

A photograph of a grand, ornate dining room. In the center is a large, oval wooden dining table with a polished surface. On the table sits a tall, silver vase filled with a bouquet of pink, red, and white flowers. A green upholstered chair with a dark wooden frame is positioned in the foreground. To the right, a large, dark wood sideboard or hutch with glass-fronted cabinets displays various silverware and decorative items. The ceiling is high and features intricate, painted woodwork. A large, multi-bulb chandelier hangs from the ceiling. In the background, an arched doorway leads to another room, and a patterned rug covers the floor.

# Rhode Island Bar Journal

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**Polishing Rhode Island's Hidden  
Gem of Professional Responsibility**

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# Polishing Rhode Island's Hidden Gem of Professional Responsibility



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In recent years, the national political community has debated the significance of “Constitutional norms,” or governmental practices and values that are not codified into law.<sup>1</sup> The debate mirrors a longstanding discussion in the legal community concerning the norms of civility and professionalism, which are not codified in the Rules of Professional Conduct. In 1995, the Rhode Island Supreme Court organized a task force to develop the Standards for Professional Conduct within the Rhode Island Judicial System (“Standards”), a set of norms the Supreme Court published in 1996 as an Appendix to Rhode Island’s Rules of Professional Conduct. Since then, the Standards have maintained a low profile. This article places Rhode Island’s Standards within historical and national contexts that can provide ideas for evaluating and enhancing our hidden gem of professional responsibility.

## I. The Development of Rhode Island’s Professionalism Standards

In a 1971 address to the American Law Institute, Chief Justice Warren E. Burger sounded an alarm concerning the “necessity for civility if we are to keep the jungle from closing in on us and taking over...rational discourse and...deliberative processes, including the trial of cases in the courts.”<sup>2</sup> In 1988, the Torts and Insurance Practice Section of the American Bar Association published “A Lawyer’s Creed of Professionalism,” which was adapted and adopted by many bar associations, including Rhode Island’s in 1989.<sup>3</sup> That same year, the Seventh Circuit Court of Appeals undertook a formal review of the issue of civility, appointing a committee to determine the extent to which “civility problems exist in litigation” and to identify the causes and possible solutions.<sup>4</sup> That Committee conducted a survey of practitioners and judges which identified and documented deep concerns, especially in litigation and, within litigation, in pretrial discovery.<sup>5</sup> The respondents offered a wide range of explanations, including the growth of the bar (which reduced the chance for repeated interactions between attorneys), an

increasingly competitive market for legal services, and the increased filing of motions for sanctions.<sup>6</sup> In its 1991 Interim Report, the Committee published its survey results and offered recommendations, including a proposed set of normative standards of conduct for courts to adopt.<sup>7</sup> In 1995, Justice Weisberger, working with the Bar Association, appointed a committee to review the issues of legal civility and professionalism in Rhode Island.<sup>8</sup> That committee developed a set of proposed standards (largely based on the Seventh Circuit’s model), which the House of Delegates approved.<sup>9</sup> The Rhode Island Supreme Court adopted the Standards in May 1996, publishing them as an Appendix to Rhode Island’s Rules of Professional Conduct (appearing at Article V of the Supreme Court’s Rules).

The Standards consist of 68 “obligations” among lawyers, clients, opposing parties, the public, and judges organized into six categories, such as “Lawyer’s Obligations To Opposing Parties and Their Counsel” (Category B). Each is phrased as an individual pledge, such as “I will treat all other counsel, parties and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.” (Portion of Obligation B-1). Taken as a whole, the Standards define a set of norms, or best practices, for legal professionals.

In a Preamble<sup>10</sup> (which draws upon the Seventh Circuit’s model), the Standards define their scope and limitation, stating the following:

These standards should be reviewed and followed by all judges and lawyers participating in any proceeding within the State of Rhode Island. Judges and lawyers are expected to make a mutual and firm commitment to these principles. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice within the State of Rhode Island. Copies may be made available to clients to reinforce the obligation to maintain and foster these standards.

Strict adherence to these standards, particularly those relating to a lawyer’s obligations to the court and to other counsel, may conflict with the interests and desires of a client who does

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not share or support our duty to advance the administration of justice. The standards anticipate that lawyers will resist pressure from clients to engage in behavior which is inconsistent with these principles. If the client continues to insist that the lawyer pursue a course of conduct contrary to these standards, the lawyer should, subject to the court's discretion, seek to sever or withdraw from that representation.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in the standards supercedes or detracts from the existing Rules of Professional Conduct and the Code of Judicial Conduct or alters existing standards of conduct against which lawyer negligence may be determined.

The Preamble attempts to strike a difficult balance. On the one hand, the Standards are strictly voluntary and must yield in authority to all Court rules. On the other hand, the Preamble urges "strict adherence" to the Standards to promote a culture that will enhance and improve the administration of justice in Rhode Island.

The Preamble identifies one possible source of tension, namely the case in which the client instructs the attorney to engage in uncivil conduct. According to Rule of Professional Conduct 1.2(a), the attorney has the initial responsibility to choose the tactical means by which to achieve a client's goals; however, this is subject to Rule 1.4's requirement of communication with the client. In the event of a disagreement between client and attorney, Rule 1.2 provides that the client's view should prevail, a position bolstered by references in the Rules to an attorney's duty to advocate a client's position with zeal.<sup>11</sup> The Preamble to the Standards provides an attorney with ethical grounds to withdraw representation of an uncivil client pursuant to Rule 1.16(b)(4).

Some critics have questioned whether civility norms may conflict with the lawyer's ethical responsibility to serve clients, whose paramount goal is to achieve a favorable outcome in their individual case without regard to the broader concerns and interests of the legal profession and/or the overall administration of justice.<sup>12</sup> While the Rules of Professional Conduct permit an attorney to engage in uncivil client-centered representation, the Standards encourage (but do not require) attorneys to avoid it.

Since their publication in 1996, Rhode Island's Standards have maintained a relatively quiet presence. For a period of time after their introduction, some Rhode Island judges placed a copy of the Standards on the lawyers' courtroom desks; however, that practice ended at some point. From time to time, some Rhode Island Bar Association presidents have mentioned the Standards in their monthly messages to members in the *Bar Journal* and in broader discussions about the profession.<sup>13</sup> A Supreme Court decision (in which an attorney was sanctioned for a violation of Rule 8.4 of the Rules of Professional Conduct) noted that while the Standards "are aspirational only, they should serve as a guide to all practicing attorneys."<sup>14</sup> In one Superior Court decision, a justice referred to the Standards as an alternative source of authority to decide an issue not governed by the Superior Court Rules of Civil Procedure.<sup>15</sup> On the other hand, in two other Rhode Island Superior Court decisions, the Court discussed the issue of civility and professionalism without referring to the Standards, instead citing other authorities.<sup>16</sup> In short, Rhode Island's Standards have become a hidden gem of our State's legal culture.



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## II. Viewing Rhode Island's Standards from a National Context

### A. Content of the Standards

The content and scope of Rhode Island's standards fall within the national mainstream, but other jurisdictions have incorporated additional norms that may be worthy of consideration here. For example, standards in other jurisdictions go beyond Rhode Island's in obliging attorneys to respond in a timely manner to communications from opposing counsel,<sup>17</sup> to disclose to opposing counsel personal relationships with judicial officers, mediators or other presiding officials<sup>18</sup> and to avoid ex parte communications with the court on the subject matter of a case absent good cause.<sup>19</sup>

### B. Methods of Promoting a Culture of Professionalism and Civility

As previously noted, Rhode Island's principal method for promoting its Standards is to include them as an Appendix to the Rules of Professional Conduct. Other jurisdictions have developed these additional tools to reinforce their Standards in their jurisdiction's legal culture:

#### 1. Attorney's Oath

Having established eligibility to join the Rhode Island Bar, new attorneys are required to swear the following oath:

You solemnly swear that in the exercise of the office of attorney and counselor you will do no falsehood, nor consent to any being done; you will not wittingly or willingly promote, sue or cause to be sued any false or unlawful suit; or give aid, or consent to the same; you will delay no man's cause for lucre or malice; you will in all respects demean yourself as an attorney and counselor of this court and of all other courts before which you may practice uprightly and according to law, with fidelity as well to the court as to your client; and that you will support the constitution and laws of this state and the constitution and laws of the United States. So help you God.

Other jurisdictions incorporate into the new attorney's oath a specific commitment to act with civility,<sup>20</sup> while Utah takes the additional step of incorporating a specific commitment for new attorneys to "faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Supreme Court of the State of Utah."<sup>21</sup>

#### 2. Mediation and Counseling

In some jurisdictions, attorneys or judges can file complaints involving issues of civility that do not rise (or sink) to the level of violations of the Rules of Professional Conduct. For example, the Colorado Bar Association maintains a Peer Professionalism Assistance (PPA) program that investigates professionalism complaints from attorneys and judges and, where appropriate, provides confidential advice and mediation to the parties involved. As part of this service, the volunteer PPA attorney follows up with the referring party (lawyer or judge) to provide information concerning the outcome of its intervention.<sup>22</sup> The PPA program operates independently from the court-administered attorney disciplinary process.<sup>23</sup>

#### 3. Imposition of Sanctions

The United States District Court for the Northern District of Texas published a set of civility standards that can, in cases of serious violations, provide grounds for judicial sanctions.<sup>24</sup> Commentators have criticized this practice, warning that the "cure" of the resulting satellite litigation may be worse than the disease.<sup>25</sup>



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### 4. Incorporation into Disciplinary Rules

Some jurisdictions have incorporated civility standards into disciplinary rules, making the standards mandatory rather than aspirational. Michigan's Rules of Professional Conduct include requirements that attorneys shall not engage in "undignified or discourteous conduct toward the tribunal"<sup>26</sup> and that attorneys "treat with courtesy and respect all persons involved in the legal process."<sup>27</sup> Other states have enforced civility standards through Model Rules 4.4 (which proscribes tactics that "have no substantial purpose other than to embarrass, delay or burden a third person,"<sup>28</sup> and 8.4(d) (which prohibits conduct "prejudicial to the administration of justice").<sup>29</sup> Florida combines these tools, incorporating civility standards into its attorney's oath, and adding language to their Rule 8.4(d) that prohibits conduct tending to "disparage, humiliate or discriminate against [anyone involved in the proceedings] on any basis."<sup>30</sup>

Michigan's experience with a litigious attorney (Jeffrey Fieger, also known for representing Dr. Jack Kevorkian) demonstrates the pitfalls of mandatory civility rules. After an appeals court reversed a jury verdict in favor of the attorney's client,<sup>31</sup> the attorney berated the justices on his radio program in personally insulting and profane terms.<sup>32</sup> In response, Michigan's Attorney Grievance Commission filed a complaint with the Michigan Supreme Court's Attorney Discipline Board, claiming that the attorney violated the civility provisions of Michigan Rules 3.5(c) and 6.5(a). The Disciplinary Board declined to sanction the lawyer, holding that his statements were protected speech under the First Amendment.<sup>33</sup> On appeal, a narrow majority of the Michigan Supreme Court reversed, upholding the constitutionality of the disciplinary rules and remanding the case to the disciplinary board to impose a reprimand on the attorney.<sup>34</sup> In collateral litigation, a Michigan federal court issued a declaratory judgment finding the civility rules unconstitutional, but the Sixth Circuit vacated on standing and ripeness grounds.<sup>35</sup> The four case decisions make for interesting reading, but the volume of effort reflects one possible cost of mandatory civility standards, especially when the civility interest in question is a lawyer's interaction with a judge.<sup>36</sup>

### III. Recommendations and Conclusion

The Standards for Professional Conduct within the Rhode Island Judicial System complement the Rules of Professional Conduct (which provide a clear "floor" of unacceptable conduct) with a set of aspirational norms that can increase the quality of justice within the Rhode Island legal system while also enhancing the institution's public standing. With that said, the Standards' relative obscurity limits their ability to promote a culture of civility and professionalism within the legal system. Rhode Island can learn from the experience of other states that have addressed this issue in different ways with varying amounts of success.

To advance that goal, this writer recommends the Rhode Island legal community review its norms of civility and professionalism, discussing such topics as:

1. The state of the culture of civility within today's legal system, and whether increased attention to a set of aspirational standards would be beneficial;
2. The content of Rhode Island's Standards, and possible amendments to improve them;
3. Ways to increase the Bar's knowledge and awareness

- of the Standards through such measures as:
- Promoting their instruction at law schools;
  - Including a question on the State bar examination that requires knowledge of the Standards;
  - Incorporating a reference to the standards into the oath sworn by newly admitted members to the Bar;
  - Incorporating a certification of familiarity with and compliance with the Standards as part of the annual renewal of Bar membership;
  - Developing a civics and professionalism curriculum to post online;
  - Offering free continuing legal education classes on the subjects of civility and professionalism.
4. Whether it would be beneficial to develop a confidential mediation program (such as Colorado's) to provide discreet guidance and resolution in cases in which one legal professional questions the civility of another's conduct.

#### ENDNOTES

<sup>1</sup> See, e.g., Chafetz, Josh & Pozen, David, How Constitutional Norms Break Down, 65 U.C.L.A. L. REV. 1430 (2018). To quote the NEW YORKER, "All we hear about is 'norms – norms violated, norms overthrown, norms thrown back in the faces of their normalcy. Not since 'Cheers went off the air, back in the nineties, have we heard so much about Norms.'" Chafetz and Posen, *supra*, (quoting Adam Gopnik, Norms and Cliffs in Trump's America, NEW YORKER (Aug. 3, 2017)).

<sup>2</sup> Burger, Warren E., The Necessity For Civility, 52 F.R.D. 211 (1971).

<sup>3</sup> See Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 423 (1992), President's Message, n. 8, *infra*.

<sup>4</sup> Interim Report, n. 3, *supra*, 143 F.R.D. at 374.

<sup>5</sup> Interim Report, n. 3, *supra*.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, 153 F.R.D. at 411-15.

<sup>8</sup> Sheridan, R. Kelly, President's Message, 44 (May) R.I. BAR JOURNAL 1 (1996).

<sup>9</sup> *Id.*

<sup>10</sup> The Preamble to the Standards is distinct from the Preamble to the Rhode Island Rules of Professional Conduct, but the latter (at §[7]) does encourage lawyers to "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."

<sup>11</sup> See Preamble to Rules of Professional Conduct, §[8] and Commentary to Rule 1.3, §[1].

<sup>12</sup> See, e.g., Burns, Robert and Luber, Steven, Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist, 2003 U.I.L.L.L.REV. 1275 (2003).

<sup>13</sup> See MacAdams, Richard, President's Message, 45 Jan. R.I.B.J. 3 (1997), Jones, Lauren Random Thoughts As Deadline Approaches, Dec. 47 R.I.B.J. 3 (1998) and It's The Client, Stupid, 47 Mar. R.I.B.J. 3 (1999); Lyons, Thomas and Deluca, Michael, The Bar Association in the Twentieth Century, 48 Feb. R.I.B.J. 9 (2000); DiMonte, Vincent, Professionalism and Civility, 50 Jan/Feb R.I.B.J. 3 (2002) and Speaking Out: 30 Years of Practice, 55 Nov./Dec. R.I.B.J. 31 (2006). See also Shea, Donald, Rhode Island Chief Justice Joseph R. Weisberger, 6 ROGER WILLIAMS U.L. REV. 491, 494 (2001) (recognizing this among the many accomplishments of his tenure).

<sup>14</sup> In re McBurney, 13 A.3d 654, 655 (R.I. 2011); See also Clarke v. Morsilli, 723 A.2d 785, 786 (R.I. 1998) (noting generally the Court's "attempts to promote civility").

<sup>15</sup> State of Rhode Island v. Lead Industries Assoc., 2009 WL 3328383 (Super. Ct.), vacated and remanded, 64 A.3d. 1183 (R.I. 2013).

<sup>16</sup> In sanctioning an attorney for discovery misconduct, the Superior Court in Cipriani v. Migliori, 2005 R.I. Super. Lexis 28, cited the Preamble to the Rules of Professional Conduct and the Lawyer's Pledge, but not the Standards. In Lambert v. Parascandolo, 2016 R.I. Super. Lexis 13, after ruling on a motion for a new trial, the Court "pause[d] briefly to discuss the unprofessional conduct of during trial," referring to Justice Burger's speech on "The Need for Civility" (n. 2, *supra*) without referring to the Standards.

<sup>17</sup> Colorado Bar Association, COLORADO PRINCIPLES OF PROFESSIONALISM, '3.5.

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