2016

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With All Due Respect: How States Can Enhance Civility among Attorneys
Elizabeth Lafferty

I. Introduction

In order to define civility, it is important first to understand the set to which civility belongs. Civility is a subset of professionalism,¹ and professionalism yields many definitions. Professionalism is "the skill, good judgment, and polite behavior that is expected from a person who is trained to do a job well," or "the conduct, aims, or qualities that characterize or mark a profession or a professional person."² The first definition clearly illustrates a do-good attitude, whereas the second definition views the conduct as the mark of the profession. Professionalism, then, is based on what society perceives the mark of the profession to be.

Because of the broad nature of the term, professionalism is hard to define. Professor Nicola A. Boothe-Perry, an associate professor of law at Florida Agricultural and Mechanical (A&M) University College of Law, crafted the definition of professionalism as "attitudes and behaviors that supersede self-interest, serve to enhance public opinion and trust, adhere to high ethical and moral standards, and aspire daily to a commitment of excellence in one's personal and professional life."³ This definition goes far beyond the conduct that is a mark of the profession. It emphasizes the need to push down self-interest and to work toward building the public image. Significantly, the definition includes one's personal and professional lives. Professionalism, thus, transcends the profession and spills over into one's personal life.

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¹ J.D. Candidate, 2016, Seton Hall University School of Law; B.S., cum laude, 2013, The College of New Jersey. I would like to thank my faculty advisor, Paula Franzese, for her expertise and support.
² Patrick E. Longan, Teaching Professionalism, 60 MERCER L. REV. 659, 669 (2009).
According to Professor Longan, a professor of law at Alabama School of Law, there are five components of professionalism: competence, fidelity to the client, service, fidelity to the law—even at the cost of client advantage—and civility.\(^4\) Civility, then, is one aspect of professionalism; but not the only one.\(^5\) Civility is commonly considered manners and politeness.\(^6\) But “[c]ivility means a great deal more than just being nice.” It is “developing thoughtfulness, and fostering effective self-expression and communication. Civility includes courtesy, politeness, mutual respect, fairness, good manners . . . [t]aking an active interest in the well-being of our community and concern for the health of our society.”\(^7\) It is the well-being of the whole that is central to civility.\(^8\) This notion of the well-being of the whole parallels Professor Hamilton’s definition of professionalism. By suppressing self-interest and fostering the public’s opinion and trust, one acts for the well-being of the whole and not the individual. Significantly, “[c]ivility by its very meaning as equal respect or dignity, is something that all can possess.”\(^9\) Everyone is capable of civility, making it possible to reinstate respect among attorneys.

Civility, like professionalism, is susceptible to change as society changes.\(^10\) Today, there is less civility in many aspects of life including television, politics, sports, and the tabloid press.\(^11\) Many young people—including young lawyers—have grown up in this environment, and they

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\(^4\) Longan, supra note 1, at 668–69.

\(^5\) Transcript from Professionalism Conference: Panel I: Strategies for Enhancing the Accountability of Lawyers, 54 S.C. L. REV. 897, 921 (2003) (“First point, be careful how you define professionalism . . . We’ve tried to be very careful in Florida not to define it as manners, not to limit it to civility. We see manners and civility as components, but not the total definition.”) (statement by Blan Teagle).

\(^6\) Id.


\(^9\) Id.


\(^11\) Id. at 5.
practice what they see all around them because that’s how the world they have come to know seems to function." If incivility becomes culturally acceptable it will threaten the credibility of the justice system, the rule of law, and those that practice it. Thus, civility efforts must be taken as young lawyers grow up where these behaviors creep into the norms and mark the conduct of the profession to ultimately become acceptable.

It is equally important to define incivility because it is less lofty and less abstract thus making it easier to define than civility or professionalism. Incivility has been quite concisely described as "[a]ll manner of adversarial excess. Personal attacks on other lawyers, hostility, boorish behavior, rudeness, insulting behavior, and obstructionist conduct all fall under the general rubric of incivility." Because of the rise of incivility in recent years, states must address the issue for the well-being of lawyer’s individually and the legal profession as a whole. Although there are opponents to the civility movement, the benefits of civility strongly support the movement. States should not sit back, they must act.

Part II of this Comment will examine the benefits of reducing incivility; specifically addressing the relationship civility has to effective lawyering and personal satisfaction. Part III, on the other hand, will discuss the arguments posed by opponents of the civility movement as to why reducing incivility among lawyers may be an inappropriate solution. Part IV will analyze the actions that some states have already taken, and will recommend further actions states should take to reinstate the respect that the law, the courts, and attorneys need. Part V will conclude by

12 Id.
13 Id.
urging states to adopt an attitude desirous of combatting incivility, and to adopt an oath, standards, and mentoring to achieve this end.

II. The Benefits of Promoting Civility in Practice

Empirical data shows a correlation between professional conduct and effectiveness and personal satisfaction in the legal field.¹⁷ Both qualities positively affect attorneys individually and the legal profession as a whole.¹⁸ Additionally, both have the ability to raise society’s impression of the field.¹⁹

A. Effectiveness

Attorneys of all levels recognize the impact that incivility has on the profession’s effectiveness.²⁰ As Sandra Day O’Connor noted while serving as a Supreme Court Justice, “[t]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down the productivity and make the process more time-consuming and expensive.”²¹ The justice system extends beyond attorneys; it includes judges and administrative workers, among others. The justice system collectively must strive toward practicing and achieving civility. This Comment focuses only on the attorney because as of 2012 there were nearly 1.2 million licensed attorneys

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¹⁷ See Neil Hamilton, The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law, 24 GEO. J. LEGAL ETHICS 137 (2011). This article addresses the empirical data that suggests the upside to professional conduct. Professor Hamilton discusses the ways in which a medical doctor becomes more effective when acting in a professional manner. He then argues the same to be true for attorneys. See also Lawrence S. Krieger, Essay on Professionalism and Personal Satisfaction: The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity, and Happiness, 11 CLINICAL L. REV. 425 (2005) (Arguing that professionalism leads to greater personal satisfaction).

¹⁸ See generally Hamilton, supra note 17.

¹⁹ Id.


²¹ O’Connor, supra note 20.
in the country, and of those licensed attorneys 92% were actively participating as attorneys.\textsuperscript{22} Because attorneys vastly outnumber other types of professionals in the judicial system,\textsuperscript{23} attorney behavior must drive the field and is therefore likely how this field will be reshaped.

If an attorney is uncivil toward one person, it affects more than just that person. For example, if an attorney is uncivil toward opposing counsel, not only does it affect both of the attorneys and their clients, but it also affects other attorneys who are unrelated to the incident, judges, and society in general.\textsuperscript{24} Additionally, as Justice O’Connor observed, this ineffectiveness results in more time and money spent to achieve the same ends. Civility promotes a more efficient and economical result.\textsuperscript{25} For example, in \textit{Teferra v. Marriott Int’l}, Judge Friedman appointed a special master to preside over a deposition acting as a “babysitter” for the attorneys to allow for discovery to continue.\textsuperscript{26} The attorneys were required to pay the babysitter his normal hourly rate.\textsuperscript{27} In discovery, civility can obviate “the need for unproductive and expensive discovery battles.”\textsuperscript{28} As in \textit{Teferra}, both time and money are lost at the expense of incivility.

Most lawyers prefer working with attorneys who act reasonably in discovery and do not play games.\textsuperscript{29} This may be because these attorneys recognize the effectiveness of civility or because even those that try to act civilly can fall below the mark in response to another lawyer’s actions;\textsuperscript{30} thus remaining civil requires reciprocation from an adversary. The problem with


\textsuperscript{23} \textit{Id.}


\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Teferra v. Marriott Int’l}, Inc., Civil Action No. 96-1626 (D.D.C. April 25, 1997) [follow bluebook and add WL or LEXIS parallel cite if you can].

\textsuperscript{27} \textit{Id.}


\textsuperscript{29} \textit{Id.}

\textsuperscript{30} \textit{Id.} at 325.
incivility is that it is hard to ignore and even harder to be respectful toward.\textsuperscript{31} As one lawyer put it, if opposing counsel is being "a jerk . . . [t]hat just makes it more unpleasant—I can be a jerk back, too. And it’s just not effective. . . . I’m not cooperating on anything . . . if you’re acting like an idiot for no reason."\textsuperscript{32} That is the problem with incivility. Civility may go unnoticed, or if noticed, not overtly praised. If someone is polite, respectful, and well mannered it may never be pointed out, nothing may come of it, no one may notice. Incivility, by contrast, is easier to notice and harder to ignore. Thus, the lawyer’s reaction of being equally uncooperative only furthers the problem.

Of course, there are different levels to which the lack of cooperation may rise and uncivil interactions are not merely limited to those between opposing counsel. For example, in \textit{In re Lovelace}, the South Carolina Supreme Court sanctioned an attorney for slapping the defendant during his deposition.\textsuperscript{33} After the attorney asked if anyone needed a break, the defendant responded "[n]o, let’s get this crap over with," to which the attorney stood up and pointed in the defendant’s face warning him to not speak like that.\textsuperscript{34} After the defendant told the attorney not to point his finger at him, the attorney slapped him across the face.\textsuperscript{35} The defendant initiated criminal charges and the attorney self-reported the incident.\textsuperscript{36} Here, the question of who acted disrespectfully first is not obvious and may well be beside the point. What is obvious is that the attorney crossed the line. But the literal words from the transcript do not necessarily illustrate the tone with which the defendant spoke, which appeared to first elevate the tensions at the scene and spur the attorney’s reaction. On the other hand, was the defendant’s comment merely one of

\textsuperscript{31} See generally Neuner, supra note 14.
\textsuperscript{32} See Gallagher, supra note 28, at 325.
\textsuperscript{33} In re Lovelace, 716 S.E.2d 919, 919 (S.C. 2011).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
frustration not directed at the attorney? If so, then the attorney's reaction of pointing in the
defendant's face was an overreaction. This overreaction was uncivil because it was disrespectful
and aggressive. However, the defendant did not back down from the finger pointing and instead
warned the attorney to not point his finger, which ultimately led to the attorney slapping the
defendant. This example is significant because it shows how hard incivility is to ignore.
Although the defendant may not have acted uncivilly, he also did nothing to lessen the tension
and instead engaged the attorney further. The true test of a good lawyer is how he or she
responds to the incivility of one's adversary.\textsuperscript{37} The legal system, however, cannot rely on all
lawyers passing this test at the expense of effective and efficient lawyering.

Incivility arises when reason and logic are suppressed, and heat and disputation lead the
argument.\textsuperscript{38} However, the former are much more effective at vindicating an argument than the
latter.\textsuperscript{39} This does not mean that all emotion is unacceptable. For example, in family law,
litigation disputes can be heated because of the context from which the litigation arises.\textsuperscript{40} Also,
the degree of what is at stake can be so significant to the parties that emotions and tensions are
high.\textsuperscript{41} For this reason, it is allowable for attorney's to express their clients' frustrations with
contrary forceful conduct.\textsuperscript{42} This conduct must not be so egregious that it creates strife.\textsuperscript{43}
Additionally, the conduct must not be deleterious to the proceedings.\textsuperscript{44} For example, "[n]ame-
calling, smear tactics, and degrading language directed toward the parties or the court is
distasteful, degrades the process, and should be avoided at all cost."\textsuperscript{45} In \textit{In re Lovelace}, the

\textsuperscript{37} See Neuner, \textit{supra} note 14, at 2046.
\textsuperscript{38} See Lee S. Rosen, \textit{Feature, Civility, & The Family Law Gladiator}, 33 FAM. ADV. 6, 8 (2011).
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} See Rosen, \textit{supra} note 38, at 8.
\textsuperscript{45} Id.
defendant’s comment “[n]o, let’s get this crap over with” is an example of an expression that may degrade the court. Of course, this was said by the defendant and not an attorney, and the defendant should not be held to the higher standards of an attorney. However, had it been said by the attorney, then one must consider whether it had a “deleterious effect on the court proceedings to fall under the uncivil rubric.”46 A comment may fall into the category of “degrading language directed at the parties or the court.”47 It is harder to tell whether or not the comment was directed at the attorney, but it is an easier argument to make that it was degrading to the court. It is hard to see who started the uncivil behavior and what is so egregious to amount to being uncivil. However, because this behavior is so hard to ignore, the more imperative it is to squash it in the first instance, in order to eliminate the risk of escalation toward clearly unethical and even criminal behavior.

The notion that civility increases a lawyer’s effectiveness is not only a maxim told by upstanding lawyers; it is also supported by empirical data.48 Professor Hamilton conducted research and found a link between effectiveness and professionalism in the law.49 Hamilton describes the link between relationship skills and professional effectiveness.50 The relationship skills include listening, good communication, conflict resolution, negotiation, persuasion, and creative problem solving.51 These activities are all related to civility and, more practically, incivility. To illustrate an extreme situation, attorneys were found to have fallen asleep during

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46 Id.
47 Id.
48 See Hamilton, supra note 17, at 164.
49 Id.
50 Id.
51 Id.
courtroom proceedings.\textsuperscript{52} This behavior was both uncivil and lacking in the relationship skill of listening.

Additionally, good communication skills are a product of civility.\textsuperscript{53} Uncivil behavior can be for the purpose of intimidation. When this is the case, the tactic is no longer simply the relationship skill of persuasion. Incivility also hinders conflict resolution because it makes cooperation much harder,\textsuperscript{54} and less cooperation amongst parties results in less conflict resolution. Professor Hamilton links these relationship skills to resisting negative social influences.\textsuperscript{55} Although incivility seems contagious, resisting the temptation supports more effective lawyering.\textsuperscript{56} Strong relationship skills further a lawyer's career because they relate to the overall satisfaction of the client, the willingness of clients to follow through on recommendations, and the willingness of clients to refer future clients.\textsuperscript{57} An attorney is more effective if the client is satisfied, follows his advice, and refers future clients.\textsuperscript{58} Ultimately, the more civil an attorney is, the better the relationship skills he possesses, and the more effectively he performs as a lawyer.

Professor Hamilton researched the effects that professionalism have on risk management, which is the assessment of a risk to determine the most efficient response.\textsuperscript{59} Hamilton maintained that "professionalism's requirement of compliance with the ethics of duty, its encouragement of a much higher internalized standard of professional excellence, and its emphasis on strong relationship skills relate positively to professional effectiveness in terms of

\textsuperscript{53} See generally Hamilton, \textit{supra} note 17.
\textsuperscript{54} See Gallagher, \textit{supra} note 28, at 328–29.
\textsuperscript{55} See Hamilton, \textit{supra} note 17, at 175.
\textsuperscript{56} Id. at 163.
\textsuperscript{57} See Hamilton, \textit{supra} note 17, at 176–77 (Comparing the legal profession to the medical profession where professionalism has a direct connection to these elements).
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 163–64.
risk management.”⁶⁰ The requirement of “compliance with the ethics of duty” is the minimum standard set forth.⁶¹ Falling below this standard would result in an ethical violation, which is now prescribed by the American Bar Association’s Model Rules of Professional Conduct.⁶² The “higher internalized standard of professional excellence” that Professor Hamilton discussed includes civility because that is a more subtle form of respect from the basic floor that the code of ethics represents. Professor Hamilton wrote “in every context, risk management incorporates considerations such as the likely reactions of the public and clients, and the spirit, not merely the letter of the law.”⁶³ Risk management incorporates the spirit of the law. The spirit of the law may be the higher internalized standard of professional excellence that professionalism includes. It is certainly equal dignity and respect for each other and for the court.⁶⁴ It must include civility. Thus, risk management incorporates civility because that is the spirit of the law.

Additionally, risk management requires considering the reactions of the public.⁶⁵ Civility plays a large role in the reactions and perceptions of the public. The public has a negative image of lawyers, in part because of the all too common uncivil conduct.⁶⁶ As Professor Forni emphasized in defining civility,⁶⁷ and Professor Boothe-Perry emphasized in defining professionalism,⁶⁸ both require the individual to focus on the well-being of the whole and not just one’s self.⁶⁹ In the context of civility, considering the reaction of the public requires a focus on the well being of the whole because incivility causes a negative reaction toward the legal field

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⁶⁰ Id.
⁶¹ Id. at 144.
⁶² See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.5(d), 4.4(a), 8.4(d) (2013).
⁶³ Hamilton, supra note 17, at 176–77.
⁶⁴ See Kang, supra note 8, at 312.
⁶⁵ Id.
⁶⁷ See Mieloch, supra note 7.
⁶⁸ See Boothe-Perry, supra note 3.
⁶⁹ See generally discussion supra Part I.
when they learn of the antics of an uncivil attorney. Thus, effective risk-management includes civility.

An additional facet of professionalism that Professor Hamilton defines is moral identity.\textsuperscript{70} Moral identity includes understanding the nature of the profession's obligation to society, understanding the responsibilities and boundaries in interpersonal relationships, defining one's own personal code of ethics, and balancing multiple role demands.\textsuperscript{71} A better understanding of the scope of the lawyer's duty enables one to see more clearly when one's conduct is unrelated to that duty owed.\textsuperscript{72} Additionally, the responsibilities and boundaries in interpersonal relationships can extend to judges, clients, and other lawyers both on one's side and against it. The boundaries may change from relationship to relationship but knowing and respecting the boundaries for each relationship is necessary to refrain from crossing into uncivil behavior. Defining one's own personal code of ethics fosters efficiency.\textsuperscript{73} Because the law does not currently sanction subtle incivilities, it is within the attorney's control to maximize his respect toward others. By including civility within one's personal code of ethics it will make for more effective lawyering. Additionally, civility requires a balance of multiple roles. One must remain civil to the court, the judge, adverse attorneys, favorable attorneys, clients, and the public. The more one can incorporate civility into his moral identity the greater effectiveness he will have because higher levels of identity development are strongly associated with increased effectiveness in settings requiring a high level of collaboration, communication, and cooperation.\textsuperscript{74} The legal field falls well within this setting.

B. Personal Satisfaction

\textsuperscript{70} Hamilton, supra note 17, at 170–75.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 163–64.
\textsuperscript{74} Id. at 173.
Professionalism and civility not only enhance a lawyer's effectiveness, they also are linked to greater personal satisfaction.\textsuperscript{75} Professor Boothe-Perry's definition of professionalism takes into account the quality of the lawyer's professional and personal lives.\textsuperscript{76} The two are interconnected within the legal field.\textsuperscript{77} Choices you make in your professional capacity affect your personal life. Civility not only affects one's professional life by making it more effective\textsuperscript{78} but it also spills into one's personal life and increases personal satisfaction.\textsuperscript{79}

Professor Lawrence Krieger, a clinical professor of law at Florida State University College of Law, analyzed the relationship between professionalism and career satisfaction.\textsuperscript{80} He found that professional reputation and quality of life both stem from our personal goals, values, and motivations.\textsuperscript{81} The values of integrity, decency, and mutuality embody professionalism, according to Krieger.\textsuperscript{82} Today, the values of "money, power, and an uncompromising drive to win are displacing" the values of professionalism.\textsuperscript{83} The values of professionalism empirically correlate to well-being and life satisfaction.\textsuperscript{84} On the other hand, the values displacing professionalism correlate with dissatisfaction and even distress.\textsuperscript{85} The difference is the type of motivation associated with the values because empirical research shows that intrinsic motivations generally result in well being while extrinsic motivations result in distress.\textsuperscript{86} Intrinsic motivations include self-understanding, close relationships with others, pro-

\textsuperscript{75} See Krieger, supra note 17.
\textsuperscript{76} See Boothe-Perry, supra note 3, at 42.
\textsuperscript{77} Id.
\textsuperscript{78} See supra discussion, Part II.A.
\textsuperscript{79} See Krieger, supra note 17.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 427.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} See Krieger, supra note 17, at 427.
\textsuperscript{86} Id. at 429.
social/helping outcomes, and community improvement. Additionally intrinsic needs include caring and cooperation. Extrinsic motivations include money, luxuries, influence, and appearance. The motivations greatly impact the end result because a person who is seeking personal improvement is more thoughtful about his treatment toward others and its effect on them whereas, a person who is focused only on money or winning will more likely go to improper lengths to achieve that result.

The pressures of clients can compound extrinsic motivations that exist on their own. Clients may pressure attorneys to win at all costs and the extrinsic motivations of the desire to win, and money, become that much stronger. However, “[a]ttorneys who are deeply committed to their own values are less likely to pursue the values or desires of their clients” with tactics that fall below his or her own standard. An attorney’s development and commitment to his own values was also one element of more effective lawyering discussed above. This principle also applies to the context of conduct falling below one’s standard by another attorney. Part II.A. discussed how incivility could be seen as contagious because it is hard to ignore. However, the commitment of an attorney to his or her own values should help to not succumb to the level of the other attorney in the same manner it helps to not succumb to the client.

Professor Krieger found that self-esteem and relatedness have the strongest correlation to happiness and satisfaction. When one has high self-esteem, he or she would have the ability to not only develop but also commit to personal values and not yield to pressures. This commitment enables the attorney to go against what is demanded of him to do instead what is

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87 Id. See also Longan, supra note 1, at 691.
88 See Krieger, supra note 17, at 432.
89 Id. at 432. See also Longan, supra note 1, at 689.
90 See Krieger, supra note 17, 429–30.
91 Id.
92 See supra discussion Part II.A.
93 Id. at 5–8.
94 See Krieger, supra note 17, at 430.
right. Thus, even if a client or supervisor demands more aggressive, uncivil conduct, the attorney would remain within his own values and on not cross the line. Relatedness to others also has a strong connection to civility. The relatedness demonstrates the interpersonal relationships that develop from being connected which is possible only with civility because “[c]ivility is at base an ethic of cooperation.”

Abusing people or the process separate the lawyer from a sense of decency which can result in a loss of professional reputation, as well as physical and emotional stress, which can ultimately compromise one’s health. On the other hand, civility “may help alleviate the stress and ill health recently reported as effects of lawyering.” Additionally, civility improves one’s reputation and credibility among other lawyers, courts, and agencies. “Reputable conduct by lawyers as a whole should lead to a better reputation of, and respect for, lawyers in the public mind.” The reputation of the whole grows from individual efforts and, in turn, either rewards or harms the individuals. The perception the public has of the profession correlates to the satisfaction attorneys receive from their careers. As civility has decreased, so too has the public’s opinion of the legal profession and those who practice it. Additionally, the public’s respect for the law is linked to its respect for those who practice it, and lawyers should “acknowledge a special constraint not to undercut that subtle element within the rule of law.”

To summarize, incivility is an abuse of people or the process. It can cause emotional and physical stress which deteriorate a person’s personal satisfaction although the action be only

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95 Kang, supra note 8, at 293.
96 See Krieger, supra note 17, at 432.
97 Camp, supra note 24, at 1397.
99 Id.
100 See Krieger, supra note 17.
101 Id.
professional. Incivility often results in a loss of reputation both personally and for the law creates a negative public perception that decreases personal satisfaction.

The benefits of civility are multi-faceted. It increases the effectiveness of the attorney and personal satisfaction. Additionally, it increases the public’s opinion of the profession and those in it. Despite these benefits, some argue against civility and do not think it is a problem at all, and even if it is a problem it is not a problem worth fixing.

Part III: Is Incivility the Nature of the Beast?

While there is strong support for a push toward civility, there are also those who disagree with the civility movement. Those opposition beliefs range from thinking civility is a waste of time,103 to arguing that it infringes on an attorney’s duty to zealously advocate for his client,104 to believing it infringes on free speech,105 and to believing it will hurt the assent of minorities.106 However, for the purposes of this Comment, I will address only the first two. Some argue that incivility is the nature of the beast—the nature of the adversarial system.107 This system has been defined as a “system of law that relies on the contest between each advocate representing his or her party’s positions” before an impartial party.108 A “contest” between two advocates. This word choice struck a chord with me. And yet, in another description of the adversarial

103 See W. Bradley Wendel, How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections, 54 S.C. L. Rev. 1027, 1031 (“I tend to agree with those who believe the emphasis on civility is at best a distraction”).
104 See Atkinson, supra note 16.
107 Atkinson, supra note 16, at 304.
system one writer summarizes it is "a battle between lawyers."\textsuperscript{109} As mentioned in Part II, there is a win at all cost attitude that is an external pressure and extrinsic motivation.\textsuperscript{110} Descriptions like these, and the beliefs that underlie them, feed the problem. The purpose recognized by the first definition and supported by literature is to find the truth.\textsuperscript{111} However, before ever getting to the purpose of truth, the definition has already described the system with a heavily connoted word "contest." Not only that, but the system "relies on" this "contest." The contest is a necessary and indispensable element to the system. The word contest itself is not the problem. It is true that there are opposing arguably competing sides. The problem is with the notion that "contest" strongly infers a winner and a loser. Thus, by the time the reader has gotten to the purpose of the contest—truth—he has already developed the idea that there is one winner and one loser regardless of the blurred lines that the truth includes.

Maybe the fact that there are two opposing sides inherently causes parties to prevail rather than find the truth and in the process they "inevitably shape the evidence and use their persuasion skills to that end."\textsuperscript{112} Using persuasion to accomplish the end is not the same as using incivility as incivility is not persuasion. Incivility is a form of intimidation, an abuse of people or the process. Persuasion is a relationship skill; incivility is not.\textsuperscript{113} Additionally, it is not inevitable to resort to incivility. Following intrinsic motivations, developing a personal value standard, and choosing to act in ways in which will build a strong reputation for the long term


\textsuperscript{110} See supra discussion Part II.B.


\textsuperscript{112} Goodpaster, supra note 111, at 78.

\textsuperscript{113} See supra discussion Part II.
rather than merely win a case in the short term are means used to avoid incivility while practicing in the adversarial system.\textsuperscript{114}

In one study performed by Austin Sarat, a professor of jurisprudence and political science at Amherst College, the lawyers and judges interviewed acknowledged that problems of civility existed.\textsuperscript{115} The rationale provided for the problem was that it was "either inextricably bound up by the practices of the adversary system itself or the product of a few bad apples."\textsuperscript{116} These individuals believed deeply in the adversarial system and believed occasional lapses were the "price of doing business."\textsuperscript{117} However, this rationale seems paradoxical. If incivility is inseparable from the adversarial system then how can only a few "bad apples" fall prey to the beast.\textsuperscript{118} If it is the nature of the beast then everyone would fall prey to incivility, but not everyone does.

Other opponents argue that it is unproductive to worry about civility because it is not a characteristic that can be taught.\textsuperscript{119} For example, one attorney said "[y]ou learn civility, or not, in kindergarten, and with your parents, and you behave a certain way because of your character."\textsuperscript{120} Thus, he believed that the academic studies aimed at civility produced little good.\textsuperscript{121} Is civility or conversely incivility so engrained within someone that by the time he is of the age to practice law it cannot be changed? If it cannot be changed then there would be no point to study civility or even take the time to consider punishments because punishments would not truly be a reform. Judge Paul Friedman, a judge for the United States District Court for the

\textsuperscript{114} See supra discussion Part II.
\textsuperscript{116} Id. at 833.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Ironically, the prey also acts in ways much more akin to predators when it acts uncivil.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
District of Colombia, discussed incidents in which attorneys behaved badly in his own courtroom. In _Teferra_, Judge Friedman appointed a special master to preside over the deposition like a babysitter. In _BOCA Investerings Partnership v. United States_, the Judge directed each lawyer to read the D.C. Bar Civility Standards and to file a certification to the court confirming that he or she had completed this. Judge Friedman’s colleague, Judge James Robertson, wrote in an order that counsel had “a startling lack of sense of humor, or sense of proportion, or both,” which is now commonly cited in briefs when opposing counsel have heated exchanges. Ultimately, the conduct changed for the better and, “in one, so dramatically that as I presided over a five-week trial I completely forgot that these were the same lawyers I had found it necessary to admonish.” Judge Friedman’s examples show that addressing civility does in fact change the behavior of attorneys in the future. The fact that he identified the attorney’s uncivil behavior was a catalyst for better behavior. The forms of “punishment” varied; all brought about the same result, however—the attorney’s behaviors changed.

Additionally, Judge George W. Miller discussed how inexperience also contributes to incivility, thus supporting the idea that one’s degree of civility can change throughout a career. The Judge, when asked if gender played a role in civility, responded by saying that inexperience plays a much greater role than gender. He believes that younger, less experienced lawyers can be more combative because of their insecurities and the thought that every point must be argued

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123 Id.
124 Id. at 195.
125 Id.
126 Id.
127 I cannot say that these attorneys were not uncivil ever again; I do not have that research. However, this does support the idea that behaviors can be changed. It is a controlled behavior otherwise these attorneys would have continued to act uncivilly in front of Judge Friedman and if it is a controlled behavior then it is the only effort put into controlling it that determines the settings and length of time for which you exhibit control.
128 See _Twenty Years of Legal Ethics_, supra note 120, at 345-46.
129 Id.
to a conclusion.130 On the other hand, the Judge found that experienced lawyers manifest a more relaxed and civil attitude.131 These observations coincide with research showing that self-esteem was one of the strongest components of personal satisfaction.

Sometimes, incivility is driven by the client’s demands. Some clients believe that aggression is key to winning and pressure their attorneys to act in accordance. Now, it is not just the clients that are opponents, the lawyers themselves are also opponents which results, at times, in insults and threats.132 “Many clients are under the misconception that because they hired they lawyer, they have the power to dictate that lawyer’s conduct.” 133 However, because the attorney is the “possessor of expert knowledge of a sort not readily or easily attainable,”134 the attorney, not the client, must decide the most appropriate approach.135 An attorney’s perception on his own role may affect his attitude toward civility. In Donald D. Landon’s study of attorney advocacy within rural communities, one attorney interviewed said that he saw his role as an officer of the court, not the client’s hired gun.136 With this broader perspective, the attorney saw limits to zealous advocacy.137 This sentiment is echoed today. As Jayne R. Reardon, executive director of the Illinois Supreme Court wrote it is the responsibility of the attorney to correct the client’s expectation of incivility and “to let the client know the lawyer is more than a ‘hired gun.’”138

130 Id.
131 Id.
135 Reardon, supra note 133.
137 Id.
138 Reardon, supra note 133.
Although some argue that a person is either civil or they are not, many feel that through education and mentoring one’s disposition can change for the better. Judge Friedman noted that the pressure to bring in clients and business leaves little time for formal and informal mentoring that he and many others benefitted from. These pressures make it difficult for inexperienced lawyers to see themselves as servants of the law and officers of the court because all they hear is to win at all costs. Significant, the Judge asked “who are they hearing to win at all costs from? Their seniors, the ones they are trying to impress? . . . Or are they taking the message out of context and crossing boundaries seniors don’t mean for them to cross.” Either way, educating young lawyers can help because knowledge builds confidence. Knowledge is the foundation for self esteem to grow. Self-esteem allows for one to commit to one’s own values and follow intrinsic motivations. Following intrinsic motivations promotes civility, which in turn promotes personal satisfaction and personal satisfaction is one step toward a reputable image for the profession as a whole. Respect for the whole is related to respect for the individual. The relation is proportional so if one has great respect for the profession as a whole then the presumption is in the attorney’s favor that he too will garner respect. This presumption of respect diminishes insecurities and the cycle continues. Education is a key component of the cycle. Recognizing this need for education, the Utah Bar Association has targeted young attorneys as a necessary element to decreasing incivility. The Young Lawyers Division created an online resource for young lawyers to access guidance from more experienced attorneys.

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139 Friedman, supra note 122, at 193.
140 Id.
141 Id.
142 See Von Maack, supra note 20, at 23.
143 Id.
Another argument posed by opponents of the civility movement is that it is inconsistent with an attorney’s duty to zealously advocate for his client.\textsuperscript{144} Zeal means the enthusiasm, passion, and devotion.\textsuperscript{145} Additionally, it is a bias, interest, partiality, favoritism, and a lack of neutrality in favor of a client as well as exhibiting “enthusiasm, energy, and benevolent” energy.\textsuperscript{146} The Model Rules of Professional Conduct recognize the need for an attorney to be a zealous advocate for his client;\textsuperscript{147} however, it also limits the scope of an attorney’s zealous advocacy.\textsuperscript{148} The Preamble to the Model Rules states that a “lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.”\textsuperscript{149} Because of the win at all cost mindset that Judge Friedman recognized, attorneys can lose sight of the fact that they are officers of the legal system,\textsuperscript{150} as well as the public. Incivility hurts the public’s perception of the legal system and it disrespects the court. When an attorney acts uncivilly his responsibilities are not harmonious. The Preamble continues, “[t]hus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”\textsuperscript{151} When an attorney’s responsibilities are in harmony then there can be a balance between zealous advocacy and justice. Therefore, when there uncivil conduct and the responsibilities become unharmonious then there is not a balance of zealous advocacy and justice. Presumably, the dominant responsibility becomes client representation and the scale tips in the favor of zealous advocacy as justice reduces.

\textsuperscript{144} See Atkinson, supra note 16, at 300.
\textsuperscript{145} See Terrell, supra note 102, at 561.
\textsuperscript{146} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} See Friedman, supra note 122, at 193.
\textsuperscript{151} Preamble, supra note 147.
Because of the fact that incivility causes this unbalance in the system, the Preamble states the "basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."\(^{152}\) An attorney must maintain a courteous and civil attitude while zealously advocating for his client.

In a synthesis of the fundamental virtues that lawyers should aspire to meet, Professor Timothy Terrell advances the second virtue as representing clients with "principled enthusiasm."\(^{153}\) "[C]lients are entitled to zealous advocacy" but this is always tempered by a sense of professional integrity.\(^{154}\) It must be tempered by "respect for the rule of law" and respect for other lawyers.\(^{155}\) Civility is the notion of respect. Thus, the Professor defines one of the fundamental values of lawyers as zealous advocacy tempered by civility. Mirroring the Model Professional Code of Conduct Preamble. Additionally, the definition of zeal above is "energy, enthusiasm, and benevolent effort."\(^{156}\) The energy and enthusiasm must work in balance with benevolence, which civility encompasses.

There is a gray area between incivility and zealous advocacy.\(^{157}\) The U.S. Court of Appeals for the Second Circuit noted the dilemma between sanctioning incivility and allowing it as zealous advocacy.\(^{158}\) The Court noted that attorneys who harass adversaries and waste judicial resources need disciplining, but it is also expected that an attorney argue zealously.\(^{159}\)

\(^{152}\) Id.
\(^{153}\) Terrell, supra note 102, at 561.
\(^{154}\) Id.
\(^{155}\) Id.
\(^{156}\) Id.
\(^{158}\) Id.
\(^{159}\) Id.
The Court went on to say that determining on which side of the line an attorney’s conduct falls is one of the most difficult things for a court to decide.\textsuperscript{160} Several factors to consider when determining whether conduct or language is uncivil or just zealous include: if the purpose is only to threaten, embarrass, delay, criticize, or attack.\textsuperscript{161}

Zealousness can quickly devolve into incivility. Indeed, the Rules of Professional Conduct appreciates that possibility when it exhorts the competence\textsuperscript{162} and diligence\textsuperscript{163} of attorneys and not zealous advocacy. The change occurred from a concern that zeal encouraged unethical behavior and was used as a justification by attorneys employing even offensive tactics.\textsuperscript{164} A lawyer’s constraint of zeal should “relate to the potential damage to the context of lawyering: the legal system and by extension, a lawyer’s relation with and to other laborers in that vineyard.”\textsuperscript{165} Again, it is essential for an attorney to consider the impact that crossing the boundary from zeal to incivility has on the legal profession as a whole. The pursuit of client service must not denigrate the legal system or bring it into disrepute. “Thus, professionalism demands that pursuit of client service not go so far as to denigrate or bring into disrepute the legal system itself.”\textsuperscript{166} Incivility cannot wear the mask of zeal; rather, zeal must be tempered by civility.

Part IV. States Take Action

Many states have begun to address the issue of civility in an attempt to reclaim the nobility of the legal profession. This Part will examine actions taken by various states to combat uncivil conduct by its attorneys.

\textsuperscript{160} Id.
\textsuperscript{161} Id. (citing Schlaifer Nance & Co., Inc. v. Estate of Andy Warhol, 194 F.3d 323, 341 (2d Cir. 1999)).
\textsuperscript{162} MODEL RULES OF PROF’L CONDUCT R. 1.1.
\textsuperscript{163} MODEL RULES OF PROF’L CONDUCT R. 1.3.
\textsuperscript{164} Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of Law 206 (Aspen Pub 2013)
\textsuperscript{165} Terrell, supra note 102, at 569–70.
\textsuperscript{166} Id.
A. Oaths

Currently five states have included civility language within their attorney oaths. South Carolina, Utah, New Mexico, Florida, and Arkansas. On October 22, 2003, South Carolina became the first state to incorporate civility into its attorneys’ oaths. Ken Anthony, president of the South Carolina Bar Association at the time, stated “I don’t think the problem is widespread to start with – this is more pre-emptive than corrective.” Maybe a lot has changed in the ten plus years since the modification of the oath or maybe it is the gentile of Southern hospitality, but today, it seems that most states are acting to correct not pre-empt. The bar required that attorneys take the changed oath and attend a mandatory one-hour civility class. Interestingly, after changing the oath in October of 2003, the state bar had to extend the deadline for attorneys to complete the oath and one-hour class. After a year and a half, only approximately 1,000 out of the 10,000 lawyers required to take part complied. Although the oath was instituted in 2003, it was not for several years that a case reached the Supreme Court on

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173 American Board of Trial Advocates, Professionalism, Ethics, and Civility, available at https://www.abota.org/index.cfm?pg=ProfEthicsCivility. The oath reads: “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”


175 Id.

176 Id.

"Until two years ago, we didn’t have any public opinions or sanctions simply on civility . . . [w]e now have four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition," said Lesley M. Coggiola, disciplinary counsel for the Supreme Court of South Carolina.

The strengths of an oath are that it is a necessary condition for practicing law, a basis for disciplinary action, and inspire attorneys to adhere to the fundamental principles of the legal profession. In the past, oaths served as the primary ethical statement. However, today, states’ rules of conduct function as such. Some states expressly say that violation of the attorney oath is grounds for discipline as in South Carolina. In Maine, the state had not expressly stated that violation of the attorney oath was grounds for discipline, but in In re Dineen, the court “based each finding of misconduct in this case on language contained in the Attorney’s Oath, thereby in effect applying . . . the standard appellant had sworn to uphold when he was admitted to practice.” The oath puts an attorney on notice and in Dineen became the standard to which the attorney was held. However, in most disciplinary cases if the oath is cited, it is as further support for a violation of the rules of conduct and not the basis for which the misconduct rests.

Thus, if a state does not include civility within its oath or standards, the misconduct must rise to the level of unethical and in violation of the state’s rules of conduct to be grounds for

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179 Id.


181 Id. at 50.

182 Id.

183 Id. at 54 (citing In re Dineen, 380 A.2d 603 (Me. 1977)).


185 In re Dineen, 380 A.2d 603 (Me. 1977).

186 See Andrews, supra note 180, at 54–55.
discipline. Incivility that is not so egregious to amount to unethical would go unpunished. The uncivil conduct reducing the effectiveness of the law, and reducing the perception of the legal field, is allowed to continue. States should follow South Carolina’s lead by including civility in their oaths. This would put attorneys on notice, allow for a basis of disciplinary action, and also inspire attorneys to be civil.

Including a civility clause in the oath alone is helpful but it should be used in conjunction with other means to combat incivility. The oath is a one-time deal; it does not continually reinforce the notion of civility.\textsuperscript{187} Unfortunately, it can become an after thought in the everyday lives of attorneys.\textsuperscript{188} Therefore, although states should adopt a civility clause within their oath, it is important that the idea is reinforced through other means.

B. Standards

States have issued standards of civility as voluntary aspirational guidelines for attorneys to follow.\textsuperscript{189} These standards are not mandatory and are not grounds for discipline.\textsuperscript{190} Some states, however, have gone a step further and have incorporated the standards into their rules of professional conduct.\textsuperscript{191} For example, New York’s Standards of Civility are not meant to supplement or modify the Code of Professional Conduct and are not a basis for sanctions.\textsuperscript{192} Instead, “[t]hey are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status

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\textsuperscript{187} See Andrews, supra note 180, at 61–62.
\textsuperscript{188} Id.
\textsuperscript{189} G.M. Filisko, Be Nice: More States are Treating Incivility as a Possible Ethics Violation, ABA J. (Apr. 1, 2012, Oct. 15, 2014), available at http://www.abajournal.com/magazine/article/be_nice_more_states_are_treating_incivility_as_a_possible_ethics_violation
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Supreme Court Appellate Division Second Department, Orientation to the Profession, available at http://www.courts.state.ny.us/courts/ad2/forms/Law%20Guardian%20handbook/OrientationtotheProfessionProgramMaterials.pdf
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as an honorable and respected profession where courtesy and civility are observed as a matter of
course.\textsuperscript{193} On the other hand, Michigan altered the Model Rules of Professional Conduct.\textsuperscript{194} Rule 6.5(a) states: "A lawyer shall treat with courtesy and respect all persons involved in the
legal process."\textsuperscript{195}

All states should have standards to emphasize the importance of civility. One would not
think that there need to be written standards demonstrating what is and is not respect for the
court, the law, clients, other lawyers, and the public. However, the problem of incivility persists;
thus, action must be taken. The question is whether standards should be laid out merely as
guidelines (as in New York) or if they should fold into a state’s rules of conduct and be
mandatory (as in Michigan).

Aspirational standards intentionally have limitations. The biggest limitation is that they do
not serve as grounds for discipline. Aspirational standards are helpful when everything is going
well for an attorney, but when an attorney is pressured by extrinsic motivations, money or
appearances, directly by a client or supervisor, the standards seem less important. The conflation
between zeal and incivility becomes easier when a state has expressly made standards only
aspirational and not mandatory. When civility is merely a guideline to follow then the scope of
zeal widens. Conversely, if civility standards are mandatory then there can be no conflation of
zeal and incivility. Conduct that is uncivil and punishable according to the codes cannot be
masked by zeal.

The fact that conduct is punishable will hold more weight against pressures and extrinsic
motivations than aspirational standards would. In this way it places the tripartite responsibilities

\textsuperscript{193} \emph{Id.} \\
\textsuperscript{194} MICHIGAN RULES OF PROFESSIONAL CONDUCT, available at
http://courts.mi.gov/courts/michigansupremecourt/currentcourtrules/5michiganrulesofprofessionalconduct.pdf. \\
\textsuperscript{195} \emph{Id.}
to represent one’s client, to be an officer of the court, and to be a citizen of the public on equal footing, allowing the duties to be executed in the harmonious manner that the Preamble to the Model Rules of Conduct suggests. Making incivility punishable by including it in the rules of conduct addresses the needs of both the court and the public. Civility is respect for the court and for others. The benefits of civility make court proceedings and the law more effective and increase the public’s trust in the rule of law. Thus, when considering conduct that may be punished uncivil, an attorney is inherently considering the impact it will have on the court and society.

States should incorporate civility clauses into their attorney oaths and use them in conjunction with mandatory civility standards to remain consistent. The oath should serve as an inspiration to set the tone on the importance of civility. The mandatory standard would reinforce this and provide express disciplinary action. For states enacting these two methods, South Carolina’s requirement of a one-hour mandatory civility course would be a beneficial function to ensure that all attorneys have knowledge of the standards.

The structure employed to mandate civility should utilize both guidelines and the rules of conduct. A civility clause should be added to the rules of conduct like Michigan did with Rule 6.5(a), warranting discipline for uncivil conduct.\textsuperscript{196} The guidelines, however, should include a non-exhaustive list of how attorneys should act.\textsuperscript{197} Therefore, although incivility is grounds for disciplinary action, there is some discretion as to what amounts to incivility. Discretion would also allow for various forms of discipline depending on the specific lawyer, conduct, and

\textsuperscript{196} See Michigan Rules of Professional Conduct, supra note 194.
circumstances. Civility like professionalism is a broad term that evades an exact definition and boundaries. For this reason, it is necessary to make it mandatory to adhere to but broad enough to allow the law to be fact sensitive.

D. Mentoring

Several states, believing in the necessity of educating and guiding the youth, have established mentoring programs. Although, as discussed above, some critics believe that civility is an inherent quality, others feel strongly that it can be changed through training. For example, Colorado instituted the Colorado Attorney Mentoring Program (CAMP) in February of 2013 for young lawyers in each of its judicial districts. Additionally, Ohio spearheaded a campaign to teach civility to middle school students. Mentoring provides both education and guidance to new attorneys entering a field with many extrinsic pressures. At the very least, it can provide attorneys with information as to what it means to be civil. If a state does not change its oath or standards, this one method will help to instill a sense of respect for others and the law within new lawyers.

Part V: Conclusion

Civility provides a great benefit to the legal profession. It enables the law to function more effectively and can provide attorneys with greater personal satisfaction, both of which increase the public’s opinion and trust in the profession and those who practice it. States should desire to correct the increased incidences of incivility. In order to do so, states should inspire attorneys from the onset by including a civility clause within their attorney oaths. Additionally,

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198 See Friedman, supra note 122, at 195–97. Judge Friedman gave out different “punishments” to the attorneys for their various incivilities. Id. Each punishment was effective and the attorneys’ conduct changed for the better. Id.
199 Reardon, supra note 133.
200 Id. (“Without question, the most effective ways of addressing incivility entail bringing lawyers together for training and mentoring.”).
201 Colorado Attorney Mentoring Program, CAMP, available at Coloradomentoring.org/programs.
states should include a civility clause within their rules of conduct to be a constant reminder of the need for civility as well as a basis for disciplinary action. Additionally, states must create standards to guide attorneys and allow them to know what conduct is and is not appropriate. The standards should not create the basis of discipline, however, in an effort to allow some discretion based on the circumstances. Finally, states should create mentoring programs to instill new attorneys with the base knowledge of civility that will increase confidence in an effort to reduce the power of extrinsic motivations.