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Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure Is Another's Poison

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COMMENT

Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure Is Another's Poison

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I. INTRODUCTION

Notice of the motion for default was not given, nor was a telephone call made before entry of the default, on the mistaken notion that an attorney's duty to his client prohibits such exercises in professional courtesy. . . . [C]ounsel's obligation to his client does not outweigh his duty as an officer of the court. It is the function of our legal system to resolve controversy on the basis of appropriately presented facts, not tactical proficiency. Time limitations exist for the sake of efficiency, not as traps for the unwary. Suffice it to say that in this case a great deal of time and energy has been wasted for want of a single, simple telephone call that a decade ago would have been considered the rule rather than the exception.¹

Judge Hersey's caustic commentary is indicative of the growing sentiment among the watchdogs of the legal community that the extension of professional courtesy between lawyers is a dying tradition.² Today's litigation is often characterized by verbal abuse

1. *Caribbean Agencies, Inc. v. Agri-Export, Inc.*, 384 So. 2d 281, 284 (Fla. Dist. Ct. App.) (Hersey, J., concurring).

2. See Samborn, *Taming the Loose Cannons: Incivility Plaguing the Nation's Bench and Bar?*, Nat'l L.J., Jan. 15, 1990, at 1, col. 3; Hazard, *Change Rules to "Civilize" the Profession*, Nat'l L.J., Apr. 17, 1989, at 13, col. 3; Miner, *Do Lawyers Owe Each Other?*, Nat'l L.J., Dec. 19, 1988, at 13, col. 1.

The United States District Court for the Northern District of Texas recently characterized the decline of collegiality as "a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation

between counsel,³ arguably unprofessional litigation tactics commonly known as "gamesmanship,"⁴ and disdain for civility within the judicial process.⁵ Such behavior raises serious questions that the legal profession must address. Are lawyers who refuse to treat opposing counsel with courtesy and respect violating an ethical or legal duty? Furthermore, should a lawyer accede to a client's demand for professional discourtesy when such action will hinder the truth-finding process? The disappearance of professional courtesy reflects a decrease in collegiality—the mutual respect among colleagues. Modern legal practice (if not theory) has increasingly de-emphasized collegiality, despite the fact that legal ethicists of the past espoused the importance that a lawyer should place on "the good opinion of his professional brethren."⁶ Although most lawyers are neither interested in marring their reputations within the field nor oblivious to the expectations of opposing counsel, today's lawyer often perceives himself to be a "hired gun" owing foremost allegiance to his client, at the possible expense of withholding professional courtesies.⁷ A hired gun is not per se uncollegial or disrespected by his colleagues, but the hired gun

beyond the financial reach of litigants." *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988). The court continued:

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

Id.

3. For examples of outrageous trial behavior, see *In re Crumpacker*, 269 Ind. 630, 383 N.E.2d 36 (1978) (lawyer directed derogatory remarks toward opposing counsel and parties, and took action on behalf of a client for the sole purpose of harassing and injuring others); *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983) (lawyer accused court of conducting a kangaroo court and engaging in cronyism, racism, and collusion with the prosecution); *In re McAlevy*, 69 N.J. 349, 354 A.2d 289 (1976) (lawyer assaulted opposing counsel during a conference in judge's chambers). For examples of less severe behavior that resulted in no reprimand and that more closely involved the issue of collegiality, see *United States v. Biasucci*, 786 F.2d 504, 514 (2d Cir. 1986) (prosecutor addressed defense counsel as a "sleaze"); *Arneja v. Gildar*, 541 A.2d 621, 622 (D.C. 1988) (lawyer charged that opposing counsel didn't "understand the law," and "should go back to law school [and] learn . . . English"). See generally Annotation, *Attorney's Verbal Abuse of Another Attorney as Basis for Disciplinary Action*, 87 A.L.R.3d 351 (1978) (collection of verbal abuse cases).

4. See, e.g., *Fina Oil & Chem. Co. v. Salinas*, 750 S.W.2d 32, 34-35 (Tex. Ct. App. 1988) (discovery tactics which frustrate truth-seeking).

5. See, e.g., *Dondi*, 121 F.R.D. at 286.

6. E.g., G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 75 (5th ed. 1896).

7. See Goldberg, *Playing Hardball*, A.B.A. J., July 1, 1987, at 48, 49; Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 79.

often disregards professional courtesies with the belief that so doing will be in his client's best interest.⁸

This Comment analyzes the value of collegiality in the judicial process. The discussion begins with the initial premise that the current practice of law often represents a disregard for standards that legal philosophers once considered mandatory in the ethical practice of law.⁹ The touchstone in such a circumstance is whether the concept of the lawyer as collegial is being devalued in the name of justice, or whether ignorant and disrespectful lawyers are invading the establishment legal practice to the detriment of justice.¹⁰ The devaluation of collegiality from its early reign may signal an evolution of the adversary system that better serves justice, or an unfortunate setback that the legal community must rectify.¹¹ Even if justice is reached, such a system may nonetheless tarnish the image of the legal profession.¹²

Two major forces control lawyer collegiality: philosophical guidelines that the lawyer sets for himself and legal guidelines that the profession provides. Each lawyer's particular philosophical understanding of the adversary system of advocacy may influence his view of the relative necessity of collegial behavior and may create self-

8. One justification for the hired gun mentality is that it "proves you love your clients, they love you and anything short of it compromises them." Saylor, *supra* note 7, at 79.

9. *Dondi*, 121 F.R.D. at 286. The *Dondi* court said:

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

Id.

10. Compare M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9-26 (1975) ("Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of advocacy that I would want as a client and that I feel bound to provide as an advocate. . . . [T]he heavens do not really have to fall—not unless justice requires that they do.") with Burger, *The Necessity for Civility*, 52 F.R.D. 211, 215 (1971) ("[L]awyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice.").

11. See *supra* note 10.

12. See Saylor, *supra* note 7, at 81 ("[Hired guns] detract[] from the profession . . . and send[] a terrible message to the public about our profession."). The American Bar Association (ABA) seems to believe that image has importance apart from the delivery of justice by the legal system. The ABA Commission on Professionalism recently stated: "The primary question for this Commission thus becomes what, if anything, can be done to improve both the reality and the perception of lawyer professionalism." REPORT OF THE COMMISSION ON PROFESSIONALISM TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, 112 F.R.D. 243, 254 (1986) [hereinafter REPORT OF THE COMMISSION ON PROFESSIONALISM].

imposed duties for and against collegial behavior. Similarly, the codes of ethics and case law in force where the lawyer practices may impose legal duties of collegiality. Over the last century, the prevailing philosophies of the legal profession have fluctuated, and the American Bar Association has passed three codes of ethical conduct.¹³ In an attempt to clarify the competing arguments for and against collegiality, this Comment examines the changing philosophies, the codes, and a smattering of case law.

Section II of this Comment investigates the role of collegiality in the practice of law according to classic and modern legal philosophies. Section III traces the history of codes of legal ethics and their corresponding treatment of collegiality. Section IV focuses on case law and the judicial response to professional discourtesy between opposing counsel. Section V considers the value collegiality brings to the legal profession. The Section questions whether an attorney should yield to professional courtesy when so doing will undermine his client's desires or legal position, and further, whether manifestations of fellowship between lawyers are ethically compatible with a just trial. Section V also illustrates a method that local jurisdictions are implementing in order to improve civility inside and outside of the courtroom, facilitate the orderly administration of justice, and improve the public image of the legal profession. Finally, Section VI recommends the use of explicit codes of professional courtesy and recognizes that lawyers will improve themselves individually, by striving to improve the entire profession.

II. LEGAL MODELS

Although this Comment notices the apparent demise of collegiality within the legal profession, such demise is not necessarily indicative of an inferior judicial process. In fact, it is unclear whether collegiality promotes or actually hinders justice in the judicial process. Although the majority of lawyers, legal educators, and lay persons would likely consider justice to be the goal of any judicial process,¹⁴ the same majority will argue vigorously over what constitutes justice.

13. See CANONS OF PROFESSIONAL ETHICS (1951); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983); MODEL RULES OF PROFESSIONAL CONDUCT (1989).

14. This is not the view of Professor Alan Dershowitz, who states: "[N]obody really wants justice. Winning is 'the only thing' to most participants in the criminal justice system" A. DERSHOWITZ, *THE BEST DEFENSE* xvi (1982). Note that Professor Dershowitz limits his opinion to the criminal sector, which may foster different goals than the civil sector. See generally Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 91-93 (D. Luban ed. 1984) (arguing that the goal of criminal defense is protection from overreaching by the state, while the goal of civil defense is individual justice).

Consequently, the changing notions of justice among lawyers in this country may actually explain a systematic, yet honorable depreciation of the value of collegial behavior.¹⁵ In order to provide a framework for such an argument, this Section develops simplified models of nineteenth century "classic" advocacy and modern advocacy, which differ fundamentally in their perceptions of justice.

A. Classic Philosophy

Early writers on legal ethics agreed that collegiality among members of the bar was an essential element of the health of the individual lawyer and of the profession as a whole.¹⁶ In his landmark book, *A Course of Legal Study*, David Hoffman wrote:

In all intercourse with my professional brethren, I will be always courteous. No man's passions shall intimidate me from asserting fully my own, or my client's rights; and no man's ignorance or folly shall induce me to take any advantage of him; I shall deal with them all as honorable men, ministering at our common altar.¹⁷

Another early writer, George Sharswood,¹⁸ whose work would become a foundation for the original ABA Canons of Professional Ethics,¹⁹ believed that a lawyer's sound relationship with other members of the bar was a key element of a successful practice. He wrote that "[a] very great part of a man's comfort, as well as of his success

15. Of course, one school of thought equates the demise of collegiality with the general deterioration of lawyers' values due to changing demographic and economic realities or, even worse, due to avarice and selfishness on the part of lawyers. See REPORT OF THE COMMISSION ON PROFESSIONALISM, *supra* note 12, at 251-61.

16. See *infra* notes 17-20 and accompanying text.

17. D. HOFFMAN, A COURSE OF LEGAL STUDY 752 (W. Hein & Co. 1968) (2d. ed. 1836). Hoffman (1784-1854) is the father of American legal ethics. T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 59 (1985). He was a successful Baltimore lawyer and a legal educator. *Id.* He developed the first systematic course for the study of law and wrote the first statement of professional ethics for American lawyers. *Id.* His second edition of *A Course of Legal Study* contained "Fifty Resolutions in Regard to Professional Deportment," which preceded the ABA Canons of Professional Ethics by more than 70 years. *Id.*; see also Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1064 (1978).

18. Sharswood (1810-1883) was a Philadelphia lawyer, a state legislator, a Pennsylvania Supreme Court Judge, a legal educator, and a writer. His work, *An Essay on Professional Ethics*, found its original form in a group of lectures given to law students at the University of Pennsylvania in 1854. G. SHARSWOOD, *supra* note 6 (biographical information taken from the memorial that precedes the text of the book).

19. The first code of ethics was adopted by the Alabama State Bar Association on December 14, 1887, nine years after the formation of the ABA. Armstrong, *supra* note 17, at 1063. Thomas Goode Jones, judge and governor, wrote the code based on Sharswood's lectures, and provided excellent source material for the drafting of the original ABA Canons. *Id.* at 1063-64.

at the Bar, depends upon his relations with his professional brethren."²⁰

Such statements reflect the nineteenth century prototype of advocacy. This classic model, the usefulness of which this Comment examines, rests on the principle that all lawyers are "practicing" their profession, that is, performing to the best ability that their knowledge and experience provides. Thus, in the courtroom, one lawyer is not trying to defeat another lawyer. Rather, one litigant is trying to best another, and each requires the services of a lawyer to adequately present his legal and factual position. It is therefore erroneous under the classic model to portray a lawyer as winning a case. A lawyer does not win a case; a client does. As such, a lawyer's central concern is to ensure that his client's position is expressed in the most favorable disposition that the facts allow—a concern that overshadows any of the lawyer's personal aspirations of winning the case.²¹

In the classic scenario, truth is a prerequisite for justice. In such a world, the goal of judicial proceedings is to produce the most accurate depiction of the dispute that is possible, the foundation of wise and informed decisionmaking.²² The lawyer's role, therefore, is to present the evidence and its most favorable interpretation so that an impartial trier of fact can apply the law to the most accurate set of available facts, with the least amount of prejudice.²³ In encouraging true and accurate results, the lawyer must present substantive evidence relevant to the dispute. As such, the model precludes gamesmanship, in which a lawyer uses the judicial process (which is conceptually intended to be orderly in every way) to harass, annoy, surprise, or otherwise have the case determined on nonsubstantive issues. Gamesmanship or sharp practice may avoid the truth directly, by insisting upon technicalities, or indirectly, by taxing the opposition's limited resources and forcing a less than optimal defense.

20. G. SHARSWOOD, *supra* note 6, at 73. Sharswood actually "told his students that they would not go wrong if they sought the approval of their professional elders in everything." T. SHAFFER, *supra* note 17, at xxvi.

21. Justice David D. Peck stated:

The object of the lawsuit is to get at the truth and arrive at the right result. That is the sole objective of the judge, and counsel should never lose sight of that objective in thinking that the end purpose is to win for his side. Counsel exclusively bent on winning may find that he and the umpire are not in the same game.

D. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 9 (1954).

22. John Noonan is among many who have argued that the purpose of a trial is to search for truth. See Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1491 (1966); see also Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34-36.

23. M. FREEDMAN, *supra* note 10, at 9.

Under the classic model, a case should be decided by the issues that arise outside of and prior to the litigation, rather than by justice-compromising antics that occur within the litigation.

This classic model of advocacy encourages collegiality in the courtroom by recognizing that a lawyer has a duty of loyalty not only to his client, but also to himself and to the court.²⁴ Because a lawyer's loyalties are divided among the selfish interests of his client, the justice-seeking interests of the court, and the morality of the lawyer himself, the lawyer is not absolutely bound to follow truth-obfuscating instructions given by his client. As noted by David Hoffman:

Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to elect other counsel.²⁵

In other words, the lawyer's duty to advance his client's interests must be subordinated to the ultimate goal of truth-seeking which brought the relationship into being.²⁶ In short, although the lawyer must be loyal to his client, he must be equally loyal to himself and to his position as an officer of the court, a position in which he must promote the orderly administration of justice and maintain the credibility of the judicial system.²⁷

The lawyer's divided loyalties allow him to behave in a collegial manner when doing so will not jeopardize his client's right to a just trial. As a result, a lawyer may forgive the superficial mistakes of the opposing counsel—a professional colleague. As Sharswood stated:

24. The classic model is by no means dead. In 1986, the Committee on Professionalism stated: "The Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice." REPORT OF THE COMMISSION ON PROFESSIONALISM, *supra* note 12, at 278.

25. D. HOFFMAN, *supra* note 17, at 754, quoted in G. HAZARD & D. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 216 (2d ed. 1988). Judge Sharswood also remarked on these responsibilities of a lawyer: "Let him . . . in plain cases not shelter himself behind the instructions of his client. The client has no right to require him to be illiberal—and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety." G. SHARSWOOD, *supra* note 6, at 74-75.

26. Noonan, *supra* note 22, at 1487; see also Simon, *supra* note 22, at 35.

27. Note that this is a hybrid description of the lawyer's motivations wrought from those who support the classic model of truth-seeking. Hoffman valued truth-seeking as a consequence of his view that the lawyer should never act immorally. Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 687 (1979) ("Hoffman referred all problems to the practitioner's conscience—that mirror of universal morality . . ."). On the other hand, Noonan's position is more institutional. According to Noonan, the function of the judicial process is not so much to reach morally sound results as it is merely to reach the truth. Noonan, *supra* note 22, at 1485-88.

"Let him [the lawyer] shun most carefully the reputation of a sharp practitioner. Let him be liberal to the slips and oversights of his opponent whenever he can do so" ²⁸

B. *Modern Philosophy*

In its simplest form, the modern model of advocacy is similar to the classic model, except that the lawyer now perceives his divided duties as weighing more heavily on the side of the client.²⁹ Consequently, because the client usually is more interested in winning his case than reaching the truth, so too is the lawyer. Less honorable litigants who seek to hinder truth-finding or to tax an opponent's resources have good reason to believe that professional courtesy may not be in their best interests. Thus, lawyers who place most of their emphasis on winning instead of on truth-seeking may consciously or unconsciously avoid collegial behavior.

Those who support the modern model justify its existence by defining justice as something other than a search for truth.³⁰ In contrast to the classic model, the modern model can be best explained as relying on "procedural justice."³¹ The concept of procedural justice assumes that moral issues encountered in the classic model are separate from the issue of whether the judicial process is just.³² Abandoning the moral issues may free a lawyer from self-imposed duties that prohibit him from engaging in a variety of discourteous and uncollegial behaviors.³³ William Simon recognized one view of procedural justice in terms of a "game analogy":

28. G. SHARSWOOD, *supra* note 6, at 74-75; *see also supra* note 20.

29. It is accepted dogma within the legal profession . . . that a lawyer should pursue his client's interests as vigorously as possible within the limits of the law. This means that he should not interpose his own moral opinion of those objectives of his client that are legal. He should not block on moral grounds any attempt by his client to exercise legal rights; nor should he refrain from using the most effective legal means to realize these rights and objectives.

A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 90 (1980).

30. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975). Frankel laments: "The advocate in the trial courtroom is not engaged much more than half the time—and only then coincidentally—in the search for truth. The advocate's prime loyalty is to his client, not to the truth as such." *Id.*

31. *See* Simon, *supra* note 22, at 38.

32. *Id.* According to Simon, procedural justice "refer[s] to the notion that there is an inherent value or legitimacy to the judicial proceeding . . . which makes it possible for a lawyer to justify specific actions without reference to the consequences they are likely to promote." *Id.*

33. David Luban also makes this point clear: "If advocates restrain their zeal because of moral compunctions, they are not fulfilling their assigned role in the adversary proceeding Therefore . . . the structure of adversary adjudication must relieve them of moral accountability." Luban, *supra* note 14, at 90.

The game analogy rationalizes the contradictions between substance and procedure. The game is a social phenomenon in which the satisfactory quality of the outcome depends almost entirely on the proper implementation of procedures. People usually feel that when the rules are followed the outcome of a game is just, precisely because the rules have been followed. They usually are not inclined to assess the outcomes in terms of an independent set of criteria.³⁴

Although Professor Simon makes clear that justice in the game analogy is achieved "precisely because the rules have been followed,"³⁵ it is possible to substantiate the theory of procedural justice. Dean Monroe Freedman rests his support for procedural justice upon the maintenance of client autonomy and confidentiality.³⁶ To explain his argument, Dean Freedman envisions a situation in which the client would have his lawyer discredit an adverse witness whom both know to be telling the truth.³⁷ Dean Freedman argues that although the lawyer might argue with his client about the morality of such an attempt to discredit, the lawyer must ultimately bow to his client's will.³⁸ Otherwise, a client who believes that his lawyer will refuse to mislead the trier of fact will be likely to withhold information necessary to the attorney-client relationship in order to convince his lawyer that actions in his interest will not be misleading.³⁹ Clearly, the client is not in a position to determine when it is in his best interest to conceal or falsify information; moreover, the lawyer must know all the facts in order to present the best possible defense. Thus, the lawyer must have the confidence of his client, and the only way to achieve this is to assure the client that he will not be prejudiced by telling his lawyer the truth.⁴⁰ Ultimately, the justice of the procedure, rather

34. Simon, *supra* note 22, at 104. Simon refers to this school of thought as "ritualist" advocacy because the justice of the process is found within the ritual of the procedure itself: "It [the ritualism] involves a faith in the immanent rationality of the world as it is . . ." *Id.* at 92.

35. *Id.* at 104.

36. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966).

37. *Id.* at 1474.

38. *Id.* at 1475, 1478; see also Simon, *supra* note 22, at 34-35.

39. Freedman, *supra* note 36, at 1474.

40. *Id.*; see also Simon, *supra* note 22, at 34-36 (analyzing Freedman's position). Simon might categorize this as "purposivist" advocacy: "In the Purposivist view, society is populated . . . by people held together by shared experiences and norms. The purpose of the law is not just to maintain order, but also to coordinate the actions of citizens so as to further their common purposes as effectively as possible." *Id.* at 62. Simon points out that purposivists generally subscribe to the "morality of the long run," which "dictates that present sacrifices be suffered when they make possible greater future benefits," and which "prescribes that social norms be violated in particular instances as a means to the general welfare." *Id.* at 73.

than the morality of the outcome, must prevail.⁴¹

Because procedural justice assumes that whatever the system provides is justice, the lawyer is allowed—or perhaps obligated—to play the role of a hired gun, carrying out his client's will within legal limits to the possible detriment of the truth or accuracy of the proceedings.⁴² Furthermore, because the procedures themselves are assuring that justice is done, a lawyer is more inclined to take advantage of every procedural edge that may be gained.⁴³ A lawyer today would likely categorize such behavior under the heading of zealous advocacy,⁴⁴ a concept inspired many years ago in Lord Brougham's surprisingly "modern" instructions:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

41. *But see* Luban, *supra* note 14, at 91 (suggesting that Freedman's view is only valid for criminal defense because it "inflicts no harm on anyone when a criminal evades punishment"); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975) ("Once we leave the peculiar situation of the criminal defense lawyer, I think it quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate.").

42. *See* Frankel, *supra* note 30, at 1036-39. Frankel remarks:

[E]thical standards governing counsel command loyalty and zeal for the client, but no positive obligation at all to the truth. Counsel must not knowingly break the law or commit or countenance fraud. Within these unconfining limits, advocates freely employ time-honored tricks and stratagems to block or distort the truth.

Id. at 1038.

43. *See* M. FRANKEL, *PARTISAN JUSTICE* 17-18 (1980). Frankel states:

Every idea for improved procedures must be imaginatively pretested to foresee its evolving shapes under the fires of adversary zeal.

Because the route of a lawsuit is marked by a running battle all the way, the outcome is nothing like the assuredly right result imagined in our dream that "justice will out." . . . Where skill and trickery are so much involved, it must inevitably happen that the respective qualities of the professional champions will make a decisive difference.

Id.

44. This idea is reflected in the Model Code of Professional Responsibility:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983).

Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁴⁵

If lawyers were given discretion to back away from zealous advocacy, they would have to prejudge each case, and essentially usurp the judicial function.⁴⁶ Thus, justice is obtained by the zealous advocate through the idea that within just procedural guidelines, a judge and lawyer do not share a common purpose, and are not allied in any way.⁴⁷ As such, any legal road not taken by a lawyer is a disservice to the client and to the system.

Although the modern model of procedural justice leaves less room for collegiality, even this model would appear to allow for basic professional courtesies some of the time. Conversely, many of today's lawyers who might attempt to "be liberal to the slips and oversights of his opponents"⁴⁸ might fear a malpractice suit for doing so.⁴⁹ The reality of today's advocacy is that gamesmanship or "hardball" is increasingly expected by lawyers and presumably demanded by clients.⁵⁰ So-called "Rambo litigation" is pervading the courtroom.⁵¹

45. 2 TRIAL OF QUEEN CAROLINE 3 (J. Cockroft & Co. ed. 1874), cited in Frankel, *supra* note 30, at 1036. Frankel notes that "[n]either the sentiment nor even the words [of Lord Brougham] sound archaic after a century and a half." *Id.*

46. Luban, *supra* note 14, at 100.

47. See Frankel, *supra* note 30, at 1035.

48. See *supra* note 28 and accompanying text.

49. See *Caribbean Agencies, Inc. v. Agri-Export, Inc.*, 384 So. 2d 281, 284 (Fla. Dist. Ct. App. 1980); *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 893-94 (Mo. 1987) (en banc).

50. See Goldberg, *supra* note 7. Goldberg provides examples of the proliferation of "hardball litigation," but he avoids addressing its origins. He implies that clients want "hardball," but he provides no supporting data. *Id.* at 48. Goldberg interviewed Philip Corboy, a plaintiff's lawyer who provided the following definition: "'Hardball is when a lawyer, whether plaintiff's or defense, is personally antagonistic or insistent on all the procedural rules being followed.'" *Id.*

51. See Sayler, *supra* note 7. Sayler defined "Rambo litigation" by listing its characteristics:

1. A mindset that litigation is war and that describes trial practice in military terms.
2. A conviction that it is invariably in your interest to make life miserable for your opponent.
3. A disdain for common courtesy and civility, assuming that they ill-befit the true warrior.
4. A wondrous facility for manipulating facts and engaging in revisionist history.
5. A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.
6. An urge to put the trial lawyer on center stage rather than the client or his cause.

Id. at 79. Sayler further argued that "Rambo litigation" is "bad advocacy" that "detracts from the profession." *Id.* at 80-81.

Collegiality has not died, but it appears to have been devalued in the modern model. The following Sections of this Comment will focus on this change and evaluate its implications.

III. CODES OF ETHICS

Section I of this Comment focused on perceived obligations or limitations of collegial behavior that are essentially ethical in nature and internal in application. These perceived obligations develop from each lawyer's unique notion of ethics within the legal profession. For example, a lawyer who believes that the trial should be a search for the truth will prefer collegiality over a strict "hired gun" approach. Such intrinsic values unique to individual attorneys operate independently of any set of external rules that the legal profession as a whole may have promulgated. Nonetheless, the external rules—the codes of ethics developed by the American Bar Association and implemented by state and county authorities—have a practical significance over and above a lawyer's personal definition of ethics.⁵² These codes provide a barometer of the prevailing ethical views of the legal community, and once the judiciary or the legislature adopts one of these codes, violators are subject to reprimand, suspension, or disbarment.⁵³ Thus, the legal profession should be able to promote collegiality or any other desired behavior through the implementation of codes.

In all of the codes, however, the provisions explaining a lawyer's duty to extend professional courtesies to opposing counsel are written with a vagueness that undermines their practical enforceability.⁵⁴ Interestingly, the treatment of collegiality in the codes has decreased over time while the current outcry for collegiality in the courtroom may be at its highest.⁵⁵ In examining this trend, the following Section of this Comment will track the legal profession's treatment of collegiality in the American Bar Association's three codes: the 1908 Canons of Professional Ethics (Canons), the 1969 Model Code of Professional Responsibility (Code), and the 1983 Model Rules of Professional Conduct (Rules).

The original 1908 Canons represent the spirit of the classic

52. "[C]odes of ethics are a primary instrument for attaining . . . the dominant goals of any occupation: objective achievement and recognition. Codified standards can generate monetary and psychic benefits by enhancing occupational status and self-image; constraining competition; preserving autonomy; and reconciling client, colleague, and institutional interests." Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 689-90 (1981).

53. See C. WOLFRAM, MODERN LEGAL ETHICS § 3.5, at 117-18 (1986).

54. See *infra* notes 56-81 and accompanying text.

55. See *supra* note 2 and accompanying text.

model of advocacy,⁵⁶ speaking exclusively in aspirational rather than black-letter terms. Each of the thirty-two canons are followed by one or more paragraphs of lofty description. The Canons demand little, but they do provide guidelines which describe what a lawyer "should" do.⁵⁷ Canons 17 and 25 particularly urge collegial behavior.⁵⁸ Canon 17 warns that "[a]ll personalities between counsel" and "[p]ersonal colloquies between counsel which cause delay and promote unseemly wrangling" should be scrupulously avoided.⁵⁹ Canon 25 reflects the idea that it is unethical to take advantage of opposing counsel by insistence upon a technicality, "even when the law permits."⁶⁰ Today, however, the perceived ethical fortitude of this canon appears to have

56. The classic model portrays a lawyer whose loyalties are divided among himself, the court, and the client. Such a division improves the acceptability of collegial behavior among lawyers. See *supra* notes 16-28 and accompanying text. Canon 15, entitled "How Far a Lawyer May Go in Supporting a Client's Cause," affirmed that a lawyer should not be a slave to his client's goals:

The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability. . . . But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client . . . any manner of fraud or chicanery. *He must obey his own conscience and not that of his client.*

CANONS OF PROFESSIONAL ETHICS Canon 15 (1951) (emphasis added).

57. See, e.g., CANONS OF PROFESSIONAL ETHICS Canon 13 (1951) (A contract for a contingent fee "should be reasonable."); *id.* at Canon 17 (Ill feeling between clients "should not be allowed to influence counsel in their conduct and demeanor toward each other."); *id.* at Canon 18 ("A lawyer should always treat adverse witnesses and suitors with fairness . . ."); *id.* at Canon 22 ("The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness").

58. See *infra* notes 59-60 and accompanying text.

59. The full text of Canon 17 is as follows:

ILL FEELING AND PERSONALITIES BETWEEN ADVOCATES. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

CANONS OF PROFESSIONAL ETHICS Canon 17 (1951).

60. See *supra* note 28 and accompanying text. Canon 25 reads in full:

TAKING TECHNICAL ADVANTAGE OF OPPOSITE COUNSEL; AGREEMENTS WITH HIM. A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

CANONS OF PROFESSIONAL ETHICS Canon 25 (1951).

eroded significantly⁶¹ in light of the proliferation of hired guns who will relentlessly press a technical advantage in the courtroom.⁶² The Canons reflected the Bar's desire to maintain honor within the profession, but the lofty language of the Canons was a poor practical guide which proved difficult to enforce.⁶³

If the Bar was to rid itself of lawyers who abused the court system, the profession would require more precise statements of standards and disciplinary procedures.⁶⁴ Thus, the ABA House of Delegates adopted the Model Code of Professional Responsibility in 1969, and most states followed suit shortly thereafter.⁶⁵ The Code is divided into nine Canons, each overseeing Ethical Considerations (EC's), and Disciplinary Rules (DR's). The nine Canons are "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers."⁶⁶ The Ethical Considerations retain much of the lofty language of the original Canons, and they proclaim themselves to be "aspirational in character."⁶⁷ Unlike the original canons, however, the Disciplinary Rules are "mandatory in character" and state "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."⁶⁸

The Ethical Considerations are extensive, alone comprising more

61. The Canons served as the only ethical code for lawyers from 1908 until the adoption of the Code of Professional Responsibility in 1969. Contrary ethical views, however, may have prevailed for quite some time before the legal community responded. For example, as early as 1935, the Special Committee on Canons of Ethics noted that the Canons no longer represented the prevailing opinions of American lawyers, particularly in the areas of advertising and law listings. Armstrong, *supra* note 17, at 1068. Nonetheless, committees reported as late as 1958 that no changes in the Canons were necessary. *Id.* at 1069.

62. Judge Walter Schaefer complained:

The system has so changed that what we are doing in the courtroom is trying the conduct of the police and that of the prosecutor all along the line. Has there been a misstep at this point? at that point? You know very well that the man is guilty; there is no doubt about the proof. But you must ask, for example: Was there something technically wrong with the arrest? You're always trying something irrelevant. The case is determined on something that really has nothing to do with guilt or innocence.

Frankel, *supra* note 30, at 1037 n.16 (remarks of Judge Walter V. Schaefer).

63. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface (1983). "There was no organized interrelationship between the Canons and they often overlapped. They were not cast in language designed for disciplinary enforcement and many abounded with quaint expressions of the past." *Id.*

64. See REPORT OF THE COMMISSION ON PROFESSIONALISM, *supra* note 12, at 258; Armstrong, *supra* note 17, at 1069.

65. T. SHAFFER, *supra* note 17, at app. I-1. Because the ABA is a voluntary association of lawyers, it has no governmental status, and its codes have legal effect only when a state legislature or court adopts them. *Id.* at app. I-2.

66. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983).

67. *Id.*

68. *Id.*

material than the original Canons. They reflect significant concern for collegiality,⁶⁹ and notably, EC 7-38 provides an explicit request for collegial behavior among members of the profession:

A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. He should follow local customs of courtesy and practice, unless he gives timely notice to opposing counsel of his intention not to do so.⁷⁰

This provision urges opposing lawyers to de-emphasize non-substantive or technical issues, ostensibly to promote an accurate depiction of the dispute and a just outcome. Such togetherness on the part of opposing counsel is basic to collegiality, but it begins to undermine the adversary nature of the process. Nonetheless, several other EC's reinforce EC 7-38 in urging compliance with the tenets of the classic model, and in emphasizing that a lawyer can be collegial with his opponents without necessarily abrogating duties owed to his clients.⁷¹ The few disciplinary proceedings which involved violations of EC's demonstrate, however, that the enforceability of the EC's is limited.⁷² In reality, the only enforceable provisions of the Code are the Disciplinary Rules, which are considerably less concerned with collegiality.⁷³ Ultimately, the Ethical Considerations embody a wealth of classic and honorable legal principles which remain unenforceable.

69. See *infra* notes 70-71 and accompanying text.

70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-38 (1983). Also relevant is EC 7-37, which states: "In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers." *Id.* at EC 7-37.

71. See, e.g., *id.* at EC 7-10 (A lawyer's zealous representation does not militate against the concurrent obligation to treat all persons involved in the legal process with consideration.); *id.* at EC 7-23 (A lawyer has a duty to inform the judge of adverse legal authority.); *id.* at EC 7-36 (Zealous advocacy does not allow a lawyer to offend the dignity and decorum of court proceedings.); *id.* at EC 7-37 (Ill feeling between clients should not influence a lawyer's demeanor towards other lawyers.).

72. See C. WOLFRAM, *supra* note 53, § 2.6, at 59 ("'[A]spirational' as used in the Code means 'recommended but not required.' . . . Most jurisdictions have used the EC's in this nonbinding way."); see also M. FREEDMAN, *supra* note 10, at 128 (The violation of EC's "is not intended to result in disciplinary action."). But see Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 840 (Iowa 1979) ("[V]iolation of an ethical consideration, standing alone, will support disciplinary action."); C. WOLFRAM, *supra* note 53, at 59 & n.60 (noting that courts in Iowa, Colorado, Kentucky, New York, and South Dakota have enforced EC's).

73. DR 7-106(C)(5) mandates that a lawyer appearing in his professional capacity before a tribunal shall not "[f]ail to comply with known local customs or courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(5) (1983). It is intriguing that being uncollegial in this context is allowable, as long as the lawyer first gives notice to his opposing counsel.

Because the Code failed to adequately address a number of issues, many legal practitioners soon considered the Code to be ineffective.⁷⁴ According to one commentator, "the disparity between what [the Code's] Ethical Considerations exhorted and what its Disciplinary Rules required was fostering cynicism about the bar's aspirational norms and creating confusion in enforcement efforts."⁷⁵ The Code thus gave way to the Model Rules of Professional Conduct, which a divided board of ABA delegates ratified in 1983.⁷⁶ The Model Rules consist of fifty-two black letter rules followed by explanatory commentary, a structure that parallels that of the American Law Institute's Restatements of the Law. The Rules attempt to draw a bright line below which a lawyer's conduct may not fall, and they all but abandon the aspirational character of the Code. The ratification of the Model Rules generated a great deal of controversy over the substance of the document and the deletion of the aspirational language.⁷⁷ Several states, some of which had only recently adopted the Code, chose not to adopt the Rules.⁷⁸

The move to the Model Rules was intended to improve the enforceability of ethical mandates, yet the Rules have the concurrent effect of setting minimum standards that de-emphasize the desire for a standard of conduct above such minimums.⁷⁹ The Rules demand little in the area of collegiality, and no rule is explicit on the topic. Rule 3.5(c) states that a lawyer shall not "engage in conduct intended to disrupt a tribunal,"⁸⁰ and Rule 3.4(d) prohibits a lawyer from making a frivolous discovery request or failing to make a "reasonably diligent

74. See C. WOLFRAM, *supra* note 53, § 2.6, at 60. Wolfram emphasizes three aspects of the Code that troubled lawyers. First, the Code needed to be clearer and more responsive to "modern practice realities," particularly in the areas of advertising and solicitation. *Id.* Second, the Code was inadequate to address the problems of nonlitigation practice. *Id.* Finally, the Code was deficient in providing helpful guidance to the full spectrum of the legal community, such as solo practitioners in economically marginal practices. *Id.*

75. G. HAZARD & D. RHODE, *supra* note 25, at 100.

76. C. WOLFRAM, *supra* note 53, § 2.6, at 62.

77. *Id.*

78. For example, Colorado has not yet adopted the rules, citing as one area of concern the abolition of the ethical considerations. Recent Developments, *State Adoption of American Bar Association Model Rules*, 2 GEO. J. LEGAL ETHICS 327 (1988). Illinois, which at present is not considering the adoption of the Model Rules, only recently adopted the Model Code in 1980. *Id.* at 327-28 (1988). Other states that have not adopted the Rules include New York, Vermont, and California. *Id.* at 329, 331, 339.

79. In the opinion of the Commission on Professionalism, lawyers tend to look at nothing but the rules: "If conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level." REPORT OF THE COMMISSION ON PROFESSIONALISM, *supra* note 9, at 259.

80. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1989). The commentary states that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." *Id.* at Rule 3.5 comment.

effort to comply with a legally proper discovery request.”⁸¹ The only affirmative statements addressing collegiality exist in the Preamble: “A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. . . . [A] lawyer is also guided by personal conscience and the approbation of professional peers.”⁸² The Preamble, however, is equally as unenforceable as aspirational language in other codes.

When reading any of the three codes, it seems clear that their authors would gladly approve of collegial behavior from all members of the bar. Nonetheless, provisions that encourage collegiality have historically been difficult to enforce.⁸³ Whether the Code’s Ethical Considerations are merely aspirational, or the Rules are inapplicable, the results are the same: The ABA has yet to create a duty that demands professional courtesy between opposing counsel. The lawyer’s duty to his client is emphasized in the Canons, the Code, and the Rules, but the lawyer’s obligations to opposing counsel (an offshoot of his personal morals and his role as an officer of the court) have declined in their prominence in the codes.⁸⁴ That the codes do not demand collegiality is consistent with the inherent conflict between the philosophies of advocacy. Collegial behavior—professional courtesy—is difficult to categorize as anything other than optional behavior, particularly when being collegial is contrary to a client’s best interest. This is not to say that the ABA has conceded that the lawyer’s duty to his client outweighs his duty to the court. It may simply mean that the difficulties inherent in attempting to enforce duties of professional courtesy determine that such duties should not be included in the bright-line rules. Conversely, the lawyer’s duty of utmost loyalty to his client reaches the heart of the advocate’s duties, and must be included in any code.⁸⁵ Thus, the decreasing emphasis on collegiality reflected in the Model Rules may represent a necessary sacrifice in the implementation of an enforceable document, rather than a declaration that discourteous hired guns are favored.

81. *Id.* at Rule 3.4.

82. *Id.* at Preamble.

83. *See supra* notes 56-81 and accompanying text.

84. The black letter quality of the Model Rules is an attestation to the fact that fringe obligations like courtesy are no longer high on the ABA’s agenda insofar as inclusion in a code is concerned. In fact, “the American bar’s history of codification reflects diminishing interest in ethical aspirations and a greater reliance on minimum prohibitions.” G. HAZARD & D. RHODE, *supra* note 25, at 93 (citing Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953).

85. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1989) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation . . .”).

IV. THE CASES

Case law provides the final block of background information that should be reviewed prior to an exploration of the actual value that collegiality may bring to the legal profession. This Section presents case law in which either the lack of professional courtesy influenced the outcome of a case or a judge felt compelled to address the issue of professional courtesy in a written opinion. The cases that bear close examination concern situations in which a lawyer's perceived duties to his client clash with opportunities to extend professional courtesies.⁸⁶ This Section examines such cases in the areas of default judgments and time extensions.

The law of default judgments is rich with debate concerning professional courtesy.⁸⁷ Before a lawyer elects to move for a default judgment, he may choose to notify opposing counsel of his intent to do so. Similarly, after the court enters a default judgment, the lawyer may choose to notify opposing counsel. In either case, some lawyers consider notice to the defaulting side to be a common courtesy which should be extended in this inherently *ex parte* procedure.⁸⁸ A lawyer who is absolutely loyal to his client, however, may perceive a conflict in extending this courtesy. For example, suppose local law provides that the default cannot be challenged after a certain time period. Although the merits of the case remain untried, a party could conceivably win a case by obtaining a default that remains uncontested beyond the expiration of the statutory time limit. If the lawyer were never to notify opposing counsel of the default, opposing counsel might fail to learn of the default until after the statutory time limit had expired. Such uncollegial behavior may indeed serve the ultimate goals of the client.⁸⁹

86. See *infra* notes 87 & 121 and accompanying text. In contrast, the less relevant cases concern, for example, verbal abuse of opposing counsel. Most instances of verbal abuse concern lawyers who are not so much emphasizing their loyalty to the client as being impolite. See *supra* note 3.

87. See, e.g., *Bellm v. Bellia*, 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389, 390 (1984); *Caribbean Agencies, Inc. v. Agri-Export, Inc.*, 384 So. 2d 281, 284 (Fla. Dist. Ct. App. 1980); *Resto v. Walker*, 66 Ill. App. 3d 733, 741, 383 N.E.2d 1361, 1367 (1978); *George F. Mueller & Sons, Inc. v. Ostrowski*, 19 Ill. App. 3d 973, 978-79, 313 N.E.2d 684, 688-89 (1974); *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 892-95 (Mo. 1987) (en banc); *Burke v. Rachau*, 262 Or. 323, 334-42, 497 P.2d 1154, 1159-62 (1972); *Hardware Wholesalers, Inc. v. Swope*, 309 Pa. Super. 321, 325-30, 455 A.2d 180, 182-84 (1983); *Ashton v. Ashton*, 257 Pa. Super. 134, 138-40, 390 A.2d 282, 284-85 (1978); *Silverman v. Polis*, 230 Pa. Super. 366, 370-71, 326 A.2d 452, 454-55 (1975); see also *supra* note 1 and accompanying text.

88. See *supra* note 1 and accompanying text.

89. The extension of the courtesy is particularly important when the lawyer for the defaulting party has a valid excuse for not attending the trial or for not learning of the subsequent default. If, however, the lawyer's negligence contributed to the default, then the

This example demonstrates the tension between the enforcement of technical rules and the desirability of a trial on the merits. In the classic realm of truth-seeking, to take a default is not honorable under most circumstances, particularly when notice is not provided to the opposing side.⁹⁰ For the most part, the refusal to extend the courtesy of notification is a significant factor in deciding to open a default judgment.⁹¹ In the 1974 case of *Silverman v. Polis*,⁹² the court vacated such a default judgment, citing EC 7-38 and DR 7-106(C)(5).⁹³ The majority's opinion concluded with the following admonition:

[I]t is patently obvious that attempts to utilize every niggling procedural point for maximum advantage demean the legal profession, reducing its procedures to a vulgar scramble. No doubt it is for this reason that in so many cases, notice of intent to take a default judgment, or the lack thereof, is properly made a significant factor in reaching a just decision.⁹⁴

The court's reasoning in one sense was simply that legal proceedings are meant to argue the facts instead of the procedures. Interestingly, the court not only rested its argument on truth-seeking, but it also mentioned that the practice of not affording notice demeaned the legal profession.⁹⁵

Although recent cases recognize the customary courtesy of notifying the opposing side of a default, the lack of notice does not always command that a default judgment be set aside.⁹⁶ "While as a matter of professional courtesy counsel should have given notice of the impending default, and we decry this lack of professional courtesy, . . . counsel was under no legal obligation to do so."⁹⁷ An excellent example of such modern thinking appears in *Sprung v. Negwer Materials, Inc.*,⁹⁸ recently decided by the Supreme Court of Missouri. In a

judgment might remain in spite of any lack of courtesy on the part of the opposing side. See *Bellm*, 150 Cal. App. 3d at 1038, 198 Cal. Rptr. at 390.

90. Traditionally, it is desirable to have the case decided on the facts that brought it to the courthouse, not on extraneous technicalities. See *supra* notes 21-22 and accompanying text.

91. See, e.g., *Caribbean Agencies, Inc. v. Agri-Export, Inc.*, 384 So. 2d 281 (Fla. Dist. Ct. App. 1980); *Resto v. Walker*, 66 Ill. App. 3d 733, 383 N.E.2d 1361 (1978); *Silverman v. Polis*, 230 Pa. Super. 366, 326 A.2d 452 (1974).

92. 230 Pa. Super. 366, 326 A.2d 452 (1974).

93. *Id.* at 370-71, 326 A.2d at 454. The code provisions cited by the court are the two provisions in the Model Code that encourage collegiality. See *supra* notes 53-54 and accompanying text.

94. *Silverman*, 230 Pa. Super. at 371, 326 A.2d at 454-55.

95. *Id.*, 326 A.2d at 455. This concern for the image of the legal profession may account for substantial support for collegial behavior. See *infra* notes 145-52 and accompanying text.

96. See, e.g., *Bellm v. Bellia*, 150 Cal. App. 3d 1036, 198 Cal. Rptr. 389 (1984); *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883 (Mo. 1987) (en banc).

97. *Bellm*, 150 Cal. App. 3d at 1038, 198 Cal. Rptr. at 390 (citation omitted).

98. 727 S.W.2d 883 (Mo. 1987) (en banc).

tort action, the plaintiff obtained a default judgment for \$1,500,000 against the defendant.⁹⁹ At the instruction of his client, the plaintiff's attorney had waited one month—the duration of the state statutory period allowed for contesting a default judgment—before he informed the defendant of the default.¹⁰⁰ On appeal, the majority remanded the case to determine whether the trial court should set aside the default on equitable grounds.¹⁰¹

The concurring and dissenting opinions in *Sprung* wrestled with the issue of professional courtesy, an issue which had remained untouched by the majority.¹⁰² The concurrence argued that “to require an attorney to inform his adversary of a default stands athwart the attorney’s duty to zealously represent his client.”¹⁰³ The concurrence preferred a bright-line rule that “when an attorney is specifically instructed by the client, the attorney must follow these instructions, if lawful, with reasonable care and promptness, or risk possible liability for damages proximately caused by the attorney’s failure.”¹⁰⁴ Philosophically, this stance is in conformity with the modern model of advocacy, placing greater emphasis on attorney-client loyalties and discouraging any professional courtesies unless the client agrees.

In his dissenting opinion, Judge Donnelly represented the classic model: “[A] lawyer does not inevitably violate his obligation to seek the lawful objections of his client when he treats his opposing counsel with courtesy and consideration.”¹⁰⁵ Consequently, Judge Donnelly fully agreed with the trial court in setting aside the default, an action to correct “what must be considered a miscarriage of justice.”¹⁰⁶ In contrast to the majority, Judge Donnelly preferred to view the case not as a dilemma for the lawyer, but as an unfortunate misdeed on the part of the client who seeks to conceal the default from his opponent.¹⁰⁷ He posed this question: Had the lawyer “acted as a professional and not as a hired representative who did solely the bidding of

99. *Id.* at 885.

100. *Id.* at 885, 893.

101. *Id.* at 890.

102. It is significant that the majority chose not to decide the courtesy issue. The majority wrote chiefly about the procedural requirements necessary to open a default judgment, avoiding (perhaps cleverly) the rather difficult issue of courtesy. *Id.* at 884-90. By not making courtesy an issue in the majority opinion, the court left the task of discouraging discourtesy to the dissenting judge. *Id.* at 893 (Donnelly, J., dissenting).

103. *Id.* (Rendlen, J., concurring).

104. *Id.*

105. *Id.* (Donnelly, J., dissenting). The dissenting judge went so far as to admit to being “somewhat old-fashioned.” *Id.*

106. *Id.* at 894.

107. *Id.*

his client, would/could this Court have protected him?"¹⁰⁸ Answering his own question, Judge Donnelly argued that the issue concerns the equities due the parties, rather than the attorneys. If the plaintiff demanded concealment by abrogation of professional courtesies, then equity should favor the defendant.¹⁰⁹

In *Hardware Wholesalers, Inc. v. Swope*,¹¹⁰ the Superior Court of Pennsylvania considered the case of an attorney who obtained a default judgment on behalf of his client because the opposing attorney had failed to answer the complaint in a timely manner. The plaintiff's lawyer had granted an extension of time to answer, and his opposing counsel responded in writing: "I would expect to have [the answer] up to you by next Thursday. If there are any problems with this, let me know."¹¹¹ The answer was not filed by the date projected in the memo, and the lawyer then moved for and received a default judgment on the following Tuesday; he had not attempted to communicate with opposing counsel.¹¹² Upon denial of its motion to open the judgment, the defaulting party appealed.¹¹³ On appeal, the Superior Court construed the memo against the drafting attorney and refused to open the judgment, never raising the issue of professional courtesy.¹¹⁴

The dissent declared that the majority opinion "rewards discourtesy."¹¹⁵ It argued that construing a writing against its author is only appropriate when parties are engaged in a bargaining struggle:

But that principle is most inappropriate . . . to instill and enforce the habits of common courtesy between counsel. Counsel discussing a mutually agreeable extension are not adversaries, engaged in a bargaining struggle. Indeed, the adversary system won't and can't work . . . unless opposing counsel have the maturity and self-

108. *Id.*

109. *Id.*

110. 309 Pa. Super. 321, 455 A.2d 180 (1983).

111. *Id.* at 323, 455 A.2d at 181.

112. *Id.*

113. *Id.*

114. *Id.* at 323-35, 455 A.2d at 181-82. The local rule provided that if a written agreement for an extension of time specified a time within which the required action was to be taken and a default occurred thereafter, default could be entered without notice. *Id.* at 326, 455 A.2d at 182. The court noted that the extension specified Thursday as a deadline and that the attorney did not comply with the deadline. Therefore, the court held that default could be entered without notice. *Id.* at 325, 455 A.2d at 182.

However, did the writing really specify a time or merely suggest one? In either case, the attorney who moved for the default could have chosen to communicate with opposing counsel, purely out of professional courtesy, if he so desired. He readily agreed to the first extension, but he may have considered a call to the opposing side concerning the violation of the deadline as undermining his client's right to a default judgment.

115. *Id.* at 325, 455 A.2d at 182 (Spaeth, J., dissenting).

control to know when they should be adversaries and when they shouldn't be.¹¹⁶

The dissent reflects dissatisfaction with the modern movement toward lawyers battling over rules, rather than clients actively resolving disputes. If a lawyer has no legal duty to inform the opposing counsel of a default judgment, and such judgment will be sustained on appeal, the lawyer's only incentive to inform his opposing counsel of a default is the fortification of his professional reputation as a fair player.¹¹⁷

In *Hardware Wholesalers*, the plaintiff's attorney granted the opposition an extension of time to answer the complaint.¹¹⁸ Only after the defendant's attorney failed to meet his new, self-imposed deadline did the plaintiff's attorney obtain a default judgment.¹¹⁹ A supporter of the modern model of advocacy might argue that by granting any extension, plaintiff's attorney reduced his client's opportunity to obtain a default judgment or take advantage of a hastily prepared answer. This argument is weakened, however, because default judgments are not favored and professional courtesy is.¹²⁰

What if a time extension effectively denied a litigant the right to

116. *Id.* at 328, 455 A.2d at 183.

117. The lawyer's desire to maintain a favorable reputation within the legal community may be a powerful check on professional discourtesy. Sharswood has stated:

Nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public. The foundations of the reputation of every truly great lawyer will be discovered to have been laid here. Sooner or later, the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar The good opinion and confidence of the members of the same profession, like the King's name on the field of battle, is "a tower of strength;" it is the title of legitimacy.

G. SHARSWOOD, *supra* note 6, at 75. Sayler provided a current assessment:

Hardball litigation tends to dry up those sources of business generated by word of mouth. Every time a lawyer handles a case, he is being judged by a multitude of colleagues. The impressions they form often bear directly on future business prospects. All of them will be in a position to say, "I have worked with so-and-so personally and I can vouch that he is a world class jerk," and refer business accordingly.

Sayler, *supra* note 7, at 81.

118. *Hardware Wholesalers*, 309 Pa. Super. at 322, 455 A.2d at 181.

119. *Id.*

120. See, e.g., *INVEST Fin. Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 397-98 (6th Cir. 1987) ("strong preference for trials on the merits" and "harsh sanction of default"); *Ashton v. Ashton*, 257 Pa. Super. 134, 139, 390 A.2d 282, 285 (1978) ("The purpose of the rules in authorizing the entry of default is to prevent a dilatory defendant from impeding the plaintiff in establishing his claim. The rules are not primarily intended to provide the plaintiff with a means of gaining a judgment without the difficulties which arise from litigation." (quoting *Moyer v. Americana Mobile Homes, Inc.*, 244 Pa. Super. 441, 445, 368 A.2d 802, 804 (1976))).

raise an affirmative defense under the statute of limitations? In *Sea-Land Service, Inc. v. R.V. D'Alfonso Co.*,¹²¹ a freight forwarder brought an action to recover freight charges. After the plaintiff filed the complaint, the parties agreed in writing to extend the due date for the defendant's response.¹²² The defendant then filed an answer *and counterclaim* for damages to the goods.¹²³ The plaintiff then asserted the statute of limitations, which had expired one week before the defendant had filed his counterclaim.¹²⁴ The trial court held that the defendant had failed to meet the burden of showing that the plaintiff had intended to waive the statute of limitations. The language of the agreement was chosen by the defendant, and therefore had to be construed against him.¹²⁵

On appeal, the Fifth Circuit reversed by a 2-1 margin, founding its decision on the principles of professional courtesy.¹²⁶ The dissent, however, considered the agreement to be vague as to the statute of limitations; it argued that the statute should apply.¹²⁷ The position of the dissent in *Sea-Land Service* is consistent with that of the majority in *Hardware Wholesalers*. Attorneys, rather than clients, are envisioned as adversaries, and objection is made to the idea that the defendant's attorney was "led down the garden path."¹²⁸ In the *Sea-Land Service* dissent's view, the defendant's attorney should have known the law, and he was therefore responsible for preparing for any of its eventualities in relation to the counterclaim. The dissent argued:

Why is not defendant's lawyer, who *drafted* the stipulation, in the best position to anticipate his own statute of limitations problem associated with the bringing of what is, in essence, a separate lawsuit? Why should not he, rather than plaintiff's lawyer be expected to anticipate the issue by appropriate language?¹²⁹

The dissent also argued that once the defense had accrued, the plaintiff's attorney had an ethical obligation to plead the statute of limitations under EC 7-7 of the Model Code, which prohibits a lawyer from

121. 727 F.2d 1 (1st Cir. 1984).

122. *Id.* at 1-2. The stipulation read: "[I]t is hereby stipulated . . . that the time within which defendant *may respond* to plaintiff's Complaint be extended" *Id.* The uncertainty in this case concerned whether a "response" refers to an answer, or includes both an answer and a counterclaim. *Id.* at 4-5.

123. *Id.* at 2.

124. *Id.* at 1-2.

125. *Id.*

126. *Id.* at 3-4.

127. *Id.* at 4 (Campbell, C.J., dissenting).

128. *Id.* at 5.

129. *Id.* at 6.

waiving a client's affirmative defenses.¹³⁰ Thus, the dissent exhibited the modern model approach by placing foremost weight on serving the client loyally. This approach does not favor professional courtesy if it in any way diminishes a client's position.¹³¹

The majority, by contrast, did not consider the plaintiff's lawyer to have waived any accrued defenses.¹³² Looking to the intent of the statute of limitations, the majority noted that the statute does not address money owed, but is instead intended as a protection against stale claims.¹³³ The court stated: "Had counsel not consented to a late filing, this claim would have been timely filed. We cannot share the thought that it would be unethical not to assert a defense that would never have existed but for counsel's conduct."¹³⁴ The majority distinguished the situation of waiving an accrued defense as a matter of courtesy from an extension of a courtesy "when the defense had not yet accrued, and never would have accrued had the courtesy not been extended."¹³⁵ The court further noted that its decision did not "substantial[ly] prejudice" any rights, but rather prevented a windfall for the plaintiff and a loss for the defendant.¹³⁶ The court concluded with rhetoric directly in line with the principles of the classic model of advocacy: "Must a lawyer assert technical constructions of what was extended as a courtesy, when, later, a substantive advantage for his client is perceived? To do so could well be against a lawyer's personal interest in his reputation with the bar."¹³⁷

V. THE VALUE OF COLLEGIALLY

This Comment has explored collegiality by focusing on the inherent conflict between a lawyer's duty of loyalty to his client and a lawyer's moral duty to promote truth and accuracy in legal proceedings. Proponents of the classic model of advocacy see truth and accuracy as

130. *Id.* at 5. EC 7-7 reads:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1983).

131. *See supra* note 32 and accompanying text.

132. *Sea-Land Service*, 727 F.2d at 3.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

moral imperatives in the judicial process.¹³⁸ Because collegiality acts as a mechanism for lawyers working together to address legal and factual issues that are substantive rather than technical, the classic model equates collegiality with an accurate depiction of the dispute.¹³⁹ Furthermore, because collegiality is compatible with lawyer self-interest, and this self-interest includes a commitment to justice as truth-finding, the classic model perceives collegiality as promoting correct results. Moreover, the cooperation of lawyers with respect to technical and superficial issues also saves litigants the time and expense required to argue such issues. Such savings arguably improve the quality of the representation with regard to the merits because increased resources are available to the litigants. In the words of a poetic judge, "justice delayed, and justice obtained at excessive cost, is often justice denied."¹⁴⁰ Thus, according to the classic model of advocacy, collegiality improves the judicial system because more legal proceedings will reach just results at a lower cost.

The discussion of the modern model presented in Section II(B) of this Comment provides only a small survey of available counterarguments.¹⁴¹ Some commentators argue that truth and accuracy are neither the goals nor the achievements of the judicial system.¹⁴² Others simply claim that a lawyer's mission is to protect every legal right his client has or may have, regardless of how technical or unsavory the origins of the right may seem.¹⁴³ The argument has been set forth as follows: "Lawyers have to assert legal interests unsupported by moral rights all the time; asserting legal interests is what they do, and everyone can't be right on all the issues."¹⁴⁴ If such is the case, then professional courtesy, although desirable in some contexts, is *not*

138. The classic model would further dictate that when professional and moral obligations conflict, moral obligation should take precedence. See Luban, *supra* note 14, at 118.

139. See *supra* notes 22-25 and accompanying text.

140. *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988). This is a modified version of the often used quotation "justice delayed is justice denied." See generally L. DOWNIE, *JUSTICE DENIED* (1971) (criticizing the long delays in the judicial system).

141. See *supra* notes 29-41 and accompanying text.

142. See, e.g., A. DERSHOWITZ, *supra* note 14, at xix. Professor Dershowitz notes:

The courtroom oath—"to tell the truth, the whole truth, and nothing but the truth"—is applicable only to witnesses. Defense attorneys, prosecutors, and judges don't take this oath—they couldn't! Indeed, it is fair to say the American justice system is built on a foundation of *not* telling the whole truth.

Id. From a more scholarly perspective, Monroe Freedman remarks that "[t]he 'ordinary process of law' . . . unquestionably includes the constitutional right to suppress relevant and truthful evidence that has been obtained in violation of constitutional rights—even though a wise and informed judgment might thereby be sacrificed." M. FREEDMAN, *supra* note 10, at 32.

143. See *infra* note 150.

144. Luban, *supra* note 14, at 89.

a legal obligation of a lawyer and should *never* intervene to override a client's existing or potential legal rights. Supporters of the modern model argue that because professional courtesy can have the effect of undermining legal rights, litigants are better served where collegiality is not available to foil the integrity and honor of loyal representation.¹⁴⁵

Legal scholars continue to debate whether the most appropriate vision of the adversary process is the modern, the classic, or some other model.¹⁴⁶ The answer, if indeed there is one, is beyond the scope of this Comment. The focus here is on whether the legal profession and society as a whole are better served by collegial lawyers. This Comment has partially investigated this question, albeit from polarized viewpoints. A better method of inquiry for the sake of reaching a conclusion, however, may be to find some common ground that unifies the opposing sides, rather than to focus on the differences that polarize them.

For example, proponents of both the classic and the modern models would presumably agree that the legal profession is currently faced with a significant image crisis.¹⁴⁷ The image problem can be traced to a number of sources: cases decided on technicalities instead of on the merits; lawyers who seem interested in promoting their own interests over those of society or the profession; and the ever-increasing amount of time and expense required to gain access to our judicial system.¹⁴⁸

The modern model, with its disdain for collegial behavior, seems to present the image conscious with greater difficulties in this regard than does the classic model. It is not likely that a legitimate dispute's

145. See *infra* note 152 and accompanying text.

146. See generally Luban, *supra* note 14, at 83; Schneyer, *Modern Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529; Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 29. Perhaps Professor Schneyer described the situation best:

Whatever may be the case in other fields, legal ethics has no paradigm, only some fragmentary conceptions of the lawyer's role vying inconclusively for dominance—the lawyer as “hired gun,” to be sure, but the lawyer also as “officer of the court,” “counsel for the situation,” “friend,” “minister,” and so forth. As a result the organized bar, for all its attention to ethics rules, has been able to do very little “predetermining” of the individual lawyer's responsibilities, at least when it comes to reconciling his duties to clients and to third parties.

Schneyer, *supra*, at 1569.

147. Every lawyer, regardless of ethical orientation, is currently experiencing a very low approval rating from the public. The Committee on Professionalism recently reported that only six percent of corporate users of legal services rated all or most lawyers as deserving to be called “professionals”; only seven percent saw professionalism increasing among lawyers. REPORT OF THE COMMISSION ON PROFESSIONALISM, *supra* note 12, at 254 & n.22.

148. *Id.* at 251-54.

obfuscation, occasioned by the gamesmanship of lawyers, will promote respect for the legal profession in the eyes of the lay public.¹⁴⁹ It is much easier for the lay public to observe that the legal system failed to punish a litigant who clearly committed a wrong, or failed to compensate the wronged party, than to appreciate and understand the societal benefits that result from resolving a dispute in explicit accordance with the law.¹⁵⁰ It is equally as convenient for the public to envision the lawyer as one interested more in personal gain than in any more honorable purpose.¹⁵¹

In response, proponents of procedural justice would claim to be answering to a higher calling by steadfastly protecting every legal right a client may have.¹⁵² Arguably, even if the image of the legal profession suffers, the integrity of the adversary process must be maintained and protected from an "old boy" network that may exist among opposing lawyers. This point deserves extra attention because a serious image problem might also develop from the so-called "old boy" network, if the public were to perceive overly collegial lawyers as colluding and thereby undermining litigants' rights.¹⁵³ Indeed, just

149. Frankel argued that "[o]ur relatively low regard for truth-seeking is perhaps the chief reason for the dubious esteem in which the legal profession is held." Frankel, *supra* note 30, at 1040. Moreover, "[public opinion data indicates] that lawyers are especially disliked because they manipulate the legal system in the interests of particular clients, without regard to the common, universal values of right and wrong." Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 386 (1987).

150. One benefit that may be easy to understand is the idea that the American legal system would rather let many of the guilty go free in order to assure that the innocent are not locked up. See A. DERSHOWITZ, *supra* note 14, at xviii.

151. The Committee on Professionalism reported that, in their opinion, many of the problems with the poor professional image of the legal profession could be addressed by subordinating a lawyer's drive to make money as a primary goal of practice. REPORT OF THE COMMISSION ON PROFESSIONALISM, *supra* note 12, at 300.

152. Charles Fried argues that "it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests—that it is right that a professional put interests of his client above some idea, however valid, of the collective interest." Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1066 (1976). Another proponent of the modern model, Monroe Freedman, states:

The client's interests are not only paramount to those of the lawyer, but are superior to "the law's" long-range interests. In short, [it is wrong to assert] that there is some "concern for history and institutions" that a lawyer must take into account before advancing a claim on behalf of a client.

M. FREEDMAN, *supra* note 10, at 12.

153. See Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooption of a Profession*, 1 LAW & SOC'Y REV. 15 (1967). Blumberg, a sociologist, conducted a study of the legal institution. In contrast to the hired guns which the legal profession currently perceives, Blumberg saw the profession as inherently subject to collusion:

Close and continuing relations between the lawyer "regular" and his former colleagues in the prosecutor's office generally overshadow the relationship

as a disdain for collegiality may hurt the lawyer's image, too much collegiality will have a similar result. Consequently, any call for increased collegiality must guard against this possibility. Supporters of the modern model of advocacy can derive a sense of honor by pursuing what in their minds is the just course, but that course does not address the low esteem that much of today's society holds for lawyers. Even if the judicial process reaches justice more often in the absence of collegiality, all members of the legal profession still suffer from the backlash of a negative image. Yet, it is likely that a middle ground could be reached where professional courtesy would be prevalent, litigators would refrain from Rambo tactics, and the public image of lawyers would consequently improve.¹⁵⁴

At best, the image issue clouds the conflict between the classic and modern views, both of which have strong ethical arguments. The classic model makes an ethical issue out of resolving disputes upon issues other than the merits, while the modern model makes an ethical issue out of the lawyer's choice to abrogate clients' rights. Unfortu-

between the regular and his client. The continuing collegueship of supposedly adversary counsel rests on real professional and organizational needs of a *quid pro quo*, which goes beyond the limits of an accommodation or *modus vivendi* one might ordinarily expect under the circumstances of an otherwise seemingly adversarial relationship. Indeed, the adversary features which are manifest are for the most part muted and exist even in their attenuated form largely for external consumption. The principals, lawyer and assistant district attorney, rely upon one another's cooperation for their continued professional existence, and so bargaining between them tends to be "reasonable" rather than fierce.

Id. at 24.

Professor Schneyer recently characterized Blumberg's study as finding the following:

[D]efense lawyers are understandably tempted to sacrifice individual clients, or even their clients as a class, in order to maintain good personal relations with the prosecutors, police, and court and jail personnel with whom they must deal on a long term basis. Moreover, they sometimes succumb to the temptation, foregoing meritorious defenses to avoid antagonizing busy prosecutors and judges, and even acting as "double agents" for the criminal justice bureaucracy by advising clients to cop pleas when it might not be in their interest and by "cooling out" clients who fail at first to see the wisdom of the advice.

Schneyer, *supra* note 144, at 1544-45 (citation omitted).

Under this alternative, less prevalent characterization of the modern lawyer's motivations, ethical codes do not demand collegiality because "the provisions . . . serve largely as a corrective against indifferent advocacy by lawyers . . . whose personal interests—rather than scruples—are stacked against clients." *Id.* at 1545; see also *id.* at 1546-47 (noting the absence of hired guns and sharp practice in small communities).

154. Several factors point to the probable existence of such a middle ground. Although public opinion has rarely favored lawyers, indications are that the image of the lawyer has declined of late, as both Rambo litigation and disdain for the classic model of advocacy increase. If these factors are even remotely related, a reasonable increase in collegiality and professional courtesy could be tolerated before the negative implications of collusion take root. Until such a threshold is reached, most commentators have argued that collegiality will benefit lawyers and clients.

nately, the image problem still remains in both cases. Although lawyers who do not regularly extend professional courtesies may in fact be unconcerned with the damage done to the profession, more are likely to claim that the justice due litigants is more important than the profession's gross public approval rating. It may be true that the strict application of procedural laws within a framework of zealous advocacy creates fewer ethical problems than allowing lawyers to determine which of their client's rights and requests are honorable. The question of whether collegiality among lawyers improves the quality of service to the public is clearly perplexing. It is at least arguable, however, that even if discourteous hired guns do provide better services to the individual client, they are not helping the public image of the legal profession.

Some jurisdictions have addressed the professional courtesy problem by moving the dispute out of ethics and morality and into black letter law. In *Dondi Properties Corp. v. Commerce Savings and Loan Association*,¹⁵⁵ the United States District Court for the Northern District of Texas responded decisively to two cases burdened by pre-trial motions for sanctions concerning discovery abuse, misrepresentation of facts, and improper withholding of documents.¹⁵⁶ The court convened en banc to establish standards of "litigation conduct" for attorneys appearing in civil actions in the district.¹⁵⁷ The court adopted eleven resolutions¹⁵⁸ modeled after the Dallas Bar Association's recently ratified "Guidelines of Professional Courtesy" and

155. 121 F.R.D. 284 (N.D. Tex. 1988).

156. *Id.* at 285.

157. *Id.* The court cited numerous reasons for taking such relatively severe action. See *supra* note 2.

158. The court adopted the following resolutions:

- (A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.
- (B) A lawyer owes, to the judiciary, candor, diligence, and utmost respect.
- (C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.
- (D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.
- (E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.
- (F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.
- (G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

"Lawyers Creed."¹⁵⁹ Most of the resolutions feature mandatory language such as "a lawyer owes" or "a lawyer must," and all specifically promote collegial behavior. For example, Resolution C states that "[a] lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves."¹⁶⁰ Resolution F is directed at clients, stating that "[a] client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct."¹⁶¹ These two provisions alone might have prevented the disputes in *Sprung*¹⁶² and *Hardware Wholesalers*.¹⁶³ Unlike the aspirational provisions of the Model Code, or the inapplicable Model Rules, the *Dondi* code uses explicit language which the court pledged to enforce.¹⁶⁴ The court warned violators to expect sanctions, including "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."¹⁶⁵

The adoption of strict codes of courtesy could provide an answer to the conflict that collegiality inspires. A mandatory code could satisfy both sides of the collegiality dispute by transcending moral issues and concentrating strictly on legal ones. Such a code of professional courtesy would defuse any argument that posits that collegial behavior has the power to abrogate the legal rights of a litigant. Lawyers would no longer be permitted to treat professional courtesy as an

(H) A lawyer should not use any form of discovery, or scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Dondi, 121 F.R.D. at 287-88.

159. Item 2 in the Dallas Bar Association Lawyer's Creed reads as follows: "In all dealings with fellow members of the Bar, I will be guided by a fundamental sense of integrity and fair play; I know that effective advocacy does not mean hitting below the belt." *Id.* at 294.

160. *Id.* at 287.

161. *Id.* at 288.

162. *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883 (Mo. 1987); see *supra* notes 98-110 and accompanying text.

163. *Hardware Wholesalers, Inc. v. Swope*, 309 Pa. Super. 321, 455 A.2d 180 (1983); see *supra* notes 111-19 and accompanying text.

164. *Dondi*, 121 F.R.D. at 288.

165. *Id.* (quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)).

optional behavior that might weaken a litigant's position because a position that could only be obtained through discourtesy would no longer be a *legally valid* position. The supporters of procedural justice would be satisfied because the procedures themselves would demand, rather than request, courtesy. Similarly, hired guns would be precluded from using gamesmanship to fortify their clients' positions. This "hybrid" model, blending the classic regard for decorum with the modern preference for procedural exactitude, could yield some important benefits. For example, if a code of courtesy brought collegiality back to the courtroom, trials would theoretically cost less and reach more accurate results. In addition, the legal profession could begin to address those aspects of the current image crisis that are traceable to the demise of collegiality. The profession could begin to regain lost esteem, and lawyers could begin to improve their reputations.

This discussion, however, is largely theoretical. The first step towards examining these hypotheses about the results of bringing collegiality back into prominence within the legal profession is to calm the opposing factions of the collegiality dispute. Explicit codes of professional courtesy may be the answer if courts are willing to vigorously enforce them. Although the ultimate success of the *Dondi* code must be judged over time, a few other jurisdictions have completed or are currently considering codes of courtesy.¹⁶⁶ Whatever positive effects codes of courtesy are able to generate, lawyers themselves must realize that collegiality in and of itself is not an enemy. Up to the threshold of the previously described "middle ground,"¹⁶⁷ professional courtesies extended between lawyers advance the idea that legal proceedings are fair. Such a realization will benefit the entire legal profession, which is in fact what collegial behavior is meant to accomplish.

166. In fact, in response to *Dondi*, the Texas Supreme Court and the Texas Court of Criminal Appeals have recently adopted the "Texas Lawyer's Creed—A Mandate for Professionalism." See *Texas Lawyer's Creed*, N.Y. Times, Dec. 1, 1989, at Y27, col. 2; see also Marcotte, *Reining in Rambo*, A.B.A. J., Nov., 1989, at 43. Under the Creed, lawyers shall "not quarrel over matters of form or style, but . . . will concentrate on matters of substance." *Texas Lawyer's Creed*, N.Y. Times, Dec. 1, 1989, at Y27, col. 2. Furthermore, lawyers are to advise clients "that civility and courtesy are expected and not a sign of weakness." *Id.* Other cities and states that have adopted or are currently considering codes of courtesy include Georgia, Kentucky, Los Angeles, New York, Cleveland, Nashville, and Little Rock. See Samborn, *supra* note 2, at 22, col. 3. Smaller jurisdictions such as Dade County, Florida are considering adopting similar codes. See *Civility*, Dade County B.A. Newsl., July 1, 1989.

167. See *supra* note 154 and accompanying text.

VI. CONCLUSION

Many of today's lawyers do not extend professional courtesies to opposing counsel. The established legal community is dissatisfied with this lack of professional courtesy for two major reasons: (1) a lack of collegiality translates into fewer accurate outcomes on the merits; and (2) a lack of collegiality tarnishes the image of the legal profession. Scholars and judges alike have questioned the former postulate, but not the latter. The current codes of ethics do not provide a cure. The ABA codes have urged collegiality since 1908, yet the codes have never carried the power of enforcement necessary to restrain those lawyers who must be discourteous. The codes have lacked enforceability not so much because they are vague as to collegiality, but rather because they are based on a morality to which every lawyer does not subscribe. In fact, judges interpreting the same code differ as to when each provision should apply.¹⁶⁸ The proposed solution to the problem is the promulgation of painfully explicit codes of professional courtesy which impose specific duties of courtesy upon attorneys. The legal obligation inherent in these codes may help to resolve the moral dilemmas that trouble lawyers who believe that collegiality can undermine a litigant's tactical position. Regardless of how lawyers currently perceive their duties to clients, public respect for the judicial process remains low. If codes of professional courtesy can work to bring collegiality back into prominence, the public may begin to develop greater respect for each lawyer, and for the legal profession as a whole.

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168. See, e.g., *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 890-93 (Mo. 1987) (Rendlen, J., concurring); *id.* at 893-901 (Donnelly, J., dissenting).