The Importance of Civility in the Sandbox

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I. INTRODUCTION – THE CIVILITY MOVEMENT

Although there have long been outcries within the bar for a return to a time of greater civility and professionalism, the most concerted effort to inspire reform appears to have been initiated in the early 1970s by then-U.S. Supreme Court Chief Justice Warren Burger. In a 1971 speech before the American Law Institute, Chief Justice Burger proclaimed:

> Whether in private negotiation or public discourse, in the legislative process or the exchanges among leaders, in the debate of parties, or the relatively simple matter of a trial in the courts, the necessity for civility is imperative. Without civility no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat. . . .
>
> Today more and more new and vexing problems reach the courts, and they call for the highest order of thoughtful exploration and careful study. Yet all too often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how

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> thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters—including the judges. . . .[2]

In the ensuing years, Burger remained publicly committed in his quest to promote professionalism and civility among lawyers, publishing articles and delivering numerous speeches. And he did not pull any punches, often harshly depicting what he viewed as the alarming state of affairs within the legal community, at one point remarking that judging from the level of attorney misconduct, "the standing of the legal profession . . . [was] at perhaps its lowest in history."[3] According to him, there was an escalating crisis of incivility and unprofessionalism, typified by "Rambo lawyers" and "huckster shyster" advertising, both of which were going unchecked by bar disciplinary authorities,[4] resulting in the steady erosion of the very fabric of the American legal tradition.[5]

Chief Justice Burger was not alone in his pessimism about the state of the profession and his belief in the need for meaningful reform, particularly in the area of civility. From Burger's tenure as Chief Justice up to the present, a litany of jurists, lawyers, and regulators have echoed his stinging appraisal, concluding in each successive year that the legal culture has seemingly reached a new low.[6] For example, in 1988, a fed up U.S. District Court for the Northern District of Texas, sitting *en banc* in *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, established a mandatory civility code and decried the decline in lawyer collegiality:

> As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.[7]

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[2] *Excerpts from the Chief Justice's Speech on the Need for Civility*, N.Y. TIMES (May 19, 1971), at 28.
[3] Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950 (1995).
[4] *Id.* at 953.
[5] The purity of Chief Justice Burger's motivation, however, was questioned by some who felt that he was targeting attorneys who represented unpopular clients in civil rights and criminal cases. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 119-20 (5th ed. 2016).
[6] *See* Jayne R. Reardon, *Civility as the Core of Professionalism*, BUS. L. TODAY (Sept. 2014) (observing that "[t]here have been countless writings . . . about widespread and growing dissatisfaction among judges and established lawyers who bemoan what they see as the gradual degradation of the practice of law, from a vocation graced by congenial professional relationships to one stigmatized by abrasive dog-eat-dog confrontations"), https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon.html. *See also* David McGowan, *Civility Traffic School: A Loony Idea from a Pointy-Headed Academic*, 19 PROF. LAW. 26 (No. 3 2009) ("Every year we read a few pieces bemoaning the decline of civility in the profession. Every year earnest efforts at reform are proposed. Every year nothing changes, except that next year's articles will say things got worse.").
[7] 121 F.R.D. 284, 286 (N.D. Tex. 1988).

Concerns over the status of the profession also inspired the establishment of an American Inns of Court, the goal of which is to "inspire the legal community to advance the rule of law by achieving the highest level of professionalism."[8] Furthermore, in 1996, the supreme courts of a number of states, including Georgia, established Commissions on Professionalism, tasked with fostering and promoting greater civility and professionalism among lawyers.

The American Bar Association ("ABA") also got involved in the 1990s, with the House of Delegates passing a resolution that encouraged bar associations throughout the country at all levels, as well as courts, to enact standards of "civility, courtesy, and conduct," in recognition that "a lawyer owes the profession adherence to a higher level of conduct than observance of the rules of professional conduct."[9] In addition, in 2011, in response to the growing "acrimony and venom" in contemporary political discourse, the ABA House of Delegates passed Resolution 108, calling upon lawyers to strive to be models of civility so as to positively influence the tenor of public discourse.[10] Furthermore, other national bodies have likewise placed demands for enhanced civility at the forefront of their objectives. For example, in 2003, the American College of Trial Lawyers adopted its Code of Pretrial Conduct, which places a premium on cooperation and collegiality among counsel in all aspects of pretrial process.[11]

In addition, the rancor over the perceived incivility epidemic led many jurisdictions to enact "civility codes" or "professionalism creeds" as a means of addressing the problem.[12] As of 2015, thirty-nine states, plus the District of Columbia had enacted guidelines of this nature.[13] Local bar associations and some federal courts also implemented professionalism-based directives.[14] Notably, in 1992 the Seventh Circuit adopted a set of "Standards for Professional Conduct."[15] Here is a sampling of the content of the behavioral objectives established by these guidelines, which are emblematic of those ensconced in the creeds of other jurisdictions:

> We will not use any form of discovery or discovery scheduling as a means of harassment.
>
> We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

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[8] American Inns of Court, at http://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. Chief Justice Burger was a strong proponent of this initiative and was instrumental in its establishment.

[9] Seth Rosner, ABA Standing Committee on Professionalism, Report with Recommendation to the House of Delegates (August 1995).

[10] ABA, Resolution 108 (adopted Aug. 8-9, 2011), *available at* https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/civility.authcheckdam.pdf.

[11] AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT (2003).

[12] *See* Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701, 707 (2015).

[13] *Id.* at 707-08.

[14] *Id.* at 708.

[15] STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT (2016), http://www.ca7.uscourts.gov/forms/Seventh_Circuit_Standards_for_Professional_Conduct.pdf.

> We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, . . . provided our clients' legitimate rights will not be materially or adversely affected.
>
> We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.
>
> We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.[16]

Various states have also incorporated the concept of civility into the oaths that lawyers are required to take upon admission to practice.[17] In 2014, California added the following language to its oath: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."[18] Florida's oath seems to be even more specific and all-encompassing: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."[19] South Carolina has an identical oath, but appears to have taken the force of that oath one step farther by subjecting those who violate it to discipline.[20] Even in those jurisdictions that do not include an enforcement component to their oaths, requiring newly admitted attorneys to swear that they will conduct themselves in a civil manner at least plants the seed that this is how they should behave.[21] The formal act of attestation adds an air of importance and responsibility.

Finally, the ABA Model Rules of Professional Conduct, as currently constituted and adopted, in whole or in part, by almost all jurisdictions, includes a number of provisions that address aspects of civility. For instance, the Preamble states that a lawyer has an obligation to zealously "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."[22] In addition, Model Rule 3.5(d) prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal,"[23] and Model Rule 4.4(a) proscribes the use of "means that have no substantial purpose other than to embarrass, delay, or burden a third person."[24] Furthermore,

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[16] *Id.*

[17] The American Board of Travel Advocates ("ABOTA"), through its Civility Matters initiative, has sought to emphasize the importance of civility in the practice of law and to encourage all jurisdictions to incorporate civility language into their oaths of admission. For more information on ABOTA's Civility Matters, see https://www.abota.org/index.cfm?pg=CivilityMatters.

[18] Maura Dolan, *New California Lawyers will have to Promise to be Courteous*, L.A. TIMES (May 2, 2014), http://www.latimes.com/local/la-me-lawyer-oath-20140503-story.html.

[19] Oath of Admission to the Florida Bar, https://www.floridabar.org/wp-content/uploads/2017/04/oath-of-admission-to-the-florida-bar-ada.pdf. Other jurisdictions that have added civility language to their oaths of admission include: Louisiana, Arkansas, Virginia, Ohio, Minnesota, Colorado, New Mexico, Arizona, Alaska, and Hawaii. *See* Preston & Lawrence, *supra* note 12, at 729.

[20] *See* South Carolina Rules of Disciplinary Enforcement, Rule 7.

[21] *See* Preston & Lawrence, *supra* note 12, at 731 (observing that including professionalism and civility components in oaths of admission will "at the very least, [cause recently admitted lawyers to] think about [these aspects] of professional responsibility").

[22] ABA MODEL RULES OF PROF'L CONDUCT, Preamble [9] (2017).

[23] *Id.* at R. 3.5(d).

[24] *Id.* at R. 4.4(a).

Model Rule 8.4(d) makes it a disciplinable offense to "engage in conduct that is prejudicial to the administration of justice,"[25] and recently enacted Rule 8.4(g) outlaws "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[26] It is also important to note that some jurisdictions, like Michigan, have adopted provisions that address even more directly the subject of civility. In particular, Rule 6.5(a) of the Michigan Rules of Professional Conduct states that:

> 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 non-lawyer assistants to provide such courteous and respectful treatment.[27]

Clearly the subject of civility and professionalism has been and continues to be a popular one. Indeed, as the foregoing discussion suggests, there seems to be a never-ending effort to promote and enhance these qualities within the profession. Given the longstanding and sustained nature of the civility movement one might reasonably expect that at some point meaningful progress would be made towards a kinder, gentler bar. However, the efforts persist nonetheless, seemingly because rather than getting better, civility among lawyers appears to be always in decline.

In this paper, I endeavor to examine why, despite all the attention, the profession is perceived to be, at best, running in place, or at worst, going backwards in terms of civility and collegiality. Generally, my view is that not enough emphasis has been placed on incentivizing civil actions. Courts and regulators tend to behave like rather inept parents trying to rein in undesirable behavior through punishment, lecturing, and scolding. Such approaches do not work very well on children, and they are even less effective when applied to adults, especially if the misconduct is often perceived as tactically advantageous. Only when lawyers can be made to appreciate the benefits of civility and come to recognize that such behavior can actually have tangible, positive effects, both economically and personally, will they adjust their conduct in a more cordial direction.

I begin with a brief analysis of the concept of "civility" and then proceed to provide examples of incivility, divided into various categories. After that, in an effort to better understand the head-scratching behavior in which attorneys frequently engage, I explore the possible explanations for uncivil actions, followed by a critique of the principal judicial response

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[25] *Id.* at R. 8.4(d).

[26] *Id.* at R. 8.4(g). *See also id.* at R. 1.3, cmt. 1 (noting that a "lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect").

[27] MICHIGAN RULES OF PROF'L CONDUCT, R.6.5(a).

to these acts. I conclude by comparing the effects of uncivil conduct to the potential benefits of civility in the hope of demonstrating why being a civil litigator makes the most sense.

II. What is Civility?

While many have been and remain critical of lawyers for their apparent ever-burgeoning lack of civility, one significant problem with these assessments is definitional. What exactly is civility? It is relatively easy to identify and condemn "incivility," which is what civility proponents typically do. One might therefore reasonably conclude that the opposite of identified uncivil acts would comprise the universe of "civility." For example, the opposite of screaming at a lawyer in a deposition would be remaining calm and collected. But it's not really that simple.[28] I have no doubt that there are lawyers who can pull off the feat of being calm and collected, yet uncivil. Take, for instance, the iconic Bill Lumbergh character from *Office Space* fame. His even-keeled, passive-aggressiveness is maddening and surely perceived by its targets as uncivil, on par with a boss who shouts the exact same directives. Remember when he tormented employee Milton by forcing him to move his desk to the farthest reaches of the office? "Hi Milton, what's happening? . . . Yeah, I'm gonna have to ask you to go ahead and move your desk again. So, if you could go ahead and get it back as far against that wall as possible, that would be great."[29]

So, if civility is not necessarily the opposite of incivility, what is it? Justice Anthony Kennedy has described it as "the mark of an accomplished and superb professional, but it is even more than this[, he says]. It is an end in itself. Civility has deep roots in the idea of respect for the individual."[30] What does that mean? The description does not provide any substantive criteria, but it tellingly emphasizes the importance of respect. Clearly, Lumbergh's actions, masked within a calm demeanor, evinced no semblance of respect for Milton. Hence, maybe that is the key, remaining cognizant of the dignity of others and endeavoring to treat them with the same respect that we would hope to receive. Though somewhat ephemeral, it does establish a base from which to contemplate civility. With this in mind, the next section categorizes some recurrent types of uncivil behavior and examines specific examples of each to get a better feel for what lawyers are doing.

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[28] *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, 141 (2011-12) (noting that "[i]n attempting a definition [of civility], one author went so far as to suggest that the best that can be said . . . is, like Justice Stewart's assessment of pornography, that 'you know it when you see it'").

[29] OFFICE SPACE (20th Century Fox 1999).

[30] Justice Douglas S. Lang & Haleigh Jones, *Can Courts Require Civil Conduct?*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 222, 226 (2016) (quoting from Louis H. Pollak, *Professional Attitude*, 84 A.B.A.J., Aug. 1988, at 66 (quoting Justice Kennedy)). Seattle-based Robert's Fund Civility Law Center places a similar emphasis on the concept of respect in endeavoring to define civility—"Civility is more than politeness, compassion, and integrity. Civility is a set of attitudes, behaviors, and skills that call upon us to respect others, to remain open-minded, and to engage in honest and constructive discourse." The Robert's Fund Civility Center for Law, Seattle University School of Law, https://www.civilitycenterforlaw.org.

III. TYPES OF UNCIVIL BEHAVIOR: WHAT WERE THEY THINKING?

Uncivil conduct by lawyers takes many forms, ranging from verbal abuse and physical confrontations to less overt digs contained in filings or other types of written communications. The following discussion provides a snapshot of the varied nature of conduct that qualifies as uncivil.

A. Verbal and Physical Abuse in the Courtroom

In *In re Greenberg*, opposing attorneys Greenberg and Lewis were subject to discipline for a childish display carried out in front of the very judge who was overseeing their case.[31] During a hearing, Greenberg suggested to the judge that Lewis may have been engaged in some "hanky–panky."[32] Lewis took offense and claimed that Greenberg (a former prosecutor) was "always suspect."[33] Greenberg interposed an objection and then proceeded to refer to Lewis as a "jackass." Lewis responded by asking: "Jackass?" And Greenberg confirmed that he indeed was referring to him as a jackass, to which Lewis sophomorically replied: "Your mother is a jackass."[34] Greenberg, in turn, lost it, and proceeded to grab Lewis causing both men to tumble to the courtroom floor.[35] I wish I could tell you that this was really an episode of *Beavis and Butthead*, but sadly, I cannot. These were two adult lawyers, in open court nonetheless.

Appropriately, the judge held Greenberg and Lewis in contempt, with Greenberg receiving the harsher penalty.[36] In addition, Greenberg was charged with simple battery and convicted.[37] Subsequently, both lawyers were subjected to discipline for violating Rules 3.5(d) (conduct intended to disrupt a tribunal) and 8.4(d) (conduct prejudicial to the administration of justice) of the Louisiana Rules of Professional Conduct—Lewis received a public reprimand and Greenberg was suspended from practice for six months, which would be reduced to thirty days if he completed an approved anger management program.[38]

B. Misconduct During Depositions

One of the most common settings for uncivil behavior is in discovery, especially during depositions. Although a deposition is considered an extension of the courtroom and attorneys are expected to conduct themselves in the same manner as if appearing before the court, it

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[31] 9 So. 3d 802 (La. 2009).
[32] *Id*. at 804.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 805.
[38] *Id.* at 809. Greenberg was also subject to discipline for violating Rule 8.4(b) for engaging in criminal conduct that reflected adversely on his honesty, trustworthiness, or fitness in other respects. *See id.* at 806.

appears that this admonition is frequently forgotten. Like children who think their parents are not around, when out of eye and earshot of the court, many lawyers are prone to misbehave.

In *In re Golden*, for instance, an attorney engaged in shockingly abusive behavior towards two separate deponents.[39] The first deposition was in a divorce case, and the deponent was the physically and mentally disabled boyfriend of the attorney's client. In an alleged effort to impugn the boyfriend's credibility, the attorney mocked and derided him throughout the deposition, repeatedly denigrating the boyfriend's intellectual ability—"You are not smart enough to question my questions. You are not smart enough to even answer my questions. . . . Well, I am not going to argue with you. You are not smart enough to argue with. . . . You are not smart enough to know what a restraining order is."[40] He even went so far as to threaten the boyfriend: "Don't get snide with me. Just answer my questions or you are going to be in severe difficulty, especially if you make me angry at you."[41] Believe it or not, the attorney's conduct was actually worse in the second deposition.

In a separate domestic relations matter in which he represented the husband, the attorney made the following statement to the wife after her deposition: "You are a mean-spirited, vicious witch and I don't like your face and I don't like your voice. What I'd like, is to be locked in a room with you naked with a very sharp knife."[42] He later suggested that the wife needed to be placed in a bag "without the mouth cut out," presumably so she would suffocate.[43] Unbelievable.

The attorney's insulting, unprofessional behavior was shocking and rightfully garnered the attention of the South Carolina disciplinary authorities. The state's supreme court ultimately found that the attorney had used means that had no purpose other than to "embarrass, harass, delay, or burden" (Rule 4.4) the first deponent[44] and otherwise engaged in conduct that was prejudicial to the administration of justice (Rule 8.4).[45] The court observed that "[h]is conduct was outrageous and completely departed from the standards of our profession, much less basic notions of human decency and civility."[46] Interestingly, the court also emphasized the enhanced responsibility of lawyers to act professionally and civilly in the deposition context, given that they are outside the presence of a "presiding authority."[47] In other words, mom and dad are not there, so the children need to be especially mindful of their behavior.

While plainly condemnable, the misconduct in *In re Golden* pales in comparison to the attorney's behavior in *Crawford v. JPMorgan Chase*.[48] Indeed, the California Court of Appeals

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[39] 496 S.E.2d 619 (S.C. 1998).
[40] *Id.* at 620.
[41] *Id.*
[42] *Id.* at 621.
[43] *Id.*
[44] *Id.* at 622.
[45] *Id.* at 623.
[46] *Id.* at 622.
[47] *Id.* at 623.
[48] 242 Cal. App. 4th 1265 (2015).

began its opinion in *Crawford* by referencing a previous case (*Green v. GTE California, Inc.*[49]) in which a lawyer's behavior was particularly egregious, noting that there it had stated, "counsel's comments and actions at a deposition made the term 'civil procedure' an oxymoron."[50] The court then observed that when compared to the conduct of the attorney in *Crawford*, "one could almost say that the offending counsel in *Green* conducted himself with decorum."[51]

In addition to filing papers that derisively and sarcastically criticized the trial court, opposing counsel, and the defendant, the offending attorney—representing himself as plaintiff in the action—issued physical threats, with weapons in hand, before the commencement of his brother's deposition. In particular, following the administration of the oath, the attorney pointed a can of pepper spray at opposing counsel and said: "I brought what is legally pepper spray, and I will pepper spray you if you get out of hand."[52] He then took it up a notch by pointing a stun gun at the opposing lawyer's head and indicating that, "If [the pepper spray] doesn't quell you, this is a flashlight that turns into a stun gun."[53] The attorney proceeded to demonstrate by firing the weapon close to counsel's face. It should come as no surprise that the deposition was immediately terminated, and later, as a sanction, so was the litigation.

In affirming the dismissal of the attorney's action, the court of appeals delivered a rueful admonition that is worth highlighting—

> The practice of law can be abundantly rewarding, but also stressful. The absence of civility displayed by some practitioners heightens stress and debases the legal profession. Those attorneys who allow their personal animosity for an opposing counsel or an opposing party to infect a case damage their reputations and blemish the dignity of the profession they have taken an oath to uphold. . . . Here the practice of law became more than stressful; it was dangerous.[54]

In *Huggins v. Coatesville Area School District*,[55] defense counsel let the stress of plaintiff's counsel's abusive deposition conduct get to him, and he made matters worse by responding in kind. The case provides an abject lesson of the importance of staying above the fray. Although it was defense counsel who sought a protective order and sanctions, the court's assessment was that although plaintiff's counsel's conduct was worse, "both attorneys contributed to the escalation of tensions and the descent of their behavior at the deposition."[56] The court went on to observe that "[t]reating an adversary with advertent discourtesy, let alone

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[49] 29 Cal. App. 4th 407 (1994).
[50] *Crawford*, 242 Cal. App. 4th, at 1266 (quoting *Green*, 29 Cal App. 4th at 408).
[51] *Id.*
[52] *Id.* at 1270.
[53] *Id.*
[54] *Id.* at 1266-67.
[55] 2009 WL 2973044 (E.D. Pa. 2009).
[56] *Id.* at *1.

calumny or derision, rends the fabric of the law."[57] Notably, in a creative effort to foster more civil, professional behavior in the future, among other things, the court also directed the two attorneys to have an informal meal together in the hope of mending the fence.[58]

One last example of deposition incivility is of particular interest because it involved an attorney doing nothing; rather, it was the deponent who engaged in the uncivil behavior, while his counsel sat idly by and allowed it to persist unabated. In *GMAC Bank v. HTFC Corp.*,[59] during his deposition, the owner of the defendant "sought to intimidate opposing counsel by maintaining a persistently hostile demeanor, employing uncivil insults, and using profuse vulgarity."[60] The court actually counted the number of times that the deponent dropped the "f-bomb," calculating that in almost twelve hours of testimony, he had done so no fewer than 73 times, often using variants of the word as an adjective to modify such nouns as "idiot" in reference to opposing counsel.[61] All the while, his attorney remained calm and cool, for the most part.

As the court noted, "notwithstanding the severe and repeated nature of [the deponent's] misconduct, [defense counsel] persistently failed to intercede and correct . . . violations of the Federal Rules. Instead, he sat idly by as a mere spectator to [the] abusive, obstructive, and evasive behavior."[62] Although the attorney maintained that he did make efforts to rein in his client, the court observed that his "meek attempts to intercede and his otherwise silent toleration of [his client's] conduct only emboldened [him] to further flout the procedural rules."[63] The court equated the attorney's silence with "endorsement and ratification," deeming his inaction to be the "functional equivalent of 'advising [the client's] conduct'" in violation of Federal Rule of Civil Procedure 37(a)(5)(A).[64] In the end, the court sanctioned both the client and counsel in the amount of $29,322.61.

C. Failure to Extend Professional Courtesy to Opposing Counsel

As fellow members of the bar, there is an expectation that lawyers will accord certain professional courtesies to one another. For example, willingly agreeing to stipulate to reasonable requests for extensions of time or accommodating the scheduling of depositions or other case-related matters. Refusing to cooperate in such situations is viewed as highly uncivil. In *Ahanchian v. Xenon Pictures, Inc.*,[65] the Ninth Circuit singled out defense counsel for unprofessional recalcitrance in actively opposing the plaintiff's attorney's efforts to obtain an extension of time to respond to a motion for summary judgment. The court noted that:

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[57] *Id.* at *3.
[58] *Id.* at *4.
[59] 248 F.R.D. 182 (E.D. Pa. 2008).
[60] *Id.* at 186.
[61] *Id.* at 187.
[62] *Id.* at 194-95.
[63] *Id.* at 195.
[64] *Id.* at 197-98.
[65] 624 F.3d 1253 (9th Cir. 2010).

> Defense counsel steadfastly refused to stipulate to an extension of time, and when [opposing] counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing [opposing] counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. . . . *Our adversary system relies on attorneys to treat each other with a high degree of civility and respect*. . . . Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries.[66]

The Third Circuit echoed this emphasis on courtesy and collegiality in the context of extension requests, and further noted the complementary effect that such cooperation has on judicial efficiency—"We do not approve of the 'hardball' tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice."[67]

Beyond granting routine requests, courts also expect lawyers to extend more significant forms of professionalism to one another, some that may appear contrary to obligations owed to one's client. For instance, a number of courts have chastised or even penalized lawyers for seeking the entry of a default judgment without first endeavoring to notify the defaulting attorney. In discussing an attorney's *ex parte* application for a default judgment, the Iowa Supreme Court stated:

> We would be remiss in our duty to the public, bench, and bar if we were to ignore the manner in which this default was taken. Standards of civility exist in the practice, not as a matter of convenience to the profession, but as a matter of fairness and simple justice. These standards condemn unfair tactics, such as 'blind siding' counsel of record with an ex parte application for default. Departure from the standards of civility are obvious examples of ineffective and counterproductive advocacy.[68]

The Eleventh Circuit's expectations regarding civility and collegiality appear to exceed what even the most strident courts require. In *Sahyers v. Prugh, Holliday & Karatinos, P.L.*,[69] the court of appeals affirmed the trial court's refusal to award any attorney's fees to the prevailing plaintiff under the Fair Labor Standards Act ("FLSA") because her attorney had failed to provide the defendants with advance notice of the plaintiff's intention to file the lawsuit. While the FLSA expressly entitles a prevailing plaintiff to recover reasonable attorney's fees and

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[66] *Id.* at 1263 (emphasis added).
[67] *Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 90 (3d Cir. 1995).
[68] *Vlotho v. Hardin County*, 509 N.W.2d 350, 352-53 (Iowa 1993).
[69] 560 F.3d 1241(11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010). It should also be noted that various additional opinions regarding this case were authored in connection with the denial of a rehearing *en banc*. *See Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 603 F.3d 888 (11th Cir. 2010).

costs, the trial court exercised its inherent powers to supervise the conduct of lawyers appearing before it to recognize an exception, finding that under the circumstances of this case, a "reasonable fee [was] no fee."[70] The Eleventh Circuit panel could not have agreed more.

Of utmost significance in the case was the fact that the defendants were lawyers and their firm. As such, plaintiff's counsel was obligated to act with enhanced candor and professionalism towards his fellow members of the bar. Significantly, the court seemed incredulous over plaintiff's counsel's failure to contact the defendants before filing suit in an effort to amicably work things out. Specifically, it emphasized that "the lawyer for Plaintiff made absolutely no effort—no phone call; no email; no letter—to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit. Plaintiff's lawyer slavishly followed his client's instructions and—without a word to Defendants in advance—just sued his fellow lawyers."[71] The court proceeded to approve of the district court's belief that "this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court."[72]

Of particular note, the court was not at all persuaded by the argument that the plaintiff's lawyer was simply following his client's instructions in failing to supply the defendants with pre-suit notice—"This explanation counts for little: a lawyer's duties as a member of the bar—an officer of the court—are generally greater than a lawyer's duties to the client. . . . Plaintiff's lawyer showed little concern for the district court's time and energy and no courtesy to his fellow lawyers."[73] Indeed, the trial court went so far as to remind the plaintiff's lawyer that he was "an officer of the Court, not the client."[74] According to the Eleventh Circuit, it was this officer-of-the-court status that enabled the district court to utilize its inherent powers to "police [his] conduct and to guard and promote civility and collegiality."[75]

D. Uncivil Pleadings, Motions, and Briefs

While one typically thinks of incivility as taking the form of abusive actions or the utterance of offensive and demeaning words, courts have become increasingly willing to reprimand lawyers for unprofessional written submissions. Some examples are so obviously improper that it's easy to understand why courts are intolerant In *Marino v. Usher*,[76] for instance, plaintiff's counsel filed briefs with the following headings: "Response Re Joint Motion for Sanctions by Moving Defendants *Who are Cry Babies*"; and "Plaintiff's Response to Defendants' Incessant Complaining."[77] In addition, in another brief, the attorney stated that the defendant's "motion is a ridiculous attempt by defense counsel to burden [me] with fake work . .

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[70] *Id.* at 1244.
[71] *Id.* at 1245.
[72] *Id.*
[73] *Id.*, n.7 (citations omitted).
[74] *Id.*, n.8.
[75] *Id.* at 1244.
[76] 2014 WL 2116114 (E.D. Pa. 2014).
[77] *Id.* at *3 (emphasis in original).

. it is: hogwash and claptrap" and in others, he described defense counsel with such terms as "absurd," "juvenile," and "petty."[78]

Similarly, in *Nissim Corp. v. ClearPlay, Inc.*,[79] the Court of Appeals for the Federal Circuit called out the parties' attorneys for utilizing "excessive hyperbole" in their briefs, which made "them difficult to take seriously and unpleasant to read"[80] and criticized their use of such words and phrases as "absurd," "ill-conceived," "bias-inducing screed," "moaning," "strange," and "baffling."[81] It suggested that adopting "a tone of civility," would be advisable and likely far more persuasive, citing approvingly *Making Your Case: The Art of Persuading Judges* by Antonin Scalia and Bryan A. Garner.[82]

In a recent case out the Eastern District of Missouri, the trial court pointedly took counsel to task for their written incivility, noting that they had "been unusually disrespectful toward each other throughout this case, and their filings often require[d] the Court to muddle through petty gripes and bickering to find the substance of the issues. This type of conduct is unprofessional and does a disservice to both the parties and the Court."[83]

Written arguments that are not so overtly distasteful have also garnered the ire of some courts. For example, in *In re Wilkins*,[84] the appellant's attorney was disciplined for including in his brief a statement in a footnote that was deemed to impugn the credibility of the lower appellate court in violation of Indiana Rule of Professional Conduct 8.2(a).[85] The offending footnote unnecessarily expressed just how wrong the attorney believed the court of appeals was and implied that the case had been prejudged. He wrote: "The [Court of Appeals] Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." For this the attorney was originally subject to a suspension from practice for his impertinent sentence, but that was later reduced to a public reprimand. Still, this vividly demonstrates how seriously courts take professionalism in discourse, especially when a fellow member of the bench is the target of a questionable accusation.

Along the same lines, there seems to be a broader trend towards directing harsh criticism towards judges, questioning their competence, integrity, and ability to remain impartial.[86] Judicial decisions, of course, should not be above reproach. Judges are human; they err and when they do, it is legitimate to criticize their handiwork, so long as that is done in a civil,

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[78] *Id.*
[79] 499 Fed. Appx. 23 (Fed. Cir. 2012).
[80] *Id.* at 27, n.4.
[81] *Id.*
[82] *Id.*
[83] *Gierer v. Rehab Medical, Inc.*, 2017 WL 976931, at *2, n.2 (E.D. Missouri 2017).
[84] 782 N.E.2d 985 (Ind. 2003).
[85] Rule 8.2(a) provides that: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge . . .. *Id.* at 986.
[86] *See generally* Beverley McLachlin, *Civility in the Age of the Internet: Criticizing the Courts*, 49 IND. L. REV. 85 (2015).

professional manner. Caustic, uncivil personal attacks lodged at members of the bench, however, are never appropriate and tend to undermine the rule of law and the perception of justice. Unfortunately, this sort of invective has been employed of late at the highest level of our government, with President Trump questioning on various occasions the competence and impartiality of judges who ruled against the administration's proposed "travel ban."[87] Even more troubling, while still a candidate for the presidency, Trump personally attacked the integrity of U.S. District Court Judge Gonzalo Curiel, publicly expressing doubt as to whether he could be impartial in the Trump University litigation because of his "Mexican heritage."[88]

While particularly jarring when uttered by the leader of the free world and undoubtedly damaging to the perceived sanctity of the judiciary, the President is not a lawyer. Of course, that should not insulate him from criticism for his impugning of the federal judiciary,[89] but it does allow for some rationalization—he is not trained in the law and may not truly get it. Lawyers, however, have absolutely no excuse. They know better, and thus should do better. Sadly, though, some attorneys too are prone to utilizing sharp, unprofessional, and demeaning rhetoric in reference to judges.[90]

E. Nature of Judicial Responses to Uncivil Conduct

Interestingly, notwithstanding the examples discussed above, the vast majority of courts seem more predisposed to address uncivil behavior by delivering a written rebuke to counsel, often noting that even though no specific ethics rule had been violated, the offending conduct was still worthy of judicial disdain. For example, a South Carolina Bankruptcy Court scolded attorneys for incivility in their filings and when appearing before the court, proclaiming that: "This court will not tolerate from either party any language in any document, pleading, or motion, or conduct at any hearing that is not civil in tone or that is vulgar, offensive or threatening. While sanctions were not considered today, sanctions may be appropriate for procedurally deficient motion filed in the future and for incivility . . .."[91]

Many courts relegate such lectures to footnotes. In *Gonzalez-Bermudez v. Abbott Lab. PR, Inc.,*[92] the U.S. District Court for Puerto Rico expressed displeasure with the plaintiff's response to the defendant's motion for summary judgment, which the court indicated, at times,

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[87] *See* Nina Totenberg, *Trump's Criticism Of Judges Out Of Line With Past Presidents*, NPR, https://www.npr.org/2017/02/11/514587731/trumps-criticism-of-judges-out-of-line-with-past-presidents.
[88] *See Donald Trump Says Judge in University Court Case Biased by "Mexican Heritage"*, THE GUARDIAN (June 2, 2016), https://www.theguardian.com/us-news/2016/jun/03/donald-trump-judge-curiel-university-case-biased-mexican.
[89] *See, e.g.*, Totenberg, *supra* note 87.
[90] *See, e.g., Grievance Administrator v. Fieger*, 719 N.W.2d 123, 131 (Mich. 2006) (attorney disciplined under Rules 3.5(c) and 6.5(a) of the Michigan Rules of Professional Conduct for radio comments directed at court of appeals judges in one of his cases, including referring to them as "Adolf Hitler," "[Joseph] Goebbels," and "Eva Braun").
[91] *In re Nettles*, 354 B.R. 90, 94 (Bankr. D.S.C. 2006).
[92] 2016 WL 5899147 (D. P.R. 2016).

dripped with sarcasm and utilized a tone that "occasionally border[ed] on vitriolic."[93] The court proceeded to soundly sermonize and threaten counsel:

> While we understand that a party's attorney is tasked with zealously defending his/her client's interests, the court reminds the appearing attorneys that "[c]ivility in litigation is a value that must be protected . . .. Members of the bar must treat each other, as well as parties and witnesses, in a civil, respectful, and courteous manner." . . . Counsel are forewarned that they are expected to adhere to the applicable ethical standards in the way they comport themselves in all proceedings before the undersigned. Any deviation will result in sanctions.[94]

Powerful stuff, but tucked away in the netherworld of a postscript.[95] This sort of veiled approach seems to send somewhat of a mixed message. If the conduct is so abhorrent, why are judges reluctant to do anything more significant about it? Will a footnote really have any impact on lawyers' behavior in the future? It seems doubtful, unless the attorney appears before the same judge on multiple occasions.

While actual sanctions and discipline are likely to capture the attention of lawyers and make them think twice before venturing down the dark path of incivility, scolding with no tangible consequences is little more than noise. Judges who adopt this strategy are no better than the parent who threatens a child with punishment the next time they carry out a specific bad act—"If you ever do that again, you won't leave your room for a week!" However, almost inevitably the ire of the moment cools and when the next time arrives, nothing happens. The child, of course, ceases to take such threats seriously. Why behave if nothing is ever going to happen? Lawyers can develop the same sort of I-can-get-away-with-it mentality when chastised in a shrouded and inconsequential manner by courts for uncivil behavior.

IV. WHY DO LAWYERS ENGAGE IN UNCIVIL CONDUCT?

The foregoing section provided a sampling of the types of uncivil behavior in which attorneys are prone to engage. The wrongful conduct in each instance was met with negative reactions from opposing counsel, the bench, or disciplinary authorities. Even the scolding, though somewhat diluted in terms of strength, still had to sting. Why then do lawyers persist in utilizing such tactics? The following are some possible explanations.

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[93] *Id.* at *1, n.3.
[94] *Id.* (citations omitted).
[95] *See also Daggett v. Waterfront Commission of N.Y. Harbor*, 2017 WL 3638872, at *8, n.10 ("The Court places a premium on civility, professionalism, and perhaps most of all, writing that is concise and clear. Notwithstanding the parties' differences, the Court expects the parties' lawyers to bear this in mind for any future motion practice or, if necessary, oral argument.").

"He/She Hit Me First"

Throughout this paper I have drawn analogies between attorney misbehavior and that of children. Fittingly, the first potential rationale for uncivil conduct is to point the finger at the other party, as kids are so often likely to do. "Why did you hit your brother?" Answer: "He hit me first." This is a lame excuse when a child offers it and even more lame when proffered by an adult who is a licensed professional. Moreover, it may very well just represent an attempted cover for aggressive behavior that the attorney would have employed in any event. To the extent that a lawyer was truthfully dragged into the mud by opposing counsel, that is simply no excuse. Professionals should know better.

"My Client Expects Me to Behave This Way"

Attorneys often believe that what their clients want—true or not—is a bulldog, someone who will go to the mat for them and do whatever it takes to achieve a successful result. Even if they are correct about their clients' desires, however, they conflate loyal, diligent representation with abusive conduct. They fail to recognize that one need not be uncivil and abusive to be aggressive and committed to a client's cause. Moreover, if clients indeed have some ill-conceived notions about what constitutes appropriate zealous advocacy, it is incumbent upon counsel to disabuse them of their misperception rather than acceding to it.

"Litigation is a Battle, a Fight, not a Tea Party"

Mike Tyson didn't get in the ring and hug his opponents before or during a fight–he wanted to win, and he would do whatever was necessary to accomplish that goal, even biting an ear here or there. Many lawyers approach litigation in precisely the same fashion. They do not come to the courtroom or the deposition to "make nice." Litigation, in their minds, is purely a battle, a contest. Good sports finish last in their view.

"To Gain a Tactical Advantage—Get into my Adversary's Head"

This rationale operates on the presumption that uncivil conduct works to provide an attorney with an advantage over opposing counsel. We witness this all the time in competitive sports. Athletes try to get into one another's heads, annoying each other to the point where they are no longer focused on the game. Typically, there, as in litigation, the objective is to intimidate or anger the other side, so as to make it more difficult for him or her to stay on task. Being incessantly obnoxious and difficult to work with can cause one's adversary to want to get the case over with as quickly as possible, rather than continue to deal with such a lawyer.

While tactical incivility may at times give a litigator an edge, I think that mostly it is just a perception of the wrongdoer. Lawyers of this ilk believe it works, so they persist in doing it, but it probably isn't really making much of a difference. In fact, it is more likely than not that the uncivil conduct works to the attorney's and his or her client's detriment.

"I am Just a Jerk; I Can't Help It"

This one has to be true. Some people are simply innately unpleasant. They operate in this manner with regard to all interpersonal dealings. They were bullies as children and now they are the same bullies, just of a larger variety. Obviously, this explanation is not a valid excuse. Everyone is capable of changing if they are willing to put forth the effort.

"Poor Law School and Post-Law School Training"

Civility and professionalism are usually not at the top of the list in terms of what law professors teach. Emphasis is placed on complex theories, rather than practicality. Moreover, the academy can often be one of the more uncivil places, thus serving as a poor model for impressionable law students. Many graduate without appreciating the importance and benefits of civility. That is a shame, and I certainly hope that my students don't fall into this category.

Post-law school training seems similarly weak. A number of jurisdictions have formal mentor programs, which can be helpful, but these are no substitute for steady, hands-on training. Poorly trained lawyers will tend to mimic what other, more experienced lawyers do. This is often a recipe for instilling bad habits. Surprisingly, lack of training has actually been accepted by some courts in partially excusing uncivil behavior.[96]

"That's What They do on Television and in the Movies"

Sad as it may seem, some lawyers actually emulate what they see on television or in the movies, either because that is what their clients come to expect or because they are simply woefully misguided. I personally witnessed this carried out live by a second-year law student at a law school that shall go unnamed. In conducting a mock cross-examination, this student literally channeled the prosecutor from *My Cousin Vinny*, asking questions and then dramatically repeating answers to the jury.[97] I asked him if he was joking around, and depressingly, he told me "no."

"Perceived Tension Between Zealous Advocacy and Civility"

Noted legal ethics scholar Monroe Freedman was highly skeptical of the civility movement because of its seemingly targeted focus on certain types of lawyers, namely those zealously representing unpopular clients. Specifically, he maintained that: "One of the most serious attacks on the traditional ethic of zeal goes under the deceptively benign banner of increasing civility, courtesy, and professionalism among lawyers. The proponents of these notions mean a variety of very different things, but the end result is the subordination of zealous

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[96] *See, e.g.*, *Marino v. Usher*, 2014 WL 2116114, at *7 (E.D. Pa. 2014) ("I reluctantly accept that [counsel's] conduct was, at least, in part, a function of the grotesquely exaggerated zeal common to less experienced lawyers. Accordingly, although I condemn [counsel's] discovery behavior, I decline to impose sanctions on that basis.").

[97] *See* Reardon, *supra* note 6 (noting the potential influence of "outrageous media portrayals" on lawyer incivility).

representation to vague and sometimes unethical notions of civility."[98] Though understandable, the general, more popular consensus is that civility is actually consistent with zealous advocacy and the fair and efficient administration of justice.

V. THE EFFECTS OF INCIVILITY VERSUS THE BENEFITS OF CIVILITY

The effects of incivility are overwhelmingly negative, damaging both personally and systemically. First, and perhaps foremost, engaging in such conduct is harmful to one's reputation. Judges and other lawyers will come to identify an uncivil lawyer as "that" person with whom no one wants to litigate or be associated. As noted earlier, an unsavory disposition may cause some opposing counsel to accede to the uncivil lawyer's demands in order to evade him or her, but more than likely this will not be the case. Rather, it will almost assuredly lead to the further negative effect of harming the client's case. Opposing counsel will be less willing to cooperate and work with the lawyer, which can hurt the client. And more importantly, to the extent that the judge becomes aware of the lawyer's misbehavior, it could affect his or her decisions in the case. After all, judges are not robots.[99] They can be offended by overt, in-your-face type of misconduct or even through less caustic written overstatement. In *Bennet v. State Farm Mutual Auto Ins. Co.*, the Sixth Circuit criticized counsel for referring to the opposing party's principal argument as "ridiculous."[100] It went on to state that one reason to avoid such rhetoric is "civility," adding that it is a "near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief)."[101] The better practice, the court informed counsel, "is usually to lay out the facts and let the court reach its own conclusions."[102] The "ridiculous" label utilized in this case was especially problematic because the court found the derided argument to be correct.[103]

Incivility also inevitably leads to an increase in the cost of litigation—bickering takes time. Justice Sandra Day O'Connor has perceptively observed that "incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent."[104] Similarly, it causes delay, often to the client's detriment, but certainly to the system's detriment.

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[98] FREEDMAN & SMITH, *supra* note 5, at 119. *But see* Sandra Day O'Connor, *Professionalism*, 76 WASH. U.L.Q. 5, 9 (1998) (acknowledging the contention that civility is diminishes zeal, but maintaining that the contrary is actually true—incivility disserves clients). Freedman also observed that civility advocates often wax nostalgically about the good old days when lawyers were more respectful and kind to one another. Such musings, however, in Freedman's view is simply mythical pining for a forgotten era that never existed. *Id.* at 119, n.341.

[99] *See* Reardon, *supra* note 6 (maintaining that "the fact that a lawyer was disrespectful or used bad behavior cannot help but register on the judge's consciousness . . . and if the judge has a choice between ruling in favor of the client whose lawyer was civil and professional or in favor of the client whose lawyer has been a troublemaker, the Judges-Are-Human rule may well control").

[100] 731 F.3d 584, 584-85 (6th Cir. 2013).

[101] *Id.* at 585.

[102] *Id.*

[103] *Id.*

[104] O'Connor, *supra* note 98, at 9.

As the Texas Supreme Court and Court of Criminal Appeals put it, "[s]uch behavior does not serve justice but tends to delay and often deny justice."[105]

On a more personal level, incivility heightens job stress and generally makes practicing law less enjoyable.[106] And it is the unpleasant experiences that unfortunately usually stand out most in an attorney's mind. I recently had one of my former colleagues from Alston & Bird speak to my Law and Ethics of Lawyering class on the subject of "ethics in advocacy," and he made the observation that what he remembers about matters and talks about the most are those lawyers who were jerks. Such unsavory memories come to the forefront and for some lawyers can become the dominant mindset leading to a complete aversion to the practice of law. They become disgruntled and end up leaving the profession altogether or at least the litigation realm of it. Not unexpectedly, many quality attorneys are driven away by recurrent encounters with uncooperative Rambo litigators.

The tendency to dwell on the negative, though, causes lawyers to fail to appreciate the enormous benefits that come from acting in a civil manner. Of course, the punitive consequences that can flow from uncivil behavior as demonstrated by the examples above provide an incentive for lawyers to conduct themselves in a professional manner. However, such lessons are not as likely to stick as the realization of the innate benefits to both clients and attorneys that can flow from carrying out representations with civility and collegiality. As one court aptly put it, "Cooperation between opposing counsel is entirely consistent with a lawyer's obligations to his or her client, and ensures the efficient and rational resolution of civil litigation."[107] The Federal Rules of Civil Procedure echo this sentiment, as they are replete with provisions that encourage or require cooperation and eschew gamesmanship, beginning with Rule 1. Notably, this provision was amended in 2015 to make it incumbent upon "the parties" (and by extension, the lawyers) to construe, administer, and employ the Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding."[108] Various discovery-related amendments in recent years have similarly tasked counsel to work together constructively to ensure the fair and efficient administration of justice.[109]

More broadly, Justice O'Connor has expressed the view that civility redounds to the benefit of every aspect of the legal profession. According to her, "[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."[110]

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[105] Justice Douglas S. Lang & Haleigh Jones, *Can Courts Require Civil Conduct?*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 222, 227 (2016) (quoting the order adopting The Texas Lawyer's Creed – A Mandate for Professionalism).

[106] *See* Reardon, *supra* note 6 (observing that "lawyer job satisfaction is often correlated with unprofessional behavior by opposing counsel").

[107] *Marino v. Usher*, 2014 WL 2116114, at *7 (E.D. Pa. 2014).

[108] FED. R. CIV. PROC., R. 1 (2017).

[109] *See, e.g.*, FED. R. CIV. PROC., R. 26(b)(5)(B) (2017) (dealing with return of inadvertently produced privileged materials).

[110] O'Connor, *supra* note 98, at 8.

Recognition of the tangible benefits that emanate from behaving in a civil fashion is perhaps the best antidote for incivility. If lawyers recognize that they can still be successful, perhaps more successful, without engaging in combative, aggressive tactics, they are much more likely to change. Sanctions, or even scolding by judges, may get their attention for a moment, but for there to be lasting reform, lawyers must believe that there is something about civility that benefits them and their clients. Courts can further this reformation process by openly acknowledging when lawyers' conduct is admirable. Just like with children, positive reinforcement can go a long way towards altering behavior in adults. We all like praise.

Finally, the seemingly precipitous decline in public discourse supplies further incentive for lawyers to act in a more professional manner. As leaders in the community and trained protectors of the public good, it is a ripe moment for us to elevate our conduct and strive to set an example for others to emulate.[111] Staying in the mud will only serve to bring the state of public discourse to an even lower level. It is high time that we, collectively as a profession, heed the longstanding call for reform and take it upon ourselves to go forth and be civil.

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[111] *Cf.* ABA, Resolution 108 (adopted Aug. 8-9, 2011), *available at* https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/civility.authcheckdam.pdf (maintaining that attorneys "are particularly well suited" to assist with the problem of declining civility in public discourse).