

California Attorney Guidelines of Civility and Professionalism

FAQs

(July 2009)

1. What are the California Attorney Guidelines of Civility and Professionalism?

The Guidelines are voluntary goals of best practices of civility in the practice of law in California.

2. Why are California Attorney Guidelines of Civility and Professionalism necessary?

Uncivil or unprofessional conduct not only disserves the individuals involved, it demeans the profession as a whole and our system of justice. The Guidelines promote both the effectiveness and the enjoyment of the practice of law and economical client representation by providing best practices of civility in the practice of law.

3. How were the Guidelines developed?

In 2007, the Board of Governors appointed a task force of attorneys and judges from every State Bar district. The task force recommended the California Attorney Guidelines of Civility and Professionalism to the Board after studying civility codes of other organizations, adapting provisions from those codes and creating new provisions for practice in California, and incorporating feedback from members, judicial officers, the public, organizations and others in two periods of public comment and two public hearings.

4. Why are there two sets of Guidelines?

The two versions are complementary. The version with examples gives detail to illustrate problem areas and best practices for the subject of the Section. The two-page version is a concise summary that can be conveniently carried by the attorney when out of the office.

5. Do the Guidelines create standards of conduct or standards of care?

No. The Introduction says they do not create standards of conduct or standards of care, and they do not supplant any rules or laws that govern attorney conduct. The Guidelines are not an independent basis for imposition of discipline or a finding of malpractice.

6. How are the Guidelines different from the Rules of Professional Conduct or laws on the practice of law in California?

Unlike the California Rules of Professional Conduct, the Supreme Court of California has not approved the Guidelines or mandated that California attorneys follow the Guidelines. Similarly, the Guidelines do not have the force of legislative enactments.

7. Are the Guidelines mandatory?

The Guidelines are cast in terms of “should”, not “must”. The State Bar follows the usage conventions of the California Supreme Court, which is that “should” expresses a preference, a nonbinding recommendation or non-mandatory conduct.

8. If they are not mandatory, why should an attorney abide by the Guidelines?

Civility in the practice of law promotes effectiveness and enjoyment of the practice of law. They also promote economical client representation. Conversely, uncivil conduct not only disserves clients, it demeans the profession and the American system of justice.

9. Are these Guidelines for statewide, local, law firm or individual use?

The Guidelines may be adopted for use by any or all of these. Courts, too, may adopt or endorse the Guidelines as best practices to be followed.

10. If the guidelines are adopted by our local bar association or law firms, what should be done to implement them?

Entities implement the Guidelines in a variety of ways to keep them viable, alive, and relevant. The Guidelines can be implemented by a number actions, including the following: through MCLE programs; by publicizing in bar association directories those attorneys who have taken the pledge; through local courts endorsement of the Guidelines; publicly posting the Guidelines and signed pledge; writing news articles on the subject of civility and professionalism; and through a mentor system for best practices of civility in the profession.

11. My organization already has a code of professionalism. How do the Guidelines relate to my organization’s code of professionalism?

The Guidelines are intended to be complementary with codes of professionalism adopted by bar associations in California.

12. Do the Guidelines denigrate an attorney’s duty of zealous representation?

No. Attorneys are officers of the court with responsibilities to the administration of justice, the courts, the public, and other counsel, in addition to attorneys’ duties to their clients. Civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation are all essential to the fair administration of justice and conflict resolution.

13. Why do some Guidelines seem redundant to local rules of court or some rules of professional conduct?

The Guidelines address problems in conduct that have been observed as arising from a local rule of court or other prescribed rule. The examples given in the Guidelines illustrate what do to, or not do, to address a particular situation.

14. There is no statement that the Guidelines are enforceable through sanctions. Is this intentional?

Yes. Sanctions can be expected to lead to a less collegial relationship among counsel, and tend to undermine the civility effort. Sanctions also tend to increase the costs and expenses of the case.

15. Section 16 seems to diverge from existing law. What is the reason for this?

When an attorney has any close, personal relationships with judicial officers, neutrals and court appointed experts, the law places a burden of disclosure on the judicial officer. The Guidelines go beyond that burden, so that as a matter of courtesy and to avoid a waste of court resources, an attorney should notify an opposing counsel of party if the attorney has a close, personal relationship with one of these categories of people.

16. There is nothing in the Guidelines for my area of law. Do they apply to me?

Yes, they could. The Guidelines are potentially applicable to all California attorneys. To avoid becoming unwieldy, the Guidelines do not cover all areas of law. However, to the extent that the guidelines could apply to areas of practice that are not mentioned, the spirit of the Guidelines would permit extending them as appropriate.

*39th National Conference on Professional Responsibility – May 30-31, San Antonio, Texas
Seminar: Making Civility Mandatory: Holding Attorneys to a Higher Standard of Conduct*

Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct

David A. Grenardo*
St. Mary's University School of Law
Assistant Professor of Law
San Antonio, Texas

**ENFORCING CIVILITY: HOLDING ATTORNEYS TO
A HIGHER STANDARD OF CONDUCT**

As there continue to be incidents of attorneys slapping opposing counsel at depositions, attorneys personally attacking each other during litigation (including in one case disparaging remarks about an attorney's alleged lack of parenting ability), and numerous other rude and disrespectful behavior by attorneys, incivility remains a pervasive problem in the legal profession.¹ The response thus far to incivility by the legal profession includes voluntary civility codes and calls for professionalism.² These responses fail to address the systemic issue of incivility in the legal profession.³ As a result, several states added civility to their oaths of admission, while several jurisdictions took the final step by making civility mandatory.⁴

This article discusses how civility can be enforced, as well as the benefits of mandatory civility and the purported disadvantages of mandatory civility.⁵ This article concludes that state bars should make civility mandatory and hold attorneys to a higher standard of conduct.⁶ As the former United States Supreme Court Justice Sandra Day O'Connor said, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."⁷

Jurisdictions Currently Enforcing Civility

As stated above, a handful of jurisdictions – Arizona, Florida, Michigan, South Carolina, and the United States District Court for the Northern District of Texas – have made civility mandatory.⁸ Arizona, for example, mandates civility through an Arizona Supreme Court rule "that prohibits 'substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism'"⁹, while Michigan mandates civility through two rules of professional conduct referred to as its civility or courtesy rules, and South Carolina relies on its attorney oath, which is discussed below in detail.¹⁰

Other jurisdictions may recommend civility through civility codes, which provide suggested best practices for attorneys, or non-mandatory civility oaths, such as New Mexico and Utah, but these efforts fail to prevent the widespread epidemic of incivility that plagues the legal profession.¹¹ As a result, mandatory civility should be employed by all state bars.¹² The following are the major requirements for enforcing civility.¹³

Necessary Elements For Enforcing Civility

Sanctions

Enforcing civility requires that attorneys' uncivil behavior can be punished or sanctioned.¹⁴ The practice of law is a privilege, not a right, and state bars have the authority and power to regulate attorney conduct, including incivility.¹⁵ Without consequences for uncivil behavior, some in the legal profession will be reluctant to change their behavior.¹⁶

Each state bar could regulate civility in the same manner it regulates its ethics rules (i.e., its rules of professional conduct).¹⁷ State bars could add civility rules to their rules of professional conduct, just as Michigan did, or state bars could incorporate civility rules through their attorney oaths or other rules.¹⁸ The civility rules should also be state specific based on the norms in each state.¹⁹ The disciplinary mechanisms already in place in each state that investigate, adjudicate and impose sanctions based on violations of the rules of professional conduct for each state, could also enforce civility.²⁰ In some cases, the sanction for incivility could be a private reprimand, while in other cases suspension may be warranted.²¹ Also, if an attorney committed uncivil acts based on substance abuse problems or a death in the family, then the proper sanction might be

court-ordered substance abuse programs or grief counseling, respectively.²² Disbarment would be an unlikely sanction.²³

Rules

Civility in the legal profession is generally defined as “treating others-opposing counsel, the court, clients, and others-with courtesy, dignity, and kindness.”²⁴ Civility for an attorney means treating opposing counsel the way the attorney would want to be treated – i.e., the golden rule.²⁵

Enforcing civility requires more than a general definition.²⁶ It requires rules that give attorneys notice of the behavior for which they may be sanctioned.²⁷

The following are ten rules for mandatory civility, along with comments (similar to what the ABA Model Rules of Professional Conduct use) to provide further guidance to the rules.²⁸ These rules align with the core concepts revealed by a 2011 study on the approximately 140 civility codes found across the nation.²⁹

1. I shall be courteous and civil, both in oral and in written communication.³⁰

Comment: A lawyer shall avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He/she shall abstain from any allusion to personal peculiarities and idiosyncrasies of opposing counsel.³¹ Derogatory racial, gender, or ethnic comments are unacceptable.³²

2. I shall advise my clients that civility, courtesy, and fair dealing are expected.³³

Comment: Civility, courtesy, and fair dealing are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in offensive or improper conduct.³⁴

3. I shall, when practical, consult with opposing counsel before scheduling hearings and depositions in a good faith attempt to avoid scheduling conflicts.³⁵

Comment:

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

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

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

(a) Exceptions to General Guidelines

(1) A lawyer who has attempted to comply with this rule is justified in

setting a hearing or deposition without agreement from opposing counsel if opposing counsel fails or refuses promptly to accept or reject a time offered for hearing or deposition.

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

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

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

(5) In cases involving extraordinary remedies where time associated with scheduling agreements could cause damage or harm to a client's case, then a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.³⁶

When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.³⁷

4. I shall grant reasonable extensions of time to opposing counsel where such extension will not have a material, adverse effect on the rights of the client.³⁸

Comment:

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

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

(c) Counsel shall make every effort to honor previously scheduled vacations of opposing counsel which dates have been established in good faith.³⁹

5. I shall be punctual and prepared for all meetings, depositions, court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.⁴⁰

6. I shall not utilize delay tactics.⁴¹

Comment: I shall readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.⁴²

7. In depositions and other proceedings, and in negotiations, I shall conduct myself with dignity, avoid making groundless objections, and not be rude or disrespectful.⁴³

Comment: Never engage in conduct which would not be appropriate in the presence of a judge. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to

preserve an objection or privilege for resolution by the court.⁴⁴ “Speaking objections” during depositions designed to coach a witness are impermissible.⁴⁵

8. I shall identify clearly, for other counsel or parties, all changes that I have made in documents submitted to me for review.⁴⁶

9. I shall adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.⁴⁷

10. I shall never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.⁴⁸

Not only are rules necessary to enforce civility, but the following are also critical elements: “(1) educating law students about civility and what it requires; (2) providing mandatory classes to attorneys on civility, including what that jurisdiction requires; (3) educating judges about their ability to sanction attorneys for uncivil conduct and what civility requires; and (4) consistent enforcement of the civility rules by judges.”⁴⁹

Advantages of Mandatory Civility

Former United States Supreme Court Justice Sandra Day O’Connor summarized the benefits of civility, stating, “More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public’s perception of lawyers.”⁵⁰

Courts and others have agreed.⁵¹ “The dignity, decorum, and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney’s responsibility for the fair and impartial administration of justice.”⁵² The Third Circuit asserted, “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.”⁵³ Likewise, the Ninth Circuit stated, “Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect.”⁵⁴

As a result, “civility is critical because it makes the administration of justice more efficient and it increases the public’s confidence in the legal system, both of which are invaluable benefits to the legal profession.”⁵⁵

Disadvantages of Mandatory Civility

The opponents of mandatory civility argue that the following are the major disadvantages of requiring civility from attorneys: (1) enforcement of civility would be too subjective; (2) mandatory civility would inhibit zealous advocacy; (3) civility rules inhibit First and Fourteenth Amendment rights; and (4) civility would be too costly to enforce.⁵⁶

Subjectivity

One of the purported disadvantages of mandatory civility is enforcement would be difficult because it would involve too much subjectivity.⁵⁷ A judge would have too much discretion when ruling on incivility issues.⁵⁸ As an initial matter, in response to this argument, if states adopt specific, straightforward civility rules, then judges should be able to enforce them.⁵⁹ Second, judges must enforce rules in a consistent manner every day, and if the public or attorneys believe that judges cannot enforce legal rules consistently and properly, then the entire judicial system would be completely unreliable and ineffective.⁶⁰ Third, rules of professional conduct are already enforced, and subjectivity is involved with their enforcement.⁶¹

For example, the professional rule of conduct for diligence, which is Rule 1.3 under the ABA Model Rules of Professional Conduct (“Model Rules”), provides, “Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.”⁶² The application of this rule requires subjectivity as the rule fails to provide how a court measures diligence or what precisely reasonable promptness is.⁶³ Consider the following hypothetical:

If the client tells her lawyer that she wants a letter sent to opposing counsel within the next two weeks regarding a deposition date for a third party witness, and the attorney does not send it until four weeks later, has there been a violation of reasonable promptness? Does it matter whether the attorney was in trial when the client made the request to the attorney to send the letter? Does it matter whether the client was not adversely affected by the letter being sent out four weeks after the request?⁶⁴

The result in this case, as in any case, would depend on the specific facts – a case-by-case analysis – regardless of the broad language of the rule.⁶⁵

Simply because subjectivity may be necessary to rule on a civility issue, that does not mean civility rules should be abandoned.⁶⁶ The rules of professional conduct require subjectivity for enforcement, but no one would argue that those should be abandoned.⁶⁷ The rules of professional conduct serve their purpose in protecting the legal profession, the legal system, and society, and civility rules do the same.⁶⁸

Zealous Advocacy

Another purported disadvantage of mandatory civility is that requiring civility would inhibit zealous advocacy.⁶⁹ The essence of the argument is that an attorney’s “ethical duties of competency and zealous representation may compel lawyers to engage in behavior or to speak in a manner others find disrespectful or uncivil.”⁷⁰ Also, zealous advocacy “may be inconsistent with the obligation to cooperate and to forego certain advantages that may arise in the course of litigation.”⁷¹

The arguments regarding zealous advocacy fail for several reasons. One, zealous advocacy should not be used as a shield for uncivil conduct because zealous advocacy and civility can and should be compatible.⁷² For example, the Model Rules require zealous advocacy “*while* maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”⁷³ Comments to Model Rule 1.3, regarding diligence, state that the “lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”⁷⁴

Two, not only are civility and zealous advocacy compatible, but civility can enhance zealous advocacy.⁷⁵ For example, attorneys oftentimes serve as the primary negotiators for their clients during settlement negotiations.⁷⁶ If the attorneys are personally attacking each other, then it may take more time to settle the case, and it will likely be more difficult to settle, which means higher costs for the clients to pay for the additional time spent negotiating.⁷⁷ Also, a judge or jury may find an attorney exhibiting uncivil behavior as less credible, which may negatively affect the outcome of the client's case.⁷⁸

Third, “[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁷⁹ A lawyer's various roles must guide his/her behavior in conjunction with zealous advocacy, understanding that an efficient legal system is undermined by uncivil conduct.⁸⁰

Fourth, looking at the suggested mandatory rules in light of the zealous advocacy argument demonstrates the ineptitude of the zealous advocacy argument.⁸¹ For instance, suggested rule number one states:

I will be courteous and civil, both in oral and in written communication.⁸²

Comment: A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He should abstain from any allusion to personal peculiarities and idiosyncrasies of opposing counsel.⁸³ Derogatory racial, gender, or ethnic comments are unacceptable.⁸⁴

Personal attacks against opposing counsel, including attacks based on someone's gender, race, or ethnicity, are not necessary to advocate zealously on behalf of a client.⁸⁵ In the South Carolina case discussed below, the court held that zealous advocacy did not excuse a lawyer's personal attack on opposing counsel regarding opposing counsel's daughter and the ability of opposing counsel as a parent.⁸⁶ Zealous advocacy can be aggressive, robust, adversarial, and civil.⁸⁷

Suggested mandatory civility rule number five states, “I shall be punctual and prepared for all meetings, depositions, court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.”⁸⁸

Zealous advocates are typically well-prepared and punctual.⁸⁹ If an attorney is not fully prepared to take a deposition, then the deposition may take longer to complete because the questioning may not be as efficient as possible.⁹⁰ The longer the deposition takes, the higher costs will be for all of the parties.⁹¹ If a deposition starts late because of a tardy attorney, then the prompt attorney's client will also incur costs for the waiting time.⁹² Thus, the civility rules promote, rather than inhibit, zealous advocacy.⁹³

First and Fourteenth Amendments

Opponents of civility argue that another major disadvantage of mandatory civility would be that it inhibits constitutionally protected rights, including free speech under the First Amendment because mandatory civility is overbroad, and due process and fair notice under the Fourteenth Amendment because it is vague.⁹⁴ As set forth above, however, if states adopt specific rules for civility, then an attorney should know what speech is proper and what behavior constitutes incivility.⁹⁵ In the case of *In re Anonymous Member of S.C. Bar*, the South Carolina Supreme

Court addressed the issue of the infringement of constitutional rights with regard to mandatory civility and held that South Carolina's oath requiring civility is constitutional and does not violate the First or Fourteenth Amendment.⁹⁶

The oath in South Carolina states, in pertinent part, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications..."⁹⁷ In *Anonymous*, the attorney accused of uncivil behavior (the "Respondent") represented the mother and opposing counsel represented the father in a contentious domestic matter.⁹⁸ The Respondent sent opposing counsel the following email:

I have a client who is a drug dealer on ... Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near ...Street. Think about it. Am I right?⁹⁹

Opposing counsel's daughter had nothing to do with the domestic dispute where Respondent and opposing counsel represented adverse clients.¹⁰⁰ As a result, the wife of opposing counsel, who was also an attorney, brought the civility complaint against Respondent.¹⁰¹

The Respondent argued that the civility oath was unconstitutional. The South Carolina Supreme Court held otherwise. With respect to the First Amendment, the South Carolina court cited the United States Supreme Court, "Even outside the courtroom, [...] lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be."¹⁰² In accordance with the overbreadth doctrine, which seeks to prevent the chilling of constitutionally protected speech, the court balanced the state's interest in regulating the legal profession against a lawyer's First Amendment interest in the type of speech at issue.¹⁰³

The South Carolina Supreme Court stated that "[t]he interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked [opposing counsel]."¹⁰⁴ The Court held that attorneys attacking each other personally in the manner that Respondent did "compromises the integrity of the judicial process" and "undermines a lawyer's ability to objectively represent his or her client."¹⁰⁵ Thus, there was not any substantial amount of protected free speech condemned in relation to the state's interest concerning the regulation of the legal profession.¹⁰⁶

With regard to the Fourteenth Amendment argument concerning vagueness, and thus due process and fair notice, the South Carolina Supreme Court applied the test of whether the law "forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application."¹⁰⁷

The South Carolina Supreme Court determined that “even a casual reading of the attorney’s oath would put a person on notice that the type of language used in Respondent’s ‘Drug Dealer’ e-mail violates the civility clause.”¹⁰⁸ In particular, “Casting aspersions on an opposing counsel’s offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause.”¹⁰⁹ Also, a person of common intelligence could understand the meaning of the South Carolina civility oath.¹¹⁰ Thus, the Supreme Court held that the civility oath did not violate the Fourteenth Amendment.¹¹¹

The suggested mandatory civility rules in this article provide, just as South Carolina’s civility oath does, fair notice of what is required by attorneys, and the suggested civility rules do not chill the use of protected free speech.¹¹²

Costly to Enforce

Another purported disadvantage of mandatory civility is that it would be too costly to enforce.¹¹³ Provided state bars enforce civility just as they do the rules of professional conduct, then the costs of enforcing civility may not rise at all.¹¹⁴ For instance, if someone makes a complaint about an attorney that includes a lack of diligence and incivility, then that complaint would likely be just as costly before mandatory civility rules existed because the diligence complaint would need to be investigated anyway.¹¹⁵ Also, even if complaints solely regarding incivility arose, then enforcement costs might rise initially, but once civility started to permeate the culture of the legal profession, then there would likely be less incivility and less incivility complaints, particularly if state bars properly sanctioned uncivil behavior, deterring others.¹¹⁶

Another disadvantage regarding the cost of mandatory civility, opponents may argue, would include some attorneys making baseless civility complaints against opposing counsel to harass opposing counsel.¹¹⁷ This argument fails as well. If state bars handle frivolous civility complaints in the same manner they handle frivolous ethical complaints, then the baseless civility complaint would be swiftly dismissed.¹¹⁸ Also, the threat of using rules to harass opposing counsel already exists with ethical complaints, but potential misuse of ethical rules do not warrant the removal of ethical rules – this reasoning similarly applies to civility rules.¹¹⁹ Finally, if mandatory civility rules are successful in changing the culture of the legal profession, then fewer frivolous civility complaints (if they are filed in the first place) will be filed as time passes.¹²⁰

Causes of Incivility

If the legal profession truly wants to dispel incivility, then it must also try to determine the root causes of incivility.¹²¹ The following are some of the major potential causes that should be studied to determine their relationship, if any, with uncivil behavior: the increase in the size of the bar – i.e., the number of attorneys – and whether that, in turn, increases incivility; poor or nonexistent education in law school on civility; clients who request or desire uncivil behavior from their attorneys; “‘individual lawyers’ poor moral character;” and the ‘decline of face-to-face interactions among lawyers’ due to the increase of interaction via technology, such as email.”¹²²

Conclusion

The benefits of mandatory civility, which include a more efficient legal system, better public perception of attorneys, and a more enjoyable practice for attorneys, outweigh any purported disadvantages, such as the alleged preclusion of zealous advocacy or constitutional rights, and the unsubstantiated difficulty with, and costs to, enforce civility.¹²³ All state bars should follow the lead of the several jurisdictions that require civility from its attorneys.¹²⁴ The legal system, the

public, and attorneys themselves should demand today that all lawyers be held to a higher standard of conduct, just as they are in those few jurisdictions that have adopted mandatory civility.¹²⁵

*David A. Grenardo will be joining the St. Mary's University School of Law faculty as an Assistant Professor of Law in the fall of 2013. He teaches Professional Responsibility, along with Contracts, Business Associations, and Civil Procedure. He has presented on ethics on both a national and also a local level. He practiced law in California and Texas for three major law firms (Jones Day, DLA Piper, and King & Spalding) for nearly a decade before joining the legal academy in 2011 as a visiting assistant professor (and he was later promoted to Assistant Professor of Law for the 2012-2013 school year) with the Ave Maria School of Law in Naples, Florida. He has received numerous awards for his pro bono efforts, including the Frank J. Scurlock Award, awarded by the State Bar of Texas, the Harriet Buhai Center for Family Law Pro Bono Panel Volunteer of the Year, the Wiley W. Manuel Award bestowed by the State Bar of California, the San Diego Volunteer Lawyer Program Distinguished Service Award, and Texas Civil Rights Project Pro Bono Champion. He earned his B.A. from Rice University and his J.D. from Duke University School of Law. This article would not have been possible without the efforts of the author's research assistants, Vito Roppo and Trevor Thomson.

¹ See, e.g., Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998) (citing Scott Hunter, *Fear and Loathing in the Law Office*, N.J. L.J., Sept. 4, 1995, at 25) (stating that "lawyers far too often breach their professional obligations to other lawyers—that many lawyers are caught up in a system of behavior that is 'structurally, morally, and emotionally exhausted'"); see also *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 636 (S.C. 2011) (citation omitted) (involving the child-rearing insults by one attorney against opposing counsel wherein the court stated that "[w]hen a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disservices his client"); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1263 (9th Cir. 2010) (citing CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 1) (stating that the "dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities" and "[t]hey are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice"); *Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 90 (3d Cir. 1995) (opining that "[t]he extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice"); *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 n.2 (9th Cir. 2000) (opining that "at the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values"); Jennifer Smith, *Lawyers Behaving Badly Get A Dressing Down From Civility Cops*, THE WALL ST. J., Jan. 28, 2013, at A1, available at <http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html> (discussing the pervasive lack of civility in the legal profession); G.M. Filisko, *You're Out of Order! Dealing With The Costs Of Incivility In The Legal Profession*, A.B.A. J. (Jan. 1, 2013, 6:19 AM), http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal/ (same); Debra C. Weiss, *Suit Claims Lawyer Slapped Paul Hastings Partner Because of Violent Finger Shaking, Spittle-Spewing*, ABA JOURNAL LAW NEWS NOW, News, Trials and Litigation, (July 2, 2012), http://www.abajournal.com/news/article/suit_claims_lawyer_slapped_paul_hastings_partner_because_of_violent_finger_/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email. (last visited Aug. 8, 2012).

² David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. ___ (forthcoming 2013) (providing an extensive and fully comprehensive discussion on mandatory civility).

³ *Id.*

⁴ *Id.*

⁵ Grenardo, *supra* note 2.

⁶ *Id.*

⁷ O'Connor, *supra* note 1, at 8.

⁸ Grenardo, *supra* note 2.

⁹ ARIZ. RULES OF THE SUP. CT. R. 41(g) (2012) (providing that attorneys shall “avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which the member is charged”) (citing ARIZ. RULES OF THE SUP. CT. R. 31(a)(2)(E) (2012) (defining unprofessional conduct)).

¹⁰ MICH. RULES OF PROF'L CONDUCT R. 3.5 (2012) (regarding impartiality and decorum of the tribunal, states “[a] lawyer shall not . . . (d) engage in undignified or discourteous conduct toward the tribunal”); MICH. RULES OF PROF'L CONDUCT R. 6.5 (2012) (stating that a “lawyer shall treat with courtesy and respect all persons involved in the legal process,” and a “lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person’s race, gender, or other protected personal characteristic”).

¹¹ Grenardo, *supra* note 2.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ MARGARET RAYMOND, *THE LAW AND ETHICS OF LAW PRACTICE*, 10 (West Publishing Co. 2009).

²¹ Grenardo, *supra* note 2.

²² *Id.*

²³ *Id.*

²⁴ Bronson D. Bills, To Be or Not To Be: Civility and the Young Lawyer, 5 *CONN. PUB. INT. L.J.* 31, 35 n.26 (2005) (citing John M. Burman & William U. Hill, Professionalism and Leadership, 27 *WYO. L. REV.* 16, 17 (2004)) (discussing the difficulty of defining civility and likening it to defining pornography as Justice Stewart said of pornography “I know it when I see it”). See also Melissa S. Hung, Comment: A Non-Trivial Pursuit: The California Attorney’s Guidelines of Civility and Professionalism, 48 *SANTA CLARA L. REV.* 1127, 1131 (2008).

²⁵ Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir.1997); *see also* Grenardo, *supra* note 2; Amy R. Mashburn, Making Civility Democratic, 47 *HOUS. L. REV.* 1147, 1217 (2011) (stating that “[c]ultural and political theorists have put forward a variety of definitions of civility, but most echo these notions of reciprocity and mutual respect”).

²⁶ Grenardo, *supra* note 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ State Bar of Arizona, *A Lawyer’s Creed of Professionalism of State Bar of Arizona*, For Lawyers, Lawyer Regulation, *LAWYER’S CREED OF PROFESSIONALISM*, available at <http://www.azbar.org/membership/admissions/lawyer/screedofprofessionalism> (last visited Aug. 5, 2012); *see* Grenardo, *supra* note 2 (setting forth these ten suggested mandatory civility rules along with several others).

³¹ Dondi Properties Corp. v. Commerce Sav. Loan Ass’n, 121 F.R.D. 284, 296 (N.D. Tex. 1988) (citing *THE AMERICAN COLLEGE OF TRIAL LAWYERS’ CODE OF TRIAL CONDUCT* (rev. 1987)); *see also* Point Blank Solutions, Inc. v. Toyobo America, Inc. Slip Copy, 2011 WL 742657 (S.D. Fla. 2011) (providing that “allegations of bad faith against opposing counsel, in addition to being in poor taste, are not helpful in aiding the Court’s adjudication of disputed issues”); ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE, the Art of Persuading Judges* 34-5 (2008) (advocating that attorneys should “[c]ultivate a tone of civility” and avoid attacking opposing counsel as it “undercuts the persuasive force of any legal argument”) (quoting Morey L. Sear, Briefing in the United States District Court for the Eastern District of Louisiana, 70 *TUL. L.REV.* 207, 224 (1995)).

³² Grenardo, *supra* note 2.

³³ UTAH, ARTICLE 3, STANDARDS OF PROFESSIONALISM AND CIVILITY, R. 14-301.

³⁴ *Id.*, cited in Grenardo, *supra* note 2.

³⁵ DALLAS BAR ASS'N GUIDELINES OF PROF'L COURTESY, DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS.

³⁶ *Id.*

³⁷ *Id.*, cited in Grenardo, *supra* note 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Principles of Civility, Integrity and Professionalism*, American Board of Trial Advocates, Professionalism Ethics and Civility, Principles of Civility, https://www.abota.org/temp/ts_8B7977AD-BDB9-505B-D0009B240E4E3BD38B7977BD-BDB9-505B-D053159BB2C04E85/principlesciv.pdf (last visited Aug. 5, 2012). [hereinafter "ABOTA"].

⁴¹ A Lawyer's Creed of Professionalism, *supra* note 30.

⁴² ABOTA, *supra* note, 40.

⁴³ A Lawyer's Creed of Professionalism, *supra* note, 30.

⁴⁴ DALLAS BAR ASS'N GUIDELINES OF PROF'L COURTESY, DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS, cited in Grenardo, *supra* note 2.

⁴⁵ A Lawyer's Creed of Professionalism, *supra* note 30.

⁴⁶ *Id.*

⁴⁷ ABOTA, *supra* note 40.

⁴⁸ *Id.*

⁴⁹ Grenardo, *supra* note 2.

⁵⁰ O'Connor, *supra* note 1.

⁵¹ *Id.*

⁵² Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1263 (9th Cir. 2010) (citing CAL. ATT'Y GUIDELINES OF CIVILITY & PROFESSIONALISM § 1).

⁵³ Marcangelo v. Boardwalk Regency, 47 F.3d 88, 90 (3d Cir. 1995).

⁵⁴ Ahanchian, *supra* note, 52.

⁵⁵ Grenardo, *supra* note 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012). The states each have a professional code of conduct, many of which are patterned after or nearly identical to, at least in parts, the ABA Model Rules of Professional Conduct ("ABA Model Rules" or "Model Rules").

⁶³ Grenardo, *supra* note 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., Amy. R. Mashburn, *Professionalism In The Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: Professionalism As Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U.L. REV. 657, 1193, cited in Grenardo, *supra* note 2.

⁷¹ 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, 107 (2012), cited in Grenardo, *supra* note 2.

⁷² Grenardo, *supra* note 2.

⁷³ MODEL RULES OF PROF'L CONDUCT, PREAMBLE (2012) (emphasis added), cited in Grenardo, *supra* note 2.

⁷⁴ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2012), cited in Grenardo, *supra* note 2.

⁷⁵ Grenardo, *supra* note 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Att’y Griev. Comm’n of Md. v. Sheinbein, 812 A.2d 981, 998 (Md. 2002) (quoting Att’y. Griev. Comm’n v. Alison, 565 A. 2d 660 (Md. 1989)).

⁸⁰ Grenardo, *supra* note 2.

⁸¹ Grenardo, *supra* note 2.

⁸² N.M. RULES. GOV. ADMISS. BAR R. 15-304

⁸³ Dondi Properties Corp. v. Commerce Sav. Loan Ass’n, 121 F.R.D. 284, 296 (N.D. Tex. 1988) (citing THE AMERICAN COLLEGE OF TRIAL LAWYERS’ CODE OF TRIAL CONDUCT (rev. 1987)).

⁸⁴ Grenardo, *supra* note 2.

⁸⁵ *Id.*

⁸⁶ *In re* Anonymous Member of S.C. Bar, 709 S.E.2d 633 (S.C. 2011).

⁸⁷ Grenardo, *supra* note 2.

⁸⁸ *See, e.g.*, ABOTA, *supra* note 40.

⁸⁹ Grenardo, *supra* note 2.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *In re* Anonymous, *supra* note 86.

⁹⁷ *Id.* at 637.

⁹⁸ *Id.*

⁹⁹ *Id.* at 636.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *In re* Anonymous, *supra* note, 86 at 637 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991)), *cited in* Grenardo, *supra* note 2.

¹⁰³ *In re* Anonymous, *supra* note, 86 at 636-7, *cited in* Grenardo, *supra* note 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Grenardo, *supra* note 2.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Grenardo, *supra* note 2; *see, e.g.*, Judith D. Fischer, Incivility in Lawyer’s Writing: Judicial Handling of Rambo Run Amok, 50 WASHBURN L.J. 365, 366-67 (2011) (regarding numerous potential causes of incivility); Smith, *supra* note 1 (regarding technology as a potential cause of incivility), *cited in* Grenardo, *supra* note 2.

¹²³ Grenardo, *supra* note 2.

¹²⁴ *Id.*

¹²⁵ *Id.*