another explanation is that law firms, where a young lawyer often learns his or her values, foster incivility. Underlying this rationale is the belief that law firms create a culture where finding and retaining work, billing, and collecting fees result in a narrow focus on winning at all costs, and thus, the sacrifice of civility. Continuing the litany of explanations, some point to the "imbalance" in a lawyer's view of her role in the legal process. Lawyers who view their duties as primarily to their client--as opposed to the integrity of the legal system as a whole--increase incivility in the bar.

Some point to demographic factors, such as the "decline in lawyers' wages [and] . . . the growth in the percentage of lawyers in the population" as contributing

causes. Prevalence of lawyer advertising has also received blame, as has the failure of law schools to provide an adequate model of civility for students. Still others argue that the increasingly non-local nature of the legal 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 interact with 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 a corresponding decrease in civility. Yet this is only a partial list of the alleged culprits of practitioner incivility; indeed, the causes are seemingly endless.

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 Amy R. Mashburn argues that civility codes are attempts by an increasingly isolated legal elite to impose their values on other lawyers that they consider less prestigious.

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

The current method for addressing incivility is through the education of lawyers. An education in civility allows lawyers to change the culture by acting in a civil manner and mentoring young lawyers to do the

same. The first step in this process was the 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 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. To this end, the stated purpose of civility codes is to "clarify and to articulate important values held by many members of the bench and the bar" by placing expected standards of civility in one document. These civility standards are not meant to be a substitute for ethical codes, but to "impose obligations above and beyond the minimum requirements" of ethical rules. As one author noted, the purpose of the codes is to provide "unifying, clarifying, and anchoring standards" that articulate "best practices" or "values" for practitioners. This recognition that the obligations of civility are not commiserate with ethical obligations is important. For example, a lawyer's ethical obligation to zealously pursue a client's interests may be inconsistent with the obligation to cooperate and to forego certain advantages that may arise in the course of litigation.

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. 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.

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."

.... the most common provisions can be categorized into ten overarching themes. Although some codes have more detail than others, the goal here is to distill the common aspects of civility across jurisdictions. The ten common concepts include the obligation to (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions; (2) be respectful and act in a courteous, cordial, and civil manner; (3) be prompt, punctual, and

prepared; (4) maintain honesty and personal integrity; (5) communicate with opposing counsel; (6) avoid actions taken merely to delay or harass; (7) ensure proper conduct before the court; (8) act with dignity and cooperation in pre-trial proceedings; (9) act as a role model to the client and public and as a mentor to young lawyers; and (10) utilize the court system in an efficient and fair manner. Each of these concepts is discussed in detail below.

#### Keeping Commitments and of Seeking Agreement and Accommodation with Regard to Scheduling and Extensions

Codes provide detailed obligations regarding keeping commitments and seeking accommodation with opposing counsel when scheduling or rescheduling matters or seeking extensions. The general obligation is to agree only to commitments that the lawyer reasonably believes she can honor. In addition to ensuring her availability, the lawyer must also ensure that others involved in the proceeding are available before scheduling an event. This includes scheduling matters by agreement (as opposed to mere notice), and refraining 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. Accommodation 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.

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 courteousness extends to other lawyers, clients, the court, office staff, the public, and even the law. It applies to written and oral communications.

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." 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.

A number of codes imply that incivility may arise because a lawyer adopts the client's dislike or disapproval of others in the proceeding. Specifically, codes make it clear that a lawyer should maintain their objective independence in the course of representation. Lawyers should not allow "ill feelings" between the parties to affect the actions of the lawyer.

The lawyer's obligation of courteousness extends beyond the obligation of a lawyer to regulate his or her own conduct. It also includes a duty on the part of the lawyer to educate clients and others, such as office staff, of the importance of civility in the legal process. 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 weakness does not necessarily follow from courtesy and civility, and ensure that

clients understand that "uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive, or obnoxious" behavior is not a valid part of effective or zealous representation. Minnesota goes even further to state that "uncivil, abrasive, abusive, hostile, or obstructive" conduct undermines the rational, peaceful, and efficient resolution of disputes--the very attributes of an effective legal system.

#### Prompt, Punctual, and Prepared

Civility includes obligations of promptness, punctuality, and preparedness. Underlying these elements are issues of efficiency and respect for those involved in a proceeding. A lawyer who is not prompt, punctual, or prepared wastes the time and resources of those involved (including the judicial system), and also demonstrates disrespect.

A lawyer should be punctual in attendance at events that occur in the course of proceedings, as well as in communications with clients, with other attorneys, and with the court. 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. 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. It is improper for a lawyer to fail to promptly respond to a communication merely to seek tactical advantage or solely because the lawyer disagrees with the communication. In addition, a lawyer has an obligation to promptly notify all those interested if a scheduled hearing, deposition, or other event has been cancelled.

A lawyer's obligation to be prepared requires adequate preparation by the lawyer prior to hearings, trials, depositions, and other commitments. A lawyer must remain educated with regard to the area of law in which she practices. This obligation has two primary justifications. First is the need to ensure that the client maintains respect for her lawyer and the legal system. Second, without proper preparation, an attorney leaves her client underrepresented and compromises the adversarial, truth-seeking process underlying the legal system.

## Honesty and Personal Integrity

Civility codes admonish lawyers to maintain integrity and to be honest. Delaware explicitly identifies personal integrity as a lawyer's most important quality and states that personal integrity is maintained by "rendering . . . professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause." While other codes mention the obligation to maintain "integrity," none give this type of detailed explanation.

With regard to honesty, several codes state that a lawyer's word is her bond. While honesty, as a general matter, is mentioned repeatedly, 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. 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."

## Interactions with Opposing Counsel

Codes provide detailed 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 assist in quickly resolving litigated disputes, but will also help avoid litigating some disputes all together. On the other hand, failure of lawyers to interact civilly can delay resolution of claims and compromise the public's view of the legal profession.

Lawyers ought to "avoid hostile, demeaning, or humiliating words in written and oral communications" to opposing counsel. 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. Kentucky sees this problem as lawyers becoming too personally involved in their client's case and acting inappropriately toward other lawyers. Kentucky's advice is to leave the conflict in the courtroom: "A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, 'leave the matter in the courtroom.'"

In situations where lawyers exchange documents, they should identify changes made to the document, and, when changes are agreed to, the lawyers must make only the agreed changes. Furthermore, when communicating understandings or agreements, a lawyer must state the agreement correctly and should not include substantive matters in the document that were not previously agreed upon. Similarly, a lawyer should not set out in a communication a position that opposing counsel "has not taken, thus creating a record of events that have not occurred." With regard to the need to communicate fairly, Utah, Texas, and Minnesota require lawyers, when practical, to notify the other side before seeking an entry of default. 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, if possible, 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 the action is necessary to protect a client and is fully justified after investigation. This recognizes that a motion for sanctions can destroy the working relationships between lawyers and encourage tit-for-tat uncivil conduct. Motions seeking sanctions or disqualification filed solely for tactical advantage or other improper reasons 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.

#### Actions Taken Merely to Delay or Harass

A fundamental tenet of civility is the engagement in fair and efficient litigation or negotiation. This means lawyers should take steps to avoid costs, delay,

inconvenience, and strife--that is, tactics that do not aid in truth-finding or the timely and efficient resolution of disputes. Actions taken solely to delay or to harass, or to gain an unfair advantage in litigation, reflect poorly on the legal profession in the eyes of the public. In fact, advocacy does not include the right of unjustified delay or harassment. This obligation essentially places a duty of good faith and fair dealing 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 such delays, lawyers should stipulate to civil matters not in dispute and withdraw claims or defenses when it becomes clear to the lawyer that they have no merit. 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 in which the sole purpose is not to resolve a claim, but merely to annoy or impose additional costs on those involved in the litigation process. Thus, a lawyer should not engage in conduct solely for the purpose of "drain[ing] the financial resources of the opposing party." 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."

#### Proper Conduct Before the Court

A lawyer's obligation of civility extends to conduct before the court and is two-fold: First, a lawyer should respect the court and the system of justice for which it stands. Second, a lawyer should be a model for clients and others in showing respect for the role of courts in the legal system. By protecting and respecting the dignity, integrity, and independence of the judiciary,

lawyers help maintain the legitimacy of the legal system as a whole. Further, a lawyer's display of civil conduct helps ensure that other participants in the legal process also maintain due respect for the judiciary and the symbolism associated with the legal process.

At the most fundamental level, a lawyer should act with respect and deference when interacting with the bench. Some civility codes provide detailed examples of what is expected. For example, Alabama states that a lawyer should "dress in proper attire" and should stand when addressing the court. Pennsylvania goes further to provide specific direction to lawyers appearing before a court, stating that a lawyer should be courteous to the court and court personnel. 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 while in court, "lawyer[s] should refer to opposing counsel by [their] surname preceded by the[ir] preferred title." Generally stated, a lawyer should act in a manner that respects the court and its decisions.

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, 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 the order to opposing counsel, and should seek to resolve issues before presenting the order to the court. In addition, a lawyer must not engage in improper ex parte contacts with members of the judiciary.

The obligation of the lawyer to inform clients and others about the needs to demonstrate deference and respect to the court, and to act to prevent clients and witnesses from disturbing courtroom decorum, is the second element of a lawyer's obligation to ensure proper conduct before courts. This duty actually has two different components. The first is an obligation not to advise a client to engage in conduct that demonstrates disrespect for the court. 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. Washington State's Creed of Professionalism puts the obligation succinctly:

As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and of the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation process and the legal profession.

#### Dignity and Cooperation in Pre-Trial Proceedings

There is no aspect of litigation that prompts more allegations of incivility than pre-trial practice, and in particular, discovery. Pre-trial is the period in which there exists the least amount of court supervision and lawyers tend to be willing to press the limits of zealous representation. Pre-trial is also a period in which the disclosure of potentially damaging or costly information takes place and attempts to limit, delay, or compel disclosure occur. These types of disputes can be contentious. Therefore, it is no surprise that civility codes contain much guidance regarding conduct during pre-trial proceedings.

Overall, there is an obligation to utilize pre-trial processes to accomplish the just and efficient resolution of a dispute. This includes the obligations to avoid "engag[ing] in excessive and abusive discovery" and to "comply with all reasonable discovery requests." 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. The same standard of need applies to both proposing and responding to interrogatories. 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. In fact, a lawyer should not do anything in a deposition or negotiation that a lawyer would not do before a judge. Specific examples of improper conduct in deposition include making improper objections, or instructing a witness not to answer merely to delay or obstruct. Lawyers should not assert "speaking objections" that are intended to coach a witness how to answer a question.

Agreement should be sought with regard to the 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 any 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 every written communication she sends to the court. And, if feasible, the lawyer should send the communication at the same time and in the same manner as was sent to the court.

#### Role Model to Client and Public and 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 codes that there is a lack of understanding by those involved in the legal process of what civility entails. Minnesota and Texas both broadly state this responsibility, providing that it is an obligation of a lawyer to "educate . . . clients, the public, and other lawyers regarding the spirit and letter" of the civility codes.

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

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.

Utilize the Court System in an Efficient and Fair Manner

The final concept of civility is, in a sense, an overarching catchall provision. Lawyers should strive for orderly, economically efficient, and expeditious disposition of litigation and transactions. Efficiency is a broad obligation that underlies a number of the civility obligations and multiple aspects of the legal process. Lawyers should advise clients early on regarding the costs and benefits of pursuing a particular cause of action and should seek to articulate the disputed issues so the dispute can be resolved in a timely manner. One aspect of efficiency is to pursue only those claims or defenses that have merit. Pursuing frivolous claims or defenses costs money and delays resolution of meritorious claims. 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 accordingly. Similarly, lawyers should always be open to the possibility of settlement of disputes so they can be resolved as soon as possible.

While this discussion of professionalism did not speak directly to how lawyers deal and interact with others it should be clear that

lawyers who make these principles part of their practice inevitably will accomplish the ends envisioned by the Bar in their dealings with others.