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Expectations in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations

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EXPECTATIONS IN THE MIRROR: LAWYER PROFESSIONALISM AND THE ERRORS OF MANDATORY ASPIRATIONS

KEITH W. RIZZARDI*

ABSTRACT

For years, Florida has been a leader in the professionalism movement, and state leaders have created new documents and standards to make professionalism enforceable. The rest of the nation can learn from Florida's errors, because the Sunshine State has blurred the lines between professionalism and legal ethics. In fact, history shows that Florida is simply repeating the same mistakes that have been addressed time and time again as our system of legal ethics has evolved. At times, Florida's professionalism concepts even contradict themselves. Indeed, from a jurisprudential perspective, even H.L.A. Hart and Lon Fuller—who otherwise disagreed over the morality of law—would probably agree that Florida's attempt to mandate professionalism is fundamentally flawed. This Article calls for more realistic expectations in the professionalism dialogue and offers five recommendations.

First, the content of the professionalism documents—and the “Professionalism Expectations” in particular—should be reduced, and limited to worthy, not banal, aspirations. Second, some of the ideas currently labelled as professionalism actually reflect minimum demands of lawyering that should be integrated into the rules or commentary of legal ethics. Third, abundant options exist for improved professionalism education, but a more informed and strategic approach is needed. Fourth, mandatory mentoring could serve as a constructive alternative to the current quasi-disciplinary panel process. Finally, if mandatory professionalism is to remain, a more transparent system is needed, both to comply with the Florida Constitution and to maintain credibility. Ultimately, while recognizing the problems with lawyer professionalism, this Article concludes that Florida's bifurcated system of ethical rules and professionalism standards is significantly flawed—just like the people it regulates.

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I. INTRODUCTION: HIGHER EXPECTATIONS

Sometimes, the legal profession cringes at itself when it looks in the mirror.¹ Putting its best face forward, the American Bar Association (ABA) views lawyers as “member[s] of a learned profession”² with “special responsibility for the quality of justice”³ and a “vital role in the preservation of society.”⁴ In theory, lawyers pursue “the highest standards of professional competence and ethical conduct.”⁵ Yet, an ABA commission acknowledged concerns with lawyer behavior when it offered its blueprint for rekindling lawyer professionalism,⁶ and the U.S. Supreme Court Chief Justices have prominently and publicly be-moaned the decline of professionalism.⁷

More than a decade ago, this author called for a better definition of professionalism, noting that any effort to encourage adherence to the principles of professionalism requires lawyers to possess a shared understanding of the principles to which we adhere.⁸ But in the subsequent years, the subject of professionalism has become so unwieldy that

1. A lawyerly self-critique is hardly new. John Adams, a Boston lawyer and Second President of the United States, once wrote in his diary the following: “I may declaim against strife and a litigious spirit, and about the dirty dabblers in the law.” John Adams, *Diary: With Passages from an Autobiography*, in *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 1, 92 (Charles C. Little & James Brown eds., 1850).

2. MODEL RULES OF PROF’L CONDUCT pmbl. cmt. 6 (AM. BAR ASS’N 2016).

3. *Id.* at pmbl. cmt. 1.

4. *Id.* at pmbl. cmt. 13.

5. *Id.* at preface.

6. AM. BAR ASS’N, COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 11 (1986), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/stanley_commission_report.authcheckdam.pdf [<https://perma.cc/9G5D-KM5W>].

7. Warren E. Burger, Remarks, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949 (1995) (“I see disturbing evidence that there has been a broad decline in professionalism over the past twenty to twenty-five years”); see also JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1-2 (2015) (warning of the parallels between the current practice of law and the historic practices of dueling), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/6RTU-YB2J>].

8. Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It?*, 79 FLA. B.J. 38, 38 (2005), <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/95c26c65a87ea83f85257029006ffc30!OpenDocument&>

scholars have called for a “Professionalism Non-proliferation Treaty.”⁹ Florida signed no such treaty, and now it has gone too far. Unsatisfied with defining professionalism as an aspiration, the highest court of Florida and the leaders of the Florida Bar have made professionalism a mandate. In so doing, Florida offers a lesson for the nation.

For better and for worse, the Florida Bar, an agent of the Supreme Court of Florida, has long been a thought leader and influential litigant in the development of the law governing lawyers.¹⁰ Of note, the Florida Bar has been a plaintiff, defendant,¹¹ or amicus participant¹² in dozens of United States Supreme Court¹³ or federal appellate¹⁴ cases related to the regulation of attorney behavior, including the disputes

Highlight0, defining professionalism* [<https://perma.cc/TMW7-F6RL>] [hereinafter Rizzardi, *Defining Professionalism*].

9. See Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 408 (2012).

10. R. REGULATING FLA. BAR, intro. (2016) (“The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court.”); see also Petition of Florida State Bar Ass’n et al. Supreme Court of Florida, 40 So.2d 902 (Fla. 1949). See generally Gary Blankenship, *The Story of The Florida Bar*, 74 FLA. B.J. 18, 18 (2000) (quoting former Bar leaders on the history of professionalism regulation); Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL’Y REV. 193 (1996) (examining the contribution of bar associations to the legal system at large, including numerous discussions of the Florida Bar).

11. Cases were dismissed, or certiorari or rehearing was denied by the U.S. Supreme Court, in 27 cases involving The Florida Bar, most of which involved the denial of an appeal of individual attorney discipline cases. See *Burns v. Fla. Bar*, 136 S. Ct. 199 (2015); *Marr v. Fla. Bar*, 135 S. Ct. 983 (2015), *reh’d denied*, 135 S. Ct. 1731 (2015); *Committee v. Fla. Bar*, 135 S. Ct. 304 (2014); *Norkin v. Fla. Bar*, 135 S. Ct. 175 (2014); *Rust v. Fla. Bar*, 134 S. Ct. 2318 (2014); *Spano v. Fla. Bar*, 134 S. Ct. 2692 (2014), *cert. denied*, 135 S. Ct. 49 (2014); *Manzini v. Fla. Bar*, 134 S. Ct. 264 (2013); *Pachecker v. Fla. Bar*, 133 S. Ct. 2351 (2013); *Pierce v. Fla. Bar*, 133 S. Ct. 2348 (2013); *Brown v. Fla. Bar*, 563 U.S. 1021 (2011); *Cox v. Fla. Bar*, 565 U.S. 1064 (2011); *Fox v. Fla. Bar*, 563 U.S. 1003 (2011); *Kivisto v. Fla. Bar*, 563 U.S. 1034 (2011), *reh’d denied*, 565 U.S. 1010 (2011); *Garcia v. Fla. Bar*, 562 U.S. 1029 (2010); *Scott v. Fla. Bar*, 562 U.S. 1030 (2010); *Sibley v. Fla. Bar*, 558 U.S. 943 (2009); *Telasco v. Fla. Bar*, 556 U.S. 1125 (2009); *Thompson v. Fla. Bar*, 556 U.S. 1183 (2009); *Sibley v. Fla. Bar*, 553 U.S. 1092 (2008), *cert. denied*, 555 U.S. 830 (2008); *Krouner v. Fla. Bar*, 552 U.S. 1040 (2007); *Ramos v. Fla. Bar*, 534 U.S. 819 (2001); *Glant v. Fla. Bar*, 515 U.S. 1119 (1995); *Palmer v. Fla. Bar*, 505 U.S. 1208 (1992); *Bynum v. Fla. Bar*, 493 U.S. 1061 (1990); *MacGuire v. Fla. Bar*, 493 U.S. 967 (1989); *Cone v. Fla. Bar*, 484 U.S. 917 (1987); *Furman v. Fla. Bar*, 469 U.S. 925 (1984).

12. See, e.g., *Lathrop v. Donohue*, 367 U.S. 820, 821 (1961) (regarding mandatory bar dues).

13. See, e.g., *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (regarding waiting periods for attorney solicitation); *Sperry v. Florida*, 373 U.S. 379 (1963) (regarding alleged unlicensed practice of patent law). The Florida Bar has been a Supreme Court litigant in matters related to judicial ethics, too. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015); *Florida J.A.I.L. 4 Judges v. Fla. Bar*, 552 U.S. 1187 (2008).

14. See, e.g., *Zisser v. Fla. Bar*, 630 F.3d 1336 (11th Cir. 2011), *aff’d* 747 F. Supp. 2d 1303 (M.D. Fla. 2010) (regarding board certification of attorneys as experts); *Schwarz v. Kogan*, 132 F.3d 1387 (11th Cir. 1998) (regarding mandatory reporting of pro bono hours); *Cone v. Fla. Bar*, 819 F.2d 1002 (11th Cir. 1987) (regarding use of interest on shared attorney trust fund accounts to pay for legal aid programs).

over the very existence of a unified bar empowered to collect dues and regulate the profession.¹⁵ Florida put itself at the forefront of the professionalism movement, too.¹⁶ The legal community developed institutions to implement its professionalism vision in the form of the Supreme Court of Florida and its Commission on Professionalism and The Florida Bar and its Center for Professionalism and Standing Committee on Professionalism.¹⁷

But what is professionalism? “There are as many definitions of ‘professionalism’ as there are people who seek to define it,”¹⁸ and defining professionalism can be akin to “Justice Potter Stewart’s ‘I know it when I see it’ approach to defining pornography.”¹⁹ The Supreme Court of Florida tried to define it anyway. In 2013, in an order adopting a

15. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (upholding constitutionality of unified bars); see also *Gibson v. Fla. Bar*, 906 F.2d 624 (11th Cir. 1990) (prohibiting a range of bar lobbying and other activities), *cert. denied*, 502 U.S. 104 (1991).

16. The Florida *Creed of Professionalism*, and the *Ideals and Goals of Professionalism*, were adopted in Florida in 1989. Thereafter, in 1990, the Florida Bar Board of Governors conducted important surveys in 1993 and 1995. Soon after, Mike Papantonio authored his book, entitled *In Search of Atticus Finch*. MIKE PAPANTONIO, *IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS* (1996). And by 1996, the Florida Bar was operating the Center for Professionalism. See *About the Center for Professionalism*, FLA. B., <https://www.floridabar.org/prof/pabout/> [<https://perma.cc/M424-9WAC>].

17. See generally Rizzardi, *Defining Professionalism*, *supra* note 8 (describing the Florida institutions and documents shaping the shared understanding of professionalism); Keith W. Rizzardi, *Redefining Professionalism? Florida’s Code Mandating the Aspirational Raises Challenging Questions*, 87 FLA. B.J. 39 (2013) [hereinafter Rizzardi, *Redefining Professionalism*] (discussing the Order issued by the Supreme Court of Florida and the shift towards new enforceable professionalism standards).

18. Heather M. Kolinsky, *Just Because You Can Doesn’t Mean You Should: Reconciling Attorney Conduct in the Context of Defamation with the New Professionalism*, 37 NOVA L. REV. 113, 123 (2012) (citing Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4, 5 (2008)).

19. Rizzardi, *Defining Professionalism*, *supra* note 8 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) but suggesting a definition of professionalism as “character, competence, commitment, and courtesy in client advocacy and community service”). As law professor Michael Rubin noted, “[w]riters of periodical and law review articles cannot agree on any particular and limited definition.” Michael H. Rubin, *Why Worry About Professionalism?*, 56 ANN. INST. ON MIN. L. 108, 109-10 (2009) (citing Elliot L. Bien, *A New Way for Courts to Promote Professionalism*, 86 JUDICATURE 132 (2002)); see also Janet Berry, *Civility and Professionalism*, 8 NEV. LAW. 10, 10 (2000); Carol Bronson, *Professionalism is a Choice*, 28 MONT. LAW. 23 (2002); Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 232 (2003); James Coleman, Jr., *Professionalism Within the Profession*, 65 TEX. B.J. 926, 928 (2002); Allen K. Harris, *The Professionalism Crisis—The ‘z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549, 562 (2002); Allen K. Harris, *The Professionalism Crisis*, 12 PROF. LAW. 1 (2001); Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409 (2001); Sean P. Ravenel, *The Contagion of Example: Attacking the Root of the Problem in Lawyer Professionalism*, 49 FED. LAW. 31, 32 (2002); Broadus A. Spivey, *Ethics: Lawyering and Professionalism*, 33 ST. MARY’S L.J. 721, 723 (2002); Gloria Sturman, *Professionalism: We Know It When We See It*, 10 NEV. LAW. 6, 6 (2002); Jeffrey M. Vincent, *Aspirational Morality: The Ideals of Professionalism – Part II*, 15 UTAH B.J. 24 (2002).

Code for Resolving Professionalism Complaints, it gave its official imprimatur to a definition of unprofessionalism. The Court cited an amended *Oath of Admission*,²⁰ the State's *Creed of Professionalism*,²¹ *Ideals and Goals of Professionalism*,²² the *Guidelines for Professional Conduct*,²³ and—in an incredibly broad statement—substantial or repeated violations of “the decisions of the Florida Supreme Court.”²⁴ In addition, in 2015, the Florida Bar Board of Governors supplemented those materials by adopting another comprehensive document known as the *Professionalism Expectations*,²⁵ which was ratified by the Court in 2016.²⁶

Like many other states, Florida is determined to teach better behavior to its lawyers. The Sunshine State's current approach, however, offers a lesson in what not to do. Seeking to solve some problems, Florida created new ones.

The very name of Florida's most recent professionalism document—*Professionalism Expectations*—juxtaposes two words in tension with each other. “Professionalism,” according to the first line of that document, is the “pursuit and practice of the highest ideals and tenets of the legal profession.”²⁷ “Expectations,” however, is a word that can

20. *Oath of Admission to The Florida Bar*, FLA. B., <https://webprod.floridabar.org/wp-content/uploads/2017/04/oath-of-admission-to-the-florida-bar-ada.pdf> (last amended Sept. 12, 2011); see *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 281 (2013).

21. *Creed of Professionalism*, FLA. B., <https://www.floridabar.org/wp-content/uploads/2017/04/creed-of-professionalism-ada.pdf> [<https://perma.cc/9CPS-3KS3>]; see *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 281.

22. *Ideals and Goals of Professionalism*, FLA. B., <https://www.floridabar.org/wp-content/uploads/2017/04/ideals-and-goals-of-professionalism-ada.pdf> [<https://perma.cc/UM4G-HNME>]; see *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 281.

23. *Guidelines for Professional Conduct*, FLA. B., <https://www.floridabar.org/prof/presources/presources002/> [<https://perma.cc/68TD-794G>]; see *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 281.

24. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 281.

25. *Professionalism Expectations*, FLA. B., <https://www.floridabar.org/wp-content/uploads/2017/04/professionalism-expectations.pdf> [<https://perma.cc/BW3C-YNVZ>].

26. In an order issued on the Court's own motion, and without prior public comment, the Court replaced the *Ideals and Goals of Professionalism* with the Professionalism Expectations. *In re Amendments to Code for Resolving Professionalism Complaints*, 174 So. 3d 995 (Fla. 2015) (“We amend the provisions in the Code addressing the ‘Standards of Professionalism’ to replace references to ‘The Florida Bar Ideals and Goals of “Professionalism”’ with ‘The Florida Bar Professionalism Expectations.’ The Chair of The Florida Bar Standing Committee on Professionalism informed the Court that the Professionalism Expectations, which were approved by The Florida Bar Board of Governors on January 30, 2015, replaced the Ideals and Goals of Professionalism referenced in the Code.”). That opinion was affirmed after receipt of public comments. *In re Amendments to the Code for Resolving Professionalism Complaints*, SC15-944 (Fla. 2016) (“The Court has considered the comments filed concerning the rule amendments adopted in the September 10, 2015, opinion in this case. The Court having determined that no further rule amendments are warranted at this time, this case is hereby final.”).

27. See *Professionalism Expectations*, *supra* note 25, at 1.

mean 'probable' or even 'certain.'²⁸ Achieving the highest *ideals* of lawyering is rarely *certain*; often, it is not even probable.

Title aside, the text of the *Professionalism Expectations* contains numerous other problems. It contradicts itself by simultaneously declaring professionalism to be an aspiration, while stating imperatives for lawyer conduct. It contradicts legal ethics rules, too. It introduces entirely new and undefined concepts, with twenty-seven different Imperatives that *must* be obeyed, and sixty different Recommendations that *should* be obeyed.²⁹ In the end, the entire document leaves vast room for interpretive mischief in the lawyer disciplinary process by rephrasing and supplementing existing principles already set forth in the legal ethics rules and commentary.

Florida's version of professionalism, in fact, is rewriting the legal ethics system in a way that seems blind to history. For example, in 1836, David Hoffman codified his Fifty Resolutions,³⁰ and in 1908, the ABA created the Canons of Professional Ethics.³¹ Both documents blended morals and ethics into one single document guiding the professional conduct of lawyers, while leaving the daily decisions of practice to the lawyer's judgment. That system eventually gave way to a new, more detailed, and more focused effort to establish disciplinary standards. In 1969, the ABA Code of Professional Responsibility separated the moral and ethical statements from the mandatory minimums of legal practice.³² By 1983, the ABA Model Rules of Professional Responsibility had removed the moral and ethical components, leaving a system of mandatory and discretionary rules.³³

The ABA's codification of lawyer minimums, by design, left unspeaken many of the ideals and aspirations of lawyering, and the emergence of the professionalism movement helped to fill that void. Now Florida, by blending legal ethics, morality, etiquette, imperative commands, and recommendations in a series of lawyer professionalism

28. See *Expectation*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/expectation> (last visited Apr. 22, 2016) ("a belief that something will happen or is likely to happen"); *Expectation*, DICTIONARY.COM, <http://www.dictionary.com/browse/expectation> [<https://perma.cc/2EJM-U6MN>] ("the degree of probability that something will occur").

29. See *Professionalism Expectations*, *supra* note 25.

30. David C. Hoffman, *Fifty Resolutions in Regard to Professional Deportment*, LONANG INST. (1836), <http://lonang.com/commentaries/curriculum/professional-deportment> [<https://perma.cc/UAL8-DD6T>].

31. See AM. BAR ASS'N, COMMITTEE ON CODE OF PROFESSIONAL ETHICS, FINAL REPORT OF COMMITTEE ON CANONS OF PROFESSIONAL ETHICS (1908) [hereinafter ABA COMMITTEE ON CODE OF PROFESSIONAL ETHICS, FINAL REPORT], http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1908_canons_ethics.authcheckdam.pdf [<https://perma.cc/XY2N-ZNBE>].

32. MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1980).

33. See MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016).

documents, is repeating historic mistakes. It has recreated the same difficulties that plagued Hoffman's work and led to the abandonment of the ABA Canons of Professional Ethics.³⁴

Part I of this Article examines Florida's emerging process for a kinder, gentler enforcement process that is separate from but interconnected with the traditional system of ethics and attorney discipline. After explaining the process, it shows how the Supreme Court of Florida, at times, has removed the distinctions between professionalism and legal ethics.

Part II then analyzes Florida's latest document setting forth professionalism expectations, highlighting some of the transformative concepts. Sometimes the document is overstated, sometimes it is understated, and sometimes it is poorly stated. Despite its approval by the Supreme Court of Florida, the document should be reworked.

Part III then steps back to evaluate Florida's body of professionalism law and other documents. It considers the historical evolution of the system of legal ethics and the viewpoints of both H.L.A. Hart and Lon Fuller. Again, based upon the lessons of both history and jurisprudence, the *Professionalism Expectations*, and the whole exercise of a professionalism mandate seems misguided.

Parts IV and V offer specific recommendations and alternatives, such as reducing the content in professionalism documents, adding requirements to the legal ethics rules, enhancing professionalism education, mandating mentoring, and increasing transparency and scrutiny of the professionalism efforts. Ultimately, while recognizing the problems with lawyer professionalism, this Article concludes that Florida's system demanding mandatory professionalism has significant imperfections—just like the people it regulates.

II. DRAWING LINES: CODIFYING AND ENFORCING PROFESSIONALISM

The mandatory minimums of lawyering in each state are codified in rules, frequently modeled after the American Bar Association's (ABA) Model Rules of Professional Conduct.³⁵ These rules are often referred to as "legal ethics," but the labeling of Rules of Professional Conduct as "ethics" is really just a common misuse of the term. Ethics, derived from the Greek term *ethikos*, is a term for the rules of behavior

34. See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2397 n.14 (2003); Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 *ARK. L. REV.* 571, 574 (2014).

35. See MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016). Florida's ethical rules, also called Rules of Professional Conduct, are found in Chapter 4 of the Rules Regulating the Florida Bar. See R. REGULATING FLA. BAR ch. 4 (Jan. 20, 2017), https://www.floridabar.org/wp-content/uploads/2018/03/Ch.-4-2018_08-FEB-1-RRTFB.pdf [<https://perma.cc/F5AR-C7DE>].

based on ideas about what is *morally* good and bad.³⁶ Morals, in turn, are about the pursuit of right and wrong in human behavior as commonly understood.³⁷ Morals are often tied to religious values, too, and the subject has filled books for many generations.³⁸ But as explained by Professor Benjamin H. Barton, “legal ethics” is a subject quite different from morals or ethics:

Many (if not most) law schools have renamed their legal ethics course “Legal Profession” or “Professional Responsibility.” These linguistic choices reflect a particular truth: the Rules that now govern lawyer conduct are not rules of ethics.

Nevertheless, lawyer regulators and lawyers have yet to eliminate the phrase “legal ethics” from their lexicon. To the contrary, in legal parlance “legal ethics” has become synonymous with the *minimum* rules governing attorney conduct. In light of the explicitly moral use of “ethics” in common parlance, the application of the phrase “legal ethics” to minimum rules carries substantial interpretive freight. The phrase “legal ethics” imbues the Rules with a depth and a meaning they no longer have.³⁹

Once upon a time, the phrase “legal ethics” was also distinguished from the concept of lawyer professionalism. Legal ethics were mandates, whereas professionalism principles were not.⁴⁰ However, in a non-adversarial judicial order, responding to the recommendations of the members of the Florida Bar serving on the Court’s own Professionalism Committee, the Florida Supreme Court announced its *Code for Resolving Professionalism Complaints*.⁴¹ That order altered the traditional boundary between legal ethics and professionalism.⁴²

36. *Ethic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ethic> [https://perma.cc/6W4R-PYLA?type=image].

37. *Moral*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/morals> [https://perma.cc/FUR2-TX3X?type=image].

38. John Hare, *Religion and Morality*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Salta ed., 2014), <http://plato.stanford.edu/archives/win2014/entries/religion-morality> [https://perma.cc/TT35-KG84].

39. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 440-41 (2005) (footnotes omitted). Other professors have flatly refused to equate professional codes with ethics. *See, e.g.*, Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327, 328 n.1 (2009) (“... I resist using ‘ethics’/‘ethical’ to refer to professional rules and standards of conduct while using ‘morality’/‘moral’ to refer to everyday rules and standards of conduct.”).

40. R. REGULATING FLA. BAR 19-1.1 (“This rule is adopted in recognition of the importance of professionalism as the ultimate hallmark of the practice of law. The purpose of this rule is to create a center to identify and enunciate non-mandatory standards of professional conduct and encourage adherence thereto. These standards should involve aspirations higher than those required by the Rules of Professional Conduct.”).

41. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013).

42. Rizzardi, *Redefining Professionalism*, *supra* note 17, at 39.

At the Court's direction, the non-mandatory standards and aspirations of professionalism have become part of a consequential effort to demand and discipline. Of note, the Court explicitly recognized that the concept of unprofessional conduct overlapped with the Rules of Professional Conduct.⁴³ Through the new *Code for Resolving Professionalism Complaints*, the Court embraced a new term, "[u]nprofessional conduct," which means "substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of the Florida Supreme Court*."⁴⁴

This Article succumbs to the imperfect phraseology of the legal profession, as the Rules of Professional Conduct contained in the Rules Regulating The Florida Bar are often referred to as "legal ethics rules," which are repeatedly contrasted herein with Florida's "lawyer professionalism standards."⁴⁵ With these two sets of rules and standards come two separate systems for the resolution of complaints.⁴⁶

One system involves The Florida Bar and the Attorney Consumer Assistance and Intake Program (ACAP), which fields and screens complaints against members of The Florida Bar. Depending on "the nature and severity" of a complaint, the ACAP can refer a matter to a branch office of The Florida Bar, which can investigate and discipline violations.⁴⁷

Alternatively, by the ACAP's referral or by a direct complaint, professionalism matters may be sent to a local professionalism panel. These panels are defined as "[a]n entity independent of The Florida Bar which is established at the local level for the purpose of resolving

43. See *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 282 ("Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct*.").

44. *Id.*

45. While aware of, and sympathetic to, Professor Barton's critique, this Article uses the common phrases anyway because of their wide acceptance among the bar members whom this Article seeks to influence. Barton, *supra* note 39, at 440-41. Indeed, from Barton's perspective, it might be argued that Florida's value and morality laden professionalism standards have greater depth and are actually more "ethical" than Florida's legal ethics rules.

46. See, e.g., Gary Blankenship, *Lapses in Professionalism May Lead to Disciplinary Sanctions*, FLA. B. NEWS (July 15, 2012), <https://www.floridabar.org/news/tfb-news/?durl=/DIVCOM/JN/jnnews01.nsf/Articles/F3B6FE3E910088D685257A3600436181> [https://perma.cc/HWF9-AUWF].

47. See, e.g., *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 283-84 (detailing §§ 3.2.3-3.2.5) (citing R. REGULATING FLA. BAR ch. 4 (2016) ("Rules of Professional Conduct")); see also *Cites to Local Professionalism Panels by Circuit as Mandated by In re: Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013), FLA. B. (Aug. 19, 2014), <https://www.floridabar.org/wp-content/uploads/2017/04/lpp-administrative-orders.pdf> [https://perma.cc/QSB6-2T43].

complaints of alleged unprofessional conduct by attorneys practicing in that circuit.”⁴⁸

In exercising its authority to regulate lawyers, the Supreme Court of Florida has traditionally allowed for discretion and customized results. Florida’s well-established system of discipline related to violations of the *legal ethics* rules, for example, allows for a range of discipline: some matters are considered minor misconduct, subjected only to admonishments;⁴⁹ others result in suspension, or even disbarment.⁵⁰ Similarly, the process for resolving professionalism complaints also leads to one of five outcomes:

- A. No probable cause;
- B. No probable cause and include a letter of advice to the Respondent;
- C. Recommendation of Diversion to one of the Practice and Professionalism Enhancement Programs;
- D. Recommendation of Admonishment for Minor Misconduct; or
- E. Probable cause. Probable cause under Rule 3-2.1 of *The Rules Regulating the Florida Bar* is a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action.⁵¹

Thus, “unprofessional” lawyer conduct—even conduct not rising to the level of a legal ethics violation—can now subject a lawyer to a range of consequences. A “letter of advice” can be issued.⁵² Professionalism panels may also refer matters for more robust measures, including a recommendation to attend a professionalism program or a recommendation of admonishment for minor misconduct.⁵³ If ethical violations are involved, those violations can be separately disciplined by The Florida Bar, too.⁵⁴

Though technically distinct, and perhaps best characterized as “quasi-disciplinary,” the enforcement of professionalism standards resembles other aspects of the Bar’s disciplinary process. When it established the professionalism requirements, Florida’s Supreme Court plainly recognized the potential for a contentious process. It addressed the potential need for confidentiality and the protection of an attorney’s reputation, citing the existing confidentiality procedures in The Florida

48. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 283 (§§ 1.5., 2.1., 3.2.2.).

49. *See* R. REGULATING FLA. BAR 3-5.1.

50. *Id.*

51. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 284.

52. *Id.* (§ 3.4.B).

53. *Id.* (§ 3.4.D).

54. *Id.* (§ 3.4.E).

Bar rules on discipline.⁵⁵ In addition, in an amendment to its original ruling, the Court granted the members of the professionalism panels absolute immunity from liability.⁵⁶ And, lawyers accused of professionalism violations might still contest or resist the allegations made against them.⁵⁷ For example, lawyers may challenge the administrative process of professionalism by raising due process arguments,⁵⁸ procedural arguments,⁵⁹

55. See *id.* at 284 (§ 3.5.) (citing R. REGULATING FLA. BAR 3-7.1).

56. See *In re* Amendment to Code for Resolving Professionalism Complaints, 156 So. 3d 1034, 1035 (Fla. 2015) (per curiam).

Section 4. Immunity.

4.1. Local Professionalism Panels and Circuit Committees on Professionalism: The members of the Local Professionalism Panels, staff persons assisting those panels, members of the Circuit Committees on Professionalism, and staff persons assisting those committees, shall have absolute immunity from civil liability for all acts in the course and scope of their official duties.

Id. at 1035-36. But see Kolinsky, *supra* note 18, at 138-54 (discussing the tensions between an attorney's immunity from defamation claims and the pursuit of professionalism).

57. After all, the administrative process related to bar certification—a capstone of lawyer professionalism—has endured litigation, too. See, e.g., *Zisser v. Fla. Bar*, 747 F. Supp. 2d 1303 (M.D. Fla. 2010).

58. See *Bell v. Burson*, 402 U.S. 535, 539 (1971). While it is often considered a privilege to be a lawyer, once granted, a law license cannot be taken away without due process. See J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 208-11 (2006) (discussing *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970)). Violations of the existing rules of ethics can even lead to disbarment and the removal of that law license. See R. REGULATING FLA. BAR 3-5.1. Some scholars have even suggested that our licenses should become renewable, and lawyers should have to periodically reapply for bar admission, with our professionalism as an indicator of whether a lawyer possesses the character and fitness deserving of renewed license. See, e.g., Jayne W. Barnard, *Renewable Bar Admission: A Template for Making "Professionalism" Real*, 25 J. LEGAL PROF. 1 (2001).

59. Ethical rules governing the legal profession and the discipline of lawyers traditionally go through a process that culminates in review by and a hearing before the Florida Supreme Court. See, e.g., *In re* Amendments to R. Regulating Fla. Bar (Biennial Report), 140 So. 3d 541, 544 (Fla. 2014) (per curiam); *In re* Amendments to R. Regulating Fla. Bar—Subchapter 4-7, Lawyer Advert. Rules, 108 So. 3d 609 (Fla. 2013) (per curiam); see also Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431 (2005). But lawyers might argue that some of Florida's professionalism documents—including the 2013 court order that marked a critical turning point in the regulation of the legal profession—have followed a different process, as the Order Adopting Code for Resolving Professionalism Complaints explains:

The Code for Resolving Professionalism Complaints . . . was published for comments, comments were received and considered by the Professionalism Commission, and a public hearing was conducted. The Conference of County Court Judges and the Conference of Circuit Court Judges have responded in favor of the proposed Code as an initial step toward improving professional conduct in Florida. We hereby adopt the Code for Resolving Professionalism Complaints . . . effective immediately.

In re Code for Resolving Professionalism Complaints, 116 So. 3d 280, 282 (Fla. 2013); see also Gary Blankenship, *Professionalism Expectations for the Electronic Age*, FLA.

or other substantive concerns.⁶⁰ The Palm Beach County Bar Association was the first professionalism panel identified to implement the Code for Resolving Professionalism Violations.⁶¹ The Administrative Order establishing the Panel stated that the Panel's purpose is "to meet with attorneys" who conducted themselves in a manner inconsistent with professionalism, but the Order also notes that "[t]he Panel shall have no authority to discipline any attorney nor to compel any attorney to appear before the Panel."⁶² Despite the Order's disclaimers, the Panel process has consequences. "[T]he Panel may consider the Respondent's failure to appear in determining whether referral to [The Florida Bar's Attorney Consumer Assistance and Intake Program] is appropriate."⁶³ If the attorney declines the counseling session, the Panel can send a letter anyway.⁶⁴ The results of the Panel process may be published in the Palm Beach County Bar Association *Bulletin*, too (with the names withheld).⁶⁵

Those published decisions afford insight as to how the emerging professionalism standards have been implemented. One Panel letter involved an attorney's unprofessionalism and improper reliance upon

B. NEWS (Mar. 15, 2015), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/39D5A799334947AC85257E030047F8B5> [<https://perma.cc/72CL-8BVU>].

60. For example, if the professionalism process was not confidential, it could incentivize compliance for lawyers who wish to avoid bad publicity. But challengers of this approach might argue that publication creates the stigma of "unprofessionalism" and reputational harms, designed to cause tangible and quantifiable loss of referrals and business opportunities. See generally Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79 (2009) (explaining the difficulty of alleging due process violations against the state and calling for reforms); Nat Stern, *Defamed but Retained Public Employees: Addressing a Gap in Due Process Jurisprudence*, 31 HOFSTRA L. REV. 795, 800 (2003) (noting the due process implications of government action affecting one's standing in the community). In response, the defenders of the process will note that in the absence of a license revocation, and with merely speculative or minor losses, due process evaluations need not apply. *Id.* Lawyers will further argue that the various professionalism standards are unreasonably vague and provide no meaningful guidance. Others will defend the professionalism standards as no less vague than other enforceable ethics rules.

61. See, e.g., *In re Fifteenth Circuit Professionalism Panel Administrative Order No. 2.105-11/14* (Fla. 15th Cir. Ct. 2014), <http://www.palmbeachbar.org/professionalism-council>.

62. *Id.* ¶ 2.

63. *Id.* ¶ 2(f).

64. *Id.* ("If the respondent attorney fails to appear, the Panel shall discuss the conduct inconsistent with the *Ideals* or *2014 Standards* and shall summarize the Panel's discussions by letter to the respondent attorney.").

65. *Id.* ¶ 2(e) ("The Chairperson of the Palm Beach County Bar Association's Professionalism Committee may send a letter summarizing the Panel's discussions to the respondent attorney and to the Palm Beach County Bar Association for publication in the *Bulletin* with the name(s) deleted.").

staff instead of directly communicating with opposing counsel.⁶⁶ A second letter, involving unflattering commentary about a judge's ruling and the clerk's office, deemed sending correspondence about a pending lawsuit to the presiding judge at the judge's home address to be unprofessional conduct.⁶⁷ A third letter discussed the unprofessionalism of a lawyer who failed to provide in advance a copy of materials to be used for oral argument, despite sitting with opposing counsel in the courthouse hallway during the fifteen minutes before the hearing.⁶⁸ Each document shows a careful effort to uphold the honorable notions of professionalism. Nevertheless, the facts recited in these publications also show how professionalism violations are closely related to ethical duties such as fairness to opposing parties,⁶⁹ decorum towards the tribunal,⁷⁰ and simple misconduct.⁷¹

In fact, an article in the Palm Beach County Bar Association *Bulletin* noted how one recent case had "all but obliterated" the distinction between unprofessionalism and misconduct.⁷² In *Florida Bar v. Norkin*,⁷³ the Supreme Court of Florida disapproved of a referee's recommended ninety-day suspension, rejected The Florida Bar's request for a one-year suspension, and imposed a two-year suspension. Mr. Norkin, unquestionably, engaged in extreme conduct as described in the 2011 order.⁷⁴ (Later, in 2015, he was disbarred for his aggressive,

66. See Amy S. Borman, *Professionalism Council Letter*, PALM BEACH COUNTY B. ASS'N (Aug. 29, 2014), <http://www.palmbeachbar.org/professionalism/3240> [<https://perma.cc/CJC3-GAEE>].

67. See Michael D. Mopsick, *Professionalism Panel*, PALM BEACH COUNTY B. ASS'N (June 2, 2014), <http://www.palmbeachbar.org/professionalism/professionalism-panel> [<https://perma.cc/MRR9-RC8V>].

68. See David Ackerman & Dana Foster, *Dear Professionalism Committee*, PALM BEACH COUNTY B. ASS'N (Oct. 24, 2013), <http://www.palmbeachbar.org/professionalism/dear-professionalism-committee> [<https://perma.cc/9XR5-P6E8>].

69. R. REGULATING FLA. BAR 4-3.4.

70. *Id.* at 4-3.5.

71. *Id.* at 4-8.4.

72. D. Culver Smith III, *"Unprofessional" Versus "Unethical" (Caution: Slippery Road Ahead)*, PALM BEACH COUNTY B. ASS'N (Feb. 4, 2014), <http://www.palmbeachbar.org/professionalism/unprofessional-versus-unethical-caution-slippery-road-ahead> [<https://perma.cc/D5HX-TP2U>].

73. 132 So. 3d 77 (Fla. 2013).

74. *Id.* at 93 (holding that *Norkin* should be suspended).

Competent, zealous representation is required when working on a case for a client. There are proper types of behavior and methods to utilize when aggressively representing a client. Screaming at judges and opposing counsel, and personally attacking opposing counsel by disparaging him and attempting to humiliate him, are not among the types of acceptable conduct but are entirely unacceptable. One can be professional and aggressive without being obnoxious. Attorneys should focus on the substance of their cases, treating judges and opposing counsel with civility, rather than trying to prevail by being insolent toward judges and purposefully offensive toward opposing counsel. This Court has been

obnoxious, purposefully offensive and outrageous conduct.)⁷⁵ However, as D. Culver Smith III, a Palm Beach County Bar Association member noted, Mr. Norkin's conduct could be characterized as "unprofessional but not unethical," an observation that led to a critical conclusion:

"This professionalism issue of ours has been a topic of debate for as long as there have been lawyers. When all has been said and done, more has been said than done. Until now. The Supreme Court has made it clear that such conduct puts one's license at risk."⁷⁶

Whatever one's view of professionalism, the Supreme Court is unquestionably in charge of the subject. Pursuant to Article V, Section 15, of the Florida Constitution, "[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."⁷⁷ Still, as the remainder of this Article explains, if the Court is going to exercise its authority to regulate and require professionalism, it should pay closer attention to the explicit terms of its own documents, better understand the fundamental distinctions between duty and aspiration, hold both the legal community—and itself—to higher standards, and remember that successful professionalism standards require individual acceptance of its norms.

III. A CLOSE LOOK: *THE PROFESSIONALISM EXPECTATIONS*

The standards and procedures associated with lawyer professionalism are constantly evolving. The *Professionalism Expectations*⁷⁸ reflect the next step in that evolutionary process. First issued by the Standing Committee on Professionalism in 2014, the document was ratified by the Florida Bar Board of Governors in 2015 and approved

discussing professionalism and civility for years. We do not tolerate unprofessional and discourteous behavior. We do not take any pleasure in sanctioning Norkin, but if we are to have an honored and respected profession, we are required to hold ourselves to a higher standard.

Id. at 92-93.

75. Fla. Bar v. Norkin, 183 So. 3d 1018 (Fla. 2015).

76. Smith, *supra* note 72. Another author in Minnesota reached a similar conclusion, but noted that Florida has a unique version of the misconduct rule, because Rule 8.4(d) of the Rules Regulating the Florida Bar states that misconduct includes "to knowingly, or through callous indifference, disparage or humiliate other lawyers on any basis." Martin Cole, *When Incivility Crosses the Line*, BENCH & B. MINN., Jan. 2014, at 12, http://mnbenchbar-digital.com/mnbenchbar/january_2014?pg=14#pg14 [<https://perma.cc/2GEK-NXMF>].

77. FLA. CONST. art. V, § 15.

78. See *Professionalism Expectations*, *supra* note 25.

thereafter by the Supreme Court of Florida.⁷⁹ The comprehensive document provides an opportunity to carefully evaluate the entire codification effort of lawyer professionalism in Florida.

As noted earlier, even the name of the *Professionalism Expectations* demonstrates the failure to distinguish between aspirations and mandates. Compounding the inherent tensions in its title, the *Professionalism Expectations* establish two distinct types of expectations, referred to as either “Imperatives” or “Recommendations.” Imperatives are commands set forth in the *Professionalism Expectations* that use the term “must.”⁸⁰ Imperatives correspond with and often cite to Florida’s relevant legal ethics rules.⁸¹ In contrast, Recommendations use the term “should” to reflect preferred customs:

Where a Professionalism Expectation is coextensive with a lawyer’s ethical duty, the expectation is stated as an imperative, cast in the terms of “must” or “must not.” Where a Professionalism Expectation is drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar, the expectation is stated as a recommendation of correct action, cast in terms of “should” or “should not.”⁸²

The *Professionalism Expectations* were created by The Florida Bar to replace the *Ideals and Goals of Professionalism*.⁸³ According to the document’s preface, as The Florida Bar membership grows, “it becomes more important to articulate the bar’s professionalism expectations and for Florida lawyers to demonstrate these expectations in practice.”⁸⁴

The *Professionalism Expectations*, with its system of Imperatives and Recommendations, is difficult to reconcile with the existing legal

79. On its own motion, the Florida Supreme Court amended the Code for Resolving Professionalism Complaints and replaced references to “The Florida Bar Ideals and Goals of Professionalism” with “The Florida Bar Professionalism Expectations” in the provisions in the Code addressing the Standards of Professionalism. *In re* Amendments to Code for Resolving Professionalism Complaints, 174 So. 3d 995 (Fla. 2015) (ratification). The court then invited public comments in its publication notice. Invitation for Comment, *In re*: Amendments to the Code for Resolving Professionalism Complaints, Case No. SC15-944 (2015), http://www.floridasupremecourt.org/clerk/comments/2015/15-944_091115_Publication%20Notice.pdf [<https://perma.cc/V3KB-3E6P>]. Ultimately, the court left its prior statement unchanged, stating that it considered the comments, and its prior opinion, and concluded that “having determined that no further rule amendments are warranted at this time, this case is hereby final.” *In re* Amendments to Code for Resolving Professionalism Complaints, SC15-944 (Feb. 2, 2016) (approval), https://efactssc-public.flcourts.org/casedocuments/2015/944/2015-944_order_208576.pdf.

80. *Professionalism Expectations*, *supra* note 25, at pmbl.

81. *Id.*

82. *Id.*

83. *In re* Amendments to Code for Resolving Professionalism Complaints, 174 So. 3d 995 (Fla. 2015).

84. *Professionalism Expectations*, *supra* note 25, at pmbl.

ethics rules. Previously, Florida's legal ethics rules⁸⁵ explained a fundamental distinction between black letter rules and the commentary below those rules:

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.⁸⁶

In other words, there are now two separate sets of regulations governing lawyers in Florida. The Rules Regulating The Florida Bar, and in particular, Chapter 4 and the Rules of Professional Conduct, contain one set of rules and commentary. Meanwhile, the professionalism documents add a second layer of complexities. The Imperatives of the *Professionalism Expectations* are commands, which cross-reference and supplement the text of each black letter legal ethics rule. The Recommendations in the *Professionalism Expectations* supplement the commentary associated with each of the legal ethics rules.⁸⁷

Yet, by its own terms, the purpose of the *Professionalism Expectations* was to establish goals, not mandates, because it declares that "[p]rofessionalism is the pursuit and practice of the highest ideals and tenets of the legal profession."⁸⁸ In addition, as the Supreme Court of Florida stated in another still-in-effect rule, the Center for Professionalism existed to "enunciate non-mandatory standards of professional conduct and encourage adherence . . . [to] aspirations higher than those required by the Rules of Professional Conduct."⁸⁹ Despite this aspirational purpose, the *Professionalism Expectations* contain mandates. Florida lawyers *must* act in accordance with the Imperatives of the *Professionalism Expectations* even when they do not have a duty to act based on the Rules Regulating The Florida Bar. Table 1, below, allows for a ready comparison of the relevant text.

85. See R. REGULATING FLA. BAR ch. 4.

86. *Id.* at pmbl.

87. The Recommendations in the *Professionalism Expectations* are "drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar" and cast in terms of "should" or "should not." *Professionalism Expectations*, *supra* note 25, at pmbl. However, the purpose of these Recommendations is virtually indistinguishable from the commentary in the Rules Regulating the Florida Bar, which "do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules." R. REGULATING FLA. BAR ch. 4 pmbl.

88. *Professionalism Expectations*, *supra* note 25, at 1.

89. R. REGULATING FLA. BAR 19-1.1 ("This rule is adopted in recognition of the importance of professionalism as the ultimate hallmark of the practice of law. The purpose of this rule is to create a center to identify and enunciate non-mandatory standards of professional conduct and encourage adherence thereto. These standards should involve aspirations higher than those required by the Rules of Professional Conduct.").

TABLE 1: <i>Internal Contradiction—Is Professionalism an Aspiration or an Imperative?</i>		
<i>Professionalism Expectations, Preamble</i>	<i>Professionalism Expectations, Introductory Quote</i>	<i>Center for Professionalism, Rules Regulating The Florida Bar</i>
“Where a Professionalism Expectation is coextensive with a lawyer’s ethical duty, the expectation is stated as an imperative, cast in the terms of ‘must’ or ‘must not.’ ”	“Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, commitment, and civility.”	Rule 19-1.1 (“The purpose of this rule is to create a center to identify and enunciate non-mandatory standards of professional conduct and encourage adherence thereto. These standards should involve aspirations higher than those required by the Rules of Professional Conduct.”)

Table 1 thus reveals the obvious contradictions, because the *Professionalism Expectations* simultaneously represent both an imperative and a mandate, whereas the Rules Regulating the Florida Bar state that the professionalism standards should involve aspirations.

In this Article, four recurring observations further reveal how the lines between aspirational ideals of professionalism and mandates of legal ethics have been blurred, or altogether erased.⁹⁰ First, some Recommendations flatly contradict the legal ethics rules. Second, some concepts in the *Professionalism Expectations* are new and potentially controversial in the replacement of the long-established system of legal ethics and discipline. Third, the Imperatives contain confusing cross-references, because the legal ethics rules once relied on the black letter text and explained that commentary did not add obligations, but now the Imperatives of the professionalism standards seem superior to the commentary of the legal ethics rules.⁹¹ Fourth, other professionalism recommendations, although not necessarily binding, seem to be cumulative with the commentary of the legal ethics rules. Each of these four

90. See Kez U. Gabriel, *The Idealist Discourse of Legal Professionalism in Maryland: Delineating the Omissions and Eloquent Silences as a Progressive Critique*, 41 U. BALT. L.F. 120, 123-24 (2011) (undertaking a similar exercise in Maryland).

91. Compare *Professionalism Expectations*, *supra* note 25, pmb1., with R. REGULATING FLA. BAR ch. 4 pmb1.

critiques—contradictions, controversy, cross-reference confusion, and cumulative commentaries—can be found in the following analysis of the seven subsections⁹² of the *Professionalism Expectations*.

A. Commitment to Equal Justice Under the Law and to the Public Good

According to the first of The Florida Bar's seven categories of *Professionalism Expectations*, "[a] license to practice law is a privilege," and "requires a lawyer to . . . promote the public good and to foster the reputation of the legal profession while protecting our system of equal justice under the law."⁹³ This broad umbrella concept includes thirteen divergent topics, such as non-misleading advertising, ensuring confidentiality and informed clients, providing access to justice, and avoiding discrimination.⁹⁴

92. See generally *Professionalism Expectations*, *supra* note 25. Of note, and exemplifying the types of inconsistencies pointed out in this Article, the seven categories used as headings throughout the *Professionalism Expectations* differ from the seven principles of professionalism stated in the Preamble. The seven headings from that document, which are the same as the subheadings used in this Article, include: "1. Commitment to Equal Justice Under the Law and to the Public Good"; "2. Honest and Effective Communication"; "3. Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play"; "4. Fair and Efficient Administration of Justice"; "5. Decorum and Courtesy"; "6. Respect for the Time and Commitments of Others"; and "7. Independence of Judgment." In contrast, the seven principles in the preamble that describe lawyer professionalism are:

1. embracing a commitment to serve others; 2. dedicating to properly using knowledge and skills to promote a fair and just result; 3. endeavoring to enhance knowledge, skills, and competence; 4. ensuring that concern for a client's desired result does not subvert the lawyer's fairness, honesty, civility, respect, and courtesy during interactions with fellow professionals, clients, opponents, public officials, members of the judiciary, or the public; 5. contributing skill, knowledge, and influence to further the profession's commitment to service and the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system; 6. enhancing the legal system's reputation by educating the public about the profession's capabilities and limits, specifically about what the legal system can achieve and the appropriate methods of obtaining those results; and 7. accepting responsibility for one's own professional conduct and the conduct of others in the profession, including encouraging other lawyers to meet these civility and Professionalism Expectations and fostering peer regulation to ensure that each lawyer is competent and public-spirited.

Id. at pmb1. The document does not explain whether the preamble, or the headings, have any independent meaning above and beyond the numbered lists of Imperative "must" and Recommended "should" statements that follow. Nevertheless, one could easily envision that this document, and either the headings or the preambles, adopted by the Florida Bar Board of Governors, could be used as persuasive evidence in a dispute as to whether or not a "misconduct" violation had occurred—something that is often explicitly prohibited in the text of other state professionalism documents. See *infra* Appendix 2; see also discussion *infra* Part IV.A.

93. *Professionalism Expectations*, *supra* note 25, at 1 (emphasis added).

94. See *id.* at 2, Expectation 1.5 ("A lawyer *must* not seek clients through the use of misleading or manipulative oral and written representations or advertisements." (emphasis

Six of the thirteen concepts are expressed as Imperatives and cite other existing legal ethics rules. These cross-references create ambiguity. For example, Expectation 1.7 states that “[a] lawyer *must* place a client’s best interest ahead of the lawyer’s or another party’s interests” but then cites to a Florida legal ethics rule governing conflicts of interest lacking such language.⁹⁵ How this Imperative is to be reconciled with the authoritative rules and non-authoritative commentary of the legal ethics rules codified in the Rules of Professional Conduct remains unclear.

The Recommendations could also become controversial. Discussions of lawyer competence and diligence,⁹⁶ attorney’s fees and billing practices,⁹⁷ and prospective clients,⁹⁸ for example, all contain language that could readily be added to the legal ethics rules’ commentary. Yet,

added) (citing R. REGULATING FLA. BAR 4-7.13, 4-7.14)), Expectation 1.7 (“A lawyer *must* place a client’s best interest ahead of the lawyer’s or another party’s interests.” (emphasis added) (citing R. REGULATING FLA. BAR 4-1.7(a)(2))), Expectation 1.8 (“A lawyer *must* maintain and preserve the confidence and private information of clients.” (emphasis added) (citing R. REGULATING FLA. BAR 4-1.6)), Expectation 1.11 (“A lawyer *must* routinely keep clients informed and attempt to resolve client concerns.” (emphasis added) (citing R. REGULATING FLA. BAR 4-1.4)), Expectation 1.12 (“A lawyer *must* devote professional time and resources and use civic influence to ensure equal access to our system of justice.” (emphasis added) (citing R. REGULATING FLA. BAR 4-6.1)), Expectation 1.13 (“A lawyer *must* avoid discriminatory conduct prejudicial to the administration of justice in connection with the practice of law.” (emphasis added) (citing R. REGULATING FLA. BAR 4-8.4(d))).

95. *Id.* at 2, Expectation 1.7; *see also* R. REGULATING FLA. BAR 4-1.7 cmt. (“The lawyer’s own interests should not be permitted to have adverse effect on representation of a client,” and “[a] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.”).

96. *See Professionalism Expectations*, *supra* note 25, at 1, Expectation 1.4 (“A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.”). These concepts of competence and diligence are already covered in the Rules Regulating the Florida Bar. *See* R. REGULATING FLA. BAR 4-1.1 (Competence); 4-1.3 (Diligence).

97. *See Professionalism Expectations*, *supra* note 25, at 2, Expectation 1.6 (“When employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation and promptly confirm those arrangements in writing.”), Expectation 1.9 (“In any representation where the fee arrangement is other than a contingent percentage-of-recovery fee or a fixed, flat-sum fee or in which the representation is anticipated to be of more than brief duration, a lawyer should bill clients on a regular, frequent interim basis, and avoid charging unnecessary expenses to the client.”), Expectation 1.10 (“When a fee dispute arises that cannot be amicably resolved, a lawyer should endeavor to utilize an alternative dispute resolution mechanism such as fee arbitration.”). These concepts could be added to the rule commentary on attorney’s fees. *See* R. REGULATING FLA. BAR 4-1.5.

98. *Compare Professionalism Expectations*, *supra* note 25, at 1, Expectation 1.4 (“A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.”), and R. REGULATING FLA. BAR 4-1.16 cmt. (“A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.”); *with id.* at 4-1.3 cmt. (“A lawyer’s workload must be controlled so that each matter can be handled competently.”).

the Recommendations in the *Professionalism Expectations* use language that differs from current legal ethics rules, creating the possibility of interpretive confusion and mischief.

At times, the Recommendations of the *Professionalism Expectations* even contradict the legal ethics rules, as most explicitly⁹⁹ demonstrated by Expectation 1.1, which states that “[a] lawyer should avoid the appearance of impropriety.”¹⁰⁰ This concept was previously *removed* from earlier versions of Florida’s system of legal ethics, and the very notion of an “appearance of impropriety” was explicitly criticized in the commentary of Florida’s Rules of Professional Conduct, declaring the concept to be “question-begging” and both too subjective and lacking in definition to apply.¹⁰¹ But in the *Professionalism Expectations*, the “appearance of impropriety” standard has been resurrected.¹⁰²

99. Expectation 1.2 also creates a tension between legal ethics and professionalism, and broadly states that, “[a] lawyer *should* counsel and encourage other lawyers to abide by these Professionalism Expectations.” *Professionalism Expectations*, *supra* note 25, at 1, Expectation 1.2 (emphasis added). In contrast, Florida lawyers are *required* to report others only when a violation of the legal ethics rules raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer. *See* R. REGULATING FLA. BAR 4-8.3(a) (“Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.”).

In fact, as the commentary explains, lawyers need *not* report every offense. *See id.* at 4-8.3 cmt. (“If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”). Based on the broad language in Expectation 1.2, breaches of Professionalism—which in theory should not be as worrisome as breaches of legal ethics—become every lawyer’s business, without qualification. *Professionalism Expectations*, *supra* note 25, at 1.

100. *Professionalism Expectations*, *supra* note 25, at 1.

101. R. REGULATING FLA. BAR 4-1.10 cmt.

102. The appearance of impropriety concept appeared in the American Bar Association’s *Model Code of Professional Responsibility* for lawyers but was eliminated when the Code was replaced by the *Model Rules of Professional Conduct*. *See* Kathleen Maher, *Keeping Up Appearances*, AM. BAR ASS’N CTR. PROF’L RESP., http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/TPL_AppearanceofImpropriety.authcheckdam.pdf [<https://perma.cc/4XEM-7T4U>].

TABLE 2: <i>External Contradiction—the Appearance of Impropriety</i>	
<i>Professionalism Expectations</i>	<i>Rules Regulating The Florida Bar</i>
Recommendation 1.1. (“A lawyer should avoid the appearance of impropriety.”)	Rule 4-1.10 cmt. (“The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety and was proscribed in former Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since ‘impropriety’ is undefined, the term ‘appearance of impropriety’ is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.”)

B. Honest and Effective Communication

The next category of *Professionalism Expectations* begins with the statement that “[a] lawyer’s word is his or her bond. Effective communication requires lawyers to be honest, diligent, civil, and respectful in their interactions with others.”¹⁰³ Six of the listed Imperatives in this section involve lawyer communications. Again, they blur the line be-

103. *Professionalism Expectations*, *supra* note 25, at 2.

tween ethics and professionalism by citing to existing Rules Regulating The Florida Bar.¹⁰⁴ Six more Recommendations—relating to lawyer-client communications,¹⁰⁵ banning the use of text messages unless otherwise agreed,¹⁰⁶ and banning “reply all” emails that communicate with the opposing counsel’s client¹⁰⁷—would fit neatly with the commentary to existing legal ethics rules, such as the rule governing communication.¹⁰⁸ How the *Professionalism Expectations*’ Recommendations related to communication will be reconciled with the ethical rules regarding communication remains to be seen.

104. See *id.* at 2-3, Expectation 2.2 (“Candor and civility must be used in all oral and written communications.” (citing R. REGULATING FLA. BAR 4-8.4(c))), Expectation 2.3 (“A lawyer must avoid disparaging personal remarks or acrimony toward opposing parties, opposing counsel, third parties or the court.” (citing R. REGULATING FLA. BAR 4-8.4(d))), Expectation 2.4 (“A lawyer must timely serve all pleadings to prevent prejudice or delay to the opposing party.” (citing R. REGULATING FLA. BAR 4-3.2)), Expectation 2.5 (“A lawyer’s communications in connection with the practice of law, including communications on social media, must not disparage another’s character or competence or be used to inappropriately influence or contact others.” (citing R. REGULATING FLA. BAR 4-8.4(d))), Expectation 2.10 (“A lawyer must not knowingly misstate, misrepresent, or distort any fact or legal authority to the court or to opposing counsel and must not mislead by inaction or silence. Further, the discovery of additional evidence or unintentional misrepresentations must immediately be disclosed or otherwise corrected.” (citing R. REGULATING FLA. BAR 4-3.3, 4-8.4)), Expectation 2.18 (“A lawyer must diligently respond to calls, correspondences, complaints, and investigations by The Florida Bar.” (citing R. REGULATING FLA. BAR 4-8.4(g))).

105. See *id.* at 2-3, Expectation 2.1 (“A lawyer should inform every client what the lawyer expects from the client and what the client can expect from the lawyer during the term of the legal representation.”), Expectation 2.7 (“In drafting a proposed letter of intent, the memorialization of an oral agreement, or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.”), Expectation 2.8 (“In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.”), Expectation 2.9 (“A lawyer should not withhold information from a client to serve the lawyer’s own interest or convenience.”), Expectation 2.14 (“Social media should not be used to avoid the ethical rules regulating lawyer advertising.”), Expectation 2.17 (“A lawyer must ensure that the use of electronic devices does not impair the attorney-client privilege or confidentiality.” (citing R. REGULATING FLA. BAR 4-1.6)).

106. See *id.* at 2, Expectation 2.6 (“A lawyer should use formal letters or e-mails for legal correspondence and should not use text messages to correspond with a client or opposing counsel unless mutually agreed.”).

107. See *id.* at 3, Expectation 2.11 (“A lawyer must not inappropriately communicate with a party represented by a lawyer including not responding ‘reply all’ to e-mails.” (citing R. REGULATING FLA. BAR 4-4.2)).

108. See R. REGULATING FLA. BAR 4-1.4, 4-4.2. A simplistic seventh recommendation in the *Professionalism Expectations* states that, “[a] lawyer should diligently prepare legal forms and documents to avoid future harm or litigation for the client while ensuring compliance with the requirements of the law.” *Professionalism Expectations*, *supra* note 25, at 3, Expectation 2.12. This point could easily be directed to the rule or commentary related to the unlicensed practice of law and the non-lawyers with businesses that help people fill out forms. See R. REGULATING FLA. BAR 10-2.2 (“It shall not constitute the unlicensed practice of law for a nonlawyer to engage in limited oral communication to assist a self-represented person in the completion of blanks on a Supreme Court Approved Form. In assisting in the completion of the form, oral communication by nonlawyers is restricted to those communications reasonably necessary to elicit factual information to complete the blanks on the form

Recognizing the larger social trends, the greatest challenge in the regulation of lawyer communication may occur in the context of social media, where three Imperatives deserve special note for their use of the term *must*. They state as follows:

2.13 Social media *must* not be used to disparage opposing parties, lawyers, judges, and members of the public. (*See* R. REGULATING FLA. BAR 4-8.2(a) and 4-8.4(d)). . . .

2.15 Social media *must* not be used to inappropriately contact judges, mediators, jurors, witnesses, or represented parties. (*See* R. REGULATING FLA. BAR 4-3.5 and 4-4.2).

2.16 Social media *must* not be used for the purpose of influencing adjudicative proceedings. (*See* R. REGULATING FLA. BAR 4-3.6).¹⁰⁹

Despite these cross-references, neither the authoritative black letter text of the ethics rules, nor the guidance in the associated commentary for each rule, refer to social media or electronic communication concepts at all. In fact, the regulation of lawyer communication in all the cross-referenced rules is much more limited. Yet, these statements related to social media usage are now Imperatives. These entirely new mandates may impinge upon significant, complex, and ever-changing First Amendment rights, especially when the rule says that “[s]ocial media must not be used to disparage . . . members of the public.”¹¹⁰

Upon careful review, the *Professionalism Expectations* seem to have narrowed the content of lawyer speech and the audience allowed to hear that speech. Consider, for example, Rule 4-3.5, which is cross referenced in the *Professionalism Expectations* by Imperative 2.15. Florida’s legal ethics rule 4-3.5 limits communications with judges, juries and decision makers related to trials, and prohibits communications using a “seek to influence” standard.¹¹¹

and inform the self-represented person how to file the form. The nonlawyer may not give legal advice or give advice on remedies or courses of action.”).

109. *Professionalism Expectations*, *supra* note 25, at 3 (emphasis added). Expectation 2.14 further states that “[s]ocial media should not be used to avoid the ethical rules regulating lawyer advertising.” *Id.*

110. *Id.* at 3, Expectation 2.13; *see, e.g.*, Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366 (2014); Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325 (2014); Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597 (2012); Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 CAMPBELL L. REV. 1 (2013).

111. Rule 4-3.5(a) (“A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.”); *see also*, Rule 4-3.5(b) (Communication with Judge or Official); Rule 4-3.5(c) (Disruption of Tribunal); Rule 4-3.5(d) (Communication With Jurors).

Imperative 2.16 is reasonably consistent with the ethical rule, stating that “[s]ocial media must not be used for the purpose of influencing adjudicative proceedings.”

Imperative 2.15, however, applies to different individuals, and modifies the standard as well. Specifically, it applies to the use of social media communications used to “inappropriately contact” persons. It is not limited to judges, jurors, decision makers, or even trials, and it also reaches and regulates communications with “represented parties.” That latter reference to represented parties explains the cross-reference to Rule 4-4.2, but Imperative 2.15 is much broader than the ethics rule it cross-references. Ethics rule 4-4.2 prohibits a lawyer from communicating “about the subject of the representation” with a person the lawyer “knows to be represented” by another lawyer in the matter, unless the lawyer has obtained consent from the other lawyer. The command of the social media Imperative 2.15 contains none of these limiting concepts.¹¹²

Worse yet, according to the sweepingly broad language of the *Professionalism Expectations* and Imperative 2.13, it seems possible that a lawyer who exercises utterly elementary rights of political free speech—blogging or tweeting a disparaging statement about the policy proposals or nominations offered by a governor, legislator, or presidential candidate—could violate the mandatory, imperative professionalism standards. The Imperative command bans statements that “disparage” anyone at all, and cross-references two ethical rules—neither of which go so far. Rule 4-8.2(a), for example, limits false and reckless statements, whereas Rule 4-8.4(a) limits conduct “prejudicial to the administration of justice.” The *Professionalism Expectations*, it seems, have equated ugly but truthful criticisms with lawyer misconduct.

112. See *infra* Table 3.

TABLE 3: <i>New Mandates of Communication</i>	
<i>Professionalism Imperative</i>	<i>Rules Regulating The Florida Bar</i>
Imperative 2.13 Social media must not be used to disparage opposing parties, lawyers, judges, and members of the public. (See R. REGULATING FLA. BAR 4-8.2(a) and 4-8.4(d))	Rule 4-8.2(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity Rule 4-8.4(d) [a lawyer shall not] engage in conduct in connection with the practice of law that is prejudicial to the administration of justice
Imperative 2.15 Social media must not be used to inappropriately contact judges, mediators, jurors, witnesses, or represented parties. (See R. REGULATING FLA. BAR 4-3.5 and 4-4.2)	Rule 4-3.5(a) A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court. <i>See also</i> , Rule 4-3.5(b) (Communication with Judge or Official); Rule 4-3.5(c) (Disruption of Tribunal); Rule 4-3.5(d) (Communication With Jurors). Rule 4-4.2(a) In representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
Imperative 2.16 Social media must not be used for the purpose of influencing adjudicative proceedings. (See R. REGULATING FLA. BAR 4-3.6)	Rule 4-3.6(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding. <i>See also</i> , Rule 4-3.6(b) A lawyer shall not counsel or assist another person to make such a statement. . . .

C. *Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play*

The third category in the *Professionalism Expectations* states that, “[c]ourtesy, cooperation, integrity, fair play, and abiding by a sense of honor are paramount for preserving the integrity of the profession and to ensuring fair, efficient, and effective administration of justice for the public.”¹¹³ Seven Imperatives cross-reference and overlap with the legal ethics rules related to litigation.¹¹⁴ All eighteen Expectations in

113. *Professionalism Expectations*, *supra* note 25, at 3.
114. *Id.* at 3-4, Expectation 3.1 (“A lawyer must not engage in dilatory or delay tactics.” (citing R. REGULATING FLA. Bar 4-3.2)), Expectation 3.4 (“A lawyer must not permit non-lawyer personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters.” (citing R. REGULATING FLA. BAR 4-3.5(b), 4-8.4(a))), Expectation 3.5 (“A lawyer must avoid substantive *ex parte* communications in a pending case with a presiding judge. The lawyer must notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters.” (citing R. REGULATING

this category, including the eleven Recommendations,¹¹⁵ seem to be an effort to establish or to clarify *minimums* in attorney behavior during litigation. But a wide range of legal ethics rules limiting improper litigation behavior, such as prohibitions of obstreperous conduct¹¹⁶ or unfairness towards an opponent,¹¹⁷ already exist. Once again, the standards in the *Professionalism Expectations* supplement and yet differ from the ethical rules and commentary, with potential for conflicts, controversy, and confusion.

D. Fair and Efficient Administration of Justice

The behavior of litigators is an important aspect of the fourth category of *Professional Expectations*, which states that, “[t]he just,

FLA. BAR 4-3.5)), Expectation 3.7 (“A lawyer must promptly prepare a proposed order, ensure that the order fairly and adequately represents the court’s ruling before submitting the order to the court, and advise the court whether opposing counsel has approved the order.” (citing R. REGULATING FLA. BAR 4-3.4(c))), Expectation 3.9 (“A lawyer must not ask a deponent irrelevant personal questions or questions designed to embarrass a deponent.” (citing R. REGULATING FLA. BAR 4-4.4(a))), Expectation 3.11 (“A lawyer must not prevent a deponent from answering questions unless a legal privilege applies.” (citing R. REGULATING FLA. BAR 4-3.4(c))), Expectation 3.18 (“A lawyer must not threaten opposing parties with sanctions, disciplinary complaints, criminal charges, or additional litigation to gain a tactical advantage.” (citing R. REGULATING FLA. BAR 4-3.4(g)-(h))).

115. The Recommendations relate to scheduling, continuances, extension, service, court submissions, communications with adversaries, depositions, interrogatories, motions, witnesses, ex parte communications settlement and trial process. *Id.* at 3-4, Expectation 3.2 (“A lawyer should not make scheduling decisions that limit opposing counsel’s opportunity to prepare or respond.”), Expectation 3.3 (“A lawyer should not unreasonably oppose an adversary’s motion.”), Expectation 3.6 (“When submitting a written communication to a court or other tribunal, a lawyer should provide opposing counsel with a copy of the document contemporaneously or sufficiently in advance of any related hearing.”), Expectation 3.8 (“A lawyer should only schedule depositions to ascertain relevant facts and not to generate income or harass deponents or opposing counsel.”), Expectation 3.10 (“A lawyer should not make improper objections in depositions.”), Expectation 3.12 (“When scheduling depositions, hearings, and other court proceedings, a lawyer should request an amount of time that permits all parties in the case the opportunity to be fully and fairly heard on the matter.”), Expectation 3.13 (“A lawyer should immediately provide a scheduling notice for a hearing, deposition, or trial to all opposing parties.”), Expectation 3.14 (“A lawyer should notify opposing parties and subpoenaed witnesses of a cancelled or rescheduled hearing, deposition, or trial.”), Expectation 3.15 (“During pre-trial disclosure, a lawyer should make a reasonable, good-faith effort to identify witnesses likely to be called to testify.”), Expectation 3.16 (“During pre-trial disclosure, a lawyer should make a reasonable good-faith effort to identify exhibits to be proffered into evidence.”), Expectation 3.17 (“A lawyer should not mark on or alter exhibits, charts, graphs, or diagrams without opposing counsel’s permission or leave of court.”).

116. R. REGULATING FLA. BAR 4-3.5(c) states that, “[a] lawyer shall not engage in conduct intended to disrupt a tribunal,” further explaining in commentary that, “[t]he advocate’s function is to present evidence and argument so that the cause may be decided according to law” and that, “[r]efraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants.” *Id.* at 4-3.5 cmt.

117. Rule 4-3.4 requires fairness to an opposing party and counsel, and commentary further explains that, “[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.” *Id.* at 4-3.4 cmt.

speedy, and inexpensive determination of every controversy is necessary to preserve our system of justice.”¹¹⁸ Four Imperative statements relate to needless delay, expense, and other concerns already addressed in the legal ethics rules,¹¹⁹ three Recommendations relate to discovery,¹²⁰ five Recommendations espouse client counseling and other actions to reduce needless litigation,¹²¹ four Recommendations regard a lawyer’s conduct with a jury,¹²² and one more Recommendation frowns upon the use of a post-hearing process to reargue a case.¹²³ Through this one section of just one professionalism document, a vast range of rules of civil procedure has been touched upon: from pleading to discovery, to courtroom argument, to claim resolution.

Three recommendations in this category of the *Professionalism Expectations*, however, discuss absolutely basic problems of lawyering:

118. *Professionalism Expectations*, *supra* note 25, at 4.

119. *See id.* at 4-5, Expectation 4.6 (“A lawyer must not invoke a rule for the purpose of creating undue delay, or propose frivolous oral or written arguments which do not have an adequate basis in the law nor fact.” (citing R. REGULATING FLA. BAR 4-3.1)), Expectation 4.7 (“A lawyer must not use discovery to harass or improperly burden an adversary or cause the adversary to incur unnecessary expense.” (citing R. REGULATING FLA. BAR 4-4.4)), Expectation 4.19 (“A lawyer must not request rescheduling, cancellations, extensions, and postponements without legitimate reasons or solely for the purpose of delay or obtaining unfair advantage.” (citing R. REGULATING FLA. BAR 4-4.4)), Expectation 4.20 (“A lawyer must not criticize or denigrate opposing parties, witnesses, or the court to clients, media, or members of the public.” (citing R. REGULATING FLA. BAR 4-8.2(a), 4-8.4(d))).

120. *See id.* at 4, Expectation 4.8 (“A lawyer should frame reasonable discovery requests tailored to the matter at hand.”), Expectation 4.9 (“A lawyer should assure that responses to proper discovery requests are timely, complete, and consistent with the obvious intent of the request. A lawyer should not avoid disclosure unless a legal privilege prevents disclosure.”), Expectation 4.10 (“A lawyer should not respond to discovery requests in a disorganized, unintelligible, or inappropriate manner, in an attempt to conceal evidence.”).

121. *See id.* at 4-5, Expectation 4.3 (“A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.”), Expectation 4.4 (“A lawyer should counsel the client to consider settlement in good faith.”), Expectation 4.5 (“A lawyer should accede to reasonable requests for waivers of procedural formalities when the client’s legitimate interests are not adversely affected.”), Expectation 4.11 (“A lawyer should stipulate to all facts and principles of law that are not in dispute and should promptly respond to requests for stipulations of fact or law.”), Expectation 4.12 (“After consulting with the client, a lawyer should voluntarily withdraw claims and defenses that are without merit, superfluous, or cumulative.”).

122. *See id.* at 4-5, Expectation 4.14 (“A lawyer should not use *voir dire* to extract promises from or to suggest desired verdicts to jurors.”), Expectation 4.15 (“A lawyer should abstain from all acts, comments, and attitudes calculated to curry favor with jurors.”), Expectation 4.16 (“A lawyer should not express bias or personal opinion concerning any matter at issue in opening statements and in arguments to the jury.”), Expectation 4.17 (“A lawyer should not make offers or requests for a stipulation in front of the jury.”).

123. *See id.* at 5, Expectation 4.18 (“A lawyer should not use the post-hearing submission of proposed orders as an opportunity to argue or reargue a matter’s merits.”).

4.1 A lawyer *should* be familiar with the court's administrative orders, local rules, and each judge's published standing orders, practices, and procedures.

4.2 A lawyer *should* endeavor to achieve the client's lawful objectives as economically and expeditiously as possible. . . .

4.13 A lawyer *should* be fully prepared when appearing in court or at hearings.¹²⁴

Although labelled as professionalism, none of these concepts reflect the highest ideals of the legal profession. Of course lawyers should follow local rules, meet client needs, or show up in court. Professionalism has been reduced to banality. Arguably, each phrase could be rewritten to have the word "should" replaced with "must." The concepts could then be seamlessly inserted into Florida's system of legal ethics as part of the black letter rule or the commentary of the legal ethics rules governing competence,¹²⁵ diligence,¹²⁶ or perhaps fairness to opposing parties and counsel¹²⁷ and decorum of the tribunal.¹²⁸

E. Decorum and Courtesy

The fifth category of *Professionalism Expectations* begins with an explanation that, "[w]hen lawyers display reverence for the law, the judicial system, and the legal profession by acting with respect, decorum, and courtesy, they earn the trust of the public and help to preserve faith in the operation of a fair judicial system."¹²⁹ The eight Recommendations

124. *Id.* at 4 (emphasis added).

125. *See* R. REGULATING FLA. BAR 4-1.1.

126. *See id.* at 4-1.3.

127. *See id.* at 4-3.4.

128. *See id.* at 4-3.5.

129. *Professionalism Expectations*, *supra* note 25, at 5.

in this category include abstaining from rude, disruptive, and disrespectful behavior,¹³⁰ referring to people by last name in legal proceedings,¹³¹ getting permission from the court,¹³² defining appropriate objections,¹³³ and avoiding gestures and diversionary conduct.¹³⁴ Again, these items easily could be added to the legal ethics rules or commentary, or the rules of civil procedure. Still, one Imperative command in this fifth category warrants special consideration:¹³⁵

5.3 A lawyer *must* always behave in a courteous and formal manner in hearings, depositions, and trials and should refrain from seeking special consideration from a judge or juror.¹³⁶

Despite The Florida Bar's explanation, quoted earlier in this Article,¹³⁷ that all mandatory language in the *Professionalism Expectations* denotes a concept that is coextensive with a lawyer's ethical duty, this Imperative does *not* refer to an existing legal ethics rule in Florida's Rules of Professional Conduct. Instead, it simply requires a lawyer to be "courteous" in hearings, depositions, and trials, and elsewhere, lawyers are told to show "civility" in oral and written communications.¹³⁸

130. See *id.* Expectation 5.1 ("A lawyer should abstain from rude, disruptive, and disrespectful behavior. The lawyer should encourage clients and support personnel to do the same.").

131. See *id.* Expectation 5.4 ("A lawyer should refer to all parties, witnesses, and other counsel by their last names during legal proceedings.").

132. See *id.* Expectation 5.5 ("A lawyer should request permission from the court before approaching the bench or submitting any document."), Expectation 5.10 ("A lawyer should attempt to resolve disagreements before requesting a court hearing or filing a motion to compel or for sanctions.").

133. See *id.* Expectation 5.6 ("A lawyer should state only the legal grounds for an objection unless the court requests further argument or elaboration."), Expectation 5.9 ("A lawyer should address objections, requests, and observations to the judge.").

134. See *id.* Expectation 5.7 ("A lawyer should inform clients and witnesses that approving and disapproving gestures, facial expressions, or audible comments are absolutely prohibited in legal proceedings."), Expectation 5.8 ("A lawyer should abstain from conduct that diverts the fact-finder's attention from the relevant facts or causes a fact-finder to make a legally impermissible decision.").

135. In this same section, a Recommendation in Expectation 5.2 states that, "[a] lawyer should be civil and courteous in all situations, both professional and personal, and avoid conduct that is degrading to the legal profession." *Id.* Expectation 5.2 (citing R. REGULATING FLA. BAR 3-4.3). Elsewhere, the *Professionalism Expectations* also state that, "[c]andor and civility *must* be used in all oral and written communications." *Id.* at 2, Expectation 2.2 (emphasis added) (citing R. REGULATING FLA. BAR 4-8.4(c)).

136. *Id.* at 5, Expectation 5.3 (emphasis added).

137. See *supra* text accompanying note 82.

138. *Professionalism Expectations*, *supra* note 25, at 2, Expectation 2.2 (stating that "Candor and civility must be used in all oral and written communications" and citing R. REGULATING FLA. BAR 4-8.4(c)).

These new professionalism standards regarding decorum and courtesy, as shown in Table 4, represent a substantial deviation from the existing legal ethics rules. In Florida’s Rules of Professional Conduct, the term “civility” is never used. The black letter rules do not refer to “courtesy” either, and the term “courtesy” only appears in the commentary related to lawyer diligence¹³⁹ and advertising,¹⁴⁰ and never as a mandate.

With these new professionalism standards, civility and courtesy are now about more than mere manners.¹⁴¹ The concept of civility has been equated with dishonesty, fraud, deceit, and misrepresentation. *See* Table 4. The *Professionalism Expectations* have introduced important new concepts into the law governing lawyers, not otherwise found in the legal ethics rules.

TABLE 4: <i>New Mandates of Civility</i>	
<i>Professionalism Imperatives</i>	<i>Rules Regulating the Florida Bar</i>
Imperative 5.3 “A lawyer must always behave in a courteous and formal manner in hearings, depositions, and trials and should refrain from seeking special consideration from a judge or juror.	This “imperative” has no cross-reference to any legal ethics rule. <i>Cf.</i> R. REGULATING FLA. BAR 4-1.3 cmt. (The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.)
Imperative 2.2 Candor and civility must be used in all oral and written communications (citing rule 4-8.4(c)).	Rule 4-8.4 A lawyer shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule . . .

139. R. REGULATING FLA. BAR 4-1.3 cmt. (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”).

140. *Id.* at 4-7.13 cmt. (“Clients as consumers are well-qualified to opine on matters such as [an attorney’s] courtesy, promptness, efficiency, and professional demeanor.”).

141. *See generally* Catherine Thérèse Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991) (identifying the theoretical and practical justifications for establishing written etiquette standards for court proceedings).

F. *Respect for the Time and Commitments of Others*

The sixth major principle in the *Professional Expectations* states that “[r]especting the time and commitments of others is essential to the efficient and fair resolution of legal matters.”¹⁴² It includes an Imperative that lawyers must engage in timely communication with their clients¹⁴³ and otherwise emphasizes common sense time management recommendations such as punctuality,¹⁴⁴ avoiding unreasonable deadlines,¹⁴⁵ providing advance notice,¹⁴⁶ allowing adequate time,¹⁴⁷ and responsible rescheduling.¹⁴⁸ Many of these concepts seem like routine procedural demands, appropriate for the Florida Rules of Civil Procedure, which already allows the court to address pre-trial issues such as rescheduling, timeliness, notice, and deadlines.¹⁴⁹ Alternatively, these concepts could be appropriate additions to the black letter rules or commentary attached to Florida’s existing legal ethics rules regarding diligence, communication, or fairness to opposing counsel.¹⁵⁰

G. *Independence of Judgment*

The seventh and final concept in the *Professionalism Expectations* document states that, “[a]n enduring value of a lawyer’s service is

142. See *Professionalism Expectations*, *supra* note 25.

143. See *id.* at 6, Expectation 6.10 (“A lawyer must respond promptly to inquiries and communications from clients and others.” (citing R. REGULATING FLA. BAR 4-1.4)).

144. See *id.* Expectation 6.9 (“A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.”).

145. See *id.* at 5, Expectation 6.1 (“A lawyer should not impose arbitrary or unreasonable deadlines on others.”).

146. See *id.* Expectation 6.3 (“Unless circumstances compel more expedited scheduling, a lawyer should provide litigants, witnesses, and other affected persons with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule these events at times convenient for all interested persons.”).

147. See *id.* Expectation 6.2 (“A lawyer should schedule a deposition during a time period sufficient to allow all parties to examine the deponent.”).

148. See *id.* Expectation 6.4 (“A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client’s opportunity for full, fair, and prompt adjudication.”), Expectation 6.5 (“A lawyer should promptly agree to a proposed time for a hearing, deposition, meeting or other proceeding or make his or her own counter proposal of time.”), Expectation 6.6 (“A lawyer should promptly call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal.”), Expectation 6.7 (“A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.”), Expectation 6.8 (“A lawyer should promptly notify the court or tribunal when a scheduled court appearance becomes unnecessary.”).

149. See, e.g., FLA. R. CIV. P. 1.200–1.201, cmt.

150. R. REGULATING FLA. BAR, 4-1.3 (diligence); 4-1.4 (communication); 4-3.4 (fairness to opponent) (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”).

grounded in the lawyer's willingness to exercise independent judgment in practice and while giving the client advice and counsel."¹⁵¹ It includes one Imperative, requiring lawyers neither to improperly delay, nor to improperly burden others.¹⁵² The related Recommendations can be sorted into two groups. First, two Recommendations involve a lawyer refusing to engage in the client's ill-founded legal actions,¹⁵³ a point that could easily be included in the legal ethics rules or commentary related to lawyer independence and lawyer misconduct.¹⁵⁴ Second, four more Recommendations state that lawyers "should" advise clients about the realities of the legal process,¹⁵⁵ concepts that could be added into the commentary related to the lawyer's role as an advisor to a client.¹⁵⁶ Mundane and minimum expectations of lawyering have been labelled, once again, as professionalism.

IV. THE BIG PICTURE: THE INHERENT FAILURES OF MANDATORY PROFESSIONALISM

Thus far, this Article has explored the Florida process for enforcing professionalism and summarized and evaluated the substantive commands of the *Professionalism Expectations* by comparing them with Florida's legal ethics rules. The analysis demonstrated how historic distinctions between professionalism and ethics have blurred. A proper discussion of the relationship between ethics and professionalism, however, must transcend a single document like the *Professionalism Expectations* or a single court order such as the one issued by the Supreme Court of Florida in 2013. Rather, a more complete view

151. See *Professionalism Expectations*, *supra* note 25, at 6.

152. See *id.* Expectation 7.5 ("A lawyer must counsel a client against using tactics designed: (a) to hinder or improperly delay a legal process; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics." (citing R. REGULATING FLA. BAR 4-1.16, 4-3.2, 4-4.4)).

153. See *id.* Expectation 7.1 ("A lawyer should exercise independent judgment and should not be governed by the client's ulterior motives, ill will, or deceit."), Expectation 7.4 ("A lawyer should not permit a client's ill will toward an adversary, witness, or tribunal to become that of the lawyer.").

154. R. REGULATING FLA. BAR 4-5.4(d) ("Exercise of Independent Professional Judgment. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

155. See *Professionalism Expectations*, *supra* note 25, at 6, Expectation 7.2 ("A lawyer should counsel a client or prospective client, even with respect to a meritorious claim or defense, about the public and private burdens of pursuing the claim as compared with the benefits to be achieved."), Expectation 7.3 ("In advising a client, a lawyer should not understate or overstate achievable results or otherwise create unrealistic expectations."), Expectation 7.6 ("In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.").

156. R. REGULATING FLA. BAR 4-2.1.

is gained by stepping back from the details. After all, professionalism, like ethics, is intended to help ensure that lawyers and the legal system properly serve justice. For that analysis, moral, philosophical, and jurisprudential concepts prove helpful.

A. History: Blurring Lines Between Morality, Ethics, and Now, Professionalism

To some extent, all documents related to the law governing lawyers, including the Rules of Professional Conduct and the *Professionalism Expectations*, represent an exercise in applied philosophy and an attempt to codify moral standards. Moral concepts often have scriptural roots, and a thoughtful look at the system of legal ethics reveals how scripture influenced the rules establishing the right way, and the wrong way, to practice law.¹⁵⁷

For example, when it comes to both bar admission¹⁵⁸ and reinstatement,¹⁵⁹ a lawyer *must* possess *character* worthy of redemption, as one practitioner observed about the professionalism standards of his home state of Minnesota:

Over the past 20 years the Minnesota Supreme Court has evolved a remarkable jurisprudence in reinstatement and bar admission cases that is nearly scriptural in its subject and its vocabulary. Although miscreants, generally, are redeemable, few have shown the desire, resolve, and actual transformation needed to obtain [a] certification of redemption.¹⁶⁰

The challenge, of course, lies in identifying the miscreants—the sinners who lack the necessary character to practice law—as opposed to the others who are deserving of redemption.

Like the bar admission rules, the legal ethics rules also contain biblical themes, but they are not limited to character. A trustworthy lawyer does not slander and keeps secrets covered,¹⁶¹ so client confidences

157. See Larry O. Natt Gantt, II, et al., *Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues*, 19 REGENT U. L. REV. 1 (2006).

158. See, e.g., FLA. BAR ADMISSION, <https://www.floridabarexam.org/web/website.nsf/rule.xsp> [<https://perma.cc/WYH6-PHQJ>].

159. R. REGULATING FLA. BAR ch. 3 (rules of discipline).

160. William J. Wernz, *Character, Fitness & Redemption: Measuring Fitness to Practice*, 64 BENCH & B. MINN. 18, 18 (2007) (emphasis omitted).

161. *Proverbs* 11:13 (English Standard) (“Whoever goes about slandering reveals secrets, but he who is trustworthy in spirit keeps a thing covered.”). Lawyer-client confidentiality bears important parallels to the pastor-parishioner relationship. However, the literal text of *Proverbs* emphasizes the benefits of open confession: “Whoever conceals his transgressions will not prosper, but he who confesses and forsakes them will obtain mercy.” *Proverbs* 28:13.

must be maintained.¹⁶² Lawyers cannot serve two masters,¹⁶³ so conflicts of interest must be avoided.¹⁶⁴ Thou shalt not bear false witness,¹⁶⁵ so honest lawyers ensure candor to the tribunal¹⁶⁶ and avoid false statements or omissions of material fact.¹⁶⁷ Thou shalt not steal,¹⁶⁸ as our trust fund accounting rules dictate.¹⁶⁹ Money can be the root of all kinds of evils,¹⁷⁰ so rules regulate the fees that lawyers can charge.¹⁷¹ People blessed with a bounty must be generous to the poor,¹⁷² should not bury talents,¹⁷³ and should serve the least well-off among us,¹⁷⁴ so lawyers are encouraged to ensure the provision of legal services to the poor.¹⁷⁵ Diligence leads to abundance, and haste to poverty.¹⁷⁶ These are just a few examples of the religious and moral underpinnings of the many concepts in our system of legal ethics, and similar exercises could be undertaken with the principles of other faiths.¹⁷⁷

162. See R. REGULATING FLA. BAR 4-1.6 (confidentiality of information).

163. *Matthew* 6:24 (English Standard) ("No one can serve two masters, for either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve God and money.").

164. See R. REGULATING FLA. BAR 4-1.7 to 4-1.12.

165. *Exodus* 20:16 (English Standard) ("You shall not bear false witness against your neighbor.").

166. See R. REGULATING FLA. BAR 4-3.3.

167. See *id.* at 4-4.1, 4-4.4.

168. *Exodus* 20:15 (English Standard) ("You shall not steal.").

169. See generally R. REGULATING FLA. BAR ch. 5 (governing attorney management of trust accounts and client finances).

170. 1 *Timothy* 6:10 (English Standard) ("For the love of money is a root of all kinds of evils. It is through this craving that some have wandered away from the faith and pierced themselves with many pangs.").

171. See R. REGULATING FLA. BAR 4-1.5 (fees and costs for legal services).

172. *Proverbs* 22:9 (English Standard) ("Whoever has a bountiful eye will be blessed, for he shares his bread with the poor."); *Proverbs* 14:21 ("Whoever despises his neighbor is a sinner, but blessed is he who is generous to the poor.").

173. *Matthew* 25:24-26 (English Standard) ("He also who had received the one talent came forward, saying, 'Master, I knew you to be a hard man, reaping where you did not sow, and gathering where you scattered no seed, so I was afraid, and I went and hid your talent in the ground. Here you have what is yours.' But his master answered him, 'You wicked and slothful servant! You knew that I reap where I have not sown and gather where I scattered no seed?'").

174. *Matthew* (English Standard) 25:40 ("And the King will answer them, 'Truly, I say to you, as you did it to one of the least of these my brothers, you did it to me.'").

175. See R. REGULATING FLA. BAR 4-6.1 (pro bono public service).

176. See R. REGULATING FLA. BAR 4-1.3 (diligence); compare *Proverbs* (English Standard) 21:5 ("The plans of the diligent lead surely to abundance, but everyone who is hasty comes only to poverty.").

177. Scholars have long discussed the connections between legal ethics and both Christianity and Judaism. See Joseph Allegritti, *Lawyer, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101 (1998); Lawrence A. Hoffman, *Response to Joseph Allegritti: The Relevance of Religion to a Lawyer's Work*, 66 FORDHAM L. REV. 1157 (1998); see also Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal*

These correlations are important. By connecting ethical codes to shared morals, standards of professionalism and disciplinary systems can have greater credibility with the community of regulated lawyers, as Professor W. Bradley Wendell has argued:

All this sermonizing is premised on the existence and teachability of norms of legal ethics that transcend positive law and upon which there is agreement. Religious preachers can appeal to a sacred text or revealed truth to ground their claims that their parishioners ought or ought not to do something. But preaching to lawyers in a pluralistic society is a different matter altogether, and the success of secular preaching by bar association leaders and judges depends on locating the authority for moral propositions. When careful attention is not given to this foundational task, the resulting arguments have a marked tendency to sound moralistic and ripe for debunking.¹⁷⁸

In other words, when our rules of legal ethics—and the standards of professionalism—deviate from otherwise accepted moral values, great debates and challenging moral problems may follow.¹⁷⁹ The ethics rules, for example, when applied to the lies of a client accused of committing a crime, present a classic “trilemma,” outlined long ago by Professor Monroe Freedman.¹⁸⁰ Legal ethics rules related to competence¹⁸¹ and communication¹⁸² require lawyers to know critical facts about representing a client, rules related to confidentiality¹⁸³ require the lawyer not to reveal those facts, and rules governing candor to the tribunal¹⁸⁴ then require the lawyer to expose a lie when told. Some

Ethics, 66 FORDHAM L. REV. 1253, 1273 (1998) (discussing how theology and religion influence the choices of the individual lawyer and the norms of the legal profession).

178. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 4 (1999).

179. See, e.g., Eric L. Muller, *The Fellowships at Auschwitz for the Study of Professional Ethics and the Moral Formation of Lawyers*, 64 J. LEGAL EDUC. 385 (2015) (discussing a fellowship program where ethical issues are studied in the context of the Holocaust and noting that lawyers contributed to the murder of the Jews of Europe because ethical duties such as candor and confidentiality, and the misapplication of law and facts, can lead to the facilitation of genocide).

180. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 159-95 (3d ed. 2004) (arguing that a lawyer's ethical difficulty is called a trilemma because of the conflicting obligations to know of the facts, keep client confidentiality, and be candid to the tribunal); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

181. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

182. *Id.* at 1.4.

183. *Id.* at 1.6.

184. *Id.* at 3.3.

scholars passionately disagreed with Freedman's solution of letting defendants lie,¹⁸⁵ while others argued that lying itself can be moral.¹⁸⁶ If nothing else, the debates demonstrated the existence of a gap between the realities of legal ethics rules and the ideals of morality.

This gap was identified long ago. In 1836, David Hoffman authored his *Fifty Resolutions in Regard to Professional Deportment*. A Maryland lawyer and law professor, he recognized and confronted the reality that the practice of law, and its ethics, could conflict with good morals. Even when one course of action was dictated by rule or custom, he argued, morality could be an independent basis for a different path:

What is wrong is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. . . . Such cases, fortunately, occur but seldom; but, when they do, I shall trust to that moral firmness of purpose which shrinks from no consequences, and which can be intimidated by no authority, however ancient or respectable.¹⁸⁷

Hoffman's effort represented the first American code of legal ethics.¹⁸⁸ For the next century, these same moral concerns would be debated by the states and the ABA, as they shaped the ethical codes governing lawyers.¹⁸⁹

In the ABA's 1908 Canons of Professional Ethics, documents were structured to integrate both the minimum expectations and the moral

185. See, e.g., Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821 (2006).

186. See, e.g., Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195, 199-202 (1996) (describing the lies of biblical figures Elisha and Rebekkah).

187. Hoffman, *supra* note 30, at ¶ 33. Many of Hoffman's Resolutions reflect concepts similar to the *Professionalism Expectations*. See, e.g., *id.* at ¶ 2 ("I will espouse no man's cause out of envy, hatred, or malice toward his antagonist."); ¶ 6 ("To the various officers of the court I will be studiously respectful, and specially regardful of their rights and privileges."). On the other hand, Hoffman also elevated his own personal sense of right and wrong, even refusing to offer a statute of limitations defense. See *id.* at ¶ 12 ("I will never plead the statute of limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.").

188. Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 571-72 (2014).

189. Stephen E. Kalish, *David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54, 57-59 (1982).

aspirations of the legal profession.¹⁹⁰ The Canons, in fact, were an attempt to respond to President Theodore Roosevelt's 1905 commencement address at Harvard University describing lawyers as "hired cunning" who thwarted the public interest.¹⁹¹ Building upon an Alabama Code of Ethics,¹⁹² and responding to Roosevelt's critique, the ABA Canons were an attempt to help the legal profession protect its reputation,¹⁹³ much like the professionalism movement today.

By 1937, the ABA Canons offered an integrated set of moral, ethical, and practical principles to help lawyers guide their conduct.¹⁹⁴ Yet, the Preamble to the ABA Canons was remarkably honest about what they could do and what they could not. "No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life."¹⁹⁵

190. See ABA COMMITTEE ON CODE OF PROFESSIONAL ETHICS, FINAL REPORT, *supra* note 31, at 569.

191. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2399, 2403-06 (2003).

192. The Alabama Code is the basis for twenty-eight of the thirty-two original Canons. See *id.* at 2432.

193. See *id.* at 2399.

194. See ABA CANONS OF PROF'L ETHICS Canon 1 ("The Duty of the Lawyer to the Courts"), Canon 2 ("The Selection of Judges"), Canon 3 ("Attempts to Exert Personal Influence on the Court"), Canon 4 ("When Counsel for an Indigent Prisoner"), Canon 5 ("The Defense or Prosecution of Those Accused of a Crime"), Canon 6 ("Adverse Influences and Conflicting Interests"), Canon 7 ("Professional Colleagues and Conflicts of Opinion"), Canon 8 ("Advising Upon the Merits of a Client's Cause"), Canon 9 ("Negotiations with Opposite Party"), Canon 10 ("Acquiring Interest in Litigation"), Canon 11 ("Dealing with Trust Property"), Canon 12 ("Fixing the Amount of the Fee"), Canon 13 ("Contingent Fees"), Canon 14 ("Suing a Client for a Fee"), Canon 15 ("How Far a Lawyer May Go in Supporting a Client's Cause"), Canon 16 ("Restraining Clients from Improperities"), Canon 17 ("Ill Feeling and Personalities Between Advocates"), Canon 18 ("Treatment of Witnesses and Litigants"), Canon 19 ("Appearance of lawyer as Witness for His Client"), Canon 20 ("Newspaper Discussion of Pending Litigation"), Canon 21 ("Punctuality and Expedition"), Canon 22 ("Candor and Fairness"), Canon 23 ("Attitude Toward Jury"), Canon 24 ("Right of Lawyer to Control the Incidents of the Trial"), Canon 25 ("Taking Technical Advantage of Opposite Counsel; Agreements with Him"), Canon 26 ("Professional Advocacy Other Than Before Courts"), Canon 27 ("Advertising, Direct or Indirect"), Canon 28 ("Stirring Up Litigation, Directly or Through Agents"), Canon 29 ("Upholding the Honor of the Profession"), Canon 30 ("Justifiable and Unjustifiable Litigations"), Canon 31 ("Responsibility for Litigation"), Canon 32 ("The Lawyer's Duty in Its Last Analysis"), Canon 33 ("Partnerships-Names"), Canon 34 ("Division of Fees"), Canon 35 ("Intermediaries"), Canon 36 ("Retirement from Judicial Position or Public Employment"), Canon 37 ("Confidences of a Client"), Canon 38 ("Compensation, Commissions and Rebates"), Canon 39 ("Witnesses"), Canon 40 ("Newspapers"), Canon 41 ("Discovery of Imposition and Deception"), Canon 42 ("Expenses of Litigation"), Canon 43 ("Approved Law Lists"), Canon 44 ("Withdrawal from Employment as Attorney or Counsel"), Canon 45 ("Specialists"), Canon 46 ("Notice to Local Lawyers"), Canon 47 ("Aiding the Unauthorized Practice of Law") (AM. BAR ASS'N 1963), <https://archive.org/details/canonsofprofessi00amer>.

195. *Id.* pmb1.

The ABA eventually attempted to untangle the Canons' integrated approach to law and morality, criticizing its own earlier efforts as disorganized, unenforceable, and quaint.¹⁹⁶ In 1969, the ABA Code of Professional Responsibility divided the Canons into 9 aspirational Canons, each subdivided into two categories of Ethical Considerations and Disciplinary Rules.¹⁹⁷ However, the Model Code, like the Canons before it, would also be replaced.

By 1977, the ABA's Commission on Evaluation of Professional Standards was rethinking the ethical premises and problems of the legal profession. As the ABA recognized, the Model Code could not "achieve a comprehensive statement of the law governing the legal profession."¹⁹⁸ The ABA pursued a different path, again.

The Model Rules of Professional Conduct were adopted in 1983 and have been amended repeatedly thereafter.¹⁹⁹ These rules achieved widespread success, and were adopted with amendments in Washington D.C., the Virgin Islands, Florida and forty-eight other states (with the exception of California).²⁰⁰ The Model Rules differed greatly from the old Canons, because they were not as blended with aspirations: "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."²⁰¹

What the ABA methodically separated, through debates that took more than a century, the Florida Supreme Court squished together in just three short years. Through its *Code for Resolving Professionalism Complaints* and the *Professionalism Expectations*, with their Imperatives and cross-references, discipline and aspiration have been reu-

196. MODEL CODE OF PROF'L RESPONSIBILITY preface (AM. BAR ASS'N 1980) ("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.").

197. See *id.* Canon 1 ("A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession"), Canon 2 ("A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available"), Canon 3 ("A Lawyer Should Assist in Preventing the Unauthorized Practice of Law"), Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client"), Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"), Canon 6 ("A Lawyer Should Represent a Client Competently"), Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"), Canon 8 ("A Lawyer Should Assist in Improving the Legal System"), Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

198. MODEL RULES OF PROF'L CONDUCT preface (AM. BAR ASS'N 2016).

199. See *id.*

200. See *State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html [https://perma.cc/C5GU-PL33].

201. MODEL RULES OF PROF'L CONDUCT pmbl., cmt. 19 (AM. BAR ASS'N 2016).

nited. “Unprofessional conduct” due to “substantial or repeated violations”²⁰² can be subjected to complaints and consequences. Indeed, the Court admitted that its goal was to achieve “better” behavior through a structure:

Over the years, we have come to understand that professionalism or acceptable professional behavior is not simply a matter of character or principles nor is it simply an issue of rule-following or rule-violating. To the contrary, unacceptable professional conduct and behavior is often a matter of choice or decision-making. Therefore, we accept the proposal of the Professionalism Commission to create a structure for affirmatively addressing unacceptable professional conduct. This first step admittedly contains small initial measures designed to firmly encourage better behavior.²⁰³

At times, the concepts of professionalism, and the demands for better behavior to achieve justice or fairness might also echo well-established moral or biblical goals.²⁰⁴ But the *Professionalism Expectations* are also making old errors all over again. Like the disorganized 1908 ABA Canons, Florida’s various professionalism documents are a jumbled blend of morality, law, ethics, and etiquette. And, like the 1969 ABA Model Code, with its Ethical Considerations and Disciplinary Rules, the *Professionalism Expectations* have been divided into a combination of Recommendations and Imperatives. Ultimately, the *Professionalism Expectations* represent just another attempt to write down rules of behavior, despite the fact that the legal profession has previously learned that not every notion of right and wrong or good and bad can be codified into an enforceable rule.

In response to these criticisms, some people might conclude that better wordsmithing might solve the problems and produce a better system of lawyer professionalism standards. To some extent, that is probably true, and this Article recommends that some of the concepts of professionalism could be rewritten, either as important aspirational standards, or as edits to the existing ethical rules. But the problem of codifying professionalism extends beyond mere words.

For decades, scholars have debated the connection between law and morality. And the historic debates of jurisprudence reveal a bigger challenge. The whole concept of mandatory and enforceable professionalism has human limitations.

202. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 282 (Fla. 2013).

203. *Id.* at 281.

204. *Cf. Exodus* 23:6 (English Standard) (“You shall not pervert the justice due to your poor in his lawsuit.”); *Proverbs* 18:5 (English Standard) (“It is not good to be partial to the wicked or to deprive the righteous of justice.”); *Proverbs* 21:15 (English Standard) (“When justice is done, it is a joy to the righteous but terror to evildoers.”); *Proverbs* 29:14 (English Standard) (“If a king faithfully judges the poor, his throne will be established forever.”).

Two philosophical thinkers, H.L.A. Hart and Lon Fuller, famously debated their theories on jurisprudence. They disagreed over the extent to which law and morality were intertwined. Yet, both recognized the significance of humanity and its place in the morality of law.

Hart developed the philosophy of legal positivism, concluding that law was not necessarily moral; rather it was simply a set of rules to be obeyed by the people, which in turn may (or may not) reflect the morality of the people.²⁰⁵ Hart's analysis engaged in a pragmatic consideration of whether the legal system would be enforced and followed by the people it governed.²⁰⁶ Fuller, on the other hand, argued that there needs to be an internal morality to law and suggested that just and moral laws adhere to a series of criteria.²⁰⁷

Tellingly, despite their distinctly different jurisprudential perspectives,²⁰⁸ both Hart and Fuller would probably agree that Florida's current system of mandatory professionalism contains significant flaws.

B. H.L.A. Hart: *The Individual's Internal Point of View*

Hart viewed law as separate from morality. His positivist approach evaluated what the law is, rather than what the law ought to be.²⁰⁹ According to Hart, laws consist of primary rules, imposing duties, and secondary rules, which confer powers to enforce or create procedures related to the primary rules.²¹⁰ Hart might consider many of the codified statements in the *Professionalism Expectations*, Oath, Creed or other professionalism documents to be "primary laws." In contrast, the *Code for Resolving Professionalism Complaints*, and the procedures for filing complaints with local professionalism committees, constitute secondary rules to implement those primary rules.

205. H.L.A. HART, *THE CONCEPT OF LAW* 113 (1961) ("On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.").

206. *Cf.* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[G]overnments are instituted among men, deriving their just powers from the consent of the governed.").

207. See LON L. FULLER, *THE MORALITY OF LAW: REVISED EDITION* 40-43 (2d. ed. 1969).

208. See H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281 (1965) (reviewing FULLER, *supra* note 207).

209. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

210. See HART, *supra* note 205, at 78-79, 151 ("Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private.").

To some extent, Hart might approve of a system that includes sanctions and consequences for rule breaking,²¹¹ as attempted by the various secondary rules related to professionalism in Florida.²¹² However, Hart might also reject the power of the primary lawyer professionalism standards based on his important jurisprudential concept of “the internal point of view.”²¹³ As Hart explained, the most important question in evaluating the morality of a law or rule is whether or not a person thinks they *ought* to obey:

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of “ought,” “must,” “should,” “right” and “wrong.”²¹⁴

Hart further noted that even if people do not accept a rule as morally legitimate, people might still be disposed to guide and evaluate their own conduct in accordance with that rule.²¹⁵ But as Yale Professor Scott Shapiro further clarified, this notion of accepting a social rule also requires that there be a pattern of behavior that becomes legitimized and accepted by the group as the general standard, with non-conformance creating a basis for criticism or punishment.²¹⁶

When the lawyer’s internal point of view, and the critical reflexive attitude, is applied to the Recommendations and Imperatives of the *Professionalism Expectations*, Hart’s approach reveals the problems. Some concepts of professionalism provide clear instruction to the legal community because they have already been incorporated into the existing systems of legal ethics rules or commentary.²¹⁷ Lawyers may not like these rules; nevertheless, they can internalize them and choose to

211. As Hart explained, sanctions are relevant to some degree. Hart, *supra* note 209, at 621 (“[E]very law in a municipal legal system must have a sanction, yet it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules.”); see also HART, *supra* note 205.

212. For example, the procedures used by the Florida Bar Board of Governors and the Florida Supreme Court to develop, adopt and modify the various rules also might satisfy Hart’s “secondary rules of change” related to how law should be created, and the use of local professionalism panels to address individual matters comports with Hart’s notion of secondary “rules of adjudication” to apply those laws to individuals. See HART, *supra* note 205, 79-91.

213. Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171 (2006); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006).

214. HART, *supra* note 205, at 57.

215. See Shapiro, *supra* note 213, at 1157.

216. See *id.* at 1161-62.

217. See, e.g., discussion *supra* Section II.D.

abide by them. But ironically, this critical reflexive attitude is most likely to exist when the professionalism rules are least necessary, such as when they overlap with existing legal ethics rules, or when community norms already exist.

But at other times, the critical reflexive attitude will be lacking, such as when Florida's ethics rules contradict Florida's professionalism documents. Lawyers cannot simultaneously have both a duty to act and no duty to act, and arguably, the entire notion of a professionalism "imperative" contradicts other Florida rules limiting professionalism to "aspirations." Given obvious and substantial contradictions, Hart would understand why individuals might not adhere to Florida's rules or otherwise reject the notion that they ought to obey.²¹⁸

Furthermore, aspirational statements that "[t]he essential ingredients of professionalism are character, competence, commitment, and civility"²¹⁹ do not articulate clear common standards of behavior, nor do they shape an internal point of view. After all, *character*, according to existing bar admissions rules, can only be assessed on a case-by-case basis.²²⁰ *Competence* may mean one thing in terms of compliance with legal ethics rules, but surely must mean something wholly different in the context of avoiding "unprofessionalism."²²¹ There are distinctions between the level of *commitment* needed to achieve compliance with the

218. See HART, *supra* note 205.

219. *Professionalism Expectations*, *supra* note 25, at 1.

220. See Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV. 1, 16-18 (2002); see also FLA. BAR ADMISS. R. 2-12. For example, in character and fitness investigations related to admission to the bar, rules discussing character recognize their own limitations, allowing for discretion, distinguishing between present day character and past character, and acknowledging the potential for rehabilitation. FLA. BAR ADMISS. R. 3-10 ("An attorney should have a record of conduct that justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to him or her."); FLA. BAR ADMISS. R. 2-12 ("All applicants seeking admission to The Florida Bar must produce satisfactory evidence of good moral character, an adequate knowledge of the standards and ideals of the profession, and proof that the applicant is otherwise fit to take the oath and to perform the obligations and responsibilities of an attorney."). Compare FLA. BAR ADMISS. R. 3-12 (including factors related to present character), with FLA. BAR ADMISS. R. 3-13 (explaining rehabilitation).

221. A law school graduate who fails the bar examination can be deemed incompetent. See, e.g., FLA. BAR ADMISS. R. 4-13. In contrast, Florida Supreme Court Justice Harry Lee Anstead called achieving Board Certification the "capstone for a lawyer's professionalism goals." *Certification Capstone*, FLA. B., <https://www.floridabar.org/about/cert/cert-capstone/> [<https://perma.cc/AD47-CLLJ>].

legal ethics rules, as compared to professionalism.²²² *Civility*,²²³ though listed as an imperative in the *Professionalism Expectations*, changes with context, and from place to place.²²⁴ In fact, Hart might have equated these core concepts of professionalism with manners and rules of etiquette, which differ from the rules of a legal system and which he said cannot be obligation-imposing.²²⁵

Admittedly, Hart noted that self-interest, tradition, and other factors influence a community, in this case the legal community, to view itself as

222. Interestingly, scholars have carefully reviewed the conduct of overworked and under-resourced public defenders while debating whether the minimum standards of competence and diligence have been met, thus suggesting that it would be even harder for these same public defenders to achieve the higher levels of competence and diligence that would be demanded by notions of professionalism. See, e.g., Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010).

223. The Imperative command in the *Professionalism Expectations*, Expectation 2.2. (“Candor and civility *must* be used in all oral and written communications.”), cross-references the ethical rule prohibiting lawyer misconduct. *Professionalism Expectations*, *supra* note 25, at 2 (emphasis added); see also R. REGULATING FLA. Bar 4-8.4(c) (“A lawyer shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.”).

224. A Maryland Judicial Task Force carefully analyzed themes of professionalism (including courtesy) and noted the varying perspectives based on questionnaire responses from urban, suburban, and rural practitioners. LYNNE A. BATTAGLIA & NORMAN L. SMITH, THE MARYLAND JUDICIAL TASK FORCE ON PROFESSIONALISM: REPORT AND RECOMMENDATIONS 28-54 (2003), <http://www.marylandprofessionalism.org/images/pdf/professionalism-task-force-03.pdf> [<https://perma.cc/4NQN-582D>]. Similarly, the concept of courtesy, a component of civility, means one thing to a civilian Greenpeace activist and another thing to a military veteran. Compare Diego Creimer, *It's Time We Gave Shell the Recognition They Deserve*, GREENPEACE (Jan. 15, 2013, 2:45 PM), <http://www.greenpeace.org/canada/en/Blogentry/its-time-we-gave-shell-the-recognition-they-d/blog/43663/> [<https://perma.cc/HH9E-FR2Y>] (“To make sure Shell is named and shamed as ‘Worst Company in the World,’ we need your participation and that of your contacts. . . . Let’s be courteous, and give Shell the recognition they deserve.”), with ARMY ROTC, BIG RED BATTALION HANDBOOK ch. 5, at 18, <http://www.unl.edu/armyrotc/HandbookChapters/Chapter5.pdf> [<https://perma.cc/P5BS-NWXF>] (“Military courtesy is simply the display of good manners and politeness in dealing with other people. Military courtesy conveys respect from both subordinate and senior to each other [including discussion of the military and hand salutes, use of sir and ma’am, standing at attention and at rest, and showing courtesy to a flag or the National Anthem].”). Compare *Standards of Professional Courtesy and Civility*, PALM BEACH COUNTY B. ASS’N, <http://www.palmbeachbar.org/standards-of-professional-courtesy> [<https://perma.cc/QQT4-QEFK>], with *HCSA Standards of Professionalism*, HILLSBOROUGH COUNTY B. ASS’N, <http://hillsbar.site-ym.com/?page=Professionalism> [<https://perma.cc/Y35S-54XR>] (containing different definitions of courtesy and civility).

225. See Shapiro, *supra* note 213, at 1157; see also HART, *supra* note 205, at 9 (“It is of course true that there are rules of many different types, not only in the obvious sense that besides legal rules there are rules of etiquette and of language, rules of games and clubs . . .”).

bound to a system of laws.²²⁶ Perhaps the self-interest of preserving a “reputation for professionalism” will be enough to convince a lawyer that they ought to comply with the *Professionalism Expectations*. Yet, it is also likely that self-interest will work against the possibility of an individual lawyer’s acceptance of the professionalism standards.

The common traits of lawyers are quite different from the traits of courtesy and civility emphasized by professionalism. For example, a professionalism standard insisting that a lawyer *must* always behave in a courteous and formal manner in hearings,²²⁷ or must show civility in all oral and written communications,²²⁸ might run contrary to a lawyer’s ingrained behaviors, according to Professor Susan Diakoff:

[T]here are eight empirically-demonstrated lawyer attributes that would have to change in order to implement most of the proposed solutions to the tripartite crisis of professionalism, public opinion of attorneys, and attorney satisfaction and mental health. The eight attributes are: materialism, need for achievement, preference for dominance, competitiveness, tendency to respond to stress by becoming more aggressive and ambitious, insensitivity to interpersonal, emotional, humanistic concerns, the Myers-Briggs dimension of “Thinking” as an approach to decision-making, and a “rights” orientation to moral decision-making (as opposed to an ethic of care).²²⁹

In other words, the demand for professionalism at all times might also be compared to “asking leopards to change their spots.”²³⁰

The logic of Hart, in fact, calls the entire professionalism movement into question. If one accepts Daikoff’s observation that the current practice of law has become a profit-motivated, competitive, and commercialized business, then there will always be at least some lawyers who do not feel that they ought to conform with the morality of a professionalism code “that values integrity, honesty, community service, pro bono work, courteousness, civility, cooperation with others, and sensitivity to interpersonal concerns.”²³¹ Not

226. See HART, *supra* note 205, at 203 (“Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.”).

227. *Professionalism Expectations*, *supra* note 25, at 5, Expectations 5.2, 5.3.

228. See *id.* at 2, Expectation 2.2 (citing R. REGULATING FLA. BAR 4-8.4(c)).

229. Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 593-94 (1998).

230. *Id.* at 548.

231. See *id.* at 582.

every lawyer possesses the necessary, critical reflective attitude desired by the professionalism movement.

C. Lon Fuller: The Internal Immorality of a Professionalism Mandate

Hart's approach focused on the precise textual content of the law and offers insights into why some lawyers choose not to embrace professionalism principles. The jurisprudential approach of Lon Fuller, who was Hart's debate opponent, yields a different but parallel set of insights. Fuller, by contemplating the spirit and structure of the law, also helps explain why even the most honorable of lawyers might stray from the principles of professionalism.

In his book, *The Morality of Law*,²³² Fuller explained that the law itself must be held to certain standards and comply with an internal, procedural morality. According to Fuller, any attempt to create and maintain a system of laws can fail to achieve internal morality in at least eight different ways:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.²³³

In the past, Florida's approach to professionalism seemed to violate Fuller's second principle, because the meaning of professionalism was undocumented.²³⁴ But as the many provisions of the *Professionalism Expectations* now show, a lack of documentation is not the issue.²³⁵ Even with the problem of prescription set aside, Florida's standards of professionalism fail Fuller's procedural tests for the morality of law in three ways.

To begin, Fuller's fourth principle decried the failure to make rules understandable. The Supreme Court of Florida has defined "unprofes-

232. FULLER, *supra* note 207.

233. *Id.* at 39.

234. See Rizzardi, *Defining Professionalism*, *supra* note 8.

235. Of course, our legal leaders can hope that lawyers read the occasional announcements related to new professionalism concepts. In truth, the current approach to providing notice of the new professionalism programs is akin to the fiction of legal notice by publication in a local newspaper. It works in theory, but in practice, many people remain ignorant of the law.

sional conduct” as “substantial or repeated violations” of the *Professionalism Expectations* without ever explaining what a “violation” means. For example, is the notion of a violation reserved to Imperatives, or can the repeated violation of a Recommendation (such as repeatedly engaging in the “appearance of impropriety”) be a substantial violation that rises to the level of unprofessional conduct?

Fuller’s fifth principle forbade the enactment of contradictory rules. As noted earlier,²³⁶ numerous inconsistencies exist between the mandatory black letter of the legal ethics rules, the aspirational comments in the ethical commentary, and the Imperatives and Recommendations in the *Professionalism Expectations*. From Fuller’s perspective, this type of internal incongruency reveals a fatal flaw, and even lawyers with highly altruistic values might have laudable reasons based on the ethics rules to reject the professionalism standards when representing a client.

Finally, Fuller’s sixth principle—the notion that rules cannot be complied with because they are beyond the powers of the affected party—presents a special dilemma. Mandatory professionalism is an impossible task. Many lawyers aspire to be highly professional, yet just as people strive to adhere to the various commandments of our faiths, they still need to be forgiven when they fall short.²³⁷ In the stressful grind of the practice of law, humans err, character flaws are revealed, and people do things they regret.

Worse yet, some lawyers will argue that they might, at times, have a duty to be harsh, aggressive, or even fanatical in the pursuit of a client’s interests, and thus, the very traits that can lead to success may also make a lawyer act in a way that others perceive as unprofessional.²³⁸ Although the *ABA Model Rules of Professional Conduct* have reduced the concept of “zealous” representation to a mere mention in the Preamble and one stray comment, a lawyer will not adhere to the principles of professionalism if they also require that lawyer to fail to fulfill the duties of the attorney-client relationship.²³⁹ Demure compliance with mandatory professionalism may be beyond the capacity of

236. See discussion *supra* Part III.

237. While this Article has referred to Judeo-Christian principles and biblical passages, other scholars have been able to apply other faiths to reach similar conclusions about the correlation between ethics and morality and the importance of forgiveness. See, e.g., Kinji Kanazawa, *Being a Buddhist and a Lawyer*, 66 FORDHAM L. REV. 1171 (1998); Russell Powell, *Forgiveness in Islamic Ethics and Jurisprudence*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 17 (2011), <http://scholarship.law.berkeley.edu/jmeil/vol4/iss1/1> [<https://perma.cc/AJF5-MAN5>].

238. Daicoff, *supra* note 229, at 584, 594 (“Without changing these inherent characteristics of attorneys, the solutions are likely to fail. . . . [because] lawyers are likely to be counter-motivated to decrease or moderate these traits, as the traits appear to serve lawyers’ needs.”).

239. See MODEL RULES OF PROF’L CONDUCT pmbl. cmt. 2 (AM. BAR ASS’N 1980) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”);

the legal professional. For all these reasons, Lon Fuller, like H.L.A. Hart, would likely be skeptical of Florida's professionalism standards.

D. Consensus: The Morality of Aspiration

As the dueling yet convergent perspectives of both Hart and Fuller explain, the noble objective of widespread professionalism among the legal community cannot be guaranteed merely by the issuance of a judicial order. Rather, the professionalism standards themselves must be moral, and the citizens regulated by them must feel that the standards should be obeyed.

An alternative to a judicial mandate would be to gradually persuade lawyers to internalize larger concepts of professionalism, allowing them to choose, moderate, and regulate their own behaviors. Explaining this concept of "self-determination theory," Florida State University College of Law Professor Lawrence Krieger wrote:

Core qualities of professionalism are embedded within the internal motivations *Intrinsically* motivated lawyers act for the joy and interest inherent in their work. As a result, these lawyers are naturally more focused on and engaged in their work, resulting in enhanced effort, dedication, diligence, and similar professional qualities. When *identified* motivation drives the work—when the lawyer experiences meaning because the work is furthering her own core values and beliefs—she will similarly tend to be engaged, energetic, diligent, and thorough.²⁴⁰

Id. at r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *see also* J. Daniel Hull, *Professionalism Revisited: What About the Client?*, SAN DIEGO SOURCE (Apr. 29, 2005), <http://www.sddt.com/Reports/article.cfm?SourceCode=20050429rb#.WqV1GWwY4y8> [<https://perma.cc/3SU7-Z9MZ>]. Hull lists eight rules of professionalism, from a client's perspective, including:

1. We come first. Be nice -- but if in doubt, use the rules. If you feel you know the lawyers you are dealing with, we will follow your advice and instincts. If you are in doubt about the lawyers, or if it might compromise us to deviate from the formal procedural rules, please stay close to those rules. . . .

. . . .

8. If you have followed these rules and opposing counsel starts making noises about professionalism and courtesy, please refer to Rule No. 1. Occasionally, a lawyer may attempt to turn professionalism into a sword. This is nonsense. If you have followed the rules, even aggressively, and opposing counsel whines hardball tactics, you are doing a good job for Upstart. Don't let your adversary turn your sticking to the rules on our behalf into a red herring. We come first.

Id.; *see also* Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994) (critiquing civility as elitist).

240. Lawrence S. Krieger, *The Most Ethical of People, The Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST.

In other words, the motivation of a lawyer to be professional does not come from a rule or court order; rather, it comes from a personal, inward desire to live up to professional ideals. A lawyer's failure to comply with *mandatory* or *ethical* duties may necessitate disciplinary action by society, but a lawyer's failure to achieve recommended standards of professionalism and excellence are aspirational matters of personal virtue to be inculcated from within.²⁴¹

Self-determination theory echoes the work of both H.L.A. Hart and Lon Fuller. It invokes Hart's notions of the internal point of view,²⁴² while also honoring Fuller's understanding of the limits of human capacity and the distinctions between the morality of duty and the morality of aspiration:

The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. . . . [I]nstead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as befits a human being functioning at his best.

Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.²⁴³

Overwhelmingly, in the ordered societies throughout the United States known as the state bar, the subjects of lawyer professionalism, courtesy, and civility are all recognized as aspirations.²⁴⁴ When the

THOMAS L.J. 168, 176-77 (2011) (footnotes omitted); see also Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015).

241. Data-based scholarly analysis also concluded that professionalism requires mentoring and self-directed learning. See, e.g., Neil Hamilton, *Professional Responsibility and Commitment to Professional Development*, 13 PROFESSIONAL 11, 12 (2016). In this Article, published in the Florida Bar's newsletter on professionalism in 2016—after the adoption of the *Professionalism Expectations*—Mr. Hamilton emphasizes that the legal profession “faces a substantial challenge in helping young attorneys grow toward ownership-over-their-own-professional-development,” and that the process requires individuals to take the initiative, “with or without the assistance of others, in diagnosing their learning needs, formulating learning goals, identifying the human and material resources for learning, choosing and implementing appropriate learning strategies, and evaluating the learning outcomes.” *Id.* at 11 (citing MALCOLM KNOWLES, SELF-DIRECTED LEARNING: A GUIDE FOR LEARNERS & TEACHERS 18 (1975)).

242. See *supra* Section IV.B. (discussing Hart's internal point of view).

243. FULLER, *supra* note 207, at 5-6.

244. See *Professionalism Codes*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html [https://perma.cc/LZR7-A7WY]. The analysis in the subsequent paragraphs is based upon review of the many professionalism codes listed within the American Bar Association's website. See *infra* Appendix 3.

ABA's Section of Tort and Insurance Practice adopted its *Creed of Professionalism* in 1988, it recognized that it was *not* intended as a basis for discipline, negligence, or civil liability.²⁴⁵ That approach was echoed by the various codes of courtesy, standards of civility, and principles of professionalism adopted by statewide bar-related organizations.

Overwhelmingly, the jurisdictions that adopted statewide standards for lawyer professionalism, courtesy, and civility declare those standards to be aspirational or mere guidance.²⁴⁶ Three states (plus the District of Columbia) describe professionalism as voluntary or aspirational in the *title* of their relevant documents.²⁴⁷ Thirteen states use a preamble or opening paragraph to make explicit the aspirational or non-disciplinary nature of the professionalism standards.²⁴⁸ Twenty jurisdictions have statewide professionalism standards that otherwise indicate their aspirational nature. In the remaining thirteen states, no statewide professionalism standards exist, although various local bar associations, federal courts, or other entities within a portion of the state often adopt aspirational codes or standards of professionalism or civility.²⁴⁹

In other words, lawyer professionalism documents have almost uniformly demonstrated an aspirational effort to unite the legal profession, encouraging lawyers to hold themselves to higher standards. Only the policy makers in the Sunshine State have declared that a lawyer *must* adhere to specific lawyer professionalism standards.

V. TOUCH UPS: EDITING PROFESSIONALISM STANDARDS (AGAIN)

Through its order adopting the *Code for Resolving Professionalism Complaints*, the Florida Supreme Court sought to create a “process to more critically address professionalism issues in Florida.”²⁵⁰ Florida should reconsider that process, carefully distinguishing the minimums of legal ethics from the aspirations of lawyer professionalism.²⁵¹ While

245. See AM. BAR ASS'N, STANDING COMM. ON PROFESSIONALISM, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES 1 (Aug. 1995), http://www.americanbar.org/content/dam/aba/directories/policy/1995_am_113.authcheckdam.pdf [<https://perma.cc/JZ5R-MS2T>].

246. See *infra* Appendix 3 (listing state bar entities otherwise describing professionalism as aspirational).

247. See *infra* Appendix 3 (listing state bar entities with professionalism documents using “ideals” or “voluntary” or “aspirational” in the title).

248. See *infra* Appendix 3 (listing state bar entities where the preambles of professionalism documents mention their aspirational or non-disciplinary nature).

249. See *infra* Appendix 3 (listing state bar entities lacking statewide professionalism documents).

250. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 280 (Fla. 2013).

251. On a personal note, I most certainly do not oppose any efforts seeking to clarify the aspirations of professionalism. Nor do I oppose efforts to hold lawyers to high standards,

insufficient lawyer professionalism may be a problem, a judicial order that demands it is an incomplete solution. Even if some of the flaws or inconsistencies in the *Professionalism Expectations* or other documents can be remedied with careful editing and craftsmanship, jurisprudential thinking also suggests a need to focus upon the internalization of professionalism by the members of the bar—not merely the punishment of human fallibility. Four modifications should be considered.

A. *Reduce the Scope of Professionalism (Or Else)*

The professionalism pendulum has swung too far. Not every good idea should be labelled as professionalism. Some scholars, from a wide variety of perspectives, argue that the professionalism movement is not even a good idea.²⁵² But even assuming that some increased effort to emphasize professionalism is a *fait accompli*, the careless writing of professionalism standards in a way that contradicts legal ethics rules disrespects both professionalism and ethics. At a minimum, Florida's legal leaders should recognize the limits of what must be mandated and how much can be absorbed by individual lawyers. Florida must reduce the scope of its various professionalism documents, and could do so in two ways.

In the case of Florida and its *Professionalism Expectations*, one clear criticism is that the document, with eighty-seven Imperatives or Recommendations, attempts to do too much. Less can be more. The highest *priority* aspirations of professionalism can be stated, without dozens of written standards. Not every professionalism concept needs to be codified (after all, even seemingly shared aspirational goals of

both through written documents and education. Earlier in my career, I stood before the Florida Supreme Court and defended a rule requiring Florida's lawyers to attend a "Practicing with Professionalism" seminar. See *In re* Amendments to the Rules Regulating the Fla. Bar and the Fla. Rules of Judicial Admin., 907 So. 2d 1138 (Fla. 2005) (per curiam) (granting requested amendments to The Florida Bar's rules on professionalism training). But mandating procedural professionalism—the exercise of learning what it means to act like a true professional—is something quite different from a substantive and enforceable mandate to achieve professionalism.

252. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 156-57 (1989); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 190-99 (1977); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 3-4 (1999); Greenstein, *supra* note 39 (arguing that law's professionalization has produced an ethos that dissuades practitioners from engaging in the highest ethical behavior); Mashburn, *supra* note 239, at 657 n.2 (citing Timothy P. Terrell & James H. Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 403-04 (1992)); see also David Luban, *The Posner Variations (Twenty-Seven Variations on A Theme By Holmes)*, 48 STAN. L. REV. 1001, 1002 (1996); Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1049 (2001).

encouraging pro bono work and civics education can cause controversy).²⁵³ Even the ABA's Model Code of Professional Responsibility began with nine core aspirational principles.²⁵⁴ A thoughtful statement of the priorities of professionalism might have greater persuasive force.

Not so long ago, the *aspirational* notion of professionalism could be described to include character, competence, commitment, and courtesy sufficiently defined professionalism.²⁵⁵ The ever-expanding subject of lawyer professionalism now fills books.²⁵⁶

Summarizing the various definitions of professionalism in 2012, Professors Wald and Pierce identified three common elements: inaccessible expertise, altruistic commitment to the public good, and autonomy.²⁵⁷ More recently, law professor Cheryl Preston and her student, Hilary Lawrence, methodically evaluated the substantive content of professionalism and civility creeds from all across the nation,²⁵⁸ identifying nine categories: "(1) general civility, (2) timeliness, (3) honesty, (4) attorney-attorney relations, (5) attorney-adversary

253. Consider, for example, Expectation 1.3, which states that "A lawyer should promote the public's understanding of the lawyer's role in the legal profession and protect public confidence in a just and fair legal system founded on the rule of law." *Professionalism Expectations*, *supra* note 25, at 1. Enhancing public understanding of the legal profession is, of course, a noble idea, perhaps best embodied by the Justice Teaching program, which seeks to pair a legal professional with every elementary, middle, and high school in the state of Florida. *About Justice Teaching...*, JUSTICE TEACHING, <http://www.justiceteaching.org/about.shtml> [<https://perma.cc/8SPA-9R8L>]. The language in the *Professional Expectations*, in fact, somewhat resembles the aspirational Preamble to Florida's Rules of Professional Conduct, which also encourages lawyers to educate the public. *See* R. REGULATING FLA. BAR ch. 4 pmbl. (2016) ("As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."). Some people, however, will declare this provision to be yet another call for free labor from Florida's lawyers. After all, Florida's minimalist requirement of mandatory *pro bono* reporting was fiercely debated and litigated nearly two decades ago. *See* Schwarz v. Kogan, 132 F.3d 1387, 1392 (11th Cir. 1998) (upholding the rule, in part, because "accurate reporting is essential for evaluating th[e] *pro bono* program . . . for determining what services are being provided under the program . . . [and] determin[ing] the areas in which the legal needs of the poor are or are not being met." (alterations in original)).

254. MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1980).

255. *See id.* at 1 ("The essential ingredients of professionalism are character, competence, commitment, and civility."); *see also* Rizzardi, *Redefining Professionalism*, *supra* note 17, at 39 ("[L]awyers and scholars may look back to 2013 as the year when the legal community of Florida concluded that character, competence, civility, commitment, and other core concepts of professionalism became more than just shared aspirations.").

256. *See* AM. BAR ASS'N STANDING COMM. ON PROFESSIONALISM, ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER (Paul A. Haskins, ed., 2013).

257. *See* Wald & Pearce, *supra* note 9, at 408.

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

relations, (6) attorney-court relations, (7) attorney-client relations, (8) public service, and (9) technology.”²⁵⁹

The devil of defining professionalism, however, lies in the detail. The analysis by Preston and Lawrence broke down the nine categories of professionalism into fifty-seven subparts.²⁶⁰ Thus, in terms of their scope, the *Professionalism Expectations* are not really far outside the norm.

But by defining professionalism with a vast scope, the core objectives get lost. To best protect the highest aspirations of professionalism, and to increase the potential for the principles to be embraced and internalized by the community of regulated lawyers, a state supreme court order demanding professionalism should consider focusing on professionalism priorities, not banalities.

Mandatory professionalism has unintended consequences, too. To the extent that mandatory professionalism creates a required norm, it becomes more likely that a lapse in professionalism will be equated with a breach of a lawyer’s standard of care, and unprofessionalism can be relabeled as malpractice. When a global community of lawyers and firms came together to identify and share best practices as part of the Lex Mundi project, their efforts to codify and articulate a Statement of Shared Fundamental Values nearly collapsed under the weight of malpractice concerns.²⁶¹ A disclaimer was added to the final document,²⁶² and as noted earlier, a similar, explicit disclaimer has been used to clarify that professionalism requirements are aspirational and non-disciplinary in thirty-seven states of the United States, plus the District of Columbia.²⁶³ Florida has now chosen a different approach, and its long list of professionalism mandates may one day come with consequences in a world of malpractice litigation.

Even putting malpractice considerations aside, the *Professionalism Expectations* do not exist in a vacuum. They discuss and are intended to interact with other provisions of the Rules Regulating The Florida Bar. The Supreme Court of Florida, through the *Code for Resolving*

259. *Id.* at 714.

260. *See id.* at 715-22.

261. *See* Timothy P. Terrell, *Professionalism on an International Scale: The Lex Mundi Project to Identify the Fundamental Shared Values of Law Practice*, 23 EMORY INT’L L. REV. 469, 571-72 (2009).

262. *See id.* at 572-73; *see also* LEX MUNDI, RAISING THE BAR FOR LEGAL SERVICE STANDARDS 1 (2013), <https://www.lexmundi.com/Document.asp?DocID=2072> [<https://perma.cc/X2Z7-ZVX2>] (“This Statement of Shared Fundamental Values was developed by Lex Mundi to assist and encourage its member firms and all firms that practice at the highest level as they strive to embody these values in their practices. Being aspirational in nature, it is not intended to address specific situations, which must be assessed based on the facts and circumstances of any particular engagement, nor is it intended to establish a particular duty of care in any engagement.”).

263. *See infra* Appendix 2.

Professionalism Complaints, stated that substantial or repeated violations of the *Professionalism Expectations* or of the Rules Regulating the Florida Bar could constitute unprofessionalism. Of note, an existing disciplinary rule in Florida states as follows:

The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.²⁶⁴

In other words, a repeated unprofessionalism that is "contrary to honesty and justice" provides cause to be called before the local professionalism panel for a discussion or quasi-disciplinary experience.²⁶⁵

In practice, many lawyers do not realize how broad these standards are, nor do they understand what they mean. Indeed, when the Supreme Court of Florida was considering the adoption of the *Professionalism Expectations*, the process allowed for the submission of public comments. Although few comments were submitted, one of them raised this concern.²⁶⁶ D. Culvert Smith III noted the expanding potential scope of discipline, due process concerns, and the risks that the *Professionalism Expectations* established new standards that could lead to professional discipline without adequate notice.²⁶⁷ The Supreme Court order adopting the *Professionalism Expectations* never responded to his valid points, and the *Professionalism Expectations*, and its new Imperatives, are now part of the law governing lawyers in Florida.

B. Revise Legal Ethics Rules, as Needed

Proponents of professionalism, even after reading this Article, will likely continue to insist that something must be done to change the problems affecting the practice of law. As the Supreme Court of Florida

264. R. REGULATING FLA. BAR 3-4.3.

265. Remarkably, the Florida Supreme Court has twice ruled that this rule has independent effect, such that even standing alone, this rule offers a basis for professional discipline. *See* Fla. Bar v. Draughon, 94 So. 3d 566, 569-70 (Fla. 2012); Fla. Bar v. Cocalis, 959 So. 2d 163, 166 (Fla. 2007).

266. *See* Comment by D. Culver Smith III Regarding Amendments at 6-7, *In re Amendments to Code for Resolving Professionalism Complaints*, 174 So. 3d 995 (Fla. 2015) (No. SC15-944), https://efactssc-public.flcourts.org/casedocuments/2015/944/2015-944_response_45274.pdf.

267. *See id.*

specifically explained, lawyer *un*professionalism remains a major problem within The Florida Bar.²⁶⁸ A lack of courtesy and civility exists in the courtroom, and The Florida Bar continues to pursue hundreds of disciplinary cases each year.

In its 2013 order creating the framework for mandatory professionalism, the Supreme Court of Florida concluded that it was only taking an initial step and not adopting a new code.²⁶⁹ But in the opinion of this author, the Court failed to recognize the significance of the *Professionalism Expectations*, and its statement of Imperatives. The document represents a stealthy and clumsy imposition of new mandates upon the community of lawyers it regulates. If an improved disciplinary process is needed, then Florida should engage in the thoughtful and robust debates needed to amend the traditional rules or commentaries of its legal ethics system.²⁷⁰ (The rules related to the disciplinary process could be revisited as well.)²⁷¹

Importantly, scholars and empirical data acknowledge a link between professionalism and ethics.²⁷² Law Professor David Grenardo called for mandatory civility, noting that the practice of law is a privilege, not a right.²⁷³ But his analysis also emphasized the importance of defining civility and avoiding the potential for prosecutorial misconduct,²⁷⁴ ultimately explaining that specific and enforceable rules are required:

Specific rules relating to civility alleviate the practical difficulties of enforcing a vague “civility” standard without defining it, as a mere civility standard by itself without specific rules raises issues of vagueness, overbreadth, fair notice, and due process for attorneys who may find themselves subject to discipline for uncivil behavior. Thus, mandatory civility rules that include specific acts and set forth the conduct required ensure the most effective manner to reduce incivility, which

268. See *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 281 (Fla. 2013).

269. See *id.* (“[T]he Professionalism Commission has concluded and now proposes that we should *not* attempt to create an entirely new code of ‘professional’ or ‘unprofessional’ conduct nor should we, at this time, attempt to codify an entirely new ‘Code of Professionalism.’ We agree with this approach.”).

270. See, e.g., R. REGULATING FLA. BAR ch. 4 (“Rules of Professional Conduct”).

271. See R. REGULATING FLA. BAR ch. 3 (“Rules of Discipline”).

272. See Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL’Y & L. 1, 8-9 (2012); Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 143 (2011).

273. See David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 239, 239 (2013).

274. Mandatory civility, like all the “Imperatives,” also comes with an unintended consequence: it renders professionalism ephemeral. With an angry outburst of incivility, a board-certified lawyer, with a great reputation, working on a pro bono matter, can breach the codified mandates of professionalism. Undoing a lifetime of professionalism, a complaint and letter of admonishment then labels that lawyer “unprofessional.”

will increase efficiency in the legal process and increase the public's confidence in, and perception of, the legal system.²⁷⁵

Thus, Grenardo's approach rejects a vague mandate for civility. His proposal could instead be described as one calling for new and specific ethics rules, complete with a disciplinary system. These changes could be integrated into the existing Rules of Professional Conduct. But caution is necessary. Hart would consider "civility" a mere rule of etiquette not worthy of law,²⁷⁶ while Fuller might note concerns with the ambiguities of civility and the inherent difficulty of compliance.²⁷⁷ Professor Amy Mashburn has powerfully argued that civility codes and their deferential tones are aristocratic, hierarchical, patrician, and misguided:

Civility codes are not neutral; they carry the imprint of a class-contingent image of civility and courtesy. The prestige hierarchy, patterns of deference, and the drafter's patrician notions of civility suggest that the behavior of lawyers will be perceived differently along class lines. Accordingly, lawyers who cannot or will not conform to those class-contingent conceptions of well-mannered and properly deferential behavior will fare differently than those whose cultural profile and inclinations correspond more closely to the image embodied in the codes. The drafters adopted, explicitly and by omission, an upper-middle-class view of professional conduct. Behavior that deviates from upper-middle-class norms will be more likely to be deemed discourteous.²⁷⁸

Objections like this notwithstanding, the Supreme Court of Florida has continued to implement professionalism requirements. And the *Professionalism Expectations*, including Imperative 2.2 and 5.3 in particular (see Table 4), have mandated civility. But perhaps, to avoid perceptions that "the system is rigged" in favor of the elites, a discussion of civility should be conscientiously expanded to reach deep into The Florida Bar membership, rather than merely relying upon the ideas of a self-selecting group of people who serve on various professionalism committees.²⁷⁹

275. Grenardo, *supra* note 273, at 292.

276. *See supra* Section IV.B.

277. *See supra* Section IV.C.

278. *See, e.g.*, Mashburn, *supra* note 239, at 694; *id.* at 663 (further arguing that civility codes involve an elitist bias, and that drafters avoid difficult issues, resulting in superficial and tentative reforms).

279. *See id.* at 696 ("Elite lawyers have thus rigged the deal: they will be seen as more courteous because of their high status, and their high status will entitle them to deference from others, which will in turn facilitate their capacity to appear more courteous than others. They will be challenged less frequently than other lower-status lawyers, and if they are challenged and a credibility battle ensues, they are more likely to be believed by others.").

Thus far, no such debate has occurred. The elites, including the members of the Board of Governors and the Supreme Court's Professionalism Commission, were responsible for the adoption of the new *Professionalism Expectations*. Only three individuals submitted comments to the Supreme Court of Florida.²⁸⁰ Not a single organized Section of The Florida Bar commented on the document. The court heard no oral argument, and its one paragraph order that adopted the *Professionalism Expectations* did not even respond to the comments the court received. In fact, when this author mentioned the emergence of the *Professionalism Expectations* at a June 2015 meeting of the Professional Ethics Committee of The Florida Bar, many members were completely unaware of the document. Serious questions exist as to whether the 102,000 members of The Florida Bar comprehend how much their system of legal ethics and professionalism is changing.

Done properly, and implemented as part of a positive, well-defined, and prospective system toward which members of the Bar could take a critical reflexive attitude, mandatory civility could be implemented in accord with both Lon Fuller and H.L.A. Hart's jurisprudential perspectives. For example, explicit requirements of civility, such as "a lawyer must not use profanity in a courtroom or during pre-trial or discovery proceedings,"²⁸¹ or "an attorney must refer to opposing counsel only by last name,"²⁸² could be readily integrated into the legal ethics rules, or the rules of civil or criminal procedure. To some extent, lawyers can agree upon certain norms of "civility," improving the legal process and the public's confidence in it.²⁸³

Furthermore, to the extent that the Florida legal profession must change, and to the extent that portions of the *Professionalism Expectations* should be kept intact, some of the contemplated changes should be pursued and achieved in more traditional ways. The ABA reformed the ABA Model Canons and ABA Model Code and developed the Model

280. See *Case Docket, In re Amendments to the Code for Resolving Professionalism Complaints*, 174 So. 3d 995 (Fla. 2015) (No. SC15-944), FLA. SUP. CT., http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2015&p_casenumbr=944 [<https://perma.cc/T54W-GVVU>] (showing comments by Richard Melvin, Thomas Newcomb Hyde, and D. Culver Smith III). As of the writing of this Article, the Florida Bar had 105,990 members. See *Frequently Asked Questions About The Florida Bar*, FLA. B., <https://www.floridabar.org/about/faq/#members> [<https://perma.cc/AS3Y-7QMJ>].

281. See, e.g., *Professionalism Expectations*, *supra* note 25, at 5, Expectation 5.1 ("A lawyer should abstain from rude, disruptive, and disrespectful behavior. The lawyer should encourage clients and support personnel to do the same."), Expectation 5.2 ("A lawyer should be civil and courteous in all situations, both professional and personal, and avoid conduct that is degrading to the legal profession.").

282. See, e.g., *id.* Expectation 5.4 ("A lawyer should refer to all parties, witnesses, and other counsel by their last names during legal proceedings.").

283. See Mary T. Robinson, *Mandating Civility: Wisdom or Folly?*, 22 PROF. LAW 16, 22 (2014).

Rules of Professional Conduct.²⁸⁴ Florida, in turn, adopted the Model Rules of Professional Conduct but with amendments of its own.²⁸⁵ New amendments are always a possibility. For example, the *Professionalism Expectations* dictate that one lawyer should tell another²⁸⁶ to be “fully prepared when appearing in court or at hearings.”²⁸⁷ Other recommendations expect a lawyer to know the local rules, or to come prepared for court.²⁸⁸ These are conversations about minimum performance standards and ethical rules—not the aspirations of professionalism. Amendments to reflect these concepts can be added to the legal ethics rules or the commentary, if appropriate.

This approach using “direct incorporation” of lawyer professionalism principles into the legal ethics rules has been employed in many states.²⁸⁹ Florida, in fact, modified the ABA version of misconduct, and rather than merely impliedly regulating professionalism²⁹⁰ through a concept such as “conduct that is prejudicial to the administration of justice,”²⁹¹ Florida explicitly embedded concepts related to civility into its misconduct rule, as follows:

284. One “simple but heretical solution” suggested by Professor Barton was to resurrect the Canons and redraft the vast array of relevant documents on morals, ethics, and professionalism in a way that united them all for the practitioner to understand both the moral context and the minimalist duties. See Barton, *supra* note 39, at 424-25. He argued that a return to a document akin to the ABA Canons would give moral, ethical, and practical guidelines for the practice of law:

This will reunite the broad and the narrow goals of legal ethics, will give some needed meaning and attention to the “broadly ethical” project, will fundamentally change the way lawyers approach their minimalist duties (because, like the reading of the Canons, the narrow will be read in light of the broad), and will make the minimums more explicitly ethical, moral, and naturally followed.

Id. at 425. Notwithstanding this informed scholarly opinion, Florida seems unlikely to wholly rewrite the legal ethics rules and professionalism standards. But Professor Barton had a point: a methodical rewrite could help to ensure that the mandatory minimums of legal ethics are kept distinct from the non-mandatory aspirations of lawyer professionalism.

285. See R. REGULATING FLA. BAR ch. 4; see also *Comparison of Newly Adopted Florida Rules of Professional Conduct with ABA Model Rules*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_florida.authcheckdam.pdf [<https://perma.cc/E2ZP-MYMY>].

286. See *Professionalism Expectations*, *supra* note 25, at 1, Expectation 1.2 (“A lawyer should counsel and encourage other lawyers to abide by these Professionalism Expectations.”).

287. *Id.* at 4, Expectation 4.13.

288. See *supra* Section III.D. (discussing requirements of the *Professionalism Expectations*).

289. See Preston & Lawrence, *supra* note 258, at 736 (explaining how Delaware and Michigan have revised their state versions of the model rules).

290. See *id.* at 734-35 (discussing implied incorporation of professionalism into lawyer disciplinary rules).

291. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2016) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . .”).

A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic²⁹²

This legal ethics rule was applied in *Florida Bar v. Norkin*²⁹³ and other matters²⁹⁴ involving lawyer behavior that might also be characterized as gross violations of professionalism standards. Conduct involving callous indifference, disparagement, or humiliation was found to be misconduct.

A similarly careful rewrite of other legal ethics rules should be considered. Mandating professionalism is a challenging task, not something that should be done lightly.

Following the traditional approach used to regulate lawyers, the *Professionalism Expectations*, and the Imperatives in particular, should be reevaluated. The bifurcated system of legal ethics rules and professionalism standards needs brighter lines to distinguish the mandates from the aspirations. When appropriate, professionalism standards can be integrated into amended legal ethics rules that are properly proposed, debated, and adopted.²⁹⁵ If a “professionalism” standard needs to be enforced as a mandate, then perhaps it is not a matter of professionalism at all. The broader debate over professionalism can and should continue. But the disjointed process through which Florida is transforming its legal ethics rules should end.

292. R. REGULATING FLA. BAR 4-8.4(d).

293. 132 So. 3d 77 (Fla. 2013).

294. See Fla. Bar v. Ratiner, 46 So. 3d 35, 37 (Fla. 2010) (stating that during a deposition, Ratiner lambasted opposing counsel in a tirade, tossed wadded-up evidence stickers at opposing counsel, and upset the court reporter, leading his own consultant to tell Ratiner to calm down and “take a Xanax”); Fla. Bar v. Tobkin, 944 So. 2d 219, 221-22 (Fla. 2006) (stating that Tobkin exhibited objectionable conduct during pretrial discovery and objectionable behavior at a cancer treatment center—snatching medical records from opposing counsel—that resulted in security personnel being called to restrain him); Fla. Bar v. Morgan, 938 So. 2d 496, 497-98 (Fla. 2006) (stating that Morgan was involved in a hostile and disrespectful verbal tirade directed at the presiding judge in open court during a felony trial).

295. Professor Barton might declare this pragmatic approach to be yet another example of “Triumph of Minimalism,” because as he explained, “[t]he clashes over these minimum Rules and the concurrent arrival of the latest series of professionalism crises are not unrelated events. To the contrary, they are the natural culmination of almost a century’s effort to free the legal profession of any broader ethical requirements or even any duty to perform ethical deliberations.” Barton, *supra* note 39, at 439.

C. Create Focused Tools for Professionalism Teaching

Even assuming that some or even all of the imperative portions of the *Professionalism Expectations* were eventually incorporated into Florida's legal ethics rules, many recommendations would remain. Those recommendations, and the many non-mandatory statements of professionalism's goals or ideals, often represent an exercise in education. Through professionalism documents, legal thinkers seek to instruct the community of lawyers as to how they can achieve the ultimate goal of professionalism.

The Palm Beach County Bar Association and its Professionalism Panel have explicitly recognized that their mission is educational:

The goal is to educate as to what is—and what is not—appropriate conduct. Is it proper to copy a judge on a nasty email to opposing counsel? Should an attorney contact a judicial assistant and inquire about how the Judge might rule on a motion he plans to file? Should an attorney call another attorney “a liar” in written communications or in the courtroom? These are all examples of matters brought to the attention of the . . . Council within the last few years. . . . The Professionalism Council, although not unique among the circuits, is a rare educational tool. In our ongoing effort to restore civility and professionalism in the practice of law, we encourage everyone, lawyers and judges, to take advantage of the opportunities it provides.²⁹⁶

Professionalism is also a required component of The Florida Bar Examination for new law school graduates.²⁹⁷ However, in a classroom environment, professionalism remains difficult to teach. Like the pudding that Winston Churchill rejected for lack of a theme,²⁹⁸ professionalism—even when neatly bound in a brightly colored Florida handbook on professionalism—consists of an assemblage of miscellaneous mandates and recommendations. Furthermore, as noted in Part II of this

296. Michael D. Mopsick & Amy S. Borman, *The 15th Judicial Circuit Professionalism Council: When the Council Counsels*, PALM BEACH COUNTY B. ASS'N (Aug. 14, 2013) (alteration of punctuation), <http://www.palmbeachbar.org/professionalism/the-15th-judicial-circuit-professionalism-council-when-the-council-counsels> [https://perma.cc/7NST-UEA6].

297. See *In re Amendments to Rules of the Supreme Court Relating to Admissions to the Bar*, 51 So. 3d 1144, 1145 (Fla. 2010) (per curiam), *reh'g granted*, 54 So. 3d 460 (Fla. 2011); *Exam Information, Test Specifications, Study Guide, and Virtual Tour*, FLA. BOARD B. EXAMINERS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748> [https://perma.cc/Y7XH-4UGW] (providing a list of the subjects tested in the Florida bar exam); *Condensed Test Specifications—Florida-Prepared Portion of the General Bar Examination: Professionalism*, FLA. BOARD B. EXAMINERS, https://www.floridabarexam.org/_85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/0d1503582c6a577b85257e360068c8ca [https://perma.cc/MKY6-N8ZL] (defining the subject matter of “professionalism” to include three documents: Florida's *Creed of Professionalism*, *Guidelines for Professional Conduct*, and the *Ideals and Goals of Professionalism*).

298. See JAMES C. HUMES, SPEAK LIKE CHURCHILL, STAND LIKE LINCOLN: 21 POWERFUL SECRETS OF HISTORY'S GREATEST SPEAKERS 29 (2002).

Article,²⁹⁹ the professional requirements are sometimes inconsistent or wholly in conflict with the ethics rules. Yet, all of those rules are also tested through The Florida Bar Exam and the Multistate Professional Responsibility Exam—which itself creates another long list of problems.³⁰⁰ Given the enormous list of substantive, practice oriented subjects, students (and their professors) should be forgiven for investing their time in the study of core subjects like contracts, torts, property, criminal law, and civil procedure, instead of professionalism.

An important debate exists over the extent to which law schools can shape lawyer professionalism.³⁰¹ To some extent, law professors themselves—as role models for their students—can shape values when they focus on their own self-interest rather than the public interest.³⁰² Law schools also shape values through classroom discussions, clinical work, and extracurricular experiences that focus on the zealous pursuit of client interests and a culture of autonomous self-interest.³⁰³ However, other scholars argue that law schools lack the skill to teach professionalism,³⁰⁴ and note that it is difficult to shape the values of adult students.³⁰⁵

Scholars have described the “three apprenticeships” in education to include the apprenticeship of knowledge, the apprenticeship of practice, and the apprenticeship of roles and duties.³⁰⁶ Lawyers experience these apprenticeships, too; first, they obtain intellectual training by “reading law” under the supervision of practicing lawyers and professors; second, they gain skills through clinical instruction and super-

299. See *supra* Part II; see also Appendix 1.

300. “Law students in forty-seven states must now pass the MPRE prior to bar admission.” Barton, *supra* note 39, at 456. However, by intentionally focusing on tricky multiple choice questions and rule exceptions, which turns the whole exercise into a memorization effort, the Multistate Professional Responsibility Examination (MPRE) undercuts the basic goals of encouraging ethical and professional behavior. See *id.* at 455-69.

301. A short comment letter to the Florida Supreme Court about the *Professionalism Expectations* suggests that law schools should do a better job with character and fitness evaluations before admission. Letter from Richard Melvin to the Fla. Supreme Court (Oct. 12, 2015), https://efactssc-public.flcourts.org/CaseDocuments/2015/944/2015-944_Response_45124.pdf. This author respectfully disagrees.

302. See Barton, *supra* note 39, at 471-72.

303. See Wald & Pearce, *supra* note 9, at 406.

304. See Carole Silver et al., *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING 373, 376-77 (2011).

305. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 21-46 (2007); Verna E. Monson & Neil W. Hamilton, *Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism*, 8 U. ST. THOMAS L.J. 129, 159-60 (2011); Silver, *supra* note 304.

306. See Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 659-61 (2009); see also WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 207-16 (Jossey-Bass 2d ed. 2005).

vised practice of law; third, they learn the values and ideals of the profession over time.³⁰⁷ To the extent that law schools should and do try to foster a change in lawyer professionalism, the methods and limitations should be carefully and strategically considered.

In his article, *Teaching Professionalism*, Mercer University Law Professor Patrick Longan suggests that law students lack experiential context to truly understand professionalism.³⁰⁸ As a result, at the Walter F. George School of Law at Mercer University, first year students take a three-credit, graded course on the Legal Profession, and a third-year Law of Lawyering course. Mercer students learn four hard lessons. First, professionalism matters to clients and to society; second, it is frequently breached in practice; third, the enforcement mechanisms inherently fall short; and fourth, inner resolve to pursue professionalism leads to personal happiness and a successful identity as a lawyer.³⁰⁹

Every decade or so, another major report encourages changes in the way law schools teach professionalism.³¹⁰ Professor Longan described the responses as follows:

Law schools have responded to the call for professionalism education in a variety of ways. These responses have included, among other activities, orientations on professionalism, distinguished guest speakers, practitioner involvement in classes, mandatory mentoring, public service requirements, integration of skills courses and values training, and other programs.³¹¹

In addition, it should be noted that Professional Responsibility often serves as the default course where professionalism training occurs.³¹² The task of instilling professionalism values, however, cannot be left solely to these professors, even with the occasional “Professionalism Day” or guest lecture. A single semester course, especially one where textbooks focus on the ABA’s Model Rules of Professional Conduct to teach ethical principles to a nationwide body of students, cannot reinvent a profession. The Professional Responsibility professors need help.

307. *Id.*

308. *See id.* at 692.

309. *Id.*

310. *See supra* note 6, at 16-19 (discussing proposals for professionalism reform in 1986); *see also* AM. BAR ASS’N, PROFESSIONALISM COMM., TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 13-25 (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM]; SULLIVAN, *supra* note 306 (discussing professionalism reform proposals in 2005).

311. Longan, *supra* note 306, at 661-62.

312. *See, e.g.*, Wald & Pearce, *supra* note 9, at 435 (calling for curricular reform and teaching of professionalism as part of professional responsibility).

Imagine, for a moment, how the 1L law school curriculum could be tweaked, and how professionalism could be embedded in the curriculum of multiple courses.³¹³ A document that simplifies and organizes some of the values or concepts of professionalism to track with the relevant rules of civil or criminal procedure would be a useful tool in first and second year law school courses. YouTube videos with real examples of misbehaving witnesses, litigants, and even judges could be integrated into first year oral advocacy classes to help develop experiential context.³¹⁴ Hypothetical contract and property negotiations could be created, too, with role play exercises testing the willingness of students to lie and deceive. Using these types of tools, multiple law school professors could engage in the teaching of professionalism concepts.

These types of ideas have been discussed for decades.³¹⁵ As one scholar explained nearly twenty-five years ago, manners and civility could also be practiced in a clinical setting:

Clinical legal education is the most appropriate way to sensitize students to etiquette skills and raise future lawyers' awareness of these codes of courtroom conduct. By adding more substantive training, practice, observation, and critique of etiquette skills in the clinical curriculum, law schools can force consciousness raising in an

313. Nicola A. Boothe-Perry, *Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517, 545-47 (2009); Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 L. & CONTEMP. PROBS. 139, 140 (1996).

314. In the current approach to legal education, Socratic case discussions encourage students to attack, criticize, and manipulate the law, and students learn to "think like a lawyer" by deconstructing statutes and rules on behalf of their clients without regard for the spirit of the law and the public interest. For law schools to teach the values of professionalism, the unintended consequences of unprofessional behaviors should be experienced and discussed. See, e.g., Wald & Pearce, *supra* note 9, at 415-19 (arguing that the law school case method creates a zero-sum competition and that thinking like a lawyer creates a "value vacuum").

315. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 310, at 16-25 (offering seven suggestions to foster an atmosphere of professionalism in law school: "(1) Faculty must become more acutely aware of their significance as role models for law students' perception of lawyering . . . (2) Greater emphasis needs to be given to the concept of law professors as role models of lawyering in hiring and evaluating faculty . . . (3) Adoption of the pervasive method of teaching legal ethics and professionalism should be seriously considered by every law school . . . (4) Every law school should develop an effective system for encouraging and monitoring its ethics and professionalism programs . . . (5) The use of diverse teaching methods such as role playing, problems and case studies, small groups and seminars, story-telling and interactive videos to teach ethics and professionalism, should be encouraged . . . (6) Law book publishers should consider adopting a policy requiring that all new casebooks and instructional materials incorporate ethical and professionalism issues. Law book publishers should also publish more course-specific materials on legal ethics and professionalism issues as part of new casebooks, new editions of old casebooks, supplements to casebooks, compilations of supplemental readings, and compendiums; . . . [and] (7) Law schools need to develop more fully co-curricular activities, policies, and infrastructures that reflect a genuine concern with professionalism"); see also David S. Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. TOL. L. REV. 421 (2009).

environment meant to do just that. Practicing these skills in a clinical setting, with the assistance of trained supervisors, will radically increase law students' etiquette awareness.³¹⁶

The Carnegie Foundation for the Advancement of Teaching echoed this need for professionalism education in its 2007 report, entitled "*Educating Lawyers: Preparation for the Practice of Law*."³¹⁷ The report recommended seven changes in legal education, but it also cautioned that providing additional classroom coverage of professionalism issues will not be an easy task and recommended changes made at the margins by adding one or two additional courses.³¹⁸ Better teaching and training of professionalism in law school was also critical to the ABA's five-part program to SERVE the public through professionalism, as discussed in a 2008 white paper on professionalism.³¹⁹ Similarly, the ABA's findings on "The Successes Thus Far" relate to the implementation of professionalism repeatedly emphasized in lawyer education.³²⁰

By marching forward with the rapid adoption of the *Professionalism Expectations*, the Supreme Court of Florida and its Professionalism Committee gave insufficient attention to these reports and the important connections between education and professionalism. Arguably, the Court's own statements in its order adopting the *Code for Resolving Professionalism Complaints* were even dismissive of education. While the Court declared that it would continue the "passive academic approach" which "probably had a positive impact toward improving professionalism or at least maintaining the status quo," Florida continued to experience significant problems, leading the court to conclude that "further integrated, affirmative, practical and active measures are now needed."³²¹

If there is a problem with the educational approach to professionalism, it is not with the teachers or the students; rather, it is with the subject matter. A simplistic order demanding professionalism does not achieve professionalism, just as a simplistic demand for education and

316. Clarke, *supra* note 141, at 1023 (footnote omitted).

317. WILLIAM M. SULLIVAN ET AL., SUMMARY, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (2007); *see also* SULLIVAN ET AL., *supra* note 305.

318. SULLIVAN ET. AL, *supra* note 317 at 7, 8-10.

319. *See* Ronald C. Minkoff, *Reviving a Tradition of Service: Redefining Lawyer Professionalism in the 21st Century*, 19 PROF. LAW. 19, 20 (2009) ("S—Support the Legal System. E—Exemplify professionalism through enhanced teaching, technology and training. R—Reaffirm access to the Legal System, promoting justice through a dispute resolution system that is available to all. V—Value our place in society, integrating our core values of professionalism in each representation to provide our clients with real value while ensuring that we and our associates maintain professional values and act with integrity. E—Embrace professional Excellence while establishing balance and Equilibrium in lawyers' lives.").

320. *See id.* at 7-12.

321. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 281 (Fla. 2013).

testing does not achieve knowledge. Education can and should play an essential role in the shaping of lawyer professionalism. In the pursuit of lawyer professionalism, bar leaders should work with law schools to review the wealth of studies and institutes thinking about these educational issues, and develop a more focused educational vision and strategy with clear objectives and specific steps.

D. Divert Lawyers to Professionalism Mentoring

Lawyer education must continue after law school, too. For example, lawyers are already required to obtain continuing legal education credits in ethics and professionalism.³²² This “passive” educational approach of a mandatory professionalism CLE course casts a wide net, but fails to precisely identify the people who could benefit the most from professionalism training.

Recognizing this problem, mentoring and professionalism have been linked all across the nation. As Professor Longan noted, the increasing commercialization of the legal profession, and the decline in mentoring, has led to a “lost generation” of lawyers in whom many of the traditional values of lawyering have not been instilled.³²³ Still, mentoring does happen in some firms, and it is common across the state bars

322. Rule 6-10.1 of the Rules Regulating the Florida Bar empowers the Bar to administer a Continuing Legal Education Requirement (“[E]ach member of The Florida Bar . . . shall meet certain minimum requirements for continuing legal education.”). R. REGULATING FLA. BAR 6-10.1 (2016). The Florida Bar CLE Accreditation Rule 5.09 (“CLER Components Approval Guidelines”) further states that credit may be awarded for courses that explore standards of conduct in the legal profession, and “Courses should also include aspirations that surpass ordinary expectations” and address the ideals and goals of professionalism, such as the:

- (1) independence of the lawyer in the context of the lawyer-client relationship;
- (2) conflict between duty to client and duty to the system of justice;
- (3) conflict in the duty to the client versus the duty to the other lawyer;
- (4) responsibility of the lawyer to employ effective client communications and client relations skills in order to increase service to the client and foster understanding of expectations of the representation, including accessibility of the lawyer and agreement as to fees;
- (5) lawyer’s responsibilities as an officer of the court;
- (6) misuse and abuse of discovery and litigation;
- (7) lawyer’s responsibility to perceive and protect the image of the profession;
- (8) responsibility of the lawyer to the public generally and to public service; and
- (9) duty of the lawyer to be informed about all forms of dispute resolution and to counsel clients accordingly.

FLA. CONTINUING LEGAL EDUC. R. 5.09. *But see* Phillip A. Wittmann, *Should “Professionalism” Be Mandatory? Can Civility Be Taught?*, 45 LA. B.J. 19, 19 (1997).

323. *See* Longan, *supra* note 306, at 674.

of the nation.³²⁴ In Georgia,³²⁵ South Carolina,³²⁶ and Utah,³²⁷ required mentoring programs help new lawyers transition into the practice of law by pairing them with experienced lawyers, allowing for practical training in professionalism, ethics, and civility. Similar formal but voluntary or pilot mentoring programs in professionalism have been explored in Florida,³²⁸ Maryland,³²⁹ North Carolina,³³⁰ and Ohio.³³¹ Mentoring, too, was emphasized by the ABA report.³³² Ideally, mentoring could be available to all new lawyers, but for a large state bar—again, Florida has more than 100,000 total members³³³—mandatory mentoring for everyone might prove too ambitious.

Remarkably, some scholars have suggested that the mentoring of law students can be counterproductive, because mentoring by a respected figure can create an increased desire for success and greater ambition, which in turn can lead to bad behaviors.³³⁴ However, if the focus stays on practicing lawyers and does not presume the worst in people, but the best—a presumption that reflects the true spirit of professionalism—then mentoring for the practitioners may have a role to play.

In lieu of the professionalism panels, the Florida Supreme Court could embrace mentoring as a tool to resolve professionalism violations while still preserving the aspirational character of professionalism. In

324. See *Mentoring Programs Listed by State*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html [https://perma.cc/HW8T-K8W2].

325. See *Transition Into Law Practice Program (TILPP)*, ST. B. GA., <http://www.gabar.org/membership/tilpp> [https://perma.cc/R2KS-XV9R].

326. See *Rule 425: Mandatory Lawyer Mentoring Program*, S.C. JUD. DEP'T, <http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=425.0&subRuleID=&ruleType=APP> [https://perma.cc/3SWP-SB7Q].

327. See *Mentor FAQ*, UTAH ST. B., <https://www.utahbar.org/member-services/nltp/mentor-faq/> [https://perma.cc/787V-QNUW].

328. See *Henry Latimer Ctr. for Professionalism*, FLA. B., <https://www.floridabar.org/prof/pabout/> [https://perma.cc/J54J-SH6Z].

329. See *Mentoring*, MD. PROFESSIONALISM CTR., INC., <http://www.marylandprofessionalism.org/mentoring> [https://perma.cc/8ZYN-Q6LK].

330. See *Mentoring Programs Info.*, N.C. CT. SYS., <http://www.nccourts.org/Courts/CRS/Councils/Professionalism/Mentoring.asp> [https://perma.cc/SSX7-38NA].

331. See *Lawyer to Lawyer Mentoring Program*, SUP. CT. OF OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/AttySvcs/mentoring> [https://perma.cc/AMN9-A3V6].

332. See MINKOFF, *supra* note 319, at 8-9.

333. See *Frequently Asked Questions About the Florida Bar*, *supra* note 280 (“How many lawyers are licensed to practice law in Florida?”).

334. As Professor Susan Daicoff explained, “[l]aw students reported that perceptions of having positive, frequent faculty-student contact was associated with the students becoming more ambitious.” Daicoff, *supra* note 229, at 572 (citing Robert B. Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 678 (1973) (asserting that law students become more ambitious and aggressive the more tension they feel in law school)).

fact, Florida already has rules and precedent that recommend mentoring. If The Florida Bar receives a complaint, but the matters do not rise to a level deserving of disciplinary sanctions, the Bar possesses the authority to remove the matter from the disciplinary system and to divert the lawyer to a professionalism program instead.³³⁵ Eliminating the need for a middle man in the process, one Florida appellate court issued a memorable order to address an attorney's errors and professionalism lapses.³³⁶ Specifically, the court mandated that an inexperienced attorney who failed to properly file appeals must self-report to a professionalism panel, obtain a mentor, learn the proper procedures, and file a sworn statement explaining the steps taken within ninety days of the order's date.³³⁷

With a few minor amendments that addressed issues such as sovereign immunity of the mentors³³⁸ and confidentiality,³³⁹ the relevant standards governing attorney sanctions³⁴⁰ and diversion of discipline³⁴¹ could be consulted to help create a mentoring approach to resolve professionalism complaints. Neither passive nor procedural, mentoring relationships require the active engagement of two people. Rather than engaging in formalized and potentially destructive panel conversations that scrutinize lawyer misbehavior,³⁴² the distinguished lawyers serving on local professionalism panels could be trained to apply their volunteer labor to informal, constructive, and uplifting one-on-

335. R. REGULATING FLA. BAR 3-2.1(f) (defining "Diversion to Practice and Professionalism Enhancement Programs" as "The removal of a disciplinary matter from the disciplinary system and placement of the matter in a skills enhancement program in lieu of a disciplinary sanction"). Diversion from discipline process acts in a manner akin to a plea bargain, where a lawyer agrees to ethics or professionalism training instead of being involved with other, more formal disciplinary proceedings. *Id.* at 3-5.3(b) ("Types of Disciplinary Cases Eligible for Diversion. Disciplinary cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice are eligible for diversion to practice and professionalism enhancement programs."). Lawyers are served with a recommendation, which they accept or reject, and for which the lawyer pays the costs. *Id.* at 3-5.3(c), (d), (h), (l). Alternatively, if the lawyer rejects a diversion recommendation, or fails to adhere to the recommendations, the matter is returned to the Florida Bar for further disciplinary proceedings. *Id.* at 3-5.3(g), (k).

336. *Garcia v. State*, 170 So. 3d 23 (Fla. 2d DCA 2015).

337. *See id.* at 24 (consolidating *Hooker v. State*, Case No. 2D15-403, and *Neff v. State*, Case No. 2D15-409, titled, "Order Imposing Sanctions on Appellants Counsel").

338. *See In re* Amendment to Code for Resolving Professionalism Complaints, 156 So. 3d 1034, 1035 (Fla. 2015) (per curiam).

339. *See In re* Code for Resolving Professionalism Complaints, 116 So. 3d 280, 284 (Fla. 2013) (citing R. REGULATING FLA. BAR 3-7.1).

340. *See, e.g.*, FLA. STDS. IMPOSING LAW. SANCS., FLA. B. (2015), <https://www.floridabar.org/wp-content/uploads/2017/04/standards-for-lawyer-sanctions.pdf> [<https://perma.cc/4RF8-UJAV>]; *see also id.* at 2.8 ("Other Sanctions and Remedies").

341. R. REGULATING THE FLA. BAR 3-5.3.

342. *See* discussion *supra* Part I.

one mentoring efforts. Unprofessionalism by a mentee can be countered by the professionalism of the mentor. In the best cases, freed from the quasi-disciplinary panel approach, new networks and friendships are forged, the participants inspire each other, and the entire profession benefits.

VI. UNSEEN BLEMISHES: EVIDENCE AND THE PUBLIC RECORDS PROBLEM.

Reforms of Florida's professionalism standards, including the *Professionalism Expectations*, will take time. Leaders of The Florida Bar invested time and effort into these documents, and the messages to law students and the members of The Florida Bar alike has been clear: in Florida, professionalism is not just an aspiration.³⁴³ Still, if some form of the current professionalism process is going to remain in place, then the government of Florida—including the Supreme Court of Florida and its agents in The Florida Bar and the local circuit professionalism panels—must engage in an exercise of power that is fair and in accordance to the United States and State of Florida Constitutions.

To fairly and effectively evaluate the effectiveness of Florida's professionalism standards and process for enforcing violations, information about the process must be made available. The Florida Constitution supports the notion of good policy, subject to public evaluation, by ensuring public access to government documents.³⁴⁴ Of special note, the Supreme Court of Florida recently observed that "the purpose of the Public Records Act, in broad terms, is 'to open public records to allow Florida's citizens to discover the actions of their government.'"³⁴⁵

343. In materials promoting a YouTube Professionalism contest for law students, the Henry Latimer Center for Professionalism notes that "Law students must appreciate that practicing with professionalism is more than aspirational, it is expected in Florida." *Law Student Professionalism YouTube Contest*, FLA. B., <https://www.floridabar.org/prof/pawards/pawards004/> [<https://perma.cc/576F-7TXZ>]; see also Caroline Johnson Levine, *A Message from the Chair*, 12 PROFESSIONAL, no. 2, Fall 2015, at 1, <http://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1008&context=professional> ("The expectations cover nearly every issue which face attorneys in the modern age and what the appropriate response should be. Some of the content includes preventing disparaging remarks on social media and in emails. The Board of Governors approved the Professionalism Expectations on January 30, 2015. The next task will be to disseminate the meaningful information contained within the Expectations to every member of the Bar and law students in order to prevent future negative issues in the profession.").

344. FLA. CONST. art. I, § 24.

345. *Bd. of Trs. v. Lee*, 189 So. 3d 120, 124 (Fla. 2016) (citing *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010)); see also *Times Publ'g Co., v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. 2d DCA 1990) ("An open government is crucial to the citizens' ability to adequately evaluate the decisions of elected and appointed officials.").

Those principles readily apply to the regulation of lawyer professionalism, and transparency empowers citizens to monitor the conduct of the government, and each other.

In time, evidence will be necessary to prove that the new system of professionalism works. As both the ABA and The Florida Bar have recognized, rules governing lawyer behavior can be subverted when they are invoked by opposing parties as procedural weapons.³⁴⁶ At times, lawyers have misused alleged ethics violations as a basis to disqualify opposing counsel as a way to achieve a tactical advantage in litigation.³⁴⁷ Courts have emphasized that these types of motions and remedies, which presumably focus upon the more egregious types of lawyer misconduct, should only be used when “absolutely necessary.”³⁴⁸ Ethical rules governing the duty of one lawyer to report another lawyer’s professional misconduct, which could also be abused, are also limited to circumstances that involve “substantial” matters.³⁴⁹ In contrast, the definition of unprofessional conduct leaves room for even trivial but repeated matters of purported “unprofessionalism” to be the basis for a complaint, because the term means substantial *or* repeated violations of the *Oath of Admission to The Florida Bar*, *The Florida Bar Creed of Professionalism*, *The Florida Bar Professional Expectations*, *The Rules Regulating The Florida Bar*, or the decisions of the Florida

346. MODEL RULES OF PROF'L CONDUCT scope cmt. 20 (AM. BAR ASS'N 2016) (emphasis added); *see also* R. REGULATING FLA. BAR ch. 4 scope (“[T]he purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty.”); Peter H. Geraghty, *Making Threats*, YOUR ABA (May 2012) <http://www.americanbar.org/content/newsletter/publications/youraba/201205article11.html> [<https://perma.cc/WMQ6-JLY9>]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-383 (1994) (discussing the use of threatened disciplinary complaint against opposing counsel).

347. *Silvers v. Google, Inc.*, No. 05-80387-CIV, 2007 WL 141153, at *1 (S.D. Fla. Jan. 6, 2007) (“[C]ourts are skeptical [of motions to disqualify counsel] because th[e]se motions are sometimes filed for tactical reasons or to harass the other party.”); *see also* Leonard D. Pertnoy, *Lions, Tigers, and Motions to Disqualify... Oh My!*, FRIENDLY PASSAGES, July–Aug. 2013, at 9 (discussing abuses of the ethics rules in litigation). *But see* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71 (2014) (suggesting that disqualification is not “uncontrollably bad” and in fact serves as a uniquely effective remedy for lawyer misconduct).

348. *See Metrahealth Ins. Co. v. Anclote Psychiatric Hosp., Ltd.*, 961 F. Supp. 1580, 1582 (M.D. Fla. 1997) (noting that an order for disqualification is a “drastic means which courts should hesitate to impose except when absolutely necessary”).

349. *See, e.g.*, R. REGULATING FLA. BAR 4-8.3 (“Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.”); *see also* discussion *supra* note 94.

Supreme Court. Inevitably, optimistic supporters of the professionalism standards will insist that the rules will not be abused, while the pessimistic opponents of professionalism will be wary of the potential for problems. To resolve the arguments, however, facts and evidence will be necessary, which in turn means that the professionalism standards and the exercise of regulatory authority over the members of the Bar should be subjected to public scrutiny.

A. *The Burden of Transparency*

Article I, Section 1 of the Florida Constitution recognizes that “All political power is inherent in the people.”³⁵⁰ Consistent with that notion, the Constitution was amended in 1992 to recognize a public right of access to government records. Article I, Section 24 of the Florida Constitution now states:

Access to public records and meetings.—

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. *This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.*³⁵¹

The Supreme Court of Florida recognized that a right of access to public records applies to the administrative actions of the judiciary, too, holding that “records generated while courts are acting in an administrative capacity should be subject to the same standards that govern similar records of other branches of government.”³⁵² As stated in the Court’s 2013 order creating the professionalism standards, both The

350. FLA. CONST. art. I, § 1.

351. FLA. CONST. art. I, § 24 (emphasis added).

352. *In re Amendments to the Florida Rules of Judicial Administration—Public Access to Judicial Records*, 608 So. 2d 472, 472-73 (Fla. 1992).

Florida Bar³⁵³ and the professionalism panels in each judicial circuit³⁵⁴ are acting as administrative entities responsible for the implementation of the new mandates. Both of these entities appear to fall within the scope of the constitutional duty to provide access to public records.

The judiciary already has rules governing transparency of public records in other circumstances.³⁵⁵ In the context of professionalism, people realized that the confidentiality standards for the judiciary might be relevant, so paragraph 3.5 of the Supreme Court's 2013 order stated as follows:

Confidentiality: The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3-7.1 of *The Rules Regulating the Florida Bar*. Any record of informal attempts to resolve a dispute as outlined in paragraph 3.2.2. would also be subject to the provisions of Rule 3-7.1 except that notes of any telephonic communication between the ACAP Attorney and the Complainant, the Respondent, or any third party would be considered the work product of The Florida Bar and would remain confidential and not become part of the public record.³⁵⁶

Thus, in general, the confidentiality of proceedings related to professionalism should be parallel with the confidentiality of disciplinary proceedings conducted by The Florida Bar. Pursuant to those rules, a

353. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 282-83 (Fla. 2013) (defining the Attorney Consumer Assistance and Intake Program as "The program of The Florida Bar which fields and screens complaints against members of The Florida Bar. Depending upon the nature and severity of the professionalism complaint, [the] ACAP can resolve the complaint informally as provided herein or it can refer the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further action"); *Id.* at 283 (defining a Local Professionalism Panel as "An entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.").

354. *Id.* at 282 ("The Chief Judge of every circuit shall create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel.").

355. For example, Rule 2.420 of the Florida Rules of Judicial Administration explicitly notes the need for confidentiality of some, but not all, internal memoranda:

Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest.

FLA. R. JUD. ADMIN. 2.420(c)(2).

356. *See In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 284 (citing R. REGULATING FLA. BAR 3-7.1).

vast array of decisions and proceedings related to lawyer discipline are all considered public information.³⁵⁷ However, Rule 3-7.1 provides that pending investigations are confidential,³⁵⁸ whereas, cases of minor misconduct³⁵⁹ or contempt proceedings³⁶⁰ are not. In other words, ongoing proceedings may be confidential, but documents generated during completed proceedings related to professionalism, including the formal complaints and any panel conclusion finding the presence or absence of a professionalism violation, do not seem to be confidential pursuant to this rule, and should be public information.

B. *The Hypocrisy of Secrecy*

In an effort to conduct research for this Article, the author contacted people serving on multiple professionalism panels to obtain public records. Despite making requests, no responsive documents were provided. In fact, the individuals involved actually discouraged the author from pursuing the request, noting their lack of resources to respond, and emphasizing the volunteer nature of their work.³⁶¹ Admittedly, compliance with the demands of producing public records can be a burden—a point to which this author is sympathetic, and that has been made elsewhere.³⁶²

357. Pursuant to Rules 3-7.1(a)(3) through (a)(5), and (a)(7) through (a)(12), Rules Regulating the Florida Bar, and other related rules, all of the following are considered public information: (3) a finding of probable cause for further disciplinary proceedings; (4) a finding of no probable cause; (5) a case referred for diversion to a practice and professionalism enhancement program or by referral to the grievance mediation program; (7) proceedings for placement on the inactive list for incapacity not involving misconduct; (8) proceedings seeking a petition for emergency suspension or probation; (9) proceedings on determination or adjudication of guilt of criminal misconduct are all considered public information; (10) proceedings based on disciplinary sanctions entered by a foreign court or other authorized disciplinary agency; (11) reinstatement proceedings; and (12) proceedings involving petitions for disciplinary resignation or for disciplinary revocation. R. REGULATING FLA. BAR 3-7.1.

358. *Id.* at 3-7.1(a)(1).

359. *Id.* at 3-7.1(a)(2).

360. Contempt proceedings are public information even if the underlying disciplinary matter is confidential. *Id.* at 3-7.1(a)(6).

361. This matter put the author in a precarious position, where the pursuit of a public records request would force already busy lawyers, who were volunteering their time to assist the Court with its professionalism standards, to spend even more time compiling records. It also raised significant questions about the way in which cost-recovery mechanisms, would, or would not, apply to volunteer labor. In the end, rather than compounding the difficulties for the volunteers, the author chose to write this footnote, and to put the Supreme Court of Florida on notice that the public records issues need to be better addressed.

362. Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425 (2015); see also *Public Records: Ensuring Compliance and Avoiding Sunburn*, FLA. LEAGUE OF CITIES, https://members.flcities.com/FLC/Events/Event_Display.aspx?EventKey=FLCU160921 [<https://perma.cc/8UYD-HLQ2?type=image>]

Within the circles of lawyers who serve on the professionalism panels, the lack of priority placed upon transparency is somewhat understandable, for two reasons. First, lawyers are accustomed to rules mandating confidentiality of their work, not transparency.³⁶³ Second, the judiciary often escapes the demands of the public records laws because, in circumstances where judicial rules predate the Florida Constitution's public records amendment, transparency is not required.³⁶⁴ The new professionalism standards and the process for implementing them, however, do fall within the transparency demands of the Florida Constitution.

Sometimes, Florida seems eager to embrace its culture of transparency. Discussing its own disciplinary process, The Florida Bar, on its Frequently Asked Questions page, declares that it has one of the most open systems in the country and among regulated professions in Florida.³⁶⁵ But the implementation of mandatory professionalism has not been transparent. A review of the websites for most of the Judicial Circuits of Florida typically reveals a simplistic web page announcing the existence of a professionalism panel, a reference to the court's related administrative order, and links to the forms for reporting professionalism violations.³⁶⁶ Also, even though The Florida Bar does collect information about professionalism programs in each of the judicial circuits, those reports, unlike the Florida disciplinary cases published in the Florida Bar Journal or the decisions of the Florida Supreme Court,

(naming Keith Rizzardi as the presenter and moderator of five public records training programs throughout the State).

363. R. REGULATING FLA. BAR 4-1.6.

364. The right of access to public records provided by the Florida Constitution includes a provision stating that "Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed." FLA. CONST. art. I, § 24.

365. "2. Does The Florida Bar regulatory process take place in secret? The Florida Bar has one of the most open systems in the country and among regulated professions in Florida. Files closed with no discipline imposed are retained for one year from date of closure. All files are public record after a grievance committee concludes action. Files pending at the staff or grievance committee levels are confidential. A pending file can be confirmed as active if an inquiry includes specific information about the case. In addition, The Florida Bar website lists a 10-year discipline history for lawyers and makes public documents available to the public." *The 10 Most Important Things to Know About Lawyer Regulation*, FLA. B., <http://www.floridabar.org/public/acap/acap001/> [<https://perma.cc/BF4F-XTAP>] [hereinafter *The 10 Most Important Things to Know About Lawyer Regulation*].

366. See, e.g., *Professionalism Panel*, FIRST JUD. CIR. FLA., <http://www.firstjudicialcircuit.org/programs-and-services/professionalism%20panel> [<https://perma.cc/RX5W-SZDS>]; *Florida's 2nd Judicial Circuit Professionalism Panel*, SECOND JUD. CIR. FLA., http://2ndcircuit.leoncountyfl.gov/Professional_directory.php [<https://perma.cc/T5S5-YB4J>]; *17th Judicial Circuit Professionalism Panel Procedures*, SEVENTEENTH JUD. CIR. FLA., <http://www.17th.flcourts.org/broward-professionalism-panel/> [<https://perma.cc/R584-5R6Y>].

do not offer insight as to the nature of the professionalism panel process or the complaints the panels hear.³⁶⁷

Ironically, an absence of transparency by the professionalism panels could itself be framed as an act of unprofessionalism. According to the preamble to the *Professionalism Expectations*, lawyer professionalism includes:

2. dedicating to properly using knowledge and skills to *promote a fair and just result*;
3. endeavoring to *enhance* knowledge, skills, and *competence*; . . .
6. enhancing the legal system's reputation by *educating the public* about the profession's capabilities and limits, specifically about what the legal system can achieve and *the appropriate methods* of obtaining those results; and
7. *accepting responsibility* for one's own professional conduct and the conduct of others in the profession, including encouraging other lawyers to meet these civility and Professionalism Expectations *and fostering peer regulation* to ensure that each lawyer is competent and public-spirited.³⁶⁸

Without greater transparency, no one can know whether the professionalism complaints and panel discussions are fair and just, or whether the methods are successfully achieving their goals of enhancing knowledge and competence. Lawyers cannot educate the public or each other, and, at best, the system of peer regulation is very narrowly defined when the results are known only to the accused and the peers sitting on the panel. And while newsletters discussing examples of cases heard by local professionalism panels can be helpful,³⁶⁹ the lack of access to original documents still makes it difficult for legal professionals, including lawyers and law professors, to assess the merits and demerits of the emerging system of professionalism standards. A greater risk remains, too; in the absence of transparency, the professionalism mandates could become the subject of abuses and controversies.

The credibility of Florida's professionalism movement is at stake. If the Florida Supreme Court is going to demand professionalism from lawyers, then its agents implementing the professionalism standards must also demonstrate professionalism. After all, flawed though it may

367. For example, the 2015-2016 edition of the circuit-by-circuit professionalism report discusses professionalism-related programming, such as breakfasts, lunches, and Continuing Legal Education courses, but offers no insight into the actual cases or complaints filed against fellow lawyers. *2015-2016 Circuit Professionalism Reports*, FLA. B., <https://www.floridabar.org/wp-content/uploads/2017/04/circuit-professionalism-report-summaries.pdf> [<https://perma.cc/7YNP-CEWP>].

368. *Professionalism Expectations*, *supra* note 25, at 1, pmb1. (emphasis added).

369. *See supra* notes 65-68 and accompanying text.

be, the very first concept in the *Professionalism Expectations* states that “A lawyer should avoid the appearance of impropriety.”³⁷⁰ Refusing to provide transparent access to the public records related to professionalism appears to be improper. In light of the command of the Florida Constitution to provide public access to government information, a spirit of transparency should be an immediate professionalism priority.

VII. CONCLUSION: TAKE ANOTHER LOOK

A vast range of opinions exist on the merits, demerits, and morality of lawyer professionalism. Ironically, by choosing to mandate the debatable concept of professionalism—and by establishing a partially invisible and quasi-disciplinary process involving panel scrutiny, reprimands, and recommendations—Florida has forgotten another value of professionalism: humility.

Our justices, judges, and leaders of the legal profession should recognize the limits to which lawyer professionalism can be made compulsory. The Florida Bar admits that its own lawyers are already members of one of the most regulated professions.³⁷¹ Mandatory professionalism complicates an already complex system, blurring the lines between the subjects of professionalism and legal ethics. And, at its worst, the written concepts of professionalism can flatly contradict existing legal ethics rules and commentary.³⁷² In all instances, distinctions between mandates and aspirations are lost.

Outside of Florida, there is a distinction between ethics and professionalism. The requirements of ethics are the minimum floor; the excellence of professionalism is the aspirational ceiling.³⁷³ Florida,

370. *Professionalism Expectations*, *supra* note 26, at 1, Expectation 1.1; *cf.* *Warrilow v. Norrell*, 791 S.W.2d 515, 523 (Tex. Ct. App. 1989) (“There exists a broader concern for public confidence in the administration of justice—justice must satisfy the appearance of justice.”); *see supra* notes 100-02 and accompanying text (discussing the appearance of impropriety standard).

371. *The 10 Most Important Things to Know about Lawyer Regulation*, *supra* note 365.

372. *See infra* Appendix 1.

373. *See infra* Appendix 2. New Mexico, in differentiating ethics and professionalism, explicitly refers to the floor and the ceiling as follows:

DISTINCTION BETWEEN ETHICS AND PROFESSIONALISM.

The New Mexico Rules of Professional Conduct set the floor that supports our status as a lawyer in good standing. Professionalism is the ceiling or higher standard to which all lawyers should aspire.

Laws and the Rules of Professional Conduct establish minimal standards of consensus impropriety; they do not define the criteria for ethical behavior. In the traditional sense, persons are not “ethical” simply because they act lawfully or even within the bounds of an official code of ethics. People can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law or the code. Truly ethical people measure their conduct not by rules but by *basic moral principles* such as honesty, integrity and fairness.

by mandating professionalism, has diminished it. The floor and the ceiling have become indistinguishable.

Thus, Florida has taught the nation five important lessons. First, to be most meaningful—and to avoid needlessly expanding malpractice accusations—the scope of professionalism documents should be carefully defined, preferably written as aspirations. Second, to the extent that there is a need for new regulatory mandates, they should not be mislabeled as professionalism; instead, to codify their importance, the legal ethics rules or commentary should be modified. Third, because education has always been part of the solution, advocates for lawyer professionalism should develop classroom tools and specific strategies to guide law schools and other legal educators who participate in lawyer professionalism teaching. Fourth, rather than the formal meetings of professionalism panels, a simplified approach of one-on-one mandatory professionalism mentoring is an alternative worth considering. Fifth and finally, no matter what options The Florida Bar and Florida Supreme Court choose, the leaders who demand lawyer accountability for unprofessionalism must be accountable themselves. They must grapple with the realities of public records laws, ensuring that government actions remain appropriately transparent and subject to the scrutiny necessary to comply with law and to ensure public acceptance.

Years ago, a motivational book inspired lawyers to be more like Atticus Finch, the hero attorney from *To Kill a Mockingbird*.³⁷⁴ Alas, in the sequel, Atticus Finch revealed himself to be a racist.³⁷⁵ The fictional character offers real life lessons. Advocates for professionalism must accept the hard truth that, from time to time, we all fail. Of course, when a lawyer's failures breach the minimum ethical norms, then the profession may rightly choose to punish him or her accordingly. But not every breach of professionalism deserves punishment, and even honorable people make mistakes.

Some scholars have noted that, over time, there has been a demoralization of legal ethics.³⁷⁶ Perhaps the professionalism movement can be explained as an effort to re-moralize lawyers. If, however, proponents of

Ethics Guidelines, N.M. MINIMUM CONTINUING LEGAL EDUC. (emphasis added), https://www.nmcle.org/rules/ethics_prof_guidelines.asp (last visited Feb. 21, 2017).

374. See PAPANTONIO, *supra* note 16.

375. Ironically, Atticus Finch turned out not to be as professional as we all once thought. In Harper Lee's *To Kill a Mockingbird*, he was the hero attorney who stood firm in defense of the wrongfully accused in a racist society. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). But in the surprising sequel, *Go Set a Watchman*, Mr. Finch has become a segregationist. See HARPER LEE, *GO SET A WATCHMAN* (2015); see also Gretel Kauffman, 'Go Set a Watchman': Has Atticus Finch Become a Fallen Hero?, CHRISTIAN SCI. MONITOR (July 12, 2015), <http://www.csmonitor.com/Books/2015/0712/Go-Set-a-Watchman-Has-Atticus-Finch-become-a-fallen-hero-video> [https://perma.cc/6M9E-8AMJ].

376. Altman, *supra* note 34.

professionalism in Florida are willing to engage in critical self-evaluation, they can begin by re-reading Reinhold Niebuhr's serenity prayer:

*God grant me the serenity to accept the things I cannot change; courage to change the things I can; and wisdom to know the difference.*³⁷⁷

A picture of lawyer professionalism is taking shape. But stepping back from the canvas, the flaws remain visible. In the opinion of this author, the work of the Supreme Court of Florida and the Florida Bar Board of Governors is yet finished, and the *Professionalism Expectations*, in particular, should go back to the drawing board.

The worthy quest for lawyer professionalism must continue. We should punish the devilishly bad behavior of lawyer misconduct that falls below the mandatory minimums of our ethical rules. We should praise the angelic legal professionals whose good behavior embodies the highest ideals of our profession.³⁷⁸ Meanwhile, the rest of us mere mortals will pursue professionalism, but, inevitably, we will err and fail to achieve our aspirations. True professionalism, like true virtue, requires a daily demonstration of character that comes from within. Ideally, Florida's professionalism documents can serve as the mirror that empowers self-evaluation. In the end, we lawyers must all learn to live with ourselves.

377. See, e.g., *5 Timeless Truths from the Serenity Prayer That Offer Wisdom in the Modern Age*, HUFFINGTON POST (Mar 18, 2014), http://www.huffingtonpost.com/2014/03/18/serenity-prayer-wisdom_n_4965139.html [<https://perma.cc/LS54-ZG9L>] (attributing the serenity prayer to Protestant theologian Reinhold Niebuhr). Compare Laurie Goodstein, *Serenity Prayer Stirs Up Doubt: Who Wrote It?*, N.Y. TIMES (July 11, 2008), http://www.nytimes.com/2008/07/11/us/11prayer.html?_r=2 [<https://perma.cc/PE4L-Q4DZ>] (debating the origin of the Serenity Prayer), with Fred Shapiro, *I Was Wrong About the Origin of the Serenity Prayer*, HUFFINGTON POST (May 15, 2014), http://www.huffingtonpost.com/2014/05/15/serenity-prayer-origin_n_5331924.html [<https://perma.cc/4QEV-BJN7>].

378. The Florida Bar's Standing Committee on Professionalism administers the William M. Hoeveler Judicial Professionalism Award to an active judge who best exemplifies strength of character, service, and competence as a jurist, lawyer, and public servant. Judge Hoeveler, like all humans, had his moments. In 2003, he was removed from presiding over the litigation in the Everglades because he demonstrated bias in comments made to a reporter. Craig Pittman, *Judge in Glades Case Removed*, ST. PETERSBURG TIMES (Sept. 24, 2003), http://www.sptimes.com/2003/09/24/State/Judge_in_Glades_case_.shtml [<https://perma.cc/HV3J-JPE2>]. See generally *The Henry Latimer Center for Professionalism, Awards*, FLA. B., <https://www.floridabar.org/prof/pawards/> [<https://perma.cc/97SL-WBUP>].

APPENDIX 1: Rules Supporting Florida’s Professionalism “Imperatives”	
The <i>Professionalism Expectations</i> define Imperatives as coextensive with ethical duties, cast in the terms of “must” or “must not,” with cross-references to relevant ethics rules.	
<i>Professionalism Expectations</i>	<i>Cross-Reference to Rules Regulating The Florida Bar</i>
Imperative 1.5	Rules 4-7.14, 4.1-5(f)
Imperative 1.7	Rule 4-1.7(a)(2)
Imperative 1.8	Rule 4-1.6
Imperative 1.11	Rules 4-1.4, 4-1.16
Imperative 1.12	Rule 4-6.1
Imperative 1.13	Rule 4-8.4(d)
Imperative 2.2	Rule 4-8.4(c)
Imperative 2.3	Rule 4-8.4(d)
Imperative 2.4	Rule 4-3.2
Imperative 2.5	Rule 4-8.4(d)
Imperative 2.10	Rules 4-3.3, 4-8.4
Imperative 2.11	Rule 4-4.2
Imperative 2.18	Rule 4-8.4(g)
Imperative 3.1	Rule 4-3.2
Imperative 3.4	Rules 4-3.5(b), 4-8.4(a)
Imperative 3.5	Rule 4-3.5
Imperative 3.7	Rule 4-3.4(c)
Imperative 3.9	Rule 4-4.4(a)
Imperative 3.11	Rule 4-3.4(c)
Imperative 3.18	Rule 4-3.4(g), (h)
Imperative 4.6	Rule 4-3.1
Imperatives 4.7, 4.19	Rule 4-4.4
Imperative 4.20	Rule 4-8.2(a), 4-8.4(d)
Imperative 5.3	N/A
Imperative 6.10	Rule 4-1.4
Imperative 7.5	Rule 4-1.16, 4-3.2, 4-4.4
Recommendation 5.2	Rule 3-4.3

APPENDIX 2: Rules Potentially Supporting Florida’s Professionalism “Recommendations”	
The Recommendations in the <i>Professionalism Expectations</i> are “drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar” and cast in terms of “should” or “should not.” Recommendations generally do not have cross-references to relevant rules, but in theory, they could.	
<i>Professionalism Expectations</i>	<i>Parallel Concepts in Rules Regulating the Florida Bar (including commentary)</i>
Recommendations 1.4 and 1.6, 1.9, 1.10 re: Commitment to Equal Justice Under the Law and to the Public Good	Rules 4-1.4 (communication) and 4-1.5 (attorney fees)
Recommendations 2.1, 2.6, 2.7, 2.8, 2.9, 2.17 and 2.12 re: Honest and Effective Communication	Rules 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communication), 4-1.18 (prospective clients), and 10-2.2 (unlicensed practice of law)
Recommendations 3.2, 3.3, 3.6, 3.8, 3.10, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17 re: Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play	Rules 4-3.4 (fairness to opponent) and 4-3.5 (decorum of tribunal) or Florida Rules of Civil Procedure (re: discovery, jurors)
Recommendations 4.1, 4.2, 4.3, 4.4, 4.5, 4.8, 4.9, 4.10, 4.11, 4.12, 4.13, 4.14, 4.15, 4.16, 4.17, 4.18 re: Fair & Efficient Administration of Justice	Rules 4-1.1 (competence), 4-1.3 (diligence), 4-3.4 (fairness to opponent), and 4-3.5 (decorum of tribunal) or Florida Rules of Civil Procedure (re: discovery, jurors)
Recommendations 5.1, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10 re: Decorum and Courtesy	Rule 4-3.5 (decorum of tribunal)
Recommendations 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9 re: Respect for Time and Commitment of Others	Rules 4-1.3 (diligence), 4-1.4 (communication), 4-3.4 (fairness to opponent)
Recommendations 7.1, 7.3, 7.4, 7.6 re: Independence of Judgment	Rules 4-2.1 (advisor), 4-5.4(d) (independent judgment), and 4-8.4 (misconduct)

APPENDIX 3: Professionalism: Florida’s Mandate, a Nation’s Aspiration
Florida implements its professionalism mandate through a court-ordered code for resolving professionalism complaints. Other states use a different approach, as follows:
<i>Statewide Documents, Aspirational Titles</i> Three states, plus the District of Columbia, describes professionalism as “ideals” or “voluntary” or “aspirational” in their document titles, including: Georgia, ³⁶² Minnesota, ³⁶³ Ohio, ³⁶⁴ and the District of Columbia ³⁶⁵
<i>Statewide Documents, Aspirational Preambles</i> Thirteen states describe professionalism as aspirational or non-disciplinary in their document preambles. Alabama, ³⁶⁶ Colorado, ³⁶⁷ Delaware, ³⁶⁸ Idaho, ³⁶⁹ Kentucky, ³⁷⁰ Louisiana, ³⁷¹ Massachusetts, ³⁷² New Jersey, ³⁷³ New York, ³⁷⁴ Oklahoma, ³⁷⁵ Pennsylvania, ³⁷⁶ West Virginia, ³⁷⁷ and Wisconsin ³⁷⁸
<i>Statewide Documents, Otherwise Aspirational</i> In twenty states, professionalism is otherwise described as aspirational. Arizona, ³⁷⁹ California, ³⁸⁰ Connecticut, ³⁸¹ Hawaii, ³⁸² Iowa, ³⁸³ Kansas, ³⁸⁴ Maine, ³⁸⁵ Maryland, ³⁸⁶ Mississippi, ³⁸⁷ Montana, ³⁸⁸ New Hampshire, ³⁸⁹ New Mexico, ³⁹⁰ North Carolina, ³⁹¹ Oregon, ³⁹² South Carolina, ³⁹³ Texas, ³⁹⁴ Utah, ³⁹⁵ Vermont, ³⁹⁶ Virginia, ³⁹⁷ and Washington ³⁹⁸
<i>Other Local Documents</i> Thirteen states do not have statewide professionalism standards, but continuing legal education or local bar associations programs may focus on professionalism, and may include aspirational professionalism documents. Alaska, ³⁹⁹ Arkansas, ⁴⁰⁰ Illinois, ⁴⁰¹ Indiana, ⁴⁰² Michigan, ⁴⁰³ Missouri, ⁴⁰⁴ Nebraska, ⁴⁰⁵ Nevada, ⁴⁰⁵ North Dakota, Rhode Island, South Dakota, Tennessee, ⁴⁰⁶ and Wyoming

362. LAWYER’S CREED AND ASPIRATIONAL STATEMENT ON PROFESSIONALISM (STATE BAR GA), <http://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm> [<https://perma.cc/WJ8D-YPVT>].

363. PROFESSIONALISM ASPIRATIONS tit. I (MINN. SUPREME COURT 2001), <http://lprb.mncourts.gov/LawyerResources/ProfessionalismAspirationsDocuments/Professionalism%20Aspirations.pdf> [<https://perma.cc/2N33-UCFP>].

364. PROF’L IDEALS FOR OHIO LAWYERS & JUDGES (SUPREME COURT OHIO COMM’N ON PROFESSIONALISM 2015), <https://www.supremecourt.ohio.gov/Publications/AttySvcs/proIdeals.pdf> [<https://perma.cc/A8B6-VVZ2>].

365. D.C. BAR VOLUNTARY STANDARDS OF CIVILITY IN PROF’L CONDUCT (D.C. BAR), <http://www.dcbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility> [<https://perma.cc/5349-8AX7?type=image>].

366. CODE OF PROF’L COURTESY pmb1. (ALA. STATE BAR ASS’N 1992), <https://www.alabar.org/membership/code-of-professional-courtesy> [<https://perma.cc/4TR4-L2AD>].

367. COLO. PRINCIPLES OF PROFESSIONALISM pmb1. (COLO. BAR ASS’N 2011), <http://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council/Principles-of-Professionalism> [<https://perma.cc/2PHA-NN57>].

368. PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS pmb1. (DEL. STATE BAR ASS’N & DEL. SUPREME COURT 2003), <http://courts.delaware.gov/rules/pdf/PPDL-LN.pdf> [<https://perma.cc/Y864-PDWV>].

369. STANDARDS FOR CIVILITY IN PROF’L CONDUCT pmb1. (IDAHO STATE BAR 2001), http://isb.idaho.gov/pdf/general/standards_for_civility.pdf [<https://perma.cc/PXY5-K6BM>].

370. CODE OF PROF'L COURTESY pmb. (KY. BAR ASS'N), <http://www.kybar.org/?procourtesy> [<https://perma.cc/MT35-ZSTM>].

371. THE CODE OF PROFESSIONALISM IN THE COURTS pmb. (SUPREME COURT LA.), <http://files.lsba.org/documents/Mentoring/LASCCodeofProfessionalisminthecourts.pdf> [<https://perma.cc/DA7Q-V7QL>].

372. STATEMENT ON LAWYER PROFESSIONALISM pmb. (MASS. BAR ASS'N 1989), <http://www.massbar.org/docs/default-source/mba-reports/massbar-mba-statement-lawyer-professionalism-1989-march-14.pdf?sfvrsn=7> [<https://perma.cc/JMT5-99K7>].

373. PRINCIPLES OF PROFESSIONALISM pmb. (N.J. STATE BAR ASS'N 2013), <http://tcms.njsba.com/personifyebusiness/LegalResources/NJCommissiononProfessionalism/NJCOPPrinciplesandPledge.aspx> [<https://perma.cc/KL3R-YRR8>].

374. STANDARDS OF CIVILITY pmb. (N.Y. STATE BAR ASS'N), https://www.nycourts.gov/press/old_keep/stdns.shtml [<https://perma.cc/2F3E-M5S3>] (22 CRR-NY B IV E 1200 Notes states that these standards have not been enacted as part of 22 NYCRR part 1200).

375. STANDARDS OF PROFESSIONALISM pmb. (OKLA. BAR ASS'N 2006), <http://www.okbar.org/members/EthicsCounsel/StandardsProfessionalism.aspx> [<https://perma.cc/Z7WQ-B9VH>].

376. 204 PA. CODE § 99.1 (2000), <http://www.pacode.com/secure/data/204/chapter99/subchapDtoc.html> [<https://perma.cc/WR4N-EKMS>].

377. STANDARDS OF PROF'L CONDUCT pmb. (W. VA. OFFICE DISCIPLINARY COUNSEL), <http://www.wvdc.org/sopc.htm> [<https://perma.cc/6JD9-RPJG>].

378. WIS. SUP. CT. R. 62.01, <http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=1082> [<https://perma.cc/R36G-LHLL>].

379. *See* A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZ. (STATE BAR ARIZ. 2017), <http://www.azbar.org/membership/admissions/lawyerscreedofprofessionalism>. In Arizona, where the Board of Governors unanimously adopted, in 1989, *A Lawyer's Creed of Professionalism* of the State Bar of Arizona, a State Task Force on Professionalism later emphasized that professionalism, though important, remains aspirational:

Integrity, courtesy and respect are not qualities that lawyers should feel free to jettison whenever they are away from work. They are qualities that constitute what used to be understood as "character". At the same time, the Task Force understands that the concepts of integrity, courtesy and respect are somewhat subjective and thus difficult to enforce the same way we enforce the Rules of Professional Conduct. In many ways, therefore, our definition of professional is aspirational. Nevertheless, we believe that our recommendations can have influence the behavior of lawyers for the better.

STATE BAR ARIZ., REPORT OF THE TASK FORCE ON PROFESSIONALISM 3 (2005), <http://www.azbar.org/media/64636/professionalism%20task%20force.pdf> [<https://perma.cc/WYR9-PTRF>].

380. *See* CAL. ATTORNEY GUIDELINES OF CIVILITY & PROFESSIONALISM intro. (STATE BAR CAL. 2007), http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf [<https://perma.cc/395D-PRA7>].

381. *See* LAWYERS' PRINCIPLES OF PROFESSIONALISM (CONN. BAR ASS'N 1994), http://ctbar.site-ym.com/resource/resmgr/Committee_ProfandCLE/Lawyers%27PrinciplesofProfessi.pdf [<https://perma.cc/6FFC-CL8S>].

382. GUIDELINES OF PROF'L COURTESY & CIVILITY FOR HAW. LAWYERS pmb. (JUDICIARY STATE OF HAW. 2004), http://www.courts.state.hi.us/docs/court_rules/rules/gpsc.htm [<https://perma.cc/E865-79NK>].

383. *See* STANDARDS OF PROF'L CONDUCT pmb. (IOWA STATE BAR ASS'N), <http://www.iowabar.org/?page=ProfessionalConduct> [<https://perma.cc/6CQZ-DLLZ>].

384. *See* PILLARS OF PROFESSIONALISM (KAN. BAR ASS'N 2012) (as adopted by the Kansas Supreme Court in 2012), <http://c.ymcdn.com/sites/www.ksbar.org/resource/resmgr/Files/pillarsofprofessionalism.pdf> [<https://perma.cc/FE7Q-S5BZ>].

385. *See* GUIDELINES OF PROF'L COURTESY (ME. STATE BAR ASS'N), <http://www.mainebar.org/?page=Guidelines> [<https://perma.cc/9359-2HHS>].

386. *See* CODE OF CIVILITY (MD. STATE BAR ASS'N 1997), <http://www.msba.org/aboutus/civility-code.aspx> [<https://perma.cc/L47J-Q4NX>].

387. See A LAWYER'S CREED (MISS. BAR), <https://www.msbar.org/ethics-discipline/professionalism/lawyers-creed.aspx> [<https://perma.cc/7B4J-XGCA>].

388. See STANDARDS OF PROF'L COURTESY TO CLIENTS (STATE BAR MONT.), http://www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/standards_of_prof_courtesy_t.pdf [<https://perma.cc/SG96-5CYL>]; STANDARDS OF PROF'L COURTESY AMONG ATTORNEYS (STATE BAR MONT.), http://www.montanabar.org/resource/resmgr/Attorney_Rules_and_Regulations/Standards_of_PC_Attorney.pdf [<https://perma.cc/6HLP-MSDH>]; STANDARDS OF PROF'L COURTESY & ETHICS BETWEEN THE JUDICIARY & ATTORNEYS (STATE BAR MONT.), http://www.montanabar.org/resource/resmgr/Attorney_Rules_and_Regulations/Standards_of_Prof_Courtesy_A.pdf [<https://perma.cc/6EQ6-DZS3>].

389. See THE N.H. LAWYER PROFESSIONALISM CREED (N.H. BAR ASS'N 2016), <https://www.nhbar.org/resources/professionalism-creed> [<https://perma.cc/4VDZ-D3LF>].

390. See ETHICS/PROFESSIONALISM GUIDELINES, N.M. MINIMUM CONTINUING LEGAL EDUC., https://www.nmmcle.org/rules/ethics_prof_guidelines.asp [<https://perma.cc/QNG5-9G3J>].

391. See THE N.C. LAWYER PROFESSIONAL CREED (N.C. BAR ASS'N PROFESSIONALISM COMM. 2003), <http://www.nclamp.gov/2008%20cle/ethics.pdf> [<https://perma.cc/9YKE-DZSE>] ("The Committee emphasized that the standards were not meant to be minimum or mandatory, but instead to be the standards related to our profession as a higher calling.").

392. See STATEMENT OF PROFESSIONALISM (OR. STATE BAR 2011), http://www.osbar.org/_docs/forms/Prof-ord.pdf [<https://perma.cc/8TSR-LSRY>].

393. See S.C. BAR LAWYERS DESK BOOK, STANDARDS OF PROFESSIONALISM 683 (2015-16 ed.), https://www.schar.org/media/filer_public/26/d3/26d39546-d201-41a4-8354-34065058feba/standardsofprof.pdf [<https://perma.cc/N8QD-KELF>].

394. See GUIDELINES OF PROF'L COURTESY (DALL. BAR ASS'N 2003), <http://www2.dallasbar.org/documents/DBA%20ProfGLsCourtesy.pdf> [<https://perma.cc/G6SZ-BZ6A>].

395. UTAH STANDARDS OF PROFESSIONALISM & CIVILITY pmbl. (UTAH SUPREME COURT 2003), <https://www.utcourts.gov/courts/sup/civility.htm> [<https://perma.cc/W5EB-6F3W>].

396. See GUIDELINES FOR PROF'L COURTESY (VT. BAR ASS'N 1989), <https://www.vtbar.org/for%20ATTORNEYS/Practice%20Resources/Guidelines%20of%20Professional%20Courtesy.aspx> [<https://perma.cc/8TAE-WB8S>]; see also *Vt. Prof'l Review Bd.*, Op. No. 2004.007, 72 PRB (2004) (interpreting guidelines as non-binding but important reminders of appropriate lawyer conduct).

397. See PRINCIPLES OF PROFESSIONALISM preface (VA. STATE BAR 2009), <http://www.vsb.org/pro-guidelines/index.php/principles> [<https://perma.cc/839L-TQ8U>].

398. See CREED OF PROFESSIONALISM (WASH. STATE BAR ASS'N 2001), https://www.wsba.org/docs/default-source/resources-services/professionalism/creed-of-professionalism.pdf?sfvrsn=c41539f1_2 [<https://perma.cc/X68M-Q6C5>]; see also GUIDELINES OF PROF'L COURTESY pmbl. (KING CTY. BAR ASS'N 1999), <http://www.kcba.org/publications/pdf/pro-guidelines.pdf> [<https://perma.cc/24JL-L6JY>].

399. See *Professionalism Award Recipients*, ALASKA BAR ASS'N, <https://alaskabar.org/for-lawyers/awards-award-recipients/professionalism-award-recipients/> [<https://perma.cc/QR6U-4RK9>] (listing professionalism award recipients); *Continuing Legal Educ. Event Calendar*, ALASKA BAR ASS'N, <https://alaskabar.org/member-services/member-events/> [<https://perma.cc/F8ZS-ZP24>] (offering continuing legal education programs dedicated to the subject of professionalism).

400. See PULASKI CTY. BAR ASS'N CODE OF PROF'L COURTESY (PULASKI CTY. BAR ASS'N 1990), <http://www.pulaskibar.com/mission> [<https://perma.cc/M82G-LJA3>].

401. See A STATEMENT OF PROF'L ASPIRATIONS FOR THE LEGAL PROFESSION IN THE 17TH JUDICIAL CIRCUIT (17TH JUDICIAL CIRCUIT COURT STATE ILL.), www.illinois17th.com/images/aspirations.pdf [<https://perma.cc/M92G-BS6Q>].

402. See PROF'L COURTESY CODE (EVANSVILLE BAR ASS'N 2007), <https://www.evvbar.org/members/professional-courtesy-code.aspx> [<https://perma.cc/TZB9-7XKX>].

403. See CIVILITY PRINCIPLES pmbl. (U.S. DIST. COURT E. DIST. MICH. 1996), <https://www.mieb.uscourts.gov/sites/default/files/courtinfo/CVprinciples.pdf> [<https://perma.cc/Z7TM-FH6C>].

404. See TENETS OF PROF'L COURTESY (MO. BAR 1987), <https://s3-us-west-2.amazonaws.com/kcmba/General/Tenets-of-Professional-Courtesy.pdf> [<https://perma.cc/J97Y-84P6>].

405. *See* THE LAWYER'S PLEDGE OF PROFESSIONALISM pmb1. (CLARK CTY. BAR ASS'N), https://www.clarkcountybar.org/wp-content/uploads/pledge_of_professionalism_ccba.pdf [<https://perma.cc/RL52-FYZX>].

406. *See* GUIDELINES FOR PROF'L COURTESY AND CONDUCT intro. (MEMPHIS BAR ASS'N 1989), http://www.memphisbar.org/sites/499/uploaded/files/Guidelines_For_Professional_Courtesy.pdf [<https://perma.cc/U7T3-BTT8>]; LAWYER'S CREED OF PROFESSIONALISM (NASHVILLE BAR ASS'N COMM. ETHICS & PROFESSIONALISM) <http://juvenilecourt.nashville.gov/wp-content/uploads/2016/08/Lawyers-Creed-of-Professionalism.pdf> [<https://perma.cc/GKD8-G9AU>].