

2015

## Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement


Cheryl B. Preston

*J. Reuben Clark Law School, Brigham Young University*

Hilary Lawrence

*J. Reuben Clark Law School, Brigham Young University*

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### Recommended Citation

Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J. L. REFORM 701 (2015).

Available at: <http://repository.law.umich.edu/mjlr/vol48/iss3/3>

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**INCENTIVIZING LAWYERS TO PLAY NICE: A NATIONAL SURVEY OF CIVILITY STANDARDS AND OPTIONS FOR ENFORCEMENT**

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Cheryl B. Preston,\* Hilary Lawrence\*\*

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I. INTRODUCTION

*[T]he organized Bar’s failure to maintain high standards of ethics and professionalism certainly warrants criticism. “Bar association bashing” would be a more*

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\* Edwin M. Thomas Professor of Law, J. Reuben Clark Law School, Brigham Young University, and Member of the Utah Supreme Court Advisory Committee on Professionalism. We are most appreciative of the work of Hon. Royal I. Hansen, Hon. Gregory K. Orme, Billy L. Walker, Diane Abegglen, and Donald J. Winder of the Utah Supreme Court Committee on Professionalism in discussing concepts relevant to the development of this Article. We also thank Austin Martineau for his able research and editing work.

\*\* J.D. Apr. 2014, J. Reuben Clark Law School, Brigham Young University.

*accurate description of what I have engaged in, because I have previously and will again . . . explain how the organized Bar's failure to set and maintain high ethical standards for the legal profession has caused much of the decline in professionalism among lawyers and the corresponding decline in the public esteem of lawyers.*<sup>1</sup>

When former Chief Justice Warren Burger was accused of “lawyer bashing” in 1995 for his repeated complaints about the loss of professionalism in the law,<sup>2</sup> he responded that he was, rather, “bar association bashing” for their “failure to set and maintain high standards.”<sup>3</sup> He particularly objected to “huckster-shyster” lawyer advertising<sup>4</sup> and “the so-called ‘Rambo Lawyer,’ whose idea of counsel’s function may have been influenced by the clownish performances seen on television programs.”<sup>5</sup> He urged the American Bar Association (ABA) to take another look at “the whole subject of professional standards.”<sup>6</sup> In the next few years, civility became the “hot topic of the legal lecture circuit,”<sup>7</sup> and various state supreme courts, federal courts, and bar associations began to adopt “creeds” of civility and professionalism.<sup>8</sup> Although many criticized those creeds,<sup>9</sup> they are still on the books, and many of the initially vociferous objections have gradually subsided.

It is time to consider what makes law and lawyers so unpopular and what can be done about it. Justice Sandra Day O’Connor suggested that “[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public’s perception of lawyers.”<sup>10</sup>

An evaluation of the state of the profession and the usefulness of now-aging creeds is overdue, especially as reports of Rambo tactics and misbehaving attorneys continue to pour in, and as some bar associations push to make creeds enforceable.<sup>11</sup> Bar associations

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1. Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 950 (1995).

2. *See id.*

3. *Id.*

4. *Id.* at 953.

5. *Id.*

6. *Id.* at 956.

7. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 *STETSON L. REV.* 253, 253 (1998).

8. *See infra* Part II. See Appendix A for the variety of forms and names such creeds take.

9. *See, e.g.* Aspen, *supra* note 7; Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the “Civil” War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 *U. DAYTON L. REV.* 151, 165 (1998).

10. Sandra Day O’Connor, *Professionalism*, 76 *WASH. U. L. Q.* 5, 8 (1998).

11. For the use of the word “Rambo” to describe overly aggressive tactics, see, for example, Allen K. Harris, *Increasing Ethics, Professionalism and Civility: Key to Preserving the American Common Law and Adversarial Systems*, 2005 *PROF. LAW.* 91, 107 (“It is not uncommon to see

should seriously evaluate their professionalism creeds and determine how to make those creeds more effective.

A lack of professionalism may explain some of the negative attitudes towards the practice of law. Whatever law once was, it is now a grueling profession. Lawyers have higher than average rates of substance abuse<sup>12</sup> and depression,<sup>13</sup> and report being generally unhappy.<sup>14</sup> Lawyers are drowning in competition.<sup>15</sup> Other occupations, such as being a rock star, are equally difficult and lonely, involve long hours, tend to keep people from their families, and drive people to drink or do drugs. While equally difficult in the trenches, lawyers do not have an adoring public. A Pew study, released July 11, 2013, found that the public esteem of lawyers comes in last among professions.<sup>16</sup> Only eighteen percent of Americans responded that lawyers “contribute a lot to society,” down from twenty-three percent in 2009.<sup>17</sup> Although over half believe lawyers make either a strong contribution or some contribution, thirty-four percent said “lawyers contribute not very much or nothing at all.”<sup>18</sup> In addition to public disdain of lawyers, applications to law schools have dramatically declined as fewer bright students choose law.<sup>19</sup>

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Rambo lawyers defend aggressive tactics by claiming that they are merely being zealous advocates.”); *Justice O'Connor Criticizes Lawyers for 'Rambo' Tactics*, WASH. POST, Apr. 4, 1993, at A27 (reporting on Justice O'Connor's speech in which she blamed confrontational tactics for the decline in professionalism); *see also infra* note 28.

12. *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1347 (1997) (citing a fifteen-to-eighteen-percent rate of substance abuse among attorneys, as compared to a ten-to-thirteen percent rate among non-attorneys).

13. *See id.* (citing a nineteen percent rate of depression among attorneys, as compared to a three-to-nine percent rate among non-attorneys).

14. *See* Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 45, 57–58 (1995). “Both male and female lawyers exhibit symptoms of distress, well beyond the norm, relating to such key areas as obsessive-compulsiveness, social alienation and isolation, interpersonal sensitivity, anxiety, and depression.” *Id.* at 2–3.

15. *See, e.g.*, Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 228 (2007) (“This glut of lawyers has made competition for clients greater than it has ever been.”).

16. *Public Esteem for Military Still High*, PEW RES. CENTER'S RELIGION & PUB. LIFE PROJECT (July 11, 2013), <http://www.pewforum.org/Other-Demographics/Public-Esteem-for-Military-Still-High.aspx>. The results showed that Americans ranked these occupations in the following order: military, teachers, medical doctors, scientists, engineers (all of which were found by the majority to contribute “a lot” to society”), followed by clergy, artists, journalists, business executives, and then lawyers. *Id.*

17. *Id.*

18. *Id.*

19. Martha Neil, *Law School Applications Down 37 Percent Since 2010; First-year Class Could Be Smallest in 40 Years*, A.B.A. J. (Jul. 22, 2014, 8:25 PM) available at [http://www.abajournal.com/news/article/law\\_school\\_applications\\_down\\_37\\_percent\\_new\\_lsac\\_survey\\_shows\\_they\\_ve\\_dropped](http://www.abajournal.com/news/article/law_school_applications_down_37_percent_new_lsac_survey_shows_they_ve_dropped).

A few samples of lawyer and judge misconduct from 2013 help explain why public opinion of lawyers is so abysmal.<sup>20</sup> A Michigan judge was removed from office after sending a nude photo to a female coworker and having an affair with a woman whose ex-boyfriend was appearing before his court in a child support case.<sup>21</sup> An Indiana patent attorney, whose romantic advances to a summer associate had been rejected, emailed clips to partners at multiple firms of her performing in a theatrical role, in which she appeared to be (but was not) nude.<sup>22</sup> Three plaintiffs' attorneys in Kentucky took a forty-nine percent contingency fee in a two-hundred million dollar diet drug case, in violation of the contingency agreement and without the plaintiffs' knowledge.<sup>23</sup> A Staten Island attorney impersonated a woman he had previously known on an online dating site for lesbians hoping to embarrass the woman.<sup>24</sup>

Despite the joke about sharks, who, as a professional courtesy, allow lawyers to swim safely by, lawyers themselves often show little professional courtesy to other lawyers. As former Chief Justice Warren E. Burger lamented in 1995, “[t]he decline of professionalism, especially in the law, has taken on epidemic proportions. I do not make such a statement lightly.”<sup>25</sup> He opined that “[a]s a result of the marked increase in attorney misconduct and the failure of the organized Bar to discipline violations, the standing of the legal profession is perhaps at its lowest ebb in this century—and perhaps at its lowest in history.”<sup>26</sup> In a 1993 convocation speech, then-Justice Sandra Day O’Connor lamented that the use of confrontational “Rambo-style tactics” were “contributing to a decline in professionalism and to public dissatisfaction with the legal system.”<sup>27</sup> Regional

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20. These rather egregious examples may be sufficient to be classified as a breach of the American Bar Association (ABA) Model Rules of Professional Conduct (1983) (Model Rules) and thus beyond the range of the professionalism creeds discussed in this Article; however, professionalism creeds should generally address similar, less dramatic, situations.

21. *Judge McCree Booted from the Bench* (WJBK-TV television broadcast Mar. 26, 2014), available at <http://www.myfoxdetroit.com/story/25083122/judge-mccree-booted-from-the-bench>.

22. *In re Usher*, 987 N.E.2d 1080, 1083–84 (Ind. 2013).

23. Debra Cassens Weiss, *Famed Tort Lawyer Stan Chesley Is Disbarred for ‘Unreasonable’ \$20M Fee in Diet-drug Case*, A.B.A. J. DAILY NEWS (Mar. 21, 2013, 3:54 PM), [http://www.abajournal.com/news/article/famed\\_tort\\_lawyer\\_stan\\_chesley\\_is\\_disbarred\\_for\\_unreasonable\\_20m\\_fee\\_in\\_die](http://www.abajournal.com/news/article/famed_tort_lawyer_stan_chesley_is_disbarred_for_unreasonable_20m_fee_in_die).

24. Charisma L. Miller, *Suspension for Lawyer Who Created Fake Online Profile*, BROOKLYN DAILY EAGLE (July 18, 2013, 10:46 AM), <http://www.brooklynneagle.com/articles/suspension-lawyer-who-created-fake-online-profile-2013-07-18-150000>.

25. Burger, *supra* note 1, at 949.

26. *Id.* at 950 (emphasis in original).

27. *See Justice O’Connor Criticizes Lawyers for ‘Rambo’ Tactics*, *supra* note 11.

authorities have also displayed dissatisfaction with decaying standards of civility. For instance, Illinois Circuit Judge Richard Curry forcefully declared, “[z]ealous [a]dvocacy is the buzz word which is squeezing decency and civility out of the law profession.”<sup>28</sup> More recently, Michael Hoelich, former dean of the University of Kansas and Syracuse Law Schools, reported that “[i]ncreasingly, the ‘law business’ has become more competitive and far more stressful. Standards of civility have dropped. Collaborative work among lawyers has become more difficult. Hours worked, particularly among young lawyers, have increased.”<sup>29</sup>

In the last decade, most commentators assume that lawyers’ behavior is now diving to new lows, notwithstanding a flurry of professionalism and civility creeds adopted in the 1980s and 1990s.<sup>30</sup> Proponents of making such creeds enforceable argue that a return to professionalism may improve lawyers’ well-being, restore the public’s confidence in lawyers, and raise the expectations of behavior, not only with respect to civility but also with respect to violations of the Rules of Professional Conduct (hereinafter, as adapted in various jurisdictions, the Rules of Professional Conduct or the Model Rules).<sup>31</sup>

Part II of this Article briefly details the history of professionalism creeds and explains the differences among the professionalism creeds, the Model Rules, and ethics opinions, all of which provide useful guidance on the conduct expectations of members of the bar.

Part III presents a comparative study of forty-seven sets of professionalism creeds, including creeds in thirty-nine states, as well as a sampling of the creeds adopted by certain counties, cities, and specific courts. This Article explores the extent to which these various creeds paint a consistent and defensible picture of the legal profession, particularly in light of the movement to make such creeds enforceable, rather than aspirational.<sup>32</sup> This Article concludes that, notwithstanding core similarities, nationwide professionalism creeds remain a hodgepodge of vague aspirations and lack enough

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28. Kathleen P. Browe, Note, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 767 (1994) (quoting a court order entered by Judge Curry).

29. Michael H. Hoelich, *Legal Ethics and Depression*, J. KAN. B. ASS’N, Sept. 2005, at 33, 35.

30. See *infra* Appendix A (listing forty-seven professionalism creeds).

31. See David A. Grenardo, *Making Civility Mandatory*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 239, 246–48 (2013) (detailing why civility in the legal profession is critical to the administration of justice and to social order).

32. See, e.g., Smith, *supra* note 9, at 167 (“[S]ome of the civility codes have been expressly made enforceable by the state bars or courts that have adopted them.”).

bite to prevent “Rambo” behavior. With some exceptions, the various creeds were developed in isolation from each other. Admirable and well-meaning members of bar committees and commissions drafted most of them, often in response to particular experiences or popular anecdotes and without the benefit of a systematic study of the range of possibilities.

Part IV identifies a list of steps courts and bar associations can take to make their professionalism creeds more effective in regulating behavior. This variety of options include improving education as well as permitting judicial sanctions and making revisions to a jurisdiction’s version of the Model Rules.

This Article addresses several audiences. First, this Article urges the responsible bodies in each jurisdiction to consider whether their creeds adequately cover the appropriate range of conduct, use the most effective language, and describe—with sufficient specificity—the circumstances under which professionalism issues arise, especially as the profession confronts major changes. This Article challenges jurisdictions to adopt uniformly an updated and reviewed version of the American Board of Trial Advocates’ (ABOTA) Code of Professionalism<sup>33</sup> and Principles of Civility, Integrity and Professionalism.<sup>34</sup> Alternatively, the ABA, Inns of Court, or other national leaders in promoting professionalism could draft and vet model standards of professionalism. Such efforts will give individual jurisdictions the benefit of a thorough analysis of potential language and will compile the best ideas and efforts without draining the resources of each individual jurisdiction.

Second, this Article addresses those in education, both scholars of the legal profession and teachers of nascent attorneys. This Article seeks to enrich the discussion of professionalism from a theoretical and policy perspective. Before efforts to make professionalism creeds enforceable become any more widespread, this Article encourages scholars to examine what is truly essential to professionalism and civility, and the appropriateness of regulations. Finally, this Article encourages greater academic attention to, and teaching of, professionalism in law schools and continuing legal education programs throughout the country.

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33. *Code of Professionalism*, Am. Bd. Trial Advoc., <https://www.abota.org/index.cfm?pg=professionalism> (last visited Mar. 7, 2015).

34. *Principles of Civility, Integrity and Professionalism*, Am. Bd. Trial Advoc., <https://www.abota.org/docDownload/43583> (last visited Mar. 10, 2015).



## II. THE INTERRELATION OF PROFESSIONALISM CREEDS, THE RULES OF PROFESSIONAL CONDUCT, AND ETHICS OPINIONS

### *A. Professionalism Creeds*

A long history of individual state and bar association codes of ethics led to the adoption of the Model Rules in 1983.<sup>35</sup> Nonetheless, lawyer misbehavior has not disappeared. To encourage compliance with the “letter of the law” set forth in the Model Rules, many state and county bar associations and courts began adopting express statements of acceptable and unacceptable behavior norms in the 1980s and 1990s.<sup>36</sup> These statements of norms aim to encourage dedication to professionalism and civility. They assume many names, from “pledges,” “pillars,” “standards,” and “creeds” of professionalism, to “codes” and “guidelines” of civility.<sup>37</sup> For simplification purposes, this Article uses the terms “professionalism creeds” or just “creeds.” Professionalism creeds, as originally envisioned, were purely aspirational, unlike the enforceable ethics Code and the current Model Rules. Now, jurisdictions are increasingly taking steps toward making professionalism creeds enforceable.

Notwithstanding critics,<sup>38</sup> professionalism creeds have become almost universal in the last two decades. Thirty-nine of fifty states now

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35. All states have based their ethics rules on the Model Rules, except California, where the Model Rules “may be considered as a collateral source.” Diane Karpman, *ABA Model Rules Reflect Technology, Globalization*, CAL. ST. B.J. (Sept. 2012), <http://www.calbarjournal.com/September2012/EthicsByte.aspx>. In other states, the Model Rules are “considered highly influential guidance when states update their own idiosyncratic Rules of Professional Conduct.” *Id.*

36. A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 302 (1998) (citing 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § AP4:107, at 1269–70 (2d ed. 1994 & Supp. 1997)) (“Many civility or conduct codes were formulated in the 1980s and 1990s.”). The number of creeds seems to have fluctuated over the years from 100 in 1995 to 150 in 2005. Aspen, *supra* note 7, at 253 n.2; Harris, *supra* note 11, at 112 (“More than 150 state, county and city bar associations have adopted professionalism codes to encourage enhanced professional behavior and support increased judicial control of incivility and other unprofessional behavior.”). Today there are about 125 such creeds that various organizations and jurisdictions in the United States have adopted. This decline may reflect consolidation, for instance, where lower courts exchange individual creeds for those of the state or circuit. The ABA has compiled an extensive, but not exhaustive nor current, list of the professionalism creeds adopted in various jurisdictions around the United States. *Professionalism Codes*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_codes.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html) (last updated Aug. 2012).

37. For examples of the various names, see the list of professionalism creeds included in the survey, *infra* Appendix A.

38. See, e.g., Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1221 (2011) (“[D]rafting lists of specific prohibited words and behavior is not practical, and moreover, with greater specificity, consensus is likely to break down. Existing codes use words like



have professionalism creeds, as well as the District of Columbia. Several county and city bar associations and the bars of some federal courts also have creeds.<sup>39</sup> Our nationwide study of creeds reveals a wide variety in both substance and form.<sup>40</sup> Because of this lack of consistency, an attorney who is a member of a state bar, a county bar, and the bars of federal district and circuit courts may be subject to at least four different sets of professionalism creeds. For instance, the Denver Bar Association, the Colorado state court system, and the Tenth Circuit's creeds may be inconsistent in coverage and content, and yet a Denver attorney may still be subject to all three.

Although it is unlikely that various creeds would directly conflict with a Model Rule or encourage conduct prohibited by a Rule, the lack of consistency raises questions about what professionalism and civility mean. The problem of inconsistent creeds becomes increasingly relevant as more attention is given to the enforcement of creed violations through sanctions and disciplinary actions.

Most of the coordinated attention given to creeds is from the ABA and ABOTA, not legal scholars. In 1978, the ABA created the Center for Professional Responsibility.<sup>41</sup> The Center's purpose is to "advance[ ] the public interest by promoting and encouraging high ethical conduct and professionalism by lawyers and judges."<sup>42</sup> The Center's early work focused on the Model Rules; more recently, the focus has expanded to encouraging the adoption of creeds and promoting professionalism through other means, such as educational programs, awards, conferences, and various publications.<sup>43</sup> The

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'civility,' 'disrespect,' and 'discourteous,' which experience suggests cannot be given a sufficiently narrow meaning in a pluralistic society."). In addition, Mashburn advocates focusing only on actions that constitute a "threat to the fair administration of justice, rather than on classifying an attorney's conduct as in or out of the bounds of decorum." *Id.* at 1223-24. Unprofessional and uncivil behavior does threaten the fair administration of justice.

39. See, e.g., *infra* Appendix A (identifying a sample of forty-seven different creeds).

40. See *infra* Appendix A; *infra* Part III.

41. *About Us*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/about\\_us.html](http://www.americanbar.org/groups/professional_responsibility/about_us.html) (last visited Mar. 10, 2015) (hereinafter *ABA About Us*); see also ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter ABA BLUEPRINT REP.], available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley\\_Commission\\_Report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf) (encouraging law schools, bar organizations, and the judiciary to help lawyers be more professional); *Standing Committee on Professionalism*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/standingcommitteeonprofessionalism2.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2.html) (stating that the Committee was charged with implementing the ABA BLUEPRINT REP., *supra*) (last Mar. 10, 2015).

42. *ABA About Us*, *supra* note 41; see also ABA BLUEPRINT REP., *supra* note 41; *Standing Committee on Professionalism*, *supra* note 41.

43. ABA STANDING COMM. ON PROFESSIONALISM, A GUIDE TO PROFESSIONALISM COMMISSIONS § II (2011), available at <http://www.americanbar.org/content/dam/aba/administra>

Center has been successful in encouraging the adoption of statements validating the importance of professionalism and civility in most jurisdictions,<sup>44</sup> but has not offered help in drafting a uniform model.

ABOTA has also actively promoted the adoption of professionalism and civility creeds.<sup>45</sup> ABOTA also promulgated a short and long version of model creeds.<sup>46</sup> To encourage education, ABOTA developed a program, also entitled “Civility Matters,” which uses printed and electronic media “[t]o elevate the creeds of integrity, honor and courtesy in the legal profession.”<sup>47</sup>

Professionalism creeds have proliferated. Most state and federal circuit court systems, as well as bar associations, have adopted them. The existence of these creeds demonstrates a widespread commitment to improved civility, but the lack of consistent and thoughtful articulation undermines their credibility.

### *B. Rules of Professional Conduct*

Professionalism creeds differ from the Rules of Professional Conduct. Each jurisdiction’s highest court adopts an ethical code, violations of which may affect an attorney’s standing to practice law and enforces them through official disciplinary proceedings. Both,

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tive/professional\_responsibility/guide\_to\_professionalism\_commissions\_august2011.authcheckdam.pdf. The Standing Committee on Professionalism is part of the Center for Professional Responsibility, and the Center’s mandate is, among other things, to

encourage and provide assistance to state and local bar associations, the judiciary, the law schools, and the legal community in their efforts to improve lawyer professionalism and competence; educate members of the legal profession, the judiciary, the law school community and the public about professionalism, competence and advertising issues; and evaluate and report on trends and developments impacting lawyer professionalism, competence and advertising and recommend initiatives and policies to address them.

*Standing Committee on Professionalism, supra* note 41.

44. See David Gering, *Law Firms Adopt Credos*, A.B.A.J., Jan. 1989, at 56, 58 (reporting on the ABA’s House of Delegates recommendation that bar associations consider adopting creeds).

45. Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, in Am. Bd. Trial Advoc., *CIVILITY MATTERS* 22, 23 (2015), available at <https://www.abota.org/docDownload/680121> (“Every ABOTA Chapter should continue to urge their respective states to: 1) adopt enforceable principles of civility; 2) modify attorney’s oaths to eliminate ‘zealous’ advocacy and require adherence to principles of civility . . . .”); see also ABOTA Foundation, *Civility Matters*, Am. Bd. Trial Advoc., <https://www.abota.org/index.cfm?pg=ProfEthicsCivility> (last visited Mar. 9, 2015) [hereinafter *Civility Matters Program*].

46. *Code of Professionalism, supra* note 33; *Civility Matters Program, supra* note 45.

47. *Civility Matters Program, supra* note 45 (quoting ABOTA’s Constitution).

however, address aspects of behavioral standards for attorneys. Today, the most influential template for ethical rules is the Model Rules.<sup>48</sup> The Canons of Professional Ethics, which preceded the Model Rules, were adopted in 1908, revised in 1969, and republished as the Model Code of Professional Responsibility.<sup>49</sup> In 1983, the Code was again revised and republished as the Model Rules, which are periodically revised, most recently in 2009.<sup>50</sup> Although each jurisdiction is free to adopt its own rules of professional conduct, most local versions are based at least in part on the Model Rules. This Article generally references the Model Rules rather than a specific version that any particular jurisdiction has adopted.<sup>51</sup>

The Model Rules differ in various ways from the professionalism creeds that are the subject of this Article. The aspirational narratives of earlier disciplinary documents gave way in the Model Rules to a “‘restatement format’ in order to give better guidance and clarity for enforcement ‘because the only enforceable standards were the black-letter Rules.’”<sup>52</sup> Some of the Model Rules “are imperatives, cast in the terms ‘shall’ or ‘shall not,’”<sup>53</sup> and some are permissive, “cast in the term ‘may,’” and apply when they address areas in which an attorney must exercise professional judgment and discretion.<sup>54</sup> The Model Rules do contain some aspirational statements, primarily in the preamble. For example, “[i]n all professional functions a lawyer should be competent, prompt and diligent;”<sup>55</sup> “[a] lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others;”<sup>56</sup> and “[a] lawyer should demonstrate respect for the legal system.”<sup>57</sup> Yet the main purpose of the Model Rules is to define more precisely

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48. *About the Model Rules of Professional Conduct*, AM. BAR ASSOC., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Mar. 10, 2015).

49. *Id.*

50. *Id.*

51. All states have based their ethics rules on the Model Rules except California, where the Model Rules “may be considered as a collateral source.” Karpman, *supra* note 35. In other states, the Model Rules are “considered highly influential guidance when states update their own idiosyncratic Rules of Professional Conduct.” *Id.*

52. Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 431 (2012) (citing ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA RULES OF PROFESSIONAL CONDUCT, 1982–2005, at xii–xiv (2006) (reporting on the 1982 ABA Midyear Meeting discussion of a format change from a Model Code to the Rules)).

53. MODEL RULES OF PROF’L CONDUCT Scope ¶ 14 (1983).

54. *Id.*

55. *Id.* pmb., ¶ 4.

56. *Id.* pmb., ¶ 5.

57. *Id.*

the point at which disciplinary action will be taken. In contrast, professionalism creeds tend to be vague, generally use the term “should,” and are usually only aspirational.<sup>58</sup> The Model Rules acknowledge that they do not “exhaust the moral and ethical considerations that should inform a lawyer . . . . [They] simply provide a framework for the ethical practice of law.”<sup>59</sup> Professionalism creeds address a more expansive range of behavior, but most are aspirational, meaning violators are not subject to formal discipline affecting their standing to practice law.

Although compliance with the Model Rules “depends primarily upon understanding and voluntary compliance” and “secondarily upon reinforcement by peer and public opinion,”<sup>60</sup> the legal counsel for the relevant bar association frequently enforce the Model Rules through disciplinary proceedings. Violating the Model Rules may result in various penalties, from private reprimands to disbarment.<sup>61</sup> Many bar associations publish periodic reports of disciplinary action taken to enforce the Rules in bar journals and collective reports on an annual basis.<sup>62</sup> Some bar associations include past disciplinary actions on the information webpage for each member of the bar.<sup>63</sup> With the exception of private reprimands, these summaries include the name of the attorney subject to discipline.

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58. Geoffrey Rush, as Captain Barbossa of the Black Pearl, said in the movie, *Pirates of the Caribbean: The Curse of the Black Pearl*, “the code is more what you’d call ‘guidelines’ than actual rules.” *PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (Walt Disney Pictures 2003).

59. MODEL RULES OF PROF’L CONDUCT Scope ¶ 16 (1983).

60. *Id.*

61. For a discussion and critique of the general processes of lawyer discipline, see Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007). Critics of attorney discipline, even when it involves violations of the Model Rules and a formal process, abound. See, e.g., Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253 (2012). The 2007 ABA Survey on Lawyer Discipline Systems found that, among the nation’s 1.4 million lawyers with active licenses, 117,598 were the subject of a filed disciplinary complaint in 2007, but only 4,782 lawyers were charged with disciplinary violations. ABA STANDING COMM. ON PROF’L DISCIPLINE, 2007 SURVEY ON LAWYER DISCIPLINE SYSTEMS, Chart I (2007), available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/survey\\_lawyer\\_discipline\\_systems\\_2007.html](http://www.americanbar.org/groups/professional_responsibility/resources/survey_lawyer_discipline_systems_2007.html).

62. For a list of references to various state reports, see Stephen E. Schemenauer, Comment, *What We’ve Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation’s Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 665 (2007).

63. See, e.g., Attorney Search on Frank Russell Wilson, State Bar of Cal., <http://members.calbar.ca.gov/fal/Member/Detail/185591> (“1/23/2009 Discipline w/actual suspension 06-O-13019 Not Eligible to Practice Law”) (last visited Mar. 16, 2015). At the bottom of this and similar pages is a note containing the following text: “The State Bar Court began posting public discipline documents online in 2005. . . . Copies of additional related documents in a case are available upon request.” *Id.*

Although the majority of complaints alleging violations of the Model Rules involve some type of failure to communicate, actual enforcement actions tend to center on conduct actionable as fraud. For instance:

Illinois' . . . Commission docketed 6,082 investigations in 2005. Of those investigations, the most frequent areas of grievance are Neglect of the client's cause (2,670 complaints), Failure to Communicate with the client (1,463 complaints), and Fraudulent or Deceptive Activity and Excessive Fees (960 complaints). Although the rankings changed slightly with respect to the types of misconduct alleged in complaints that made it before a hearing board, the Failure to Communicate with the client remained in second place at forty-seven cases, constituting thirty-seven percent of all cases filed.<sup>64</sup>

A recognized gap exists between behavior that is acceptable under the Model Rules and behavior that is, in fact, civil. Lawyers should remember that "[e]thical conduct [under the Rules] is the minimum standard demanded of every lawyer while professionalism is a higher standard that is *expected* of every lawyer."<sup>65</sup> Because the Model Rules punish only the "most egregious forms of misconduct,"<sup>66</sup> most bar associations have found the need for more specific creeds of conduct.<sup>67</sup> The function of professionalism creeds "is to reach beyond the basic and uninspiring values enforced by the [Model Rules], and demonstrate that lawyers share, or ought to share, higher, more ambitious moral aspirations. Professionalism seeks to infuse into Bar membership the important moral information it currently lacks."<sup>68</sup>

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64. See Schemenauer, *supra* note 62, at 645–46 (reporting on record keeping practices of various bar associations).

65. Harris, *supra* note 11, at 112 (quoting Harold G. Clarke, First Annual Georgia Convocation on Professionalism 31 (Oct. 14, 1988) (emphasis added)); see also Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 414 (1992) ("[Although t]he rhetoric of [the Rules] is often lofty, . . . they in fact *enforce* only minimum standards of behavior.").

66. Terrell & Wildman, *supra* note 65, at 414.

67. Harris, *supra* note 11, at 112.

68. Terrell & Wildman, *supra* note 65, at 414.

*C. Ethics Opinions*

All states have a mechanism by which bar association committees, offices of disciplinary counsel, and other entities issue ethics advisories or opinions.<sup>69</sup> Generally, ethics opinions are issued in response to specific inquiries from members of the bar as to the interpretation of the Model Rules. Sometimes, but not always, these opinions are first submitted to the public for comment prior to publication.<sup>70</sup> The bar association's response is issued either as informal advice or as a "formal opinion," the latter of which becomes a standard for compliance with the Model Rules. Even though such opinions are generally not binding, they may be cited as persuasive authority in disciplinary decisions.<sup>71</sup>

One main function of ethics opinions is to clarify how the Model Rules might apply in particular circumstances, thus adding specificity and details to the barebones structure of the Model Rules. Ethics opinions are available to the members of the bar and help guide lawyers in complying with the Model Rules.<sup>72</sup> By fleshing out details, ethics opinions function similarly in practice to professionalism creeds, as guidance and expectation setting. Ethics opinions, however, also become a measure for enforcing the Model Rules, while professionalism creeds are simply advisory in most jurisdictions.

## III. SURVEY OF PROFESSIONALISM CREEDS

This Part explains the results of a survey of the professionalism creeds in thirty-eight states and Washington, D.C., as well as a sampling of the professionalism creeds of three city bar associations, two county bar associations, three federal courts, and one national specialized practice association—the American College of Real Estate Lawyers (ACREL). The survey, thus, covers a total of forty-seven

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69. Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 332 (2002) (stating that forty-nine states have mechanisms for issuing ethics opinions). Since Joy's article was published, Wyoming has adopted such a mechanism by creating the Judicial Ethics Advisory Committee that can issue opinions. Judicial Ethics Advisory Comm., WYO. JUDICIAL BRANCH, <http://www.courts.state.wy.us/BoardCom/JEAC> (last visited Mar. 10, 2015).

70. See, e.g., *Opinion Requests*, STATE BAR OF CAL., <http://ethics.calbar.ca.gov/Committees/COPRAC/OpinionRequests.aspx> (advising that the formal opinion process includes "circulation of the draft opinion for a 90-day public comment period.") (last visited Mar. 10, 2015).

71. See, e.g., *Ethics Opinions*, STATE BAR OF CAL., <http://ethics.calbar.ca.gov/Ethics/Opinions.aspx> (last visited Mar. 10, 2015).

72. Joy, *supra* note 69, at 316–18 (describing the kinds and functions of ethics opinions).

professionalism creeds.<sup>73</sup> The tables below classify the content of these creeds into nine general categories, collectively containing fifty-four specific topics.

This study comes with a few important caveats. First, many of the issues potentially covered by professionalism creeds could be policed under the existing language of the Model Rules in most states. The primary object of professionalism creeds is to cover behavior that is above the Model Rules' minimum requirement and to warn of specific kinds of behavior that are not clearly addressed in the Model Rules. In some jurisdictions, creeds express in more detail, but in others creeds unnecessarily restate, the commands of the Model Rules. Another caveat is that professionalism creeds tend toward vague wording; thus, it is possible that vague wording somewhere in the creed could be interpreted as addressing a particular subject matter even if it is not explicitly mentioned. Creeds are less effective to the extent they fail to clearly warn about the kinds of behaviors that are troublesome. This study only includes subjects clearly covered in the various creeds, looking at the primary meaning of language used in identifying the breadth of the creeds' substantive content. Third, some of the creeds that were easily available on the Internet or linked to the ABA website at the time of the study have been moved or lost. Appendix A provides current links for researchers. We suspect that adopted professionalism creeds are not given much attention in a few jurisdictions.<sup>74</sup> Identifying a once-adopted professionalism creed may not mean that its particular terms and coverage, as reported below, are given much weight.

#### A. Substantive Content

We have loosely classified the content of various creeds into nine categories: (1) general civility, (2) timeliness, (3) honesty, (4) attorney-attorney relations, (5) attorney-adversary relations, (6) attorney-court relations, (7) attorney-client relations, (8) public service, and (9) technology.<sup>75</sup> The following tables compare the

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73. See *infra* Appendix A.

74. We note that in tracking down current locations of copies of these documents, we spoke to two bar association offices that initially were unaware of the location, or the existence, of the document, although both were able eventually to find someone who knew it existed and had not been repealed.

75. Coverage of technology abuses is almost non-existent, which is alarming given the monumental changes in the practice of law resulting from use of the Internet and electronic communications. The authors had hoped to find standards covering at least the use of social media and electronic discovery. Unfortunately, the only references that could be categorized under technology were (1) a warning that technology should be used for efficiency and not



coverage and language of the various creeds in each substantive category, with each Key explaining what conduct is expected of a practicing attorney in each respective jurisdiction.

TABLE 1 – GENERAL CIVILITY

Key:

1. Civility is not a sign of weakness.
2. Treat others in a courteous and dignified manner.
3. Avoid offensive, demeaning, harassing, or intimidating language or behavior (including racial or gender bias).
4. Do not speak at the same time as others.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN	MS	MT
1		X			X					X						X				
2	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X
3						X	X	X	X			X				X				X
4																				

	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA	WV	WI	WY
1			X					X			X		X	X					
2	X		X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X
3				X		X		X	X	X				X	X		X	X	
4																			

	Denver	Evansville	Kansas City	Santa Clara County	Contra Costa County	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1						X		X	
2	X	X	X	X	X	X	X	X	X
3				X	X				
4	X								

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for an unfair advantage, and (2) requirements to allow other attorneys to respond using non-technological methods and retransmit electronic communications or provide hard copies upon reasonable request.

TABLE 2 – TIMELINESS

Key:

1. Respond in a timely manner to offers of settlement, motions, communications, and other interactions with opposing counsel.
2. Be punctual.
3. Be cooperative in scheduling.
4. Do not create motions, pleadings, or similar actions at a time calculated to unfairly limit opposing counsel's opportunity to respond.
5. Allow reasonable time for an adversary to respond.
6. Agree to reasonable requests for extensions of time.
7. Never use delay to create a tactical advantage or to harass.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN
1			X	X	X	X		X	X	X	X	X	X			X		X
2	X	X	X	X	X	X	X			X	X	X		X	X	X		X
3	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
4		X			X			X	X		X	X						X
5								X						X				
6		X	X		X	X	X	X	X	X		X		X	X	X		X
7	X	X			X	X	X	X	X	X	X	X						X

	MS	MT	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA
1	X	X				X		X		X				X		X	X	X
2	X	X		X	X	X		X	X	X		X	X	X	X		X	X
3	X	X		X	X	X		X	X	X			X	X	X	X	X	X
4	X			X	X			X	X						X	X		
5																		
6	X	X		X	X	X		X	X	X			X		X	X	X	X
7	X	X		X	X			X	X	X	X		X	X	X	X		

	WV	WI	WY	Denver	Evansville	Kansas City	Santa Clara County	Contra Costa County	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1			X	X	X	X	X					
2	X	X	X	X	X	X	X			X	X	X
3	X	X	X	X	X	X	X	X		X	X	X
4	X					X	X	X		X	X	X
5				X								
6	X	X		X		X	X	X		X	X	
7	X			X	X	X	X	X		X		X



TABLE 4 – ATTORNEY-ATTORNEY RELATIONS

Key:

1. Stipulate to undisputed matters and attempt in good faith to resolve disputes and procedural issues.
2. Do not seek sanctions lightly.
3. Do not use or oppose discovery, depositions, motions, or other actions for purposes of harassment or expense.
4. Do not interpret document requests or interrogatories in an artificially restrictive manner.
5. Carefully craft document requests and interrogatories to limit them to necessary matters, and not to create burden or expense for the other party.
6. Do not send copies of opposing counsel’s correspondence to the court.
7. Do not attribute to opposing counsel a position they have not taken.
8. Do not personally criticize or unnecessarily embarrass another attorney.
9. Identify clearly all changes made in documents.
10. Papers should not be served at times calculated to take advantage of another attorney.
11. Do not evade communication or service.
12. Notify and disclose to opposing counsel any personal relationship between the attorney and judicial officer, mediator, or other presiding official.
13. Mentor new attorneys or be a role model.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN
1	X	X	X		X	X	X	X		X		X	X	X			X	X
2	X						X					X	X	X			X	X
3		X	X	X	X	X	X	X		X	X	X	X	X		X		X
4						X	X	X		X	X	X						X
5					X	X	X	X		X	X	X					X	X
6								X		X		X						X
7								X		X	X	X						X
8	X						X			X	X	X	X	X		X		X
9		X					X		X	X	X	X	X	X		X		X
10			X					X		X		X						X
11								X		X		X						X
12			X															X
13			X						X							X		

	MS	MT	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA
1				X	X					X			X	X		X		
2		X						X		X			X		X	X		
3	X			X	X	X				X			X	X	X	X		
4					X			X		X			X			X		
5					X					X			X	X				
6								X		X					X	X		
7						X		X		X			X			X		
8		X						X		X		X	X		X		X	
9	X				X			X	X	X			X	X	X	X		
10						X			X									
11																		
12										X								
13																	X	

	WV	WI	WY	Denver	Evansville	Kansas City	Santa Clara County	Contra Costa County	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1	X	X		X	X	X	X			X	X	X
2	X			X	X	X				X	X	
3	X	X	X	X	X	X		X		X	X	X
4	X			X		X	X			X	X	X
5	X				X	X				X	X	X
6	X			X		X	X			X	X	
7	X					X	X	X		X	X	X
8			X		X	X						
9		X		X		X	X		X	X	X	
10							X	X				
11					X							
12							X					
13									X			

TABLE 5 – ATTORNEY-ADVERSARY RELATIONS

Key:

1. Do not impugn an adversary’s character, intelligence, morals, or similar personal qualities unless essential to resolution of an issue.
2. Do not enter a default judgment without notifying any known counsel of the opposing party.
3. Do not reflect a client’s ill will for adversaries.
4. Do not attribute to adversaries or opposing counsel improper motives, purpose, or conduct.
5. Do not use depositions for harassment; use depositions only to ascertain necessary information.
6. Limit objections to those that are well founded.
7. Do not inquire into a witness’s personal affairs or integrity if not relevant to the case.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN
1		X					X	X										
2			X									X						X
3							X	X				X			X	X		X
4	X						X				X	X	X			X		X
5								X		X	X	X						X
6		X					X	X		X	X	X						X
7								X										

	MS	MT	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA
1										X						X		
2								X		X					X	X		
3	X	X				X				X			X	X	X	X	X	
4		X						X				X	X		X	X		
5						X				X			X					
6					X	X		X		X			X		X	X		
7										X								

	WV	WI	WY	Denver	Evansville	Kansas City	Santa Clara County	Contra Costa County	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1							X	X				
2	X				X	X	X				X	
3	X				X	X					X	X
4	X			X	X	X					X	X
5	X			X		X	X	X			X	X
6	X			X		X	X				X	X
7				X			X					

TABLE 6 – ATTORNEY-COURT RELATIONS

Key:

1. Dress appropriately in court.
2. Stand when addressing the court.
3. Avoid ex parte communications.
4. Act in a way that preserves the dignity of the court.
5. Accurately draft orders from the court.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN
1	X					X			X									
2	X					X												
3	X		X			X	X	X		X	X					X		X
4	X		X				X	X	X		X	X	X			X	X	X
5							X	X			X	X						X

	MS	MT	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA
1	X								X			X						X
2																		
3	X							X		X		X				X		
4	X	X		X			X		X	X		X	X		X		X	X
5								X		X		X	X		X	X		

	WV	WI	WY	Denver	Evansville	Kansas City	Santa Clara County	Contra Costa County	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1		X	X	X	X							
2			X	X	X							
3			X	X	X		X	X				X
4		X	X		X			X			X	X
5	X					X						





TABLE 8 – PUBLIC SERVICE

Key:

1. Be involved in pro bono work.
2. Participate in civic, educational, and charitable organizations.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN
1		X	X	X	X	X			X							X	X	
2		X				X											X	

	MS	MT	NH	NJ	NM	NV	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA
1	X	X	X		X		X	X	X	X	X		X		X			
2	X								X									

	WV	WI	WY	Denver	Evansville	Kansas City	Santa Clara Co.	Contra Costa Co.	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1				X			X		X			
2									X			

TABLE 9 – TECHNOLOGY

Key:

1. Use technology only for efficiency and not for an unfair advantage.
2. Allow opposing counsel to respond using non-electronic means.
3. Honor reasonable requests to retransmit or provide hard copies.

	AL	AZ	CA	CO	CT	DE	D.C.	FL	GA	HI	ID	IA	KY	LA	ME	MD	MA	MN
1																		
2																		
3																		

	MS	MT	NH	NJ	NM	NV	NC	ND	OH	OK	OR	PA	RI	SC	TX	UT	VA	WA
1																		
2																		
3																X		

	WV	WI	WY	Denver	Evansville	Kansas City	Santa Clara County	Contra Costa County	ACREL	7 <sup>th</sup> Circuit	Middle D. of AL	Western D. of MI
1				X	X							
2				X								
3				X								

### B. General Observations and Conclusions from the Survey

The professionalism creeds included in this study vary in length from about ten lines of text to about twelve pages. As described in the Introduction of this Article, they carry a variety of titles, and are issued by a variety of organizations, typically state supreme courts or bar associations.<sup>76</sup>

While the surveyed creeds' contents vary widely, they all contain only one understanding of professionalism—acting respectfully—and most omit interpreting professionalism as acting to improve the legal system or society in the larger sense. Thus, in most creeds, professionalism essentially means only civility.<sup>77</sup> To the extent that creeds address a lawyer's duty to improve the legal system, the most

76. See *infra* Appendix A.

77. Terrell & Wildman, *supra* note 65, at 420.

common are charges to improve access to the legal system. For instance, in twenty-two of the creeds surveyed, lawyers are encouraged to provide pro bono legal services. In six of those twenty-two, lawyers are additionally encouraged to participate in civic, educational, and charitable organizations (as seen in Table 8).

The provision that appears most frequently in the survey is the vague charge to “treat others in a courteous and dignified manner” or to “act in a civil manner,” which forty-five of the forty-seven creeds included. This general objective is not very helpful without being further refined and defined within the creed. Other common provisions include the charge to be punctual and the charge to cooperate in scheduling. Also common are provisions urging honesty (without specific definition or elaboration) and provisions against knowingly deceiving or misrepresenting fact or law. Because Model Rules 3.3, 4.1 and 7.1 cover misrepresentation, restating the honesty requirement in unenforceable creeds may suggest that honesty is aspirational, not essential. Such a creed would be more helpful if it articulated borderline cases where the honesty implications are less obviously addressed in the Model Rules.

The topic that is increasingly important but receives the least attention in the surveyed creeds is the use of technology, as seen in Table 9. This lack of attention likely exists because the misuse of technology is an emerging issue, and many states have not amended their creeds since they were first adopted, typically in the 1990s. Some bar associations may be waiting for the ABA to issue model statements on the use of social media and other technology. The ABA has already published a short statement on judges’ use of social media,<sup>78</sup> but it has not yet addressed other attorneys. All creeds should be updated to include the professionalism concerns common in the use of the Internet and electronic communications until these issues can be fully implemented in Rules of Professional Responsibility. Especially pertinent are the use of social media to research jurors, judges, and opposing parties, and the permissible bounds of surreptitious fact gathering. The practice of “friending” other attorneys, litigants, jurors, and judges on social media sites may also create conflicts of interest and suggest attempts to communicate in ways prohibited by the Model Rules, but not sufficiently targeted by the language of the current Model Rules.<sup>79</sup>

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78. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_462.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf).

79. See Cheryl B. Preston & Austin R. Martineau, *Professionalism and the Abuse of Technology* (forthcoming 2015).

## IV. MAKING PROFESSIONALISM CREEDS MATTER

Although the widespread existence of creeds is a promising development, their effectiveness is questionable. In this Part, we discuss methods for making creeds more meaningful and describe current efforts in some jurisdictions to enforce creeds.

## A. Education

Creeds can form the basis of programs to educate, counsel, and mentor lawyers, even if no direct enforcement mechanisms exist. Mentioning professionalism and civility in the attorney oath, as discussed below, is only a first step towards making new lawyers aware of their importance. Other means are available for creating awareness of, and commitment to, creeds in law school and throughout a lawyer's career.

Improved education is key. As one Texas judge reports,

The Texas Lawyer's Creed is the best control device available to trial judges. Unfortunately, most lawyers and even judges today are unaware of the Creed. I incorporate it into my Scheduling Orders and make it clear from the earliest signs of incivility that it is enforced in my court by whatever means are available for enforcement.<sup>80</sup>

Incorporating a copy of the applicable professionalism creed in scheduling orders, annual dues statements, notifications of bar passage, and other correspondence from the court or bar association is a good idea. But more in-depth discussion and training is also necessary.

A well-written statement of standards facilitates a continuing lawyer education (CLE) program where judges and those involved in drafting professionalism creeds can provide courses on compliance. The New York State Bar, for example, regularly holds a course in "Basic Lessons on Ethics and Civility."<sup>81</sup> Attendees discuss principles and rules of civility and receive practical advice for dealing with civility issues, both in court and in the office.<sup>82</sup> Comparable programs offered by numerous state bars can be augmented from outside

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80. Catherine M. Stone et al., *Civility in the Legal Profession: A Survey of the Texas Judiciary*, 36 ST. MARY'S L. J. 115, 131 (2004).

81. See, e.g., *Basic Lessons on Ethics and Civility 2014 NYC*, N.Y. STATE BAR ASS'N (Apr. 25, 2014), <http://www.nysba.org/store/events/registration.aspx?event=0DI54>.

82. *Id.*

sources. For example, Robert's Fund, a Seattle-based organization headed by University of Seattle law professor Paula Lustbader, is dedicated to "fostering civility in the legal profession."<sup>83</sup> This organization holds continuing legal and judicial education seminars, provides consulting and custom programs to help improve individual legal organizations, and also publishes essays on the topic.<sup>84</sup> ABOTA also offers an excellent resource in teaching aids,<sup>85</sup> and other curricula can be found from the ABA or on the web.

A potentially significant step toward improving civility would be to require lawyers to devote a certain number of hours specifically to CLE programs focusing on professionalism and civility, in addition to the minimum required ethics CLE hours. Even if all lawyers are not required to take civility classes, another option would be a civility course specifically required for new lawyers.

A more aggressive way to improve awareness of a professionalism creed is to require lawyers to acknowledge the creed and commit to compliance with its charges. The Hawaii State Bar Association's (HSBA) Committee on Professional Responsibility has no enforcement capabilities, yet it undertook a program in the 1990s to obtain written commitments from lawyers and law firms to abide by the HSBA's Guidelines of Professional Courtesy and Civility.<sup>86</sup> The Committee published a brief pledge to abide by the Guidelines in the Hawaii Bar Journal, which it encouraged lawyers to sign and mail to the HSBA office.<sup>87</sup> The Committee also consulted with the judiciary and gained their support in encouraging lawyers to abide by the guidelines.<sup>88</sup>

A second potential program to enhance awareness of, and compliance with, professionalism creeds, is a counseling system. For example, to facilitate application of their Standards, the Utah Supreme Court created a program for the Utah bar where lawyers can receive professionalism counseling.<sup>89</sup> It established a board of seven counselors that, in addition to providing CLE and publishing information generally, is intended primarily to respond to members of the bar who request advice on their own professionalism

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83. *About Us: What We Do*, ROBERT'S FUND, <http://www.robertsfund.org/what-we-do/> (last visited Mar. 1, 2015).

84. *Id.*

85. *See Civility Matters Program*, *supra* note 45.

86. James Kawachika, *If Not Us, Who? If Not Now, When?*, HAW. B.J., Nov. 1998, at 4.

87. *Id.*

88. *Id.*

89. UTAH R. APP. P. Order 7 (2012), *available at* <http://www.utcourts.gov/resources/rules/urap/Supctso.htm#7>.

obligations.<sup>90</sup> Surprisingly, a large number of attorneys utilize this service.<sup>91</sup>

But voluntary counseling has its limits. Lawyers may be reluctant to go to the board with respect to their own past conduct for fear that the board may see it as sufficiently egregious to file disciplinary complaints. Lawyers may also fear that asking for advice about the limits on civility with respect to future conduct will draw scrutiny to their future actions. In addition, attorneys may be concerned about the privacy and confidentiality of such counseling. Although counselors are instructed about respecting confidentiality, perhaps a system of written or telephonic requests could permit anonymous requests for advice.

Including an obligation to mentor new lawyers in professionalism creeds may produce improved professionalism and civility both for the experienced lawyer mentor and for the new lawyer. The mentor takes some time to think about what professionalism is and what values should be transferred to a new generation of practitioners and the new lawyer is on notice of the requirements of the profession, given an opportunity to ask questions, and hopefully is inspired to comply. A more active step is to establish a formal system of mentoring. Some bar associations have responded with processes by which an established lawyer can receive continuing education credit for becoming an official mentor to a newly admitted member to the bar.<sup>92</sup> If the lack of mentoring is a factor in the

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90. *Id.*

91. E-mail from Robert Clark, Chair, Utah Professionalism Counseling Board, to Cheryl Preston (Aug. 15, 2014 5:49 PM MST) (on file with author).

In the last five years the Board has received approximately 28 to 30 complaints or referrals, or an average of five or six per year. It has been estimated that a complaint or referral will come to our attention every sixty days or so. In addition, as contemplated, we receive informal contacts (sometimes by phone, sometimes by email, sometimes in personal conversation after a CLE presentation, etc.) where individual lawyers will ask for advice about their own conduct or about how to deal with a highly aggressive adversary. It has been estimated that such contacts would be approximately equal to the formal complaints or referrals we have dealt with.

We have had two or three complaints from non-lawyers, and have advised such persons that the boundary of our authority does not include such complaints. We have had two referrals from Judges, and four referrals from [the Utah Office of Professional Conduct].

*Id.*

92. "Mentors receive 12 hours of CLE credit (including 1 professionalism/civility credit and 1 ethics credit) for their efforts with the new lawyer." UTAH STATE BAR, NEW LAWYER TRAINING PROGRAM: 2014–2015 MANUAL 6 (2011), available at [http://www.utahbar.org/wp-content/uploads/2013/02/nltp\\_Manual.pdf](http://www.utahbar.org/wp-content/uploads/2013/02/nltp_Manual.pdf). To qualify,

[m]entors must satisfy the following qualifications: (i) seven years of practice; (ii) no past or pending public or formal discipline proceeding of any type or nature; (iii)

decline of professional behavior, such programs may go a long way toward improvement.

In addition, mentoring programs may help resolve civility problems between lawyers without resorting to direct enforcement. ABOTA's "Civility Matters" program allows experienced members of the bar to work as "civility mentors and mediators."<sup>93</sup> Thus, when one lawyer (often one who is young and inexperienced) acts in an uncivil manner, the bar or the court may appoint a more sophisticated lawyer to work as an *ex parte* mentor to the more inexperienced lawyer.<sup>94</sup> If necessary, the mentor might also later function as a mediator between the lawyers.<sup>95</sup>

Similarly, an Indiana program called "Mentor Match" places new lawyers with experienced lawyers.<sup>96</sup> The program is mainly informational, except with respect to mentoring. Its stated goals include "increas[ing] the lawyer's] knowledge of legal customs; contribut[ing] to a sense of integrity in the legal profession; [and] promot[ing] collegial relationships among legal professionals and involvement in the organized bar."<sup>97</sup> New Mexico's "Bridge the Gap" mentoring program is similar in matching new lawyers with experienced lawyers, but it includes some additional substance: the mentor must meet with the assigned new lawyer at least twelve times during the year.<sup>98</sup> New Mexico's stated goal is to "enhance professionalism, ethics, civility, relationships, and practical skills in the legal profession,"<sup>99</sup> but the mentoring program is its only concrete suggestion.

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malpractice insurance in an amount of at least \$100,000/\$300,000 if in private practice; and (iv) approval by the Supreme Court's Advisory Committee on Professionalism. . . . [In addition,] mentors are required to attend Mentor Training and Orientation.

*Id.* For other expectations of mentors, see Utah Judicial Council Rules of Judicial Administration, Rule 14-808, available at <http://www.utcourts.gov/resources/rules/ucja/ch14/08%20Special%20Practice/USB14-808.html> (last visited Mar. 9, 2015).

93. Donald C. Robinson, *The "Civility Matters" Venture in Montana*, MONT. LAW., April 2011, at 10; see also *Civility Matters* Program, *supra* note 45.

94. *Id.*

95. *Id.*

96. *Mentor Match*, IND. STATE BAR ASS'N, [http://www.inbar.org/?page=mentor\\_match](http://www.inbar.org/?page=mentor_match) (last visited Mar.10, 2015).

97. *Id.*

98. *Bridge the Gap Mentorship Program*, STATE BAR OF N.M., [http://www.nmbar.org/nmstatebar/Membership/Mentorship\\_Program/Nmstatebar/For\\_Members/Bridge\\_the\\_Gap\\_Mentorship\\_Program.aspx?hkey=9a869992-db6d-4690-813c-16db1f3237ac](http://www.nmbar.org/nmstatebar/Membership/Mentorship_Program/Nmstatebar/For_Members/Bridge_the_Gap_Mentorship_Program.aspx?hkey=9a869992-db6d-4690-813c-16db1f3237ac) (last visited Mar.10, 2015).

99. *Id.*

Judges, because of their unique authority and experience, have great potential as mentors on the subject of civility. A formal program is not needed for judges to provide such help; judges can provide guidance *sua sponte* as the opportunity arises. In writing for the American Inns of Court, Judge James F. Holderman of the Northern District of Illinois supports this approach and has encouraged judges to mentor law students, accept externs in chambers, emphasize real world situations and dilemmas when teaching classes, and join professional organizations.<sup>100</sup> Judge Holderman suggests that civility mentoring of law graduates occur when talking with clerks, in off-the-record jury instructions meetings, and during legal education programs and bar activities.<sup>101</sup> Finally, Judge Holderman notes that less experienced judges would also particularly benefit from civility mentoring by their more experienced peers.<sup>102</sup>

Some bar associations and courts may want to go beyond mere education and mentoring on civility toward devising procedures for formal sanctions to enforce the provisions of the applicable professionalism creed against practicing lawyers.

### B. Enforcement Options

Historically, professionalism creeds have been aspirational and voluntary; in this way, they differ from the Rules of Professional Conduct, which are expressly enforceable through formal disciplinary proceedings. In fact, thirty-five of the forty-seven professionalism creeds surveyed include an express statement that they are not to be used as a basis for disciplinary action. However, as the need to emphasize professionalism has grown, so must the mechanisms for enforcing compliance with professionalism creeds. This Subpart discusses possible options for taking professionalism creeds more seriously, beginning with the least invasive.

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100. James F. Holderman, *Instilling Civility and Professionalism—From Law School to Retirement*, THE BENCHER, Mar./Apr. 2013, available at <http://home.innsofcourt.org/for-members/current-members/the-bencher/recent-bencher-articles/marchapril-2013/instilling-civility-and-professionalism%E2%80%94from-law-school-to-retirement.aspx>.

101. *Id.*

102. *Id.*



### 1. Incorporation in the Attorneys' Oath

Many bar associations have added language in their Attorneys' Oaths that has newly admitted members commit to being civil or courteous. For example, in 2007, Utah's bar association added the following italicized language to the Attorneys' Oath: "I do solemnly swear that I will . . . discharge the duties of attorney . . . with honesty, fidelity, *professionalism, and civility*; and that I will strictly observe the Rules of Professional Conduct *and the Standards of Professionalism and Civility*."<sup>103</sup> Other states—including Florida,<sup>104</sup> South

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103. Order Approving and Promulgating Effective Proposed Amendments, *In re Proposed Amendments to Attorney's Oath*, Case No. 20070639-SC (Utah 2007), available at <http://www.utcourts.gov/resources/rules/approved/USBRPC00.00.pdf> (emphasis added); see also UTAH RULES OF PROF'L CONDUCT pmb1. (2007), available at <http://www.utcourts.gov/resources/rules/comments/2007-08/RPC00.00Preamble.pdf>.

104. *Oath of Admission to the Florida Bar*, FLA. BAR (June 25, 2013), <http://www.floridabar.org/tfb/TFBProfess.nsf/basiciew/04E9EB581538255A85256B2F006CCD> D?OpenDocument ("To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.") (last visited Mar. 10, 2015).

Carolina,<sup>105</sup> Louisiana,<sup>106</sup> Arkansas,<sup>107</sup> Virginia,<sup>108</sup> Ohio,<sup>109</sup> Minnesota,<sup>110</sup> Colorado,<sup>111</sup> New Mexico,<sup>112</sup> Arizona,<sup>113</sup> Alaska,<sup>114</sup> and Hawaii<sup>115</sup>—have amended their Attorneys’ Oaths to include a commitment to behave civilly. Some have used analogous language such as courtesy and respect.<sup>116</sup> Recently, the president of the State Bar of California said that, since lack of decorum persists despite the fact that California has one of the longest professionalism creeds in

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105. S.C. APP. CT. R. 402 (2003), available at <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03> (“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”).

106. *Lawyer’s Oath*, LA. SUP. CT. COMM. ON BAR ADMISSIONS, [https://www.lascba.org/lawyers\\_oath.asp](https://www.lascba.org/lawyers_oath.asp) (“To opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications.”) (last visited Mar. 10, 2015).

107. *Oath of Admission*, STATE BAR OF ARIZ., <http://www.azbar.org/membership/admissions/oathofadmission> (“I will maintain the respect and courtesy due to courts of justice and judicial officers; . . . I will abstain from all offensive conduct . . . .”) (last visited Mar. 10, 2015).

108. Va. Code Ann. § 54.1-3903 (1988) (“[H]e will honestly demean himself in the practice of law and execute his office of attorney-at-law to the best of his ability.”).

109. SUP. CT. R. FOR GOV’T OF BAR OF OHIO R. I(8)(a) (2006), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf>. (“In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons.”).

110. Minn. Stat. § 358.07(a) (2014), available at <https://www.revisor.mn.gov/statutes/?id=358.07> (“[You] will conduct yourself as an attorney and counselor at law in an upright and courteous manner.”).

111. *Colorado Attorney Oath of Admission*, COLO. BAR ASS’N, <http://www.cobar.org/index.cfm/ID/1653/CLPE/Colorado-Attorney-Oath-of-Admission/> (“I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty.”) (last visited Mar. 10, 2015).

112. N.M. RULES GOV’T ADMISSIONS BAR R. 15-304 (2014), available at <http://www.nmexam.org/pdfs/RulesMay2014.pdf> (“I will maintain civility at all times, abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.”).

113. *Oath of Admission*, STATE B. ARIZ., <http://www.azbar.org/membership/admissions/lawyer’screedofprofessionalism>, (“I will abstain from all offensive conduct.”) (last visited Mar. 16, 2015).

114. ALASKA BAR R. 5(I) § 3 (1989), available at <http://courts.alaska.gov/sco/sco1704leg.pdf> (“I will maintain the respect due to courts of justice and judicial officers . . . I will be candid, fair, and courteous before the court and with other attorneys.”).

115. HAW. SUP. CT. R. 1.5(a)(3)(c) (1984), available at [http://www.courts.state.hi.us/docs/court\\_rules/rules/rsch.htm](http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm) (“I will conduct myself with dignity and civility towards judicial officers, court staff, and my fellow professionals.”).

116. See examples discussed in Donald J. Winder, *Civility Revisited*, UTAH B.J., MAR./APR. 2013, at 46; Grenardo, *supra* note 31, at 252.

the nation, the State Bar is considering adding to the attorney oath “civility wording.”<sup>117</sup>

An oath may be more effective in this regard if it specifically links professionalism and civility with a reference to that jurisdiction’s professionalism creed. The creed gives the definable details that are important for informing lawyers and targeting behavior for sanction.

Adding professionalism and civility to the oath increases the likelihood that lawyers—especially recently admitted lawyers—will, at the very least, think about this aspect of professional responsibility. Inclusion in the oath also increases the likelihood that a judge or bar association will address lawyers’ bad behavior. Although moving the commitment for professionalism and civility into the oath is a positive step, oaths add little in terms of concrete enforcement options. Some states do have mechanisms or precedent for attaching consequences to breaches of the oath, but most do not.

## 2. Referrals

Jurisdictions can add some teeth to their professionalism creeds with programs for referring offenders to investigation and dispute resolution boards. This method falls short of disciplinary action, but subjects lawyers who violate terms of professionalism creeds to significant pressure. The professionalism board in Utah, for example, is directed “to counsel members of the Bar, in response to complaints by other lawyers, referrals from judges, or referrals from counsel in the Office of Professional Conduct (OPC counsel).”<sup>118</sup> The board provides a dispute resolution body to which aggrieved lawyers may turn, rather than referring another attorney to the OPC for discipline under the Model Rules or requesting judicial sanctions.<sup>119</sup>

Upon receiving a complaint or referral, the board conducts its own investigation, communicates “directly with lawyers, judges, or clients involved in the dispute concerning the relevant facts and the application or interpretation of the Standards.”<sup>120</sup> The board may issue a “written advisory,” which “may, at the discretion of the

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117. Patrick Kelly, *Civility: The Time Has Come for Civility to Be Added to our Attorney Oath*, CAL. ST. B.J., July 2013, <http://www.calbarjournal.com/July2013/Opinion/FromthePresident.aspx> (“Still, the lack of decorum has persisted, and thus it’s critical to use more dramatic means to address this issue.”).

118. UTAH R. APP. P. Order 7, *supra* note 89.

119. *See infra* Part III.B.3.

120. UTAH R. APP. P. Order 7, *supra* note 89.

Board, also be provided to OPC counsel” and “to supervisors, employers, or agencies whose lawyers have been the subject of a complaint.”<sup>121</sup> In addition, if the matter was submitted by referral from a judge, the board will report to the judge.<sup>122</sup>

The Colorado Peer Professionalism Assistance (PPA) program has a similar approach.<sup>123</sup> The Peer Professionalism Assistance group:

- \* Provides one-on-one confidential advice to individual attorneys on how to handle an unprofessional situation.
- \* Communicates with opposing counsel upon request of the calling attorney to discuss and help resolve professionalism issues.
- \* Meets jointly with and provides informal mediation services to both/all attorneys experiencing professionalism issues (either upon request of the attorney(s) or when ordered by the court).
- \* Receives referrals from judges and magistrates to eliminate unprofessional behavior in courtrooms (PPA will work with all attorneys on the case to avoid any appearance of bias).
- \* Provides Continuing Legal Education seminars . . . .<sup>124</sup>

New Jersey has a less formal referral program.<sup>125</sup> The Professionalism Counseling Program encourages the county bar associations to establish “Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence.”<sup>126</sup> The program focuses on “such things as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff.”<sup>127</sup>

### 3. Judicial Sanctions

Many judges are reluctant to appear activist or hostile to an attorney and fear that taking a firm stand against uncivil behavior in

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121. *Id.*

122. *Id.*

123. See *Peer Professionalism Assistance*, COLO. BAR ASS’N, <http://www.cobar.org/index.cfm/ID/20980> (last visited Mar 16, 2015).

124. *Id.*

125. See *Programs & Projects: Professionalism Counseling Program*, N.J. STATE BAR ASS’N, <http://www.njsba.com/resources/njcop/njcop-prog-proj.html> (last visited Mar. 16, 2015).

126. *Id.*

127. *Id.*

their courtrooms will backfire and negatively affect their popularity and their career.<sup>128</sup> Nevertheless, judges in every jurisdiction should support the applicable professionalism creed. For example, the court system should explicitly provide mechanisms and standards requiring judges to stop bad behavior. If the targeted party files complaints that may affect the judge's competency ratings, those who review such complaints need to support judges in doing their duty to police professionalism. The Maryland Judicial Commission on Professionalism recommended empowering judges with uniform sanctions for dealing with problems of incivility.<sup>129</sup> A climate of increased civility will likely result when all of a jurisdiction's judges enforce professionalism creeds and when official documents suggest that judges are entitled, if not required, to take enforcement action.

Judicial sanctions for violations of an oath or a professionalism creed may take a variety of forms. A survey of Texas judges reported that various sanctions to curb attorney incivility are available in Texas,<sup>130</sup> which include assessing monetary sanctions, directing attorneys to revise pleadings or briefs, excluding evidence, striking pleadings, removing attorneys from cases, requiring attorneys to complete additional continuing education classes, referring attorneys to state bar grievance committees, holding attorneys in contempt, limiting further discovery, and taxing expenses of discovery to the misbehaving attorney.<sup>131</sup> The survey reports that forty-three percent of the 128 Texas judges surveyed had imposed sanctions, including monetary sanctions, to curb incivility.<sup>132</sup> Seventy-five percent of the surveyed judges thought that such sanctions

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128. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 299 (1995) ("Judges have evinced, and occasionally expressed, reluctance to enter the lists against offending lawyers, sometimes because the judges fear retaliation in retention elections and bar polls.") (citing ABA BLUEPRINT REP., *supra*, note 41, at 293 ("[J]udges are far less likely to punish misconduct and take other tough action if they must run for reelection or retention every few years.")); see also *id.* (citing COMM'N ON LAWYER PROFESSIONALISM, FLORIDA BAR, PROFESSIONALISM: A RECOMMITMENT OF THE BENCH, THE BAR, AND THE LAW SCHOOLS OF FLORIDA 23 (1989) ("[M]any judges are uncomfortable in the role of disciplinarian . . . .")).

129. Janet Sidman Eveleth, *Court Considers Reforms to Advance Legal Professionalism*, Md. B.J., Mar./Apr. 2007, at 42, 45–46.

130. Stone et al., *supra* note 80, at 128–129.

131. *Id.*

132. *Id.* at 129.

“had a positive effect on curbing the attorney’s negative behavior.”<sup>133</sup> By contrast, less than ten percent of the judges believed that the sanctions had no effect on the attorney’s behavior.<sup>134</sup>

Other states have taken similar approaches in dealing with uncivil behavior through case law.<sup>135</sup> For instance, the Florida Supreme Court has instituted specific procedures for filing complaints based on their professionalism standards.<sup>136</sup>

#### 4. Discipline under the Rules of Professional Conduct

##### *i. Implied Incorporation in the Rules of Professional Conduct*

Bad behavior outlined in a professionalism creed may also overlap with an interpretation of one of the Model Rules. For example, Model Rule 8.1 forbids conduct that is prejudicial to justice.<sup>137</sup> Such language can be broadly interpreted to include disrespectful behavior. Another provision that can be used to curb incivility is Rule 4.4, which states that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”<sup>138</sup>

A well-known example of using the Model Rules to enforce civility is *Grievance Administrator v. Fieger*, which addressed attorney Geoffrey Fieger’s actions in a tort case and its subsequent appeal.<sup>139</sup> The Michigan Court of Appeals overturned the verdict in favor of Fieger’s client on grounds of insufficient evidence but also “held that Mr. Fieger’s repeated misconduct by itself would have warranted a new trial.”<sup>140</sup> The court highlighted Fieger’s unsupported claims at trial that the defendants and their witnesses conspired to cover up medical malpractice, Fieger’s assertion that defense witnesses destroyed and suppressed evidence, and Fieger’s insinuation

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133. *Id.*

134. Seventy-five percent of the fifty-four judges who had imposed sanctions for attorney-attorney incivility responded that they thought the sanctions either decreased or eliminated the unwanted behavior. Of the forty-five judges who had imposed sanctions for attorney-judge incivility, sixty-three percent responded that it decreased or eliminated the unwanted behavior. *Id.* at 129, 143.

135. Winder, *supra* note 116, at 47–48.

136. *Id.* at 48.

137. MODEL RULES OF PROF’L CONDUCT R. 8.1 (1983).

138. *Id.* at R. 4.4 (1983). The New Mexico Supreme Court ruled that an attorney had violated this provision when she engaged in continuing uncivil behavior, including persistent name-calling and unfounded accusations. *In re Ortiz*, 304 P.3d 404, 405–07 (N.M. 2013).

139. *Grievance Adm’r v. Fieger*, 719 N.W.2d 123 (Mich. 2006).

140. *Id.* at 129.

that one of the defendants abandoned the plaintiff to engage in a sexual tryst.<sup>141</sup>

The Michigan Court of Appeals decision inspired further hostility from Mr. Fieger, who profanely condemned the appellate court on a radio program and compared the appellate court panel to Nazis.<sup>142</sup> In response, the state Attorney Grievance Counsel filed a complaint against Mr. Fieger,<sup>143</sup> alleging that his statements violated the Michigan Rules of Professional Conduct (Mich. RPC) Section 3.5(c), which at that time “provide[d] that a lawyer shall not engage in ‘undignified or discourteous conduct toward the tribunal,’”<sup>144</sup> and Mich. RPC Section 6.5(a), which states that a lawyer “shall treat with courtesy and respect all persons involved in the legal process.”<sup>145</sup> Mr. Fieger challenged this decision by claiming that the MRPC violated his right to free speech and could not apply to remarks made outside of a courtroom.<sup>146</sup> The Michigan Supreme Court concluded that Mr. Fieger’s challenge failed on both grounds and that “lawyers have an unquestioned right to criticize the acts of courts and judges. . . . [but t]here are limitations only on the form and manner of such criticism.”<sup>147</sup>

A similar, if less dramatic example, arose in Delaware. The Office of Disciplinary Counsel brought charges of professional misconduct against Richard L. Abbot in a case that the Delaware Supreme Court eventually heard.<sup>148</sup> The Office alleged that Abbot violated the Delaware Lawyers’ Rules of Profession Conduct Sections 3.5(d) and 8.4(d) because his written advocacy was “undignified, discourteous and degrading to the tribunal, as well as prejudicial to the administration of justice.”<sup>149</sup> The court’s opinion highlighted certain derogatory and sarcastic terms used in Abbot’s written material to characterize his opponent’s positions, including “fictionalized,” “miraculously,” “imaginary,” “make-believe,” “illogical,” “irrational,” “whimsical,” and “pure sophistry.”<sup>150</sup> Abbot’s implication that the superior court may rule based on something other than the merits of the case also disturbed the Office.<sup>151</sup> The Delaware Supreme

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141. *Id.*

142. *Id.*

143. *Id.* at 130.

144. *Id.* at 137 (quoting MICH. RULES OF PROF’L CONDUCT R. 3.5(c) (2009) (current version at MICH. RULES OF PROF’L CONDUCT R. 3.5(d) (2015))).

145. *Id.* at 138 (quoting MICH. RULES OF PROF’L CONDUCT R. 6.5(a) (2009)).

146. *Id.* at 137.

147. *Id.* at 144.

148. *In re Abbott*, 925 A.2d 482,482 (Del. 2007).

149. *Id.*

150. *Id.* at 484–85.

151. *Id.* at 485.

Court concluded that Abbot's insinuations and insulting language were "so far beyond the boundaries of propriety that they were unethical," but limited the sanctions to a public reprimand in the form of the opinion itself.<sup>152</sup>

Such egregious examples can be addressed using the more formal mechanisms of the Rules of Professional Conduct and bar disciplinary counsel. Some offenses fit better within the literal language of the Model Rules, but others require some stretches in interpretation. Judges and bars are scrambling to find mechanisms short of ethics violations to moderate and deter a wide range of unprofessional and uncivil behavior.

*ii. Direct Incorporation in the Rules of Professional Conduct*

Some states have drafted customized language that more expressly addresses professionalism and civility in their versions of the ABA Model Rules. For instance, Delaware has changed the ABA standard Model Rules to include Section 3.5(d) ("[a] lawyer shall not engage in conduct intended to disrupt a tribunal,") to a new Section 3.5(d), which provides that "[a] lawyer shall not . . . engage in undignified or discourteous conduct that is degrading to a tribunal."<sup>153</sup>

Michigan went even further in 1993 and added a new section to its version of the ABA Model Rules, entitled "Professional Conduct." This section states in full:

A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.<sup>154</sup>

The next paragraph of Michigan's rules contains similar requirements for adjudicative officers, who are not covered by the Code of Judicial Conduct.<sup>155</sup>

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152. *Id.* at 489.

153. DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 3.5(d) (2015); *see also* KAN. RULES OF PROF'L CONDUCT R. 3.5(d) (2014).

154. MICH. RULES OF PROF'L CONDUCT R. 6.5(a) (2015).

155. *Id.* at R. 6.5(b).



With a slightly different approach, the Florida Bar prosecutes violations of the Lawyer's Oath, including the civility-oriented provision, under its version of the Model Rules. Florida added new language in Section 4-8.4, which forbids a lawyer to "engage in conduct . . . that is prejudicial to the administration of justice, including to . . . disparage, humiliate or discriminate against [anyone involved in the proceedings] on any basis."<sup>156</sup>

Other states may have or adopt customized language to characterize acts of incivility within their versions of the Model Rules. Until a viable process for enforcing professionalism creeds directly is devised, this approach is likely the most effective.

## V. CONCLUSION

To address the incivility problem, state and federal courts, bar associations, and other organizations have adopted professionalism and civility creeds setting out standards for behavior. Our review of such creeds has shown that many are poorly worded, out of date, and lack coherence across the various jurisdictions in which a lawyer may practice. Many are too limited or so vague that they fail to effectively identify conduct that crosses the line. Judicial and other forms of policing professionalism and civility are severely hampered when no clear warning is given in the applicable creed.

Whatever the status of a particular professionalism creed's wording, courts and bar associations can take significant steps toward making their creeds more effective in changing lawyer behavior. This includes improving education, providing counseling, and incentivizing mentoring of young lawyers with respect to professional and civil conduct. In addition, violating creeds should be linked to tangible consequences, and organizations should enforce the creeds. One option is to include a specific reference to the jurisdiction's creed in the oath new attorneys take. A better option is for courts and bar associations to establish a referral system under which a designated board evaluates complaints from other lawyers or judges about an attorney's uncivil behavior and issues written reports. An even more effective approach is to incentivize courts to

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156. RULES REGULATING THE FLA. BAR R. 4-8.4 (d) (2014). Examples of this section being used for incivility related problems are found in Grenardo, *supra* note 31, at 255 n.89. Grenardo's examples include Fla. Bar v. Ratiner, 46 So. 3d 35, 37, 41-42 (Fla. 2010) (disciplining an attorney with a suspension of sixty days, public reprimand, and probation for lambasting opposing counsel over the deposition table, as well as tearing up an evidence sticker and flicking it at opposing counsel"); and Fla. Bar v. Abramson, 3 So. 3d 964, 965, 965 (Fla. 2009) (suspending attorney for ninety-one days based on attorney's disrespectful conduct towards judge and prospective jurors).

police by issuing a wide variety of sanctions linked to specific violations of a professionalism creed.

Although courts and bar associations can use the rubric of several of the existing Model Rules to enforce professionalism and civility, more tailored language is more effective in providing warning and supporting a decision to sanction. Getting serious about professionalism can also be signaled by adding new language to the Model Rules in individual jurisdictions that incorporate professionalism and civility requirements. Even better would be a national model of such language so that the courts and bar associations can rely on uniform and carefully thought through language. In any event, the time has come to do more than print a statement of lofty but vacuous ideals.

Lawyer professionalism affects more than lawyers, clients, and judges. As Burnele Powell, former chair of the ABA's Standing Committee on Professional Discipline, noted, lawyers play a role in our society and government that is too significant for us to ignore bad behavior.<sup>157</sup>

Lawyers and non-lawyers alike can pretend that what lawyers do and say has little or no impact in the real world, but the actuality is that every aspect of our lives—quite literally from cradle to grave—is regulated, and a large amount of that regulation is carried out by lawyers. Thus, we should care about lawyers' commitments to professionalism because it is in our self-interest as sometime-disputants, and constant citizens, to care about them.<sup>158</sup>

Bar associations and courts should be lauded for their efforts thus far to address lawyer behavior. Creeds, even with partial coverage, inconsistent wording, and marked overlap with the Model Rules, serve a purpose and represent, at least, a declaration that most members of the bar find certain conduct abhorrent. Rather than ride on the original effort to adopt some symbolic creed of professionalism and civility, courts and bar associations need to unite to undertake the difficult but necessary task of framing a defensible and enforceable statement of what professionalism and civility require on a uniform, national scale.

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157. Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEX. L. REV. 275, 286 (1994).

158. *Id.* (citation omitted).

APPENDIX A: CREEDS INCLUDED IN STUDY<sup>159</sup>

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