

The Role of Civility in the Legal Profession

Over three hundred years ago Shakespeare advised to “do as adversaries do in the law, strive mightily, but eat and drink as friends.”¹ Today, no doubt, adversaries continue to strive mightily against one another but do they eat and drink as friends, as Shakespeare suggested? Indeed, Moliterno remarked that the “adversarial system by its nature [is]...strongly partisan and...emotionally charged,”² so one may question why anyone would suggest that adversaries could be friends. If it is not likely that adversaries could be friends, could they, at the very least, be civil to one another?

In our litigious society lawyers constantly interact. This interaction is likely to be governed by different factors such as court rules, the goals lawyers wish to achieve for their clients, and the participants’ own mores. While the driving force behind the type of interaction lawyers engage in may vary, it becomes almost impossible to imagine how adversarial interaction could proceed, with any measure of success, without basic notions of civility between its participants.³ As this is the case, it becomes important to examine the role civility plays in interaction among lawyers.

This paper explores the purported decline in civility in the legal profession and, using conclusions drawn from this analysis, proposes methods to improve the level of civility. I first examine what civility means, and how it is defined by scholars, lawyers, and judges. I then

¹ Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L.J. 1049, 1051 (2000) (quoting William Shakespeare, *The Taming of the Shrew*, Act 1, Sc. 2).

² James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 782 (1997).

³ See generally Rhesa Hawkins Barksdale, *Appellate Advocacy: The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573 (1999) (stating that civility has a “salutary function in legal proceedings”). *Id.* at 573; Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts On Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113 (1995) (stating that the “practice of law...presupposes a commitment to civility”). *Id.* at 113.

examine various explanations about why civility has declined, and consider how norms of civility may vary across different practice areas. Finally, I draw on this analysis to evaluate proposals for improving civility. Though conducting an in depth examination of civility may not enhance its presence in the legal profession, this paper may help to reveal why adversaries may or may not “eat and drink as friends.”

I. The Meaning Of Civility

In order to comprehensively study civility it is necessary to decipher the meaning of the word. The term civility, at first glance, appears to be easily definable. For example, it is unlikely that a child, at some point during his or her childhood, was not told by a parent to “be civil” to another. Surely the child did not ask his or her parent what exactly they meant by “be civil.” Yet as adults, particularly in the legal profession, we grapple with how to define the term. Justices of the Supreme Court, legal scholars, and lawyers alike all have assumed the task of attaching a precise and exacting meaning to civility, as it operates within the profession. In fact, a committee on civility was established for the very purpose of better understanding civility in litigation.⁴ Despite valiant efforts to define civility, its meaning continues to be elusive.

Perhaps civility is, as Judge Bassler suggests, “akin to pornography in that while it may be hard for us to define, we all know it when we see it.”⁵ Though we all may be able to recognize civility, or the lack thereof, in order to effectively examine its role within the legal profession it becomes necessary to make explicit, if not civility’s precise meaning, the term’s various implications. The following discussion attempts to do so.

⁴ The Committee on Civility conducted an eighteen-month study on civility within litigation practices in the Seventh Judicial Circuit. The Committee’s Interim Report, which detailed its findings, was disseminated to lawyers, judges, and legal scholars around the nation. See 143 F.R.D. 371 (1992). The Committee released its Final Report in June 1992. The Final Report can be found at <http://www.law.stetson.edu/excellence/litethics/conclave/aspenreport.htm> (last visited February 11, 2005).

⁵ *Kohlmayer v. Amtrak*, 124 F. Supp. 877, 879 (D.N.J. 2000) (quoting William G. Bassler, *Lost Cause or Last Chance for Civility*, N.J. LAW JOURNAL, op. ed. at 23 (1995)).

Civility's Roots

The word civility draws its roots from the Latin word for city and its citizens.⁶ At its core, behaving civilly means exhibiting behavior “befitting a citizen.”⁷ To behave as a citizen, and therefore civilly, one must conform his savage, uneducated, and rude state into a civil, enlightened, and refined being.⁸ When the people of a community behave as citizens, sociologist Philip Selznick argues that the community has signaled a “commitment to dialogue as the preferred means of social decision.”⁹ Therefore, a precursor to interaction among people in a community is that the community members behave civilly.

Freud argues that behaving civilly may not be a simple task. Freud contended that Western civility was founded on the “suppression of instincts” and that civility imposed “arbitrarily created...forms, social rites, and decorum” which masked “lust, greed [and] even violence.”¹⁰ Though Freud argued that civility only produced the *appearance* of ethics and morality, he nevertheless stated that civility was necessary to “gentle” the “coarse and crude public world of economic and social relationships.”¹¹ Marx, too, thought that civility within a community was difficult to maintain because it produced an “inherent tension” as it required restraints on writing and speaking one’s personal conception of the truth.¹² Because he argued that “tactlessness was no crime”¹³ Marx likely grappled with the notion of restraining behavior.

⁶ Kevin F. Ryan, *Lex Et Ratio...*, 27 – JUN VT. B.J. 5, 5 (2001).

⁷ Aaronson, *supra* note 3, at 116 (quoting PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 390 (1992)).

⁸ Chuck Kenrick, *Civility- Why It's Important To Attorneys, Americans In General*, 5 *LAWYERS J.* 6, 6 (2003) (quoting Webster’s Dictionary).

⁹ Aaronson, *supra* note 3, at 117 (quoting Selznick at 391).

¹⁰ Harry Cohen, *Lawyer Certification, Civility, “Good Moral Character,” and Pressures for Conformity*, 25 *J. LEGAL PROF.* 101, 106 (1976) (quoting J.M. CUDDIHY, *THE ORDEAL OF CIVILITY* 40, 54, 66 (1974)).

¹¹ *Id.* (quoting Cuddihy at 66, 42).

¹² *Id.* at 107 (quoting Cuddihy at 123). Marx, in speaking of an “inherent tension”, was eluding to the tension between the actual truth and speaking and writing the truth. His commentary was in response to a request to restrain himself in writing a political article. *Id.* at 106-107 (quoting Cuddihy at 121,123).

¹³ *Id.* at 107 (quoting Cuddihy at 128).

Despite Freud and Marx's personal views about the integrity of conforming to a community's sense of civility, both theorists recognized the role that civility plays in interaction among a community. Because members of the legal profession comprise a community, in order for lawyers to maintain meaningful interactions within their community they must practice civility in the most fundamental sense of the word. In essence, civility encompasses only those virtues that are *necessary* to interact and carry on as citizens in a community. Therefore, one need not foster interaction, promote cooperation, or display camaraderie to be considered civil. However, displaying behavior that barely falls short of promoting disrespect, disdain, and savageness does not allow one to escape being deemed uncivil. Instead, for lawyers to be deemed civil, as defined from the very root of the word, they must act refined, with decorum, and enlightened. When acting in this manner, lawyers exhibit behavior befitting a citizen, nothing more and nothing less.

A Scholarly Perspective

Legal scholars and academics, in defining civility, adopt a far more expansive view of the term than is derived from its roots. While they agree that, at its core, civility maintains and stabilizes relationships,¹⁴ scholars seem to take the definition of civility one step further. The scholarly trend appears to equate civility with cooperation, good manners, social grace, courtesy, and respect.¹⁵

Moving beyond conduct that embraces only the bare necessities for interaction, scholars contend that civility includes behavior that allows relationships to improve and grow.¹⁶ Such

¹⁴ Kenrick, *supra* note 8, at 6.

¹⁵ See generally Kenrick, *supra* note 8; Cohen, *supra* note 10; Ryan, *supra* note 6; Ralph D. Cook, *Reflections on Ethical Issues: Civility: Its Decline and a Resolution for its Restoration*, 64 ALA. LAW. 226 (2003); Kara Anne Nagorney, Note, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815 (1999); Helen Wilson Nies, *Rambo Lawyering*, 87 TRADEMARK REP. 131 (1997); Janet Berry, *Civility and Professionalism*, 8 NEVADA LAWYER 10 (2000).

¹⁶ Kenrick, *supra* note 8, at 6.

behavior includes cooperation, politeness, common courtesy, and decency.¹⁷ Civility not only allows for interaction, but it, according to scholars, makes life more enriching by helping to resolve difficulties and conflicts.¹⁸ When people act civilly, that is with modesty, hospitality, and unpretentiousness, they are more desirable as companions, and even adversaries.¹⁹ Finally, scholars go so far as to include in the definition of civility refraining from behavior that impedes an adversary's professional goals.²⁰

The scholarly perspective on the meaning of civility differs remarkably from the definition as derived from the root of the word, as explored above. As theorized by scholars, civility does not simply embrace virtues that are *necessary* for interaction (i.e. refinement, enlightenment) but the term further encompasses those attributes that *encourage* interaction (i.e. cooperativeness, politeness, courtesy). According to scholars, then, it is not those lawyers that simply exhibit behavior “befitting a citizen” that are considered to be behaving civilly. It is only those lawyers that exhibit behavior of a polite, courteous, and cooperative citizen that are said to be truly displaying civility.

Civility as Defined from the Bench

While theorists and scholars have attempted to define civility, so too have the justices of the Supreme Court. Chief Justice Burger stated that civility is “the very game that keeps organized society from flying into pieces.”²¹ Justice O’Connor stated, “civility...enhance[s] the pleasure lawyers find in practice, increase[s] effectiveness of our system of justice, and improve[s] the public’s perception of lawyers.”²² Finally, Justice Thomas remarked that civility

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ryan, *supra* note 6, at 6.

²⁰ See Nagorney, *supra* note 15, at 816.

²¹ *Id.*

²² *Id.* at 827 (citing Sandra Day O’Connor, *Professionalism*, 76 WASH. U.L.Q. 5, 8 (1998)).

prevents “the erosion of...rules that allow our...society to function.”²³ Just as the above-mentioned Supreme Court justices have their own understanding of what constitutes civility, no doubt every judge has his or her own understanding of what the term means. If this truly is the case how, then, are lawyers to anticipate what conduct will leave them vulnerable to reprimand and sanctions when appearing before a judge? Yet further, how is a judge to transform his or her subjective connotation of civility into a concrete rule consistently applied in his or her courtroom?

Codes setting out rules of civility are designed to assist judges and lawyers with the above problems.²⁴ Though civility codes are designed to provide clarity to the problems that occur when trying to define the term and adopt a civility standard, they instead create confusion for a number of reasons. First, most states do not have civility codes. Second, some states have civility codes drafted by both the courts in the jurisdiction and the particular state’s bar association, making it difficult for a lawyer to discern which rules to follow. Third, civility codes vary between states, making a uniform definition of civility almost impossible to achieve. Fourth, and most critical, is that case studies show that even when civility codes are available to and referenced by judges, they have no real impact on the outcome of the case, because in most instances the parties would have been penalized regardless of the codes because their actions were in violation of procedural rules.²⁵ This finding corroborates the theory that judges generally accord uncivil conduct to a breach of procedural rules.

Despite the fact that procedural rules govern courtroom *procedure* and do not set out to

²³ Clarence Thomas, *Civility*, 39 S. TEX. L. REV. 655, 655 (1998).

²⁴ For an example of proposed civility standards see *supra* note 4.

²⁵ See Marvin E. Aspen, *A Response to Civility Naysayers*, 28 STETSON L. REV. 253, 264 (1998) (noting that in certain cases in the Seventh Circuit the judge’s conclusions would have been no different had the Standards of Civility never been proposed as the real basis for the holdings were the parties’ violations of procedural rules). *Id.*

prescribe civility norms or standards,²⁶ civility is defined, both by judges and by the drafters of civility codes, as an adherence to procedural guidelines. Perhaps this is because procedural rules are easy to apply, they are mechanical, technical, and content-specific.²⁷ Indeed, the civility rules set out by the Seventh Circuit are procedural in nature, and primarily cover aspects of the discovery process.²⁸ Further, opinions expressing judges' disapproval of lawyers' 'uncivil' behavior tend to involve egregious procedural violations such as frivolous discovery requests, and repeated interruptions during oral arguments.²⁹ Therefore, as an attorney's conduct increasingly diverges from the standards set forth by the court's procedural rules, he or she is more likely to be deemed by the trial judge to be behaving uncivilly. In sum, a majority of judges term behavior uncivil and impose sanctions *only* when they find that an attorney's behavior diverges greatly from conduct that accords with procedural rules. For judges, then, civility equates with procedural compliance.

Summary

After considering the meaning of civility from the word's roots and from the perspective of scholars and judges alike it remains clear that a single definition of civility may not exist.

²⁶ See FED. R. CIV. P.

²⁷ Christopher J. Piazzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted A Civility Rule*, 74 U. COLO. L. REV. 1197, 1213 (2003).

²⁸ *Id.* at 1216 (noting that the procedural nature of the Seventh Circuit's civility code is probably in response to the fact that 94% of survey respondents in the Seventh Circuit identified depositions and the discovery process as the main causes of incivility in the legal profession). *Id.*; See Final Report of the Committee on Civility, *supra* note 4 (examples of civility guidelines covering the discovery process include such rules stating "we will not use any form of discovery...as means of harassment," "we will make good faith efforts to resolve by agreement our objections to matters contained in...discovery requests," "we will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony.")

²⁹ *E.g.* Berry, *supra* note 15, at 11 (quoting Judge Arthur M. Monty Ahalt, *The Elements of Electronic Filing*, Virtualcourthouse.com, April 1998, at 164) (Ahalt, a District Court Judge, denied a defendant's motion to dismiss, noting the uncivil conduct of both sides during discovery proceedings); Aspen, *supra* note 25, at 264 (citing *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146 (D. Puerto Rico, 1994) (attorneys sanctioned for their uncivil conduct during discovery proceedings which included the filing of ten motions for discovery conflicts); Aspen, *supra* note 25, at 264 (citing *Van Pilsun v. Iowa State University of Science and Technology*, 152 F.R.D. 179 (S.D. Iowa, 1993) (plaintiff's attorney sanctioned for conduct the court termed "Rambo Litigation", which included making repeated groundless interruptions during a deposition).

However, the term may best be encapsulated not by a single meaning, but along a continuum. At one side of the continuum is the definition of civility as taken *from its roots*. That is, in order to act civilly all one must do is display the qualities minimally required for interaction. Next on the continuum is behavior a step above that just described, that is, displaying the qualities that a *judge* would deem characteristics of a civilized attorney. These qualities include according with the procedural guidelines set forth by the court. If an attorney does not exhibit behavior grossly defying these guidelines, he is deemed civil. Finally, at the other side of the continuum lay the most stringent requirements with which an attorney must conform in order to display civility, those prescribed by *scholars and academics*. This end of the continuum not only insists on conduct that is necessary to interact in order to be deemed behaving civilly, but requires that an attorney be polite, courteous, and cooperative towards others.

Admittedly, understanding the definition of civility along a continuum is not ideal. The term is still deprived of one distinct meaning. However, conceiving of civility in this sense provides for clarity in understanding the role civility plays in the legal profession because we no longer have to ask what is meant by civility; we now only have to ask from whose prospective are we considering the definition. Once that is revealed, all we must do is conceptualize civility within its place on the continuum to determine whether an attorney has satisfied the burden imposed on him or her within that particular understanding of the term. If an attorney has satisfied the burden, his or her conduct can properly be characterized as civil.

After discussing the definition of civility, I next examine various explanations for its decline, both throughout the legal profession and across different practice areas. In order to understand why such an examination is necessary, however, it is helpful to briefly discuss why civility and its study are important. Doing so will lend meaning to the following section, and

indeed, the paper as a whole.

In order to appreciate the importance of civility within the legal profession all one must do is envision its absence. Without civility, as defined from the root of the word, the practice of law could simply not exist. As described above, when one does not exhibit behavior “befitting a citizen” interaction cannot take place. Litigation, by its nature, discourages lawyers from exhibiting such behavior.³⁰ The charges, countercharges, and defenses involved in the litigation process³¹ contribute to the transformation of an attorney from a refined and enlightened adversary into a savage and rude opponent. If, due to the absence of civility, it becomes impossible for lawyers to interact then the continuation of a just society is put into jeopardy.³² No longer will there be an effective way to resolve social disputes and problems.³³ Because interaction is a necessary component of the legal profession, civility (as defined by the ability to interact and the commitment to dialogue) is of utmost importance. Not only is civility’s function in the law important, but its study is as well. Monitoring the decline of civility will alert lawyers, judges, and the public that our legal system is in jeopardy and if we continue to display behavior that offends notions of civility we will destroy the only mechanism we have for ensuring justice.

If one considers civility as the display of good manners and politeness, perhaps its import in the legal profession appears to diminish. However civility, as defined by a measure more than the mere ability to interact, confers important benefits onto the legal profession. Scholars contend that civility is important because it makes the profession rewarding, makes life better and more pleasant, and impacts attorneys’ enjoyment of the practice of law.³⁴ When attorneys

³⁰ See Kenrick, *supra* note 8, at 14.

³¹ *Id.*

³² Nagorney, *supra* note 15, at 816.

³³ Aaronson, *supra* note 3, at 141.

³⁴ Ryan, *supra* note 6, at 6; Cook, *supra* note 15, at 227.

are civil to one another they are more desirable as companions and associates.³⁵ Happiness and an enjoyment of the practice of law are not only important for an attorney's well-being but also for the legal profession. Those that enjoy their profession are likely to excel in their work and to remain in their career. Studying civility's presence in the legal profession can help us to better understand why some lawyers are unhappy or choose to stop practicing law. Further, it is important to study whether there is a decline in civility to assess whether the practice of law will become increasingly individualized, with attorneys less willing to help one another and more prone to working by themselves.

Studying the current role of civility in the legal profession is important because it can provide a gauge of the condition of the legal profession in the future. Partners at firms often encourage their associates to be belligerent and combative.³⁶ New associates are often mentored in deceptive litigation tactics.³⁷ For instance, a new associate was told by a senior partner at a large Chicago law firm that "all this baloney about ethics and civility is a waste of time," and to use sneaky tricks to confuse opposing counsel and win the case.³⁸ If civility is decreasing and those entering the profession are taught to emulate uncivil behavior, the important attributes of civility, as described above, will be lost. Without civility, attorneys will continue to grow increasingly unhappy. Therefore displaying civility is important to the well-being of lawyers and in providing new attorneys with behavior worthy of emulation.

Civility preserves the public trust in the justice system. Lawyers are often portrayed as obnoxious, combative, and as displaying inappropriate advocacy in the courtroom.³⁹ Behaving

³⁵ Ryan, *supra* note 6, at 6.

³⁶ Aspen, *supra* note 1, at 1054-1055.

³⁷ *Id.*

³⁸ *Id.* (citing Thomas R. Mulroy, Jr., Editorial, *Civility, Mentors and the Good Old Days*, CHICAGO LAWYER, Sept. 1991, at 14).

³⁹ Berry, *supra* note 15, at 11.

civility is important to prevent the erosion of the public's perception of lawyers and to preserve the integrity of the rule of law.⁴⁰ We must study civility in order to appreciate the impact that uncivil behavior has on the perception of the integrity of the legal profession and to better encourage the public's trust in the administration of justice.

Civility not only impacts the *perception* of the administration of justice but it serves an important role in the administration of justice itself. Civility, as defined by an adherence to procedural rules, “enhances greatly the ability to work together to reach fair, prompt, efficient, and relatively inexpensive resolution of litigated matters.”⁴¹ Behaving civilly conserves both time and resources.⁴² Nies notes that uncivil behavior may include deliberately ambiguous discovery requests which, when not adhered to, bring immediate charges of noncompliance; depositions deliberately scheduled at inconvenient times; and mail sent by slow-boat to shorten an opponents' time to respond.⁴³ This turns “litigation on the merits of the controversy...into litigation over lawyering.”⁴⁴ Studying civility highlights the importance of conformance to procedural rules and can reveal why a decline in civility (i.e., conforming to procedural rules) may be more troublesome in certain practice areas more than others.

As discussed above, judges define civility as an egregious departing from procedural rules. Because this is a subjective standard, it may be difficult for attorneys to predict when a judge will view a divergence from procedural rules as uncivil conduct as opposed to a tactical divergence from established norms of procedure. Some judges “value courtesy to ‘brother

⁴⁰ *Id.*; Piazzola, *supra* note 27, at 1210.

⁴¹ Barksdale, *supra* note 3, at 577.

⁴² Piazzola, *supra* note 27, at 1209 (citing cases where uncivil conduct caused mistrials and wasted judicial time and resources). *Id.* at 1209-1210.

⁴³ Nies, *supra* note 15, at 132-133.

⁴⁴ *Id.* at 133.

lawyers' above 'entire devotion to the interests of the client'."⁴⁵ Certain judges even reward attorneys who, though confronted with unprofessional conduct, remain civil.⁴⁶ It is important to examine whether or not civility has declined because this may impact judges' interpretations of procedural rules. As civility decreases will judges require stricter conformance with procedural rules or will judges relax their standards, making it more difficult to deem conduct uncivil? The study of the types of behavior that judges deem uncivil and sanction worthy is of great importance to those already in legal practice and those who will be practicing in the near future.

No matter from whose perspective the term is defined, civility is of great importance in the legal profession. It allows for interaction, facilitates the enjoyment of legal practice, and provides for efficiency in the administration of justice. Studying civility fosters a greater understanding and a deeper appreciation of its need in the legal profession. With this insight, I now examine various explanations about why civility has declined.

II. A Decline In Civility: Throughout The Legal Profession And Across Practice Areas

Many scholars have set out to study the changing role of civility among lawyers, and have noted its particular decline throughout the legal profession.⁴⁷ One of the most comprehensive studies examining the level of civility among lawyers and judges was undertaken by the Seventh Circuit's Committee on Civility (the "Committee"). The Committee's Interim Report includes both analytical and statistical findings that detail civility problems in litigation practice within the Seventh Circuit.⁴⁸ Though the Committee's report examines the decline in civility within only the litigation practices of the Seventh Circuit, similar findings have been

⁴⁵ Aspen, *supra* note 25, at 257 (citing Monroe Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995, at 54).

⁴⁶ Aspen, *supra* note 1, at 1059.

⁴⁷ See, e.g., 143 F.R.D. 371 (1992); Nagorney, *supra* note 15; Cook, *supra* note 15.

⁴⁸ The Committee conducted an informal survey using four page questionnaires distributed to circuit, district, magistrate and bankruptcy judges. Surveys were also distributed to over 1,500 attorneys who were members of the Seventh Circuit Bar Association and who practiced in Illinois, Indiana, and Wisconsin. The surveys were also distributed to members of other bar associations within the Circuit. 143 F.R.D. at 374.

echoed by scholars examining attorneys throughout the United States who are engaged in areas other than litigation practice.⁴⁹ The following discussion outlines reasons, as put forth by scholars and the Committee, for the general decline in civility among the legal profession as a whole. For the purposes of this discussion, civility will be defined from the perspective of scholars and judges, that is, as *both* good manners and social grace as well as an adherence to procedural guidelines.⁵⁰

The Decline in Civility Nationwide

Many have attributed the decline in civility among lawyers to a nation-wide disregard for professionalism and an overall decline in civility among the American people.⁵¹ For example, theorists posit that the areas of professional sports, politics, academia, and interpersonal communication have all generally become increasingly less civil.⁵² Lawyers, then, are no exception. They are simply following the trend of a rude and disrespectful American people.

The Committee's findings show that both lawyers and judges have noticed the changing trend towards an increasingly uncivil atmosphere within the profession. Sixty-nine percent of all judges surveyed stated that civility problems represent a change from their past personal experience,⁵³ and fifty-five percent of surveyed lawyers found that litigation practice has changed from past experience.⁵⁴ Therefore, it is posited that the decline in civility found among lawyers and judges is not unique to the legal profession but instead is a mere reflection of the uncivil behavior displayed throughout society.

The Diversification of the Legal Profession

⁴⁹ See generally Nagorney, *supra* note 15; Cook, *supra* note 15.

⁵⁰ In its survey, the Committee on Civility defines civility in this manner, including in the definition of civility both manners and professional conduct within litigation proceedings. 143 F.R.D. at 426.

⁵¹ Nagorney, *supra* note 15, at 817-818.

⁵² *Id.*

⁵³ 143 F.R.D. at 379.

⁵⁴ *Id.* at 380.

A diversified bar provides a multitude of benefits, including a robust exchange of ideas, novel approaches to legal problems, and a decrease in racial discrimination and tension. While Turner and Fulero recognize the importance of these benefits, they argue that the increase in women and minorities has played some role in the decline of civility within the legal profession.⁵⁵ They posit that women and minorities tend to perceive the profession as a ‘good old boys network’⁵⁶ and therefore they feel the need to approach matters more harshly by using extreme methods to gain respect.⁵⁷ Indeed, attorneys and judges recognize that uncivil behavior is a consequence of the relationships lawyers have with one another. The Committee found that ninety-four percent of judges find that civility arises from lawyers relations with one another⁵⁸ and seventy-nine percent of lawyers believe that civility problems arise most frequently in lawyers’ relations among themselves.⁵⁹ When incivility results from practices used to fit in and gain respect it, as Nagorney notes, becomes part of the legal community which “feeds on itself” to create more incivility.⁶⁰

The Expanding Bar and Economic Competition

The number of attorneys is increasing at a steady rate and this, no doubt, has led to a decline in civility. Between 1980 and 1990 the number of licensed attorneys in the United States increased almost seventy-five percent.⁶¹ Further, the number of lawyers in the United States is expected to increase twenty-eight percent by the year 2006; an increase almost twice that of other professions.⁶² The increase in attorneys has led to, according to the Committee, a loss of

⁵⁵ Nagorney, *supra* note 15, at 819 (citing Dennis Turner and Solomon Fulero, *Can Civility Return to the Courtroom? Will American Jurors Like It?*, 58 OHIO S.L.J. 131, 134 (1997)).

⁵⁶ *Id.*

⁵⁷ Nagorney, *supra* note 15, at 819.

⁵⁸ 143 F.R.D. at 379.

⁵⁹ *Id.* at 380.

⁶⁰ Nagorney, *supra* note 15, at 819.

⁶¹ 143 F.R.D. at 382.

⁶² Cook, *supra* note 15, at 227.

collegiality among lawyers and a “growing impersonality in lawyer relations.”⁶³

The effects of an increasingly impersonal atmosphere on the level of civility within the legal profession is best exemplified by contrasting urban and rural bars. According to New York State bar leaders, civility is highest among lawyers practicing in rural areas.⁶⁴ Because lawyers practicing in smaller communities are likely to know one another by name, know one another’s family, and likely to repeatedly interact with one another, they are prone to display civility.⁶⁵ Any display of incivility is met with a cold shoulder.⁶⁶ This practice stands in stark contrast to urban areas, where, urban bar leaders contend, civility remains a premier problem.⁶⁷ Members of urban bars are unlikely to know one another’s names, and, due to large membership, unlikely to engage in repeated interaction. The improbability of repeated interaction provides no incentive to foster a courteous and cooperative relationship. Because the number of attorneys is increasing nationwide, incivility problems are no longer solely a phenomenon of urban bars.

Not only has the great influx of attorneys decreased the likelihood of cooperation between lawyers, but it also has led to fierce competition among attorneys to obtain clients. The legal profession is becoming a marketplace enterprise, where attorneys compete for business.⁶⁸ The Committee found that lawyers are hesitant to display civility for fear that clients will perceive them as weak,⁶⁹ therefore in order to maintain a client base attorneys must become “more aggressive and less civil.”⁷⁰ Attorneys are increasingly displaying “Rambo” tactics to get results in order to keep abreast of the competition, and the desire to win at all costs is replacing

⁶³ 143 F.R.D. at 382.

⁶⁴ Bruce A. Green, *The Ten Most Common Ethical Violations*, 24 LITIGATION 48, 48 (1998); See Susan D. Carle, *The Effect of Context on Practice*, 52 Buffalo L. Rev. 1347 (2004).

⁶⁵ Green, *supra* note 64, at 48.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Nagorney, *supra* note 15, at 818.

⁶⁹ 143 F.R.D. at 382.

⁷⁰ *Id.*

cooperation and respect.⁷¹ Over fifty percent of the lawyers surveyed by the Committee attribute the decline in civility within the legal profession to economic pressures.⁷² Therefore, because of the ever-increasing size of the bar, it is likely that first, lawyers will meet only once and therefore be less inclined to cooperate with one another and second, compete vehemently with one another to secure employment. These factors have led to a decrease in civility among lawyers.

Lack of Guidance from the Bench

Of the many causes attributed to the decline of civility within the legal profession, one of the most pressing is the lack of judicial guidance and high rate of judicial tolerance towards uncivil behavior. Because judges are the “pillars of our judicial system”⁷³ it is no wonder that attorneys look to them for guidance in determining how to accord their behavior with civil conduct. Despite this great responsibility, judges have yet to take a leadership role in both setting the standard of civility expected of lawyers and taking an active role in curbing lawyers’ uncivil behavior.⁷⁴ Indeed, judges themselves engage in uncivil behavior.⁷⁵ If judges engage in uncivil behavior and do not take an active role, insisting on civil behavior at an early stage of the cases that come before them, future occurrences of uncivil conduct will occur. This is because, as Nagorney notes, through their opinions and decorum, judges set the tone of the entire jurisdiction.⁷⁶

The Committee’s surveys revealed that more than half of the attorneys and judges

⁷¹ *Id.* at 382-383.

⁷² *Id.* at 380.

⁷³ Nagorney, *supra* note 15, at 820.

⁷⁴ 143 F.R.D. at 383.

⁷⁵ Recently, the Illinois Supreme Court commented on the level of civility among the justices themselves. After a majority of the justices affirmed a reversal of a murder conviction by a mother of her newborn child, the dissent remarked that “...it is now legal in Illinois for a parent to murder his or her newborn infant.” *People v. Ehlert*, 811 N.E.2d 620, 633 (Ill. 2004) (Thomas, J., dissenting). The majority noted the disparaging tone used by the dissent, and warned that it would be difficult for the court to “...expect practitioners to engage in civility in the practice of law when members of this court are unwilling or unable to engage in respectful legal discourse in a published opinion.” *Id.* at 632.

⁷⁶ Nagorney, *supra* note 15, at 820.

surveyed attribute the decline in civility to a lack of judicial leadership and to tension between the bench and the bar. Fifty-six percent of surveyed judges, and fifty-six percent of surveyed attorneys mark the relations among judges and attorneys as a source of the decline in civility.⁷⁷ Further, ninety-four percent of surveyed judges attribute written decisions to the decline in civility among judges.⁷⁸ From attorneys' perspective then, the key to maintaining civil conduct within the legal profession is strong judicial leadership in setting civility standards and ensuring that attorneys conform to the same.

Manipulation of the Legal Process

An overwhelming number of scholars attribute the decline in civility among attorneys within the profession to abuses of legal procedure. Specifically, depositions and discovery procedures have increasingly become argumentative,⁷⁹ causing a lapse in professional behavior.⁸⁰ Judge Cook stated that in his experience as both a district court judge and a circuit court judge lawyers have related to him their experiences with the deposition process, which included threats of violence made by one lawyer to another; instructions by lawyers to their clients not to answer questions without a good faith legal basis; and abrupt terminations of depositions.⁸¹

The Committee noted that “discovery has become a battlefield on which verbal hostility, overly aggressive tactics and often automatic and unreasoned denials of cooperation are the principal weapons.”⁸² According to Judge Cook, uncivil behavior pervades the discovery process, where tactics including misrepresentations by lawyers in responding or not responding

⁷⁷ 143 F.R.D. at 379-380.

⁷⁸ *Id.* at 379.

⁷⁹ Cook, *supra* note 15, at 229.

⁸⁰ Nagorney, *supra* note 15, at 819.

⁸¹ Cook, *supra* note 15, at 229.

⁸² 143 F.R.D. at 383.

to document requests, not returning phone calls, and scheduling discovery in a manner calculated to frustrate and inconvenience the other party, are likely to be used.⁸³ The abuses currently abounding in legal procedure are, as Nagorney states, a consequence of the winning-at-all-costs mentality, which has encouraged the use of repetitive and argumentative questions as well as unwarranted objections in the adversarial process.⁸⁴

The hostile practices described above contribute significantly to the decline of civility within the legal profession. Indeed, ninety-four percent of all lawyers surveyed by the Committee target discovery as the primary setting for uncivil conduct and fifty-three percent of attorneys attribute routine matters, such as continuances or scheduling changes, to civility problems.⁸⁵ With a large number of attorneys resorting to manipulative practices of legal procedure it is no wonder that there now occurs, according to scholars, a general decline in civility throughout the legal profession.

Civility among attorneys, no doubt, is generally declining. To better determine the central reasons for this decline and to generate solutions that will reverse this downward trend, it is necessary to examine civility across different practice areas. Examining the increased presence or absence of civility within specific practice areas, as opposed to the legal profession as a whole, provides greater insight as to why attorneys behave, or fail to behave, civilly. Specifically, I examine the practice areas of appellate advocacy, matrimonial practice, criminal defense, commercial litigation, and corporate practice. Though the factors contributing to a general decline in civility throughout the legal profession are present in all of these areas, civility is apparent in some practice areas and absent in others. The differences among practice areas are crucial to explaining civility trends.

⁸³ Cook, *supra* note 15, at 229.

⁸⁴ Nagorney, *supra* note 15, at 821.

⁸⁵ 143 F.R.D. at 380.

Appellate Advocacy

Attorneys display uncivil conduct far less in appellate advocacy than other phases of litigation.⁸⁶ Jude Barksdale, serving on the United States Court of Appeals for the fifth circuit, sets forth specific reasons accounting for the increased prevalence of civility within the practice of appellate advocacy. First, Barksdale attributes the lack of incivility to the short amount of time allowed for the entire process of appellate advocacy. There is but a brief time allotted for oral argument. During this time, the court focuses on the issues presented and any time spent on abrasive, rude, uncooperative, hostile behavior is simply wasted.⁸⁷

The second reason Barksdale provides for the increased prevalence of civility within appellate advocacy is the rigid rules of appellate practice and procedure, which deter incivility. If an attorney disparages opposing counsel or the judges, Barksdale notes that some form of sanction, such as the brief being stricken or a monetary penalty, will immediately follow.⁸⁸ A lack of civility will only work to harm the attorney and his or her client. Barksdale likens the display of uncivil conduct in appellate advocacy to ‘cutting off one’s nose to spite his face.’⁸⁹ Finally, Barksdale states that decency, politeness, and procedural exactness often occur in appellate advocacy because of the close supervision paid to such conduct by the appellate court judges and other personnel. These factors, short time period, close supervision, rigid procedure, and strict sanctions have the effect of encouraging civility within appellate practice.

Matrimonial Practice

Research shows that civility persists among lawyers in matrimonial practice, and more

⁸⁶ See Barksdale, *supra* note 3.

⁸⁷ *Id.* at 575.

⁸⁸ *Id.* at 574-575.

⁸⁹ *Id.* at 574.

specifically those involved in divorce proceedings.⁹⁰ One reason for the cooperation found among divorce lawyers is that the goals of opposing counsels' clients are often aligned. For example, Gilson and Mnookin note that a fundamental interest that the clients of opposing counsel in a divorce case share is the well-being of the couple's children. Working cooperatively can benefit both sides in reaching this goal. Gilson and Mnookin argue that even when couples seeking divorce do not have children, their goals may still coincide. They couple may seek a low priced divorce, in terms of both financial and emotional costs. Keeping the divorce procedure at a low cost will increase the resources for both parties to restart their lives.⁹¹

It may seem paradoxical that those getting divorced will be better served if their attorneys cooperate, and indeed strong emotions often surround divorce proceedings. Clients harboring volatile feelings often urge their attorneys to be less than civil to the opposing side. However, research shows that even when this is the case, divorce lawyers are likely to remain civil to one another. Gilson and Mnookin contend that this is so because the dysfunctional patterns that pervaded the clients' marriage would make cooperation difficult or even impossible if opposing counsel acted in accordance with their clients' behavior.⁹² Instead, by displaying civility, lawyers act as intermediaries enabling their clients to get benefits that they could not realize on their own.⁹³

Because matrimonial practice tends to be localized and particularized,⁹⁴ clients will choose attorneys that they perceive to be civil in order to realize the gains they can achieve by selecting lawyers who are most likely to cooperate with the other side. Further, because of the

⁹⁰ See Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065 (2003); Ronald J. Gilson and Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); Aaronson, *supra* note 3.

⁹¹ Gilson and Mnookin, *supra* note 90, 542.

⁹² *Id.* (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 5254 (1992)).

⁹³ Gilson and Mnookin, *supra* note 90, 542-543.

⁹⁴ *Id.* at 543.

institutional structure of matrimonial practice, lawyers can create reputations for being cooperative or uncooperative.⁹⁵ Being known as an attorney who displays civility can benefit both the lawyer and the client because such a reputation will create trust between opposing counsel. Gilson and Mnookin found, in their field research, that when opposing counsel knew and trusted one another, they “rarely insisted on interrogations, depositions, or engaged in protracted formal discovery.”⁹⁶ When lawyers display incivility, however, they face collegial disapproval.⁹⁷ Due to the localized atmosphere in which most divorce attorneys practice, this disapproval stands to impair an attorney’s future interaction with members of the local bar, as well as disadvantage the attorney and his or her client in the matter at hand. Therefore, the display of civility within matrimonial practice benefits both the attorneys who practice it and their clients who reap the benefits from its presence.

Criminal Defense

Many argue that defense lawyers have a cooperative relationship with prosecutors.⁹⁸ Because research shows that defense attorneys share a worldview, based upon their experiences, that their clients are guilty they are more likely to exhibit cooperative behavior in order to negotiate for a reduced charge and a less severe punishment for their clients.⁹⁹ Further, defense attorneys play the role of an independent advisor rather than an agent for their clients,¹⁰⁰ making them less inclined to vehemently oppose their adversary and abuse procedural rules, and more likely to advise their client to accept a plea bargain. This type of non-combative, cooperative, civil behavior works to the benefit of defense attorneys because they most often get paid on a flat

⁹⁵ *Id.*

⁹⁶ *Id.* at 544.

⁹⁷ Carle, *supra* note 64, at 1353.

⁹⁸ *See* Mather, *supra* note 90.

⁹⁹ *Id.* at 1072.

¹⁰⁰ *Id.* at 1073.

fee basis thereby providing an incentive to process cases quickly.¹⁰¹ Because, as Mather argues, criminal defendants view the fee they pay to their attorneys as a fee for advice and are fearful that their attorney's will withdraw, they are likely to heed to the advice they are given and not insist on uncivil (non-cooperative) behavior between their defense attorneys and prosecutors. As defense attorneys generally believe it is in their clients' best interest to enter into a plea bargain, and because they are usually not rewarded any greater for obtaining an acquittal, they lack the impetus to act uncivilly towards their opposition.

Commercial Litigation

Commercial litigation is one of the most contentious and uncivil practices within the legal profession.¹⁰² One of the most pressing reasons for such behavior common within commercial practice is the dramatic increase of this type of litigation as well as the increase in law firms handling such matters.¹⁰³ For instance, the number of annual commercial litigation filings (federal court contract cases in particular) remained constant at a level of fourteen thousand per year during the 1960's, by the late 1980's however, the number of annual filings reached forty-seven thousand.¹⁰⁴ Gilson and Mnookin argue that during this same period, there existed an increase in uncivil conduct among attorneys in the field. This can be attributed to competition among attorneys willing to resort to win at all cost tactics to attract and retain clients. The uncivil conduct within commercial litigation particularly manifested itself in discovery abuse. According to Gilson and Mnookin, the abuses consisted of over-reaching requests for production; resistance to perfunctory compliance; motions and counter-motions accompanied by requests for sanctions; and satellite litigation that pushed the merits of the case

¹⁰¹ *Id.*

¹⁰² See Gilson and Mnookin, *supra* note 90.

¹⁰³ *Id.* at 534.

¹⁰⁴ *Id.* (citing Marc Galanter and Joel Rogers, *A Transformation of American Business Disputing? Some Preliminary Observations*, Institute for Legal Studies Working Paper No. DPRP 10-3 (1991)).

into the background.¹⁰⁵

Not only has competition to retain a client base led attorneys to utilize uncivil litigation tactics, but according to Gilson and Mnookin, opposing parties actually receive a benefit by *not* cooperating. To explain this proposition, Gilson and Mnookin hypothesize about litigation arising from the nonpayment of money by the defendant to the plaintiff. When interest rates are rising, the defendant has more to gain by not paying the plaintiff on demand and instead letting the owed money accrue interest in a bank account while the case is being litigated. By the time the judgment is rendered, the defendant may have made more money than is actually owed to the plaintiff, simply by extending the litigation and allowing the money owed to remain in a bank account during this time. Indeed, as interest rates have risen so, too, has uncivil conduct. For example, in the 1970's the market rate of interest was no higher than six percent as compared to the twenty-one percent market rate of interest by the end of 1980.¹⁰⁶ As noted above, during this time a rise in uncivil conduct within commercial litigation occurred.

A final reason offered by Gilson and Mnookin to explain the contentious relationship between opposing counsel in commercial litigation is the business advantages attorneys secure for their clients by imposing costs on the opposing side.¹⁰⁷ For example, an attorney representing a target company may delay litigation to avoid the hostile takeover of its client.¹⁰⁸ As shown above, the more litigious and uncooperative behavior that attorneys display in the commercial litigation arena, the more favorably they will be viewed by their clients and by potential clients. This is something law firms desire as they compete to be hired in the ever-increasingly competitive market of commercial litigation. For these reasons, civility among

¹⁰⁵ Gilson and Mnookin, *supra* note 90, at 535.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 536.

¹⁰⁸ *Id.* at 536-537 (citing Herbert M. Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433 (1977)).

attorneys in this area of the law is particularly lacking.

Corporate Practice

Due to the fierce competition for corporate business and the fear that a corporate client would seek another attorney if its demands are not adhered to,¹⁰⁹ a lawyer representing a corporate entity is likely to comply with its client's requests concerning litigation strategy. These requests often include behaving uncivilly. When representing businesses and corporations, attorneys rarely act as independent counselors;¹¹⁰ they instead conform their litigation tactics to the wishes of their clients. Behaving uncooperatively and manipulating legal procedure in order to advance a clients' goals may be necessary for an attorney in corporate practice to keep his job. Any threat of sanction or resentment by opposing counsel as a result of uncivil conduct may pale in comparison to the consequences attorneys may face if they diverge from their corporate client's demanded strategy. If attorneys display civil conduct to the detriment of their clients, they will not only loose their job with the particular client, but they risk gaining a reputation that makes them an undesirable counselor throughout the corporate world. Therefore, utilizing tactics that allow for their clients to win at all costs is generally in the best interest of corporate attorneys. Despite furthering an attorney's career, this type of mentality and conduct imposes great costs on the legal profession.

The claim that any one type of practice area is immune from the decrease in civility plaguing the legal profession is misguided. Civility is a problem among lawyers within the profession due to the several reasons listed above. However, it is correct to state that civility is more likely to persist in certain practice areas more than others. The above discussion highlighted areas of the law where civility is most prominent and, in contrast, where incivility

¹⁰⁹ Mather, *supra* note 90, at 1081.

¹¹⁰ *Id.*

abounds. The following section attempts to synthesize the lessons learned from the specific practice areas explored above, as well as from the explanations for the general decline in civility, in order to generate proposals for improving civility throughout the profession.

III. Why Lawyers Behave Uncivilly And The Solutions That Can Reverse This Trend

In order to evaluate proposals for increasing civility rates among attorneys it is necessary to first identify the driving force behind attorneys' decisions to engage, or fail to engage, in civil conduct (conduct including both cooperation and procedural conformity). To do this, one must consider what induces attorneys to act in a particular manner. I propose that the fundamental motivation for an attorney to display civility is his or her economic self-interest. When attorneys stand to gain a direct monetary benefit from displaying, or failing to display, civility they will act accordingly. Further, when attorneys directly benefit their clients by displaying civility, and therefore indirectly gain monetary benefits for themselves, they will do so. Finally, I argue that the type of person an attorney is, and the particular environment in which attorneys work (including the type of law firm and the community in which they practice) also has an effect on the display, or lack thereof, of civil conduct. The following discussion uses the five specific practice areas discussed above to exemplify my theory.

When an attorney's monetary position is likely to be enhanced by engaging in civil, or uncivil, conduct with an adversary, he or she is more likely to do so. For example, lawyers who practice appellate advocacy are directly supervised by judges; any display of uncivil conduct will increase their chances of being monetarily sanctioned. By acting civilly, then, the appellate advocate avoids suffering any economic harm. When a matrimonial attorney develops a reputation for handling matters civilly, he or she is more likely to gain a larger client base than one who is known for displaying uncivil conduct. A larger client base will increase the

matrimonial lawyer's salary. Additionally, because of the repeated interaction between attorneys in the localized matrimonial bar, behaving civilly fosters greater cooperation and ease between attorneys when opposing each other in future matters.¹¹¹ Therefore, behaving civilly in a matter he or she is currently engaged in, will reduce the transaction costs the matrimonial lawyer will face in the future.

A corporate lawyer, in comparison, gains a direct monetary benefit by *not* displaying civil conduct, because that type of behavior will likely prevent the attorney from being fired and will allow for a positive reputation in the corporate world. This allows the corporate attorney to retain his current income, as well as generate future income from new clients. Likewise, a commercial litigator known to be uncooperative and litigious stands to benefit economically because he or she is likely to attract clients simply by acting in this manner. A final example is the benefit a criminal defense lawyer obtains by cooperating with prosecutors. As discussed above, because they usually get compensated on a flat fee basis, the faster the criminal defense attorney can process his or her case, the more money he or she can make. In all of the above examples, the display of civility, or incivility as the case may be, resulted in a direct benefit to the attorney's economic interest.

Attorneys are more likely to display civility (or not display civility) when doing so will, by directly benefiting their clients, indirectly further their own economic interests. In the following examples, whether or not a client receives a specific benefit hinges on the type of conduct his or her attorney exhibits. If an appellate advocate displays civility, he or she does not run the risk of having his or her client's brief stricken. Uncivil conduct will only work to the

¹¹¹ See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Gilson and Mnookin, *supra* note 90 (Gilson and Mnookin discuss Axelrod's study of the prisoner's dilemma, which hypothesized that when parties are likely to engage in future dealings with one another they are more inclined to cooperate than those who will not likely deal with one another again). *Id.* at 521.

detriment of the client, as without the brief it will be nearly impossible to prevail. The display of civility by a matrimonial lawyer advances his or her client's pecuniary interest as well as safeguarding the client's emotional well-being. By cooperating with a prosecutor, a defense attorney increases the chances of obtaining a reduced charge for his client. Finally, by manipulating legal procedure and promoting an unwillingness to cooperate, the commercial litigator actually *makes* money for his client.

In the above situations, whether or not an attorney displays civil conduct determines the benefits stood to be gained by a client. Though prevailing in the instant matter directly benefits the clients in the examples provided, the victories indirectly benefit the attorneys. They are indirectly benefited because the prevailing attorneys are more likely to attract a large client base and retain their existing clients, thereby ensuring economic security for the future.

An attorney is, no doubt, affected by his or her own sense of morals, virtues, and experiences.¹¹² The type of person one is, then, will probably influence the practice area in which he or she works. Because I hypothesize that attorneys are motivated by a desire to enhance their economic interests, they are likely to choose to practice in an area of law where their proclivity towards civility or incivility generates the greatest economic return. For example, a person with a tendency to behave uncivilly may suffer economically if he or she chose to practice appellate advocacy; he or she would suffer monetary sanctions by uncivil displays. However, the same attorney might very well thrive practicing commercial litigation, where his or her uncivil tendencies would generate a large client base.

Not only will a person's character influence his or her choice of practice, but it may affect the atmosphere in which he or she chooses to work. Because of the strenuous business demands and high billable hour requirements of large law firms, a person with a tendency to

¹¹² See generally Aaronson, *supra* note 3 (stating that a lawyer's moral character influences his or her actions).

behave civilly may choose not to work in that type of atmosphere.¹¹³ Conversely, an attorney may begin their work at a large law firm as a cooperative, courteous person and *become* an uncooperative, litigious adversary. While the type of law firm one practices in speaks to an attorney's proclivity towards civility, so to does his or her community. A cooperative person who resists displaying incivility may prosper in a rural community, where cooperation and courtesy are rewarded, and incivility snubbed by local practitioners. If, however, an attorney feels compelled to display hostility and win at all cost tactics, he or she may fare better in an urban setting, where it is unlikely he or she will encounter the same adversaries over time. In sum, not only will lawyers' inner sense of selves influence their behavior, but the environment attorneys choose to work in will also affect whether or not they are civil, or uncivil, adversaries.

The above discussion makes apparent that the driving force behind attorneys' decisions to display civil conduct is their economic self-interest. Understanding what types of behavior will generate the greatest economic return in various practice areas can help attorneys to better predict their adversaries' actions. With a greater understanding of why attorneys engage in civil, or uncivil, conduct it becomes easier to now evaluate proposals for improving civility.

Despite the tight grip incivility has on the legal profession, all hope is not lost. Though much research is devoted to the study of the decline of civility throughout the profession, theorists have also proposed ways to reverse this trend. Before examining such proposals, it is important to discern whether increasing the level of civility within the profession is a feat that should be undertaken. After all, though civility may be important,¹¹⁴ if uncivil behavior ultimately succeeds in achieving a client's goals then cannot it be said that behaving uncivilly is a display of zealous advocacy?

¹¹³ See 143 F.R.D. at 398-400 (surveyed lawyers point to the demands of large law firms as a cause of incivility within the legal practice).

¹¹⁴ See the above discussion on pages 9-12.

If one defines civility as procedural compliance, as most judges do, then perhaps the concepts of zealous advocacy and civil conduct are not at odds. A lawyer's duty is to "zealously assert the client's position *under the rules of the adversary system*."¹¹⁵ A lawyer, then, may be as uncooperative (in the scholarly sense) and litigious as he or she sees fit to accomplish his or her client's goals, as long as the attorney's behavior extends no further than civility codes (or procedural rules) permit. Though the rules may not permit attorneys to exhibit the types of behavior that will produce the greatest benefits for their clients, they are nonetheless zealously asserting the client's rights because they are doing all they are permitted under the rules of the adversary system (here the civility rules). Therefore, if attorneys exhibit behavior, deemed by some to be uncooperative, which conforms to procedural guidelines, they can maximize returns for themselves and their clients and promote civility within the profession (by conforming to such guidelines). The essential mechanism then, to increase civility is precise civility guidelines and stringent enforcement of the same.

Civility Codes and Standards

Though civility codes have been introduced by various sources, including courts in several jurisdictions, bar associations, and committees, as demonstrated by the general decline of civility, they are proving largely ineffective. Perhaps this is because courts are unclear as to what standard to apply, as it is possible there are many codes within one jurisdiction.¹¹⁶ Therefore, each court should make clear the standard it expects from attorneys that appear before it. Further, courts should be resolute in applying civility codes and should monetarily sanction lawyers for any deviation from their supervision. Because the prime motivating factor for behaving civilly, or uncivilly, is the economic self-interest of an attorney, the threat and carrying

¹¹⁵ MODEL CODE OF PROF'L RESPONSIBILITY (1980) Preamble (emphasis added).

¹¹⁶ Nagorney, *supra* note 15, at 824 (citing A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 304 (1998)).

out of sanctions will no doubt encourage attorneys to conform to civility codes. This threat has already motivated some attorneys to behave civilly, as demonstrated by appellate advocates.

Civility Training in Law School

When asked how to improve civility throughout the profession, attorneys and judges surveyed by the Committee most frequently suggested civility training in law school.¹¹⁷ Indeed, Chief Justice Burger remarked “Someone must teach that good manners, disciplined behavior and civility by whatever name are the lubricants that prevent lawsuits from turning into combat.”¹¹⁸ The Committee posits that civility might be taught on its own, similar to, for example, an ethics class.

Learning about civility in the abstract, as the Committee suggests, might not be effective when students are faced with the idea that in order to be a zealous advocate, one must stop at nothing to prevail. A more valuable way to teach civility would be to weave it into substantive classes.¹¹⁹ This way students could learn the specific guidelines to be followed in a particular practice area. If exposed to the idea that a zealous advocate is one that conforms to the civility guidelines as best fits a client but stops short of violating them, it is more likely that students will adhere to the codes. Further, students should be taught the particular economic consequences of violating the civility codes, providing a warning early on that such a violation comes at a high cost. The incorporation of civility in law school classes may very well increase civility within the profession because, as Nagorney argues, “if law students are forced to consider civility from the outset, they will presume it is a necessary feature of the practice of law.”¹²⁰

Civility Training in Law Firms

¹¹⁷ 143 F.R.D. at 411.

¹¹⁸ Nagorney, *supra* note 15, at 825 (citing Eliot B. Glicksman, *Civility ‘A Return to Normalcy’*, 41 *ADVOC.* 10, 11 (1998)).

¹¹⁹ 143 F.R.D. at 411-412.

¹²⁰ Nagorney, *supra* note 15, at 826.

Because lawyers and judges surveyed by the Committee commonly stated that civility values are transmitted by attitude and example¹²¹ and because the display of civility is largely affected by workplace socialization, a likely way to increase civility is law firm training programs. If a law firm practices commercial litigation, for example, an incoming associate might feel pressured to display incivility to realize economic benefits for his or her client and firm. However, if the law firm made the attorney aware of the economic sanctions the firm would face if it violated the civility codes, it is less likely the attorney would display incivility. Further, if law firms held attorneys personally liable for any monetary sanctions they received for violating civility codes, this would certainly be strong incentive to conform to such guidelines.

Law firms could also have programs or could designate certain attorneys to provide support or guidance when an attorney is faced with a civility dilemma.¹²² Consulting another attorney may bring to light civil methods of dealing with a situation that may otherwise call for conduct in violation of court rules. A more experienced attorney at a law firm could help a new associate understand that by conforming to civility codes he or she is, in fact, displaying zealous advocacy. If law firms devise standards of civility that their attorneys are expected to, at the very least, meet if not surpass, civility within the legal profession may begin to increase.

While these suggestions illustrate ways to promote civility throughout the profession, they are no guarantee that a rise in civility will actually occur. However, by first, clearly defining civility through civility codes; second, enforcing the civility codes through monetary sanctions; and third, making law students and attorneys aware that displaying civility equates

¹²¹ 143 F.R.D. at 412.

¹²² The Inns of Court in the British legal system provide this very type of support. They are private associations that have a duty of educating members of the bar. The English believe that this system is less intimidating and more efficient than being reprimanded by a higher court authority. Nagorney, *supra* note 15, at 822.

with zealous advocacy, it is likely that civility will indeed begin to rise. Overtime, toleration for incivility will decrease and a positive trend towards civility will occur.

The study of civility within the legal profession, at first, appears a bit perplexing. After all, civility is difficult to define, indeed in this paper alone I have put forth three definitions of the word; difficult to place within legal practice; and difficult to measure. Despite these obstacles, undertaking the study of civility is a worthy cause. The display of civility affects the way the legal profession proceeds as well as the way in which the profession is perceived. It influences peoples' decisions to become lawyers, lawyers' decisions to stay in practice, and the ways in which disputes are ultimately resolved. A legal system without civility might as well not operate at all. Hence, its study is crucial.

Civility must continue to be monitored, reasons for its decline should be uncovered, and practice areas in which civility persists must be examined. Doing so will prevent civility's present position within the legal profession from remaining stagnant. Instead, continuing to undertake its study will provide the means for an increase of civility throughout the profession. I believe that in time, with persistence and focus towards the ultimate goal of achieving an increase in civility, even the most steadfast adversaries will be able to eat and drink as friends, as Shakespeare suggested.