I. Introduction.

The issues of civility, professionalism and hostility in the legal profession are of perennial interest to litigators. The American Bar Association’s Litigation Section, the College of Labor & Employment Lawyers, a number of courts, and many state and local bar associations have adopted “civility guidelines.” This article explores the current landscape of

1 Gender Equity & LGBT Rights Program Director and Senior Staff Attorney, Legal Aid Society-Employment Law Center, 180 Montgomery Street, Suite 600, San Francisco, CA 94104, ekristen@las-elc.org.
2 EEOC legal intern and law student at Florida International University College of Law, class of 2013.
4 The College of Labor and Employment Lawyers is a membership-based organization for those who have practices and met certain standards, including standards of professionalism and civility for twenty years or more.

civility guidelines, examines the question of whether voluntary guidelines have any beneficial
effect on civility and explores other possible solutions to lack of civility in litigation.5

II. Civility Guidelines in the United States.

A. American Bar Association Litigation Section Civility Guidelines.

The Litigation Section’s civility guidelines, adopted in 1998 are purely aspirational and
modeled on voluntary guidelines in the Seventh Circuit.6 Indeed, the Guidelines are explicit in
saying that they should not serve “as a basis for litigation or for sanctions or penalties.”7 Some
Courts have adopted these Guidelines as part of their local rules.8

The preamble to the ABA Litigation Section Civility Guidelines lays out the case for and
the components of greater civility from both lawyers and judges, indicating that the pursuit of
justice is “a truth-seeking process designed to resolve human and societal problems in a rational,

5 Possible reasons for the rise of incivility include: “over-the-top portrayals of lawyers on TV
and in films, inexperienced lawyers and lack of mentoring, the fuzzy line between aggressive
advocacy and rudeness, the broad platform provided by today’s technology, coupled with the
ability to act anonymously online, the country’s current fractious public discourse.” G.M.
Filsko, You’re Out of Order: Dealing with the Costs of Incivility in the Legal Profession, ABA
Journal 33, 37 (January 2013).

6 http://www.americanbar.org/groups/litigation/policy/conduct_guidelines.html. See also
Melissa S. Hung, Comment, A Non-Trivial Pursuit: The California Attorney Guidelines Of
Civility And Professionalism, 48 Santa Clara Law Review 1127, 1130-31 (2008) (noting that the
increased interest in the topic. The study surveyed almost 1300 attorneys in the circuit, of which
forty-two percent felt civility was an issue. Specifically, many judges and attorneys were
frustrated about the apparent increase in aggressive conflicts at the expense of professional
collegiality. The Circuit’s resulting and highly influential civility code is significant because it
articulated, for the first time, a common set of expectations for judges and attorneys regarding
appropriate behavior.”) (citations omitted).


8 Manuel San Juan, ABA Litigation Section’s Civility Guidelines, Federal Lawyer (February
2001); see also infra note 17 for a resource listing civility guidelines by jurisdiction.
peaceful, and efficient manner.”9 Uncivil conduct, the guidelines note, delays, and sometimes denies justice.10 Leaving aside the topics directed at judges, the specific guidelines cover the following topics: lawyers’ duties to other counsel and lawyers’ duties to the court. The guidelines conclude with “civility pledges.”11

The section of the guidelines on lawyers’ duties to each other is comprised of an enumerated list of 31 such duties. The duties cover topics such as avoiding bias and offensive conduct (#1-2), abiding by our promises (#6-7), seeking out early opportunities for settlement (#8-9), reaching agreements where possible (#9, 11), being fair in matters relating to timing and scheduling (#10, 12-17), and avoiding discovery abuses (#10, 19-27).12 The list of duties to the court is shorter, with only 8 duties, ranging from civil conduct in the courtroom to punctuality in appearances and scheduling.13 “Although the guidelines state nothing novel or revolutionary and are mostly just plain old common sense, they are an important step toward articulating and codifying an overarching set of values for our profession. If we all adhere to these standards,

10 Id.
11 The pledge for employers reads as follows:

As an employer (e.g., law firm, law enforcement agency, regulatory body, governmental agency) of attorneys, we hereby declare that every lawyer who is employed by or associated with us is expected to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. We recognize that overly aggressive litigation tactics and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance legitimate interests.

We further pledge to use our best efforts to assure that all our employees recognize the foregoing Guidelines and do not put lawyers or others employed by us in a position that would compromise their ability to meet the Guidelines for Conduct.

http://www.americanbar.org/groups/litigation/policy/conduct_guidelines/civility_pledge.html

13 Id.
there can be little doubt that litigation practice would be more enjoyable and rewarding. Moreover, the public perception of lawyers and of our system of justice would be greatly and positively enhanced.”

B. The College of Labor & Employment Lawyers.

In 2006, the membership-based College of Labor & Employment Lawyers adopted a set of Guidelines for Civility and Professionalism. The guidelines are required for the College’s fellows but are purely voluntary for other members of our community. The Guidelines address duties to the client, opposing parties and counsel, the court and other tribunals, and the public and the system of justice.

C. California Civility Guidelines.


In 2006, Sheldon Sloan State Bar President noted the problems posed by a decline in civility and created an attorney civility task force. The task force drafted voluntary guidelines and circulated them for comment. The Civility Guidelines were adopted in July 2007. The guidelines cover civil litigation but also include special rules for family and criminal practitioners.

D. Other Bench and Bar Civility Guidelines.

In addition to those described above, numerous other states and courts have adopted civility guidelines. The ABA Center for Professional Responsibility has a collected list of codes of professional conduct and civility (organized by state). One author notes that “over 150 organizations in forty-six states have adopted some type of professional responsibility code.” An analysis of common components of civility codes found that “the most common provisions

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14 San Juan, supra note 8.
16 For additional background on the California process, see Hung, supra note 6 at 1138-40.
17 http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html.
18 Hung, supra note 6, at 1136.
can be categorized into ten overarching themes. … The ten common concepts include the
obligation to[:]

(1) recognize the importance of keeping commitments and of seeking agreement and
accommodation with regard to scheduling and extensions;
(2) be respectful and act in a courteous, cordial, and civil manner;
(3) be prompt, punctual, and prepared;
(4) maintain honesty and personal integrity;
(5) communicate with opposing counsel;
(6) avoid actions taken merely to delay or harass;
(7) ensure proper conduct before the court;
(8) act with dignity and cooperation in pre-trial proceedings;
(9) act as a role model to the client and public and as a mentor to young lawyers; and
(10) utilize the court system in an efficient and fair manner. 19

III. The Effectiveness of Voluntary Civility Guidelines and the Question of Whether
They Should be Mandatory.

We found no study showing any objective efficacy of voluntary civility guidelines and
wondered why the guidelines were not mandatory and violations sanctionable. We found that
mandatory guidelines have been challenged on a number of grounds, including Constitutional
concerns. For example, California Business & Professions Code, part of the Code regulating
California lawyers, used to state that an attorney had to refrain from “offensive personality.” 20
This section was found to be unconstitutionally vague. U.S. v. Wunsch, 84 F.3d 1110, 1120 (9th
Cir. 1996). In Wunsch a male lawyer sent to his female opposing counsel a letter that stated, in
part, “Male lawyers play by the rules, discover truth and restore order. Female lawyers are
outside the law, cloud truth and destroy order.” Id. at 1113. The recipient of the letter asked the
District Court to sanction the lawyer sending the letter. The Court sanctioned him for gender-

19 Donald E. Campbell, Raise Your Right Hand and Swear to be Civil: Defining Civility as an
based discrimination. The Ninth Circuit reversed. *Id.* at 1113, 1120. A more recent California case, in the educational context, found a campus code of conduct to be unconstitutional. Similarly, courts struck down two provisions of the Michigan Code of Conduct as unconstitutional.

With respect to sanctions for incivility, commentators have challenged that approach because “[w]hen an attorney is sanctioned for incivility, she no longer merely represents only the client's interests. Rather, the situation is now personal because the attorney has been personally reprimanded for her actions. Such emotional attachment clouds objectivity, and often arouses additional inappropriate behavior.” In addition, because sanctions are imposed after the fact, they lack effectiveness in improving civility.

**IV. Does the Enforcement of Professional Responsibility Rules Serve as a Viable Substitute to Mandatory Civility Codes?**

Although the various civility guidelines are merely aspirational and voluntary, we have found that notions of civility have been enforced through the use of court sanctions for violations of various professional responsibility rules. Accordingly, commentators have argued that mandatory civility codes and the use of sanctions for incivility are unnecessary.

Dating as far back as 1824, the Supreme Court has recognized that Federal Courts have the power to “discipline attorneys who appear before it.” Similarly, state courts also have the power to discipline attorneys who appear before it regarding conduct that violates the governing

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21 For a review of other states that have a similar rule to the former 6068(f), see Janelle McEacher, *Engaging In Offensive Personality As Ground For Disciplinary Action Against Attorney*, 58 A.L.R.5th 429 (1998).

22 *College Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).


24 *Id.* at 1151.

25 See also *id*.

26 *Id.* at 1150.

Rules of Professional Conduct.  To date, all fifty states and the District of Columbia have adopted the ABA Model Rules of Professional Conduct, which provides courts and attorneys with a system of rules regarding what constitutes appropriate, professional, and civil conduct.

A recent federal Florida case demonstrates how the Rules of Professional Conduct can be used by a court to enforce civility.  See Bedoya v. Aventura Limousine & Transp. Serv. Inc., 861 F.Supp.2d 1346 (S.D. Fla. 2012) In Bedoya, the court, for multiple reasons, granted the defendant’s Motion to Disqualify plaintiff’s counsel. Id. at 1373. Among uncivil conduct, the court found that plaintiff’s counsel had displayed “deplorable behavior” by drawing pictures of male genitalia and describing the picture as his opposing counsel as well as playing the game Angry Birds during depositions, by wearing a t-shirt and shorts to proceedings, and by choosing Dunkin’ Donuts as the site of depositions against opposing counsel’s wishes. Id. at 1370. The court found that this behavior constituted a violation of Florida Bar Rule 4-8.4 and that this egregious behavior, coupled with numerous other Bar Rule violations, constituted grounds for disqualification. Id. at 1370, 1373.

These actions undoubtedly constituted uncivil behavior. The Southern District of Florida has not adopted a civility code or standards for civility other than those imposed by the Florida Bar. Although the court pointed out that this unacceptable conduct occurred in another forum and was therefore not directly actionable by the court, it nevertheless found that “[t]he various Florida Bar Rule 4-8.4 violations whereby [plaintiff’s counsel] disparaged [opposing counsel] in

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30 Florida Bar Rule 4-8.4, in relevant part, prohibits a lawyer from: “violat[ing] or attempt[ing] to violate the Rules of Professional Conduct,” “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation,” and “engag[ing] in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis…” This Rule is modeled off of Rule 8.4 of the American Bar Association’s Model Rules of Professional Conduct.
front of [opposing counsel’s] clients and generally acted with flagrant disrespect exacerbat[ed] the situation and show[ed] that the *ex parte* contact... was merely one element of a consistent course of disrespectful, unprofessional conduct” and thereby granted defendant’s motion to disqualify. *Id.* at 1370-73.

*Grievance Administrator v. Fieger* also illustrates a court using its inherent powers to discipline an attorney for incivility based on violations of state rules of professional conduct as well as the issue relating to the constitutionality of civility provisions within those rules. 719 N.W.2d 123 (Mich. 2006). There, an attorney was disciplined for making numerous “discourteous, undignified, and disrespectful” comments on a daily radio program about three judges who rendered an unfavorable decision for the attorney’s client. *Id.* at 129, 131. The court concluded that these disrespectful remarks violated the Michigan Rules of Professional Conduct 3.5(c) (prohibiting undignified or discourteous conduct toward the tribunal) and 6.5(a) (requiring a lawyer to treat all persons who are involved in the legal process with courtesy and respect). *Id.* at 137-38. Furthermore, the court concluded that these rules were constitutional; specifically that, “[t]o invite the sodomization of a judge, with a client’s finger, a plunger, or his own fist, and to invite a judge to kiss one’s ass are statements that do not come close to the margins of the ‘civility’ or ‘courtesy’ rules” and were therefore a blatant violation of both Rules of Professional Conduct. *Id.* at 139.

While these cases are illustrative of the enforcement of certain notions of civility through professional conduct rules, the question still remains as to whether the enforcement of professional responsibility rules is an effective means of eradicating incivility in the legal profession. On the one hand, the various state Bar Rules of Professional Conduct provide courts with a more concrete system of what constitutes appropriate, professional, and civil conduct. However, the Rules of Professional Conduct are still not immune to constitutional challenges, especially those Rules that contain “civility” provisions.31 Furthermore, depending on the rules,

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judicial enforcement can include conduct that occurred outside of the courtroom and therefore broadens the scope of conduct that can be regulated by the court through sanctions and other disciplinary measures.  

On the other hand, there are some concerns with this enforcement mechanism as well. First, it is in line with the argument raised by many commentators that sanctions are ineffective because the damage has already been done. Accordingly, court-imposed sanctions based on the Bar Rules of Professional Conduct are rather ineffective in preventing the uncivilized conduct in the first instance. Second, punishment is often “unnecessary and counterproductive” to the underlying goal of instilling civility. For these reasons, this course of action may not serve as the most effective means of truly eradicating incivility in the legal profession.

V. Alternative Ways to Accomplish Civility

Due to the need to accomplish civility from the outset, preventative measures may be more effective than punitive ones. Accordingly, it has been proposed that various legal institutions take measures to instill and restore civility in the legal profession.

A. Law Schools.

As commentator Melissa Hung astutely points out, incorporating civility principles within law schools is a logical starting place because it is where attorneys receive their initial legal training and it therefore presents the “greatest opportunities for change.” Hung further notes that, “the institution of law school, however, is often where incivility begins.” This incivility can be attributed to a combination of factors, including “mandatory steep grade curves, competition for faculty attention, law review positions, clerkships, and plum jobs at the most prestigious firms.” These factors tend to create an extremely competitive environment where students are pressured to outshine classmates if they want to succeed.

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32 See Grievance Adm’r v. Fieger, 719 N.W.2d at 137-38.
33 See Hung, supra note 6, at 1151.
35 Hung, supra note 6, at 1156.
36 Id.
37 Id.
For these reasons, commentators have proposed a number of measures that law schools should take in order to address the increasing issue of incivility. These measures include: introducing Civility Guidelines at orientation, integrating professional responsibility discussions in every course, stressing the Guidelines more in legal research and writing classes, and reconsidering inviting “Rambo-type lawyers” to speak at events.38

B. Law Firms and Other Legal Employers.

As with law schools, new attorneys often learn “the practical building blocks of practicing law on the job.”39 Accordingly, law firms and other legal employers have the power to restore civility in the legal profession by setting an example for new attorneys. Commentators have suggested adopting mentoring and mandatory training programs that incorporate civility guidelines as well as providing clients with a copy of the guidelines as part of the standard operating procedure before finalization of the fee agreement.40

C. Individual Attorneys.

Similarly, any change within the legal profession “must begin at the individual level.”41 Commentators suggest that individual attorneys take a pledge to honor the oath of the Guidelines and promise to encourage other attorneys to observe the Guidelines.42 Individual attorneys can further the goals of civility by not taking part in “Rambo-style” litigation tactics and by forgiving opposing counsel’s offensive tactics. Furthermore, as with law firms, individual attorneys should take active measures to educate their clients about the principles of civility and how civility can lead to “quicker resolutions and a more economically efficient outcome.”43

38 Id. at 1158.
39 Id. at 1159-60.
40 Id. at 1160.
41 Id.
42 Id. at 1160-61.
43 Id. at 1162.
VI. A Proposal to Voluntarily Adopt Civility Guidelines as Part of the Case Management Process.

A recent ABA article suggests that even discussion of civility at the outset of the litigation can result in more civil conduct.44 Therefore, we propose that a discussion of the relevant jurisdiction’s civility code be incorporated into the case management process. Litigators are required to meet and confer at the outset of the litigation on matters ranging from ADR, to discovery planning, to trial setting. It would be relatively easy to add to that list of required items, a planned discussion on a given local civility code. The lawyers could be encouraged to voluntarily adopt the code, with or without modifications.45 Lawyers that adopt the code would be binding themselves to a pledge to engage in conduct that meets standards of civility. If they fell short, at the very least, opposing counsel could send a reminder of the pledge and a note about which aspect of the code had been violated. In certain circumstances, advising the judge of the issue might be appropriate if the civility code has been a topic of case management. In the meantime, it might be a good idea for all of us to begin our opposing counsel “relationships” with a discussion of civility and a copy of the local civility code.

VII. Conclusion.

A variety of civility codes have been put forward to regulate incivility in the legal profession. While these codes share a number of key concerns, they are generally not mandatory. We propose that we begin incorporating a discussion of civility into the case management process and encourage lawyers to pledge to conduct themselves in a manner that comports with their jurisdiction’s civility code.

44 Filsko, supra note 5, at 40.
45 Other possible tactics include “pushing back as soon as an ugly incident erupts” by writing a letter detailing the conduct. One lawyer mails her jurisdiction’s civility code to opposing counsel. Id.