



ST. MARY'S  
UNIVERSITY

St. Mary's Journal on Legal Malpractice &  
Ethics

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Volume 14 | Number 1

Article 1

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1-9-2024

## The Ethical Lawyer: Beyond the Rules

Nick Badgerow

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### Recommended Citation

Nick Badgerow, *The Ethical Lawyer: Beyond the Rules*, 14 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 2 (2024).

Available at: <https://commons.stmarytx.edu/lmej/vol14/iss1/1>

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# ARTICLE

*J. Nick Badgerow*

## The Ethical Lawyer: Beyond the Rules

**Abstract.** Does being a lawyer mean more than the mere pursuit of a client’s cause and resulting (hoped for) financial success and professional standing, while avoiding discipline? This article invites a consideration of what it means to be a true “professional” in the practice of law. First, the article explores the definition of the term “professional,” and proceeds to examine the obligations undertaken by lawyers (a) in their oath of admission, and (b) in codes of professional conduct. However, the author posits, should not the true professional aspire to more than the mere compliance with these minimum standards? In answer, the author describes aspirational creeds of professionalism which have been adopted in an effort to stem the tide of increasing unprofessionalism in the practice. Then, the article explores a couple of Biblical sources for more professional conduct. True professionals commit themselves to behavior far above that prescribed by the rules of professional conduct.

**Author.** J. Nick Badgerow is a partner with the firm of Spencer Fane LLP in Overland Park, Kansas. He has practiced civil litigation for more than forty-six years in the state and federal courts of Kansas and Missouri. Nick was a member of the Kansas Judicial Council (twenty-four years); member of the Kansas State Board of Discipline for Attorneys (sixteen years); member of the Kansas Supreme Court Commission on Professionalism; Chairman, Kansas Ethics 2000 Commission; Chairman, Kansas Ethics 20/20; Chairman, Kansas Bar Ethics Advisory Committee (fourteen years); Chairman, Johnson County

Bar Association Ethics and Grievance Committee (twenty-nine years). Nick is co-author of the KBA Employment Law Handbook and an author and the editor of the KBA Ethics Handbook, Third Edition (2015). Nick has published more than eighty law review and law journal articles and presented more than two hundred seminars, mostly on the subjects of attorney ethics, liability, and professional responsibility. Nick received the Distinguished Service Award from the KBA in 2020 and the Justinian Award from the Johnson County (Kansas) Bar Association in 2022.

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## I. INTRODUCTION—OVERVIEW

As one approaches the practice of law, numerous practical concerns confront the new lawyer. What is necessary for one to pass the bar examination? Will one get a job? How will one get clients? How will one climb the ladder to partnership—with personal, professional, and financial success? How does one avoid a disciplinary complaint? And perhaps the most important question from a practical standpoint, how does one apply all the principles and topics learned in law school to *practice* the profession for actual clients?

But overriding all these practical concerns should be this consideration: how does one fulfill the high ideals of ethical, moral, and professional conduct while practicing law?

## II. THE PRACTICE OF LAW IS A PROFESSION.

*What is a Profession?* A “profession”—more than mere employment—carries with it a sense of a “calling,”<sup>1</sup> involving higher education, standards for admission, standards of conduct, and self-regulation.<sup>2</sup> A “profession” is defined by its characteristics, which are:

[T]he requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.<sup>3</sup>

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1. See *Master v. Chalko*, 794 N.E.2d 144, 148 (Ohio C.P. 1999) (“[T]he practice of law is a profession—a high calling.”); *Disciplinary Counsel v. Bein*, 822 N.E.2d 358, 360 (Ohio 2004) (“[T]he legal profession . . . ought to be a high calling dedicated to the service of clients.”); *In re Moore*, 812 N.E.2d 1197, 1200 (Mass. 2004) (“[T]he profession of law is a high calling.”).

2. See *In re Unification of the New Hampshire Bar*, 248 A.2d 709, 711–12 (N.H. 1968) (outlining the purposes of the unified Bar and the courts’ role in regulating the profession).

3. *In re Estate of Freeman*, 311 N.E.2d 480, 483 (N.Y. 1974).

So, the hallmarks of the practice of law as a profession are:

- (1) Formal education;
- (2) Admission by a formal licensing body;
- (3) A code of ethics;
- (4) A system by which the profession polices itself for violations of the code of ethics;
- (5) A duty to help others, above the desire to generate income; and
- (6) A duty to act in a learned, disciplined and honorable fashion in all conduct, both professional and private.<sup>4</sup>

Therefore, “[t]he practice of law is a profession and its uniqueness distinguishes it from all other endeavors.”<sup>5</sup> The Law is not just a business; indeed, its best practices may be contrary to principles found in business.

[T]he rules of professional ethics that attorneys are duty-bound to “observe most scrupu[l]ously are diametrically opposed to the code by which businessmen must live if they are to survive.” The Rules of Professional Conduct ensure that “[t]he practice of law is not simply an occupation; it is a profession,” whose members seek “to avoid even the appearance of impropriety and, thus, strive[] to live by a higher standard of conduct than a layperson . . . .”<sup>6</sup>

Moreover, lawyers are not interchangeable technicians who apply unbending principles to unassailable facts. Rather, lawyers hold a unique and important historic place in the preservation of law and justice in society.

Since the time of Edward I (King of England 1272–1307) and continuing for centuries to follow, the legal profession has occupied a unique role in society, in part, by virtue of the important responsibilities entrusted to it. Justice Frankfurter eloquently pronounced the legal profession’s responsibilities when writing that “[o]ne does not have to inhale the self-

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4. See Nancy Behrens, *What is a Profession?*, ACTUARIAL BD. FOR COUNSELING AND DISCIPLINE (Aug. 2015), [http://www.abcdboard.org/wp-content/uploads/2015/07/UptoCode\\_julaug2015.pdf](http://www.abcdboard.org/wp-content/uploads/2015/07/UptoCode_julaug2015.pdf) [https://perma.cc/N6LY-BPJU] (reviewing major components of a profession).

5. *Sifers v. Horen*, 188 N.W.2d 623, 628 (Mich. 1971).

6. *Averill v. Cox*, 145 N.H. 328, 333 (N.H. 2000) (internal citations omitted).

adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty, and property' are in the professional keeping of lawyers." *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247, 77 S.Ct. 752, 760, 1 L.Ed.2d 796 (1957) (Frankfurter, J., concurring). A lawyer's responsibility is preeminently to stand "as a shield' [] in defense of right and ward off wrong." *Id.*<sup>7</sup>

Thus, the practice of law is much more than the mechanical application of rules to factual situations; it is a *profession*, a higher calling to represent those in need, to aid and help others, to place clients' interests above personal interests, and to stand for and enforce basic principles of fairness and justice, tempered with mercy and kindness.

### III. THE PRACTICE OF LAW IS A PRIVILEGE.

Lawyers are accorded a very special place in society. While often the subject of jokes and derision, lawyers are the first people called when clients encounter legal difficulties and need help.<sup>8</sup> Only lawyers may represent clients in court and in a wide array of other settings.<sup>9</sup> As a result of this representation, lawyers and their clients are given the protection of their privileged communications.<sup>10</sup>

But as obligations accompany rights, the privileges given to lawyers carry with them certain well-defined obligations.

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should

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7. *Ippolito v. State of Fla.*, 824 F. Supp. 1562, 1566 (M.D. Fla. 1993).

8. Ron Phillips et al., *Did You Hear About the Lawyer. . . .*, MURRAY PHILLIPS LAW: BLOG (Apr. 15, 2022), <https://www.murrayphillipslaw.com/lawyers/> [https://perma.cc/GU3V-LNCF] ("I do find it ironic that lawyers are the first to be called upon when people need help with a legal problem.").

9. *Thomas v. Estelle*, 603 F.2d 488, 489 (5th Cir. 1979).

10. *Kessel v. Leavitt*, 511 S.E.2d 720, 807 (W. Va. 1998) ("The attorney-client privilege is a widely recognized and solemnly respected privilege, the purpose of which is to protect confidential communications between a client and his/her counsel.").

use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.<sup>11</sup>

As the Kansas Supreme Court has cogently stated, “[t]he practice of law is a privilege rather than a right,”<sup>12</sup> and the holders of this privilege should carefully guard and maintain it. Other courts have uniformly agreed that “[t]he practice of law is a privilege and not a vested right.”<sup>13</sup> Indeed, “[t]he generous trust and broad confidence of the public ought to prompt the most scrupulous conduct in every professional relation” of a lawyer.<sup>14</sup>

[I]t must be recognized that the practice of law is a privilege, not a right. *In re Little*, 40 Wash.2d 421, 430, 244 P.2d 255 (1952). See also *State v. Russo*, 230 Kan. 5, 630 P.2d 711 (1981); *State Bar of Tex. v. Heard*, 603 S.W.2d 829

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11. KAN. RULES OF PROF'L CONDUCT preamble ¶ 1, 5 (2021) (hereinafter “KRPC”).

12. *State v. Phelps*, 598 P.2d 180, 187 (Kan. 1979); see also *Thomas*, 603 F.2d at 489 (5th Cir. 1979) (“There is no constitutional guarantee that non-attorneys may represent other people in litigation.”); see also *Cox v. Huddleston*, 914 S.W.2d 501, 505 (Tenn. App. 1995) (explaining the legislature’s intent in construing the practice of law as a privilege); *In re Butcher*, 907 S.W.2d 715, 717 (Ark. 1995) (noting the practice of law as a “privilege and not a right” (citing *In re Petition for Reinstatement of Lee*, 806 S.W.2d 382, 387 (1991)); *Murphy v. Bd. of Prof'l Resp.*, 924 S.W.2d 643, 647 (Tenn. 1996).

13. *Iowa State Bar Ass'n v. Kraschel*, 148 N.W.2d 621, 625 (Iowa 1967) (citing *In re Meldrum*, 51 N.W.2d 881 (Iowa 1922)); see also *State ex rel. Florida Bar v. Fishkind*, 107 So.2d 131, 132 (Fla. 1958) (“This court has many times stated that the practice of law is a privilege which places special burdens upon those choosing to pursue this honorable profession.”); *People v. Kistler*, 354 P.2d 1022, 1024 (Colo. 1960) (“The practice of law is a privilege, highly esteemed and respected.”); *In re Wysell*, 198 N.Y.S.2d 456, 459 (N.Y. App. Div. 1960) (“The practice of law is a privilege surrounded with a public interest but vested as well with a private responsibility. The public must be protected in its reliance upon the integrity and responsibility of the legal profession.” (quoting *In re Gould*, 164 N.Y.S.2d 48, 49 (1957)); *In re Owen*, 306 P.3d 452, 457 (N.M. 2013) (“The practice of law is a privilege and carries with it substantial responsibility.”); *In re Butcher*, 908 S.W.2d at 717 (Ark. 1995) (citing *In re Lee*, 806 S.W.2d 382 (1991)); *Wickham v. Freed*, 166 N.Y.S.3d 508 (2022) (“The practice of law is a privilege and not a right. Licenses to practice law in New York are granted by the Appellate Divisions and can be suspended or revoked. The privilege carries with it certain obligations including adherence to the rules of conduct, deportment and effort in the rendition of legal services, and respect for the Court and opposing counsel.”); *Brooks v. Bd. of Prof'l Resp.*, 578 S.W.3d 421, 427 (Tenn. 2019); *In re Walwyn*, 531 S.W.3d 131, 139 (Tenn. 2017) (citing *Murphy*, 924 S.W.2d at 647); *Horwitz v. Holabird & Root*, 816 N.E.2d 272, 291 (Ill. 2004) (“This court has repeatedly made clear that the practice of law is a privilege and not a right. (citing *In re Anastaplo*, 121 N.E.2d 826 (Ill. 1954)).

14. See *In re Cooksey*, 100 P.2d 62, 63 (Kan. 1909) (discussing a lawyer’s disbarment).

(Tex.1980); *Petition of Morris*, 175 Mont. 456, 575 P.2d 37 (1978). This privilege is burdened with certain conditions, one of which is possession of good moral character. It is this court's duty to insure that such conditions are met.<sup>15</sup>

The Mississippi Supreme Court has succinctly noted: "The practice of law is a privilege, not a property right, and a revocable privilege at that." *Mississippi State Bar v. Young*, 509 So. 2d 210, 219 (Miss. 1987) (citing *Levi v. Mississippi State Bar*, 436 So. 2d 781, 786 (Miss. 1983)).<sup>16</sup>

And nearly a century ago, the Oregon Supreme Court held:

"The right to engage in the practice of law is a privilege conferred or withheld, in accordance with the general policy of the state expressed by statutory enactment." *In re Application of Jesse Crum*, 103 Or. 296, 204 P. 948, 949 [1922]. Further, as said in 6 C.J. p. 569, § 11, "the right to practice law is not a natural or constitutional right, but is a privilege or franchise subject to the control of the legislature, and limited to persons of good moral character with special qualifications ascertained and certified as prescribed by law."<sup>17</sup>

Before being allowed the privilege to practice law, a lawyer is required to complete specialized and advanced education,<sup>18</sup> meet standards for admission, including standards of moral character and mental and emotional fitness,<sup>19</sup> take and pass a rigorous examination,<sup>20</sup> and then take the oath of admission.<sup>21</sup>

#### IV. THE LAWYER'S OATH.

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15. *In re Belsher*, 689 P.2d 1078, 1084 (Wash. 1984).

16. *Asher v. Mississippi Bar*, 661 So. 2d 722, 728 (Miss. 1995).

17. *In re Weinstein*, 42 P.2d 744, 745-46 (Or. 1935).

18. Kan. Sup. Ct. R. 711(a)(1)-(2) (describing the education required to practice law in Kansas).

19. Kan. Sup. Ct. R. 712(b)-(c) (explaining what constitutes good moral character and emotional fitness).

20. Kan. Sup. Ct. R. 716 (listing steps prospective lawyers must take for admission to the Kansas Bar).

21. Kan. Sup. Ct. R. 726 (providing the oath every lawyer takes to practice law in Kansas).



The first step (after passing the bar exam) will be to take the oath of admission, administered by each court to which one is admitted to practice. While oaths vary in detail from jurisdiction to jurisdiction, their aim and import are much the same. The oath commits the lawyer to certain professional obligations and to faithfully uphold and support the laws of state and country. Each oath generally requires the lawyer to support and defend the Constitution of the state and the United States; to faithfully discharge the duties of an attorney, and to conduct oneself with integrity and civility.<sup>22</sup> Taking the oath is not a mere formality. As the Vermont Supreme Court has noted: “The acceptance of the attorney’s obligation, symbolized in the administration of the oath of admission, is the assumption of a professional office of special public trust, with standards of conduct which all practitioners must abide.”<sup>23</sup>

And in a Kansas case involving a lawyer of some repute, it was held: “The general principles set forth in the oath should serve as a constant reminder to the members of the bar of the grave responsibilities cast upon them in the practice of their profession.”<sup>24</sup>

One taking the oath of admission should carefully consider the obligations being undertaken therein. After admission, one should recurrently review the oath and renew one’s commitment to its provisions, not just because a lawyer is a professional, but because a lawyer may be disciplined for violating the oath.<sup>25</sup>

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22. *See generally id.* (“You do solemnly swear or affirm that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas . . .”).

23. *In re Calhoun*, 245 A.2d 560, 561 (Vt. 1968).

24. *See In re Phelps*, 459 P.2d 172, 180 (Kan. 1969) (disbarring a lawyer after determining he was unable to deal honorably with his clients).

25. *See generally In re Southerland*, 414 P.2d 495, 495(N.M. 1966) (suspending lawyer for making a series of false representations to clients); *Bell v. Conner*, 241 N.E.2d 360, 361 (Ind. 1968) (suspending attorney for six months and conditioning readmission on character and fitness review); *The Florida Bar v. Walton*, 952 So. 2d 510, 516 (Fla. 2006) (suspending lawyer); *State ex rel. Nebraska State Bar Ass’n v. Wiebusch*, 45 N.W.2d 583, 593 (Neb. 1951) (disbarring lawyer for violating “canons of judicial ethics, but also violat[ing] his oath of admission as a lawyer, his oath of office as a judge, the Constitution of the State of Nebraska, and the statutes of [Nebraska]”); *In re Holovachka*, 198 N.E.2d 381, 396 (Ind. 1964) (disbarring lawyer for violating oath of admission to the Indiana bar).

## V. WHAT ARE ETHICS?

This is a question on which volumes have been written and could easily subsume this entire treatise.<sup>26</sup> The root for the word “ethics” (ēthos) is the Greek word for custom or character, “the distinguishing character, sentiment, moral nature, or guiding beliefs of a person, group, or institution.”<sup>27</sup> The root for the word “morality” (moralis) is the Latin word for much the same idea, one’s usual way of behaving, *custom or manner*.<sup>28</sup> But “ethics” and “morals” are not the same.

*Merriam-Webster’s* explains that “moral” implies “conformity to established sanctioned codes or accepted notions of right and wrong (‘the basic *moral* values of a community’).” The dictionary says “ethical” may suggest “the involvement of more difficult or subtle questions of rightness, fairness, or equity (‘committed to the highest *ethical* principles’).”<sup>29</sup>

Put more succinctly: “While they’re closely related concepts, *morals* refer mainly to guiding principles, and *ethics* refer to specific rules and actions, or behaviors.”<sup>30</sup>

Ethics, then, is comprised of the rules of conduct one establishes to govern action. The late Pope Benedict XVI Joseph Aloisius Ratzinger, who served from 2005 to 2013, once said:

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26. See *What Are Ethics? Definitions and Meaning*, MARKET BUSINESS NEWS, <https://marketbusinessnews.com/financial-glossary/ethics-definition-meaning/> [<https://perma.cc/Y5Q3-7FCZ>] (stressing the ceaseless presence of ethics within philosophical debates over the years); Chuck Morris, *What Are Ethics?*, DEL COMMUNICATIONS INC., [https://issuu.com/delcomminc/docs/efma\\_2022-1\\_web/s/15569341](https://issuu.com/delcomminc/docs/efma_2022-1_web/s/15569341) [<https://perma.cc/T8KN-KU5N>]; Tim Ryan, *What Are Ethics At Your Work?*, FAITH MAGAZINE (Oct. 2004), <https://faithmag.com/what-are-ethics-your-work> [<https://perma.cc/AQ9Y-5AQK>].

27. *Ethos*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/ethos> [<https://perma.cc/5XDK-4HEP>] (providing an example of ethics disputes).

28. Stephen M. Perle, *Morality and Ethics: An Introduction*, DYNAMIC CHIROPRACTIC (Mar. 11, 2004), <https://www.dynamicchiropractic.com/mpacms/dc/article.php?id=46121> [<https://perma.cc/S7HE-GAEU>].

29. Patricia T. O’Connor & Stewart Kellerman, *Ethics vs. Morals*, GRAMMARPHOBIA (Feb. 20, 2012), <https://www.grammarphobia.com/blog/2012/02/ethics-vs-morals.html> [<https://perma.cc/3FBH-E3E9>].

30. *Ethics vs. Morals: What’s The Difference?*, DICTIONARY.COM (Aug. 18, 2022), <https://www.dictionary.com/e/moral-vs-ethical/> [<https://perma.cc/DB7M-WQQD>].

To me, it really seems visible today that ethics is not something exterior to the economy, which, as technical matter, could function on its own; rather, ethics is an interior principle of the economy itself, which cannot function if it does not take account of the human values of solidarity and reciprocal responsibility. To integrate ethics into the construction of the economy itself is the great challenge of this moment, and I hope to have made a contribution to this challenge with the encyclical. The discussion that's underway strikes me as encouraging.<sup>31</sup>

A lawyer may think “ethics” are defined and delineated by the lawyers’ rules of conduct, set forth in the Model Rules of Professional Conduct. However, many lawyers consider the word and the Model Rules as interchangeable. That idea deserves inquiry.

#### VI. THE MODEL RULES OF PROFESSIONAL CONDUCT—HISTORY.

*The Canons.* In 1887, the Supreme Court of Alabama adopted a code of legal ethics,<sup>32</sup> which a number of other states subsequently adopted.<sup>33</sup> But before the year 1908, there was no standard written code of professional responsibility adopted by all states, any bar, or bar association on a nationwide basis existed.<sup>34</sup> In 1908, the American Bar Association adopted the Canons of Professional Responsibility,<sup>35</sup> mainly derived from the Alabama Code.

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31. John L. Allen, Jr., *Interview with Benedict XVI aboard the papal plane*, NAT’L CATH. REP. (Sept. 27, 2009), <https://www.ncronline.org/blogs/ncr-today/interview-benedict-xvi-aboard-papal-plane> [https://perma.cc/42MV-3X24].

32. The history of the development and adoption of this Code is set forth in *History of the Alabama State Bar*, ALA. STATE BAR, <https://www.alabar.org/about/culture/> [https://perma.cc/M3TM-B3LQ].

33. The Alabama Code was adopted (sometimes with modifications) by the states of Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky, and Missouri between 1887 and 1906. *Canons of Judicial Ethics Preamble*, ALABAMA.GOV, <https://judicial.alabama.gov/docs/library/rules/canpre.pdf> [https://perma.cc/AS7Q-3E9J].

34. See Walter B. Jones, *The First Legal Code of Ethics Adopted in the United States*, 8 A.B.A.J., No. 2, 1922, at 111–13 (acknowledging the ABA’s adoption of the Cannons of Ethics in 1908).

35. These Canons are set forth in full at Minnesota Legal History Project. *Am. Bar Ass’n, Canons of Professional Ethics*, MINN. LEGAL HIST. PROJECT (Feb. 28, 2012), [http://www.minnesotalegalhistoryproject.org/assets/ABA%20Canons%20\(1908\).pdf](http://www.minnesotalegalhistoryproject.org/assets/ABA%20Canons%20(1908).pdf) [https://perma.cc/B47L-KNVH].

On August 27, 1908, the Association adopted the original Canons of Professional Ethics. These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as *Professional Ethics*, and from the fifty resolutions included in David Hoffman's *A Course of Legal Study* (2d ed. 1836).<sup>36</sup>

*The Code.* The Canons—with amendments and updates—remained in place from 1908 until the American Bar Association adopted the Model Code of Professional Responsibility in 1969,<sup>37</sup> and thereafter by most states.<sup>38</sup> The Code of Professional Responsibility governed lawyer conduct and was comprised of Canons, ethical considerations, and disciplinary rules.<sup>39</sup>

*The Model Rules.* Finally, in 1983, the Model Rules of Professional Conduct (MRPC) replaced the Model Code.<sup>40</sup> The MRPC has been adopted (with some modifications) by nearly all the states in the Union.<sup>41</sup>

The MRPC is comprised of a set of specific rules under the general headings of Client-Lawyer Relationship, Counselor, Advocate, Transactions with Persons Other than Clients, Law Firms and Associations, Public Service, Information About Legal Services, and Maintaining the Integrity of the Profession.<sup>42</sup>

36. MODEL RULES OF PROF'L CONDUCT preface (AM. BAR ASS'N 2023).

37. *Code of Professional Responsibility*, LEGAL INFO. INST. (Aug. 2022), [https://www.law.cornell.edu/wex/code\\_of\\_professional\\_responsibility](https://www.law.cornell.edu/wex/code_of_professional_responsibility) [https://perma.cc/549R-4Y3S].

38. *Ethis and Professional Responsibility: Model and State Rules*, GA. STATE UNIV. COLL. OF L. (last updated June 7, 2022, 5:33 PM) <https://libguides.law.gsu.edu/c.php?g=253396&p=1689859> [https://perma.cc/VR97-PAEV].

39. *Code of Professional Responsibility*, *supra* note 37 (“The Code comprised three portions: (1) Canons; (2) Ethical Considerations; and (3) Disciplinary Rules. The first two portions were considered ‘aspirational’ while the third was mandatory.”).

40. MODEL RULES OF PROF'L CONDUCT preface.

41. See *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A. (last updated Mar. 28, 2018) [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/) [https://perma.cc/Q5C2-XM97] (listing various jurisdictions implementing the MRPC, including the District of Columbia, the Virgin Islands, and the Northern Mariana Islands).

42. MODEL RULES OF PROF'L CONDUCT table of contents.

VII. THE MODEL RULES OF PROFESSIONAL CONDUCT—MINIMUM STANDARDS.

“The . . . Rules of Professional Conduct are minimum standards of conduct.”<sup>43</sup>

The . . . Disciplinary Rules of Professional Conduct establish minimum standards of conduct required of lawyers to avoid disciplinary action. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 7 (the rules identify “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action”); *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996). . . . The rules do not exhaust the moral and ethical considerations that should guide a lawyer. *Id.* ¶ 11.<sup>44</sup>

Indeed, the Model Rules themselves note that they do not prescribe the heights to which a lawyer may aspire, but only proscribe the minimum below which a lawyer must not sink.

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 and the approbation of professional peers. 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.

. . . .

The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.<sup>45</sup>

Thus, the Model Rules do not delineate the outer boundaries of ethical conduct, but only the minimum standards which prescribe lawyer conduct.

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43. *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 427 (Tex. 1996) (Owen, J., dissenting).

44. *Comm'n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 178 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

45. MODEL RULES OF PROF'L CONDUCT preamble ¶ 7, 16.

It should be noted that the Model Rules themselves, as stated in the Preamble, “are rules of reason [that] do not exhaust the moral and ethical considerations that should inform a lawyer for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”<sup>46</sup>

#### VIII. THE MODEL RULES OF PROFESSIONAL CONDUCT—COMPLY OR BE DISCIPLINED AND SANCTIONED.

Of course, even as a minimum standard, because the Model Rules represent official mandates in every jurisdiction in the United States, lawyers must comply with them. Rule 8.4[1] of those Rules specifies:

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.<sup>47</sup>

Lawyers will be disciplined by the applicable regulatory agency or board of discipline for violating the MRPC for any conduct, whether committed while practicing the profession or otherwise.<sup>48</sup> In addition, a lawyer violating the MRPC may find himself/herself sanctioned by a court.<sup>49</sup>

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46. *Figueroa-Olmo v. Westinghouse Elec. Corp.*, 616 F. Supp. 1445, 1450 (D. P.R. 1985); *see also* ABA Comm’n. On Ethics & Pro. Resp., Formal Op. 06-440 (2006) (“[T]he Rules do not exhaust the moral and ethical considerations that should inform a lawyer[’s conduct].”).

47. MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 1; *Iowa Sup. Ct. Att’y Disciplinary Bd. v. Templeton*, 784 N.W.2d 761, 769 (Iowa 2010) (noting Rule 32:8.4 of the Iowa Rules of Professional Conduct gives “notice to attorneys that they are subject to discipline for violating the rules”); *State v. Uchima*, 464 P.3d 852, 870 n.23 (Haw. 2020).

48. *See In re Tedder*, 374 S.E.2d 294, 296 (S.C. 1988) (“Attorneys are subject to discipline for conduct not strictly related to the practice of law.”); *In re Gregory*, 411 S.E.2d 430, 432 (S.C. 1991); *Romero-Barcelo v. Acevedo-Vila*, 275 F. Supp. 2d 177, 190 (D. P.R. 2003).

49. *See Chapman & Cole v. Intel Container Int’l B.V.*, 865 F.2d 676, 686 (5th Cir. 1989) (sanctioning an attorney for the clandestine taping of a telephone conversation in violation of the ABA Model Rules); *Harlan v. Lewis*, 982 F.2d 1255, 1257 (8th Cir. 1993); *see also* *Subway Rests., Inc. v. Kessler*, 970 P.2d 526, 528 (Kan. 1998) (affirming imposition of monetary sanctions and revocation of *pro hac vice* admission for violations of MRPC).

Thus, familiarity<sup>50</sup> and compliance with the MRPC are necessary. But, as noted above, the MRPC only represents minimum standards. Should the ethical lawyer not aspire to more?

IX. ETHICS IS MORE THAN THE MODEL RULES OF PROFESSIONAL CONDUCT.

Though the Model Rules specify minimum standards, there must be more to the ethical practice of law.

The Model Rules may be the “law for lawyers,” clearly defining the circumstances under which we can be found guilty of improper conduct and disbarred, but they are not coextensive with the concept of legal ethics. If we are to live lives as ethical litigators, we must make decisions concerning evidence based on more than the Model Rules—we must (and do) rely on our experience, judgment, tradition, moral ideals, and character guided by moral principles that are supposed to push us in the direction of good lawyering.<sup>51</sup>

Thus, good lawyers will strive to act well above the minimum standards required to avoid discipline and sanction, be professional, and conduct themselves accordingly.

X. CREEDS OF PROFESSIONALISM.

Numerous courts and bar associations have adopted creeds of professionalism in a laudable effort to encourage lawyers to go above the MRPC and to curb the tide of increasing acrimony between and among practicing lawyers. These creeds are aspirational statements which go above and beyond the minimum standards imposed by the MRPC<sup>52</sup> to encourage better relations and to minimize unnecessary resentment.

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50. See, e.g., *Parker Waichman LLP v. Salas LC*, 263 F. Supp. 3d 369, 375 (D. P.R. 2017) (“Attorneys who are admitted or permitted to practice before this Court are expected to be thoroughly familiar with the Model Rules’ standards.”).

51. J. Alexander Tanford, *The Ethics of Evidence*, 25 AM.J. TRIAL ADVOC. 487, 490 (2002); see also Xeris Gregory, *Ignorance is Not Bliss: Why More Than the Model Rules of Professional Conduct Are Necessary for Competency in the Legal Profession*, 42 J. LEGAL PROF. 243, 244 (2018) (elaborating on additional skills necessary for competent legal practice).

52. See *Professionalism Codes*, A.B.A. (Mar. 8, 2021), [https://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/profe](https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/profe)

Compliance with the District's Local Rules and the Creed of Professionalism is critical to resolving cases quickly and inexpensively because the purpose of such compliance is to avoid having the Court, which has a tremendously high case load, expend its resources on matters that should be resolved informally between counsel.<sup>53</sup>

For example, the Florida Bar's Creed of Professionalism is a model of brevity, and encapsulates the major points of other creeds extant in this country:

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

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

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit.

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ssionalism\_codes/ [https://perma.cc/FZQ4-J522] (listing some twenty-five state supreme courts, twenty state bar associations, fifty-two local and county bar associations, nine federal courts, and five national lawyer associations that have adopted creeds of professionalism).

53. *Lucero v. Citelum US, Inc.*, No. 1:18-cv-1088-WJ-SCY, 2019 WL 6877492, at \*2 (D.N.M. Dec. 17, 2019).



My word is my bond.<sup>54</sup>

So, a true professional:

- Reveres his/her profession;
- does not misstate, distort, or improperly exaggerate;
- acts with honor, integrity, and fair play;
- avoids rude, disruptive, disrespectful, and abusive behavior; and
- acts at all times “with dignity, decency, and courtesy.”<sup>55</sup>

While each of the lawyer creeds currently in place differ in detail, their general thrust is aimed at these principles while improving cordiality, cooperation, and collegiality among legal professionals. But they are all aspirational rather than mandatory, because “morality cannot be legislated.”<sup>56</sup> As a well-experienced lawyer has stated: “True professionalism cannot be legislated. Ethical conduct can be codified, but professionalism must come from within the lawyer.”<sup>57</sup>

Another commentator cogently stated:

In a profession where the pressures are already extreme, the marked increase in hostility, insolence, and vitriol is unsustainable to the advancement of justice.

. . . .

Sanctionable or not, incivility and gratuitous rancor is unnecessary and is counterproductive.

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54. *The Florida Bar Creed of Professionalism*, THE FLA. BAR <https://www.floridabar.org/prof/presources/creed-of-professionalism/> [https://perma.cc/43EF-79QN].

55. *Id.*

56. *See* *People v. James*, 415 N.Y.S.2d 342, 346 (N.Y. Crim. Ct. 1979) (“[M]orality cannot be legislated . . . .”); *State v. Charlton*, 746 S.W.2d 467, 469 (Tenn. Crim. App. 1987) (“Notwithstanding the maxim that morality cannot be legislated . . . .”). The more complete statement is attributed to Dr. Martin Luther King, who famously said, “Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless.” *Martin Luther King, Jr. Quotes*, ALL AUTHOR, <https://allauthor.com/quotes/104926/> [https://perma.cc/YEQ5-3NWX].

57. Alan Hunt, ‘*Professionalism Must Come from Within*,’ *Lawyers Told*, BAYLOR UNIV. (June 9, 2003), <https://www.baylor.edu/mediacommunications/news.php?action=story&story=5193> [https://perma.cc/2V4Z-QMQ9] (quoting respected Dallas attorney James “Blackie” Holmes).

....  
 Civility and professionalism cannot be legislated; it must be learned—and it takes practice. It also takes cultivating an ethos of civility by law firm partners, Bar leadership, and the Courts. Civility is good for you and for your client.<sup>58</sup>

Though professionalism creeds are necessarily aspirational, courts do on occasion cite them in dealing with unprofessional conduct on the part of lawyers appearing before them.<sup>59</sup> It would behoove all lawyers seeking a higher level of professionalism (and seeking to avoid the disapprobation of other lawyers and the courts) to investigate the existence of professionalism creeds in the bars and courts where one intends to practice, and to conform one's practice to the goals stated therein.

#### XI. ETHICS AND PROFESSIONALISM ARE THEOLOGICALLY BASED.

A lawyer is a professional—a member of a learned profession, with standards for admission and practice. A lawyer is bound to comply with the minimal requirements of the MRPC. A lawyer should be mindful of his/her oath of admission and applicable creeds of professionalism. But, the true professional will consider and live by overarching principles which apply integrally to the lawyer's entire life, both personal and professional. This brings a higher meaning to the words “ethical” and “professional.”

It is suggested that the Christian lawyer might base the foundation of his/her professional practice upon theological principles, i.e., mold one's professional pursuits on the same principles which govern the rest of one's life. Indeed, one's professional creed should be inseparable from that which apply to one's personal conduct.

One might start with the Old Testament in this roadmap for life found in the Book of Micah:

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58. Melanie M. Baillee, *Why Can't We Just Be Nice?*, IDAHO STATE BAR (Jan. 3, 2023), <https://isb.idaho.gov/blog/why-cant-we-just-be-nice/> [<https://perma.cc/2RHQ-BQG4>].

59. See *Hormel v. Maricopa Cnty.*, 232 P.3d 768, 775 (Ariz. Ct. App. 2010) (encouraging “a greater degree of courtesy and cooperation” between counsel); *Andren v. Dake*, 472 P.3d 1013, 1018 (Wash. Ct. App. 2020); *Gonzalez v. Quinco Elec., Inc.*, 171 So. 3d 153, 155 (Fla. 1st DCA 2015); *Andreas v. Impact Pest Mgmt., Inc.*, 157 So. 3d 442, 446 n.1 (Fla. 1st DCA 2015). Indeed, Arizona has made a violation of the Creed of Professionalism actionable. See *In re Martinez*, 462 P.3d 36, 43 (2020) (declaring unprofessional conduct as actionable).

He has told you, O mortal, what is good; and what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?<sup>60</sup>

So, let us start a possible list of considerations:

**(1) Do Justice—**

Place the ends of justice and right at the forefront of one's work.

Lawyers are an integral part of and essential to the administration of justice. As officers of the court, lawyers do not stand in the shoes of ordinary citizens. Lawyers must execute their professional responsibilities ethically and pursuant to rules, carefully considered, in order to ensure the confidence of both litigants and the public.<sup>61</sup>

**(2) Love Kindness—**

Be kind to clients, courts and court personnel, partners and office staff, opposing parties—AND opposing counsel.

Kindness is a quality that most of us were taught at an early age: “Treat others the way you would want to be treated”; “be nice to everyone”; “no act of kindness is ever wasted.” Clichés aside, one thing any young lawyer should quickly learn is the power and benefit of being kind. We all know (or, at least, hope) that extending a favor to opposing counsel, such as stipulating to an extension for a filing or continuance of a hearing, can go a long way toward receiving a favor from that counsel down the road. But the benefits of being kind don't stop at just other lawyers—we should be kind to *everyone*. You never know who will be in a position to help you, and if that person likes you, he or she will be much more likely to do so.<sup>62</sup>

**(3) Walk Humbly with God—**

Express and exemplify humility:

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60. *Micah* 6:8 (New Revised Standard Version).

61. *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991) (en banc) (internal citations omitted).

62. Nasir Hussain, *For Lawyers, Kindness is More Than a Virtue; It's a Requirement*, A.B.A. (Aug. 30, 2017), <https://www.americanbar.org/groups/litigation/committees/consumer/practice/2017/for-lawyers-kindness-is-more-than-a-virtue-its-a-requirement/> [https://perma.cc/X9W8-5Y9V].

“Humility leads to a balanced perspective and a focus on lawyering as just one of many callings an individual may have.” This is certainly a valid and meritorious statement that most lawyers should remember.<sup>63</sup>

Then, one naturally would turn next to the Beatitudes for a roadmap of life:

Blessed are the poor in spirit, for theirs is the kingdom of heaven. Blessed are those who mourn, for they will be comforted. Blessed are the meek, for they will inherit the earth. Blessed are those who hunger and thirst for righteousness, for they will be filled. Blessed are the merciful, for they will receive mercy. Blessed are the pure in heart, for they will see God. Blessed are the peacemakers, for they will be called children of God. Blessed are those who are persecuted for the sake of righteousness, for theirs is the kingdom of heaven. Blessed are you when people revile you and persecute you and utter all kinds of evil against you falsely on my account.<sup>64</sup>

**(4) *Be poor in spirit*—**

The person who lives by the Beatitudes is “poor in spirit,” which may be taken to mean, “recognizes his spiritual poverty, namely, that there is nothing of spiritual worth in himself alone, apart from God’s grace.” The person who is “poor in spirit” does not depend on himself or his own merit, but recognizes that anything within himself of any value in a spiritual sense has been given to him by God.<sup>65</sup>

**(5) *Mourn*—**

This is not limited to those who mourn for the death of family or loved ones.

Motives of mourning are not to be drawn from the miseries of a life of poverty, abjection, and subjection, which are the very blessings of verse 3, but rather from those miseries from which the pious man is suffering in

63. *The Humble Lawyer*, CAL. DESERT TRIAL ACAD. (May 13, 2023) <https://cdtalaw.com/cdta/the-humble-lawyer/> [https://perma.cc/3E34-A6NG].

64. *Matthew* 5:3–11 (New Revised Standard Version); *The Humble Lawyer*, *supra* note 63.

65. *Kingdom of the Poor*, ST. PAUL CTR. FOR BIBLICAL THEOLOGY (Jan. 31, 2011), <https://stpaulcenter.com/kingdom-of-the-poor/> [https://perma.cc/9LY8-DBST].

himself and in others, and most of all the tremendous might of evil throughout the world.<sup>66</sup>

So, it is a blessing to recognize one's sins, faults, and shortcomings, and then to regret them, to "mourn" for them.

**(6) Be meek—**

This does not mean to be a push-over, or to let others trample one's rights. Rather, it means to quell and subordinate personal interests to those of others. The meek "humbly and meekly bend themselves down before God and man."<sup>67</sup>

**(7) Hunger and thirst after righteousness—**

This means that one hungers and thirsts "after justice; a strong and continuous desire of progress in religious and moral perfection, the reward of which will be the very fulfilment of the desire, the continuous growth in holiness."<sup>68</sup> Of course, good lawyers will hunger and thirst for justice; that should be the lawyer's overriding goal.

**(8) Be merciful—**

In the context of a law practice, showing mercy should come naturally.

From this interior desire a further step should be taken to acting; to the works of "mercy", corporal and spiritual. Through these the merciful will obtain the Divine mercy of the Messianic kingdom, in this life and in the final judgment. The wonderful fertility of the Church in works and institutions of corporal and spiritual mercy of every kind shows the prophetic sense, not to say the creative power, of this simple word of the Divine Teacher.<sup>69</sup>

**(9) Be pure in heart—**

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66. *Beatitudes: Solemn Blessings Which Mark the Opening of the Sermon on the Mount*, CATH. ANSWERS TO EXPLAIN & DEF. THE FAITH, <https://www.catholic.com/encyclopedia/beatitudes> [<https://perma.cc/34EP-APZT>].

67. *Id.*

68. *Id.*

69. *Id.*

Purity of heart should be the aim of all feeling persons—though this is not a quality often associated with lawyers in the common thought.

[F]requently in the Old and New Testaments . . . the “pure heart” is the simple and sincere good intention, the “single eye” of Matt., vi, 22, and thus opposed to the unavowed by-ends of the Pharisees . . . This “single eye” or “pure heart” is most of all required in the works of mercy . . . and zeal . . . in behalf of one’s neighbor. And it stands to reason that the blessing, promised to this continuous looking for God’s glory, should consist of the supernatural “seeing” of God Himself, the last aim and end of the heavenly kingdom in its completion.<sup>70</sup>

#### **(10) Be a peacemaker—**

Again, this should be a lawyer’s preferred role. As Abraham Lincoln famously opined:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.<sup>71</sup>

#### **(11) Endure persecution—**

A lawyer’s life will include more than its share of persecution: strenuous and unjustified opposition and even slander from opposing counsel; unfortunate rulings from judges; and dissatisfaction from clients.

But the patient undergoing of persecution and trial is the summary of [the Beatitudes]. We find this beatitude in the longer eighth one. This is simply because if we are able to stand up under trial and misunderstanding and persecution, we will surely observe all the other beatitudes, rejecting a

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70. *Id.* (internal citations omitted).

71. See Mark. E. Steiner, *The Lawyer as a Peacemaker: Law and Community in Abraham Lincoln’s Slander Cases*, J. OF THE ABRAHAM LINCOLN ASS’N, Summer 1995, at 1, 2 (quoting ABRAHAM LINCOLN, FRAGMENT: NOTES FOR A LAW LECTURE (1850), reprinted in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 82 (Roy P. Basler ed., 1953)).

false happiness and embracing the goods of the active life and the final heavenly contemplative life.<sup>72</sup>

Perhaps St. Paul (himself a lawyer) was arguably speaking to lawyers when he summarized these rules for life in his letter to Titus:

Show yourself in all respects a model of good deeds, and in your teaching show integrity, gravity, and sound speech that cannot be censured, so that an opponent may be put to shame, having nothing evil to say of us.<sup>73</sup>

Lawyers should be models of good deeds, and exemplify integrity, gravity, and sound speech that cannot be censured.

## XII. CONCLUSION.

Being a lawyer is challenging and rewarding. One is called upon to represent clients when they are vulnerable and in need of a lawyer's expertise. A lawyer must therefore be knowledgeable about all the nuances of the substantive and procedural law. And a lawyer must recognize that he/she is not merely a technician, mechanically applying legal rules to factual settings. Every lawyer is a professional, and must be mindful of:

- (1) the requirements of the oath of admission;
- (2) the requirements of the Rules of Professional Conduct; and
- (3) the provisions of any applicable Creed of Professionalism in his/her particular jurisdiction.

But above all of these should be the lawyer's own moral compass, the inherent need to do justice, humbly, meekly, mercifully, and patiently. In this way, a lawyer can be a true professional.

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72. Hugh Barbour, *The Greatest Beatitude: All the Beatitudes Tell Us how to Find Happiness in Christ, but Only One Sums up All the Others*, CATH. ANSWERS TO EXPLAIN & DEF. THE FAITH <https://www.catholic.com/magazine/online-edition/the-greatest-beatitude> [<https://perma.cc/J4K8-BLJ6>].

73. *Titus* 2:7–8 (New Revised Standard Version).

