

# A Critique of the Civility Movement: Why Rambo Will Not Go Away

Kathleen P. Browe

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751 (1994).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol77/iss4/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## COMMENTS

### A CRITIQUE OF THE CIVILITY MOVEMENT: WHY RAMBO WILL NOT GO AWAY

#### I. INTRODUCTION

Over the last decade, a movement has developed within the legal community to improve the declining professional conduct of attorneys. This deterioration of civility standards has been referred to as "among the most important and universally discussed issues facing the legal community today."<sup>1</sup> The term "civility," in the legal context, is not limited to etiquette and good manners.<sup>2</sup> Rather, it encompasses a wide range of behaviors from blatant rudeness to creating unnecessary delays in an attempt to "win at all cost."<sup>3</sup> Speeches,<sup>4</sup> reports,<sup>5</sup> letters from bar presi-

---

1. FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 4 (1992) [hereinafter FINAL REPORT]. Conduct between attorneys is the area of greatest concern. A survey of judges and lawyers in the Seventh Circuit found that 91% of respondents from the Northern District of Illinois, 81% from the Eastern District of Wisconsin, 84% from the Southern District of Indiana, and 44% from the Western District of Wisconsin believe that civility problems arise principally among or between lawyers. See INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 10 (1991) [hereinafter INTERIM REPORT]. Civility standards are also referred to as professional etiquette, professional courtesy, decorum, and sometimes under the general term of professionalism.

2. INTERIM REPORT, *supra* note 1, at 1.

3. *Id.*

4. See Chief Justice Harry L. Carrico, *Adhering to a Different Honor: The Necessity for a Return to Professionalism in the Practice of Law*, 39 FED. B. NEWS & J. 321 (1992); Chief Justice Warren E. Burger, *The Necessity for Civility*, Address Before the American Law Institute (May 18, 1971), in 52 F.R.D. 211 (1971).

5. See ABA COMM'N ON PROFESSIONALISM, AMERICAN BAR ASSOCIATION, " . . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM," reprinted in 112 F.R.D. 243 (1986) [hereinafter COMMISSION ON PROFESSIONALISM]; FINAL REPORT, *supra* note 1, at 1. See also *Professionalism: Committee Issues Recommendations*, 12 WIS. B. BULL. 18 (1988) [hereinafter *Professionalism Recommendations*] (reporting the recommendations of the State Bar of Wisconsin's Professionalism Committee); *Supreme Court Committee to Develop Uniform Decorum Rules*, WIS. LAW., Nov. 1992, at 5 (discussing the Wisconsin Supreme Court's recent formation of a Decorum Study Committee). According to the American Bar Association, 21 state and local bar associations have produced reports on professionalism. COMMISSION ON PROFESSIONALISM, *supra*. This Comment focuses primarily on the report of the ABA Commission on Professionalism and the Seventh Circuit Committee on Civility.

dents,<sup>6</sup> and numerous articles<sup>7</sup> all discuss this topic. Additionally, numerous jurisdictions and organizations have set up ethical codes and creeds to combat the problem.<sup>8</sup>

This Comment discusses the basis for this civility movement and examines commonly suggested causes and solutions. Next, it argues that some foundational problems have not been addressed, that the proposed solutions do not fit the proposed causes of incivility, and that some of the underlying assumptions of the movement need to be re-examined. Then, it looks at whether the proposed solutions will be successful in increasing civility within the legal profession. Finally, this Comment concludes that, in order to increase civility, proponents of civility need to re-evaluate their goals and methods.

## II. THE CALL FOR INCREASED PROFESSIONALISM AND CIVILITY

The trend toward increasing professionalism and civility began with a report of the ABA Commission on Professionalism.<sup>9</sup> The Commission on Professionalism was formed in 1985 because of the shared concerns

---

6. Civility has become a common topic on the President's Page of Bar Journals. See e.g., Ivan E. Barris, *Is Courtesy Really Contagious?*, 22 MICH. B.J. 506 (1980); Alfred F. Belcune, *Restoring the Cathedral*, 39 FED. B. NEWS & J. 282 (1991); Maurice E. Bone, *A Lawyer's Choice—Civility or Hardball*, 79 ILL. B.J. 216 (1991); John J. Curtin, Jr., *Civil Matters*, A.B.A. J., Aug. 1991, at 8.

7. See Nancy A. Bowser, *The Pros of Being A Pro: Trend Toward Enhanced Professionalism Grows*, B. LEADER, May-June 1989, at 12; Aaron J. Broder, *When the Opponent Plays Hardball . . . The Practitioner Need Not Play Lowball*, TRIAL, Aug. 1989, at 62; Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., March 1, 1988, at 79; Justin A. Stanley, *The ABA Comm'n on Professionalism and Its Sequel*, B. EXAMINER, May 1990, at 26.

8. The American Bar Association has a list of 46 state and local bars that have adopted some type of code of professional courtesy. See generally ALA. ST. B. ASS'N, A LAWYER'S CREED: RULES OF ENGAGEMENT (1992); MOBILE (ALA.) B. ASS'N, A LAWYER'S CODE OF PROFESSIONALISM (1990); ST. B. OF ARIZ., A LAWYER'S CREED OF PROFESSIONALISM (1989); PULASKI COUNTY (ARK.) B. ASS'N, CODE OF PROF. COURTESY (1986); L. A. COUNTY B. ASS'N, LITIG. GUIDELINES (1989); SAN DIEGO COUNTY B. ASS'N, CIVIL LITIG. CODE OF CONDUCT (1990); BOULDER COUNTY (COLO.) B. ASS'N, GUIDELINES FOR PROF. COURTESY (1990); EL PASO COUNTY (COLO.) B. ASS'N, CODE OF PROF. COURTESY (1989); FL. B. ASS'N, IDEALS AND GOALS OF PROFESSIONALISM (1990); HILLSBOROUGH COUNTY (FLA.) B. ASS'N, STANDARDS OF PROF. COURTESY (1987); PALM BEACH COUNTY (FLA.) BAR ASS'N, STANDARDS OF PROF. COURTESY (1990); INDIANAPOLIS B. ASS'N, TENETS OF PROF. COURTESY (1989); IOWA ST. B. ASS'N, CODE OF PROFESSIONALISM (1991); LOUISVILLE B. ASS'N, CREED OF PROFESSIONALISM (1989); BATON ROUGE (LA.) BAR ASS'N, CREED OF PROFESSIONALISM (1990); LA. ST. B. ASS'N, CODE OF PROFESSIONALISM (1991); SHREVEPORT (LA.) B. ASS'N, A LAWYERS CREED OF PROFESSIONALISM (1988).

9. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 243.

of former Chief Justice Warren E. Burger and former American Bar Association President John C. Shepard that the Bar was "moving away from the principles of professionalism and that it was so perceived by the public."<sup>10</sup> Because of the difficulty in defining professionalism, the Commission used a working definition based on a list of common elements that distinguish a profession from other occupations.<sup>11</sup> They defined a profession as:

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgments;
2. That clients cannot adequately evaluate the quality of the service, so they must trust those they consult;
3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good; and
4. That the occupation is self-regulating; that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest.<sup>12</sup>

The Commission's Report was the impetus for many state and local bar associations to formulate their own reports and codes.<sup>13</sup> The focus of many of the reports began to turn from overall professionalism, to an examination of the uncivil conduct between attorneys in the courtroom

10. *Id.* at 248. Former Chief Justice Warren Burger also stated that the importance of an attorney is "wholly independent of the government" and repudiates "any external effort to direct how the obligations to the client are to be carried out." *Polk County v. Dodson*, 454 U.S. 312, 327 (1981) (Burger, C.J., concurring).

11. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 261.

12. *Id.* at 261-62. The definition was provided specifically for the Commission by Professor Eliot Freidson. *Id.* Wisconsin's Professionalism Committee defined a profession by describing the characteristics of a professional lawyer:

[F]irst and foremost, a professional lawyer is dedicated to the rule of law and an understanding of the rule of law in a free society — as a means by which the people govern themselves and through which the freedom of every person is protected. A professional is committed to the peaceful and just resolution of human conflict and to the toleration of opposing points of view. A professional is ever-mindful that his or her talents as counselor, mediator or advocate should be used not only in the pursuit of the case of a single client, but also in the service of the public good. Finally, a professional strives toward the highest standards of competence and conduct and realizes the substantial contributions to society that can be made by a person who chooses a career in law.

*Professionalism Recommendations*, *supra* note 5, at 19.

13. See sources cited *supra* note 8.

and in general litigation proceedings.<sup>14</sup> Commentators viewed this lack of civility and the increase in hardball litigation techniques as the primary stumbling blocks to higher levels of professionalism.<sup>15</sup>

In June 1992 the Seventh Circuit formed a committee to focus entirely on the problem of civility.<sup>16</sup> The committee defined civility as "professional conduct in litigation proceedings of judicial personnel and attorneys."<sup>17</sup> The Committee's purpose was to determine if a civility problem existed in the Seventh Circuit and, if a problem existed, to recommend possible solutions. The reports of the Committee detailed the findings of an informal circuit-wide survey, discussed the causes of incivility, and proposed some solutions.<sup>18</sup> The final report included "Standards for Professional Conduct in Litigation."<sup>19</sup> In December 1992, the Seventh Circuit determined that, as a precondition of admission to courts within the Seventh Federal Judicial Circuit, all lawyers must certify that they will abide by these standards.<sup>20</sup>

#### A. *The Antithesis of Civility: Rambo Litigation*

Although definitions of professionalism vary, proponents of an increase in professionalism and civility agree that the antithesis of civility is "Rambo style" litigation tactics.<sup>21</sup> Therefore, the increase in the use of these "Rambo style"<sup>22</sup> or "hardball"<sup>23</sup> litigation tactics is one of their

14. See Clarke, *supra* note 7, at 945; Reavley, *supra* note 7, at 637; Broder, *supra* note 7, at 62; Saylor, *supra* note 7, at 79.

15. See Carrico, *supra* note 4, at 321; William P. Bergsten & Elizabeth A. Pauli, *Rule 11 and Professionalism*, WASH. ST. B. NEWS, May 1992, at 23, 24. Because agreeing on a standard definition of professionalism is often difficult, the definitions used by the various committees differ. See Nancy A. Bowser, *Professionalism: What Does It Mean?*, B. LEADER, May-June 1989, at 15; COMMISSION ON PROFESSIONALISM, *supra* note 5, at 261.

16. FINAL REPORT, *supra* note 1, at 1A.

17. INTERIM REPORT, *supra* note 1, at 1.

18. The Seventh Circuit Committee on Civility worked in several steps. First, an informal survey was sent out throughout the Seventh Circuit. The results were compiled and some preliminary suggestions were made. These suggestions included a "Proposed Standard for Professional Conduct." In April 1992, the Committee published this information in an interim report and distributed it for comment. Some of the suggestions were revised, and a final report was published in June 1992. FINAL REPORT, *supra* note 1, at 1A.

19. *Id.* at 7.

20. Martha Middleton, *7th Circuit OKs Rules on Civility*, NAT'L L.J., Jan. 11, 1993, at 18.

21. Bowser, *supra* note 15, at 15; Bone, *supra* note 6, at 216; Curtin, *supra* note 6, at 8; Saylor, *supra* note 7, at 81; Joryn Jenkins, *The Quiet Crusade: American Inns of Court's Battle to Return Professionalism to the Practice of Law*, 39 FED. B. NEWS & J. 318 (1992).

22. Curtin, *supra* note 6, at 8.

23. Bone, *supra* note 6, at 216.

main concerns.<sup>24</sup> Although Rambo tactics are seldom defined,<sup>25</sup> they are characterized alternatively as “zealous advocacy,”<sup>26</sup> “disdain for common courtesy and civility,”<sup>27</sup> and a “scorched earth strategy.”<sup>28</sup> Rambo litigators are perceived as those who use discovery as a weapon,<sup>29</sup> constantly threaten other lawyers with Rule 11 motions,<sup>30</sup> and utilize an aggressive and abusive style of litigation<sup>31</sup> in order to “win at all costs.”<sup>32</sup>

### B. *The Results of Incivility*

The problems generated by this increasing incivility are numerous. The most commonly discussed include: (1) the dissatisfaction of judges and lawyers, (2) the overloaded trial dockets, (3) a decline in public respect, and (4) the increased cost to clients.

Some judges and lawyers have discussed their unhappiness with replacing congenial working relationships with hostile confrontations.<sup>33</sup>

---

24. *Id.* The phrases “Rambo tactics,” “Rambo litigation,” “hardball tactics,” and “hardball litigation,” are used interchangeably. *See* Bone, *supra* note 6, at 216.

25. Robert Saylor said that Rambo or hardball lawyering was “like pornography, you know it when you see it.” Saylor, *supra* note 7, at 79. Hardball has also been described as taking the most difficult position for your opponent that your client will live with and never backing down. *See id.*

26. Bone, *supra* note 6, at 216.

27. Curtin, *supra* note 6, at 8.

28. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 253. Hardball lawyering is also frequently characterized as:

- A mind-set that litigation is war and that describes trial practice in military terms.
- A conviction that it is invariably in your interest to make life miserable for your opponent.
- A disdain for common courtesy and civility, assuming that they ill-befit the true warrior.
- A wondrous facility for manipulating facts and engaging in revisionist history.
- A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.
- An urge to put the trial lawyer on center stage rather than the client or his cause.

Saylor, *supra* note 7, at 79, *cited with approval in* Curtin, *supra* note 6, at 8, and Bone, *supra* note 6, at 216.

29. *See* INTERIM REPORT, *supra* note 1, at 17.

30. *See id.* at 20.

31. *See id.* at 21.

32. Jenkins, *supra* note 21, at 318.

33. INTERIM REPORT, *supra* note 1, at 2. *See also* Gene B. Brandzel, *Improving Collegial Relationships*, WASH. ST. B. NEWS, May 1992, at 20; Bill Coleman, *Problems in the District Court as the Judges See Them*, C.B.A. REC., May 1992, at 18; Faustin A. Pipal Jr., *Thoughts from the Chair: Taking the Time to Be Civil*, C.B.A. REC., Jan. 1992, at 32.

Incivility can make their work much more difficult and time consuming.<sup>34</sup>

Lack of cooperation, along with collateral arguments between attorneys, also backs up already overloaded trial dockets.<sup>35</sup> Delay tactics used by attorneys take up court time and increase the amount of unnecessary information provided to the court.<sup>36</sup> This can cause growing impatience for everyone involved, thereby decreasing the level of civility<sup>37</sup> and effecting the efficiency of the entire judicial process.<sup>38</sup>

Commentators also believe that increased incivility has led to a decline in public respect for the legal profession.<sup>39</sup> The Commission on Professionalism was formed partially to remedy the concern that the public viewed the bar as moving away from the principles of professionalism.<sup>40</sup> Others have expressed the concern that high standards of conduct must be maintained because the public will be less accepting of judicial decisions if they lack respect for the system.<sup>41</sup>

Another frequently used argument against incivility is the high cost to the client and the lack of effectiveness of such tactics.<sup>42</sup> Civility advocates argue that Rambo litigation tactics increase the client's legal costs by adding unnecessary time to the process.<sup>43</sup> One hostile act is countered with another, increasing the costs for clients and lengthening the process.<sup>44</sup> Because Rambo tactics often make an attorney look bad in

---

34. Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, in 132 F.R.D. 309, 330 (1990). When describing the incivility problems surrounding Rule 11, Stein said "that the only ill effect of incivility among lawyers may be to make life less pleasant for lawyers. . . ." *Id.*

35. FINAL REPORT, *supra* note 1, at 6; INTERIM REPORT, *supra* note 1, at 36. Collateral arguments, such as discovery problems that attorneys cannot work out themselves, have to go to the judge for resolution. The judge then has to take time out of an already full docket to listen to both sides and rule on the issue. See Coleman, *supra* note 33, at 18.

36. FINAL REPORT, *supra* note 1, at 6.

37. *Id.*

38. Clarke, *supra* note 7, at 969.

39. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 248. The Commission was formed not only because of a concern that the Bar might be "moving away from the principles of professionalism," but also because "it was so perceived by the public." *Id.* See also Bone, *supra* note 6, at 219; Carrico, *supra* note 4, at 322 (noting that lack of professionalism will result in a decline of public respect).

40. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 248.

41. Clarke, *supra* note 7, at 964.

42. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 254; FINAL REPORT, *supra* note 1, at 6; Reavley, *supra* note 7, at 646.

43. FINAL REPORT, *supra* note 1, at 6; Reavley, *supra* note 7, at 647.

44. Sayler, *supra* note 7, at 80. Sayler noted that "[h]ardball also encourages costly retaliation, as one act of hostility breeds another, until someone cries uncle. The result is the three-

front of the judge and jury, this increase in fees does not necessarily accompany a greater chance of success.<sup>45</sup> Hardball tactics also eliminate the alternative of resolving disputes through settlement, mediation, or arbitration.<sup>46</sup> Additionally, some believe judges and juries find attorneys who use these tactics less credible.<sup>47</sup>

### C. Causes of Incivility

The most commonly cited causes of increasing incivility are: (1) the growth of the bar, (2) the growing commercialism of the profession, (3) the increased use of Rule 11 sanctions, (4) the abuse of the discovery process, and (5) the poor preparation of incoming lawyers.

#### 1. Growth of the Bar

In the last thirty years, the bar has grown tremendously.<sup>48</sup> In 1960, there were about 286,000 lawyers admitted to practice in the United States.<sup>49</sup> By 1991, this number had grown to approximately 744,000.<sup>50</sup> Many believe that the increase in competition and the decline in "collegiality" caused by this growth are major contributors to the upswing in incivility.<sup>51</sup>

When discussing the increase in incivility, lawyers frequently reminisce about practicing law in the past when all the attorneys practicing in a certain area knew one another and a more "collegial"<sup>52</sup> atmosphere

day deposition that should have taken one day, a volley of motions when an oral stipulation would have sufficed. Obviously, the clients on both sides bear the cost." *Id.*

45. Reavley, *supra* note 7, at 646; Broder, *supra* note 7, at 64. One way an attorney can make a Rambo litigator look bad is by goading him into a temper tantrum in front of the court. Saylor, *supra* note 7, at 80.

46. Reavley, *supra* note 7, at 647. The cost of negotiation, mediation, or arbitration is much less than ordinary litigation and its success rate is high. See L. Randolph Lowrey, *Alternative Dispute Resolution: How will Lawyers Respond?*, ORE. ST. B. BULL., May 1989, at 8.

47. See Saylor, *supra* note 7, at 80; Tripp Baltz, *The State of Civility: Fighting over Fights*, CHI. L., Oct. 1990, at 1, 68. It is also questionable whether hardball tactics benefit the lawyer. A hardball litigator is apt to get fewer referrals from other attorneys, and these tactics may turn off as many clients as they attract. Saylor, *supra* note 7, at 80-81.

48. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 251.

49. BARBARA CURRAN, *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 4* (1985).

50. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1992* (112th ed. 1992).

51. INTERIM REPORT, *supra* note 1, at 12. See Brandzel, *supra* note 33, at 20; Charles H. Wilson, *Planes, Trains and . . . Civility*, A.B.A. J., Jan. 1990, at 77. Others believe that incivility is nothing new to the profession. See *infra* notes 156-60 and accompanying text.

52. "Collegiality" is defined as "shared power and authority vested among colleagues." THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 372 (3d ed. 1992). It has



existed.<sup>53</sup> Incivility was less common, partially because attorneys maintained social relationships with one another that they valued.<sup>54</sup> For example, when the legal profession of Arkansas was widely concentrated in Little Rock and air travel was not widely available, lawyers and judges would travel together to handle matters pending in state courts outside of the city.<sup>55</sup>

It is difficult to imagine the lawyers who shared [a] rail car . . . and the rooming-house dinner engaging in abusive deposition tactics or unleashing discovery requests designed to harass. There was, after all, a social dimension to their relationship, and they knew that they would face each other repeatedly in the course of their professional lives.<sup>56</sup>

Offensive behavior was frequently modified by simply notifying the offending lawyer's colleagues.<sup>57</sup>

The growth of the bar has made this type of behavior modification technique impossible.<sup>58</sup> Practicing attorneys have commented that it is much easier to act abusively toward opposing counsel when one does not know them and will probably never see them again.<sup>59</sup>

The substantial growth in the number of practicing lawyers has also led to fierce competition for clients.<sup>60</sup> Because many clients want aggressive lawyers,<sup>61</sup> attorneys often feel that they must become combative and uncivil to survive in the marketplace.<sup>62</sup> This intense competitiveness can also foster antagonism between attorneys, which affects their subsequent conduct toward each other.

also been used to describe a group of people who "share a disciplined body of thought, and . . . hold purposes and privileges in common." Pamela Anne Rymer, *High Road, Low Road: Legal Profession at the Crossroads*, TRIAL, Oct. 1989, at 81. "Collegium" is defined in part as "[a] group, the members of which pursue shared goals while working within a framework of mutual trust and respect." THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 373 (3d ed. 1992).

53. Bowser, *supra* note 7, at 12; Wilson, *supra* note 51, at 77; INTERIM REPORT, *supra* note 1, at 25.

54. Wilson, *supra* note 51, at 78.

55. *Id.*

56. *Id.*

57. Brandzel, *supra* note 33, at 20. A group of attorneys in the State of Washington want to reinstitute this practice as well as introduce a "[S]eries of Commitments" for the attorneys of the state to voluntarily sign. *Id.*

58. *Id.*

59. INTERIM REPORT, *supra* note 1, at 15; Bowser, *supra* note 7, at 12.

60. INTERIM REPORT, *supra* note 1, at 12-13. The Seventh Circuit survey result showed that 52% of the responding lawyers thought that economic pressures on lawyers and law firms contributed to a decline in civility. *Id.* at 24.

61. Reavley, *supra* note 7, at 650. *Contra* Saylor, *supra* note 7, at 79.

62. INTERIM REPORT, *supra* note 1, at 12.

## 2. Growing Commercialism

Closely related to the increasing competitiveness of lawyers and law firms is the growing commercialism of the practice. The Commission on Professionalism asked the question, "Has our profession abandoned principle for profit, professionalism for commercialism?"<sup>63</sup>

The law profession underwent major changes in the 1970s when the Supreme Court made it unconstitutional to completely prohibit advertising by lawyers<sup>64</sup> and illegal to set minimum fee schedules.<sup>65</sup> The Court also allowed direct solicitation of clients in certain situations.<sup>66</sup> These decisions increased the competition within the profession and emphasized the commercial aspect of the practice.

Some commentators feel that this increased commercialism caused the legal profession to lose its morals and manners.<sup>67</sup> The Seventh Circuit survey revealed comments such as: "The legal profession as such is almost extinct—the business is booming. Too many lawyers are intent on money rather than service."<sup>68</sup> Part of the problem stems from the high cost of simply maintaining an office. In 1986, the ABA Commission on Professionalism noted that, not including salary, \$62,000 in fees must be collected each year just to keep the average lawyer in business.<sup>69</sup> There are firms that set a minimum requirement of twenty-five hundred billable hours per year,<sup>70</sup> and there are associates billing eighteen to twenty hours a day.<sup>71</sup> Bonuses, compensation, and promotions are all intertwined with the amount of hours worked.<sup>72</sup> This puts a tremendous pressure on associates to bill a large amount of hours.<sup>73</sup> The concern is that this promotes inefficiency and penalizes productivity, often leaving attorneys willing to drag out cases and cause problems for the opposing attorney just to bill as many hours as possible.<sup>74</sup> In addition, the intense

---

63. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 251.

64. *See* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

65. *See* *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

66. *See In re Primus*, 436 U.S. 412 (1978).

67. Carrico, *supra* note 4, at 322; Peter M. Brown, *Narcissism, Manners, and Morals: Can Grace and Collegiality Be Salvaged?*, 13 *LITIG.* 17 (1987).

68. INTERIM REPORT, *supra* note 1, at 24.

69. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 260.

70. Carrico, *supra* note 4, at 322.

71. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 260 n.61.

72. Carrico, *supra* note 4, at 322.

73. INTERIM REPORT, *supra* note 1, at 32.

74. Tripp Baltz, 'Bottom-line Greed' Called Culprit in Discovery Abuses, *CHI. DAILY L. BULL.*, Aug. 7, 1990, at 3.

pressures put on associates to win cases and generate fees can lead to other forms of unprofessional conduct.<sup>75</sup>

### 3. Increasing Use of Rule 11

The frequent threat by attorneys to use Rule 11 motions<sup>76</sup> against one another is described by many commentators as both a cause and a result of increasing incivility.<sup>77</sup> The 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure was "intended to reduce the reluctance of courts to impose sanctions" and thereby "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."<sup>78</sup> In practice, however, it has not worked out that way.<sup>79</sup> Rather than streamlining the process, Rule 11 added satellite litigation in which attorneys constantly file Rule 11 motions in response to opposing counsel's Rule 11 motions.<sup>80</sup> Rule 11 allegations were frequently used as intimidation and negotiating techniques by lawyers.<sup>81</sup> In addition, the large number of Rule 11 motions caused judges to disregard such allegations.<sup>82</sup> The 1983 amendments to Rule 11 increased the hostility between lawyers and further promoted incivility.

75. See COMMISSION ON PROFESSIONALISM, *supra* note 5, at 259-61.

76. Rule 11 requires that attorneys sign any pleading, motion, or other paper to signify that they have determined that "after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument . . ." FED. R. CIV. P. 11(a). Sanctions for the violation of this rule may include a court order requiring the attorney to pay the other party's expenses. FED. R. CIV. P. 11(c).

77. See INTERIM REPORT, *supra* note 1, at 20; Pival, *supra* note 33, at 33; Stein, *supra* note 34, at 330. The Commission on Professionalism did not focus on Rule 11 as a problem. Although they recognized that imposing sanctions occasionally results in "time-consuming collateral proceedings," they recommended "the increased use of [Rule 11] sanctions in appropriate cases to reimburse opposing parties for defending against improper actions or filings." COMMISSION ON PROFESSIONALISM, *supra* note 5, at 291-92.

78. 2A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 11.01[4] (2d ed. 1993).

79. Stein, *supra* note 34, at 331. Stein suggests that the dynamics of Rule 11 work against its purpose:

Lawyers tend to threaten or seek sanctions against non-frivolous positions, hoping both to convince opposing counsel to withdraw an argument voluntarily and to influence the judge's decision on the merits. Lawyers tend not to threaten or seek sanctions against frivolous positions, not needing to antagonize opposing counsel for a relatively meager benefit. Judges tend to err in imposing sanctions.

*Id.*

80. Bergsten, *supra* note 15, at 24. "[There are] numerous cases where opposing counsel counters such an attack by asserting that the Rule 11 allegation was frivolous, done for harassment purposes, and therefore that its use was itself a Rule 11 violation." *Id.*

81. *Id.*

82. Pival, *supra* note 33, at 32, 33.

Although Rule 11 was amended again in 1993,<sup>83</sup> it is unclear how these amendments will affect civility. The amended Rule 11 allows judges discretion in imposing sanctions and creates a "safe harbor" which allows a party twenty-one days to withdraw an improper pleading or motion to escape sanction.<sup>84</sup> The advisory committee's comments suggest that any monetary sanctions be paid to the court as a penalty as opposed to paying the moving party's attorneys fees.<sup>85</sup> While supporters of the amendments say that the changes are a positive step that will speed up litigation and reduce costs, U.S. Supreme Court Justice Scalia and others disagree.<sup>86</sup> The changes may not increase the current problems, but it does not appear that they will alleviate any problems.

#### 4. Abuse of the Discovery Process

Discovery requests and acts that are contrary to the Rules of Civil Procedure are considered abusive.<sup>87</sup> Since attorneys conduct discovery largely without judicial supervision, it is an area with a high potential for abuse. The growing problems with discovery are understood by many to be both causes and results of the deteriorating civility.<sup>88</sup> Discovery has been described as "a battlefield on which verbal hostility, overly aggressive tactics, and often automatic and unreasoned denials of cooperation are the principal weapons."<sup>89</sup> Unnecessary and elongated depositions, as well as excessive document requests, have been linked with demands on associates to produce large amounts of billable hours.<sup>90</sup> This abuse takes the form of everything from refusing to return phone calls and scheduling depositions without notice to deliberate stall tactics in producing documents and answering interrogatories.<sup>91</sup> Judges frequently complain about hardball tactics used in discovery disputes that result in attorneys turning to the judiciary without attempting to resolve the dispute themselves.<sup>92</sup> Discovery abuse is one of the most prevalent forms

---

83. MOORE ET AL., *supra* note 78, ¶ 11.01.

84. FED. R. CIV. P. 11.

85. MOORE, ET AL., *supra* note 78, ¶ 11.01[9].

86. John F. Rooney, *Revamped Sanctions Among Largest Federal Rules Change in 20 Years*, CHI. DAILY L. BULL., Nov. 30, 1993, at 1.

87. See INTERIM REPORT, *supra* note 1, at 19.

88. See *id.* Ninety-four percent of the lawyers that responded to the Seventh Circuit survey felt that civility was a problem in discovery proceedings. *Id.* at app. III, table 5.

89. INTERIM REPORT, *supra* note 1, at 13.

90. Baltz, *supra* note 74, at 3.

91. INTERIM REPORT, *supra* note 1, at 19.

92. Coleman, *supra* note 33, at 18.

of incivility, and it contributes to the overall hostility level of lawyer relations.

## 5. Poorly Prepared Incoming Lawyers

Lawyers entering the profession receive much of the blame for incivility problems. The extreme billable hour requirements they must meet and the fact that they were never taught "proper" conduct leads to a lack of civility.<sup>93</sup> Some see the problem stemming from the law school experience, which promotes competitiveness for grades, class standing, and jobs.<sup>94</sup> In addition, the Socratic method of teaching, which often results in the professor belittling students, is blamed for encouraging future lawyers to treat each other poorly.<sup>95</sup> After they graduate, partners and senior associates do not have the time to teach them "proper" conduct.<sup>96</sup> Without guidance, young attorneys may try to hide their insecurity through aggressive and belligerent conduct.<sup>97</sup>

### D. *The Proposed Solutions*

A wide range of solutions has been suggested to increase civility.<sup>98</sup> These solutions include the following: (1) the establishment of codes of

93. Baltz, *supra* note 47, at 68.

94. John H. Frye III, *Returning Civility to the Practice of Law: A Call Which Members of the Legal Profession Would Do Well to Heed*, 39 FED. B. NEWS & J. 302 (1992); see Brown, *supra* note 67.

95. Frye, *supra* note 94, at 302.

96. Baltz, *supra* note 47, at 68.

97. *Id.*

98. The final recommendations of the Seventh Circuit Committee on Civility were:

1. The Proposed Standards for Professional Conduct within the Seventh Federal Judicial Circuit . . . should be adopted.

2. Each lawyer admitted to practice . . . in any court in the Seventh Federal Judicial Circuit should receive a copy of the Standards for Professional Conduct. Each court within the Circuit should consider adoption of a local rule requiring each lawyer admitted to practice . . . to certify, as a precondition to admission and to filing an appearance[,] . . . that he or she has read and will abide by the Standards.

3. Civility training, including education regarding the Standards for Professional Conduct, should be implemented by public law offices, private law firms, . . . corporations with in-house counsel[, and] . . . federal judicial workshops.

4. All lawyers and judges within the Seventh Federal Judicial Circuit should consider participation in [or establishment of] civility, professionalism, or mentoring programs in professional legal associations and bar associations as well as participation in [or establishment of] one of the American Inns of Court.

. . . .  
6. Law schools should encourage discussion of the Standards of Professional Conduct in the classroom and, especially in clinical training programs, should encourage discussion among faculty members.

conduct, (2) an increase in training and mentoring programs, and (3) stronger judicial control.

### 1. Codes of Conduct

Written standards of conduct are a consistently proposed method of combating incivility.<sup>99</sup> The "Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit" lists thirty-one duties that lawyers owe to other counsel, eight duties lawyers owe to the courts, twelve duties courts owe to lawyers, and three duties that judges owe to each other.<sup>100</sup> The preamble states that although "[v]oluntary adherence [to these standards] is expected, . . . [t]hese standards shall not be used as a basis for litigation or for sanctions or penalties."<sup>101</sup>

The purpose in making these standards nonsanctionable is to avoid satellite litigation and to avoid turning them into another weapon attorneys could use against each other in litigation proceedings.<sup>102</sup> The major benefits of codes of conduct are that they educate attorneys on proper standards of behavior and remind attorneys of these standards.<sup>103</sup> They also provide goals to achieve rather than minimum standards that would be required, for example, under the Professional Rules of Responsibility.<sup>104</sup>

In *Dondi Properties Corp. v. Commerce Savings & Loan Ass'n*,<sup>105</sup> the United States District Court for the Northern District of Texas established standards of litigation conduct that would be sanctionable through "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."<sup>106</sup> The court made it clear that the rules were not to be used for satellite litigation of the type seen in Rule 11 motions.<sup>107</sup> Although these standards have not been used frequently, in *Lelsz v. Kavanagh*<sup>108</sup> they were used as a basis for remov-

FINAL REPORT, *supra* note 1, at 9-10.

99. See *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988); FINAL REPORT, *supra* note 1; Brandzel, *supra* note 33.

100. FINAL REPORT, *supra* note 1, at 2A-7A.

101. *Id.* at 1A.

102. *Id.* at 7.

103. Bowser, *supra* note 7, at 12.

104. See *id.* at 13.

105. 121 F.R.D. 284 (N.D. Tex. 1988).

106. *Dondi Properties*, 121 F.R.D. at 288 (quoting *Thomas v. Capital Sec. Servs. Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)).

107. *Id.*

108. 137 F.R.D. 646 (N.D. Tex. 1991).

ing an Assistant Attorney General from participation in a case because of her "combative and improper conduct."<sup>109</sup>

## 2. Education and Mentoring

Increased education and training of the proper standards of conduct are frequently suggested as a means of decreasing uncivil behavior. This can be accomplished within law schools and through the establishment of professional programs.

The Seventh Circuit Committee recommended that law schools encourage discussion about the standards of professional conduct among the students and faculty.<sup>110</sup> Substantive training in etiquette skills through seminars and clinical education has also been proposed.<sup>111</sup> The Commission on Professionalism suggested: required summer reading on ethics and professionalism for entering law students, instruction on methods of negotiation and alternative dispute resolution, adoption of codes of student conduct, retention of high admission standards, and observance of the highest standards of ethics and professionalism within law schools.<sup>112</sup>

After graduation, the Seventh Circuit Committee proposes that civility training be continued and furthered in the profession through courses implemented at public law offices, private firms, corporate legal departments, and federal judicial workshops.<sup>113</sup> It also advises participation in or establishment of civility, mentoring, or professionalism programs. An organization singled out for recommendation by the Seventh Circuit was The American Inns of Court (AIC).<sup>114</sup> The American Inns of Court are small groups established across the country. They unite judges, law

---

109. *Lelsz v. Kavanagh*, 137 F.R.D. 646, 655 (N.D. Tex 1991). The court sanctioned the Assistant Attorney General because:

[Her actions] prejudiced the rights of her adversaries and impaired the administration of justice in this case. . . . Also, . . . the [c]ourt's focus on this case has meant that other deserving cases have gone unattended. In short, Plaintiffs, Advocacy, Defendants, and the administration of justice have all been harmed by the Assistant Attorney General's conduct.

*Id.*

110. FINAL REPORT, *supra* note 1, at 10.

111. *See* Clarke, *supra* note 7, at 1023.

112. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 263.

113. FINAL REPORT, *supra* note 1, at 10.

114. INTERIM REPORT, *supra* note 1, at 48-49. The Committee initially recommended that "all lawyers and judges in the Seventh Federal Judicial Circuit consider participation in one of the Inns of Court." *Id.* at 49. They made alternative recommendations, however, when it was brought to their attention that the membership in the Inns is by invitation only. *See* FINAL REPORT, *supra* note 1, at 9.

professors, experienced and inexperienced trial attorneys, and law students for the purpose of improving legal skills, professionalism, civility, and ethics.<sup>115</sup> There are approximately 172 Inns currently meeting throughout the country.<sup>116</sup>

### 3. Judicial Control

Increased judicial control is seen as another way to increase civility. It is suggested that "early and active" judicial involvement can stop incivility before it gets out of control.<sup>117</sup> The Commission on Professionalism recommended that trial judges play a more active role in litigation to make sure that "cases advance promptly, fairly and without abuse."<sup>118</sup> The Seventh Circuit did not take as strong a stand, asking only that judges bring any uncivil conduct to the attention of the lawyers.<sup>119</sup>

## III. CRITIQUE OF THE CIVILITY MOVEMENT

This Comment critiques the Civility Movement in three general areas. First, does it address and resolve the foundational issues surrounding civility? Second, do the proposed solutions fit the proposed problems? Finally, are the underlying assumptions of the civility movement accurate?

### A. *The Foundational Concerns Surrounding the Civility Issue*

Although proponents of civility discuss the outward behavior of attorneys and some potential causes of this conduct, they do not address the unresolved conflicts concerning a lawyer's role and the function of trials. These two key issues are essential to any discussion of civility and professionalism. An attorney's professional conduct is directly affected by how she perceives her role and what she perceives to be the purpose of the trial.

---

115. Jenkins, *supra* note 21, at 318.

116. *Id.* During the summer of 1992, an Inn of Court was established in Milwaukee.

117. INTERIM REPORT, *supra* note 1, at 43. Some judges disagree. Many complain about attorneys running to them with all sorts of problems without trying to work them out for themselves. Coleman, *supra* note 33, at 18.

118. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 264.

119. FINAL REPORT, *supra* note 1, at 6A.



## 1. The Lawyer's Role

There is no standardized conception of the lawyers' role.<sup>120</sup> Some perceive an attorney as being a lawyer for society, a friend, a minister, or a counselor.<sup>121</sup> Others suggest that the attorney should be a truth seeker.<sup>122</sup>

The absence of one standard role is apparent in the Model Rules of Professional Conduct. The preamble states that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>123</sup>

Workplace and clientele also affect the perception of the proper role of the attorney. Judges often think lawyers should be truth seekers,<sup>124</sup> prosecuting attorneys see themselves as protectors of justice, and criminal defense attorneys see themselves as defenders of individual rights.

These differing perceptions of an attorney's role reflect the broad range of ethical views within the bar. These views were expressed during the formulation of the Model Rules of Professional Conduct as various specialty groups lobbied for changes. The workplace and clientele of these groups clearly affected their concerns. Legal service lawyers wanted rules protecting zealous advocacy and attention paid to increasing litigation expenses, while bar counsel were lobbying for easily enforceable rules.<sup>125</sup> Trial lawyers were concerned with protecting attorney-client confidentiality, while judges and many law professors took the opposite view.<sup>126</sup>

The quote most often used as a statement of the ideal of zealous advocacy, written by Lord Broughman in defense of his representation of the Queen, stated:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client at all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffer-

120. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 19 L. & SOC. INQUIRY 677, 687 (1989). But see David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83 (David Luban ed., 1983).

121. Schneyer, *supra* note 120, at 686.

122. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055-57 (1975).

123. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1992).

124. See Frankel, *supra* note 122, at 1055.

125. Schneyer, *supra* note 120, at 733, 734.

126. *Id.* at 733.

ing, the torment, the destruction, which he may bring upon any other.<sup>127</sup>

Some scholars still consider this a fundamental principle of a lawyer's professional responsibilities<sup>128</sup> and the primary standard of lawyerly excellence.<sup>129</sup> Others suggest it is only one of many viewpoints within the profession.<sup>130</sup>

A recent quote expressing an opposite viewpoint is that of Cook County Circuit Judge Richard Curry. Judge Curry wrote in a court order:

Zealous Advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client, and, of course, for a price. Zealous advocacy is the modern day plague which infects and weakens the *truth-finding process* and which makes a mockery of the lawyers' claim to *officer-of-the-court status*.<sup>131</sup>

This quote symbolizes the view that the primary roles of an attorney should be to learn the truth and to protect the integrity of the court.

The conflict between roles is evident in the overlap of an attorney's duties as an officer of the court and as an advocate of the client. These roles can come into direct conflict in civility situations. If the attorney's primary duty is to the client, then a "win at all cost" attitude seems more than appropriate. If the primary duty is to the court, then decorum and civility should be the first concern.

This wide range of ethical opinions and views has an important impact on civility. Conduct toward an opposing party is greatly affected by the attorney's ethical concerns and view of the primary role. In addition, the interpretation of this behavior by opposing counsel and the presiding judge is also affected by their own views concerning the primary role of the attorney.

---

127. Rogers, *The Ethics of Advocacy*, 15 L.Q. REV. 259, 269 (1899) (quoting Lord Brougham), *quoted in* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 909 n.1 (1980).

128. MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 65 (1990).

129. *See* Patterson, *supra* note 127, at 909. There are two aspects to this view of primary loyalty to the client. One is that the attorney is a hired gun using every legal tactic to pursue the client's aims without regard to her view of the client's character or goals. Schneyer, *supra* note 120, at 686. The other is that an attorney is required to zealously represent the client's aims, but is morally accountable for her choice of clients. FREEDMAN, *supra* note 128, at 71.

130. *See* Schneyer, *supra* note 120, at 733.

131. Bone, *supra* note 6, at 216 (emphasis added).

## 2. The Function of a Trial

Another foundational concern is the debate over the function of trials. Is the purpose of a trial to learn some objective truth, to allow adversaries to fight for their individual rights through their representatives under certain procedural rules, or some combination of the two?<sup>132</sup>

The model of a trial as a search for the truth is suggested in Rule 102 of the Federal Rules of Evidence, which states that the Rules' purpose is to promote the "growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."<sup>133</sup> The numerous evidentiary privileges as well as rules limiting the obtainment and admittance of certain evidence, however, suggest that truth is not always the prevalent goal.<sup>134</sup> The model of a trial as a battle to protect individual rights is suggested by the protections given to individuals through evidentiary privileges, burdens of proof, and due process requirements.<sup>135</sup>

A combination of these two models is suggested by focusing on the process and procedures of a trial. The trial creates "truth" through the implementation of rules that are fair to both sides and through the placement of relevant information before the trier of fact.<sup>136</sup> The role of the advocate would be to pursue the process from which the truth emerges, rather than the truth itself.<sup>137</sup> Tactics include cross examining truthful witnesses and excluding relevant evidence through the use of privileges.<sup>138</sup> Attorneys who are skillful in the use of these tactics are often applauded, and attorneys who are less skilled can lose a case that another attorney might have won.

If the goal of a trial is to find an objective truth, then attorneys should not act in any way that hinders the truth-finding process. If the goal of a trial is to let adversaries fight out their battles in a legal setting, then any legal tactic should be appropriate. But if the goal of a trial is a combination of these two models, allowing the procedures of the trial to

---

132. See Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 WASH. L. REV. 477, 530-32 (1990). Raveson suggests two partially competing and partially complementary models of a trial. One model is that a trial is a search for the truth, and the other is that a trial is a fight or a contest between combatants. *Id.*

133. FED. R. EVID. 102.

134. Raveson, *supra* note 132, at 532. Concerns that are weighed as more important than truthfulness include the lawyer-client privilege and individual rights. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 534.

138. *Id.* at 533.

determine the truth, then rules and codes of conduct within the trial setting are a key element. These procedures affect how the truth is determined and what the truth is determined to be.

*B. Does the Civility Movement Resolve These Foundational Conflicts?*

By simply addressing the surface issue of attorney conduct, the civility movement neither addresses nor resolves the foundational conflicts concerning the role of the attorney and the function of a trial.

The preamble to the Seventh Circuit Standards for Professional Conduct states, "In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner."<sup>139</sup> The roles of truth seeker, client advocate, and officer of the court are all combined. Moreover, the attorney is not given any guidance on what to do when these roles conflict.

The civility movement also does not clearly address the debate concerning the purpose of a trial. Although war-like behavior and Rambo tactics are condemned,<sup>140</sup> it does not address why these tactics are wrong. Are they wrong because they are not the proper procedures or are they wrong because the goal of a trial is not to find an objective truth?

If the goal of a trial is to find an objective truth, then implementing standards of conduct is not enough. Substantive changes in the overall trial structure would be necessary. This might include the removal of certain evidentiary privileges or changes in the discovery process to require disclosure of core information.<sup>141</sup>

If the goal of a trial is to let the adversaries fight out their battles in a legal setting, then civility will only force attorneys to find new ways to protect their client's legal rights. An example of this possibility is seen in the 1983 amendments to Rule 11. Although the amendments were intended to decrease frivolous claims, they are now used by attorneys as an additional weapon.

---

139. FINAL REPORT, *supra* note 1, at 1A.

140. See *supra* notes 21-32 and accompanying text.

141. In 1993, Rule 26(a)(1) was amended to require mandatory disclosure of "core" information before formal discovery. FED. R. CIV. P. 26(a)(1). Because the rule was strongly opposed by bar groups and others who claimed it would create more litigation and impinge upon attorney-client relationships, the judges within the Northern District of Illinois have adopted an "opt-out" provision allowing judges to decide individually if they want to use the rule. Rooney, *supra* note 86, at 1.

However, if these tactics are wrong because they are not within the prescribed procedures and rules for creating truth, then attorneys must adjust their tactics to fit within the prescribed rules. The most skillful attorneys will be the most successful, as they are the first to learn how to manipulate the rules to their advantage.

Attempting to decrease incivility without addressing these foundational concerns will only change the type of tactics used without changing the underlying motivations and goals. It will not make attorneys "better" people or improve the profession; it will merely change their methods.

### C. *Do the Solutions Fit the Problems?*

Several problems pointed out by the civility movement are either not addressed or not fully addressed by the proposed solutions. These include Rule 11 abuse, discovery abuse, billable hours, and commercialism.

#### 1. Rule 11

Although the increasing use of Rule 11 motions is seen as both a cause and a result of increasing incivility,<sup>142</sup> the proposed solutions do not directly address this problem. In fact, the ABA Commission recommended that all courts adopt rules similar to Rule 11 to allow judges to "impose sanctions for abuse of the litigation process."<sup>143</sup> The Seventh Circuit lists two duties that are applicable to Rule 11:

We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

. . . We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.<sup>144</sup>

These duties do not add to the restrictions already placed on attorneys by the Rules of Professional Conduct and Rule 11 itself.<sup>145</sup>

---

142. See *supra* text accompanying notes 76-86.

143. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 265. The Commission on Professionalism did not focus on Rule 11 as a problem. See FINAL REPORT, *supra* note 1.

144. FINAL REPORT, *supra* note 1, at 2A.

145. Rule 3.1 of the Model Rules states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1992). Rule 11 provides that the attorney's signature on a pleading certifies that:

Although some commentators believe that the 1993 amendments to Rule 11 will decrease Rule 11 jurisprudence and increase civility in the settlement of disputes arising from the initial pleadings, others believe that the amendments render Rule 11 ineffective.<sup>146</sup>

In practice, the dynamics of Rule 11 and the discrepancies of judges' rulings sometimes combine to make it in the best interest of the client for the attorney to file a Rule 11 motion against nonfrivolous positions "hoping both to convince opposing counsel to withdraw an argument voluntarily and to influence the judge's decision on the merits."<sup>147</sup> This problem is not addressed by the 1993 amendments.

Since the purpose of Rule 11 is to discourage abuse of the litigation process,<sup>148</sup> possible changes to Rule 11 should be examined in order to decrease incivility.

## 2. Discovery

Discovery is mentioned more often than Rule 11 as a cause of incivility,<sup>149</sup> yet suggested solutions to the overall problem do little more than inform attorneys that they should not use the discovery process for the purposes of harassment or delay.<sup>150</sup> The recommendation by the Commission on Professionalism that trial judges take a more active role in

---

to the best of [the signer's] knowledge, information, and belief . . . *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.*

FED. R. CIV. P. 11 (emphasis added).

146. Rooney, *supra* note 86, at 1.

147. Stein, *supra* note 34, at 331.

148. See *supra* note 78 and accompanying text.

149. See *supra* notes 87-92 and accompanying text.

150. The standards set forth by the Seventh Circuit Committee which relate to discovery include:

19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony[,] . . . not . . . for the purposes of harassment or to increase litigation expenses.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

FINAL REPORT, *supra* note 1, at 3A-4A. The standards set out in *Dondi* are very similar. They state that "[a] lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client." *Dondi*, 121 F.R.D. at 288.

the discovery process does not create any guidelines for judges to follow.<sup>151</sup>

Civility advocates do not address what can be done substantively to alleviate the problem of discovery abuse.<sup>152</sup> Even the Seventh Circuit report, which stated that "a need for systemic change is suggested by its findings," did not comment on potential changes.<sup>153</sup>

### 3. Billable Hours

Although the problem of billable hours and the extreme stress put on young attorneys to meet these billable hours is consistently cited as a cause of incivility,<sup>154</sup> there are no solutions offered for this problem. Educating lawyers on the subject of civility standards will do nothing to reduce the pressures of meeting billable hour requirements.<sup>155</sup>

### 4. Commercialism

Civility proponents frequently blame commercialism for incivility problems.<sup>156</sup> Yet, no solutions are proposed to either decrease the commercialism of the profession or to increase the benefits that can be obtained through commercialism. There is no dispute that commercialism is now an unavoidable aspect of the legal profession. The Supreme Court decisions that allowed advertising and prohibited minimum fee schedules increased commercialism of the practice.<sup>157</sup>

It is important to keep in mind, however, that these decisions also made the law profession more accessible to new lawyers and to clients.

---

151. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 264. The Commission recommends that trial judges take a more active role in litigation to make sure that "cases advance promptly, fairly and without abuse." *Id.* at 264-65.

152. There have been many suggestions within the profession for alleviating the discovery problem such as: charging all the discovery costs to the losing party, assessing prejudgment interest, narrowing the scope of discovery, and improving litigation management. Baltz, *supra* note 47, at 16.

153. FINAL REPORT, *supra* note 1, at 6. The Committee notes that the recent proposed amendments to Rule 26 could minimize "the adversarial character of the discovery process" but does not comment on them. *Id.*

154. See *supra* notes 71-75 and accompanying text.

155. One suggested solution to the problems caused by billable hours is to change the system to one in which the fee would depend on the results. Carrico, *supra* note 4, at 323.

156. See *supra* notes 63-69 and accompanying text.

157. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 256.

Market forces can help decrease certain types of legal costs, increase the quality of services, and allow greater access to the legal system.<sup>158</sup>

Instead of decrying the negative, the bar should focus on ways in which the public and the profession can benefit from increased commercialism.<sup>159</sup>

#### *D. Problems with the Underlying Assumptions of the Civility Movement*

There are several assumptions underlying the suggested causes and solutions of the civility movement. These theories include: (1) incivility and commercialism are new to the profession, (2) hardball litigation tactics are not successful for the client or the attorney, (3) the loss of collegiality is detrimental to the profession, and (4) improving civility will improve the public's views of the legal profession.

##### 1. Is Incivility a New Phenomenon?

Incivility is often discussed as if it is a new phenomenon for the bar.<sup>160</sup> Some of the most frequently cited causes of incivility, such as the growth of the bar<sup>161</sup> and Rule 11 abuse,<sup>162</sup> are new developments. Furthermore, in criticizing the current environment, many attorneys compare it to the collegiality of the bar in the "good old days."<sup>163</sup>

Not everyone recalls the law practice as being more genteel in the past. Various commentators have pointed out that the practice of law used to be *less civil*.<sup>164</sup> In 1932, Clarence Darrow compared trials to prize-ring combat.<sup>165</sup> When describing common law practices in Texas in 1948, Thomas Reavley explained that:

158. Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 334 (Geoffrey C. Hazard & Deborah L. Rhode eds., 2d ed. 1988).

159. The full debate on positive and negative aspects of commercialism is beyond the scope of this article. For a discussion of the benefits and detriments of advertising see Hazard, *supra* note 158. See also Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION*, *supra* note 158, at 327.

160. See Bone, *supra* note 6, at 216; Carrico, *supra* note 4, at 321; Curtin, *supra* note 6, at 8.

161. See *supra* notes 48-62 and accompanying text.

162. Substantial problems with Rule 11 did not arise until it was amended in 1983. See *supra* notes 76-78 and accompanying text.

163. See *supra* notes 78-82 and accompanying text.

164. Reavley, *supra* note 7, at 638-39.

165. Darrow, *THE STORY OF MY LIFE* (1932), noted in Reavley, *supra* note 7, at 638-39.



[S]ome of the trial lawyers regularly interfered with the deposition testimony by coaching their own witnesses, usually off the record, and by employing tactics to upset adverse witnesses. Young opposing lawyers were verbally abused and even threatened with physical attack. Promises were made about disclosure, settings, settlements, and continuances, only to be violated. . . .

. . . We encountered more professional and judicial misconduct in those days, misdeeds which would lead to disbarment today.<sup>166</sup>

Law firms becoming more akin to businesses is also not a new phenomenon, nor is criticizing this practice something new. Charles Dickens wrote in the 1853 novel *Bleak House* that "the one great principle of English law is to make business for itself."<sup>167</sup> In a 1934 speech at the University of Michigan Law School, then Associate Justice Harlan F. Stone complained about legal products produced through mass production methods and stated that lawyers were looking to material satisfactions rather than the satisfactions of professional service.<sup>168</sup>

It is important for proponents to realize that incivility and commercialism are not new facets of the profession. They have been as much a part of the profession as bar associations. This does not mean that they are inseparable from the profession, rather that changes will require a more indepth analysis.

## 2. Do Rambo Litigation Tactics Work?

Proponents of the Civility Movement argue that Rambo litigation tactics are not only bad for professionalism, but that they are also largely unsuccessful for both the client and the attorney.<sup>169</sup> The question then is why is the use of these tactics growing if they do not aid the attorney? The answer often given is that the competitive nature of the business leaves attorneys fighting for clients. Therefore, when clients want their attorney to use hardball tactics, the attorney obliges.<sup>170</sup> However, this reasoning assumes that clients are unsophisticated customers who do not

---

166. Reavley, *supra* note 7, at 640.

167. CHARLES DICKENS, *BLEAK HOUSE* (1853), *quoted in* Monroe H. Freedman, *A Brief Professional History*, *LEGAL TIMES*, Dec. 17, 1990, at 22.

168. Freedman, *supra* note 167, at 13.

169. Reavley, *supra* note 7, at 646. There are many ways to combat hardball tactics. *See* Saylor, *supra* note 7, at 80; Broder, *supra* note 7, at 64. *But see* INTERIM REPORT, *supra* note 1, at 13 (discussing that because Rambo litigators get results, more clients want their attorneys to be Rambo litigators).

170. INTERIM REPORT, *supra* note 1, at 26; *see also* Reavley, *supra* note 7, at 647.

know that hardball litigation tactics do not work.<sup>171</sup> This portrayal does not quite fit. According to the Seventh Circuit Report, large law firms are singled out as the major source of civility problems.<sup>172</sup> The clients of these large law firms are predominantly major corporations, many with in-house counsel.<sup>173</sup> They are not unsophisticated clients who do not know what they are doing. If they ask their attorneys to use hardball tactics or they authorize the use of such tactics, then they are getting the results they want.

Within the courtroom, Rambo tactics will sometimes work against the client's best interest. Judges and juries are often turned off by this type of behavior,<sup>174</sup> and there are effective means for the opponent to counter these tactics.<sup>175</sup> Such tactics, however, can take place out of the sight of judge and jury, especially in the area of discovery. Additionally, skilled and experienced attorneys can be very successful at hardball advocacy. Their manners and tactics in front of the jury are markedly different than their manners and tactics outside of the courtroom. If the use of these tactics is on the rise and is largely utilized by corporate clients, then some success with these techniques is evident.

The success of hardball tactics makes reducing their use much more difficult. The attorney must weigh the potential disapproval of colleagues against the benefit to clients.

### 3. Is the Loss of a Collegial Atmosphere Detrimental to the Profession?

A "collegial" atmosphere is created when a group of people share privileges and goals.<sup>176</sup> Collegiality existed in the law profession in the past, not only because lawyers all knew each other, but also because they shared many of the same backgrounds and values.<sup>177</sup> Basically it was an

---

171. INTERIM REPORT, *supra* note 1, at 26.

172. *Id.* at 28.

173. Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION, *supra* note 158, at 68.

174. See Saylor, *supra* note 7, at 80; Baltz, *supra* note 47, at 68.

175. See Saylor, *supra* note 7, at 80; Broder, *supra* note 7, at 64.

176. "Collegiate" is generally used to describe shared goals, purposes, and privileges. See *supra* note 52.

177. After describing the increasing numbers of women and minorities in the practice and the decreasing minimum age of lawyers, the ABA Commission on Professionalism stated, "[I]f it ever could have been said that the Bar was composed of persons having the same backgrounds and values, that certainly is no longer the case. We are as diverse as one could imagine." COMMISSION ON PROFESSIONALISM, *supra* note 5, at 252.

"Old Boys' Club," consisting almost completely of white, middle-class males.<sup>178</sup>

The collegiality that commentators describe as making the law practice more civil also contributed greatly to the difficulty women and minorities had breaking into the profession and taking active roles.<sup>179</sup> Shared values and goals might create a congenial working atmosphere, but they can also exclude people of various backgrounds from participation. In the past, law school admissions, bar character screening practices, and treatment by employers, clients, and bar associations showed a bias against religious and ethnic minorities.<sup>180</sup> It was not until the 1950s that African Americans were allowed to join the ABA and women were allowed to attend Harvard Law School.<sup>181</sup>

The break up of the Old Boys' Club was slow and painful. Several years after graduating with honors from Stanford Law School, the only offer Justice Sandra Day O'Connor received from a California law firm was for a secretarial position.<sup>182</sup> In the 1960s, there were incidents where law school placement officers would give only the names of the top *male* students to inquiring firms, and a pregnant student was not allowed to interview.<sup>183</sup> Even when positions were offered to women, it was occasionally made clear that not everyone in the firm approved of the offer.<sup>184</sup>

Although there is still much room for improvement in this area,<sup>185</sup> the addition of women and minorities to the practice of law has created an entirely new atmosphere and has made many accomplishments possi-

This author does not mean to suggest by this that the proponents of collegiality are racist or sexist, only that they have overlooked one of the major ties between attorneys in the past—fundamentally they all had the same backgrounds and values.

178. Robert M. Spire, *Breaking Up the Old Boy Network*, TRIAL, Feb. 1990, at 57.

179. See Victoria C. Swanson, *The More Things Change*, TRIAL, Feb. 1990, at 44; Judith S. Kaye, *Three Decades of Progress*, TRIAL, Aug. 1992, at 20; Roxanne Barton Conlin, *Women, Power, and the Law*, TRIAL, Feb. 1990, at 22.

180. Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi*, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION, *supra* note 158, at 49-50.

181. Freedman, *supra* note 167, at 22.

182. Kaye, *supra* note 179, at 20.

183. Conlin, *supra* note 179, at 26.

184. See Kaye, *supra* note 179, at 20. The author stated that, "[t]he partner extending the offer told me that it personally offended him and he sincerely hoped I would decline it." *Id.*

185. Although law school classes are now about 50% women, in 1991 women accounted for only 37% of the associates, 11% of partnership positions at large law firms, and 10% of the judiciary. *Id.* Because of the increase of women in law school classes today, the amount of women in partnerships and judicial positions should increase in the near future.

ble.<sup>186</sup> Collegiality has been replaced with diversity. This diversity is not only due to the addition of people of different sexes, races, and religions but also the different ideas and values they possess. Although this might have detracted from the formerly existing amenity, it has brought more representative viewpoints of both the country and the clients that the system serves to the profession and the judicial system.<sup>187</sup> To see this it is only necessary to look at the accomplishments of Justice Thurgood Marshall and Sarah Weddington. In *Brown v. Board of Education*,<sup>188</sup> Thurgood Marshall argued for integration. As an African American, he brought a unique understanding to the problem that only someone who had been directly affected by segregation could bring. The same is true of Sarah Weddington, who argued in *Roe v. Wade* on behalf of women hoping to overturn an 1865 Texas law restricting abortions.<sup>189</sup> In this respect, any harm caused to the profession by the loss of collegiality has been far outweighed by the benefits of diversity.

Another reason for the loss of collegiality is the diversification of the bar into many different specialties. This stratification partially corresponds to the types of practice and clientele of attorneys.<sup>190</sup> Attorneys often have more in common with attorneys within their own group than with the bar at large.<sup>191</sup> This is even evident to some extent within the general field of litigation. Attorneys in the fields of criminal prosecution, criminal defense, personal injury, insurance defense, and business litigation all have different concerns and interests.<sup>192</sup> This diversity within the profession may not foster collegiality, but it reflects the heterogeneity and needs of American society.<sup>193</sup>

Having a diverse bar does not mean that pleasant relationships can not exist between attorneys, but it does signify that attorneys within the

---

186. See Conlin, *supra* note 179, at 24 (resulting from the work of women in concert with men, progress has been made in dealing with such areas as the problems of rape and wife-beating).

187. Spire, *supra* note 178, at 58. The author states that, "[m]inorities and women improve the quality of legal services. For example, minority members who have had to overcome discrimination themselves are sensitive to minorities in a way that lawyers from the dominant white society may never fully understand. Through this sensitivity, minority members make the profession responsive to all people." *Id.*

188. 347 U.S. 483 (1954).

189. 410 U.S. 113 (1973).

190. Barbara A. Curran, *The Legal Profession of the 1980s: Selected Statistics From the 1984 Lawyer Statistical Report*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION*, *supra* note 158, at 56, 60.

191. COMMISSION ON PROFESSIONALISM, *supra* note 5, at 253.

192. See *supra* notes 125-31 and accompanying text.

193. Spire, *supra* note 178, at 57.

bar possess a wide spectrum of values and goals. Although this creates better representation, it takes away from the camaraderie of the past.

The focus should turn away from a decline in collegiality to acceptance and improvement of diversity within the profession. The percentage of minority students in law schools and in the profession is still very low.<sup>194</sup> This low participation impacts the makeup of the judicial branch of government on state and local levels. Minorities should be made to feel more welcome in the profession. Bar associations should look into the creation of anti-discrimination guidelines and study ways to improve diversity within the bar. Support should be given to bar organizations tailored to meet the needs of different legal specialties. These organizations increase the support networks between lawyers with similar goals and interests.

#### 4. Will Improving Civility Improve the Public's Perception of Attorneys?

Some civility advocates have argued that improving civility will improve the public perception of attorneys.<sup>195</sup> The client who is employing the attorney as his advocate often feels differently. Clients hire attorneys because they are not personally knowledgeable about the law or skilled in legal argument and, therefore, need someone to act in their place. The client often expects the attorney to act as the client himself would if he possessed legal skills and knowledge, even when this behavior might be thought of as uncivil in the eyes of the other attorney or the judge.<sup>196</sup> Clients are often confused and feel betrayed when they see their attorney acting friendly towards the opposing counsel.

Although the public may have a low regard for the legal profession, it is not overly concerned with a lack of professional courtesy between lawyers. The source of public discontent is focused on other issues such as the availability of affordable legal services. Consumer advocates view the civility movement as a public relations campaign and would like bar associations to focus on key issues such as increasing the availability of

---

194. Minority law students made up only 8% of all law students in 1982. African Americans constitute 12% of the population, however, only approximately 4.4% of law students and 2.2% of lawyers are African American. Additionally, a 1983 Survey of 300 law firms revealed that only 2% of the firms had any minority attorneys. Julie Taylor, *Demographics of the American Legal Profession*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION*, *supra* note 158, at 53, 54.

195. Carrico, *supra* note 4, at 322.

196. See FREEDMAN, *supra* note 128, at 66.

affordable legal services.<sup>197</sup> Creating programs to educate the public on their legal rights and the availability of legal services is likely to be a more effective way to improve the public's perception of attorneys.<sup>198</sup>

In addition, if the public had a better understanding of the roles and purposes of the legal profession,<sup>199</sup> it would help clients understand the actions of attorneys and help improve the public perception of attorneys. For example, if it was established that the primary role of the attorney was to act as a client advocate, the public would better understand the attorney-client privilege and some of the actions of attorneys during trial. It also might be able to understand why an attorney is not necessarily dishonorable although he defends a dishonorable client. However, when attorneys claim to be officers of the court and truthseekers, the attorney-client privilege and other evidentiary privileges do not make sense. The conflicts between the two roles make it difficult for the public to understand attorneys.

If Rambo tactics can be successful and are nothing new to the profession, then civility proponents need a stronger approach to prevent the use of such tactics. In addition, the collateral problems of the loss of collegiality and lack of public respect would be better addressed by improving diversity within the profession, educating the public of their rights and the availability of legal services, and establishing clear roles for attorneys.

#### IV. THE EFFECT OF THE PROPOSED SOLUTIONS ON CIVILITY

This section addresses the issue of whether codes, education, and an increased judicial role will affect the overall level of civility within the profession.

##### A. *The Problem with Codes*

Instead of alleviating conflict, there is a concern that enforceable civility codes will provide a new arena for conflict. There are two ways that codes can increase problems. First, where a code has a slightly different standard than the Model Rules of Professional Conduct, it could result in a great deal of satellite litigation to determine which standard applies.<sup>200</sup> Second, provisions of the civility codes have the potential to be

---

197. Bowser, *supra* note 7, at 16.

198. FREEDMAN, *supra* note 128, at 122.

199. See *supra* part III(A)(1)-(2).

200. Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L. J., Feb. 26, 1990, at 13. Professor Hazard points out the example of the Texas Lawyer's Creed compared

recognized as professional standards in malpractice claims. Under the Texas Creed requirement that a lawyer inform the client of alternative methods of dispute resolution, an attorney could be sued for not advising the client of the possibility of mediation or arbitration even in cases where the attorney has determined that these methods would be unsuccessful.<sup>201</sup>

A further criticism of civility codes is that they do not add much to already existing rules governing attorneys. The Model Rules of Professional Conduct provide in Rule 3.2 that “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”<sup>202</sup> The comment to the rule makes it clear that delay solely for the purpose of frustrating the opposing party is improper.<sup>203</sup> The comment to Rule 3.4 prohibits “obstructive tactics” in discovery procedures, while Rule 3.5 and the accompanying comment establish the impropriety of abusive or disruptive conduct in the courtroom.<sup>204</sup> These rules address the same problems as civility codes.

In its Proposed Standards for Professional Conduct, the Seventh Circuit report states that lawyers’ duties require that they do not use discovery as a means of harassment or delay, and that they not act in a disruptive or disorderly manner in the courtroom.<sup>205</sup> If the present rules of professional conduct are not being observed, adding more guidelines will not increase the observance of these rules.

One benefit to the promulgation of these codes is that they increase the discussion and, therefore, the awareness of civility standards. Overall, however, codes of conduct do not add much to the already existing standards of attorney conduct and, where the new codes do differ from already existing rules, there is a potential for confusion and satellite litigation as attorneys argue over which rules should apply.<sup>206</sup>

---

to Model Rule 4.3. While Model Rule 4.3 provides that a lawyer shall not “use means that have no substantial purposes other than to embarrass, delay or burden a third party,” the Texas Creed could be read as calling for a subjective rather than objective intent to harass since it requires that a lawyer not pursue “conduct which is *intended* primarily to harass or drain the financial resources of an opposing party.” *Id.* (emphasis added).

201. *Id.* at 14.

202. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1991).

203. *Id.* Rule 3.2 cmt.

204. *Id.* Rule 3.4 cmt., Rule 3.5 cmt.

205. FINAL REPORT, *supra* note 1, at 2A.

206. So far, there have not been many problems with an increase in litigation resulting from these standards.

### B. Education and Mentoring

Increased education and mentoring of new and future lawyers can also increase awareness of the problem. However there are some problems with this approach.

Mentoring can only be as good as the mentor.<sup>207</sup> If experienced attorneys within a firm do not have time to guide new attorneys, then it is questionable whether appropriate mentors can be found. There is also the additional question of whether it is really the young attorneys who are causing the problem. The law school experience teaches students to have respect for courtroom proceedings through moot court and trial practice classes. If young attorneys are not civil, this is something they see within the practice. When they emerge from law school, young attorneys look at the actions of older attorneys for guidance. They imitate the actions of those around them. They are probably singled out for blame because they are less skilled at hardball litigation and, therefore, their use of such tactics is more obvious.

It is interesting that law schools are blamed for fostering competitiveness within the profession. Although grades and class standing are a function of law schools, it is law firms that choose to interview only the top percentages of law school classes.

The American Inns of Court (AIC) serves as a sort of mentoring organization. It teaches young attorneys skills and unites various members of the bar. AIC, however, is an exclusive organization. Membership is by invitation only, and there are a limited number of invitations given out each year. Membership is often limited to a certain section of the bar. Small firms and sole practitioners are seldom included unless they have a strong reputation within the community. Divorce attorneys and lesser-known criminal defense attorneys are also seldom included. Overall, AIC is beneficial as long as it is not expected to bring unity and collegiality to the overall bar.<sup>208</sup>

Providing increased training and mentoring in law school or through groups such as the AIC might make the use of Rambo tactics less blatant, and it may also decrease the use of such tactics when they are not useful to the attorney. However, it will not solve the underlying problems of incivility.

---

207. See Baltz, *supra* note 47, at 4.

208. The information on AIC was learned from an examination of the Milwaukee, Wisconsin branch's bylaws and membership roster.



### C. *Increased Judicial Role*

There are substantial concerns with giving the judiciary an increased role within the courts. One problem is that the judiciary and attorneys have differing and sometimes conflicting goals.<sup>209</sup> The attorney is committed to defending the client through the use of procedures, rules, and tactics. The judge is neutral, committed to insuring that proper rules and procedures are followed and that the disagreement is resolved.<sup>210</sup> Increasing the role of the judge could have adverse effects in some situations. If a judge believes one side more than the other, this may have an effect on rulings. In addition, juries often try to interpret how the judge feels about the case when they make their decisions.

Increased judicial control could change the nature of the adversarial system. A more careful analysis of its effects is necessary before making such changes.

## V. CONCLUSION

The primary benefit of the Civility Movement has been the discussions that have taken place throughout the Bar. These discussions have created a greater awareness of the problems caused by incivility. However, the focus of these discussions should shift to the underlying foundational dilemmas that exist concerning the role of the attorney and the purpose of the trial. Incivility is not necessarily something new to the profession. Therefore, it is important to focus on the underlying goals and purposes of the profession in order to make changes, rather than on the surface problems.

If the primary role of the attorney is to be an officer of the court, the enforcement of civility codes would be an effective method of decreasing incivility. However, if the primary role of the attorney is to be a client's advocate, then disciplinary codes conflict with this role and can create problems.<sup>211</sup> In this situation, incivility can only be alleviated by rendering hardball tactics ineffective. If hardball tactics are ineffective, then the attorney would have no reason to utilize these tactics. Without a clear understanding of the role of an attorney, the problem of incivility cannot be addressed effectively.

Similarly, it is important to understand the purpose of a trial.<sup>212</sup> If attorneys understand the purpose of a trial to be to create a "truth"

---

209. FREEDMAN, *supra* note 128, at 77.

210. RAVESON, *supra* note 132, at 533.

211. See *supra* notes 120-31 and accompanying text.

212. See *supra* notes 132-38 and accompanying text.

through implementation of rules and placement of relevant information before the trier of fact, skilled attorneys will attempt to use civility codes as another tactic to advance their case. If attorneys understand the purpose of a trial to be a battle to protect individual rights, they will only be civil if it advances their interests.

The collateral problem of the lack of public respect can also benefit from an awareness of the role of attorneys and the purposes of a trial. If the public understands what is going on and why, it is less likely to be unhappy with the results of a particular case and the legal profession as a whole. Public respect can also be improved by creating programs to educate the public about legal rights and the availability of legal services. Additionally, if attorneys want to convince the public that legal services are an essential part of society, they should work to make sure legal services are available to everyone.

Furthermore, if increased civility is determined to be important to the improvement of the profession, the solutions should directly address the problems of Rule 11, discovery, billing requirements, and commercialism.

The problems caused by high billing requirements could be partially solved by requiring new attorneys to bill only a limited amount of hours during their first two years of practice. This would reduce the pressure on them, allow them time to learn "proper" conduct, and prevent them from wasting time in discovery in order to meet their billing requirements.

A more comprehensive solution would involve a review of the entire billing system. For example, if law firms gave a billing "estimate" at the time the case was brought in by the client, the client and the attorneys would know what to expect in advance. Attorneys would be hesitant to waste time in needless depositions and hearings, potentially reducing problems with discovery and Rule 11. Because firms that wanted to compete would have to avoid wasting time on a case, this idea takes advantage of the increasing commercialism of the profession. Although this solution is not without drawbacks, it is an example of the type of solution that is necessary to address the problems of Rule 11, discovery, billing requirements, and commercialism.

If the legal community truly wants to improve the professional conduct of attorneys, it needs to address the issue of the role of attorneys and the purpose of trials. Furthermore, talking about problems with Rule 11, discovery, billing requirements, and commercialism is not

enough. Solutions need to be proposed that directly address these problems.

KATHLEEN P. BROWE\*

---

\* The author would like to thank Marquette University Law School Professors McChrystal and Wiseman for their assistance in formulating the ideas that led to this article.