

Professionalism

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**ADVENTURES IN PROFESSIONALISM:
ABI SOUTHWEST CONFERENCE
SEPTEMBER 11, 2015***

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PRESENTATION AGENDA

- I. PANELIST INTRODUCTIONS
- II. SUMMARY OF ABI REPORT ON STANDARDS OF PROFESSIONAL CONDUCT AND CIVILITY
- III. INTRODUCTION OF PRINCIPLES OF CIVILITY WITH INTERACTIVE DISCUSSIONS ON HYPOTHETICALS FROM MATERIALS
- IV. DISCUSSION OF JUDICIAL CIVILITY
- V. CONCLUDE

INTRODUCTION

This presentation is intended to be an interactive learning and thinking experience, **not** a lecture course. Attendees are encouraged to review the following materials prior to attending but not focus on them during the discussion. Generally, the presenters will briefly introduce a standard of professionalism emphasized by the ABI in its Report on Standards of Professional Courtesy and Conduct dated August 2013, and then summarize a hypothetical that has been developed to illicit discussion among the panelists and attendees. The concepts of “Professionalism” and “Civility” start from the proposition that there are often alternative ways of addressing various situations, none of which, strictly speaking, would violate our ethical rules of professional conduct. The question is what course of action is the most “professional” way to address these situations. There are sometimes multiple “right answers” to a hypothetical. The panel appreciates and encourages a respectful discussion among the participants, including opposing viewpoints and approaches to each hypothetical. Please participate and enjoy!

ABI PRINCIPLES OF CIVILITY

I. General Duties of Professionals:

1. Professionals should be courteous and civil in all professional dealings with others.
2. When not conflicting with their clients' interests, professionals should cooperate with other professionals in an effort to avoid unnecessary litigation and to resolve litigation that already has commenced.
3. Professionals should respect the schedules and commitments of others, consistent with the protection of their clients' interests.
4. A professional should return telephone calls promptly and respond to communications that reasonably require a response, with due consideration of time zone differences and other known circumstances affecting availability.
5. The time and manner of the servicing of papers should not be designed to cause disadvantage or embarrassment to the party receiving the papers.
6. A professional should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.
7. In out-of-court proceedings, professionals should not engage in any conduct that would not be appropriate in the presence of a judge.
8. A professional should keep his or her word.
9. A professional should not mislead others involved in the bankruptcy process.

II. General Duties of Lawyers

1. Lawyers should be respectful of the schedules and commitments of others.
2. In examinations and other proceedings, as well as in meetings and negotiations, professionals should conduct themselves with dignity and refrain from displaying rudeness and disrespect.
3. Lawyers should not mislead others involved in the bankruptcy process.

III. Lawyers' Duties to the Court and Court Personnel

1. A lawyer is both an officer of the court and an advocate. As such a lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court and its personnel.
2. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

IV. Duties of Judges and Court Personnel to Lawyers, Parties and Witnesses

1. A judge should be patient, courteous and civil to lawyers, parties and witnesses.
2. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts

PRINCIPLE: TREAT OTHERS WITH CIVILITY AND COURTESY.

Hypothetical No. 1: Civility towards Opposing Counsel

You have just been retained for the first time to represent ABC Bank in an ongoing bankruptcy case in which ABC is a creditor after two years of effort to develop ABC Bank as a client.

Debtor's attorney is someone you regard well. ABC's officers tell you that they intensely dislike the debtor's counsel because he has represented many debtors in, and outside of, the bankruptcy court, and been very successful against ABC in the past. The president of ABC instructs you to do everything possible to drive a wedge between opposing counsel and his client, and to embarrass opposing counsel in front of his client in retribution for his past conduct. ABC's president advises you that she understands Debtor's counsel to be a binge drinker with two pending DUI charges. As luck would have it, debtor is president of the local chapter of MADD and would be outraged if she learned of the charges brought against her attorney.

How do you deal with your client's instructions?

Would it make a difference if you knew that opposing counsel was, in fact, an alcoholic, and the rumors of the DUIs were accurate?

Would it make a difference if opposing counsel had a poor reputation for professionalism, and regularly used bullying and harassment to obtain an advantage?

Hypothetical No. 2: Civility Outside of Courtroom

You are defending a chapter 11 debtor from a motion to appoint a trustee filed by the Committee. Committee's counsel is deposing your client.

What should you do if:

1. Committee's counsel embarks upon a line of questions which you believe are designed to upset and embarrass your client for tactical reasons and not to elicit relevant information?

2. Committee's counsel becomes aggressive staring at and leaning toward your client while asking questions in a loud and combative manner?

3. Committee's counsel poses accusatory questions such as: why did you lie to my clients, why did you steal from my clients...?

Hypothetical No. 3: Civility before the Court

You represent a chapter 11 debtor and have recently filed the chapter 11 petition and first day motions including a motion for use of cash. The senior secured creditor is represented by a law firm (Law Company) through a partner and an associate. In its recent motion, bank's counsel has used a non-material error by debtor's counsel, together with the parties' genuine disagreement regarding facts, and combined these in making the following allegations in its opposition to Debtor's use of cash collateral:

Debtor's Motion contains numerous false statements..."; "Debtor's arguments take extreme liberties with the facts"; "Debtor's attorneys have falsely alleged ..."; "Debtor's counsel's assertions are misleading and a transparent attempt to sway the newly appointed Judge...

What should you do if:

- 1. It is not clear that the partner is cognizant of the allegations even though the partner has signed the motions?**
- 2. The associate is drafting the objection and the partner, although competent, is arrogant and extremely condescending and you believe that the partner has directed the associate to include the disparaging allegations?**
- 3. What if, based upon your prior experience, you believe that the inclusion of the disparaging remarks and tone and tenor of the objection will greatly annoy the judge hearing the case.**

PRINCIPLE: COOPERATE TO AVOID LITIGATION AND REACH COMPROMISE.

Hypothetical No. 4: Resolution without Litigation

You represent a creditors' committee in a Chapter 11 Bankruptcy involving a developer. A number of lenders hold first liens against the various homes to secure construction loans. Each of these lenders is undersecured. Each is expected to file a motion for relief from the automatic stay. There is no basis for opposing the motions.

Should you refuse to stipulate to an order granting the motions to extract an agreement from each of these lenders requiring them to waive the unsecured portion of their claims?

Should you oppose the motions for the same purpose?

PRINCIPLE: RESPECT THE SCHEDULES AND COMMITMENTS OF OTHERS.

Hypothetical No. 5: Reasonable Requests for Extensions and Continuations

You represent a secured creditor. You have filed a motion for relief from the automatic stay to allow you to continue the foreclosure proceedings on your client's collateral. The court has scheduled a preliminary hearing. Debtor's counsel calls and advises you that he is about to start a three week vacation on the day prior to the scheduled hearing. He asks you to continue the preliminary hearing until after he returns. Your client is anxious to move forward on the stay relief motion and opposes any continuance, even though you have advised your client it is highly unlikely that the court will grant the creditor stay relief at this early stage of the case.

What do you do?

Hypothetical No. 6: Resolution of Calendar Disputes

You have been retained to represent a manufacturing company in its chapter 11 proceedings. A creditor, represented by an attorney with whom you have worked in the past, holds a lien on all of your client's equipment. At your request, the Court has set an evidentiary hearing to determine the value of a unique and increasingly desirable piece of your client's equipment. You need a determination of this equipment's value so that you can incorporate that information into the plan of reorganization which you intend to propose.

The attorney representing the secured creditor calls and asks if you would be willing to stipulate to a sixty-day continuance of the upcoming evidentiary hearing. The attorney tells you that the continuance is necessary because the banker responsible for the oversight of your client's case has been transferred, and his replacement needs time to come up to speed. In recent hearings, the Judge has said that this case must move quickly. The requested continuance will delay the entire bankruptcy proceeding. Additionally, you know that granting the continuance will make the appraisal you obtained at the beginning of the case more outdated and fear that it could allow the value of the equipment (and the secured portion of the creditor's claim), to increase materially prior to the hearing.

How can the request for a continuance be handled professionally?

Are there any conditions that can be agreed to that would allow you to accommodate the creditor without prejudicing your client's interests?

Hypothetical No. 7: Avoid Delay for Tactical Reasons

You represent a creditor in a nondischargeability action. You've tried and lost two previous nondischargeability cases which were heard by the judge who you believe is too debtor oriented. Discovery deadlines have been set. You are aware that the judge is retiring and her replacement is a former creditor's attorney. If discovery deadlines were extended for several months, the new judge would preside at trial. An extension would also make it easier for you to complete the necessary discovery.

Would it be appropriate to file a motion to extend the discovery deadline by several months?

Hypothetical No. 8: Respecting Commitments of Counsel and Setting Reasonable Calendars

You represent the Chapter 7 Trustee. A day before a scheduled Bankruptcy Rule 2004 exam, Debtor's counsel calls and advises you she is in trial and has not had time to respond to your document production request or to prepare the Debtor for the exam. Debtor's counsel requests your cooperation in rescheduling the 2004 exam to a date and time mutually agreeable at least three weeks down the road. You have already previously rescheduled the 2004 exam once.

If you were to continue the Rule 2004 exam you will need to file a motion to extend the time to object to the Debtor's claimed exemptions and right to a discharge. Although Debtor's counsel will likely stipulate to the extensions, the pleadings will add administrative costs to the bankruptcy estate. You also know your client would oppose a continuance of the exam.

What considerations are involved in your response to the Debtor's counsel's request?

What could Debtor's counsel have done differently?

PRINCIPLE: COMMUNICATE TIMELY AND FAIRLY

Hypothetical No. 9: Scheduling to Disadvantage or Embarrass

You represent an operating business which is distressed. Efforts to restructure your client's debt have been unsuccessful. Your client has decided it is necessary to file a chapter 11 bankruptcy case at some time in the near future.

In advance of the filing, you have prepared the petition and numerous first day motions, including a request to use cash collateral. You have been in active communication with counsel for the major secured creditor. You anticipate a fight over the use of cash collateral. As required by the Local Bankruptcy Rules, you are providing the United States Trustee's office with an advance copy of the first day papers and the budget supporting the use of cash collateral.

Is it appropriate to provide counsel for the major secured creditor with an advanced copy of some or all of the first day papers?

You know opposing counsel is about to start a lengthy evidentiary hearing in another matter and your client is asking you whether to file right before opposing counsel's trial.

What do you do?

**PRINCIPLE: LITIGATION SHOULD NOT BE USED FOR HARASSMENT OR UNFAIR
ADAVANTAGE**

Hypothetical No. 11:

You represent a debtor contractor in a dispute over the allowance of a supplier's claim. The basis for your client's position is weak and based upon years of minor alleged over-billings for finance charges provided for by the supply contract. The creditor is a small business. You believe that the creditor can barely afford to litigate. You believe the finance charges are proper and, if not, any dispute regarding them has been waived.

You need documents for the last year in order to depose creditor's bookkeeper to establish the overcharges. You believe that it is likely once you require creditor to produce years of statements and backup invoices and notice depositions of the owner, bookkeeper and drivers that creditor will agree to settle on a basis that is advantageous to Debtor.

What should you do?

What if your client's success in chapter 11 depended upon disallowance of the creditor's claim?

PRINCIPLE: PROFESSIONALS SHOULD NOT MISLEAD OTHERS.

Hypothetical No. 12:

You represent a chapter 11 debtor with a significantly large employee base. You are preparing for a chapter 11 status hearing in which you plan to report that, other than being behind one month in operating reports, your client is operating in compliance with its chapter 11 obligations. While preparing, your client calls you and advises that it has fallen behind on its post-petition payroll tax obligations, which has not been reported yet due to the delay in filing operating reports. Your client indicates that it has a plan to recover within two weeks and catch up with the IRS. At the hearing the following day, you don't make any affirmative representations about the debtor's compliance with its chapter 11 obligations but instead simply indicate that the debtor is operating pursuant to its recently agreed cash collateral budget, that its past due reporting will be cured within 2-3 weeks, and that it will file a chapter 11 plan by the expiration of the exclusivity period.

Have you misled the court?

What if the Court asks you if the debtor has had any other issues? How can/should you respond?

PRINCIPLE: DEMONSTRATE RESPECT FOR COURT AND STAFF.

Hypothetical No. 13: Courtroom Decorum

You are appearing at the opening of a three day plan confirmation trial before the Court. You represent the senior secured lender and your client rep is accompanying you before he testifies later in the trial. The first witness is the debtor representative. During direct examination, you notice that your client is reacting physically to the debtor's testimony by grimacing, shaking his head, and angrily dropping notes on counsel's table.

How do you handle your client's behavior?

Later, the Court overrules several evidentiary objections you make.

How do you react?

During cross examination of your client, opposing counsel becomes physically animated and disrespectful towards your client.

How do you react? How does the Court properly react?

Hypothetical No. 14: Respect for Court's Calendar

You are stuck in traffic and realize that you are going to be at least 20 minutes late for a court hearing.

What alternatives exist besides just arriving late?

What if you are coming from another court appearance in a different courtroom or court system? Is there anything you should have done ahead of time?

PRINCIPLE: JUDGE SHOULD BE PATIENT, COURTEOUS AND CIVIL.

Hypothetical No. 15:

You are the judge presiding over a hotly contested chapter 11 proceeding. You are a former bankruptcy practitioner having primarily represented debtors in chapter 11. You are presiding over a chapter 11 proceeding, during the early stages of which, you ruled in favor of the debtor on several threshold issues. The senior secured creditor is represented by out of state counsel that has been very aggressive in its pleadings and in argument before the court. Counsel's courtroom behavior has been borderline sanctionable. Most recently, counsel for the bank has questioned your impartiality and has requested that you disqualify yourself due to a social friendship you have with an associate in the family law practice of the debtor's law firm. You have denied the request and are preparing to conduct a trial on confirmation of the debtor's plan.

How do you prepare?

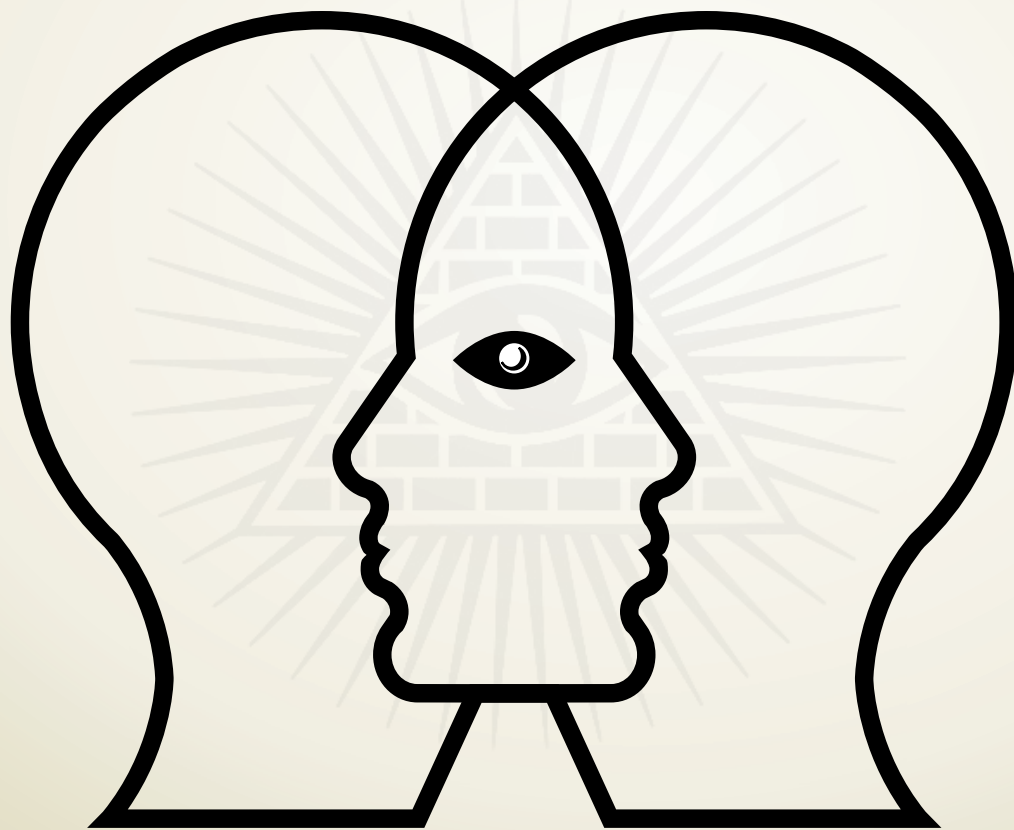
Is your preparation any different because of the personal attacks against you?

Do you prepare your decision any differently than you otherwise would in other cases?



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**REPORT ON STANDARDS OF PROFESSIONAL
COURTESY and CONDUCT**



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CIVILITY TASK FORCE • AUGUST 2013

Report on Standards of Professional Courtesy and Conduct

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Report on Standards of Professional Courtesy and Conduct

Reporter:

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Reporter's Notes:¹

The need to promote civility is not a new topic. After all, Abraham Lincoln said, “There is a vague and popular belief that lawyers are necessarily dishonest.”² In 1992, the Seventh Circuit adopted its official civility code,³ a turning point that inspired hundreds of jurisdictions to codify their own understandings of professionalism and civility.⁴ This widespread codification is due in large measure to a perceived increase in incivility among business and legal professionals. What was once a watershed moment has now reached a tipping point. Indeed, over the past 30 years, the “biggest negative change [in the legal profession] has probably been the decreased emphasis on professionalism.”⁵ Yet despite this universal concern about incivility, there has been little discussion or study regarding unprofessional or uncivil behavior among insolvency professionals.⁶

I. Duties of civility and professionalism.

In striving to fulfill their duties and responsibilities to the public, insolvency professionals⁷ must remain conscious of the broader duty owed to their profession. The bankruptcy process is part of a larger legal system that is adversarial by design, and insolvency professionals must ardently represent their respective positions to ensure that the system is effective and trusted. But also rooted in bankruptcy, perhaps more so than in other areas of litigation, are the concepts of cooperation and

¹ James Patrick Shea (Civility Task Force Chair), David Houston, IV (Vice Chair), Emily Taube (Vice Chair), Nancy B. Rapoport, Deborah L. Thorne, and Bill P. Weintraub put together an excellent first draft of this topic, and I thank them. Additionally, I thank Civility Task Force members Rudy J. Cerone, Hon. Daniel P. Collins, Hon. Mary Grace Diehl, Edward T. Gavin, Hon. Bruce A. Harwood, Nina M. Parker, Andrea B. Schwartz, Hon. Elizabeth S. Stong, Hon. Howard R. Tallman, Hon. Gregg W. Zive, and James T. Markus. Finally, I thank Ashley D. Champion, Phillip Parham III, and Kimberly B. Reeves, graduates and students at Georgia State University College of Law, for their hard work in assisting our Task Force.

² Abraham Lincoln, July 1, 1850.

³ STANDARDS FOR PROFESSIONAL CONDUCT, U.S.C.S. Ct. App. 7th Cir., Appx. (LexisNexis 2013).

⁴ Howard Merten, *The Case for Self-Interested Civility*, F.D.C.C. Q., Jan. 1, 2012 at 214; *see also*, Ctr. for Prof'l Resp., *Professionalism Codes*, A.B.A.,

http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last updated August 2012) (listing more than 100 jurisdictional professionalism codes).

⁵ Jim Maiwurm, *Above the Law Interrogatories: 10 Questions with Jim Maiwurm of Squire Sanders*, ATL INTERROGATORIES (MAY 22, 2013, 2:55 PM), <http://abovethelaw.com/2013/05/the-atl-interrogatories-10-questions-with-jim-maiwurm-of-squire-sanders/>; *see, e.g.*, Howard Merten, *The Case for Self-Interested Civility*, *supra* note 4.

⁶ Despite the lack of empirical evidence related to the insolvency world, it is undeniable that, in recent years, there has been an increase in unprofessional and uncivil behavior among insolvency professionals; yet no civility code relates strictly to the bankruptcy profession.

⁷ The American Bankruptcy Institute “includes more than 13,000 attorneys, auctioneers, bankers, judges, lenders, professors, turnaround specialists, accountants and others bankruptcy professionals.” *About ABI*, AM. BANKR. INST., http://www.abiworld.org/AM/Template.cfm?Section=About_ABI (last visited July 5, 2013).

negotiation, and those components seem to have become misplaced in an increasingly uncivil legal climate.

While some headlines may make us snicker, others leave us disappointed. The collection of attorney misconduct stories reiterate that the system's integrity must be fortified by ensuring that members' conduct adheres to fundamental concepts of civility.⁸ Undoubtedly, a professional owes his colleagues a certain level of candor, courtesy, fairness, and cooperation. Indeed, the bankruptcy system is a "civilized mechanism for resolving disputes, but only if the [professionals] themselves behave with dignity."⁹ In disagreement, we must not be disagreeable.

II. Addressing civility among bankruptcy professionals.

Despite the apparently heavy-handed focus on changing the character of professionals' interactions, the lack of civil behavior continues to plague professional communities.¹⁰ Incivility comes with a high price. As Judge Gene E.K. Pratter (addressing opposing litigators' incivility) commented, "[U]ncivil, abrasive, abusive, hostile or obstructive conduct . . . impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently."¹¹

For over two decades, the legal community has attempted to quash incivility among members, but the problem seems more deeply entrenched in professional culture despite efforts to excise the growth. While the causes and effects of this troubling trend are numerous, growing

⁸ See Jennifer Smith, *Lanymers Behaving Badly Get a Dressing Down from Civility Cops*, WALL ST. J. (U.S.), Jan. 27, 2013 (the prevalence of in-court shouting and vulgar emails and phone calls to judges and clients further damages the already poor reputations of "Rambo" litigators), *available at* <http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html>; e.g., *Goldberg v. Mt. Sinai Med. Ctr. of Greater Miami, Inc.*, 2007 Bankr. LEXIS 2780, *6 (ordering bankruptcy attorney William P. Smith (appearing *pro hac vice*) to attend professionalism course for telling U.S. Bankruptcy Judge Laurell Isicoff, "[Y]ou're a few French fries short of a Happy Meal," because "there is no jurisdiction in the United States . . . [where Smith's comments] would fall within the bounds of professional behavior."); Debra Cassens Weiss, *11th Circuit OKs Sanction for Brief Calling Judge's Findings 'Half Baked' and Wine Peace Offering*, A.B.A. J., Oct. 17, 2012, *available at* http://www.abajournal.com/news/article/11th_circuit_oks_sanction_for_brief_calling_judges_findings_half_baked_wine (reporting that the Eleventh Circuit Court of Appeals upheld bankruptcy attorney Kevin Gleason's 60-day suspension for calling U.S. Bankruptcy Judge John Olson's rulings "half-baked," then sending a bottle of wine to the judge's chambers with a note inviting him to resolve the issue "privately"); G.M. Filisko, *Be Nice: More States Are Treating Incivility as a Possible Ethics Violation*, A.B.A. J., Apr. 2012, *available at* http://www.abajournal.com/magazine/article/be_nice_more_states_are_treating_incivility_as_a_possible_ethics_violation (reporting that famed Jack Kevorkian attorney Geoffrey Fieger compared three Michigan Court of Appeals judges to Hitler and other Nazis on his radio program after the three-judge panel overturned a \$15M jury verdict for his client); Kyle Munzenrieder, *Lanymers Thrown Off Case for Drawing D*** Pics, Playing Angry Birds During Deposition*, Miami New Times Blog (May, 17 2012, 12:26 PM), *available at* http://blogs.miaminewtimes.com/riptide/2012/05/lawyers_drew_dick_pictures_and.php (reporting that two attorneys, Richard Cellar and Stacey Schulman, and the Morgan & Morgan firm were disqualified from a case because one lawyer drew pictures of male genitalia and played the video game Angry Birds during depositions); Debra Cassens Weiss, *Courtroom 'Shoutfest' over Scheduling Conflict Results in \$200 Fine for Lawyer*, A.B.A. J., Apr. 3, 2012, *available at* http://www.abajournal.com/news/article/lawyer_is_fined_200_after_scheduling_conflict_spurs_courtroom_shouting.

⁹ Melvin F. Right, Jr., *I'll See You in Court!*, N.C. CH. J.'S COMM'N ON PROF'LISM, (Feb. 2012), *available at* <http://www.nccourts.org/Courts/CRS/Councils/Professionalism/Documents/seeyouincourt-feb2012.pdf>.

¹⁰ See, e.g., Julie Kay, *Got Civility? Litigation Is Getting Uglier than Ever*, DAILY BUS. REV., Jan. 28, 2013, *available at* <http://dailybusinessreview.com/PubArticleDBR.jsp?id=1202585857660&slreturn=20130607200553>.

¹¹ Michael J. Newman, *Being the Lawyer You Want to Be*, THE LEGAL INTELLIGENCER, March 22, 2013 (citing *Huggins v. Coatesville Area Sch. Dist.*, CIV A. 07-4917 (E.D. Pa. Sept. 16, 2009)), *available at* <http://law.com/jsp/pa/PubArticlePA.jsp?id=1202593170481>.

incivility is likely attributable in large part to the business (and legal) world's rapidly changing landscape. Popular culture continually embraces over-the-top portrayals of hard-nosed lawyers, judges, and businessmen.¹² Factor in technological advances,¹³ a globalized business market,¹⁴ decreased mentorship within the legal community,¹⁵ and vague professionalism policies,¹⁶ and it creates a perfect storm that may affect young professionals' misguided understanding of professionalism.¹⁷ Reversing the trend will require changing the culture. The task of clearly defining acceptable standards of conduct lies with each profession's governing body, but personal responsibility for one's actions must also be at the forefront of civility consideration.

During his tenure as president of the American Bankruptcy Institute, Geoffrey L. Berman created the Civility Task Force¹⁸ to promulgate principles of civility within the context of the insolvency profession. Under the leadership of ABI's immediate past-president, Jim Markus, and current president Patricia A. Redmond, the Task Force drafted the proposed Principles of Civility, a professionalism initiative intended to be a framework on which to build civility among bankruptcy professionals and fortify ABI's leadership role in policymaking and education.

The bankruptcy profession largely is self-regulating. Thus, re-emphasizing professionalism must begin with each member's commitment to carry out his or her duties to colleagues, clients, and the public in a manner that instills trust and confidence in the profession. The Principles are designed to guide ABI's member community of more than 13,000 by codifying fundamental concepts of civility. Accordingly, the proposed Principles are not intended to supplement professional ethical codes, nor are they to be enforced by a disciplinary committee.¹⁹ Rather, these Principles of Civility are aspirational — meant to encourage members to rise above the fray to promote the profession's integrity and instill in the public a trust in the bankruptcy system. Accordingly, the Principles' effectiveness relies on individuals maintaining accountability to themselves and their peers.

III. Standards of civility and professionalism across jurisdictions.

¹²G.M. Filisko, *You're Out of Order! Dealing with the costs of incivility in the legal profession*, A.B.A. J., Jan. 2013, at 37.

¹³ Gone are the days when written communications were carefully crafted with time to reflect on the content of letters before putting them in the mailbox. Today, typing a strongly worded email and hitting send is often a source of strife among colleagues. See G.M. Filisko, *You're Out of Order!*, supra note 12 (“By far, technology is cited most often as the foundation for boorish behavior.”); David Bernstein, *A New Civility Standard*, VOLOKH CONSPIRACY (Mar. 4, 2013, 4:36 PM), <http://volokh.com/2013/03/04/a-new-civility-standard>.

¹⁴ Generally, today's business environment requires interacting with colleagues from different towns, states, or even countries. See, e.g., Julie Kay, *Got Civility?*, supra note 10 (“Now [professionals] frequently parachute in[] . . . from out of town and may not know or ever see the same [people] again.”).

¹⁵ G.M. Filisko, *You're Out of Order!*, supra note 12, at 37.

¹⁶ See, e.g., Kay, *Got Civility?*, supra note 10; Phillip Bantz, *All fun and games until free speech rights in S.C. get violated*, S.C. Law. Wkly., Feb. 1, 2013 (listing reasons judges and Florida bar associations have given for the rise of incivility in Florida's legal profession), available at <http://sclawyersweekly.com/news/2013/02/01/all-fun-and-games-until-free-speech-rights-get-violated>.

¹⁷ G.M. Filisko, *You're Out of Order!*, supra note 12.

¹⁸ The Civility Task Force is a stand-alone committee created to work with ABI's Ethics and Professional Compensation Committee in order to address standards of conduct within the bankruptcy profession.

¹⁹ In this sense, the Principles fit within the “Professionalism as Focus of Aspiration” definition from Robert Atkinson: “voluntary conformity with legally unenforceable standards.” Robert Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 275 (1995).

As a starting point, the American Bar Association’s House of Delegates adopted Resolution 108, which, at a general policy level, encourages attorneys to promote public discourse. The Resolution also calls for lawyers to personally take notice and take charge of the degree to which they engage in civil discourse, and to exercise self-management of communicative etiquette in all of their professional dealings. The Resolution also puts the onus on bar associations to take “meaningful steps” toward fostering civil discourse and promoting the lawyer’s role in its realization. This purposefully vague call to action is intended to encourage creative pursuits — no matter how big or small — provided that the step is taken to promote and embody civil public discourse in the law profession.

IV. The American Bankruptcy Institute’s Principles of Civility

“Every action done in company ought to be with some sign of respect to those that are present.” – George Washington, ca. 1744.

A. Goal(s) and purpose(s) of the Principles.

Purpose(s). In furtherance of the fundamental concepts of civility, these Principles are designed to define the expected degree of courtesy and professionalism among insolvency professionals and to provide specific guidance to those new to bankruptcy practice as to how to maintain an acceptable standard of professional conduct. The Principles are intended to educate and guide professionals who are representatives of — or practicing in — American bankruptcy courts.

Although professionals are encouraged to comply with the Principles, this civility code does not establish enforceable minimum standards of professional care or competence. Rather, the Principles should be considered against the context of the professional’s duty to represent clients competently, diligently, and ethically, and to promote the ideals of professional courtesy, conduct, and cooperation.

The Principles are not a basis for litigation, sanctions, or penalties. Nothing in the Principles supersedes existing ethics rules or alters existing standards of conduct against which professional negligence may be determined. Instead, ABI intends that its members voluntarily agree to adhere to these Principles so as to improve the bankruptcy profession and the administration of justice for all of its participants.

Goal(s). Consider ethics and professionalism issues in bankruptcy practice and make recommendations for uniform standards.

B. Principles of Civility²⁰

Preamble

Professionals should be mindful of the need to protect the integrity of the bankruptcy process in the eyes of the public and in the eyes of the legal community around us.

General Duties of Professionals

1. **Professionals should be courteous and civil in all professional dealings with other persons.**
 - a. Professionals should act in a civil manner regardless of the feelings that they or their clients may have toward others.
 - b. Professionals can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. In all communications, professionals should avoid vulgar language, disparaging personal remarks, or other indications of acrimony toward counsel, parties, witnesses, and court personnel.
 - c. Professionals should require that persons under their supervision conduct themselves with courtesy and civility.
2. **When not inconsistent with their clients' interests, professionals should cooperate with other professionals in an effort to avoid litigation and to resolve litigation that already has commenced.**
 - a. Professionals should avoid unnecessary motion practice or other judicial intervention whenever it is practicable to do so.
 - b. Professionals should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another directly (in person or by telephone) and imposing reasonable and meaningful deadlines in light of the nature and status of the case.
3. **Professionals should respect the schedule and commitments of others, consistent with the protection of the client's interests.**
 - a. On receipt of any inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a professional should — if not inconsistent with the legitimate interests of the client — agree to the proposal or offer a counter-suggestion that is as close in time to the original proposal as is reasonably possible.

²⁰ Many of the concepts incorporated into the Principles of Civility began with the Administrative Order issued by the Bankruptcy Court for the Eastern District of New York that adopted the New York State Standards of Civility. See Ch. J. Judith S. Kaye, *Standards of Civility*, NEW YORK STATE UNIFIED CT. SYSTEM, (Oct. 1997), available at http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/2009_ethics_h.authcheckdam.pdf.

- b. A professional should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected. Ordinarily, the first request for an extension of time should be granted as a matter of courtesy.
 - c. A professional should consult with others regarding scheduling matters in a good-faith effort to avoid scheduling conflicts. Likewise, a professional should cooperate with others when scheduling changes are requested, provided that the legitimate interests of his or her client will not be jeopardized.
 - d. A professional should not attach unreasonable conditions to any extensions of time. A professional is entitled to impose conditions appropriate to preserve rights that an extension otherwise might jeopardize.
 - e. A professional should not request a calendar change or misrepresent a conflict in order to obtain an undue advantage or delay.
 - f. A professional should advise clients against the strategy of refusing to accede to time extensions for the sake of appearing “tough.”
4. **A professional should not initiate communications with the intention of gaining undue advantage from the recipient’s lack of immediate availability.**
5. **A professional should return telephone calls promptly and respond to communications that reasonably require a response, with due consideration of time zone differences and other known circumstances affecting availability.**
6. **The timing and manner of the servicing of papers should not be designed to cause disadvantage or embarrassment to the party receiving the papers.**
7. **A professional should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.**
- a. A professional should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.
 - b. A professional should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.
 - c. A professional should base discovery objections on a good-faith belief in their merit and should not object solely for the purpose of withholding or delaying the disclosure of relevant information.

8. **In out-of-court proceedings, professionals should not engage in any conduct that would not be appropriate in the presence of a judge.**
9. **A professional should keep his or her word.**
10. **A professional should not mislead others involved in the bankruptcy process.**
 - a. A professional should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
 - b. A professional exchanging drafts with others should identify any changes in the drafts or otherwise explicitly bring those changes to the attention of the recipient.

General Duties of Lawyers

1. **Lawyers should be respectful of the schedules and commitments of others.**
 - a. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is calculated to permit full and fair representation of the matter to be adjudicated and to permit an appropriate time for the lawyer's adversary to prepare a full response.
 - b. A lawyer should notify other counsel and, if appropriate, the court and other persons foreseeably affected at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed, and should inform the court as soon as possible as to whether the parties will seek to have the matter continued or whether the matter has been resolved.
 - c. A lawyer should serve papers to other counsel with the understanding that all parties should have adequate time to consider their contents.
2. **In examinations and other proceedings, as well as in meetings and negotiations, professionals should conduct themselves with dignity and refrain from displaying rudeness and disrespect.**
 - a. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at examinations, and at conferences.
 - b. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary to protect the legitimate interests of the client.
 - c. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

3. Lawyers should not mislead others involved in the bankruptcy process.

- a. A lawyer should not ascribe a position to another professional that he or she has not taken or otherwise seek to create an unjustified inference based on the professional's statements or conduct.
- b. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

Lawyers' Duties to the Court and Court Personnel

1. A lawyer is both an officer of the court and an advocate. As such, a lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court and its personnel.

- a. A lawyer should speak and write civilly and respectfully in all communications with the court and court personnel, avoiding histrionics and innuendo.
- b. A lawyer should stipulate to relevant matters if they are undisputed and if no good-faith advocacy basis exists for a refusal to so stipulate.
- c. A lawyer should use his or her best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.
- d. A lawyer should not engage in conduct intended primarily to harass or humiliate witnesses, parties, or professionals.
- e. During court proceedings, a lawyer shall maintain neutral behavior and refrain from making inappropriate gestures, facial expressions, audible comments, or similar attitudes. A lawyer shall also advise clients to conduct themselves similarly.

2. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

- a. A lawyer should be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.
- b. A lawyer should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible. Parties should notify the court of requested continuances or resolutions as soon as practicable.
- c. A lawyer should use his or her best efforts to ensure that persons under their direction act civilly toward court personnel.

Duties of Judges and Court Personnel to Lawyers, Parties, and Witnesses

- 1. A judge should be patient, courteous, and civil to lawyers, parties, and witnesses.**
 - a. A judge should maintain control over the proceedings and ensure that the proceedings are conducted in a civil manner.
 - b. Judges should not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.
 - c. To the extent consistent with the efficient conduct of litigation and other demands on the court, judges should be considerate of the schedules of lawyers, parties, and witnesses when scheduling hearings, meetings, or conferences.
 - d. Judges should be punctual in convening all trials, hearings, meetings, and conferences; if delayed, they should notify counsel when practicable.
 - e. Judges should make all reasonable efforts to promptly decide all matters presented to them for decision.
 - f. Judges should use their best efforts to ensure that court personnel under their direction act civilly toward lawyers, parties, and witnesses and be mindful of the far-reaching consequences of sanctions before imposing them.

- 2. Court personnel should be courteous, patient, and respectful while providing prompt, efficient, and helpful service to all persons having business with the courts.**
 - a. Court employees should respond promptly and helpfully to requests for assistance or information; if the requests are for information that a court employee is not permitted to provide, then the court employee should refuse that request with an explanation of the reason for the refusal.
 - b. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.
 - c. Court employees should avoid unfounded and unreasonable attacks on lawyers and the judiciary.
 - d. When circulating documents, a court employee should explicitly highlight all proposed changes.