

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

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I. Introduction.¹

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 local 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 economic 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.² Conspiracy theories cover a wide range of subject matter dating back to biblical times. Those involving "meddling foreigners" have been hailed as a favorite pastime in the United States.³ For example, one contends that the American

¹ The author would like to thank Vickie Graham, Kristin Parkinson and Mary Waters at Noble Energy, Inc. for their assistance in the preparation of this article. The views expressed herein are those of the author, not of Noble Energy, and no attempt is made to render legal advice.

² Conspiracy theory, OXFORDDICTIONARIES.COM, Oxford University Press (2017), https://en.oxforddictionaries.com/definition/conspiracy_theory.

³ See Maggie Koerth-Baker, *Why Rational People Buy Into Conspiracy Theories*, N.Y. TIMES MAG., May 21, 2013.

Civil War was started by Britain in an effort to reclaim the country.⁴ The 2016 presidential campaign and its progeny highlighted modern day frustrations with the big and powerful⁵ and spawned a number of conspiracy theories including election tampering by those meddling Russians.⁶ To be fair, not all conspiracy theories are untrue, but they nonetheless often produce hypotheses that contradict the prevailing understanding of history or simple facts.⁷

Conspiracy theories have been said to take root in moments of powerlessness and uncertainty, with one's brain kicking into analytical overdrive in a coherent and understandable narrative.⁸ The term has been dissected by type and geographic origin.⁹ A popular type, the "enemy above" conspiracy theory, is often raised in connection with big business and is premised on powerful people manipulating the system for their own gain.¹⁰ 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.¹¹

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.¹²

The United States ("U.S.") Foreign Corrupt Practices Act of 1977¹³ and United Kingdom Bribery Act of 2010¹⁴ are good examples of legislative responses to corporate scandals or

⁴ Quinton, *Top 100 Conspiracy Theories of All Time*, TRUTH CONTROL BLOG (Apr. 24, 2013), <http://www.truthcontrol.com/articles/top-100-conspiracy-theories-all-time>.

⁵ 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 will make the decisions if the American people are not involved at the grassroots level? It will be insurance companies, it will be Wall Street, it will be drug companies, it will be fossil fuels. 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.").

⁶ Adam Entous & Ellen Nakashima, *FBI in agreement with CIA that Russia aimed to help Trump win White House*, WASH. POST, Dec. 16, 2016, 2016 WLNR 38583014.

⁷ Conspiracy theory, https://en.wikipedia.org/w/index.php?title=Conspiracy_theory&oldid=758282451 (last visited Jan. 4, 2017).

⁸ Maggie Koerth-Baker, *Why Rational People Buy Into Conspiracy Theories*, N.Y. TIMES MAG., May 21, 2013, at MM15.

⁹ Conspiracy theory, *supra* note 7. (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).

¹⁰ *Id.* (citing Jesse Walker's historical typology of five types).

¹¹ False flag, https://en.wikipedia.org/w/index.php?title=False_flag&oldid=764163728 (last visited Jan. 31, 2017).

¹² Syed Balkhi, *25 Biggest Corporate Scandals Ever*, list25.com (Apr. 8, 2013), <http://list25.com/25-biggest-corporate-scandals-ever/>.

¹³ 15 U.S.C. § 78m (accounting provisions for issuers) and 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (anti-bribery provisions for issuers, domestic concerns and other persons).

¹⁴ The Bribery Act, 2010, c. 23 (U.K.).

perceived unethical conduct, and were generally enacted to stop the bribery of foreign officials. Another example in the U.S. is the Sarbanes-Oxley Act of 2002,¹⁵ 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 2010¹⁶ takes steps to reform perceived failures in the U.S. financial regulatory system. The effects of these laws are far-reaching, and the consequences of noncompliance significant.

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 typical public perceptions of words like "restatement," "recall," "investigation" and "loophole." They elicit an immediate negation reaction, and few people make the effort to understand the factual context that surrounds 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 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."¹⁷ 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 gross revenues exceeding \$10 billion in 2016.¹⁸ With same year U.S. box office movie ticket sales of 1.3 billion,¹⁹ its portrayals of big business have the potential to influence the opinions of a lot of people. One commentator observed that while most of one's friends and colleagues in business seem like decent people, the movies consistently portray business – *especially big business* – as a hotbed of deceit and villainy.²⁰ Another suggested a rather obvious motive, in that vilifying senior management and elevating working stiffs sells more tickets.²¹

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.²²

¹⁵ See UNITED STATES CODE, Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745 (codified in scattered sections of 11, 15, 18, 28 and 29 USC, July 2002).

¹⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2010.

¹⁷ *The Transcript of Bernie Sanders' Victory Speech*, WASH. POST, Feb. 10, 2016, 2016 WLNR 4052604.

¹⁸ See Boxofficemojo.com (last visited Dec. 28, 2016) (projected based on \$9.5 billion reported through Nov. 6, 2016).

¹⁹ See The Numbers, www.the-numbers.com (last visited Dec. 28, 2016).

²⁰ David Walker, *Hollywood heavies: Why is business always the villain in the movies?* INTHEBLACK, June 1, 2015.

²¹ Rachel Dodes, *Hollywood's Favorite Villain*, WALL ST. J., Oct. 14, 2011, at D1.

²² RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 49 (Thomson West 2015-2016) (citing ABA Commission on Advertising, *Lawyer Advertising at the*

Concerns have also been raised that Hollywood may even influence the views of young lawyers and law students as to acceptable professional conduct.²³

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 movies have hidden and nefarious stories that only certain people are able to synthesize.²⁴

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 the standing metaphor. Everyone loves an underdog, a passion most often seen in sports and enlarged through 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 \$50 million in punitive damages in *Rainmaker*,²⁵ or Paul Newman’s “down-on-his-luck” solo practitioner find justice for the family of a medical malpractice victim in *The Verdict*?²⁶

Today’s “whistleblower” is sometimes seen as an extension of the underdog role, exposing incidents of possible workplace misconduct. Most companies have established compliance and ethics hotlines to facilitate such reporting, and one study suggests that employees and customers of corporations are collectively responsible for approximately seventy percent of the tips received. Underdog or not, this reporting plays an important role in helping companies identify and address problems and vulnerabilities, and both the law²⁷ and company codes of conduct generally provide protection to the reporting party.

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

²³ Interview with Judge Marvin E. Aspen, *It’s How You Play the Game*, 34 TRIAL 28 (July 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).

²⁴ See Quinton, *supra* note 4.

²⁵ THE RAINMAKER (Constellation Entertainment 1997).

²⁶ THE VERDICT (Twentieth Century Fox Film Corporation 1982).

²⁷ See, e.g., UNITED STATES CODE, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, Sec. 806 (“Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud”) 18 U.S.C. § 1514A.

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 and investment, 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” mindset.²⁹ However, small banking has also played poorly in one recent film, anxiously plotting to foreclose on a family farm 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 More recently, global warming has been at the epicenter of competing conspiracy theories by its proponents and opponents. In Hollywood’s eyes, hardly any aspect of big government is off limits, as one sees fictionalized portrayals 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 seen sending in camouflaged troops with gas masks to quarantine the premises and detain the public.³⁷

C. Energy.

Oil may be the headliner, but coal and nuclear are among those seen as the energy bigs. They are typically portrayed as powerful, at the same time neither safe nor friendly to the environment. Conspiracy theories include Saddam Hussein being targeted for his refusal to let

²⁸ Quinton, *supra* note 4.

²⁹ *See, e.g.*, WALL STREET (Twentieth Century Fox Film Corporation and America Entertainment Partners L.P. 1987) and 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 4.

³² ABSOLUTE POWER (Castle Rock Entertainment and Malpasio Productions 1997).

³³ *House of Cards* (Media Rights Capital, Panic Pictures 2013-2016).

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

³⁵ INTERNAL AFFAIRS (Paramount Pictures, Image Organization, Malofilm 1990).

³⁶ JAWS (Zanuck/Brown Production and Universal Pictures 1975).

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

U.S. companies take over Iraqi oil production,³⁸ and the oil industry holding back electric car development,³⁹ killing or hounding into obscurity the inventor of the efficient automobile carburetor to protect its business from an engine that would make its product obsolete⁴⁰ and concocting the “peak oil” theory of demand outpacing supply in an effort to increase prices.⁴¹ Movie portrayals highlight power and corruption⁴² and safety and environmental concerns and cover-up.⁴³

D. Medicine.

Big medicine, like big energy, has several parts. Professional practitioners like doctors and nurses fare well in most ethics surveys, yet the broader medical and pharmaceutical businesses have drawn a fair amount of 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 a conspiracy 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 always 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 found pulling

³⁸ Quinton, *supra* note 4.

³⁹ Mark Hooson, *Strange Car Conspiracies*, MONEYSUPERMARKET.COM BLOG (Apr. 6, 2014), <http://www.money-supermarket.com/car-insurance/blog/5-strange-car-conspiracy-theories/>.

⁴⁰ *Who Killed the Electric Car?*, https://en.wikipedia.org/w/index.php?title=Who_Killed_the_Electric_Car%3F&oldid=762280234 (last visited Jan. 31, 2017).

⁴¹ *History's Greatest Conspiracy Theories*, THE TELEGRAPH (London), Nov. 19, 2008.

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

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

⁴⁴ Kevin Trudeau, *Natural Cures “They” Don’t Want You To Know About*, GSN (2016).

⁴⁵ Derik Bradshaw, *The World’s Top 15 Conspiracy Theories of All Time*, LIBERTY VOICE BLOG (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 (Mar. 1, 2006).

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.

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

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

⁵⁰ *See* Edward Iwata, *Tobacco Trial Heads for Big Showdown*, USA Today, Sept. 21, 2004, WLNR 6680128 (“prosecutors accuse Big Tobacco of a vast marketing, legal and health conspiracy over five decades in which they lied about the dangers of smoking”).

out all of the stops to fix prices,⁵¹ crush a whistleblower,⁵² deploy its lobbying muscle to stop an anti-smoking crusader⁵³ and force poor cotton mill working conditions.⁵⁴

Religion too has found a home among the bigs. Conspiracy theorists have sought to link the Vatican to the Mafia and Nazi movement and assert that Jesus never existed.⁵⁵ *The Da Vinci Code*⁵⁶ is one of the more controversial recent movies, suggesting that the Catholic Church is behind a 2,000 year-old cover-up involving the Holy Grail.

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 competition from the radically advanced Tucker automobile.⁵⁷ Movies have shown big automotive's theft of patent rights⁵⁸ and concealment of defects that resulted in injuries.⁵⁹

Mainstream media has also been portrayed as a 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 think them government actions.⁶⁰ Hollywood portrayals show a television network exploiting a former anchor's ravings and revelations about the news media for its own profit⁶¹ and a spin-doctor and movie producer fabricating a war to cover up a presidential sex scandal.⁶²

IV. Big Law.

Welcome to the club, big law! With well over a million lawyers in the U.S. alone,⁶³ the profession is certainly looking big and that only represents around twenty percent of the world's lawyer population.⁶⁴ 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.⁶⁵ It has also been observed

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

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

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

⁵⁴ NORMA RAE (Twentieth Century Fox Film Corporation 1979).

⁵⁵ Quinton, *supra* note 4.

⁵⁶ THE DA VINCI CODE (Columbia Pictures, Imagine Entertainment, Skylark Productions 2006).

⁵⁷ Aaron Miller, *The 8 Craziest Automotive Conspiracy Theories of All Time*, Thrillist.com (July 16, 2016), <https://www.thrillist.com/cars/the-craziest-automotive-conspiracy-theories-of-all-time>.

⁵⁸ FLASH OF GENIUS (Universal Pictures, Spyglass Entertainment, Strike Entertainment 2008).

⁵⁹ CLASS ACTION (Interscope Communications, Twentieth Century Fox Film Corporation 1991).

⁶⁰ Quinton, *supra* note 4.

⁶¹ NETWORK (Metro-Goldwyn-Mayer 1976).

⁶² WAG THE DOG (Baltimore Pictures, New Line Cinema, Punch Productions 1997).

⁶³ National Lawyer Population Survey 1878 – 2016, ABA, http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2016.authcheckdam.pdf.

⁶⁴ ETHAN MICHELSON, WOMEN IN THE LEGAL PROFESSION, 1970-2010: A STUDY OF THE GLOBAL SUPPLY OF LAWYERS 45 tbl. A6 (2012).

⁶⁵ HR Grapevine (Sept. 1, 2014), <https://www.hrgrapevine.com/content/article/2014-09-01-top-10-jobs-parents-want-for-their-children>HR Grapevine (2014) (with doctors at 49% and engineers at 45%, contrasted with bankers at 18%).

that while popular culture often criticizes lawyers for being too tough, those in trouble probably want a tough lawyer to represent them.⁶⁶

A half-century ago concerns were raised that there was simply too much to know for all aspects of law to be practiced by everyone.⁶⁷ 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 alone. In response, the profession has seen the rise of the "megafirm," with the 200 largest global firms having offices in 573 cities in ninety-four countries and total revenues exceeding \$100 billion.⁶⁸ 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 movie lawyers:⁶⁹ the crusading lawyer, like Atticus Finch in *To Kill a Mockingbird*;⁷⁰ heroic lawyer, like Mick Haller in *The Lincoln Lawyer*;⁷¹ obtuse lawyer, like Lt. Daniel Kaffee in *A Few Good Men*;⁷² disillusioned lawyer, like Mitch McDeere in *The Firm*;⁷³ vengeful lawyer, like Nicholas Easter in *Runaway Jury*;⁷⁴ and buffoon lawyer, like Vinny Gambini in *My Cousin Vinny*.⁷⁵

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 practices in such areas as broad-based human rights, labor rights, rights of indigenous peoples, environmental stewardship and transparency.

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.

⁶⁶ See, generally, ROTUNDA & DZIENKOWSKI, *supra* note 22, at 12.

⁶⁷ ABA. COMM'N ON PROF., IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

⁶⁸ The Global 100, *The American Lawyer* (Sept. 26, 2016), <http://www.americanlawyer.com/id=1202767838452/The-Global-100?slreturn=20170110112538>.

⁶⁹ Thane Rosenbaum, *The 6 types of lawyer movies*, A.B.A. J. (Aug. 1, 2016), http://www.abajournal.com/magazine/article/6_lawyer_movie_tropes.

⁷⁰ TO KILL A MOCKINGBIRD (Universal International Pictures, Pakula-Mulligan and Brentwood Productions 1962).

⁷¹ THE LINCOLN LAWYER (Lionsgate, Lakeshore Entertainment and Sidney Kimmel Entertainment 2011).

⁷² A FEW GOOD MEN (Castle Rock Entertainment and Columbia Pictures Corporation 1992).

⁷³ THE FIRM (Paramount Pictures 1993).

⁷⁴ RUNAWAY JURY (Regency Enterprises, New Regency Pictures and Epsilon Motion Pictures 2003).

⁷⁵ MY COUSIN VINNY (Palo Vista Productions, Peter V. Miller Investment Corp. and Twentieth Century Fox Film Corporation 1992).

B. Technology Tests the Limits.

The 1979 hit song *Video Killed the Radio Star*⁷⁶ was a harbinger of things to come. On the plus side of the ledger, technology has brought many advances to business and society. Research, especially legal research, has improved through technology, with massive amounts of information and data accessible real time from 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 capacities 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 spawned 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 an ever-connected world where speed often takes precedence over truth, an observation by a private citizen can quickly become a talking point, even as it is being proved false.⁷⁷ One commentator has suggested that access to information, which one might think helps minimize wide speculation, likely only serves to make conspiracy theories more convincing to the public.⁷⁸

Technology carries other risks, not the least of which being that it can fail. Ninety law students in Georgia learned this the hard way as 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 not properly calculated by the computer to boost the final scaled exam score.⁷⁹

Technology never sleeps. President Reagan would learn this the hard way in his “live microphone” incident.⁸⁰ 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. This also presents 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

⁷⁶ BRUCE WOOLLEY AND THE CAMERA CLUB, *VIDEO KILLED THE RADIO STAR* (Epic 1979) and THE BUGGLES, *VIDEO KILLED THE RADIO STAR* (Island 1979).

⁷⁷ Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES, Nov. 20, 2016.

⁷⁸ Koerth-Baker, *supra* note 3, at 2.

⁷⁹ *Pass-Fail, Georgia bar exam mistake takes toll on 90 law students*, A.B.A. J., Jan. 2017.

⁸⁰ We begin bombing in five minutes, 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 Feb. 14, 2017).

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. Today incivility seems to be everywhere, with surveys showcasing rude cities, drivers, vacationers and air travelers. One poll asked what annoyed people most about others' mobile habits, with making speaker phone calls in public topping the list.⁸¹ 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, if anything, could be done to improve the reality and perception of lawyer professionalism.⁸² Professionalism creeds and mandatory continuing legal education are among the positive outcomes of this groundbreaking effort.

VI. Making Big Less Bad.

A. Reject the Premise.

Perceptions are hard to change, especially negative ones concerning ethics. One annual poll surveys public views as to which professions or trades have the highest honesty and ethics.⁸³ Sadly, not once in the past decade have business executives or lawyers been rated “high” or “very high” by more than twenty-five percent of survey respondents.⁸⁴ 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 historian says no, that Goliath's armor limited his vision and mobility and David, with his accurate sling shot, was simply deadly.⁸⁵ 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.⁸⁶ These behemoths of American business certainly didn't start out big,

⁸¹ *Irritable Scowl Syndrome*, ECONOMIST (Oct. 15, 2014), <http://www.economist.com/blogs/gulliver/2014/10/rude-travellers>.

⁸² ABA. COMM'N ON PROF., *supra* note 67.

⁸³ JIM NORMAN, *Americans Rate Healthcare Providers High on Honesty and Ethics*, GALLUP (Dec. 7-11, 2016), <http://www.gallup.com/poll/187874/americans-faith-honesty-ethics-police-rebounds.aspx>.

⁸⁴ *See, e.g., Honesty/Ethics in Professions*, GALLUP, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited Jan. 24, 2017).

⁸⁵ Bill Murphy, Jr., *3 Things People Get Wrong About David Versus Goliath*, INC. MAG., May 6, 2014.

⁸⁶ Don Steinberg, *Entrepreneurial Lessons From the Movies*, WALL ST. J, Jan. 12, 2017, at A13.

but in becoming so seem to 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 that involve multiple jurisdictions, large 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 restore 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, large number of elements and involvement of large numbers of people who would need to keep silent.⁸⁷ One study found that the conspiracy theory that the Moon landing was faked would require the involvement of 411,000 people,⁸⁸ a pretty good reason to reject that premise.

Lawyers too should reject the premise of a big bad legal profession, instead recognizing that in today's increasingly complex business world many clients greatly benefit from the ranges 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*,⁸⁹ inspire the rejection of the premise and promote the positives with expressions of passionate pride for the profession⁹⁰ and consciousness of one's duty to the judicial system.⁹¹ Not perpetuating the negatives through lawyer jokes, or behavior such as making unfounded accusations or personal comments about opposing counsel or clients⁹² can also make a difference as to how the individual lawyer and broader profession are perceived.

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...."⁹³ 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,

⁸⁷ Michael Shermer, *The Conspiracy Theory Detector*, SCIENTIFIC AMERICAN, Dec. 1, 2010.

⁸⁸ David Robert Grimes, *On the Viability of Conspiratorial Beliefs* (Jan. 26, 2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0147905>.

⁸⁹ Reprinted in 72 TEX. B. J. 10, 842 (2010) (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 enumerated statements for achieving those goals.

⁹⁰ TEX. LAWYER'S CREED I(1).

⁹¹ TEX. LAWYER'S CREED I(5).

⁹² 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).

⁹³ WAYLON JENNINGS, LUCKENBACH TEXAS (RCA Victor 1977).

responsibility and reliability, and being goal-oriented and job-focused.⁹⁴ 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. These fascinating documents have evolved over time from detailed policy compilations to more principles-based statements of compliance and ethics in areas relevant to the business. Most are premised on the core values of the company, and more and more their look and substance reflects 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*")⁹⁵ 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 pillar of ethical conduct, at the heart of all strong business relationships. A reputation for honesty once lost is difficult to recapture. Codes of conduct embrace this pillar, focusing on conducting business honestly, ethically, transparently and with integrity. Some cite the more colloquial notion of "doing the right thing."⁹⁶ These themes extend through the document's policy and administrative sections, and set overarching expectations of behavior for a company's employees and, in some cases, contractors.

A number of the *Model Rules* highlight honesty in the practice of law. For example, it is a part of the lawyer's duty of candor toward the tribunal.⁹⁷ This duty prohibits the lawyer from knowingly making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made, and from failing to disclose adverse legal authority or offering false evidence.⁹⁸ 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 when necessary to avoid assisting a criminal or fraudulent act by the client.⁹⁹

Honesty is also implicit in the lawyer's obligation, as an advisor, to exercise independent judgment and render candid advice.¹⁰⁰ This is easier said than done in today's law practice, where lawyers are increasingly expected to be an integral part of their client's business team and provide real time advice on matters for which they possess only skeletal information. The ethics rule anticipates these circumstances, allowing the lawyer to refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the

⁹⁴ Erin Schreiner, *What Are Characteristics of Ethical People in the Workplace?*, HOU. CHRON., Oct. 10, 2016.

⁹⁵ MODEL RULES OF PROF'L CONDUCT (2016).

⁹⁶ See, e.g., Code of Conduct, General Motors, https://www.gm.com/content/dam/gm/en_us/english/Group4/InvestorsPDFDocuments/WWI.pdf (last visited Jan. 31, 2017).

⁹⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3 (2016).

⁹⁸ *Id.*

⁹⁹ MODEL RULES OF PROF'L CONDUCT R. 4.1 (2016).

¹⁰⁰ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016).

client's situation.¹⁰¹ If the profession is to become a less bad big, it must effectively navigate these modern nuances of this traditional obligation.

3. Responsibility.

Corporate codes of conduct impose obligations on company 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-government 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, with partners and managing lawyers having broader duties to maintain measures to ensure that their firms do so.¹⁰² Lawyers will generally be held responsible for others' violations of the rules if they order or, with knowledge, ratify the conduct or the lawyer is a partner, supervisor or manager over the other lawyer and knows of the conduct but fails to take reasonable remedial action.¹⁰³ It should also be remembered that lawyers generally remain responsible for their own violations of the ethics rules, even if acting at the direction of another person.¹⁰⁴

Lawyers also have responsibilities in their fee setting, as they are prohibited from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses.¹⁰⁵ The rule provides flexibility by listing a number of factors to be considered in determining reasonableness.¹⁰⁶ The lawyer must generally communicate the scope of the representation and the basis or rate of the fee and expenses, preferably in writing, before or within a reasonable time after commencing the representation.¹⁰⁷ Legal fees have long been a source of anxiety for clients, and avoiding surprises over them is good way to relax negative perceptions of big law.

4. Reliability.

Corporations recognize the importance of reliability in their dealings with their stakeholders. Failure to meet their operational and financial guidance 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

¹⁰¹ *Id.*

¹⁰² MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3 (2016).

¹⁰³ MODEL RULES OF PROF'L CONDUCT R. 5.1(c) (2016).

¹⁰⁴ MODEL RULES OF PROF'L CONDUCT R. 5.2 (2016) (noting an exception where the subordinate lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty).

¹⁰⁵ MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2016).

¹⁰⁶ *Id.* (including the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent).

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT R 1.5(b) (2016).

important parts of company compliance and ethics programs, helping ensure their reliability and minimize risk.

Reliability is very much about competency, a well-established ethical obligation of lawyers in the representation of their clients.¹⁰⁸ This “first rule of ethics”¹⁰⁹ allows a fair amount of situational flexibility.¹¹⁰ It is not just about being competent, but also about maintaining 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.¹¹¹ 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.¹¹²

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.¹¹³ 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’ representation of their clients.

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, and this highlights their broader responsibility to represent the corporate entity.¹¹⁴ This ethical obligation recognizes that while corporations act through duly authorized constituent representatives, the lawyer’s duty is to the entity and thus the entity’s goals. As such, where those constituents act, or intend to act or refuse to act, in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that might reasonably be imputed to the organization that is likely to result in substantial injury to the organization, the lawyer must

¹⁰⁸ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2016) (requiring the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation).

¹⁰⁹ ROTUNDA & DZIENKOWSKI, *supra* note 22, at 89.

¹¹⁰ MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 1 (2016) (setting out relevant factors including the 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).

¹¹¹ *See id.* cmt. 8.

¹¹² Rosenbaum, *supra* note 69.

¹¹³ MODEL RULES OF PROF’L CONDUCT R. 1.6 (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).

¹¹⁴ MODEL RULES OF PROF’L CONDUCT R. 1.13 (2016).

proceed as is reasonably necessary in the best interests of the organization and, if appropriate, refer the matter to higher authority.¹¹⁵

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 clients¹¹⁶ goes beyond an occasional "hello," eloquently articulating duties to promptly inform the client of decisions or circumstances with respect to which the client's informed consent is required, reasonably consult about the means by which the client's objectives are to be accomplished, keep the client reasonably informed as to status and 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 to effectively participate in the representation.¹¹⁷

6. Job Focused.

Corporations are represented by individuals from many professions and with different perspectives. Hopefully, the collective efforts of these individuals as business teams lead to solid performance results. Organizational alignment is key, with everyone focused on the job at hand and without major distraction.

Being job focused is consistent with the lawyer's ethical duty of diligence in representing clients.¹¹⁸ 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.¹¹⁹ It also means controlling one's workload.¹²⁰ A comment on the rule decries procrastination, which can destroy the client's legal position and undermine confidence in the lawyer's trustworthiness.¹²¹

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 have their lawyer's loyalty.¹²² The *Model Rules* include a general prohibition against representing a client if the representation involves a concurrent conflict of interest¹²³ and set out a number of specific conflict situations.¹²⁴ Each conflict avoided helps preserve a public perception of the independence and integrity of the individual lawyer and the broader legal profession.

¹¹⁵ *Id.* at (b).

¹¹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2016).

¹¹⁷ *Id.* cmt. 1.

¹¹⁸ MODEL RULES OF PROF'L CONDUCT R. 1.3 (2016).

¹¹⁹ *See id.* cmt. 1.

¹²⁰ *See id.* cmt. 2.

¹²¹ *See id.* cmt. 3.

¹²² *See Developments in the Law – Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1252-60 (1981).

¹²³ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016).

¹²⁴ MODEL RULES OF PROF'L CONDUCT R. 1.8 (2016).

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 U.S. or abroad, have a higher opinion of them than those who have never used them.¹²⁵

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 and their constituent professions, through language stressing such things as “playing by the rules.”¹²⁶

Fair play is a part of a lawyer’s ethical obligations and captured in the aspirational statements of many creeds of professionalism adopted by federal, state and local bar associations across the U.S. The expectations cover a wide range of interactions. For example, the *Model Rules* require lawyers to be fair to opposing parties and their counsel, prohibiting such things as the unlawful obstruction of another party’s access to evidence or 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 and the making of a frivolous discovery requests or failure to make reasonably diligent efforts to comply with legally proper discovery requests.¹²⁷ It is based on the premise that the adversary system process contemplates that the evidence in a case is to be marshalled competitively by the contending parties.¹²⁸

The “no contact rule” is another ethical obligation based on 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.¹²⁹ In a world of continuous 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.¹³⁰

The *Model Rules* take care to ensure that the lawyer’s ethical obligations under one rule 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

¹²⁵ See ROTUNDA & DZIENKOWSKI, *supra* note 22, at 50-51 (citing studies by BARBARA CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 238 *passim* (American Bar Foundation, 1977) and Sue Farron, Margaret Llewelyn & Kath Middleton, *Public Perceptions of the Legal Profession: Attitudinal Surveys as a Basis for Change*, 20 J. LEGAL PROFESSION 79, 87 (1995-96)).

¹²⁶ See, e.g., Coca Cola, <http://www.coca-colacompany.com/investors/code-of-business-conduct> (last visited Feb. 14, 2017).

¹²⁷ MODEL RULES OF PROF’L CONDUCT R. 3.4 (2016).

¹²⁸ *Id.* cmt. 1.

¹²⁹ MODEL RULES OF PROF’L CONDUCT R. 4.2 (2016).

¹³⁰ *Id.* cmt. 1.

tactics or preclude treating others involved in the legal process with courtesy and respect¹³¹ or preclude the lawyer from agreeing to a reasonable request for postponement that will not prejudice the client.¹³² 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.¹³³

When it comes to fair play, little things make a difference. Professionalism creeds also 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 for other counsel or parties all changes made in those documents.¹³⁴ 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.¹³⁵

As a matter of professionalism, lawyers should advise their clients that civility and courtesy are expected and are not a sign of weakness¹³⁶ and that the client has no right to demand that the lawyer abuse anyone or indulge in any offensive conduct.¹³⁷ In more pointed statements, some professionalism creeds call upon the lawyer to abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.¹³⁸ 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.¹³⁹ Is it possible that through diplomacy the positive stories can be better told? A "diplomat" is, after all, someone who can deal with others in a sensitive and tactful way.¹⁴⁰

Everyone is a diplomat for their business or profession, and what they say, how they behave and the image they project are all important. The best diplomats know their story, and their stakeholders. They understand their business and profession, and the challenges and opportunities of each. The social responsibility programs of many lawyers' corporate clients are expanding in recognition of the importance of this broader diplomatic role.

¹³¹ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2016).

¹³² MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 (2016).

¹³³ TEX. LAWYER'S CREED II(10).

¹³⁴ See, e.g., TEX. LAWYER'S CREED III(3) and (4).

¹³⁵ See, e.g., TEX. LAWYER'S CREED III(12), (13) and (14).

¹³⁶ See TEX. LAWYER'S CREED II(4).

¹³⁷ See TEX. LAWYER'S CREED II(6).

¹³⁸ See TEX. LAWYER'S CREED III(10).

¹³⁹ *Public Esteem for Military Still High*, PEW RESEARCH CENTER (July 11, 2015), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/#journalists>.

¹⁴⁰ Diplomat, Oxford Learners Dictionaries, Oxford University Press (2017), <http://www.oxfordlearnersdictionaries.com/definition/english/diplomat>.

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.¹⁴¹ 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, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of those persons.¹⁴² It also contemplates performance of additional services at no fee or a reduced fee in securing and protecting civil rights or liberties, or charitable, religious, civic, community, governmental and educational 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 to begin mentoring future diplomats. Many corporations have active mentoring programs, often in support of leadership succession planning efforts. Some companies today are actually embracing "reverse mentorship," in which millennials, who grew up with computers, are consultants for more senior workers.¹⁴³ Mentoring is also consistent with the ethical obligations of law firm partners or managers to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and nonlawyer assistants in the firm meet their ethical obligations.¹⁴⁴

Another aspect of mentoring is recognizing, and acting, when co-workers and other associates may be in need. Most corporations and bar associations have 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.¹⁴⁵ More troubling, the results suggest that a significant majority of those law students most in need of help are reluctant to seek it.¹⁴⁶ Another study found that attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other populations.¹⁴⁷ That study cited mental distress, and noted that the data underscored the need for greater resources for lawyer assistance programs and attorney-specific prevention and treatment interventions.¹⁴⁸

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

¹⁴¹ MODEL RULES OF PROF'L CONDUCT R. 6.1 (2016).

¹⁴² *Id.*

¹⁴³ Phyllis Korkki, *What Could I Possibly Learn From a Mentor Half My Age?*, N.Y. TIMES, Sept. 10, 2016, BU3.

¹⁴⁴ MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3 (2016).

¹⁴⁵ Jerome M. Organ, David B. Jaffe & Katherine M. Bender, Ph.D., *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, 116-156 (autumn 2016).

¹⁴⁶ *Id.*

¹⁴⁷ Patrick R. Krill, JD, LLM, Ryan Johnson, MA, & Linda Albert, MSSW, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. ADDICT MED, VOL. 10 ISSUE 1, 46-52 (2016).

¹⁴⁸ *Id.*

hiring practices; training and education on ethics, legal compliance and company 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.

The legal profession is governed by a similar set of 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 as a lawyer in other respects.¹⁴⁹ The rule recognizes that some measure of judgment must be applied in any decision to report.¹⁵⁰ Procedural rules under the State Bar of Texas attorney discipline system, as an example, provide the mechanism by which grievances are processed, investigated and prosecuted.

VII. Summary.

The presumption that big is bad – or, in the extreme, that *all big is always bad* – may play well with conspiracy theorists or on the big screen, but overlooks the many contributions big has made 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 professions for generations.

¹⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 8.3 (2016). *See also* MODEL RULES OF PROF'L CONDUCT R. 8.2 (2016) (containing a similar reporting obligation with respect to judicial conduct that raises a substantial question as to the judge's fitness for office).

¹⁵⁰ *Id.* cmt. 3.