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A NON-TRIVIAL PURSUIT: THE CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM

Melissa S. Hung*

I. INTRODUCTION

“New Ethics Allegations In Prosecution at Duke; Bar Says DA Lied, Withheld Evidence.”¹ “The Cloud Over Mr. Gonzales: The attorney general has a few things to explain.”² “Judge Who Seeks Millions for Lost Pants Has His (Emotional) Day in Court.”³ In 2007, these and other headlines in the mainstream media ensured the legal profession’s ethical standards were a hot topic not only in the legal world, but in general society. In news of significance to legal ethicists last year, the American Bar Association issued

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1. Sylvia Adcock, *New Ethics Allegations In Prosecution at Duke; Bar Says DA Lied, Withheld Evidence*, WASH. POST, Jan. 25, 2007, at A3. A North Carolina prosecutor’s misconduct while pursuing an alleged rape case and subsequent disbarment attracted national attention for months. See The N.Y. Times, http://topics.nytimes.com/top/reference/timestopics/people/n/michael_b_nifong (last visited Apr. 5, 2008).

2. Editorial, *The Cloud Over Mr. Gonzales; The attorney general has a few things to explain.*, WASH. POST, Mar. 26, 2007, at A14. The United States Attorney General eventually resigned following assertions that the firing of seven United States Attorneys was politically motivated. See Dan Eggen & Michael A. Fletcher, *Embattled Gonzales Resigns*, WASH. POST, Aug. 28, 2007, at A01.

3. Marc Fisher, *Judge Who Seeks Millions for Lost Pants Has His (Emotional) Day in Court*, WASH. POST, June 13, 2007, at B1. A judge’s sixty-five-million-dollar lawsuit against his neighborhood drycleaner over a pair of lost pants provided ample fodder for more jokes about the morals of the legal profession. See *id.*

four formal opinions.⁴ Subjects included contact with potential class action members,⁵ disclosure of legal assistance to pro se litigants,⁶ advice to clients of the advantages and disadvantages of collaborative law practice,⁷ and appointed counsel's relationship to a person who refuses representation.⁸ The State Bar of California Standing Committee on Professional Responsibility and Conduct also issued three advisory opinions regarding acceptance of credit card payments from clients,⁹ use of will depositories and registries,¹⁰ and release of electronic client files upon termination of representation.¹¹

Rather than highlighting and summarizing notable news items, ethics opinions, and cases, however, this year's ethics feature differs from past works by focusing on a specific development during the assigned year of 2007. Of particular interest to this year's editors is The State Bar of California's adoption of the California Attorney Guidelines of Civility and Professionalism (Guidelines).¹² The intent of this piece is to

4. While California has not adopted the ABA Model Rules of Professional Conduct, California attorneys may still find these advisories informative. The State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 152 (1988). "The ABA Model Code of Professional Responsibility and ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California." *Id.*

5. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-445: Contact by Counsel with Putative Members of Class Prior to Class Certification (2007).

6. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446: Undisclosed Legal Assistance to Pro Se Litigants (2007).

7. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447: Ethical Considerations in Collaborative Law Practice (2007).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-448: Appointed Counsel's Relationship to a Person Who Declines to be Represented (2007).

9. The State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 172 (2007): Accepting Credit Card Payments from a Client, available at <http://calbar.ca.gov/calbar/pdfs/ethics/2007-172.pdf>.

10. The State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 173 (2007): Use of Will Depositories and Registries, available at <http://calbar.ca.gov/calbar/pdfs/ethics/2007-173.pdf>.

11. The State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 174 (2007): Electronic Client Files, available at <http://calbar.ca.gov/calbar/pdfs/ethics/2007-174.pdf>.

12. THE STATE BAR OF CAL., CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM (2007) [hereinafter GUIDELINES], available at <http://calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf>. The Guidelines were adopted on July 20, 2007. *Id.* Although the Guidelines' title refers to both

introduce attorneys to the history and content¹³ of the Guidelines, and suggest methods for implementing their principles into the culture of the California bar.¹⁴

II. DEAR MISS MANNERS,¹⁵ IS THERE A NEED FOR ETIQUETTE INSTRUCTION?

An initial reading of the Guidelines, described in further detail in Part III, did not reveal any surprisingly lofty goals. The Guidelines are more remarkable for characterizing as aspirational what most would consider fundamental concepts. For example, “[a]n attorney should not disparage another’s personal characteristics.”¹⁶ This statement is strikingly similar to rules about how to play well with others commonly posted in elementary school classrooms. “An attorney should treat clients with courtesy and respect. . . .”¹⁷ Didn’t Mr. Cleaver tenderly lecture the Beaver across the dinner table on a related principle? And as a final illustration, “an attorney should be punctual and prepared.”¹⁸ Any civilized person knows that being on time and ready are elementary manners. “Gentle readers,” if attorneys must be encouraged to aspire to basic etiquette, what does this imply about the state of legal practice? Are the Guidelines, which are largely reminders of simple decorum, really necessary?

Apparently, the answer is yes.¹⁹ Lawyers are

civility and professionalism, civility alone is the main focus as the Introduction states, “These are guidelines for civility.” *Id.* Professionalism has been defined to include civility, ethical practice, competence, service to the public, and self-regulation. *See, e.g.*, Agenda Item from The State Bar of Cal. Staff to Bd. of Governors and Bd. Comm. on Member Oversight (July 20, 2007) (on file with author) [hereinafter Agenda Item, July 2007].

13. *See infra* Part III.

14. *See infra* Part IV.

15. “Miss Manners” is etiquette advice columnist Judith Martin. WIKIMEDIA FOUNDATION, JUDITH MARTIN (2008), http://www.en.wikipedia.org/wiki/Judith_Martin. Since 1978, Miss Manners has been answering readers’ decorum questions in columns currently printed three times a week in more than 200 newspapers internationally. *Id.* Martin has also published more than a dozen books in the Miss Manners theme. *Id.*

16. GUIDELINES, *supra* note 12, § 3.

17. GUIDELINES, *supra* note 12, § 11.

18. GUIDELINES, *supra* note 12, § 14.

19. Some scholars argue, however, that there has been no decline since American lawyers have always been criticized for sub-par standards of professionalism, and that perhaps lawyers have never actually been professional. Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 712 (2006).

stereotypically impolite, and unfortunately, there is some truth to this stereotype. Civility, or rather the increasing lack thereof, has been an acknowledged professional concern for decades.²⁰ The deterioration of good manners in our occupation and corresponding call for reform are the topic of numerous articles, speeches, and commentary by members from the entire spectrum of the legal profession.²¹ In the literature, there are frequent references to “the Golden Rule,”²² “Rambo” tactics,²³ supervising “kindergarten,”²⁴ and childhood lessons from our parents and teachers.²⁵ Recent civility discussions often cite the Seventh Federal Judicial Circuit’s report, published in 1991,²⁶ as the primary stimulus for increased interest in the topic.²⁷ The study surveyed almost 1300 attorneys in the circuit, of which forty-two percent felt civility was an issue.²⁸ Specifically, many judges and attorneys were frustrated about the apparent increase in aggressive conflicts at the expense of professional collegiality.²⁹ The Circuit’s resulting and highly influential civility code is significant because it articulated, for the first time, a common set of expectations for judges and attorneys

20. See, e.g., John W. Reed, *The Changing Face of Legal Education: Implications for the Practice of Law and the Courts*, 1999 L. REV. M.S.U.-D.C.L. 779, 779 (1999) (referring to the “constant drumbeat of concern about civility and manners in the profession”).

21. As of April 2, 2008, a Lexis search produced 258 results for United States law reviews and journals with sentences containing both “decline” and “civility.” Even Supreme Court Justices have weighed in on this topic. See, e.g., Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 2 (1993); Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 6 (1998); Clarence Thomas, *A Return to Civility*, 33 TULSA L.J. 7, 7 (1997).

22. E.g., Thomas, *supra* note 21, at 9.

23. E.g., Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L.J. 1049, 1053 (2000); Allen K. Harris, *The Professionalism Crisis – The ‘Z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549, 583 (2002); William M. Monroe, *A Kind Word is so Easily Spoken*, ORANGE COUNTY LAW., May 2007.

24. E.g., John T. Berry, *A Check-Up on the Health of the Legal Profession*, 17 PROF. LAW. 2, 2 (2006); Robert D. Kraus, *Toward Civility in Civil Practice*, BUS. LAW TODAY, May/June 2007.

25. E.g., Sheldon Sloan, *Let’s Open Wide the Pipeline to Diversity of the Legal Profession*, DAILY J., July 28, 2006.

26. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 254 (1998).

27. See, e.g., *id.* at 256; Ralph D. Cook, *Civility: Its Decline and a Resolution for Its Restoration*, 64 ALA. LAW. 226, 229 (2003).

28. Aspen, *supra* note 26, at 254.

29. *Id.*

regarding appropriate behavior.³⁰

There is sadly no evidence indicating California is unaffected by this trend towards uncivilized conduct. Examples of discourtesy experienced in California include refusals to continue proceedings,³¹ serving documents in a manner calculated to restrict the other side's chance to respond,³² and using large firm resources to smother solo practitioners.³³ Scheduling depositions at inopportune times, including during rush hour,³⁴ the holidays,³⁵ or when the opposing lawyer is on vacation,³⁶ is also a favored stunt. Several publications directed toward California attorneys featured articles in 2007 encouraging more courteous behavior,³⁷ even while acknowledging the plethora of materials already addressing the topic.³⁸ Practitioners' suggestions for improvement include shaking hands, refraining from interrupting others, and notifying the court and opposing counsel of illness or tardiness.³⁹ The simplistic nature of these propositions signals the growing lack of professionalism within the legal community and immediate need for reform.

A. *What Is Civility?*

Definitions of civility are nebulous, often referring to synonyms such as "courtesy" and "politeness."⁴⁰ An alternative definition is "a polite act or expression."⁴¹ There is also the comparison to Justice Potter Stewart's definition of pornography—"I can't define it, but I know it when I see it."⁴²

While the definition of civility may be elusive,

30. *Id.* at 256.

31. *See Guidelines for Lawyer Civility Move Forward*, CAL. ST. B.J., May 2007 [hereinafter *Guidelines Move Forward*].

32. Sloan, *supra* note 25.

33. *Id.*

34. Monroe, *supra* note 23.

35. *Guidelines Move Forward*, *supra* note 31.

36. Sloan, *supra* note 25.

37. Diane Karpman, *A Collision of Legal Needs and Professionalism*, CAL. ST. B.J., Jan. 2007; Monroe, *supra* note 23; Robert K. Sall, *Practicing Law by the Code of the West*, ORANGE COUNTY LAW., July 2007.

38. Monroe, *supra* note 23.

39. *Id.*

40. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 226 (11th ed. 2003), available at <http://www.merriam-webster.com/dictionary/civility>.

41. *Id.*

42. Aspen, *supra* note 26, at 257.

commentators have many ideas about civility's roles in the legal world. Civility is an element of professionalism⁴³ and one of the foundations of self-government.⁴⁴ One professor describes civility to call for "maintaining a delicate balance between client advocacy and professional decorum."⁴⁵ Civility also encompasses consideration for opposing counsel and personal integrity.⁴⁶ Functional viewpoints describe civility as a "mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well being,"⁴⁷ and to "require bringing actions to a resolution in a reasonable amount of time so that the parties are better served."⁴⁸ The newly adopted Guidelines espouse all these notions of civility.

B. Why Have We Become So Uncivil?

Several articles discuss the causes of civility's decline in the legal profession.⁴⁹ Some argue the movement reflects the general deterioration of public morality.⁵⁰ Many cite the growth of the bar as a major factor.⁵¹ The increased number of lawyers has resulted in a more impersonal legal

43. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 295 (1995); Harris, *supra* note 23, at 557.

44. Thomas, *supra* note 21, at 10 (also noting civility's relation to respect and how true discourse is impossible without respect).

45. Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 RUTGERS L. REV. 889, 890 (1999).

46. Monroe, *supra* note 23. Note that civility and ethics are distinguishable; civility addresses consideration for others, and does not necessarily imply moral behavior. See Harris, *supra* note 23, at 557. One may thus be civil and immoral, or impolite yet principled. *Id.* However, discussions regarding civility, including the Guidelines, imply a presumption of good faith while interacting with others.

47. Robert C. Josefsberg, *The Topic is Civility - You Got a Problem With That?*, 59 OR. ST. B. BULL. 19, 19 (1999).

48. Monroe, *supra* note 23.

49. See, e.g., Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1379 (2007); Cook, *supra* note 27.

50. See Camp, *supra* note 49, at 1379; Paul L. Friedman, *Civility, Judicial Independence and the Role of the Bar in Promoting Both*, 2002 FED. CTS. L. REV. 4 (2002); Douglas S. Lang, *Professionalism and Civility: Is it Time for a Different Approach?*, TEX. B.J., June 2000 (referencing claims that "our society is becoming populated by people who lack fundamental training in values"); Thomas, *supra* note 21 (citing the extreme celebration following scoring and unnecessarily contentious challenges to referees often seen in professional sports these days).

51. E.g., Chin et al., *supra* note 45, at 892; Gaetke, *supra* note 19, at 712.

community, where collegiality can be less valued than client relationships.⁵² This is especially true when opposing lawyers are unlikely to cross paths more than once.⁵³ Another consequence of the bar's expanding membership is increased diversity, which complicates interactions.⁵⁴ Some individuals simply do not realize what is proper and improper when dealing with other genders or races.⁵⁵ A few scholars theorize that women and minorities, perhaps in response to this ignorance, believe more heavy-handed tactics are needed to break into the ranks of law practice.⁵⁶

Other culprits of incivility within the profession include frequent malpractice suits,⁵⁷ decreased mentoring,⁵⁸ inadequate training,⁵⁹ greater misuse of discovery,⁶⁰ commercialization of law practice,⁶¹ and increased competition for clients.⁶² Decreased client loyalty,⁶³ the intrusion of accounting firms and other businesses into conventional legal arenas,⁶⁴ and the changing role of law in our society⁶⁵ are contributing external factors.

A more client-focused approach is a significant consequence of these factors.⁶⁶ The transformation of law practice into a business, combined with diminished client

52. See Thomas E. Humphrey, "Civil" Practice in Maine, ME. B.J., Winter 2005.

53. See, e.g., Camp, *supra* note 49, at 1380; Harris, *supra* note 23, at 590; W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 2013 (2001). The fear of retaliatory conduct is absent and not a restraint on attorneys in areas with a larger number of lawyers due to the low probability of interacting again in the future. Josefsberg, *supra* note 47, at 22.

54. See Aspen, *supra* note 23, at 1051; Camp, *supra* note 49, at 1380.

55. See Aspen, *supra* note 23, at 1051.

56. See Camp, *supra* note 49, at 1380.

57. See, e.g., Wendel, *supra* note 53, at 1957.

58. Gaetke, *supra* note 19, at 713; Humphrey, *supra* note 52; Reed, *supra* note 20, at 784.

59. E.g., Chin et al., *supra* note 45, at 892.

60. E.g., *id.*

61. E.g., Camp, *supra* note 49, at 1381; Chin et al., *supra* note 45, at 892; Gaetke, *supra* note 19, at 712-13; Harris, *supra* note 23, at 552.

62. See, e.g., Camp, *supra* note 49, at 1381; Chin et al., *supra* note 45, at 892.

63. E.g., Camp, *supra* note 49, at 1379-80; Wendel, *supra* note 53, at 1957.

64. See Wendel, *supra* note 53, at 1957.

65. Thomas, *supra* note 21, at 11-12. Justice Thomas hypothesizes that in the 1960s the public began to perceive law as a tool for furthering social causes in the courts, rather than for vindicating private rights. *Id.*

66. See, e.g., Camp, *supra* note 49, at 1381.

loyalty and a more competitive environment, creates this attitude.⁶⁷ Some believe that lawyers now sacrifice other duties to the court and public in favor of the extreme advocacy considered necessary to attract and retain clients.⁶⁸ Clients can now find a lawyer to take almost any case due to this client-based philosophy and competition.⁶⁹

In the same vein, lawyers are marketed as “can do” people instead of “independent counselors of the law;”⁷⁰ clients consider lawyers “morally neutral” tools hired to pursue their objectives.⁷¹ Clients therefore appear to drive the ethical standards of the legal profession,⁷² expecting their attorneys to utilize “every trick in the book” to win,⁷³ regardless of whether or not the outcome is fair.⁷⁴ As expressed by one practitioner, “The business of law trudges toward its downfall by virtue of a creeping acceptance of bad manners, trickery, outright deceit, and sharp dealing, all cloaked in the language of doing the best job for a client.”⁷⁵ Paradoxically, prioritizing the financial bottom line of the firm stands in tension with efficient client representation due to the billable hour structure.⁷⁶ As a result, the clients for whom attorneys sacrifice their professionalism ultimately complain about the cost of legal representation.⁷⁷ This cycle is absurd. Is it really such a surprise that public respect for the profession continues to decline when lawyers are willing to sell their professional principles at the expense of both the client (literally) and the occupation (figuratively)?⁷⁸

“Rambo” attorneys have spawned in this climate.⁷⁹ Characteristics of this “win at all costs” breed of lawyer

67. See, e.g., *id.*; see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 899-900 (1999).

68. See Camp, *supra* note 49, at 1381.

69. See *id.* at 1385.

70. *Id.* at 1381.

71. *Id.* at 1382.

72. See *id.* at 1381.

73. See Camp, *supra* note 49, at 1388.

74. See *id.* at 1382.

75. Daniel Coffey, *Letter to the Editor*, L.A. LAW., Mar. 1997.

76. See, e.g., Humphrey, *supra* note 52.

77. Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 STETSON L. REV. 305, 309 (1998).

78. See Berry, *supra* note 24, at 12.

79. Chin et al., *supra* note 45, at 889.

include treating litigation as combat by capitalizing on discovery as a chance for bullying the other party rather than learning information, and torturing opposing counsel with the belief that such conduct benefits the client's case.⁸⁰ Rambo lawyers claim genuine fighters are not polite,⁸¹ and prefer to shun negotiation, even if contrary to common sense.⁸² Exceptional abilities to warp reality and lightning-quick reactions to file frivolous motions are other typical Rambo attributes.⁸³ Rambo attorneys spotlight themselves in court, instead of the client or the case.⁸⁴ Beware! This strain of lawyer is contagious, often infecting polite attorneys through naive clients who question why their attorney does not behave the same way.⁸⁵

The above reasons and outcomes notwithstanding, is the profession's loss of manners so startling? Attorneys as a group are generally miserable and unwell vis-à-vis the general population, as evidenced by greater rates of divorce, alcoholism, suicide, and depression.⁸⁶ Job dissatisfaction is common; only half of California's attorneys would elect to pursue this career again.⁸⁷ Unhappy people are frequently not very pleasant. Attempting to balance the demands of billable hour requirements with client retention and a personal life is also stressful.⁸⁸ Time is at such a premium that there is no time for a lawyer to calm down, which exacerbates the situation.⁸⁹ People under pressure are frequently less courteous in their interactions. When frazzled attorneys are attempting to best serve angry parties with adverse interests, it is not surprising that attorney relations may be less than civil. However, the proliferation of civility and professional codes across the country suggest that attorneys believe mutual respect and graciousness are not

80. *Id.*

81. *Id.*

82. Harris, *supra* note 23, at 550.

83. Chin et al., *supra* note 45, at 889.

84. *Id.*

85. Harris, *supra* note 23, at 550.

86. Schiltz, *supra* note 67, at 874-81.

87. Nancy McCarthy, *Pessimism for the Future: Given a Second Chance, Half of the State's Attorneys Would Not Become Lawyers*, CAL. ST. B.J., Nov. 1994.

88. See, e.g., Aspen, *supra* note 23, at 1051; Schiltz, *supra* note 67, at 890.

89. Cary, *supra* note 77, at 311.

only possible, but desired.⁹⁰

III. THE CALIFORNIA GUIDELINES IN CONTEXT

Civility codes are neither radical nor uncommon. According to the American Bar Association, over 150 organizations in forty-six states have adopted some type of professional responsibility code.⁹¹ Like the California Guidelines,⁹² the majority of codes are voluntary and aspirational.⁹³ Prior to the adoption of these Guidelines by The State Bar of California, twelve associations in California had already embraced similar aspirational professional conduct codes.⁹⁴ This group includes The State Bar of California Litigation Section, which adopted a “Model Code of Civility and Professionalism” in 2006.⁹⁵ The earliest known dates of guidelines adoption were in 1989, by the Beverly Hills Bar Association and Los Angeles County Bar Association.⁹⁶

The State Bar’s adoption of these Guidelines is significant due to the institution’s unique reach and scope in

90. See, e.g., Amer. Bar Association Center for Professional Responsibility, <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited Mar. 21, 2008) [hereinafter Professional Responsibility Center]. This site lists the professionalism codes adopted by legal groups, ordered by state. *Id.*

91. See *id.* States without organizations that have adopted some type of professionalism code are Alaska, Maine, North Dakota, and South Dakota. See *id.* The District of Columbia’s bar is represented on the list, as well as several national entities, including the American Bar Association Sections on Family Law, Litigation, Tort and Insurance Practice, and Young Lawyers’ Division; as well as the American College of Real Estate Lawyers and American Inns of Court. *Id.*

92. GUIDELINES, *supra* note 12, Introduction.

93. Humphrey, *supra* note 52.

94. See Professional Responsibility Center, *supra* note 90. These groups are the Alameda County Bar Association, Beverly Hills Bar Association, Contra Costa County Bar Association, Los Angeles County Bar Association, Marin County Bar Association, Orange County Bar Association, Riverside County Bar Association, Sacramento County Bar Association, Association of Business Trial Lawyers (Northern California and San Diego chapters), San Diego County Bar Association, Santa Clara County Bar Association, and Ventura County Bar Association. *Id.* These policies are usually titled some combination of “statement,” “guidelines,” “standards,” or “codes” on “professionalism,” “civility,” or “conduct.” See *id.* No formal study on the effectiveness of these existing codes was conducted prior to the State Bar’s undertaking. Interview with Mary Yen, Assistant Gen. Counsel, The State Bar of Cal., in S.F., Cal. (Jan. 18, 2008) [hereinafter Yen Interview].

95. Professional Responsibility Center, *supra* note 90.

96. *Id.*

California. Unlike voluntary regional and practice area bar associations, membership in The State Bar of California is mandatory.⁹⁷ The State Bar includes not only attorneys from the entire state, but also a number of attorneys practicing outside of California.⁹⁸ While membership is obligatory, the Guidelines are voluntary and intended to illustrate “the best practices of civility in the practice of law in California”⁹⁹ and to “restrain unprofessional behavior” by attorneys.¹⁰⁰ Most importantly, the Guidelines are aspirational, and not meant to serve as the basis for disciplinary charges, nor replace the Rules of Professional Conduct.¹⁰¹

A. *Why Now?*

In 1995, The State Bar of California and its Commission on the Future of the Legal Profession released suggestions on fostering legal professionalism in California.¹⁰² Recognizing the apparent tension between civility and the nature of the adversarial system, Recommendation 58 proposed the implementation of a state-wide aspirational code of professionalism.¹⁰³ The major force reviving interest in this recommendation in 2006 was then State Bar President Sheldon Sloan, who expressed a desire to “bring back

97. THE STATE BAR OF CALIFORNIA: WHAT DOES IT DO? HOW DOES IT WORK? 1 (2006), <http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf>. Over half of the states have a unified or mandatory bar. *Id.* In 1927, California’s bar became one of the first integrated state bars. *Id.*

98. THE STATE BAR OF CALIFORNIA, MEMBER DEMOGRAPHICS, <http://members.calbar.ca.gov/search/demographics.aspx> (last visited Mar. 21, 2008). Over forty-thousand members of California’s bar, almost twenty percent of the membership, reside out of the state. *Id.*

99. GUIDELINES, *supra* note 12, Introduction.

100. *Board Adopts Civility Code*, CAL. ST. B.J., Aug. 2007 [hereinafter *Board Adopts Civility Code*].

101. GUIDELINES, *supra* note 12, Introduction. Other states with mandatory bars which have adopted civility guidelines include Alabama, Arizona, Florida, Hawaii, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, Oregon, Rhode Island, Virginia, Washington, and West Virginia. Agenda Item, July 2007, *supra* note 12.

102. Agenda Item from The State Bar of Cal. Staff to Bd. of Governors and Bd. Planning, Program Dev. and Budget Comm. (July 31, 2006) (on file with the author) [hereinafter Agenda Item, July 2006]; Agenda Item from The State Bar of Cal. Att’y Civility Task Force to Bd. Comm. On Member Oversight (Apr. 20, 2007) (on file with the author) [hereinafter Agenda Item, Apr. 2007]; Agenda Item, July 2007, *supra* note 12.

103. Agenda Item, July 2006, *supra* note 102; Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

professionalism, and along with it some public respect” during his tenure as president.¹⁰⁴ In addition to discouraging the “take no prisoners” attitude of some lawyers,¹⁰⁵ Sloan wanted to correct the misperceptions that rude behavior produced advantages and cooperative conduct conveyed vulnerability.¹⁰⁶

B. *The Process*

The Attorney Civility Task Force (Task Force) was formed and appointed to determine whether to recommend a single set of civility objectives, or an another option.¹⁰⁷ Funding for the Task Force was requested in 2006 by the State Bar staff¹⁰⁸ and subsequently approved by the State Bar Board of Governors.¹⁰⁹ Members of the Board of Governors submitted nominations for potential Task Force members.¹¹⁰ The resulting twenty-member Task Force, which included four judges,¹¹¹ decided to recommend one set of voluntary guidelines.¹¹² The drafting process began with the Santa Clara County Bar Association’s Code of Professionalism as a template.¹¹³ The Task Force studied and integrated provisions from at least twenty other codes, but drafted their own text as well.¹¹⁴

Because the Task Force members wished for the Guidelines to reflect more than just their visions, they arranged for formal feedback through several mechanisms.¹¹⁵

104. Sloan, *supra* note 25.

105. *Board Adopts Civility Code, supra* note 100.

106. *See* Sloan, *supra* note 25; *Guidelines Move Forward, supra* note 31.

107. Agenda Item, July 2006, *supra* note 102; Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

108. Agenda Item, July 2006, *supra* note 102.

109. *See* Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

110. Yen Interview, *supra* note 94.

111. *Guidelines Move Forward, supra* note 31; *see* Agenda Item, Apr. 2007, *supra* note 102.

112. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

113. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12; *see* Sloan, *supra* note 25.

114. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12. Other referenced codes include those from the American Academy of Matrimonial Lawyers and the American Board of Trial Advocates. Agenda Item, Apr. 2007, *supra* note 102.

115. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra*

A draft was made available for informal public comment over a two-month period.¹¹⁶ During this time, much interest was generated; attorneys from all fields of law, members of the public, and residents of other states requested copies.¹¹⁷ More than thirty attorneys, judges, members of the public, and representatives from bar entities submitted written comments.¹¹⁸ The Task Force also held two public hearings, and submitted drafts for evaluation by law school classes and continuing education programs.¹¹⁹ A subsequent revision was released for another thirty-day comment period.¹²⁰ The *California Bar Journal* featured the proposed Guidelines, and all voluntary bar associations in California received an electronic copy.¹²¹ Those who had requested copies during the earlier two-month period also received an amended version.¹²² The Task Force viewed the feedback process as an opportunity to spotlight civility and to reiterate that courtesy does not diminish effective advocacy.¹²³ Consequently, the drafters revised every section of the Guidelines¹²⁴ over the course of six meetings.¹²⁵

Public feedback varied widely. Roughly half of those who offered written commentary supported the Guidelines, some with additional recommendations.¹²⁶ An enforcement mechanism, coverage of additional concepts, and editorial revisions were among the suggestions.¹²⁷ Approximately one-third of the respondents, including leaders from several southern California bar entities, opposed the Guidelines.¹²⁸

note 12.

116. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

117. Agenda Item, Apr. 2007, *supra* note 102.

118. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

119. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

120. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

121. Agenda Item, July 2007, *supra* note 12.

122. *Id.*

123. *Guidelines Move Forward*, *supra* note 31.

124. Agenda Item, Apr. 2007, *supra* note 102.

125. Agenda Item, July 2007, *supra* note 12.

126. *Id.*

127. *Id.*

128. *Id.* Specific groups represented include the Orange County Bar Association, the Professional Responsibility and Ethics Commission of the Los

Reasons cited include fears the Guidelines would be utilized as a basis for discipline, potential for confusion with other standards of conduct, and ineffectiveness.¹²⁹

The Task Force took several considerations into account while producing these Guidelines, including misgivings expressed during the feedback process. Because most attorneys associate the State Bar with discipline, the drafters made a conscious effort to minimize confusion between the Guidelines and other mandatory standards of conduct.¹³⁰ There was a recognized awareness about concerns that the Guidelines would be viewed as a basis for discipline.¹³¹ The Guidelines were drafted with the intent to establish ideal practices, not regulations.¹³² To emphasize the voluntary nature of the Guidelines, the Task Force avoided the terms “code” and “rule.”¹³³ The most prominent substantive change was to re-title the standards “Guidelines,” rather than the “Code” used by the Santa Clara County Bar Association.¹³⁴ This philosophy is clearly reflected in the Guidelines’ Introduction.¹³⁵

C. *The Structure of the Guidelines*

The Guidelines are available in two versions, which are intended to serve as one unit.¹³⁶ The abbreviated version of the Guidelines is two pages and contains only the Guidelines themselves.¹³⁷ The second version includes examples to illustrate the principles in practice.¹³⁸ With examples, the Guidelines are a fifteen-page document.¹³⁹ The four-

Angeles County Bar Association (LACBA), LACBA’s Individual Rights Section, LACBA’s Litigation Section, and the Los Angeles Chapter for the Federal Bar Association. *Id.*

129. Agenda Item, July 2007, *supra* note 12.

130. *Board Adopts Civility Code*, *supra* note 100.

131. *Guidelines Move Forward*, *supra* note 31.

132. See GUIDELINES, *supra* note 12, Introduction.

133. Agenda Item, Apr. 2007, *supra* note 102.

134. *Id.* Other noted substantive changes included rewording Section 2 (Responsibilities to the Public and the Profession) to omit an explicit referral to pro bono work while still maintaining the spirit of pro bono goals, rethinking Section 9 (Discovery), adding Section 18 (Negotiation of Written Agreements), and overhauling Section 21 (Courtroom Proceedings). *Id.*

135. GUIDELINES, *supra* note 12, Introduction.

136. Agenda Item, July 2007, *supra* note 12.

137. See GUIDELINES, *supra* note 12.

138. See *id.*

139. See *id.*

paragraph Introduction is the longest section, emphasizing the discretionary and aspirational nature of the Guidelines.¹⁴⁰ Twenty-one sections address eight main topics: civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation.¹⁴¹ The individual sections are titled as follows:

Section 1: Responsibilities to the Justice System

Section 2: Responsibilities to the Public and the Profession

Section 3: Responsibilities to the Client and Client Representation

Section 4: Communications

Section 5: Punctuality

Section 6: Scheduling, Continuances and Extensions of Time

Section 7: Service of Papers

Section 8: Writings Submitted to the Court, Counsel or Other

Parties

Section 9: Discovery

Section 10: Motion Practice

Section 11: Dealing with Nonparty Witnesses

Section 12: Ex Parte Communication with the Court

Section 13: Settlement and Alternative Dispute Resolution

Section 14: Conduct in Court

Section 15: Default

Section 16: Social Relationships with Judicial Officers, Neutrals

and Court Appointed Experts

Section 17: Privacy

Section 18: Negotiation of Written Agreements

Section 19: Additional Provision for Family Law Practitioners

Section 20: Additional Provision for Criminal Law Practitioners

Section 21: Court Proceedings

The Guidelines conclude with the optional Attorney's Pledge, stating a commitment to the Guidelines' principles,

140. GUIDELINES, *supra* note 12, Introduction.

141. *Board Adopts Civility Code*, *supra* note 100.

an agreement to notify clients of this promise, and a vow to encourage other attorneys to adhere to the Guidelines.

Twelve of the twenty-one sections are comprised of only a single sentence.¹⁴² The Guidelines are thus not particularly detailed, and the examples are beneficial in elaborating upon the Guidelines. While statutes do regulate many of the section topics, they set minimum behavioral criteria.¹⁴³ In contrast, the Guidelines set forth ideal conduct.¹⁴⁴

IV. SUPPORTING THE GUIDELINES

Civility codes similar to these Guidelines are sometimes criticized as an inadequate response to the increase of incivility in the legal profession.¹⁴⁵ Although the Guidelines do not directly confront the roots of incivility,¹⁴⁶ they still have the potential to positively affect the profession despite their optional character. Because punishments generally foster more cooperative behavior than promised rewards,¹⁴⁷ this phenomenon leads to the conclusion that these Guidelines will have a limited impact due to the lack of a formal enforcement mechanism. This is true; elective Guidelines are not a bomb shelter against the Rambo attorney's machine-gun-like bombardment of last minute motions. If effectively implemented, however, the Guidelines can be a sturdy shield.

While there are no official measures in place compelling Rambo to act in accordance with the Guidelines, the Guidelines can still significantly impact the California bar. The most important insight is to recognize that this potential will not be realized if the Guidelines are not embraced; they are completely useless if they are not put into practice.¹⁴⁸ The crucial element for the Guidelines' success lies in maximizing the capability of existing resources for implementation.

142. See GUIDELINES, *supra* note 12, §§ 5, 7, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21.

143. *Guidelines Move Forward*, *supra* note 31.

144. *Guidelines Move Forward*, *supra* note 31.

145. See Wendel, *supra* note 53, at 1957.

146. *Supra* Part II.B.

147. James Adreoni, William Harbaugh & Lise Vesterlund, *The Carrot or the Stick: Rewards, Punishments, and Cooperation*, 93 AM. ECON. REV. 893, 901 (2003) (also suggesting that cooperative behavior is best fostered by a system featuring both punishments and rewards).

148. See Brian C. Walsh, *A Time for Professionalism: The Santa Clara Solution*, 6 CAL. LITIG. 20, 21 (1991).

From the inception of this project, President Sloan recognized these Guidelines would be ineffectual if lawyers did not pledge a commitment to them and their principles.¹⁴⁹ The Board of Governors is responsible for publicizing the Guidelines, and encouraging firms and bar associations to embrace them.¹⁵⁰ The resolution adopting the Guidelines assigns the Member Oversight Committee the task of recommending how the State Bar can assist the courts, voluntary bar associations, and individual lawyers in the implementation of these Guidelines.¹⁵¹ Funding was approved for a limited number of town hall style meetings across the state.¹⁵² Although several of the public comments¹⁵³ and articles on civility¹⁵⁴ suggest law schools are the institutions best situated to promote the growth of civility in the profession, law schools are not included in this group,¹⁵⁵ possibly because the State Bar has limited influence with schools. The initial step to realizing the Guidelines' value is an understanding of civility's benefits.

149. Sloan, *supra* note 25.

150. Agenda Item, July 2006, *supra* note 102.

151. E-mail from Mary Yen, Assistant Gen. Counsel, The State Bar of Cal., to author (Nov. 26, 2007, 13:17:59 PST) (on file with author) [hereinafter Resolution].

“RESOLVED that the Board of Governors of The State Bar of California adopt the California Attorney Guidelines of Civility and Professionalism in the form attached as Attachments 1 and 2 as a model set of guidelines for members, voluntary bar associations, and courts to use and implement in a way that is effective for the local legal community; and

FURTHER RESOLVED that the Member Oversight Committee recommend to the Board of Governors of The State Bar of California appropriate ways and means for the State Bar to facilitate such usage of the guidelines by members, voluntary bar associations and the courts.”

Id.

152. Agenda Item, July 2006, *supra* note 102; Agenda Item, Apr. 2007, *supra* note 102. Proposed meeting locations include Sacramento, Fresno, Los Angeles, and San Diego. Agenda Item, July 2006, *supra* note 102.

153. Agenda Item, July 2007, *supra* note 12.

154. Cary, *supra* note 77, at 305; see Ronald L. Carlson, *Competency and Professionalism in Modern Litigation: The Role of Law Schools*, 23 GA. L. REV. 689, 702 (1989); Chin et al., *supra* note 45, at 896; William I. Weston, *Law Schools – Heal Thyself*, 15 PROF. LAW. 24, 24 (2004).

155. See Resolution, *supra* note 151.

A. *Why Be Civil?*

The civility issue is not simply about being nice; the underlying costs of incivility are what lie at the heart of the matter. Civility's positive returns are particularly evident when compared with the expense of incivility. Incivility comes at a price to the courts, our clients, and our profession. Victims of incivility include not only other attorneys and opposing parties, but also judges, witnesses, and judicial administrators.¹⁵⁶ Our judicial system has become increasingly inefficient due to dockets gridlocked by discovery disputes.¹⁵⁷ Excessively contentious lawsuits result in augmented litigation expenses for clients.¹⁵⁸ With incivility, time is misdirected from the merits of the case to psychologically manipulating opposing counsel.¹⁵⁹ Discourteousness also instigates retaliatory techniques from opposing counsel and disfavor with the court.¹⁶⁰ Incivility negatively affects transactional attorneys as well. Hostility, resulting in tension, irritation, and diminished efficiency, extends the process needed to complete tasks, which often must be finalized within a certain timeframe.¹⁶¹ An attorney may be unable to meet her client's deadlines or resolve issues in a timely manner due to another counsel's unreliability in returning documents.¹⁶² Unfriendly conduct and gamesmanship¹⁶³ during negotiations also entail a risk of impairing clients' business deals.¹⁶⁴ Disrespectful lawyers reinforce our negative image as "untrustworthy" and "corrupt" tricksters,¹⁶⁵ further damaging the perception of the legal profession held by the general public.¹⁶⁶ Attorneys also report progressively less personal fulfillment with their

156. Humphrey, *supra* note 52.

157. *E.g.*, Camp, *supra* note 49, at 1382.

158. *E.g.*, Camp, *supra* note 49, at 1382.

159. Humphrey, *supra* note 52.

160. *See id.*

161. *See* Kraus, *supra* note 24; Humphrey, *supra* note 52.

162. Kraus, *supra* note 24.

163. Camp, *supra* note 49, at 1386.

164. Kraus, *supra* note 24.

165. Kraus, *supra* note 24.

166. *See, e.g.*, Camp, *supra* note 49, at 1382. In 1994, only seventeen percent of Americans gave lawyers high marks for "honesty and ethical standards." Harris, *supra* note 23, at 554. This was a decline of ten percent in nine years from 1985. *Id.* Since this survey is now fourteen years old, attorneys can only hope the rate of decline has slowed down.

work.¹⁶⁷ Such misbehavior also threatens the legal profession's privilege of self-regulation.¹⁶⁸

According to the Guidelines, civility advances the success and satisfaction of both the lawyer and the client.¹⁶⁹ Attorneys also have an obligation to be civil as officers of the court.¹⁷⁰ The Guidelines also name civility as an essential element to the "fair administration of justice and conflict resolution."¹⁷¹ Just as incivility breeds distrust, ill will, and greater incivility, genuine civility promotes trust, goodwill, and reciprocal consideration for all groups. Transactions are conducted and disputes settled more efficiently, lowering client costs. Benefits for individual attorneys include self-respect, collegiality, peace of mind, and more personal satisfaction.¹⁷² By resolving issues with grace and courtesy, attorneys have the opportunity to elevate public perceptions about the nature of the legal profession.

B. Correcting Misconceptions

Both attorneys and clients need to be educated about what constitutes acceptable behavior.¹⁷³ A commonly held misconception is that civility and zealous advocacy are mutually exclusive.¹⁷⁴ Some perceive civility as indicative of weakness,¹⁷⁵ and believe uncivil attorneys are more effective.¹⁷⁶ If effectiveness is measured by the ability to resolve matters efficiently, this idea is plainly wrong. In fact, one judge has stated that an aggressive attorney actually disadvantages his client by not distinguishing "zealous advocacy" from "overzealous representation" that wastes time and aggravates the court and opposing counsel.¹⁷⁷

Similarly, in litigious situations, most clients expect their attorneys to do everything possible to win on the client's

167. *E.g.*, Camp, *supra* note 49, at 1382; Schiltz, *supra* note 67, at 884-84.

168. Harris, *supra* note 23, at 560.

169. GUIDELINES, *supra* note 12, Introduction.

170. *E.g.*, *id.*

171. *Id.*

172. *E.g.*, Monroe, *supra* note 23.

173. *See Guidelines Move Forward*, *supra* note 31.

174. *E.g.*, Monroe, *supra* note 23; *see* Harris, *supra* note 23, at 557.

175. *See* Harris, *supra* note 23, at 558.

176. This idea likely stems from depictions of attorneys in the mass media, which greatly influences the public's notions of how an ace lawyer should behave. *See* Cary, *supra* note 77, at 311.

177. Aspen, *supra* note 23, at 1056.

behalf.¹⁷⁸ Clients frequently desire not just the smartest lawyer, but the “smartest and meanest” lawyer.¹⁷⁹ However, clients may not understand that employing devious tactics is more costly for them in the long run. A lawyer who utilizes schemes like frivolous motions, for example, is actually behaving unprofessionally and unethically, not simply “playing within the rules of the game.”¹⁸⁰ The lawsuit or deal must conclude at some point, and uncooperative behavior between attorneys while negotiating the inevitable conclusion only costs the clients more money due to the billable hour structure. Furthermore, litigation clients who encourage their attorneys to use underhanded strategies, and attorneys who permit their clients to override the attorneys’ professional duties in such a manner, undermine the integrity of the justice system. The so-called “winner” does not necessarily triumph due to the merits of her case, but instead on the basis of possessing enough financial resources to outlast the opposing party. These incidents threaten the influence of law as an institution¹⁸¹ by creating an alternative scheme of justice based on assets and rewarding unprincipled attorneys. This is contrary to the attorney’s duty as an officer of the court. Civility codes are criticized for intruding upon a lawyer’s duty of zealous client representation, which many believe is supreme to other obligations.¹⁸² Court decisions, however, support the view that courtesy trumps client responsibilities.¹⁸³

The Guidelines are a valuable educational reference for both attorneys and clients in clarifying the expected standard of conduct for California lawyers. A young attorney mentored by Rambo may not even realize the impropriety of Rambo’s tactics.¹⁸⁴ After all, serving papers on opposing counsel the Friday before Labor Day does not run afoul of professional

178. See Camp, *supra* note 49, at 1388.

179. Harris, *supra* note 23, at 599.

180. See Harris, *supra* note 23, at 568.

181. *Id.* at 560.

182. Aspen, *supra* note 26, at 257.

183. See *id.* at 257-66 (discussing a number of cases where courts reprimanded counsel for behavior which Rambo would likely characterize as strategic).

184. See Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 359, 361 (2001) (noting that civil litigators often don’t understand the difference between overzealous advocacy and unprofessional conduct).

conduct rules. An apprentice may naively believe timing service in this manner is a legitimate and acceptable maneuver. Clients similarly benefit from the Guidelines by learning what they may and may not expect from their attorneys as endorsed by the profession's governing body.

C. Why Aren't the Guidelines Mandatory?

Considering the respective costs of incivility and benefits of civility, obligatory guidelines would appear appropriate. The voluntary nature of the Guidelines, however, encourages attorneys to support the practice of civility without fear of repercussion for missteps.¹⁸⁵ The Task Force wished to encourage as many attorneys as possible to embrace the Guidelines, and it was believed that possible punishment for infractions would deter attorneys from pledging a commitment to the Guidelines.¹⁸⁶ In addition, problems with mandatory civility standards include constitutional issues and the limited effectiveness of punishments, including sanctions.¹⁸⁷

1. Constitutional Barriers

Proponents of a more heavy-handed approach to discouraging misbehavior will find constitutional obstacles to enforcing compulsory rules. Accurately defining offensive behavior in statutes with precisely the right level of specificity is difficult because drafters must "enjoin obedience to the spirit, as well as the letter" of the law.¹⁸⁸ Although certain types of behavior may be indisputably unprofessional, they are often still constitutionally protected.¹⁸⁹ Several regulations have been struck down due to vagueness and

185. Agenda Item, Apr. 2007, *supra* note 102.

186. *Id.*

187. In some states, however, civility codes are used as the basis for discipline despite the intent of the drafters. This is unlikely to occur in California because the Guidelines clearly articulate that "they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence." GUIDELINES, *supra* note 12, Introduction.

188. Atkinson, *supra* note 43, at 283-84; Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 40-41 (2000). Furthermore, relegating ethics to "black letter imperatives . . . discourages lawyers from reflecting on the virtue of their conduct and separates them from moral responsibility for their behavior." Gaetke, *supra* note 19, at 714.

189. *See* Atkinson, *supra* note 43, at 281.

infringement upon First and Fourteenth Amendment rights.

For example, the Ninth Circuit Court of Appeals held a previous version of California's Business and Professional Code section 6068(f), requiring lawyers to "abstain from all offensive personality," void for vagueness.¹⁹⁰ Because it was impossible for lawyers to determine what was "offensive" given the ambiguous language of the statute, the rule had a chilling effect on some constitutionally protected speech.¹⁹¹ Since this decision, there has been no statute addressing the behavior previously found offensive under section 6068(f).¹⁹²

More recently, a U.S. District Court found two Michigan Rules of Professional Conduct, compelling civil behavior from attorneys, too overbroad and vague for enforceability.¹⁹³ The provisions at issue prohibited attorneys from "undignified or discourteous conduct" in courts, and instructed attorneys to act with "courtesy and respect" toward others.¹⁹⁴ While the court acknowledged valid state interests in regulating attorney speech to uphold the judicial system's honor and reputation, these interests did not override an attorney's Fourteenth Amendment right to due process and the First Amendment right to free speech.¹⁹⁵ Not only were the rules too vague for consistent application, but they also did not

190. *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996). The court held that a defense lawyer's sexist letter to an Assistant United States Attorney did not obstruct the administration of justice. *Id.* at 1117.

191. *Id.* at 1119.

192. See Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

193. *Fieger v. Mich. Supreme Court*, 2007 U.S. Dist. LEXIS 64973 (E.D. Mich., Sept. 4, 2007). The Michigan Supreme Court disciplined attorney Geoffrey N. Fieger for disrespectful comments regarding appellate court judges who had reversed a large judgment for Fieger. *Id.* Fieger's rants, which included characterizing the judges as "Nazis" and "jackasses," were uttered on a radio show. *Id.* The Supreme Court found Fieger's outburst so outrageous as to fall outside the scope of First Amendment protection. *Id.* Fieger subsequently challenged the rules in question in a separate action. *Id.*

194. Rule 3.5, Impartiality and Decorum of the Tribunal, states "[a] lawyer shall not: . . .

(c) engage in undignified or discourteous conduct toward the tribunal." MICH RULES OF PROF. CONDUCT (2003). Rule 6.5, Professional Conduct, states "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process . . ." *Id.* These specific rules are derived from the earlier Model Code of Professional Responsibility, not the ABA Model Rules of Professional Conduct. *Id.*

195. *Fieger*, *supra* note 193.

permit exceptions for harmless speech, including truth.¹⁹⁶

Finally, a judge recently determined that the language of a California State University conduct code, mandating students “be civil to one another,” would likely not survive First Amendment scrutiny.¹⁹⁷ “It’s fine to say, ‘We hope you’re civil to each other . . . it’s not fine to say, ‘we’ll punish you if you’re not.’”¹⁹⁸ While the judge appreciated the intent of the code in promoting collegial campus relations, he also recognized that a person could behave contrary to this goal, but within their First Amendment right to free expression.¹⁹⁹

While these attempts to mandate civility by formally penalizing undesirable behavior have been unsuccessful, behavior regulation is not an unattainable goal. Although the Ninth Circuit found section 6068(f) unconstitutional as phrased, the court did discuss “conduct unbecoming a member of the bar” as language which would pass constitutional muster.²⁰⁰ The State Bar of California has now proposed a “rule of conduct with provisions to address uncivil conduct.”²⁰¹ The state of Arizona has also recommended that their civility guidelines serve as the source for disciplinary proceedings, meaning civility becomes the basis for sanctions.²⁰²

2. *The Use of Sanctions*

However, The State Bar of California explicitly recommends against the use of sanctions in implementing the

196. *Id.*

197. *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007). This case arose from an intense argument at an on-campus anti-terrorism rally between San Francisco State University’s College Republicans and members of the university’s Muslim community. See Dan Levine, *Judge Tosses Part of Campus Civility Code*, THE RECORDER, Nov. 1, 2007, at 1. A complaint alleging the Republicans attempted to instigate fighting and foster an antagonistic atmosphere in violation of the campus conduct code was lodged. *Id.* Although the complaint was subsequently dismissed, the Republications consequently sued the university, claiming student policies violated First Amendment freedoms. *Id.*

198. *Levine*, *supra* note 197.

199. *Id.*

200. *United States v. Wunsch*, 84 F.3d 1100, 1120 (9th Cir. 1996).

201. Agenda Item, July 2007, *supra* note 12. Proposed Rule 8.4 states: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.” *Id.*

202. E-mail from Mary Yen, Assistant Gen. Counsel, The State Bar of Cal., to author (Nov. 26, 2007, 13:23:31 PST) (on file with author).

Guidelines.²⁰³ Some commentators argue incivility is frequently already subject to enforcement through sanctions because notions of civility are integrated into many professional responsibility rules.²⁰⁴ Additionally, the United States Supreme Court has established that even in the absence of a violation of a particular rule of conduct, sanctions for “abusive” litigation may be enforced.²⁰⁵ Court decisions have also held that attorneys have the duty to abide by the policies behind the discovery procedures, even when the attorney has not violated a specific rule.²⁰⁶ Because the authority to issue sanctions stems from the inherent power of the court, constitutional issues are less prevalent than for statutes.²⁰⁷

Accordingly, some advocate imposing sanctions for inappropriate behavior, as both punishment and deterrence.²⁰⁸ Sanctions imposed against counsel are also incentives for lawyers to assert more management over clients.²⁰⁹ Keeping clients in check can also result in a more desirable balance with an attorney’s obligations as an officer of the court, including fewer frivolous motions and discovery disputes.²¹⁰ Sanctions related to the merits of the case may be more valuable because monetary sanctions may simply be considered an acceptable business expense.²¹¹

Opponents, however, believe increasing sanctions compounds the problems they are designed to prevent, especially incivility and decreasing public esteem for the

203. Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12. Although public feedback suggested utilizing sanctions to enforce the Guidelines, the Task Force thought sanctions would result in less friendly relationships among counsel and weaken civility endeavors. Agenda Item, July 2007, *supra* note 12. The Task Force also believed bar members would be more likely to undertake the attorney’s oath if members did not fear imposition of sanctions for infractions. *Id.*

204. See Kraus, *supra* note 24 (referring to Ethical Cannon EC-1 of the New York Lawyer’s Code of Professional Responsibility encouraging all lawyers to be “temperate and dignified,” and sections of Washington’s Rules of Professional Conduct expecting lawyers to present “a professional, courteous civil attitude toward all persons involved in the legal system”).

205. Camp, *supra* note 49, at 1389.

206. *Id.*

207. See Atkinson, *supra* note 43, at 300-01.

208. See Camp, *supra* note 49, at 1388.

209. See *id.* at 1389.

210. See *id.*

211. *Id.*

judicial process. When an attorney is sanctioned for incivility, she no longer merely represents only the client's interests. Rather, the situation is now personal because the attorney has been personally reprimanded for her actions. Such emotional attachment clouds objectivity, and often arouses additional inappropriate behavior.

As a remedy for incivility, sanctions are also flawed because they do not extend to offensive behavior of attorneys who do not practice in court. While sanctions may discourage attorneys they do reach, they are not the most prophylactic measure available because they are imposed after the fact. In other jurisdictions, it appears judges' decisions to sanction attorneys were unaffected by the existence of civility codes.²¹² However, there is also evidence showing that similar guidelines actually decreased the imposition of sanctions.²¹³ Sanctions are an inadequate cure for incivility; if they were satisfactory, civility would not be such a hot issue, and the movement to create and adopt the Guidelines would probably not have materialized. Given the difficulty of mandating civility through statutory measures and limited effectiveness of sanctions, other means of advancing civility must be considered.

D. Implementing the Guidelines

While aspirational guidelines have not stamped out frustrations over professionalism and civility, they are still valuable.²¹⁴ Some argue that guidelines like these are unnecessary and overlap with professional conduct codes.²¹⁵ While there are intersections, there are also significant differences. Most importantly, the California Rules of Professional Conduct, like most statutes, set minimum standards for behavior. While attorneys are often accustomed to pushing the boundaries of laws, they should utilize a different approach with respect to their personal

212. See Aspen, *supra* note 26, at 264.

213. Aspen, *supra* note 26, at 264-65 (describing an instance where the defendant's motion for fees on the basis of plaintiff attorney's misconduct was not granted, but the court referred the uncivil attorney to civility guidelines as a reminder that his behavior was wanting).

214. Berry, *supra* note 24, at 9.

215. Humphrey, *supra* note 52; Michael D. Marcus, *Behavior Modification: Laws are Already in Place to Restrain Attorneys Who Engage in Uncivil and Offensive Behavior*, L.A. LAW., Sept. 2004.

conduct. Avoiding discipline and meeting professional conduct rules are not tantamount to practicing law in a moral fashion.²¹⁶ Professionalism is characterized by actions which exceed minimum behavior requirements.²¹⁷ As one judge aptly stated, “[E]thical conduct is the minimal standard demanded of every lawyer while professional conduct is a higher standard that is expected of every lawyer.”²¹⁸ Consequently, changing the philosophy about how to practice will earn the legal profession more respect from the public.

The Guidelines, despite their idealized and punishment-free nature, are still valuable for the purposes of unifying, clarifying, and anchoring standards. At a minimum, the Guidelines are beneficial for articulating uniform principles of best practices in common scenarios; they are a statement of values. They reconcile differing perceptions of propriety²¹⁹ and inappropriateness, even if some questionable conduct is permitted by the Rules of Professional Conduct. Although the Guidelines may be too vague to enforce or punish in a formal setting, they are sufficiently concrete for aspirational goals.²²⁰

As previously noted, attorneys now have a reference for what is expected of them by their professional peers and judges.²²¹ Clients have an official declaration regarding what types of behavior they should expect from their lawyers.²²² Even if the standard of practice in one’s jurisdiction meets the Guidelines, the Guidelines are helpful in preserving that level of practice.²²³ If continually discussed and referred to in the course of practice, the Guidelines also encourage constant

216. *E.g.*, Harris, *supra* note 23, at 550 (calling lawyers who believe fulfillment of professional rules equals absolute satisfaction of legal ethics “cave dwellers”); Sall, *supra* note 37.

217. *See* Harris, *supra* note 23, at 561; Lang, *supra* note 50.

218. Harris, *supra* note 23, at 567.

219. *But see* Atkinson, *supra* note 43, at 303 (criticizing the professionalism and civility “crusade” for assuming there is one correct model of ethical lawyering). The Civility Task Force, however, made a conscientious effort gather various viewpoints through the feedback process. *See* Agenda Item, Apr. 2007, *supra* note 102; Agenda Item, July 2007, *supra* note 12.

220. *See* Gaetke, *supra* note 19, at 738; Johnson, *supra* note 188, at 38.

221. *See* Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism,”* 41 EMORY L.J. 403, 413 (1992).

222. *Id.*

223. The Santa Clara County Bar Association’s Code of Professionalism was drafted to preserve, not change, the level of professional practice in that area. Interview with Honorable Brian C. Walsh of the Superior Court of Cal., County of Santa Clara, in San Jose, Cal. (Jan. 16, 2008) [hereinafter Walsh Interview].

reassessments of the embodied principles and reflections on how law is best practiced.²²⁴ The legal profession's component entities can each play a role in realizing the Guidelines' goals.

1. *The State Bar and Voluntary Bar Associations*

As the sole organization encompassing all attorneys in California, the State Bar has unique access to California's legal professionals. The State Bar could offer continuing legal education seminars and compulsory programs for new members on the subject of civility to encourage and reinforce the practices illustrated in the Guidelines.²²⁵ Additionally, the Bar could indicate on each attorney's public membership record and in their attorney referral services database whether the attorney has undertaken the Attorney's Pledge committing to the Guidelines. However, due to the State Bar's close association with attorney discipline and the fact that the Guidelines are set forth by the institution, the State Bar is understandably wary of appearing to coerce its members into adhering to the Guidelines.²²⁶ Incentives will need to be tailored with this consideration in mind.²²⁷

The suggestions for the State Bar could also be implemented by voluntary bar associations, including local bars. Since voluntary bar associations are more close-knit than the State Bar and do not carry the shadow of discipline, they are perhaps the best positioned to rally attorneys to embrace the Guidelines.²²⁸ One scholar suggests social networks through informal mechanisms effectively regulate behavior that courts are unable to reach.²²⁹ Thus, even if individual attorneys are not willing to pledge to the Guidelines, they can be pressured by peers into employing the

224. See Johnson, *supra* note 188, at 40-41.

225. The ideas are commonly suggested weapons for the war against Rambo and his incivility. See Weston, *supra* note 154, at 24.

226. Yen Interview, *supra* note 94.

227. In other locations, similar codes have not been embraced by local bars due to wariness of enforcement. Humphrey, *supra* note 52. This sentiment is reflected in comments from the State Bar feedback process. Agenda Item, July 2007, *supra* note 12.

228. A survey of a sample population projects that over half of California's attorneys belong to voluntary bar associations. THE STATE BAR OF CALIFORNIA, MEMBER SERVICES SURVEY 17 (2006), http://calbar.ca.gov/calbar/pdfs/reports/2006_State-Bar-Survey.pdf.

229. Wendel, *supra* note 53, at 1985.

Guidelines' principles.²³⁰ This is accomplished by group "shaming" individuals, which results in compliance through isolation, social snubs, and gossip.²³¹ In order for this technique to function, the wrongdoer must desire the respect of his colleagues.²³² Civility is more prevalent in smaller legal communities where attorneys encounter the same individuals repeatedly;²³³ this speaks to the efficacy of social control. Rambo attorneys are rarely found in such areas since they feed on anonymity.²³⁴ Voluntary bar associations can also endorse the Guidelines by prominently printing them in membership directories, and indicating on their rosters which attorneys have pledged to the Guidelines.²³⁵ Voluntary associations can also encourage civility by presenting awards for desirable conduct.²³⁶

Lawyers are more prone to honor professional responsibility duties which are perceived to be legitimate, and legitimacy is based on acceptance by bar associations.²³⁷ The State Bar has adopted the Guidelines, indicating its approval of the Guidelines' message. The approval of additional, non-mandatory bar organizations would significantly add to the Guidelines' credibility.

2. *The Judicial System*

In some states, civility codes have the endorsement of the State Supreme Court.²³⁸ The Seventh Circuit Court of

230. *See id.*

231. *Id.*

232. *Id.* at 1988-89.

233. *See, e.g.,* Aspen, *supra* note 23, at 1051.

234. *See* Laura V. Farber, *Lawyering Without Hardball Tactics: Respected and Experienced Practitioners Offer Tips on How to Best Serve the Profession*, L.A. LAW., Feb. 1997; Harris, *supra* note 23, at 590.

235. This implementation technique is currently practiced by the Santa Clara County Bar Association. Brian C. Walsh, *Professionalism - One Year Later*, 7 CAL. LITIG. 8, 10 (1991).

236. *Id.*

237. Gaetke, *supra* note 19, at 730.

238. Yen Interview, *supra* note 94. The Santa Clara County Bar Association Code of Professionalism has been adopted by the Santa Clara County Superior Court:

ORDER
STANDING ORDER RE SANTA CLARA COUNTY BAR
ASSOCIATION
CODE OF PROFESSIONALISM

Appeals mandates that each lawyer attest in writing that she has read and will abide by that jurisdiction's civility code as a condition of admission.²³⁹ Courts can also support the Guidelines by methods as simple as making copies readily available, or posting the Guidelines in prominent locations frequented by lawyers, such as courtrooms, hallways, lobbies, and elevators.

The Guidelines encourage judges to become familiar with the Guidelines and to "support and promote them where appropriate in court proceedings."²⁴⁰ Ideally, judges embody the principles articulated in the Guidelines, establishing standards for behavior by example.²⁴¹

Judges can discourage unprofessional behavior by conveying their expectations about acceptable conduct from the start of the proceedings.²⁴² Referring to the Guidelines as the standard in this context is a relatively effortless method of promotion. Praises and reprimands for behavior by continual reference to the Guidelines reinforce the credibility of the Guidelines in the courtroom. While judicial sanctions for violations of the Guidelines could be useful as a means for enforcement as discussed earlier, they are clearly not

CODE OF PROFESSIONALISM

Good cause therefore appearing, upon consideration by and with the approval of the Judges of the Santa Clara Superior Court, it is hereby ORDERED that the Code of Professionalism adopted by the Santa Clara County Bar Association in June 1992 will serve as a guide to the Judges of the Santa Clara Superior Court in the exercise of their individual discretion when adjudicating disputes among attorneys. While the Code does not have the force of law or regulation with respect to the conduct of attorneys, it reflects the view of the members of the Santa Clara County Bar Association regarding appropriate attorney behavior. As such it is helpful in giving Judges guidance about the expectations of attorneys concerning acceptable behavior. Cf., *Kloepfer v. Commission on Judicial Performance* (1989), 49 Cal.3d 826, 83 fn. 6.

It is further ORDERED that notice of this standing order shall be published to all attorneys practicing before this Court by appending a copy of this order to the Local Rules of Court.

Dated: September 30, 1992

/s/ Leonard Edwards

Presiding Judge

239. Harris, *supra* note 23, at 583.

240. GUIDELINES, *supra* note 12, § 21.

241. See Camp, *supra* note 49, at 1392.

242. *Id.* at 1391-92; Humphrey, *supra* note 52.

endorsed by the State Bar for this purpose.²⁴³ If possible, judges may consider refraining from rewarding hardball and other underhanded tactics so wrongdoers do not benefit. Judges can also consider citing to the Guidelines in their decisions.²⁴⁴ Courtrooms are also where the public's perception of the legal profession is created; referrals to the Guidelines increase public awareness of the profession's efforts to maintain civility.

The influence of the judiciary is limited because judges usually only interact with litigation attorneys who appear in court, which is a small segment of the legal profession. Because courts are restricted in their reach, bar associations, law schools, law firms, and individual attorneys have a greater capacity to make a difference.²⁴⁵

3. Law Schools

Although law schools are not specifically mentioned in the State Bar resolution adopting the Guidelines as a potential participant, they are frequently referred to in articles as an ideal starting point.²⁴⁶ This is logical because law schools provide training for new lawyers and therefore present "our greatest opportunities" for change.²⁴⁷ Additionally, law schools have traditionally introduced other changes in the profession.²⁴⁸

The institution of law school, however, is often where incivility begins. Some commentators assert that the static nature of law schools is the source of civility's decline.²⁴⁹ At most schools, the combination of mandatory steep grade curves, competition for faculty attention, law review positions, clerkships, and plum jobs at the most prestigious firms create tremendous pressure to outshine classmates.²⁵⁰ Adversity and resulting incivility surreptitiously permeate

243. See *supra* note 203 and accompanying text.

244. See Friedman, *supra* note 50.

245. See, e.g., Camp, *supra* note 49, at 1390.

246. See, e.g., Josefsberg, *supra* note 47, at 20-21; Lang, *supra* note 50.

247. See Carlson, *supra* note 154, at 710.

248. These changes include the increase of women and minorities in the legal profession. E.g., Reed, *supra* note 20, at 784.

249. Weston, *supra* note 154, at 24. This proposal is especially notable because the author was an associate dean at a law school at the time the article was written. *Id.*

250. See, e.g., *id.*

law school due to these "friendly" rivalries, which foster distrust.²⁵¹ It has been proposed that greater financial liabilities, a consequence of escalating law school tuition fees, have further negatively affected the professionalism of new lawyers.²⁵²

California law schools can institute a practice similar to medical schools, which commonly have entering students recite the Hippocratic Oath,²⁵³ addressing ethical medical

251. *See id.*

252. *See Camp, supra* note 49, at 1393; Harris, *supra* note 23, at 594-96.

253. The modern version of the Hippocratic Oath, written in 1964 by Louis Lasagna, Academic Dean of the School of Medicine at Tufts University, reads:

I swear to fulfill, to the best of my ability and judgment, this covenant:

I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.

I will apply, for the benefit of the sick, all measures [that] are required, avoiding those twin traps of overtreatment and therapeutic nihilism.

I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.

I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.

I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.

I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.

If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter. May I always act so as to preserve the finest traditions of my calling and may I long

practices, to begin instilling the moral standards expected of doctors. The Guidelines could be introduced at new student orientations, and faculty could discuss how the principles could be applied in the law school setting. These actions familiarize students with the profession's expectations of its members, which are not the hardball practices frequently glamorized by the media.

The Guidelines and their principles provide law schools with an opportunity to defy claims that schools ignore professional issues.²⁵⁴ Another frequent criticism of law schools is that administrators have not reassessed and revised curricular programs to reflect changes in the profession and the shifting demographics of clients.²⁵⁵ Few law schools have integrated concepts of professionalism consistently through all three years of coursework.²⁵⁶ Accordingly, several scholars have suggested integrating professional responsibility discussions throughout each course so students will recognize how ethics function in practice, rather than perceive professional responsibility as a separate topic, as it is often taught.²⁵⁷ Following the proposal of one group of educators, the Guidelines could be stressed most effectively in legal research and writing classes, which are often smaller in class size.²⁵⁸ These classes also offer more opportunity to foster classroom tone in small group interactions.²⁵⁹ The Guidelines could also be implemented into the oral argument component of such courses, which closely mimics courtroom interaction.²⁶⁰ Schools may also wish to reconsider inviting Rambo-type lawyers, even if financially successful, to be event speakers or alumni mentors. These honors implicitly endorse Rambo as a role

experience the joy of healing those who seek my help.

Nova Online, The Hippocratic Oath - Modern Version, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last visited Mar. 21, 2008).

254. See Camp, *supra* note 49, at 1379.

255. See Weston, *supra* note 154, at 24.

256. See Berry, *supra* note 24, at 10 (also noting the ABA Standing Committee of Professionalism is currently studying law schools to formulate an ideal curricular approach).

257. See Carlson, *supra* note 154, at 710; Cary, *supra* note 77, at 314; Weston, *supra* note 154, at 25.

258. Chin et al., *supra* note 45, at 895-97.

259. *Id.* at 890.

260. *Id.* at 895-97.

model to emulate.²⁶¹

Even if law schools do modify their educational missions, these changes alone will not be enough to reverse the current decline of good manners in the profession. If incivility frequently occurs among practicing attorneys, it is unrealistic to expect newly-minted lawyers to adhere to classroom teachings when their colleagues behave otherwise.²⁶² Aggressiveness is sometimes taught by mentors, occasionally unwittingly, but unfortunately also purposely.²⁶³ More importantly, young lawyers are under pressure to impress partners and clients, as well as bill hours.²⁶⁴ They want to please and meet expectations, even if it does not feel morally comfortable,²⁶⁵ and have no true power to correct misbehavior or encourage politeness. A practitioner has suggested teaching students to recognize situations where they might be confronted with incivility.²⁶⁶ This technique would better prepare new lawyers to react appropriately, rather than compound the incivility.²⁶⁷ While law schools can raise awareness of and provide some training on the civility issue, the workplace is where behavior is truly learned and engrained.

4. Law Firms

As employers, law firms and their policies shape the profession. New lawyers learn the practical building blocks of

261. See Camp, *supra* note 49, at 1393-94 (commenting on how a litigation partner famed for his ability to draw a case out to “infinity” was honored with a chair at a prestigious law school).

262. Utah’s adoption of Standards of Professionalism and Civility serve as an example of how law schools alone cannot turn the tide of incivility. The Utah Supreme Court adopted these standards in 2003, stating that lawyers were expected to adhere to these standards and did not need their client’s approval to show consideration for reasonable requests if unrelated to the merits of the case. These guidelines are taught to law school students, and most express intent to practice by such standards upon entering practice. Nevertheless, these plans are often frustrated for most students because the prevailing practice does not meet the standards. Well-intentioned students do not know how to react in these situations. Bonnie Mitchell, *Standards of Professionalism & Civility: Standard 14 – Professional Courtesy*, 19 UTAH B.J., Jan./Feb. 2006; see Reed, *supra* note 20, at 784.

263. Aspen, *supra* note 23, at 1054.

264. See, e.g., *id.*

265. See *id.*

266. *Id.* at 1060.

267. *Id.*

practicing law on the job, so firms are positioned to significantly mold the behavior patterns of new attorneys. Mentoring and training programs integrating the Guidelines are obvious methods of implementing the Guidelines' principles.²⁶⁸ Internal promotion could include providing copies of the Guidelines to new attorneys as part of the orientation packet and mandatory training on civility in practice.

Law firms can also create accountability for themselves by announcing the firm's commitment to the Guidelines on marketing materials and websites. It should be standard operating procedure to provide clients with a copy of the Guidelines before the fee agreement is finalized. Assigning a high profile, senior attorney in the firm the responsibility of receiving and investigating complaints from either clients or other attorneys demonstrates a desire to further civility. The names and contact information for such "civility liaisons" should be readily available. Ideally, the civility liaison would respond to complaining parties after the matter has been addressed so those offended realize these mechanisms are not just for show, and concerns are taken seriously.

5. *Individual Attorneys*

Any change in the profession, including a commitment to the Guidelines, must begin at the individual level. The institutions discussed above are simply groups of individuals. One author claims the moral fiber of individuals form the roots of civility.²⁶⁹ While California does require bar applicants to pass the Moral Character Evaluation, possessing the requisite moral fiber does not guarantee that one will behave ethically when other pressures are present. Each individual lawyer is accountable to others, and our personal actions form the basis for professionalism,²⁷⁰ which encompasses civility. Individual attorneys can personally implement the Guidelines through several measures.

The most obvious step is for individual attorneys to pledge to the Guidelines and honor that oath. The Attorney's Pledge also includes a promise to encourage other attorneys

268. See, e.g., Humphrey, *supra* note 52.

269. Lang, *supra* note 50.

270. See Berry, *supra* note 24, at 18; William Wagner, *The Root of Institutional Integrity*, MICH. B.J., June 2003.

to observe these Guidelines.²⁷¹ Such support can be shown by making a conscious effort to refer clients only to other attorneys who practice in the spirit of the Guidelines.²⁷² As suggested in the Guidelines, more experienced attorneys can mentor and educate new attorneys on the standards for professional behavior.²⁷³ Attorneys should practice by reference to the Guidelines, not the Rules of Professional Conduct. Rather than simply reacting when confronted with uncivil behavior, individuals can also deliberately mentally step back and take some time to regain composure in order to respond civilly, rather than aggravate the situation by responding in kind.

Communicating a willingness to forgive offensive actions and to start anew can also inspire colleagues to practice civilly. Attorneys will have better success maintaining a steadfast commitment to the Guidelines by making an effort to realize where civility may deteriorate throughout proceedings or transactions. Armed with this awareness, attorneys will possess superior psychological ability to maintain their composites and refrain from retaliatory conduct when attacked with hardball tactics. And finally, lawyers can show others that civility works by winning litigation suits and completing deals faster and more economically than Rambo.²⁷⁵

Managing client expectations is a key element to implementing the Guidelines in practice, especially since law has become more commercialized. Revenue and costs drive practice decisions, and attracting and retaining clients determine revenue. Because the vast majority of clients assume their lawyers will do everything they can to win on their behalf,²⁷⁶ lawyers need to educate clients on the standards of professional practice. There is a difference between playing tough and fair, and engaging in delaying tactics or personal attacks, the purpose of which is to annoy

271. GUIDELINES, *supra* note 12, Pledge.

272. One practitioner candidly recommends lawyers openly gossip and "brand" Rambo lawyers as a means of discouraging incivility. Josefsberg, *supra* note 47, at 23.

273. GUIDELINES, *supra* note 12, § 2.

275. Josefsberg, *supra* note 47, at 23.

276. *See, e.g.*, Mitchell, *supra* note 262.

or demean the other side.²⁷⁷ Like law firms, attorneys should consider providing clients with a copy of the Guidelines with their fee retainers, and direct every client's attention to the phrase stating "attorneys should not allow clients to prevail upon the attorney to engage in uncivil behavior."²⁷⁸ Attorneys should also explain decisions to grant opposing counsel's requests for extensions by reference to the Guidelines, reminding clients of the possibility that they may be in a position to require similar courtesies in the future.²⁷⁹

Some attorneys may be reluctant to educate their clients out of fear that clients will decide to hire an attorney who is willing to utilize underhanded tricks. Because clients are often concerned about expenses, lawyers can explain how civility and goodwill lead to quicker resolutions and a more economically efficient outcome. Lower overall fees and less client frustration give lawyers who practice civility a competitive advantage over the stereotypical sharks. Clients who hire sharks often discover sharks bite clients as well as opposing parties.²⁸⁰ Attorneys should recognize that their value to clients includes not only their skills, but their independent professional judgment,²⁸¹ goodwill with colleagues, and reputation in the legal community.

There will always be individuals who rebel against the majority, and there will always be lawyers who refuse to take any notice of the Guidelines. Lawyers are motivated by different incentives and conduct themselves accordingly. There will be clients whose objective is to "win," no matter how difficult, how disproportionately expensive, or emotionally draining the undertaking. These clients will find these lawyers, and it might seem unfair to the professional lawyers that Rambo lawyers are rewarded for their unprofessional behavior, which also harms the reputation of the profession as a whole. However, as State Bar President Jeff Bleich reminded California attorneys during his inaugural speech in 2007, "When we don't take responsibility for fixing what can be improved, we diminish all of our

277. See Aspen, *supra* note 23, at 1057.

278. GUIDELINES, *supra* note 12, § 3.

279. *Id.*

280. Walsh Interview, *supra* note 223; Yen Interview, *supra* note 94.

281. See Terrell & Wildman, *supra* note 221, at 426.

shadow.”²⁸² Although the public may loathe the profession as a group, clients often boast about their own lawyer’s positive qualities.²⁸³ Because the public’s regard for individual lawyers is connected to the public’s respect for law,²⁸⁴ the commitment of individual lawyers to the Guidelines and their principles have the potential to impact how society values law.

V. CONCLUSION

The State Bar of California’s adoption of the California Attorney Guidelines of Civility and Professionalism presents a unique opportunity for bar members to remedy concerns about the legal profession’s decline in courtesy between colleagues, professionalism, and public respect. Even if this trend reflects a general deterioration of manners in society, lawyers are guardians of a community’s legal and ethical standards.²⁸⁵ Due to their voluntary nature, the Guidelines may not initially appear to be civility’s knight in shining armor, but they are worthy of consideration and further examination. Given the limited reach of judicial sanctions and difficulty of drafting mandatory rules which pass constitutional muster, the optional Guidelines are a feasible means of fostering civility. At the very least, the Guidelines have value in unifying and publicizing the profession’s values and aspirations for both practitioners and clients. Although the Guidelines are not mandatory, their utility can be maximized through informal social mechanisms. An understanding of incivility’s costs to us, our vocation, and our clients compels a reasoned, thoughtful reflection of how institutions and individuals can best incorporate the Guidelines into the practice of the California bar.

With almost one in eight active American lawyers a member of The State Bar of California, the association is one

282. Jeff Bleich, President, The State Bar of Cal., Inaugural Address at the State Bar’s 80th Annual Meeting (Sept. 29, 2007), *available at* http://calbar.ca.gov/calbar/pdfs/bog/special/Bleich-Inaugural-Speech_2007.pdf. Bleich also urged bar members to mend the profession’s relationship with the public by executing existing bar policies, specifically naming the Guidelines. *See id.*

283. Lang, *supra* note 50.

284. *E.g.*, Terrell & Wildman, *supra* note 221, at 427.

285. *See* Josefsberg, *supra* note 47, at 19.

of the largest in the United States.²⁸⁶ Considering the increase of multi-jurisdictional practice, law firm mergers, and the forty-thousand members of the California bar who reside in other states, California attorneys have the numbers, opportunity, and influence to harness the synergy of the changing legal profession towards a more civil direction. Public regard for attorneys will not improve before the individual members of the profession respect each other.²⁸⁷ The legal profession's merits and image are ours to tarnish, preserve, or ideally, elevate. The Guidelines provide the momentum and incentive to champion civility and eradicate incivility, one of the profession's common ills. In the interest of our own self-respect and wellbeing, let us not allow the Guidelines to fade into the archives.

286. See AMER. BAR ASS'N, NATIONAL LAWYER POPULATION BY STATE, http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonpage.pdf (last visited Mar. 21, 2008). As of December 2006, there were 145,355 active California attorneys out of a total 1,143,358 active attorneys in the United States. *Id.*

287. Terrell & Wildman, *supra* note 221, at 432.

APPENDIX

**CALIFORNIA ATTORNEY
GUIDELINES OF CIVILITY AND
PROFESSIONALISM²⁸⁸**

California Attorney Guidelines of Civility and Professionalism

(Abbreviated, adopted July 20, 2007)

INTRODUCTION. As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct,

288. GUIDELINES, *supra* note 12. Please note that the Guidelines herein constitute an abbreviated version of the California Attorney Guidelines of Civility and Professionalism. The complete version, which includes examples, can be found at the State Bar's website. *See id.*

nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence. The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end.

The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

SECTION 1. 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.

SECTION 2. An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance. An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

SECTION 3. An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4. An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5. An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

SECTION 6. An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

SECTION 7. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

SECTION 8. Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

SECTION 9. Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes

identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the California Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

SECTION 10. An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

SECTION 11. It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

SECTION 12. In a social setting or otherwise, an attorney should not communicate *ex parte* with a judicial officer on the substance of a case pending before the court, unless permitted by law.

SECTION 13. An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every case as soon possible and, when appropriate, during the course of litigation.

SECTION 14. To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

SECTION 15. An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

SECTION 16. An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17. An attorney should respect the privacy rights of parties and non-parties.

SECTION 18. An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

SECTION 19. In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interests of the children in mind.

SECTION 20. In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

SECTION 21. Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

ATTORNEYS' PLEDGE. I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.