

2000

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Recommended Citation

Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 Fordham L. Rev. 757 (2000).

Available at: <https://ir.lawnet.fordham.edu/flr/vol69/iss2/8>

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ENFORCING COURTESY: DEFAULT JUDGMENTS AND THE CIVILITY MOVEMENT

Adam Owen Glist

“We have much less of a sense of shared values than we used to have. There was a common understanding of how you acted. You zealously represented your client, but you had respect for the other side and treated them with dignity. Afterward, you’d all go out for a drink.” Can we ever again achieve this level of professionalism? I hope so.¹

INTRODUCTION

Calls for more civility in the legal profession multiplied over the last decade or more.² Although concern over a “crisis in professionalism” may be a perpetual refrain of the bar,³ an array of jurisdictions—local

1. Stephen C. Rice, *President's Message: We Need to Come Together as a Profession*, Advocate (Idaho), Jan. 1998, at 4, 4 (quoting Dean Haynsworth of William Mitchell College of Law); see also John Gibeaut, *Nourishing the Profession: Report on Professionalism Calls for Ethics Training, Civility Rules in Court*, A.B.A. J., Jan. 1997, at 92, 92 (quoting same from Dean Haynsworth). This quaint description of lawyer fraternization, like so many other clichés, may originate with Shakespeare. See Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 Val. U. L. Rev. 531, 531 (1994) (quoting from The Taming of the Shrew: “And dō as adversaries do in law, strive mightily, but eat and drink as friends.”); see also Daniel J. Pope & Helen Whatley Pope, “Take Care of Each Other”, 63 Def. Couns. J. 270, 270 (1996) (“They regularly fought with one another in court . . . but just as regularly, they walked off arm in arm to share a beer and a good story.”).

2. See Dickson & Jackson, *supra* note 1, at 537 n.49 (identifying codes from 24 states enacted in the late 1980s and early 1990s); Sarah Diane McShea, *Taking and Defending Depositions: Special Ethical Issues*, 611 PLI/Lit 59, 61 (1999) (“Civility, as you hear at least once a week, ought to be one of the legal profession’s primary concerns.”); James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 Wake Forest L. Rev. 781, 782 (1997) (“Professionalism creeds are sweeping the nation.”); John Stuart Smith, *Civility in the Courtroom from a Litigator’s Perspective*, N.Y. St. B.J., May/June 1997, at 28, 28 (noting that 23 state bars have adopted civility codes); see also Clarence Thomas, *A Return to Civility*, 33 Tulsa L.J. 7, 11 (1997) (noting decline of civility in sports, politics, and academia, resulting in part from a view of the law as a tool for social and political change); Gary L. Johnson, *Role, Ritual and Civility in Litigation*, Utah B.J., Apr. 1999, at 12, 12-15 (calling for civility and increased attention to “ritual behavior”).

3. See Moliterno, *supra* note 2, at 781 (quoting similar-sounding alarm calls from the turn of the twentieth and twenty-first centuries); see also Marvin E. Aspen, *What We Can Do about the Erosion of Civility in Litigation*, Judges’ J., Fall 1996, at 32, 32 (quoting from Dean Roscoe Pound’s address to the American Bar Association in

bar associations, states, and federal circuits—swiftly adopted civility codes, standards, and creeds.⁴

Civility codes are aimed at a range of conduct thought to be at the root of growing lawyer dissatisfaction and diminishing public prestige.⁵ They seek to combat abuses that threaten to permeate civil litigation: lawyers who engage in obstreperous deposition tactics, conduct discovery calculated to harass, become obstinate over scheduling matters, or are quick to falsely accuse their adversaries of impropriety. Civility codes also aim at more basic failures: lawyers who fail to cooperate, act honestly, behave politely, or keep promises.⁶

Many of these simple pleas for increased civility might seem difficult to resist.⁷ The “professionalism crusade” is not without its detractors, however,⁸ and few disagree that “civility” is difficult to define.⁹ Nor are concerns about civility limited to the legal profession.

1906); Rhesa Hawkins Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. Rev. 573, 573 n.4 (1999) (citing cases concerning incivility dating from 1887).

4. See *infra* Part II.B. The array may be illustrated by a few cross-adopted codes. See, e.g., *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988) (sitting en banc to adopt mandatory “standards of litigation conduct” for the district, adapted from the Dallas Bar Association “Guidelines of Professional Courtesy” and “Lawyer’s Creed”); D.N.J. R. app. R (appending ABA Section of Litigation, *Guidelines for Litigation Conduct*, to local rules for the district); D.N.M. Civ. R. 83.9 (“Lawyers appearing in this District must comply with ‘A Lawyer’s Creed of Professionalism of the State Bar of New Mexico.’”).

5. See ABA Sec. of Litig., *Guidelines for Litigation Conduct*, Introduction, Lawyers’ Duties to Other Counsel (Aug. 1998) at <http://www.abanet.org/dispute/lawcivil.html> [hereinafter *ABA Guidelines*]; *infra* Part II.B.

6. See *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 414 (1992). The Committee proposed adopting “Standards for Professional Conduct” such as, “When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely.” *Id.* at 417.

7. E.g. *ABA Guidelines*, *supra* note 5, at Lawyers’ Duties to Other Counsel, No. 16 (“We will promptly notify other counsel and, if appropriate, the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.”); see discussion *infra* Part II.B.

8. See, e.g., Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 263 (1995) (providing “sympathetic” critique of movement); Phillip A. Wittmann, *MCLE Requirement in Professionalism? Should “Professionalism” Be Mandatory? Can Civility Be Taught?*, La. B.J., June 1997, at 19, 22-23 (arguing that professionalism is hard to define and cannot be taught, stating, “you know it when you see it—sometimes”); Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751, 765-79 (1994) (providing general critique of the civility movement’s assumptions and proposed solutions); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the ‘Civil’ War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. Dayton L. Rev. 151, 152-53 (1998) (arguing that civility codes do not achieve their stated aims).

9. Bruce A. Green, *The Ten Most Common Ethical Violations*, Litig., 48, 48 (1998) (noting that despite the attention devoted to the subject, the definition of civility may yet be unclear); Monroe Freedman, *Civility Runs Amok*, Legal Times, Aug. 14, 1995, at 54 (“Everyone is for civility and courtesy, but everyone is defining

The term, little analyzed, is invoked by the political left, right, and center.¹⁰

Critics of the movement in the legal profession object that civility codes add a confusing layer of responsibility to existing, under-enforced disciplinary rules.¹¹ Others argue that the notion of civility looks to a by-gone era that either did not exist, or should not: “a happily lost past.”¹² This critique recalls that, even in the “good old days,” the treatment of lawyers from outside of one’s “practice

those terms differently.”); Smith, *supra* note 2, at 28 (“[C]ivility, like beauty, may be in the eye of the beholder . . .”).

10. See generally Melinda Henneberger, *Bradley's Most Influential Adviser?* *Bradley*, N.Y. Times, Jan. 21, 2000, at A1 (quoting the former Democratic presidential candidate as saying, “I want to run a campaign as an extension of the way I want to govern, to restore trust and bring back civility”); *American Renaissance*, at <http://www.amren.com/pen-logo.htm> (last modified Feb. 16, 2000) (arguing against immigration and aiming to preserve an American white majority and publishing “[a] literate, undeceived journal of race, immigration, and the decline of civility”); *Americans for More Civility*, at <http://www.morecivility.com> (last modified Apr. 20, 2000) (urging that people, inter alia, “[s]mile more and complain less”); *Center for Communication and Social Policy: Civility Project & Clearinghouse*, at <http://www.ccspace.ucsb.edu/civil.htm> (last modified July 7, 1999) (describing Civility Project at the University of California, Santa Barbara, engaged in conducting, among other things, “a content analysis measuring civility in public affairs talk and interview shows [to measure], e.g., the rate of interruptions and the use of ad hominum argumentation”); The Interfaith Alliance, *Civility.net—Affirming the Need for Greater Civility in Society*, at <http://www.civility.net> (last modified Jan. 24, 2000) (urging fairer and more polite conduct from candidates for office, as well as an end to hate speech); Randall Kennedy, *State of the Debate: The Case Against ‘Civility’*, 41 *Am. Prospect Online* ¶¶ 1-4 (Nov.-Dec. 1998), at <http://www.prospect.org/archives/41/41kenn.html> (arguing that the larger movement for civility is confused and reactionary).

11. See Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, 13 *Geo. J. Legal Ethics* 427, 453 (2000) (“In practice, civility codes can cause confusion among the judiciary and the practicing bar, because it is not always clear when mandatory rules of professional conduct, as opposed to ‘aspirational’ statements of ideal conduct, are being applied.”); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 *Vand. J. Transnat’l L.* 1117, 1127 (1999) (“Lawyer discipline in the United States has always been an embarrassment.”)

12. Moliterno, *supra* note 2, at 808-14. See generally Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 *Val. U. L. Rev.* 657, 664 (1994) (criticizing civility codes as a “patrician reaction” to the increased pluralism of the bar). For examples of such nostalgia, see Sol Wachtler, *Law Day ‘90: Yes, Jessica, There are ‘Good’ and ‘Bad’ Lawyers*, N.Y. L.J., May 1, 1990, at 37, 37, who notes that “lawyers are employing tactics that would have been unthinkable a generation ago,” and Pope & Pope, *supra* note 1, at 270-71, who compare the declining collegiality among lawyers with the increased cooperation in professional sports. Some civility advocates appear to long for an even earlier era, as well as an entirely different culture. See, e.g., Mashburn, *supra*, at 695 (calling the allusions that civility promoters make to the English system “ironic” as that system is rigidly class-bound); Dennis Turner & Solomon Fulero, *Can Civility Return to the Courtroom? Will American Jurors Like It?*, 58 *Ohio St. L.J.* 131, 134, 169 (1997) (studying how American juries react to trials conducted in a more “civil atmosphere” by British barristers, and finding that although juries rated the British style more civil, they preferred the American).

cohort" was far from civil.¹³ Thus, to the extent that the warm memory of collegiality promoted by civility codes¹⁴ is not entirely imagined, social cohesion was achieved through force of exclusion by race, class, and gender.¹⁵

Finally, other commentators find the duties imposed by civility codes at odds with the lawyer's duty of zealous advocacy to the client.¹⁶ Promoters of civility have deemed one cause of incivility "overzealous advocates [who] seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout."¹⁷

This Note closely examines one feature of many civility codes that illustrates aspects of each of these critiques: the prohibition of seeking

13. See Moliterno, *supra* note 2, at 810.

14. See, e.g., *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988). The *Dondi* court declared:

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. . . . As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.

Id.

15. See Mashburn, *supra* note 12, at 666, 672-73; Moliterno, *supra* note 2, at 809-10. The American Bar Association, for example, did not officially admit black lawyers until 1943. See Charles W. Wolfram, *Modern Legal Ethics* § 1.4.2, at 10 (1986); see also Jerold S. Auerbach, *Unequal Justice* 40-73 (1976) (describing the maintenance of class differences among "the stratified profession"); Jerome E. Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* 176-82 (1966) (documenting significant social stratification of the bar based on class, ethnicity, and other differences). Professor Carlin suggests that social distance "deprofessionalizes" non-elite lawyers, inhibits reform, and restricts access to high quality legal services. *Id.* For an example of nostalgia imbued with implicit, unspoken issues of race, see Charles H. Wilson, *Planes, Trains and . . . Civility*, A.B.A. J., Jan. 1990, at 77, 77. Mr. Wilson tells a story from a time before air travel was common, and the Arkansas legal community was concentrated in Little Rock. *Id.* A Little Rock judge sat in Hot Springs every other Tuesday. On Monday afternoon, the judge and an entourage of lawyers would ride the same train from Little Rock, board at the same rooming house, and dine together in Hot Springs. The next day, after a court calendar complete with adversarial proceedings, the group would return to Little Rock together on the afternoon train. *Id.* While Mr. Wilson imagines the increased courtesy and civility that might result from such an arrangement, he fails to consider, in this story of public conveyance and accommodation, that Arkansas was most likely segregated at the time.

16. See, e.g., Freedman, *supra* note 9, at 54 ("And one of the principal casualties of these managerial judges [who enforce voluntary codes] is the American lawyer's traditional ethic of zealous representation."); see *infra* Part II.B.

17. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 *Stetson L. Rev.* 253, 253 (1998) (quoting Warren E. Burger, *The Necessity for Civility*, 52 *F.R.D.* 211, 213 (1971)).

default judgments against a known attorney adversary.¹⁸ Hesitating before seeking a default judgment is part of the “professional courtesy” which drafters of civility codes seek to revive.¹⁹ Professional courtesy dictates that before taking steps to obtain a default judgment, attorneys should provide other attorneys with extra notice above what is required by the procedural rules. With the prohibition against defaults, civility codes pit prized, incremental advantage against loyalty to professional colleagues. That advantage may be fleeting, if not self-defeating. Nonetheless, there may be times when the best course includes obliging one’s adversary to first appear before the court asking to set aside a default due to “excusable neglect.”²⁰

Part I of this Note describes the mechanics of the law of default judgments, how they are entered and the competing policies they implicate. Part II explores attempts to regulate defaults in cases and civility codes. Then, the part traces the origins of “professional courtesy” and its requirements from the Canons of Professional Ethics set out at the turn of the last century through the Model Code of Professional Responsibility and Model Rules of Professional Conduct. Part III argues that there are more effective ways to stop attorneys from seeking defaults they ought not seek. Part III first analyzes cases that have set aside defaults under increasingly liberal legal standards, without any reference to ethical ones. This part concludes that regulating defaults is ill-advised in light of superior methods to encourage better behavior, including liberal interpretation of existing law and the enactment of clear procedural rules that simply prohibit the defaults without notice that civility promoters lament. The result reduces potential interference with zealous advocacy, and frees the organized bar to better enforce existing disciplinary rules and address

18. See, e.g., American College of Trial Lawyers, *Code of Trial Conduct*, § 13(b) (1994), available at http://www.actl.com/home/publications_by_date/code_of_trial_conduct/code_of_trial_conduct.html. Section 13(b) provides: “When a lawyer knows the identity of a lawyer representing an opposing party, the lawyer should not take advantage of the opposing lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer’s intention to proceed.” *Id.*

19. Marvin E. Aspen, *Let Us Be ‘Officers of the Court’*, A.B.A. J., July 1997, at 94, 96 (quoting from the *ABA Guidelines*, *supra* note 5, at *Lawyers’ Duties to Other Counsel*, No. 18). The *ABA Guidelines* provide, “We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity, unless the rules provide otherwise.” *Id.*

20. Fed. R. Civ. P. 60(b); see discussion *infra* Parts I.A., III.A.2. The theoretical advantage may indeed be slight. See *Silverman v. Polis*, 326 A.2d 452, 454-55 (Pa. Super. Ct. 1974). That court condemned:

[A]ttempts to utilize every niggling procedural point for maximum advantage [that] demean the legal profession, reducing its procedures to a vulgar scramble. No doubt it is for this reason that in so many cases, notice of intent to take a default judgment, or the lack thereof, is properly made a significant factor in reaching a just decision.

Id. at 455.

more fundamental causes of lawyer dissatisfaction. Part III concludes that this approach—redefining “appearance” or revising procedural rules—is the best and most modern way to balance the competing policies of expediency and fairness implicated by default judgments.

I. DEFAULT JUDGMENTS: PROCEDURE

One practitioner recalls the words of a senior attorney in the small western city where he first set out to practice: “[Y]ou don’t default a colleague.”²¹ A retired state high court judge tells the story of a friend rebuked rather than rewarded for promptly moving for a default judgment in his first assignment as a law clerk for an older, well-respected trial lawyer.²² That lawyer quickly instructed the zealous novice, “We just don’t take defaults in these circumstances.”²³ Another judge advises that “in theory there may be opportunity to take a default or default judgment. Best to talk to opposing counsel, and inquire whether some extenuating circumstance exists.”²⁴ He continues, “You likely will make a friend of a fellow lawyer with whom you will be dealing for many years”²⁵

When do missed deadlines signal the forfeiture of legal rights, and when do they prompt a friendly phone call?²⁶ This part outlines the

21. Rice, *supra* note 1, at 4.

22. See Stewart F. Hancock, Jr., *Preparing Law Students and New Lawyers for the Year 2000 and Beyond*, N.Y. St. B.J., May/June 1997, at 12, 12.

23. *Id.* Hancock also tells of how his work on the Craco Commission, New York’s Committee on Professionalism and the Courts, made him realize that “[m]any lawyers were either not aware of or were simply ignoring the unwritten ‘[w]e just don’t do it this way’ code of professional conduct.” *Id.* at 13.

24. J. Thomas Greene, *Views from the Bench: How to be Effective and Contented in the Practice of Law*, Utah B.J., Dec. 1995, at 32, 35.

25. *Id.*

26. The extra time that should be afforded professional colleagues is in marked contrast to the effect of defaults in other contexts. For instance, in the criminal context, the doctrine of “procedural bar” or “procedural default” strictly limits the evidence and arguments that may be presented on collateral appeal when not made, or defaulted, at trial or on direct appeal. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (“This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment This rule applies whether the state law ground is substantive or procedural.” (citations omitted)); John H. Blume & Pamela A. Wilkins, *Death By Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. Rev. 1, 3 (1998) (reviewing South Carolina’s “draconian” procedural bar doctrine); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 630 (1999) (examining prohibition against providing Georgia juries with detailed information about alternatives to death penalty, such as life imprisonment without parole, and thereby inducing choice of “death by default”); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835, 1839-40 (1994) (describing death sentences imposed in cases of egregious failures of lawyering and evidentiary development that were impossible to correct on appeal due to procedural default). Similarly, courts increasingly impose the sanction of default for discovery delay. *See,*

mechanics of default judgment procedure—at first glance a straightforward area of procedural law.

A. Entry

Under the Federal Rules of Civil Procedure and many state rules patterned after them, obtaining a default judgment is a two-step process that begins with an entry of default.²⁷ The clerk may enter a party's default upon "fail[ure] to plead or otherwise defend."²⁸ This includes a defendant's failure to file any papers at all, or, after filing an appearance, failing to file an answer.²⁹ The language also includes failure to answer cross- or counter claims.³⁰ Entry of default is the clerk's certification that process was properly served and no response was filed.³¹ In a typical case, a "no-answer default,"³² the plaintiff may seek entry of default after the defendant fails to answer within 20 days.³³

The clerk's entry of default is an interlocutory order.³⁴ Rule 55(c) provides that the court may set aside an entry of default "for good cause shown."³⁵ Good cause is generally established by examining three criteria: "(1) whether the default was willful; (2) whether the moving party has presented a meritorious defense; and (3) whether setting aside the default would prejudice the party who secured the entry of default."³⁶ If the entry of default is not set aside, the complaint is deemed admitted. Further, *res judicata* may prevent the defendant from pressing a counterclaim.³⁷

B. Judgment

At any time after entry, a party may move for a judgment on the default.³⁸ If damages are liquidated and the party has not appeared,

e.g., *Kihl v. Pfeffer*, 722 N.E.2d 55, 58 (N.Y. 1999) (upholding dismissal for plaintiff's delay in responding to court-ordered disclosure).

27. Fed. R. Civ. P. 55(a).

28. *Id.*

29. See Mass. R. Civ. P. 55 reporters' notes.

30. See 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2682 (3d ed. 1998).

31. See Kenneth C. Broodo & Douglas D. Haloftis, *Practice in the Federal District Courts from the Law Clerk's Perspective: The Rules Behind the Rules*, 43 *Baylor L. Rev.* 333, 365 n.105 (1991).

32. *Costley v. State Farm Fire & Cas. Co.*, 894 S.W.2d 380, 383 (Tex. Ct. App. 1994).

33. See generally Fed. R. Civ. P. 12(a)(1)(A) ("[A] defendant shall serve an answer . . . within 20 days after being served with the summons and complaint")

34. See Mass. R. Civ. P. 55 reporters' notes.

35. Fed. R. Civ. P. 55(c).

36. *First Interstate Bank v. Serv. Stores of Am., Inc.*, 128 F.R.D. 679, 680 (W.D. Okla. 1989).

37. See *id.*

38. Fed. R. Civ. P. 55(b). The rules provide that a judgment by default may not

the clerk may enter that judgment, without notice to the defendant or a hearing.³⁹ If the party has appeared before defaulting, or if damages are not liquidated, the court must enter the judgment, holding a hearing if necessary.⁴⁰ The decision to grant a default judgment, notwithstanding a party's technical default, is discretionary.⁴¹ One court found that the plaintiff-appellant "cites no case in which a reviewing court reversed a failure to enter a default judgment."⁴² Even short of a default judgment, however, if the order of default is not set aside, a party may be prevented from defending the merits, leaving the amount of the final judgment the only issue to be determined.⁴³ Likewise, on appeal, a court may set aside the judgment, but not the entry of default, thereby preventing a defendant from filing a responsive pleading.⁴⁴

Rule 5(a) makes clear that "[n]o service need be made on parties in default for failure to appear."⁴⁵ Asking the clerk to enter a default does not require notice to the opposing party.⁴⁶ When proceeding to judgment, however, a party's appearance requires notice before application for judgment.⁴⁷

Once a clerk or judge has already entered judgment by default, the rules refer to the general rule of relief from judgment, Rule 60(b).⁴⁸ This rule provides for relief due to "mistake, inadvertence, surprise" and the like.⁴⁹ Entry of default will therefore be set aside with a lesser showing than that required for default judgment.⁵⁰

exceed that originally sought in the action. *Id.* at 54(c). Of course, if the defendant does not respond, and the plaintiff does not move for default, the action may be dismissed for want of prosecution. *Id.* at 41(b); Broodo & Haloftis, *supra* note 31, at 364-65.

39. Fed. R. Civ. P. 55(b)(1).

40. *Id.* at 55(b)(2).

41. See 10A Wright et al., *supra* note 30, § 2685; see also SEC v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998) (finding that a denial of motion to vacate default judgment is reversed only for an abuse of discretion).

42. Lindsey v. Prive Corp., 161 F.3d 886, 893 (5th Cir. 1998).

43. See Mass. R. Civ. P. 55 reporters' notes.

44. See Key Bank v. Tablecloth Textile Co., 74 F.3d 349, 356 n.13 (1st Cir. 1996); Ole, Inc. v. Yariv, 566 So. 2d 812, 813 (Fla. Dist. Ct. App. 1990) (setting aside entry of default after trial court set aside only the default judgment).

45. Fed. R. Civ. P. 5(a).

46. *Id.* at 55(a).

47. *Id.* at 55(b)(2) (requiring 3 days notice before hearing on application for judgment); 10A Wright et al., *supra* note 30, § 2684.

48. Fed. R. Civ. P. 55(c).

49. *Id.* at 60(b).

50. Davis v. Musler, 713 F.2d 907, 918 (2d Cir. 1983) (Van Graafeiland, J., concurring) (noting that the standard for setting aside an entry of default under Fed. R. Civ. P. 55(c) is more liberal than that for setting aside a default judgment under Fed. R. Civ. P. 60(b)); First Interstate Bank v. Serv. Stores of Am., Inc., 128 F.R.D. 679, 680 (W.D. Okla. 1989) (same).

Competing policies are at stake in the decision to set aside defaults or default judgments.⁵¹ The mechanism of default fosters efficiency and discourages delay by severely penalizing dilatory or procrastinating conduct.⁵² Defaults protect diligent parties.⁵³ The law also favors the finality of judgments.⁵⁴ Default judgments, of course, bind the parties just as if the matter were contested.⁵⁵ These “considerations of social goals, justice and expediency”⁵⁶ must be weighed against a strong policy favoring hearing matters on their merits, rather than according to “procedural maneuver.”⁵⁷ Indeed, the development of the Federal Rules of Civil Procedure relaxed the historic “harshness of defaults,”⁵⁸ and the “philosophy of modern federal procedure favors trials on the merits.”⁵⁹

As a result, entries of default and default judgments are routinely set aside. One standard has set out that “[a]ny doubt should be resolved in favor of setting aside a default,” as long as the default was not willful, no substantial prejudice will occur, and the defendant has a

51. See 10A Wright et al., *supra* note 30, § 2693.

52. See H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970).

53. See *id.*

54. See generally *Ledwith v. Storkan*, 2 F.R.D. 539, 544 (D. Neb. 1942) (holding that “[t]he vacation of a default judgment duly entered without fraud or overreaching, is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party,” and that, “even when he makes the showing [of mistake, neglect, surprise] required by the rule, his claim to relief is not absolute,” but discretionary).

55. See *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691-92 (1895). The Court explains:

It is said that the defendants did not contest; that they withdrew their answer, and that there was only a judgment by default. But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached. A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission. Suppose the defendant files a denial, and on the trial the only evidence is the testimony of a witness to an admission made by the defendant out of court, and upon such testimony the judgment is rendered. Is it any the less a judicial determination because resting simply upon proof of the defendant’s admission, and yet in principle what distinguishes that case from this? In each the judgment is resting upon an admission of the party against whom the judgment is rendered, and does it make any difference in what form that admission is presented to the judge?

Id.

56. *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990) (quoting *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970)).

57. *Sun Bank v. Pelican Homestead & Sav. Ass’n*, 874 F.2d 274, 276 (5th Cir. 1989).

58. 10A Wright et al., *supra* note 30, § 2681.

59. *Id.*; *Passarella v. Hilton Int’l Co.*, 810 F.2d 674, 675 (7th Cir. 1987) (quoting *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972)).

meritorious defense.⁶⁰ Under this standard, delay alone is not substantial prejudice,⁶¹ and "even a hint of a suggestion" of proof available at trial is enough to meet the showing of a meritorious defense.⁶² Default judgments are seen as "a weapon of last, rather than first, resort," imposed only "upon a serious showing of willful default."⁶³ Most courts hold that they should be imposed "only when the adversary process has been halted because of an essentially unresponsive party."⁶⁴

II. COURTESY AND CONDEMNATION

This part first explores several cases that condemn lawyers who seek default judgments without notice to their adversaries. This part then turns to the civility movement, and the codes and standards that prohibit or foreswear the use of such defaults. Then this part looks at early writings about professional courtesy at the outset of legal self-regulation, and the treatment of professional courtesy in modern ethics codes.

As seen above,⁶⁵ the law of default judgments appears to be straightforward. Flexibility is built into the language of the rules, allowing relief from entry for good cause, and from judgment for mistake or neglect. Nonetheless, throughout the case law governing these terms, there is a strain of judicial condemnation of some lawyers who file for default judgments, despite their procedural availability under the rules. "Snapping up a judgment," one court declared, "is a practice widely condemned by this and other Courts."⁶⁶ How does a simple procedural maneuver provoke such hostility, and lead judges to anguish over the doomed profession?

A. Snap Judgments

A few cases illustrate the question. In *First Interstate Bank v. Service Stores of America, Inc.*, the "snapping" lawyer, above, took an

60. *Morris v. Charnin*, 85 F.R.D. 689, 690 (S.D.N.Y. 1980) (citations omitted). The court found that the defendant's conduct did not constitute gross neglect, and "[f]urthermore, we are unable to find any legitimate reason for the failure of plaintiff's counsel to inform his adversary that the action had been commenced, or that a default on defendant's part seemed imminent." *Id.*

61. *See, e.g., Davis v. Musler*, 713 F.2d 907, 916 (2d Cir. 1983) ("[I]t must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." (citation omitted)).

62. *Keegel v. Key W. & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C. Cir. 1980) (citation omitted).

63. *Davis*, 713 F.2d at 916 (citations and internal quotation marks omitted).

64. *Sun Bank v. Pelican Homestead & Sav. Assoc.*, 874 F.2d 274, 276 (5th Cir. 1989) (quoting *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970)).

65. *See discussion supra* Part I.

66. *First Interstate Bank v. Serv. Stores of Am., Inc.*, 128 F.R.D. 679, 680 (W.D. Okla. 1989).

entry of default one day after the time to file an answer expired.⁶⁷ Counsel for defendant had just been retained one week earlier, and faced both an intervening holiday (Thanksgiving) and a family illness.⁶⁸ When the defendant moved under Rule 55(c) to set aside the entry of default, plaintiff's counsel contested.⁶⁹ The court found that "[c]onduct of this nature only reinforces stereotypical attitudes about the lawyer who plays 'hardball' at any cost."⁷⁰

In another case, a Pennsylvania appellate court addressed the tension between zealous advocacy and courtesy while reversing a refusal to vacate a default.⁷¹ The court reversed in part for failing to consider the negative equities presented, including plaintiff's lack of courtesy in moving for default and failing to return phone calls or cooperate.⁷² The court declared that:

The purpose of the rules in authorizing the entry of default judgments is to prevent a dilatory defendant from impeding the plaintiff in establishing his claim. The rules are not primarily intended to provide the plaintiff with a means of gaining a judgment without the difficulties which arise from litigation. . . . Without the rudimentary amount of courtesy or accession to reasonable requests, the legal profession is demeaned and its procedures reduced to a "vulgar scramble" Zeal, while admirable, must be tempered by decency.⁷³

In *Miro Tool & Manufacturing, Inc. v. Midland Machinery*, a Wisconsin appellate court reversed a trial court order reopening a default after the one-year statutory period.⁷⁴ The trial court had vacated the default because the defendant relied on representations that the plaintiff would not pursue the judgment.⁷⁵ While the appellate court reversed due to a clear statutory limit on the trial court's discretion,⁷⁶ the presiding judge wrote a lengthy concurrence to

67. *Id.*

68. *Id.*

69. *Id.* The court condemned this appeal of the denial to vacate as frivolous and unprofessional. *Id.* at 680-81.

70. *Id.* at 680.

71. *Duckson v. Wee Wheelers, Inc.*, 620 A.2d 1206 (Pa. Super. Ct. 1993). For more on the tension between zealous advocacy and civility, see Edward M. Waller, Jr., *Professionalism: The Client May Come Second*, 28 *Stetson L. Rev.* 279, 279 n.3 (1998), who notes that the decision whether to seek a default is procedural, not substantive, and thus is within control of the lawyer rather than the client. See also *Gulf Maint. & Supply, Inc. v. Barnett Bank*, 543 So. 2d 813, 816 (Fla. Dist. Ct. App. 1989) (accepting the view that a decision whether to vacate a default when requested by opposing counsel is procedural, not substantive, and thus within the control of the attorney).

72. See *Duckson*, 620 A.2d at 1212.

73. *Id.* (citations omitted).

74. See *Miro Tool & Mfg., Inc. v. Midland Mach., Inc.*, 556 N.W.2d 437, 438 (Wis. Ct. App. 1996).

75. See *id.* at 438-39.

76. If the court were to find this statutory authority outweighed by the duty of

“lament the untimely demise of common courtesy in the legal profession.”⁷⁷

Counsel in *Miro Tool* did not “warn opposing counsel that a default judgment would be taken.”⁷⁸ Although the concurrence found that counsel “cannot be faulted for complying with the technical requirements of the Rules,” the court proceeded to do just that, despite acknowledging that Wisconsin had no reported cases on the ethical obligation to give additional notice to opposing counsel that a default is “close at hand.”⁷⁹ The opinion identified some illustrative support for a requirement of courtesy in California case law.⁸⁰ However, that authority similarly upheld a discretionary denial of relief, while “decry[ing] this lack of professional courtesy.”⁸¹

The *Miro Tool* concurrence quoted at length from a law review article about civility.⁸² Although noting that counsel’s failure to notify is not the same as calling an opponent an “asshole,”⁸³ the presiding

professional courtesy, a small matter of the separation of powers might arise. Court rules, as statutory commands, raise questions of separation of powers and appropriate construction in the debate within *Pioneer Investment Service Co. v. Brunswick Associates*, 507 U.S. 380 (1993). The majority concludes that “by empowering the courts to accept late filings ‘where the failure to act was the result of excusable neglect’ . . . Congress plainly contemplated that the courts would . . . accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Id.* at 388. The dissent warned that “[w]hen courts depart from the language of a congressional command, they often create unintended difficulties in the process.” *Id.* at 409 (O’Connor, J. dissenting).

77. *Miro Tool*, 556 N.W.2d at 440 (Anderson, J., concurring).

78. *Id.* at 441.

79. *Id.*

80. See *Bellm v. Bellia*, 198 Cal. Rptr. 389, 390 (Cal. Ct. App. 1984).

81. *Miro Tool*, 556 N.W.2d at 442 (quoting *Bellm*, 198 Cal. Rptr. at 390).

82. See *id.* (“[T]he cardinal virtues have been either taken for granted or overlooked . . . [which] partially explains what others perceive as a fairly pervasive breakdown in contemporary legal professionalism.” (quoting Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 St. Thomas L. Rev. 113, 118 (1995))). Reliance on this scholarship may be misplaced. Professor Aaronson hopes to move discourse about civility beyond “superficial,” “behavioral” standards that lack “moral suasion”—such as, perhaps, the prescription to provide extra notice to colleagues—to a deeper level rooted in the classical sense of civility as good citizenship. Aaronson, *supra*, at 115-17.

83. *Miro Tool*, 556 N.W.2d at 442. In light of the rather dry procedural issue at stake in this case, the court’s use of profanity, *sua sponte*, may belie a contamination by the coarseness it purports to reject. A similar process may be at work in others who write about civility and, who oddly, almost pruriently, repeat, at length, the violation of the norm. See, e.g., John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 Minn. L. Rev. 505, 583 (2000) (noting extensive publicity and reproducing the outrageous deposition conduct in *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994)); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 Md. L. Rev. 273, 295, nn.114-23 (1998) (quoting from and repeating same). A Westlaw search shows 20 articles that quote the more graphic moments of this deposition. Search of Westlaw, TP-ALL database (Sept. 10, 2000) (search for “gag/3 maggot”).

judge found the behavior nonetheless "symptomatic of the decline of civility in the legal profession."⁸⁴

The Supreme Court of Alaska, in *Valdez v. Salomon*, accepted a provision of the American College of Trial Lawyer's Code of Trial Conduct that prohibits taking defaults without additional notice.⁸⁵ The Alaska court cited this provision, as well as the Code of Professional Responsibility's mandate to follow customs of courtesy, in reversing a trial court's refusal to set aside a default judgment.⁸⁶ The plaintiff in *Salomon* had received a letter from the city attorney asking to be notified if the city's insurer did not appear, in order to avoid default.⁸⁷ The court concluded that the plaintiff was entitled to rely on the defendant for notice.⁸⁸

Later, in *Cox v. Nasche*,⁸⁹ the Alaska federal district court sanctioned the plaintiff's attorneys for resisting a motion to vacate a default that had been entered without notice.⁹⁰ The court, referring to the lawyers by pseudonyms to protect them from further public censure, ordered the lawyers to pay attorney fees for their "unnecessary motions or unwarranted opposition to motions."⁹¹ Plaintiff's lawyers had a default entered shortly after the defendants removed the case to federal court, clearly signaling their intention to defend.⁹² Attorneys Doe and Roe proceeded to vigorously resist the defendant's motion to set aside the default, claiming that "substantial attorney's fees and costs have been incurred in moving for entry of default and default judgment."⁹³ The attorneys unsuccessfully defended against the court's sanction by asserting that zealous advocacy, and even fear of malpractice, motivated their conduct.⁹⁴ The court reiterated that the purpose of default is to "prevent a procrastinating defendant from unduly delaying a case," and that the lawyers proceeded in bad faith and with "no hope of success."⁹⁵ The court nonetheless noted that it does "not impose sanctions

84. *Miro Tool*, 556 N.W.2d at 442.

85. See *Valdez v. Salomon*, 637 P.2d 298, 299 (Alaska 1981). Provision 14(a) of the Code (1971-72) provided that "[w]hen [a lawyer] knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed." *Id.*

86. See *id.* at 299 n.1; Model Code of Prof'l Responsibility EC 7-38, DR 7-106(C)(5) (1983).

87. *Salomon*, 637 P.2d at 298-99.

88. *Id.* at 299; see also *Nev. Indus. Guar. Co. v. Sturgeon*, 391 P.2d 862, 864 (Nev. 1964) (Thompson, J., concurring) (warning that "silence may lead opposing counsel to rely upon an assumption that professional standards will be followed").

89. 149 F.R.D. 190 (D. Alaska 1993).

90. *Id.* at 191.

91. *Id.*

92. *Id.*

93. *Id.* at 192.

94. *Id.* at 193.

95. *Id.* at 192 (citing *Valdez v. Salomon*, 637 P.2d 298 (Alaska 1981)).

regularly,"⁹⁶ and found that "incivil attorneys are far fewer than public fears might suggest and adverse publicity might indicate."⁹⁷

These cases display the application of largely unwritten rules⁹⁸ to sanction procedural tactics viable on their face. While it is difficult to defend the tactics criticized in these cases, it is easier to discern that discourtesy is not at all the most serious misconduct at issue. The results may have been clearer and more powerful if the lawyer in *First Interstate Bank* faced sanctions for frivolously contesting the order vacating entry of default; the lawyers in *Miro Tool* and *Salomon*, for deceiving opposing counsel.⁹⁹

In fact, the court in *Cox* follows such an alternative path, steering clear of ethical and customary precepts, by necessity.¹⁰⁰ Since the District of Alaska had not adopted the Alaska Code of Professional Responsibility by local rule, the court made it clear that it was "not sanctioning Doe for failure to give notice before seeking the entry of default . . . [and was] not adopting the rule of *Salomon* by court decision and then applying it retroactively."¹⁰¹ Instead, the court used an array of authority that included its inherent power, Rule 11, and 28 U.S.C. § 1927 to sanction Doe and Roe.¹⁰²

B. Civility Codes

The civility movement is commonly dated to 1971, to remarks by then Chief Justice Warren Burger.¹⁰³ Reacting to the roiling political passions of that era, Burger told the opening session of the annual American Law Institute meeting:

With passing time I am developing a deep conviction as to the necessity for civility if we are to keep the jungle from closing in on us and taking over all that the hand and brain of Man has created in thousands of years, by way of rational discourse and in deliberative processes, including the trial of cases in the courts.¹⁰⁴

Burger reiterated his concern about a decline in professionalism at the mid-year meeting of the American Bar Association in 1984, and his call for a study group on the issue led to the ABA Commission on Professionalism report, *In the Spirit of Public Service: A Blueprint for*

96. *Id.* at 197.

97. *Id.* at 194.

98. See Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 *Clinical L. Rev.* 127, 154 (1999).

99. See, e.g., Fed. R. Civ. P. 11; see also 28 U.S.C. § 1927 (1994) (providing for liability for costs incurred by an attorney who "multiplies the proceedings in any case unreasonably and vexatiously").

100. *Cox*, 149 F.R.D. at 192 n.2.

101. *Id.*

102. *Id.*

103. See Aspen, *supra* note 17, at 254; Smith, *supra* note 2, at 28.

104. Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 212 (1971).

the Rekindling of Lawyer Professionalism.¹⁰⁵ The report observed the move from the Canons of Professional Ethics, aspirational statements that relied on the rough outlines of a “not-too-demanding conscience,” to the more demanding Model Rules, noting that lawyers “tend to look at nothing but the rules.”¹⁰⁶ The report encouraged local bar associations to draft creeds of professionalism.¹⁰⁷

A significant development in the ensuing creation of these gap-filling codes was the *Report of the Committee on Civility of the Seventh Federal Judicial Circuit*.¹⁰⁸ The Committee, headed by Chief Judge Marvin E. Aspen of the Northern District of Illinois, proposed “Standards for Professional Conduct” that have been widely adopted.¹⁰⁹ Drawing on sources including the American College of Trial Lawyers Code of Trial Conduct, the ABA adopted the Standards in 1998, with little modification, as “proven aspirational standards.”¹¹⁰

In an article addressed in part to Monroe Freedman and other “civility naysayers,” Judge Aspen defended civility codes against

105. 112 F.R.D. 243 (1986); see Moliterno, *supra* note 2, at 795 (citing *Mid-Year Meeting of A.B.A.*, 52 U.S.L.W. 2471, 2471 (1984)); see also Warren E. Burger, *The Decline of Professionalism*, 63 *Fordham L. Rev.* 949, 953 (1995) (decrying “Rambo” lawyers and noting that “[c]ivility is imperative in the courtroom . . . [and] an essential element of the fair administration of justice”).

106. ABA Comm’n on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. at 259.

107. *Id.* at 296-97. The report recommended “all segments of the bar” should: Resolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.

Surely, it is not too much to call on the American Bar Association and its members to reach for such a goal. The minimum standards are important, indeed essential, to uphold; but leadership, example and inspiration are needed as well. We call on the American Bar Association to provide the leadership and the example, which in turn will provide the inspiration.

Id. Professor Moliterno has remarked on the circularity of this return to earlier, pre-regulatory writings about professionalism. See Moliterno, *supra* note 2, at 796 (citing, e.g., David Hoffman, *A Course of Legal Study* (1836)).

108. 143 F.R.D. 371, 414 (1992); see Aspen *supra* note 17, at 254. A more thorough analysis of this history might identify Judge Aspen as a prime “marketer” of civility. One commentator has written that “[c]ivility in the profession do not just happen; they are ‘created’ and marketed by particular segments of the bar.” Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 *Fordham L. Rev.* 809, 809-10 (1998).

109. See, e.g., D.N.J. R. app. R (adding to local rules the *Guidelines for Litigation Conduct*, including the duty not to seek a default against a known attorney adversary); N.D. Ind. R. app. B (appending Standards for Professional Conduct); E.D. Mich. R. Civility Principles (same).

110. See *Code of Trial Conduct*, *supra* note 18; *ABA Guidelines*, *supra* note 5, at Introduction. The Seventh Circuit Committee noted that “the majority of the survey respondents did not rank such a code at the top of their recommended solutions,” but “the Committee determined that a specification of civility expectations and commitments would be very useful.” *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 417 (1992).

claims that they inhibit zealous representation and inevitably will be enforced rather than remain aspirational.¹¹¹ To do so, Judge Aspen reviewed several cases citing the Standards, including one concerning the improper entry of default.¹¹² In *Vlotho v. Hardin County*, the defendant county obtained a default on a counterclaim against the plaintiff, a contractor who had destroyed an historic bridge.¹¹³ The court found that it could not “ignore the manner in which this default was taken.”¹¹⁴ The court cited the Seventh Circuit’s Standard providing that “[w]e will not cause any default or dismissal to be entered without first notifying opposing counsel.”¹¹⁵ In his article, Judge Aspen applauds the court, which found that the default was clearly improper because a clerk may not enter defaults on counterclaims.¹¹⁶ Judge Aspen called the county “underhanded,” in its *ex parte* and improper application to the clerk.¹¹⁷ The move may have been aggressive, but it is hard to deem it evil; the same maneuver would have been allowed under the rules in federal court.¹¹⁸

This demonstrates another problem that inhibits the efficacy of civility codes—their patchwork application across jurisdictions. One example is the disclaimer added by the ABA Section of Litigation version of the Seventh Circuit’s Standards. The ABA version

111. Aspen, *supra* note 17, at 256-57. Professor Freedman has written extensively about, and, on behalf of, the adversary system. See Monroe H. Freedman, *Lawyers’ Ethics in an Adversary System* viii-ix (1975); Monroe H. Freedman, *Understanding Lawyers’ Ethics* 13-42 (1990); Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 *Emory L.J.* 467, 470 (1992) (defining professionalism as including the obligation to “zealously and competently use all lawful means to protect and advance the client’s lawful interests”). Judge Aspen notes that Freedman counted the adoption of over 100 civility codes in Monroe Freedman, *Civility Runs Amok*, *Legal Times*, Aug. 14, 1995, at 14. Aspen, *supra* note 17, at 257.

Those concerned about the inappropriate judicial enforcement of civility may take comfort in a recent Second Circuit decision overturning lower court sanctions against an incivil attorney. *Revson v. Cinque & Cinque*, 221 F.3d 71, 71 (2d Cir. 2000). The district court imposed a \$50,000 sanction against an attorney for a course of abusive conduct which included threatening his adversary with “the legal equivalent of a proctology exam” unless he immediately settled. *Id.* at 73, 75. The district court relied on its inherent power and 28 U.S.C. § 1927 (1994), but referred to the larger problem of civility in litigation in what the appeals court called a “lengthy discussion” of the issue. *Id.* at 77. While the court of appeals did note “the general decline in the decorum level of even polite public discourse,” the court oddly mused that the attorney’s remark would not have garnered such attention if it had referenced an MRI or a CAT scan, and concluded that, though some of the conduct lacked “grace and civility,” none of it was sanctionable. *Id.* at 79.

112. See *Vlotho v. Hardin County*, 509 N.W.2d 350 (Iowa 1993).

113. See *id.* at 351.

114. *Id.* at 352.

115. *Id.* at 353. In 1996, the Iowa Supreme Court followed that state’s bar association and adopted the Seventh Circuit’s Standards for Professional Conduct, with two slight additions. See *Iowa Standards for Prof’l Conduct*.

116. See *Vlotho*, 509 N.W.2d at 353; see also Iowa R. Civ. P. 230-31 (providing that clerk may enter default, but not on counterclaims).

117. See Aspen, *supra* note 17, at 261.

118. See Fed. R. Civ. P. 55(a), (d); *supra* Part I.

promises not to enter a default “without first notifying opposing counsel, when we know his or her identity, *unless the rules provide otherwise.*”¹¹⁹ Of course, a guideline is only needed when procedural rules do provide otherwise. If the rules prohibit entry without notice, no guideline is necessary. The standard has been revised to a nullity.

C. *Early Writings on Professional Courtesy*

Early writings on the nature and content of professional courtesy are instructive. A number of contemporary writers carelessly use the phrase as synonymous with “common courtesy.”¹²⁰ Professional courtesy was traditionally conceived as governing matters “[a]side from the conventional rules that regulate the conduct of gentlemen between themselves . . . which arise out of . . . and are peculiar to the attorney’s office.”¹²¹ Professional courtesy focuses on relations within the profession, and is not extended to lay people.¹²² Today, professional courtesy applies narrowly to contexts such as initial default judgments and cooperation over scheduling matters.¹²³ At one time, however, professional courtesy dictated that lawyers not charge one another for services.¹²⁴

George Warvelle, an early commentator, described the courtesies primarily as scheduling accommodations, favors that ought to be granted, but noted that “no ethical obligation requires it.”¹²⁵ He

119. *ABA Guidelines*, *supra* note 5, at Lawyers’ Duties to Other Counsel, No. 18 (emphasis added).

120. See, e.g., Marilyn Lindgren Cohen, *A Case for Civility: Some Good Reasons Lawyers Need to Show a Little Common Courtesy*, Or. St. B. Bull. 33, Aug./Sept. 1995, at 33, 33.

121. George W. Warvelle, *Essays in Legal Ethics* § 316 (1920).

122. See *Fox v. Mellon*, 264 A.2d 623, 627 (Pa. 1970) (Pomeroy, J., dissenting) (arguing that trial court did not abuse its discretion in refusing to set aside default, but that, in light of professional courtesy, “[h]ad there been counsel for defendant in the picture here, even informally, the case would be entirely different.”)

123. Cf. *Seabrook Med. Sys., Inc. v. Baxter Healthcare Corp.*, 164 F.R.D. 232, 233 (S.D. Ohio 1995) (“[A]s a matter of professional courtesy, and as a means to avoid future scheduling conflicts . . . counsel for both sides should jointly call the third-party deponent to schedule that party’s deposition. . . . [Or] counsel for both sides should contact each other and jointly agree to a deposition date. Only then should the deposition subpoena issue. What needs to occur is quite simple: counsel should discuss and agree to a deposition date before the issuance of the subpoena, not after.”); John Caher, *Attorney Sanction for Ex Parte Order Reversed*, N.Y. L.J., Jan. 21, 2000, at 1 (reporting on the reversal of a sanction against an attorney who obtained an ex parte order in a custody matter, despite seeing opposing counsel at the courthouse, which, according to the court in *In re Matter of Frank “M” v. Siobahn “N”*, 702 N.Y.S.2d 409 (App. Div. 2000) showed a lack of professional courtesy but did not merit sanction).

124. See *Graydon v. Stokes*, 24 S.C. 483, 486 (1886) (acknowledging local “courtesy” in certain localities in regard to services between attorneys, but finding that “the moment the parties, from any cause whatever, stand upon their rights, there can be no such thing as courtesy in the case”); Warvelle, *supra* note 121, § 322 (acknowledging that attorneys should not charge for slight services to one another).

125. Warvelle, *supra* note 121, § 316.

continued that "in the few cases where bar associations have ventured to express an opinion it has generally been left in the discretion of counsel."¹²⁶ Warvelle also noted that, although it is counsel's province to make procedural decisions,¹²⁷ the client also has the "right to have his cause tried at the time set; to have adverse pleadings filed within the time allowed; and to insist that his attorney shall take every legal advantage the case may afford."¹²⁸ This succinct statement of contrasting responsibilities raises the same question today:¹²⁹ To what extent should the virtues of professional courtesy mitigate the duty of zealous advocacy to the client?¹³⁰

Canon 25 of the Canons of Professional Ethics, adopted by the American Bar Association in 1908, styled the matter as one of "taking technical advantage" of one's opponent.¹³¹ The Canons treated observing known customs together with honoring oral agreements with opposing counsel.¹³² This identifies one strain of court disapproval for taking defaults—that there is an implicit misrepresentation involved when one attorney does not inform another of an impending default.¹³³ This implicit affirmative duty contrasts with the lack of any duty to inform opposing counsel, for instance, that a claim being negotiated for settlement is actually barred by the statute of limitations.¹³⁴

126. *Id.*

127. See Canons of Prof'l Ethics Canon 24 (1908) (Right of Lawyer to Control the Incidents of the Trial).

128. Warvelle, *supra* note 121, § 317.

129. Balance between zeal and duties to the court and colleagues has long occupied the bar. See David Hoffman, A Course of Legal Study 752 (1836) ("I will never permit professional zeal to carry me beyond the limits of sobriety and decorum . . .").

130. See *supra* Part II.B.

131. See Canons of Prof'l Ethics Canon 25 (1908) (Taking Technical Advantage of Opposite Counsel; Agreements With Him).

132. *Id.*

133. The misrepresentation at issue in Canon 25 is whether or not a particular custom will be followed. When the custom is not to take a default, despite its availability under the rules, deviating requires notice. See Canons of Prof'l Ethics Canon 25 (1908); *Fox v. Mellon*, 264 A.2d 623, 627 (Pa. 1970) (Pomeroy, J., dissenting); see also *Nev. Indus. Guar. Co. v. Sturgeon*, 391 P.2d 862, 865 (Nev. 1964) (Thompson, J., concurring) (finding no conflict between duty to client and the duty to inform opponent of "an honest statement of intention" to seek a default.)

134. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 387 (1994). This opinion finds no duty of candor, barring any affirmative misrepresentation. Filing a suit knowing it is barred by the statute of limitations is not an ethical violation. *Id.* pt. II. ("[T]he whole point of an adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponents" (quoting Hazard & Hodes, *The Law of Lawyering*, § 3.1: 204-2 (1992 Supp.))); ABA Comm. on Prof'l Ethics, Informal Op. 694 (1963) (citing the duty under Canon 15 to assert "every remedy" and put opponent's defense to the test, who may for some reason not wish to raise it); *Fox*, 264 A.2d at 627-28 (Pomeroy, J., dissenting) (noting that limitations is an affirmative defense that may be waived). This is a long way from Hoffman's *Resolutions in Regard to Professional Department*. Resolution XII provided "I will never plead the Statute of Limitations . . . for if my

D. *Courtesy in Modern Ethics Codes*

The Model Code of Professional Responsibility was drafted after the "general aspirational approach of the Canons proved to be outmoded."¹³⁵ The Code is primarily a mix of mandatory "Disciplinary Rules" and aspirational "Ethical Considerations."¹³⁶ Canon 25 was directly incorporated in the provisions of Canon 7, both as mandatory and aspirational.¹³⁷ The Code's division resulted in some confusion about the force of these aspirational principles. Some of the aspirational standards, for example, could serve just as well as prescriptive rules, and the converse is true for some of the mandatory standards.¹³⁸ After the Model Code was developed, some jurisdictions, wary of confusing binding and non-binding obligations, adopted only the Disciplinary Rules.¹³⁹

Canon 7 of the Model Code of Professional Responsibility requires that a lawyer should "represent a client zealously within the bounds of the law."¹⁴⁰ Ethical Consideration ("EC") 7-10 provides that zeal does not reduce a lawyer's "concurrent obligation" to treat others with "consideration."¹⁴¹ EC 7-38 advises that a lawyer should be courteous, and should agree to reasonable requests that do not impair a client's interests.¹⁴² Tracking the language of the Ethical Considerations, Disciplinary Rule ("DR") 7-101 indicates, in the negative, that a lawyer does not fail to act zealously by avoiding "offensive tactics" and embracing "courtesy."¹⁴³ More clearly, DR 7-106(C)(5) mandates that a lawyer shall not "fail to comply with known local customs of courtesy" without proper notice.¹⁴⁴ This provision was not carried over into the Model Rules, as it was found to be "too vague to be a

client is conscious he owes the debt... he shall never make me a partner in his knavery." Hoffman, *supra* note 129, at 754.

135. Professional Responsibility Standards, Rules & Statutes 494 (John S. Dzienkowski ed., 1999).

136. Model Code of Prof'l Responsibility, Preliminary Statement (1983).

137. See Model Code of Prof'l Responsibility Canon 7, EC 7-38, DR 7-106(C)(5) (1983), *reprinted in* Dzienkowski, *supra* note 135, at 464 n.64, 468 n.84. The footnotes in the original ABA Model Code cite Canon 25 for the provisions in EC 7-38 and DR 7-106(C)(5), although the footnotes are not intended to indicate Committee intent. *Id.* at 385 n.1.

138. See Wolfram, *supra* note 15, § 2.6, at 58-59; see, e.g., Model Code of Prof'l Responsibility EC 7-4 ("[A] lawyer is not justified in asserting a position in litigation that is frivolous.").

139. See Wolfram, *supra* note 15, § 2.6, at 58 n.54. Wolfram presumes that the decision to make a standard binding or non-binding reflected its questionable wisdom or difficulty in application. *Id.* § 2.6, at 59 n.58.

140. Model Code of Prof'l Responsibility Canon 7, EC 7-1 (1983). The references to "EC" or "DR" that follow are to the Model Code of Professional Responsibility.

141. *Id.* at EC 7-10.

142. *Id.* at EC 7-38.

143. *Id.* at DR 7-101(A)(1).

144. *Id.* at DR 7-106(C)(5).

rule of conduct enforceable as law."¹⁴⁵ Courts in Rule states¹⁴⁶ have read a requirement of professional courtesy into Rule 8.4(d), however, finding that failing to act with professional courtesy is "prejudicial to the administration of justice."¹⁴⁷

In what appears to be the most thorough treatment of DR 7-106(C)(5) in the case law, the Supreme Court of Oregon developed a detailed interpretation of "known local customs of courtesy."¹⁴⁸ The court increased a recommended thirty-day suspension from practice to sixty-three days for "the worst sort of sharp practice."¹⁴⁹ Attorney Porter, the court agreed, misrepresented to opposing counsel that he would not seek a default, by a letter stating: "I anticipate no problems in allowing extra time for your appearance."¹⁵⁰ Six weeks later, Porter sought and received entry of default, then unsuccessfully resisted when defendant immediately moved to set it aside.¹⁵¹

Finding a violation of DR 1-102(A)(3)'s prohibition of "conduct involving dishonesty, fraud, deceit or misrepresentation," the court then explored DR 7-106(C)(5), noting that "the accused's misrepresentation so overshadows any finding that we might make as

145. Model Rules of Prof'l Conduct R. 3.4 (Model Code Comparison 5) (1983). Several cases show the difficulty of proving a "local custom of courtesy." See *In re Schiff*, 542 S.W.2d 771, 775 (Mo. 1976) (upholding discipline for deceit but deeming the testimony of several attorneys about the practice of notice before taking default judgments "equivocal" and refusing to find violation of DR 7-106(C)(5)); *Inv. Bankers of Am., Inc. v. Schools*, 178 A.2d 325, 326 (D.C. 1962) (stating "[w]e know of no rule that required plaintiff's attorney to notify defendant's attorney that default judgment had been taken . . . [and] while professional courtesy might have suggested [it], he was under no duty to do so"); see also *Seabrook Med. Sys., Inc. v. Baxter Healthcare Corp.*, 164 F.R.D. 232, 233 (S.D. Ohio 1995) (noting that "[t]he Court has no way of knowing whether such calls [to coordinate scheduling depositions] are, in fact, routine practice, but believes they should be in this and all other cases"). The Model Rules similarly did not retain the Code's exhortation to avoid "offensive tactics" while zealously advancing the client's interests. See Model Code of Prof'l Responsibility DR 7-101(A)(1), EC 7-37 (1983).

146. About forty-one states have adopted (and adapted) the Model Rules. See Daly, *supra* note 11, at 1137 n.87 (citing *Laws. Manual on Prof'l Conduct* (ABA/BNA) 01:03-01:04 (1999)).

147. *Smith v. Johnston*, 711 N.E.2d 1259, 1264 n.7 (Ind. 1999) (citing *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 422 n.9 (7th Cir. 1998)). In *Grun*, the court disapproved of counsel's failure to notify his opponent that the court had entered a dismissal after both failed to appear, despite knowing that his opponent was unaware of the dismissal. *Grun*, 163 F.3d at 422 n.9. The court looked to the spirit of fair play in Duty 18 of the Seventh Circuit's Standards for Professional Conduct as well as Rule of Professional Conduct 8.4. See also *N. Cent. Ill. Laborers' Dist. Council v. S.J. Groves & Sons Co.*, 842 F.2d 164, 169 n.10 (7th Cir. 1988) ("We do not condone North Central's decision not to extend Mr. Kaplan the professional courtesy of notifying him of the default hearing."); *Passarella v. Hilton Int'l Co.*, 810 F.2d 674, 677 (7th Cir. 1987) (criticizing failure to extend professional courtesy of providing notice of a default hearing in Rule 60(b)(1) context).

148. *In re Porter*, 890 P.2d 1377, 1382-86 (Or. 1995).

149. *Id.* at 1381, 1387.

150. *Id.* at 1380.

151. *Id.*

to this charge."¹⁵² The court squarely addressed Porter's argument that compliance with the Federal Rules of Civil Procedure was a defense against the ethics charge.¹⁵³ Indeed, it is clear that Canon 7 sets out limits on "zealous advocacy," and while there is substantial overlap with rules of procedure and evidence, the Model Code stands as "a separate source of applicable substantive law."¹⁵⁴ The court described how Oregon's ethical standards began as "customs of courtesy and practice" because "[t]here was nothing else" before the first state adopted a code of ethics in 1881, and the ABA provided the "Canons of Professional Ethics" in 1908.¹⁵⁵ In 1935, Oregon adopted the "Rules of Professional Conduct of the Oregon State Bar," which included Rule 29, providing in part that "[a] member of the state bar shall not ignore known customs or practices of the bar of a particular court, even when the law permits, without giving timely notice to opposing counsel."¹⁵⁶

The court also found a continuity of disapproval of defaults sought without notice, citing precedent¹⁵⁷ which accepted the Code of Trial Conduct of the American College of Trial Lawyers, provision 14(a),¹⁵⁸ requiring notice to the opposing party when the identity of the lawyer is known.¹⁵⁹ In Porter's defense,¹⁶⁰ the court gave no weight in its historical review, including its review of Oregon cases, to the difference between the state procedural rule and the federal.¹⁶¹ Oregon procedure, which does not separate entry from judgment, requires notice before a default judgment if the party had filed an

152. *Id.* at 1382.

153. *See id.*

154. *Id.*

155. *Id.* at 1383.

156. *Id.*; see also Andrew R. Herron, Comment, *Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure is Another's Poison*, 44 U. Miami L. Rev. 807, 819 n.60 (1990) (quoting Canons of Professional Ethics). Canon 25 provides:

Taking Technical Advantage of Opposite Counsel; Agreements with Him. A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

Canons of Prof'l Ethics Canon 25 (1908).

157. *See Porter*, 890 P.2d at 1383 (citing *Ainsworth v. Dunham*, 384 P.2d 214 (Or. 1963)).

158. *See supra* note 85.

159. *See Porter*, 890 P.2d at 1383.

160. For Porter's self-defense, see Charles O. Porter, Letters, Or. St. B. Bull., Dec. 1995, at 5, 5-6 (noting that the case went to a hearing as a result of Porter's refusal to stipulate to a public reprimand, and maintaining the issue was "whether I complied with the rules, not with the optional customs of courtesy"). Porter was writing, in part, in response to Marilyn Lindgren Cohen, *A Case for Civility: Some Good Reasons Lawyers Need to Show a Little Common Courtesy*, Or. St. B. Bull., Aug./Sept. 1995, at 33, 33 (reporting on the *Porter* case).

161. The underlying litigation at issue in *Porter* was filed in federal court.

appearance or a written *intent* to do so.¹⁶² The federal rule allows entry of default without notice, and only requires notice before judgment if an appearance has been made, or damages are unliquidated.¹⁶³

As to the question of whether a "custom" existed, the court looked to how courts determine "customs" in other "trades."¹⁶⁴ The court found that "a custom is a particular course of acting or dealing so general and uniform that it has taken on the status of an unwritten law governing practitioners in a particular community" such that "no person of ordinary intelligence . . . who exercises reasonable care would be ignorant of it."¹⁶⁵

Porter is remarkable, as one commentator noted,¹⁶⁶ in its attempt to give new life to a moribund provision of the Code of Professional Responsibility; one that was deleted from the Model Rules as unenforceable unenforceable. The case is also remarkable for its severity. The court exceeded the recommendation of the state bar and imposed a sixty-three day suspension. Although in part due to previous discipline, this seems strong punishment. After all, the misrepresentation at issue amounted to one phrase, allegedly calculated to lull the defendant into a default that was not taken for six weeks.¹⁶⁷

The court's method of determining a "custom" in the practice of law is also problematic. While it improves upon merely declaring that a practice is a custom, as a justice of the Nevada Supreme Court announced,¹⁶⁸ the diversity of practice in the legal profession is vast. In *Porter*, the court was clear that it was not disciplining Mr. Porter for violation of a custom, but for his misrepresentation.¹⁶⁹ It is important to note the distinction between a "custom" and "an agreement or understanding between opposing attorneys that a default will not be taken without notice."¹⁷⁰ However, in a number of cases, these

162. See Or. R. Civ. P. 69(A).

163. See Fed. R. Civ. P. 55(a), (b)(1)-(2); *supra* notes 38-47 and accompanying text.

164. *Porter*, 890 P.2d at 1385.

165. *Id.* (citation omitted). On the importance of these sorts of "unwritten customs" and their relevance to clinical education, see Seielstad, *supra* note 98, at 152-54 (noting that *Porter* "purports to breathe new life into unwritten customs of courtesy and practice that preceded the adoption of written codes of ethics or rules of civil procedure" and discussing the theoretical implications of such "local legal culture"). One positive view of civility codes sees them as educational, hoping to change behavior by clarifying norms and spelling out the unwritten rules of the profession. See Aaronson, *supra* note 82, at 115.

166. See Seielstad, *supra* note 98, at 154.

167. See *Porter*, 890 P.2d at 1381.

168. See Nev. Indus. Guar. Co. v. Sturgeon, 391 P.2d 862, 864 (Nev. 1964) (Thompson, J., concurring) (declaring that "[i]t is the practice among members of the Nevada Bar for an attorney, who knows that a defaulting adverse party is represented by counsel in the pending case, to give notice of intention to have default entered").

169. See *Porter*, 890 P.2d at 1382.

170. J.R. Kemper, Annotation, *Failure to Give Notice of Application for Default*

questions are bound up together.¹⁷¹ Indeed, Canon 25 of the Canons of Professional Ethics conceives of the problem together.¹⁷² In addition, often there is a gray area when informal agreements are made.¹⁷³

III. RELIEF FROM JUDGMENT: BETTER WAYS TO INTERPRET AND ENFORCE PROCEDURAL RULES

This part further examines the law of default judgments and how other courts have responded to concerns about defaults, both directly and indirectly. Courts have developed simple and effective ways to curtail the practice of default judgments. This organic process is likely to be more effective than simple requests in the form of non-binding codes and creeds.

A. *Defining Appearance and Excusable Neglect Liberally*

Developments in the law of default judgments show steady evolution of increasingly flexible standards that favor allowing matters to be heard on their merits. The sum of this trend makes taking defaults under some circumstances simply untenable. Indeed, in light of the developing law, defaults under some circumstances amount to a frivolous litigation position, sanctionable by well-established ethics codes, court rules, statutes, and the court's inherent authority.¹⁷⁴

1. Appearance

The Florida courts have read professional courtesy into the rules for obtaining defaults, setting them aside when notice has not been provided even though not required by those procedural rules.¹⁷⁵ Florida Rules of Court require notice of an application for default

Judgment Where Notice Is Required Only By Custom, 28 A.L.R. 3d 1383 (1969).

171. See e.g., *Bernath v. Wilson*, 309 P.2d 87, 89 (Cal. Dist. Ct. App. 1957) (finding plaintiff's counsel acted "contrary to his agreement and understanding" extending time to respond to opposing counsel, and contrary to custom).

172. See Canons of Prof'l Ethics Canon 24 (1908).

173. See *Cahaley v. Cahaley*, 12 N.W.2d 182, 185 (Minn. 1943) ("If an agreement between attorneys for an extension of time has been made which is indefinite in its terms, such an understanding should not be construed by counsel technically or strictly in the taking of a default judgment so as to deprive a party unjustly of his rights, but rather in the spirit of professional courtesy and mutual helpfulness.").

174. See Model Rules of Prof'l Conduct R. 3.1 (1999) (Meritorious Claims and Contentions); *supra* notes 99-102 and accompanying text.

175. See *Sklar v. Brawley*, 651 So. 2d 1314, 1314 (Fla. Dist. Ct. App. 1995) (reversing failure to set aside default since plaintiff knew by opposing counsel's "communicat[ions]" that he intended to defend); *Ole, Inc. v. Yariv*, 566 So. 2d 812, 814 (Fla. Dist. Ct. App. 1990) (setting aside default when plaintiff had actual knowledge that opposing counsel intended to defend, despite failure to answer or serve any papers in the matter).

only when the party has filed or served any papers in the action.¹⁷⁶ Florida courts have construed "any papers" more liberally than the "appearance" that triggers the requirement for notice under the federal rules.¹⁷⁷

The liberal standard for requiring notice evolved first from a broad definition of "file or serve any paper" to include letters not filed with a court, or even drafted by an attorney.¹⁷⁸ From this expansive definition, in *Gulf Maintenance & Supply, Inc. v. Barnett Bank*, the appellate court held "[i]t follows that notice of an application for default should always be served when the plaintiff is aware that a defendant is being represented by counsel who has expressed an intention to defend on the merits."¹⁷⁹

The connection from procedural to ethical standards was completed when the court took note of the Code of Trial Conduct adopted by the American College of Trial Lawyers.¹⁸⁰ The court also repeated the Florida Supreme Court's declaration that "the true purpose . . . of a default is to speed the cause," not to award judgment "without the difficulty that arises from a contest."¹⁸¹ Federal courts have liberalized the definition of the "appearance" necessary to trigger the rule's notice provisions since a leading case in 1970¹⁸² accepted letters between counsel as an "appearance" that communicated the defendant's "purpose to defend" the suit.¹⁸³

Aside from the pronouncements in civility codes, the law of defaults has been increasingly liberalized. There has been greater and more easily obtainable relief from the harshness of defaults, allowing for surer invalidation of entry and judgment. This standard more fully implements the aim of modern procedural rules that encourage matters to be heard on their merits, not through highly technical pleading.

176. See Fla. R. Civ. P. 1.500(b).

177. *Id.*; see also Fed. R. Civ. P. 55(b)(2).

178. See Fla. R. Civ. P. 1.500(a)-(b); *Gulf Maint. & Supply, Inc. v. Barnett Bank*, 543 So. 2d 813, 816-17 (Fla. Dist. Ct. App. 1989).

179. *Gulf Maint. & Supply*, 543 So. 2d at 816.

180. See *id.* at 816 n.3; *supra* note 18.

181. *Gulf Maint. & Supply*, 543 So. 2d at 816 (quoting *Coggin v. Barfield*, 8 So. 2d 9, 11 (Fla. 1942)).

182. See *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970).

183. *Id.* at 691-92. *But see* N. Cent. Ill. Laborers' Dist. Council v. S.J. Groves & Sons Co., 842 F.2d 164, 169 (7th Cir. 1988) (declining to follow *Livermore* definition of appearance for notice requirement); *W. Union Tel. Co. v. Crowder*, 547 So. 2d 876, 879 (Ala. 1989) (declining to follow federal precedent, despite identical rules, and holding that something must be filed with the court, refusing to give attorneys "authority to enlarge the time for answering a complaint without some filing, as meager as it might be, with the court").

2. Excusable Neglect

New, more liberal standards for relief from judgment may also be used to set aside defaults taken without “courtesy” notice more easily. Such liberalization further diminishes any potential advantage that “snap judgments” may offer.

In *Pioneer Investment Service Co. v. Brunswick Associates*, the Supreme Court adopted a broad definition of “excusable neglect.”¹⁸⁴ The Court acted in the bankruptcy context, but discussed the operation of the same standard within Rule 60(b)(1), providing for relief from judgment.¹⁸⁵ The Court noted that “for purposes of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.”¹⁸⁶

To reach its conclusion, the Court looked to dictionary definitions of what constitutes “neglect.”¹⁸⁷ Rejecting the “narrow view”¹⁸⁸ that required some conduct out of the party’s control as an excuse, the Court found the standard permitted “inadvertence, mistake, or carelessness” as well.¹⁸⁹ After finding that a party’s omission resulted from neglect, *Pioneer* directs only that a court engage in a “determination [that] is at bottom an equitable one, taking account of all relevant circumstances” to determine whether the neglect is excusable.¹⁹⁰

The dissent in *Pioneer* objected that decoupling “excusable” from “neglect” drained the meaning from the phrase.¹⁹¹ While not explicit, in practice the *Pioneer* standard will offer relief for all conduct except deliberate or “willful” delay.¹⁹² The less restrictive standard will allow more ready relief in a number of default judgments that begin as rather ordinary mistakes in the transmission of process. While relief from defaults taken in circumstances implicating “professional

184. *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380, 380 (1993).

185. *Id.* at 393. The Court based its decision on the plain meaning of “excusable neglect,” which is used in a number of contexts. *Id.* at 391-94 (discussing Fed. R. Civ. P. 6(b), 13(f), 60(b)(1), 60(b)(6) and Fed. R. Crim. P. 45(b)); see also *Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1324 (11th Cir. 1996) (joining other circuits in applying the *Pioneer* definition to Fed. R. App. P. 4(a)(5) and 4(b), rules governing time for filing appeals).

186. *Pioneer*, 507 U.S. at 394.

187. *Id.* at 388.

188. *Id.* at 387 n.3.

189. *Id.* at 388.

190. *Id.* at 395.

191. See *id.* at 403-04 (O’Connor, J., dissenting).

192. For a description of the “liberal” and “strict” standards used by the circuit courts of appeal before *Pioneer*, see Brett Warren Weathersbee, Note, *No More Excuses: Refusing to Condone Mere Carelessness or Negligence under the “Excusable Neglect” Standard in Federal Rule of Civil Procedure 60(b)(1)*, 50 Vand. L. Rev 1619, 1624-31 (1997). The liberal standard allowed relief for all but willful or culpable conduct, while the strict insisted on something more than carelessness. *Id.*

courtesy" were often set aside before, *Pioneer* further lowers the standard.

B. *Reforming Default Procedure: An Example from Pennsylvania*¹⁹³

Pennsylvania has dealt with the issue of providing notice before taking defaults directly by amending its procedural rules to require at least ten days notice of intent to seek a default judgment. The frank explanatory statement that accompanies the rule is comprehensive.¹⁹⁴ The rule clearly aims to avoid the problems of "snap judgments."¹⁹⁵ It provides for notice to the party and counsel in order to account for both the sometimes inevitable "delays in transmittal of process" (when insurers are involved, for instance) and for the "salutary effect" of notice to the client upon a "dilatatory attorney."¹⁹⁶ The rule provides for notice to parties, whether represented by counsel or not.¹⁹⁷ In fact, the form of notice is calculated to alert the unrepresented litigant with explicit, all-caps warnings of the impending default, as well as the admonition: "YOU SHOULD TAKE THIS NOTICE TO A LAWYER AT ONCE."¹⁹⁸ The warnings are intended to "stem the tide of petitions to open default judgments."¹⁹⁹

Finally, the rule squarely addresses the practice of professional courtesy.²⁰⁰ First, the rule cannot be waived.²⁰¹ Second, operation of the rule eliminates the need for most extensions of time since, before the required notice of intention to seek default, "there is no event to postpone."²⁰²

The provision governing attorneys who grant each other extensions of time was amended in 1994.²⁰³ The rule's first amendment, effective in 1980, had allowed an exception to the notice requirement when the parties had agreed upon an extension in writing.²⁰⁴ That writing could

193. Arizona similarly amended its rules for application and entry of default. These provide for ten days notice to a party or a party's attorney, if known, whether or not that attorney has appeared. See Ariz. R. Civ. P. 55(a). A default does not become effective if the party defends within those ten days, effectively extending the time for answer. *Corbet v. Superior Court*, 798 P.2d 383, 385 (Ariz. Ct. App. 1990).

194. See Pa. R. Civ. P. 237.1, explanatory cmt. (1994).

195. The pun is popular in Pennsylvania. See, e.g., *Smith v. Goschenhoppen-Home Ins. Group*, No. CIV.A. 97-2034, 1998 WL 721082, at *1 (E.D. Pa. Oct. 6, 1998); *Farrell v. Bd. of Tr. of Soc. Sec. Fund*, 269 A.2d 890, 893 (Pa. 1970); *Carson Pirie Scott & Co. v. Phillips*, 434 A.2d 790, 791-92 (Pa. Super. Ct. 1981); *Wentzell v. Cooper*, 74 A.2d 693, 693 (Pa. Super. Ct. 1950).

196. Pa. R. Civ. P. 237.1 explanatory cmt. (1994).

197. Pa. R. Civ. P. 237.1.

198. Pa. R. Civ. P. 237.4-5.

199. Pa. R. Civ. P. 237.1 explanatory cmt. (1994).

200. See *id.*

201. See Pa. R. Civ. P. 237.1(a)(4).

202. Pa. R. Civ. P. 237.1 explanatory cmt. (1994).

203. See *Flynn v. Casa Di Bertacchi Corp.*, 674 A.2d 1099, 1104 (Pa. Super. Ct. 1996) (discussing 1994 amendment providing for use of form for extensions of time).

204. See *Johnson v. Southeastern Pa. Transp. Auth.*, 570 A.2d 71, 72-73 (Pa. 1990)

substitute as proof of notice after its agreed time expired.²⁰⁵ The comment to the earlier rule noted that, if the language of the correspondence was “couched in general language” without a fixed date, notice under the rule would still be required.²⁰⁶ The Pennsylvania Supreme Court pointed out that this part of the rule was “intended as a sort of procedural statute of frauds.”²⁰⁷ Nonetheless, within this narrow exception, disputes still arose.²⁰⁸ The amended rule eliminated the exception and substituted a simple form to provide for definite agreements.²⁰⁹

In fact, the formal agreements provided by the rule are only available after notice of intent to seek a judgment.²¹⁰ While parties will likely reach informal agreements—of the sort that often lead to contest later, or are subject to manipulation or misrepresentation—they are now wholly irrelevant to the court.

The effect of this revised rule is clearer than applying ideas about cooperation, civility, implied misrepresentations, or custom. The rule, unfettered by antiquated notions of professional courtesy, also applies equally to all parties—even non-lawyers.

C. *Keeping Away from Courtesy*

Widespread civility codes that include provisions proscribing the use of defaults are marked by a look backwards—to a time when “taking technical advantage” of one’s opponent meant something very different.²¹¹ This nostalgia conflicts with the evolution of the regulation of lawyers, which has largely been moving away from listing aspirational precepts, and toward more enforceable rules. One commentator has thus called civility codes an example of “reverse evolution.”²¹² The history of the provision regarding professional courtesy illustrates this backward look.²¹³

There are more powerful alternatives to civility codes already used directly by courts to regulate default judgments. Trying to legislate

(quoting text of earlier rule); see also *Carson Pirie Scott & Co. v. Phillips*, 434 A.2d 790, 791 (Pa. Super. Ct. 1981) (discussing the amendment and its purpose to “ameliorate the inequities which oft times inured” due to “snap judgments”).

205. See *Johnson*, 570 A.2d at 72-73.

206. *Id.* at 73.

207. *Id.* at 74.

208. See *id.*

209. See Pa. R. Civ. P. 237.6.

210. See Pa. R. Civ. P. 237.2 explanatory cmt. (1994).

211. See *Canons of Prof'l Ethics Canon 25* (1908).

212. Mashburn, *supra* note 12, at 683-84.

213. See, e.g., W. Va. Standards of Prof'l Conduct, Preamble (“Society at this time seems to be accepting a fundamental loss of common courtesy as a trend that accompanies the fast-paced existence most Americans now live. Perhaps instant communication, in which more information needs to be assimilated more rapidly, has rendered thoughtfulness nearly impossible. Perhaps it is simply the cynicism inherent in a society that values winning at all costs.”).

and enforce courtesy may be inherently illogical—courtesy is a matter of social or professional grace that cannot be legislated. “Professional” courtesy cannot somehow become “common” through mere repetition; customs are not easily declared.

One meaning of courtesy, the one at work in the phrase “professional courtesy,” is “indulgence,” an “agreement in spite of fact.”²¹⁴ Contrast this with the simple meaning accorded default: “By its derivation, a failure. An omission of that which ought to be done.”²¹⁵ Default is the failure to do what is necessary; a courtesy is doing something that isn’t.

Civility codes lose sight of this easy distinction, the difference between unspoken graces and enforced manners. The codes threaten to ignore alternatives such as increased enforcement of existing disciplinary rules²¹⁶ and amendments to rules of procedure.²¹⁷ They threaten to redirect energy away from investigating more substantive causes of lawyer dissatisfaction. Civility codes also pass over potential conflicts with the duty of lawyers to represent their clients zealously. Defaults without notice may offend, but lawyers may be disciplined for lack of diligence if they don’t seek to secure entry of default eventually.²¹⁸

Civility codes fail to consider rule changes that would be simple to

214. The American Heritage Dictionary of the English Language (3d ed. 1992) (“2.a. Consent or agreement in spite of fact; indulgence: *They call this pond a lake by courtesy only.*”); *Graydon v. Stokes*, 24 S.C. 483, 486 (1886) (“The very fact that it is called a courtesy indicates that making no charge is exceptional, and that the general rule is to charge.”)

215. Black’s Law Dictionary 417 (6th ed. 1990).

216. See *Mashburn*, *supra* note 12, at 684 (“One wonders why civility advocates gave up on mechanisms that are already in place in favor of new, symbolic codes.”)

217. See *Moliterno*, *supra* note 2, at 800. Professor Moliterno has argued similarly:

Aspirational creeds should not be used to police lawyer conduct that complies with the language of procedural rules such as . . . default judgment rules If a currently authorized practice, such as moving for default judgment when no answer has been timely filed or moving to strike a late-filed brief, ought rather to be prohibited, then the procedural rules should themselves be amended to reflect the measure of diligence with which lawyers should be expected to enforce violations.

218. See *Morse v. Ky. Bar Ass’n*, 961 S.W.2d 798, 798 (Ky. 1998); *Baker v. Ky. Bar Ass’n*, 935 S.W.2d 612, 613 (Ky. 1996); *Cincinnati Bar Ass’n v. Komarek*, 702 N.E.2d 62, 66-67 (Ohio 1998). Of course, attorneys are more likely to be disciplined for lack of diligence when their conduct results in defaults entered *against* their clients. See *In the Matter of Disciplinary Proceedings against Broadnax*, 559 N.W.2d 595, 597 (Wis. 1997) (upholding 90-day suspension for, *inter alia*, neglect of client matters). These cases demonstrate a cynical reason to encourage lawyers to stick by each other: When a client loses by an attorney’s default, that lawyer will likely be responsible to the client for malpractice. See, e.g., *Curran v. James Regulator Co.*, 36 A.2d 187, 189 (Pa. Super. Ct. 1944) (decrying counsel’s “lack of that professional spirit which . . . if not thwarted, might subject a reputable member of the bar to liability to his client for a large sum of money”).

effect, nor note where they have already been implemented.²¹⁹ Since civility codes overlap with existing codes and rules,²²⁰ civility codes divert attention from other concerns.²²¹ Siren calls for more civility enforced by code should be considered more thoughtfully and ultimately resisted.

CONCLUSION

As one writer has noted, “[p]arity in representation would in time affect lawyers’ conduct, tempering excessive zeal more effectively than pleas for ethical self-restraint ever will.”²²² The writer continues:

Trial lawyers make easy targets. But are they less moral than journalists—or other professionals? In this era of doubts and disillusionments about the ability of American institutions of all kinds to promote human well-being, who in a position of trust has a conscience free of moral conflicts? Every occupation has long-standing troubles its practitioners must face if they are to reach beyond narrow craft standards and self-interest to act for the larger good.²²³

Civility codes, despite their rhetoric, too often focus on narrow “craft” standards—such as when to forbear seeking a default judgment. When this prohibition is examined closely, it appears rooted in a reflexive nostalgia. Advocates of greater civility should offer, rather than simple pleas, straightforward procedural reforms that benefit both lawyers and the unrepresented.

219. The rule changes described above, in Arizona and Pennsylvania, precede the wave of civility codes. See notes 193, 204 and accompanying text.

220. Even in Texas, where the “Texas Lawyer’s Creed” is mandatory, discovery rules were recently amended after ten years of the Creed aimed at the same abuses. Some of the rule changes prohibit deposition misconduct, such as witness coaching, which was also a subject of the Texas Lawyer’s Creed. Compare Tex. R. Civ. P. 199 (prohibiting deposition misconduct by court rule) with Texas Lawyer’s Creed (prohibiting same as a matter of creed). See Alyson Nelson, Comment, *Deposition Conduct: Texas’s New Discovery Rules End Up Taking Another Jab at the Rambos of Litigation*, 30 Tex. Tech L. Rev. 1471, 1496-98 (1999) (noting that the recent rule amendment will lessen the confusion about standards that might result from proceedings subject both to locally enacted, aspirational standards of civility and the state-wide creed).

221. See Mashburn, *supra* note 12, at 661 (contending that “legal trade journals reveal[] an almost obsessive focus upon the behavior of lawyers to the virtual exclusion of all other social, cultural, historical, and economic” concerns).

222. Sam Schrage, *The Trial Lawyer’s Art* 218 (1999).

223. *Id.* at 221.

Notes & Observations