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## Making Civility Mandatory: Moving from Aspired to Required

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# MAKING CIVILITY MANDATORY: MOVING FROM ASPIRED TO REQUIRED

DAVID A. GRENARDO\*

## ABSTRACT

*Despite the rise of voluntary civility codes and calls for professionalism, incivility persists in the legal profession. The practice of law is a privilege, not a right, and attorneys must be held to a higher standard of conduct as 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. The time for mandatory civility has long come, and all state bars should follow the lead of the few jurisdictions that have made civility mandatory.*

*This article examines what civility is, its importance, and the problem of incivility. The article also discusses the legal profession's response to incivility thus far, and why this response in most instances falls short. The article also examines the manner in which mandatory civility can be enforced and provides suggestions on the specific rules necessary to enforce it. This article also discusses the arguments against mandatory civility and provides responses to each.*

*This article argues that civility should be mandatory for attorneys, because when a lawyer fails to act with civility by failing to treat others in the legal process, including the opposing party and its counsel, the court, and clients, with dignity, respect and courtesy, then the public's confidence in the legal system suffers and legal costs rise, including the costs of litigation. As*

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*the former United States Supreme Court Justice Sandra Day O'Connor said, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."*

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## INTRODUCTION

“The practice of law is a privilege, not a right.”<sup>1</sup> Attorneys must be held to a higher standard of conduct as “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>2</sup> When a lawyer fails to act with civility by failing to treat others, including the opposing party and its counsel, the court, and clients, with dignity, respect and courtesy, then the public’s confidence in the legal system suffers and legal costs rise, including the costs of litigation.<sup>3</sup>

Although the issue of when the decline of civility took place is debatable – some say the legal profession was rife with incivility for many years – the lack of civility today remains indisputable.<sup>4</sup> One need

<sup>1</sup> *In re Anderson*, 851 S.W.2d 408, 410 (Ark. 1993) (citing *In re Lee*, 806 S.W.2d 382, 385 (Ark. 1991)); *Fla. Bar v. Greenspahn*, 396 So.2d 182, 184 (Fla. 1984); *In re Redburn*, 746 N.W.2d 330, 339 (Minn. 2008). See *In re Evans*, 169 P.3d 1083, 1090 (Kan. 2007) (stating that “a license to practice law is a privilege not a right. In order to preserve the privilege, a lawyer must refrain from engaging in misconduct”).

<sup>2</sup> *Att’y Griev. Comm’n of Md. v. Sheinbein*, 812 A.2d 981, 998 (Md. 2002) (quoting *Att’y Griev. Comm’n v. Alison*, 565 A. 2d 660 (Md. 1989)).

<sup>3</sup> See, e.g., Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998) (citing Scott Hunter, *Fear and Loathing in the Law Office*, N.J. L.J., Sept. 4, 1995, at 25) (stating that “lawyers far too often breach their professional obligations to other lawyers—that many lawyers are caught up in a system of behavior that is ‘structurally, morally, and emotionally exhausted’”); see also *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 636 (S.C. 2011) (citation omitted) (stating that “[w]hen a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client”); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1263 (9th Cir. 2010) (citing CAL. ATT’Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 1) (stating that the “dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities” and “[t]hey are essential to an atmosphere that promotes justice and to an attorney’s responsibility for the fair and impartial administration of justice”); *Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 90 (3d Cir.1995) (opining that “[t]he extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice”); *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 n.2 (9th Cir. 2000) (opining that “at the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values”).

<sup>4</sup> Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 103, n.20 (2012) (citing

only peruse the American Bar Association (“ABA”) Journal to find appalling stories of incivility, such as a Florida attorney who, among other things, disparaged the opposing lawyer before his clients, and was accused of “deplorable behavior” including: scheduling depositions at Dunkin’ Donuts against opposing counsel’s request, attending them in t-shirts and shorts, drawing pictures of male genitalia, and playing the game “Angry Birds” during deposition testimony.<sup>5</sup>

The lawyer’s defense, as is typical with this type of behavior by attorneys, was zealous advocacy. The judge, however, disagreed and disqualified the lawyer and his firm from the case.<sup>6</sup> Although the law firm was disqualified for its rude and abrasive behavior, what is most disturbing is the notion that an attorney might conduct himself in such a manner and still believe his actions are defensible under the guise of zealous advocacy.<sup>7</sup>

The lack of civility by attorneys caused no less than 140 state and local bar associations to adopt civility codes.<sup>8</sup> These civility codes serve as aspirational guidelines that attorneys “should” follow during their practice.<sup>9</sup> Despite these civility codes, incivility persists. As these civility codes remain guidelines, attorneys need not adhere to them.<sup>10</sup> Waiting for all attorneys to come to their senses and become inspired to follow civility guidelines remains a naïve and passive approach to an issue that needs to be resolved for several reasons.

As one court stated, the need for civility exists to “ensure that justice is not removed from the reach of litigants either because improper

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early twentieth century sources describing the decline of attorney conduct); Jennifer Smith, *Lawyers Behaving Badly Get A Dressing Down From Civility Cops*, *THE WALL ST. J.*, Jan. 28, 2013, at A1, available at <http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html> (recognizing and discussing the prevalent issue of incivility in the legal profession); G.M. Filisko, *You’re Out of Order! Dealing With The Costs Of Incivility In The Legal Profession*, *A.B.A. J.* (Jan. 1, 2013, 6:19 AM), [http://www.abajournal.com/magazine/article/youre\\_out\\_of\\_order\\_dealing\\_with\\_the\\_costs\\_of\\_incivility\\_in\\_the\\_legal/](http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal/). See generally O’Connor, *supra* note 3 (addressing incivility as growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication).

<sup>5</sup> See *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F.Supp.2d 1346 (S.D. Fla. 2012) (holding that the attorney and his law firm were disqualified based on the egregious violations of the Florida Rules of Professional Conduct, including *ex parte* communications and the consistent course of disrespectful, unprofessional conduct).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Campbell, *supra* note 4, at 141-42.

<sup>9</sup> *Id.* at 142.

<sup>10</sup> *Id.*

litigation tactics interpose unnecessary delay or because such actions increase the cost of litigation beyond the litigant's financial grasp."<sup>11</sup> Furthermore, as officers of the court, attorneys must display civility to maintain public confidence in the legal system.<sup>12</sup> Without public trust and confidence, the legal system will be reduced to mere spectacle and gamesmanship, where fair play and rules become obsolete. Uncivil behavior can sometimes lie beyond the reach of each jurisdiction's rules of professional conduct and discovery rules. Such conduct must be dealt with consistently and sternly.

A handful of state bar associations sought to deal with uncivil conduct, going one step further than the guidelines, by adding civility to their oaths of admission.<sup>13</sup> Several other states and jurisdictions took the last step in responding to incivility by making civility mandatory.<sup>14</sup>

The time for mandatory civility has long come, and all state bars should follow the lead of the few jurisdictions that made civility mandatory. Simply suggesting that attorneys follow civility guidelines does not adequately alter attorney behavior. Systemic behavior change will more likely occur when civil behavior is required and negative consequences accompany the failure to adhere to the required behavior in appropriate cases. Accordingly, if the legal profession truly wants to reduce unnecessary legal costs and provide greater respect for, and confidence in, the legal system and those who safeguard it, then each state bar should make civility mandatory by using specific civility rules.

Part I of this article examines what civility is, why it is important, and, briefly, the problem of incivility. Part II examines the legal profession's response to incivility thus far, and why this response in most in-

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<sup>11</sup> *Dondi Properties Corp. v. Commerce Sav. Loan Ass'n*, 121 F.R.D. 284, 288 (N.D. Tex. 1988).

<sup>12</sup> O'Connor, *supra* note 3, at 19.

<sup>13</sup> See *In re Fla. Bar*, 73 So.3d 149 (Fla. 2011) (recognizing "[t]he necessity for civility in the inherently contentious setting of the adversary process"); UTAH RULES PROF'L CONDUCT, PREAMBLE; S.C. ADMISSION TO PRACTICE LAW R. 402(k); N.M. RULES. GOV. ADMISS. BAR R. 15-304.

<sup>14</sup> See, e.g., *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633 (S.C. 2011); *In re Norfleet*, 595 S.E. 2d 243, (S.C. 2004); *In re White*, 707 S.E.2d 411 (S.C. 2011); *Dondi*, *supra* note 11, at 284. See also John T. Berty's Responses to Questions on Civility app. A [hereinafter *Berty's Responses*]. Mr. Berty served as Executive Director of the State Bar of Michigan from 2000-2006. Before joining the State Bar of Michigan in November 2000, he served as Director of the Center of Professionalism at the University of Florida's Levin College of Law. Mr. Berty also served as chair of the ABA's Professionalism Committee (2003-2006) and has served on the McKay Commission that evaluated lawyer regulation nationwide.

stances falls short. Part III examines the manner in which mandatory civility can be enforced and suggests rules for enforcing civility. Part IV raises the major arguments against mandatory civility and responds to each. Part V discusses further research that needs to be done on the subject.

## I. UNDERSTANDING CIVILITY

### A. *What is Civility?*

Commentators and leading authorities on civility each maintain different, yet similar, definitions of civility. For example, John T. Berry (“Mr. Berry”), Director of the Legal Division for the Florida Bar, who supervises the lawyer regulation and professionalism efforts for the State Bar of Florida, says the following: “Generally, civility is acting with respect, kindness, courtesy and graciousness with everyone you contact.”<sup>15</sup> Billy Walker (“Mr. Walker”), Senior Counsel for the Utah State Bar – Office of Professional Conduct, who supervises the office, and along with staff, investigates and prosecutes complaints against attorneys, states, “Civility is following the Rules and getting along in a respectful and dignified manner with the individuals necessary to carry out your responsibilities.”<sup>16</sup>

William Slease, Chief Disciplinary Counsel for the Disciplinary Board of the New Mexico Supreme Court, describes civility as the following:

Using the appropriate means to accomplish a legitimate end for a client without injecting hostility, combativeness, rude behavior, insults, threats, or demeaning conduct or words in the course of one’s practice. It also means refraining from engaging in personal attacks against an opposing party, counsel or the court, or disparaging the abilities and qualifications of opposing counsel and judges. It further means treating everyone fairly, and with respect and dignity.<sup>17</sup>

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<sup>15</sup> Berry’s Responses, *supra* note 14.

<sup>16</sup> Billy Walker’s Responses to Questions on Civility app. B [hereinafter Walker’s Responses]. The opinions expressed by Mr. Walker are his personal views [based on his experience] and should not be considered opinions of the Utah Supreme Court which has the responsibility for professionalism and civility in the state of Utah. Lesley Coggiola, Disciplinary Counsel for the South Carolina Supreme Court Office of Disciplinary Counsel, says civility is “politeness, courtesy, respect of others. These are all characteristics of a professional.” Lesley Coggiola’s Responses to Questions on Civility app. E. [hereinafter Coggiola’s Responses].

<sup>17</sup> William Slease’s Responses to Questions on Civility app. C. [hereinafter Slease’s Responses].

One legal commentator characterized civility as “treating others-opposing counsel, the court, clients, and others-with courtesy, dignity, and kindness.”<sup>18</sup> At its core, civility in the legal profession is embodied in the golden rule – treat opposing counsel the way you would like to be treated.<sup>19</sup>

A 2011 law review article by Professor Donald A. Campbell examined the core concepts of civility found in the various civility codes adopted by different bar associations and determined ten common concepts, which include the obligation to:

- (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions;
- (2) be respectful and act in a courteous, cordial, and civil manner;
- (3) be prompt, punctual, and prepared;
- (4) maintain honesty and personal integrity;
- (5) communicate with opposing counsel;
- (6) avoid actions taken merely to delay or harass;
- (7) ensure proper conduct before the court;
- (8) act with dignity and cooperation in pre-trial proceedings;
- (9) act as a role model to the client and public and as a mentor to young lawyers; and
- (10) utilize the court system in an efficient and fair manner.<sup>20</sup>

Thus, civility by lawyers includes treating opposing counsel, the parties, the courts, and everyone an attorney encounters, with respect, courtesy, and dignity.

Civility is also linked to professionalism and ethics. Civility and professionalism are sometimes used interchangeably in the legal profession.<sup>21</sup> Similarly, civility is also sometimes considered “an element or

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<sup>18</sup> Bronson D. Bills, *To Be or Not To Be: Civility and the Young Lawyer*, 5 *CONN. PUB. INT. L.J.* 31, 35 n.26 (2005) (citing John M. Burman & William U. Hill, *Professionalism and Leadership*, 27 *WYO. L. REV.* 16, 17 (2004)) (discussing the difficulty of defining civility and likening it to defining pornography as Justice Stewart said of pornography “I know it when I see it”). See also Melissa S. Hung, *Comment: A Non-Trivial Pursuit: The California Attorney’s Guidelines of Civility and Professionalism*, 48 *SANTA CLARA L. REV.* 1127, 1131 (2008).

<sup>19</sup> *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir.1997); see also Amy R. Mashburn, *Making Civility Democratic*, 47 *HOUS. L. REV.* 1147, 1217 (2011) (stating that “[c]ultural and political theorists have put forward a variety of definitions of civility, but most echo these notions of reciprocity and mutual respect”).

<sup>20</sup> Campbell, *supra* note 4, at 109.

<sup>21</sup> Walker’s Responses, *supra* note 16; Maret Vessella’s Responses to Questions on Civility app. D. [hereinafter Vessella’s Responses]. The State Bar of Arizona is responsible for the regulation and discipline of persons engaged in the practice of law, and Ms. Vessella is responsible for overseeing and administering the regulatory process.



characteristic of professionalism.”<sup>22</sup> Civility and ethics can overlap as well, as civility refers to how an attorney treats others, and ethics in the legal profession is today considered compliance with each state’s rules of professional conduct, which regulates attorney conduct.<sup>23</sup> As a result, leaders in the area of attorney discipline contend that civility is a part of professionalism and ethics.<sup>24</sup> For example, Mr. Slease of New Mexico’s Disciplinary Board states:

Assuming . . . ethics . . . mean[s] compliance with the Rules of Professional Conduct, civility is a facet of both professionalism and ethics. From a professionalism standpoint, acting in a civil manner allows the parties and counsel to focus on the merits of the legal dispute and reach a just resolution without the injection of unnecessary posturing, hostility, or personalization into the matter. From a Rules of Professional Conduct standpoint, several rules address proper behavior with opposing counsel, tribunals, unrepresented third parties and clients, such as refraining from bringing meritless claims or asserting meritless defenses, refraining from making misrepresentations, and refraining from using means that have no substantial purpose other than to embarrass or burden another person.<sup>25</sup>

Similarly, Billy Walker of the Utah Bar asserts the following, “Civility is synonymous with professionalism because professionalism is following the Rules of your profession and following the Rules in a respectful and dignified way [that] encompasses civility. There is overlap with civility and ethics where uncivil conduct breaches the Rules of Professional Responsibility.”<sup>26</sup>

Mr. Berry of the Florida Bar recognizes the difference of opinion on where civility falls with respect to professional and ethics.<sup>27</sup> Some believe civility falls under professionalism as “civility is more like a moral code in fulfilling obligations to clients, and to a lesser extent, to

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<sup>22</sup> See, e.g., Campbell, *supra* note 4, at 142. See also Coggiola’s Responses, *supra* note 16. One legal commentator, however, claims that civility is different than professionalism as professionalism addresses societal consciousness, while civility focuses on the client. See Campbell, *supra* note 4, at 142-43.

<sup>23</sup> Slease’s Responses, *supra* note 17; Walker’s Responses, *supra* note 16.

<sup>24</sup> See, e.g., Slease’s Responses, *supra* note 17; Walker’s Responses, *supra* note 16.

<sup>25</sup> Slease’s Responses, *supra* note 17.

<sup>26</sup> Walker’s Responses, *supra* note 16.

<sup>27</sup> Berry’s Responses, *supra* note 14.

the court.”<sup>28</sup> Others believe that civility falls under both professionalism and ethics, depending on the particular uncivil behavior at issue.<sup>29</sup>

Thus, civility is typically considered either synonymous with or a part of professionalism, and it can overlap at times with ethics rules. As a result, there remains a need to enforce civility as it does not always fall under ethics, which requires only the lowest common denominator of behavior to avoid sanctions.<sup>30</sup>

### B. *Why Is Civility Important?*

Courts, attorneys, and legal commentators have discussed why civility is important to the legal profession. “The dignity, decorum, and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney’s responsibility for the fair and impartial administration of justice.”<sup>31</sup> Similarly, the Third Circuit stated, “We do not approve of the ‘hardball’ tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice.”<sup>32</sup> Moreover, the Ninth Circuit opined, “Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect.”<sup>33</sup>

Additionally, former United States Supreme Court Justice Sandra Day O’Connor provided her insight on the benefits of civility, stating, “More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public’s perception of lawyers.”<sup>34</sup>

The South Carolina Supreme Court declared that the interests protected by civility are the administration of justice and integrity of the lawyer-client relationship; that is, uncivil conduct “not only com-

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Campbell, *supra* note 4, at 132.

<sup>31</sup> Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1263 (9th Cir. 2010) (citing CAL. ATT’Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 1).

<sup>32</sup> Marcangelo v. Boardwalk Regency, 47 F.3d 88, 90 (3d Cir. 1995).

<sup>33</sup> Ahanchian, 624 F.3d at 1263; see also Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223 n.2 (providing that “at the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values”).

<sup>34</sup> O’Connor, *supra* note 3, at 8.

promises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client."<sup>35</sup>

Mr. Berry of the Florida Bar, explained why civility is important:

Civility is important to the legal system in order to engender respect towards all participants in a legal proceeding as well as to the public at large. Legal proceedings are solemn and dignified, where important rights, both criminal and civil, are determined. It is necessary for all participants to be treated courteously and respectfully in order to ensure the fair administration of justice. Indeed, it may be said that civility promotes the efficient administration of justice.

Often, a lack of civility leads to increased expenditures of time, money and resources, which further burdens the judicial system. Instances of incivility within the judicial system cause issues of credibility which may negatively impact the entire governmental structure. In societies where incivility reigns, respect for the judicial system waivers, and revolution occurs.<sup>36</sup>

Similarly, Billy Walker of the Utah Bar contends, "Civility is important to the legal profession because it is the most effective and economical way to carry out your responsibilities as a lawyer."<sup>37</sup>

Thus, civility is critical because it makes the administration of justice more efficient and it increases the public's confidence in the legal system, both of which are invaluable benefits to the legal profession.

### C. *Incivility in the Legal Profession*

Incivility in the profession has been recognized before, and it remains an issue.<sup>38</sup> For example, in August of 2011, Manhattan lawyer Kenechukwu Okoli slapped the co-chairman of Paul Hastings' employment practice, Allen Bloom, during a deposition.<sup>39</sup> Mr. Okoli, the "slapper," brought a complaint for \$1 million against the "slappee,"

<sup>35</sup> In re Anonymous Member of S.C. Bar, 709 S.E.2d 633, 637 (S.C. 2011).

<sup>36</sup> Berry's Responses, supra note 14.

<sup>37</sup> Walker's Responses, supra note 18.

<sup>38</sup> See, e.g., Campbell, supra note 4, n.20, at 103; O'Connor, supra note 3, at 8; In re Fla. Bar, 73 So.3d 149 (Fla. 2011); Smith, supra note 4 (recognizing and discussing the prevalent issue of incivility in the legal profession); Filisko, supra note 4.

<sup>39</sup> Debra C. Weiss, Suit Claims Lawyer Slapped Paul Hastings Partner Because of Violent Finger Shaking, Spittle-Spewing, ABA JOURNAL LAW NEWS NOW (July 2, 2012, 7:20 AM), [http://www.abajournal.com/news/article/suit\\_claims\\_lawyer\\_slapped\\_paul\\_hastings\\_partner\\_because\\_of\\_violent\\_finger\\_/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/suit_claims_lawyer_slapped_paul_hastings_partner_because_of_violent_finger_/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email).

Bloom, claiming that the slap was justified because Bloom rushed him “and began yelling at the top of his lungs and shaking his pointed index finger violently less than one foot from Okoli’s face.”<sup>40</sup> Okoli also claims that “spittle from Bloom’s wide open mouth hit Okoli’s face.” Okoli alleges Bloom’s conduct constituted assault.<sup>41</sup> Okoli also brought a claim for slander based on the allegation that Bloom called Okoli “uncivilized, ignorant and incompetent.”<sup>42</sup>

Paul Hastings brought a motion to dismiss, arguing that “Okoli made hostile and disparaging comments to Bloom during the deposition, telling him to ‘keep your mouth shut.’”<sup>43</sup> The motion also argues that Bloom’s purported conduct – accidental spittle, finger wagging, close proximity and a raised voice – do not amount to assault, which requires fear of imminent physical harm, “not a well grounded fear of spittle.”<sup>44</sup>

Paul Hastings claims that the transcript of the deposition does not include Bloom calling Okoli uncivilized, ignorant or incompetent, but if those words were said, then Bloom uttered those words “in the heat of passion, making it harder to define as slander under New York law.”<sup>45</sup>

Although the “slapping suit” is one anecdotal story, there are unfortunately many more instances of incivility, including attorneys actually brawling in a deposition, and attorneys verbally abusing and shoving each other in front of court officials.<sup>46</sup>

In response to a discovery dispute in Oklahoma, a federal district court judge wrote an order concerning counsels’ violation of the local lawyers’ civil conduct creed.<sup>47</sup> The order conceded that the creed is aspirational and could not be enforced by the court, but that the court could still disapprove of conduct that violated the oath.<sup>48</sup> The order stated, in part, “If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with lawyers of equally repugnant attributes.”<sup>49</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> O’Connor, *supra* note 3, at 7.

<sup>47</sup> *Krueger v. Pelican Prod. Corp.*, No. CIV 87-2385-A (W.D. Okla. Feb. 24, 1989) (Judge Wayne E. Alley) (order denying motion to dismiss action).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Additionally, surveys indicate that legal professionals believe the lack of civility within the legal profession is an issue.<sup>50</sup> The results from the surveys “mean that lawyers far too often breach their professional obligations to other lawyers – that many lawyers are caught up in a system of behavior that is ‘structurally, morally, and emotionally exhausted.’”<sup>51</sup> In 2012, in a Florida Bar News article, Florida Supreme Court Justice Fred Lewis noted that “[s]urveys of Bar members and judges have listed professionalism – or the lack of it – as a top concern for years.”<sup>52</sup>

In that same article, Justice Lewis acknowledged that “The entire profession is not satisfied with the professionalism,” and that it is not enough to simply talk about professionalism or maintain it as an aspirational goal because the fact is that professionalism needs some teeth, which, in turn, necessitates enforcement.<sup>53</sup>

## II. THE RESPONSE TO INCIVILITY AND WHY IT FALLS SHORT FOR THE MOST PART

The legal profession’s response to incivility includes, among other things, numerous state and local bar associations adopting guidelines of civility, four state bars adding civility in their oaths for newly admitted lawyers, and one federal district court in Texas and several states (such as Florida, Arizona, South Carolina and Michigan) requiring civility. Each of these responses is discussed below.

### A. *Civility Codes*

As stated above, Professor Campbell performed an extensive review of civility codes across the nation and found that they “are intended to provide guidance to lawyers regarding how to conduct themselves in

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<sup>50</sup> See, e.g., O’Connor, *supra* note 3, at 8 (citing a Seventh Circuit study in 1991 finding that forty-two percent of lawyers, and forty-five percent of the judges, in that circuit believe that “civility is a profession-side problem,” a 1996 C.C. Bar study showing that sixty-nine percent of the lawyers identified civility as a problem, and a 1997 survey of presidents of state and local bar associations that revealed “ninety percent of the respondents reported both problems with civility and diminished respect among lawyers in their jurisdictions”).

<sup>51</sup> *Id.* (citing Scott Hunter, *Fear and Loathing in the Law Office*, N.J. L.J., Sept. 4, 1995, at 25).

<sup>52</sup> Gaty Blankenship, *Putting ‘Teeth’ in Professionalism*, THE FLORIDA BAR NEWS (May 15, 2012), <http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/92c1e519c6934a8e852579f4006c11cb!OpenDocument>.

<sup>53</sup> *Id.*

dealings with opposing counsel, clients, courts and third parties.”<sup>54</sup> Their purpose, based on his research, “is also to ensure that the image of the legal process is preserved and respected by the public, and to ensure that disputes are resolved in a timely, efficient, and cooperative manner.”<sup>55</sup> Civility codes recommend conduct “the minimum requirements of ethical rules” and summarize “best practices” or “values” for practitioners.<sup>56</sup> Civility codes, however, are not meant for use in sanctioning or penalizing attorneys – they are merely guidelines.<sup>57</sup>

The American Board of Trial Advocates (“ABOTA”) promulgated its version of a civility code titled the “ABOTA’s Principles of Civility, Integrity and Professionalism,” which includes twenty-nine general rules of civility and eight other rules specifically regarding attorney conduct in court.<sup>58</sup> The Principles of Civility, Integrity and Professionalism (the “Principles”) are quite similar to bar association civility codes.<sup>59</sup> The ABOTA’s code begins with a preamble that states, among other things, “Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsels adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.”<sup>60</sup> The Principles are not meant to inhibit or discourage vigorous advocacy or diminish an attorney’s duties to his/her clients, but they are meant to “discourage conduct that demeans, hampers, or obstructs our system of justice.”<sup>61</sup> The Principles also state that they are not

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<sup>54</sup> Campbell, *supra* note 4, at 142.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 107.

<sup>57</sup> *Id.* at 142.

<sup>58</sup> See Principles of Civility, Integrity and Professionalism, American Board of Trial Advocates, Professionalism Ethics and Civility, Principles of Civility, [https://www.abota.org/temp/ts\\_8B7977AD-BDB9-505B-D0009B240E4E3BD38B7977BD-BDB9-505B-D053159BB2C04E85/principlesciv.pdf](https://www.abota.org/temp/ts_8B7977AD-BDB9-505B-D0009B240E4E3BD38B7977BD-BDB9-505B-D053159BB2C04E85/principlesciv.pdf) (last visited Aug. 5, 2012). [hereinafter ABOTA]. Several of the specific Principles are discussed below in Part III, Section D, *infra*. ABOTA “is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution.” AMERICAN BOARD OF TRIAL ADVOCATES, <http://www.abota.org> (last visited Aug. 11, 2012). ABOTA “requires its members to be responsible for elevating the standards of integrity, honor, ethics, civility and courtesy in the legal profession.” AMERICAN BOARD OF TRIAL ADVOCATES, <http://www.abota.org> (last visited Aug. 11, 2012).

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

meant for imposing sanctions, penalties, or liability— they are merely guidelines.<sup>62</sup>

ABOTA's Principles are insightful as they provide specific civility rules to follow, and they come from an organization that includes over 6,000 trial lawyers representing equally the plaintiff and defense bars from all over the 50 states, the District of Columbia, and Puerto Rico.<sup>63</sup> The ABA, in contrast, which promulgates the Model Rules of Professional Conduct, has been criticized based on the belief that the ABA is dominated primarily by large law firms, which typically focus on defense work.<sup>64</sup>

Civility codes, and ABOTA's principles, nevertheless, are currently not mandatory.

### B. *Civility Oaths*

Four states – Florida, South Carolina, Utah and New Mexico – each added a civility pledge in their oaths of admission for newly admitted attorneys.<sup>65</sup>

In September 2011, the Supreme Court of Florida, based on “concerns [that] have grown about acts of incivility among members of the legal profession,” added civility to its oath for newly admitted attorneys to recognize “[t]he necessity for civility in the inherently contentious setting of the adversary process.”<sup>66</sup> The civility portion of the oath reads, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”<sup>67</sup>

Similarly, in March 2010, New Mexico added the following affirmation to its oath: “I will maintain civility at all times, abstain from all offensive personality, and advance no fact prejudicial to the honor or

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<sup>62</sup> See *id.*

<sup>63</sup> See About Us, AMERICAN BOARD OF TRIAL ADVOCATES: SAN FRANCISCO CHAPTER, <http://www.sfabota.org> (last visited Aug. 10, 2012).

<sup>64</sup> See, e.g., Amy. R. Mashburn, Professionalism In The Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: Professionalism As Class Ideology: Civility Codes and Bar Hierarchy, 28 VAL. U.L. REV. 657, 675-76 (1994).

<sup>65</sup> See *In re Fla. Bar*, 73 So.3d 149 (Fla. 2011); S.C. ADMISS. TO PRACTICE LAW R. 402(k); N.M. RULES. GOV. ADMISS. BAR R. 15-304; UTAH RULES OF PROF'L CONDUCT, PREAMBLE.

<sup>66</sup> *In re Fla. Bar*, 73 So.3d at 149-50 (citing *In re Snyder*, 472 U.S. 634, 647 (1985)).

<sup>67</sup> *Id.* at 150.

reputation of a party or witness unless required by the justice of the cause with which I am charged.”<sup>68</sup>

In August 2007, Utah added the following affirmation to its oath: “I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism, and civility; and that I will faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility.”<sup>69</sup>

Finally, in October 2003, South Carolina modified its oath to include the following affirmation: “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”<sup>70</sup>

New Mexico and Utah, however, do not enforce civility unless an attorney’s conduct violates some other rule of professional conduct or civil procedure.<sup>71</sup>

### C. *Mandatory Civility*

Several jurisdictions, such as South Carolina, Florida, Arizona, Michigan, and the Northern District of Texas, took the final step in responding to incivility by making civility mandatory.<sup>72</sup>

In 1988, the Northern District of Texas in the seminal case of *Dondi* addressed civility issues regarding litigation conduct of attorneys.<sup>73</sup> Before the court were, among other motions, several motions to compel and motions for sanctions, based on discovery disputes and alleged misconduct by the opposing counsels.<sup>74</sup>

The court in *Dondi* recognized “patterns of behavior that forebode ill for our system of justice,” namely “unnecessary contention and sharp practices between lawyers” that “threaten to delay the administration of justice and to place litigation beyond the financial reach of litigants.”<sup>75</sup> The court noted that scarce judicial resources must be devoted to referee

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<sup>68</sup> N.M. RULES. GOV. ADMISS. BAR R. 15-304.

<sup>69</sup> UTAH RULES OF PROF'L CONDUCT, PREAMBLE.

<sup>70</sup> S.C. ADMISS. TO PRACTICE LAW R. 402(k).

<sup>71</sup> See Walker's Responses, *supra* note 16; cf. Slease's Responses, *supra* note 17.

<sup>72</sup> See, e.g., *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633 (S.C. 2011); *In re Norfleet*, 595 S.E.2d 243 (S.C. 2004); *In re White*, 707 S.E.2d 411 (S.C. 2011); see also Berry's Responses, *supra* note 14; *Dondi Properties Corp. v. Commerce Sav. Loan Ass'n*, 121 F.R.D. 284, 284 (N.D. Tex. 1988).

<sup>73</sup> *Dondi*, 121 F.R.D. at 288.

<sup>74</sup> *Id.* at 284.

<sup>75</sup> *Id.* at 286.



uncivil litigation tactics, which may cause litigation costs to become prohibitive for some clients.<sup>76</sup> The court adopted standards to remove uncivil practices by attorneys and emphasized that “a lawyer’s conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play.”<sup>77</sup>

Thus, the court in *Dondi* made civility mandatory and paved the way for courts to sanction attorneys in the Northern District of Texas for incivility.<sup>78</sup> For instance, a bankruptcy court in the Northern District of Texas fined attorney Harvey Greenfield \$25,000 for his personal attacks made orally and in writing during a bankruptcy proceeding, relying on the *Dondi* opinion.<sup>79</sup> Greenfield allegedly made a number of irrelevant, threatening, and offensive remarks during the bankruptcy proceeding, which included “characterizing other attorneys, including an Assistant United States Attorney, as ‘stooges,’ ‘puppet,’ a ‘weak pussyfooting ‘deadhead’ who ‘had been ‘dead’ mentally for ten years.’”<sup>80</sup> Greenfield also called the work of other attorneys “‘garbage,’ demonstrating ‘legal incompetence,’ and involving ‘ludicrous additional time and expenses.’”<sup>81</sup>

On appeal to the district court, Greenfield’s appellate brief failed to grasp the *Dondi* standards as it made reference to the fact that his opposing counsel graduated from a lower-ranked law school than Greenfield’s law school, and also mentioned that Greenfield’s opposing counsel had been fired by a law firm in the past.<sup>82</sup> The district court affirmed the bankruptcy court’s sanctions, as did the Fifth Circuit.<sup>83</sup>

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 289. Some of the overarching standards listed in the opinion include the following types of requirements: “(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client [ . . . ] (C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves. (D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.” *Id.* The standards adopted that were placed in the appendix of the opinion included the Dallas Bar Association’s “Guidelines of Professional Courtesy” and a “Lawyer’s Creed,” which provided specific acts required to maintain civility, several of which are discussed in Part III, Section D, *infra*.

<sup>78</sup> See, e.g., *In re First City Bancorporation of Tex., Inc.*, 270 B.R. 807 (N.D. Tex. 2001).

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

<sup>80</sup> *Id.*

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Greenfield argued his behavior and practices made him more effective as an advocate, as most lawyers argue.<sup>84</sup> The court cited *Dondi*, which rejected the proposition that lawyers must engage in offensive and uncivil behavior to be effective advocates.<sup>85</sup> The court also stated that the court in *Dondi* urged attorneys to recognize their “broader duty to the judicial system that serves both attorney and client.”<sup>86</sup>

South Carolina mandates civility through its oath, which has withstood constitutional attacks on the grounds of vagueness and overbreadth.<sup>87</sup> This civility oath has been relied upon in several cases of discipline, including affirming sanctions for an attorney who personally attacked the opposing lawyer’s daughter and child-rearing abilities, another attorney who questioned whether a party in a zoning dispute had a soul and stated that the same party had no brain, while calling the town leaders “pagans, insane and pigheaded,” and yet another who slapped a defendant during a deposition.<sup>88</sup>

Florida enforces civility through violations of the pre-existing Oath, including the provision that an attorney “[w]ill abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness.”<sup>89</sup> Florida also uses Rule of Professional Conduct 4-8.4 to enforce civility, which prohibits conduct contrary to the administration of justice.<sup>90</sup> “Repeated and substantial violations of the civility provisions” result in discipline, and the “Florida Supreme Court publishes the incivility cases to deter similar conduct in

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<sup>84</sup> *Id.*

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

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

<sup>87</sup> See, e.g., *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 634-35 (S.C. 2011).

<sup>88</sup> *Id.* at 633 (attacking the daughter of opposing counsel in an email); *In re White*, 707 S.E.2d 411 (S.C. 2011) (zoning case); *In re Lovelace*, 716 S.E.2d 919, 920 (S.C. 2011) (slapping case).

<sup>89</sup> *Berry’s Responses*, supra note 14; see *Fla. Bar v. Ratiner*, 46 So.3d 35, 37, 41-2 (Fla. 2010) (disciplining attorney with a suspension of 60 days, public reprimand, and probation for “lambasting” opposing counsel over the deposition table, tearing up the evidence sticker and flicking it at opposing counsel); *Fla. Bar v. Abramson*, 3 So.3d 964, 965 (Fla. 2009) (suspending attorney for 91 days based on attorney’s disrespectful conduct towards judge and prospective jurors).

<sup>90</sup> *Berry’s Responses*, supra note 14; RULES REGULATING THE FLA. BAR, CHAPTER 4, RULES OF PROF’L CONDUCT, 4-8.4(d) (prohibiting the following, “knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic”).

the future.”<sup>91</sup> Specific regulations for enforcing civility can be found in The Rules Regulating The Florida Bar, which are Florida’s ethics rules or rules of professional conduct, the Oath of Admission, the Creed of Professionalism and the Guidelines for Professional Conduct.<sup>92</sup>

Michigan included civility in its rules of professional conduct. Rules 3.5 and 6.5 are sometimes referred to as the civility or courtesy rules.<sup>93</sup> Rule 3.5, regarding impartiality and decorum of the tribunal, states that a lawyer shall not, among other things, engage in undignified or discourteous conduct toward the tribunal.<sup>94</sup> Rule 6.5(a) provides that a “lawyer shall treat with courtesy and respect all persons involved in the legal process,” and a “lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person’s race, gender, or other protected personal characteristic.”<sup>95</sup> The comment to Rule 6.5 reinforces the notion that when a lawyer fails to treat others courteously and civilly, then the public’s respect for the legal system is diminished.<sup>96</sup>

These civility rules came under heavy scrutiny in the Fieger case.<sup>97</sup> In Fieger, plaintiff’s attorney, Geoffrey Fieger, obtained a \$15 million jury verdict in favor of his client in a personal injury case.<sup>98</sup> On appeal, the Court of Appeals ruled that the defendants were entitled to judgment notwithstanding the verdict because of insufficient evidence to find for the plaintiff.<sup>99</sup> The court also held that “Mr. Fieger’s repeated misconduct by itself would have warranted a new trial.”<sup>100</sup> The miscon-

<sup>91</sup> Berry’s Responses, *supra* note 14.

<sup>92</sup> See RULES REGULATING THE FLA. BAR, CHAPTER 4, RULES OF PROF’L CONDUCT, 4-1.1-4-8.6. The Creed of Professionalism includes several commitments, including, but not limited to, “abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy,” and to “respect the time and commitments of others,” available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/82D119A3382C40F185256FFD0072FC8C/\\$FILE/CreedOfProfessionalism.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/82D119A3382C40F185256FFD0072FC8C/$FILE/CreedOfProfessionalism.pdf?OpenElement). The Guidelines for Professional Conduct covers topics such as scheduling, written submissions to courts, communication with adversaries, depositions, and trial conduct and court decorum. The Florida Bar, Professional Practice, Henry Latimer Center for Professionalism, CREED OF PROFESSIONALISM, available at <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/2f2668cdfd7b99e085256b2f006ccd15>.

<sup>93</sup> *Griev. Adm’r v. Fieger*, 719 N.W.2d 123 (Mich. 2006).

<sup>94</sup> MICH. RULES OF PROF’L CONDUCT R. 3.5 (2012).

<sup>95</sup> *Id.*, R. 6.5.

<sup>96</sup> *Id.*, R. 6.5 cmt.

<sup>97</sup> See e.g., *Griev. Adm’r v. Fieger*, 719 N.W.2d 123 (Mich. 2006).

<sup>98</sup> *Id.* at 129.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

duct included, among other things, accusing the defendants and their witnesses of a conspiracy to hide malpractice and claiming defendants altered, destroyed, or suppressed evidence, without any bases in fact to support either of these claims. The court found that Mr. Fieger's conduct "completely tainted the proceedings."<sup>101</sup>

A few days later, Mr. Fieger appeared on his radio program and said the following of the Court of Appeals judges that overturned his verdict, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too."<sup>102</sup> Mr. Fieger then said of his personal injury client, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses."<sup>103</sup>

On his radio show a couple days later, Mr. Fieger made similar remarks, including, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think—what was Hitler's—Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."<sup>104</sup>

The Michigan Supreme Court held that Mr. Fieger's comments violated Rules of Professional Conduct Rules 3.5 and 6.5 regarding civility and courtesy.<sup>105</sup> The Michigan Supreme Court also found that these two rules did not infringe Mr. Fieger's First Amendment rights, and that they were constitutional.<sup>106</sup> The Michigan Supreme Court quoted United States Supreme Court Justice Potter Stewart in his concurring opinion in *Sawyer* to demonstrate the aptness of the civility rules: "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards."<sup>107</sup>

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<sup>101</sup> Id. (citing *Badalamenti v. William Beaumont Hosp.*, 602 N.W.2d 854 (Mich. Ct. App. 1999)).

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id. at 138.

<sup>106</sup> Id.

<sup>107</sup> Id. (citing *In re Sawyer* 360 U.S. 622, 646 (1959)). Subsequently, a federal district court granted judgment in favor of Mr. Fieger, holding that the civility rules were unconstitutional under the First and Fourteenth Amendments based on their vagueness and overbreadth. *Fieger v. Mich. Sup. Ct.*, 2006 U.S. Dist. LEXIS 48266 (E.D. Mich. 2006). The Sixth Circuit then

The Michigan civility rules also help to prevent creating a legal system that involves attorneys personally attacking the judges, and judges responding to the attorneys in kind to defend themselves, because the civility rules serve as the judge's protection.<sup>108</sup> Michigan has judicial elections.<sup>109</sup> If Michigan's civility rules embodied in its rules of professional conduct, Rule 3.5 ("which prohibits undignified or discourteous conduct toward the tribunal") and Rule 6.5 ("which requires a lawyer to treat with courtesy and respect all persons involved in the legal process"), were not in place, then judges would feel compelled to defend themselves before the electorate.<sup>110</sup> The Michigan Supreme Court stated that if those civility rules did not exist and judges were required to engage in self-defense, then the result would be a "a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."<sup>111</sup>

Thus, without the civility rules in Michigan, lawyers would attempt to attack and undermine judges to help remove judges they did not want, and judges would be forced to respond by, potentially, discussing the flaws of the judgment, competence and/or character of the attacking attorney.<sup>112</sup> The judge's response might seriously affect the lawyer's ability to make a living if current or potential clients (or even other judges) believed the judge's comments.<sup>113</sup> Also, if the public sees attorneys tearing down those charged with rendering fair and just decisions – the judiciary – and it also witnesses the judiciary "firing back" at the attorneys to protect themselves, then the "profession that is already marked by declining standards of behavior would be subject to further erosion, and [. . .] public regard for the system of law would inevitably be diminished over time."<sup>114</sup>

Arizona enforces civility through a rule "that prohibits 'unprofessional conduct,' which is defined as 'substantial or repeated violations of

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vacated the federal district court's judgment finding that Mr. Fieger failed to show an injury in fact that would subject him to future harm. *Fieger v. Mich. Sup. Ct.*, 2009 U.S. App. LEXIS 13253 (6th Cir. 2009).

<sup>108</sup> See *Fieger*, 719 N.W.2d at 128, 144-45.

<sup>109</sup> *Id.* at 144.

<sup>110</sup> See *id.* at 128, 144-45.

<sup>111</sup> *Id.* at 144.

<sup>112</sup> *Id.* at 145.

<sup>113</sup> See *id.*

<sup>114</sup> *Id.*

the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism."<sup>115</sup>

The Northern District of Texas and the state bars of Florida, South Carolina, Michigan and Arizona are at the forefront of requiring civility, but they remain in the minority, as the majority of jurisdictions do not yet require civility.

D. *Why Voluntary Civility Codes and Non-Enforced Civility Oaths Fall Short*

Despite voluntary civility codes and the civility oaths that are not enforced, incivility remains a blatant and pervasive issue in the legal profession.<sup>116</sup> When conduct is merely voluntary, as civility codes generally are, then one may choose not to follow those recommendations without any personal repercussions. If the legal profession truly wants to reduce incivility, then it should require civility from its attorneys and penalize those attorneys who fail to act civilly.

The civility oaths and guidelines, according to some, are not enough.<sup>117</sup> Mr. Walker of the Utah Bar states:

I do not feel civility or professionalism oaths or guidelines that are voluntary are sufficient to respond to the lack of civility because the elimination/reduction of incivility is a culture change for a significant number of attorneys. This culture change is an awareness that the adversarial process and zealous representation does not preclude civil-

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<sup>115</sup> ARIZ. RULES OF THE SUP. CT. R. 41(g) (2012); see *In re Ziman*, 847 P.2d 106, 109-110 (Ariz. 1993) (suspending attorney for, among other things, "making an offensive and profane comment to the arbitrator" and requiring supervision by a practice monitor for one year and additional hours of continuing legal education); *In re Piatt*, 951 P.2d 889, 890-91 (Ariz. 1997) (sanctioning an attorney with public censure and a one-year period of probation during which the attorney would participate in the State Bar's membership assistance program and complete a counseling program for sexually harassing two domestic relations clients by making sexually oriented comments and soliciting sexual favors in exchange for continued legal service). The Oath of Admission to the Bar requires that an attorney, among other things, "abstain from all offensive conduct" and "maintain the respect due to courts of justice and judicial officers." The Lawyer's Creed of Professionalism consists of the obligations of attorneys with respect to their clients, the opposing party and their counsel, the courts and other tribunals, and to the public and our system of justice. State Bar of Arizona, A Lawyer's Creed of Professionalism of State Bar of Arizona, For Lawyers, Lawyer Regulation, LAWYER'S CREED OF PROFESSIONALISM, available at <http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism> (last visited Aug. 5, 2012). Part III, section D includes some of Arizona's creed of professionalism in the suggested mandatory civility rules.

<sup>116</sup> See, e.g., *supra* note 3; Smith, *supra* note 4; Filisko, *supra* note 4.

<sup>117</sup> See Berry's Responses, *supra* note 14.

ity; and that in fact civility makes an attorney a more effective and efficient advocate. If you are changing a culture, in my opinion, you need more than voluntary oaths or guidelines; at minimum you need education through continuing legal courses and at maximum you may need mechanisms of enforcement.<sup>118</sup>

This article has set forth the significant benefits of civility, and the legal profession has witnessed the ill effects of incivility. Civility by attorneys is a critical component of the efficiency and public image of the legal system. Mandatory civility is the only way to ensure optimal civility in the legal profession, which will, in turn, enhance the profession.

The modern day rules of professional conduct themselves were created in response to “rising discontent [by members of the bar] over the 1908 Canons of Ethics,” which was a codification of the unwritten rules of the profession that could “inform the new (and ever more diverse) members of the bar [ . . . ] of their ethical obligations.”<sup>119</sup> The ABA’s Canons of Ethics were not mandatory.<sup>120</sup> Certain rules of professional conduct were mandatory, and they required “the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”<sup>121</sup> Now, many in the legal profession and the public are discontent with civility; the rules of professional conduct fail to mandate the type of conduct expected and necessary from attorneys to maintain an efficient and reliable legal system.<sup>122</sup> Mandatory civility is the next logical step.<sup>123</sup>

### III. MAKING CIVILITY MANDATORY

Based on the benefits of civility and the issues the legal profession faces with incivility, some in the legal profession believe civility should be mandatory.<sup>124</sup> For example, Mr. Berry of the Florida Bar contends,

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<sup>118</sup> Walker’s Responses, *supra* note 16.

<sup>119</sup> Campbell, *supra* note 4, at 132, 135. Prior to the Canons of Ethics, most states did not have written rules or guidelines on ethics. *Id.* at 129.

<sup>120</sup> *Id.* at 133.

<sup>121</sup> *Id.* at 135 (citing the MODEL CODE OF PROF’L RESPONSIBILITY, preliminary statement (1969)).

<sup>122</sup> See Campbell, *supra* note 4.

<sup>123</sup> See Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, 22 UTAH B.J. 36, 37 (2009), available at [http://www.utahbar.org/barjournal/pdf/2009\\_may\\_june.pdf](http://www.utahbar.org/barjournal/pdf/2009_may_june.pdf).

<sup>124</sup> Berry’s Responses, *supra* note 14; Walker’s Responses, *supra* note 16; Coggiola’s Responses, *supra* note 16.

“Mandatory civility is necessary for the efficient and effective administration of justice.”<sup>125</sup> Mr. Walker of the Utah Bar comments, “I personally think civility should be mandatory because it makes an attorney a more effective and efficient advocate; and as importantly, the benefits of mandatory civility are the improvement of the practice of law overall and the public’s perception of the legal profession.”<sup>126</sup> Maret Vessella, Chief Bar Counsel for the State Bar of Arizona, asserts that enforcing civility rules “instills public confidence in the profession and the system of justice. The rules set the standards and enforcement lets all lawyers understand what is expected of them and may deter conduct that would fall short.”<sup>127</sup>

### A. *Sanctions*

This article argues that civility should be mandatory, i.e., compulsory, obligatory, required. In other words, if an attorney fails to act with civility, then he/she can be sanctioned or penalized. Each alleged violation of civility would be judged on a case-by-case basis. Thus, as with alleged violations of the rules of professional conduct, there might be no punishment in a particular case, or the sanction could fall somewhere within a whole range of punishment.<sup>128</sup>

As an initial matter, as one commentator noted, the judiciary and the bar have long possessed extensive powers to punish attorneys for disrespect and other forms of incivility.<sup>129</sup> For instance, the Rules Regulating the Florida Bar state:

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<sup>125</sup> Berry’s Responses, *supra* note 14.

<sup>126</sup> Walker’s Responses, *supra* note 16.

<sup>127</sup> Vessella’s Responses, *supra* note 21.

<sup>128</sup> See, e.g., *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633 (S.C. 2011) (involving the case where the attorney attacked the daughter of opposing counsel in an email, the sanction included the issuance of a private letter of caution and the publishing of that letter in the format of the legal opinion to give guidance to other members of the bar); *In re White*, 707 S.E. 411 (S.C. 2011) (suspending attorney for 90 days based on comments in a zoning dispute where attorney questioned whether a party had a soul and called town leaders “pagans” and “pig-headed”); *In re Lovelace*, 716 S.E.2d 919, 920 (S.C. 2011) (suspending an attorney 90 days and requiring anger management classes for slapping a defendant in a deposition).

<sup>129</sup> *Mashburn*, *supra* note 20, at 115; see also, e.g., *Dondi Properties Corp. v. Commerce Sav. Loan Ass’n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (stating a district federal court can adopt standards for attorney conduct); *Aspen Servs., Inc. v. IT Corp.*, 583 N.W.2d 849 (Wis. Ct. App. 1998) (providing that the state court has power to promote civility); RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-1.1, 3-1.2 (recognizing that a “license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause”).



The Supreme Court of Florida has the inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, to discipline for cause attorneys admitted to practice law in Florida, and to revoke the license of every lawyer whose unfitness to practice law has been duly established.<sup>130</sup>

Thus, the judiciary and the bar can implement and enforce mandatory civility rules. In particular, state bars can require mandatory civility through either a code of civility or by adding civility rules to their professional rules of conduct. Once a state bar requires a certain standard of behavior from all of its attorneys, then state and federal court judges sitting in that state can enforce those civility rules.

Attorney discipline can occur by: private reprimand, where the discipline is unknown to the public; probation, where a lawyer may continue to practice law under certain conditions; public reprimand or censure, where the lawyer's violation and the jurisdiction's punishment are made known to the public; suspension, where the attorney is not allowed to practice law for a specified amount of time; or finally disbarment, which can be either temporary or permanent.<sup>131</sup>

Other sanctions and remedies which may be imposed include, but are not limited to: restitution, fines, requiring the re-taking of the bar examination or professional responsibility examination, and requiring that the lawyer attend continuing education courses.<sup>132</sup> A bar can also mandate that a lawyer attend certain classes or programs to address civility issues, such as rehabilitative programs, including Ethics School, Stress (formerly known as Anger) Management, Lawyer Assistance (drug/alcohol rehabilitation), and Law Office Management.<sup>133</sup>

Enforcement of civility could be conducted in the same manner as enforcement of the rules of professional conduct. Each jurisdiction has

<sup>130</sup> RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-1.1, 3-1; see MICH. REVISED JUDICATURE ACT 236 OF 1961 § 600.904 (2012) (stating that the Michigan Supreme Court has "the power [. . .] to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, [. . .] [and] the discipline, suspension, and disbarment of its members for misconduct").

<sup>131</sup> FLA. STATE BAR STANDARDS FOR LAWYER SANCTIONS, SECTIONS 2.1-2.8; see The Florida Bar's Board of Governors, Florida's Standards for Imposing Lawyer Sanctions, Lack of Diligence, § 2.8, 17 (Nov. 2000), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/\\$FILE/lawyersanctions03.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/lawyersanctions03.pdf?OpenElement).

<sup>132</sup> FLA. STATE BAR STANDARDS FOR LAWYER SANCTIONS, SECTIONS 2.1-2.8.

<sup>133</sup> Berry's Responses, *supra* note 14; RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-1.1, 3-1.2.

a disciplinary mechanism that enforces the jurisdiction's rules of professional conduct, which includes investigating alleged violations of its rules of professional conduct, adjudicating those claims, and imposing sanctions if applicable.<sup>134</sup> For example, the Florida Bar bestows to several entities (i.e., a board of governors, grievance committees, and referees) the jurisdiction and powers necessary "to conduct the proper and speedy disposition of any investigation or cause."<sup>135</sup> The Supreme Court of Florida supervises the disciplinary entities, and it can review decisions made by the referee (after a grievance committee or the board of governors finds probable cause of misconduct) if the referee's decision is appealed, and the Supreme Court "shall review all reports and judgments of referees recommending probation, public reprimand, suspension, disbarment, or resignation pending disciplinary proceedings."<sup>136</sup>

Assume a mandatory civility rule that requires an attorney to be courteous and civil, both in oral and in written communication, and a hotly contested child custody case, during which an attorney calls his opposing counsel a jackass, while on break in a deposition. The attorney then quickly apologizes and the deposition proceeds. If this were an isolated incident – name-calling of opposing counsel – and the attorney had no record of being disciplined in the past and cooperated thereafter with any disciplinary proceeding, assuming this was even prosecuted by a disciplinary agency, then it is unlikely that an attorney would be sanctioned for this conduct beyond a private reprimand, if at all. If however, the attorney was making racial, gender or ethnic slurs to opposing counsel over the course of several months, failed to cooperate with the disciplinary proceeding and remained devoid of remorse, then a fine, public reprimand or even probation or suspension might be in order.

Another possibility may be an instance when an attorney says something rude or disrespectful because, for example, either the attorney has just lost a loved one or the attorney has a tendency to become belligerent after drinking alcohol. The appropriate remedy in either of those scenarios may not be a fine or public reprimand, but instead, ordering

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<sup>134</sup> MARGARET RAYMOND, *THE LAW AND ETHICS OF LAW PRACTICE*, 10 (West Publishing Co. 2009).

<sup>135</sup> RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-3.1, 3-7.6, 3-7.7; cf., *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 636 (S.C. 2011) (stating that the South Carolina Supreme Court "has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record," but the findings of subordinate disciplinary agencies are entitled to great weight in deciding on the appropriate sanction).

<sup>136</sup> RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-3.1, 3-7.6, 3-7.7; cf., *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 636 (S.C. 2011) (stating that the South Carolina Supreme Court "has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record," but the findings of subordinate disciplinary agencies are entitled to great weight in deciding on the appropriate sanction).

grief counseling or a substance abuse program, respectively, for the troubled attorney. Disbarment would be an unlikely sanction for a civility infraction, although it would still be available for a state bar to employ. Thus, the potential of penalties and sanctions based on uncivil conduct would deter incivility on behalf of attorneys, although each incivility complaint may not warrant sanctions or penalties.

### B. *Issue of Subjectivity*

Opponents of mandatory civility may argue that the general rule in the above hypothetical, where the rule requires an attorney shall be courteous and civil, both in oral and in written communication, demonstrates how much subjectivity is involved in making decisions regarding incivility. Subjective decisions, however, must be made on enforcement of the rules of professional conduct already. For example, jurisdictions have either the exact or an equivalent rule of the ABA's Model Rule of Professional Conduct 1.3 – "Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>137</sup> How does a court measure diligence? What is reasonable promptness? If the client tells her lawyer that she wants a letter sent to opposing counsel within the next two weeks regarding a deposition date for a third party witness, and the attorney does not send it until four weeks later, has there been a violation of reasonable promptness? Does it matter whether the attorney was in trial when the client made the request to the attorney to send the letter? Does it matter whether the client was not adversely affected by the letter being sent out four weeks after the request? As always, the decision depends on the situation and an evaluation of the facts on a case-by-case basis, despite the arguably imprecise language of the rule.

Similarly, Rule 1.4 of the ABA's Model Rules of Professional Conduct provides, in part, that a lawyer shall "keep the client reasonably informed about the status of the matter."<sup>138</sup> Does this mean an attorney must call a client every week about a matter, every other week, every other day, every month? What does the attorney need to disclose – none, some, or all of the discovery disputes with opposing counsel?

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<sup>137</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012). The states each have a professional code of conduct, many of which are patterned after or nearly identical to, at least in parts, the ABA Model Rules of Professional Conduct ("ABA Model Rules" or "Model Rules"). RAYMOND, *supra* note 134, at 11.

<sup>138</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4. (2012).

Does the attorney need to inform the client about none, some, or all of the fact gathering efforts by the attorney (e.g., update the client on documents being reviewed and information found in those documents or inform the client on witnesses being interviewed and their knowledge of the issues in the matter)? Again, it depends on a number of factors, which may include, among other things, the type of case at issue (e.g., a multi-million toxic tort case, probate, child custody, etc.) and the particular client involved.

Notably, as set forth above, the civility requirement that an attorney shall be courteous and civil, both in oral and in written communication, is identical to the civility language required in South Carolina, and that requirement was upheld as constitutional and appropriate to curtail behavior beyond civil communication.<sup>139</sup>

### C. *Guidance through Comments to Mandatory Civility Rules*

Despite potentially vague ethical requirements, the rules of professional conduct exist in the states and serve their proper purpose, which is to regulate certain attorney conduct. The rules of professional conduct include comments that are not binding, but the comments provide guidance for the observance and application of the ethics rules.<sup>140</sup> Mandatory civility rules could also use comments to further provide guidance to both attorneys on acceptable behavior and to courts on how to rule on potential incivility infractions.

In *Dondi*, the court adopted the Dallas Bar Association's "Guidelines of Professional Courtesy" and a "Lawyer's Creed" to curb the "observe[d] patterns of behavior that forebode ill for our system of justice," which provided specific acts required to maintain civility.<sup>141</sup> In particular, under the Dallas Bar Association's Guidelines of Professional Courtesy, there is a general statement of the rule and discussion expanding on the rule, much like a comment in the rules of professional conduct. For example, under the heading "DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS," the general statement provides in part:

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<sup>139</sup> See *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 636 (S.C. 2011).

<sup>140</sup> See, e.g., RULES REGULATING THE FLA. BAR, CHAPTER 4, RULES OF PROF'L CONDUCT, 4-1.1-4-8.6. (2012).

<sup>141</sup> *Dondi Properties Corp. v. Commerce Sav. Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

Scheduling Lawyers should, when practical, consult with opposing counsel before scheduling hearings and depositions in a good faith attempt to avoid scheduling conflicts.<sup>142</sup>

The discussion for that section also provides the following:

(a) General Guidelines

(1) When scheduling hearings and depositions, lawyers should communicate with the opposing counsel in an attempt to schedule them at a mutually agreeable time. This practice will avoid unnecessary delays, expense to clients, and stress to lawyers and their secretaries in the management of the calendars and practice.

(2) If a request is made to clear time for a hearing or deposition, the lawyer to whom the request is made should confirm that the time is available or advise of a conflict within a reasonable time (preferably the same business day, but in any event before the end of the following business day).

(3) Conflicts should be indicated only when they actually exist and the requested time is not available. The courtesy requested by this guideline should not be used for the purpose of obtaining delay or any unfair advantage.

(b) Exceptions to General Guidelines

(1) A lawyer who has attempted to comply with this rule is justified in setting a hearing or deposition without agreement from opposing counsel if opposing counsel fails or refuses promptly to accept or reject a time offered for hearing or deposition.

(2) If opposing counsel raises an unreasonable number of calendar conflicts, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(3) If opposing counsel has consistently failed to comply with this guideline, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(4) When an action involves so many lawyers that compliance with this guideline appears to be impractical, a lawyer should still make a good faith attempt to comply with this guideline

(5) In cases involving extraordinary remedies where time associated with scheduling agreements could cause damage or harm to a client's case, then a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.<sup>143</sup>

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<sup>142</sup> DALLAS BAR ASS'N GUIDELINES OF PROF'L COURTESY, DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS.

<sup>143</sup> *Id.*

Thus, the general statement provides the rule to follow, and the discussion provides more explanation about the rule. This allows an attorney in the Northern District of Texas, where civility is mandatory, to obtain sufficient notice as to what behavior is expected in order to avoid sanction or penalty.<sup>144</sup>

#### D. *Suggested Mandatory Civility Rules*

The following are a set of suggested mandatory civility rules. They include components of several different civility codes and are meant to provide a basic set of specific civility rules and comments to facilitate a discussion on how a mandatory civility code would work. These suggested standards also align with the ten categories of civility that are seen throughout the numerous civility codes found across the country.<sup>145</sup> The suggested mandatory civility rules include the following:

1. I shall be courteous and civil, both in oral and in written communication.<sup>146</sup>

Comment: A lawyer shall avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He/she shall abstain from any allusion to personal peculiarities and idiosyncrasies of opposing counsel.<sup>147</sup> Derogatory racial, gender, or ethnic comments are unacceptable.

2. I shall advise my clients that civility, courtesy, and fair dealing are expected.<sup>148</sup>

Comment: Civility, courtesy, and fair dealing are tools for effective advocacy and not signs of weakness. Clients have no right to

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<sup>144</sup> Id.

<sup>145</sup> Campbell, *supra* note 4, at 109.

<sup>146</sup> A Lawyer's Creed of Professionalism of State Bar of Arizona, *supra* note 127.

<sup>147</sup> *Dondi Properties Corp. v. Commerce Sav. Loan Ass'n*, 121 F.R.D. 284, 296 (N.D. Tex. 1988) (citing THE AMERICAN COLLEGE OF TRIAL LAWYERS' CODE OF TRIAL CONDUCT (rev. 1987)); see also *Point Blank Solutions, Inc. v. Toyobo America, Inc.* Slip Copy, 2011 WL 742657 (S.D. Fla. 2011) (providing that "allegations of bad faith against opposing counsel, in addition to being in poor taste, are not helpful in aiding the Court's adjudication of disputed issues"); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE, the Art of Persuading Judges 34-5 (2008) (advocating that attorneys should "[c]ultivate a tone of civility" and avoid attacking opposing counsel as it "undercuts the persuasive force of any legal argument") (quoting Morey L. Sear, Briefing in the United States District Court for the Eastern District of Louisiana, 70 TUL. L.REV. 207, 224 (1995)).

<sup>148</sup> UTAH, ARTICLE 3, STANDARDS OF PROFESSIONALISM AND CIVILITY, R. 14-301.

demand that lawyers abuse anyone or engage in offensive or improper conduct.<sup>149</sup>

3. I shall not knowingly make statements of fact or of law that are untrue.<sup>150</sup>

Comment: Being honest means that an attorney shall never misrepresent or misquote facts or authorities, and this applies during meetings, discovery dealings, depositions, hearings before the court, and trial.<sup>151</sup>

4. I shall, when practical, consult with opposing counsel before scheduling hearings and depositions in a good faith attempt to avoid scheduling conflicts.<sup>152</sup>

Comment:

(1) When scheduling hearings and depositions, lawyers must communicate with the opposing counsel in an attempt to schedule them at a mutually agreeable time. This practice will avoid unnecessary delays, expense to clients, and stress to lawyers and their secretaries in the management of the calendars and practice.

(2) If a request is made to clear time for a hearing or deposition, the lawyer to whom the request is made shall confirm that the time is available or advise of a conflict within a reasonable time (preferably the same business day, but in any event before the end of the following business day).

(3) Conflicts should be indicated only when they actually exist and the requested time is not available. The courtesy requested by this guideline shall not be used for the purpose of obtaining delay or any unfair advantage.

(a) Exceptions to General Guidelines

(1) A lawyer who has attempted to comply with this rule is justified in setting a hearing or deposition without agreement from opposing counsel if opposing counsel fails or refuses promptly to accept or reject a time offered for hearing or deposition.

(2) If opposing counsel raises an unreasonable number of calendar conflicts, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(3) If opposing counsel has consistently failed to comply with this guideline, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

<sup>149</sup> *Id.*

<sup>150</sup> A Lawyer's Creed of Professionalism of State Bar of Arizona, *supra* note 146.

<sup>151</sup> See ABOTA, *supra* note 58.

<sup>152</sup> DALLAS BAR ASS'N GUIDELINES OF PROF'L COURTESY, DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS.

(4) When an action involves so many lawyers that compliance with this guideline appears to be impractical, a lawyer shall still make a good faith attempt to comply with this guideline.

(5) In cases involving extraordinary remedies where time associated with scheduling agreements could cause damage or harm to a client's case, then a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.<sup>153</sup>

When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.<sup>154</sup>

5. I shall grant reasonable extensions of time to opposing counsel where such extension will not have a material, adverse effect on the rights of the client.<sup>155</sup>

Comment:

(a) In the practice of law there can be multiple deadlines for an attorney, and additional time is often required to complete a given task.

(b) A lawyer shall readily grant any reasonable request for an extension of time as an accommodation to opposing counsel who, because of a busy trial schedule, personal emergency or heavy work load, needs additional time to prepare a response or comply with a legal requirement.

(c) No lawyer shall request an extension of time solely for the purpose of delay or to obtain any unfair advantage.

(d) Counsel shall make every effort to honor previously scheduled vacations of opposing counsel which dates have been established in good faith.<sup>156</sup>

6. I shall be punctual and prepared for all meetings, depositions, court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.<sup>157</sup>
7. I shall not utilize litigation or any other course of conduct to harass the opposing party.<sup>158</sup>

<sup>153</sup> Id.

<sup>154</sup> ABOTA, *supra* note 58.

<sup>155</sup> DALLAS BAR ASS'N GUIDELINES OF PROF'L COURTESY, DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS.

<sup>156</sup> Id.

<sup>157</sup> See, e.g., ABOTA, *supra* note 58.

<sup>158</sup> A Lawyer's Creed of Professionalism of State Bar of Arizona, *supra* note 115.



8. I shall not engage in excessive and abusive discovery, and I shall comply with all reasonable discovery requests.<sup>159</sup>  
Comment: This includes never using any form of discovery scheduling as a means of harassment.<sup>160</sup>
9. I shall not utilize delay tactics.<sup>161</sup>  
Comment: I shall readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.<sup>162</sup>
10. In depositions and other proceedings, and in negotiations, I shall conduct myself with dignity, avoid making groundless objections, and not be rude or disrespectful.<sup>163</sup>  
Comment: Never engage in conduct which would not be appropriate in the presence of a judge. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.<sup>164</sup> "Speaking objections" during depositions designed to coach a witness are impermissible.<sup>165</sup>
11. I shall not serve motions and pleadings on the other party or the party's counsel at such a time or in such a manner as will unfairly limit the other party's opportunity to respond.<sup>166</sup>
12. In business transactions I shall not quarrel over matters of form or style but will concentrate on matters of substance and content.<sup>167</sup>
13. I shall identify clearly, for other counsel or parties, all changes that I have made in documents submitted to me for review.<sup>168</sup>
14. I shall adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.<sup>169</sup>
15. When called on to do so, I shall commit oral understandings to writing accurately and completely, provide other counsel with a

<sup>159</sup> *Id.*

<sup>160</sup> ABOTA, *supra* note 58.

<sup>161</sup> A Lawyer's Creed of Professionalism of State Bar of Arizona, *supra* note 115.

<sup>162</sup> DALLAS BAR ASS'N GUIDELINES OF PROF'L COURTESY, DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS.

<sup>163</sup> A Lawyer's Creed of Professionalism of State Bar of Arizona, *supra* note 115.

<sup>164</sup> ABOTA, *supra* note 59.

<sup>165</sup> UTAH, ARTICLE 3, STANDARDS OF PROFESSIONALISM AND CIVILITY, RULE 14-301(18).

<sup>166</sup> A Lawyer's Creed of Professionalism of State Bar of Arizona, *supra* note 115.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> ABOTA, *supra* note 58.

- copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.<sup>170</sup>
16. I shall advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so.<sup>171</sup>
  17. I shall never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.<sup>172</sup>

Requiring “civility” and nothing more invites arguments of vagueness and overbreadth, as well as due process and fair notice concerns, as attorneys sanctioned for incivility may claim that there was no notice of the type of behavior that constituted their incivility. The suggested mandatory civility rules above include tangible rules that provide guidance to attorneys and courts on the behavior required by attorneys. Although some of these suggested rules relate to litigation, many are also applicable to non-litigation attorneys, such as transactional attorneys.

A state bar that does not yet have a civility or professionalism code could adopt a code that it prefers instead, such as ABOTA’s, Dondi’s standards, Arizona’s Lawyer’s Creed of Professionalism, these suggested rules, any other suggested rules, or some combination of different codes, but, in the end, a state bar should adopt some civility standards and enforce those standards.

Simply having mandatory civility rules, however, is not enough. To ensure that the civility rules are understood and enforced, several steps need to be taken, including the following: (1) educating law students about civility and what it requires; (2) providing mandatory classes to attorneys on civility, including what that jurisdiction requires; (3) educating judges about their ability to sanction attorneys for uncivil conduct and what civility requires; and (4) consistent enforcement of the civility rules by judges.

### 1. Civility Training Must Start in Law School

Law students must be taught during law school about civility, its importance, and how they should conduct themselves as attorneys.<sup>173</sup> A

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See Hung, *supra* note 18, at 1156-58; DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD* (2d ed. 1998) (providing “coverage of all the basic

law school professor can create an environment of learning that is respectful, demanding, and civil, through the use of the Socratic method.<sup>174</sup> Law school professors must also recognize their duty to law students to model how an attorney should interact with others, which includes refraining from name-calling and humiliating students, speaking to students and others with respect and dignity, and being punctual and prepared at all times.

## 2. Required Professionalism/Civility Courses For Lawyers

Many states already require a professionalism or civility course for lawyers.<sup>175</sup> The purpose of these courses, under a mandatory civility standard, would be to reiterate the importance of civility, set forth the particular standards required for attorneys in each jurisdiction, and help lawyers keep abreast of new requirements, if any, of civility. Attorneys would thus receive education on civility in law school, and then be put on notice of the behavior required as officers of the court and members of their particular bar, which would aid in alleviating due process and fair notice concerns.<sup>176</sup>

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professional responsibility issues that would be part of a specialized course in the subject, as well as materials for integrating such issues into the core curriculum”).

<sup>174</sup> See Verna E. Monson & Neil W. Hamilton, *Entering Law Students’ Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 *J. LEGAL PROF.* 385, 414-15 (2011).

<sup>175</sup> Benjamin H. Barton, *The ABA, The Rules, And Professionalism: The Mechanics Of Self-Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons*, 83 *N.C. L. REV.* 411, n.18 (Jan. 2005) (stating “[a]t least forty states require every lawyer to regularly attend some type of professionalism CLE”).

<sup>176</sup> Although it would be difficult to enforce, senior attorneys of a bar mentoring junior attorneys of a bar about what civility requires and what civility looks like in their particular jurisdiction would also greatly benefit the legal profession. Junior attorneys could be strongly encouraged by the courts, their firms, and colleagues to join an organization such as an American Inn of Court, which is dedicated to promoting professionalism and ethics in the legal profession. American Inn of Court can include judges, attorneys, and sometimes law professors and law students. See American Inns of Court, *Get to Know the American Inns of Court*, <http://home.innsofcourt.org/about-us/get-to-know-the-american-inns-of-court.aspx> (last visited Aug. 10, 2012). Mentoring is a key element of an Inn of Court, which would create an ideal environment for a junior attorney to receive mentoring on civility from senior members of the bar in one’s geographic area. See American Inns of Court, *Mentoring*, <http://home.innsofcourt.org/for-members/future-members/mentoring.aspx> (last visited Aug. 8, 2012).

### 3. Educate Judges About Civility Requirements and Their Ability to Sanction Attorneys for Uncivil Conduct

Judges, just like attorneys, must be made aware of what constitutes civil and uncivil conduct for purposes of enforcement. Judges must also be informed of their power to sanction attorneys for uncivil conduct. The bar or its disciplinary agencies could fulfill these requirements.

### 4. Consistent Enforcement of the Civility Codes by Judges

Judges must enforce the civility rules in a consistent manner, meaning conduct that falls outside of the civility requirements must be sanctioned, if appropriate, based on the case, regardless of who is failing to act with civility.<sup>177</sup> This responsibility clearly lies with the judiciary which is required to enforce laws every day in a consistent manner. If attorneys or the public believe judges cannot enforce a new set of rules consistently, then the legal system itself would collapse.

There are clear cases of when uncivil conduct has occurred – e.g., slapping a witness or opposing counsel during a deposition. However, close questions could be determined by case law in each jurisdiction.<sup>178</sup> A situation involving a close question would likely warrant less of a sanction, if any, than a more obvious violation of a civility rule. Also, if an attorney is in doubt as to whether his potential conduct may violate a mandatory civility rule, then she can decide to refrain from that conduct and choose a more civil approach, which will further the interests of the profession and the administration of justice. For example, an attorney could refrain from calling opposing counsel a name during a deposition and instead communicate the substantive reason(s) why the attorney is frustrated with opposing counsel, which might help make the deposition proceed more efficiently or at least it may help avoid unnecessary bickering or posturing on the record, thus shortening the length and (consequently) cost of the deposition. As Benjamin Franklin once said, “Remember not only to say the right thing in the right place, but far

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<sup>177</sup> One commentator has noted that “[j]udges have been surprisingly reluctant to sanction lawyers who violate discovery rules.” Mashburn, *supra* note 64, at 705-06. Judges, when given the opportunity, would need to sanction attorneys to help make the civility rules effective.

<sup>178</sup> Campbell, *supra* note 4, at 102.

more difficult still, to leave unsaid the wrong thing at the tempting moment.”<sup>179</sup>

#### IV. ARGUMENTS AGAINST CIVILITY REQUIREMENTS AND RESPONSES TO THOSE ARGUMENTS

Despite the need for mandatory civility, some legal scholars argue not only against mandatory civility, but also against civility codes that are used merely as guidelines.<sup>180</sup> This section discusses the arguments against mandatory civility and responds to each.

##### A. *Civility Inhibits Zealous Advocacy*

One of the more common arguments against mandating civility is that an attorney’s “ethical duties of competency and zealous representation may compel lawyers to engage in behavior or to speak in a manner others find disrespectful or uncivil.”<sup>181</sup> One legal commentator argues that the ethical duty to advocate zealously “may be inconsistent with the obligation to cooperate and to forego certain advantages that may arise in the course of litigation.”<sup>182</sup> An attorney accused of incivility may argue that the conduct at issue may be uncivil to the accuser, but zealous advocacy to the accused.<sup>183</sup>

As an initial matter, in response to the zealous advocacy argument, zealous advocacy should not be used as a shield for uncivil conduct.<sup>184</sup> Second, civility does not hinder zealous advocacy, but instead it can increase zealous advocacy. Courteous conduct “does not reflect a lack of zeal in advancing [the client’s] interests, but rather is more likely to successfully advance their interests.”<sup>185</sup> For example, if an attorney resists every discovery request by objecting to each of them without providing any substantive response or producing any documents, then that

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<sup>179</sup> JAMES C. REES, *GEORGE WASHINGTON’S LEADERSHIP LESSONS: WHAT THE FATHER OF OUR COUNTRY CAN TEACH US ABOUT EFFECTIVE LEADERSHIP AND CHARACTER* § 5 (John Wiley & Son’s, Inc., 2007) (quoting Benjamin Franklin).

<sup>180</sup> See, e.g., Mashburn, *supra* note 64, at 703-08.

<sup>181</sup> Mashburn, *supra* note 20, at 1193.

<sup>182</sup> Campbell, *supra* note 4, at 107.

<sup>183</sup> *Id.* at 143.

<sup>184</sup> *Thomas v. Las Vegas*, 127 P.3d 1057, 1067 (Nev. 2006) (stating that although “[z]ealous advocacy is the cornerstone of good lawyering and the bedrock of a just legal system[. . .] zeal cannot give way to unprofessionalism, noncompliance with court rules, or, most importantly, to violations of the ethical duties of candor to the courts and to opposing counsel”).

<sup>185</sup> Campbell, *supra* note 4, at 113 (citing *PRINCIPLES OF PROFESSIONALISM FOR VA. LAWYERS*, PRINC. 2).

could very well lead to motions to compel that in effect increase the cost of litigation. Also, as over 90% of all cases settle, and attorneys oftentimes serve as the chief negotiators for their respective clients, settlement negotiations may be more difficult and time-consuming when the attorneys are personally at odds with each other, thus potentially making the negotiation process more expensive for the client. Even more importantly, failing to act civilly may lead to decreased credibility with the judge or jury, which may result in less favorable outcomes for the uncivil attorney's clients. As one Court noted, "Rambo" tactics have brought disrepute upon attorneys and the legal system.<sup>186</sup>

The highest form of zealous advocacy embodies civility; it is not devoid of civility. The ABA Model Rules of Professional Conduct (the "ABA Model Rules") illustrate this point. One of the basic principles underlying the ABA Model Rules is that a lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."<sup>187</sup> Furthermore, under the comments for Model Rule 1.3, regarding diligence and promptness, the Rule states that a "lawyer must also act with [. . .] zeal in advocacy upon the client's behalf," but the "lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."<sup>188</sup>

For example, suppose Attorney Arnold calls Attorney Barry and asks Barry to stipulate to moving the hearing date of a summary judgment motion because Arnold's mother has just passed away, and Arnold will be out of town for a week and a half prior to the hearing attending the funeral and making arrangements for his mother's estate.<sup>189</sup> Arnold would like to file a joint motion or unopposed motion to move the hearing date, but if not, he will be forced to file a motion on his own asking the court to move the hearing date.

Barry knows that this hearing is critical to the case, and if they proceed on the scheduled date, then Arnold will likely be flustered and

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<sup>186</sup> McLeod, Alexander, Powel and Apffel, *P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990) (citing *Geiserman v. MacDonald*, 893 F.2d 787, 792 (5th Cir. 1990) (holding that the lower court did not abuse its discretion in striking [plaintiff's] untimely witness designation and precluding expert testimony).

<sup>187</sup> MODEL RULES OF PROF'L CONDUCT, PREAMBLE (2012) (emphasis added).

<sup>188</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2012).

<sup>189</sup> See RAYMOND, *supra* note 134, at 140 (proposing a similar hypothetical).

less prepared, making it more likely that Barry will have a better outcome than if he agrees to move the hearing date (with permission of the court). Barry also knows that a court is typically more likely to grant a continuance on a hearing when both parties agree to the continuance. On the other hand, if Arnold files the motion on his own, then the court may look unfavorably upon Barry for not agreeing to move the hearing date under the circumstances. Barry will also likely need to file an opposition to the motion if he truly wants to avoid the continuance. Also, there is a chance that the court will grant the continuance even if Barry does not stipulate to moving it. Finally, Barry fully believes his client will not be prejudiced if the summary judgment hearing is heard a few weeks later than currently scheduled.

The ABA Model Rules state that a “lawyer is not bound, [despite his duty to act with zeal in advocacy], to press for every advantage that might be realized for a client.”<sup>190</sup> In the end, it will likely be more beneficial for his client’s interests if the attorney stipulates to the continuance, as the attorney and his client may lose credibility with the judge if they do not. Barry may also need to file an opposition if he decides to oppose to continuance, which will increase costs, and potential negotiations later in the case may be frustrated or they may become more difficult and time-consuming once Barry refuses this simple courtesy to Arnold.

In addition, lawyers must understand that they serve in a number of crucial roles: “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>191</sup> Thus, zealous advocacy must be advanced in consideration of attorneys’ role as officers of the court.<sup>192</sup> The Minnesota State Bar contends that uncivil conduct undermines an effective legal system.<sup>193</sup>

When one examines several of the suggested mandatory civility rules, the argument that behavior in opposition to civility is necessary to

<sup>190</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (2012).

<sup>191</sup> See, e.g., *Att’y Griev. Comm’n of Md. v. Sheinbein*, 812 A.2d 981, 998 (Md. 2002) (quoting *Att’y. Griev. Comm’n v. Alison*, 565 A. 2d 660 (Md. 1989)); see also, Edward D. Re, *The Causes of Popular Dissatisfaction With the Legal Profession*, 68 ST. JOHN’S L. REV. 85, 92-93 (1994) (citing Woodrow Wilson, *The Lawyer and the Community*, 35 A.B.A. REP. 419, 421 (1910)) (asserting that “[o]ur duty [as attorneys] is a much larger thing than the mere advice of private clients . . . we are servants of society, officers of the courts of justice”).

<sup>192</sup> Re, *supra* note 191, at 92.

<sup>193</sup> Campbell, *supra* note 4, at 114.

achieve zealous advocacy becomes unpersuasive. For example, suggested rule number one states:

I will be courteous and civil, both in oral and in written communication.<sup>194</sup>

Comment: A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He should abstain from any allusion to personal peculiarities and idiosyncrasies of opposing counsel.<sup>195</sup> Derogatory racial, gender, or ethnic comments are unacceptable.

Zealous advocacy does not require derogatory racial, gender, or ethnic slurs, or personal attacks on opposing counsel. Indeed, in the South Carolina case discussed above, the lawyer who personally attacked the opposing lawyer's daughter and child-rearing abilities was sanctioned under the civility oath of South Carolina.<sup>196</sup> Rather than spending time on his client's case, the lawyer needed to participate in the disciplinary proceeding that led to a sanction of private reprimand.<sup>197</sup> Zealous advocacy would more likely entail diligence on a client's case than diligence in defending oneself before a disciplinary panel and court for uncivil conduct.

During oral argument on a summary judgment motion, for example, an attorney can make persuasive, passionate arguments without personally attacking opposing counsel. Indeed, up until the time when the court indicates it will hear no more oral argument, an attorney can be relentless in his/her pursuit of a favorable ruling by pointing out the evidence to support his/her client's position and the flaws in the opposing counsel's arguments. Thus, zealous advocacy can be aggressive, robust, and adversarial, while also remaining civil.

As for other suggested mandatory civility rules, rule number five, regarding reasonable extensions of time, was discussed above in this section (i.e., Attorneys Arnold and Barry's summary judgment continuation hypothetical).

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<sup>194</sup> N.M. RULES. GOV. ADMISS. BAR R. 15-304.

<sup>195</sup> *Dondi Properties Corp. v. Commerce Sav. Loan Ass'n*, 121 F.R.D. 284, 296 (N.D. Tex. 1988) (citing THE AMERICAN COLLEGE OF TRIAL LAWYERS' CODE OF TRIAL CONDUCT (rev. 1987)).

<sup>196</sup> *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633 (S.C. 2011).

<sup>197</sup> *Id.* at 637 (referring to the underlying case as "pending").



Suggested rule number six states:

Be punctual and prepared for all meetings, depositions, court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.<sup>198</sup>

When an opposing counsel arrives late for a deposition or comes unprepared, then the deposition will end later than it could have, and it may require another day or half day of testimony to complete the deposition. Litigation costs increase for both parties as the client for the prompt attorney will be charged the waiting time, as well as any additional time needed to complete the deposition. The tardy or unprepared attorney's client will also likely be charged for all hours of the deposition, regardless of which hours were efficient, if any. Zealous advocacy, thus, would require punctuality and preparation, not oppose them.

Suggested rule number ten states:

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful.<sup>199</sup>

Comment: Never engage in conduct which would not be appropriate in the presence of a judge. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.<sup>200</sup> "Speaking objections" during depositions designed to coach a witness are impermissible.<sup>201</sup>

Depositions are often recorded by videographers, and although an attorney is usually not in the camera frame (the testifying witness is), the tone, volume, and inflection of an attorney's voice can be captured quite well on videotape. If behavior becomes too uncivil, which may be evident from the video, the deposition transcript, or personal accounts of individuals at the deposition, then a lawyer may be sanctioned by the court. Again, time spent on responding to a motion for sanctions could be better spent on working on substantive issues in the case. If most attorneys simply acted outside of the courtroom the way they act inside

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<sup>198</sup> See, e.g., ABOTA, *supra* note 58.

<sup>199</sup> N.M. RULES. GOV. ADMISS. BAR R. 15-304.

<sup>200</sup> ABOTA, *supra* note 58.

<sup>201</sup> UTAH, ARTICLE 3, STANDARDS OF PROFESSIONALISM AND CIVILITY, R. 14-301.

the courtroom, where attorneys are typically civil and respectful of others, then many civility issues would cease.

Improper obstruction of a deposition is not required for zealous advocacy, which does allow for reasonably necessary objections to preserve an objection or privilege.<sup>202</sup>

Thus, zealous advocacy can and should reside in harmony with civility. In addition, the issue of chilling zealous advocacy can be overcome with a “clearly delineated set of civility concepts to ensure lawyers know what is and is not allowed under the civility rules.”<sup>203</sup>

The mere fact that litigation involves an adversarial system does not justify the removal of decency and respect for the opponent. Even in actual war, there are rules against fighting unfairly.<sup>204</sup> In addition, real prisoners of war are afforded dignity and respect and more rights than one might expect.<sup>205</sup> If actual war requires fighting fair, then litigators should be working within the adversarial system with respect as well. And if prisoners of war are afforded dignity and respect, then so should combatants in the legal arena.

Many other organizations require or encourage civility to, among other things, assure public confidence in the integrity of the organizations and its effective operation.<sup>206</sup> For example, the organization that

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<sup>202</sup> ABOTA, *supra* note 58.

<sup>203</sup> Campbell, *supra* note 4, at 107.

<sup>204</sup> See DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS*, 69-93 (Martinus Nihjoff 1988). Under the Hague Convention, there are rules against fighting unfair. “Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited. Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden - (a) To employ poison or poisoned weapons; (b) to kill or wound treacherously individuals belonging to the hostile nation or army. . . (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering; (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.”

<sup>205</sup> *Id.* Under the Hague Convention, “[prisoners of war] must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property. . . In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them. . . . Art. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.”

<sup>206</sup> Ethics and Civility Resources, THE FLORIDA LEAGUE OF CITIES, INC., <http://www.floridaleagueofcities.com/Assets/Files/EthicsandCivilityResources.pdf><http://www.floridaleagueofcities.com/Assets/Files/EthicsandCivilityResources.pdf> (last visited Aug. 5, 2012) (setting forth links

controls the American sport of professional football, the National Football League (“NFL”), employs a code of conduct.<sup>207</sup> Thus, even a sports organization understands that the irresponsible conduct of its members “undermines public respect and support” for the organization.<sup>208</sup> As a result, a “higher standard” of conduct is “expected” and required by members of the NFL, including the professional athletes who play in the NFL.<sup>209</sup>

The NFL is akin to the legal profession as the primary participants in professional football, the players, are set up in a combatant and adversarial system against each other, just as attorneys representing opposing parties are. In the NFL, the players “battle” against each other on their respective teams, while in the legal profession, attorneys “battle” against each other to win a case. If the NFL, which organizes football games to provide entertainment to its fans, demands a higher standard of conduct from its members (including the players who engage in intense competition) to maintain the integrity of its organization, then state bars, which admit individuals to practice law and regulate attorney conduct, should also demand a higher standard of conduct from its members, the attorneys, who help administer justice and represent the legal system as officers of the court.

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to multiple government entities that have adopted civility standards or civility pledges for their officials and employees).

<sup>207</sup> Personal Conduct Policy, <http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFL%20Personal%20Conduct%20Policy%202008.pdf>. (last visited Aug. 5, 2012). “All persons associated with the NFL are required to avoid ‘conduct detrimental to the integrity of and public confidence in the National Football League.’ This requirement applies to players, coaches, other team employees, owners, game officials and all others privileged to work in the National Football League. For many years, it has been well understood that rules promoting lawful, ethical, and responsible conduct serve the interests of the League, its players, and fans. Illegal or irresponsible conduct does more than simply tarnish the offender. It puts innocent people at risk, sullies the reputation of others involved in the game, and undermines public respect and support for the NFL. STANDARD OF CONDUCT: While criminal activity is clearly outside the scope of permissible conduct, and persons who engage in criminal activity will be subject to discipline, the standard of conduct for persons employed in the NFL is considerably higher. It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime.”

<sup>208</sup> Personal Conduct Policy, *supra* note 207.

<sup>209</sup> *Id.*

B. *Civility Rules Inhibit First and Fourteenth Amendment Rights*

Opponents of civility argue that the requirement of civility inhibits the First and Fourteenth Amendment rights and, more specifically, civility requirements are unconstitutionally vague and overbroad and do not provide due process and fair notice.<sup>210</sup>

The South Carolina Supreme Court addressed these issues in a case where the defendant respondent attacked the state's mandatory civility clause.<sup>211</sup> The matter involved a disciplinary proceeding based on Respondent attorney's email to opposing counsel.<sup>212</sup> The Respondent represented the mother and opposing counsel represented the father in a bitter domestic dispute. Respondent sent the following email to opposing counsel:

I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . .Street. Think about it. Am I right?<sup>213</sup>

Opposing counsel's wife, also an attorney, filed the complaint against Respondent.<sup>214</sup> Opposing counsel's daughter, referenced in the "Drug-Dealer Email," had no connection to the pending case where Respondent and opposing counsel represented their respective clients.<sup>215</sup>

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<sup>210</sup> Mashburn, *supra* note 20, at 1168-1191; see Toni M. Massaro & Robin Stryker, Symposium, Political Discourse, Civility, and Harm: Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement, 54 ARIZ. L. REV. 375, 406-09 (2012).

<sup>211</sup> *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 638 (S.C. 2011).

<sup>212</sup> *Id.* at 635-36.

<sup>213</sup> *Id.* at 636.

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

<sup>215</sup> *Id.*

In analyzing the case, the court recited the lawyer's oath that Respondent took: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications. . ." <sup>216</sup> The court also recognized that a lawyer's First Amendment rights are not as broad as a layperson's, and an attorney's ethical obligations may restrict otherwise constitutionally protected speech. <sup>217</sup> As the United States Supreme Court noted, "[e]ven outside the courtroom, [ . . . ] lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." <sup>218</sup>

The South Carolina Supreme Court then discussed the concept of vagueness or indefiniteness. Those concepts "rest on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." <sup>219</sup> Procedural due process and fair notice are required under the Fourteenth Amendment. <sup>220</sup> The question for determining if a law is unconstitutionally vague is whether that law "forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." <sup>221</sup> The South Carolina Supreme Court cited *Grievance Administrator v. Fieger* <sup>222</sup> for its holding that Mr. Fieger's constitutional challenge could not prevail "because there [was] no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a)." <sup>223</sup>

The South Carolina Supreme Court likewise concluded that "even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's 'Drug Dealer' e-mail violates the civility clause." <sup>224</sup> Specifically, "[c]asting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing

<sup>216</sup> *Id.* at 637.

<sup>217</sup> *Id.* (citing *In re Snyder*, 472 U.S. 634, 644–45 (1985)).

<sup>218</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

<sup>219</sup> *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 638 (S.C. 2011) (citing *State v. Albert*, 184 S.E.2d 605, 606 (S.C. 1971)).

<sup>220</sup> U.S. CONST. amend. XIV.

<sup>221</sup> *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 637 (S.C. 2011) (citing *Curtis v. State*, 549 S.E.2d 591, 598 (S.C. 2001)).

<sup>222</sup> *Griev. Adm'r v. Fieger*, 719 N.W.2d 123 (Mich. 2006) (discussed in detail in Part II, Section C of this article, *supra*).

<sup>223</sup> *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 637 (S.C. 2011) (citing *Fieger*, 719 N.W.2d at 139).

<sup>224</sup> *Id.*

attorney was rearing his or her own children does not even near the margins of the civility clause.”<sup>225</sup> Also, someone of common intelligence would not need to guess at the meaning of the South Carolina civility oath.<sup>226</sup> Thus, the Supreme Court held that the civility oath was not unconstitutionally vague.<sup>227</sup>

The South Carolina Supreme Court then addressed the overbreadth argument Respondent advanced in challenging the civility oath.<sup>228</sup> Under the overbreadth doctrine, “the party challenging a statute simply must demonstrate that the statute could cause someone else—anyone else—to refrain from constitutionally protected expression.”<sup>229</sup> The overbreadth doctrine seeks to prevent the chilling of constitutionally protected speech.<sup>230</sup>

The court must perform a balancing test to determine whether a disciplinary rule is overcome by the overbreadth doctrine under the First Amendment.<sup>231</sup> In particular, the court must balance the state’s interest in regulating the legal profession against a lawyer’s First Amendment interest in the type of speech at issue.<sup>232</sup> If the lawyer’s speech “threatens a significant state interest,” then the speech may be restricted.<sup>233</sup>

The South Carolina Supreme Court stated that “[t]he interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked [opposing counsel].”<sup>234</sup> The Court held that attorneys attacking each other personally in the manner Respondent did “compromises the integrity of the judicial process” and “undermines a lawyer’s ability to objectively represent his or her client.”<sup>235</sup> In upholding the civility oath as constitutional, the Court determined that the civility oath did not penalize any

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 637-38.

<sup>229</sup> *Id.*

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

<sup>231</sup> *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, (1991)).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (citing *In re Johnson*, 729 P.2d 1175, 1178 (Kan. 1986)).

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

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

substantial amount of protected free speech in light of the state's interest in regulating the legal profession.<sup>236</sup>

South Carolina's Supreme Court held that the civility oath requiring courteous and civil oral and written communications was constitutionally valid and provided due process and fair notice to attorneys.<sup>237</sup> When one looks at the suggested mandatory civility rules, they similarly provide enough detail to overcome the vague and overbreadth arguments, as well as the due process and fair notice requirements.

For example, the above suggested mandatory civility rule, number one, is identical to South Carolina's civility oath, and it was held to be constitutional. The suggested rule also provides comments that provide further guidance on what is not acceptable, e.g., personal attacks on another attorney. Likewise, the other suggested mandatory rules (see *supra*, Part III, Section D, for the complete list) are all adequately straightforward and unambiguous to withstand scrutiny as well, such as: advising clients that civility, courtesy, and fair dealing are expected; refraining from knowingly making statements of fact or law that are untrue; consulting with opposing counsel on scheduling issues; and granting reasonable extensions of time where the client will not be adversely affected.

The key principle in mandating civility is that attorneys do not have a right to practice law, but rather an opportunity.<sup>238</sup> The opportunity to practice law is a privilege granted to a person from the bar association of the state in which they reside, and each state bar has the inherent power and duty to prescribe standards of conduct for lawyers.<sup>239</sup> Thus, the bars of each state possess the ability to restrict an attorney's behavior to conform to an acceptable standard of behavior for that particular state.<sup>240</sup>

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 637.

<sup>238</sup> *In re Anderson*, 851 S.W.2d 408, 410 (Ark. 1993) (citing *In re Lee*, 806 S.W.2d 382, 385 (Ark. 1991); *Fla. Bar v. Greenspahn*, 396 So.2d 182, 184 (Fla. 1984); *In re Redburn*, 746 N.W.2d 330, 338-39 (Minn. 2008); see *In re Evans*, 169 P.3d 1083, 1090 (Kan. 2007).

<sup>239</sup> See, e.g., RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-1.1, 3-1.2 (stating also that a "license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause").

<sup>240</sup> See, e.g., RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-1.1, 3-1.2.

C. *Civility Serves the Interests of the Elite and Ignores the Less Represented Attorneys*

One legal commentator argues that the civility codes reflect an “upper-middle-class view of professional conduct,” and that the “prestige hierarchy, patterns of deference, and the [civility codes] drafters’ patrician notions of civility suggest that the behavior of lawyers will be perceived differently along different class lines.”<sup>241</sup> The commentator provides the results of a study that examined the prestige hierarchy of the Chicago legal community.<sup>242</sup> The results generally showed that attorneys practicing “big business law” for large clients resided at the top of the prestige hierarchy, while attorneys who represented individuals in cases of family law, plaintiff personal injury, consumer law, and criminal law, dwelled at the bottom of the prestige hierarchy.<sup>243</sup> Low prestige apparently resulted from the “socio-economic status of a lawyer’s client and the nature of the work performed.”<sup>244</sup>

The study attempted to determine the relationship between prestige and a lawyer’s ethical reputation, which was defined as providing “zealous representation within the bounds of the ethical rules.”<sup>245</sup> The researchers found that attorneys in high-prestige specialties, who represented large business clients, received high ethical scores, while lawyers in low-prestige specialties, such as family law, personal injury, and criminal defense, received the lowest scores.<sup>246</sup>

Although this argument of elitism and class differences may have some appeal in the abstract, it loses its strength when it is applied to actual civility rules. Some of the suggested mandatory civility rules will be examined in light of this argument.

Suggested mandatory civility rule number one and its comments include being courteous and civil in all oral and written communications. Refraining from personal attacks of the opposing counsel that are unrelated to the lawsuit is not a class issue. Anyone, from any socioeconomic class, should feel compelled as attorneys, and as human beings, to refrain from making derogatory racial, gender, or ethnic remarks, or

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<sup>241</sup> Mashburn, *supra* note 64, at 694.

<sup>242</sup> *Id.* at 676.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 677. The results came from a “1977 statistical study of a large, random sample of Chicago lawyers.” *Id.* at 676.

<sup>246</sup> *Id.* at 677.



turning a dispute between clients into a personal attack against a representative of the opposing side.

Similarly, suggested mandatory civility rule number three requires not knowingly making false statements of fact or of law. President Abraham Lincoln offered some advice to potential, and likely current, lawyers about honesty: "Let no young man choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer."<sup>247</sup> President Lincoln made no distinction between classes or socioeconomic status regarding who should be honest, and neither should the state bars – it should be expected of all its members.

Moreover, being punctual and prepared (suggested rule number six) are traits that are not exclusive to any class or socioeconomic group; they are characteristics founded in professionalism and respect for others' time and schedules. Also, rules that prohibit utilizing litigation or discovery to harass or abuse the opposing party and counsel are rules based on efficiency of litigation, not some socioeconomic distinction. Likewise, alerting the other party to changes made in documents such as settlement agreements does not have anything to do with prestige; it is based on saving time and resources by avoiding the need to have someone comb through the document for the changes, and it encourages honest, straightforward dealings.

Thus, when mandatory civility rules are written as specifically as possible to reduce unnecessary litigation costs and increase the public's confidence in, and perception of, the legal profession, issues of class, socioeconomic differences and prestige hierarchy become irrelevant.

#### D. *Civility Will Be Costly And Difficult To Enforce*

Another argument against mandatory civility involves the issues with enforcement. The argument centers on the notions that: (1) civility is too hard to define;<sup>248</sup> (2) it "lends itself to a certain level of subjectivity and could easily lead to claims of disparate enforcement or regulation;"<sup>249</sup> (3) it will cost money to enforce civility.<sup>250</sup>

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<sup>247</sup> Abraham Lincoln, Notes for a Law Lecture, July 1, 1850 Vol. II, p. 141.

<sup>248</sup> Slease's Responses, *supra* note 19.

<sup>249</sup> *Id.*

<sup>250</sup> Walker's Responses, *supra* note 18.

As discussed above at length in sections A, B and C of Part IV, if a state bar defines the mandatory civility rules in a manner that provides due process and fair notice for attorneys, and judges and attorneys are educated on what constitutes sanctionable behavior, then courts will be able to enforce mandatory civility rules. Also, courts can develop common law on questions of civility that may be on the margin, just as courts do with other areas of law.<sup>251</sup> It begins, though, with individual state bars enacting state-specific civility codes.

Although the ABA may provide model rules for civility, just as it does for the professional rules of conduct, the ABA cannot enforce those rules as it does not license attorneys to practice law, nor does it regulate attorney conduct – each state bar does.<sup>252</sup> As a result, each state bar must adopt civility rules that properly reflect the demographics, culture and social norms of its members. In particular, each state, which consists of members from the community, must determine what the social norms are for the profession. That can be done by looking at the social norms of the community. Thus, the borderline questions of whether calling someone a certain name is uncivil in a certain area of the country would be governed by a particular state bar and its courts that are familiar with what is acceptable locally. Peculiarities of a state can be placed in the comments section to the mandatory civility rules, or peculiarities of different areas within a state may be placed in the local rules of the court, or the comments section, to provide further guidance to attorneys and the courts. This responsibility requires each state bar to construct carefully a set of standards that are specific, reasonable, and capable of being applied on a consistent basis.

The obvious offenses, such as the “Drug Dealer” e-mail that included a personal attack on an attorney and his family, would not be condoned anywhere in the United States. And, if an attorney is unsure of whether his potential conduct may be sanctioned for being uncivil, taking time to reflect on civility and perhaps proceeding in another manner or with different words is also a desired result of mandatory civility.

Defining civility as specifically as possible would help prevent disparate decisions and provide clarity to judges. Decisions by judges are

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<sup>251</sup> Campbell, *supra* note 4, at 146.

<sup>252</sup> States each maintain their own rules of professional conduct, many of which are patterned after or nearly identical to, at least in parts, the ABA Model Rules. RAYMOND, *supra* note 134, at 11.

rarely wholly objective, and subjectivity may be a part of rendering decisions. Moreover, every day throughout the United States, judges are asked to decide motions and cases when a large law firm is representing a large corporate client against a solo practitioner representing an individual with limited means. These decisions may include some subjectivity.

The legal community and public must trust the judiciary to decide all disputes, including civility claims, properly. Although judges, as human beings, may have predispositions toward certain groups of individuals, lawyers and the public must expect that judges will adhere to their duties and not be overcome in their decisions by those predispositions. Thus, the legal community and public must rely on the judiciary to judge a case on the merits and not favor or disfavor an attorney solely based on the attorney's firm name, the client's Fortune 500 status, or the attorney's socioeconomic status. Without these beliefs, the judicial system would become devoid of justice, rules, and reliability, and individuals of low socioeconomic status or individuals who were injured by a large company's product, for example, would simply never voluntarily avail themselves to the court system, as failure would be inevitable.

As for the cost to enforce civility, it may or may not increase the costs for state bars that are enforcing the rules of professional conduct, provided the disciplinary agencies who handle rules of professional conduct violations would also handle incivility complaints. For instance, if a disciplinary agency of a state bar receives a complaint about an attorney, then it is likely that civility may be only one of the alleged violations by an attorney. If so, the cost to take the call, investigate, and render a decision on the case involving incivility may already be included in the costs for doing the same with the alleged violations of professional conduct by that same attorney. Likewise, if the civility issue reaches the supreme court of a state for decision, and violations of rules of professional conduct are also at issue, then there may not be any added cost. Even if the costs to a state bar do increase initially (as eventually they should subside if civility becomes the status quo), the overall benefits to society (reduced litigation costs because of more civility and cooperation) and the profession (increased confidence by the public) more than offset these potential costs if those costs actually do come to fruition.

If civility complaints are raised instead as motions during a case, such as a motion for sanctions that can accompany motions to compel

discovery, then litigation costs may rise initially. The number of motions to compel, however, may decrease if civility becomes more pervasive in the profession. And civility motions would also likely decrease, provided judges sanction attorneys for incivility (thus deterring others from uncivil conduct) and civility amongst the members of the bar becomes the norm. In any event, to avoid the cost of civility motions and to take advantage of the existing disciplinary mechanisms in the states, mandatory civility rules should not be enforced via sanction-like motions, but they should be enforced in the same manner as the rules of professional conduct.<sup>253</sup>

Opponents of mandatory civility may also argue that an unintended cost might entail some attorneys using the civility rules as a sword to file baseless complaints against opposing counsel, rather than using the rules as a shield to protect the profession from uncivil conduct. This argument also fails for several reasons. First, if the complaints are handled by state bars in the same manner that ethical complaints are, then frivolous civility complaints would be quickly dismissed just as frivolous ethical complaints are. Second, attorneys can already use the ethical rules of each state (i.e., the rules of professional conduct) to make baseless complaints about other attorneys (complaints that would be dismissed anyway), but the ethical rules are still critical to the legal profession and should not be discarded simply because at times they can be misused – the same rationale applies to civility rules. Third, if the civility rules are effective in changing the culture of the legal profession or, at least, in encouraging more civility from most of its members, then frivolous civility complaints (if they do arise) should, in turn, decrease over time. As stated above, any costs due to the misuse of mandatory civility rules would be outweighed by the benefits that would accrue to the legal profession.

#### E. *More Mandatory Rules are Unnecessary*

Some argue that more rules are too burdensome and unnecessary, namely because civility rules are subsumed in the rules of professional conduct.<sup>254</sup>

Although some of the suggested mandatory civility rules may be similar to civil procedure rules (such as rules prohibiting the use of discovery to harass or cause unnecessary delay) or the rules of professional

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<sup>253</sup> See, e.g., RULES REGULATING THE FLA. BAR, CHAPTER 3, RULES OF DISCIPLINE, 3-3.1.

<sup>254</sup> Slease's Responses, *supra* note 17.

conduct (such as ethics rules that prohibit the making of false statements to a tribunal or falsifying evidence), many of the civility rules are not similar to those civil procedure or ethics rules.<sup>255</sup> For example, the civility rule that requires that written and oral communications be courteous and civil is not required under the ethics rules or civil procedure. Advising the client that civility, courtesy, and fair dealing are expected is not required under any existing rule either. Requiring that an attorney clearly identify, for other counsel or parties, all changes made in documents submitted to the attorney for review is not mandatory under either the rule of ethics or civil procedure. Adhering to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom is neither a mandatory ethics nor civil procedure rule. Ethics rules that are mandatory allow for the lowest common denominator of behavior to avoid sanctions, while civility and professionalism represent the optimal level of conduct.<sup>256</sup>

Even if some civility rules are arguably similar to pre-existing rules, the civility rules go beyond those pre-existing rules. For example, the requirement that an attorney readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party may relate to delay, but no ethics rule or civil procedure rule requires such stipulation. Making civility mandatory would require more than what is required by the ethical or discovery rules of each jurisdiction.

Mr. Walker of the Utah Bar believes, “There is a problem that needs to be addressed and because of the cultural nature of the problem, only mandatory Rules are going to be effective in addressing the problem.”<sup>257</sup>

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<sup>255</sup> See, e.g., FED. R. CIV. P. 26(g)(1)(i-iii) (prohibiting the use of discovery to harass, cause unnecessary delay, or needlessly increase the cost of litigation); CAL. CODE OF CIV. PRO. § 2023.010 (prohibiting a party from using discovery method “in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense”); MODEL RULES OF PROF’L CONDUCT R. 3.3 (prohibiting false statements to a tribunal); MODEL RULES OF PROF’L CONDUCT R. 3.4 (prohibiting falsifying evidence).

<sup>256</sup> Campbell, *supra* note 4, at 132.

<sup>257</sup> Walker’s Responses, *supra* note 16.

F. *Lawyers Are Already Civil, or Conversely, Lawyers Will Remain Uncivil*

One may argue that lawyers are already civil or, in the alternative, that lawyers will remain uncivil.<sup>258</sup>

Lawyers may be civil in parts of certain states or practice areas, but the lack of incivility caused no less than 140 state and local bar associations to adopt civility codes, and many courts have commented about the pervasive lack of civility in the profession as well.<sup>259</sup>

As for the argument that attorneys will remain uncivil in the face of mandatory civility rules, sanctions in appropriate cases should eliminate or decrease incivility for the sanctioned attorneys (particularly if a heavy fine or suspension is levied). At the very least, the sanctioned attorney will “think about civility as it pertains to their practice.”<sup>260</sup> Sanctioning uncivil behavior by attorneys will also deter similar, uncivil conduct, from other attorneys who have not been sanctioned for uncivil behavior, but who may be considering an action that could result in sanctions. Attorneys would rather forgo committing an uncivil act than potentially subjecting themselves to any sanctions, particularly harsh sanctions, such as the \$25,000 sanction in the Greenfield case or the 90 day suspension in the South Carolina zoning case.<sup>261</sup> It is unrealistic to think that an attorney who wanted to act uncivilly despite mandatory rules would continue to do so if his bank account was severely depleted with a fine or his livelihood was taken away from him for three months with a suspension. Attorneys, thus, would need to become more civil to avoid sanctions, which would be in the best interests of themselves, their clients, and the legal system.

V. FURTHER RESEARCH NEEDED

Although there seems to be a consensus that there is an incivility issue, there has not been thorough research done on the purported causes of incivility in the legal profession. In particular, further research is required on potential causes of incivility such as the following: the increase in the number of attorneys and how that actually relates to civility or incivility; the manner in which law graduates are educated

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<sup>258</sup> See Slease’s Responses, *supra* note 17; See also Walker’s Responses, *supra* note 16.

<sup>259</sup> Campbell, *supra* note 4.

<sup>260</sup> Walker’s Responses, *supra* note 16.

<sup>261</sup> See *In re White*, 707 S.E.2d 411 (S.C. 2011) (zoning case); *In re Lovelace*, 716 S.E.2d 919, 920 (S.C. 2011) (slapping case).

about civility in law school; clients who want or demand “bulldogs” as lawyers, the misconception that civility equals weakness; “individual lawyers’ poor moral character;” and the “decline of face-to-face interactions among lawyers” due to the increase of interaction via technology, such as email.<sup>262</sup> Without an understanding of the actual causes of incivility, the effort to increase civility throughout the profession may not be fully realized.

Also, states or jurisdictions that are mandating civility should attempt to obtain empirical evidence regarding the effects of mandatory civility, which may help persuade other states or jurisdictions to adopt mandatory civility. For example, mandatory civility jurisdictions should attempt to determine the following: whether mandatory civility reduces the percentage of motions to compel discovery filed by attorneys; the number of disciplinary actions prosecuted based primarily or solely on civility issues; the number of incivility complaints made to attorney disciplinary bodies; and the amount of additional work and costs of handling civility complaints for organizations that also handle disciplinary complaints regarding professional rules of conduct.

Also, states and jurisdictions that do not currently require civility could track the number of incivility complaints they receive in connection with complaints concerning the rules of professional conduct to determine empirically how large an issue incivility truly is in their particular locale.

## CONCLUSION

Specific rules relating to civility alleviate the practical difficulties of enforcing a vague “civility” standard without defining it, as a mere civility standard by itself without specific rules raises issues of vagueness, overbreadth, fair notice, and due process for attorneys who may find themselves subject to discipline for uncivil behavior. Thus, mandatory civility rules that include specific acts and set forth the conduct required ensure the most effective manner to reduce incivility, which will increase efficiency in the legal process and increase the public’s confidence in, and perception of, the legal system.

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<sup>262</sup> See, e.g., Judith D. Fischer, *Incivility in Lawyer’s Writing: Judicial Handling of Rambo Run Amok*, 50 *WASHBURN L.J.* 365, 366-67 (2011) (discussing several factors that may contribute to incivility in the legal profession); Smith, *supra* note 4 (discussing technology and incivility).

This article is not calling for a hearkening back to the “good old days” or the golden age of law, if there was such a thing. This article simply reminds lawyers that the practice of law is a tremendous privilege that places attorneys at the forefront of the legal system. The public wants to believe in the credibility of the justice system, and it wants its attorneys to represent the best of zealous advocacy, civility, and professionalism at the same time – the efficient running of the legal system depends on it, and the public deserves it. The legal profession can no longer wait for higher standards of conduct from its members – it must demand it now.



APPENDIX A – JOHN BERRY RESPONSES TO QUESTIONS ON CIVILITY  
 PROPOSED BY ASSISTANT PROFESSOR OF LAW DAVID A.  
 GRENARDO, JULY 2012

1. Organization – The Florida Bar
2. Title –John T. Berry, Director, Legal Division
3. What is civility? Why, if at all, is civility important to the legal profession?

Generally, civility is acting with respect, kindness, courtesy and graciousness with everyone you contact. Civility is important to the legal system in order to engender respect towards all participants in a legal proceeding as well as to the public at large. Legal proceedings are solemn and dignified, where important rights, both criminal and civil, are determined. It is necessary for all participants to be treated courteously and respectfully in order to ensure the fair administration of justice. Indeed, it may be said that civility promotes the efficient administration of justice.

Often, a lack of civility leads to increased expenditures of time, money and resources, which further burdens the judicial system. Instances of incivility within the judicial system cause issues of credibility, which may negatively impact the entire governmental structure. In societies where incivility reigns, respect for the judicial system waivers, and revolution occurs.

4. In the legal profession, does civility fall under professionalism, ethics, both, some of both, neither? And why?

There are differences of opinion when it comes to determining whether civility falls under professionalism or ethics, or both. For those who believe civility falls under professionalism, they argue that civility is more like a moral code in fulfilling obligations to clients, and to a lesser extent, to the court.

For those who argue that civility is a measure of both professionalism and ethics, their answers usually depend upon the level of the incivility in a given circumstance. Minor issues of incivility are ethical consideration not rising to the level of rule violations. Major incivility issues, such as those prosecuted by the Bar, fall under professionalism.

5. Why did your state contend that civility was needed in its oath (or creed) for newly admitted lawyers? What examples or evidence (including any empirical evidence) did your state rely on to con-

tend that civility was needed in its oath? Is the oath applicable to all attorneys in your state? If so, how?

Please see Supreme Court Opinion. On its own accord, the Court, noting its concern on increasing incivility, amended the Oath of Admission.

By submitting the annual Bar Dues Statement, every attorney licensed to practice in the state acquiesces to the amended Oath.

6. How does your organization address/enforce civility? Are there any statistics or data that you maintain regarding civility complaints or lack of civility issues? If so, what type of statistics or data do you compile, and can you please provide us with that information? Has there been any data or evidence evidencing that the inclusion of civility in your state's oath has improved the profession, or that it has not improved the profession?

The Florida Bar continues to prosecute disciplinary cases against attorneys for violations of the pre-existing Oath, including the provision that an attorney "[W]ill abstain from all offensive personality. . ." and Rule 4-8.4 that prohibits conduct contrary to the administration of justice.

We have no statistical or empirical data on civility other than those cases which have been prosecuted under the Rules Regulating The Florida Bar. We are compiling data related to requests for assistance; however, the data is used for internal purposes only.

7. Is the enforcement of civility in your jurisdiction worthwhile or not? Please explain. See #3.
8. Are civility or professionalism oaths or guidelines that are voluntary sufficient to respond to the lack of civility? Why or why not? No. As the Bar grows in number, the instances of incivility will most likely rise. There seems to be an inverse relationship between number of members and civility. Enforcement is only one tool in impacting lawyer behavior. Added emphasis of the importance of civility is being provided in law schools. Additionally, the Bar has established rehabilitative programs such as Ethics School, Stress (f/k/a Anger) Management, Lawyer Assistance (drug/alcohol rehab) and Law Office Management are some examples of programs which the Bar has at its disposal to address issues of incivility.
9. Should civility be mandatory? Why or why not? What benefits, if any, can be reaped from the implementation of mandatory civility? What are the disadvantages, if any, of mandatory civility?

Yes. Mandatory civility is necessary for the efficient and effective administration of justice.

Mandatory civility could have a chilling effect on those members who may over-react by not acting zealously on behalf of a client. Where is the line of zealous representation vs. incivility? Can one ever disagree with a judge civilly? Mandatory civility is subject to prosecutorial misconduct.

The media also gives a distorted picture of how attorneys must act towards one another and opposing parties. Often we see misguided complaints, which allege that an attorney was “friendly” with the opposing counsel, thus there must have been a conflict of interest and the attorney “sold out” the complaining former client.

10. If it chose to do so, how could the legal profession enforce civility?

We have chosen to do so. See #8. See also number of cases which the Bar has prosecuted cases of incivility. These cases are published to deter similar conduct. Which of those methods is the best method for enforcing civility? Difference between the carrot and the stick. The Bar is the stick, imposing discipline on those attorneys who engage in repeated and substantial violations of the civility provisions. Do there need to be more specific regulations and rules to enforce civility, besides requiring civility in general? The RRTFB, supported by the Oath, Creed and Guidelines offer specific regulations to enforce civility. However, civility is not simply a matter of discipline for the Bar. It must be demanded by the court and colleagues, as well as clients and members of the public. If so, why, and what regulations or rules are necessary to enforce civility? If not, why not?

11. What are the main arguments against mandatory civility, and what are the counter-arguments or responses to those arguments? See #9 above.

12. If available, please provide any data or documents you have regarding civility issues with attorneys (e.g., complaints, opinions), particularly if incivility complaints or incidents are tracked in some manner.

Already provided.

13. Please provide a brief biography of yourself that includes your experience with issues relating to civility and your background in general.

See attached Biographical information regarding John Berry.

APPENDIX B – BILLY WALKER RESPONSES TO QUESTIONS ON  
CIVILITY PROPOSED BY ASSISTANT PROFESSOR OF LAW  
DAVID A. GRENARDO, JULY 2012

1. Organization  
Utah State Bar – Office of Professional Conduct
2. Title  
Senior Counsel
3. What is civility? Why, if at all, is civility important to the legal profession?  
Civility is following the Rules and getting along in a respectful and dignified manner with the individuals necessary to carry out your responsibilities.  
Civility is important to the legal profession because it is the most effective and economical way to carry out your responsibilities as a lawyer. Here in Utah civility is specifically defined by the Utah Supreme Courts' Standards for Professionalism and Civility. A copy of the Civility Rules is attached.
4. In the legal profession, does civility fall under professionalism, ethics, both, some of both, neither? And why?  
Civility falls under professionalism and some ethics. Civility is synonymous with professionalism because professionalism is following the Rules of your profession and following the Rules in a respectful and dignified way encompasses civility. There is overlap with civility and ethics where uncivil conduct breaches the Rules of Professional Responsibility.
5. Why did your state contend that civility was needed in its oath (or creed) for newly admitted lawyers? What examples or evidence (including any empirical evidence) did your state rely on to contend that civility was needed in its oath? Is the oath applicable to all attorneys in your state? If so, how?  
One of the things that Utah wanted to address was the "culture" of incivility and unprofessionalism. To change culture you need to acclimate new attorneys. Our state felt a way to do this was to make civility part of the oath that all new lawyers take. Utah did not really have any examples or evidence to rely on or contend that civility was needed in its oath. The oath is intended to be applicable to all attorneys in the state, however, currently only new attorneys take it. There has been some discussion about possibly making the oath part of the annual registration form so that

all lawyers will reaffirm the oath they initially took with the inclusion of the civility part (for those attorneys who took the oath before civility was part of it).

6. How does your organization address/enforce civility? Are there any statistics or data that you maintain regarding civility complaints or lack of civility issues? If so, what type of statistics or data do you compile, and can you please provide us with that information? Has there been any data or evidence evidencing that the inclusion of civility in your state's oath has improved the profession, or that it has not improved the profession?

The Utah Bar's Office of Professional Conduct does not enforce civility unless the facts of incivility give rise to violations of the Rules of Professional Conduct (i.e. ethics rules); if this is the case, my office investigates and prosecutes the cases. Effective as of June 30, 2012, my office can refer cases of incivility, as this is defined by a violation of our Supreme Court's Standards of Professionalism and Civility, to our Supreme Court's Board of Professional Counselors. A copy of the Utah Supreme Court Standing Order No. 7 is attached. The Office of Professional Conduct does not have any statistics on civility complaints (i.e. those cases where there is overlap in civility and ethics violations that can be isolated as civility complaints). Due to the recent effective date, to date we have not referred any cases to the Board of Professionalism Counselors.

We do not have any evidence or data evidencing that the inclusion of civility in our state's oath has improved or not improved the profession.

7. Is the enforcement of civility in your jurisdiction worthwhile or not? Please explain.

Civility standards in our state are aspirational and thus not enforceable in the same manner that the ethical rules are enforceable. It is difficult to answer whether if the civility standards were enforceable, it would be worthwhile. The ethical rules are enforceable and there are still unethical attorneys, so I suppose if the civility standards were enforceable, there would still be uncivil attorneys. The "worthwhile" question raises the issue of whether expending resources on civility enforcement will help the practice of law. I think yes because, while you may never eliminate incivil-

ity, any reduction of uncivil conduct improves the practice of law overall.

8. Are civility or professionalism oaths or guidelines that are voluntary sufficient to respond to the lack of civility? Why or why not? I do not feel civility or professionalism oaths or guidelines that are voluntary are sufficient to respond to the lack of civility because the elimination/reduction of incivility is a culture change for a significant number of attorneys. This culture change is an awareness that the adversarial [sic] process and zealous representation does not preclude civility; and that in fact civility makes an attorney a more effective and efficient advocate. If you are changing a culture, in my opinion, you need more than voluntary oaths or guidelines; at minimum you need education through continuing legal courses and at maximum you may need mechanisms of enforcement.
9. Should civility be mandatory? Why or why not? What benefits, if any, can be reaped from the implementation of mandatory civility? What are the disadvantages, if any, of mandatory civility? I personally think civility should be mandatory because it makes an attorney a more effective and efficient advocate; and as importantly, the benefits of mandatory civility are the improvement of the practice of law overall and the public's perception of the legal profession. The disadvantages of mandatory civility are more mandatory rules to enforce and the possible need for more resources to enforce these Rules.
10. If it chose to do so, how could the legal profession enforce civility? Which of those methods is the best method for enforcing civility? Do there need to be more specific regulations and rules to enforce civility, besides requiring civility in general? If so, why, and what regulations or rules are necessary to enforce civility? If not, why not?  
The legal profession could enforce civility by fines or sanctions, including sanctions that would affect an attorney's bar license. The best method probably would be fines and/or court costs. Yes, there needs to be specific regulations and Rules to enforce civility because from a due process standpoint attorneys need to know precisely what conduct is prohibited that would expose them to fines and/or sanctions.

11. What are the main arguments against mandatory civility, and what are the counter-arguments or responses to those arguments?

The main arguments against mandatory civility are:

- i. More mandatory Rules (i.e. we already have too many or enough);
- ii. More resources needed to enforce rules (which we don't have);
- iii. Will do no good; some attorneys will still be uncivil;
- iv. Not needed because attorneys are civil.

The counter-arguments or responses to the arguments against mandatory civility are:

- i. There is a problem that needs to be addressed and because of the cultural nature of the problem, only mandatory Rules are going to be effective in addressing the problem;
  - ii. If necessary, resources should be diverted from other areas. Resources can also be supplied by volunteers;
  - iii. Of course the overall idealistic goal would be to eliminate all incivility; however, the more practical goal would be to make all lawyers think about civility as it pertains to their practice. This goal is achievable and would make a significant positive impact on the legal profession;
  - iv. Unfortunately, this is a viewpoint most often held by attorneys who are uncivil and do not recognize that they are. It is also often a viewpoint of attorneys who are part of a specialized practice where the attorneys seem to get along with the ones they deal with on a regular basis. It is not the widespread viewpoint of those attorneys who have to deal with uncivil attorneys. It is also not the viewpoint of a significant number of attorneys who are outside of that specialized practice.
12. If available, please provide any data or documents you have regarding civility issues with attorneys (e.g., complaints, opinions), particularly if incivility complaints or incidents are tracked in some manner.
13. Please provide a brief biography of yourself that includes your experience with issues relating to civility and your background in general.

I am an original member of the Utah Supreme Court's Advisory Committee on Professionalism in the practice of law created in

2001. As part of this Committee I participated in the drafting of Utah Standards of Professionalism and Civility. In my position of Senior Counsel, Office of Professional Conduct, I have made numerous hours of presentations to lawyers on the subject of Professionalism and Civility.



APPENDIX C – WILLIAM SLEASE RESPONSES TO QUESTIONS ON  
CIVILITY PROPOSED BY ASSISTANT PROFESSOR OF LAW  
DAVID A. GRENARDO, JULY 2012

1. Organization

The Disciplinary Board of the New Mexico Supreme Court.

2. Title

Chief Disciplinary Counsel.

3. What is civility? Why, if at all, is civility important to the legal profession?

From my perspective, civility is using the appropriate means to accomplish a legitimate end for a client without injecting hostility, combativeness, rude behavior, insults, threats, or demeaning conduct or words in the course of one's practice. It also means refraining from engaging in personal attacks against an opposing party, counsel or the court, or disparaging the abilities and qualifications of opposing counsel and judges. It further means treating everyone fairly, and with respect and dignity.

4. In the legal profession, does civility fall under professionalism, ethics, both, some of both, neither? And why?

Assuming by ethics you mean compliance with the Rules of Professional Conduct, civility is a facet of both professionalism and ethics. From a professionalism standpoint, acting in a civil manner allows the parties and counsel to focus on the merits of the legal dispute and reach a just resolution without the injection of unnecessary posturing, hostility, or personalization into the matter. From a Rules of Professional Conduct standpoint, several rules address proper behavior with opposing counsel, tribunals, unrepresented third parties, and clients, such as refraining from bringing meritless claims or asserting meritless defenses, refraining from making misrepresentations, and refraining from using means that have no substantial purpose other than to embarrass or burden another person.

5. Why did your state contend that civility was needed in its oath (or creed) for newly admitted lawyers? What examples or evidence (including any empirical evidence) did your state rely on to contend that civility was needed in its oath? Is the oath applicable to all attorneys in your state? If so, how?

The Creed of Professionalism adopted by the State Bar of New Mexico long preceded my tenure and I do not have any particular insight into how it came about.

6. How does your organization address/enforce civility? Are there any statistics or data that you maintain regarding civility complaints or lack of civility issues? If so, what type of statistics or data do you compile, and can you please provide us with that information? Has there been any data or evidence evidencing that the inclusion of civility in your state's oath has improved the profession, or that it has not improved the profession?

If incivility progresses to the point of a violation of the Rules of Professional Conduct, our Office investigates and prosecutes the violation. We do not have any statistics that track civility complaints or provide data on whether the Creed of Professionalism has improved the profession.

7. Is the enforcement of civility in your jurisdiction worthwhile or not? Please explain.

Enforcement of civility when incivility results in a violation of the Rules of Professional Conduct is worthwhile as is all enforcement by our Office of the Rules. Such enforcement benefits the public and improves the profession.

8. Are civility or professionalism oaths or guidelines that are voluntary sufficient to respond to the lack of civility? Why or why not? Despite what I suspect is a perception among the public, that all lawyers are uncivil, my experience is that very few lawyers are routinely uncivil. I am not convinced that an oath or guideline or creed will modify the behavior of these few individuals. However, such oaths, guidelines, and creeds are important reminders to all other lawyers that it is important to act, at all times, in a civil manner with the best interests of our clients and our profession in mind.

9. Should civility be mandatory? Why or why not? What benefits, if any, can be reaped from the implementation of mandatory civility? What are the disadvantages, if any, of mandatory civility?

Mandatory civility may be unworkable because precisely defining what constitutes civil and uncivil behavior may be difficult. Moreover, enforcement of mandatory civility would be challenging. It lends itself to a certain level of subjectivity and could easily lead to claims of disparate enforcement or regulation. Moreover,

as stated above, the existing Rules of Professional Conduct subsume civility issues. For example, there are Rules that address appropriate conduct with courts, opposing counsel, third parties, and clients.

10. If it chose to do so, how could the legal profession enforce civility? Which of those methods is the best method for enforcing civility? Do there need to be more specific regulations and rules to enforce civility, besides requiring civility in general? If so, why, and what regulations or rules are necessary to enforce civility? If not, why not?

The best enforcement, in my view, is to teach civility, professionalism, and compliance with the Rules of Professional Conduct beginning in law school and throughout a lawyer's career. Further, expecting senior members of the bar to model civil behavior and educating clients that a civil lawyer does not mean an ineffective lawyer are important steps. Again, the implementation of specific regulations and rules to enforce civility would, in my opinion, be unworkable and difficult to enforce.

11. What are the main arguments against mandatory civility, and what are the counter-arguments or responses to those arguments? Please see my answers to numbers 9 and 10, above.
12. If available, please provide any data or documents you have regarding civility issues with attorneys (e.g., complaints, opinions), particularly if incivility complaints or incidents are tracked in some manner.
- None available.
13. Please provide a brief biography of yourself that includes your experience with issues relating to civility and your background in general.

William D. Slease is Chief Disciplinary Counsel for the New Mexico Disciplinary Board. He was appointed to the position in December, 2010. Mr. Slease received his undergraduate, graduate, and law degrees from the University of New Mexico. In addition to his duties as Chief Disciplinary Counsel, he serves as an adjunct professor at UNM, where he has taught employment law and ethics. He also serves on the State Bar of New Mexico Professionalism Commission, which is responsible for operating and administering the "Bridge the Gap: Transitioning Into the Profession Program" for new lawyers in New Mexico. Prior to his appoint-

ment as Chief Disciplinary Counsel, Mr. Slease was in private practice with an emphasis in civil rights, employment, and tort litigation.

APPENDIX D – MARET VESSELLA RESPONSES TO QUESTIONS ON  
 CIVILITY PROPOSED BY ASSISTANT PROFESSOR OF LAW  
 DAVID A. GRENARDO, JULY 2012

1. Organization  
 State Bar of Arizona
2. Title  
 Chief Bar Counsel
3. What is civility? Why, if at all, is civility important to the legal profession?  
 Civility is a term that describes the minimum expectations for conduct by lawyers and can be referenced back to the Lawyer's Creed of Professionalism. The Creed sets forth general expectations with respect to clients, opposing parties and their counsel, tribunals and the general public.  
 Having defined expectations as to civility/professionalism, a mechanism to enforce those standards is important for a number of reasons. It underscores for the profession the importance of the behavior; creates a greater sense of confidence in the public that the system of justice is administered fairly and efficiently; and, reinforces the integrity of the profession.
4. In the legal profession, does civility fall under professionalism, ethics, both, some of both, neither? And why?  
 Civility and professionalism are synonymous for our purposes and it can be part of both ethics and professionalism.
5. Why did your state contend that civility was needed in its oath (or creed) for newly admitted lawyers? What examples or evidence (including any empirical evidence) did your state rely on to contend that civility was needed in its oath? Is the oath applicable to all attorneys in your state? If so, how?
6. How does your organization address/enforce civility? Are there any statistics or data that you maintain regarding civility complaints or lack of civility issues? If so, what type of statistics or data do you compile, and can you please provide us with that information? Has there been any data or evidence evidencing that the inclusion of civility in your state's oath has improved the profession, or that it has not improved the profession?  
 Yes. Arizona has a rule (Rule 41(g), Ariz. R. Sup. Ct.) that prohibits "unprofessional conduct" which is defined as "substantial or repeated violations of the Oath of Admission to the Bar or the

Lawyer's Creed of Professionalism." We keep track of cases that involve a violation of Rule 41(g), but do not compile statistical data concerning those cases. We have not undertaken any type of analysis to determine if the enforcement of the Rule has impacted the profession.

7. Is the enforcement of civility in your jurisdiction worthwhile or not? Please explain.

It is equal in its importance to the any other Rule of Professional Conduct.

8. Are civility or professionalism oaths or guidelines that are voluntary sufficient to respond to the lack of civility? Why or why not?
9. Should civility be mandatory? Why or why not? What benefits, if any, can be reaped from the implementation of mandatory civility? What are the disadvantages, if any, of mandatory civility?

It would be nice to think that lawyers would, without rules, engage each other in a civil or professional manner. Probably a large number of lawyers would. However, there was a reason that the Court promulgated a series of ethical rules which dictate a minimum level of behavior for lawyers.

The benefits are again the same as having and enforcing all other rules of professional conduct. It instills public confidence in the profession and the system of justice. The rules set the standards and enforcement lets all lawyers understand what is expected of them and may deter conduct that would fall short.

10. If it chose to do so, how could the legal profession enforce civility? Which of those methods is the best method for enforcing civility? Do there need to be more specific regulations and rules to enforce civility, besides requiring civility in general? If so, why, and what regulations or rules are necessary to enforce civility? If not, why not?
11. What are the main arguments against mandatory civility, and what are the counter-arguments or responses to those arguments? Although I am not overly familiar with the arguments set forth by opponents of mandatory civility rules and enforcement, I would assume that the main arguments could be reduced to constitutional issues involving freedom of speech and constitutional vagueness. Both of these have surfaced in lawyer regulation cases involving rules that limit the lawyer's speech and/or infringed on

their ability to engage in bad behavior and have by and large survived attack.

12. If available, please provide any data or documents you have regarding civility issues with attorneys (e.g., complaints, opinions), particularly if incivility complaints or incidents are tracked in some manner.
13. Please provide a brief biography of yourself that includes your experience with issues relating to civility and your background in general.

APPENDIX E – LESLEY COGGIOLA RESPONSES TO QUESTIONS ON  
CIVILITY PROPOSED BY ASSISTANT PROFESSOR OF LAW  
DAVID A. GRENARDO, JULY 2012

1. Organization  
South Carolina Supreme Court-Office of Disciplinary Counsel  
Title
2. Title:  
Disciplinary Counsel
3. What is civility? Why, if at all, is civility important to the legal profession?  
Civility is politeness, courtesy, respect of others. These are all characteristics of a professional.
4. In the legal profession, does civility fall under professionalism, ethics, both, some of both, neither? And why?  
Civility does fall under professionalism. As far as ethics in the legal professional, most jurisdictions include civility in their Lawyer's Oath or in specific Rules of Professional Conduct. This applies to parties, opposing counsel, the tribunal, court staff, etc.
5. Why did your state contend that civility was needed in its oath (or creed) for newly admitted lawyers? What examples or evidence (including any empirical evidence) did your state rely on to contend that civility was needed in its oath? Is the oath applicable to all attorneys in your state? If so, how?  
I think that it was included because there were instances where lawyers were acting inappropriately in the course of their practice. I don't have empirical evidence, just anecdotal, but I think this was simply a way of making it clear that it is expected. We do cite the oath in some of our disciplinary opinions. It is applied to all members of the South Carolina Bar who have been sworn in.
6. How does your organization address/enforce civility? Are there any statistics or data that you maintain regarding civility complaints or lack of civility issues? If so, what type of statistics or data do you compile, and can you please provide us with that information? Has there been any data or evidence evidencing that the inclusion of civility in your state's oath has improved the profession, or that it has not improved the profession?  
(These are pretty substantial questions that would require additional research). We have had three or four opinions in which lawyers were strictly sanctioned strictly on civility matters. Every-



thing from email exchanges, to written correspondence to slapping a deponent during a deposition. We also cite the oath on a number of confidential dispositions.

7. Is the enforcement of civility in your jurisdiction worthwhile or not? Please explain.

Absolutely. It is critical to the profession. The Court is more than willing to “question” a lawyer at oral argument about inappropriate behavior. Social media has also added to the problem as people seem to think what they say in blogs, listserves, facebook etc. is not to be considered. We often find ourselves in a dilemma when we get complaints about those type of postings and they are in no way related to the lawyer’s practice or any specific cases. We can only take one case at a time and look at it. There should, in my opinion, be a distinction between our rold [sic] as investigators and prosecutors of misconduct pursuant to the Rules of Professional Conduct and simply being the moral police.

8. Are civility or professionalism oaths or guidelines that are voluntary sufficient to respond to the lack of civility? Why or why not?

I have not dealt with any that are voluntary.

9. Should civility be mandatory? Why or why not? What benefits, if any, can be reaped from the implementation of mandatory civility? What are the disadvantages, if any, of mandatory civility?

I believe civility should be mandatory. But I believe that in my own household as well. Civility and professionalism should be hand in hand. When you are a professional and in the course of your business it gets personal, you are crossing the line and that is unacceptable.

10. If it chose to do so, how could the legal profession enforce civility? Which of those methods is the best method for enforcing civility? Do there need to be more specific regulations and rules to enforce civility, besides requiring civility in general? If so, why, and what regulations or rules are necessary to enforce civility? If not, why not?

Oaths and Rules that are mandated and when not followed, lawyers should be sanctioned. This varies by jurisdiction but whether it is the Bar or the Court, there should be procedures in place.

11. What are the main arguments against mandatory civility, and what are the counter-arguments or responses to those arguments? Cannot think of any!

12. If available, please provide any data or documents you have regarding civility issues with attorneys (e.g., complaints, opinions), particularly if incivility complaints or incidents are tracked in some manner.

I will send cites to those few opinions we have.

13. Please provide a brief biography of yourself that includes your experience with issues relating to civility and your background in general.

I will attach with this.

