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# BENCHSLAPS

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## *Abstract*

*The practice of judges issuing so-called benchslaps is growing both in popularity and concern. Such published decisions and orders seek to publicly shame lawyers for their alleged unethical or unprofessional lawyering. Legal blogs have picked up on this trend, celebrating and elevating benchslaps to become a part of legal popular culture. However, the practice of using embarrassing and belittling published decisions to punish or to deter unethical or professional conduct raises serious concerns that the issuing judge is violating his or her own ethical duties.*

*This Article criticizes the practice and concludes that it must end based on three arguments: (1) benchslaps breach a judge's ethical obligation to take appropriate action in response to attorney misconduct; (2) benchslaps by their nature breach a judge's ethical obligation to treat those appearing in court with courtesy, respect, and patience; and (3) the lack of appeal rights from a benchslap compounds their inappropriateness.*

*The Article concludes that we retain the flexibility that judges need to manage attorney conduct while eliminating benchslaps as a disciplinary method. The Article rejects radical approaches such as limiting judicial immunity. Instead, the Article posits that current judicial ethical enforcement regimes—properly strengthened—are best equipped to address the issue and prevent future benchslaps.*

## I. INTRODUCTION

The universal narrative of childhood includes two equally unwholesome characters, the bully and the tattletale. Parents wisely counsel their child to be neither tattletale nor bully because each comes with costs. It should come as no surprise that

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bullying's dangerous use of power against those in weaker positions<sup>1</sup> causes the bully to lose a sense of compassionate empathy for others.<sup>2</sup> Bullies have the ability to understand the moral dimensions of their actions, but lack the ability to use that knowledge to adjust their behavior.<sup>3</sup> The tattletale role comes with its own downsides. Parents warn "no one likes a tattletale" for good reason—no one does.<sup>4</sup> Even popular culture makes clear that tattling is the fast lane to losing friends and popularity.<sup>5</sup>

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<sup>1</sup> See Gianluca Gini, Tiziana Pozzoli, & Marc Hauser, *Bullies Have Enhanced Moral Competence to Judge Relative to Victims, But Lack Moral Compassion*, 50 PERSONALITY & INDIVIDUAL DIFFERENCES 603, 604 (2011) ("Moreover, bullying is characterized by an imbalance of power between the bully and the victim; the powerful bully intentionally uses this inappropriate social behavior to reach valued goals, such as dominance, resource control and popularity within a group of peers.").

<sup>2</sup> *Id.*

<sup>3</sup> See *id.* at 607 ("[I]n the same way that recent studies suggest that psychopaths, including both adults and adolescents, may know right from wrong, but not care about such moral distinctions, so too may bullies have a sophisticated understanding of the moral domain without having the requisite emotions to inhibit their aggressive urges.") (citations omitted); Mary C. Lamia, *Do Bullies Actually Lack Empathy?*, PSYCHOL. TODAY (Oct. 30, 2010), <https://www.psychologytoday.com/blog/intense-emotions-and-strong-feelings/2010-10/do-bullies-actually-lack-empathy> [<https://perma.cc/YT4U-ZLHZ>] (explaining that while bullies have a "capacity to empathize," they tend to "destructively use their empathy to manipulate, control, exploit, or to cause pain. And they are able to withhold their compassion for the distress they cause others to feel").

<sup>4</sup> A recent study of whistleblowing in corporations suggests that employees who tattletale (or "blow the whistle") do not fare well professionally. Alexander Dyck, Adair Morse, & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FINANCE 2213, 2240–45 (2010) (stating that 82% of employee whistleblowers were "fired, quit under duress, or had significantly altered [employment] responsibilities"). This distaste for tattletales was also evident in a study conducted by Ernesto Reuben and Matt Stephenson. See Ernesto Reuben & Matt Stephenson, *Nobody Likes a Rat: On the Willingness to Report Lies and the Consequences Thereof*, 93 J. ECON. BEHAV. & ORG. 384, 385 (2013) (showing that in an emulated organizational setting, groups rarely selected individuals who had a history of tattling, and that individuals who had previously reported wrongdoing were generally shunned by each group).

<sup>5</sup> Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 545 (2009) [hereinafter Greenbaum, *Judicial Reporting*] ("In our culture, reporting the misconduct of others is regularly frowned upon—who wants to be a 'snitch' or a 'tattle-tail?'"); John M. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 104 (1982) ("In our society the person who blows the whistle occupies a very ambiguous position. In common parlance and even in law review articles pejorative terms such as 'squeal,' 'rat,' 'stool pigeon,' and 'gestapo' are used freely. People often say and believe that such action somehow does violence to 'basic ethical notions.' As a parent one can remember using the devastating 'put down of, 'Don't be a tattle-tale.'" On the other hand, we give and have been given messages such as 'Why didn't you tell me that Johnny was . . . ?'"); THE BRADY BUNCH MOVIE (Paramount Pictures 1995) (counseling his youngest daughter Cindy, America's television father, Mike Brady, stated:

These twin childhood villains begin to frame a more serious adult problem: how are judges expected to manage the conduct of attorneys appearing before them? Should a judge reflexively report all, including minor, ethical or professional transgressions to the appropriate state bar disciplinary committee? Or, should a judge ensure attorney compliance with ethical and professional norms with the force of the schoolyard bully by ridiculing and publicly shaming weaker parties into compliance? As noted by one author over thirty years ago, the judiciary owns an “abysmal” record for reporting attorney misconduct to disciplinary committees.<sup>6</sup> In the thirty years since, nothing much has changed, as judges continue to preserve their own popularity and to avoid taking on the role of the tattletale regarding attorney misconduct.<sup>7</sup>

Instead, some judges have less trouble adopting the role of the bully. Rather than report misconduct, it has become increasingly popular for judges to enforce ethical and professional norms through so-called “benchslaps,”<sup>8</sup> where the judge, often in a way that is superficially humorous, calls out attorney misconduct in a written order or opinion. There is some debate as to the cause of this particular type of judicial conduct.<sup>9</sup> Yet whatever the cause, it is plain that in each case the judges fail to initiate disciplinary action or to counsel the offending attorney quietly.

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“Cindy, you know by tattling on your friends you’re really just tattling on yourself. By tattling on your friends, you’re just telling them that you’re a tattletale. Now is that the tale you want to tell?”).

<sup>6</sup> See Levy, *supra* note 5, at 106 (quoting J. LIBERMAN, CRISIS AT THE BAR 203–04 (1978)) (“[M]any judges, most notably Chief Justice Warren E. Burger, have complained that a significant number of advocates who appear before them are incompetent . . . [However,] neither the Chief Justice nor the other judges have forwarded the names of obviously unskilled and incompetent lawyers to disciplinary committees for appropriate action.”).

<sup>7</sup> See Leslie W. Abramson, *The Judge’s Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 780 (1997) (“Moreover, when a judge reports another judge or a lawyer, even one widely regarded as acting unethically, others may ‘blame’ the notifying judge, whose status may diminish more than that of the reported offender. Understandably, what judge would want the reputation of a snitch? Who would want to be a judge?”).

<sup>8</sup> A “benchslap” is formally defined as “a judge’s sharp rebuke of counsel, a litigant, or perhaps another judge, esp., a scathing remark from a judge or magistrate to an attorney after an objection from opposing counsel has been sustained.” *Benchslap*, BLACK’S LAW DICTIONARY (10th ed. 2011).

<sup>9</sup> See, e.g., Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949, 956–68 (2013) [hereinafter Goodman, *Causes of Judicial Misbehavior*] (suggesting judges lose their temper for three reasons: a loss of recognition of the humanity of those appearing before the court, “decision fatigue,” and the inability to “regulate their emotions”); see Steve Lubet, *Stupid Judge Tricks*, 41 S. TEX. L. REV. 1301, 1310 (2000) (suggesting that such “stupid judge tricks” are rooted in “an over-active sense of entitlement, verging on self-attributed invulnerability”).

Instead, judges use public shaming and the power of their position to bully the attorney into compliance.<sup>10</sup>

The shaming aspect of the benchslap is quite public. Attorneys, law students, fellow judges, and anyone with internet access can easily find and guffaw at the “Benchslap of the Day” on one legal blog,<sup>11</sup> or ring in the New Year by celebrating the “Best Benchslaps of [the Year]” on another.<sup>12</sup> These legal blogs and their celebration of this form of judicial bullying convert attorney discipline from the somber and serious correction of professional misconduct into judicial blood sport for all to enjoy and cheer on.

However, once the viewer clicks another link and the laughter dies down, this practice raises serious issues regarding the judge’s own ethical and professional duties and obligations. Like attorneys, judges too have an ethical obligation to take appropriate action when confronted with unethical conduct by lawyers and other judges.<sup>13</sup> Not only does the practice of correcting attorney misdeeds through a benchslap question the benchslapping judge’s ethics,<sup>14</sup> it also raises serious concerns regarding the slapped attorney’s due process rights because such slaps are generally not appealable.<sup>15</sup> Beyond that, the indecorous use of the judicial power to mock an officer of the court in a written order crosses into unprofessional conduct, further eroding the already weakened image of the legal profession and the justice system.

The analysis that follows makes plain that a judge simply does not and should not have the choice to play the bully when disciplining attorneys. Is a judge who witnesses attorney misconduct left only with playing the tattletale? The choice should not be that stark. Instead, judges must retain the flexibility to manage courtroom behavior and the content of attorneys’ written product, while at the same time fulfilling their important role in the self-policing of the legal profession of which they are an integral part. While the benchslap is under no circumstances an appropriate response to attorney misconduct, we need not place the judge in the position of “ratting out” attorneys whenever there is a whiff of even minor transgressions. Rather, we must trust judges to employ the same common sense that

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<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> This is a regular feature at the popular legal blog “Above the Law.” *Benchslap of the Day*, ABOVE THE LAW, <http://abovethelaw.com/tag/benchslap-of-the-day/> [https://perma.cc/J937-JD5C].

<sup>12</sup> Josh Blackman, *The 8 Best Benchslaps of 2012*, JOSH BLACKMAN’S BLOG (Dec. 18, 2012), <http://joshblackman.com/blog/2012/12/18/the-8-best-benchslaps-of-2012/> [https://perma.cc/G5ZL-TJHA].

<sup>13</sup> See Abramson, *supra* note 7, at 757–59 (showing that Canon 3D of the 1990 Code of Judicial Conduct contained ethical obligations imposed on judges who knew of ethical violations by judicial officers and lawyers).

<sup>14</sup> See *infra* Parts III.A., III.B.

<sup>15</sup> See Douglas R. Richmond, *Appealing from Judicial Scoldings*, 62 BAYLOR L. REV. 741, 757 (2010) (noting that the collateral order doctrine limits the avenues for appeal of judicial benchslaps).

we entrust them to deploy every day when deciding cases or interacting with litigants restrained by stronger guidance from existing judicial ethics codes.

This Article proposes that it is possible to both restrict the harmful benchslap while providing judges with the needed discretion to monitor and correct attorney misconduct. Part II of this Article notes the nature of bullying and its foundation in the disparate power between bully and victim and explores the effect that bullying in workplaces has on both victims and innocent bystanders. This part also explores the effects of bullying to the practice of judicial benchslapping, further defines and illustrates judicial benchslaps, illuminates the connection between the benchslap and attorneys' breaches of the Rules of Professional Conduct, and drives home how the dissemination of benchslaps through legal blogs and social media makes them a particularly aggressive form of bullying and an inappropriate method of correcting attorney misconduct. Part III offers three separate, but related arguments, concluding that the practice of judicial benchslaps is inconsistent with both ethical rules and good policy. First, the judicial benchslap represents an abdication of the judge's duty to report attorney misconduct or to take other appropriate action.<sup>16</sup> Second, the benchslap breaches the judge's own duty of decorum.<sup>17</sup> Third, the benchslap cannot be a proper vehicle to mete out attorney discipline because it lacks the necessary due process and appeal rights that any system of formal discipline must ensure to be just.<sup>18</sup>

Part IV recognizes that proposals to limit judicial immunity from defamation suits and to expand the opportunity for affected attorneys to appeal judicial benchslaps may serve as a deterrent or a safety valve if needed. However, such suggestions are ultimately rejected because of the negative effects they would have on judicial independence and judicial resources. Instead of such radical reforms, Part IV suggests a practical and more modest approach. Because the judicial benchslap raises issues of judicial ethics, it is best dealt with through the existing framework regulating judicial conduct. Thus, this part ultimately suggests revisions to the ABA's Model Code of Judicial Ethics to make clear that (1) a benchslap is not an "appropriate" response to attorney misconduct, while retaining the judge's ability to address less serious infractions of attorney ethics by something less formal than a report to the state disciplinary committee, and (2) a benchslap is a violation of a judge's duty to be courteous to lawyers and others appearing before the court.

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<sup>16</sup> See *infra* Part III.A.

<sup>17</sup> See *infra* Part III.B.

<sup>18</sup> See *infra* Part III.C.

## II. BACKGROUND

*A. The Underbelly of the Slap: The Psychology of Bullying and Its Relation to Judicial Benchslaps*

“Bullying is aggressive behavior that is intentional and that involves an imbalance of power or strength.”<sup>19</sup> Importantly, bullying is usually not a random act—it is purposeful behavior designed to reach a particular goal.<sup>20</sup> In this way, it is “premeditated aggression.”<sup>21</sup> While it often involves repeated behavior, a single act can suffice.<sup>22</sup> Bullying has been classified as a “particularly vicious kind of aggressive behavior” because the target “is unable to defend himself or herself effectively.”<sup>23</sup> Bullies can be found in many places—from the schoolyard to the work environment like a courtroom.<sup>24</sup> Bullies can be most often found in places or situations from which the victim can find no escape.<sup>25</sup> Yet whether on the playground or at work, between children or adults, the general profile of bullies is sadly consistent. Bullies are more often men in a position of power vis-à-vis the victim of bullying.<sup>26</sup>

Over the past two decades, researchers have extensively examined workplace bullying and its effects.<sup>27</sup> This body of research has revealed that, much like bullying

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<sup>19</sup> ROBIN M. KOWALSKI ET AL., CYBERBULLYING: BULLYING IN THE DIGITAL AGE, at 18 (2d ed. 2012) (citations omitted).

<sup>20</sup> See Gini, Pozzoli, & Hauser, *supra* note 1, at 604 (asserting that bullying “is more goal-oriented than reactive aggression”).

<sup>21</sup> *Id.*

<sup>22</sup> See Anthony Carlino, *The Counsellor’s Column*, POLARE, Oct. 2012, at 21 (noting that “even a single act can be bullying and have a massively detrimental effect to someone’s mental health”).

<sup>23</sup> PETER K. SMITH, THE NATURE OF SCHOOL BULLYING: A CROSS-NATIONAL PERSPECTIVE 1 (1999).

<sup>24</sup> See Gini, Pozzoli, & Hauser, *supra* note 1, at 604 (studying bullying in school-aged children); David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 478–79 (2000) [hereinafter Yamada, *The Phenomenon of “Workplace Bullying”*] (studying bullying among adults at work).

<sup>25</sup> SMITH, *supra* note 23, at 1.

<sup>26</sup> See Yamada, *The Phenomenon of “Workplace Bullying,” supra* note 24, at 481 (noting that in one study 70% of the “instigators were male, men were much more likely than women to inflict their actions on those of lower status”).

<sup>27</sup> The term “workplace bullying” was coined by British journalist Andrea Adams in the 1980s and early 1990s when she used a series of BBC radio documentaries to bring the topic to a more public audience. See David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251, 254 (2010). Although definitions vary, workplace bullying is commonly defined as “repeated, unreasonable actions of individuals (or a group) directed towards an employee (or a group of employees), which are intended to intimidate, degrade, humiliate, or undermine,

in childhood, there are significant and adverse consequences associated with workplace bullying.<sup>28</sup> These consequences affect not only the individual target, but also their peers and the larger profession as well.<sup>29</sup> At the individual level, the consequences range from minor physical and mental health issues to severe psychological disorders and physiological side effects.<sup>30</sup> At the organizational level, the resulting consequences can include anything from high turnover to a general lack of commitment to the profession.<sup>31</sup>

The personalized, focused nature of bullying, often compromises a target's mental health.<sup>32</sup> The bullying behavior destabilizes and disassembles the target's identity and sense of justice and fairness, creating insecurities and feelings of loss and helplessness.<sup>33</sup> In addition, bullying causes targets to experience shame, guilt, embarrassment, and low self-esteem.<sup>34</sup> These emotions often compound, and may result in psychological distress, including anxiety, depression, negative emotions,

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or which create a risk to the health or safety of the employee.” SAFETY & HEALTH ASSESSMENT & RESEARCH FOR PREVENTION (SHARP) PROGRAM, WASH. STATE DEP'T OF LABOR & INDUS., REPORT NO. 87-2-2011, WORKPLACE BULLYING AND DISRUPTIVE BEHAVIOR: WHAT EVERYONE NEEDS TO KNOW 1 (2011).

<sup>28</sup> See Randy A. Sansone & Lori A. Sansone, *Workplace Bullying: A Tale of Adverse Consequences*, 12 INNOVATIONS CLINICAL NEUROSCIENCE 32, 34–35 (2015).

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See Charlotte Rayner, *The Incidence of Workplace Bullying*, 7 J. COMMUNITY & APPLIED SOC. PSYCHOL. 199, 207–08 (1997); see also Yamada, *The Phenomenon of “Workplace Bullying,”* *supra* note 24, at 483–84.

<sup>32</sup> See Morten Birkeland Nielsen et al., *Longitudinal Relationship Between Workplace Bullying and Psychological Distress*, 38 SCANDINAVIAN J. WORK ENV'T & HEALTH 38, 38 (2012).

<sup>33</sup> *Id.* (likening the experience of workplace bullying to a traumatic event); see Annie Hogh et al., *Individual Consequences of Workplace Bullying/Mobbing*, in BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE 115 (Ståle Einarsen et al. eds., 2d ed. 2011). A traumatic event is an event that is so overwhelming that the individual feels unable to function without substantial help from others, and can threaten to shatter basic cognitive schemas. *Id.* This process is further explained by examination of Janoff-Bulman's theory of cognitive trauma. According to this theory, “psychological problems following victimization are caused by the shattering of basic assumptions targets of bullying hold of themselves, other people, and the world.” Nielsen et al., *supra* note 32, at 42. Thus, exposure to workplace bullying “is assumed to shatter the target's basic beliefs in justice and fairness, creating a state of anxiety and feelings of loss that subsequently have consequences on mental health.” *Id.*

<sup>34</sup> See GARY NAMIE ET AL., BULLYPROOF YOURSELF AT WORK!: PERSONAL STRATEGIES TO STOP THE HURT FROM HARASSMENT 69 (1999); see also HARVEY A. HORNSTEIN, BRUTAL BOSSES AND THEIR PREY 74–75 (1996) (showing statistically significant correlations between a “boss's abusive disrespect” and depression, anxiety, and low self-esteem).



and overt anger.<sup>35</sup> This distress is heightened in workplace environments, where power structures are particularly apparent.<sup>36</sup>

When these behavioral stressors go unabated, a target's mental health can further deteriorate and, in some cases, even result in severe psychological disorders and work-related suicide.<sup>37</sup> In fact, several researchers have suggested that targets of workplace bullying experience symptoms similar to those associated with posttraumatic stress disorder ("PTSD").<sup>38</sup> One study in particular found that victims of bullying exhibited higher levels of PTSD than a series of nonbullied, high-trauma control groups, including recently divorced persons and war zone personnel.<sup>39</sup> While these are extreme cases, there is no question that there are serious adverse mental health consequences for victims of bullying.

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<sup>35</sup> See Karl Aquino et al., *Overt Anger in Response to Victimization: Attributional Style and Organizational Norms as Moderators*, 9 J. OCCUPATIONAL HEALTH PSYCHOL. 152, 160 (2004) (finding a strong relationship between perceived victimization at the workplace and overt anger); Åse Marie Hansen et al., *Bullying at Work, Health Outcomes, and Physiological Stress Response*, 60 J. PSYCHOSOMATIC RESEARCH 63, 67–69 (2006) (noting a statistically significant association between bullying and anxiety and depression); Lars Johan Hauge et al., *The Relative Impact of Workplace Bullying as a Social Stressor at Work*, 51 SCANDINAVIAN J. PSYCHOLOGY 426, 429–30 (2010) (finding a strong correlation between workplace bullying and anxiety and depression); Tina Løkke Vie et al., *How Does It Feel? Workplace Bullying, Emotions and Musculoskeletal Complaints*, 53 SCANDINAVIAN J. PSYCHOLOGY 165, 170 (2012) (concluding that victims of bullying "tend to be more afraid, upset, angry, guilty, nervous, hostile, frustrated, ashamed, scared and stressed than non-victims").

<sup>36</sup> See Sara Branch et al., *Workplace Bullying, Mobbing and General Harassment: A Review*, 15 INT'L J. MGMT. REVS. 280, 282 (2013); see also Kathleen Conn, *Best Practices in Bullying Prevention: One Size Does Not Fit All*, 22 TEMP. POL. & C.R. L. REV. 393, 396 (2013) (noting that one of the defining characteristics that differentiates bullying from more general forms of violence is the imbalance of power).

<sup>37</sup> See Stig Berge Matthiesen & Ståle Einarsen, *Psychiatric Distress and Symptoms of PTSD Among Victims of Bullying at Work*, 32 BRITISH J. GUIDANCE & COUNSELLING 335, 338 (2004); see also Virginia Hazel Routley & Joan E. O'zanne-Smith, *Work-Related Suicide in Victoria, Australia: A Broad Perspective*, 19 INT'L J. INJ. CONTROL & SAFETY PROMOTION 131, 132 (2012) (noting that of the 642 work-related suicides examined in the study, 55% had an association with work stressors such as workplace bullying). Joseph Kinney, founding director of the nonprofit National Safe Workplace Institute, also found that workplace violence can be a consequence of abusive work environments, noting that "there have been numerous instances where abusive supervisors have baited angry and frustrated employees, pushing these individuals to unacceptable levels of violence and aggression." JOSEPH A. KINNEY, *VIOLENCE AT WORK: HOW TO MAKE YOUR COMPANY SAFER FOR EMPLOYEES & CUSTOMERS* 132 (1995).

<sup>38</sup> See Matthiesen & Einarsen, *supra* note 37, at 338; see also Claire Bonafons et al., *Specificity of the Links Between Workplace Harassment and PTSD: Primary Results Using Court Decisions, a Pilot Study in France*, INT'L ARCHIVE OCCUPATIONAL ENV'T HEALTH 663, 665 (2009).

<sup>39</sup> Matthiesen & Einarsen, *supra* note 37, at 342–45.

In addition to these mental health concerns, a lengthy list of physical side effects is also associated with workplace bullying.<sup>40</sup> Recent research has linked the experience of bullying to physiological outcomes, such as sleep problems, musculoskeletal complaints, lower salivary cortisol, and cardiovascular disease.<sup>41</sup> Additional physical effects include reduced immunity to infection, stress headaches, high blood pressure, and digestive problems.<sup>42</sup>

Interestingly, the consequences are not limited to the individual targets themselves. Studies have found that witnesses also experience negative reactions to workplace bullying, such as lower general and mental stress and emotional drain.<sup>43</sup> In addition, the vicarious experience of bullying may create feelings of fear and depression.<sup>44</sup> Many coworkers and peers who witness workplace bullying can invoke a strong sense of guilt that can erode confidence over time.<sup>45</sup>

Unsurprisingly, the combination of these physiological and psychological effects often results in broader consequences, such as an increase in absenteeism, as targets report higher levels of burnout and emotional exhaustion.<sup>46</sup> Concerns

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<sup>40</sup> See Sansone & Sansone, *supra* note 28, at 34–35.

<sup>41</sup> See Hansen et al., *supra* note 35, at 69 (finding that bullied participants had a 30% lower cortisol concentration in the saliva); M. Kivimäki et al., *Workplace Bullying and the Risk of Cardiovascular Disease and Depression*, 60 J. OCCUPATION & ENVTL. MED. 779, 780 (2003) (noting that, with regard to cardiovascular disease, the odds ratio for bullied participants compared to non-bullied counterparts was 2.3); Isabelle Niedhammer et al., *Workplace Bullying and Sleep Disturbances: Findings from a Large Scale Cross-Sectional Survey in the French Working Population*, 32 SLEEP 1211, 1213–14 (2009) (finding that sleep disturbances are prevalent among individuals exposed to workplace bullying); Vie et al., *supra* note 35, at 169 (noting a positive correlation between exposure to workplace bullying and musculoskeletal complaints).

<sup>42</sup> See NAMIE ET AL., *supra* note 34, at 69.

<sup>43</sup> Maarit A-L Vartia, *Consequences of Workplace Bullying with Respect to the Well-Being of Its Targets and the Observers of Bullying*, 27 SCANDINAVIAN J. WORK ENV'T. & HEALTH 63, 65 (2001) (noting that “observers of bullying . . . reported significantly more general stress and mental stress reactions than did the employees from workplaces without bullying”); Peter Totterdell et al., *Can Employees Be Emotionally Drained by Witnessing Unpleasant Interactions Between Coworkers? A Diary Study of Induced Emotion Regulation*, 26 WORK & STRESS 112, 126–27 (2012) (concluding that staff felt significantly more emotionally drained after witnessing workplace bullying).

<sup>44</sup> See *Impact of Workplace Bullying on Coworkers*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/impact/coworkers/> [<https://perma.cc/B6NF-Y2L5>].

<sup>45</sup> *Id.*

<sup>46</sup> See Paolo Campanini et al., *Rischio Mobbing e Assenze Lavorative per Malattia [Workplace Bullying and Sickness Absenteeism]*, 37 EPIDEMIOLOGIA E PREVENZIONE [EPIDEMIOLOGY & PREVENTION] 8, 8–16 (2013) (It.) (confirming that workers exposed to workplace bullying report higher sickness absenteeism as compared to non-exposed participants); M. Voss et al., *Physical, Psychosocial, and Organisational Factors Relative to Sickness Absence: A Study Based on Sweden Post*, 58 OCCUPATIONAL & ENVTL. MED. 178, 181 (2001) (noting that the occurrence of bullying at the workplace almost doubled the

regarding turnover are also prevalent, with some studies suggesting that one in four people leave their organizations because of workplace bullying.<sup>47</sup> Perhaps most devastating, however, is the fact that workplace environments conducive to bullying create “fear and mistrust, resentment, hostility, feelings of humiliation, withdrawal, play-it-safe strategies, and hiding mistakes.”<sup>48</sup> As David Yamada noted, an atmosphere “infected with [these attitudes]” often results in stress that “stifle[s] creativity,” commitment to quality, and respect for the overall profession.<sup>49</sup>

The documented research demonstrates that exposure to bullying, particularly in one’s workspace, has a corrosive effect not only on the direct victim but on others around him or her.<sup>50</sup> If we consider the courtroom and the court’s written orders and decisions as part of a lawyer’s workspace, the effect of the judicial benchslap expands far beyond simply the judge and the lawyer to whom it is directed. It infects all of those interacting with the court—parties, lawyers, staff, etc. And those effects appear to be far beyond hurt feelings as discussed above. We should seriously consider why we would tolerate anything that would stifle creativity, reduce commitments to quality, and erode respect for the profession.

### *B. The Nature of the Slap: Benchslaps Defined and Illustrated*

Coined in 2005, the term “benchslap” is a recent addition to legal vocabulary.<sup>51</sup> As defined, it is a “judge’s sharp rebuke of counsel, a litigant, or perhaps another judge.”<sup>52</sup> The term is derived from the offensive term “bitch-slap.”<sup>53</sup> To “bitch-slap” someone is to “slap (someone) angrily usually as an expression of dominance,

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risk of high incidences of sickness); Tsung-Yu Wu & Changya Hu, *Abusive Supervision and Employee Emotional Exhaustion: Dispositional Antecedents and Boundaries*, 34 GROUP & ORG. MGMT. 143, 151 (2009) (noting a positive correlation between abusive supervision and emotional exhaustion). Concerns of high turnover as a result of workplace bullying are also quite prevalent. *Id.* at 145.

<sup>47</sup> See Rayner, *supra* note 31, at 204.

<sup>48</sup> EMILY S. BASSMAN, ABUSE IN THE WORKPLACE: MANAGEMENT REMEDIES AND BOTTOM LINE IMPACT 141 (1992).

<sup>49</sup> See Yamada, *The Phenomenon of “Workplace Bullying,” supra* note 24, at 483–84.

<sup>50</sup> In fact, the potential damage from bullying can reach beyond the tight circle of those who know the perpetrator and victim. See Abigail A. Patthoff, *This Is Your Brain on Law School: The Impact of Fear-Based Narratives on Law Students*, 2015 UTAH L. REV. 391, 393–94 (2015) (arguing that the use of benchslaps in law school to scare students into later ethical and professional practice is likely to backfire. Because law school is a “‘breeding ground’ for anxiety and law student distress,” the use of such “fear-based narratives” could cause students to “react in perverse ways in response to fear appeals.”).

<sup>51</sup> *Benchslap*, BLACK’S LAW DICTIONARY (10th ed. 2010) (noting that the term was coined by “Above the Law” creator and legal blogger David Lat in 2005); *Benchslaps*, ABOVE THE LAW <http://abovethelaw.com/benchslaps/> [<https://perma.cc/KG3L-WU36>].

<sup>52</sup> *Benchslap*, BLACK’S LAW DICTIONARY (10th ed. 2010).

<sup>53</sup> *Id.* (noting that the term is “an echo of the offensive and derogatory term *bitch-slap*”).

contempt, or disrespect.”<sup>54</sup> The online Urban Dictionary’s definition likewise reflects the intent to dominate the recipient of such a slap.<sup>55</sup> Given that pedigree, the “benchslap” certainly connotes the judge’s attempt to dominate and bully the recipient of the rebuke. It is this thinly veiled attempt to demean and belittle that sets apart the true benchslap from the more routine business of the court managing attorney behavior.

The rising popularity of the benchslap has led to the creation of a modern taxonomy of slaps. Developed by legal blogger Josh Blackman, benchslaps are broken down into five distinct categories. A “horizontal bench slap” is a slap directed at a judge on the same level or court as the slapping judge.<sup>56</sup> Of course, the “vertical bench slap” is directed at a lower-court judge.<sup>57</sup> Its opposite is the “reverse bench slap,” where a lower-court judge benchslaps a judge on a higher court.<sup>58</sup> A

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<sup>54</sup> *Bitch-Slap*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/bitch%E2%80%93slap> [<https://perma.cc/3EZA-XYL7>].

<sup>55</sup> *Bitch-slap*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=bitch%20slap> [<https://perma.cc/TW8X-NSC8>] (noting that the top definition states that the act’s purpose is to “[d]enote disrespect for the person being bitch slapped as they are not worthy of a man sized punch. Suggests the slap was met with little resistance and much whining.”).

<sup>56</sup> Blackman, *supra* note 12 (“The [term] horizontal benchslap refers to a judicial remark that smacks down a fellow judge on the same court.”). In a footnote in the majority opinion in *Lapointe v. Commissioner of Correction*, Justice Richard N. Palmer of the Connecticut Supreme Court attacks fellow Justice Carmen E. Espinosa for her dissenting opinion, where she purportedly misinterprets the meaning of habeas corpus:

Rather than support her opinion with legal analysis and authority, however, [Justice Espinosa] chooses, for reasons we cannot fathom, to dress her argument in language so derisive that it is unbefitting an opinion of this state’s highest court. Perhaps worse, her interest lies only in launching groundless ad hominem attacks and in claiming to be able to divine that (allegedly improper) personal motivations of the majority. We will not respond in kind to Justice Espinosa’s offensive accusations; we are content, instead, to rely on the merits of our analysis of the issues presented by this appeal. Unfortunately, in taking a different path, Justice Espinosa dishonors this court.

*Lapointe v. Comm’r of Corr.*, 112 A.2d 1, 59 n.69 (Conn. 2015).

<sup>57</sup> Blackman, *supra* note 12 (“The vertical benchslap refers to a judicial remark that smacks down a judge on a lower court.”). After Judge Posner questioned Justice Scalia’s dissent in *Arizona v. United States*, Justice Scalia “benchslapped” back in an interview with *Fox News Sunday*: “‘He’s a court of appeals judge, isn’t he?’ Scalia, 76, said of Posner. ‘He doesn’t sit in judgment of my opinions as far as I’m concerned.’” *Benchslap of the Day: Justice Scalia Pulls Rank on Judge Posner*, ABOVE THE LAW (July 30, 2012, 4:48 PM), <http://abovethelaw.com/2012/07/benchslap-of-the-day-justice-scalia-pulls-rank-on-judge-posner/> [<https://perma.cc/KS2A-VZPP>].

<sup>58</sup> Blackman, *supra* note 12 (“The reverse benchslap (as coined by David Lat) refers to ‘a lower-court judge dissing a judge on a higher tribunal.’”). In a piece for *Slate*, federal

particularly severe benchslap is the “GVRtical Bench Slap,” where the U.S. Supreme Court specifically refers to a court of appeals by name in a “Grant-Vacate-Remand . . . per curium order.”<sup>59</sup> Finally, the “Flying Bench Slap” includes situations where the judge issues a benchslap to the litigants in a particular case—flying off the bench “to deliver a personal slap to the litigant.”<sup>60</sup> It is the final category of

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appeals court Judge Posner penned a scathing criticism of the dissenting Justices in *Obergefell*:

The four dissents strike me as very weak, though I’ll discuss just two of them, beginning with the chief justice’s. . . .

The chief justice criticizes the majority for “order[ing] the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?” We’re pretty sure we’re not any of the above. And most of us are not convinced that what’s good enough for the Bushmen, the Carthaginians, and the Aztecs should be good enough for us. Ah, the millennia! Ah, the wisdom of ages! How arrogant it would be to think we knew more than the Aztecs—we who don’t even know how to cut a person’s heart out of his chest while he’s still alive, a maneuver they were experts at.

Richard A. Posner, *Supreme Court Breakfast Table: The Chief Justice’s Dissent Is Heartless*, SLATE (June 27, 2015, 1:56 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2015/scotus\\_roundup/supreme\\_court\\_gay\\_marriage\\_john\\_roberts\\_dissent\\_in\\_obergefell\\_is\\_heartless.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.html) [https://perma.cc/G2A3-V456].

<sup>59</sup> Blackman, *supra* note 12 (“The most severe of all vertical benchslaps is when SCOTUS calls out a court of appeals by name in a Grant-Vacate-Remand (GVR in the lingo) per curium order. This is the dreaded GVRtical benchslap (pronounced Go Vertical).”). The United States Supreme Court, in *Parker v. Matthews*, repeatedly called out the Sixth Circuit in their Grant-Vacate-Remand per curium order:

As we explained in correcting an identical error by the Sixth Circuit two Terms ago . . . circuit precedent does not constitute “clearly established Federal law, as determine by the Supreme Court.” It therefore cannot form the basis for habeas relief under AEDPA. Nor can the Sixth Circuit’s reliance on its own precedents be defended in this case on the ground that they merely reflect what has been “clearly established” by our cases. The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here. To make matters worse, the Sixth Circuit decided *Gall II* under pre-AEDPA law . . . so that case did not even *purport* to reflect clearly established law as set out in this Court’s holdings. It was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief.

*Parker v. Matthews*, 132 S. Ct. 2148, 2155–56 (2012).

<sup>60</sup> Blackman, *supra* note 12 (“Yet, the benchslap is not only used to smack down other judges. Frequently, it is used to smack down litigants who mess up. In such cases, the Judge flies off the bench to deliver a personal slap to the litigant. This is the flying benchslap.”).

benchslaps—those directed not towards other judges but to lawyers appearing before the judge—that raise the concerns addressed in this Article. While the intrajudicial benchslaps raise concerns,<sup>61</sup> it is the ones directed towards nonjudges where issues of decorum, ethical obligations, and public perception are particularly pronounced. Moreover, the extrajudicial slap represents the clearest case of judicial bullying—where one party is prevented from responding in kind even if so inclined.<sup>62</sup> Thus, while there are certainly arguments against benchslaps in all of their forms, the analysis that follows focuses exclusively on the flying benchslap (and will use the generic term “benchslap” to refer to that subset).

Not every order or decision noting an attorney’s performance is properly classified as a benchslap. Merely pointing out potential misconduct is not enough. Two examples nicely illustrate judicial condemnation of poor attorney performance without benchslapping the attorneys involved.

In *Cottonwood Financial v. Estes*,<sup>63</sup> the Wisconsin Court of Appeals took the time to sanction an attorney \$150 for failing to comply with the rules of appellate procedure while deciding the merits of the case without issuing a caustic benchslap.<sup>64</sup> The court noted that the attorney failed “to provide proper citation to the appellate record or to the relevant case law” and included an inappropriately lengthy 230-page appendix consisting of nearly the entire appellate record.<sup>65</sup> The court “seeing as [it was] already expending judicial resources explaining how Estes wasted judicial resources in this appeal,” went on to criticize the attorney for the unwise decision to reply to the defendant’s brief by filing a letter standing on the argument in the initial briefing.<sup>66</sup>

Likewise, the California Court of Appeal took on a particularly bad case of unprofessional and unethical conduct in *In re S.C.*<sup>67</sup> There, the court was faced with a truly incompetent and quite offensive brief in which counsel, during the course of

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<sup>61</sup> While the other forms of benchslaps certainly raise questions about their inappropriateness, at least in many the power imbalance and bullying seen in the “flying benchslap” are not present or are not as problematic. Certainly, the spectacle of life-tenured federal and state court judges lowering themselves and their offices by engaging in such unprofessional behavior raises many of the concerns about judicial decorum and the public’s perception of the justice system addressed below. However, I leave to another article or another author to more fully analyze the appropriateness of such intra-judicial benchslaps.

<sup>62</sup> See *infra* Part III.B. While ill-advised, parties themselves are not immune from the temptation to slap back occasionally. Thus, one pro se litigant filed a Notice of Appeal in which he informed the court that he was “appealing the asshole Ronald B. Leighton’s decision in this matter. You have been hereby serve[d] [sic] notice. You’re not getting away with this shit that easy.” *Swinyer v. Cole*, Case 3:04-cv-05348-RBL, 100 (W.D. Wash. July 12, 2006).

<sup>63</sup> 784 N.W.2d 726 (Wis. Ct. App. 2010), *vacated on other grounds*, 337 Wis.2d 49 (2011).

<sup>64</sup> *Id.* at 729.

<sup>65</sup> *Id.* at 735.

<sup>66</sup> *Id.*

<sup>67</sup> 41 Cal. Rptr. 3d 453 (Cal. Ct. App. 2006).

over 76,000 words, “gratuitously and wrongly insult[ed] her client’s daughter (the minor in this case) by, among other things, stating the girl’s developmental disabilities make her ‘more akin to broccoli.’”<sup>68</sup> The opening lines of the published decision reflects the court’s clear frustration with the offending attorney:

This is an appeal run amok. Not only does the appeal lack merit, the opening brief is a textbook example of what an appellate brief should not be.

In 76,235 words, rambling and ranting over the opening brief’s 202 pages, appellant’s counsel has managed to violate rules of court; ignore standards of review; misrepresent the record; base arguments on matters not in the record on appeal; fail to support arguments with any meaningful analysis and citation to authority; raise an issue that is not cognizable in an appeal by her client; unjustly challenge the integrity of the opposing counsel; make a contemptuous attack on the trial judge; and present claims of error in other ways that are contrary to commonsense notions of effective appellate advocacy . . . .<sup>69</sup>

The court noted that its “comments are harsh but deservedly so.”<sup>70</sup> The remainder of the opinion is a mix of merits determinations and criticisms of the lawyering in the case. Thus, the court was “mystified as to how appellant’s counsel believes the record citations support the claim of error,”<sup>71</sup> noted that counsel “fails to grasp” a fundamental rule of appellate review,<sup>72</sup> and labeled counsel’s advocacy as “uncivil, unprofessional, and offensive.”<sup>73</sup> The court concluded its opinion with an order that its decision be sent to the state bar.<sup>74</sup>

In neither example did the court employ rhetoric that would bully or demean the attorneys in question. Instead, both decisions frankly state the attorneys’ failings without demeaning them. Such professional recitation of the attorneys’ ethical lapses stands in stark contrast to the demeaning, belittling, and bullying benchslaps.

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<sup>68</sup> *Id.* at 458.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 459.

<sup>71</sup> *Id.* at 467.

<sup>72</sup> *Id.* at 470.

<sup>73</sup> *Id.* at 474.

<sup>74</sup> *Id.* at 479 (“Upon issuance of the remittitur, the Clerk/Administrator of this court is directed to send a copy of this opinion to the State Bar of California.”). The propriety of judges using a written order to recited alleged attorney failings and sending that order to a state bar for investigation and potential sanction is beyond the scope of this Article. On one hand, if done professionally, such an order would not raise the problems associated with benchslaps. On the other, such public accusations, even if proven false, can have a long last effect on the accused attorney’s reputation. This would counsel for a less public reporting instrument.

While the term “benchslap” is a relative newcomer to legal vocabulary, the act of a judge using his or her position of power to demean a lawyer in writing dates back hundreds of years.<sup>75</sup> In what may be the first benchslap in recorded history, a London judge in 1596 took a lawyer to task for filing a pleading that, in the judge’s opinion, was significantly over length.<sup>76</sup> The court noted that the plaintiff’s “replication”<sup>77</sup> amounted to “six score sheets of paper,” but could have been “well contrived in sixteen sheets of paper.”<sup>78</sup> The court took to the task of discovering the author of this verbose pleading so that “for example sake” he could be punished and fined.<sup>79</sup> The author confessed to drafting the pleading, and the court took him into custody, imposed a fine, and ordered costs to the defendant.<sup>80</sup> As if being taken into custody was insufficient, the court went a step beyond and benchslapped the offender by ordering that a hole be cut “in the myddest” of the pleading and that the offender wear the pleading (“with the written side outward”) while being shown, “bare headed and bare faced,” to the courts sitting within Westminster Hall.<sup>81</sup>

Modern benchslaps lack the Elizabethan English, but contain the same elements of mockery and public shaming. One of the more famous benchslaps, making a yearly appearance in legal writing classes across the nation, is *Bradshaw v. Unity Marine Corp.*<sup>82</sup> In that case, former Federal District Court Judge Kent,<sup>83</sup> benchslapped both the plaintiff’s and defendant’s attorneys while granting summary judgement for the defendant on a personal injury claim.<sup>84</sup> The resolution of the matter hinged on whether state law or federal maritime law applied to the claim because of the differing statutes of limitation.<sup>85</sup> While the issue was rather

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<sup>75</sup> Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers’ Papers*, 31 SUFFOLK U. L. REV. 1, 2–4 (1997); Judith D. Fischer, *Incivility in Lawyers’ Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 367 (2011).

<sup>76</sup> *Mylward v. Weldon*, [1595] EWHC Ch. 1, Reg. Lib. A. 1596, Fol. 672 (15 Feb., 1595).

<sup>77</sup> A replication is a common law pleading in which the plaintiff replies to the defendant’s answer. *Replication*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>78</sup> *Mylward v. Weldon*, [1595] EWHC Ch. 1, Reg. Lib. A. 1596, Fol. 672 (15 Feb., 1595).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* The court ordered the plaintiff to be held prisoner until he pay ten pounds as a fine and twenty nobles to the defendant as costs. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 147 F. Supp. 2d 668 (S.D. Tex.).

<sup>83</sup> It should be noted that former Judge Kent was impeached by the U.S. House of Representatives in June 2009 and is currently serving a prison sentence for lying to investigators during an investigation of allegations that he sexually assaulted two female employees. S.A. Miller, *Impeached Judge Samuel B. Kent Tenders His Resignation*, WASH. TIMES (June 27, 2009), <http://www.washingtontimes.com/news/2009/jun/27/impeached-judge-tenders-his-resignation/> [https://perma.cc/54FJ-S99S].

<sup>84</sup> *Bradshaw*, 147 F. Supp. 2d at 672.

<sup>85</sup> *Id.* at 671.



straightforward, the parties' briefings were deficient in many respects. The third paragraph of the published order begins the court's screed of the lawyering in the case:

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.<sup>86</sup>

After setting forth the summary judgment standard, the court continued to openly mock the lawyers in the case. The court accused defendant's counsel of beginning the case's "descent into Alice's Wonderland" through his "bumbling approach" of relying on only one case and failing to cite to the statute of limitation.<sup>87</sup> In the court's view, the plaintiff's counsel's own "gossamer wisp of an argument" was no better, although he does get credit for citing to the federal statute of limitations.<sup>88</sup> The court noted that the plaintiff also cited to only one case, but the citation in the brief referred to a nonexistent volume of the federal reporter.<sup>89</sup> After locating the case, the court noted that it stood "for the bombshell proposition that torts committed on navigable waters . . . require the application of general maritime rather than state tort law."<sup>90</sup> Referring to that case, the court went on: "(What the . . .)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent

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<sup>86</sup> *Id.* at 670.

<sup>87</sup> *Id.* ("Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. . . . A more bumbling approach is difficult to conceive—but wait folks, There's More!").

<sup>88</sup> *Id.* ("Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff does at least cite the federal limitations provision applicable to maritime tort claims.").

<sup>89</sup> *Id.* at 670–71 ("Plaintiff 'cites' to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume '1886' of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision.").

<sup>90</sup> *Id.* at 671.

volume!).”<sup>91</sup> The remainder of the decision is filled with similar language openly mocking the lawyers for their failure to adequately inform the court of the applicable law and authorities, suggesting that the parties’ briefs were written with crayon.<sup>92</sup>

In another benchslap, Federal District Court Judge Sam Sparks invited counsel to a “kindergarten party” to discuss the pending motion to quash subpoenas filed by three nonparties.<sup>93</sup> The order noted:

The party will feature many exciting and informative lessons, including:

- How to telephone and communicate with a lawyer
- How to enter into reasonable agreements about deposition dates
- How to limit depositions to reasonable subject matter
- Why it is neither cute nor clever to attempt to quash a subpoena for technical failures of service when notice is reasonably given; and
- An advanced seminar on not wasting the time of a busy federal judge and his staff because you are unable to practice law at the level of a first-year law student.

Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshals have beds available if necessary, so you may wish to bring a toothbrush in case the party runs late.<sup>94</sup>

Judge Sparks has lamented in at least one other case that the litigants in his cases behaved like kindergarten children.<sup>95</sup> His benchslapping ways, while not leading to

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* In a particular passage worth noting, the court stated:

Despite the continued shortcomings of Plaintiff’s supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotted about Plaintiff’s briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig. *Id.*

<sup>93</sup> *Morris v. Coker*, No. A-11-MC-712-SS, 2011 WL 3847590, at \*1 (W.D. Tex. Aug. 26, 2011).

<sup>94</sup> *Id.*

<sup>95</sup> In *Klein-Becker, LLC v. Stanley*, No. A-03-CA-871-SS, 2004 U.S. Dist. LEXIS 19107 (W.D. Tex. July 21, 2004), Judge Sparks lamented:

When the undersigned accepted the appointment from the President of the United States of the position now held, he was ready to face the daily practice of law in federal courts with presumably competent lawyers. No one warned the undersigned that in many instances his responsibility would be the same as a person who supervised kindergarten. Frankly, the undersigned would guess the lawyers in this case did not attend kindergarten as they never learned how to get along well with others. . . .

formal discipline, have not gone unnoticed. In response to the kindergarten benchslap, U.S. Circuit Court of Appeals Chief Judge Edith Jones sent Judge Sparks an email suggesting that his “cute” orders are doing more harm than good and reflecting “badly on all of us.”<sup>96</sup> Other courts have taken lawyers to task in written orders for failing to play nicely with others during the litigation process.<sup>97</sup>

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The Court simply wants to scream to these lawyers, “Get a life” or “Do you have any other cases?” or “When is the last time you registered for an anger management class?”

*Id.* at \*4–6.

<sup>96</sup> MATTHEW A. BOWERS, *BENCHSLAPPED: PUBLICLY HUMILIATING JUDICIAL OPINIONS* 227 (2d. ed. 2013). The email in question, which was intended to be private but so easily made it into the public realm is reprinted here:

Dear Sam,

It has not escaped my attention, or that of my colleagues or, I am told, nationally known blog sites that you have issued several “cute” orders in the past few weeks. The order attached below is the most recent.

Frankly, this kind of rhetoric is not funny. In fact, it is so caustic, demeaning, and gratuitous that it casts more disrespect on the judiciary than on the now-besmirched reputation of the counsel. It suggests either that the judge is simply indulging himself at the expense of counsel or that he is fighting with counsel in what, as Judge Gee used to say, is surely not a fair contest.

No doubt, none of us has been consistently above reproach in our professional communications with counsel. We are all prone to human error. But no judge who writes an order should allow such rhetoric to overcome common sense.

Ultimately, this kind of excess, as I noted, reflects badly on all of us. I urge you to think before you write.

Sincerely,  
Edith Jones.

*Id.*

<sup>97</sup> See, e.g., Rulings on Pending Motions at 2–4, *Physicians Choice of Ariz. v. Miller*, No. CV2003-020242, (Ariz. Sup. Ct. July 19, 2006) (granting Plaintiff’s Motion to Compel Attendance of Lunch Invitation, listing the parties’ squabbles over the location and timing, allocating the cost and tip, and suggesting that “serious discussion occur after counsel have eaten. The temperaments of the Court’s children always improve after a meal.”); Order on Motion to Continue at 1–3, *Jayhawk Capital Mgmt., LLC v. LSB Indus., Inc.*, No. 08-2561-EFM, 2011 WL 1626581 (D. Kan. April 12, 2011) (granting a contested motion to continue where one of the plaintiff’s counsel’s wife was expecting a child during the scheduled trial and noted that this case represented an “uncommon example” of the “unhappy trend” of “attorneys los[ing] sight of their role as professionals, and personaliz[ing] the dispute; converting the parties’ disagreement into a lawyer’s spat.” The court noted the “importance of federal court,” but also that he “ha[d] always tried not to confuse what he does with who

Another trial-level benchslap began as a verbal assault on a lawyer and eventually morphed into a highly insulting written order.<sup>98</sup> U.S. District Court Judge Lynn Hughes had been presiding over a federal prosecution of an alleged terrorist in *United States v. Hardan*.<sup>99</sup> Texas-based assistant U.S. attorneys handled the case exclusively until Assistant U.S. Attorney Kashyap Patel, a prosecutor with the U.S. Department of Justice's National Security Division in Washington, D.C., was assigned to oversee the case.<sup>100</sup> Mr. Patel's first meeting with Judge Hughes did not go well.<sup>101</sup> Before they even met, Judge Hughes referred to Mr. Patel as a "son of [a] bitch[]" in advising the Texas-based lawyers that they should not have let Mr. Patel use their PACER account to file his notice of appearance.<sup>102</sup> From the tenor of the conversation, it seems that it was the presence of Washington, D.C. lawyers that got under Judge Hughes's skin.<sup>103</sup> Once the two met, things did not improve. Judge Hughes berated Mr. Patel for failing to wear a tie, even after he explained that he had arrived directly to the courthouse from an international flight through Tajikistan.<sup>104</sup> Judge Hughes then berated Mr. Patel for his presence in the case, concluding that he did not "add a bit of value" over the Texas-based lawyers.<sup>105</sup>

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he is, nor to distort the priorities of his day job with his life's role." The court concluded with: "Counsel are encouraged to order their priorities similarly.").

<sup>98</sup> See Order on Ineptitude, *United States v. Al Hardan*, No. H-16-CR-003 (S.D. Tex. Feb. 5, 2016) (Docket Document 45).

<sup>99</sup> See *id.*

<sup>100</sup> Adam Goldman, 'You Don't Add a Bit of Value, Do You?': Texas Judge Berates Government Lawyers, WASH. POST (Feb 11, 2016), [https://www.washingtonpost.com/world/national-security/you-dont-add-a-bit-of-value-do-you-texas-judge-berates-government-lawyers/2016/02/11/0b3a181c-d006-11e5-88cd-753e80cd29ad\\_story.html](https://www.washingtonpost.com/world/national-security/you-dont-add-a-bit-of-value-do-you-texas-judge-berates-government-lawyers/2016/02/11/0b3a181c-d006-11e5-88cd-753e80cd29ad_story.html) [<https://perma.cc/UN5P-QXWP>].

<sup>101</sup> Mr. Patel's first few seconds of his meeting with Judge Hughes set the tone:

THE COURT: What is your role in this?

MR. PATEL: I'm a member of the trial team from the counterterrorism section.

THE COURT: You're not a member of the trial team. It's been going on for a month or so and you haven't been here, have you?

*Read: How a Federal Judge in Texas Berated a Federal Prosecutor*, WASH. POST, <http://apps.washingtonpost.com/g/documents/national/read-how-a-federal-judge-in-texas-berated-a-federal-prosecutor/1857/> [<https://perma.cc/5RWJ-YAZG>] (giving easy access to Transcript of Proceedings at 4, *United States v. Al Hardan*, No. H-16-CR-003 (S.D. Tex. Jan. 28, 2016)).

<sup>102</sup> *Id.* ("Don't let those son of bitches use your account. And put that in the record. They'll do something terrible, and you'll get blamed for it.").

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Judge Hughes, after making Mr. Patel retrieve his passport, told him that if he wanted to "be a lawyer dress like a lawyer" and to "act like a lawyer." *Id.*

<sup>105</sup> *Id.* ("So, what is the utility to me and to the people of America to have you fly down here at their expense, eat at their expense, and stay at their expense when there are plenty of

Judge Hughes then excused Mr. Patel from the in-chambers meeting.<sup>106</sup> The lawyers in Washington, D.C. were aghast by Judge Hughes' treatment of their colleague, Mr. Patel.<sup>107</sup> They apparently had some trouble obtaining a copy of the transcript of the in-chambers meeting.<sup>108</sup> Their fumbling led Judge Hughes to issue a written benchslap, styled as an "Order on Ineptitude."<sup>109</sup> Judge Hughes' order provided:

1. If the pretentious lawyers from "main" justice knew what they were doing—or had the humility to ask for help from the United States Attorney for the Southern District of Texas—it would not have taken three days, seven telephone calls, three voicemail messages, and one snippy electronic message for them to indirectly ask the court for assistance in ordering a transcript.
2. The Washington lawyers might have looked at the Court's website: <http://www.txs.uscourts.gov/page/OrderingTranscripts>.<sup>110</sup>

The urge to benchslap attorneys is by no means limited to trial-level courts. Instead, renowned federal appellate jurists have entered the fray. U.S. Court of Appeals Judge Posner issued a particularly well-known benchslap to the appellant's counsel in *Gonzalez-Servin v. Ford Motor Co.*<sup>111</sup> That opinion covered two cases consolidated for appeal, both raising issues of *forum non conveniens*.<sup>112</sup> Judge Posner questioned counsel's decisions in both cases to not discuss the court's prior decisions in *Abad v. Bayer Corp.*<sup>113</sup> and *Chang v. Baxter Healthcare Corp.*,<sup>114</sup> which presented the "identical issue" as the present case.<sup>115</sup> In one of the consolidated cases, the opening brief was filed prior to the issuance of *Abad* and *Chang* because of a long delay between opening and response briefing.<sup>116</sup> However, the court noted that the reply brief touched on *Abad* only slightly and failed to discuss *Chang*,

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capable people over there, in this room plus over there? You don't add a bit of value, do you?"

<sup>106</sup> *Id.*

<sup>107</sup> Goldman, *supra* note 100. According to anonymous sources at the Department of Justice, "the episode has left those very lawyers in the Justice Department fuming at the rough handling of their colleague." *Id.*

<sup>108</sup> *Id.* ("When word of the hearing reached Patel's bosses in Washington, they apparently tried to get a transcript of the session, but with some difficulty. Their efforts provoked another rebuke from Hughes, who issued his 'Order on Ineptitude' – now being passed around legal circles like a deliciously illicit piece of literature.").

<sup>109</sup> *United States v. Al Hardan*, No. H-16-CR-003 (S.D. Tex. Feb. 5, 2016).

<sup>110</sup> *Id.*

<sup>111</sup> 662 F.3d 931 (7th Cir. 2011).

<sup>112</sup> *Id.* at 933.

<sup>113</sup> 563 F.3d 663 (7th Cir. 2009).

<sup>114</sup> 599 F.3d 728 (7th Cir. 2010).

<sup>115</sup> *Gonzalez-Servin*, 662 F.3d at 933.

<sup>116</sup> *Id.* at 934.

despite being filed after the issuance of the two controlling cases and being relied on in the defendant's response brief.<sup>117</sup>

Judge Posner suggested that counsel, when faced with adverse precedent, may argue that the court should distinguish it or overrule it—not ignore it.<sup>118</sup> Judge Posner then, in both words and pictures, suggested that the attorneys were practicing law like ostriches, by sticking their heads in the sand to hide from difficult precedent—referring to one attorney by name twice:

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches *really* bury their heads in the sand when threatened; don't be fooled by the picture below.) The 'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.'

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* Judge Posner warned:

When there is apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari but may not simply ignore it. We don't know the thinking that led the appellants' counsel in these two cases to do that. But we do know that the two sets of cases out of which the appeals arise, involving the blood-products and Bridgestone/Firestone tire litigations, generated many transfers under the doctrine of *forum non conveniens*, three of which we affirmed in the two ignored precedents. There are likely to be additional such appeals; maybe appellants think that if they ignore our precedents their appeals will not be assigned to the same panel as decided the cases that established the precedents. Whatever the reason, such advocacy is unacceptable.

*Id.*



The attorney in the vehicular accident case, David S. ‘Mac’ McKeand, is especially culpable, because he filed his opening brief as well as his reply brief after the *Abad* decision yet mentioned it in neither brief despite the heavy reliance that opposing counsel placed on it in their response brief. In contrast, counsel in the blood-products appeal could not have referred to either *Abad* or *Chang* in their opening brief, did try to distinguish *Abad* (if unpersuasively) in their reply brief, and may have thought that *Chang* added nothing to *Abad*. Their advocacy left much to be desired, but McKeand’s left more.<sup>119</sup>

These examples of benchslaps represent more than a judge managing the lawyers’ behavior. Instead of meeting the attorney’s unprofessional or unethical conduct with dispassionate and professional counseling or sanctions, the judges in these benchslaps took the opportunity to use their authority to shame and belittle the lawyers. Like weaker children on the playground or subordinate employees in a workplace, these lawyers had nowhere to run from this judicial bullying. Like those victims, these lawyers also had little recourse given their inability to retaliate in kind and the court’s and judicial ethics commissions’ unwillingness or inability to address the problem.

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<sup>119</sup> *Id.* at 934–35 (quoting *Mannheim Video, Inc. v. Cty. of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989)).

*C. Provoking the Slap: Benchslaps as Inappropriate Reactions to Attorney  
Breaches of the Core Ethical Duties of an Advocate*

A review of even the few benchslaps illustrated here reveals a common provocation—attorney misconduct during the course of litigation that rises to the level of at least a potential violation of the Rules of Professional Responsibility. This should come as no surprise. It would be highly unlikely, and even more inappropriate, for a benchslap to be unprovoked or to be randomly issued. It is also consistent with what we know of bullying—it is planned behavior to achieve a particular goal. Each involves some action by the attorney that gets up the judicial dander and results in the publication of the benchslap.

All attorneys, regardless of their practice jurisdiction, owe basic ethical obligations of competence, candor, and decorum; attorneys must avoid raising frivolous arguments not only to their clients but also to the tribunals before which they appear.<sup>120</sup> The public, and even some members of the bar, often misperceive the advocacy duties as boiling down to one—“do anything to win” or, in the terms of the former canons of professional conduct, to “represent a client zealously within the bounds of the law.”<sup>121</sup> However, the advocacy duties serve as important counterweights to that common misperception. Vigorous enforcement of these duties protects the public from ethically wayward attorneys, protects the administration of justice by ensuring that decisions are based on the law and facts and not on lawyerly bluster or trickery, and protects the legal profession from the tarnished reputation such tactics would bring.<sup>122</sup>

The enumeration of the duty of competence as Model Rule 1.1 signifies that it is the most basic of the advocacy duties.<sup>123</sup> While most of the commentary speaks of the rule in terms of duties owed to the client, we can also think of the duty of competence running to the tribunal as well—imposing on the lawyer the obligation of competent practice and assistance to the court in litigating a case.<sup>124</sup> That first-

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<sup>120</sup> See Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 90 (2000) (noting that a majority of states have adopted the ABA Model Rule of Professional Conduct 1.1 imposing a duty of competence on attorneys); *supra* notes 70–72 and accompanying text.

<sup>121</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 1980).

<sup>122</sup> See *Auriemma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988) (noting that the “unique duties of an advocate” along with judicial supervision of litigation protects litigants from “overzealous advocates”).

<sup>123</sup> MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015); John M. Burman, *Lawyers' and Judges' Ethical Duty of Competence*, 33 WYO. LAW. 34, 34 (2010) (noting that “all lawyers should want to fulfill what may be the most basic duty lawyers owe to their clients: the duty to be competent”).

<sup>124</sup> *Smith v. Town of Eaton*, 910 F.2d 1469, 1470 n.1 (7th Cir. 1990) (“The duty that the bar owes to this court is mirrored by counsel's duty to represent clients competently.”);



order duty requires an attorney to “provide competent representation to a client” requiring “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>125</sup> The duty is not inflexible, and it does not require the exhaustion of all available time and monetary resources for matters large and small. Instead, the duty is tied to the complexity of the matter—the more complex, the more “attention and preparation” is required.<sup>126</sup> Nor does the duty of competence require attorney perfection.<sup>127</sup> Instead, the hallmark of the duty of competence, like many things in the law, is reasonableness.<sup>128</sup>

Yet, reasonableness does not imply that the duty is so amorphous so as to become merely aspirational. Instead, the duty has real bite in the context of litigation. Thus, competence requires an attorney to perform appropriate research on the factual and legal basis of a claim.<sup>129</sup> The failure to perform basic legal research has been

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McCrickard v. Pac. Bell Tel. Co., No. A131224, 2012 WL 3568480, at \*3 (Cal. Ct. App. Aug. 20, 2012) (“In our view, any attorney who engages in civil litigation has a duty of competence to understand the rules of discovery.”); *Temples v. Crow*, No. 99-1147-CIV-T-17A, 1999 U.S. Dist. LEXIS 17724, at \*14 (M.D. FL. 1999) (reminding counsel that “the Rules of Professional Conduct of the Florida Bar require candor toward the tribunal, and a duty of competence. Rule 4.1.1 and Rule 4-3.3(3) imply a duty to know and disclose to the court adverse legal authority” (quoting *Dilallo v. Riding Safely, Inc.*, 687 So.2d 353, 355 (Fla. 4th DCA 1997))).

<sup>125</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2015); Burman, *supra* note 123, at 34 (noting that the duty of competence has both legal and ethical implications in that the duty of duty competence is “more often enforced through malpractice actions rather than through the grievance process”).

<sup>126</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS’N 2015) (“The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.”).

<sup>127</sup> Paul J. Sax, *When Worlds Collide: Ethics v. Economics*, 20 CAP. U. L. REV. 365, 366 (1991) (concluding “that there can be little doubt that relevant ethical principles impose duties that contract and expand with the properly limited scope of the client engagement, because the lawyer’s duty of competence does not require doing all work necessary to get the answer right, but instead only the amount of work appropriate to the client engagement”).

<sup>128</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (AM. LAW INST. 2000) (noting that a lawyer must act “with reasonable competence and diligence”).

<sup>129</sup> *Commonwealth v. McDaniels*, 785 A.2d 120, 122 (Pa. Super. Ct. 2001) (noting that attorney fell “well below the level of thoroughness and preparation required for competent representation” where the attorney’s *Anders* brief named the wrong client and listed crimes of which the defendant was not convicted); MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2015) (“A lawyer must be able to ascertain applicable rules of law, whether or not commonly known or settled, using standard research sources.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (AM. LAW INST. 2000) (noting that competence and diligence requires “appropriate factual research, legal analysis, and exercise of professional judgment”).

found to be inconsistent with an attorney's duty of competence.<sup>130</sup> Further, attorneys have been disciplined by state bars where the violation of the duty of competence was premised on the attorney's failure to conduct sufficient research and to provide that research to the court in briefs or in other representations to the court.<sup>131</sup>

In *Kentucky Bar Assoc. v. Brown*,<sup>132</sup> the Kentucky Supreme Court suspended an attorney for sixty days based only on a breach of the duty of competence.<sup>133</sup> The attorney filed an appellate brief with the Kentucky Court of Appeals that was substandard in form and content.<sup>134</sup> Not only was the brief missing sections, such as a brief introduction, a statement of the case, and a conclusion,<sup>135</sup> those parts of the brief that were included fell well below the standard for competent representation.<sup>136</sup> The Kentucky Supreme Court agreed with the bar association's characterization of the brief as "a little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message."<sup>137</sup> The court noted that the "brief would compare unfavorably with the majority of the handwritten pro se pleadings prepared by laypersons."<sup>138</sup>

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<sup>130</sup> *Nickels v. Conway*, 480 F. App'x 54, 56 (2d Cir. 2012) (excusing failure to file a habeas corpus petition based on the attorney's violation of Rule 1.1 when she failed to understand the consequences of a late petition); *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) (excusing failure to file a habeas corpus petition based on extraordinary circumstances including defense counsel's failure to comply with Rule 1.1 when she "did no legal research on [the defendant's] case").

<sup>131</sup> *Smith v. Town of Eaton*, 910 F.2d 1469, 1473 (7th Cir. 1990) (imposing \$500 fine and warning counsel that further breaches of competence would be met with suspension from practice before the court where attorney's brief was "rambling, almost totally incomprehensible in its treatment of the issues and legal principles"); *In re Willis*, 505 A.2d 50, 50–51 (D.C. 1985) (per curiam) (ordering 60-day suspension for violation of duty of competence where attorney filed briefs that "were sloppy, incoherent, incomplete and misleading on their face . . . [and] prepared . . . without any meaningful investigation." (quoting *In re Crestwell*, 30 B.R. 619, 620 (Bankr. D.D.C. 1983))); *State ex rel. Okla. Bar Ass'n v. Hensley*, 661 P.2d 527, 530 (Okla. 1983) (disbarring attorney in part based on violation of duty of competence where the attorney's "unexplained failure to ascertain what she knew to be basic and statutorily defined points of law readily ascertainable by any member of the bar").

<sup>132</sup> 14 S.W.3d 916 (Ky. 2000).

<sup>133</sup> The Kentucky Bar Association alleged that the attorney violated SCR 3.130-1.1: "A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.* at 918.

<sup>134</sup> *Id.* at 917–18.

<sup>135</sup> *Id.* at 917.

<sup>136</sup> *Id.* at 918–19.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 919 (citations omitted).

The duty of candor, likewise included in the Model Rules of Professional Responsibility,<sup>139</sup> is one of the earliest formal rules of attorney conduct.<sup>140</sup> Under this duty, attorneys cannot knowingly make false statements of fact or law to a tribunal.<sup>141</sup> The duty includes acts of omission and requires attorneys to disclose “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.”<sup>142</sup> While commonly misperceived, the duty of candor is not satisfied by a lawyer deciding not to raise a case with the court because he or she believes that it is distinguishable.<sup>143</sup> Thus, the duty of candor is not limited to so-called “controlling authorities.”<sup>144</sup> Instead, it is generally understood that a lawyer has a duty to disclose any decision that is “directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.”<sup>145</sup> Thus the duty requires the consideration of factors to determine its application to a particular case.<sup>146</sup> And the scope of the duty would depend on the

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<sup>139</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2015).

<sup>140</sup> Raymond J. McKoski, *The Truth Be Told: The Need for a Model Rule Defining a Lawyer's Duty of Candor to a Client*, 99 IOWA L. REV. BULL. 73, 74 (2014) (“A lawyer’s duty to scrupulously avoid the presentation of false information to the court was embodied in the first English statute regulating the legal profession. Enacted by Parliament in 1275, the First Statute of Westminster provided that a lawyer who perpetrated or consented to any ‘Deceit or Collusion in the King’s Court’ would be imprisoned for a year and a day and barred from further court appearances.”).

<sup>141</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2015).

<sup>142</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 2015); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 (AM. LAW INST. 2000) (“In representing a client in a matter before a tribunal, a lawyer may not knowingly make a false statement of a material proposition of law to the tribunal; or fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.”).

<sup>143</sup> *Tyler v. State*, 47 P.3d 1095, 1105–06 (Alaska Ct. App. 2001); ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 84-1505 (1984); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 280 (1949).

<sup>144</sup> ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 84-1505 (1984); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 280 (1949).

<sup>145</sup> ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 84-1505 (1984); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 280 (1949).

<sup>146</sup> The ABA Committee on Ethics and Professional Responsibility suggested the following test:

Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

complexity of the case—shrinking in cases where the law is well settled and understood, but expanding in cases where the law is new or unsettled.<sup>147</sup> Regardless, in cases of doubt, lawyers are counseled to favor disclosure.<sup>148</sup> Thus, in *Mannheim Video, Inc. v. County of Cook*,<sup>149</sup> the United States Court of Appeals for the Seventh Circuit, while ruling on an appeal from the district court’s refusal to grant Rule 11 sanctions, noted that it would have upheld sanctions if the lower court had issued them.<sup>150</sup> There, counsel failed to cite a case which he thought was not “dispositive” but “at best only persuasive.”<sup>151</sup> While noting that the lawyer was “technically correct,” the court noted that the lawyer had a duty to disclose not only controlling cases but “potentially dispositive authorities” and that “the word ‘potentially’ deliberately included those cases arguably dispositive.”<sup>152</sup> Likewise, in *Tyler v. State*,<sup>153</sup> the Alaska Court of Appeals found that an attorney violated his duty of candor by failing to cite a case that he “honestly believed” was distinguishable.<sup>154</sup> While acknowledging “that appellate litigation is a contest, not a seminar,” the court found that the failure to disclose was inconsistent with candor.<sup>155</sup>

Thus, the duty of candor represents a “paramount” counterbalance to the well-known duty stemming from the former Code of Professional Responsibility to

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ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 84-1505 (1984); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 280 (1949).

<sup>147</sup> ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 84-1505 (1984); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 280 (1949) (“We felt the duty should be interpreted sensibly so as not to produce absurd results, but concluded that ‘Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer’s duty may be broader.’”).

<sup>148</sup> ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 84-1505 (1984); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 280 (1949).

<sup>149</sup> 884 F.2d 1043 (7th Cir. 1989).

<sup>150</sup> *Id.* at 1046–47.

<sup>151</sup> *Id.* at 1047.

<sup>152</sup> *Id.*; see also *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304–05 (7th Cir. 1988) (noting that Counsel’s “ostrich-like tactic of pretending that potentially dispositive authority against [his] contention does not exist [is] precisely the type of behavior that would justify imposing . . . sanctions”); *Massey v. Prince George’s County*, 918 F. Supp. 905, 908 (D. Md. 1996) (noting that duty includes a case that “comes anywhere close to being relevant to a disputed issue”); *In re Bowen*, No. 12-31699-KLP, 2015 WL 5717439, at \*1, \*3 (Bankr. E.D. Va. Sept. 29, 2015) (holding that counsel has a duty not only to cite to adverse authority but “also must bring to the attention of the deciding court another court’s ruling against the lawyer’s client on the same issue”); *Shaeffer v. State Bar of Cal.*, 160 P.2d 825, 829 (Cal. 1945) (noting that the duty of disclosure required counsel to disclose a case the lawyer thought was mere dictum).

<sup>153</sup> 47 P.3d 1095 (Alaska Ct. App. 2001).

<sup>154</sup> *Id.* at 1107.

<sup>155</sup> *Id.* at 1108.

represent a client zealously.<sup>156</sup> Candor requires the lawyer, as an officer of the court, to constrain his or her advocacy so that the client's interests are represented but not at the expense of the integrity of the justice system.<sup>157</sup> While lawyers are still expected to advocate on behalf of their client as to what the law is or should be, the lawyer cannot simply ignore relevant authority.<sup>158</sup>

The duty of decorum generally prevents attorneys from engaging in "undignified or discourteous conduct degrading to a tribunal."<sup>159</sup> And, like the duty of candor, decorum can sometimes place the lawyer between a rock and a hard place. Too little vigor in representing a client's interest presents malpractice or disciplinary liability, but too much crosses from zealousness to undignified conduct.<sup>160</sup> This duty also imposes on the lawyer the obligation to turn the other cheek when faced with discourteous conduct from others. The comments to Rule 3.5 make clear that an attorney cannot use a judge's intemperate conduct towards him as an excuse for retaliatory discourteous conduct.<sup>161</sup>

The final duty restraining a lawyer's advocacy is Model Rule 3.1's duty to refrain from raising frivolous arguments.<sup>162</sup> Under Rule 3.1, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is

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<sup>156</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS'N 2015) (noting that the "obligation to present the client's case with persuasive force" is "qualified by the advocate's duty of candor to the tribunal"); J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 76–77, n.218 (2005).

<sup>157</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS'N 2015) ("This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.").

<sup>158</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 4 (AM. BAR ASS'N 2015) ("Legal argument based on a knowingly false representation of law constitutes dishonesty towards the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. . . . The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.").

<sup>159</sup> KAN. RULES OF PROF'L CONDUCT r. 3.5(d) (2016); MODEL RULES OF PROF'L CONDUCT r. 3.5(d) (AM. BAR ASS'N 2015) (prohibiting "conduct intended to disrupt a tribunal").

<sup>160</sup> Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 144 (2011–2012); Joseph P. Mastrosimone, *Mind Your Manners*, 83 J. KAN. B. ASS'N 10, 10 (October 2014) ("Advocacy that exceeded zealousness and crossed into discourteousness has landed attorneys in ethical hot water.").

<sup>161</sup> MODEL RULES OF PROF'L CONDUCT r. 3.5 cmt. 4 (AM. BAR ASS'N 2015) ("A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

<sup>162</sup> MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2015).

a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”<sup>163</sup> Despite the image of the movie-lawyer papering his opposition with frivolous motions in some litigation war of attrition, Rule 3.1 prevents real-life lawyers from using the litigation process to harass or abuse another party.<sup>164</sup> That a claim is eventually judged to be unmeritorious does not make it necessarily frivolous and violative of Rule 3.1.<sup>165</sup> In fact, even a lawyer’s belief that a claim may not be successful does not make it frivolous.<sup>166</sup> Instead, Rule 3.1 requires lawyers to act reasonably and to make reasonable investigation of the relevant facts and laws.<sup>167</sup> In federal court, a similar restriction on a lawyer’s advocacy is represented by Rule 11. In fact, courts have based a violation of Rule 3.1 on a court issuing Rule 11 sanctions for bringing unsupported claims.<sup>168</sup>

In light of this quartette of advocacy duties, it is plain that the attorney misbehavior which provoked the judges into responding with a benchslap was not just garden variety unprofessionalism. While all attorneys strive to be professional and the state bars have attempted to raise the level of professionalism—unprofessional conduct that comes short of crossing an ethical boundary is not

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<sup>163</sup> *Id.*

<sup>164</sup> MODEL RULES OF PROF’L CONDUCT r. 3.1 cmt. 1 (AM. BAR ASS’N 2015) (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.”). Although, it should be noted that this rule does not prevent a criminal defense lawyer from raising issues or arguments that might be otherwise prohibited. *Id.* at cmt. 3.

<sup>165</sup> *See, e.g.,* Lawyer Disciplinary Bd. v. Neely, 528 S.E.2d 468, 473 (W. Va. 1998) (“An action or claim is not frivolous if after a reasonable investigation, all the facts have not been first substantiated. A complaint may be filed if evidence is expected to be developed by discovery. A lawyer may not normally be sanctioned for alleging facts in a complaint that are later determined to be untrue.”).

<sup>166</sup> MODEL RULES OF PROF’L CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS’N 2015).

<sup>167</sup> MODEL RULES OF PROF’L CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS’N 2015) (“What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”).

<sup>168</sup> *See, e.g., In re Boone*, 66 P.3d 896, 897 (Kan. 2003).

sanctionable.<sup>169</sup> As one state chief justice said, “ethics is that which is required and professionalism is that which is expected.”<sup>170</sup>

However, the conduct seen in the benchslaps crossed from merely unprofessional and into breaches of the advocacy duties. Thus, the attorneys in *Bradshaw v. Unity Marine Corp.*, whose failure to adequately brief the issues so frustrated the judge, were not merely an example of shoddy or unprofessional lawyering to be avoided. Instead, that failure to conduct the necessary research and

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<sup>169</sup> Gregory R. Hanthorn, *When Breaches of Professionalism Become Sanctionable*, AM. BAR ASS’N (Feb. 5, 2014), <http://apps.americanbar.org/litigation/committees/ethics/articles/winter2014-0214-when-breaches-professionalism-become-sanctionable.html> [https://perma.cc/YH7D-5UR3] (pointing out that not all breaches of professionalism are sanctionable, and noting that “most professionalism standards [are simply] viewed as aspirational”). The distinction between ethics and professionalism is particularly apparent when looking to states’ continuing legal education requirements. See *Florida MCLE Requirements*, AM. BAR ASS’N, [http://www.americanbar.org/cle/mandatory\\_cle/mcle\\_states/states\\_a-k/florida.html](http://www.americanbar.org/cle/mandatory_cle/mcle_states/states_a-k/florida.html) [https://perma.cc/38VB-MNFG] (listing continuing legal education requirements focused on *professionalism* as distinct from *ethics*); *Georgia MCLE Requirements*, AM. BAR ASS’N, [http://www.americanbar.org/cle/mandatory\\_cle/mcle\\_states/states\\_a-k/georgia.html](http://www.americanbar.org/cle/mandatory_cle/mcle_states/states_a-k/georgia.html) [https://perma.cc/6LUS-F36K]; *Louisiana MCLE Requirements*, AM. BAR ASS’N, [http://www.americanbar.org/cle/mandatory\\_cle/mcle\\_states/states\\_l-o/louisiana.html](http://www.americanbar.org/cle/mandatory_cle/mcle_states/states_l-o/louisiana.html) [https://perma.cc/AU3C-MBYS]; *Mississippi MCLE Requirements*, AM. BAR ASS’N, [http://www.americanbar.org/cle/mandatory\\_cle/mcle\\_states/states\\_l-o/mississippi.html](http://www.americanbar.org/cle/mandatory_cle/mcle_states/states_l-o/mississippi.html) [https://perma.cc/WM74-GU5U].

<sup>170</sup> *Evanoff v. Evanoff*, 418 S.E.2d 62, 63 (Ga. 1992) (per curiam); Campbell, *supra* note 160, at 139 (“To put it another way, ethical obligations can be seen as the shall-nots of lawyering, and professionalism as creating affirmative obligations of the lawyer to the broader society.”). Similar aspirations can be seen in attempts to create professionalism or civil codes separate from the rules of professional responsibility. For example, the Kansas Supreme Court has adopted “Pillars of Professionalism” as a guide to attorneys seeking to conduct their practice in a professional manner:

Admission to practice law in Kansas carries with it not only the ethical requirements found in the *Kansas Rules of Professional Conduct*, but also a duty of professionalism. Law students who aspire to be members of the Kansas bar should also heed these guidelines. Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration. Acting in such a manner helps lawyers preserve the public trust that lawyers guard and protect the role of justice in our society. Lawyers frequently interact with clients, courts, opposing counsel and parties, and the public at large. A lawyer’s actions also reflect on the entire legal profession. With those interactions in mind, the following Pillars of Professionalism have been prepared. These Pillars should guide lawyers in striving for professionalism.

*Kansas Pillars of Professionalism*, KANS. BAR ASS’N (October 25, 2012), <http://www.ksd.uscourts.gov/pillars-of-professionalism/> [https://perma.cc/2QTU-8PD6].

to prepare the required depth of legal analysis was, at a minimum, a likely violation of Rule 1.1's competency requirement. Likewise, Judge Hughes's "Order on Ineptitude" could be more aptly styled as an order on "incompetence" for the lawyers' inability to perform basic research on the local rules and processes. Judge Posner's pictograph benchslap was not merely a reaction to subpar advocacy, but raised serious issues of whether the lawyers failed to disclose directly adverse authority as required by their duty of candor.<sup>171</sup> Similarly, Judge Sparks's role as kindergarten cop was not brought on by lawyers who were just not playing well in the litigation sandbox, but by at least one side arguably raising frivolous arguments to harass the other party.<sup>172</sup>

Thus, in each of those cases, issues weightier than just frustrating litigation tactics were at play. At best, each presented potential violations of the core ethical duties all advocates owe to their clients and the court. Yet, none of those potential violations were addressed in a way contemplated by those rules. Instead of noting and reporting the violations to the appropriate disciplinary committees for full and fair investigations and hearings, the judges in those cases took a more public position on the alleged breaches and engaged in a blunter method of enforcement—public shaming through a benchslap.

*D. Slaps in the Spotlight: The Internet and the Widespread Dissemination of Judicial Benchslaps*

Unlike benchslaps of old, which may have sat on dusty bookshelves in rarely opened volumes of the case reporters, today's benchslaps are much more assessable and much more widely read. The wide availability of published and unpublished decisions on electronic legal search platforms, such as Westlaw, Lexis, and Bloomberg, make it all too easy for judges, lawyers, law students, or anyone with access to the system to search for and find references to individual lawyer's names if they are mentioned by the judge in the offending order. While these references would have been unsearchable under the digest research system most lawyers used until just fifteen or so years ago, with cheap and widely available term search capability, these have become all too easy to find.<sup>173</sup>

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<sup>171</sup> *Gonzales-Servin v. Ford Motor Co.*, 662 F.3d 931, 935 (7th Cir. 2011).

<sup>172</sup> *Klein-Becker, L.L.C. v. Stanley*, No. A-03-CA-871-SS, 2004 U.S. Dist. LEXIS 19151, at \*10 n.3 (W.D. Tex. July 21, 2004) (stating that counsel's "purpose in pleading the fraud counterclaim is simply to harass and alarm").

<sup>173</sup> See Patrick W. Spangler, *The New World Versus the Old World of Legal Research: Are Print Resources Completely a Thing of the Past?*, 20 CHI. B. ASS'N REC. 48, 49 (2006) (discussing a study that showed "overwhelmingly, attorneys use Westlaw and Lexis for basic case research," and noting that "[e]ven among the older lawyers . . . [a]lmost nobody said 'I [march] down to the library [to] find the Federal Reporter'"). According to David Dilenschneider, who oversees content development for LexisNexis, "[t]oday, virtually 100 percent of practitioners use online research." Drew Singer, *Legal Research Moves from the Print Library to Expensive Digital Databases*, PITT. POST-GAZETTE (March 21, 2011),



A simple search for the term “benchslap” on the internet returns thousands of results.<sup>174</sup> One of the most popular legal blogs, AbovetheLaw.com, has two sections of its website dedicated to benchslaps: the first a general listing and summary of benchslaps, and the second a chronicling of the “Benchslap of the Day” for those that apparently go above and beyond the routine.<sup>175</sup> Other blogs have gotten into the game as well. For example, Lawyerist.com contains an entry entitled, “Six Benchslaps to Brighten Your Day.”<sup>176</sup> One law firm website contains an entry on its blog summarizing a state court of appeals case entitled “It’s a Benchslap Party!”<sup>177</sup> Even blogs designed for academics have taken to using the term and summarizing the newest examples.<sup>178</sup> The term and interest in it has expanded beyond legal blogs and into the more general popular culture.<sup>179</sup>

These online mentions and summaries of benchslaps are just as permanent as the actual published order and all the more damaging to an attorney’s reputation given their ease of access.<sup>180</sup> This effect is not lost on those who publicize benchslaps. AbovetheLaw.com published a series of posts following a court’s inquiry into whether two partners at a national law firm breached their duty of candor

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<http://www.post-gazette.com/business/legal/2011/03/21/Legal-research-moves-from-the-print-library-to-expensive-digital-databases/stories/201103210191> [<https://perma.cc/9WS7-GKK2>].

<sup>174</sup> Google Search Results for Benchslap, GOOGLE, <http://www.google.com> (search for “Benchslap”; then look for the small print at the top of the results for an estimation of the total results).

<sup>175</sup> *Benchslaps*, ABOVE THE LAW, <http://abovethelaw.com/benchslaps/?rf=1> [<https://perma.cc/KG3L-WU36>].

<sup>176</sup> Lisa Needham, *Six Benchslaps to Brighten Your Day*, LAWYERIST.COM (Oct. 2, 2015), <https://lawyerist.com/76537/six-benchslaps-will-brighten-day/> [<https://perma.cc/2LQ2-72EQ>].

<sup>177</sup> *3d DCA Watch – It’s a Benchslap Party!*, S. FLA. LAW. (Nov. 4, 2015), <http://southfloridalawyers.blogspot.com/2015/11/3d-dca-watch-its-benchslap-party.html> [<https://perma.cc/69PH-G9DF>].

<sup>178</sup> See, e.g., Legal Writing Prof, *Another Seventh Circuit Bench Slap*, LEGAL WRITING PROF BLOG (July 19, 2015), <http://lawprofessors.typepad.com/legalwriting/2015/07/another-seventh-circuit-bench-slap.html> [<https://perma.cc/YS6F-SEEX>] (summarizing a benchslap out of the Seventh Circuit).

<sup>179</sup> URBAN DICTIONARY, *supra* note 55.

<sup>180</sup> See Meg Leta Ambrose, *It’s About Time: Privacy, Information Life Cycles, and the Right to be Forgotten*, 16 STAN. TECH. L. REV. 369, 369 (2013) (“The current consensus is that information, once online, is there forever.”); Patricia Sanchez Abril, *A (My)Space of One’s Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 75 (2007) (noting that internet information’s “digital permanence, searchability, replicability, transformability, and multitude of often unintended audiences make its effects more damaging than ever”); Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES (July 21, 2010), [http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0) [<https://perma.cc/RHJ6-JZAR>] (noting that “the Internet records everything and forgets nothing” and reminding readers that “every online photo, status update, Twitter post and blog entry . . . can be stored forever”).

by failing to cite relevant authority.<sup>181</sup> The court ultimately concluded that the lawyers failed in their duty, but declined to issue sanctions or to revoke their pro hac vice admissions.<sup>182</sup> In reporting on the final disposition, the article crystalized the danger of these public benchslaps: “Yes, being the subject of extensive benchslap coverage on AbovetheLaw is sanction enough. We’ve moved past the days of scarlet letters, but Google footprints have much greater reach.”<sup>183</sup>

Recognizing this potential scarlet letter effect, there have been some who have advocated that the courts should more routinely name and accuse lawyers of ethical breaches in written orders.<sup>184</sup> However, those arguments largely ignore the potential damage that flows from such public and embarrassing accusations.

Professor John Levy first criticized the judiciary for failing its duty to report attorney misconduct.<sup>185</sup> Professor Levy then proposed that courts use written orders to summarize alleged ethical breaches as the “reporting-triggering mechanism” for investigation by appropriate disciplinary committees.<sup>186</sup> Professor Levy recognized both the potential stigma for the wrongly accused “innocent” attorney and the need for “fairness” in any reporting system.<sup>187</sup> However, he discounted that damage because, in his view, the accusations of ethical misconduct would be read only by other lawyers and those lawyers would empathize with the lawyer in the case and “take the accusations for what they are.”<sup>188</sup> Giving the danger of the false accusation little weight, Professor Levy easily found that it was outweighed by the need to “strengthen the enforcement system.”<sup>189</sup> Even assuming that balance was correctly

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<sup>181</sup> David Lat, *Benchslap Update: Skadden Partners Learn Their Fates*, ABOVE THE LAW (Jan. 18, 2013) <http://abovethelaw.com/2013/01/benchslap-update-skadden-partners-learn-their-fates/> [https://perma.cc/UB5M-BNKP].

<sup>182</sup> See *Thul v. OneWest Bank, FSB*, No. 12 C 6380, 2013 WL 212926, at \*3 (N.D. Ill. Jan. 18, 2013).

<sup>183</sup> Lat, *supra* note 181.

<sup>184</sup> Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors’ Offices*, 52 WASHBURN L.J. 1, 2 (2012); Levy, *supra* note 5, at 116.

<sup>185</sup> Levy, *supra* note 5, at 106; *infra* Part III.A.

<sup>186</sup> Levy, *supra* note 5, at 109 n.70.

<sup>187</sup> *Id.* at 108–09.

<sup>188</sup> *Id.* at 109. Professor Levy noted:

Ironically, the fact that the accusations would be in appellate court opinions would probably lessen the damage to the lawyer’s reputation because of one of the factors which keeps lawyers from turning in other lawyers – empathy. While reading the cases for this article I found myself thinking of all the possible things that would justify or excuse the conduct of the lawyer about whom I was reading. Generally, lawyers are the only people who regularly read appellate opinions and by their identification with the lawyer in the opinion, they are more inclined to take the accusations for what they are.

*Id.*

<sup>189</sup> *Id.*

struck in the pre-Internet age, the dissemination of these accusations on the Internet upsets that balance. First, observing the posts and the comments that follow reporting on benchslaps reveals little in the way of empathy.<sup>190</sup> Second, these accusations are no longer relegated to little-read appellate decisions. Instead, they are immediately discovered through simple Internet searches and are the subject of widely read blogs.

More recently, renowned legal ethics scholar Professor Monroe Freedman suggested that courts should more often name names in written opinions to highlight and punish lawyers' unethical conduct.<sup>191</sup> In his essay describing examples of prosecutors' unethical conduct, Professor Freedman noted that in many of the cases, the court would refer to the offending attorney not by name but by some generic label.<sup>192</sup> While never directly arguing that courts should specifically call out ethically challenged lawyers by name, his implication that courts should do so is clear.<sup>193</sup> In one case where the court did name the offending prosecutor, Professor Freedman noted that this was an "unusual step" and described the U.S. Attorney's office's failure to convince the court to delete the reference to the prosecutor's name in the published decision.<sup>194</sup> While naming names in published decisions would partially

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<sup>190</sup> For example, a blog post by David Lat on AbovetheLaw.com gleefully reports that a lawyer was "mauled by an Article III bear" when U.S. Circuit Court Judge Easterbrook benchslapped an attorney for filing an inadequate appendix. David Lat, *Benchslap of the Day: You Won't Like Judge Easterbrook When He's Mad*, ABOVE THE LAW (Feb. 12, 2014), <http://abovethelaw.com/2014/02/benchslap-of-the-day-you-wont-like-judge-easterbrook-when-hes-mad/> [<https://perma.cc/EZT5-UDYS>]. The article noted that the attorney had been reprimanded by a district judge and had a case before the U.S. Supreme Court dismissed as improvidently granted and congratulated him, by name "on winning the benchslap trifecta." *Id.* The article is long on humor but noticeably short on empathy. *See id.*

<sup>191</sup> Freedman, *supra* note 184, at 2–3.

<sup>192</sup> *Id.* at 3–4 (noting that the court referred to the lawyer only as "the Government" or "a prosecutor"); *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981) (noting that "appellate courts have generally been reluctant to name the individual prosecutors" making inappropriate comments during trial and declining to name the prosecutor by name because "his improper remarks, though ill-advised, were not instances of deliberate misconduct").

<sup>193</sup> Freedman, *supra* note 184, at 9 (noting that the court "took pains not to name any particular prosecutor"); Charles E. MacLean, *Anecdote as Stereotype: One Prosecutor's Response to Professor Monroe Freedman's Article "The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices,"* 52 WASHBURN L.J. 23, 27 (2012) (noting that "Professor Freedman focuses on the fact that the offending prosecutors are not individually named in the courts' opinions that found error or misconduct").

<sup>194</sup> Freedman, *supra* note 184, at 7 ("If federal prosecutors receive public credit for their good works—as they should—they should not be able to hide behind the shield of anonymity when they make serious mistakes." (quoting *United States v. Lopez-Avila*, 678 F.3d 955, 965 (9th Cir. 2012))). Other prosecuting attorneys have been more successful at excising their names from published judicial scoldings. *See Bennett L. Gershman, Now You See it, Now You Don't: Depublication and Nonpublication of Opinions Raise Motive Questions*, 73 N.Y. ST. B. ASS'N J. 36, 37–39 (2001) (describing four such cases).

correct “the failure of courts and disciplinary committees to hold prosecutors accountable,” the question is at what cost does that benefit come?<sup>195</sup> Given the heightened public interests at stake when it is a prosecutor, as opposed to a private attorney, who acts unethically or unconstitutionally perhaps justifies the heightened publicity that comes with Internet dissemination. However, these public accusations raise serious concerns under judicial ethics codes and due process norms that, when considered, should outweigh any slight benefit that may come from the public shaming of wayward prosecutors.<sup>196</sup> And, if those benefits fall short of justifying such harsh treatment to reign in public prosecutors, they certainly fall short of justifying the public shaming of private attorneys as a method of enforcing ethical and professional norms.

### III. ANALYSIS

Regardless of whether or not a system of enforcing ethical norms through the public shaming of benchslaps would be effective, the practice should not be on the menu of options for the judges as they fulfill their obligation to regulate attorney conduct. As others have already noted, when judges behave in this manner, whether in written opinions or from the bench, they erode the public’s confidence in the fairness of the judicial process.<sup>197</sup> In general, the public’s confidence in the fairness of the judicial branch is shallowing. In a recent national poll, only 48% of the respondents thought that state courts make decisions “based on an objective review of facts and the law.”<sup>198</sup> In contrast, those with recent direct experience with the court system give it high marks for fairness—with 70% indicating that they were “satisfied with the fairness of the process in [their] dealings with the court

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<sup>195</sup> Freedman, *supra* note 184, at 21; *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (“A reprimand in a published opinion that names the prosecutor is not without deterrent effect.”).

<sup>196</sup> *See infra* Part III.

<sup>197</sup> GREGORY C. SISK & MARK S. CADY, 16 IOWA PRACTICE SERIES: LAWYER AND JUDICIAL ETHICS § 18:1(b)(2) (2016) (author’s commentary) (“Rude or hostile behavior by a judge can also diminish public confidence in the integrity and impartiality of the judiciary . . . especially when it develops into a pattern of conduct. . . . Public confidence in the impartiality of the judiciary is adversely affected even if conduct exhibiting impartiality is directed towards a single lawyer or a single law firm, and is otherwise uncharacteristic of the judge.”); Goodman, *Causes of Judicial Misbehavior*, *supra* note 9, at 954 (“In addition, judicial temperament has real consequences regarding the public’s perception of the judiciary as fair, trustworthy, and effective. . . . [J]udicial behavior, not just the outcome of judicial proceedings, impacts the public’s perception of the judiciary’s fairness.”).

<sup>198</sup> GBA STRATEGIES, ANALYSIS OF NATIONAL SURVEY OF REGISTERED VOTERS 2 (2015), [http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC\\_2015\\_Survey%20Analysis.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx) [https://perma.cc/U8FH-XH3B] (noting that the poll found “a majority believe judges make decisions based more on their own beliefs and political pressure”).

system.”<sup>199</sup> Those numbers suggest that something critical happens when people experience courts firsthand. As the wheels of justice grind unseen, people are skeptical of their fairness. However, going through the process restores trust and faith. Thus, judges must take care during those interactions to foster trust rather than confirm the incoming skepticism. Moreover, the negative effect of benchslaps on the public is particularly troubling. As seen from the disparate data, those without direct contact with the judiciary are more prone to distrust the institution. The publication of these benchslaps through the Internet and other popular social media platforms risks further eroding the general population’s already waning confidence in the judiciary. Given how quickly and widely information can travel, it takes only a few judges acting in ways inconsistent with the principles of fairness and decorum to erode general confidence.<sup>200</sup>

If the fragility of the public’s confidence in the judiciary was not enough to counsel against the practice of benchslapping wayward attorneys, the canons of judicial ethics and principles of due process mandate their elimination. Considerations of the judge’s own duty to report attorney misconduct, to act within the bounds of judicial decorum, and to ensure individuals’ rights to due process, all point strongly in the direction of eliminating the benchslap as a way to enforce ethical and professionalism standards.

#### *A. Benchslaps as Breaches of Judges’ Duty to Report Attorney Misconduct*

As a self-regulating profession, both lawyers and judges must play an active role in the enforcement of ethical obligations less the privilege of self-regulation be revoked.<sup>201</sup> Lawyers have an ethical obligation to report potential violations of ethical rules.<sup>202</sup> Beyond the duty that would be required of judges as lawyers, judges have an independent ethical requirement to report ethical breaches.<sup>203</sup> This should come as no surprise given the judiciary’s solemn and critical role in the regulation

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<sup>199</sup> *Id.*

<sup>200</sup> Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 LAW & CONTEMP. PROBS. 69, 70 (1970) (“That some judges—however few in number is beside the point, for even one rotten judicial apple can go far toward spoiling the entire judicial barrel—fall short of the requisite standards of integrity and propriety (nebulous and ill-defined though they may be) creates a large part of the problem of public confidence.”).

<sup>201</sup> It has been long understood that, unlike other professions, the legal profession is self-regulated “and outside the purview of the legislature.” *Ippolito v. Florida*, 824 F. Supp. 1562, 1570 (M.D. Fla. 1993). The basis for this self-regulation includes the profession’s long-history of self-regulation and separation of powers concerns.

<sup>202</sup> MODEL RULES OF PROF’L CONDUCT r. 8.3(a) (AM. BAR ASS’N 2015) (“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>203</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.15 (AM. BAR ASS’N 2011).

of professional ethics.<sup>204</sup> The judge's role is elevated in importance for two reasons. First, litigation allows a judge to observe many lawyers in a context where stress and temptation combine to make ethical lapses both likely and dangerous to the profession.<sup>205</sup> Second, judges' recognition of unethical conduct and their reactions to that conduct serve a norm-setting function.<sup>206</sup> Thus, a judge's expectation of exacting ethical standards and the enforcement of that expectation through reports to proper authorities or less formal, though still considered, counseling signals to the lawyers that ethical and professional standards in the legal profession are highly valued. However, a judge's decision to meet lawyer misconduct with his or her own brand of public shaming and ridicule signals that ethics and professionalism are necessary for only some—lawyers not judges.

The American Bar Association's Model Code of Judicial Conduct creates a stair-step duty to report attorney misconduct—imposing a more rigorous duty for more serious ethical lapses.<sup>207</sup> Thus, judges are required to report when they have knowledge of an attorney's violation of an ethical rule that "raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."<sup>208</sup> However, when a judge "receives information indicating a substantial likelihood" that a lawyer breached an ethical rule, the judge is required

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<sup>204</sup> MASS. CODE OF JUDICIAL CONDUCT Canon 3 cmt. D (1999) ("Judges are required by this Section to participate actively in maintaining and preserving the integrity of the judicial system. The rule is necessary because judges make up a significant group that may have information about colleagues' misconduct. For this reason, judges have an opportunity and a special duty to protect the public from the consequences of serious misconduct and the potential harmful results of other violations of the Code."); see Abramson, *supra* note 7, at 753 ("The ethical responsibility of a judge to effectively begin the disciplinary process against fellow lawyers and judicial associates is a heavy burden."); Greenbaum, *Judicial Reporting*, *supra* note 5, at 537 ("It has long been recognized that judges can and should play a central role in the lawyer disciplinary process by reporting substantial lawyer misconduct they observe to disciplinary authorities.").

<sup>205</sup> Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 484 (2012) [hereinafter Greenbaum, *Automatic Reporting*] (noting that "[j]udges are well situated to witness and evaluate certain forms of misconduct").

<sup>206</sup> Judith A. McMorow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1426 (2004) ("While much of the litigation action occurs outside the courtroom, judges set the norms for that out-of-court litigation conduct through the signals that they send and the sanctions they impose for conduct that occurs during pretrial conferences, discovery motions, and other pre- and post-trial activity.").

<sup>207</sup> See MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS'N 2011).

<sup>208</sup> *Id.* (requiring that a judge with such knowledge "shall inform the appropriate authority"). The ABA's commentary to subsection (B) plainly states that "[t]aking action to address known misconduct is a judge's obligation." *Id.* at cmt. 1.

only to “take appropriate action.”<sup>209</sup> Thus, the ABA model code mandates reporting only in those cases where the judge both “knows” that a breach has occurred and where that breach raises a “substantial question” regarding the attorney’s honesty, trustworthiness, or fitness.<sup>210</sup> In less serious cases, the model code allows for a wider range of responses.<sup>211</sup> This relaxing of the reporting requirement and opening of the range of options comes with a much more expansive trigger for action. Rule 2.15(D) is triggered even if the judge lacks actual knowledge of a breach and applies to any violation of the Rules of Professional Conduct without limitation.<sup>212</sup> The requirement that the judge take “appropriate action” in such cases could be satisfied by reporting the misconduct to state disciplinary authorities.<sup>213</sup> However, reporting is certainly not required; otherwise, there would be little need for the distinctions set forth in subsections (B) and (D).<sup>214</sup> Instead, for these less serious ethical breaches, Rule 2.15(D) contemplates situations where the judge’s action could be less than reporting but still be “appropriate.”<sup>215</sup>

The ABA’s model rules of judicial ethics have been widely adopted, with thirty-three states adopting them almost verbatim along with the ABA’s commentary.<sup>216</sup> Of those states, Kentucky and Massachusetts have provided judges additional guidance regarding when reporting attorney misconduct is mandated.<sup>217</sup> While Kentucky adopted the model rule, it altered the nature of the rule’s reporting requirement through a separate statute mandating reporting whenever a judge learns that an attorney “may have been guilty of unprofessional conduct.”<sup>218</sup> Unlike

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<sup>209</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.15(D) (AM. BAR ASS’N 2011) (“A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.”).

<sup>210</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.15(A) cmt. 1 (AM. BAR ASS’N 2011) (“This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.”).

<sup>211</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.15(D) (AM. BAR ASS’N 2011).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* cmt. 2 (“Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include . . . reporting the suspected violation to the appropriate authority . . .”).

<sup>214</sup> *Id.*

<sup>215</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) cmt. 2 (AM. BAR ASS’N 2011) (noting that appropriate actions “may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body”).

<sup>216</sup> See *State Adoption of Revised Model Code of Judicial Conduct*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html) [<https://perma.cc/HNG4-UCNM>].

<sup>217</sup> See *infra* notes 218–219 and accompanying text.

<sup>218</sup> KY. REV. STAT. ANN. § 26A.080 (West 2017) (“When it comes to the attention of any judicial officer that any justice or judge of the Court of Justice or any attorney may have been guilty of unprofessional conduct, he shall at once report the matter to the proper investigating and disciplinary authorities.”).

Kentucky's rigid reporting requirement, Massachusetts provided additional commentary to the reporting rule providing a nonexclusive list of examples where reporting would be mandated.<sup>219</sup>

Those states not adopting the ABA's model code language have some substantial variation, but all, at minimum, require a judge to take some appropriate action when presented with evidence that a lawyer has violated an ethical rule.<sup>220</sup> Thus, Alabama, Delaware, Louisiana, Maryland, and North Carolina all require, in effect, that a judge must take or initiate appropriate corrective measures with respect to the unprofessional conduct of another judge or a lawyer.<sup>221</sup> Maryland differs slightly in that it also includes a separate section directing that if other corrective measures are not appropriate or if the measures taken were not successful, then a judge shall report the misconduct.<sup>222</sup> Illinois can also be grouped here because its Rule is mostly a modified ABA version. Illinois only requires appropriate disciplinary measure when a lawyer violates Rule 8.4 of the ABA's Rules of Professional Conduct.<sup>223</sup>

California and New York both require a judge to take action for a lawyer's misconduct, but lower the threshold for such action. In New York, the lawyer must commit a "substantial violation" of the ethics rules to trigger the judge's duty to take

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<sup>219</sup> Massachusetts provides the following guidance:

While a measure of judgment is required in complying with this Section, a judge must report lawyer misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including knowingly making false statements of fact or law to a tribunal, suborning perjury, or engaging in misconduct that would constitute a serious crime. A serious crime is any felony, or a misdemeanor a necessary element of which includes misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit the above crimes. Section 3D(2) does not preclude a judge from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory. Reporting a violation is especially important where the victim is unlikely to discover the offense. If the lawyer is appearing before the judge, a judge may defer making a report under this Section until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge has knowledge that a lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

MASS. CODE OF JUDICIAL CONDUCT Canon 3 cmt. D (1999).

<sup>220</sup> See *infra* notes 221–224 and accompanying text.

<sup>221</sup> ALA. CODE ANN. § 45-3(B)(3) (West 2016); see also DEL. CODE OF JUDICIAL CONDUCT r. 2.15 (2015); LA. CODE OF JUDICIAL CONDUCT Canon 3(B)(3); MD. CODE OF JUDICIAL CONDUCT r. 2.15(a); N.C. CODE OF JUDICIAL CONDUCT Canon 2(b)(3).

<sup>222</sup> See MD. CODE OF JUDICIAL CONDUCT r. 2.15(b).

<sup>223</sup> See ILL. CODE OF JUDICIAL CONDUCT r. 63(B)(3)(a).



“appropriate action.”<sup>224</sup> New York does not require reporting, instead “appropriate action” might include reporting but could also include direct communication with the offending lawyer.<sup>225</sup> California has taken a different approach to judicial reporting of attorney misconduct. California has adopted a modified version of the ABA Canons of Judicial Ethics requiring “[w]henver a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.”<sup>226</sup> Like New York, that corrective action need not be reporting of the misconduct, but may include other measures such as direct counseling of the attorney or referring counsel to a substance abuse program.<sup>227</sup> However, California statutorily mandates judicial reporting of attorney misconduct in particular cases, such as when a court finds an attorney in contempt or when a reversal is premised on “misconduct, incompetent representation, or willful misrepresentation of an attorney.”<sup>228</sup>

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<sup>224</sup> N.Y. JUD. CT. ACTS § 100.3(D)(2) (McKinney 2015).

<sup>225</sup> Dennis P. Glascott, *Attorney Professionalism Forum: Dear Slow Burn*, 80 N.Y. ST. B. ASS’N J. 50, 51 (March/April 2008) (“Appropriate action may include direct communication with the lawyer who committed the violation, or some other direct action, if available—and reporting the violation to the appropriate authority or agency or body.”).

<sup>226</sup> CAL. CODE OF JUDICIAL ETHICS Canon 3(D)(2) (West 2015). California has also required judges to report to the California Bar incidents of contempt, misconduct that caused a modification or reversal of a judgment, or any judicial sanctions against the attorney. CAL. BUS. & PROF. CODE § 6086.7(1)–(3) (West 2016).

<sup>227</sup> See CAL. CODE OF JUDICIAL ETHICS Canon 3(D)(2) cmt. (West 2015) (“Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body.”).

<sup>228</sup> CAL. BUS. & PROF. CODE § 6086.7(a) (West 2016). California also mandates reporting under the following circumstances:

- (1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.
- (2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.
- (3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
- (4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.
- (5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting

Alaska uses the ABA's stair-stepped approach, but loosens the reporting requirement. Alaska requires a judge to take "appropriate action" whenever he or she has "information establishing a likelihood that a lawyer has violated" an ethics rule.<sup>229</sup> A judge's reporting obligation is triggered by information establishing a "likelihood" that a lawyer violated any ethics "by an act of dishonesty, obstruction of justice, or breach of fiduciary duty."<sup>230</sup> However, that obligation is negated if the judge "reasonably believes that the misconduct has been or will otherwise be reported."<sup>231</sup> While the Code provides judges with a fair degree of discretion as to when to report and how to react to misconduct, the commentary makes clear that the judge must always "respond reasonably."<sup>232</sup>

Finally, Idaho and Washington have the most lenient reporting requirements. Idaho merely encourages judges "to bring instances of unprofessional conduct by judges or lawyers to their attention in order to provide them opportunities to correct their errors without disciplinary proceedings."<sup>233</sup> Reporting is only suggested "when no such remedial action is promptly undertaken, or if the violations are flagrant or repeated."<sup>234</sup> Thus, even when the violation is flagrant or repeated, Idaho still uses the permissive language "should."<sup>235</sup> Washington's Canon also uses the permissive language "should" regarding a judge's reporting obligation, but explains in the commentary that the state should not have to *force* judges to report; judges should *want* to report.<sup>236</sup> Washington even loosens the requirement for judicial reactions to

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attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

*Id.*

<sup>229</sup> AK. CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (West 2015).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at cmt. ("Appropriate action will vary with particular situations and with particular individuals. There will generally be a range of reasonable responses available to the judge who learns of misconduct. However, a judge who learns of misconduct must respond reasonably. For example, the judge may not 'respond' by explicitly or implicitly condoning the misconduct.").

<sup>233</sup> IDAHO CODE OF JUDICIAL CONDUCT Canon 3(D) (2013).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> The commentary states:

(1) Judges are *not required to report the misconduct* of other judges or lawyers. Self regulation of the legal and judicial professions, however, *creates an aspiration* that judicial officers report misconduct to the appropriate disciplinary authority when they know of a serious violation of the Code of Judicial Conduct or the Rules of Professional Conduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary violation can uncover.

less serious ethical lapses, only directing that judges “should take appropriate action.”<sup>237</sup>

As noted in a number of codes commentaries, judges have substantial discretion in determining what action is “appropriate” short of reporting. Short of the fairly obvious advice that “ignoring or denying known misconduct” is not appropriate, the codes and their commentary provide little direct guidance regarding the scope of appropriate actions.<sup>238</sup> The commentary to the Canons of Judicial Conduct suggests that such action could include “direct communication” with the offending lawyer, “other direct action if available,” and reporting the violation to the appropriate authority.<sup>239</sup> As Alaska noted in its commentary, what is appropriate “will vary,” but within that variance judges are required to “respond reasonably.”<sup>240</sup> California, like nearly every state, limits appropriate action to “direct action”—either direct communication with the offending lawyer or “other direct action, such as a confidential referral to a judicial or lawyer assistance program.”<sup>241</sup> Florida has gone further, making plain that when the judge is faced with “minor” conduct, he or

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Reporting a violation is especially important where the victim is unlikely to discover the offense.

(2) While *judges are not obliged to report every violation* of the Code of Judicial Conduct or the Rules of Professional Conduct, the failure to report may undermine the public confidence in [the] legal profession and the judiciary. A measure of judgment is, therefore, required in deciding whether to report a violation. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the judge is aware. *A report should be made* when a judge or lawyer’s conduct raises a serious question as to the honesty, trustworthiness or fitness as a judge or lawyer.

WA. STAT. ANN. CODE OF JUDICIAL CONDUCT r. 2.15 cmt. 1–2 (West 2015) (emphasis added).

<sup>237</sup> *Id.* at r. 2.15(D).

<sup>238</sup> *See, e.g.*, COLO. CODE OF JUDICIAL CONDUCT r. 2.15 cmt 1 (West 2016) (“Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system.”).

<sup>239</sup> Abramson, *supra* note 7, at 772. *See, e.g.*, ARIZ. REV. STAT. ANN. CODE OF JUD. CONDUCT r. 2.15 cmt 2 (West 2016) (“Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.”).

<sup>240</sup> AK. CODE OF JUDICIAL CONDUCT Canon 3(D)(2) cmt. (West 2016) (“Appropriate action will vary with particular situations and with particular individuals. There will generally be a range of reasonable responses available to the judge who learns of misconduct. However, a judge who learns of misconduct must respond reasonably. For example, the judge may not ‘respond’ by explicitly or implicitly condoning the misconduct.”).

<sup>241</sup> CAL. CODE OF JUDICIAL ETHICS Canon 3(D)(2) cmt. (West 2016).

she is limited to addressing it “solely by direct communication with the offender” while serious violations must be reported.<sup>242</sup> Within the context of direct action, Ohio suggests that communication with “a supervisor, partner, or colleague” is a method of correcting attorney unethical conduct.<sup>243</sup> Maryland uses the term “appropriate corrective measures,” rather than appropriate action signifying that the action should be directed at rehabilitation rather than punishment.<sup>244</sup> The commentary notes that judges have a “wide range of options to deal with unprofessional conduct,” but suggests “direct communication,” “other direct action if available,” or a “private admonition or referral to a bar association counseling service.”<sup>245</sup>

Given the nearly universal ethical obligation to either report serious misconduct or to take other “appropriate action,” a judge does not comply with those obligations by addressing attorney misconduct through a benchslap. As noted, benchslaps are often a reaction to attorney ethical misconduct. That misconduct accordingly triggers one of two responses—reporting to the appropriate authorities or other appropriate action. The benchslap complies with neither requirement.

First, if the attorney misconduct is sufficiently serious, a judge is obligated to report that misconduct to the proper authority for investigation and possible formal discipline. While judges possess the inherent authority to discipline attorney misconduct, the exercise of that inherent authority to address attorney misconduct through less formal measures such as in-chambers discussions, written reprimands, or sanctions orders, is not a substitute for formal discipline.<sup>246</sup> Thus, even if the breach of a judges’ duty of decorum<sup>247</sup> and the serious due process issues presented

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<sup>242</sup> FLA. STAT. CODE OF JUDICIAL CONDUCT Canon 3(D) cmt. D (West 2016).

<sup>243</sup> OHIO CODE OF JUDICIAL CONDUCT r. 2.15(B) cmt. 2 (West 2015) (“A judge who does not have actual knowledge, but who receives information indicating a substantial likelihood that another judge or a lawyer has committed misconduct, should take appropriate action. Appropriate action may include, but is not limited to, communicating directly with the judge or lawyer involved, communicating with a supervisor, partner, or colleague, or reporting the suspected violation to the appropriate disciplinary authority.”).

<sup>244</sup> MD. CODE ANN. CTS. & JUD. PROC. § 16-813 r. 2.15(a) (West 2016).

<sup>245</sup> *Id.* at § 16-813 r. 2.15 cmt. 1 (“Permitting a judge to take ‘corrective’ measures gives the judge a wide range of options to deal with unprofessional conduct. Appropriate corrective measures may include direct communication with the judge or lawyer who is believed to have committed the violation or other direct action if available. There may be instances of professional misconduct that would warrant a private admonition or referral to a bar association counseling service.”).

<sup>246</sup> See ABA CTR. FOR PROF’L RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 2 (1986), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/sanction\\_standards.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf) [<https://perma.cc/TNR3-85UH>] (noting that the ABA Committee has criticized judges for taking the position that “there is no such need [to initiate the disciplinary process] and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means”).

<sup>247</sup> See *infra* Part III.B.

by benchslaps<sup>248</sup> could be ignored, a benchslap cannot be an appropriate method, standing alone, to address serious ethical breaches.

Second, even for those breaches for which reporting is not mandated, a judge is still obligated to take “appropriate action.”<sup>249</sup> The thread running through the differently worded canons and commentary is that such action is to be direct, corrective, and often times private. Given this understanding of appropriateness, there is nothing appropriate about a judicial benchslap. Instead of a private admonishment, a benchslap is designed to be public. In fact, it gains its power only from the shaming effect emanating from the public humiliation. It seeks to require future compliance with ethical norms not through direct communication and counseling with the attorney but indirectly through the public shaming and humiliation.

Yet, no judicial code of ethics even hints that it is appropriate for a judge to correct attorney misconduct through public humiliation. Instead, judges are directed to do the exact opposite and to “avoid the imposition of humiliating acts or discipline.”<sup>250</sup> And, that public humiliation aspect adds nothing to ensuring future compliance given the ineffectiveness of public shaming as a corrective and deterrent strategy.<sup>251</sup> Yet, despite the ethical issues raised by benchslaps, there has been little in terms of reprimands for this conduct. The reason for this lax enforcement is likely two-fold and complimentary. First, lawyers and other judges have a poor track

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<sup>248</sup> See *infra* Part III.C.

<sup>249</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.15(D) (AM. BAR ASS’N 2015); Abramson, *supra* note 7, at 771–78.

<sup>250</sup> See, e.g., MICH. CODE OF JUDICIAL CONDUCT Canon 3(A)(9) (West 2015) (“A judge should adopt the usual and accepted methods of doing justice; avoid the imposition of humiliating acts or discipline, not authorized by law in sentencing and endeavor to conform to a reasonable standard of punishment and not seek popularity or publicity either by exceptional severity or undue leniency.”).

<sup>251</sup> In fact as Professor Massaro has noted, public shaming as a penalty may make recidivism more likely not less:

Fourth, the impact of stigmatization on an offender’s post-shaming behavior is difficult to predict, as the psychological materials and the unresolved controversy about labeling theory—the claim that labeling an offender “deviant” produces secondary deviance or criminal acts—prove. Consider ways in which a person who is, or feels, shamed may respond: angrily (defending against the shame) or even violently. In other words, we already know that shaming does not always produce permanent (or even temporary) pained withdrawal. Shaming a person, especially an adult, instead may produce *more* norm deviance and even physical violence.

Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 694 (1997) (citations omitted).

record of reporting judges' ethical lapses.<sup>252</sup> Compounding that problem is the lack of clear guidance in judicial ethics codes regarding the propriety of addressing lawyers' misconduct through benchslaps.<sup>253</sup>

Further, any method of attorney discipline that bullies weaker parties into compliance, brings the judiciary's reputation for evenhandedness and the fair administration of justice into disrepute, and raises questions about the judge's own ethical obligations cannot possibly be considered appropriate. As noted, the public leveraging of the disparate power relationship between attorney and judge that the benchslap represents has consequences beyond the immediate correction of one attorney's misconduct. As the research suggests, the use of such power has immediate psychological and physiological consequences, not only for the attorney victim, but also for innocent bystanders.<sup>254</sup> Even the judges who issue the benchslap can suffer an erosion of the compassionate empathy that is critical to the fair administration of justice.<sup>255</sup> And, it is not only the judge and the benchslapped attorney who is likely to feel its effects. The psychological effects of bullying are felt by not only by the instigator and victim but by the innocent bystanders as well as they fret over when they may fall victim next. Given those consequences for the parties and for the system of justice, this method of ethical enforcement is simply not "appropriate."

Legal education's use of the Socratic Method and its reputation as a chamber of horrors in which students are humiliated and "toughened up" for the rough and tumble of legal practice does not justify addressing attorney misconduct through benchslaps. The popular culture image that comes to mind of this version of legal education is Professor Kingsfield offering Mr. Hart a dime and suggesting "call your mother, and tell her there is serious doubt about your becoming a lawyer."<sup>256</sup> To the extent that Professor Kingsfield ever represented the true face of legal education, that model of instruction is increasingly being set aside. Instead, the "humanizing legal education" movement seeks to correct the harmful effects of legal education on students' physical and mental well-being.<sup>257</sup> There is a growing acknowledgment

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<sup>252</sup> See Abramson, *supra* note 7, at 753 (noting the stigma associated with reporting misconduct); Greenbaum, *Judicial Reporting*, *supra* note 5, at 537 (noting the "conventional wisdom" that judges' duty to report misconduct "often is ignored").

<sup>253</sup> See *infra* Part IV.B.

<sup>254</sup> See *supra* Part II.A.

<sup>255</sup> See Gini, Pozzoli, & Hauser, *supra* note 1, at 604.

<sup>256</sup> THE PAPER CHASE (Twentieth Century Fox 1973).

<sup>257</sup> Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L.J. 235, 235–36 (2008). Professor Schwartz notes that "while law students come to law school with similar levels of depression, anxiety, and substance abuse as other graduate students, by the end of their first year of legal education, law students' level of depression, anxiety and substance abuse are significantly greater." *Id.* at 235.

that law professors serve as important “models of civility.”<sup>258</sup> In fact, this role modeling function is listed among the attributes of the nation’s best law professors.<sup>259</sup> In describing one of the “best law professors,” one student noted “the absence of mocking and humiliation in his classes, in contrast to some other courses . . . .”<sup>260</sup> Just as isolated Professor Kingfields are increasingly told that such methods are counterproductive and should yield to modern best practices, so too must benchslapping judges be reminded that their admonishment of unprofessional and unethical conduct through unprofessional benchslaps is as unethical as it is counterproductive.

### *B. Benchslaps as Breaches of Judges’ Duty of Decorum*

Not only does the benchslap violate the judge’s duty to report misconduct or to take other appropriate action, but the benchslap also violates the judge’s duty of decorum. Like the lawyers appearing in court, judges too are ethically bound to conduct themselves with a level of decorum and professionalism befitting the somber and serious work of the justice system. Since 1924 in its former Canons of Judicial Ethics, the ABA has recommended rules requiring judicial decorum.<sup>261</sup> The most recent version of this duty is the ABA’s Model Code of Judicial Conduct requiring judges to “be patient, dignified, and courteous” to everyone associated with the work of the court, specifically to the appearing lawyers.<sup>262</sup> Model Rule 2.8 has been widely adopted nearly verbatim.<sup>263</sup> Importantly, this rule mandates judges

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<sup>258</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 157–58 (2007) (noting that some professors “emphasize the importance of serving as exemplars of lawyer professionalism”).

<sup>259</sup> MICHAEL HUNTER SCHWARTZ ET AL., WHAT THE BEST LAW TEACHERS DO 114 (2013) (“Most of the teachers we studied focus a significant part of their teaching, mentoring, and modeling on professionalism.”).

<sup>260</sup> *Id.* at 86.

<sup>261</sup> See Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 331–32 (2012) (summarizing the history of the ABA’s guidance on judicial decorum from earlier versions of the canons of judicial ethics requiring that judges “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” to the current requirement in Rule 2.8’s decorum mandate).

<sup>262</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.8 (AM. BAR ASS’N 2010) (“A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge’s discretion and control.”).

<sup>263</sup> See ARIZ. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); ARK. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); CAL. CODE OF JUD. ETHICS Canon 3(B)(4) (West 2015); COLO. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); CONN. CODE OF JUDICIAL CONDUCT r. 2.8(b) (West 2015); D.C. RULES OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); DEL. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); FLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (West 2015); GA. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); HAW.

to “require similar conduct” of the appearing lawyers—thus linking the lawyer’s duty of decorum with the judge’s own duty.<sup>264</sup>

In whatever their iteration, judicial decorum requires judges to rise above the fray and to act with the dignity consistent with their position. As noted by New York’s rules of trial court judges, a judge “should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom.”<sup>265</sup> Hawai‘i has gone so far as to create a list of “Principles of Professionalism for Hawai‘i Judges,”<sup>266</sup> which, while not creating additional standards for discipline purposes “should, however, be followed by all judges in the State of Hawai‘i.”<sup>267</sup> In general, those principles place an obligation on judges to act courteously in their interactions with attorneys appearing before them in both their written and oral communications.<sup>268</sup>

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CODE OF JUDICIAL CONDUCT r. 2.8(b) (West 2015); ILL. CODE OF JUDICIAL CONDUCT r. 63(A)(3) (West 2015); IND. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); KAN. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (West 2015); ME. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); MD. CODE OF JUDICIAL CONDUCT r. 18-102.8(b) (West 2015); MINN. CODE OF JUDICIAL CONDUCT r. 2.8 (B) (West 2015); MONT. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); NEV. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); N.H. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); N.Y. CODE OF JUDICIAL CONDUCT Canon 3(B)(3) (McKinney 2015); N.D. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); OHIO CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); OKLA. STAT. ANN. tit. 5, ch. 1, App. 1-a, r. 2.8(B) (West 2015); OR. CODE OF JUDICIAL CONDUCT r. 3.7(B) (West 2015); PA. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); TENN. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (West 2015); UTAH CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); WASH. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); W. VA. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015); WYO. CODE OF JUDICIAL CONDUCT r. 2.8(B) (West 2015).

<sup>264</sup> MODEL CODE JUDICIAL CONDUCT r. 2.8 (AM. BAR ASS’N 2010).

<sup>265</sup> N.Y. CT. R. § 700.5 (McKinney 2016).

<sup>266</sup> HAW. R. S. CT. EX. B-1 (2015).

<sup>267</sup> HAW. R. S. CT. EX. B-1 Preamble (2015).

<sup>268</sup> In relevant part, those principles require:

1. A judge should be courteous, respectful and civil to lawyers, parties, witnesses, court personnel, and all other participants in the legal process.
- ...
9. A judge should not employ hostile, demeaning or humiliating language in opinions or in written or oral communications with other judges, lawyers, parties, witnesses or court personnel.
- ...
15. A judge should be courteous and respectful in opinions, ever mindful that a position articulated by another judge is the result of that judge’s earnest effort to interpret the law and the facts correctly.

HAW. R. S. CT. EX. B-1 (2015).



These requirements of judicial decorum are not mere exercises in “political correctness” or forced niceness. Instead, judges acting without the required level of decorum have a direct negative effect on the judicial process. If judges have unchecked ability to belittle counsel who appear before the court, it becomes particularly difficult to hold those lawyers to their ethical obligation of decorum while not doing so for the judge.<sup>269</sup> But, more importantly, the injudicious use of judicial power erodes the public’s already weakened perception of the judiciary as fair, balanced, and trustworthy.<sup>270</sup>

Despite the institutional importance of judicial decorum, its outer boundary has been difficult to detect. Judges are advised to avoid needless humor in both their courtroom presence and judicial writing as it is often “neither judicial nor humorous.”<sup>271</sup> As the Kansas Supreme Court noted, the ABA’s 1924 canons of judicial ethics suggested that judges should be more “learned than witty” and reminded judges that “integrity is their portion and proper virtue.”<sup>272</sup> Beyond avoiding judicial “wisecracking,” few general rules can be gleaned. Judges are to avoid obscene language during the course of their official duties.<sup>273</sup> Judicial name-

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<sup>269</sup> Edward Cashman, *From the Bench: Civility as a Tool of Persuasion*, 30 VT. B. J. & L. DIG., Summer 2004, at 8 (“Civility starts with the trial judge. The civility index of any county bar association depends upon the example of civility practiced by the judge. The judge’s example sets the expectation for the bar.”); Catherine Thérèse Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 1005 (1991) (“Legal etiquette is a two-way street.”).

<sup>270</sup> *In re Rome*, 542 P.2d 676, 685 (Kan. 1975) (“[A judge] is expected to act in a manner inspiring confidence that even-handed treatment is afforded to everyone coming into contact with the judicial system.”); see also MODEL CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS’N 2011) (“Public confidence in the judiciary is eroded by improper conduct that creates the appearances of impropriety.”); Tobin A. Sparling, *Through Different Lenses: Using Psychology to Assess Popular Criticism of the Judiciary from the Public’s Perspective*, 19 KAN. J. L. & PUB. POL’Y 471, 500 (2010) (explaining how judicial temperament has real consequences regarding the public’s perception of the judiciary as fair, trustworthy, and effective).

<sup>271</sup> George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 210 (1967); Richard H. Underwood, *What Gets Judges in Trouble*, 23 J. NAT’L. ASS’N. ADMIN. L. JUDGES 101, 129 (2003) (recommending that judges “leave the stupid jokes and wisecracks to the law professors. No one expects anything better from them anyway.”). However, as Judge Lebovits noted, Justice Smith eventually altered his view on judicial humor. Gerald Lebovits, *Judicial Jest: Judicious?*, 75 N.Y. ST. B. ASS’N J. 64, 64 n.2 (2003).

<sup>272</sup> *In re Rome*, 542 P.2d at 685 (quoting from “Ancient Precedents” contained in the 1924 ABA Canons of Judicial Ethics).

<sup>273</sup> *In re Bartie*, 138 S.W.3d 81, 85 (Tex. Rev. Trib. 2004) (affirming a violation of Canon 3(B)(4) and recommendation to review and permanently bar judge from holding judicial office where “the nature and frequency of the extremely obscene language employed by [the judge] are, standing alone, sufficient to warrant removal”).

calling, particularly when directed towards litigants, has landed judges in ethical trouble.<sup>274</sup>

The Kansas Supreme Court's decision in *In re Rome*<sup>275</sup> illustrates what judges can do to run afoul of the duty of decorum. There, a criminal defendant was convicted of prostitution and in placing her on probation for two years, the judge issued a "Memorandum Decision" written in poetic form and which called her a "young whore" and referred to her in other ways so as to make her "someone to be laughed at and her plight found amusing."<sup>276</sup> The Kansas Supreme Court recognized that a judge has "discretion to write an opinion the way he chooses but that discretion

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<sup>274</sup> It is difficult to square the courts' condemnation of name-calling against their inattention to the written benchslap. Yet, the disparate treatment exists. *In re Eiler*, 236 P.3d 873, 879 (Wash. 2010) (suspending a judge for five days for a breach of decorum based on calling *pro se* litigants "idiot," "young and stupid," and interrupting them in "a rude, impatient, and undignified manner"); see also *Disciplinary Counsel v. Elum*, 979 N.E.2d 289, 295 (Ohio 2012) (suspending judge for six months for, among other things, telling a defendant "[y]ou have a bad case of D.H. Dickheaditis" and "[y]ou can't keep continuing to screw off or you'll be like the rest of the dickheads at the Stark County Jail"); Megan Zaviehl, *Judge Threatens to Strangle Lawyer in Death Penalty Case, Calls Defendant a "Carcass,"* LAWYERIST (Aug. 28, 2013), <https://lawyerist.com/69462/judge-behaving-badly/> [<https://perma.cc/X2XJ-PMBJ>] (recounting the public reprimand of a Kentucky judge who referred to a defendant as a "carcass").

<sup>275</sup> 542 P.2d 676 (Kan. 1975).

<sup>276</sup> *Id.* at 685. The poetic order included the following:

On January 30th, 1974,  
 This lass agreed to work as a whore.  
 Her great mistake, as was to unfold,  
 Was the enticing of a cop named Harold.  
 Unknown to \_\_, this officer, surnamed Harris,  
 Was duty-bent on \_\_\_\_'s lot to embarrass.  
 At the Brass Rail they met,  
 And for twenty dollars the trick was all set.  
 . . .  
 On February 26, 1974,  
 This State of Kansas tried this young whore.  
 . . .  
 The judge showed mercy and \_\_ was free,  
 But back to the street she could not flee.  
 The fine she'd pay while out on parole,  
 But not from men she used to cajole.  
 From her ancient profession she'd been busted,  
 And to society's rules she must be adjusted.  
 If from all of this a moral doth unfurl,  
 It is that Pimps do not protect the working girl!

*Id.* at 680–81.

must be exercised within the framework of the judicial code generally and canon 3 A. (3) in particular.”<sup>277</sup> Finding a violation of the judge’s duty of decorum, the court noted that “[j]udges simply should not ‘wisecrack’ at the expense of anyone connected with a judicial proceeding who is not in a position to reply.”<sup>278</sup>

Courts enforcing the duty of decorum have sent mixed signals, recognizing the systemic importance of the rule and at the same time take a somewhat lax attitude regarding its enforcement. Some judges have been able to avoid removal from office for repeated breaches of decorum when they agree to seek assistance to modify their behavior, most commonly agreeing to “anger management” counseling.<sup>279</sup> In general, judicial conduct committees and courts are generally reluctant to sanction judges for spontaneous statements made from the bench.<sup>280</sup> The West Virginia Supreme Court’s decision in *In re Hamrick*<sup>281</sup> is a prime example of this lax enforcement. There, the court found no breach of the family law master’s duty of decorum where the master yelled at the *pro se* litigant and banged his gavel so loudly that it brought the bailiff into the room to make sure there was no danger.<sup>282</sup> While the court did not “condone” the conduct, it found that it did not violate decorum because it was a reaction to the litigant’s own behavior.<sup>283</sup> That was too much for the concurring justice who wrote separately because he thought “the majority was too hard on” the judge and “too easy on” the litigant.<sup>284</sup>

While there are no reported cases admonishing a judge under the duty of decorum for issuing the benchslaps as described above, that does not detract from the fairly plain conclusion that the orders and opinions raise serious breach of decorum issues. At worst, they are clear violations and at best, they are close enough to the line that review by judicial ethics commissions would be warranted. There is little “patient, dignified, or courteous” about the former-Judge Kent suggesting that the lawyers wrote their pleadings in “crayon on the back sides of gravy-stained paper place mats,” Judge Sparks’s invitation to a “kindergarten party,” Judge Hughes “Order on Ineptitude,” or Judge Posner’s inclusion of a picture of an attorney with

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<sup>277</sup> *Id.* at 684.

<sup>278</sup> *Id.* at 685; *see supra* note 271 and accompanying text.

<sup>279</sup> *See, e.g., In re Sloop*, 946 So.2d 1046, 1057–58 (Fla. 2007) (noting examples of lesser penalties when counseling was agreed to).

<sup>280</sup> *See, e.g., In re Grant*, No. 4952-F-131, 2006 WL 6084806, at \*3 (Wash. Com. Jud. Cond. Aug. 4, 2006) (“Ordinarily, a spontaneous, well-intentioned and intrinsically innocuous comment made by a judge from the bench—even though misplaced—would not by itself amount to judicial misconduct deserving of public sanctions. To preserve and respect judicial independence, judges should be afforded some measure of human fallibility.”).

<sup>281</sup> 512 S.E.2d 870 (W.Va. 1998).

<sup>282</sup> *Id.* at 871.

<sup>283</sup> *Id.* (finding that a judge did not breach decorum despite brusquely yelling at a litigant because it was in response to litigant’s filing of a “false claim,” attempting “to evade answers,” and misrepresenting facts to the judge).

<sup>284</sup> *Id.* at 873 (Maynard, J., concurring).

his head in the sand in a published decision. The fact these benchslaps were written makes them even more indecorous. A slip of the judicial tongue during an exchange with counsel in court could be excused given the rapid-fire nature of courtroom proceedings. However, these written opinions and orders are apparently the result of thoughtful reflection. However justifiable the frustration with the attorneys' misconduct, the writing process should have allowed that frustration to subside and the judges' sense of decorum to rise to allow them to address the attorneys' failings in a more productive and dignified way. One is left to wonder in each of these cases: if this is what was published, how bad were the first drafts?

Not only are these orders and opinions likely violations under the plain understanding of Rule 2.8, but each is eerily like the behavior that led the Kansas Supreme Court to sanction the judge in *In re Rome*.<sup>285</sup> Judge Rome attempted to justify the humorous and mocking tone in his order as a way of combating the problem of prostitution in Hutchison, Kansas and "jolt[ing]" the town's red light district, "more particularly, the pimps" into compliance with the state's prostitution laws.<sup>286</sup> Certainly the notoriety of the initial maximum sentence and the widespread dissemination of the offending order served that purpose. Everyone in Hutchinson knew that Judge Rome was getting tough on prostitution.<sup>287</sup> However, that intent did not excuse the decorum violation. Likewise, the judges issuing benchslaps directed at counsel are certainly using them to put lawyers on notice that they are getting tough on whatever ethical violations prompted the judicial rebuke. No one doubts that judges should confront attorney misconduct. The enforcement of ethical and professionalism norms by judges is a vital and mandatory component of the self-regulation of attorney ethics. But, their service to enforcement cannot justify the breach of decorum. Whatever good may come from benchslaps, the conclusion that they tread too closely to the line of decorum, if not over, is inescapable. The fact benchslaps even approach the line should be reason enough to avoid them. That they potentially discredit the judiciary and lead to a coarsening and not a refinement of judicial and lawyer ethics and professionalism are all the more reasons why the practice offends the judge's duty to act with decorum.

The conclusion that these benchslaps are undignified is supported by at least one other judge's own discomfort with the practice. While Chief Judge Jones neglected to use the words "your order violates your duty of decorum" in her email to Judge Sparks, her implication is clear. Notwithstanding the likely violation, Judge Sparks still felt free to issue such orders and Judge Jones felt unrequired to report his likely violations. His actions and her lack of reporting are not proof that the benchslap did not violate decorum. Instead, the actions of judges like Judge Sparks and the reluctance of judges like Chief Judge Jones to bring formal complaints are strong support for the need to clarify the model rules of judicial ethics to make clear that such behavior crosses an ethical line.<sup>288</sup>

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<sup>285</sup> *In re Rome*, 542 P.2d at 685.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> See *infra* part IV.B.

*C. Benchslaps as Breaches of Attorneys' Due Process Rights*

Putting aside judges' ethics obligations to take appropriate action when faced with attorney misconduct and to act with decorum when doing so, the practice of issuing judicial benchslaps raises serious due process concerns for the slapped attorneys. In his recent article, Professor Richmond explored the ability of lawyers to remove a judge's negative comments about their performance from an order or decision.<sup>289</sup> He noted that courts universally agree that a lawyer has no right to appeal a decision in which the court includes "routine judicial commentary."<sup>290</sup> Conversely, when a court order finds and sanctions an attorney for some misconduct, there is no doubt that the attorney may appeal.<sup>291</sup> However, the issue becomes more complex when the court's order falls short of issuing a sanction but includes language that might affect an attorney's reputation.<sup>292</sup> In short, there is much dispute regarding whether an attorney has a right to appeal a lower court's benchslap.

The question of whether an attorney's reputational interest can invoke appellate jurisdiction has generated three distinct answers: never, sometimes, and most of the time.<sup>293</sup> The U.S. Court of Appeals for the Seventh Circuit stands alone in finding

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<sup>289</sup> Richmond, *supra* note 15, at 741–46.

<sup>290</sup> *Id.* at 760.

<sup>291</sup> *Williams v. United States (In re Williams)*, 156 F.3d 86, 90 (1st Cir. 1998) (noting that the "imposition of a sanction on an attorney is universally regarded as an order" that is appealable). The court further noted that whether such a mid-case order is immediately appealable on an interlocutory basis is a matter of some disagreement. *Id.* at 90 n.3.

<sup>292</sup> The reputational damage from a benchslap has a hearty durability. For example, a Google search for David "Mac" McKeand, the attorney who Judge Posner compared to an ostrich in *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011), yields as its first result a six-year old Blog post on Above the Law about the benchslap. Search Results for a Search of David Mac McKeand, GOOGLE, <http://www.google.com> [<https://perma.cc/HB4V-7UQR>] (highlighting this particular article: David Lat, *A Reverse Benchslap? Chastised Lawyer Lashes Out at Judge Posner*, ABOVE THE LAW (Nov. 28, 2011, 11:06 PM), <http://abovethelaw.com/2011/11/a-reverse-benchslap-chastised-lawyer-lashes-out-at-judge-posner/> [<https://perma.cc/P7QA-EJ7T>]). See also MATTHEW A. BOWERS, BENCHSLAPPED: PUBLICLY HUMILIATING JUDICIAL OPINIONS 10–11 (2d ed. 2013) (noting that because of benchslaps "[r]eputations are being tarnished. Clients are being lost. Career prospects are being crushed."). Further, the potential damage to an attorney's reputation is enough that at least one company is marketing strategies to eliminate the internet stain of a benchslap. See Scott Holcomb, *Virtual Reputation Management for Lawyers & Law Firms*, <http://www.androvett.com/clientuploads/advertising-marketing-white-papers/white-paper-pdf-files/virtual-reputation-management-for-lawyers-and-law-firms-by-scott-holcomb.pdf> [<https://perma.cc/UB3M-DW96>] (noting that "[l]awyers and law firms face many online reputation challenges, including: . . . Negative mentions in law-related blogs, such as Above the Law's 'Bench Slap of the Day'").

<sup>293</sup> In fact, that disagreement extends even to the categories into which the circuits fall. The Tenth Circuit classified the split as never, always, and "only if . . . expressly classified

that reputational interests, standing alone, can never justify an appeal.<sup>294</sup> In the absence of some monetary sanction, the Seventh Circuit will not entertain such appeals; instead, it finds them not to be a “final decision” under section 1291’s grant of appellate jurisdiction.<sup>295</sup> Courts allowing such appeals generally require that the lower court’s order go beyond merely identifying attorney misconduct, but include some formal statement that the identification of the attorney’s misdeeds is intended to serve as a formal reprimand.<sup>296</sup> These courts essentially allow the lower court to determine the appealability of a benchslap. Simply by avoiding certain formal magic words classifying the benchslap as a formal reprimand, a lower court can insulate itself from higher review. The final category, most of the time, is the broadest in that those courts will allow an attorney to appeal based on the reputational harm associated with the benchslap alone.<sup>297</sup> This approach jettisons the requirements that the benchslap come with monetary sanctions or be specifically designated as a reprimand. However, as noted by Professor Richmond, it does not represent an “always appealable” position.<sup>298</sup> Instead, even this most liberal approach requires the lower court to make “specific findings of misconduct to support an appeal.”<sup>299</sup> In addition to those three approaches, even the never appealable jurisdiction would permit review of a written judicial scolding through mandamus procedures.<sup>300</sup>

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as a reprimand.” *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1167 (10th Cir. 2003). Professor Richmond took issue with those classifications and instead adopted his own taxonomy: “conservative,” “middle ground,” and “supposed liberal” approaches. Richmond, *supra* note 15, at 764–81. A student author created a third classification system: “monetary sanctions only,” “sanctions that could damage an attorney’s professional reputation,” and “sanctions that are considered formal.” Carla Pasquale, Note, *Scolded: Can an Attorney Appeal a District Court’s Order Finding Professional Misconduct?*, 77 *FORDHAM L. REV.* 219, 230–42 (2008). This Article has chosen never, sometimes, and most of the time; not to create further confusion but because it more accurately reflects the uncertainty that a lawyer faces when attempting to access the appellate system to right an alleged reputational wrong.

<sup>294</sup> *Butler*, 348 F.3d at 1167 (noting that the Seventh Circuit is “the only circuit falling into the first category”); Richmond, *supra* note 15, at 764–71 (labeling this the “conservative” approach); Pasquale, *supra* note 293, at 230–33.

<sup>295</sup> *Butler*, 348 F.3d at 1167.

<sup>296</sup> *Williams v. United States (In re Williams)*, 156 F.3d 86, 92 (1st Cir. 1998) (“Sanctions are not limited to monetary imposts.”); *see also* *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1200 (9th Cir. 1999) (noting that “Words alone may suffice if they are expressly identified as a reprimand.” (quoting with approval the First Circuit’s decision in *Williams*, 156 F.3d at 91–92)).

<sup>297</sup> *Butler*, 348 F.3d at 1167.

<sup>298</sup> Richmond, *supra* note 15, at 778.

<sup>299</sup> *Id.*

<sup>300</sup> *Williams*, 156 F.3d at 92 (“Our holding does not leave a chastised attorney remediless. A lawyer is free to petition for a writ of mandamus, and request that offending commentary be expunged from the public record.” (citation omitted)).

However, mandamus is an extraordinary remedy and is rarely granted by reviewing courts.<sup>301</sup> Thus, it serves as a “slender reed on which to lean for appellate review.”<sup>302</sup>

Accordingly, all three approaches to the appealability of benchslaps allow the lower court to control whether the attorney has a right to appeal. By refraining from issuing a monetary sanction, strategically declining to formally label the benchslap as a reprimand, or reciting what the lawyer did, but coming just short of connecting the conduct to a specific ethical violation, the benchslap-inclined judge can assure him or herself that the attorney will have no direct and mandatory right to have the commentary reviewed and removed from the order.<sup>303</sup> In this sense, courts can use such orders as a way to enforce ethical and professional norms without the inconvenience of providing an avenue for the wrongly chastised attorney to have his or her complaint heard and the record corrected. The lower court decides to benchslap an attorney, and that benchslap remains both on the books and in the electronic ether for all time without response.

A central component of any sanction system must be a reasonable avenue for mandatory review and correction of errors. The three approaches to appealability of lower court benchslaps disqualify them from being part of such a system. Yet, some judges use the less formal but more public benchslap as opposed to the private, formal, and serious reprimand proceedings before attorney ethics commissions.<sup>304</sup> And, while discretionary mandamus is available to correct some flagrant violations, its flaw is that it is discretionary and rarely granted.<sup>305</sup> Combining the public shaming at the core of the benchslap and the lack of serious and certain due process protections, it is easy to conclude that the benchslap is not an “appropriate” action for a judge to take when learning of potential or even actual attorney misconduct. Thus, the rules on judicial conduct should be modified to give clear guidance to judges and disciplinary committees that judicial benchslapping violates both the judge’s twin duties of decorum and to take appropriate action to address attorney misconduct.

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<sup>301</sup> See *Cheney v. U.S. District Court for D.C.*, 542 U.S. 367, 380 (2004) (noting that mandamus “is a drastic and extraordinary remedy reserved for really extraordinary causes”).

<sup>302</sup> *Williams*, 156 F.3d at 99 (Rosenn, J., dissenting).

<sup>303</sup> *Id.* (“Under the majority’s view, it is possible for a judge to harshly censure or chastise the lawyer in a published opinion and intend to punish but avoid appellate review. The trial judge can escape appellate review of an unfounded or intemperate censure merely by refraining from labeling the public reprimand as an order or decree.”).

<sup>304</sup> Greenbaum, *Judicial Reporting*, *supra* note 5, at 566 (noting that the attorney disciplinary process is largely confidential until the disciplinary board has sufficient evidence to file a complaint but that “[j]udicial opinions notifying the world that a particular lawyer is being reported, and often identifying the reasons for the referral, undercut the privacy/reputation rationale of the disciplinary system”). However, at least one author suggested that the lack of due process makes the issuance of such “informal sanctions” more efficient. Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1453 (2004) (“[U]nlike traditional sanctions, informal sanctions are more efficient because they do not entail an adherence to due process requirements.”).

<sup>305</sup> See *Richmond*, *supra* note 15, at 758–59.

IV. STOPPING THE SLAP: CLARIFYING CODES OF JUDICIAL CONDUCT TO MAKE THE BENCHSLAP AN “INAPPROPRIATE RESPONSE” TO ATTORNEY MISCONDUCT AND A BREACH OF THE DUTY OF DECORUM

While it is plain to see that the benchslap is not an appropriate response to attorney ethical and professional failings, the reform of that problem must be carefully calibrated. Any solution must preserve the judiciary’s central role in regulating and correcting attorney conduct. Generally speaking, judges, with exceptions noted here, perform this important work with the careful skill and judgment required. Not only are judges for the most part doing good work in this area, but their work is vitally needed. Judges sit on the front lines of legal practice. This vantage point allows them to observe attorneys in action and unguarded. Thus, they are in the best position to identify and correct attorney misdeeds before they take on truly serious proportions. Not only that, but judges with their vast reservoirs of knowledge and experience are best positioned to act as elder statesmen and counsel junior and less experienced wayward lawyers.

However, the attempts to correct attorney misconduct via the benchslap discredits the judiciary’s important role in ensuring an ethical and professional bar. Further, they erode the public’s trust in both the legal profession and the judiciary. The open mocking and belittling of lawyers helps no one. Instead, we need to keep the judges in the process of regulating attorney conduct, but remove this increasingly popular sport of benchslapping from that process.

*A. Bringing a Tank to a “Slap Fight”: Reforms that Do More Harm than Good*

As noted above, benchslaps implicate three main problems: (1) their indecorous and bullying nature damage the reputation of the attorneys at whom they are directed; (2) they represent an abdication of the judge’s ethical duty to take appropriate action when faced with attorney misconduct; and (3) there are exceedingly narrow avenues to appeal them. Thus, to remedy and deter their issuance, solutions centered on those concerns could be crafted. However, as suggested below, certain solutions that meet those flaws head-on, such as altering judicial immunity, increasing appeal rights, and mandating reporting of all attorney misconduct would likely do more harm than good. Given those dangers, a more modest approach must be taken to preserve the best of the current system while eliminating the worst.

If a benchslap is simply viewed as raw judicial bullying, then a potential solution would be to modify the nearly impenetrable cloak of judicial immunity to allow the attorney-victims to sue the benchslapping judge.<sup>306</sup> Thus, a judge could be

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<sup>306</sup> See *Forrester v. White*, 484 U.S. 219, 225–29 (1988) (noting that judge’s enjoy a “sweeping form of immunity” to prevent judges from being liable for their judicial acts to avoid “the resulting avalanche of suits, most of them frivolous but vexatious”).



subject to civil liability for the career damaging benchslaps. Or, like Professor Yamada has tried to create in the employment context, a new statutory right of action could be created providing civil remedies for judicial bullying.<sup>307</sup> In theory, imposing civil remedies and opening the judge up to liability would provide remedies for those who fell victim to a benchslap and deter future benchslaps. Despite this theoretical benefit, the costs of such a solution would easily outweigh whatever the benefits. While it would deter benchslaps, it is also likely that the solution would deter judges from playing their needed role in the attorney discipline process. Just the threat of litigation would be enough to lead most judges to conclude that it was much too risky to comment on an attorney's conduct even in the most professional language and manner. To the extent that benchslaps erode public confidence, this solution also fails to correct the problem. Imagine the public's reaction to regular lawsuits pitting judges and lawyers against each other. If our hope in eliminating the benchslap is to protect the judicial system and the self-regulated legal profession, civil liability kills the patient along with the aimed-at cancer.

Another possible solution would be to leave the benchslaps as they are, but increase the due process rights associated with them by easing their appealability. While adopting an "always appealable" position would reintroduce basic notions of fairness, that solution fails as simultaneously too restrained and too aggressive. It is too restrained in that it would fail to address the basic flaws in using public shaming to regulate attorney conduct. Even if an appeal was successful in having the offending benchslap removed from the order or decision, it would come too late to correct the damage that was done. As in many things, the later retraction is never as widely published as the first filed scandalous story.<sup>308</sup> The sensational benchslap and its initial publicity, rather than the reasoned decision on appeal, is what would be remembered. This solution also fails to address the basic inappropriateness of the benchslap as a response to attorney misconduct. Any proposed solution should reinforce and re-center the judiciary's role in that process and not implicitly encourage judges to find and come up to the line that might trigger a successful appeal. Relying on busy intermediate courts, with their ever-growing dockets of mandatory appeals, to police and set standards for when lower court judges have gone too far is destined to fail. Such courts would have every incentive to set relatively low bars and permit lower court's substantial latitude to continue current practices. Such a rule would be supported by the normal discretion allowed to lower courts to manage their proceedings and the appellate courts' understandable effort to limit the impact on their dockets of a new flood of appeals, not from the parties

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<sup>307</sup> See generally Yamada, *The Phenomenon of "Workplace Bullying,"* *supra* note 24, at 479 (arguing for the creation of "a statutory cause of action to give the bullied employee true legal recourse against the bully and his or her employer").

<sup>308</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (noting that "the truth rarely catches up with a lie"); *Kehoe v. N.Y. Tribune, Inc.*, 229 A.D. 220, 223 (N.Y. App. Div. 1930) ("Retractions are often dilatory, offensive, and ineffective.").

but from lawyers unhappy with a judge's conduct.<sup>309</sup> Thus, this reform too is over aggressive. Like opening up judges to civil liability, relaxing appeal standards would generate more infighting between judges and lawyers in a forum that seems ill equipped to handle those disputes. Not only would the public's confidence be shaken by such infighting, but the results would be constantly open to doubt. It would be all too easy to discount an appellate court denying a benchslap appeal as the court "protecting one of their own."

A final potential solution focuses on the judge's ethical duty to report attorney misconduct. Such a reform would do away with the stair-step approach to mandatory reporting and replace it with a requirement that any potential violation, large or small, of the ethics rules must be reported to the proper authority for investigation. However, that reform too creates more problems than it would solve. First, it would convert judges from reasoned counselors on attorney conduct to hair-trigger tattletales. Such a result is neither necessary nor wanted. It would rob judges of one of their most effective tools of ensuring attorneys live up to the high standards of ethics and professionalism demanded of the practicing bar. The firm but professional conversation, the note suggesting how one might handle situations better in the future, mentoring relationships, and other aspects of private guidance and nudges to get attorneys back on the correct path would all be lost. In some sense, those tactics are private shaming strategies, as opposed to public ones. While eliminating the public shaming of the benchslap is a needed step, it need not and should not come at the expense of effective private ones.

*B. Stopping the Slap Without Hamstringing the Judiciary: Strengthening Judicial Ethics Commissions to Punish and Deter Benchslaps*

Because a benchslap primarily raises ethical concerns—both of the attorney to whom it is directed and of the judge from whom it is issued—issues regarding their propriety should be decided by the current ethical enforcement institutions. Rather than taking the drastic step of either ignoring those issues (the status quo) or creating new remedial avenues as outlined above, we can strengthen the current system while making clear that a benchslap is inconsistent with a judge's ethical obligations. Four

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<sup>309</sup> See, e.g., *Statewide Grievance Comm. v. Egbarin*, 767 A.2d 732, 783 (Conn. App. 2001) ("[U]nless it clearly appears that [the attorney's] rights have in some substantial way been denied him, the action of the court will not be set aside upon review." (quoting *Statewide Grievance Comm. v. Presnick*, 577 A.2d 1054 (1990))); *In re Craven*, 1515 So.2d 861, 865 (La. 1943) ("The court is concerned therefore solely with the disciplining of the defendant for his professional misconduct, as to which the court has a wide discretion."); *State v. Norton*, 116 A.2d 635, 639 (Me. 1955) ("The conduct of attorneys in the course of a trial is at all times subject to proper regulation by the presiding judge, who has a wide discretion in this regard. Thus, it is for the judge to determine, *in the exercise of his discretion*, whether counsel has transgressed the bounds of professional duty . . . ." (quoting 88 C.J.S. Trial § 158(b), p. 306)); *Royal Indem. Co. v. J.C. Penney Co.*, 27 Ohio St. 3d 31, 35 (1986) ("A trial court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it.").

main reasons justify maintaining the basic structure while improving the guidance provided by the canons of judicial ethics.

First, judicial ethics commissions already are experts in balancing the needs of the judiciary against the requirements of the canons of judicial ethics. Accordingly, from a judicial resources viewpoint, it makes little sense to ask appellate court judges on appeal or a trial court judge in a civil suit to assess whether a court's order has crossed from stern rebuke to discourteous belittling. Further, this expertise with the canons of ethics would better equip the judicial ethics commissions to speedily and quietly dispose of frivolous complaints. That in turn would eliminate whatever incentives a lawyer might have to bring a complaint or file an appeal simply to harass or embarrass a judge in retribution for the commentary on the lawyer's performance.

Second, keeping issues regarding benchslaps with judicial ethics commissions would avoid the under-reporting problem that undercuts the self-policing of the legal profession.<sup>310</sup> Lawyers are understandably apprehensive about filing complaints or appeals against a judge before whom they may appear in the future. Rather than passively waiting for attorney victims to file complaints that may never be filed, judicial discipline bodies could act *sua sponte* to address an indecorous benchslap. A judicial disciplinary body need only peruse one of the many legal blogs to see whether local judges have potentially violated their ethical obligations to take appropriate action when faced with attorney misconduct and to conduct their affairs with respect and courtesy.

Third, judicial ethics commissions are better equipped to issue remedies that would both address the immediate concerns raised in the benchslap and ensure the integrity of the judiciary. The overriding goal in any judicial discipline case is not to punish the offending judge but to cleanse the judicial system of the blemish caused by the offending judge and to restore and preserve the integrity of the judiciary.<sup>311</sup>

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<sup>310</sup> Greenbaum, *Automatic Reporting*, *supra* note 204, at 440 (summarizing the reasons why judges and lawyers under report misconduct and noting that the "flexible standards" for reporting attorney misconduct is a "recipe for silence in many instances").

<sup>311</sup> See Goodman, *Causes of Judicial Misbehavior*, *supra* note 9, at 976–78 (noting the goals of judicial discipline are most often described as maintaining "judicial independence," deterrence, rehabilitation, and to "protect the public" from misbehaving judges). According to the Nebraska Supreme Court, the court

disciplines a judge not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society. And it is one of the more important and difficult tasks we undertake. The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. The discipline imposed on a judge must be designed to announce publicly this court's recognition that there has been misconduct. And appropriate discipline should discourage others from engaging in similar conduct in the future.

Any remedy provided by the civil justice system would focus more on compensating the attorney rather than protecting the institution and the public. Conversely, judicial ethics commissions are nimbler in their range of potential remedies and have both the means and the incentive to impose more fully restorative remedies. For breaches that are less serious, a simple admonishment may do. Even for actions that may approach but not cross an ethical line, an ethics commission could warn the judge that similar conduct in the future may be treated differently. For particularly severe cases, a judicial ethics commission could recommend removal of the judge from the bench. Or, as Professor Goodman suggested, judicial disciplinary commissions could focus more on a restorative justice model and provide mechanisms to allow the judge to apologize and reconcile with the parties whom he or she offended.<sup>312</sup> In this sense, the existing ethics enforcement mechanisms are the only ones able to balance the remedy to the severity of the problem, consider and remedy the damage to the institution of the judiciary, and remedy the most severe cases.

Fourth, that nimbleness of remedies and focus on protecting the institution rather than the payment of damages would reduce any potential chilling effect that a more rigorous enforcement of the duties to report and of courtesy might create.<sup>313</sup> If the judges' role in the enforcement of attorney ethical standards is to remain vibrant, then judges should not feel overly constrained in engaging in that role. Subjecting judges to civil remedies or costly appellate litigation whenever a lawyer feels aggrieved by a judge's commentary on his or her performance would incentivize judges to refrain from commenting on attorneys' work more than they are already.

Yet, despite these four benefits, the fact remains that the current system of judicial ethical enforcement has proved either unwilling or unable to address the propriety of judges issuing benchslaps. It is without doubt that the judicial discipline system is in need of reform.<sup>314</sup> However, the problem in the context of benchslaps is

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*In re Florom v. Florom*, 784 N.W.2d 897, 904 (Neb. 2010) (citations omitted). *See also In re Judicial Disciplinary Proceedings Against Crivello*, 564 N.W.2d 785, 787 (Wisc. 1997) ("In determining appropriate discipline to impose for Judge Crivello's misconduct, we consider the purpose of judicial discipline — 'to protect the court system and the public it serves from unacceptable judicial behavior.'" (quoting *In re Disciplinary Proceedings Against Gorenstein*, 434 N.W.2d 603, 608 (Wisc. 1989))).

<sup>312</sup> See Goodman, *Causes of Judicial Misbehavior*, *supra* note 9, at 989–92.

<sup>313</sup> See Lubet, *supra* note 9, at 1311 (noting that "[p]recipitous disciplinary action may also threaten judicial independence" but discounting that effect regarding discipline for "stupid judge tricks").

<sup>314</sup> See Goodman, *Causes of Judicial Misbehavior*, *supra* note 9, at 952–56 (discussing the importance of regulating judicial rudeness); Maxine D. Goodman, *Shame, Angry Judges, and the Social Media Effect*, 63 CATH. U. L. REV. 589, 591 (2014); Eric Dexheimer, *Who's Policing Texas Judges?*, AUSTIN AM.-STATESMAN, Apr. 15, 2012, at A1; William Glaberson, *A Push to Open Judge-Misconduct Cases*, N.Y. TIMES (Feb. 3, 2011), <http://www.nytimes.com/2011/02/04/nyregion/04judges.html> [<https://perma.cc/9QDT-ZWNC>]; Brian Rogers, *Defense Lawyers Complain Judges Rarely Punished*, HOUS. CHRON.

more basic—a total failure to engage that system regardless of its inherent flaws. Lawyers, judges, and judicial ethics commissions have failed to respond to benchslaps even when they are out in the open. Thus, Judge Posner’s pictorial benchslap goes uninvestigated. Judge Sparks’s invitation to a “kindergarten party” stands without a similar invitation to a judicial disciplinary hearing. However, modest modifications to the canons of judicial ethics would prod those parties into action while maintaining the benefits of the current ethics enforcement regime.<sup>315</sup>

To that end, I suggest two additional comments to the canons of judicial ethics to make clear that the kind of written orders described here represent breaches of the judges’ ethical obligations. First, Model Rule of Judicial Ethics 2.8 regarding judicial decorum and demeanor should include a new comment 4 making plain to judges and judicial ethics commissions that: “While judges have substantial discretion in the contents of their written orders and decisions, the inclusion of language that would reasonably demean, belittle, or bully an attorney, litigant, or other person appearing before the court is inconsistent with a judge’s ethical obligation to be ‘patient, dignified, and courteous.’” Second, Model Rule of Judicial Ethics 2.15 regarding a judge’s duty to take appropriate action when faced with lawyer misconduct should include further language at the end of existing comment 2 making clear that: “Under no circumstances would it be appropriate for a judge to belittle, demean, or bully a lawyer in a written decision or order (whether published or unpublished) as a means of addressing potential or actual attorney misconduct.”

Obviously, the existing language in Rules 2.8 and 2.15 and the commentary thereto are insufficient to produce the needed enforcement. However, given the benefits of the current system we should take whatever measures necessary to clarify the application of those rules to judicial benchslaps. By doing so, we can eliminate the role of the judicial bully. However, by retaining and strengthening the existing flexibility that judges have to address attorney ethical and professional breaches, we also need not convert every judge into a tattletale. Instead, this added commentary leaves in place a judge’s discretion to report attorney misconduct to the bar and removes from the judge the authority to address attorney misconduct through the public shaming of a benchslap.

## V. CONCLUSION

In his book, *Retreat from Doomsday: The Obsolescence of Major War*, Professor John Mueller makes a distinction between options that are “rationally

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(Feb. 3, 2012), <http://www.chron.com/news/houston-texas/article/Disciplining-Texas-judges-can-be-a-balancing-act-3004058.php> [<https://perma.cc/YZH7-S5AD>].

<sup>315</sup> Professor Greenbaum argues in the context of judicial reporting of attorney misconduct that clearer guidelines for reporting would result in judges complying with that obligation despite their apparent reluctance to do so under the current guidance. See Greenbaum, *Automatic Reporting*, *supra* note 205, at 440; Greenbaum, *Judicial Reporting*, *supra* note 5, at 545–51.

unthinkable” and those that are “subrationally unthinkable.”<sup>316</sup> Options that are “rationally unthinkable” appear on the list of options but are ultimately rejected by a decision maker because they are “determine[d] . . . to be unwise after mulling [it] over.”<sup>317</sup> An option only becomes truly obsolete when it is “subrationally unthinkable”—when it “never percolates into their consciousness as something that is available.”<sup>318</sup> This Article posits that issuing a benchslap should, at least for now, be rationally unthinkable. The suggested revisions to the ABA’s Canons of Judicial Conduct achieve that goal by causing judges to think twice before issuing such demeaning and belittling orders. While a judge may consider penning a benchslap, hopefully, after reflecting on the strengthened canons, the judge will reject that option and find a more helpful and less destructive way of addressing the attorney’s conduct. Eventually, taking such action should become truly obsolete. Like the art of dueling is no longer considered to be a valid method of restoring one’s besmirched honor,<sup>319</sup> so too should issuing a benchslap simply fall off the judge’s menu of options in favor of better, more constructive alternatives—alternatives that honor, rather than demean, the judge’s important role in the self-policing of the legal profession.

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<sup>316</sup> JOHN MUELLER, RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR 11 (1989).

<sup>317</sup> *Id.* at Foreword to the 1996 reprint.

<sup>318</sup> *Id.* at 11.

<sup>319</sup> *Id.*