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Just Because you can Doesn't Mean you Should: Reconciling Attorney Conduct in the Context of Defamation with the New Professionalism

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**JUST BECAUSE YOU CAN DOESN'T MEAN YOU SHOULD:
RECONCILING ATTORNEY CONDUCT IN THE CONTEXT OF
DEFAMATION WITH THE NEW PROFESSIONALISM**

HEATHER M. KOLINSKY*

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I. INTRODUCTION

Competence,¹ advocacy,² and ethics³ are the pillars of the practice of law; almost every professional obligation an attorney has flows from one of these three core concepts.⁴ An attorney must know the law.⁵ An attorney must advance his client's position.⁶ An attorney must do so within the confines of what his colleagues and community find acceptable.⁷ The concept of a lawyer has not changed much, but how we perceive the larger legal community's adherence to these pillars frequently shifts.⁸

1. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

2. *See id.* R. 3.1–3.9.

3. *See id.* scope para. 16.

4. *See id.* R. 1.1, 3.1–3.9, scope para. 16.

5. *E.g., id.* R. 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

6. *E.g.,* MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (“As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”); *see also id.* R. 1.2(a) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . .”).

7. *See, e.g., id.* pmbl. para. 5 (“A lawyer should demonstrate respect for the legal system and for those who serve [in] it, including judges, other lawyers, and public officials.”). “Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.” *Id.* pmbl. para. 9.

8. *See* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 103–07 (2011–2012) (focusing on the rise and fall of civility and how it should be enforced going forward).

Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.

Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (per curiam)); *see also* Campbell, *supra* note 8, at 102. In fact, as the economy has downshifted, firms have switched practice areas or taken cases on in bulk, which has led to the same firms being penalized or sanctioned for failing to practice in an appropriate manner. *See, e.g.,* Martha Neil, *Federal Judge's Unusual Order Puts Well-Known Bankruptcy Law Firm Under Fla. Bar Scrutiny*, A.B.A. J. (June 16, 2011, 5:15 PM), http://www.abajournal.com/news/article/federal_judges_unusual_order_puts_well-known_bankruptcy_law_firm_under_florida_bar_scrutiny/ (firm banned from bankruptcy court for improper practice); Matt Chandler, *Baum Settles with AG; Will Pay \$4M*, BUFFALO BUS. FIRST (Mar. 22, 2012, 10:38 AM), <http://www.bizjournals.com/buffalo/news/2012/03/22/baum-settles->

In theory, competence, advocacy, and ethics are all equally important—each must be given due consideration and rarely should one be considered paramount to the other.⁹ But the way this practice paradigm has evolved sometimes leaves good lawyers—and some less than good lawyers—struggling to find a balance between what can be done and what should be done.¹⁰

This struggle comes into clear relief when considering the tension between advocacy and ethics. An attorney may defame a party in a proceeding, as long as such defamation has some relation to the legal proceeding, and be immune from civil liability.¹¹ Even if false statements were knowingly made with malice, the immunity protects the attorney in the name of unfettered zealous advocacy.¹² The Rules of Professional Conduct, however, prohibit an attorney from “conduct that is prejudicial to the administration of justice.”¹³ Professionalism demands even more—honesty and fair dealing.¹⁴ Is it fair to ask an attorney to weigh these competing interests without the benefit of clear guidance, indeed, should an attorney be required to make these choices at all?

Three competing but complementary obligations balance with these three core pillars of practice.¹⁵ The first obligation is to the client: to zealously represent the client, to hold that client’s confidences inviolate, and to serve the client’s needs.¹⁶ Second, an attorney has an obligation as an officer of the court.¹⁷ An attorney must understand that the overarching need for justice may come before an individual client’s needs, and that the attorney has a personal obligation to support and defend the judicial system.¹⁸ Third,

with-ag-will-pay-4m.html?page=all (firm improperly conducted high-volume foreclosure practice by improperly authenticating documents and taking other inappropriate shortcuts).

9. See MODEL RULES OF PROF’L CONDUCT R. 1.1, 3.1–3.9, pmbl. paras. 2, 9, scope para. 16.

10. See *id.* scope para. 16; Campbell, *supra* note 8, at 104–07.

11. See RESTATEMENT (SECOND) OF TORTS § 586 (1977).

12. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 817 (5th ed. 1984); T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 918 (2004).

13. MODEL RULES OF PROF’L CONDUCT R. 8.4(d). One would think defaming someone with malice would be prejudicial to the administration of justice, even if the purpose was to engage in the most complete form of advocacy.

14. See *id.* R. 8.4(b)–(e).

15. *Id.* pmbl. paras. 1, 8; see Mike Hoeflich & J. Nick Badgerow, *The Regulation of Courtesy: Does Kansas Need a Code of Professionalism?*, 60 U. KAN. L. REV. 413, 416 (2011).

16. MODEL RULES OF PROF’L CONDUCT R. 1.2(a), pmbl. paras. 2, 8.

17. See *id.* R. 3.3.

18. See, e.g., *id.* R. 3.3(b).

the attorney has an obligation to the public.¹⁹ The attorney should embrace his obligation to serve those who would not otherwise have access to the law, and to create in the public a confidence in those who serve as attorneys.²⁰

Reconciling these affirmative obligations to three very distinct audiences can be difficult. Over the years, rules of professional conduct have evolved from little more than civility codes to a complete body of law that helps define the outer boundaries of how these relationships interact with one another.²¹ More importantly, the rules of professional conduct, as they have evolved, have given guidance to lawyers to offer the floor below which no lawyer may fall.²² But, because the rules only provide a floor, the legal community has acknowledged that professionalism requires more than mere compliance.²³ Since the rules do not define an ideal standard of professionalism, lawyers must step up from the minimum requirements in executing their

19. *Id.* R. 6.1 (encouraging voluntary pro bono public service), R. 6.2 (accepting appointments by the court to represent indigent clients), pmb. para. 6.

20. *Id.* R. 6.1, pmb. paras. 6–7.

21. *See* Campbell, *supra* note 8, at 128–37. In his article, Campbell traces the evolution of codes of professional conduct. *See id.* The first professional code of conduct in 1908 was ethos based, and generally an attempt to codify morality and behavior. *Id.* at 128. It was aspirational. *Id.* at 133. The 1960s saw a shift to a more practical approach with an emphasis on resolving ethical issues that arose in practice in addition to creating an enforcement mechanism. *See id.* at 134–35. The code was set out in three parts. Campbell, *supra* note 8, at 135. The Canons offered “axiomatic norms.” *Id.* Ethical considerations were identified but again, adherence was aspirational. *Id.* Finally, disciplinary rules were incorporated that set a floor for proper conduct. *Id.* The final significant shift occurred in 1983 when the rules evolved into black letter law with rules and comments to guide behavior and to impose discipline as necessary. *Id.* at 136.

22. *See* MODEL RULES OF PROF’L CONDUCT scope paras. 14–16 (explaining the proper interpretation of the rules, including the words “shall,” “shall not,” “may,” and “should” when used in conjunction with the rules or the comments; setting the rules in a larger context of law and licensure; and clarifying the rules are not exhaustive of a lawyer’s moral and ethical obligations); *see also* Campbell, *supra* note 8, at 128–37.

23. Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It?*, FLA. B.J., July-Aug. 2005, at 38, 38. *See* Deasonlaw, *Ethics and Professionalism*, TAMPA BAY BUS. L. (Mar. 16, 2012), <http://tampabaybusinesslaw.wordpress.com/2012/03/16/ethics-and-professionalism/>.

No code or set of rules can be framed which will particularize all the duties of the lawyer. . . . The . . . canons of ethics are . . . a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

CANONS OF PROF’L ETHICS pmb. (1908); *see also* MODEL RULES OF PROF’L CONDUCT pmb. para. 7.

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.

MODEL RULES OF PROF’L CONDUCT pmb. para. 7.

duties to client, court, and community.²⁴ The rules, however, cannot dictate all of an attorney's conduct or address every situation.²⁵ Thus, they represent a starting point, not an end goal.²⁶ This means, however, that there is a gap between what is required and what is expected.²⁷ The problem occurs when that gap exposes a lawyer to divergent choices that serve competing interests—advocacy and protection of a client versus serving the goals of justice or professional conduct.

To truly satisfy her ethical obligation, a lawyer must do more than the minimum.²⁸ Indeed, professionalism as a concept arose out of an acknowledgement that the rules were not enough.²⁹ Somewhere between the floor and the ceiling, there must be a happy medium where competing obligations of practice and professionalism can be woven together to build a stronger, more complete foundation for the practice of law that provides clearer expectations for those who practice.

There has been a modern movement within the legal community to capture the ideals of professionalism and civility and articulate them as aspirations and goals for the practicing bar.³⁰ The American Bar Association

24. *See id.* “Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.” MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1983).

25. *See* 4 FLA. JUR. 2D *Attorneys at Law* § 97 (2008). “The standards of professional conduct to be observed by members of the Florida Bar are not limited to the observance of rules and avoidance of prohibited acts, and . . . the failure to specify any particular act of misconduct [will not] be construed as tolerance thereof.” *Id.*

26. *See* MODEL RULES OF PROF'L CONDUCT pmbl. para. 7.

27. *See id.*

28. *See id.* scope para. 16.

29. *See* Deasonlaw, *supra* note 23.

Professionalism differs from ethics in the sense that ethics is a minimum standard . . . while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no official reward. Yet, sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right's own sake?

Id. (quoting John W. Spears, *Interview with Harold G. Clark, Chief Justice, Supreme Court of Georgia*, DECATUR-DEKALB B. Q., May 24, 1990).

30. *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) (reviewing the newly-adopted Ideals of Professionalism in Maryland). This movement is by no means new. *See* Hoeflich & Badgerow, *supra* note 15, at 414–15. As multiple scholars have pointed out, almost any generation of lawyers has a previous generation that bemoans their inability to conduct themselves professionally and civilly. *See id.* at 413; Campbell, *supra* note 8, at 103. Neil Hamilton notes that “[t]he critical question at any point in the legal profession's history is not whether the profession had more civility or a deeper sense of calling at an earlier period” but rather, it is “whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals.” Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF.

(“ABA”), the federal government, and several states have implemented aspirational goals related to professionalism, civility, or behavior in the practice of law over the last twenty or so years.³¹ The problem, however, is that these aspirational goals lack any real effectiveness because, unlike laws or mandatory rules of professional conduct, there is no consequence for failure to comply above and beyond community reaction.³² So, while these goals help articulate clearer guidance for attorneys of what is expected, they do little to alleviate the tension between zealous advocacy and professionalism.³³ However, the Florida Bar has proposed rules for enforcing professionalism based on its preexisting professionalism goals.³⁴ Recent law review articles discussing the twin necessities of professionalism and civility offer studies,

LAW, no. 4, 2008, at 4, 4. But this movement has changed from simple complaint to action with the advent of codes of professionalism, creeds of professionalism, both aspirational and now regulatory, that seek to shape how lawyers behave while practicing law. *See, e.g., Proposed Rules for Resolving Professionalism Complaints*, FLA. B. NEWS, May 15, 2012, <http://www.floridabar.org/DIVCOM/JN/JNNNews01.nsf/Articles/4496E3E1F2882611852579F4006DF11E>.

31. *See Professionalism Codes*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last updated Aug. 2012) [hereinafter *Professionalism Codes*]. According to the ABA’s website, to date, forty-two states and the District of Columbia have professionalism codes, civility codes, or some other standard of conduct set apart from the rules of professional conduct that have been promulgated by either that state’s bar, Supreme Court, or commission on professionalism. *See id.* Several smaller bars within many states also have their own codes. *See id.* But these codes, whether state or local, are aspirational and some, like Louisiana and Virginia’s, specifically provide that failure to comply will not be used as a basis for sanctions or discipline. LA. SUP. CT. GEN. ADMIN. R. pt. G, § 11, pmb1.; *Professional Guidelines*, VA. ST. B., <http://www.vsb.org/pro-guidelines/index.php/principles> (last updated Dec. 22, 2009) (“Having been unanimously endorsed by Virginia’s statewide bar organizations, the Principles [articulate] standards of civility to which all Virginia lawyers should aspire. The Principles of Professionalism shall not serve as a basis for disciplinary action or for civil liability.”). The ABA, as well as many of its sections, has also adopted aspirational professionalism standards. *E.g., SECTION OF FAMILY LAW, AM. BAR ASS’N, CIVILITY STANDARDS (2006)*, available at http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_civility.authcheckdam.pdf. Other national organizations, including the American Board of Trial Advocates and the American College of Trial Lawyers, have adopted professionalism codes. AM. BD. OF TRIAL ADVOCATES, PRINCIPLES OF CIVILITY, INTEGRITY, AND PROFESSIONALISM pmb1. (n.d.), available at <https://www.abota.org/index.cfm?pg=Civility> (follow “download” hyperlink); AM. COLL. OF TRIAL LAWYERS, CODE OF PRETRIAL AND TRIAL CONDUCT 2 (2009), available at http://www.actl.com/AM/Template.cfm?Section=All_publications&Template=/CM/contentDisplay.cfm&contentID=4380.

32. *See* LA. SUP. CT. GEN. ADMIN. R. pt. G, § 11, pmb1.; *Professional Guidelines*, *supra* note 31.

33. Hoeflich & Badgerow, *supra* note 15, at 416; *see* LA. SUP. CT. GEN. ADMIN. R. pt. G, § 11, pmb1.; *Professional Guidelines*, *supra* note 31.

34. *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

suggestions, and salvos against the fall of standards within the legal profession.³⁵ Like Florida, other state bars may consider taking aspirational goals for attorney conduct and turning them into actionable rules.³⁶

This is a “new professionalism” borne of a constant refrain that the newest generation of lawyers fails to uphold the standards of those who came before;³⁷ the difference now is that this new professionalism will have teeth, and more closely resemble a marriage between mandatory legal ethical standards and what have been, for the most part, aspirational goals for professionalism.³⁸

But this shift to a more professional practice must be examined against the historical backdrop of advocacy,³⁹ the role of a lawyer in litigation,⁴⁰ and the attorney client relationship.⁴¹ It remains a tension between advocacy and ethics,⁴² client and court,⁴³ and attorney and community.⁴⁴ In some ways, it

35. See Nicola A. Boothe-Perry, *Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517, 556–57 (2009) [hereinafter Boothe-Perry, *Professionalism's Triple E Query*] (asserting the importance of academia's roll in molding professionalism in the legal community); Gabriel, *supra* note 30, at 121–27, 146–47 (reviewing the newly adopted “Ideals of Professionalism” in Maryland and discussing the gaps within those ideals); Hoeflich & Badgerow, *supra* note 15, at 413 n.1, 415; Dennis A. Rendleman, *Pogo Professionalism: A Call for a Commission on Truth and Professionalism*, 2012 J. PROF. LAW. 181, 185, 199–200; Nicola A. Boothe-Perry, *Professionalism and Academia*, PROFESSIONAL, Summer 2010, at 6, 6–7, [hereinafter Boothe-Perry, *Professionalism and Academia*] (discussing professionalism and learned behavior in the law school setting). Hoeflich and Badgerow cite a two-fold crisis: “[T]he general public neither understands nor appreciates the skill, dedication, and public service exhibited by the vast majority of Kansas lawyers” and “it seems that civility, decency, and cooperation among Kansas lawyers is on the decline, based on personal experience, case reports, and anecdotal evidence.” Hoeflich & Badgerow, *supra* note 15, at 414; see also Hamilton, *supra* note 30, at 4.

36. See *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30. However, not everyone believes enforceable professionalism codes are necessary, positing that the current rules of professional conduct, the inherent powers of the court, and more education can be used effectively to cure what ails our profession. See Hoeflich & Badgerow, *supra* note 15, at 414–15 (advocating for using existing means to control objectionable behavior, “mandatory ‘professionalism’ education for law students, . . . and . . . annual continuing education for lawyers”); see also Gabriel, *supra* note 30, at 123, 136.

37. See Hoeflich & Badgerow, *supra* note 15, at 414.

38. See *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

39. See Campbell, *supra* note 8, at 134.

40. See, e.g., RESTATEMENT (SECOND) OF TORTS § 586 cmt. c (1977).

41. MODEL RULES OF PROF'L CONDUCT pmbl. para. 2.

42. Compare Anenson, *supra* note 12, at 922–23 (advocacy), with RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (ethics).

43. Compare MODEL RULES OF PROF'L CONDUCT pmbl. para. 9 (client), and *id.* R. 1.2 (client), with *id.* R. 3.3 (court).

seems that this move toward professionalism could be setting attorneys up for failure no matter what the context.

Regulating a certain level of behavior is problematic at best. Normally, this would be something left to an attorney's community to regulate,⁴⁵ but the constant refrain that professionalism is lacking seems to indicate otherwise.⁴⁶ Lawyers are nothing more than their reputation.⁴⁷ So, when a lawyer behaves badly, is rude, or is otherwise inappropriate on a professional level, the community reacts accordingly.⁴⁸

Judges and colleagues react differently depending on a person's behavior.⁴⁹

“A lawyer who seriously offends against widely held professional norms faces unofficial but nonetheless powerful interdictions. Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutting off of valuable practice opportunities . . . denial of access to centers of power and prestige . . . and [the] preclusion from judicial posts.”⁵⁰

The community, however, can also respect the difference between a good lawyer that may be difficult to deal with at times, and a nice lawyer that may not have the same skills. The problem with trying to require the prickly lawyer to hew to a “nicer” practice of law is that it may serve no purpose in the larger scheme of things, and may in fact harm the underlying principles of practice that have been indelibly inked on our profession.

In some instances, the tension between the common law and rules of professional conduct may also force an attorney to make difficult ethical or strategic choices in the name of advocacy.⁵¹ The shift to mandatory profes-

44. Compare MODEL RULES OF PROF'L CONDUCT pmbl. para. 9 (attorney), with *id.* pmbl. para. 6 (community).

45. MODEL RULES OF PROF'L CONDUCT pmbl. para. 10.

46. Hoeflich & Badgerow, *supra* note 15, at 414–15.

47. See *Professional Guidelines*, *supra* note 31.

48. See Campbell, *supra* note 8, at 101.

49. Hamilton, *supra* note 30, at 12.

50. *Id.* (first and second alterations in original) (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22 (student ed., 1986)).

51. See Campbell, *supra* note 8, at 137; see also MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12. For example, a lawyer must keep evidence of a past crime confidential if it is disclosed by his client. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 8. It is the quintessential dilemma, not being able to tell someone where the body is buried. See *id.* The same can be said of permitting a criminal defendant to testify on his own behalf, thereby exercising his constitutional rights when the attorney suspects, but does not know for sure, that the defendant will lie on the witness stand. See *id.* R. 3.3 cmt. 8. Comment 9 “prohibits a lawyer from offering evidence the lawyer knows to be false, [but] permits the lawyer to refuse to offer

sionalism creates an additional tension between a lawyer's need to represent a client professionally and to legitimately take advantage of those tools available to do so, even where they do not entirely embrace the ideals of professionalism.⁵² The backlash that a zealous lawyer may receive in the name of regulating civility and codifying professionalism will not sting any less simply because the lawyer may not face civil liability for her actions.⁵³ As proposed in Florida, there is still an intake, review, and grievance process for professionalism complaints, just as there is for any other bar grievance.⁵⁴

The concern is how to reconcile a lawyer's obligations: To create a meaningful relationship between a lawyer's role as a practitioner, a lawyer's role as a colleague, and a lawyer's role as a member of the larger legal community. This must be done in the larger context of both ethics and mandatory professionalism. These concerns come into sharper focus when considering the lawyer's litigation privilege, also known as absolute immunity.⁵⁵ According to several courts, even though an attorney is not subject to civil liability for defamation or other related torts that bear some relation to a legal proceeding, an attorney is still subject to court sanctions or to disciplinary action for defamatory conduct.⁵⁶ The problem is that it appears to be rare

testimony or other proof that the lawyer *reasonably believes* is false." *Id.* cmt. 9 (emphasis added). However, the "Rule does not permit a lawyer to refuse to offer the testimony of [a criminal defendant] where the lawyer reasonably believes but does not know that the testimony [is] false." *Id.*

52. See Campbell, *supra* note 8, at 139; see also RESTATEMENT (SECOND) OF TORTS § 586 (1977). For example, attacking a witness's credibility, or being permitted to make defamatory statements in a judicial proceeding. RESTATEMENT (SECOND) OF TORTS § 586 cmt. c.

53. See, e.g., O'Neil v. Cunningham, 173 Cal. Rptr. 422, 428 (Ct. App. 1981).

54. *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

55. See Anenson, *supra* note 12, at 916.

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Id. at 918 (quoting RESTATEMENT (SECOND) OF TORTS § 586). "The privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer so long as the conduct complained of has some relation to the litigation." *Id.*

56. Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (noting "the trial court's contempt power [and] the disciplinary measures of the state court system and bar association" address this type of misconduct); Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608-09 (Fla. 1994); O'Neil, 173 Cal. Rptr. at 428 (acknowledging that while the attorney could not be subject to civil liability for a breach of trust, it "may subject him to disciplinary action"); Higgs v. Dist. Court, 713 P.2d 840, 865 (Colo. 1985) (en banc) (Erickson, J., dissenting) (agreeing with the majority that alternate remedies are available in absolute immunity cases); Hawkins v. Harris, 661 A.2d 284, 288 (N.J. 1995) (citing Rubertson v. Gabage, 654 A.2d

that those sanctions are imposed, particularly with respect to disciplinary action.⁵⁷ As professionalism becomes a subject of discipline, these newly enforceable “aspirations” could alter the balance struck between a person’s right to be free from harmful statements and acts such as defamation, and an attorney’s need to have wide latitude to protect his client and proceed with his case.⁵⁸ The extent of this problem cannot be understated. Only two states do not recognize absolute immunity.⁵⁹ Even the two states that do not recognize absolute immunity have simply adopted a qualified version of the same immunity.⁶⁰ It is not that these contradictory concepts cannot coexist, but the crux of the problem is deciding how to strike a balance that properly acknowledges the value of each.

Part II of this article will discuss “professionalism” as a concept, and discuss how it has been defined by scholars and various bar associations. Part III will examine how there has been a shift from aspirational professionalism goals, to a move to enforceable standards of professionalism based on these goals in Florida. As an example of the tension that may be created by

1002, 1006–07 (N.J. Super. Ct. App. Div. 1995); *Kirschstein v. Haynes*, 788 P.2d 941, 950–51 (Okla. 1990)).

57. See Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209, 235 (2011). The Seventh Circuit has even acknowledged that while disciplinary action and court sanctions have always been available remedies to redress an attorney’s improper conduct during litigation, “the likelihood of these sanctions being invoked is speculative at best.” *Auremma v. Montgomery*, 860 F.2d 273, 278–79 (7th Cir. 1988) (discussing the balance between a person’s rights and the attorney’s need to be unfettered). It is curious why cases, where defamation or a related claim is made, do not make their way to disciplinary proceedings. Perhaps it is a two-fold problem. First, a defamation plaintiff seeks to be made whole—either by receiving some sort of retraction, apology, or money—and disciplinary proceedings may not accomplish that. Oral Argument at 26:30, *DelMonico v. Traynor*, No. SC10-1397, (Fla. June 9, 2011), available at <http://wfsu.org/gavel2gavel/archives/flash/viewcase.php?case=10-1397>. Second, disciplinary proceedings, and discipline itself, generally cannot be used as “a basis for civil liability.” MODEL RULES OF PROF’L CONDUCT scope para. 20 (2012). So maybe there is some unwritten corollary that it is unfair to discipline an attorney for strategic choices that are otherwise permissible and not subject to civil liability.

58. Anenson, *supra* note 12, at 920–21, 925–26; see also Campbell, *supra* note 8, at 100.

59. Anenson, *supra* note 12, at 917.

60. *Id.* at 917 n.6. Louisiana recognizes immunity, but qualifies it such that it is only available when “the statement [is] material, . . . made with probable cause, and without malice.” *Freeman v. Cooper*, 414 So. 2d 355, 359 (La. 1982) (citing *Waldo v. Morrison*, 58 So. 2d 210, 211 (La. 1952)); see also LA. REV. STAT. ANN. § 14:49 (2012), declared unconstitutional by *Garrison v. Louisiana*, 379 U.S. 64 (1964); *id.* § 14:50. The Supreme Court of Louisiana, in rejecting the absolute nature of the immunity, observed that the immunity is “not a license to impugn the professional integrity of opposing counsel or the reputation of a litigant or witness;” it is designed to protect those “who are merely performing their duties.” *Freeman*, 414 So. 2d at 359.

these new rules, absolute immunity is reviewed and discussed in Part IV. In Part V, the author highlights how absolute immunity has been applied in a recent defamation case on writ of certiorari to the Supreme Court of Florida. Against this backdrop, the author then considers the contradictions inherent in protecting lawyers from what would otherwise be considered unprofessional conduct in the name of zealous representation of the client. Finally, Part VI considers how legal theories such as absolute immunity should be viewed within the context of a potential movement toward enforcing mandatory professionalism standards in the practice of law.

II. PROFESSIONALISM, A CONCEPT DEFINED

“‘[P]rofessionalism’ seems to encompass practically all concerns about what lawyers do and the way in which they do it.”⁶¹

A. Scholars Approach to Professionalism

There are as many definitions of “professionalism” as there are people who seek to define it.⁶² It has been defined by author and organization alike.⁶³ Quite often, it is distinguished as a step above the professional rules, an ideal to aspire to and behavior that should be expected.⁶⁴ However, some definitions have chosen to frame it as a minimum standard as well, just as the rules of professional conduct are framed.⁶⁵ In that instance, professionalism is conceived as “the minimum level of civility in word and action that law-

61. Donald Hubert, *Competence, Ethics, and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners*, in *TEACHING AND LEARNING PROFESSIONALISM* 113, 115 (1996) (emphasis added).

62. See Hamilton, *supra* note 30, at 5. Neil Hamilton sought to classify these definitions, noting that there are three varieties of scholarship on professionalism. *Id.* The first makes “no attempt to affirmatively state [the] definition of the concept itself,” but rather presumes the definition is “self-evident or meant to be implicitly understood within the context of the article’s main focus.” *Id.* (footnote omitted). The second “focus[es] on one or more characteristics that are the ‘core’ of professionalism,” more specifically enumerating the requisite values, standards, and “commitment[s] to public service.” *Id.* Finally, a third “dismisses [it] as a misguided concept.” *Id.*

63. See Hamilton, *supra* note 30, at 5; Burnele V. Powell, Essay, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEX. L. REV. 275, 277–80 (1994); Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism”*, 41 EMORY L.J. 403, 424 (1992) (listing six values that comprise the elements of a professional tradition); *Ideals and Goals of Professionalism*, FLA. B., <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/deafda73c03233e985256b2f006ccd5e?OpenDocument> (last updated May 26, 2011).

64. See Hoeflich & Badgerow, *supra* note 15, at 415–16.

65. *Id.* at 415.

yers believe every lawyer should show every other lawyer, the minimum level of cooperation expected among lawyers in adversarial and non-adversarial situations, and the minimum degree of courtesy one would expect lawyers to show each other.”⁶⁶ Still, another posits that while “ethical obligations can be seen as the shall-nots of lawyering, . . . professionalism [should be seen] as creating affirmative obligations of the lawyer to the broader society.”⁶⁷

Another author has distilled professionalism down to five principles—focusing on personal conscience, ethics of duty, ethics of aspiration, holding colleagues to the same standards, and reflective engagement, including contemplating income and wealth balanced by public obligation.⁶⁸ Interestingly, at least one scholar has attempted to identify the core concepts of civility as distinct obligations separate from legal ethics and professionalism.⁶⁹ Campbell identifies ten common concepts including “maintain[ing] honesty and personal integrity . . . avoid[ing] actions taken merely to delay or harass . . . act[ing] with dignity and cooperation in pre-trial proceedings, [and] act[ing] as a role model to the client and public.”⁷⁰

B. *Organizational Definitions of Professionalism*

The Kansas Bar has conceived professionalism as a focus on actions that are grounded in “civility, respect, fairness, learning, and integrity” that encompass the lawyer’s role as an officer of the court “and as a public citizen with special responsibilities for the quality of justice.”⁷¹ The Florida Bar has defined professionalism, in its broadest terms, as a commitment to “ensure[] that concern for the desired result does not subvert fairness, honesty, respect and courtesy for others with whom one comes into contact . . . [including] opponents.”⁷² The ABA has defined a “professional lawyer” in the context of professionalism as “an expert in law pursuing a learned art in service to

66. *Id.*

67. Campbell, *supra* note 8, at 139. Campbell carries this notion of a larger societal obligation further positing that “morality represents a *personal conscience*, whereas professionalism represents a *social conscience*.” *Id.* at 141.

68. Hamilton, *supra* note 30, at 8.

69. Campbell, *supra* note 8, at 99, 128, 142.

70. *Id.* at 109.

71. Hoefflich & Badgerow, *supra* note 15, at 416.

72. *Ideals and Goals of Professionalism*, *supra* note 63. Maryland defines it as “the combination of the core values of personal integrity, competency, civility, independence, and public service that distinguish lawyers as the caretakers of the rule of law.” MD. R. app. *Ideals of Professionalism*.

clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.”⁷³

C. *A Working Definition*

No matter what definition is used, professionalism is universally considered to be something separate from the rules themselves, even if it is also complementary to them.⁷⁴ Perhaps professionalism is best captured as that intangible space between “shall” and “may,” and an understanding that society demands more than that which is required by “must.” Where a lawyer ends up on the spectrum between what you must do, what you can do, and what you should do, is going to be impacted by the definition of professionalism that is adopted in his community and potentially codified into enforceable standards. As legal communities continue to articulate and refine the new professionalism, norms will shift to raise the bar for desired behavior.

III. PROFESSIONALISM, A CONCEPT ENFORCED

“*To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.*”⁷⁵

A. *Florida*

The Oath of the Florida Bar was changed in 2011 to add the language quoted above.⁷⁶ The move was designed to emphasize a shift in conscious-

73. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 6 (1996) (emphasis omitted). The ABA notes the following “[e]ssential characteristics of [a] professional lawyer . . . : 1) [l]earned knowledge; 2) [s]kill in applying the applicable law to the factual context; 3) [t]horoughness of preparation; 4) [p]ractical and prudential wisdom; 5) [e]thical conduct and integrity; [and] 6) [d]edication to justice and the public good.” *Id.* at 6–7. This Report is based on two earlier reports commissioned by the ABA: The 1986 Stanley Commission Report and the 1992 MacCrate Commission Report. *Id.* at 1.

74. See, e.g., AM. BD. OF TRIAL ADVOCATES, *supra* note 31, at pmb1.

75. *Oath of Admission to The Florida Bar*, FLA. B., <http://www.floridabar.org/tfb/TFBProfess.nsf/basic+view/04E9EB581538255A85256B2F006CCD7D?OpenDocument> (last updated Sept. 13, 2011) (emphasis added).

76. *In re Oath of Admission to The Florida Bar*, 73 So. 3d 149, 150 (Fla. 2011) (per curiam); Jan Pudlow, *Revised Admission Oath Now Emphasizes Civility*, FLA. B. NEWS, Oct. 1, 2011, <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/f0058f33ea1ffefc8525791700476e37!OpenDocument>; see also *Oath of Admission to The Florida Bar*, *supra* note 75.

ness from baseline legal ethics to a higher standard of conduct, particularly with respect to civility.⁷⁷ At the same time, the Florida Board of Bar Examiners announced that professionalism would be tested as a separate subject on the Florida Bar beginning in 2013.⁷⁸ Finally, recommendations were made to begin addressing professionalism complaints much in the same way ethics complaints are currently processed by the Florida Bar.⁷⁹ At the most recent Florida Bar Convention, former Florida Bar President Scott Hawkins told an audience assembled to discuss the matter of enforcing professionalism standards in Florida that ““this topic is ground zero for our . . . efforts of the next 10 years. . . . [I]t will not go away.””⁸⁰ Indeed, the Supreme Court of Florida’s Commission on Professionalism tentatively adopted guidelines for disciplining substantial and repeated violations of the professionalism standards in Florida.⁸¹ These proposed guidelines are based on the professionalism standards set forth in Florida’s *Creed of Professionalism, Ideals and Goals of Professionalism*, and the *Oath of Attorney*.⁸²

77. Pudlow, *supra* note 76.

78. *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). The Bar has defined the subject matter for testing “professionalism” as that information mainly contained in three documents: Florida’s *Creed of Professionalism, Guidelines for Professional Conduct* developed by the Trial Lawyers Section of the Florida Bar, and the *Ideals and Goals of Professionalism*. Kirsten Davis, *Assessing Aspiration: Florida Bar Exam to Test Professionalism Guidelines* (AALS Professional Responsibility Section Newsletter, D.C.), Spring 2011, at 28, 28–29. Davis noted that this is “a compliance first-step—requiring . . . that lawyers *know* the professionalism guidelines.” *Id.* at 31. Another byproduct of such action, is a “de facto ‘codif[ication]’ [of] uniform, customary expectations of professional practice in Florida.” *Id.* Finally, such action has elevated professionalism to the level of other subject matter and “branded” it with “intellectual and practical legitimacy.” *Id.* at 32.

79. Gary Blankenship, *Lapses in Professionalism May Lead to Disciplinary Sanctions*, FLA. B. NEWS, July 15, 2012, <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/F3B6FE3E910088D685257A3600436181> [hereinafter Blankenship, *Disciplinary Sanctions*]; see Gary Blankenship, *Putting ‘Teeth’ in Professionalism: Comments Sought on Proposed Professionalism Rules*, FLA. B. NEWS, May 15, 2012, <http://www.floridabar.org/div-com/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/92c1e519c6934a8e852579f4006c11cb!OpenDocument> [hereinafter Blankenship, *Putting ‘Teeth’ in Professionalism*].

80. Blankenship, *Disciplinary Sanctions*, *supra* note 79 (first alteration in original).

81. *Id.*

82. *Id.*; *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

1. Development of New Professionalism Standards

a. *Ideals and Goals*

In 1990, the Board of Governors of the Florida Bar adopted the *Ideals and Goals of Professionalism*.⁸³ There are seven ideals and each one contains corresponding goals.⁸⁴ Professionalism is broadly defined, and it includes a commitment to “ensur[e] that concern for the desired result does not subvert fairness, honesty, respect, and courtesy for others with whom one comes into contact . . . [including] opponents.”⁸⁵ Ideal two provides that “[a] lawyer should at all times be guided by a fundamental sense of honor, integrity, and fair play, and should counsel his or her client to do likewise.”⁸⁶ In furtherance of this ideal, a stated goal is that “[a] lawyer should abstain from conduct calculated to detract or divert the fact-finder’s attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.”⁸⁷

b. *Florida’s Creed of Professionalism*

The *Creed of Professionalism* followed the *Ideals and Goals of Professionalism* and was adopted in 1989.⁸⁸ Developed by the Florida Bar, the *Creed of Professionalism* sought to memorialize the professional obligations that underlie an attorney’s obligations to his client, the judiciary, and the administration of justice.⁸⁹ It provides in part that an attorney

will strictly adhere to the spirit as well as the letter of [the] profession’s code of ethics, . . . be guided by a fundamental sense of honor, integrity, and fair play, . . . [and] not knowingly misstate,

83. *Ideals and Goals of Professionalism*, *supra* note 63.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Professionalism Codes*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2/professionalismhomepage/professionalsimcodes.html (last visited Oct. 28, 2012) [hereinafter *Professionalism Codes and Year*].

89. *See Creed of Professionalism*, FLA. B., [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/82D119A3382C40F185256FFD0072FC8C/\\$FILE/CreedOfProfessionalism.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/82D119A3382C40F185256FFD0072FC8C/$FILE/CreedOfProfessionalism.pdf?OpenElement) (last visited Oct. 28, 2012).

distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.⁹⁰

c. *Guidelines for Professional Conduct*

The Guidelines for Professional Conduct, first promulgated in 1994 and most recently revised in 2008,⁹¹ are more detailed and address administrative issues such as: Scheduling, continuances, and extensions of time; service of papers; written submissions to the court; as well as litigation matters including discovery, motions practice, and trial conduct.⁹²

2. Imposing Discipline for Issues Related to Professionalism Under the Rules of Professional Conduct

Florida's move to regulate professionalism does not mean that an attorney could not previously be subjected to discipline for unprofessional conduct.⁹³ Prior to the Florida Bar's move to develop enforceable professionalism standards, attorneys were simply more likely to be disciplined under catch-all provisions of Rule 4-8.4(d), Rules Regulating the Florida Bar, which makes it a violation to engage in conduct that is prejudicial to the administration of justice.⁹⁴ Because it is so broadly written, this rule has been applied to a variety of circumstances and has been used to address egregious breaches of professionalism that in and of themselves flirt with the "musts" of the rules of professional conduct.⁹⁵

90. *Id.*

91. *Guidelines for Professional Conduct*, FLA. B., <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/2f2668cdfd7b99e0852566b2f006ccd15> (last updated Sept. 8, 2011).

92. *Id.*

93. *See id.*; R. REGULATING FLA. BAR 4-8.4(d) (2012).

94. *See Fla. Bar re: Amendments to Rules Regulating the Fla. Bar*, 621 So. 2d 1032, 1049 (Fla. 1993) (per curiam); R. REGULATING FLA. BAR 4-8.4(d). Rule 4-8.4(d) provides that:

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 characteristic.

Id.

95. *See Fla. Bar v. Knowles*, 37 Fla. L. Weekly S508, S509 (July 12, 2012) (per curiam); *Fla. Bar v. Mitchell*, No. SC10-637, slip op. at 1 (Fla. Oct. 5, 2010); Referee Report at 1–2, *Fla. Bar v. Mitchell*, 46 So. 3d 1003 (Fla. 2010) (No. SC10-637) [hereinafter *Mitchell Report*]; Complaint at 1, 3, *Fla. Bar v. Mitchell*, 46 So. 3d 1003 (Fla. 2010) (No. SC10-637) [hereinafter *Mitchell Complaint*]; *see also* R. REGULATING FLA. BAR 4-8.4(d).

a. *Lawyers Behaving (Very) Badly*

In one instance, two attorneys, Kurt Mitchell and Nicholas Mooney, who could not even maintain a professional relationship with each other for more than the length of an e-mail, were disciplined for violating Rule 4-8.4(d).⁹⁶ The e-mail exchanges between counsel were exceedingly unpleasant and on more than one occasion would escalate to outright name calling and other childish behavior.⁹⁷ And although both attorneys were equally guilty of inappropriate, completely unprofessional remarks, Mooney finally reported Mitchell to the Florida Bar when Mitchell made disparaging remarks about his disabled child including the statement, “[w]hile I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces . . . I would look at the bright side at least you definitely know the kid is yours.”⁹⁸ Mitchell received a ten-day suspension and was required to attend the Florida Bar’s Anger Management Workshop.⁹⁹ Mooney received a public reprimand for his behavior and was required to attend a professionalism program.¹⁰⁰

More recently, an attorney was suspended for a year for, among other things, disparaging her client after she was fired.¹⁰¹ The attorney filed a Mo-

96. *Mitchell*, No. SC10-637, slip op. at 1; Mitchell Report, *supra* note 95, at 1, 2; Mitchell Complaint, *supra* note 95, at 1, 3; Fla. Bar v. Mooney, No. SC10-640, 2010 WL 4685407, at *1 (Fla. Nov. 16, 2010); Referee Report at 1, 2, Fla. Bar v. Mooney, 49 So. 3d 748 (Fla. 2010) (No. SC10-640) [hereinafter Mooney Report]; Complaint at 1, 3, Fla. Bar v. Mooney, 49 So. 3d 748 (Fla. 2010) (No. SC10-640) [hereinafter Mooney Complaint]. The complaints against Kurt D. Mitchell and Nicholas Mooney also cited them for violating Rule 3-4.3, “commission of any act that is unlawful or contrary to honesty and justice.” Mitchell Complaint, *supra* note 95, at 3; Mooney Complaint, *supra* note 96, at 3; *see also* R. REGULATING FLA. BAR 3-4.3.

97. *See* Mitchell Complaint, *supra* note 95, Ex. A, at 1. For example, Mooney continually referred to Mitchell as “Junior” and Mitchell to Mooney as “Old Hack.” *Id.* In addition, at one point Mooney stated that “the fact that you are married means that there truly is someone for everyone, even a short/hairless jerk!!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization!!!” *Id.* Ex. B, at 1.

98. *Id.* Ex. C, at 1.

99. *Mitchell*, No. SC10-637, slip op. at 1. However, it is interesting to note that Mitchell had two other pending disciplinary cases that served as an additional underlying basis for his discipline—one for failure to pay a deposition transcription bill and one for sending disparaging and humiliating emails to his landlord when the two became embroiled in a conflict. Mitchell Report, *supra* note 95, at 2.

100. *Mooney*, 2010 WL 4685407, at *1; *see* Mooney Report, *supra* note 96, at 2.

101. Fla. Bar v. Knowles, 37 Fla. L. Weekly S508, S508–10 (July 12, 2012) (*per curiam*).

tion to Withdraw four days before an immigration hearing on the ground that the client had paid her with a check that bounced.¹⁰²

In her motion, the attorney also stated “that she regretted helping her client, who [was] right[fully] convicted [of] grand theft, and that [she] had received reports from the [client’s] community that [the] client had robbed them.”¹⁰³ The motion was withdrawn when the attorney and client resolved the matter.¹⁰⁴ Another motion was filed to withdraw after the client retained new counsel, and at the same time, the attorney advised an assistant state attorney that “she had reason to believe her client would lie to the Immigration Court at an upcoming hearing.”¹⁰⁵

The referee found the attorney violated Rule 4-8.4(d) of the Rules Regulating the Florida Bar, for “conduct prejudicial to the administration of justice.”¹⁰⁶ The Supreme Court of Florida commented separately on this violation, addressing its egregious nature:

Respondent filed two motions on separate occasions in which she disparaged her client’s character in a reprehensible fashion. Respondent attacked her client’s integrity with regard to her alleged failure to honor checks and fulfill contracts. Respondent further stated that she had heard reports that her client had robbed members of the Romanian community. Finally, and most egregiously, Respondent brazenly asserted that her client had been rightfully convicted for grand theft, and that Respondent actually regretted having helped her client. Such disparaging language is needless and has no place in a public court pleading, especially when the statements are made by an attorney and are directed at the attorney’s own client. Unbridled language of this sort harms the client and causes the public to lose faith in the legal profession. Respon-

102. *Id.* at S508. In fact, counsel implied in her motion that the funds were for an immigration matter when in fact they were for another case in which she was representing the same client. *Id.*

103. *Id.*

104. *Id.*

105. *Knowles*, 37 Fla. L. Weekly at S508.

106. *Id.* at S509; *see also* R. REGULATING FLA. BAR 4-8.4(d) (2012). The referee observed that:

“regardless of intent, the very act of filing such a motion with such language is so prejudicial to the client so as to be actionable.” The referee stated that it was inconceivable that anyone knowing the rules of ethics would think such statements would be appropriate. Accordingly, the referee recommended that Respondent be found guilty of violating rule 4-8.4(d).

Knowles, 37 Fla. L. Weekly at S509 (quoting Referee Report at 7, Fla Bar. v. Knowles, 37 Fla. L. Weekly S508 (July 12, 2012) (No. SC10-1019)).

dent's conduct was highly prejudicial to the administration of justice and cannot be tolerated.¹⁰⁷

b. *Making the Crime Fit the Punishment*

The attorneys' unprofessional conduct in each of these cases was found to violate Rule 4-8.4(d) and these attorneys were subject to discipline as a result.¹⁰⁸ Discipline was appropriate in both circumstances and certainly keeps with the purposes of the Rules of Professional Conduct.¹⁰⁹ However, similar conduct could now be regulated under the proposed enforceable professionalism standards because although the new professionalism standards require substantial or repeated offenses, the same was likely true of the use of Rule 4-8.4(d).¹¹⁰ For example, in Mitchell's and Knowles' respective cases, had the attorneys' statements not been so extreme, or repeated, and had other factors not been present, it is unlikely that a disciplinary action would have been filed or punishment would have been imposed.¹¹¹

107. *Id.*

108. *Id.* at S509–10; Mitchell Report, *supra* note 95, at 2–3; Mooney Report, *supra* note 96, at 2; *see also* R. REGULATING FLA. BAR, 4-8.4(d).

109. *See* Mitchell Report, *supra* note 95, at 3; Mooney Report, *supra* note 96, at 2; *see also* MODEL RULES OF PROF'L CONDUCT scope para. 14 (2012). The Supreme Court of Florida has continuously acknowledged that the appropriate considerations for imposing discipline are threefold:

[(1)] the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty; [(2)] the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; [and (3)] the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Fla. Bar v. Behm, 41 So. 3d 136, 150 (Fla. 2010) (per curiam) (quoting Fla. Bar v. Cohen, 919 So. 2d 384, 388 (Fla. 2005) (per curiam); Fla. Bar v. Barrett, 897 So. 2d 1269, 1275–76 (Fla. 2005) (per curiam); Fla. Bar v. Spear, 887 So. 2d 1242, 1246 (Fla. 2004) (per curiam); Fla. Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983) (per curiam)); *see also* Fla. Bar v. Liberman, 43 So. 3d 36, 39 (Fla. 2010) (per curiam) (citing Fla. Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970) (per curiam)). Imposing discipline for unprofessional conduct in and of itself is in keeping with these goals of discipline. *See Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

110. *See* Mitchell Report, *supra* note 95, at 1–2; Mooney Report, *supra* note 96, at 1–2 (supporting proposition that rule 4-8.4(d) implicitly requires substantial or repeated offenses); *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30; *see also* R. REGULATING FLA. BAR 4-8.4(d).

111. Mitchell Complaint, *supra* note 95, at 1–4; *see Knowles*, 37 Fla. L. Weekly at S508; Fla. Bar v. Mitchell, No. SC10-637, slip op. at 1 (Fla. Oct. 5, 2010). For example, Knowles' punishment was actually enhanced from a ninety-day suspension because it was not her first offense. *Knowles*, 37 Fla. L. Weekly at S508. Also, in Knowles' case, she was not attacking another attorney or a witness, but was disparaging her own client. *Id.* at S510. The Supreme

Under newly proposed rules for enforcement of professionalism, recourse to formal and informal sanctions may be much more readily available than before.¹¹² Instead of relying on the catch-all provisions under the Model Rules of Professional Conduct or the Rules Regulating the Florida Bar, the proposed rules set additional, distinct standards that all attorneys must meet.¹¹³ Although these professionalism standards are only a step above the minimum requirements, it raises the bar for all practitioners. While heightened professionalism is commendable, as explained later, Florida—and other states like it—need to be mindful to promote and advance the cause of professionalism without compromising an attorney’s competing obligations to the client, the court, and the public.¹¹⁴

3. A Proposed Florida Model for Resolving Complaints of Unprofessional Conduct

Florida is one step closer to enforcing its proposed professionalism guidelines and disciplining those lawyers who fail to comply.¹¹⁵ The Florida Bar’s Commission on Professionalism has approved proposed rules for resolving professionalism complaints.¹¹⁶ The Commission approved the Attorney Consumer Assistance and Intake Program Model (“ACAP Model”).¹¹⁷ The ACAP Model involves a very simple rule, which then relies upon previously adopted professionalism goals and decisions from the Supreme Court of Florida for definition and form.¹¹⁸ The Standard of Professionalism, as set forth in the proposal, is that “[m]embers of The Florida Bar shall not engage in unprofessional conduct,” defined as “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*

Court of Florida justifiably took a very dim view of Knowles’ actions because her actions, offensive in and of themselves, were that much worse because her defamatory remarks were directed at her own client. *See id.* at S508, S510.

112. Compare R. REGULATING FLA. BAR 3-2.1, with *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

113. *See Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30; *see also* R. REGULATING FLA. BAR 3-2.1; MODEL RULES OF PROF’L CONDUCT scope para. 19.

114. *See* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, *supra* note 73, at 6 & n.22, 7.

115. *See Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

116. *Id.* The Commission on Professionalism approved this model at its February 16, 2012 meeting, and proposed these rules and regulations for public comment and approval by the Supreme Court of Florida, but they have not yet been formally adopted. *Id.*

117. *Id.*; Blankenship, *Disciplinary Sanctions*, *supra* note 79.

118. *See Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30; Blankenship, *Disciplinary Sanctions*, *supra* note 79.

*Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*¹¹⁹ What is evident at first glance is that this standard does not contemplate violation by the commission of a single act, unless that act is “substantial or repeated.”¹²⁰ The reliance on prior Supreme Court of Florida decisions, in addition to the professionalism guidelines that have been adopted by the Florida Bar, should assist in guiding the committees as these new rules evolve and are put into practice.¹²¹

The proposal adopts existing bar grievance procedures to handle bar complaints and violations of The Rules Regulating the Florida Bar, which will make the rules easy to implement.¹²² Once a complaint is filed, the proposal uses the intake attorney as a gatekeeper with initial discretion to resolve matters informally, including referral of a respondent attorney to appropriate remedial professionalism programs.¹²³ After an investigation, the complaint may be dismissed or forwarded “to the appropriate branch office of The Florida Bar’s Lawyer Regulation Department for further” review.¹²⁴

If a complaint is referred forward, the appropriate branch counsel has the discretion to “dismiss the [complaint] . . . , recommend Diversion . . . in accordance with Rule 3-5.3(d) of The Rules Regulating The Florida Bar, or refer to a Grievance Committee for further [consideration].”¹²⁵ Rule 3-5.3(d)

119. *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

120. *Id.*

121. *See* Fla. Bar v. Ratiner, 46 So. 3d 35, 41–42 (2010) (per curiam); Fla. Bar v. Abramson, 3 So. 3d 964, 969 (2009) (per curiam); Fla. Bar v. Martocci, 791 So. 2d 1074, 1078 (2001) (per curiam); *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

122. *See Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30; *see also* R. REGULATING FLA. BAR 3-5.3(d) (2012). There is also a local option that would permit judicial circuits to adopt Local Professionalism Panels to resolve some complaints of unprofessional conduct within that circuit’s own legal community. *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30. The idea was to permit circuits to decide how much involvement they wanted to have—and likely had the resources to support—with respect to dealing with professionalism complaints. *See id.* Under the current ACAP Model proposal, the Local Professionalism Panel would receive referrals of cases that the ACAP attorney determines could be handled informally. *Id.*

123. *Id.* In this context, remedial professionalism programs are identified as “Practice and Professionalism Enhancement Programs,” which are “[p]rograms operated either as a diversion from disciplinary action or as a part of a disciplinary sanction that are intended to provide educational opportunities to members of the bar for enhancing skills and avoiding misconduct allegations” either with no investigation or determination of whether an investigation is required where a potential violation of the Rules of Professional Conduct may exist. R. REGULATING. FLA. BAR 3-2.1(i); *see Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

124. *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30.

125. *Id.*; R. REGULATING FLA. BAR 3-5.3(d).

provides that “[t]he bar shall not offer a respondent the opportunity to divert a disciplinary case that is pending at staff or grievance committee level investigations to a practice and professionalism enhancement program unless staff counsel, the grievance committee chair, and the designated reviewer concur.”¹²⁶ Rule 3-5.3(b) contemplates “diversion to practice and professionalism enhancement programs” in cases where the case would be subject to a “finding of minor misconduct or by a finding of no probable cause with a letter of advice.”¹²⁷ A lawyer may be referred to diversion only once every seven years.¹²⁸

The Grievance Committee is the final stop in the review process.¹²⁹ Upon review and consideration, the Grievance Committee makes one of five findings: 1) “No probable cause;” 2) “No probable cause [with] a letter of advice to the Respondent;” 3) “Recommendation of Diversion to [a] Practice and Professionalism Enhancement Program[];” 4) “Recommendation of Admonishment for Minor Misconduct;” or 5) “Probable cause under Rule 3-2.1, [which] is a finding of guilt justifying disciplinary action.”¹³⁰

B. *Examples of Other States’ Approaches to Discipline and Enforcement with Respect to Professionalism Issues*

Unlike Florida’s proposed rules for regulating professionalism, most states simply have aspirational goals for professionalism and civility.¹³¹ Most do not intend for those goals to be enforceable through disciplinary proceedings.¹³² For example, Minnesota’s aspirational professionalism stan-

126. R. REGULATING FLA. BAR 3-5.3(d).

127. *Id.* R. 3-5.3(b).

128. *Id.* R. 3-5.3(c).

129. See *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30. These options track with the traditional role of the Grievance Committee in Bar Proceedings for other violations. See R. REGULATING FLA. BAR 3-7.4(j), (k), (m), (o). Rule 3-2.1(j) provides that probable cause is defined as “[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.” *Id.* R. 3-2.1(j).

130. *Proposed Rules for Resolving Professionalism Complaints*, *supra* note 30; see R. REGULATING FLA. BAR 3-2.1(j), 3-7.4(j), (k), (m), (o).

131. See generally *Professionalism Codes*, *supra* note 31 (listing the states that have professionalism or civility codes or goals); see also Gary J. Leppla, *Professional Responsibility: The Move from Bright Line Rules to Aspirational Disciplinary Standards*, ALL RISE, Spring 2008, <http://moritzlaw.osu.edu/news/allrise/2008/05/professional-responsibility-the-move-from-bright-line-rules-to-aspirational-disciplinary-standards/>.

132. E.g., LA. SUP. CT. GEN. ADMIN. R. pt. G, § 11, pmb.; *Professional Guidelines*, *supra* note 31. As noted earlier, Louisiana and Virginia’s codes specifically provide that failure to comply will not be used as a basis for sanctions or discipline. LA. SUP. CT. GEN. ADMIN. R. pt. G, § 11, pmb.; *Professional Guidelines*, *supra* note 31.

dards specifically state that they “are not intended to be used as a basis for discipline.”¹³³ Yet Minnesota has sanctioned attorneys for unprofessional conduct.¹³⁴ Like Minnesota, Maryland has also addressed unprofessional conduct without the benefit of enforceable professionalism standards.¹³⁵ But, as with similar cases in Florida,¹³⁶ the courts tend to rely on the catch-all provision of behavior that “is prejudicial to the administration of justice,” rather than being able to point to specific standards of professionalism or civility.¹³⁷ Often, the attorney disciplined has also violated a more specific rule of professional conduct as well.¹³⁸

The Court of Appeals in Maryland suspended an attorney from the practice of law for ninety days based on conduct that was related to marital difficulties, but resulted from him using vulgar language directed at colleagues and court staff, failing to cooperate with law enforcement in several situations, and otherwise behaving in a less than professional manner.¹³⁹ On the one hand, the court acknowledged that an “[a]ttorney[] who cannot maintain [a] level of professional performance [that includes common courtesy and civility] must be disciplined,” but the court also acknowledged that “[a]ttorneys are not prohibited from using profane or vulgar language at all times and under all circumstances.”¹⁴⁰ Instead, such language can be curbed when it “would be prejudicial to the administration of justice.”¹⁴¹

A New Jersey court sanctioned an attorney for repeated instances of the use of vulgar name-calling, threatening, and abusive language toward opposing counsel, a New Jersey Transit investigator, and a trial judge’s law clerk.¹⁴² This was not Mr. Vincenti’s first appearance before the Disciplinary

133. *Professionalism Aspirations*, MINN. ST. B. ASS’N (2001), <http://www2.mnbar.org/committees/professionalism/aspirations-final.htm>.

134. See *In re Graham*, 453 N.W.2d 313, 314–15, 325 (Minn. 1990) (per curiam); *In re Williams*, 414 N.W.2d 394, 395 (Minn. 1987) (per curiam).

135. Compare *In re Williams*, 414 N.W.2d at 395, with *Attorney Grievance Comm’n v. Alison*, 565 A.2d 660, 664, 668 (Md. 1989).

136. See, e.g., *Fla. Bar v. Knowles*, 37 Fla. L. Weekly S508, S509 (July 12, 2012) (per curiam); see also *Standards for Lawyer Sanctions*, FLA. B., www.floridabar.org (follow “Standards for Lawyer Sanctions” hyperlink under “Lawyer Regulation”) (last updated June 6, 2011).

137. See *Alison*, 565 A.2d at 666.

138. See *id.* at 664.

139. *Id.* at 661–64, 668.

140. *Id.* at 666–67 (citing *In re Williams*, 414 N.W.2d at 397).

141. *Id.* at 667.

142. *In re Vincenti (In re Vincenti II)*, 554 A.2d 470, 471 (N.J. 1989) (per curiam). Vincenti told the trial judge’s law clerk to “get real,” that she did not know what she was doing, and that he was “not taking this fucking shit.” *Id.* at 473. He apparently called the Deputy

Review Board, nor before the Supreme Court of New Jersey, as he had been suspended from practice for similar conduct several years earlier.¹⁴³

The court found that Vincenti, again, had engaged in conduct that was prejudicial to the administration of justice and suspended him from the practice of law for three months.¹⁴⁴ The court stated that “[c]onduct calculated to intimidate and distract those who, though in an adversarial position, have independent responsibilities and important roles in the effective administration of justice cannot be countenanced” and that such conduct would subject an attorney to discipline.¹⁴⁵ The court explained that while “[u]nder some circumstances it might be difficult to determine precisely the point at which forceful, aggressive trial advocacy crosses the line into the forbidden territory of an ethical violation,” Vincenti’s conduct, in both cases, clearly crossed that line.¹⁴⁶

Both of these cases involved extreme behavior issues, attorneys who were on some level “out of control.”¹⁴⁷ And both reflect a desire to address professionalism issues that were underlying the designated offense of engaging in conduct prejudicial to the administration of justice.¹⁴⁸ Clearly, these are attorneys who were unlikely to behave, no matter what rules were in place. But, in terms of helping attorneys whose unprofessional conduct does not rise to this level, it is worth considering whether enforceable standards, which would give clearer guidance as to the type of “civility” and “professionalism” required, would not be more beneficial and reach beyond cases with such extreme behavior.¹⁴⁹ As Chief Justice Warren E. Burger observed:

Lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice. . . . I suggest the necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court; and their worst conduct will be emulated . . . more readily than their best.¹⁵⁰

Attorney General who was serving as opposing counsel a “piece of shit,” challenged him to fight on at least two occasions, and used a threatening tone while dealing with him. *Id.* at 472.

143. *Id.* at 470–71; *In re Vincenti (In re Vincenti I)*, 458 A.2d 1268, 1274–75 (N.J. 1983) (per curiam).

144. *In re Vincenti II*, 554 A.2d at 473, 476.

145. *Id.*

146. *Id.* at 475–76 (quoting *In re Vincenti I*, 458 A.2d at 1268).

147. *See id.* at 473; *Attorney Grievance Comm’n v. Alison*, 565 A.2d 660, 666–68 (Md. 1989).

148. *See In re Vincenti II*, 554 A.2d at 473–74; *Alison*, 565 A.2d at 668.

149. *See* Hubert, *supra* note 61, at 118–19, 121.

150. *Id.* at 113 (quoting Warren E. Burger).

C. *A Parallel System Considered—the Military*

Military attorneys, such as the Judge Advocate General Corps, are subject to the same type of Rules of Professional Conduct as civilian attorneys.¹⁵¹ In addition to the rules that guide the professional conduct of military attorneys, the Department of Defense has promulgated ethical requirements that apply to all service members, including attorneys.¹⁵² Thus, ethics and professionalism for the military community as a whole are addressed from the top down.¹⁵³

Military employees are directed to “carefully consider ethical values when making decisions as part of official duties.”¹⁵⁴ “Primary Ethical Values” are enumerated: Truthfulness (which is required); straightforwardness; candor; integrity; loyalty; accountability (“includ[ing] avoiding even the appearance of impropriety”); fairness; caring; respect; promise keeping; responsible citizenship; and the pursuit of excellence.¹⁵⁵ The Joint Ethics Regulation then provides that “job-related decisions . . . should be preceded by a consideration of ethical ramifications,”¹⁵⁶ and a framework for an ethical decision-making plan is offered.¹⁵⁷ Part of the ethical decision-making plan provides that a decision maker should “[b]e prepared to fall somewhat short of some goals for the sake of ethics and other considerations.”¹⁵⁸ At the end of the day, The Joint Ethics Regulation indicates that unethical options should be eliminated.¹⁵⁹ And, further, that the decision maker should commit to and implement the best ethical solution.¹⁶⁰

151. AIR FORCE RULES OF PROF'L CONDUCT introduction (2005).

152. See DEP'T OF DEF., THE JOINT ETHICS REGULATION § 2-200, at 18 (2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf>.

153. See AIR FORCE RULES OF PROF'L CONDUCT introduction. Having said this, clearly attorneys and other divisions may have additional ethical and professional conduct rules, but the Department of Defense guidelines provide a baseline from which the entire military community must proceed. See DEP'T OF DEF., *supra* note 152, § 2-200, at 18. For example, the Air Force Rules of Professional Conduct are adapted from the ABA Model Rules and are, for the most part, simply modified to reflect the realities of practice before military courts. AIR FORCE RULES OF PROF'L CONDUCT introduction. The Introduction to the Air Force Rules indicates that: “Beyond establishing minimum standards, the *Rules* are designed to meet three important objectives. They provide workable guidance to Air Force lawyers, they are specific to the problems and needs of our practice, and they are accessible to Air Force lawyers assigned throughout the world.” *Id.*

154. DEP'T OF DEF., *supra* note 152, § 12-400, at 118.

155. *Id.* § 12-401, at 118–19.

156. *Id.* § 12-500, at 119.

157. See *id.* § 12-501, at 120–21.

158. *Id.* § 12-501, at 120.

159. DEP'T OF DEF., *supra* note 152, § 12-501, at 120.

While a member of the Judge Advocate General Corps has familiar obligations under the Rules of Professional Conduct for that specific branch, the attorney also has ethical obligations as part of the larger military community.¹⁶¹ Those obligations stress the importance of ethics first.¹⁶² And, failure to comply with the requirements of The Joint Ethics Regulation can result in administrative, criminal and civil sanctions.¹⁶³

IV. DEFAMATION AND THE DOCTRINE OF ABSOLUTE IMMUNITY¹⁶⁴

Other than Louisiana and Georgia, every state has adopted a version of “absolute immunity for lawyers.”¹⁶⁵ The Restatement of Torts Second provides that:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the

There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages. Eliminate the unethical solutions.

Id.

160. *See id.* at 121.

161. AIR FORCE RULES OF PROF'L CONDUCT introduction (2005); DEP'T OF DEF., *supra*, note 152, § 1-406, at 10.

162. *See* AIR FORCE RULES OF PROF'L CONDUCT introduction.

163. DEP'T OF DEF., *supra* note 152, § 1, at 105. Clearly, the military has an advantage over the ABA, the best comparator here, in that it has control over its employees. *See About the American Bar Association*, AM. B. ASS'N, http://www.americanbar.org/utility/about_the_aba.html (last visited Oct. 28, 2012). The ABA is a voluntary organization, so it would be impossible to adopt mandatory professionalism standards. *See id.* However, states could accomplish this much in the way Florida has chosen to do so. *See* R. REGULATING FLA. BAR 3-1.2 (2012).

164. This concept has been identified as the lawyer's litigation privilege, the absolute litigation privilege, and absolute immunity. Anenson, *supra* note 12, at 917–18, 920, 928–29; Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 283 (2007). While there are underlying reasons why one term may be preferable to the other, those reasons are tangential to the discussion in this article. *See id.* Here, the author uses the terms absolute immunity and privilege interchangeably, referring to the doctrine as one of absolute immunity, but when necessary, discussing it in the appropriate context as a “privilege” as well. For a more complete discussion regarding the use of the terms of privilege and immunity as they relate to absolute immunity, see Douglas R. Richmond's, *The Lawyer's Litigation Privilege*.

165. Anenson, *supra* note 12, at 917 & n.6.

course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.¹⁶⁶

“The privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer, so long as the conduct complained of has some relation to the litigation.”¹⁶⁷ Generally, the immunity granted is absolute, but it may also be qualified under certain circumstances.¹⁶⁸

Such broad immunity from defamation is arguably necessary because there is a need to protect an attorney who is trying to protect his client’s interest—often under the most dire circumstances—from the specter of collateral litigation aimed at his own behavior during trial.¹⁶⁹ Imagine, for example, a criminal defense attorney is faced with a sympathetic victim, a dead toddler, and a defendant, the toddler’s mother, who has a history of telling

166. RESTATEMENT (SECOND) OF TORTS § 586 (1977); *see also* RESTATEMENT OF TORTS § 586 (1938) (“An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.”). Defamation is generally defined as a communication that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Paul T. Hayden, *Reconsidering the Litigator’s Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 988 (1993). *But see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring actual malice for public officials). Both Louisiana and Georgia offer qualified versions of absolute immunity. *See* GA. CODE ANN. § 51-5-7(7) (2012) (“Comments of counsel, fairly made, on circumstances of a case in which he or she is involved and on the conduct of parties in connection therewith” is deemed privileged.); *Freeman v. Cooper*, 414 So. 2d 355, 356, 359 (La. 1982) (citing *Waldo v. Morrison*, 58 So. 2d 210, 211 (La. 1952)) (proposing that “in order for privilege to apply, the statement must be material . . . with probable cause and without malice”).

167. Anenson, *supra* note 12, at 918. Louisiana has emphatically rejected the absolute nature of the privilege. *Id.* at 917 n.6; *see also Freeman*, 414 So. 2d at 359. The Supreme Court of Louisiana specifically held that such a policy of permitting malicious statements by counsel to be protected “has no place in the system of law prevailing in Louisiana.” *Freeman*, 414 So. 2d at 359 (emphasis omitted) (quoting *Sabine Tram Co. v. Jurgens*, 79 So. 872, 873 (La. 1918)).

168. *See Richmond*, *supra* note 164, at 284; *see also* RESTATEMENT (SECOND) OF TORTS § 586 (1977). “A privilege is [considered] absolute when it cannot be [defeated] by a defendant’s malic[ious]” behavior but, if the privilege is qualified, then a plaintiff may defeat it and strip a defendant of immunity if the plaintiff can prove malicious conduct. *Richmond*, *supra* note 164, at 284.

169. *Green Acres Trust v. London*, 688 P.2d 617, 621 (Ariz. 1984) (quoting *Van Vechten Veeder, Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 482 (1909)). Or, put another way, “[t]o subject him to actions for defamation would fetter and restrain him in the fearless discharge of the duty which he owes to his client, and which the successful administration of justice demands.” *Id.* (quoting *Veeder, supra* note 169, at 482).

lies; intricately involved lies.¹⁷⁰ His client is accused of first-degree premeditated murder.¹⁷¹ She is portrayed in the media as cold and uncaring—a mother who “fail[ed] to report her daughter missing for [thirty-one] days.”¹⁷² There is no real physical evidence tying her to the death, it is mostly circumstantial, and there is no proof to show how the child died.¹⁷³ The attorney needs to tell the jury something—needs to offer a theory of the case that explains the dead toddler, his client’s behavior, and his client’s innocence.¹⁷⁴ These are significant obstacles in defending his client.¹⁷⁵ Thus, the defense team crafts a theory of the case, and in doing so, draws others into the story accusing them of unspeakable crimes.¹⁷⁶

In his opening statement, attorney Jose Baez offered the following explanation for Caylee Anthony’s death.¹⁷⁷ Caylee disappeared on the morning of June 16, 2008, and was discovered by George Anthony, Casey Anthony’s father, in the family’s swimming pool.¹⁷⁸ He yelled at Casey and told her she

170. Anthony Colarossi, *Casey Anthony’s Avalanche of Lies: Jury Left to Decide What’s True*, ORLANDO SENTINEL, June 26, 2011, at A1.

171. *Register of Actions*, ORANGE COUNTY CLERK CTS., <http://myclerk.orangeclerk.com/default.aspx> (follow “Criminal and Traffic Case Records” hyperlink; then search “Last Name” for “Anthony” and “First Name” for “Casey” and “Middle Name” for “Marie;” then click “Search;” then follow “2008-CF-015606-A-O” hyperlink) (last visited October 28, 2012).

172. *See The Detail That Could Doom Casey Anthony*, NBCNEWS.COM (July 5, 2011, 11:04 AM), http://www.msnbc.msn.com/id/43639517/ns/us_news-crime_and_courts/t/detail-could-doom-casey-anthony#ulmDM9fcwy.

173. Gregory Kane, *Anthony Verdict May Signal Death of Circumstantial Evidence*, WASH. EXAMINER, July 6, 2011, <http://washingtonexaminer.com/anthony-verdict-may-signal-death-of-circumstantial-evidence/article/40352#.UDu-YaBQS7o>.

174. *See The Detail That Could Doom Casey Anthony*, *supra* note 172.

175. *See id.*

176. *See* Jessica Hopper & Ashleigh Banfield, *Casey Anthony Trial: Defense Team Claims Caylee Anthony Drowned in Family Pool*, ABC NEWS (May 24, 2011), http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-trial-defense-claims-caylee-anthony-drowned/story?id=13674375#.UDvElaBQS7o. The author presumes that this is information provided to Baez by his client, and that he relied upon her information because confirming it would have been difficult under the circumstances if no documentation existed.

177. CochiseLiberty, *Defense Winning: Opening Statement Part 1 (of 2)*, YOU TUBE, at 0:35 (June 6, 2011), <http://www.youtube.com> (search “Defense Winning: Opening Statement Part 1 (of 2),” then choose the video by CochiseLiberty) [hereinafter CochiseLiberty, *Defense Winning: Opening Statement Part 1 (of 2)*].

178. *Id.* at 1:00; CochiseLiberty, *Defense Winning: Opening Statement Part 2 (of 2)*, YOU TUBE, at 7:07 (June 6, 2011), <http://www.youtube.com> (search “Defense Winning: Opening Statement Part 2 (of 2),” then choose the video by CochiseLiberty) [hereinafter CochiseLiberty, *Defense Winning: Opening Statement Part 2 (of 2)*]. *But see* Sunsentinelmobile, *George Anthony Called as First Witness, Denies Molesting Casey*, YOU TUBE, at 0:03 (May 24, 2011), <http://www.youtube.com> (search “George Anthony Called as First Witness, Denies Molesting Casey,” then choose the video by Sunsentinelmobile).

would be blamed.¹⁷⁹ Father and daughter covered up the death, failing to report it or otherwise give any indication Caylee was dead to anyone else.¹⁸⁰ The problem, of course, was that Casey was a liar and George Anthony, while not without some suspicion, would deny this.¹⁸¹ Then Baez introduced his explanation for Casey's behavior and why she was not culpable—she had been taught from an early age to lie.¹⁸² Baez told the jury, and the watching world, that “it all began when Casey was eight years old and her father came into her room and began to touch her inappropriately.”¹⁸³ “She could be thirteen years old, have her father's penis in her mouth, and then go to school and play with the other kids as if nothing ever happened.”¹⁸⁴ Baez went so far as to accuse Casey's brother of the same incestuous behavior, indicating that he was “follow[ing] in his father's footsteps.”¹⁸⁵ At no point did Baez have to prove the truth of these allegations, and at no point did he have to corroborate the story of Casey's sexual abuse.¹⁸⁶ The only response would come from George Anthony, who denied that Caylee drowned in the pool and denied that he sexually abused his daughter.¹⁸⁷

If Baez had been subject to civil liability, would he have taken the same approach? Could Baez risk making such allegations against a prosecution witness without being cloaked in the protection offered by absolute immunity? Perhaps not. But this scenario is the quintessential reason why such protection exists. At trial, at the moment when a lawyer must be unfettered in his ability to fully represent his client, this immunity cloaks his actions in order to realize complete, zealous representation.¹⁸⁸ The argument is that the collateral damage it may cause is an acceptable byproduct that serves the

179. CochiseLiberty, *Defense Winning: Opening Statement Part 2 (of 2)*, *supra* note 178, at 6:05, 7:23.

180. *See id.* at 7:48.

181. *See* SunsentiMobile, *supra* note 178, at 0:51, 2:12; CochiseLiberty, *Defense Winning: Opening Statement Part 1 (of 2)*, *supra* note 177, at 3:22, 7:04; CochiseLiberty, *Defense Winning: Opening Statement Part 2 (of 2)*, *supra* note 178, at 4:35.

182. CochiseLiberty, *Defense Winning: Opening Statement Part 1 (of 2)*, *supra* note 177, at 4:55–7:12.

183. *Id.* at 5:00.

184. CochiseLiberty, *Defense Winning: Opening Statement Part 2 (of 2)*, *supra* note 178, at 4:44.

185. *Id.* at 3:00. Baez even dragged Cindy Anthony into the web of lies, claiming she deliberately lied to friends and family about Casey being pregnant. *Id.* at 0:47.

186. Curt Anderson, *Attorney: Casey Anthony Rejected Early Plea Deal*, SALON (July 5, 2012, 8:55 AM), http://www.salon.com/2012/07/05/attorney_casey_anthony_rejected_early_plea_deal/.

187. *See* SunsentiMobile, *supra* note 178, at 0:16, 1:10.

188. Hayden, *supra* note 166, at 1038.

larger purpose of administering justice.¹⁸⁹ But, as was noted at the outset of this section, other jurisdictions have managed to tether this immunity in a manner that may strike a better balance between overzealous, disingenuous trial tactics and zealous advocacy that remains truthful to the best of its ability.¹⁹⁰

Those jurisdictions that recognize absolute immunity in its purest form will apply it to defamation claims and other tortious claims¹⁹¹ made against attorneys.¹⁹² In order to invoke absolute immunity, there must first be litigation or a proceeding pending, or the same must be “contemplated in good faith.”¹⁹³ Second, the attorney needs to be participating as counsel.¹⁹⁴ Third, the communication, or in some cases the conduct, needs to have “some relation to the proceeding” or contemplated proceeding.¹⁹⁵

189. *See id.* at 1026, 1038.

190. *See supra* text accompanying notes 165–69. As a practical matter, requiring reasonable inquiry may not be a bad thing. Thinking through how to approach what may otherwise be defamatory statements while still preserving a client’s best interests is not impossible, as Louisiana has demonstrated.

191. Courts have extended this immunity beyond defamation to other types of torts, including tortious interference with business relationships, intentional infliction of emotional distress, negligence, conspiracy, and invasion of privacy. Richmond, *supra* note 164, at 296–97. Richmond notes that only malicious prosecution, fraud claims, and now potentially Fair Debt Collection Practices Act actions have been held to fall outside the privilege. *Id.* at 297. The Eleventh Circuit noted that the privilege, while initially developed to protect against liability for defamatory acts, has “been extended to cover all acts related to and occurring within judicial proceedings.” *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1274 (11th Cir. 2004) (citing *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 607–08 (Fla. 1994)). Similarly, the court in *Thornton v. Rhoden* justified extending the privilege to other tortious acts, stating that “[t]he salutary purpose of the privilege should not be frustrated by putting a new label on the complaint.” *Thornton v. Rhoden*, 53 Cal. Rptr. 706, 719 (Ct. App. 1966). Hayden noted that the privilege has been applied to quasi-judicial proceedings as well, including “a board of funeral directors and embalmers, . . . a school board [proceeding], . . . [and] a state labor commission.” Hayden, *supra* note 166, at 994.

192. *See Stepanek v. Delta Cnty.*, 940 P.2d 364, 368 (Colo. 1997) (en banc) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)); *Mozzochi v. Beck*, 529 A.2d 171, 173 (Conn. 1987) (citing *Petyan v. Ellis*, 510 A.2d 1337, 1338 (Conn. 1986)); *Ferry v. Carlsmith*, 23 Haw. 589, 591 (1917); *Libco Corp. v. Adams*, 426 N.E.2d 1130, 1131 (Ill. App. Ct. 1981) (citing *Weiler v. Stern*, 384 N.E.2d 762, 763 (Ill. App. Ct. 1978)); *Macie v. Clark Equip. Co.*, 290 N.E.2d 912, 913 (Ill. App. Ct. 1972); RESTATEMENT (SECOND) OF TORTS § 586 (1977)). Instead, Louisiana applies a modified version of absolute immunity, allowing such protection as long as the statement is material, and “made with probable cause and without malice.” *Freeman v. Cooper*, 414 So. 2d 355, 359 (La. 1982) (citing *Waldo v. Morrison*, 58 So. 2d 210, 211 (La. 1952)).

193. Richmond, *supra* note 164, at 301.

194. *Id.* at 284.

195. *Id.* at 284, 301 (quoting RESTATEMENT (SECOND) OF TORTS § 586).

For the most part, the courts focus on a relevant nexus between the communication made and a pending or potential judicial or quasi-judicial proceeding.¹⁹⁶ If the communication or conduct is too far removed from the official proceedings—either in time, content, or audience—then it may not be protected.¹⁹⁷ For example, courts found that statements made by attorneys during a press conference are not protected by absolute immunity because “the news media [generally] lacks a sufficient relationship to [the] . . . proceeding[.]”¹⁹⁸ But, many courts permit statements made both pre-litigation and post-litigation to be immune, as long as the statements bear the requisite relation to the proceeding itself.¹⁹⁹

196. *Adams v. Ala. Lime & Stone Corp.*, 142 So. 424, 425 (Ala. 1932) (quoting *Moore v. Mfrs.’ Nat’l Bank*, 25 N.E. 1048, 1049 (N.Y. 1890)); *Rosenfeld, Myer & Susman v. Cohen*, 194 Cal. Rptr. 180, 200 (Ct. App. 1983) (quoting *Bradley v. Hartford Accident & Indem. Co.*, 106 Cal. Rptr. 718, 722 (Ct. App. 1973)) (requiring that a statement have a logical nexus to the proceeding). Relevance is a qualification. *Adams*, 142 So. at 425 (quoting *Moore*, 25 N.E. at 1049). The privilege “‘extends only to such matters as are relevant or material to the litigation, [declining to] protect slanderous imputations plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.’” *Id.* (quoting *Moore*, 25 N.E. at 1049); *see also* *Green Acres Trust v. London*, 688 P.2d 617, 621 (Ariz. 1984) (quoting RESTATEMENT (SECOND) OF TORTS § 586 cmt. c) (citing *Bailey v. Superior Court*, 636 P.2d 144, 146 (Ariz. Ct. App. 1981)) (holding that “the defamatory publication must relate to, bear on, or be connected with the proceeding,” but “need not be ‘strictly relevant;’ [it] . . . need only have ‘some reference to the subject matter’”); *Pogue v. Cooper*, 680 S.W.2d 698, 700 (Ark. 1984) (quoting *Westridge v. Wright*, 466 F. Supp. 234, 237 (E.D. Ark. 1979)) (providing that statements must be “‘relevant and pertinent’” to the proceeding); *Malmin v. Engler*, 864 P.2d 179, 182–83 (Idaho Ct. App. 1993) (holding that “communications [arose] ‘in the due course of a judicial proceeding,’ [and they] . . . ‘were reasonably related to that . . . proceeding’”).

197. *See Adams*, 142 So. at 425; *Green Acres Trust*, 688 P.2d at 622, 624 (citing *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 (8th Cir. 1979)); *Malmin*, 864 P.2d at 182.

198. *Green Acres Trust*, 688 P.2d at 622 (citing *Asay*, 594 F.2d at 697); *Bradley*, 106 Cal. Rptr. at 724; *Kennedy v. Cannon*, 182 A.2d 54, 58 (Md. 1962); *Barto v. Felix*, 378 A.2d 927, 931 (Pa. Super. Ct. 1977); *see also* *Meier v. Hamilton Standard Elec. Sys., Inc.*, 748 F. Supp. 296, 302 (E.D. Pa. 1990) (holding that absolute privilege may be waived by circulation of defamatory material to parties not involved in a grievance process).

199. *See Asay*, 594 F.2d at 697; *Bradley*, 106 Cal. Rptr. at 724; *Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992) (quoting *Ange v. State*, 123 So. 916, 917 (Fla. 1929)). Courts have limited immunity to some extent when dealing with pretrial investigations, such as the limitation placed upon private individuals who make statements to police or to a state attorney’s office before criminal charges are filed. *Fridovich*, 598 So. 2d at 69. But even in those instances, attorneys often still enjoy immunity, where it simply becomes qualified rather than absolute. *See id.* (noting immunity in the context of statements to police officers, and that the majority of states that have addressed this issue have embraced qualified immunity). *But see* *Moore v. Bailey*, 628 S.W.2d 431, 436 (Tenn. Ct. App. 1981) (quoting *Spain v. Connolly*, 606 S.W.2d 540, 543 (Tenn. Ct. App. 1980)). While it might seem that qualified immunity might limit protection, as a practical matter, “a plaintiff would [still] have to establish by a preponderance of the evidence that the defamatory statements were false and uttered with common

The touchstone for absolute immunity is the relationship between the communication, the audience to which it is made, and the proceeding to which it arguably attaches.²⁰⁰ In determining whether the “proceeding” requirement of the nexus is met, courts have often set the outer boundaries differently.²⁰¹ For example, in *Jackson v. Bellsouth Telecommunications*,²⁰² the Eleventh Circuit noted that both New Jersey and California would include settlement negotiations and agreements as part of a “proceeding,” but in at least one Florida case, the court only extended qualified immunity to pre-suit settlement discussions.²⁰³

The problem with all of this, as courts have noted, is that, the further removed an immune statement is from the actual proceeding, the less protection is available to the party that is defamed or injured by tortious conduct.²⁰⁴ Jose Baez made statements about George Anthony in front of a judge,²⁰⁵ on the record, and Anthony was able to take the witness stand and respond to those allegations.²⁰⁶ The same cannot be said for statements made by an attorney in a pretrial investigation of a case, including interviews with potential witnesses.²⁰⁷ The harm identified is deemed acceptable because as many courts point out, the court still has the power to sanction attorneys, attorneys are still subject to disciplinary action, and criminal sanctions are also possi-

law express malice.” *Fridovich*, 598 So. 2d at 69 (citing *Nodar v. Galbreath*, 462 So. 2d 803, 806–07 (Fla. 1984)). So, a plaintiff is still left with the burden of demonstrating that the “primary motive in making the statements was the intent to injure the reputation of the plaintiff.” *Id.* (citing *Nodar*, 462 So. 2d at 806).

200. See *Richmond*, *supra* note 164, at 285.

201. Compare *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1275–76 (11th Cir. 2004), with *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323, 1325–27 (Fla. 4th Dist. Ct. App. 1983) (quoting *Ange*, 123 So. at 917).

202. 372 F.3d 1250 (11th Cir. 2004).

203. *Id.* at 1275 & n.26, 1276 (citing *Pledger*, 432 So. 2d at 1326–28). The Eleventh Circuit agreed with the Third Circuit’s holding that “the negotiation of a settlement is a part of a judicial proceeding,” and the “non-party insurer was absolutely immune from a defamation claim based on statements made at a settlement conference.” *Id.* at 1276 (quoting *Petty v. Gen. Accident Fire & Life Assurance Corp.*, 365 F.2d 419, 421 (3d Cir. 1966)). But, the Eleventh Circuit acknowledged that Florida’s Fourth District Court of Appeals had found that statements made during settlement discussions before suit was filed were subject only to qualified immunity. *Id.* at 1275 n.26 (citing *Pledger*, 432 So. 2d at 1326–28).

204. *Fridovich*, 598 So. 2d at 69; *Moore v. Bailey*, 628 S.W.2d 431, 431 (Tenn. Ct. App. 1981).

205. See *CochiseLiberty, Defense Winning: Opening Statement Part 1 (of 2)*, *supra* note 177, at 5:05–9:15.

206. *Sunsentinelmobile*, *supra* note 178, at 0:01–2:34.

207. See *Moore*, 628 S.W.2d at 431 (citing *Spain*, 606 S.W.2d at 543).

ble.²⁰⁸ However, if the likelihood is minimal that these remedies will be invoked, how can a balance of rights be maintained? Once again, there is a gray zone—that intangible place between what can be done and what should be done—where the outer limits of absolute immunity intersect with the heightened standards of new professionalism requirements presenting a practical problem for lawyers as they try to discern how to reconcile these competing interests.

V. ABSOLUTE IMMUNITY AT ODDS WITH NEW PROFESSIONALISM—A CASE STUDY

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.

....

*I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged.*²⁰⁹

The protection of absolute immunity will likely always be available to protect attorneys from civil liability.²¹⁰ And it is unlikely that an attorney will be disciplined for the same conduct under the rules of professional responsibility for defamation alone.²¹¹ The question becomes, however, how to

208. *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995) (citing *Ruberton v. Gabage*, 654 A.2d 1002, 1007 (N.J. Super. Ct. App. Div. 1995); *Kirschstein v. Haynes*, 788 P.2d 941, 950–51 (Okla. 1990)); *see also O’Neil v. Cunningham*, 173 Cal. Rptr. 422, 428 (Ct. App. 1981) (acknowledging that while an attorney could not be subject to civil liability for a breach of trust, it “may subject him to disciplinary action”); *Higgs v. Dist. Court*, 713 P.2d 840, 865 (Colo. 1985) (en banc) (Erickson, J., dissenting) (citing *Butz v. Economou*, 438 U.S. 478, 515–16 (1978)) (agreeing with the majority that alternate remedies are available in absolute immunity cases); *Echevarria, McCalla, Raymer, Barret & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007) (citing *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608–09 (Fla. 1994)) (finding that a trial court’s contempt power and disciplinary measures in the state court system and bar association are remedies to address this type of misconduct).

209. *Oath of Admission to The Florida Bar*, *supra* note 75 (emphasis added).

210. *See Anenson*, *supra* note 12, at 918–20.

211. *See, e.g., DelMonico v. Traynor*, 50 So. 3d 4, 7–8 (Fla. 4th Dist. Ct. App.) (citing *Levin*, 639 So. 2d at 608; *Fernandez v. Haber & Ganguzza, LLP*, 30 So. 3d 644, 647 (Fla. 3d

reconcile this common law protection, and the practices associated with it, with a focus shifting to enforcing professionalism. Will this shift mean that state bars and courts will begin to do what they have apparently been unwilling to do in this context: Impose disciplinary consequences for attorneys who go too far even if the law imposes no comparable consequence and instead affirmatively permits the behavior?

The Supreme Court of Florida recently heard a case, which serves as a perfect example of when an attorney's otherwise permissible and immune conduct may exceed the standards of professionalism.²¹² The case of *DelMonico v. Traynor*²¹³ offers a glimpse of how an attorney's conduct went too far, but no mechanism was available to reach behind the cloak of immunity to correct clearly unprofessional actions.²¹⁴

Daniel DelMonico, the owner of MYD Marine Distributor, sued Donovan Marine and Tony Crespo, for defamation alleging that Crespo told others that DelMonico stole business from Donovan by supplying prostitutes to prospective clients.²¹⁵ Arthur Traynor, an experienced litigator,²¹⁶ was hired to defend Donovan Marine.²¹⁷ During his pre-trial investigation, Traynor spoke to several potential witnesses about the suit, including two of DelMonico's ex-wives, a former employee, and "principals of other marine services companies."²¹⁸

According to DelMonico's defamation complaint against Traynor, Traynor had advised the potential witnesses that DelMonico used prostitutes to get business.²¹⁹

Specifically, DelMonico alleged that Traynor did the following: 1) Traynor told one of DelMonico's ex-wives that DelMonico took business "away from Donovan by enticing [Donovan's] purchasing agent with prostitutes;" 2) Traynor told another ex-wife "that DelMonico was being prosecuted for using prostitution to get business;" 3) Traynor contacted one of DelMonico's former employees and told "him that DelMonico's method to take an account was to supply a prostitute to the owner." Traynor then "encour-

Dist. Ct. App. 2010) (per curiam); *Stucchio v. Tincher*, 726 So. 2d 372, 375 (Fla. 5th Dist. Ct. App. 1999), *review granted*, 47 So. 3d 1287 (Fla. 2010).

212. See Oral Argument, *supra* note 57, at 13:12.

213. 50 So. 3d 4 (Fla. 4th Dist. Ct. App.), *review granted*, 47 So. 3d 1287 (Fla. 2010).

214. See *id.* at 12 (Warner, J., dissenting).

215. *Id.* at 6 (majority opinion). Both DelMonico's company, MYD Marine Distributor, and Donovan Marine, are marine services companies. See *id.*

216. See A. *Rodger Traynor Jr.*, AKERMAN, <http://www.akerman.com/bios/bio.asp?id=466&name=Traynor,Jr.> (last visited Oct. 28, 2012).

217. See *DelMonico*, 50 So. 3d at 6.

218. *Id.*

219. *Id.*

aged the . . . employee to provide additional examples of DelMonico’s ‘unethical business practices;’” 4) Traynor contacted a former business owner and told him “that DelMonico was ‘being prosecuted for prostitution;’” and 5) Traynor “contacted principals of other marine services companies” and conveyed to them that DelMonico was being prosecuted “for procuring prostitutes and illegal business dealings,” further representing to these potential witnesses that he was part of the prosecution.²²⁰

Traynor sought summary judgment in the defamation case based on absolute immunity because all of the communications with the potential witnesses were in furtherance of his defense of his client during pending litigation.²²¹ DelMonico argued that absolute immunity was inapplicable because developing a witness for litigation was not encompassed with the concept of “in the course of judicial proceedings.”²²²

The trial court found that absolute immunity attached to Traynor’s statements and that DelMonico could not maintain a civil cause of action for defamation or tortious interference based on those statements as a matter of law.²²³ The trial court, relying on the Supreme Court of Florida’s decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Insurance Co.*,²²⁴ held that absolute immunity reached interviews with potential witnesses in a pending case.²²⁵

The Fourth District Court of Appeal agreed with the trial court and held that absolute immunity applied because the statements complained of “bore ‘some relation’ to the proceeding” and were made “while [Traynor] was acting as defense counsel.”²²⁶ And, as many courts before it have done, the

220. *Id.*

221. *See id.*

222. Oral Argument, *supra* note 57, at 9:54, 17:08 (discussing *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 607 (Fla. 1994)).

223. *See DelMonico*, 50 So. 3d at 5–6.

224. 639 So. 2d 606 (Fla. 1994).

225. *DelMonico*, 50 So. 3d at 7 (citing *Levin*, 639 So. 2d at 608).

226. *Id.* at 7 (quoting *Levin*, 639 So. 2d at 608). The appellate court clarified that absolute immunity extended to interviews of potential witnesses connected to pending litigation. *Id.* (citing *Stucchio v. Tincher*, 726 So. 2d 372, 373–75 (Fla. 5th Dist. Ct. App. 1999)). The court also noted that other jurisdictions had come to similar conclusions, and in some instances, gone even further, finding that the doctrine applies to statements made before suit is even initiated. *Id.* at 7–8 (citing *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1276 (11th Cir. 2004); *Pettitt v. Levy*, 104 Cal. Rptr. 650, 654 (Ct. App. 1972); *Jones v. Coward*, 666 S.E.2d 877, 880 (N.C. Ct. App. 2008); *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981); *Pratt v. Nelson*, 164 P.3d 366, 376 (Utah 2007)).

court noted that “[t]here could be ‘discipline of the courts, the bar association, and the state’ if there was misconduct.”²²⁷

The Supreme Court of Florida heard oral arguments in this matter on a Petition for Writ of Certiorari after the Fourth District Court of Appeals affirmed a grant of summary judgment in favor of Traynor.²²⁸ The case remains pending before the Supreme Court of Florida.²²⁹

While the court in *DelMonico* focused on the application of the law and the reach of absolute immunity, there is another underlying question that remains, one that speaks directly to professionalism.²³⁰ Did Traynor need to employ these methods to appropriately represent his client? In other words, just because he could say these things and avoid civil liability, does that mean he should have or that there should be no consequences for his decision?²³¹ If you accept the balancing test offered as a rationale for absolute immunity, there should nevertheless be some consequence for behavior that is unprofessional. Inasmuch as such behavior is rarely addressed through disciplinary proceedings, don’t the new professionalism standards present an opportunity to rectify that oversight? Indeed, there is a strong argument that the proposed professionalism standards in Florida will require action.

From Traynor’s perspective, is it fair to second guess his decisions and strategy in preparing for his client’s defense? Is it fair to subject him to discipline? The answer here has to be yes because the argument for permitting such far-reaching immunity is that the same behavior is kept in check by the

227. *Id.* at 8 (quoting *Levin*, 639 So. 2d at 608). Other than the obvious irony that such discipline is not often visited upon attorneys in these circumstances, it is difficult to conceive of how a court could discipline or otherwise correct statements made prior to litigation being filed since the jurisdiction of the court has yet to be invoked when pre-suit statements are contemplated. *See Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323, 1326–27 (Fla. 4th Dist. Ct. App. 1983); Curtis, *supra* note 57, at 235; Erno D. Lindner, Comment, *Torts—Simpson Strong-Tie v. Stewart: Balancing the Protection of Individuals with the Freedom of the Judicial Process in Tennessee Attorney Solicitations*, 39 U. MEM. L. REV. 1093, 1101 (2009). On the other hand, when confronted with unprofessional behavior or flat-out deceit by an attorney, even if cloaked by the protection of absolute immunity, how can a court not take action and report the matter?

228. *See DelMonico*, 50 So. 3d at 6; *see also* Oral Argument, *supra* note 57.

229. *DelMonico v. Traynor Case Docket*, FLA SUPREME CT., http://jweb.flcourts.org/pls/docket/ds_docket_search (search by “case number,” then select “SC10” for “FSC case number” field, enter “1397,” then select “submit”) (last visited Oct. 28, 2012).

230. *See DelMonico*, 50 So. 3d at 5–8.

231. To be clear, Traynor denied saying that *DelMonico* was being prosecuted for prostitution, which was easily the most egregious statement he allegedly made, but for the purposes of this discussion, the author assumes all of the statements were made by Traynor. *Id.* at 6. Additionally, even if Traynor did not indicate that *DelMonico* was being prosecuted, there is something about the way he chose to conduct his interviews and the way he approached the witnesses. *Id.*

consequences constantly enumerated by the courts, namely, inherent power of the trial courts, bar discipline, and even procedural rules, such as Federal Rule of Civil Procedure 11.²³²

VI. HOW CAN THE ATTORNEY'S OBLIGATIONS TO HIS CLIENT AND THE ENFORCEMENT OF NEW PROFESSIONALISM STANDARDS BE RECONCILED?

Enforcing professionalism is yet another way that improper conduct is addressed by the self-regulating legal profession. Inherently, these standards stand for the proposition that certain types of attorney conduct are subject to a heightened level of regulation and scrutiny—including honesty, fair dealing, and courtesy. In and of themselves, they are laudable goals that should be given form to move the entire legal community forward to a better place and better clarify expectations—professional and otherwise—for the legal community.

The problem, however, is that these same provisions create a tension between what a lawyer can do, and what a lawyer should do. Absolute immunity provides a perfect example of this tension.²³³ In effect, “the privilege’s . . . immuniz[ation] [of] lawyer conduct is at odds with many other legal provisions that condemn the very same conduct.”²³⁴

In Traynor’s case, clearly he did not have to convey to any potential witnesses that DelMonico was being prosecuted for prostitution.²³⁵ If this were true, then Traynor would have independent verification of that fact from another source, such as a police investigation, a police report, or other

232. Hayden, *supra* note 166, at 1037–38; Ronald E. Mallen & James A. Roberts, *The Liability of a Litigation Attorney to a Party Opponent*, 14 WILLAMETTE L. REV. 387, 393 (1977–1978). Federal Rule of Civil Procedure 11(b) provides that “[b]y presenting . . . a pleading, written motion, or other paper [to the court]—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the person’s knowledge, information, and belief,” after reasonable inquiry, “it is not being presented for [an] improper purpose;” there are no frivolous legal claims and facts, contentions, or denials have evidentiary support. FED. R. CIV. P. 11(b). This rule has been enforced in the federal courts when an attorney has filed a factually deficient pleading and it does not appear justice has ground to a halt. *Robeson Def. Comm. v. Britt (In re Kunstler)*, 914 F.2d 505, 514–15, 525 (4th Cir. 1990); *Coates v. United Parcel Servs.*, 933 F. Supp. 497, 499–500 (D. Md. 1996). Surely, an attorney could be held to a comparable standard of reasonable inquiry in matters where defamation may be a factor without significant repercussions to absolute immunity if the only sanctions were disciplinary in nature. *See, e.g., In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990) (per curiam) (citing *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam)).

233. Hayden, *supra* note 166, at 1037.

234. *Id.*

235. *See DelMonico v. Traynor*, 50 So. 3d 4, 6 (Fla. 4th Dist. Ct. App.), *review granted*, 47 So. 3d 1287 (Fla. 2010).

official source. Traynor also should not have represented or permitted the impression that he was involved in the prosecution.²³⁶ Not only does this run afoul of the standards of professional conduct, but it arguably created a different dynamic when he was interviewing presumably unrepresented lay witnesses.²³⁷

It is easy to imagine that Traynor could have obtained similar results by simply telling each potential witness that DelMonico was suing Crespo and Donovan for telling others he was using prostitutes to gain business.²³⁸ Traynor could also have asked the witnesses if they were aware of DelMonico's business practices.²³⁹ If Traynor determined the witnesses knew nothing, he need not have conveyed further information about the alleged use of prostitutes. And, if he was unsure, Traynor could have chosen to depose those witnesses affording DelMonico and his counsel an opportunity to participate in the process.²⁴⁰

Regardless of what Traynor could or should have done, the bigger question is whether Traynor should be subject to disciplinary sanctions for his unprofessional conduct even if what he did was otherwise protected by absolute immunity and, perhaps, not even in violation of the rules of professional conduct. Courts that are presented with these cases in the context of civil liability raise the issue of enforcement and balance,²⁴¹ but it does not appear that they act even when directly confronted with an attorney's unprofessional behavior. If professionalism becomes enforceable, then the new question will be whether an attorney's behavior was sufficiently substantial or repeated to necessitate discipline, and how discipline should be imposed. There is a need for zealous representation, and there is a need to thoroughly vet potential witnesses in a pending case.²⁴² But when does it cross the line, and how do you regulate those judgment calls? Such judgment calls are clearly made in the moment. While it would be difficult to fashion a bright line rule for this sort of conduct, clearer guidance would be helpful.

The treatment of another type of immunity—from defamation—in disciplinary cases may offer some insight into how to fashion a rule for discipli-

236. *See id.*

237. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2012); *see DelMonico*, 50 So. 3d at 12 (Warner, J., dissenting).

238. *See DelMonico*, 50 So. 3d at 6 (majority opinion).

239. *See id.*

240. *Id.* at 12 (Warner, J., dissenting).

241. Oral Argument, *supra* note 57, at 24:41–27:09.

242. *See Levin*, 639 So. 2d at 608.

nary proceedings that will balance the current application of absolute immunity with newly enforceable professionalism standards.²⁴³

In *In re Graham*,²⁴⁴ Graham filed an action for injunction in federal court alleging that the County Attorney, Rathke, filed a criminal action against his client as retaliation against Graham.²⁴⁵ The Federal Magistrate, McNulty, found in favor of the County Attorney.²⁴⁶ Graham then sent a letter to the United States Attorney alleging that Rathke, Rathke's attorney, another Federal Judge, Spellacy, and McNulty conspired to fix the result of the criminal action.²⁴⁷ Graham made the accusations of judicial misconduct public, so the Chief Judge of the Eighth Circuit reviewed Graham's complaint and found no evidence that even suggested judicial misconduct.²⁴⁸

Ultimately, a referee concluded that Graham's statements regarding the integrity of the federal judge, the magistrate, and the county attorney were made without basis and fact, and with reckless disregard for their truth or falsity.²⁴⁹ The Supreme Court of Minnesota considered Graham's claims of absolute immunity under the First Amendment and the Petition Clause.²⁵⁰ The court apparently considered the matter in this context because the defamatory statements were made about public officials—a judge, a magistrate, and a county attorney—and Graham was charged with violating Rule 8.2(a), Minnesota Rules of Professional Conduct.²⁵¹

The court found that First Amendment protection for an attorney's criticism of judges' integrity or conduct was limited and subject to an application of an objective standard to determine actual malice when related to attorney disciplinary proceedings, rather than the subjective standard generally ap-

243. See, e.g., *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990) (per curiam) (quoting *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam)).

244. 453 N.W.2d 313 (Minn. 1990) (per curiam).

245. *Id.* at 316–17.

246. *Id.* at 317.

247. *Id.* at 317–18.

248. *Id.* at 318 n.3. Graham made similar accusations in a motion to recuse the magistrate from hearing an attorney's fees motion, but these were found to be false by the referee in the disciplinary proceeding as well. *In re Graham*, 453 N.W.2d at 319.

249. *Id.*; see also MINN. RULES OF PROF'L CONDUCT R. 8.2(a), 8.4(d) (2011).

250. *In re Graham*, 453 N.W.2d at 319–20; see also U.S. CONST. amend. I.

251. *In re Graham*, 453 N.W.2d at 314–15, 319–20; see also MINN. RULES OF PROF'L CONDUCT R. 8.2(a). Graham was also charged with violating Rules 3.1 and 8.4(d), Minnesota Rules of Professional Conduct. *In re Graham*, 453 N.W.2d at 314–15; MINN. RULES OF PROF'L CONDUCT R. 3.1, 8.4(d). Rule 8.2(a) deals with false statements or statements made with reckless disregard for the truth about judges and other public officials. *In re Graham*, 453 N.W.2d at 315, 324; MINN. RULES OF PROF'L CONDUCT R. 8.2(a).

plied to actual malice in criminal or civil defamation actions.²⁵² Other courts have come to a similar conclusion, finding that an objective standard is applicable under these circumstances.²⁵³

In *In re Graham*, an attorney's immunity under the First Amendment was limited based on the nature of a disciplinary proceeding because the interests protected by "regular" legal proceedings for defamation and attorney disciplinary proceedings are not the same.²⁵⁴ The Supreme Court of Minnesota cited the distinction made by the Supreme Court of Indiana:

Defamation is a wrong directed against an individual and the remedy is a personal redress of this wrong. On the other hand, the

252. *In re Graham*, 453 N.W.2d at 322. Normally, the First Amendment provides limited immunity from civil or criminal defamation when public officials are criticized for their official conduct. *Id.* at 320 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 282–83 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); *see also* U.S. CONST. amend. I. Even if the statements made are false, "the public official cannot recover unless the statements [are] made with 'actual malice,'" requiring "knowledge that the statements were false or made with reckless disregard [for] their truth or falsity." *In re Graham*, 453 N.W.2d at 320 (quoting *N.Y. Times*, 376 U.S. at 279–80). The court did not, however, address whether *Graham's* statements were protected by absolute immunity. *See id.* at 319–20. Given the specific nature of the disciplinary complaint, and the fact that it deals with a special population of public officials with a specific rule of professional conduct connected thereto, absolute immunity was likely not an appropriate consideration. *See id.*

253. *U.S. Dist. Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *In re Green*, 11 P.3d 1078, 1084, 1086 n.7 (Colo. 2000) (per curiam) (en banc) (stating "the inquiry focuses on whether the attorney had a reasonable factual basis for making the statements" that the "judge was 'drunk on the bench'" (quoting *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1437, 1441 (9th Cir. 1995))); *In re Cobb*, 838 N.E.2d 1197, 1212 (Mass. 2005) (noting a majority of states that have considered this question have expressed "the standard [a]s whether the attorney had an objectively reasonable basis for making the statements"); *see also* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) ("[L]awyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be" (citing *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring))). The Supreme Court also stated that lawyers in these circumstances "may be regulated under a less demanding standard than that established for regulation of" other protected speech under the First Amendment. *Gentile*, 501 U.S. at 1074; *see also* U.S. Const. amend. I. While *In re Green* focused on the application of First Amendment protection to an attorney's opinions about a judge, which were conveyed to that judge, including the fact that the attorney believed the judge to be racist, the court also stated that it "neither condone[d] the tone of . . . [the] letters nor agree[d] with the conclusions . . . he drew." *In re Green*, 11 P.3d at 1086–87; *see also* U.S. Const. amend. I. It bears considering whether *Green's* actions may have been subject to different treatment under enforceable professionalism standards instead of First Amendment defamation protection when only the tone and nature of his conduct might be at issue. *See In re Green*, 11 P.3d at 1086–87; *see also* U.S. Const. amend. I.

254. *See In re Graham*, 453 N.W.2d at 321–22 (quoting *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam)); *see also* U.S. CONST. amend. I.

Code of Professional Responsibility encompasses a much broader spectrum of protection. Professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.²⁵⁵

While recognizing that the regulation of professional conduct has different goals, creating a way to balance those goals is slightly different than the justification usually given for permitting absolute immunity for civil liability.²⁵⁶ This becomes increasingly relevant when the conduct at issue is not a direct violation of the rules of professional conduct as it was in *In re Graham*.²⁵⁷ Where professionalism itself is enforceable, the courts should consider adopting a qualification of absolute immunity and not permitting the use of immunity unless an attorney can satisfy an objective standard that considers what a reasonable attorney would have done in the same circumstance. Similar to Louisiana's application of the privilege, it could require that an attorney demonstrate the "statement [was] material . . . , made with probable cause, and [that it was, in fact, made] without malice."²⁵⁸

Absolute immunity is not going away. While some federal rules and qualifications imposed upon such immunity have created limits, the reality is that attorneys will always have unfettered discretion to act in a manner that

255. See *In re Graham*, 453 N.W.2d at 322 (quoting *In re Terry*, 394 N.E.2d at 95). Interestingly, the Supreme Judicial Court of Massachusetts, in adopting an objective standard, agreed with the logic that application of the subjective standard to actual malice "would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth" and that such a system, without the check of an objective standard, would "permit[] an attorney . . . to challenge the integrity, and thereby the authority, of a judge presiding over a case elevat[ing] brazen and irresponsible conduct above competence and diligence, hallmarks of professional conduct." *In re Cobb*, 838 N.E.2d at 1213–14 (quoting *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam)).

256. Compare Anenson, *supra* note 12, at 920–21, with Terrell & Wildman, *supra* note 63, at 424, 426–28.

257. See *In re Graham*, 453 N.W.2d at 314–15, 320 (citing MINN. RULES OF PROF'L CONDUCT R. 3.1, 8.2(a), 8.4(d) (2011)). The criticism of public officials and judges raises different concerns than defamation that may affect a party to a legal proceeding. See *id.* at 322. The former has a direct impact on the administration of justice and depending on whether such statements are made public, can have a much more far-reaching effect. See *id.* However, in balance, absolute immunity is designed for the benefit of the attorney to protect him from needless litigation so that he may do his job, which also impacts the administration of justice. Anenson, *supra* note 12, at 920.

258. Freeman v. Cooper, 414 So. 2d 355, 359 (La. 1982) (citing Waldo v. Morrison, 58 So. 2d 210, 211 (La. 1952)).

may be dishonest and harmful to a third party under certain circumstances.²⁵⁹ This has always been an accepted part of the advocacy system.²⁶⁰ However, as more and more states may consider adopting enforceable professionalism standards, perhaps this is a perfect time to shift the balance away from the broadest reading of absolute immunity, or at least start truly imposing the balance that is supposed to be imposed by discipline as an available remedy.

Professionalism, and the bench and the Bar's demand for more, may offer a perfect opportunity to finally put some teeth in the sanctions available to curb and correct attorney behavior under these circumstances.²⁶¹ It also offers a relatively low threat alternative, with due process, a diversionary program (in the case of Florida), and a chance to change attorney attitudes and behavior without hampering an attorney's obligation to zealously represent a client. Given these limitations, plus the protection of an educated audience, it may be the perfect way to shape up the profession itself, giving a new spin to an old problem and, more importantly, sending a clear message to new attorneys about where the limits are for acceptable behavior. It may also serve as guidance for similar situations where what a lawyer could do conflicts with what a lawyer should do.

259. See Anenson, *supra* note 12, at 918–20; see also U.S. CONST. amend. I.

260. See Anenson, *supra* note 12, at 918–19.

261. See Fla. Bar v. Barrett, 897 So. 2d 1269, 1273, 1277 (Fla. 2005) (per curiam); Hubert, *supra* note 61, at 117; Blankenship, *Putting 'Teeth' in Professionalism*, *supra* note 79.