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## *BUSHIDO* IN THE COURTROOM: A CASE FOR VIRTUE-ORIENTED LAWYERING

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# **BUSHIDO IN THE COURTROOM: A CASE FOR VIRTUE-ORIENTED LAWYERING\***

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## **I. INTRODUCTION**

The samurai, the privileged warrior class of ancient Japan, dedicated their lives to loyal service and the pursuit of justice. Although samurai commonly evoke images of barbarity, they were in fact respected and refined, and they cared as much about cultivating calligraphy and philosophy as they did about perfecting skills of swordsmanship and war strategy. The samurai spent a lifetime honing the skills necessary to be effective and honorable warriors. Modern American lawyers possess many of the same characteristics as the samurai<sup>1</sup> and actually bear a remarkable resemblance to them. Lawyers also are a privileged class, engaging in battles of a legal nature.<sup>2</sup> While lawyers are often thought of as harsh and abrasive, ideally lawyers will use their knowledge of law and the legal system to effectuate justice one case at a time. Lawyers spend their entire careers fine tuning their ability to communicate and strategize to advocate effectively and zealously.

In their quest to become effective advocates, many lawyers earn the reputation that they lack professionalism and civility. For years, court opinions, scholarly articles, symposia, and media headlines have focused on the decline in

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1. The lawyer-as-samurai paradigm is more than symbolic. The samurai's violent combat primarily served as a mechanism for conflict resolution of property disputes. EIKO IKEGAMI, *THE TAMING OF THE SAMURAI* 87 (1997). During the period of the Kamakura shogunate (1185-1333), samurai often acted as legal advocates in the newly formed court system:

Transferring his aggressively individualistic attitude from the battlefield to the court, the medieval samurai could be ferociously litigious. Whether he preferred lawsuits or contests of arms to resolve a conflict depended on the situation of the individual samurai. . . . Thus, the existence of a judicial system not only did not inhibit the spirit of personal responsibility and private retribution; it was built on the foundation of samurai self-determination.

*Id.* at 88. These samurai advocates sought to mediate legal disputes according to principles of *dori* (reasonableness) in a manner closely resembling Western legal theory. *See id.*

2. Alexis de Tocqueville described lawyers as a "privileged class." He explained:

The special knowledge that lawyers acquire in studying the law assures them a separate rank in society; they form a sort of privileged class among [persons of] intelligence. Each day they find the idea of this superiority in the exercise of their profession; they are masters of a necessary science, knowledge of which is not widespread. . . . Add to this that they naturally form a body. It is not that they agree among themselves . . . but community of studies and unity of methods bind their minds to one another as interest could unite their wills.

Thomas D. Morgan, *Creating a Life as a Lawyer*, 38 VAL. U. L. REV. 37, 46 (2003) (alterations and omissions in original) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835)).



professionalism.<sup>3</sup> Not only is the public's perception of lawyers at an all-time low, but lawyers themselves admit to increasing dissatisfaction with their occupation.<sup>4</sup> As Supreme Court Justice Sandra Day O'Connor observed, "Attorneys are more than three times as likely as non-lawyers to suffer from depression, and they are significantly more apt to develop a drug dependency, to get divorced, or to contemplate suicide."<sup>5</sup> "Lawyers [also] suffer from stress-related diseases . . . at rates well above average."<sup>6</sup> The perceived professionalism crisis prompted legal ethics reform by way of exacting codes of professional conduct and the adoption of civility codes.<sup>7</sup>

Like lawyers, the samurai recognized the need for a code of moral conduct to govern the members of their profession. *Bushido* fulfilled that need. Literally translated, "[b]u-shi-do means . . . Military-Knight-Ways."<sup>8</sup> *Bushido* served as an unwritten, ever-present code of the ideal samurai warrior:

It is not a written code; at best it consists of a few maxims handed down from mouth to mouth or coming from the pen of some well-known warrior or savant. More frequently it is a code unuttered and unwritten, possessing all the more the powerful sanction of veritable deed, and of a law written on the fleshly tablets of the heart. It was founded not on the creation of one brain, however able, or on the life of a single personage, however renowned. It was an organic growth of decades and centuries of military career.<sup>9</sup>

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3. See, e.g., *Matter of Curtis*, 908 P.2d 472 (Ariz. 1995) (condemning an attorney for failing to handle a client's matter promptly and effectively); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809 (1998) (analyzing lawyers' and judges' viewpoints on the current "crisis" of ethics and civility in the legal profession); Milo Geyelin, *Lawyers Object to Colleagues' Rudeness*, WALL ST. J., June 24, 1991, at B1 (discussing a rise in lack of civility and overall rude behavior among lawyers).

4. See Morgan, *supra* note 2, at 38-44 (discussing sources of attorney discontent); Randall T. Shepard, *The Personal and Professional Meaning of Lawyer Satisfaction*, 37 VAL. U. L. REV. 161, 162-75 (exploring the relationship between public attitudes about lawyers' work and lawyers' satisfaction with their career choices); Geyelin, *supra* note 3, at B1 (asserting that "rudeness . . . now ranks with huge workloads and long hours as a major source of professional dissatisfaction"); *Rising Concern About Stress in Lawyers' Lives*, N.Y. TIMES, Mar. 10, 1995, at B16 (reporting that rising job dissatisfaction among lawyers is partially attributed to stress-related factors "like longer hours at work, fewer hours with the family, pressures to make partner, even the low esteem in which lawyers are held").

5. Sandra Day O'Connor, Speech, *Professionalism*, 78 OR. L. REV. 385, 386 (1999).

6. *Id.*

7. Some commentators assert that legal ethics must embody something more than mere adherence to a set of rules:

A profession should not have to instruct its own members on what they should have learned from their parents, or in Sunday school, or anywhere except before the bar. Such code provisions could serve as a focal point for public contempt. We certainly should not be seen congratulating ourselves on maintaining such a low standard of conduct.

N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 937 (1996).

8. INAZO NITOBE, *BUSHIDO: THE SOUL OF JAPAN* 34 (Kodansha Int'l Ltd. 2002) (1900).

9. *Id.* at 35.

The spirit of *bushido* can be distilled into several universally recognized virtues, including Politeness, Honor, Humility, Integrity, and Courage. These virtues, once embraced by the ancient warriors of Japan, supply a cogent approach to ethical lawyering.

This Essay employs the samurai and their virtue-oriented *bushido* code as a conceptual framework for legal professionalism and civility to promote a greater consciousness of virtue-oriented lawyering—the hallmark of an ethical and socially responsible lawyer. However, I do not purport to be an expert on *bushido* or the virtues it represents, for these topics have been the subject of philosophical discourse for centuries. I hope to illuminate the congruence between *bushido* and the modern practice of law as a way to inspire thoughtful reflection on legal professionalism in a meaningful way.

Part II of this Essay begins with a brief historical and philosophical explanation of *bushido*, highlighting the inherently universal quality of its virtues, and details why *bushido* aptly represents modern legal professionalism. Part III discusses each of the five virtues in terms of its importance to the samurai and its relevance to ethical lawyering. While the idea of virtue as a key to solving the decline in professionalism is not new,<sup>10</sup> most literature in this area merely identifies the problem in an academic sense without providing practical methods of incorporating a virtue-oriented approach in everyday practice. The Essay attempts to fill this void by offering practical solutions to the professionalism problem. Part IV illustrates how lawyers can translate the abstract virtues of *bushido* to the practice of law using a pyramid model of implementation. Following the pyramid model will bring heightened job fulfillment for lawyers, improved satisfaction for clients, and renewed faith in the judicial system for the public.

## II. BACKGROUND

### A. What is Bushido?

For over a thousand years, “the samurai dominated Japan, controlling much of the economic, religious, intellectual, social and artistic life of the country.”<sup>11</sup> The samurai appeared menacing, always wielding two swords—one short (*wakizashi*) and one long (*daito* or *katana*)<sup>12</sup>—with which they were highly proficient. Though intimidating in appearance, the samurai embodied “the finest expression of the Japanese spirit.”<sup>13</sup> Extremely dedicated, the samurai were deeply committed to upholding duty and honor in their profession.<sup>14</sup> As they rose to prominence during the feudal Kamakura period (1185–1333), the samurai, “[c]oming to profess great honour and great privileges, and correspondingly great responsibilities, . . . soon felt

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10. See, e.g., Joseph P. Tomain & Barbara G. Watts, *Between Law and Virtue*, 71 U. CIN. L. REV. 585 (2002) (examining the relationship between legal ethics and professionalism).

11. HARRY COOK, SAMURAI, THE STORY OF A WARRIOR TRADITION 6 (1993).

12. NITOBE, *supra* note 8, at 118; see generally JOHN M. YUMOTO, THE SAMURAI SWORD (1958) (providing an in-depth education on samurai swords from their role in samurai culture to the construction and appreciation of swords).

13. COOK, *supra* note 11.

14. *Id.* at 6–7.



the need of a common standard of behaviour, especially as they were always on a belligerent footing and belonged to different clans."<sup>15</sup> The code of conduct that emerged became known as *bushido*. Over time, *bushido* evolved into a rich cultural embodiment of samurai ethics.

Authors and historians have compared *bushido* to the code of chivalry that guided the knights of Medieval Europe.<sup>16</sup> In Japan, as in Europe, warrior-class ethics were deeply imbued with notions of honor and chivalry. However, *bushido* departed from European chivalry because it gradually integrated principles from several eastern philosophies, including Zen Buddhism, Shintoism, and Confucianism, to create its own distinct brand of ethics.<sup>17</sup> *Bushido* became a moral philosophy firmly rooted in principles of virtue, which brought much needed balance to the aggressive samurai character.

Honor was chief among the characteristic virtues of *bushido*.<sup>18</sup> The samurai had a keen sense of personal honor that fueled an undivided loyalty to their lord and clan.<sup>19</sup> The typical warrior trait of Honor was tempered by Politeness and Humility. The samurai learned to observe specific rules of etiquette on and off the battlefield, and to be humble in all things. Finally, the samurai placed significant importance on the virtues of Integrity and Courage. They sought to live according to their values and bravely faced the possibility of death every day.<sup>20</sup>

The ancient philosophers and sages who shaped *bushido* regarded cultural refinement as a conduit for moral development.<sup>21</sup> Thus, the samurai inherited a heightened appreciation of culture, which transformed them into exceptional warriors. The samurai valued education, and studied history and philosophy as an integral part of their training.<sup>22</sup> The samurai also pursued cultural refinement through poetry and the tea ceremony.<sup>23</sup> While some feared that the samurai's

15. NITOBE, *supra* note 8, at 37.

16. See Trevor Pryce Leggett, *Gentlemanship and Bushido*, in TOWARD AN UNDERSTANDING OF BUDO THOUGHT 139, 139-62 (Shigeyoshi Matsumae ed., 1987) (comparing the ideals of European chivalry to *bushido*).

17. See THOMAS CLEARY, THE JAPANESE ART OF WAR 40-67 (1991) (describing how specific aspects of Eastern philosophies contributed to *bushido* thought); see also Michael Sean Quinn, *The Analects for Lawyers: Variations upon Confucian Wisdom*, 34 TEX. TECH L. REV. 933, 935 (2003) (providing an adaptation of *The Analects of Confucius* that equips lawyers with ancient wisdom explicitly applied to the modern practice of law).

18. See COOK, *supra* note 11, at 7 ("[I]n the ideal samurai, a man who lived and died according to a code of honour[,] . . . we can find many qualities to admire.").

19. *Id.* at 134.

20. See THOMAS CLEARY, CODE OF THE SAMURAI: A MODERN TRANSLATION OF THE BUSHIDO SHOSHINSHU OF TAIRA SHIGESUKE 3 (Thomas Cleary trans., 1999) [hereinafter CODE OF THE SAMURAI].

21. *Id.* at 95-98.

22. See JOHN WHITNEY HALL, JAPAN FROM PREHISTORY TO MODERN TIMES 214-19 (1970) (1968).

23. See CODE OF THE SAMURAI, *supra* note 20, at 95 (advising samurai that "it is desirable to learn things such as poetry and the tea ceremony, little by little, in your spare time"). Shigesuke elaborated that:

When it comes to the study of poetry, in accord with Japanese custom there have been famous generals and valiant knights throughout history who have mastered the art of composing poetry. So even if you are a warrior in minor rank, it is desirable to take an interest in poetry and even be able to compose the occasional verse.

. . . .



emphasis on culture "might weaken a warrior's fighting ability," the samurai believed that cultural refinement provided a balance between the samurai's warrior calling and his sense of cultural identity.<sup>24</sup>

Once unique to the warrior class, the traditions and values embodied in *bushido* eventually permeated the whole of Japanese society.<sup>25</sup> The Japanese martial arts of *judo*, *karate-do*, *kendo*, and *aikido*, which are practiced internationally today, have become synonymous with *bushido*.<sup>26</sup> The virtues emblazoned upon the hearts of the samurai became the moral ethos of an entire nation.<sup>27</sup> Thus, *bushido* enjoyed a long reign of moral influence in Japan, producing a well-rounded class of warriors and giving birth to a modern nation marked by quiet strength and the steady pursuit of Honor.

### B. The Universal Nature of Bushido

Westerners have an unfavorable view of certain aspects of Japanese culture, primarily because Japanese culture differs in many respects from that of the West. This tends to be especially true in the case of the samurai. The most notorious characteristics of the samurai, including their preoccupation with death<sup>28</sup> and their

As for the tea ceremony, it has been a pastime of knights since the era of the Kyoto Shoguns, so even if you do not take an interest in it yourself, nevertheless it may happen that you have to participate as a guest at someone's house, or as an escort to a noble of high rank. On such occasions, you have to know all sorts of things, such as how to approach and enter the tea room, how to look at the décor, how to eat, and how to drink tea. Therefore you should get some instruction in the tea ceremony and learn a little bit about it.

*Id.* at 96-97.

24. COOK, *supra* note 11, at 112-13.

25. See NITOBE, *supra* note 8, at 136 ("In manifold ways has Bushido filtered down from the social class where it originated, and acted as leaven among the masses, furnishing a moral standard for the whole people.").

26. *Judo* is a type of wrestling created to develop moral values in addition to physical skill. COOK, *supra* note 11, at 132. The object of *judo* is "to throw or lock an opponent according to strictly defined rules." *Id.* *Karate-do* stresses kicking and punching, with some forms incorporating the use of certain Okinawan weapons such as the staff (*bo*) and jointed flail (*nunchaku*). *Id.* *Kendo*, the Way of the Sword, is a method of fencing practiced with a bamboo sword (*shinai*). *Id.* at 132-33. Many of the methods taught in *kendo* resemble swordsmanship techniques taught to the samurai. *Id.* *Aikido*, the Way of Harmony, is an art of self-defense and "features rapid turning movements, designed to blend with an attacker's movements so as to throw or unbalance him." *Id.* at 133.

27. Cook, *supra* note 11, at 6.

28. The samurai are commonly viewed as being overly concerned with death. Indeed, one of the few written explications of *bushido* begins by instructing that "[o]ne who is supposed to be a warrior considers it his foremost concern to keep death in mind at all times, every day and every night, from the morning of New Year's Day through the night of New Year's Eve." CODE OF THE SAMURAI, *supra* note 20, at 3. While at first glance this may seem morbid, the samurai had a rational basis for their belief:

If people comfort their minds with the assumption that they will live a long time, something might happen, because they think they will have forever to do their work and look after their parents—they may fail to perform for their employers and also treat their parents thoughtlessly.

But if you realize that the life that is here today is not certain on the morrow, then when you take your orders from your employer, and when you look in on your parents, you will have the sense that this may be the last time—so you



suicide ritual of *hara-kiri* or *seppuku*,<sup>29</sup> often repulse and offend those who do not fully understand the samurai ethic. However, the virtues important to the samurai are not so different from virtues cherished in Western civilizations. When stripped of its foreign appearance and rituals, the virtues embraced by *bushido* transcend geographical and cultural lines.

Historically, there is a remarkable consensus about the virtues that are considered central to morality. Virtues played a significant role in the moral consciousness of the ancient Greeks, Romans, Christians, and even the founding fathers of the United States. The Greeks looked to four cardinal virtues—Wisdom, Courage, Temperance and Justice—to guide their morality.<sup>30</sup> Of these, the Greeks particularly coveted Courage, especially in battle. The Greek conception of Courage resembled the virtues of *bushido*. The Greeks felt Courage involved “not mere willingness to meet death without flinching but sacrificial devotion to one’s state.”<sup>31</sup> “[C]ourage [was] closely intertwined with *aidos*, an inner sense of honor and self-respect.”<sup>32</sup> Both Greek and Roman heroes portrayed in tales such as *The Iliad*<sup>33</sup> and *The Odyssey*<sup>34</sup> exemplified the virtues of the era. As one scholar described Greek morality:

The heroic age is filled with battle, murder and sudden death, but intermingled with acts of bravery, chivalry and hospitality which do much to offset the dark side of the picture. The heroes of the Trojan War . . . followed no Christian code of an advanced age of chivalry, yet they had their own ten commandments of which this list has been given: Bravery, wisdom, self-control, justice,

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cannot fail to become truly attentive to your employer and your parents.

. . . .  
When you always keep death in mind, when you speak and when you reply to what others say, you understand the weight and significance of every word as a warrior by profession, so you do not engage in futile arguments. As a matter of course you do not go to dubious places even if people invite you, so there is no way for you to get into unexpected predicaments. This is why I say you will avoid myriad evils and calamities if you keep death in mind.

*Id.* at 3–4 (emphasis added). Contradictory to the image of samurai as fanatics, well-reasoned moral principles molded the samurai’s beliefs about death. Contemplating death simply reminded the samurai to live in accordance with their values every moment of every day.

The samurai’s view of death can provide guidance to the modern lawyer. Lawyers often get caught up in the details of every day life and may not perform at their personal best. Acknowledging the imminence of death, even on a subconscious level, might provide profound insight in making daily decisions involving legal ethics and civility.

29. *Hara-kiri* and *seppuku* are Japanese terms that mean “cutting of the belly.” COOK, *supra* note 11, at 38. “Rather than allow[ing] himself to be shamed by being taken prisoner and beheaded by his enemies, the tradition arose among the samurai of disembowelling himself with his own sword.” *Id.* This method of suicide became an accepted part of samurai culture because it required a tremendous amount of Courage, as the Japanese believed that the stomach was the spiritual center of the body. *Id.* To prevent prolonging the performer’s suffering, another man called the *kaishakunin* stood by to behead the performer immediately after *hara-kiri* was committed. *Id.*

30. GEORGIA HARKNESS, *THE SOURCES OF WESTERN MORALITY* 160 (1954).

31. *Id.*

32. *Id.*

33. HOMER, *THE ILIAD* (E.V. Rieu, Penguin 2003) (1950).

34. HOMER, *THE ODYSSEY* (E.V. Rieu trans., Penguin 2003) (1946).

vengeance belonging to the wronged, family affection, patriotism, generosity, magnanimity, and truth.<sup>35</sup>

From Socrates to Aristotle, Greek moral philosophers built upon the virtue ethic. For example, in his famous work, *The Nicomachean Ethics*, Aristotle dedicated much discussion to the moral virtues of Honor, Courage, and Friendship.<sup>36</sup> Like *bushido*, the Greeks also based their high moral ideals on virtue.

Christianity is another source of Western morality that promotes virtuous living. Most parables in the Old Testament of the Bible illustrate the significance of virtue in developing personal character.<sup>37</sup> In a straightforward fashion, the Book of Proverbs delineates the virtues deemed important to the Christian ethic. For example, one proverb states, "When pride comes, then comes disgrace, but with humility comes wisdom."<sup>38</sup> Furthermore, the New Testament is ripe with Jesus's teachings on living with Humility, Integrity, and Love.<sup>39</sup>

More recently, the founding fathers of the United States were deeply committed to moral virtue. Indeed, the virtuous character of these individuals influenced the formation of our nation. Benjamin Franklin was so convinced that virtues "were of the utmost Importance to the Felicity of Life" that he listed thirteen virtues in his personal journal and resolved to practice them every day of his life.<sup>40</sup> Thomas

35. HARKNESS, *supra* note 30, at 163-64 (quoting WOODBRIDGE RILEY, *MEN AND MORALS* 34 (1929)).

36. See generally ARISTOTLE, *THE NICOMACHEAN ETHICS* 63-72, 89-96, 192-247 (David Ross trans., Oxford Univ. Press 1980) (1925) (devoting two chapters on moral virtue to Honor and Courage and dedicating two entire books to Friendship).

37. The story of David and Goliath, for example, illustrates the virtue of Courage. See 1 *Samuel* 17:1-54 (New International Version). David, a mere sheep herder, garnered the Courage to fight and defeat Goliath, a giant whom the Israelites feared. See *id.* at 17:4-11.

38. *Proverbs* 11:2 (New International Version).

39. See, e.g., *Luke* 14:11 (New International Version) ("For everyone who exalts himself will be humbled, and he who humbles himself will be exalted.").

40. BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 114 (Leonard W. Labaree et al. eds., Yale Univ. Press 1964) (1793). Benjamin Franklin abided by the following thirteen virtues:

1. TEMPERANCE. Eat not to Dulness. Drink not to Elevation.
2. SILENCE. Speak not but what may benefit others or yourself. Avoid trifling Conversation.
3. ORDER. Let all your Things have their Places. Let each Part of your Business have its Time.
4. RESOLUTION. Resolve to perform what you ought. Perform without fail what you resolve.
5. FRUGALITY. Make no Expence but to do good to others or yourself: i.e. Waste nothing.
6. INDUSTRY. Lose no Time. Be always employ'd in something useful. Cut off all unnecessary Actions.
7. SINCERITY. Use no hurtful Deceit. Think innocently and justly; and, if you speak, speak accordingly.
8. JUSTICE. Wrong none, by doing Injuries or omitting the Benefits that are your Duty.
9. MODERATION. Avoid Extrems. Forbear resenting Injuries so much as you think they deserve.
10. CLEANLINESS[.] Tolerate no Uncleaness in Body, Cloaths or Habitation.
11. TRANQUILITY[.] Be not disturbed at Trifles, or at Accidents common or



Jefferson also advocated the practice of virtue in daily life. His writings reflected the virtues of Simplicity, Sincerity, Gratitude, Humility, Sacrifice, and Self-Perfection.<sup>41</sup> As Jefferson eloquently stated, "I sincerely believe in the general existence of a moral instinct. I think it is the brightest gem with which the human character is studded, and the want of it as more degrading than the most hideous of the bodily deformities."<sup>42</sup>

From the cardinal virtues of ancient Greek heroes to the moral sentiments of our founding fathers, virtues have played a critical role in the history of morality. Therefore, *Bushido* is not such a foreign concept after all. It is but one historic example of a virtue-based ethic with the potential to provide an aspirational model for legal professionalism.

### C. *Bushido as a Model For Legal Professionalism*

Current regulation of the legal profession is primarily rule-oriented. The American Bar Association's Model Rules of Professional Conduct (Model Rules), adopted in whole or in part by most states, sets forth rules governing attorney conduct for common ethical dilemmas.<sup>43</sup> The Model Rules are necessary because they establish a uniform set of rules governing attorney conduct in situations that are unique to the legal profession. These rules, however, merely set minimum criteria and do not assist individual lawyers in achieving a higher standard of professionalism in practice. In the conflict-filled life of a lawyer, the Model Rules offer limited guidance for resolving complex ethical issues. Although lawyers find comfort in bright-line rules and three-part tests, legal ethics does not lend itself to such a simple analysis. Lawyers need a comprehensive approach that equips them with a moral compass for acting professionally and ethically in a broad range of situations.

Given the complexity of legal professionalism and ethics, a conceptual framework provides a common ground for useful analysis. The powers and responsibilities that defined the ancient samurai parallel those of modern day attorneys in many ways. Accordingly, *bushido*, the code of the samurai, offers a suitable model for legal professionalism. The timeless wisdom of *bushido* supplements the existing rules that regulate lawyers, and embodies virtues that, if practiced often and well, will bring a renewed sense of honor to the practice of law for lawyers, their clients, and the public.

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unavoidable.

12. CHASTITY. Rarely use Venery but for Health or Offspring; Never to Dulness, Weakness, or the Injury of your own or another's Peace or Reputation.

13. HUMILITY. Imitate Jesus and Socrates.

*Id.* at 149-50.

41. See generally THOMAS JEFFERSON, LIGHT AND LIBERTY (Eric S. Peterson ed., 2004) (arranging quotes from a collection of Thomas Jefferson's essays into virtue-based categories).

42. *Id.* at 53.

43. See generally MODEL RULES OF PROF'L CONDUCT (2004) (governing rules for attorney conduct).



## III. THE VIRTUES

A. *Politeness*

Politeness has long been observed as a hallmark of social intercourse in Japan. At first glance, it may seem superficial and unworthy to classify Politeness as a virtue. The *bushido* concept of Politeness, however, involves more than mere manners. Inazō Nitobe, a renowned Japanese author of *bushido* ideology, explained, "Politeness is a poor virtue, if it is actuated only by a fear of offending good taste, whereas it should be the outward manifestation of a sympathetic regard for the feelings of others."<sup>44</sup> Thus, Politeness is only a virtue if it is accompanied with sincerity.

In modern legal culture, Politeness can be equated with civility. In common parlance, "civility" simply refers to manners. But in the legal context, civility is less precisely defined. Supreme Court Justice Anthony M. Kennedy offered perhaps one of the most poignant and frequently cited definitions of civility in a 1997 address to the American Bar Association. Justice Kennedy defined civility as "the mark of an accomplished and superb professional, but it is even more than this. Civility is an end in itself. . . . Civility has deep roots in the idea of respect for the individual."<sup>45</sup> Justice Kennedy's articulation of civility mirrors the *bushido* virtue of Politeness—the primary characteristic of both being a genuine concern for others.

The samurai were acutely aware that polite conduct is an indication of inner character. One samurai, Yamamoto Tsunetomo (1659–1719), compiled narratives about the samurai and *bushido* in a book entitled *Hagakure*.<sup>46</sup> In his book, Tsunetomo explained:

At a glance, every individual's own measure of dignity is manifested just as it is. There is dignity in personal appearance. There is dignity in a calm aspect. There is dignity in a paucity of words. There is dignity in flawlessness of manners. There is dignity in solemn behavior. And there is dignity in deep insight and clear perspective. These are all reflected on the surface. But in the end, their foundation is simplicity of thought and tautness of spirit.<sup>47</sup>

Even in battle between fierce rivals, the samurai always treated their opponents with respect. Legendary tales of the samurai always evidenced a prescribed "order of battle."<sup>48</sup> According to this order, the samurai fought battles in a series of stages: (1) the warriors arranged the day and time of the battle in advance; (2) the warriors

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44. NITOBÉ, *supra* note 8, at 65.

45. Anthony M. Kennedy, Associate Justice, United States Supreme Court, Law and Belief, Address at the American Bar Association's 1997 Annual Convention (1997), in 34 TRIAL, July 1998 at 23, 25.

46. YAMAMOTO TSUNETOMO, *HAGAKURE* (William Scott Wilson trans., 1999).

47. *Id.* at 79.

48. PAUL VARLEY, *WARRIORS OF JAPAN AS PORTRAYED IN THE WAR TALES* 25 (1994).



exchanged ambassadors from each army as the soldiers arranged themselves on the battlefield; (3) they fired arrows, announcing the start of fighting; (4) the armies exchanged arrows in turn; (5) the armies moved toward one another while continually firing arrows; and (6) as the armies approached one another, the warriors paired off to fight one-on-one using only their swords.<sup>49</sup> Although the samurai did not follow the "order of battle" in every circumstance,<sup>50</sup> most battles followed some variation of the order.

The practice of law has its own "order of battle." Lawyers litigate cases in accordance with rules of procedure. Lawyers face an additional expectation to carry out these rules with due consideration for the court, opposing counsel, and the parties involved.<sup>51</sup> Lawyers achieve civility in practice by, among other things, satisfying reasonable discovery requests, communicating amicably with clients and opposing counsel,<sup>52</sup> filing papers and appearing in court in a punctual fashion, addressing the court in a respectful manner, speaking with appropriate language and tone, and possessing some degree of flexibility. Many lawyers fall short of these expectations.

Inside the courtroom, ignorance of proper decorum is sometimes the culprit of some lawyers' shortcomings. Young lawyers are especially prone to offending the court simply because they are unaware of the proper courtroom etiquette. Young lawyers can remedy this problem by becoming acquainted with court rules on etiquette procedures, participating in law firm training programs, and studying codes of legal etiquette.<sup>53</sup> But in far too many cases, lawyers simply disregard the human lives involved in the judicial process. The win-at-all-costs mentality, fueled by pride or financial motives, causes numerous lawyers to deviate from the legal "order of battle" and conduct themselves in inexcusable ways.<sup>54</sup>

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49. *Id.* at 26.

50. *Id.* (noting that many battles in samurai war tales begin with a surprise attack).

51. See generally Catherine Thérèse Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991) (discussing the importance of courtroom etiquette in legal representation).

52. This does not mean to imply that Politeness should trump Veracity. In his written explanation of *bushido* for novice samurai, Confucian scholar and military scientist Taira Shigesuke encouraged samurai to strike a balance between politeness and honesty in their capacity as advisors:

Now then, expressing your opinions to others, or objecting to their views, are also things that should be done with due consideration. Although it does not matter very much if people express their opinions too much, whatever they may be, when talking to their parents, teachers, brothers, uncles, children, students, or nephews, nevertheless anything a warrior says must be tactful and considerate. How much the more so when speaking with friends and colleagues; tact is even more appropriate under those circumstances.

Then again, if someone comes to you for advice, to absolutely refuse on the grounds that it is beyond you too is an exceptional case. Once you have become someone's confidant, it shows a certain degree of dependability to pursue the truth and speak your mind freely even if the other person doesn't like what you say.

CODE OF THE SAMURAI, *supra* note 20, at 50.

53. See Clarke, *supra* note 51, at 1011-25 (exploring various methods of teaching courtroom etiquette).

54. See Joseph J. Ortego & Lindsay Maleson, *Under Attack: Professionalism in the Practice of Law*, PRAC. LITIGATOR, July 2004, at 51 (collecting anecdotes involving lawyers using insulting words, derogatory comments, and racist remarks in court).



Politeness carries equal importance when communicating with clients and opposing counsel outside the courtroom. After years of practice, some lawyers become calloused and easily forget how the adversarial process affects clients, many of whom are first-time participants in the legal system. Clients will always greatly appreciate Politeness. Above all else, treating clients with Politeness and respect indicates a genuine concern for them. Lawyers should use this same level of Politeness when communicating with opposing counsel. The mere fact that an adversarial relationship exists with opposing counsel never justifies disrespectful conduct. All members of the bar deserve a measure of professional courtesy and civility. By engaging in polite conduct, opposing counsel will respond favorably, making the litigation process more manageable for all involved.

The virtue of Politeness should in no way be limited to interaction with judges, attorneys, and clients. Lawyers should extend courtesy and civility to every human being. We live in a small world, and even for attorneys in big cities, bad reputations circulate rapidly within the legal community. Lawyers can maintain a solid reputation by constantly evaluating the manner in which they deal with others and by endeavoring to practice law with Politeness.<sup>55</sup> Knowing the rules of etiquette and observing them is not an end in itself. As experienced lawyers are well aware, Politeness is the *modus operandi*<sup>56</sup> of a lawyer with Honor.

### B. Honor

Honor is perhaps the most important virtue of a samurai and of a lawyer. The samurai had a distinct culture of honor and shame, which they defined in terms of one's personal interest in his reputation.<sup>57</sup> This deep concern for Honor is expressed by the "colloquial saying . . . *Mittomonai kara yoshinasai* (Don't do it, you would look bad)."<sup>58</sup> While the samurai sought to win against their opponents, they also felt that a warrior could accomplish true victory only by acting with Honor and in accordance with the principles of *bushido*.<sup>59</sup> To achieve victory in this way, the samurai strove for perfection in every action. This involved honing their skills of battle—especially swordsmanship and martial arts—which the samurai practiced incessantly.<sup>60</sup> They frequently engaged in friendly sparring, using every moment of free time to perfect their craft.

Lawyers would fare well to approach the practice of law with the same honorific attitude as the samurai. This could prove difficult for lawyers who view their work as merely a job. Being a lawyer is more than a job, it is a profession, one

55. Young attorneys should especially take care to learn proper legal etiquette. *The Etiquette Advantage in Business*, an invaluable addition to any attorney's personal reference library, provides a comprehensive description of general business customs that translate well to the legal profession. PEGGY POST & PETER POST, *THE ETIQUETTE ADVANTAGE IN BUSINESS* (1999).

56. *Black's Law Dictionary* defines *modus operandi* as "[a] method of operating or a manner of procedure." BLACK'S LAW DICTIONARY 1026 (8th ed. 2004).

57. IKEGAMI, *supra* note 1, at 17; see also NITOBE, *supra* note 8, at 79–84 (examining the influence of shame on a young samurai's development of Honor).

58. IKEGAMI, *supra* note 1, at 17.

59. MIYAMOTO MUSASHI, *THE BOOK OF FIVE RINGS* 58 (Bradford J. Brown et al. trans., 1982).

60. See generally COOK, *supra* note 11, at 130 (discussing the teaching methods of one of the great samurai, Yamaoka Tesshu, who required students to practice for over "1000 consecutive days").



that should advance daily with commitment to excellence and a pledge of Honor. Honor should exist in every aspect of law practice, from maintaining competence in practice areas to creating quality work product. The virtue of Honor is especially prominent in three aspects of the practice of law: (1) competence, (2) communication, and (3) personal appearance.

First, lawyers must exhibit Honor by maintaining competence. Not only is competence a mandatory duty under the Model Rules,<sup>61</sup> but it is also essential in this dynamic profession. Statutes are revised, new cases are decided, and new rules are enacted. Lawyers must maintain a level of knowledge and skill that allows them to represent their clients in an honorable manner. Lawyers can achieve competence by borrowing the samurai's conception of self-cultivation and the constant pursuit of perfection in every endeavor.

Second, communication is essential to the practice of law. The quality of oral and written communication signifies an attorney's commitment to Honor. As legal advocates, lawyers use their verbal skills to communicate with judges, juries, clients, and opposing counsel. Because of their position as trusted advocates and officers of the court, lawyers should resolve to exhibit Honor in every representation. Although Model Rules 1.4<sup>62</sup> and 3.3<sup>63</sup> address communication with

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61. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

62. Rule 1.4 states:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004).

63. Rule 3.3 states:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2004).



clients and the court, Honor requires a broader commitment to communicating in an honest and forthright manner.

Lying to clients, for example, defies any semblance of Honor.<sup>64</sup> Yet many lawyers fail to disclose information to their clients either through misstatements of law or fact, or through outright omissions.<sup>65</sup> In one study, lawyers reported lying to clients to bring in business, cover up mistakes, impress clients, impress their boss, or conform to a particular law firm atmosphere.<sup>66</sup> To assist in the determination of whether disclosure is preferable, lawyers may consider using a standard premised on the golden rule: "Lawyers should reveal to their clients that which they would want revealed to them if they were clients."<sup>67</sup> Lawyers who genuinely deliberate in this way will know that they acted in accordance with their personal sense of Honor.

In the jury-trial context, attorneys have many opportunities to misinform the jury. While genuinely appealing to jurors' human emotions is an acceptable method of persuasion, other tactics, such as feigning emotional reactions or producing tears on demand, may inappropriately play on the jurors' sympathies.<sup>68</sup> Additionally, attorneys increasingly use technology to augment their oral presentations to the judge and jury. Today's courtrooms support laptop computers, internet connectivity, PowerPoint presentations, DVD presentations, video teleconferencing, and electronic evidence, all designed to assist the jury in comprehending the evidence.<sup>69</sup> However, these devices can present fabricated or altered evidence that may go undetected by the court. Attorneys should refrain from abusing courtroom technology. To ensure that the adversarial process proceeds with Honor, attorneys should make honest representations to the court at all times.

Finally, Honor plays a crucial role in alternate dispute resolution (ADR), including settlement negotiations, mediation, and arbitration. Section 2.3 of the American Bar Association's *Ethical Guidelines for Settlement Negotiations* provides that "[a] lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing."<sup>70</sup> The Committee Notes to section 2.3 explain that "[s]ettlement negotiations are likely to be more productive and effective and the resulting settlement agreements more sustainable if the conduct of counsel can be so characterized."<sup>71</sup> Similarly, honor and fair dealing should also apply to general communication in ADR forums. Honorable negotiators "can be recognized

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64. See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 661 (1990); see also Carrie Menkel-Meadow, *Lying to Clients For Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 781-83 (1990) (exploring "what really matters when lawyers lie to clients" and proposing the enactment of a "Golden Rule of Candor" for lawyers' interactions with clients and fellow lawyers).

65. Lerman, *supra* note 64, at 663.

66. *Id.* at 721-44.

67. Menkel-Meadow, *supra* note 64, at 771 (emphasis omitted).

68. See Peter W. Murphy, "There's No Business Like . . . ?" *Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. TEX. L. REV. 111, 117-18 (2002) (contrasting authentic methods of persuasion in the courtroom with fake acting intended to convince a jury to decide a case on emotion rather than on the merits of the case).

69. Fredric I. Lederer, *Introduction: What Have We Wrought?*, 12 WM. & MARY BILL RTS. J. 637, 640-43 (2004).

70. SECTION OF LITIG., ABA, *ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS* § 2.3, at 3 (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>.

71. *Id.* at 4.



by their preparation<sup>72</sup> and ability to handle conflict in an equitable manner.<sup>73</sup> These characteristics will enable negotiators to "always be vigilant and ready to defend against attack from any angle."<sup>74</sup> Because "[t]oday litigants settle nearly 95 percent of civil cases out of court,"<sup>75</sup> negotiating with Honor can result in better outcomes for clients.

Written communication presents distinctive hurdles with respect to Honor. Legal writing is the fundamental skill of a lawyer.<sup>76</sup> Attorneys use writing skills to communicate and persuade on a daily basis. Given that the practice of law relies so heavily on the written word, poor legal writing is a prime example of shameful conduct. One commentator described some common problems in legal writing as "failing to state the law accurately, failing to state the facts accurately, poor writing, plagiarism, and lack of civility."<sup>77</sup> Not only is Honor at stake, but many courts have also begun to sanction attorneys for particularly egregious writing. In *Pierotti v. Torian*,<sup>78</sup> Torian's attorneys submitted a brief that failed to cite a controlling case, lacked required citations to the record, quoted documents not in the record, and repeated unsupported assertions.<sup>79</sup> Consequently, the California Court of Appeals sanctioned Torian's attorney with a \$6,000 fine.<sup>80</sup>

Lawyers have a professional obligation to know the law and represent it accurately to the courts.<sup>81</sup> Accordingly, lawyers should seek to sustain a respectable level of competence in their practice areas and hone their research and writing skills to avoid some of the pitfalls that have afflicted many lawyers. For reasons that run deeper than Rule 11 sanctions,<sup>82</sup> a sense of Honor

72. See John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704, 731 (1996) (using the samurai as a model for a successful conflict resolver).

73. *Id.* at 729-32.

74. *Id.*

75. Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1220 (2004).

76. See BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 1 (2d ed. 2002) (describing law as "a literary profession").

77. Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories*, 9 SCRIBES J. LEGAL WRITING 77, 79 (2003).

78. 96 Cal. Rptr. 2d 553 (Ct. App. 2000).

79. *Id.* at 562-63.

80. *Id.* at 566-67.

81. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2004).

82. The drafters of the Federal Rules of Civil Procedure formulated Rule 11 to limit or eliminate abusive litigation by lawyers. See Peter A. Joy, *The Relationship between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation Of Lawyers*, 37 LOY. L.A. L. REV. 765, 778-81 (2004). Rule 11 states in pertinent part:

- (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
  - (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
  - (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;



should pervade every document a lawyer prepares and signs because their reputation—not to mention license—is always at stake.

Third, a lawyer's personal appearance must exhibit Honor. Lawyers should follow the example of the samurai, who took special care to ensure that their appearance manifested Honor:

The principles of knighthood include washing your hands and feet and bathing morning and night, keeping your body clean, shaving and dressing your hair every morning, dressing formally according to the season and circumstances, and always keeping your fan in your belt, not to mention your long and short swords. When dealing with guests, you treat them courteously according to their status, and avoid useless talk. Even when you partake a bowl of rice or a cup of tea, you are always careful not to be slovenly.

If you are in public service, when off duty you do not simply lounge around; you read, practice calligraphy, contemplate ancient stories or ancient warrior codes. Whether you are walking, standing still, sitting down, or reclining, in your conduct and manner you carry yourself in a way that exemplifies a genuine warrior.<sup>83</sup>

As a result, the refined appearance of the samurai commanded great respect from the people. Attorneys should take as much pride in dressing themselves every morning as they do in their work product.

Modern lawyers sometimes receive criticism for dressing in less than professional attire.<sup>84</sup> However, not all attorneys need to dress in expensive designer suits and high priced accessories to look professional. Dressing like a professional simply means portraying a polished image that will make a positive impression on clients and colleagues. Attorneys should realize that, rightly or wrongly, how they

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- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
  - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
  - (c) *Sanctions.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

FED. R. CIV. P. 11(b), (c).

83. CODE OF THE SAMURAI, *supra* note 20, at 10–11.

84. See Jill Schachner Chanen, *What Not to Wear: There's an Easy Fix for Even the Worst Fashion Faux Pas*, A.B.A.J., Feb. 2005, at 52, 52 (pointing out that "between formal, business casual, and casual Fridays, confusion [among lawyers] is inevitable," and that lawyers struggle with deciding what to wear to work and understanding what it means to dress professionally).



dress speaks volumes.<sup>85</sup> Attire sends messages to others about professionalism, self-image, and even work habits. Books are available to assist attorneys in making wardrobe decisions by providing guidelines for maintaining a professional appearance while allowing individual expression.<sup>86</sup> As a general rule, lawyers should err on the side of conservative clothing.

Attorneys often overlook another aspect of professionalism: maintenance of office space. An office space reflects upon the attorney who inhabits it. The old cliché bears repeating: "A cluttered desk is a sign of a cluttered mind." Of course, this is not a hard-and-fast rule. Most attorneys have some degree of clutter on their desks, and some studies suggest that a messy desk actually promotes productivity.<sup>87</sup> However, as it relates to professionalism and Honor, the cluttered desk motto merely serves as a gentle reminder that no matter how messy an office becomes for temporary projects, it should never remain in an extreme state of disorder. Colleagues who visit for a quick chat and clients who come in for a status conference will notice the appearance of a lawyer's office and make judgments based on their observations. Thus, a question attorneys should periodically consider is: "What does my office say about me?" A disappointing answer may suggest a need for redecorating or reorganizing.

Honor obliges lawyers to avoid shame in every aspect of law practice—from competence and communication, to business attire and desk space. Because the public often considers lawyers a privileged class, and expects lawyers to practice Honor and Politeness, lawyers must remain careful so as not to become overconfident of their social status. To temper pride of this nature, lawyers should strive for Humility.

### C. Humility

Simply put, Humility is the act of being humble. Humble is defined as "1: proud or haughty[;] not arrogant or assertive. 2: reflecting, expressing, or offered in a spirit of deference or submission."<sup>88</sup> Consequently, Humility is often misunderstood as an indication of weakness and servility. The *bushido* notion of Humility, however, is more akin to Aristotle's view that Humility is a mean between the extremes of pride and worthlessness.<sup>89</sup> Striking a balance between these extremes, Humility emerges as self-image guided by lucid honesty. Humility involves choosing to view oneself through a lens of truth so as to recognize ones shortcomings and realize that there is always room for improvement.

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85. See SUSAN BIXLER & NANCY NIX-RICE, *THE NEW PROFESSIONAL IMAGE* 3 (1997) ("[M]illions of individuals . . . make decisions based on appearance . . . and people are initially evaluated on how they choose to dress and behave.").

86. See, e.g., POST & POST, *supra* note 55, at 149–80 (providing two chapters, one each for men and women, articulating a modern approach to appropriate business dress); see also Chanen, *supra* note 84 (providing advice, guidance, and examples to professionals on ways to enhance their personal appearance and achieve business success).

87. See John C. Boyden, *The Meaning of a Messy Desk*, NEV. LAW., Feb. 2003, at 12, 12–13 (discussing several studies that challenge the notion that "a cluttered desk is a sign of a cluttered mind").

88. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 605 (11th ed. 2003).

89. See ARISTOTLE, *supra* note 36, at 89–95.



The samurai valued Humility and detested arrogance. Warriors who gained fame as good generals were especially susceptible to a prideful character.<sup>90</sup> Samurai frequently looked down upon those among them who were conceited and cautioned young warriors against this type of behavior:

[I]f [warriors] cultivate the arts of war wrongly, they get conceited about their knowledge, looking down on others around them. Spouting high-flown but untrue theories, they mislead the youth and spoil their dispositions. Although they speak words beyond their own capacity that may seem correct and true, in their hearts they are very greedy, always calculating gain and loss. Gradually their character degenerates, and there are those who even lose the mentality of warriorhood altogether.<sup>91</sup>

The *bushido* conception of Humility can be further explored in the context of martial arts. In *judo*, students commonly engage in practice between players of a higher or lower rank. Before a match, players customarily exchange bows regardless of rank.<sup>92</sup> Thus, a black belt of the highest rank readily bows to a white belt of the lowest rank. This formality teaches players to conduct themselves in a humble manner.

Even the slightest air of condescension can appear offensive, and may negatively impact client relations and a lawyer's reputation within the legal community. Humility, however, involves much more than the avoidance of a superior attitude. As lawyers gain experience in their respective practice areas and become comfortable in their ways, a stubborn mind-set can easily develop. Tenacity of this sort stifles professional development by foreclosing opportunities to learn from the perspectives of others.

Humility counters the tendency toward rigidity and unites the concept of honesty with an attitude of openness and flexibility. As professor Brett Scharffs aptly described the virtue:

One who is humble can be persuaded that her conclusions are wrong; that her perspectives are limited and should be broadened; that her settled opinions merit reconsideration. One who is humble will possess a quiet confidence that enables learning and reassessment, because she is not defensive or insecure. What is more, one who is humble will seek the insights and viewpoints of others, because she will not have an unwarranted confidence in the power of her own intellect or the rightness of her every conclusion. One who is humble will have the capacity to be

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90. CODE OF THE SAMURAI, *supra* note 20, at 31.

91. *Id.* at 31-32.

92. Shigeyoshi Matsumae & Trevor Pryce Leggett, *A Talk: World Peace Through the Internationalization of Japanese Budo*, in TOWARD AN UNDERSTANDING OF BUDO THOUGHT, *supra* note 16, at 163, 170.



surprised by an argument or insight that causes her to rethink long-held opinions or favorite theories.<sup>93</sup>

Scharffs's articulation of Humility particularly applies to lawyers. The practice of law requires the perspective to both understand the world in which legal problems arise and to craft solutions to those problems within the confines of the law. The lawyer who can be open to various perspectives and engage in honest self-evaluation will be able to make sound decisions when confronted with legal, personal, and professional issues.

Additionally, Humility enables lawyers to learn from their mistakes. In *Hagakure*, Tsunetomo said that "one should not hesitate to correct himself when he has made a mistake. If he corrects himself without the least bit of delay, his mistakes will quickly disappear. But when he tries to cover up a mistake, it will become all the more unbecoming and painful."<sup>94</sup> Taking responsibility for mistakes and correcting them promptly are always wise in the practice of law. Humility helps attorneys realize that everyone makes mistakes just as it encourages attorneys to learn from their own mistakes.

Ultimately, Humility means understanding that everyone wins sometimes and loses sometimes. Someone else can always write a better brief, deliver a more articulate oral argument, or draft a tighter contract. Humility of character reveals that attorneys always have room to grow, and attorneys should pursue this virtue throughout their legal careers. Humility positions attorneys between pride and inferiority, a place where the samurai continually sought to be. To the extent that Humility seeks the truth, Integrity aligns personal truths with action.

#### D. Integrity

Integrity implies consistency and steadfastness.<sup>95</sup> According to one law professor:

[A] person of integrity has four primary character traits: a steadfast commitment to her values and principles, maintained even in the face of negative consequences; deliberative flexibility; a clear sense of her values and principles; and consistency, both in the application of her principles and between word and deed.<sup>96</sup>

These characteristics of Integrity apply to modern lawyers just as they applied to ancient samurai warriors.

The samurai sought to live with Integrity. To them, Integrity meant acting consistently with the principles of *bushido* at all times. In *Code of the Samurai*,

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93. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 164 (1998).

94. TSUNETOMO, *supra* note 46, at 42.

95. Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1650 (2002) ("At a minimum, the person of integrity manifests the trait of consistency or steadfastness.").

96. *Id.* at 1649.



Shigesuke discussed these principles for an audience of novice knights.<sup>97</sup> The following passage explains the practical difficulties of living in accordance with what is right:

As long as it is realized and accepted that warriors must comprehend right and wrong, and strive to do right and avoid wrong, then the way of the warriors is alive.

Right and wrong mean good and evil. Right is good, wrong is evil. Ordinarily people are not totally devoid of understanding of good and evil, right and wrong, but they find it boring and tiresome to act rightly and strive for goodness. Acting wrongly and behaving badly is fun and familiar, so they drift toward things that are wrong and bad, and it becomes tiresome for them to do right and foster good.

....

Therefore warriors consider it essential to always beware of wrong and pursue right.<sup>98</sup>

Young samurai learned that although living with Integrity does not come easily, it is a vital characteristic of an honorable warrior.<sup>99</sup>

Martial arts schools have also fostered Integrity. Martial arts students both in the age of the samurai and today learn and regularly recite virtues displayed in the *dojo* (school). Martial arts schools train their students to conduct themselves in accordance with these virtues in and out of the *dojo*, regardless of whether they are in uniform.<sup>100</sup> They learn that virtue must be a way of life rather than a matter of abiding by a set of rules that only apply in certain environments and in front of certain people.<sup>101</sup>

Lawyers constantly face impediments to living with Integrity. For example, lawyers are trained to rationalize. From the first day of law school, lawyers learn to distinguish one case from another to justify a client's conduct. It is logical then for attorneys to rationalize a deviation from their values on the ground that it is excusable under the circumstances. Once a lawyer begins rationalizing even minor ethical issues in this manner, however, this rationalization quickly becomes a "slippery slope."<sup>102</sup> Social influences also impede a life of Integrity. In practice, most lawyers make ethical decisions in the context of a larger institution. Law firms,

97. "This handbook, written after five hundred years of military rule in Japan, was composed to provide practical and moral instruction for warriors, correcting wayward tendencies and outlining the personal, social, and professional standards of conduct characteristic of Bushido, or the way of the warrior, the Japanese chivalric tradition." CODE OF THE SAMURAI, *supra* note 20, at xvi.

98. *Id.* at 18-19.

99. *Id.* at 18.

100. See Hidenori Tashiro, *About Budo: A Philosophical Examination*, in TOWARD AN UNDERSTANDING OF BUDO THOUGHT, *supra* note 16, at 179, 226-27 ("The sincere heart is the *dojo*: the *dojo* is not only the edifice called the *dojo*. Is not the *dojo* everywhere, where we live, where we talk, where we work and where we study?").

101. *Id.*

102. Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 912 (2002).



government offices, and private companies all exert social pressures on attorneys to act in accordance with the organization's culture even though that culture may conflict with an individual attorney's values. These pressures weigh heavily on a lawyer's ability to practice with Integrity.

Though rarely discussed, one particular issue that implicates Integrity involves the ethics of billing. Billing directly tests Integrity because this practice occurs behind closed office doors. When an attorney records billable hours, no one watches to make sure that the hours actually represent the legal work performed. Billable hour requirements in firms vary, but anyone who has worked in a law firm is familiar with the tremendous pressure to bill. Chief Justice William H. Rehnquist once commented that "if one is expected to bill more than two thousand hours per year, there are bound to be temptations to exaggerate the hours actually put in."<sup>103</sup> Because time sheets are difficult to verify, "[a]ttorneys' billing practices are increasingly subject to scrutiny."<sup>104</sup> Therefore, billing demands Integrity—requiring attorneys to resist the lure of exaggerating billable hours, to think critically about the billing process, and to conform billing practices to an elevated professional ethic.

Integrity boils down to living according to personally held virtues whether in or out of the courtroom, without regard to contrary social forces. "It is easy to act consistently with one's values and principles when everyone else holds the same commitments and is encouraging and supportive of them."<sup>105</sup> However, "the real test of steadfastness" involves choosing the right action even when confronted with strong external pressures to do otherwise.<sup>106</sup> Living with Integrity therefore requires a considerable amount of Courage.

### *E. Courage*

Courage may not be virtuous in all situations. Courage can enable bad deeds as well as good. For example, it takes Courage to fraudulently misappropriate funds from a client, yet this type of Courage is hardly a virtue. Thus, Courage alone is indiscriminate and requires an element of good intention to truly be classified as a virtue.

Courage is not necessarily the absence of fear, but rather the ability to overcome fear. The samurai had no choice but to conquer fear everyday. They lived each moment of their lives in contemplation of impending death,<sup>107</sup> yet they valiantly and consistently returned to the battlefield to serve their lords and to uphold justice. Tsunetomo once said, "When one's own attitude on courage is fixed in his heart, and when his resolution is devoid of doubt, then when the time comes

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103. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 155 (1987).

104. Douglas R. Richmond, *Professional Responsibility and the Bottom Line: The Ethics of Billing*, 20 S. ILL. U. L.J. 261, 261 (1996).

105. Dolovich, *supra* note 95, at 1650.

106. *Id.* Some of the social consequences of living with Integrity include: "contempt, ostracism, loss of a job, penal sanctions, the breakdown of friendships and familial relations, [or] being labeled 'confrontational,' 'difficult,' 'overly sensitive,' or 'militant.'" *Id.* (quoting Chesire Calhoun, *Standing for Something*, 92 J. PHIL. 235, 259 (1995)) (alterations in original).

107. CODE OF THE SAMURAI, *supra* note 20, at 3.



he will of necessity be able to choose the right move."<sup>108</sup> Courage, like Integrity, is a key ingredient in adept decisionmaking.

The general practice of law requires Courage. Courage keeps a lawyer committed to a just cause in spite of strong opposition from the media, clients, other lawyers, or even judges. "In order to achieve or at least seek justice, there can be instances when a lawyer may have to stand alone and point out that one's colleagues—and perhaps even the nation—are wrong."<sup>109</sup> A poignant example is the World War II Japanese-American internment case, *Korematsu v. United States*,<sup>110</sup> in which three United States Supreme Court Justices showed tremendous Courage in opposing a popular majority opinion.<sup>111</sup> Justices Roberts, Murphy, and Jackson disagreed with the majority,<sup>112</sup> which upheld an exclusion order against all persons of Japanese ancestry.<sup>113</sup> In a time in American history when anti-Japanese opinions were rampant, these Justices put their professional reputations on the line to condemn what they perceived as "a clear violation of Constitutional rights."<sup>114</sup> Justice Murphy, in an especially strongly worded dissent, wrote:

Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.<sup>115</sup>

In addition to the courageous dissents of these Supreme Court Justices, a group of attorneys, nearly four decades later, fought for recognition of the historic injustice that the 1944 decision engendered.<sup>116</sup> The significant number of pro bono hours committed to the *coram nobis*<sup>117</sup> cases resulted in reparations for Japanese-

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108. TSUNETOMO, *supra* note 46, at 46.

109. Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMUL. REV. 433, 451 (1997).

110. 323 U.S. 214 (1944).

111. See Araujo, *supra* note 109, at 452 (noting "the dissents of Justices Murphy, Roberts, and Jackson in the Japanese-American internment cases").

112. *Korematsu*, 323 U.S. at 225 (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting); *id.* at 242 (Jackson, J., dissenting).

113. See *id.* at 223–24 (majority opinion).

114. *Id.* at 225 (Roberts, J., dissenting).

115. *Id.* at 234–35 (Murphy, J., dissenting).

116. See Eric K. Yamamoto, *A Tribute to Patsy Takemoto Mink: Introduction of Fred Korematsu*, 6 ASIAN-PAC. L. & POL'Y J. 220, 221 (2005).

117. The legal term *coram nobis* is defined as "[a] writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact." BLACK'S LAW DICTIONARY 362 (8th ed. 2004).



Americans.<sup>118</sup> The Courage of the attorneys and judges who passionately stood up for those who did not have the resources or the legal skills to stand up for themselves made the reparations possible.<sup>119</sup>

While opportunities to act with valor in the general practice of law arise on occasion, the professionalism and ethics aspect of law demands Courage on a daily basis. To practice law with all of the other virtues described in this Essay requires varying degrees of Courage. For example, attorneys must have Courage to comply with the requirement that, in some instances, a lawyer must report a colleague. Rule 8.3(a) of the Model Rules provides that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."<sup>120</sup> Although the failure to report a violation constitutes a violation in itself,<sup>121</sup> lawyers often hesitate to turn in a colleague because of the tacit understanding that lawyers should not report "one of their own."<sup>122</sup> This reluctance is buttressed by the fact that Rule 8.3 is difficult, if not impossible, to enforce.<sup>123</sup> If, after careful examination,<sup>124</sup> a lawyer determines that a situation necessitates reporting a colleague, that lawyer will need Courage to overcome the social pressures that encourage silence.<sup>125</sup>

More often than not, making the "right" decision requires considerably more effort than making the easy decision. When senior lawyers in a firm advocate aggressiveness, associates must have Courage to choose politeness and civility. Lawyers must also have Courage to cite an opinion that may undermine their argument in a case. Lawyers must exercise Courage to live according to their own principles and values when others disagree. Perhaps most of all, lawyers must exercise Courage by assessing their own shortcomings and embracing their mistakes. Though sometimes difficult, lawyers must have the Courage to be accountable for their actions and to stand up for what is right and just.

Knowing the virtues that guided the samurai is but the first step in improving professionalism in the practice of law. The next step is to translate that knowledge into action.

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118. See Yamamoto, *supra* note 116, at 221; see also 50 U.S.C. §§ 1989a(a), 1989b (2000) (establishing restitution for the internment of Japanese-Americans during World War II).

119. See Jack B. Weinstein, *Every Day is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 131 (2004) ("[T]he judge embraces his professional life most fully when he is prepared to fight—and be criticized or reversed—in striving for justice.").

120. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2004).

121. *Id.* at R.8.3(a); see also MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2004) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . .").

122. Nikki A. Ott & Heather F. Newton, Note, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 750 (2003).

123. *Id.* at 749–50.

124. See Bruce A. Campbell, *To Squeal or Not To Squeal: A Thinking Lawyer's Guide To Reporting Lawyer Misconduct*, 1 FLA. COASTAL L.J. 265, 281 (1999) (providing a three-step analysis in determining whether to report a colleague: "(1) is this the type of violation that must be reported? (2) what is the source of the information? and (3) is there sufficient knowledge?").

125. See Ott & Newton, *supra* note 122, at 752–54 ("Lawyers, who in many respects depend upon their reputation among members of the bar and extended legal community, may think twice about reporting the actions of another lawyer if the ripple effect of being labeled a snitch could create havoc in their own lives.").



## IV. PRACTICING THE VIRTUES

To grow both professionally and ethically, attorneys must practice the virtues of Politeness, Honor, Humility, Integrity, and Courage daily, in the same way that the samurai tirelessly practiced their skills of war. *Bushido* primarily focused on practical wisdom rather than solely intellectual wisdom.<sup>126</sup> As an old samurai proverb states, "[A] literary savant [is] a book-smelling sot."<sup>127</sup> In other words, knowledge becomes valuable only when "it is assimilated in the mind of the learner and shows in his character."<sup>128</sup> Miyamoto Musashi, a legendary samurai from the Tokugawa period (1600–1860) who documented principles of *bushido* before his death, explained, "One cannot master the things recorded in this book by just reading the notes and trying to imitate them. They are things that are discovered in a true sense from within oneself. One must exert oneself unceasingly and study very hard."<sup>129</sup> Likewise, any approach to legal professionalism must consist of persistence both in study and in practice.

In the same way that lawyers practice law, they must also practice professionalism. Lawyers should live and breathe professionalism, ethics, and civility in all aspects of their lives. Constant practice is essential to self-perfection. A samurai obtained superior archery skills from many hours of disciplined practice.<sup>130</sup> The samurai frequently participated in the tea ceremony to practice grace and economy of movement. In both instances, practice engendered grace, which made the samurai's undertakings appear effortless. In turn, grace naturally commanded the power and respect for which the samurai were celebrated. Similarly, lawyers should constantly practice virtue to strengthen moral faculties and increase their worth.

Acting with sound moral judgment requires more than mastering ethics rules. Because of the complex nature of legal professionalism, a multi-disciplinary approach may work better than a single-tiered model to instill a sense of virtue into the practice of law. This Essay proposes a pyramidal model that individual lawyers may use to implement virtue-oriented lawyering. This model, the "I-Pyramid Model," focuses on three distinct levels: (1) individual, (2) interpersonal, and (3) institutional. Like a pyramid, the foundation of a lawyer's professional development should occur at the individual level by invoking various means of personal education and by making efforts to convert that knowledge to professional practice. The interpersonal level, which involves cultivation of virtue in the realm of interpersonal relationships, ranks second in importance. Finally, the tip of the pyramid consists of the institutional level, which includes law school curricula and bar-sponsored programs that can enhance the individual and interpersonal levels.

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126. See NITOE, *supra* note 8, at 41–43 ("[K]nowledge was conceived as identical with its practical application in life.").

127. *Id.* at 42.

128. *Id.*

129. MUSASHI, *supra* note 59, at 33.

130. See generally Eugen Herrigel, *Japan's Art of Archery*, in TOWARD AN UNDERSTANDING OF BUDO THOUGHT, *supra* note 16, at 109, 117–29 (describing the author's five-year journey in becoming a master of archery).



The I-Pyramid Model conveys the relative weight that attorneys should place on cultivating virtue at each of the three levels.

#### A. *The Individual Level*

Because ethical lawyering is an individual ethic, an attorney should exert the greatest effort on individual methods of professional enhancement. Each attorney must decide what kind of lawyer he or she wants to be and find the inspiration to bring that desire to fruition. No matter how much legal scholars or bar associations attempt to craft mass solutions to the professionalism problem, in the end, professionalism can only proliferate one attorney at a time.

Attorneys can advance their moral knowledge by reading books, magazines, and law journals on professionalism. Modern non-fiction titles address professionalism and ethics as they apply to business generally and law specifically.<sup>131</sup> Works by moral philosophers provide a collective knowledge of ethics.<sup>132</sup> Autobiographies of great leaders who epitomize virtue can also raise moral awareness.<sup>133</sup> Moreover, the internet and modern legal databases, such as Westlaw and Lexis-Nexis, contain ample resources from which to draw moral and intellectual guidance.<sup>134</sup> Constant exposure to virtue-oriented materials by reading even a few pages a day will heighten moral acuity.

Individual lawyers may also develop professionalism and ethics by watching television shows and films that portray lawyers and legal problems. Though lawyers

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131. See, e.g., JOHN KULTGEN, *ETHICS AND PROFESSIONALISM* (1988) (arguing that morality and professionalism are symbiotic and necessarily interconnected); LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES (Stephen Parker & Charles Sampford eds., 1995) (examining legal ethics in Australia, the United States, and the United Kingdom from a variety of practicing and academic perspectives); DAVID H. MAISTER, *TRUE PROFESSIONALISM: THE COURAGE TO CARE ABOUT YOUR PEOPLE, YOUR CLIENTS, AND YOUR CAREER* (2000) (arguing that the true meaning of professionalism is believing passionately in one's job and never compromising one's standards); DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (1994) (viewing legal ethics from an interdisciplinary perspective); THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985) (using a personal approach to examine legal ethics by discussing stories and experiences of American lawyers).

132. See, e.g., ARISTOTLE, *supra* note 36 (discovering the link between happiness and virtue); IMMANUEL KANT, *LECTURES ON ETHICS* (Louis Infield trans., Harper & Row 1963) (1930) (discussing the effects of individual ethics); THE DALAI LAMA, *ETHICS FOR THE NEW MILLENNIUM* (1999) (establishing individual ethical guidelines based on universal principles); JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* (Barbara Herman ed., 2000) (examining and comparing the philosophical theories of Hume, Leibniz, Kant, and Hegel). For a modern philosopher's examination of the classical virtues, see ANDRÉ COMTE-SPONVILLE, *A SMALL TREATISE ON THE GREAT VIRTUES* (Catherine Temerson trans., Metro. Books 2001) (1996).

133. See, e.g., FRANKLIN, *supra* note 40 (citing truth, sincerity, and integrity as the most important aspects of interpersonal relations); THOMAS JEFFERSON, *THOMAS JEFFERSON: WRITINGS* (Merrill D. Peterson ed., 1984) (discussing considerations of virtue in drafting the Declaration of Independence); MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* (Clayborne Carson ed., 1998) (asserting that focusing on the proper values will revolutionize America); ELEANOR ROOSEVELT, *THE AUTOBIOGRAPHY OF ELEANOR ROOSEVELT* (1961) (discussing how virtues shaped her life).

134. See generally Darby Dickerson, *Ethics on the Web: An Annotated Bibliography of Legal Ethics Material on the Internet*, 28 STETSON L. REV. 369, 370 & n.6 (1998) (discussing online ethics databases and listing online resources devoted to legal ethics).



and law students often "critique lawyer films for legal inaccuracies and for their unrealistic depiction of the legal profession,"<sup>135</sup> two major benefits accrue to attorneys who indulge in viewing these fictional portrayals. First, legal dramas provide provocative stories that capture the subtleties of legal ethics.<sup>136</sup> Episodes of *Law and Order* and *The Practice*, for example, delve into controversial ethical issues that some attorneys might not readily encounter in everyday practice. Watching these shows allows attorneys to think critically about legal ethics and test their values against a range of factual landscapes. Moreover, the characters and the storylines embodied in the lawyer film genres tend to have a lasting impact.<sup>137</sup> TV shows and films also tend to spark discussion among lawyers, thereby increasing the discourse on legal ethics and professionalism. Second, courtroom dramas provide great entertainment value. Some lawyers would rather watch a lawyer-themed film than read a scholarly journal article about legal ethics. When material is interesting, the audience gains more from its message.

Finally, lawyers can implement the virtues by using a personal mission statement that reminds themselves of the virtues they seek to uphold in their law practice. Many organizations commonly use mission statements. Both private companies and non-profit organizations use mission statements to ensure that the decisions of the group comport with a set of shared values. Interestingly enough, Miyamoto Musashi fashioned a list of nine guidelines for samurai that loosely resemble a mission statement:

- First: Do not harbor sinister designs.
- Second: Diligently pursue the path of *Niten Ichiryū*.<sup>138</sup>
- Third: Cultivate a wide range of interests in the arts.
- Fourth: Be knowledgeable in a variety of occupations.
- Fifth: Be discreet regarding one's commercial dealings.
- Sixth: Nurture the ability to perceive the truth in all matters.
- Seventh: Perceive that which cannot be seen with the eye.
- Eighth: Do not be negligent, even in trifling matters.
- Ninth: Do not engage in useless activity.<sup>139</sup>

135. James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. REV. 813, 834 (2004).

136. See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 177-81 (1996) (asserting that stories provide context and detail in understanding and applying legal and ethical principles).

137. See, e.g., Elkins, *supra* note 135, at 836-37, 841-42 (discussing the use of lawyer films in shaping legal ethics). Professor James R. Elkins uses the following movies in teaching his course *Lawyers and Film*: ADAM'S RIB (Metro-Goldwyn-Mayer 1949); ANATOMY OF A MURDER (Columbia Pictures Corp. 1959); AND JUSTICE FOR ALL (Columbia Pictures Corp. 1979); CLASS ACTION (Twentieth Century Fox 1991); PARIS TROUT (Anchor Bay Entm't 1992); THE CASTLE (Miramax Home Entm't 1997); THE DEVIL'S ADVOCATE (Warner Bros. 1997); THE LAST WAVE (Ayer Prod. 1977); THE MUSIC BOX (Carolco Pictures, Inc. 1990); THE SWEET HEREFTER (New Line Studios 1997); THE VERDICT (Twentieth Century Fox 1982); and TO KILL A MOCKINGBIRD (Universal Int'l Pictures 1962). *Id.* at 822. Other useful films include: A FEW GOOD MEN (Columbia Pictures Corp. 1992); A TIME TO KILL (Warner Bros. 1996); PRIMAL FEAR (Paramount Pictures 1996); THE FIRM (Paramount Pictures 1993); and THE RAINMAKER (Paramount Pictures 1997).

138. *Niten Ichiryū* means "Two Heavens-as-One School." MUSASHI, *supra* note 59, at 5. It is the name that Miyamoto Musashi gave to his philosophical and practical approach to samurai living. *Id.*

139. *Id.* at 25.



The samurai are not the only ones who believed in a mission statement approach to morality. Stephen R. Covey, the renowned author of *The Seven Habits of Highly Effective People*, recommends using a personal mission statement to center our lives on correct principles.<sup>140</sup> According to Covey, "[Y]our mission statement becomes your constitution, the solid expression of your vision and values. It becomes the criterion by which you measure everything else in your life."<sup>141</sup>

Attorneys can adopt the mission statement concept by reducing personal virtues to writing and reviewing them frequently to aid in ethical decisionmaking.<sup>142</sup> In the Eighth Annual Hugh J. Clausen Lecture on Leadership, United States Army Major General Kenneth D. Gray shared a list of values drafted by faculty leaders at West Virginia University.<sup>143</sup> These values can serve as a starting point for a mission statement that conveys the virtues of *bushido* and applies to the modern day lawyer. The values espoused by Major Gray include:

- (1) Absolute integrity—honest at all times: *Always tell the truth;*
- (2) Commitment to excellence—set and adhere to high standards: *Do the right thing;*
- (3) Wisdom—competence in your job: *Know your job and do it well;*
- (4) Respect human dignity and cultural diversity: *Respect for others;*
- (5) Compassion and humility—a little tolerance of others never hurts: *Be kind, understanding, and humble;* and
- (6) Clear and concise communication: *Pass on the right information.*<sup>144</sup>

Writing a mission statement takes an investment in time and energy. It can take days or even months to draft a mission statement that represents a clear and concise expression of your innermost values. Lawyers who decide to develop a mission

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140. See STEPHEN R. COVEY, *THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE* 128–29 (1989).

141. *Id.* at 129.

142. See Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 733 (2001). Mission statements can be used by groups as well as by individual attorneys: "[E]ach law firm should adopt an individualized professionalism code; make it available to the office, clients, and to other members of the public . . . ." *Id.* at 734. Mission statements are most effective when every member of the group participates in drafting it. *Id.* Professor Green suggests the following topics that a professionalism code might address:

How lawyers should treat other lawyers, nonlawyer personnel, and others in the office; how lawyers should balance their professional lives against their responsibilities to their family and the community; how the office conceptualizes its lawyers' responsibility to the legal profession and to the public; the lawyers' responsibility to develop and expand their skills and knowledge; the standards to which the lawyers will aspire in representing clients; the role of moral values in the lawyers' professional work on behalf of clients; the importance of integrity; and the importance of promoting public respect for the law and the legal profession.

*Id.* at 736.

143. See Kenneth D. Gray, *The Eighth Annual Hugh J. Clausen Lecture on Leadership*, 175 MIL. L. REV. 385, 389 (2003).

144. *Id.* at 389.



statement should review and revise it so that it continually reflects their beliefs. As Yamamoto Tsunetomo said, "[t]hroughout your life advance daily, becoming more skillful than yesterday, more skillful than today. This is never-ending."<sup>145</sup>

### B. *The Interpersonal Level*

On the interpersonal level, conversation and mentoring can promote professionalism. Increasing conversation within smaller legal circles can have a burgeoning effect. Sociologists have identified socialization as one of the "major sources of organizational culture."<sup>146</sup> Therefore, "[i]n most social settings, culture is elaborated through informal dialogue and reinforced by formal ceremony."<sup>147</sup> Informal dialogue on legal ethics can take place virtually anywhere—in a firm, at bar association meetings, on the golf course, or even at a fundraising dinner. These types of social settings provide an increased level of comfort for discussing ethical norms.

One way to increase conversation in a relaxed setting and to promote professionalism is to mentor or be mentored. Mentoring is a well-established method of imparting ethical principles to new generations of attorneys.<sup>148</sup> Samurai followed a similar apprenticeship method of training. Taira Shigesuke recommended that samurai, "even if they are of low rank, should select an appropriate mentor from whom to receive instruction in the arts of war, gaining detailed understanding of army principles and combat principles, including the inner secrets."<sup>149</sup> Finding a good mentor resulted in learning the principles of *bushido* in addition to acquiring skills of war. Though mentoring is a time-honored tradition, all mentoring is not created equal. The efficacy of any given mentorship depends on its structure.

Many law firms use organized mentoring programs,<sup>150</sup> in which a mentor is assigned to a junior associate. While this seemingly helps new associates navigate the turbulent first few years in practice, studies show that "assigned mentoring rarely works."<sup>151</sup> Assigned mentoring can seem forced and unnatural.

A successful mentoring relationship needs to be the product of both the mentor and the new lawyer. A number of factors affect the quality of a mentoring relationship, including personality, areas of practice, and personal interests. Considering these factors when pairing mentors to mentees should improve the relationship. Above all else, for mentoring to be successful, both the mentor and the new lawyer must want to be a part of the mentoring process. If two attorneys sustain a good mentoring relationship for a significant period of time, a new lawyer can gain an abundance of guidance in the areas of professionalism and ethics.<sup>152</sup> All

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145. TSUNETOMO, *supra* note 46, at 27.

146. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 861 (1998).

147. *Id.* at 863.

148. See Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 888 (2001).

149. CODE OF THE SAMURAI, *supra* note 20, at 31.

150. Tomain & Watts, *supra* note 10, at 600.

151. *Id.* at 601.

152. *Id.*



new lawyers should seek out a mentor who possesses qualities that they want to develop. Experienced lawyers should consider being a mentor and providing necessary and invaluable guidance to new lawyers at the dawn of their careers.

### C. *The Institutional Level*

Because individual ethics reside within a larger institutional framework, organizations like law schools and bar associations play a role in the practice of virtue. The institutional level comprises the tip of the I-Pyramid because organizations do not ordinarily practice institutional methods on a daily basis. A law school professionalism course might occupy a total of twenty-four hours in one semester of law school. Similarly, bar associations may only schedule Continuing Legal Education (CLE) courses on professionalism on a monthly basis. Therefore, institutional level devices only occasionally enhance the individual and interpersonal levels.

Law schools have experienced the brunt of criticism from the professionalism movement. Some critics argue that law schools foster a hyper-competitive atmosphere that emphasizes "winning at all costs."<sup>153</sup> The prevailing cut-throat attitude of law students puts virtue on the backburner. Others say that the formalistic manner in which law schools teach professional responsibility courses undermines moral concerns.<sup>154</sup> Regardless of the cause, survey results show that law students regard ethics courses as "ineffective" and "too theoretical."<sup>155</sup> To make matters worse, many law school graduates find that their ethics education failed to give them the information and tools necessary to resolve ethical dilemmas that arise in practice.<sup>156</sup>

During my third year of law school, I was fortunate enough to have an adjunct Professional Responsibility professor who had the Courage to modify the usual rules-based curriculum. Despite vocal opposition by students who only wanted to know what would be on the Multi-State Professional Responsibility Exam, this professor taught his class with a refreshing blend of personal anecdotes from practice, journal entries from students in the class, and lively discussion about what kind of lawyers we would and would not like to be. It was only a two credit class and the lack of the Socratic Method let some fall behind in the readings, but I always came out of that class feeling as though I learned something that substantive courses such as Corporations or Secured Transactions simply could not teach. This example demonstrates one effective method of teaching ethics courses.

Law schools should reevaluate their ethics curricula and identify shortcomings in light of the large amount of scholarship available in the area of legal-ethics education. Law professors should realize that different methods work for different

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153. Robert Granfield & Thomas Koenig, "It's Hard to Be a Human Being and a Lawyer": *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 501 (2003).

154. *Id.*

155. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 40-41 (1992).

156. Granfield & Koenig, *supra* note 153, at 512.



people, should study various approaches, and should experiment to find a technique that best fosters the moral instinct in their students.<sup>157</sup>

After law school, bar sponsored programs become the primary institutional mode of ethics education. CLE programs provide instruction on various areas of substantive law, as well as legal ethics. Bar associations make a few ethics CLE courses available every year, but typically assign them a fairly low number of credit hours—if they assign credit at all. The weakness of most of these courses is that the content is too general. CLE courses could be of more practical import by emphasizing ethics issues in specific areas of practice. Lawyers come from different practice areas, including prosecutors, public defenders, and attorneys general; large and small private practice attorneys and in-house counsel; and judges, law clerks, and law professors. All lawyers, depending on their practice area, face very different moral issues. Thus, an effective CLE program would tailor ethics courses in ways that are relevant to each lawyer's practice.

Bar associations also form sections for various areas of practice, which attorneys can join to keep abreast of the law in their respective fields. Unfortunately, the professionalism and ethics sections of most state bar associations are small or nonexistent. Leaders in the bar should make a concerted effort to strengthen interest in a professionalism section. Senior lawyers can support this effort by encouraging new attorneys to join and by joining themselves. The best way to lead is by example.<sup>158</sup> As with CLE programs, professionalism sections of the bar should strive to maintain active and relevant roles in the lives of their lawyer-members.

The institutional-level methods work in conjunction with the individual and interpersonal levels of the I-Pyramid Model and provide a sensible plan to implement virtue-oriented lawyering. Practicing virtue at each level of the I-Pyramid ensures a balanced approach to professionalism, ethics, and civility in the practice of law.

## V. CONCLUSION

Ethical conduct is a continuing obligation. Lawyers must exercise great Courage to live each day with Politeness, Honor, Humility, and Integrity. The virtues that contoured the moral consciousness of the samurai for generations are just as useful in polishing the path of professionalism for modern day lawyers. *Bushido's* virtue-oriented lawyering strikes the ultimate balance between powerful, zealous advocacy and powerfully understated civility, empowering attorneys with a quiet strength that is often absent in courtrooms across the nation.

Living in accordance with virtues that civilizations have cherished throughout history has many benefits. Virtue-oriented lawyering brings a sense of dignity to the practice of law that can improve lawyer fulfillment and mend the public's negative

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157. See, e.g., Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing the Profession from Its Roots*, 13 J. L. & HEALTH 1 (1998) (advocating an approach to help students make sense of the problems that typically arise in the classroom, courtroom, or law office).

158. See generally JOHN MAXWELL, *THE 21 INDISPENSABLE QUALITIES OF A LEADER*, at ix (1999) (helping readers "recognize, develop, and refine the personal characteristics needed to be a truly effective leader, the kind people want to follow").



perception of lawyers. Virtue-oriented lawyering can also improve client satisfaction because people place confidence in their lawyers and want to hire lawyers whom they can trust.

A virtue-oriented approach should supplement, not displace, a working knowledge of the ethics rules. The preamble to New York's Code of Professional Responsibility points out how virtue-oriented lawyering complements the rules that currently shape our ethical norms:

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer's own conscience must provide the touchstone against which to test the extent to which the lawyer's actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the profession and of the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.<sup>159</sup>

Law will undoubtedly endure as a noble profession. A strong resolve to internalize virtue-oriented lawyering on individual, interpersonal, and institutional levels will aid in this pursuit. In the end, lawyers should be able to look back on their careers with a profound sense of Honor. This is the way of the samurai.

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159. N.Y. CODE OF PROF'L RESPONSIBILITY pmb1. (McKinney 2002).