

CONSPIRACY THEORY? THE ETHICAL PARADOX OF “BIG IS BAD”

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I. INTRODUCTION

The late 1950s and early 1960s elicit fond memories amongst today’s baby boomers, who annoy successor generations with their embellished reflections on the “good ol’ days.” A dawning of America they would say, as the store fronts of a plethora of thriving middle class towns struck a seemingly perfect balance between small business and retail juggernauts the likes of F.W. Woolworth Company, J.C. Penny, Sears, Roebuck & Company, and Montgomery Ward. The local banker was the pillar of the community, the family doctor kept everyone well, and the town dentist filled teeth—quite a few of them it would seem. More importantly, there was simply no problem, legal or personal, too big for that iconic lawyer in the small Main Street office.

It was a time of optimism and a “can do” attitude, as the American business machine that would eventually be disparaged as “big” was creating jobs and building chrome-laden cars and trucks, washers and dryers, televisions and radios, and countless other contraptions that would bring convenience to everyday life. Ethics and professionalism were a given, as reputations mattered in these communities where everyone knew everyone else. For the first and last time in this article it might be said that big was good, *or at least not presumed bad*.

What happened? Could it simply be that business itself changed, becoming more detached from the public as it grew larger and more complex? Perhaps the world evolved, with big business falling out of favor with inevitable shifts in pop culture and politics. Maybe the economic growth inspired by big business highlighted a societal divide between haves and have nots. While historians and sociologists sort this out, one thing seems certain. Big is now often seen as bad, and it is paradoxical that these same institutions that have provided the eco-

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conomic foundation for society today lie victim to conspiracy theories and a distrusting public.

This article will explore the presumption that big is bad, considering contributing factors; members of the “bad big” club, including the practice of law; ethical challenges facing the “bigs”; and ways in which ethics and professionalism might pave the way to making big less bad.

II. HOW BAD CAN BIG REALLY BE?

A. ANATOMY OF A CONSPIRACY THEORY

A conspiracy theory has been described as a belief that some covert but influential organization is responsible for a circumstance or event.¹ Conspiracy theories cover a wide range of subject matter dating back to biblical times. Those involving “meddlesome foreigners” have been hailed as a favorite pastime in the United States.² For example, one contends that the American Civil War was started by Britain in an effort to reclaim the country.³ The 2016 presidential campaign highlighted modern day frustrations with the big and powerful⁴ and spawned a number of conspiracy theories, including election tampering by those meddlesome Russians.⁵ To be fair, not all conspiracy theories are untrue, but they nonetheless often involve hypotheses that are inconsistent with what most would understand to be the history or facts.⁶

Conspiracy theories have been said to take root in moments of powerlessness and uncertainty, with one’s brain kicking into analytical overdrive in an effort to find a coherent and understandable narra-

1. *Conspiracy theory*, OXFORDDICTIONARIES, https://en.oxforddictionaries.com/definition/conspiracy_theory (last visited June 18, 2017).

2. See Maggie Koerth-Baker, *Why Rational People Buy Into Conspiracy Theories*, N.Y. TIMES MAG. (May 21, 2013), <http://www.nytimes.com/2013/05/26/magazine/why-rational-people-buy-into-conspiracy-theories.html>.

3. Quinton, *Top 100 Conspiracy Theories of All Time*, TRUTH CONTROL (Apr. 24, 2013), <http://www.truthcontrol.com/articles/top-100-conspiracy-theories-all-time>.

4. See, e.g., Interview by David Greene with Senator Bernie Sanders, NAT’L PUB. RADIO (Jan. 6, 2017), <http://www.npr.org/templates/transcript/transcript.php?storyId=508385203> (“Who do you think is going to make the decisions if the American people are not involved at the grassroots level? It will be the insurance companies. It’ll be Wall Street. It’ll be the drug companies. It’ll be the fossil fuel industry. I don’t want to break the bad news to you. But, in fact, these large corporate interests have enormous legislative and political power in this country.”).

5. Adam Entous & Ellen Nakashima, *FBI in Agreement with CIA that Russia Aimed to Help Trump Win White House*, WASH. POST (Dec. 16, 2016), https://www.washingtonpost.com/politics/clinton-blames-putins-personal-grudge-against-her-for-election-interference/2016/12/16/12f36250-c3be-11e6-8422-eac61c0ef74d_story.html?utm_term=.9f2d23c02312.

6. *Conspiracy theory*, WIKIPEDIA, https://en.wikipedia.org/wiki/Conspiracy_theory (last visited June 2, 2017).

tive.⁷ They have been dissected by type and geographic origin.⁸ A popular type, the “enemy above” conspiracy theory, is often raised in connection with big business and premised on powerful people manipulating the system for their own gain.⁹ One variation, the “false flag” conspiracy theory, suggests that covert operations conducted by governments, corporations, and other big organizations are designed to appear as if they are being carried out by other entities.¹⁰

B. CORPORATE SCANDALS

Corporate scandals fuel negative sentiment toward big business, making it more vulnerable to conspiracy theories. They have plagued individual companies and entire industries, tarnishing reputations and brands, spawning investigations and litigation, prompting corrective legislation and regulation and reinforcing a stereotype of a “bad big” that sees itself above the law. In most cases, corporate scandals have involved ethical concerns, like corruption, bribery, records falsification, spying, and espionage.¹¹

The United States Foreign Corrupt Practices Act of 1977¹² and United Kingdom Bribery Act of 2010¹³ are good examples of legislative responses to corporate scandals or perceived unethical conduct, and were enacted to address concerns over the bribery of foreign officials. Another example in the United States is the Sarbanes-Oxley Act of 2002,¹⁴ passed by Congress in a targeted effort to restore confidence in the financial markets after a series of major corporate scandals. Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010¹⁵ takes steps to correct perceived failures in the country’s financial regulatory system. The effects of these laws are far-reaching and the consequences of noncompliance can be significant.

7. Koerth-Baker, *supra* note 2.

8. *Conspiracy theory*, *supra* note 6 (citing Jesse Walker’s historical typology of five types, political scientist Michael Barkun’s three types based on breadth and libertarian economist Murray Rothbard’s distinction between shallow and deep).

9. *Id.* (referencing Jesse Walker’s historical typology of five types).

10. *False flag*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=false_flag&oldid=764163728 (last visited Jan. 31, 2017).

11. Syed Balkhi, *25 Biggest Corporate Scandals Ever*, LIST25 (July 15, 2014), <http://list25.com/25-biggest-corporate-scandals-ever/>.

12. 15 U.S.C. § 78m (2015) (accounting provisions for issuers); 15 U.S.C. §§ 78dd-1-dd-3 (1998) (anti-bribery provisions for issuers, domestic concerns and other persons).

13. Bribery Act 2010, c. 23 (UK).

14. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

15. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

C. STICKS AND STONES

The children's taunt that "words cannot ever hurt me" may be true in theory, but for big business some words can be more damaging than others. Consider the public perceptions of words like "recall," "investigation," and "loophole." They elicit an immediate negative reaction, and few people care to make the effort to understand the factual contexts that surround them. Couple these words with standing images of the ivory towers of business and the reputational damage, regardless of the truth, can be high.

The repetition of words, even seemingly benign ones, can also be impactful. The stump speech of one presidential candidate relentlessly, and effectively, argued that "our government belongs to all of us, and not just a handful of wealthy campaign contributors, and their Super PACs."¹⁶ While it would be easy to dismiss these words as political rhetoric, their continuous recital on the campaign trail likely leaves lasting impressions on the minds of their audiences.

D. HOLLYWOOD SPIN

It is noteworthy that Hollywood, an institution that has reaped significant benefits in its depiction of conspiracy theories, is itself a big business. With 1.3 billion movie tickets sold in the United States in 2016 and gross revenues exceeding eleven billion dollars,¹⁷ its portrayals of big business have the potential to influence the opinions of a lot of people. One commentator observed that "although most of your friends and colleagues in business seem like decent people, the movies consistently portray business—especially big business—as a hotbed of deceit and villainy."¹⁸ Another suggested a rather obvious motive, in that vilifying senior management and elevating "working stiffs" sells more tickets.¹⁹

Hollywood's influence extends to the legal profession. Some evidence suggests that the primary way people learn about lawyers is by watching fictionalized portrayals of them.²⁰ Concerns have also been raised that Hollywood may influence the perceptions of younger law-

16. *The transcript of Bernie Sanders's Victory Speech*, WASH. POST (Feb. 10, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/10/the-transcript-of-bernie-sanders-victory-speech/?utm_term=.2c78587dd126.

17. *Domestic Movie Theatrical Market Summary 1995 to 2017*, NUMBERS, <http://www.the-numbers.com/market/> (last visited Mar. 7, 2017).

18. David Walker, *Hollywood Heavies: Why is Business Always the Villain in the Movies?*, INTHEBLACK (June 1, 2015), <https://www.intheblack.com/articles/2015/06/01/why-is-business-always-the-villain-in-hollywood-movies>.

19. Rachel Dodes, *Hollywood's Favorite Villain*, WALL ST. J., Oct. 14, 2011, at D1.

20. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 49 (2015-2016 ed., 2015) (citing ABA Comm. on Advert., *Lawyer Advertising at the Crossroads: Professional Policy Consider-*

yers and law students as to what constitutes acceptable professional conduct.²¹

In fairness, Hollywood has suffered its own conspiracy theories. One asserts that it promotes drugs and other vices in movies and on television so that society will slowly shift toward their acceptance, while another claims that films have hidden and nefarious stories that only certain people are able to synthesize.²² The erroneous announcement of “best picture” at the 2017 Academy Awards spawned competing theories of actor mischief.²³

E. THE UNDERDOG

Another possible contributor to the “big is bad” mindset is the public’s infatuation with the underdog, with the epic battle of David and Goliath as the standing metaphor. Everyone loves an underdog, a role frequently celebrated in fictionalized movie portrayals. Pick your sport, and you will find an inspiring tale of an underdog defying the odds. The formula is quite simple as without a Goliath there can be no David. It is not necessary to understand this giant, only to know that he is big and powerful and for those reasons alone may be presumed bad.

The underdog role transcends sports. On film, outmatched lawyers rise to deliver knockout punches to their Ivy League adversaries and often, it should be noted, those adversaries’ big and bad corporate clients. Who didn’t enjoy watching Matt Damon’s “fresh-out-of-law-school” lawyer character tag the insurance company for fifty million dollars in punitive damages in *Rainmaker*,²⁴ or Paul Newman’s “down-on-his-luck” solo practitioner find justice for the family of a medical malpractice victim in *The Verdict*?²⁵

Today’s “whistleblower” sometimes appears as an extension of the underdog role, exposing incidents of possible workplace misconduct. Most companies have embraced this role, establishing compliance and ethics hotlines to facilitate reporting. One study suggests that employees and customers of corporations are collectively responsible for

ations 65-66 (1995) and noting that when people are asked to name the lawyer they most admire, they frequently cite “Perry Mason” or “Matlock”).

21. Interview with Judge Marvin E. Aspen, *It’s How You Play the Game*, 34 TRIAL 28 (July 1, 1998) (observing that “young lawyers and law students exposed to current Hollywood films sensationalizing trial practice may expect that they should act in some of the dramatic, abrasive ways portrayed”).

22. See Quinton, *supra* note 3.

23. Ashley Hoffman, *The Absolute Funniest Conspiracy Theories About the Oscars Mix-up*, TIME (Feb. 27, 2017), <http://time.com/4683716/oscars-2017-best-picture-mistake-theories/?iid=sr-link1>.

24. THE RAINMAKER (Constellation Entertainment 1997).

25. THE VERDICT (Twentieth Century Fox Film Corporation 1982).

approximately seventy percent of the tips received.²⁶ Underdog or not, this reporting serves an important purpose in helping companies identify and address problems and vulnerabilities, and both the law²⁷ and corporate codes of conduct provide protection to the reporting party.

III. WHO ARE THE BAD BIGS?

A. WALL STREET

It would seem that the admission standards for the “bad big” club are relatively low, as potential new members pop in and out of the headlines daily. Wall Street, a broad category that includes banking, finance, investment, and insurance, is a big the public loves to hate. One noteworthy conspiracy theory claims that the Federal Reserve is neither federal, nor does it have any reserves, but was instead constructed to allow profits to be privatized by a small group of bankers while losses are passed to the public through taxes and inflation.²⁸ Hollywood has had its fun with this big, lending it a caricature of the “greed is good” philosophy.²⁹ However, small banking also showed poorly in one recent film as it anxiously plotted to foreclose on a family ranch and its underlying oil and gas riches.³⁰

B. GOVERNMENT

The business of big government is a perennial favorite, easily eclipsing all other bigs in both the volume and egregiousness of conspiracy theories. The assassination of President Kennedy, the Watergate scandal, the alleged staging of the Cold War, President Eisenhower’s supposed treaty with aliens, the Philadelphia experiment, the “faked” Moon landing, the 1995 Oklahoma City bombing as a “false flag” event to demonize opposition to the government, and the citizenship of President Obama have all been cited as among the top 100 conspiracy theories of all time.³¹ In Hollywood’s eyes, hardly any aspect of big government is off limits, as one sees fictionalized portray-

26. ASS’N OF CERTIFIED FRAUD EXAM’RS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE: 2014 GLOBAL FRAUD STUDY 21 (2014) <https://www.acfe.com/rtn2016/docs/2016-report-to-the-nations.pdf>.

27. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 116, Stat. 745, 806 (2002) (“Whistleblower Protection for Employees of Publicly Traded Companies”).

28. Quinton, *supra* note 3.

29. *See, e.g.*, WALL STREET (Twentieth Century Fox Film Corporation and America Entertainment Partners L.P. 1987); BOILER ROOM (New Line Cinema and Team Todd 2000).

30. HELL OR HIGH WATER (Film44, OddLot Entertainment, and Sidney Kimmel Entertainment 2016).

31. Quinton, *supra* note 3.

als of murderous presidents,³² backstabbing congressmen,³³ inept yet egotistical federal agents,³⁴ corrupt police³⁵ and bungling backslapping mayors.³⁶ When all else fails, it will be shown sending in camouflaged troops with gas masks to quarantine the premises and frighten the public.³⁷

C. ENERGY

Oil may be the headliner, but the coal and nuclear industries are among those seen as the energy bigs. They are typically portrayed as powerful, yet at the same time neither safe nor friendly to the environment. Conspiracy theories include Saddam Hussein being targeted for his refusal to let United States companies take over Iraqi oil production,³⁸ and the oil industry holding back electric car development,³⁹ hounding into obscurity the inventor of the efficient automobile carburetor to protect its business from an engine that would make its product obsolete,⁴⁰ and concocting the “peak oil” theory of demand outpacing supply in an effort to increase prices.⁴¹ Movie portrayals highlight power and corruption,⁴² as well as safety and environmental concerns and cover-up.⁴³

D. MEDICINE

Big medicine, like big energy, has several parts. Professional practitioners like doctors and nurses are generally well regarded by

32. See, e.g., *ABSOLUTE POWER* (Castle Rock Entertainment and Malpasio Productions 1997).

33. See, e.g., *House of Cards* (Media Rights Capital, Panic Pictures 2013).

34. See, e.g., *DIE HARD* (Twentieth Century Fox Film Corporation, Gordon Company, Silver Pictures 1988).

35. See, e.g., *INTERNAL AFFAIRS* (Paramount Pictures, Image Organization, Malofilm 1990).

36. See, e.g., *JAWS* (Zanuck/Brown Production and Universal Pictures 1975).

37. See, e.g., *OUTBREAK* (Warner Bros. Pictures, Arnold Kopelson Productions and Punch Productions 1995); *CONTAGION* (Warner Bros. Pictures, Participant Media, Imagenation Abu Dhabi FZ, Double Feature Films, and Regency Enterprises 2011).

38. Quinton, *supra* note 3.

39. Mark Hooson, *5 Strange Car Conspiracy Theories*, MONEYSUPERMARKET (Apr. 6, 2014), <https://www.moneysupermarket.com/car-insurance/articles/5-strange-car-conspiracy-theories/>.

40. *WHO KILLED THE ELECTRIC CAR?* (Plinyminor, Electric Entertainment, Papercut Films 2006).

41. *History's Greatest Conspiracy Theories*, TELEGRAPH (Nov. 19, 2008) <http://www.telegraph.co.uk/news/2016/03/16/historys-greatest-conspiracy-theories/>.

42. See, e.g., *SYRIANNA* (Warner Bros. Pictures, Participant Productions and 4M 2005) (improper payments to foreign officials).

43. See, e.g., *THE CHINA SYNDROME* (IPC Films 1979); *ON DEADLY GROUND* (Seagal/Nasso Productions and Warner Bros. Pictures 1994); *CHAIN REACTION* (Chicago Pacific Entertainment, Twentieth Century Fox Film Corporation and The Zanuck Company 1996).

the public, yet the broader medical and pharmaceutical businesses have drawn considerable negative attention. Wide-ranging conspiracy theories suggest that natural cures for serious illness are being withheld from the public;⁴⁴ the truth about ingredients in vaccines is being hidden, leading to autism and other conditions;⁴⁵ the drug Nevirapine was part of an effort by the scientific-medical complex to spread toxic drugs;⁴⁶ and acquired immunodeficiency syndrome, or “AIDS,” was a creation of scientists, possibly coordinating with the Central Intelligence Agency, as a tool of population control or as biological warfare.⁴⁷ Movie portrayals include hospital mischief and cover-up⁴⁸ and government-pharmaceutical industry conspiracy to test drugs on unknowing local populations.⁴⁹

E. HONORABLE MENTIONS

When it comes to bigs, few business sectors have escaped public scrutiny. There is big agriculture, in particular big tobacco, at the root of conspiracy theories involving the hiding of the known hazards of cigarette smoking.⁵⁰ On film, big agriculture can be seen pulling out all of the stops to fix prices,⁵¹ crush a whistleblower,⁵² deploy its lobbying muscle to stop an anti-smoking crusader,⁵³ and force poor cotton mill working conditions.⁵⁴

The automotive industry has earned its stripes as a big. Conspiracy theorists claim that it deliberately designed cars to fail after a few years and that Detroit’s Big Three acted in concert in the 1940s to stop

44. KEVIN TRUDEAU, *NATURAL CURES “THEY” DON’T WANT YOU TO KNOW ABOUT* (2004).

45. Derik Bradshaw, *The World’s Top 15 Conspiracy Theories of All Time*, *GUARDIAN: LIBERTY VOICE* (Mar. 22, 2014), <http://guardianlv.com/2014/03/the-worlds-top-15-conspiracy-theories-of-all-time/>.

46. Celia Farber, *Out of Control: AIDS and the Corruption of Medical Science*, *HARPER’S MAG.* (Mar. 2006), <https://harpers.org/archive/2006/03/out-of-control/>.

47. *Separating Fact from Fiction: The CIA and AIDS*, *TIME*, http://content.time.com/time/specials/packages/article/0,28804,1860871_1860876_1861031,00.html (last visited June 20, 2017).

48. *See, e.g.*, *COMA* (Metro-Goldwyn-Mayer 1978).

49. *See, e.g.*, *THE CONSTANT GARDNER* (Focus Features, UK Film Council and Pot-boiler Productions 2005).

50. *See* Tim Loehrke et al., *Tobacco Trial Heads for Big Showdown*, *USA TODAY* (Sept. 21, 2004), https://usatoday30.usatoday.com/money/industries/2004-09-20-tobacco_x.htm (“[P]rosecutors accuse Big Tobacco of a vast marketing, legal and health conspiracy over five decades in which they lied about the dangers of smoking . . .”).

51. *See, e.g.*, *THE INFORMANT* (Warner Bros. Pictures, Participant Media, and Groundswell Productions 2009).

52. *See, e.g.*, *THE INSIDER* (Blue Lion Entertainment, Forward Pass, Kaitz Production, Mann/Roth Productions, Spyglass Entertainment, and Touchtone Pictures 1999).

53. *See, e.g.*, *THANK YOU FOR SMOKING* (Room 9 Entertainment, TYFS Productions LLC, and ContentFilm 2005).

54. *See, e.g.*, *NORMA RAE* (Twentieth Century Fox Film Corporation 1979).

competition from the radically advanced Tucker automobile.⁵⁵ Movies have shown big automotive's theft of patent rights⁵⁶ and concealment of defects that resulted in injuries.⁵⁷

Mainstream media is another big, with conspiracy theories suggesting that it is controlled by powerful people who benefit through manipulation of the news and that it produces shows that depict terror and other disasters so that the public will be predisposed to not to think of them as government actions.⁵⁸ Hollywood portrayals show a television network exploiting a former anchor's ravings and revelations about the news media for its own profit⁵⁹ and a spin-doctor and movie producer fabricating a war to cover up a presidential sex scandal.⁶⁰

IV. BIG LAW

Welcome to the club, big law! With well over a million lawyers in the United States alone,⁶¹ the profession is certainly looking big, and that only represents around twenty percent of the world's lawyer population.⁶² The practice of law finds itself in a paradox. On the one hand, lawyers are the target of many jokes and a favorite movie villain. On the other, forty-three percent of parents recently polled indicated that they wanted their children to be one.⁶³ It has also been observed that while lawyers are sometimes criticized for being too tough, those in trouble probably want a tough lawyer to represent them.⁶⁴

55. Aaron Miller, *The 8 Craziest Automotive Conspiracy Theories of All Time*, THRILLIST: CARS (July 16, 2015), <https://www.thrillist.com/cars/the-craziest-automotive-conspiracy-theories-of-all-time>.

56. See, e.g., FLASH OF GENIUS (Universal Pictures, Spyglass Entertainment, Strike Entertainment 2008).

57. See, e.g., CLASS ACTION (Interscope Communications and Twentieth Century Fox Film Corporation 1991).

58. Quinton, *supra* note 3.

59. NETWORK (Metro-Goldwyn-Mayer 1976).

60. WAG THE DOG (Baltimore Pictures, New Line Cinema, and Punch Productions 1997).

61. ABA National Lawyer Population Survey: Historical Trend in Total National Lawyer Population 1878 - 2016, AM. B. ASS'N (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2016.authcheckdam.pdf.

62. Ethan Michelson, *Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers*, 20 IND. J. GLOBAL LEGAL STUD. 1071, 1083 (2013).

63. Top 10 Jobs Parents Want for Their Children, HR GRAPEVINE (Sept. 1, 2014, 10:39 AM), <https://www.hrgrapevine.com/content/article/2014-09-01-top-10-jobs-parents-want-for-their-children> (with doctors at 49% and engineers at 45%, contrasted with bankers at 18%).

64. ROTUNDA & DZIENKOWSKI, *supra* note 20, at 44.

Three decades ago, concerns were raised that there was simply too much to know for every lawyer to practice every aspect of law.⁶⁵ There can be little doubt that today's law practice is materially different than in the past. Specialization abounds, with nearly fifty practice sections in the State Bar of Texas, thirty-three in the Nebraska State Bar Association, and twenty-three in the Iowa State Bar Association. In response, the profession has seen the rise of the "megafirm," with the two hundred largest global firms having offices in 573 cities in ninety-four countries.⁶⁶ Law has indeed become big.

Big law has been subject to more negative film portrayals than actual conspiracy theories, with one commentator identifying six types of lawyers depicted in movies:⁶⁷ the crusading lawyer, like Gregory Peck's "Atticus Finch" in *To Kill a Mockingbird*;⁶⁸ heroic lawyer, like Matthew McConaughey's "Mick Haller" in *The Lincoln Lawyer*;⁶⁹ obtuse lawyer, like Tom Cruise's "Lt. Daniel Kaffee" in *A Few Good Men*;⁷⁰ disillusioned lawyer, like Josh Lucas' "Mitch McDeere" in *The Firm*;⁷¹ vengeful lawyer, like John Cusack's "Nicholas Easter" in *Runaway Jury*;⁷² and buffoon lawyer, like Joe Pesci's "Vinny Gambini" in *My Cousin Vinny*.⁷³

V. ETHICS, BIG CHALLENGES

A. GLOBALIZATION

Globalization is having a profound effect on big business and its ethics. Today's fast-paced, 24/7, cross-cultural environment never takes a break, and its challenges transcend the language barrier. Companies must navigate differing business and tax models, as well as international norms and sustainable practice standards in such areas as broad-based human rights, labor rights, rights of indigenous peoples, environmental stewardship, and transparency.

65. ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 2 (1986).

66. *The Global 100*, AM. LAW. (Sept. 26, 2016), <http://www.americanlawyer.com/id=1202767838452/The-Global-100?slreturn=20170110112538>.

67. Thane Rosenbaum, *The 6 Types of Lawyer Movies*, ABA J. (Aug. 1, 2016, 12:10 AM), http://www.abajournal.com/magazine/article/6_lawyer_movie_tropes.

68. *TO KILL A MOCKINGBIRD* (Universal International Pictures, Pakula-Mulligan, and Brentwood Productions 1962).

69. *THE LINCOLN LAWYER* (Lionsgate, Lakeshore Entertainment, and Sidney Kimmel Entertainment 2011).

70. *A FEW GOOD MEN* (Castle Rock Entertainment and Columbia Pictures Corporation 1992).

71. *THE FIRM* (Paramount Pictures 1993).

72. *RUNAWAY JURY* (Regency Enterprises, New Regency Pictures, and Epsilon Motion Pictures 2003).

73. *MY COUSIN VINNY* (Palo Vista Productions, Peter V. Miller Investment Corporation, and Twentieth Century Fox Film Corporation 1992).

For many lawyers, international practice is inevitable. Cross-border transactions and disputes are on the rise, and more foreign clients are seeking host country legal assistance. Legal ethics principles vary by jurisdiction, with some mandatory and others permissive. In some cases multiple organizations impose ethical requirements within the same jurisdiction.

B. TECHNOLOGY TESTS THE LIMITS

The 1979 song *Video Killed the Radio Star*⁷⁴ was a harbinger of changes to come. On the plus side of the ledger, technology has brought countless advances to business and society. Research, especially legal research, has improved, with massive amounts of information and data accessible through a variety of sources. Travel is easier, most of the time, and communication is fast, cheap, and easy as cell phone and personal data device capabilities expand. That said, technology now tests the limits of ethics and renders some traditional ways of conducting business and practicing law obsolete.

Artificial intelligence and stem cell research are examples of areas that have ignited significant ethical debates. Electronic communications present new challenges in both the style and substance of human interaction. Social media presents real time, and often unchecked, news reporting as the curious phenomenon of “fake news” emerges. In today’s ever-connected world in which speed prevails over truth, one person’s observation may quickly become a talking point, even when proven false.⁷⁵ One commentator has suggested that access to information, which might be expected to help minimize wide speculation, likely makes conspiracy theories more convincing.⁷⁶

Technology carries other risks, not the least of which is that it can fail. Ninety law students in Georgia learned this when they were told that they failed the July 2015 or February 2016 bar exam, only to later learn that they had passed. It was reported that a change resulting from a regrading of essays was improperly calculated by the computer.⁷⁷

74. BRUCE WOOLLEY AND THE CAMERA CLUB, *VIDEO KILLED THE RADIO STAR* (Epic Records 1979); THE BUGGLES, *VIDEO KILLED THE RADIO STAR* (Island Records 1979).

75. Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html>.

76. Koerth-Baker, *supra* note 2.

77. Karen Schwartz, *Georgia Bar Exam Mistake Takes Toll on 90 Law Students*, ABA J. (Jan. 1, 2017, 3:10 AM), http://www.abajournal.com/magazine/article/georgia_bar_exam_mistake.

Technology never sleeps. President Reagan would learn this in his “live microphone” incident.⁷⁸ Today the microphone is always on, with cookies and malware, global positioning system tracking, cell phone and stationary security cameras, and now, drone spying technology. There are inherent security risks, as confidentiality may be compromised through the hacking of websites, database theft, loss of personal data devices, missent electronic communications, and overheard phone conversations.

The consequences of the “live microphone” for lawyers extend beyond legal ethics, as the unintended disclosure or theft of business information may result in misuse by client competitors, breach of confidentiality obligations owed to third parties, waiver of the attorney-client privilege, violation of insider trading, and other laws and reputational damage, to name a few. Likewise, compromised or erroneous information may lead to ill-advised client decisions and inaccurate regulatory reporting. On top of these risks, ethics experts cringe as lawyer advertising is redefined through blogs, chatrooms, and websites.

C. CIVILITY ON THE ROPES

If the 2016 presidential election is any indication, civility and common courtesy appear to be in steep decline. The trend has not gone unnoticed, with today’s public opinion surveys showcasing rude cities, drivers, vacationers, and air travelers. One poll asked what annoyed people most about others’ mobile habits, with making speakerphone calls in public topping the list.⁷⁹ From a business perspective, employees are representatives of their companies and must project a high level of civility and professionalism regardless of this trend in the broader population.

While not widely recognized today, the American Bar Association took early action to preempt this trend, creating a commission to address concerns over declining civility traced to the radical politics of the 1960s and the disrespect that some lawyers showed for the judicial system. Its report in 1986 pondered the question of what could be done to improve the perception and reality of lawyer professionalism.⁸⁰ Professionalism creeds and mandatory continuing legal education are among the positive outcomes of this groundbreaking effort.

78. *We Begin Bombing in Five Minutes*, WIKIPEDIA, https://en.wikipedia.org/wiki/We_begin_bombing_in_five_minutes (“My fellow Americans, I’m pleased to tell you today that I’ve signed legislation that will outlaw Russia forever. We begin bombing in five minutes.”) (last visited June 20, 2017).

79. B.R., *Irritable Scowl Syndrome*, ECONOMIST: GULLIVER (Oct. 15, 2014), <http://www.economist.com/blogs/gulliver/2014/10/rude-travellers>.

80. ABA COMM’N ON PROFESSIONALISM, *supra* note 65, at 3.

VI. MAKING BIG LESS BAD

A. REJECT THE PREMISE

Perceptions are hard to change, especially negative ones concerning ethics. One poll annually surveys public views as to which professions or trades have the highest honesty and ethics.⁸¹ Sadly, not once in the past decade have business executives or lawyers been rated “high” or “very high” by more than thirty percent of survey respondents.⁸² How can this be changed?

A good first step is to reject, or at least not acquiesce to, the premise that big is bad. Was David really an underdog to Goliath? At least one writer says no, that Goliath was visually impaired and clad with armor limiting his mobility, while David, with his accurate sling, was simply deadly.⁸³ This alternative, and credible, view has been obscured by the power of the myth for thousands of years. Bigs too must provide the public with an alternative view based on reality.

Most bigs started out small. One commentator recently summarized “lessons learned” from movie depictions of fictional and nonfictional entrepreneurs who gave rise to the likes of McDonalds and Apple.⁸⁴ These behemoths of American business certainly did not start out big, but in becoming so, have managed to preserve the integrity of their brands. It can be done.

Being big presents a number of unique challenges, but that doesn’t make it bad. Public companies have large scale operations covering multiple jurisdictions, sizable and diverse workforces, extensive legal and regulatory requirements, and comprehensive disclosure obligations. The systems and controls designed to address these challenges are thorough, but not perfect. Mistakes can be made and things can go wrong. Continual efforts to enhance these systems and controls will help ensure public confidence in big business.

Many conspiracy theories are simply wrong. One writer has offered some tell-tale signs that a conspiracy theory is likely untrue. The most obvious are the theory’s complexity, numerous elements,

81. Jim Norman, *Americans Rate Healthcare Providers High on Honesty and Ethics*, GALLUP (Dec. 19, 2016), <http://www.gallup.com/poll/200057/americans-rate-healthcare-providers-high-honesty-ethics.aspx>.

82. See, e.g., *Honesty/Ethics in Professions*, GALLUP, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited June 20, 2017).

83. Bill Murphy, Jr., *3 Things People Get Wrong About David vs. Goliath, Inc.* (May 6, 2014), <https://www.inc.com/bill-murphy-jr/3-things-people-get-wrong-about-david-vs-goliath.html>.

84. Don Steinberg, *What ‘The Founder’ Can Teach Us About Starting a Business: Biopics About Real-Life Entrepreneurs Impart Lessons in Finance, Marketing, and Sales*, WALL STREET J. (Jan. 11, 2017, 5:10 PM), <https://www.wsj.com/articles/what-the-founder-can-teach-us-about-starting-a-business-1484151063>.

and involvement of large numbers of people who would need to keep silent.⁸⁵ One study casts doubt on the conspiracy theory that the Moon landing was faked, finding that, if true, it would have required the involvement and silence of 411,000 people!⁸⁶

Lawyers too should reject the premise of a big bad legal profession, instead recognizing that in today's increasingly complex business world many clients benefit from the range of specialized services that larger firms, and a more sophisticated profession, can provide. Those services are often complimentary to those provided by their small and mid-sized firm counterparts. Professionalism creeds—like *The Texas Lawyer's Creed*,⁸⁷ Kansas Bar Association *Pillars of Professionalism*,⁸⁸ and The Iowa State Bar Association *Standards for Professional Conduct*⁸⁹—inspire the rejection of the premise and promote the positives with expressions of passionate pride for the profession;⁹⁰ consciousness of one's duty to the judicial system,⁹¹ including taking opportunities to improve the system and profession;⁹² and conduct characterized at all times by personal courtesy and professional integrity.⁹³ Not perpetuating the negatives through lawyer jokes or making unfounded accusations or personal comments about opposing counsel or clients⁹⁴ can also make a difference as to how the individual lawyer and broader profession are perceived.

85. Michael Shermer, *The Conspiracy Theory Detector*, SCI. AM. (Dec. 1, 2010), <https://www.scientificamerican.com/article/the-conspiracy-theory-detector/>.

86. David Robert Grimes, *On the Viability of Conspiratorial Beliefs*, PLOS ONE (Jan. 26, 2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0147905>.

87. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (1989), reprinted in 76 Tex. B. J. 394, 435-36 (2013) [hereinafter "TEXAS LAWYER'S CREED"] (enacted by the Texas Supreme Court and Texas Court of Criminal Appeals in 1989). The *Texas Lawyer's Creed* is divided into sections involving our legal system, and lawyer to client, lawyer to lawyer, and lawyer and judge relationships, with each containing an introductory set of goals followed by a series of aspirational statements. *Id.*

88. PILLARS OF PROFESSIONALISM (KAN. BAR ASS'N 2012) [hereinafter "KAN. PILLARS OF PROFESSIONALISM"]. The Kansas Bar Association's *Pillars of Professionalism* is divided into sections involving clients, courts, opposing parties and counsel, the legal process, and the profession and the public, with each containing a series of aspirational statements. *Id.*

89. STANDARDS FOR PROFESSIONAL CONDUCT (IOWA BAR ASS'N 2009) [hereinafter "IOWA STANDARDS FOR PROF'L CONDUCT"]. The Iowa State Bar Association's *Standards for Professional Conduct* is divided into sections involving the lawyer's duties to other counsel, lawyer's duties to the courts, court's duties to lawyers and judge's duties to each other, with each containing a series of aspirational statements. *Id.*

90. TEX. LAWYER'S CREED I(1).

91. TEX. LAWYER'S CREED I(5).

92. KAN. PILLARS OF PROFESSIONALISM, Profession and the Public (4).

93. IOWA STANDARDS FOR PROF'L CONDUCT, pmbl.

94. IOWA STANDARDS FOR PROF'L CONDUCT, Lawyer's Duties to Other Counsel statements 2, 4 (committing to abstain from disparaging remarks or acrimony toward other counsel, parties or witnesses, and committing to "not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into dispute by

B. RETURN TO THE BASICS

1. *Staying Grounded*

Waylon Jennings was on to something with his urging that “maybe it’s time we get back to the basics.”⁹⁵ In a world of big is bad, those basics are all about ethics and professionalism. One commentator suggested five elements of an ethical workplace, including honesty, responsibility and reliability, and being goal-oriented and job-focused.⁹⁶ Each is captured in different ways in corporate codes of conduct and the tenets of legal ethics and professionalism.

Corporate codes of conduct are the foundation of companies’ compliance and ethics programs. They have evolved over time from mundane policy compilations to more engaging, principles-based statements of compliance and ethics in areas relevant to the business. Most are premised on the core values of the company, and their look and substance reflect the company’s unique personality. To understand a company, begin by looking at its code.

For lawyers, the American Bar Association Model Rules of Professional Conduct (“Model Rules”)⁹⁷ are an extraordinary gathering of ethical obligations that have been adopted to varying degrees by most states. They have withstood the test of time. Collectively, they inspire. Individually, they instruct on ethics in ways that recognize the uniqueness of each situation.

2. *Honesty*

Honesty is a cornerstone of ethical conduct, at the heart of all strong business relationships. A reputation for honesty once surrendered is difficult to recapture. Corporate codes of conduct embrace this pillar, focusing on conducting business honestly, ethically, transparently, and with integrity. Some cite the more colloquial notion of “do the right thing.”⁹⁸ These themes set overarching expectations of behavior for a company’s employees and, in some cases, contractors.

unfounded accusations of impropriety”); TEX. LAWYER’S CREED III(10) (committing to “not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety . . . [And to] avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses . . .”).

95. WAYLON JENNINGS, LUCKENBACH TEXAS (RCA Victor 1977).

96. Erin Schreiner, *What Are Characteristics of Ethical People in the Workplace?*, HOUSTON CHRON., <http://smallbusiness.chron.com/characteristics-ethical-people-workplace-15703.html> (last visited June 21, 2017).

97. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016).

98. See, e.g., *GM’s Code of Conduct*, GEN. MOTORS, https://www.gm.com/content/dam/gm/en_us/english/Group4/InvestorsPDFDocuments/WWI.pdf (last visited June 21, 2017).

A number of the Model Rules highlight honesty in the practice of law. For example, honesty is implicit in the lawyer's obligation, as an advisor, to exercise independent judgment and render candid advice.⁹⁹ This is especially important in today's law practice, where lawyers are increasingly expected to be an integral part of their client's business team and provide contemporary advice on matters for which they sometimes possess only skeletal information. The ethics rule anticipates these circumstances, allowing the lawyer to refer to the law as well as other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.¹⁰⁰

Honesty is also a part of the lawyer's duty of candor toward the tribunal.¹⁰¹ This duty prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal, failing to correct a false statement of material fact or law previously made, failing to disclose adverse legal authority, or offering false evidence.¹⁰² Similarly, in the course of representing a client, lawyers are generally prohibited from making false statements of material fact or law to a third person or failing to disclose material facts if necessary to avoid assisting a criminal or fraudulent act by the client.¹⁰³ If the profession is to become a less bad big, it must effectively navigate the modern nuances of these traditional obligations.

3. *Responsibility*

Corporate codes of conduct impose obligations on employees to act responsibly and in compliance with the law. Companies today are placing greater emphasis on social responsibility, recognizing the needs of a broader stakeholder base that includes shareholders, customers, governments, non-governmental organizations, and local communities. The results of a company's efforts are typically highlighted in its sustainability reporting.

Responsibility is a common theme in the Model Rules. All lawyers are responsible for meeting their ethical obligations, even if acting at the direction of another person,¹⁰⁴ with partners and managing lawyers having broader duties to maintain measures to ensure that members of their firms do so.¹⁰⁵ Lawyers will generally be held re-

99. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

100. *Id.*

101. *Id.* r. 3.3.

102. *Id.*

103. *Id.* r. 4.1.

104. *Id.* r. 5.2 (noting an exception where a subordinate lawyer acts in accordance with a "supervisory lawyer's reasonable resolution of an arguable question of professional duty").

105. *Id.* r. 5.1 and 5.3.

sponsible for other lawyers' violations of the rules if they order or, with knowledge, ratify the conduct, or they are a partner, supervisor, or manager over other lawyers and know of the conduct at a time when its consequences could be avoided, but fail to take reasonable remedial action.¹⁰⁶

Lawyers also have responsibilities in their fee setting, as they are prohibited from making an agreement for, charging, or collecting unreasonable fees or expenses.¹⁰⁷ The rule provides flexibility by listing a number of factors to be considered in determining reasonableness.¹⁰⁸ The lawyer must generally communicate the scope of representation and the basis or rate of the fee and expenses, preferably in writing, before or within a reasonable time after commencing the representation.¹⁰⁹ Legal fees have long been a source of anxiety for clients, and avoiding surprises over them is a good way to assuage negative perceptions of this aspect of big law.

4. Reliability

Corporations recognize the importance of reliability in their dealings with stakeholders. Failure to meet operational and financial expectations can raise investor concerns, a risk that can be mitigated through methodical goal setting and job focus. Ethical lapses can have more lasting consequences. Training programs and auditing protocols have become important components of company compliance and ethics programs, helping ensure their reliability.

Reliability is very much about competency, a well-established ethical obligation of lawyers in the representation of their clients.¹¹⁰ This "first rule of ethics"¹¹¹ allows a fair amount of situational flexibility.¹¹² It is not just about being competent, but also about maintain-

106. *Id.* r. 5.1(c).

107. *Id.* r. 1.5(a).

108. *Id.* Factors to be considered in determining if the fee is reasonable are:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Id.

109. *Id.* r. 1.5(b).

110. *Id.* r. 1.1 (requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

111. ROTUNDA & DZIENKOWSKI, *supra* note 20, at 89.

112. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2016). Factors to be considered in determining the lawyer's competence include:

ing one's competency. This means keeping abreast of changes in both the law and its practice, including the risks and benefits associated with relevant technology, which reinforces the importance of engaging in continuing education and study.¹¹³ Competent lawyers represent the profession's greatest hope for striking the "buffoon" category off the list of the six types of lawyers depicted in Hollywood movies.¹¹⁴

Clients and prospective clients rely on lawyers to keep their secrets. Another fundamental principle of the lawyer-client relationship is that the lawyer generally must not reveal information relating to the representation without the client's consent unless the disclosure is impliedly authorized in order to carry out the representation.¹¹⁵ The lawyer's duty to prospective clients generally prohibits the use or disclosure of information provided during consultation in advance of an attorney-client relationship.¹¹⁶ With today's public demanding transparency above all else, it is important for the legal profession to help people understand the role that confidentiality and the attorney-client privilege play in lawyers' professional undertakings.

5. Goal-Oriented

Corporations are, by their nature, goal-oriented. Goals are set, at least annually, and performance against them measured and monitored with adjustments made. In most cases, employee compensation is linked to their achievement. The key is in ensuring that these goals are understood and embraced by all responsible for them.

It is important that lawyers for corporate clients understand their client's goals, which highlights their broader responsibility to represent the corporate entity.¹¹⁷ This ethical obligation recognizes that while corporations act through authorized representatives, the lawyer's duty is to the entity and, thus, the entity's goals. As such, where those representatives act, or refuse to act, in a matter which would violate a legal obligation to the organization or a law that might

[T]he relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id.

113. *See id.* r 1.1 cmt. 8.

114. Rosenbaum, *supra* note 67.

115. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016) (providing a number of exceptions including where the lawyer reasonably believes that disclosure is necessary to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another).

116. *Id.* r. 1.18.

117. *Id.* r. 1.13.

reasonably be imputed to the organization that is likely to result in substantial injury to the organization, the lawyer must proceed as reasonably necessary in the best interests of the organization and, possibly, refer the matter to a higher authority.¹¹⁸

Communication is an important part of the lawyer's efforts to help the client achieve its goals. The lawyer's ethical obligation to effectively communicate with clients¹¹⁹ goes beyond an occasional "hello," encompassing duties to promptly inform the client of circumstances or decisions with respect to which the client's informed consent is required, reasonably consult with the client about the means by which the objectives are to be met, keep the client reasonably informed as to status of the case, promptly comply with reasonable requests for information, and explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. These duties exist because "reasonable communication between the lawyer and client is necessary for the client effectively to participate in the representation."¹²⁰

6. *Job-Focused*

Corporations are represented by individuals from many professions and with different perspectives. Hopefully, their collective efforts will lead to favorable performance results. Organizational alignment is key, with everyone focused on the job at hand, free from major distraction.

Being job focused is consistent with the lawyer's ethical duty of diligence in representing the client.¹²¹ This means pursuing matters on the client's behalf despite opposition, obstruction, or personal inconvenience to the lawyer, and with zeal in advocacy on the client's behalf.¹²² It also means controlling one's workload.¹²³ A comment on the ethics rule decries procrastination, which can destroy the client's legal position and undermine confidence in the lawyer's trustworthiness.¹²⁴

Conflicts of interest can detract from the lawyer's focus and credibility. The rules governing conflicts derive, in part, from the needs to protect client confidences and secrets and assure clients that they

118. *Id.* r. 1.13(b).

119. *Id.* r. 1.4.

120. *Id.* r. 1.4 cmt. 1.

121. *Id.* r. 1.3.

122. *See id.* r. 1.3 cmt. 1.

123. *See id.* r. 1.3 cmt. 2.

124. *See id.* r. 1.3 cmt. 3.

have their lawyer's loyalty.¹²⁵ The Model Rules include a general prohibition against representing a client if the representation involves a concurrent conflict of interest¹²⁶ and set out a number of specific conflict situations.¹²⁷ Each conflict avoided helps reassure the public of the independence and integrity of the individual lawyer and the broader legal profession.

The connection between the lawyer being goal-oriented and job-focused and making big law less bad is simple—by giving a positive experience to the discreet portion of the population that has ever had the occasion to hire a lawyer, they are more likely to come back and to recommend legal services to others. Empirical studies provide validation, showing that people who use lawyers, whether in the United States or abroad, have a higher opinion of them than those who have never used them.¹²⁸

C. PLAY FAIR

Public perceptions of the power and influence wielded by big business highlight the importance of fair play. Fair play is seen in the codes of conduct of most corporations, through language stressing such things as “play by the rules.”¹²⁹

Fair play is a part of a lawyer's ethical obligations and captured in the aspirational statements of many creeds of professionalism. The expectations cover a wide range of interactions. For example, one of the Model Rules requires lawyers to be fair to opposing parties and their counsel, generally prohibiting such things as the unlawful obstruction of another party's access to evidence; unlawful alteration, destruction or concealment of a document or other evidentiary material; falsifying evidence; knowing disobedience of an obligation under the rules of a tribunal; making frivolous discovery requests; or failure to make reasonably diligent efforts to comply with legally proper discovery requests.¹³⁰ This rule is based on the premise that evidence in a case is to be marshalled competitively by the contending parties.¹³¹

125. See *Developments in the Law – Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1252-60 (1981).

126. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016).

127. *Id.* r. 1.8.

128. See ROTUNDA & DZIENKOWSKI, *supra* note 20, at 51-52 (citing studies by BARBARA CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 238 (1977); Sue Farron, Margaret Llewelyn & Kath Middleton, *Public Perceptions of the Legal Profession: Attitudinal Surveys as a Basis for Change*, 20 J. LEGAL PROF. 79, 87 (1995-96)).

129. See, e.g., *Code of Business Conduct*, COCA-COLA CO., <http://www.coca-colacompany.com/investors/code-of-business-conduct> (last visited June 21, 2017).

130. MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2016).

131. *Id.* r. 3.4 cmt. 1.

The “no contact rule” is another ethical obligation that is based on the notion of fair play, prohibiting a lawyer representing a client from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter.¹³² In a world of meetings and calls scheduled with little or no notice or clarity as to participants, satisfying this obligation can be a challenge. It is nonetheless important as it contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter.¹³³

The Model Rules take steps to ensure that the lawyer’s ethical obligations are not used as an excuse for other unethical or unprofessional behavior. For example, they make it clear that the lawyer’s duty to act with diligence does not require the use of offensive tactics or preclude the lawyer from treating others involved in the legal process with courtesy and respect¹³⁴ or agreeing to a reasonable request for postponement that will not prejudice the client.¹³⁵ This theme of reasonable accommodation is an integral part of legal professionalism, with creeds urging lawyers to make their clients aware that the lawyer reserves the right to determine whether to grant accommodations to opposing counsel in matters that do not adversely affect the client’s lawful objectives.¹³⁶

When it comes to fair play, little things can make a difference. Professionalism creeds highlight the importance of preparing documents that correctly reflect the agreement of the parties, not including provisions which have not been agreed upon, and identifying all changes made in those documents.¹³⁷ They also extend to the lawyer’s dealings with the court, encouraging prompt submission of orders to the court and delivering copies to opposing counsel, not attempting to gain unfair advantage by sending the court or its staff copies of correspondence, and not arbitrarily scheduling depositions, court appearances, or hearings.¹³⁸

132. *Id.* r. 4.2.

133. *Id.* r. 4.2 cmt. 1.

134. *Id.* r. 1.3 cmt. 1.

135. *Id.* r. 1.3 cmt. 3.

136. *See* IOWA STANDARDS FOR PROF’L CONDUCT, Lawyers Duties to Other Counsel, Statement 19; KAN. PILLARS OF PROFESSIONALISM, Opposing Parties and Counsel (3); TEX. LAWYER’S CREED II(10).

137. *See, e.g.*, IOWA STANDARDS FOR PROF’L CONDUCT, Lawyers Duties to Other Counsel, Statement 9; TEX. LAWYER’S CREED III(3) and (4).

138. *See, e.g.*, IOWA STANDARDS FOR PROF’L CONDUCT, Lawyers Duties to Other Counsel, Statement 33 (committing to not sending copies of correspondence between counsel to the court); KAN. PILLARS OF PROFESSIONALISM, Opposing Parties and Counsel (1) (be courteous, respectful and considerate, not reciprocating unprofessional behavior); TEX. LAWYER’S CREED III(12), (13) and (14).

As a matter of professionalism, lawyers should advise their clients that “civility and courtesy are expected and are not a sign of weakness”¹³⁹ and that “[a] client has no right to demand that [the lawyer] abuse anyone or indulge in any offensive conduct.”¹⁴⁰ In more pointed statements, some professionalism creeds call upon the lawyer to “abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.”¹⁴¹ In the spirit of fair play, the underlying premise is that business is just that, and not personal.

D. BE A DIPLOMAT

It is unfortunate that many of the positives that the bigs bring to society go unnoticed. In fact, some surveys suggest that business executives and lawyers are not seen as contributing to society’s well-being when compared to other trades or professions.¹⁴² Is it possible that through diplomacy their positive stories can be better told?

Everyone is a diplomat for their business or profession. The best diplomats understand their contributions to society, as well as their challenges and opportunities. The sustainability reporting of many lawyers’ corporate clients is expanding in recognition of the importance of this broader diplomatic role.

Law firm *pro bono* efforts can have a big impact on the community and enhance the image of the legal profession. Lawyers have a professional responsibility to provide legal services to those unable to pay.¹⁴³ The rule also encourages lawyers to contribute financial support to organizations that provide legal services to persons of limited means, and envisions work for charitable and similar organizations designed to address the needs of persons of limited means.¹⁴⁴ It also contemplates performance of additional services at no fee or a reduced fee in securing and protecting civil rights or liberties of charitable and similar organizations where the payment of standard legal fees would significantly deplete the organizations’ economic resources or otherwise be inappropriate, or activities for improving the law, the legal system, or the legal profession.

It is never too early, nor too late, to begin mentoring future diplomats. Many corporations have active mentoring programs, often in support of leadership succession planning efforts. Some companies today are embracing “reverse mentoring” in which millennials, who

139. See TEX. LAWYER’S CREED II(4).

140. See TEX. LAWYER’S CREED II(6).

141. See TEX. LAWYER’S CREED III(10).

142. *Public Esteem for Military Still High*, PEW RES. CTR. (July 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/#journalists>.

143. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2016).

144. *Id.*

grew up with computers, are consultants for more senior workers.¹⁴⁵ Mentoring is also consistent with the ethical obligations of law firm partners or managing lawyers to make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that others in the firm meet their ethical obligations.¹⁴⁶ It is also encouraged by some creeds of professionalism.¹⁴⁷

Another aspect of mentoring is recognizing, and acting, when co-workers and other associates may be in need. Most corporations and bar associations maintain discreet assistance programs. The data on drug and alcohol dependency in the legal profession is startling, with roughly one quarter to one third of respondents in a recent study of law students reporting “frequent binge drinking or misuse of drugs, and/or mental health challenges.”¹⁴⁸ More troubling, the results suggest that a significant majority of law students in need of help are hesitant to seek it.¹⁴⁹ Another study found that attorneys experience drinking that is harmful, hazardous, or otherwise consistent with alcohol use disorders at a higher rate than other populations.¹⁵⁰ That study cited mental distress, and noted that the data underscored the need for more resources for attorney assistance programs and lawyer-specific prevention and treatment interventions.¹⁵¹

E. ENSURE ACCOUNTABILITY

A final way to make big less bad is to ensure that effective processes are in place, and functioning, to ensure accountability. For corporations, this includes such things as consistent hiring practices; training and education on ethics, legal compliance and related policies, auditing, and the taking of disciplinary actions where appropriate. It is also important that hotlines and similar vehicles exist by which alleged misconduct can be identified, reported, investigated, and addressed. Corporate compliance and ethics programs play an important role in these areas.

145. Phyllis Korkki, *What Could I Possibly Learn from a Mentor Half My Age? Plenty*, N.Y. TIMES, Sept. 10, 2016, BU3.

146. MODEL RULES OF PROF'L CONDUCT r. 5.1 and 5.3 (AM. BAR ASS'N 2016).

147. See, e.g., KAN. PILLARS OF PROFESSIONALISM, Profession and the Public (5) (encouraging “[giving] back to the community through *pro bono*, civic or charitable involvement mentoring, or other public service”).

148. Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, J. LEGAL EDUC. 116, 116 (2016).

149. *Id.*

150. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT MED. 46 (2016).

151. *Id.*

The legal profession maintains similar processes. Lawyers generally have an ethical duty to report conduct of another lawyer “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness” in other respects.¹⁵² The rule recognizes that some measure of judgment must be applied in any decision to report.¹⁵³ Procedural rules under the attorney discipline systems of most states provide the mechanism by which grievances are processed, investigated and addressed.

VII. CONCLUSION

The presumption that big is bad may play well with conspiracy theorists or on film, but overlooks the many contributions big makes to everyday life. Perceptions can be changed, perhaps just not overnight. In many respects, the greatest hope for that change lies in the tenets of ethics and professionalism that have guided business and the legal profession for generations.

152. MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2016). *See also id.* r. 8.3(b) (containing a similar reporting obligation with respect to judicial conduct that raises a substantial question as to the judge's fitness for office).

153. *Id.* r. 8.3(b) cmt. 3.