

DEBUNKING THE MAJOR MYTHS SURROUNDING MANDATORY CIVILITY FOR LAWYERS PLUS FIVE  
MANDATORY CIVILITY RULES THAT WILL WORK<sup>†</sup>

DAVID A. GRENARDO\*

“Well done is better than well said.”—Benjamin Franklin<sup>1</sup>

INTRODUCTION

I first observed vociferous opposition to mandatory civility in the most unlikely of places. After organizing a panel on mandatory civility comprised of a federal judge, a state’s chief disciplinary counsel, a practicing lawyer, and myself, I felt that I was going to be preaching to the choir at the American Bar Association’s (“ABA”) National Conference on Professional Responsibility. Instead, most of those in attendance berated the chief disciplinary counsel for purportedly failing to prosecute Big Law firms, accused the judiciary both of failing to control their courtrooms and their own poor treatment of lawyers in their courtrooms, and otherwise attacked the notion of mandatory civility for lawyers.

During that incredibly (and ironically) uncivil ABA panel, several myths about mandatory civility were discussed. For example, mandatory civility inhibits zealous advocacy,

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\* Professor of Law & Associate Director of the Holloran Center for Ethical Leadership in the Professions, University of St. Thomas School of Law; Rice University, B.A., Duke University School of Law, J.D. I would like to thank Professor Patrick Longan, the William Augustus Bootle Chair in Professionalism and Ethics and the Director of the Mercer Center for Legal Ethics and Professionalism at Mercer University School of Law, Professor Benjamin Madison, Director of the Center for Ethical Formation & Legal Education Reform at Regent University School of Law, and Jerry Organ, the Bakken Professor of Law and Co-Director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law, for providing invaluable insight and comments on an earlier draft. This Article would not have been possible without the work of my current and former research assistants, Lena Atchan, Ajang Ekinde, Stella Haberman, Alex Kautza, Gabrielle Murphy, and Merryn L. Wier, University of St. Thomas School of Law J.D. Candidates, and Khadija Aboueisha, Rockland Gleason, Mikayla Longoria, M. Alejandra Salas, David R. Sames, and Lourdes Vela, St. Mary’s University School of Law, J.D. The views expressed in this article are mine alone, and any mistakes, errors, or omissions are solely attributable to me.

<sup>1</sup> *Benjamin Franklin’s Famous Quotes*, THE FRANKLIN INSTITUTE, <https://www.fi.edu/en/benjamin-franklin/famous-quotes> [<https://perma.cc/Y5YW-GPTU>] (last visited June 28, 2023).

and civility rules are too vague and difficult to enforce. Those myths and others will be discussed, and dispelled, in this Article. That ABA panel convened in 2013, yet not much has changed a decade later (other than that we have become more polarized as a society and our public discourse has, if anything, become less civil). The legal profession should be, and needs to be, an exemplar of civility.

Civility remains a problem in the legal profession.<sup>2</sup> Teaching law students about civility is important, if not critical,<sup>3</sup> but it is not enough. Entertaining CLEs on civility for lawyers make for a fun hour,<sup>4</sup> but they also fall short. Calls for civility and calls to return to civility have become routine,<sup>5</sup> yet they can ring hollow. Adding phrases about civility to the oaths lawyers take to practice sounds wonderful,<sup>6</sup> but those oaths oftentimes lack accountability. Recognizing

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<sup>2</sup> See, e.g., Appendix A, Maret Vessella's Responses to Questions on Mandatory Civility Proposed by Professor of Law David A. Grenardo, May 3, 2021 ("I would characterize the amount of charges alleging unprofessional conduct as significant.") [hereinafter Vessella's Responses]; SURVEY ON PROFESSIONALISM, ILLINOIS SUPREME COURT COMMISSION ON PROFESSIONALISM (2021) (finding that 54% of lawyers in a statewide survey conducted in Illinois "experienced uncivil or unprofessional behavior from another lawyer in the last six months"); Debra Cassens Weiss, *Judge sanctions lawyer for 'obnoxious' and 'appalling' deposition conduct*, ABA Journal (May 10, 2023), [https://www.abajournal.com/news/article/judge-sanctions-lawyer-for-obnoxious-and-appalling-deposition-conduct?utm\\_medium=email&utm\\_source=salesforce\\_667383&sc\\_sid=01075549&utm\\_campaign=weekly\\_email&promo=&utm\\_content=&additional4=&additional5=&sfmc\\_j=667383&sfmc\\_s=45062043&sfmc\\_l=1527&sfmc\\_jb=18001&sfmc\\_mid=100027443&sfmc\\_u=19834670](https://www.abajournal.com/news/article/judge-sanctions-lawyer-for-obnoxious-and-appalling-deposition-conduct?utm_medium=email&utm_source=salesforce_667383&sc_sid=01075549&utm_campaign=weekly_email&promo=&utm_content=&additional4=&additional5=&sfmc_j=667383&sfmc_s=45062043&sfmc_l=1527&sfmc_jb=18001&sfmc_mid=100027443&sfmc_u=19834670) (recounting the numerous personal attacks made by an attorney against other attorneys during depositions and representing the incivility story(ies) featured weekly by the ABA Journal Weekly).

<sup>3</sup> See, e.g., *Excerpts From the Chief Justice's Speech on the Need for Civility*, N.Y. TIMES, May 19, 1971, at 28 (discussing the need to teach law students about civility); David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135 (2019) (arguing law schools should teach civility); Nancy B. Rapoport, *Training Law Students to Maintain Civility in Their Law Practices as a Way to Improve Public Discourse*, 98 N.C. L. Rev. 1143 (2020).

<sup>4</sup> See, e.g., ABOTA FOUNDATION: CIVILITY MATTERS, [https://www.abota.org/Foundation/Foundation/Professional\\_Education/Civility\\_Matters.aspx](https://www.abota.org/Foundation/Foundation/Professional_Education/Civility_Matters.aspx) [<https://perma.cc/X9KH-G9XV>] (last visited June 28, 2023).

<sup>5</sup> See, e.g., *Annual 2021: Incoming president-Elect issues calls for civics, civility and collaboration*, AM. BAR ASS'N (Aug. 10, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/08/annual-2021--incoming-president-elect-issues-call-for-civics--ci/?login> [<https://perma.cc/H87E-786S>]; Deborah Enix-Ross, *Reducing the civility deficit*, AM. BAR ASS'N (Jun. 12, 2023), [https://www.americanbar.org/news/abanews/publications/youraba/2023/0612/civility-deficit/?utm\\_medium=email&utm\\_campaign=YOURABA&promo=YOURABA&utm\\_source=sfmc&utm\\_medium=email&utm\\_campaign=&utm\\_term=&utm\\_id=681668&sfmc\\_id=45062043](https://www.americanbar.org/news/abanews/publications/youraba/2023/0612/civility-deficit/?utm_medium=email&utm_campaign=YOURABA&promo=YOURABA&utm_source=sfmc&utm_medium=email&utm_campaign=&utm_term=&utm_id=681668&sfmc_id=45062043) [<https://perma.cc/F3JW-8MSL>].

<sup>6</sup> See ABOTA FOUNDATION: CIVILITY MATTERS, [https://www.abota.org/Foundation/Foundation/Professional\\_Education/Civility\\_Matters.aspx](https://www.abota.org/Foundation/Foundation/Professional_Education/Civility_Matters.aspx) [<https://perma.cc/X9KH-G9XV>] (last visited June 28, 2023).

that our country is divided and toxic in the way we communicate with each other is accurate,<sup>7</sup> but that similarly fails to solve the problem. And most of all, we are naïve to hope that some lawyers will make significant changes to their behavior in a profession riddled with systemic incivility just because others in the legal profession kindly ask them to do so. The carrot approach must give way to the stick if systemic changes are to occur.<sup>8</sup> Should the legal profession not adopt mandatory civility, incivility will simply continue and likely get worse.

Part I of this Article provides an overview of civility in the legal profession. Part II describes mandatory civility in the legal profession. Part III raises the major myths of mandatory civility and responds to each of them. Part IV includes proposed mandatory civility rules, while Part V sets forth arguments against mandatory civility and responds to those arguments. This Article also includes insight from disciplinary counsel of two of the states that mandate civility—Maret Vessella, Chief Bar Counsel of Arizona, and Kimberly Uhuru, the Deputy Administrator of the Michigan Attorney Grievance Commission. Their responses to questions on mandatory civility are attached as Appendices A and B. In addition, this Article contains critiques of the proposed civility rules in this Article from nearly twenty attorneys who attended a presentation regarding these same civility rules. The unedited critiques are attached as Appendix C. This Article concludes that mandatory civility rules are necessary and practicable.

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<sup>7</sup> See *Civility in America 2019: Solutions for Tomorrow*, WEBER SHANDWICK, <https://cms.webershandwick.com/wp-content/uploads/2023/01/CivilityInAmerica2019SolutionsforTomorrow.pdf> (last visited June 28, 2023) (finding that 93% of Americans identify incivility as a problem and 68% of Americans consider incivility a major problem).

<sup>8</sup> Even the NFL, in an effort to combat team representatives from engaging in “disrespectful, inappropriate, or unprofessional” behavior during interviews, the NFL instituted penalties for conduct that does not meet its expectations of “dignity, respect and professionalism.” *NFL teams could lose draft pick, face fines for unprofessional conduct during draft prospect interviews*, ENT. SPORTS PROGRAMMING NETWORK (Jan. 5, 2022), [https://www.espn.com/nfl/story/\\_/id/32998827/nfl-teams-lose-draft-pick-face-fines-unprofessional-conduct-draft-prospect-interviews](https://www.espn.com/nfl/story/_/id/32998827/nfl-teams-lose-draft-pick-face-fines-unprofessional-conduct-draft-prospect-interviews) [<https://perma.cc/7SXY-8QHA>] (stating that NFL teams would lose draft picks if team representatives acted below its required standards).

As Michigan’s Deputy Administrator of Michigan’s Attorney Grievance Commission stated, “[T]he adoption of civility rules preserves the integrity of the profession. Doing so helps to set appropriate standards for lawyers, who of course serve as officers of the court. It also engenders the trust and respect of clients and other third parties who encounter the legal system.”<sup>9</sup>

Rather than continue to talk about how lawyers need to be more civil (well said), states should require civil behavior (well done) from all of their attorneys. Systemic change requires it.

## I. UNDERSTANDING THE BASICS OF CIVILITY IN THE LEGAL PROFESSION

This part briefly describes civility in the legal profession, including its definition, advantages of civility and the disadvantages of incivility, and the institutional responses to incivility in the legal profession.

### A. Definition and General Characteristics of Civility

Civility in the legal profession “is defined as treating others with courtesy, dignity, and respect, as well as demonstrating cooperation, honesty, and restraint.”<sup>10</sup> Professor Donald

Campbell studied over 140 civility codes and arrived at ten core concepts of civility in the law:

- (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions;
- (2) be respectful and act in a courteous, cordial, and civil manner;
- (3) be prompt, punctual, and prepared;
- (4) maintain honesty and personal integrity;
- (5) communicate with opposing counsel;
- (6) avoid actions taken merely to delay or harass;
- (7) ensure proper conduct before the court;
- (8) act with dignity and cooperation in pre-trial proceedings;
- (9) act as a role model to the client and public and as a mentor to young lawyers; and
- (10) utilize the court system in an efficient and fair manner.<sup>11</sup>

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<sup>9</sup> Appendix B, Kimberly Uhuru’s Responses to Questions on Mandatory Civility Proposed by Professor of Law David A. Grenardo, April 28, 2021 [hereinafter Uhuru’s Responses].

<sup>10</sup> David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 143 (2019).

<sup>11</sup> See Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99, 109 (2011).

## B. Advantages of Civility and Disadvantages of Incivility

Former United States Supreme Court Justice Sandra Day O'Connor noted several advantages of civility, including that it brings more joy to the practice of law for lawyers, makes the legal justice system more effective, and "improve[s] the public's perception of lawyers."<sup>12</sup> In particular, when lawyers can focus on the merits of a case instead of dealing with the outbursts of a rude and obstreperous opposing counsel, then practicing law becomes more enjoyable. When lawyers can resolve discovery or scheduling issues without the court by being reasonable and empathetic, then court dockets are not full of motion to compel hearings and courts can devote their time to trials and substantive motions, such as summary judgment motions.<sup>13</sup> Finally, when lawyers avoid headlines regarding their uncivil behavior and act appropriately in court, then the public will not lose confidence in, and esteem for, lawyers based on their petulant behavior.<sup>14</sup>

Lawyers who act uncivil waste the court's resources, harm the public image of the legal profession, and make a lawyer's life miserable. And yet those are just some of the negative consequences. Incivility by lawyers also can result in losing a case or a client, damaging their reputation, and wasting the client's money.<sup>15</sup> For instance, uncivil behavior by a lawyer or law firm can lead to its dismissal from a case as counsel, resulting in the loss of a client not just for that case, but for others. In a Florida case, a lawyer demanded that all depositions take place in a

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<sup>12</sup> Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998).

<sup>13</sup> *Redwood v. Dobson*, 476 F.3d 462, 466-67, 470 (7th Cir. 2007) (involving frivolous motions by attorneys); *Galle v. Orleans Parish Sch. Bd.*, 623 So. 2d 692 (La. Ct. App. 1993).

<sup>14</sup> Debra Cassens Weiss, *Federal judge reminds lawyers that 'this proceeding is not the playground'*, AM. BAR ASS'N: ABA JOURNAL (May 24, 2023), <https://www.abajournal.com/news/article/federal-judge-reminds-lawyers-that-this-proceeding-is-not-the-playground> [<https://perma.cc/3QAK-EZH7>].

<sup>15</sup> See Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 369 (2011) (citations omitted) (stating uncivil conduct can result in lawyers losing cases for clients); *Redwood v. Dobson*, 476 F.3d 462, 466-67, 470 (7th Cir. 2007) (censuring one lawyer and admonishing another for bringing frivolous motions); Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 672 (2009) (discussing costs of incivility, which include increased costs for clients, slower judicial system, and miserable lawyers).

noisy Dunkin Donuts despite opposing counsel's objection, and that lawyer showed up to the depositions in shorts and tee shirts, played the video game Angry Birds, and drew male genitalia during those depositions.<sup>16</sup> Despite the claim of zealous advocacy to justify those actions, the court disqualified the lawyer and his firm from continued representation of the client in that case.<sup>17</sup>

Moreover, if lawyers decide to fight every motion or every discovery request, then the *client* pays for the briefings and hearings that come along with that strategy. In many instances, that results in a waste of money.<sup>18</sup> For example, if opposing counsel seeks to postpone the beginning of trial or a summary judgment hearing for a valid reason (such as the death or sickness of a loved one), and doing so will not materially prejudice a lawyer's client, then a judge will likely grant a motion to continue.<sup>19</sup> If the lawyer opposes that motion, then she will need to file an opposition and appear at a hearing to argue.<sup>20</sup> Not only will the lawyer likely lose that motion, but the lawyer will also be wasting the client's money in the process to pay for the briefing and argument. Furthermore, the judge will probably look less favorably on the lawyer for opposing such a motion, which can negatively affect the judge's rulings (consciously or subconsciously) later in the case that harm the lawyer or her client.<sup>21</sup>

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<sup>16</sup> *Bedoya v. Aventura Limousine & Transp. Serv.*, 861 F. Supp. 2d 1346, 1370 (S.D. Fla. 2012).

<sup>17</sup> *Bedoya v. Aventura Limousine & Transp. Serv.*, 861 F. Supp. 2d 1346, 1371-73 (S.D. Fla. 2012).

<sup>18</sup> Jayne R. Reardon, *Civility as the Core of Professionalism*, AM. BAR ASS'N: BUSINESS LAW Today (Sep. 18, 2014), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2014-september/civility-as-the-core-of-professionalism/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-september/civility-as-the-core-of-professionalism/) [<https://perma.cc/M5FN-B7FJ>] (listing the increase of costs to clients as a consequence of lawyer incivility).

<sup>19</sup> MARGARET RAYMOND & EMILY HUGHES, *THE LAW AND ETHICS OF LAW PRACTICE* 150 (2d ed. 2009).

<sup>20</sup> MARGARET RAYMOND & EMILY HUGHES, *THE LAW AND ETHICS OF LAW PRACTICE* 150 (2d ed. 2009).

<sup>21</sup> Jayne R. Reardon, *Civility as the Core of Professionalism*, AM. BAR ASS'N: BUSINESS LAW Today (Sep. 18, 2014), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2014-september/civility-as-the-core-of-professionalism/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-september/civility-as-the-core-of-professionalism/) [<https://perma.cc/M5FN-B7FJ>] (providing, on a close call, that judges may rule in favor of attorney's client if that attorney acted civilly and professionally and against an attorney's client when the attorney acted uncivilly because judges are human).

Incivility by some lawyers also causes other lawyers to leave litigation because they find dealing with incivility to be so distasteful and frustrating.<sup>22</sup> This long-term cost raises the possibility of a spiral effect. If more and more civil and professional lawyers flee litigation, then they will leave a higher percentage of litigators who engage in (or at least tolerate) incivility.

The question we need to ask is: why do lawyers not consider the impact of their knee-jerk tendency to fight everything? At the least, that behavior is self-centered, not client-centered. At worst, the deplorable conduct is motivated by an incentive to churn a case so that a lawyer makes more money even though the lawyer's litigation conduct lacks merit.

### C. Responses to Incivility

The rampant rise and longevity of incivility has led to many responses by local and state bars, which include civility codes, civility oaths, CLE programs, and mandatory civility.<sup>23</sup>

Civility codes are typically aspirational codes that set forth civility guidelines for lawyers.<sup>24</sup> For example, common guidelines found in civility codes include the following: “A lawyer owes, to opposing counsel, a duty of courtesy;<sup>25</sup> [l]awyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility;”<sup>26</sup> and “[a] client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct.”<sup>27</sup>

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<sup>22</sup> See Jayne Reardon, *Incivility in Law and Society*, 32 CBA Rec. 40, 42-44 (2018).

<sup>23</sup> See David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 148-151 (2019).

<sup>24</sup> See David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 149, 151 (2019) (discussing various states that added civility to their attorney oaths, but only a few states make civility mandatory).

<sup>25</sup> *Dallas Bar Association Guidelines of Professional Courtesy*, DALLAS BAR ASS'N, <http://www2.dallasbar.org/documents/DBA%20ProfGLsCourtesy.pdf> [https://perma.cc/8AJR-M9AE].

<sup>26</sup> *Dallas Bar Association Guidelines of Professional Courtesy*, DALLAS BAR ASS'N, <http://www2.dallasbar.org/documents/DBA%20ProfGLsCourtesy.pdf> [https://perma.cc/8AJR-M9AE].

<sup>27</sup> *Dallas Bar Association Guidelines of Professional Courtesy*, DALLAS BAR ASS'N, <http://www2.dallasbar.org/documents/DBA%20ProfGLsCourtesy.pdf> [https://perma.cc/8AJR-M9AE].

In addition to civility codes, almost half of the states (currently 24) thus far have incorporated civility language into their oaths of admission for lawyers.<sup>28</sup> Nearly all of those states view the civility language as aspirational.<sup>29</sup> In fact, in Texas, one of the reasons the legislature passed the bill adding civility to the lawyer oath revolved around the fact that it could not be used to sanction lawyers.<sup>30</sup> A few states, though, allow for sanctions based on a violation of the oath. Those states are discussed below in Part II of this Article.<sup>31</sup>

CLE programs also sprouted up to combat incivility in the legal profession, most notably ABOTA's entertaining and informative program titled "Civility Matters," which examines the pitfalls of incivility through actual instances of uncivil behavior.<sup>32</sup>

Furthermore, the American Inns of Court promote civility via each inn and programming to educate its members and non-members on the importance of civility.<sup>33</sup> American Inns of Court follow their English predecessor by forming local inns comprised of judges, lawyers, law professors, and law students who learn about and stress the importance of professionalism, civility, and ethics in the legal profession.<sup>34</sup> These inns also incorporate mentoring to pass on

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<sup>28</sup> ABOTA FOUNDATION: CIVILITY MATTERS, [https://www.abota.org/Foundation/Foundation/Professional\\_Education/Civility\\_Matters.aspx](https://www.abota.org/Foundation/Foundation/Professional_Education/Civility_Matters.aspx) [https://perma.cc/X9KH-G9XV] (last visited June 28, 2023).

<sup>29</sup> See David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 149, 151 (2019) (noting a number of states added civility to their attorney oaths, yet civility is only mandatory in a handful of states).

<sup>30</sup> Angela Morris, *Lawyer Civility Oaths: That's a Joke.*, LAWS IN TEXAS (Nov. 14, 2019), <https://lawsintexas.com/lawyer-civility-oaths-thats-a-joke/> [https://perma.cc/5G7B-E459].

<sup>31</sup> See *infra* Part II.

<sup>32</sup> ABOTA FOUNDATION: CIVILITY MATTERS, [https://www.abota.org/Foundation/Foundation/Professional\\_Education/Civility\\_Matters.aspx](https://www.abota.org/Foundation/Foundation/Professional_Education/Civility_Matters.aspx) [https://perma.cc/X9KH-G9XV] (last visited June 28, 2023).

<sup>33</sup> See AM. INNS OF COURT: OUR VISION, MISSION, AND STRATEGIC GOALS, [https://home.innsofcourt.org/AIC/About\\_Us/Our\\_Vision\\_and\\_Mission/AIC/AIC\\_About\\_Us/Vision\\_Mission\\_and\\_Goals.aspx?hkey=27d5bcde-8492-45da-aebd-0514af4154ce](https://home.innsofcourt.org/AIC/About_Us/Our_Vision_and_Mission/AIC/AIC_About_Us/Vision_Mission_and_Goals.aspx?hkey=27d5bcde-8492-45da-aebd-0514af4154ce) [https://perma.cc/SB24-GZWC] (last visited June 28, 2023); AM. INNS OF COURT: INNOVATION EDUCATION, <https://www.pathlms.com/innsofcourt> [https://perma.cc/E5EA-LNA4] (last visited June 28, 2023).

<sup>34</sup> AM. INNS OF COURT: WHAT IS AN AMERICAN INN OF COURT?, [https://home.innsofcourt.org/AIC/About\\_Us/What\\_Is\\_an\\_American\\_Inn\\_of\\_Court/AIC/AIC\\_About\\_Us/What\\_Is\\_An\\_American\\_Inn\\_of\\_Court.aspx?hkey=d3aa9ba2-459a-4bab-ae8-f8faca2bfa0f](https://home.innsofcourt.org/AIC/About_Us/What_Is_an_American_Inn_of_Court/AIC/AIC_About_Us/What_Is_An_American_Inn_of_Court.aspx?hkey=d3aa9ba2-459a-4bab-ae8-f8faca2bfa0f) [https://perma.cc/C7RY-SXZB]



these principles to their more junior members.<sup>35</sup> The American Inns of Court also provide educational programs on civility, professionalism, and ethics.<sup>36</sup>

At the law school level, some law schools include civility in their curriculum.<sup>37</sup> I incorporated a lecture on civility in my professional responsibility courses for over half a decade. Civility also comprises one of the key elements to professional identity formation.<sup>38</sup>

Professional identity formation grew out of the recognition in the Carnegie Institute for the Advancement of Teaching in the Professions study of law schools, *Educating Lawyers*, of the need for law schools to make formation of values and civility a priority.<sup>39</sup> Professional identity formation involves purposefully guiding the development of a law student's and lawyer's identity as a lawyer, recognizing the key traits and competencies that lawyers should exhibit as professionals, and understanding how lawyers relate to their clients, the justice system, and others involved in the legal profession.<sup>40</sup> Three pioneers of professional identity formation, Professors Patrick Longan (Director of the Mercer Center for Legal Ethics and Professionalism),

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(last visited June 28, 2023); Justice Donald Lemons, *Return to Civility: How the American Inns of Court Foundation Is Promoting Professionalism and Ethics Through Mentoring*, 76 TEX. B. J. 207, 207 (2013), available at

<https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/TransitiontoPractice/ReturnToCivility.pdf> (discussing the English roots of the Inns of Court).

<sup>35</sup> AM. INNS OF COURT: WHAT IS AN AMERICAN INN OF COURT?,

[https://home.innsofcourt.org/AIC/About\\_Us/What\\_Is\\_an\\_American\\_Inn\\_of\\_Court/AIC/AIC\\_About\\_Us/What\\_Is\\_An\\_American\\_Inn\\_of\\_Court.aspx?hkey=d3aa9ba2-459a-4bab-ae8-f8faca2bfa0f](https://home.innsofcourt.org/AIC/About_Us/What_Is_an_American_Inn_of_Court/AIC/AIC_About_Us/What_Is_An_American_Inn_of_Court.aspx?hkey=d3aa9ba2-459a-4bab-ae8-f8faca2bfa0f) [<https://perma.cc/C7RY-SXZB>] (last visited June 28, 2023).

<sup>36</sup> See AM. INNS OF COURT: CONTINUING EDUCATION COURSES AND RESOURCES,

<https://home.innsofcourt.org/AIC/Education/AIC/Education/Education.aspx?hkey=fe5b1521-4c25-4655-87e9-fcb9d874e98e> [<https://perma.cc/9EDP-96D8>] (last visited June 28, 2023); AM. INNS OF COURT: INNOVATION EDUCATION, <https://www.pathlms.com/innsofcourt> [<https://perma.cc/E5EA-LNA4>] (last visited June 28, 2023).

<sup>37</sup> Nancy B. Rapoport, *Training Law Students to Maintain Civility in Their Law Practices as a Way to Improve Public Discourse*, 98 N.C. L. Rev. 1143, 1164, 1181, Appendix B (2020).

<sup>38</sup> See PATRICK EMERY LONGAN, DAISY HURST FLOYD, TIMOTHY W. FLOYD, *THE FORMATION OF PROFESSIONAL IDENTITY: THE PATH FROM STUDENT TO LAWYER* 7, 87-100 (2019).

<sup>39</sup> See, e.g., Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. St. Thomas L.J. 195, 200-01, 216 (2012).

<sup>40</sup> See, e.g., Neil Hamilton & Jerome M. Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 Tenn. L. Rev. 843, 844 (2016).

Daisy Floyd (former Dean of Mercer Law School) and Timothy Floyd (Director of Mercer Law School's Experiential Education), opine in their book on professional identity formation that civility is one of the six virtues of professional identity that every lawyer should possess and exhibit.<sup>41</sup> The ABA has embraced the professional identity formation movement wholeheartedly as it amended its rules on legal education in February of 2022 to require that all law schools provide substantial opportunities for students to develop their professional identities.<sup>42</sup>

Finally, some state bars and federal district courts have made civility mandatory for their lawyers.<sup>43</sup> Mandatory civility is discussed at length in the next section.

## II. UNDERSTANDING THE BASICS OF MANDATORY CIVILITY

This part discusses the basics of mandatory civility, including what it means, what it does not mean, and how some jurisdictions employ mandatory civility. Finally, this part details the advantages of mandatory civility.

### A. What Mandatory Civility Is and What It Is Not

Mandatory civility means that a lawyer *could* face sanctions for uncivil behavior. Mandatory civility entails some rule or rules that require civility and/or condemn uncivil behavior from lawyers. Those rules may be found in attorney admission oaths, disciplinary rules, or enforceable codes of conduct. The various methods used by the four states that mandate civility—Arizona, Florida, Michigan, and South Carolina—will be discussed below briefly.

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<sup>41</sup> PATRICK EMERY LONGAN, DAISY HURST FLOYD, TIMOTHY W. FLOYD, *THE FORMATION OF PROFESSIONAL IDENTITY: THE PATH FROM STUDENT TO LAWYER* 7, 87-100 (2019).

<sup>42</sup> See American Bar Association Section of Legal Education and Admissions to the Bar Revised Standards for Approval of Law Schools, AM. BAR ASS'N 1 (Feb. 14, 2022), [perma.cc/J86X-43QU]. Law schools must create a plan to comply with this revision by the Fall of 2022, and they must implement that plan by the Fall of 2023. Neil W. Hamilton & Louis D. Bilionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements*, NALP BULLETIN+ 17 (May 2022), <https://www.nalp.org/revised-aba-standards-part-1>.

<sup>43</sup> Nancy B. Rapoport, *Training Law Students to Maintain Civility in Their Law Practices as a Way to Improve Public Discourse*, 98 N.C. L. Rev. 1143, 1168-1180, Appendix A (2020).

Before doing so, it is important to understand what mandatory civility is not. Mandatory civility does not mean that if a lawyer fails to open the door for opposing counsel, then that lawyer is punished. One state, for example, makes either *repeated* or *substantial* violations of its civility rules sanctionable.<sup>44</sup> Mandatory civility also does not mean that even an egregious act of incivility must be met with a certain punishment or a punishment of any sort. Although a state bar investigating a violation has the power to order a private reprimand, public reprimand or censure, probation, suspension, disbarment, and/or a fine in some states, disciplinary counsel need not sanction a lawyer for violation of the rules, including a civility rule.<sup>45</sup> The disciplinary counsel has a number of options. Counsel can call the attorney informally and decide to dismiss the charges against the attorney because the attorney explains what happens and shows remorse.<sup>46</sup> Alternatively, disciplinary counsel could determine that the lawyer needs some type of diversion program, such as law office management training, mental health support, or substance abuse relief.<sup>47</sup> Even if the incivility is substantial or repeated, the discipline may result in only a private reprimand.<sup>48</sup> The following section discusses how state bars enforce civility.

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<sup>44</sup> See Ariz. Rules of the Sup. Ct. R. 41(g).

<sup>45</sup> ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(B)(1).

<sup>46</sup> ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(B)(1); Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 483 (2013) (discussing how disciplinary counsel can “communicate informally – but immediately, directly, and confidentially – with the attorney who is the subject of the complaint to discuss and resolve the issue”).

<sup>47</sup> ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(B)(1) and 11(G); see David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 Cardozo Pub. L. Pol’y & Ethics, 239, 295, Appendix A (2013); Florida Bar v. Martocci, 791 So.2d 1074, 1078 (Fla. 2001) (ordering, among other things, an evaluation of the respondent lawyer by the state’s lawyer assistance program for possible anger management and/or mental health assistance).

<sup>48</sup> See, e.g., In re Anonymous Member of the S.C. Bar, 709 S.E.2d 633, 638 (S.C. 2011).

## B. How States With Mandatory Civility Enforce It

Four states mandate civility.<sup>49</sup> The basis for each state’s mandatory civility rules are briefly discussed below.

### i. Arizona

Arizona mandates civility using two main rules—Ethical Rule 8.4 under Rule 42 of the Arizona Supreme Court Rules and Rule 41(g).<sup>50</sup> Rule 8.4 provides it is “professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.”<sup>51</sup> The State Bar of Arizona has “long interpreted this to encompass conduct that is egregiously uncivil and unprofessional.”<sup>52</sup> As for Rule 41(g), before 2008, this rule required lawyers to “abstain from all offensive personality” but was not necessarily a rule mandating civility or one capable of being strictly enforced by the State Bar of Arizona (SBA).<sup>53</sup> In 2008, the Arizona

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<sup>49</sup> On July 20, 2023, the State Bar of California Board of Trustees approved measures to improve civility in the legal profession in California that include, among other things, mandatory civility for lawyers. The State Bar of California News Releases, *State Bar of California Board of Trustees Approves Measures to Improve Civility in the Legal Profession*,

<https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-board-of-trustees-approves-measures-to-improve-civility-in-the-legal-profession>. The California Supreme Court must review and approve those measures before they go into effect. The State Bar of California News Releases, *State Bar of California Board of Trustees Approves Measures to Improve Civility in the Legal Profession*, <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-board-of-trustees-approves-measures-to-improve-civility-in-the-legal-profession>.

In addition to the four states that require civility, several federal district courts also mandate civility. See Nancy B. Rapoport, Training Law Students to Maintain Civility in Their Law Practices as a Way to Improve Public Discourse, 98 N.C. L. Rev. 1143, 1168, Appendix A (2020). Those districts include the Northern District of Texas, the District of Wyoming, and the Eastern District of Washington. See *id.*; *Dondi Properties Corp. v. Commerce Savings Loan Association*, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988); D. WYO. LOC. CIV. R. 84.1(a)-(b), [https://www.wyd.uscourts.gov/sites/wyd/files/local\\_rules/localrules-cv\\_0.pdf](https://www.wyd.uscourts.gov/sites/wyd/files/local_rules/localrules-cv_0.pdf) [<https://perma.cc/3NFT-GDZB>]; E.D. Wash. Loc. Civ. R. 83.1(j), <https://www.waed.uscourts.gov/sites/default/files/localrules/LocalCivilRules.pdf> [<https://perma.cc/SU5S-9GP7>].

<sup>50</sup> Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 482 (2013).

<sup>51</sup> Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 482 (2013); Ariz. Rules of Prof'l Conduct R 8.4(d) (State Bar of Ariz. 2003).

<sup>52</sup> See Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 482 (2013).

<sup>53</sup> Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 482 (2013).

Supreme Court made 41(g) enforceable and included “unprofessional conduct” under Rule 31(a)(2)(E), which is defined as “substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer’s Creed of Professionalism of the State Bar of Arizona.”<sup>54</sup> Since civility, courtesy and “abstaining from ‘all offensive conduct’ are explicit components of the Oath and the Creed,” a lawyer may be sanctioned by the SBA for failing to act with civility.<sup>55</sup>

ii. Florida

Florida uses a variety of sources and methods to mandate civility. On September 12, 2011, the Supreme Court of Florida added civility to its lawyer’s Oath of Admission, which now includes the following language, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”<sup>56</sup> The Court added the civility language based on rising concern over uncivil conduct in the legal profession and noted how other states, namely South Carolina, had added civility to their oaths.<sup>57</sup>

In 2013, the Court adopted the Code for Resolving Professionalism Complaints (“Code”), which defined “unprofessional conduct” as “substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*”<sup>58</sup> The language of the Oath prior to the civility addition also included language, and still does, that prevented uncivil conduct, including that an attorney “[w]ill abstain

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<sup>54</sup> Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 482 (2013).

<sup>55</sup> Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 482-83 (2013).

<sup>56</sup> *In re The Florida Bar*, 73 So. 3d 149, 150–51 (Fla. 2011) (emphasis added).

<sup>57</sup> *In re The Florida Bar*, 73 So. 3d 149, 151 (Fla. 2011) (emphasis added).

<sup>58</sup> *In Re Code for Resolving Professionalism Complaints*, 116 So.3d 280, Exhibit A (Mem) (Fla. 2013).

from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness.”<sup>59</sup>

The Code explains that “unprofessional conduct” will also violate Rule 4-8.4(d) of the Rules Regulating the Florida Bar, which has served as a basis for sanctions in the past regarding similar conduct.<sup>60</sup> Rule 4.8.4(d) prohibits behavior “in connection with the practice of law that is prejudicial to the administration of justice,” such as “disparage[ing], humiliate[ing], or discriminat[ing] against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic[.]”<sup>61</sup>

Florida uses a multi-tiered system for handling professionalism complaints, which includes civility complaints. First, each of the state’s twenty circuit courts maintains a Circuit Committee on Professionalism that handles complaints informally. The Circuit Committee passes more serious cases on to the Attorney Consumer Assistance and Intake Program (ACAP) or the Florida Bar when necessary.<sup>62</sup> “ACAP . . . accepts, screens, mediates and attempts to resolve any complaints concerning professional behavior . . . before and in the place of the initiation of formal grievance proceedings.”<sup>63</sup> ACAP acts as another filter for professionalism complaints informally before they reach the Florida Bar.<sup>64</sup>

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<sup>59</sup> Florida Attorney Oath.

<sup>60</sup> *In Re Code for Resolving Professionalism Complaints*, 116 So.3d 280, Exhibit A (Mem) (Fla. 2013).

<sup>61</sup> FL. ST. BAR RULE 4-8.4(d).

<sup>62</sup> *In Re Code for Resolving Professionalism Complaints*, 116 So.3d 280, (Fla. 2013).

<sup>63</sup> *In Re Code for Resolving Professionalism Complaints*, 116 So.3d 280, (Fla. 2013).

<sup>64</sup> *In Re Code for Resolving Professionalism Complaints*, 116 So.3d 280, (Fla. 2013).

iii. Michigan

The Michigan Rules of Professional Conduct mandate civility via rule 6.5, which was added in 1993.<sup>65</sup> Rule 6.5 states:

Rule: 6.5 Professional Conduct

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

(b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.<sup>66</sup>

Michigan's civility rule is "designed to prohibit only 'undignified,' 'discourteous,' and 'disrespectful' conduct or remarks."<sup>67</sup> It serves as "a call to discretion and civility," as opposed to a means to silence, censor, or prohibit criticism.<sup>68</sup>

The state of Michigan enforces mandatory civility through its Rules of Professional Conduct and the Attorney Discipline Board. The Michigan Attorney Disciplinary Board supervises and disciplines Michigan attorneys as the "adjudicative arm of the Michigan Supreme Court."<sup>69</sup> Specifically, the Disciplinary Board appoints hearing panels consisting of three volunteer attorneys.<sup>70</sup> The panel conducts trial-level proceedings in cases that the Attorney Grievance Commission has filed a formal complaint alleging professional misconduct by a member of the State Bar of Michigan.<sup>71</sup>

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<sup>65</sup> MICH. RULES OF PROF'L CONDUCT R. 6.5 (1993).

<sup>66</sup> MICH. RULES OF PROF'L CONDUCT R. 6.5 (1993) (emphasis added).

<sup>67</sup> *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 135 (Mich. 2006).

<sup>68</sup> *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 135 (Mich. 2006).

<sup>69</sup> *Welcome to the Attorney Discipline Board*, ADB, <https://www.adbmich.org/> [<https://perma.cc/XX9M-4J6X>].

<sup>70</sup> *Welcome to the Attorney Discipline Board*, ADB, <https://www.adbmich.org/> [<https://perma.cc/XX9M-4J6X>].

<sup>71</sup> *Welcome to the Attorney Discipline Board*, ADB, <https://www.adbmich.org/> [<https://perma.cc/XX9M-4J6X>].

iv. South Carolina

On October 22, 2003, South Carolina added a civility pledge to its attorney oath requiring all lawyers to be civil “not only in court, but also in all written and oral communications. . . [t]o opposing parties and their counsel. . . .”<sup>72</sup> In 2004, South Carolina amended Rule 7 of the Rules for Lawyer Disciplinary Enforcement by including a warning of disciplinary action for violation of the attorney oath.<sup>73</sup> South Carolina manages and enforces its mandatory civility oath by enforcing sanctions for civility violations sworn to be upheld in the attorney oath.<sup>74</sup>

Except for Florida, all three states handle mandatory civility complaints through the disciplinary counsel of their respective state bars, as opposed to each state court serving as a monitor and arbiter of civility complaints. In other words, parties need not run to the judge in each case for relief; they can file a complaint with the state bar that will handle the claim. Judges, too, can refer civility complaints to the state bar in mandatory civility states.

C. Advantages of Mandatory Civility

Mandatory civility has several compelling advantages. Those include the following: increasing accountability, improving health and wellness, covering more lawyers (not just litigation attorneys in pending case), preserving judicial resources, reducing costs for clients, decreasing stress for attorneys and allowing lawyers to focus on merits of cases, and improving perceptions about lawyers and the legal system. Each is discussed below.

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<sup>72</sup> SOUTH CAROLINA JUDICIAL BRANCH, (Oct. 22, 2010), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03> [<https://perma.cc/X4NE-ST6E>].

<sup>73</sup> SUPREME COURT OF SOUTH CAROLINA, (Sept. 22, 2004), <http://www.sccourts.org/courtOrders/HTMLFiles/2004-09-22-01.htm> [<https://perma.cc/7A8E-ELEG>].

<sup>74</sup> *See, e.g.*, *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 638 (S.C. 2011).



i. Accountability

Incivility remains a systemic issue in the legal system.<sup>75</sup> Hoping all lawyers will rise to the standard of civil behavior appears to be just that—a hope, at best, and more wishful thinking than reality. Only mandatory civility will hold all attorneys accountable for their deleterious conduct that hurts lawyers, their clients, and the justice system. Mandatory civility stands alone as the most realistic and practical solution for systemic change.

ii. Ability to Catch Health and Wellness Issues

As mentioned above, if state bars make civility mandatory, then disciplinary counsel can contact lawyers accused of incivility to find out the root cause of the issue, which may be substance abuse, a mental health issue, an anger management issue, overwhelming circumstances at the office due to poor office management, or any combination of these issues.<sup>76</sup> Disciplinary counsel could then utilize diversion programming, which could include mental health and/or substance abuse counseling, group meetings, and/or training on office management to address the underlying cause(s) of the uncivil conduct.<sup>77</sup> Without mandatory civility, disciplinary counsel might not have that opportunity to catch these issues, which might manifest themselves in tragic events that cannot be undone.<sup>78</sup>

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<sup>75</sup> See, e.g., SURVEY ON PROFESSIONALISM, ILLINOIS SUPREME COURT COMMISSION ON PROFESSIONALISM (2021) (finding that 54% of lawyers in a statewide survey conducted in Illinois “experienced uncivil or unprofessional behavior from another lawyer in the last six months”).

<sup>76</sup> ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(B)(1) and 11(G).

<sup>77</sup> ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(B)(1) and 11(G); see, e.g., Florida Bar v. Martocci, 791 So.2d 1074, 1078 (Fla. 2001) (ordering, among other things, an evaluation of the respondent lawyer by the state’s lawyer assistance program for possible anger management and/or mental health assistance).

<sup>78</sup> Jeena Cho, *Attorney suicide: what every lawyer needs to know*, AM. BAR ASS’N (Jan. 1, 2019), [https://www.abajournal.com/magazine/article/attorney\\_suicide\\_what\\_every\\_lawyer\\_needs\\_to\\_know](https://www.abajournal.com/magazine/article/attorney_suicide_what_every_lawyer_needs_to_know) [<https://perma.cc/NA3Q-THT4>].

iii. Covers More Lawyers

Opponents of mandatory civility might point to current disciplinary rules, local court rules, and the court's inherent power as tools to combat incivility.<sup>79</sup> These tools come up short for a number of reasons. First, they must be stretched and distorted sometimes to prosecute the alleged uncivil behavior.<sup>80</sup> Second, they sometimes fail to address lawyers whose uncivil conduct occurs outside the context of a case pending before a court.<sup>81</sup> Transactional and other non-litigation attorneys can evade oversight for their uncivil behavior based on the limited rules currently available. If civility became mandatory for all lawyers, then all practicing attorneys, whether litigating or not, would be subject to civility rules.

iv. Preserves Judicial Resources

Mandatory civility overseen and administered by the state bar would allow courts to focus more on the substantive issues of cases than on attorney misconduct. Certainly judges could and should quell incivility they witness inside their courtrooms, and judges should set a good example for lawyers by maintaining civility themselves.<sup>82</sup> At the same time, judges could refer alleged uncivil conduct inside or outside the courtroom to the state bar for the latter to handle as opposed to the courts.

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<sup>79</sup> See, e.g., Fed. R. Civ. P. 26(g)(1)(i-iii) (prohibiting discovery a means to harass, cause unnecessary delay, or needlessly increase the cost of litigation); ABA Model Rules of Prof'l Conduct R. 8.4(d)(g) (prohibiting "conduct that is prejudicial to the administration of justice" and "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status").

<sup>80</sup> Appendix A, Vessella's Responses ("I think that other states should strongly consider the value of adopting a rule that allows for addressing unprofessional conduct. Many states believe that there are ethical rules that provide enough latitude to get at incivility or unprofessional behavior, but I think trying to utilize the ethical rules for that purpose makes for a very narrow set of circumstances that can be addressed.")

<sup>81</sup> Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHOENIX L. REV. 465, 504 (2013) (stating that Arizona's mandatory civility rules have caught "uncivil conduct occurring during the practice of law, even outside formal court proceedings and official interactions")

<sup>82</sup> See, e.g., Norman L. Greene, *A Perspective on "Temper in the Court: A Forum on Judicial Civility"*, 23 Fordham Urb. L.J. 709, 716 (1996) (stating that "[a] judge may improve civility in the courtroom by setting an example").

v. Reduces Costs for Clients

As set forth above, when lawyers agree to reasonable extensions and cooperate with opposing counsel on scheduling and discovery matters, then lawyers no longer need to write meet and confer letters—which cost clients’ money—or draft and file briefs regarding discovery/scheduling disputes—which also cost clients’ money—or attend hearings to argue about the issues stated in those meet and confer letters and briefs—which also cost clients’ money. Mandatory civility rules would deter such conduct and encourage cooperation amongst attorneys, saving clients’ money and reducing their costs of litigation.

vi. Decreases Stress on Attorneys and Allows Lawyers to Focus on the Merits of Cases

Every lawyer who has practiced for several years probably can think of one or more lawyers who, if only mentioned, leads one’s blood pressure to rise. I practiced law for nearly a decade, and I certainly can say there were lawyers who had that effect on me. Most litigation attorneys will embrace a challenge and can handle tough opposition. What causes unnecessary stress in litigation is the disrespectful and flippant manner in which some lawyers routinely treat others. Lawyers even leave the practice of law because of the uncivil conduct they encounter in the legal profession.<sup>83</sup> Causing lawyers to bear the consequences of their incivility should lessen the unnecessary stress that the recipient lawyers (of that incivility) encounter. In turn, that reduced friction should translate into less stress and anxiety for other lawyers, litigants, and judges. Attorneys (and humans) should treat all with respect. If that becomes the norm, then the practice of law would likely become more enjoyable.<sup>84</sup>

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<sup>83</sup> See Jayne Reardon, *Incivility in Law and Society*, 32 CBA Rec. 40, 42-44 (2018).

<sup>84</sup> Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998).

Furthermore, mandatory civility would also enable attorneys to focus on the actual merits of the cases instead of arguing about issues unrelated to the substantive matters of the case. That focus would help cases move quicker through the courts since less time would be spent on bickering over inconsequential issues.

vii. Improves Perceptions About Lawyers and the Legal System

If civility became mandatory, then lawyer conduct would eventually conform to those rules more so than it does now as lawyers would face sanctions for non-compliance, which would likely improve the public's perception of lawyers as there would presumably be fewer incidents of lawyer incivility over time.<sup>85</sup> In addition, a public commitment to civility in the legal profession might also result in the public's belief that all lawyers should be civil and held to a higher standard. The public might view the legal system, then, as a place where the lawyers argue the merits of a case and the best lawyers with the best cases prevail instead of the most obnoxious and obstreperous attorneys prevail.

### III. ADDRESSING THE MAJOR MYTHS OF MANDATORY CIVILITY

This section debunks the major myths of mandatory civility, one by one.

A. MYTH NUMBER ONE: ONE ACT OF INCIVILITY COULD LEAD TO SANCTIONS AND A TARNISHED CAREER

Lawyers may worry that one act of incivility will lead to sanctions and public destruction of their career. The published opinions, case law, and common sense simply do not bear out that myth.<sup>86</sup> In *MacDonald*, the Grievance Administrator in Michigan filed a complaint alleging that

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<sup>85</sup> Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998).

<sup>86</sup> See, e.g., *Board Opinion*, Case No. 00-4-GA, *Grievance Adm'r v. MacDonald*, P-16917, STATE OF MICH. ATT'Y DISCIPLINE BD. (Jan. 25, 2001) <http://data.adbmich.org/coveo/opinions/2001-01-25-00o-4.pdf#search=%226.5%22> [<https://perma.cc/L4NN-PVVM>] (stating that one isolated act of incivility does not violate the civility rule); *Board Opinion*, Case No. 96-228-GA, *Grievance Adm'r v. Szabo*, P 33792, STATE OF MICH. ATT'Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>] (same).

attorney Duncan MacDonald called opposing counsel a “lying son of a b----” and a “shyster” on a telephone call.<sup>87</sup> The State of Michigan Attorney Discipline Board declined to sanction MacDonald or even find he violated Michigan’s civility rule.<sup>88</sup> The Board, citing another case (Szabo, discussed *infra*), stated that “one isolated incident of profane language did not constitute professional misconduct.”<sup>89</sup>

In *Szabo*, attorney Neil Szabo allegedly called opposing counsel a “f---ing asshole” multiple times and challenged opposing counsel to a fight.<sup>90</sup> The board viewed this as a situation where Szabo made the comments in exasperation, frustration, and in jest concluding that this could not be “seriously understood” as a real invitation for a fight.<sup>91</sup> Szabo actually walked away after the complainant attorney retaliated with aggression, and Szabo attempted to disengage with opposing counsel.<sup>92</sup> The board saw this as an isolated incident that arose after a highly contentious hearing in which opposing counsel allegedly showed up over an hour and a half late.<sup>93</sup> Finding that respondent’s actions did not violate the civility rule, the Board aptly noted, “Litigation is by its nature adversarial. Oftentimes attorneys involve themselves in heated,

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<sup>87</sup> See, e.g., *Board Opinion*, Case No. 00-4-GA, *Grievance Adm’r v. MacDonald*, P-16917, STATE OF MICH. ATT’Y DISCIPLINE BD. (Jan. 25, 2001), <http://data.adbmich.org/coveo/opinions/2001-01-25-00o-4.pdf#search=%226.5%22> [<https://perma.cc/L4NN-PVVM>].

<sup>88</sup> See, e.g., *Board Opinion*, Case No. 00-4-GA, *Grievance Adm’r v. MacDonald*, P-16917, STATE OF MICH. ATT’Y DISCIPLINE BD. (Jan. 25, 2001), <http://data.adbmich.org/coveo/opinions/2001-01-25-00o-4.pdf#search=%226.5%22> [<https://perma.cc/L4NN-PVVM>].

<sup>89</sup> See, e.g., *Board Opinion*, Case No. 00-4-GA, *Grievance Adm’r v. MacDonald*, P-16917, STATE OF MICH. ATT’Y DISCIPLINE BD. (Jan. 25, 2001), <http://data.adbmich.org/coveo/opinions/2001-01-25-00o-4.pdf#search=%226.5%22> [<https://perma.cc/L4NN-PVVM>].

<sup>90</sup> *Board Opinion*, Case No. 96-228-GA, *Grievance Adm’r v. Szabo*, P 33792, STATE OF MICH. ATT’Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>].

<sup>91</sup> *Board Opinion*, Case No. 96-228-GA, *Grievance Adm’r v. Szabo*, P 33792, STATE OF MICH. ATT’Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>].

<sup>92</sup> *Board Opinion*, Case No. 96-228-GA, *Grievance Adm’r v. Szabo*, P 33792, STATE OF MICH. ATT’Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>].

<sup>93</sup> *Board Opinion*, Case No. 96-228-GA, *Grievance Adm’r v. Szabo*, P 33792, STATE OF MICH. ATT’Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>].

confrontational and hostile exchanges. Words are often exchanged in the heat of the battle, but when the emotions calm down, all is forgotten and it is back to business.”<sup>94</sup>

In the four states that require civility from their lawyers, incivility by itself is usually not found in the published opinions and case law.<sup>95</sup> When it is, the sanctions typically include private or public reprimand and sometimes suspension for incredibly egregious behavior.<sup>96</sup> The only

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<sup>94</sup> *Board Opinion*, Case No. 96-228-GA, *Grievance Adm’r v. Szabo*, P 33792, STATE OF MICH. ATT’Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>].

<sup>95</sup> *See, e.g.*, *In re Eric S.*, No. PDJ-2011-9070, 2011 WL 9368633, at \*1 (Ariz. Disp. Comm’n Jan. 1, 2011) (alleging incivility plus representation without written communication of fees and expenses, lack of diligent representation, and failure to respond to the State Bar investigation); *Hearing Officer’s Report for Cornelia H.*, ARIZ. JUD. BRANCH 1, 2 (Feb. 17, 2009), [https://www.azcourts.gov/Portals/36/2009\\_scanned/HO\\_Reports/HoncharHORpt.pdf](https://www.azcourts.gov/Portals/36/2009_scanned/HO_Reports/HoncharHORpt.pdf) [<https://perma.cc/23MN-DRK8>] (claiming incivility plus, among other offenses, lack of diligence, competence, and exercising independent judgment, along with conflict of interest and asserting non-meritorious claims); *Summary of Disciplinary Proceedings In re Joseph P.*, ARIZ. JUD. BRANCH (May 8, 2017), <https://www.azcourts.gov/ortals/101/2017/Palmisano%20Joseph%20P%20012839%20PDJ-2016-9098.pdf> [<https://perma.cc/S93R-EZ3Q>] (alleging incivility plus, among other offenses, failed to comply with the requests of client regarding the representation, diligence, communication, and failed as managing attorney to assure all lawyers in firm conformed to Rules of Professional Conduct); *Florida Bar v. Patterson*, 257 So.3d 56 (Fla. 2018) (asserting incivility plus, among other offenses, conflict of interest); *Florida Bar v. Norkin*, 183 So.3d 1018 (Fla. 2015) (claiming incivility plus attorney continued to practice law after being suspended); James M. Cameron, Chairperson, *Order Affirming Hearing Panel Order of Suspension*, Case No. 11-128-GA, *Grievance Adm’r v. Dunchock*, P 13013, STATE OF MICH. ATT’Y DISCIPLINE BD. (Jan. 30, 2015), <http://data.adbmich.org/coveo/boardorders/2015-01-30-11bo-128.pdf#search=%226.5%22> [<https://perma.cc/B8JV-RCZA>] (alleging incivility plus, among other offenses, practicing law while suspended, failing to inform the client of termination of representation, and failing to take steps in the client’s interest after termination of the representation); *Dismissal*, Case No. 00-189-GA, Patrick K. Ehlmann, P-31644, STATE OF MICH. ATT’Y DISCIPLINE BD. (Mar. 12, 2001), <http://data.adbmich.org/coveo/notices/2001-03-12-00n-189.pdf#search=%226.5%22> [<https://perma.cc/VM2Y-A72L>] (asserting incivility plus, among other offenses, lack of competence and diligence); *In re Norfleet*, 595 S.E.2d 243 (2004) (alleging incivility plus, among other offenses, misappropriation of about \$20,000 in trust money, failure to honor tax obligations, and failure to respond to disciplinary charges); *In re Kennedy*, 367 S.C. 355 (2006) (asserting incivility plus, among other offenses, communication, mishandling client funds, and misappropriating funds).

<sup>96</sup> *See, e.g.*, *Summary of Disciplinary Proceedings In re Peter S.*, ARIZ. JUD. BRANCH (Aug. 24, 2017), <https://www.azcourts.gov/Portals/101/2017/Strojnjk%20Peter%20K%20026082%20PDJ-2017-9096.pdf> [<https://perma.cc/6E3R-MBHH>] (ordering private reprimand based on incidents of incivility in three separate matters); *Florida Bar v. Martocci*, 791 So.2d 1074, 1075, 1078 (Fla. 2001) (ordering public reprimand, a two-year period of probation, an evaluation by Florida Lawyers Assistance for anger management, mental health assistance, or both based on, among other things, respondent’s calling the opposing party a “crazy” and a “nut case” and telling opposing counsel she was a “stupid idiot,” did not know the law or procedure, and she should “go back to Puerto Rico”); John F. Van Bolt, *Notice of Reprimand*, Case No. 12-49-GA, Eric J. Smith, P 46186, STATE OF MICH. ATT’Y DISCIPLINE BD. (July 12, 2012) <http://data.adbmich.org/coveo/notices/2012-07-12-12n-49.pdf#search=%226.5%22> [<https://perma.cc/LT32-YG8P>] (ordering reprimand and costs); William J. Danhof, Chairperson, *Order Affirming Hearing Panel Order of Reprimand*, Case No. 04-118-GA, *Grievance Adm’r v. Barkovic*, P 29797, STATE OF MICH. ATT’Y DISCIPLINE BD. (Feb. 23, 2010) <http://data.adbmich.org/coveo/boardorders/2010-02-23-04bo-118.pdf#search=%226.5%22> [<https://perma.cc/6DYJ-ZAZV>] (same); *In re Anonymous Member of the S.C. Bar*,

instances that could be found where an attorney received a sanction of disbarment based solely on unprofessional or uncivil conduct occurred where there were extreme and prolonged instances of unprofessional conduct by attorneys, along with other aggravating factors such as a refusal to acknowledge any wrongdoing by the attorneys who were repeat offenders.<sup>97</sup> Both of those instances occurred in Florida.<sup>98</sup>

Uncivil conduct may not even result in sanctions, and those cases are often resolved privately with the disciplinary arm of the state bar, meaning those cases are not even disclosed to the public. Some complaints of incivility are also dismissed.<sup>99</sup>

**B. MYTH NUMBER TWO: COMPLAINTS WILL INCREASE DRAMATICALLY IF INCIVILITY BECOMES A SEPARATE OFFENSE, AND THE EXTRA COMPLAINTS WILL NECESSITATE MORE STATE BAR STAFF TO INVESTIGATE INCIVILITY COMPLAINTS**

Some may worry that if state bars add mandatory civility rules, then the number of incivility complaints will overwhelm the disciplinary counsel, necessitating the hiring of additional disciplinary counsel in a time when state bar resources are limited. As an initial

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709 S.E.2d 633, 638 (S.C. 2011) (ordering private reprimand); *In re Lovelace*, 716 S.E.2d 919, 919-20 (S.C. 2011) (ordering 90-day suspension and “continued psychiatric and/or psychological treatment, including, but not limited to anger management” based on respondent slapping the opposing party defendant at defendant’s deposition).

<sup>97</sup> *Florida Bar v. Ratiner*, 238 So. 3d 117, 119 (Fla. 2018) (encompassing three different disciplinary actions that involved substantial, egregious conduct in each action); *Lee v. American Eagle Airlines*, 93 F.Supp.2d.1322 (S. Dist. Fla. 2000); *Florida Bar v. Kurzban*, NO.: SC18-1709, 2018 WL 6427638 (December 7, 2018); *In re Petition for Disciplinary Revocation of Marvin Kurzban*, NO.: SC19-176, 2019 WL 655523 (Feb. 13, 2019) (disbarring Kurzban after a litany of egregious uncivil conduct and several run-ins with courts and the Florida State Bar).

<sup>98</sup> *Florida Bar v. Ratiner*, 238 So. 3d 117, 119 (Fla. 2018) (encompassing three different disciplinary actions that involved substantial, egregious conduct in each action); *Lee v. American Eagle Airlines*, 93 F.Supp.2d.1322 (S. Dist. Fla. 2000); *Florida Bar v. Kurzban*, NO.: SC18-1709, 2018 WL 6427638 (December 7, 2018); *In re Petition for Disciplinary Revocation of Marvin Kurzban*, NO.: SC19-176, 2019 WL 655523 (Feb. 13, 2019) (disbarring Kurzban after a litany of egregious uncivil conduct and several run-ins with courts and the Florida State Bar).

<sup>99</sup> *See, e.g.*, *In re David W.*, No. PDJ-2015-9102, 2016 WL 7048470 (Ariz. Disp. Comm’n Feb. 23, 2016) (dismissing claims that included incivility based on findings that claims were untrue and statements made by respondent did not violate the professional rules despite being insensitive and thoughtless); Mark A. Armitage, *Dismissal*, Case No. 16-147-GA, Lyle Dickson, P 55424, STATE OF MICH. ATT’Y DISCIPLINE BD. (Sept. 16, 2017), <http://data.adbmich.org/coveo/notices/2017-09-16-16n-147.pdf#search=%226.5%22> [https://perma.cc/462D-DRCR] (dismissing the complaint that included allegations of incivility the misconduct had not been proved by a preponderance of the evidence); John F. Van Bolt, *Dismissal*, Case No. 09-96-GA, Michael A. Rataj, P 43004, STATE OF MICH. ATT’Y DISCIPLINE BD. (Sept. 09, 2011), <http://data.adbmich.org/coveo/notices/2011-09-09-09n-96.pdf#search=%226.5%22> [https://perma.cc/3XAK-LQ5R] (dismissing the complaint because “respondent’s expletives, uttered in a single sentence in a single telephone conversation with another lawyer did not rise to the level of” misconduct required to violate the civility rule).

response, it is inconsistent to argue that incivility is not a problem, but if civility is made mandatory, then the enormous number of incivility complaints will necessitate more disciplinary counsel to handle those complaints.

Second, the Chief Bar Counsel of Arizona, Maret Vessella, and the Deputy Administrator of the Michigan Attorney Grievance Commission, Kimberly Uhuru, did not witness a need to increase staff at their state bars' respective disciplinary arms to address the addition of mandatory civility.<sup>100</sup> Chief Bar Counsel Vessella stated, "Over the years we have added to staff to address caseloads or other specific areas of regulation. Any additions were not the result of charges alleging unprofessional conduct."<sup>101</sup> Similarly, Deputy Administrator Uhuru indicated, "Our office has not needed to increase staff (either support staff or attorney staff) to process these [civility] complaints, and staffing levels have remained consistent for our office. ...[Our] staffing levels have not increased in the wake of Michigan adopting MRPC 6.5."<sup>102</sup>

Notably, even though the Arizona State Bar did not need to add additional staff to handle complaints regarding incivility, Chief Bar Counsel Vessella did indicate that she "would characterize the amount of charges alleging unprofessional conduct as significant."<sup>103</sup> Thus, incivility remains a major issue in the legal profession.

Deputy Administrator Uhuru, for her part, observed, "Our state has not experienced an increase in incivility complaints since the adoption of ... [MRPC 6.5]."<sup>104</sup> Uhuru went on to provide that civility cases comprise a "relatively small percentage of Michigan disciplinary orders. For example, in 2019, out of 88 total orders of discipline issued by the Michigan Attorney Discipline

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<sup>100</sup> Appendices A & B, Vessella's Responses and Uhuru's Responses.

<sup>101</sup> Appendix A, Vessella's Responses.

<sup>102</sup> Appendix B, Uhuru's Responses.

<sup>103</sup> Appendix A, Vessella's Responses.

<sup>104</sup> Appendix B, Uhuru's Responses.



Board, only 4 disciplinary orders involved 6.5 violations.”<sup>105</sup> Uhuru explained that Michigan handles most incivility complaints with “private letters of caution or admonishment to the respondent, rather than formal prosecution.”<sup>106</sup> Those warnings are sufficient to deter future similar conduct in her judgment.<sup>107</sup> Only egregious incivility cases result in a formal complaint where Michigan seeks formal discipline.<sup>108</sup>

C. MYTH NUMBER THREE: CIVILITY RULES INHIBIT ZEALOUS ADVOCACY

Opponents of mandatory civility argue that rules prohibiting incivility inhibit lawyers’ ability to represent their clients zealously.<sup>109</sup> This argument goes hand in hand with the notions that lawyers cannot be tough or aggressive if mandatory civility rules exist, and civility rules chill lawyers’ free speech.<sup>110</sup> Although these arguments seem persuasive in the abstract, they fall flat for several reasons when considered in-depth and in conjunction with the proposed mandatory civility rules.

First of all, some lawyers believe that “zeal” is a bad word with negative connotations, which spurred a movement to remove the word zeal and its derivatives, such as “zealous,” from several states’ rules of professional conduct.<sup>111</sup> I do not agree. I am fine with the word and often teach my students that clients want aggressive lawyers who will fight for them, and they should. The question is not whether a lawyer should be zealous. The question is *how* the lawyer conducts oneself in being a zealous advocate.

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<sup>105</sup> Appendix B, Uhuru’s Responses.

<sup>106</sup> Appendix B, Uhuru’s Responses.

<sup>107</sup> Appendix B, Uhuru’s Responses.

<sup>108</sup> Appendix B, Uhuru’s Responses.

<sup>109</sup> *See, e.g.*, *Bedoya v. Aventura Limousine & Transp. Serv.*, 861 F. Supp. 2d 1346, 1369 (S.D. Fla. 2012).

<sup>110</sup> *See, e.g.*, *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 637-38 (S.C. 2011).

<sup>111</sup> Daniel Harrington and Stephanie K. Benecchi, *Is it Time to Remove “Zeal” From the ABA Model Rules of Professional Conduct?*, AM. BAR ASS’N LITIGATION SECTION: ETHICS AND PROFESSIONALISM (May 26, 2021), <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2021/is-it-time-to-remove-zeal-from-the-aba-model-rules-of-professional-conduct/>.

When comparing civility in an adversary system such as the law I am often reminded of sports as lawyers (particularly litigators) represent one of the few professions, which includes professional athletes, where another professional competes with and attempts to defeat them as a regular part of the job.<sup>112</sup> Reggie White and Mike Singletary played in the NFL and earned induction into the NFL Hall of Fame. Each gained notoriety for hitting hard and playing ferociously. White and Singletary, however, played with respect for the opponent and within the rules of the game. Other players, such as Bill Romanowski, a former linebacker in the NFL, went beyond playing hard like White and Singletary and crossed the line into playing dirty, unprofessionally, or unsportsmanlike.<sup>113</sup> Romanowski spit on, punched, and kicked opposing players.<sup>114</sup> He even ended another player's career by breaking that player's eye socket—that player was *his own teammate* at the time.<sup>115</sup> Litigation is not a sport but the analogy is a fair one. There are lawyers like White and Singletary who, if one opposed them, the lawyer knew the case would be hard fought, but fought fairly. Then there are the all-too-many lawyers like Romanowski who believe that the ends justify the means. Their form of spitting may be to curse their opponent or mock an opposing party. That crosses the line in law practice. Lawyers can compete in the adversarial system and still maintain civility. Indeed, the ABA Model Rules of Professional Responsibility (Model Rules) echo that very notion.

The preamble of the ABA Model Rules provides that a lawyer has an obligation to zealously “protect and pursue a client’s legitimate interests, within the bounds of the law, while

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<sup>112</sup> Doctors, for example, are not actively trying to combat the efforts of other doctors in their normal practice. One doctor does not attempt to knock the scalpel out of another doctor’s hands while the latter is performing a surgery.

<sup>113</sup> Ben Donahue, *The Life and Career of Bill Romanowski (Complete Story)*, PRO FOOTBALL HIST. (Nov. 20, 2021), <https://www.profootballhistory.com/bill-romanowski/> [https://perma.cc/Q5U7-MFV5].

<sup>114</sup> Ben Donahue, *The Life and Career of Bill Romanowski (Complete Story)*, PRO FOOTBALL HIST. (Nov. 20, 2021), <https://www.profootballhistory.com/bill-romanowski/> [https://perma.cc/Q5U7-MFV5].

<sup>115</sup> Ben Donahue, *The Life and Career of Bill Romanowski (Complete Story)*, PRO FOOTBALL HIST. (Nov. 20, 2021), <https://www.profootballhistory.com/bill-romanowski/> [https://perma.cc/Q5U7-MFV5].

maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”<sup>116</sup> Respect for everyone in the system should be the norm, not the exception.

One of the proposed civility rules in this Article is that lawyers should not personally attack another with disparaging comments. This rule does not prohibit attacking the credibility of a witness on the stand. Instead, this rule prohibits an ad hominem attack on opposing counsel or the opposing party, which is unnecessary for the zealous advocacy of a client. Another proposed rule in this Article would require lawyers to “commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.”<sup>117</sup> If a lawyer failed to abide by this rule, then it might result in time-consuming arguments between counsel that would increase the costs to clients who must pay their attorneys for the time spent arguing. Disingenuously quarreling with opposing counsel about what the attorneys agreed on is not zealous advocacy; it is dishonest, disrespectful, and obstreperous. The proposed civility rules do not conflict with zealous advocacy.

D. MYTH NUMBER FOUR: CIVILITY RULES ARE TOO VAGUE AND DIFFICULT TO ENFORCE

Some lawyers argue that mandatory civility rules, such as “lawyers must be civil and treat others with respect and dignity,” are too vague and difficult to enforce.<sup>118</sup> This argument fails for two reasons. One, lawyers (and people in general) know the difference between respectful and uncivil behavior. Courts previously used the age of seven as the age of reason for

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<sup>116</sup> ABA MODEL RULES pmb1.

<sup>117</sup> *Infra* Part IV.

<sup>118</sup> See Keith W. Rizzardi, *Expectation in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations*, 44 FLA. ST. U. L. REV. 691, 745 (2017) (noting there might be issues of ambiguities of civility and the inherent difficulty of compliance).

criminal cases as children as young as seven know the difference between right and wrong.<sup>119</sup> To feign ignorance regarding whether calling someone an idiot or insulting their children equates to uncivil conduct strains credulity. Two, the proposed rules in this Article attempt to reduce the discretion necessary to adjudicate a violation of the proposed rules and eliminate the alleged potential vagueness. For example, one proposed mandatory civility rule states: “Lawyers shall identify clearly, for other counsel or parties, all changes that they have made in documents submitted to them for review.”<sup>120</sup> It is difficult to fathom how this rule could be applied inappropriately or not put a lawyer on notice of precisely what behavior potentially subjects them to discipline under this rule.

E. MYTH NUMBER FIVE: CIVILITY RULES ATTACK RACIAL MINORITIES AND WOMEN WHILE FAVORING THE ELITE

Some opponents of mandatory civility argue that “[c]ivility codes are not neutral; they carry the imprint of a class-contingent image of civility and courtesy.”<sup>121</sup> Namely, “[b]ehavior that deviates from upper-middle-class norms will be more likely to be deemed discourteous.”<sup>122</sup> Put even more bluntly, some argue that civility is used to cabin and control the behavior of people of color, “preventing social mobility and preserving the status quo,” and to “civilize people” considered by White citizens as “less than.”<sup>123</sup> Moreover, because sometimes professionalism and civility are used interchangeably to denote aspirational, expected behavior,

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<sup>119</sup> See Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 246 (2009) (stating that children in eighteenth century America above the “‘age of reason,’ traditionally seven years of age or older, were deemed capable of criminal intent, and therefore were tried in the same courts and subjected to the same punishment as adult defendants”).

<sup>120</sup> *Infra* Part IV.

<sup>121</sup> Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Val. U. L. Rev. 657 (1994) (critiquing civility as elitist).

<sup>122</sup> Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Val. U. L. Rev. 657 (1994) (critiquing civility as elitist).

<sup>123</sup> Karen Grisgby Bates, *When Civility Is Used as A Cudgel Against People of Color*, NPR (Aug. 5, 2021), <https://www.npr.org/sections/codeswitch/2019/03/14/700897826/when-civility-is-used-as-a-cudgel-against-people-of-color> [<https://perma.cc/W2RZ-ERGQ>].

and professionalism sometimes refers to how people dress and look in a professional setting, civility efforts can be seen as racist if everyone is asked or expected to look and talk like a White male.<sup>124</sup>

Civility in the abstract or statements that lawyers should look professional may conjure up images of upper-class White males. The proposed mandatory civility rules in this Article demand behavior that all lawyers, regardless of color, race, gender, creed, or class, should live up to as attorneys. For example, the first proposed civility rule forbids an attorney from making disparaging personal remarks about anyone involved in the legal process and specifically prevents such remarks “based on race, gender, or other protected personal characteristics,” demonstrating how this civility rule will benefit, not constrain, women and people of color.

Moreover, historically underrepresented individuals (i.e., racial minorities and females) often serve as the recipients of uncivil behavior,<sup>125</sup> meaning mandatory civility rules would make

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<sup>124</sup> See Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear “You Don’t Look Like a Lawyer”*, HARVARD BUSINESS REVIEW (Aug. 5, 2021), <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer> [<https://perma.cc/Y272-BKW7>].

<sup>125</sup> See, e.g., Judge Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L.J. 1049, 1053 (2000) (suggesting that “increases in opportunities for women and minorities has coincided with the unwelcome increase in incivility”); Initial Report of the California Civility Task Force, *Beyond the Oath, Recommendations for Improving Civility*, September 2021, <https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%209.10.21.pdf> (recommending that California adopt, among other things, mandatory civility, and stating that “young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end” of incivility); Honorable Lee Smalley Edmon & Honorable Samantha P. Jessner, *Gender Equality is Part of the Civility Issue*, Ass’n of Bus. Trial Law’s (2019), [https://abtl.org/report/la/articles/ABTL\\_LA\\_Summer19\\_EdmonJessner\\_Reprint.pdf](https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf) [<https://perma.cc/3RBW-Y9BA>] (“Common complaints by women lawyers include being interrupted inappropriately or ‘talked over’ while speaking, jokes and comments that are sexist, and comments that trivialize gender discrimination.”); Lilia Cortina, et. al, *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact*, 39 J. MANAGEMENT 1579, 1580-81, 1596-99 (2013) (noting that women and racial minorities report more instances of being subject to incivility in the workplace than White males); Gallus, et. al, *An Eye for an Eye? Exploring the Relationship Between Workplace Incivility Experiences and Perpetration*, 19 J. OCC. HEALTH PSYC. 143, 146 (2014) (“men are more likely than women to be the perpetrators of workplace” incivility and “women are most often the targets”); Lilia M. Cortina, et. al, *Researching Rudeness: The Past, Present, and Future of the Science of Incivility*, 22 J. OCC. HEALTH PSYC. 299, 301 (2017) (finding “more women than men reporting uncivil experiences, especially in male-dominated professions such as the law”); Jayne Reardon, *Incivility in Law and Society*, 32 CBA Rec. 40, 42-44 (2018) (“Many anecdotally speculate that incivility discourages women and minority lawyers from staying in the legal

their lives better, not worse, by protecting them from uncivil conduct. When I spoke at the American Inns of Court 2021 National Conversation on Civility on the topic of “Mandating Civility—Yes or No,” most attendees were racial minorities and females, and one of the attendees pointed out that fact towards the end of the presentation. The proposed mandatory civility rules described in the next part of the Article can protect historically underrepresented individuals, and the proposed rules should be followed by all attorneys.

#### IV. FIVE MANDATORY CIVILITY RULES THAT WILL WORK

I propose that state bars should add any or all of the civility rules below to the disciplinary rules of conduct.<sup>126</sup> This makes including the rules simple, easy to find, and contained in a form that lawyers are used to seeing. State bars represent the best mechanism to enforce mandatory civility for several reasons. First, it puts the onus on the state bar to investigate and enforce these rules, which it does for many other rules of professional conduct, and state bars can do so without increased costs.<sup>127</sup> Second, state bar disciplinary counsel can require diversion programs for lawyers based on civility complaints and do so frequently. Third, if state bars become the primary entity that handles civility issues, then courts can refer these issues to them and spend less time on civility issues and more time on the substantive issues in the case. In enforcing civility, state bars could only sanction lawyers based on repeated or substantial violations of any of these rules. This additional rule curbs those fears about major punishments for minor infractions.

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profession...This belief is mirrored by evidence that incivility disproportionately affects women and other under-represented minorities in the general population.”); *See generally*, Amelia Clegg, *All Lawyers Are Equal, But Some Are More Equal than Others: Incivility Towards Female Attorneys from Within the Legal Profession*, American Inns of Court, [https://home.innsocourt.org/AIC\\_PDFs/Burger\\_Prize/Burger\\_2022\\_Clegg\\_Essay.pdf](https://home.innsocourt.org/AIC_PDFs/Burger_Prize/Burger_2022_Clegg_Essay.pdf) [https://perma.cc/5YLL-2K6N] (last visited June 28, 2023).

<sup>126</sup> Keith W. Rizzardi, *Expectations in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations*, 44 Fla. St. U. L. Rev. 691, 746 (2018) (arguing that well-defined, explicit requirements of civility could be “integrated into the legal ethics rules”).

<sup>127</sup> *See supra* Part III.B.

Each proposed rule is set forth below:

1. A lawyer shall avoid disparaging personal remarks toward all individuals, such as opposing counsel, the opposing party, and all court staff, involved in the legal process. A lawyer shall abstain from any allusion to personal peculiarities and idiosyncrasies of those individuals. Derogatory comments about persons involved in the legal process based on race, gender, or other protected personal characteristics are unacceptable. Insults about a lawyer's work or work product are also unacceptable.<sup>128</sup>
2. A lawyer must communicate with opposing counsel in an attempt to schedule meetings, hearings, and depositions in a good faith attempt to avoid scheduling conflicts. When meetings, hearings, depositions, or other events are to be canceled or postponed, lawyers must notify as early as possible other counsel, the court, or other persons as appropriate.<sup>129</sup>
3. Lawyers shall grant reasonable extensions of time to opposing counsel where such extensions will not have a material, adverse effect on the rights of the client.<sup>130</sup>
4. Lawyers shall identify clearly, for other counsel or parties, all changes that they have made in documents submitted to them for review.<sup>131</sup>
5. When called on to do so, lawyers shall commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.<sup>132</sup>

State bars could sanction lawyers based on repeated or substantial violations of any of these rules.<sup>133</sup>

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<sup>128</sup> See *Dondi Properties Corp. v. Commerce Sav. Loan Ass'n*, 121 F.R.D. 284, 296 (N.D. Tex. 1988) (citing The American College of Trial Lawyers' Code of Trial Conduct (rev. 1987)).

<sup>129</sup> See Dallas Bar Ass'n Guidelines of Prof'l Courtesy, Depositions, Hearings, And Discovery Matters; Principles of Civility, Integrity and Professionalism, American Board of Trial Advocates, Professionalism Ethics and Civility, Principles of Civility,

[https://www.abota.org/Online/About/Principles\\_of\\_Civility\\_\\_Integrity\\_\\_and\\_Professionalism.aspx#:~:text=Principles%20of%20Civility%2C%20Integrity%2C%20and%20Professionalism%201%201.,and%20counsel%20as%20soon%20as%20possible.%20More%20items](https://www.abota.org/Online/About/Principles_of_Civility__Integrity__and_Professionalism.aspx#:~:text=Principles%20of%20Civility%2C%20Integrity%2C%20and%20Professionalism%201%201.,and%20counsel%20as%20soon%20as%20possible.%20More%20items).

<sup>130</sup> See Dallas Bar Ass'n Guidelines of Prof'l Courtesy, Depositions, Hearings, And Discovery Matters.

<sup>131</sup> See Ariz. Rules of the Sup. Ct. R. 41(g), A Lawyer's and Legal Paraprofessional's Creed of Professionalism of the State Bar of Arizona (2012).

<sup>132</sup> Principles of Civility, Integrity and Professionalism, American Board of Trial Advocates, Professionalism Ethics and Civility, Principles of Civility,

[https://www.abota.org/Online/About/Principles\\_of\\_Civility\\_\\_Integrity\\_\\_and\\_Professionalism.aspx#:~:text=Principles%20of%20Civility%2C%20Integrity%2C%20and%20Professionalism%201%201.,and%20counsel%20as%20soon%20as%20possible.%20More%20items](https://www.abota.org/Online/About/Principles_of_Civility__Integrity__and_Professionalism.aspx#:~:text=Principles%20of%20Civility%2C%20Integrity%2C%20and%20Professionalism%201%201.,and%20counsel%20as%20soon%20as%20possible.%20More%20items).

<sup>133</sup> See Ariz. Rules of the Sup. Ct. R. 41(g).

These five simple rules would apply to the conduct of all lawyers including, but not limited to, litigators and transactional attorneys—“related to the practice of law.”<sup>134</sup>

These straightforward rules regarding civility provide clear guidelines that state bars can enforce.<sup>135</sup> The first proposed rule prohibiting personal disparaging remarks would allow the lawyers to focus on the merits of the cases without worry of individual insults from opposing counsel. If a lawyer is at trial and challenges the credibility of a witness based on reliable evidence, then that would not violate this rule. If, however, a lawyer personally attacks opposing counsel’s daughter who is unrelated to a case and maligns opposing counsel’s child-rearing abilities, then that would violate this rule.<sup>136</sup> If a lawyer during a dispute questions whether a party has a soul and claims that party has no brain while calling individuals associated with a dispute “pagans, insane, and pigheaded,” then that would also violate the rule.<sup>137</sup>

With regard to insulting the work or work product of an attorney under this rule, that would not include pointing out opposing counsel’s brief argues for a position that is unsupported by any controlling law, opposing counsel’s brief relies on outdated precedent, or the arguments in opposing counsel’s brief are inconsistent for certain enumerated reasons. The rule would cover a situation in which an attorney refers “to the work of other attorneys as ‘garbage,’ demonstrating ‘legal incompetence,’ and involving ‘ludicrous additional time and expenses.’”<sup>138</sup>

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<sup>134</sup> ABA Model Rules of Prof’l Conduct R. 8.4(g), cmt. 4 (“Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”).

<sup>135</sup> Keith W. Rizzardi, *Expectations in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations*, 44 Fla. St. U. L. Rev. 691, 746 (2018) (supporting mandatory civility when “[d]one properly, and implemented as part of a positive, well-defined, and prospective system toward which members of the Bar could take a critical reflexive attitude”).

<sup>136</sup> See, e.g., *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633 (S.C. 2011).

<sup>137</sup> *In re White*, 707 S.E.2d 411 (S.C. 2011).

<sup>138</sup> *In re First City Bancorporation of Tex., Inc.*, 270 B.R. 807, 810 (N.D. Tex. 2001).



The second and third proposed rules regarding scheduling and extensions would likely, among other things, prevent unnecessary motions and hearings, saving the clients' money and the court's time, energy, and resources. The fourth proposed rule that requires lawyers to inform the opposing counsel of any changes they have made in a document would benefit any attorneys—certainly transactional attorneys, as well as litigation attorneys, the latter of which compose settlement agreements—who are drafting agreements or documents on behalf of their clients. The fifth proposed civility rule would also benefit all lawyers, such as transactional, regulatory, and litigation attorneys, who reach an oral understanding on certain matters, ensuring that the attorneys accurately reduce their understandings to writings and do not include matters on which the attorneys did not agree. “To some extent, lawyers can agree upon certain norms of ‘civility,’ improving the legal process and the public’s confidence in it.”<sup>139</sup> These proposed rules represent such norms of civility that will also make the practice of attorneys more satisfying and efficient.

## V. COUNTERARGUMENTS TO MANDATORY CIVILITY AND RESPONSES THERETO

This Part addresses several of the main counterarguments to mandatory civility that go beyond the myths already covered. This Part will also provide responses to those counterarguments.

### A. Incivility is an Effective Tool as a Lawyer

Opponents of mandatory civility argue that there are some lawyers who use incivility as a tool itself in litigation or the practice of law—i.e., strategic incivility—to throw or keep their

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<sup>139</sup> Keith W. Rizzardi, *Expectations in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations*, 44 Fla. St. U. L. Rev. 691, 746 (2018).

opponents off balance.<sup>140</sup> The response to this argument includes several counterarguments. First, just because a method effectively accomplishes a goal does not mean it should be employed. For example, a student can effectively cheat on every exam to achieve their goal of obtaining straight A's, but that does not mean the means employed are inherently laudable because of their efficacy. By way of another example, a child who cries to get his way should not be rewarded for that behavior even if it works occasionally or often. Second, even if the lawyer may feel that their incivility helped them win a case, there remain significant costs to incivility—public perception of lawyers decreases, increased costs to the client, and wasted judicial resources.<sup>141</sup> Third, the lawyer may have succeeded in a case, not because of incivility, but despite it. Many excellent lawyers point to civility as a necessary component of effective advocacy.<sup>142</sup> Finally, both judges and juries are known to respect a lawyer who refrains from responding to incivility. Indeed, the lawyer who refrains is often rewarded with respect and possibly a favorable outcome in a close case.

#### B. Judges are the Answer, Not Mandatory Civility Rules

Opponents of mandatory civility often argue that judges can and must stop incivility by condemning and punishing it in their courtrooms and by exhibiting civility themselves.<sup>143</sup> Judges may be reluctant to condemn or punish lawyers acting uncivilly because of fear of retaliation from an attorney who might report the judge to a disciplinary committee or because the judge

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<sup>140</sup> Iachan and Richman, *Combating Strategic Incivility in Cyberspace, Part I: Effective Private Combat (Without the Court or Bar)*, Am. Bankr. Inst. J., July/August 2010, at 26 (including, among other behaviors, “misrepresenting or stretching the facts, playing ‘hardball’ and indiscriminately filing multiple pleadings or motions”).

<sup>141</sup> See, e.g., Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 672 (2009)

<sup>142</sup> See, e.g., Kevin Dubose & Jonathan E. Smaby, *The Power of Professionalism: Civility as a Strategy for Effective Advocacy*, 79 TEX. B.J. 432, 433 (2016).

<sup>143</sup> Rhesa Hawkins Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. Rev. 573, 579 (1999).

fears the attorney will try to prevent the judge's re-election if the judge presides in a state where judges are elected.<sup>144</sup>

The judge's argument also fails. Courts have the inherent power to address issues pending within their courts, but they do not often witness the uncivil behavior of counsel, which takes place outside of the courtroom. In addition, judges cannot stop behavior in matters not pending before their courts, such as transactional matters, which limit their ability to curtail incivility throughout the practice of law. Moreover, if courts became the sole arbiters of civility matters, then they would "become hall monitors, which is inefficient."<sup>145</sup> Under mandatory civility rules, judges could refer civility matters to the state bar disciplinary counsel to handle, freeing up the courts' time and resources to adjudicate cases.

### C. Judgment Calls Will Be Necessary

Another argument is that civility rules will require some judgment calls from state bar disciplinary counsel, a hearing panel, or courts when they decide to investigate, prosecute, and decide a case, respectively. One respondent asked about the proposed mandatory civility rules in this Article stated that the proposed rules should be implemented and opined with regard to this argument, "As with many other provisions of ethical codes, there will always be judgement calls related to the materiality, seriousness, or relevancy of the facts at hand. This has not stopped state bars from seeking to enforce[] other types of ethical rules."<sup>146</sup> The issue regarding the

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<sup>144</sup> Appendix C, Mandatory Civility Inns of Court National Conversation on Civility Assessment Report, Response Number 1 ("I have found that judges are concerned about retaliation from attorneys who will report them to a disciplinary committee and/or seek to challenge them via election."); Appendix C, Mandatory Civility Inns of Court National Conversation on Civility Assessment Report, Response Number 3 ("I agree with all of the rules. I also think judges should take a more active role in calling out unprofessional behavior when they see it. And file bar complaints when appropriate.")

<sup>145</sup> Appendix C, Mandatory Civility Inns of Court National Conversation on Civility Assessment Report, Response Number 7.

<sup>146</sup> Appendix C, Mandatory Civility Inns of Court National Conversation on Civility Assessment Report, Response Number 4.

discretion already afforded state bars and courts in matters involving ethical rules does not outweigh the benefits (discussed *supra*) of mandatory civility rules.

#### D. Concern Regarding Abuse of Civility Rules

Opponents of mandatory civility may argue that attorneys will abuse the rules to report minor issues or behavior to the state bars in an attempt to annoy and harass opposing counsel or gain some type of advantage in the underlying case involving opposing counsel.<sup>147</sup> First of all, attorneys can try to use current rules to do the same thing. Second, the response to this argument falls into the same category as the response to the previous arguments, which entail trusting (or failing to trust) those who investigate, prosecute, and adjudicate violations of the ethics rules. If an alleged violation of the mandatory civility rules does not rise to the level of a substantial or repeated violations of a rule, then state bar disciplinary counsel would likely not prosecute that conduct and, if they did, a grievance board or high court adjudicating such conduct should dismiss the complaint.<sup>148</sup> Along the same lines, state bars must recognize that the practice of law involves, at times, a great deal of emotions, sometimes with high stakes depending on the case, which can lead to isolated outbursts. Disciplinary counsel can and will take this into account when they are reviewing civility complaints, as will disciplinary panels/boards and courts that hear these cases.<sup>149</sup>

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<sup>147</sup> See *Board Opinion*, Case No. 96-228-GA, *Grievance Adm'r v. Szabo*, P 33792, STATE OF MICH. ATT'Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>] (dismissing the complaint, noting that the complainant used the grievance to try to gain a tactical advantage against opposing counsel in the underlying divorce proceeding, and stating that the threat of fighting was said in exasperation and jest by the respondent yet complainant attempted unsuccessfully to claim the threat was real).

<sup>148</sup> See, e.g., *Board Opinion*, Case No. 00-4-GA, *Grievance Adm'r v. MacDonald*, P-16917, STATE OF MICH. ATT'Y DISCIPLINE BD. (Jan. 25, 2001) <http://data.adbmich.org/coveo/opinions/2001-01-25-00o-4.pdf#search=%226.5%22> [<https://perma.cc/L4NN-PVVM>] (dismissing the complaint because the alleged misconduct did not rise to the level of professional misconduct); *Board Opinion*, Case No. 96-228-GA, *Grievance Adm'r v. Szabo*, P 33792, STATE OF MICH. ATT'Y DISCIPLINE BD. (Feb. 11, 1998), <http://data.adbmich.org/coveo/opinions/1998-02-11-96-228.pdf#search=%226.5%22> [<https://perma.cc/HU6F-VLNV>] (same).

<sup>149</sup> See *supra* Part III.A.

## CONCLUSION

How many more calls to civility must we endure as civility continues to decline in society and the legal profession? How long will the legal profession continue to pay lip service to civility while the negative effects of incivility continue to plague the profession? Systemic change requires significant changes to the system. Talking is not enough—leaders of the legal system need to act. State bars, state supreme courts, and, if necessary, state legislatures must take the step that four brave states already have—mandate civility.

Appendix A: Responses to Questions on Mandatory Civility  
Proposed by Professor of Law David A. Grenardo, March 2021

1. Name: Maret Vessella
2. Date: May 3, 2021
3. Current Position, Employer Chief Bar Counsel, State Bar of Arizona
4. Has the department that receives attorney complaints in your state experienced a significant amount of incivility complaints after civility became mandatory in your state? I believe that the civility rule first appeared in the mid 80's when the rule read that the duties and obligations of members shall be ... to abstain from all offensive personality. That rule violation was found in some cases in the mid to late 90's. In 2008 the rule was changed from offensive personality to unprofessional conduct. In the last 10-15 years that rule violation has been found in many cases where other violations of the ethical rules are found. I would characterize the amount of charges alleging unprofessional conduct as significant. The outcomes range from a dismissal/dismissal with an educational comment advising the lawyer of their professional obligations, diversion programs to address behavior and in some instances the imposition of a disciplinary sanction. It is very rare though that a charge is isolated to allegations of unprofessional conduct, so the outcome considers all provable violations of both the ethical rules and the professionalism rule.

Have you observed a significant amount of incivility complaints against attorneys in your state? Please explain. See above

5. Has the department that handles attorney complaints in your state needed to add staff or resources to investigate and/or prosecute incivility complaints? Please explain. Over the years we have added to staff to address caseloads or other specific areas of regulation. Any additions were not the result of charges alleging unprofessional conduct. A charge of unprofessional conduct is almost always combined with alleged violations of the ethical rules so even if allegations of unprofessional conduct were removed, it is presumed that the charge alleging violations of the ethical rules would still be filed.
6. Should other states adopt mandatory civility? Why or why not? I think that other states should strongly consider the value of adopting a rule that allows for addressing unprofessional conduct. Many states believe that there are ethical rules that provide enough latitude to get at incivility or unprofessional behavior, but I think trying to utilize the ethical rules for that purpose makes for a very narrow set of circumstances that can be addressed.

Appendix B: Responses to Questions on Mandatory Civility  
Proposed by Professor of Law David A. Grenardo, March 2021

1. Name Kimberly L. Uhuru

2. Date 4/28/21

3. Current Position, Employer Deputy Administrator Michigan Attorney Grievance Commission

4. Has the department that receives attorney complaints in your state experienced a significant amount of incivility complaints after civility became mandatory in your state? Have you observed a significant amount of incivility complaints against attorneys in your state? Please explain. Michigan Rule of Professional Conduct 6.5 was adopted in 1993. Our state has not experienced an increase in incivility complaints since the adoption of this rule. (Prior to the adoption of MRPC 6.5, incivility allegations could be addressed through a Michigan court rule which prohibits conduct by attorneys which expose the legal profession to obloquy, censure or reproach). Overall, civility cases represent a relatively small percentage of Michigan disciplinary orders. For example, in 2019, out of 88 total orders of discipline issued by the Michigan Attorney Discipline Board, only 4 disciplinary orders involved 6.5 violations. This reflects the fact that most complaints involving incivility are addressed by private letters of caution or admonishment to the respondent, rather than formal prosecution. We find these warnings to be a sufficient deterrent in most cases. However, in egregious cases, a formal complaint will be filed and formal discipline sought. The investigation and prosecution of these complaints do not pose an inordinate burden on our office.

5. Has the department that handles attorney complaints in your state needed to add staff or resources to investigate and/or prosecute incivility complaints? Please explain. Our office has not needed to increase staff (either support staff or attorney staff) to process these complaints, and staffing levels have remained consistent for our office. We currently employ 14 attorneys. Three of those positions are management positions (Grievance Administrator, Deputy Administrator, and Assistant Deputy Administrator). The remaining 11 attorney positions are staff attorneys who handle all manner of ethical violations. These staffing levels have not increased in the wake of Michigan adopting MRPC 6.5.

6. Should other states adopt mandatory civility? Why or why not? I believe that the adoption of civility rules preserves the integrity of the profession. Doing so helps to set appropriate standards for lawyers, who of course serve as officers of the court. It also engenders the trust and respect of clients and other third parties who encounter the legal system.

Appendix C: American Inns of Court National Conversation on Civility 2021, MANDATING CIVILITY – YES OR NO? Assessment Report

**MANDATING CIVILITY – YES OR NO?**  
**Assessment Responses: 10/21/21 – 11/19/21**

There were 19 responses to this post/question:

**Recommended Mandatory Civility Rules\***

By David A. Grenardo, Professor of Law

1. A lawyer shall avoid disparaging personal remarks toward all individuals, such as opposing counsel, the opposing party, and all court staff, involved in the legal process. A lawyer shall abstain from any allusion to personal peculiarities and idiosyncrasies of those individuals. Derogatory comments about persons involved in the legal process based on race, gender, or other protected personal characteristics are unacceptable.
2. A lawyer must communicate with opposing counsel in an attempt to schedule meetings, hearings, and depositions in a good faith attempt to avoid scheduling conflicts. When meetings, hearings, depositions, or other events are to be canceled or postponed, lawyers must notify as early as possible other counsel, the court, or other persons as appropriate.
3. Lawyers shall grant reasonable extensions of time to opposing counsel where such extensions will not have a material, adverse effect on the rights of the client.
4. Lawyers shall identify clearly, for other counsel or parties, all changes that they have made in documents submitted to them for review.
5. When called on to do so, lawyers shall commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.

State bars could sanction lawyers based on repeated or substantial violations of any of these rules.

*\*These rules are based on the suggested mandatory civility rules found in Professor Grenardo's article Making Civility Mandatory: Moving from Aspired to Required, 11 Cardozo Pub. L. Pol'y & Ethics J. 239, 267-71 (2013). The sources for the suggested mandatory rules themselves can also be found in that article. See Making Civility Mandatory: Moving from Aspired to Required, 11 Cardozo Pub. L. Pol'y & Ethics J. at 267-71.*

Be part of the conversation! Share your thoughts on this important and evolving topic; Professor Grenardo will look to your comments and contributions as he prepares his next article for publication! (*Required if seeking CLE credit for participation.*)

**RESPONSES**

1. I agree that judges need to step in and address the attorneys who violate civility rules. I have found that judges are concerned about retaliation from attorneys who will report



them to a disciplinary committee and/or seek to challenge them via election. If the States could provide more protection to judges, such as removing them from election, then I think we would start to see an end to this behavior.

2. This is excellent work by Professor Grenardo. Civility is an important value for attorneys to uphold, for the good of our clients, the public, the profession, and our own health. Clear guidelines are useful as touchstones for attorneys to refer to in navigating particular situations.
3. I agree with all of the rules. I also think judges should take a more active role in calling out unprofessional behavior when they see it. And file bar complaints when appropriate. I especially like the first rule about avoiding disparaging remarks. It undermines the judicial system when others hear lawyers speaking badly about a judge or another lawyer. You can disagree with a strategy or a decision without the other person being an "idiot".
4. There is no reason that mandatory civility rules should not be implemented. As with many other provisions of ethical codes, there will always be judgement calls related to the materiality, seriousness, or relevancy of the facts at hand. This has not stopped state bars from seeking to enforcement other types of ethical rules.
5. Judicial enforcement is needed for mandatory civility rules to be accepted and applied. State bar enforcement is going to be difficult, and the threat of enforcement is not enough; rather, from personal experience, when judges are proactive in enforcement, parties tend to be more civil with each other. This is a difficult task as well because judicial resources are already stretched thin.
6. I think civility is paramount. As a member of the legal profession, we should mandate rules of civility. It is a privilege to be a member of the bar. When we seek admission to the bar our character is reviewed, our conduct as a lawyer should also be reviewed. We are leaders, educated, dedication to code of conduct lets us lead by example.
7. Professor Grenardo: I do not believe that having these rules of civility will alter the behaviors of those who egregiously engage in such behaviors. I do think that incorporating them as rules of civil procedure that are sanctionable by the Court would have a greater and more imminent impact. Of course, this means that turning the Court into monitors of behavior is required. However, this is where I would anticipate the greatest impact on the offending attorney.
8. I particularly appreciated points 3 (reasonable extensions) and 4 (clearly identifying all changes made in a document). With regard to (3), perhaps the larger umbrella of "granting courtesies" is too broad, and I appreciate the narrowness of the requirement to grant reasonable extensions. For non-litigators and litigators alike though, "grating courtesies" may better inform the intent where extensions aren't the only issue. Perhaps this could be guidance or aspirational rather than mandatory if too broad.

With regard to (4), being able to rely on opposing counsel's redline because they are required to disclose those changes would be a time-saver for attorneys (though it's not clear yet if there would be enough trust to rely on that) but particularly where one party is represented and the other party is unrepresented, this is particularly important.

9. think that this is such an important topic. Fortunately, I have had very few incidents that I would consider uncivil over my nearly 20-year career as a criminal defense attorney. Surprisingly, I have heard from colleagues on the civil bar and judges that civil attorneys can be the most uncivil. If our profession is as esteemed as we want it to be, we need to hold ourselves and our profession to a higher standard when it comes to how we conduct ourselves with other attorneys, parties, witnesses, and the court. I agree that civility rules should be mandatory, and I agree with Dr. Grenardo's stated advantages of these rules, including accountability, reduced cost of litigation, and the public perception of our profession. Thank you again for a great, thought-provoking program.
10. I'm from Florida and we have mandatory rules. I agree that the rules are necessary but at the same time it's a shame that the profession has come to where we need rules to tell us how to practice.
11. The proposed rules are excellent. It is apparent that the aspirational creeds have not helped the profession to move above the increasing lack of incivility that we see in our culture. As ever, lawyers can and should model behavior for the rest of the citizens, as we have in the past. I appreciate the fact that rather than making a generalized reference to civility, Professor Grenardo has set some more clearly defined rules. Although they are not bright line rules, they do serve as valuable markers to let attorneys know when their conduct may be approaching a danger zone.
12. I enjoyed today's conversation very much (Professor Grenardo, I thought your jokes were funny!). I have many thoughts on this subject - in 19 years of litigation practice, I have dealt with many collegial, cooperative lawyers, but unfortunately, also with many who seem to make it a point of pride to be belligerent, uncooperative, and snide. Comments on the above: I like the idea of mandatory rules, although the challenges brought up on the call today are also difficult. But an outline such as the above I believe is workable, and better than not doing anything. To address the issue of lawyers being brought before the bar for a single instance of incivility or for something not particularly bad, could there be a consequence for that? Something that says use your judgment, but if you repeatedly report other lawyers without a serious basis to do so, you could be sanctioned. And what about a Rule 11-type procedure by which lawyers who want to report someone must first alert that person to give them an opportunity to moderate their behavior? As to #1, I don't think it goes far enough. In my experience, the uncivil behavior is rarely "personal remarks" (although I would include "youth" or "level of experience" in the mix - I have seen older attorneys slam younger ones with comments like "this is so idiotic, it can only be explained by your lack of experience"). The uncivil behavior I have experienced is really what I would call belligerence, often accompanied by threats, accusations, or implications that we (our side, lawyers and client) have deliberately done something unethical, and name-calling not of me, but of our positions in the dispute. It plays out in

nasty, "poison pen" type emails or letters. Where it happens, it's rarely an isolated incident such as you described, of losing your temper and soon thereafter calling back to apologize. It's a sustained course of conduct that often starts at the beginning of a matter, and makes it impossible to have civil, reasonable, productive conversations or to resolve anything. I have had a few matters where I will not speak over the phone to opposing counsel because it is so unproductive, and my words always end up twisted. And in such matters, I can honestly say that nothing I did warrants that kind of behavior - it just seems to be how some lawyers practice law. My own personal point of pride is not to respond in kind and to maintain a professional, civil tone always. Which makes me very sympathetic to the point someone made today that while judges/arbitrators often take a "both sides need to cool it" approach, sometimes there really is only one side who is making things so difficult, and it is very frustrating to be lumped into the same unprofessional category. So, to sum up, I think #1 needs to go beyond "personal" remarks, to extend to other types of difficult, uncivil behavior. On #3, and perhaps for others on the list, it might be helpful to include a few examples of what would be considered uncivil, similar to "comments" on the rules. For example, in many circumstances, it would be uncivil to attempt to extract some substantive concession (other than a similar extension) in exchange for agreeing to a reasonable extension. Wow, I did not mean to write so much - but I have thought a lot about this and have been very frustrated over the years by just not understanding why some attorneys make law so unpleasant when it doesn't need to be. I do believe a lot of it goes back to teaching law students - it's so important for them to understand that you do not need to be a jerk to be effective, and that in fact, being a jerk makes you less effective, contrary to popular opinion. In any event, thanks for today - I look forward to reading your next article!

13. Delaware started with Civility Rules in 1991 and the most recent version is attached. Having been admitted to the Delaware bar 30 years this December, I fully support your efforts in making the bar more professional with civility principals. [see attachment on DE Professional Rules]
14. I agree that uncivil attorneys should be sanctioned for repeated or substantial violations of any of these rules. I work for Chief Counsel, IRS, and over the years have seen private practitioners submit briefs with snide, rude remarks about the government's position, make assertions that are false and baseless, and cite cases that have nothing to do with the issue. We in the government always take the high road and, in our reply briefs, ignore the rudeness and get to the heart of the issue. Although I have thought that the judges should take these practitioners to task, if these rules on civility become mandatory in all state bars, there will be options for us to refer these attorneys for their incivility, attaching their briefs as evidence.
15. I'm only curious about the subjective definition of some of the terms, and the potential for abuse of using the threat of a grievance. I'm assuming the same State Bar process as other grievances would take place that would review for whether there is a complaint that goes forward, and that would be appropriate check and balance. I think most lawyers will be interested in the numbers of grievances in jurisdictions that have mandated civility.

16. These expectations seem both wildly basic and yet far from reality in the day-to-day life of a litigator. While the press of business and the stress of helping others with their problems quite reasonably leads to frayed nerves and sometimes short tempers, the persistent presence of incivility is demoralizing in our profession. And I have noticed that the problem snowballs when courts do not devote regular and concerted attention to managing civil dockets. I do not see these problems as frequently in courts where I know I can get a quick status conference with the judge if someone isn't cooperating. Counsel always tend to be more cooperative in the judge's presence. So perhaps the solution needs to be from multiple directions: state bars mandating civility and judges monitoring litigation progress.

I put into my engagement agreements that I have the discretion to grant extensions of time and other professional courtesies without seeking approval from my clients. This way I never have to refuse a reasonable request because my client is being uncooperative. I do not view my own professionalism and reputation as something a client should get to negatively influence through such refusal.

Thanks for a great program!

17. As a proposed mandatory rule, I believe the operative terms "shall" and "must" have been used appropriately. As it relates to rule number four, my personal experience has me supporting this proposed rule. Changes were made to a document in areas other than what was agreed to by the parties. The attorneys failed to disclose the changes and the other attorneys failed to find the changes until it was too late.

For the most part, I think Prof. David A. Grenardo is on the right track with this article. Although it was ahead of its time when published, post COVID 19 civility has decreased. This is a perfect time for discussion.

18. Proposed Rule #3 is necessary. I have been victim to and seen too many reasonable requests denied for unfounded reasons--including when requests were for personal medical reasons, which is unacceptable.

Proposed Rule #5 concerns me some. Absent extreme circumstances, I think most lawyers intend to accurately reflect agreements but unfortunately mistakes are made. How do you identify a misunderstanding versus an intentional intention to make an agreement lean in your favor?

19. I agree that the rules should be mandatory. I especially agree with the first in the list of advantages of making these rules mandatory, and that is accountability. I am in Pennsylvania, and I have never seen attorneys suffer any consequences for really egregious conduct. My friends and colleagues feel the same way.