Trump Style Lawyering: Civility and the Rule of Law

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ABSTRACT

Can lawyers adopt a Trump style of lawyering? No formal rule of professional conduct prohibits incivility in the practice of law, in part because historically an informal mix of professional norms, law firm values, and market controls have protected civility. As these informal protections have eroded and attacks on the rule of law have escalated, should lawyers role-model civil, respectful interaction to shore up public trust in the rule of law? The Article explores and dismisses four obstacles on the road to a civility rule of conduct—lawyer exceptionalism ("everybody is uncivil, this is not a problem lawyers can or should solve"), loyalty to clients ("civility is inconsistent with zealous advocacy"), subjectivity ("nobody knows what civility means and it cannot be enforced"), and legality ("name-calling and derogatory remarks are protected by the First Amendment and lawyers' free speech rights")—and advances a proposal for civility rules designed to protect the rule of law.

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INTRODUCTION

The rule of law in the United States is under attack. In a statement dated February 10, 2025, American Bar Association (ABA) President William R. Bay wrote:

> [W]e see wide-scale affronts to the rule of law itself . . . There is much that Americans disagree on, but all of us expect our government to follow the rule of law, protect due process and treat individuals in a way that we would treat others in our homes and workplaces.[1]

Furthermore, Bay wrote:

> We call upon our elected representatives to stand with us and to insist upon adherence to the rule of law and the legal processes and procedures that ensure orderly change. The administration cannot choose which law it will follow or ignore. These are not partisan or political issues. These are rule of law and process issues.[2]

President Bay concluded:

> We cannot afford to remain silent. We must stand up for the values we hold dear. The ABA will do its part and act to protect the rule of law. We urge every attorney to join us and insist that our government, a government of the people, follow the law. It is part of the oath we took when we became lawyers. Whatever your political party or your views, change must be made in the right way. Americans expect no less.[3]

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1. William R. Bay, *The ABA Supports the Rule of Law*, AM. BAR ASS'N (Feb. 10, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-supports-the-rule-of-law [https://perma.cc/7M6Y-F9B3].
2. *Id.*
3. *Id.*

On March 3, 2025, the ABA issued yet another stern message cautioning against unprecedented attacks on the rule of law:

> Three weeks ago, the American Bar Association spoke to you about values that guide us. We called upon every lawyer to insist that the government adhere to four major principles of law that have guided our country for over 200 years: Defending Judges and Courts, Acknowledging the Role of the Courts, Adhering to the Rule of Law, and Respecting the Separation of Powers and the three co-equal branches of government with distinct duties and responsibilities. These principles have been bedrocks of American democracy. The ABA does not shrink from standing in support of each of them.
>
> Since that time, government actions evidence a clear and disconcerting pattern. If a court issues a decision this administration does not agree with, the judge is targeted. If a lawyer represents parties in a dispute with the administration, or if a lawyer represents parties the administration does not like, lawyers are targeted.[4] We issued statements standing up for these four key principles, and a government official targeted us by instructing some of its lawyers not to attend ABA meetings or participate as speakers. These actions highlight escalating governmental efforts to interfere with fair and impartial courts, the right to counsel and due process, and the freedoms of speech and association in our country.
>
> There are clear choices facing our profession. We can choose to remain silent and allow these acts to continue or we can stand for the rule of law and the values we hold dear. We call upon the entire profession, including lawyers who serve in elected positions, to speak out against intimidation.[5]

How are lawyers to stand for the rule of law? One would think that one straightforward means of defending the rule of law and shoring up public trust in it would be for lawyers to model respect for the law as actors participating in the legal system. Surprisingly, one would be wrong.

As we explain in Part I, the law governing lawyers does not generally prohibit lawyer incivility. Instead, traditionally, civility has been protected by a mix of informal professional norms, institutional values, and market controls. These

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4. In February–March 2025, President Trump issued Executive Orders sanctioning five law firms for representing clients the President disfavored. *See*, *e.g.*, Exec. Order No. 14230, 90 Fed. Reg. 46 (Mar. 11, 2025) (denying firm lawyers security clearances and access to federal government buildings and instructing agency heads to terminate contracts with the law firm and possibly with the law firm's clients). Whereas one targeted law firm and eight other large law firms settled with the administration, four targeted law firms challenged the Orders, which were declared by courts to be an affront to the rule of law and found unconstitutional. *See*, *e.g.*, Perkins Coie LLP v. U.S. Dep't. of Just., No. 25-716 (D.D.C. May 2, 2025) (mem. op.) (Howell, J.). As this Article goes to print, the Department of Justice appealed these rulings. *See*, Michael S. Schmidt, Jonah E. Bromwich, & Devlin Barrett, *Trump Administration, in Reversal, Tries to Continue Fight Against Law Firms*, N.Y. TIMES (Mar. 3, 2026), https://www.nytimes.com/2026/03/03/us/politics/trump-law-firm-orders-reversal.html [https://perma.cc/N9L7-MMTU].

5. William R. Bay, *The ABA Rejects Efforts to Undermine the Courts and the Legal Profession*, AM. BAR ASS'N (Mar. 3, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/aba-rejects-efforts-to-undermine-courts-and-legal-profession [https://perma.cc/46Z6-TFX6].

informal protections have been in decline, leaving the rule of law vulnerable exactly when it is under attack, and making the practice of law more likely to experience increased instances of lawyer incivility, or Trump style lawyering.

In the face of the decline of informal protections of civility, one might have expected the ABA to adopt a formal civility rule of professional conduct designed to guard the rule of law. Such a reform proposal has faced a powerful opposition, consisting of four criticisms we explore and refute in Part II: the lawyer exceptionalism challenge, pursuant to which incivility in the legal profession is but a reflection of growing incivility in American politics and culture and cannot be effectively addressed by a rule of professional conduct; the zealous advocacy challenge, pursuant to which civility is inconsistent with loyalty to clients; the subjectivity challenge, pursuant to which civility is an incoherent and overinclusive term of art that cannot be the basis for a rule of conduct and its enforcement; and the First Amendment challenge, pursuant to which a civility rule would be inconsistent with lawyers' free speech rights.

After disposing of the traditional objections to a civility rule, Part III introduces our proposed reform, complete with a blueprint for civility rules of professional conduct. In a day and age in which the rule of law is under attack, lawyers must stand up and take action to protect it. Protecting the rule of law may encompass many different initiatives. One such stance, a low-hanging fruit really, should be for lawyers to commit themselves to protecting the rule of law by role-modeling respect for it.

I. TRUMP STYLE LAWYERING

As a businessman with an interest in popular culture, Donald Trump was notorious for making disrespectful comments about women, people of color, and other marginalized minorities.[6] Since emerging as a significant political figure in the United States, President Trump brought his brash style to the mainstream political arena, introducing, popularizing, and mastering an uncivil style of politicking. As an aspiring presidential candidate in 2015–2016, Mr. Trump made countless harsh, derogatory, and unsubstantiated claims.[7] Assuming office for the first time in 2017, President Trump did not relent, bringing his often disrespectful engagement style to the Oval Office.[8] Campaigning again in 2019–2020, and then in 2023–2024, President Trump continued to utilize his brash style of politicking, including name-calling and making derogatory unsupported claims.[9]

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6. *See, e.g.*, Christina Capatides, *30 of Donald Trump's Wildest Quotes*, CBS NEWS (Mar. 18, 2016), https://www.cbsnews.com/pictures/wild-donald-trump-quotes/3/ [https://perma.cc/Q428-SPHQ].

7. *See, e.g.*, Nick Gass, *The 15 Most Offensive Things that Have Come Out of Trump's Mouth*, POLITICO (Dec. 8, 2015), https://www.politico.eu/article/15-most-offensive-things-trump-campaign-feminism-migration-racism/ [https://perma.cc/G4G7-FVG7].

8. *See, e.g.*, Chris Cillizza, *The 41 Most Unreal Donald Trump Quotes of 2018*, CNN (Dec. 20, 2018), https://www.cnn.com/2018/12/20/politics/trump-lines-of-the-year-the-point/index.html [https://perma.cc/6XY7-CX2J].

9. *See, e.g.*, Brett Samuels, *Trump Doubles Down on Insults and Mockery in Attacks on Harris*, THE HILL

Trump style politicking is at times disrespectful, uncivil, inflammatory, and offensive. It is also incredibly successful.

Could members of the legal profession adopt a Trump style of lawyering? Could lawyers, for example, name-call or make derogatory comments about opposing counsel, judges, or other actors participating in the legal system? The short answer, which may surprise lay people—one might not expect doctors, lawyers, and other professionals to act disrespectfully and get away with it—is yes. The long answer, befitting of lawyers, is significantly more complicated and qualified. This part explores whether lawyers can act uncivilly and explains why the answer has become a problem in need of attention.

A. THE TRADITIONAL APPROACH TO CIVILITY AND THE REGULATION OF LAWYERS

This section shows that the legal profession has traditionally approached civility informally. It establishes that the rules of professional conduct do not directly regulate lawyers by explicitly mandating civil behavior. Instead, the section details how an array of institutions and mechanisms used to informally set expectations and regulations for civility among lawyers.

The law governing lawyers is a complicated body of law. It consists of disciplinary controls, liability controls, institutional controls, legislative controls, market controls, and peer group controls.[10] At the core of the law governing lawyers are state-based disciplinary systems, in which independent or quasi-independent agencies acting under the supervision of state supreme courts investigate and prosecute violations of the rules of professional conduct.[11] State-based rules of professional conduct vary but most follow the American Bar Association *Model Rules of Professional Conduct* (*Rules*), which therefore guide the conduct of most lawyers in the United States.[12]

The *Rules* are silent on civility per se, although four different rules contain some relevant guidance. The closest rule on point is Rule 3.5(d), titled Impartiality & Decorum of the Tribunal. It states that "[a] lawyer shall not . . . engage in conduct intended to disrupt a tribunal."[13] Comment 4 explains that "[t]he advocate's function is to present evidence and argument so that the cause

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(Oct. 13, 2024), https://thehill.com/homenews/campaign/4929331-trump-insults-harris/ [https://perma.cc/Q2SS-HGNH].

10. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 804–19 (1992); David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers? Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 482–91 (1996).

11. Gregory C. Sisk, *Sources of Legal Ethics & the Law of Lawyering* § 4–1.5(a), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 132 (West Academic Press 2018); Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761, 2764–2772 (2012).

12. McKay Mitchell, *Access to Justice Laboratories: Regulating Legal Services with a Sandbox*, 96 CHI.-KENT L. REV. 431, 433 (2023).

13. MODEL RULES OF PROF'L CONDUCT R. 3.5(d) (Am. Bar Ass'n 2023) [HEREINAFTER MODEL RULES].

may be decided according to law. *Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants*."[14] Furthermore, "[a] lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate."[15] Notably, the comment concludes that: "*[a]n advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics*."[16] Comment 5 adds that "[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."[17]

While comment 4 does state that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants," and that "[a]n advocate can present the cause. . . and preserve professional integrity by patient firmness no less effectively than by belligerence," by its own terms the comment applies only to advocates, not all lawyers. Indeed, Chapter 3 of the *Rules* is titled Advocate and, as such, it does not apply to all lawyers but rather only to advocates, that is, trial attorneys and litigators.[18] Moreover, as its title indicates, and comment 5 clarifies, Rule 3.5(d) does not apply to all advocate conduct but only to advocates who appear in proceedings before a tribunal. Thus, the rule does not appear to regulate the conduct of advocates when they are preparing for argument in their own offices or otherwise in the practice of law, let alone more generally to their personal conduct. Although comment 5 extends the rule's application outside of the four corners of the courtroom to apply to an advocate's conduct in deposition and therefore implies that the rule may cover conduct toward opposing counsel, witnesses, and court personnel such as court recorders, comment 4 further limits the rule's scope by referring to an advocate's conduct toward the court, not other actors involved in the justice system. By focusing on respect to the judge, the comment puts the focus of the rule on civility to the court, not other legal actors.

Furthermore, and importantly, Rule 3.5(d) does not directly prohibit an advocate's disruptive and uncivil conduct. Instead of regulating conduct, the rule focuses on the advocate's intentions and on the impact the conduct has on the court. This approach means that conduct that was in fact disruptive complies with the rule if the advocate did not intend for it to be upsetting. It also means that uncivil conduct complies with the rule if the court did not find it disruptive to the proceedings.

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14. MODEL RULES R. 3.5 cmt. 4 (emphasis added).

15. MODEL RULES R. 3.5 cmt. 4

16. *Id.* (emphasis added).

17. MODEL RULES R. 3.5 cmt. 5.

18. For an insightful essay exploring the differences between trial attorneys and litigators, see Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in Our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L. J. 1293 (2015).

Finally, while other rules in Chapter 3 regulate conduct before tribunals, including conduct directed at opposing counsel,[19] none specifically address civility toward opposing counsel. In all of these ways, Rule 3.5(d) misses an opportunity to clearly endorse civility. Nonetheless, by insisting that the cause of the client ought to be decided according to law, the comment at least suggests that cases should be decided according to the merits and not according to which advocate yells the loudest.[20]

Next is Rule 4.4, titled Respect for Rights of Third Persons, which, unlike Rule 3.5(d), applies to all lawyers in their representation of clients, not only to advocates. Rule 4.4(a) states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[21] The language of Rule 4.4(a) is broad enough to encompass incivility because it constitutes means that could embarrass and burden third parties. For example, in *The Matter of Raykin*, the Colorado Supreme Court disciplined an attorney for making profane outbursts during a meeting with school district staff to review his client's individual educational plan.[22] The court found that the attorney's conduct at the meeting served no purpose other than to embarrass, delay, or burden a third person and violated Colorado's rule 4.4(a).[23] Nonetheless, the rule does not explicitly mention civility, and its "substantial purpose" caveat implies that incidental incivility, which was not the substantial purpose of the conduct, would be tolerated. Moreover, comment 1 to Rule 4.4 does not mention civility at all. After stating generally that "[r]esponsibility to a client . . . does not imply that a lawyer may disregard the rights of third persons,"[24] the comment lists as examples of third parties' rights "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship,"[25] not civility.

Last are *Rules* 8.4(d) and 8.4(g). Chapter 8 is unique in that some of its provisions apply in general to all lawyers' conduct, not just in the representation of clients or even in the practice of law. That is, Chapter 8 regulates professional as well as personal conduct of lawyers.[26] Rule 8.4(d), in particular, states that it is

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19. *See, e.g.*, MODEL RULES R. 3.4.

20. *See* MODEL RULES R. 3.5(d) cmt. 4.

21. MODEL RULES R. 4.4(a); *see, e.g.*, People v. Piccone, 459 P.3d 136, 158–59 (Colo. 2020) (attorney's social media post about a ten-year-old allegation that city attorney had engaged in affair with city client violated Colorado's rule 4.4(a) because the post had no substantial purpose other than to embarrass a third party).

22. *In re* Raykin, 565 P.3d 728, 730–32 (Colo. 2025).

23. *Id.* at 733.

24. MODEL RULES R. 4.4(a) cmt. 1.

25. *Id.*

26. *See* MODEL RULES R. 8.4(b) ("It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."); R. 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[27] The rule is part of Chapter 8, titled Maintaining *The Integrity* of The Profession,[28] so its language is broad enough to encompass civility as a component of integrity. Still, as was the case with Rule 3.5(d), the emphasis of Rule 8.4(d) is not on how lawyers acted per se but on the impact of their conduct on the administration of justice.

Before the ABA revised Rule 8.4 and its comments in 2018, comment 3 used to state that "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."[29] Thus, while the comment limited regulated conduct to "in the course of representing a client," it arguably covered some derogatory comments, including racial and sexist slurs, if found to be prejudicial to the administration of justice. Still, some name-calling was unaddressed by comment 3, for example, referring to another lawyer as a fool or an idiot.

In 2018 the ABA revised Rule 8.4, explicitly prohibiting some discriminatory conduct in new section 8.4(g), which reads "it is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[30] The amendment was designed to achieve two goals. First, to clarify the prohibited conduct by elevating it from a comment—comment 3—to a rule—new subsection 8.4(g)—given that the *Rules* define misconduct as a rule violation rather than a comment violation.[31] Second, to expand the reach of prohibited conduct from "in the course of representing a client," to "conduct related to the practice of law."[32]

New comments 3 and 4 do not mention civility explicitly but are consistent with it by emphasizing respect and confidence in law and lawyers as an essential component of the rule of law. For example, new comment 3 states that "Discrimination and harassment by lawyers in violation of paragraph (g) *undermine confidence in the legal profession and the legal system.*"[33] The comment comes exceedingly close to addressing civility, stating that prohibited "discrimination includes harmful verbal or physical conduct that manifests bias or

27. MODEL RULES R. 8.4(d).

28. MODEL RULES R. Chapter 8 (emphasis added).

29. MODEL RULES R. 8.4 cmt. 3 (2017); *see* Myles Lynk, REPORT TO THE HOUSE OF DELEGATES, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/revised_resolution_109_08_03_2016_final_amended_header.pdf [https://perma.cc/EFY5-HF23] (last visited Oct. 23, 2025).

30. *See* MODEL RULES R. 8.4(g).

31. MODEL RULES R. 8.4(a).

32. MODEL RULES R. 8.4(g).

33. MODEL RULES R. 8.4 cmt. 3 (emphasis added).

prejudice towards others. *Harassment includes* sexual harassment and *derogatory or demeaning verbal* or physical *conduct*."[34] In terms of Rule 8.4(g)'s intended scope, new comment 4 adds that:

> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.[35]

The new rule and its comments generated strong opposition from First Amendment advocates who argued that Rule 8.4(g) violated lawyers' freedom of speech,[36] for example, by chilling speech at a continuing legal education event hosted by a bar association in which a lawyer would oppose affirmative action or diversity, equity, and inclusiveness (DEI) initiatives.[37] The ABA issued a formal ethics opinion attempting to clarify that the new rule and its comments do not violate the First Amendment,[38] but to date only a few jurisdictions have adopted the new rule and the comments that would have included the most explicit statement on incivility,[39] and at least one court has initially enjoined adoption of the new rule on the ground that it violates the First Amendment.[40] As a result, most states continue to follow the less explicit Rule 8.4(d) and old comment 3.[41]

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34. *Id.*

35. MODEL RULES R. 8.4 cmt. 4.

36. *See* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017); *see also* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and A Call for Scholarship*, 41 J. LEGAL PRO. 201 (2017); Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017); *but see*, Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018).

37. *See* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. UNIV. L. REV. 629, 630–31 (2019).

38. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at *9–12 (2020); *see* Alex B. Long, *Discrimination, Model Rule 8.4(g), and the ABA's Quixotic Quest for Uniformity*, 81 WASH. & LEE L. REV. 1551 (2024).

39. *See* Am. Bar Ass'n CPR Pol'y Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct: 8.4: Misconduct*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf [https://perma.cc/P5FW-UKV9].

40. *See* Greenberg v. Goodrich, 593 F.Supp.3d 174, 200–20 (E.D. Penn. 2023), *rev'd sub nom.* Greenberg v. Lehocky, 81 F.4th 376 (3d Cir. 2023). In Greenberg v. Lehocky, the Third Circuit Court of Appeals reversed, mostly avoiding the substantive issue by holding that petitioner lacked standing to bring pre-enforcement action challenging the proposed rule 8.4(g), and the Supreme Court denied cert.

41. Most states, but not all states. *See, e.g.*, Colorado's rule of professional conduct 8.4(g), which states:

> It is professional misconduct for a lawyer to engage in conduct, *in the representation of a client*, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (emphasis added). Colorado has also adopted a unique subsection 8.4(i), which states: "It is professional misconduct for a lawyer to engage in conduct the lawyer knows or

In sum, the *Rules* do not explicitly prohibit incivility, including some name-calling and making derogatory remarks. Rule 3.5(d) prohibits advocates from disrupting tribunals, emphasizing belligerent conduct towards judges. Rule 4.4(a) prohibits lawyerly conduct if its substantial purpose is to embarrass or burden others, but only if it violates the legal rights of a third person. And Rule 8.4(d)'s comment 3 prohibits a subset of name-calling and derogatory comments if made in the course of representing a client and if prejudicial to the administration of justice.

The *Rules*' formal silence on incivility is explained by the informal expectation of civility as a facet of professionalism. Lawyers (and doctors) acting as professionals were expected to follow certain unwritten norms of respectful decorum.[42] In terms of the regulation of lawyers, no formal rules of professional conduct or other disciplinary control were needed because institutional and peer group controls were in effect. As members of law firms, bar associations, and indeed as members of the legal profession, lawyers were expected to behave as respectful professionals. Such institutional and peer group controls include civility codes and attorney oaths of office. Civility codes "provide guidance to lawyers regarding how to conduct themselves in dealings with opposing counsel, clients, courts and third parties."[43] While violating a civility code is not a basis for disciplinary sanctions, the codes summarize "best practices" and the "values" of the legal profession.[44] Similarly, over twenty states include civility in their attorney oaths.[45] Other national peer organizations, such as the American Board of Trial Advocates and Inns of Court, have also been involved in efforts to instill and promote civility.[46]

In addition to national organizations and bar associations, law firms have emerged as de facto regulators of lawyers' conduct and professional expectations.[47] As the majority of American lawyers transitioned from solo practice to practicing in law firms,[48] the ethical infrastructure of firms became an important

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reasonably should know constitutes sexual harassment *where the conduct occurs in connection with the lawyer's professional activities*." *Id.* at 8.4(i) (emphasis added).

42. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 488–89 (1990) (experienced lawyers who practice over a long period of time in a particular forum tend to develop unwritten rules of decorum and common understandings of appropriate behavior); Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar,* 15 REV. LITIG. 177, 188–89 (1996) (uncivil lawyers break unspoken and unwritten rules on civility and professionalism upon which the legal profession was built).

43. 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, 142 (2011) (studying over 140 civility codes from state and local bar associations).

44. *Id.* at 106–07.

45. *See Attorney Oaths by State*, AM. BD. OF TRIAL ADVOCS., https://www.abota.org/index.cfm?pg=CivilityMattersOaths [https://perma.cc/A3PW-ARSR].

46. David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 150–51 (2019).

47. *See* Ted Schneyer, *Professional Discipline for Law Firms?* 77 CORNELL L. REV. 1, 13–23 (1991).

48. *See* CLARA N. CARSON & JEEYOON PARK, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 (2005); James M. Fischer, *External Control Over The American Bar*, 19 GEO. J. LEGAL ETHICS 59, 92 (2006).

institutional control on lawyers' professional behavior.[49] Individual lawyers gradually ceded power and independence to the firm, which in return provided professional and financial stability, and demanded and enforced centralized expectations of rule-compliance and professional conduct.[50] When law firms' culture demanded civil conduct, their lawyers complied.

A third layer of institutional control was enforced by courts and judges, believed by some to be best positioned to address incivility taking place in front of them, using the inherent power of the court doctrine.[51] But of course such an approach, like Rule 3.5(d), would apply only to advocates—lawyers appearing before courts—and it ignores the many incentives and pressures judges face to avoid sanctioning lawyers or even referring misbehaving lawyers to the disciplinary system.[52]

These institutional and peer controls, primarily enforced informally by national organizations, bar associations, law firms, and courts, were aided by market controls favoring civility. Arguably, explicit rules prohibiting incivility were unnecessary since clients would not have tolerated uncivil lawyer conduct because it would be ineffective, and reflect poorly on them.[53] Yet, like many "the business case for" arguments, the market or business case for civility depends on what clients want and what they are willing to emphasize and pay for.[54] Some clients, for example, may come to expect assertive, aggressive—even abusive—lawyerly conduct as part of zealous advocacy, especially in instances when uncivil conduct is likely to be an effective means of advancing their interests.

In sum, the *Rules*, traditionally relying on informal institutional and market controls, do not generally prohibit incivility.

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49. *See* Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 342–50 (2003); Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 123–36 (2005); Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 589–91 (2011).

50. *See* Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006); Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95 (2008); Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957 (2006).

51. Wilkins, *Who Should Regulate Lawyers?*, *supra* note 10, at 804–19.

52. Eli Wald, *Should Judges Regulate Lawyers?* 42 MCGEORGE L. REV. 150 (2010).

53. *See*, *e.g.*, Gleason v. Isbell, 145 S.W.3d 354, 360 (Tex. 2004) ("Incivility does not advance a litigant's legal position, but only tends to eclipse or obscure whatever legal points he intended to make. Incivility is not only ineffective but also ill-advised. At a minimum, courts and those appearing before them expect and deserve civility and courtesy from all participants in the legal process.") (Frost, J. concurring in part and dissenting in part); E. James Burke, *Professional Responsibility: A View from the Bench*, 5 WYO. L. REV. 417, 419 (2005).

54. David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 (2004).

B. TWENTY-FIRST CENTURY CIVILITY CONCERNS: ATTACKS ON THE RULE OF LAW AND THE VISIBLE SUCCESS OF TRUMP STYLE POLITICKING

That lawyers could deploy a Trump style of lawyering does not, of course, mean that they would. One might argue that the possibility of incivility is old news, and that history teaches us that lawyers in general are civil because, notwithstanding the *Rules*' silence on civility, they adhere to peer group, institutional, and market controls disfavoring incivility.[55] Despite occasional scholarly complaints about the rise of "Rambo" style aggressive litigation,[56] no rigorous empirical evidence suggests that it is becoming common.

Consider the famous (or infamous, depending on one's perspective) career of the late Joe Jamail, considered by many at his time to be the greatest lawyer in Texas and perhaps in the United States.[57] Mr. Jamail was a very successful trial attorney. He was also known for his brash, offensive style of lawyering. In one especially noteworthy instance, Mr. Jamail was personally representing Mr. Liedtke, a director of plaintiff Paramount Communications. Mr. Liedtke's deposition was taken by Mr. Johnston, counsel for defendant QVC Network. Paramount was represented by Mr. Thomas. The following exchange took place during Mr. Liedtke's deposition:

> A. [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter] . . . I think I did read it, probably.
>
> . . . .
>
> MR. JOHNSTON: Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?
>
> MR. JAMAIL: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.
>
> MR. JOHNSTON: No, Joe—
>
> MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.
>
> MR. JOHNSTON: No. Joe, Joe—
>
> MR. JAMAIL: Don't "Joe" me, *asshole*. You can ask some questions, but get off of that. *I'm tired of you. You could gag a maggot off a meat wagon*. Now, we've helped you every way we can.
>
> . . . .

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55. Wilkins, *Who Should Regulate Lawyers?*, *supra* note 10, at 804–19.

56. Campbell, *supra* note 43, at 104; James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?* 62 LA. L. REV. 467, 472 (2002).

57. John Spong, *The Greatest Lawyer Who Ever Lived*, TEXAS MONTHLY (Jan. 2015), available at https://www.texasmonthly.com/news-politics/the-greatest-lawyer-who-ever-lived/ [https://perma.cc/H33W-6W5M].

> MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.
>
> MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.
>
> MR. JAMAIL: Well, go on and *shut up*. . . You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing. Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.
>
> . . . .
>
> MR. JOHNSTON: I don't need this kind of abuse.
>
> MR. THOMAS: Then just ask the next question. . .[58]

Mr. Jamail's antics took place in 1994, demonstrating that incivility is not a new phenomenon. Arguably, the case became so notorious exactly because of how rare Mr. Jamail's conduct was. His uncivil conduct, it would seem, was the exception that proved the civility norm among lawyers. The case, incidentally, also demonstrates the shortcomings of the regulatory approach to incivility. Mr. Jamail was an advocate and could have been disciplined in Delaware or in Texas for violating the applicable state rules of professional conduct analogous to *Rules* 3.5(d) and 8.4(d). He was not.[59] Still, the infrequency of such uncivil conduct seems to suggest that historically incivility had not become the norm among lawyers, and appears to imply that the onus ought to be on civility advocates to explain why incivility, including Trump style lawyering, is likely to be a concern in the twenty-first century.

Although the potential for incivility in the practice of law is admittedly not new, two related phenomena warrant contemporary attention to civility concerns: unprecedented attacks on the rule of law and the visible success of incivility in the political realm.

First, a hallmark of mature democracies is adherence to the rule of law, a societal commitment to democratically adopt laws and live by them.[60] The rule of law means that "all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human and civil rights norms and standards."[61]

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58. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 53–4 (Del. 1994), appendix (emphasis added).

59. Spong, *supra* note 57.

60. Eli Wald, *The Role of Lawyers in Mature Democracies When the Rule of Law is Under Attack*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF LEGAL ETHICS 368–73 (Ole Hammerslev et al., eds., 2025).

61. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

The rule of law consists of a complex set of arrangements. To begin with, citizens' participation in the creation of laws is indirect: the people vote in elections for officials—members of the legislative branch—who promulgate laws on their behalf. In this sense, the rule of law encompasses free elections, a peaceful transition of power following elections, and acceptance of election results as legitimate and trustworthy.[62] Next, promulgated laws are not self-executing. Rather, they are enforced by an executive branch and adjudicated by an independent judiciary, aided by an independent legal profession. Thus, core tenets of the rule of law include the accountability of the executive branch to the law[63] and the existence of an independent judiciary, part and parcel of a separation of powers apparatus, that acts as a check and balance on the legislative and executive branches.[64] Finally, acceptance of the rule of law does not mean that mature democracies are always harmonious. Strong disagreements may arise about the prudence of proposed laws, about enforcement priorities, and about the wisdom of judicial interpretation of statutes. Commitment to the rule of law is not about avoiding public discord. Rather, the rule of law is a process that entails debating, agreeing (and disagreeing), and accepting the results of the exchange.[65]

In the United States, the rule of law has long been thought to be stable, secure, and beyond questioning. This, to be sure, does not mean that our rule of law is free of challenges or that it is not a work in progress. Our rule of law was understood to be consistent with slavery and tolerated doctrines such as "separate but equal."[66] We historically excluded women and people of color from voting. Even after we overcame such explicit discrimination, we continued to struggle with low turnout rates and participation in elections,[67] disenfranchisement of some voters, including gerrymandering,[68] the legacy and impact of past discrimination,[69] implicit bias,[70] and the reality and consequences of mass incarceration.[71]

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62. Robert A. Stein, *What Exactly is the Rule of Law?* 57 HOUS. L. REV. 185, 192–98 (2019).

63. Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191, 192–99 (2010) (summarizing procedural and substantive definitions of the rule of law); Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77, 92–96 (2021).

64. Wald, *supra* note 60.

65. Hilary Sommerland & Ole Hammerslev, *Lawyers in a New Geopolitical Conjuncture—Continuity and Change*, in LAWYERS IN 21ST-CENTURY SOCIETIES. VOL. 1: NATIONAL REPORTS 1–41 (Richard L. Abel, et al. eds., 2020).

66. Rodney A. Smolla, *Contemplating the Meaning of "the Rule of Law*," 42 U. RICH. L. REV. 1, 5–7 (2007).

67. Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985, 1005–14 (2021).

68. Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 1021–22 (2020).

69. Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1094–1100 (2011).

70. Russell G. Pearce, Eli Wald, & Swethaa S. Ballakrishnen, *Difference Blindness Vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2423–30 (2015).

71. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF

Contemporary challenges include concerns about the decline of bipartisanship,[72] the rise of disinformation,[73] the impact of corporations and money on the political realm,[74] and foreign interference in our elections.[75] Still, until recently, the core tenets of the rule of law were believed to be secure: our elections were thought to be generally free, safe, and trustworthy; our legislative and executive branches operated pursuant to the law, overseen by an independent judiciary, aided by an independent legal profession. Indeed, our rule of law was thought to be unassailable. To question the rule of law, at least in mainstream America, was unthinkable.

The twenty-first century, however, has seen unparalleled attacks on the rule of law in the United States. The January 6, 2021, insurrection on the United States Capitol following the 2020 elections threatened the peaceful transition of power, literally interrupting the certification of the election results.[76] The "stolen election"/"Big Lie" conspiracy narrative perpetrated by supporters of President Trump following his 2020 elections loss questioned the legitimacy of the elections, notwithstanding repeated rebukes from numerous state and federal courts.[77] The conspiracy movement has proven to be quite successful, with a surprisingly high percentage of Americans questioning the outcome and legitimacy of the elections.[78] Subsequently, it led to numerous politicians refusing to commit that they will accept the election results should they lose.[79] Unprecedented attacks on judges in cases involving President Trump and others followed, undermining the independence of the judiciary.[80] Combined, these developments have constituted unprecedented attacks on the rule of law in the United States.

Colorblindness (2010) (ARGUING THAT THE WAR ON DRUGS AND MASS INCARCERATION CREATE A CASTE SYSTEM, WHICH DISPROPORTIONATELY DISENFRANCHISES BLACK VOTES).

72. Noel Rubinton, *In a Polarized Era, Efforts To Boost Bipartisanship in Congress*, HEWLETT FOUND. (Oct. 13, 2016), https://hewlett.org/making-bipartisanship-stick-in-congress/ [https://perma.cc/5HPY-RSBM] (discussing the decline in bipartisanship in Congress over the past several decades).

73. Fernando Nuñez, Note, *Disinformation Legislation and Freedom of Expression*, 10 UC IRVINE L. REV. 783, 785–87 (2020).

74. CARL BOGGS, THE END OF POLITICS—CORPORATE POWER AND THE DECLINE OF THE PUBIC SPHERE 6–24, 67–88 (The Guilford Press, 2000); Hanoch Dagan, *Political Money*, 8 ELECTION L. J. 349 (2009).

75. Troy McCurry, *If It Was Good Enough to Work Against the Nazis. . .: Revitalizing the Foreign Agents Registration Act to Regulate Modern Foreign Electioneering*, 74 CATH. U. L. REV. 51, 53–54 (2025).

76. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT DECEMBER 22, 2022, 117TH CONGRESS SECOND SESSION HOUSE REPORT 117–663 (2022), https://www.govinfo.gov/app/details/GPO-J6-REPORT/context [hereinafter FINAL REPORT].

77. *Id.*

78. *Id.*

79. Patrick Svitek, *Top Republicans, Led by Trump, Refuse to Commit to Accept 2024 Election Results*, WASH. POST (May 9, 2024) https://www.washingtonpost.com/elections/2024/05/08/trump-republicans-2024-election-results/ [https://perma.cc/P63Q-QJWY]; Alexander Bolton, *Republicans Divided on Pledging to Accept 2024 Election Results*, THE HILL (May 28, 2024), available at https://thehill.com/homenews/senate/4685294-republicans-2024-election-results/ [https://perma.cc/WC3F-WBRB].

80. *See* Letter from ABA President Mary Smith to fellow lawyers (Apr. 8, 2024) https://napco4courtleaders.org/2024/04/aba-president-mary-smith-letter-in-support-of-judicial-and-court-security/; Letter from ABA President William Bay, (Jan. 27, 2025).

One would have expected lawyers to rush to the defense of the rule of law. After all 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*."[81] As officers of the legal system, certainly lawyers would defend it from attacks. As public citizens responsible for the quality of justice, surely lawyers would defend the rule of law, the very system designed to ensure justice.[82] Some lawyers and legal institutions, to be sure, have come to the defense of the rule of law.[83] The majority of lawyers, however, have been rather passive,[84] and others have even helped orchestrate the very attacks on the rule of law.[85]

Two reasons explain this seemingly surprising state of affairs. To begin with, in mature democracies, where the rule of law has long been secure, lawyers are out of practice defending it. In particular, there are hardly any rules of professional conduct spelling out duties to the legal system or to justice that lawyers can use to guide their defense of the rule of law.[86] As Professor Deborah Rhode pointed out two decades ago, although lawyers rhetorically claim to be three-legged stools— representatives of clients, officers of the legal system, and public citizens—the latter two roles ring hallow.[87] Perhaps taking these roles for granted for far too long, the legal profession has not bothered to fill them with actual content. It is hardly surprising that when lawyers all of a sudden have a reason to turn to the rules of professional conduct for guidance, the rules have little to offer.

Next, taking the rule of law, their independence, and their professional status for granted, lawyers have gradually abandoned their roles as officers of the legal system and as public citizens and embraced their role as representatives of clients.[88] What it means to be an excellent lawyer has become increasingly exclusively client-centered,[89] a service ethos that leaves little room for commitments to the legal system and the public.[90] Put differently, even if the rules of

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81. MODEL RULES pmbl. cmt. 1 (emphasis added).

82. MODEL RULES pmbl. cmt. 6 ("As a public citizen. . ., a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

83. Including the ABA, in a series of public statements. *See* Bay, *supra* note 1.

84. For example, when the four large law firms which challenged President Trump's Executive Orders sought amicus brief support from their peers on the AM200 list, the majority of BigLaw firms refused to join the brief, see Ben Protess, *In Trump's Fight with Perkins Coie, the Richest Firms Are Staying Quiet*, N.Y. TIMES, (Apr. 2, 2025), https://www.nytimes.com/2025/04/02/business/trump-perkins-coie-amicus-brief.html [https://perma.cc/6W5L-ZKBM].

85. Wald, *supra* note 60; Scott L. Cummings, *Lawyers in Backsliding Democracy,* 112 CALIF. L. REV. 513 (2024).

86. Wald, *supra* note 60.

87. Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1326 (2009) (examining the "special responsibilities" of lawyers as "public citizens").

88. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* WIS. L. REV. 29, 34–9 (1978); Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 608–12 (2016).

89. Wald & Pearce, *supra* note 88.

90. *Id.*

professional conduct were to infuse the traditional roles of lawyers as officers of the legal system and as public citizens with content, some lawyers no longer buy into these roles.[91]

Moreover, the understanding of lawyers as service providers is not limited to the profession itself. Clients and the public too have come to understand lawyers as service providers.[92] If lawyers were to try to act as officers of the legal system and as public citizens, their efforts may be rejected offhand as not credible. If lawyers do not believe in these roles and have not acted on them, why should clients and the public listen to them now?

Indeed, lawyers' empty shell of public roles and client-centered ethos help explain why some members of the bar have participated in attacks on the rule of law on behalf of clients. Thinking of themselves as the clients' longarm, legal technocrats with no accountability for the outcomes they help bring about, and buying into the client-service ideology of the profession, why would lawyers not do their clients' bidding, even if the objectives undermine the rule of law?

In the face of attacks on the rule of law, lawyers must defend it. But defending the rule of law is anything but a straightforward proposition. The organized bar would need to spell out the meaning of the profession's public-facing obligations, and lawyers would then have to buy into and act on these commitments, and over time build public trust, to increase the probability that when they act and take a stand, the public will listen. Infusing the public role of lawyers with content is a multi-faceted tall order, well outside the scope of this or any one article. One small step in the right direction, however low-hanging fruit it may be, seems obvious: because the rule of law depends on public trust in the legitimacy of and respect for the law, the legal system, legal process, and the legal actors who administer it, judges and lawyers included, defending the rule of law must include renewed commitment to civility, defined to mean respectful conduct and interactions with the law and legal actors. Put differently, because respect for the rule of law is a constitutive characteristic of it, one would think that civility defined as respectful engagement would be an easy, uncontroversial aspect of lawyers' renewed commitment to defend the rule of law. As we shall see, however, it is anything but.

Second, absent a regulatory stance in support of civility, Trump style lawyering is likely to increase and spread. President Trump's first victory in 2016 and triumph in the 2024 elections may prove to be the spark that ushers in a new era of incivility in the legal profession: President Trump's initial and comeback victories, in spite of his disrespectful, derogatory style, seem to indicate that Americans are willing to overlook form and focus on substance. It would appear that Americans care about the economy, jobs, and the prospect of a better future

91. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227 (2014).

92. Eli Wald, *Glass-ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2258–64, 2271–73 (2010).

and voted for someone who promised to deliver on these commitments,[93] his style notwithstanding. It would appear Americans care about securing the border, limiting the flow of undocumented immigrants, and perhaps about prioritizing the interests of working-class and poor Americans over minding the due process rights of immigrants, and voted for a brash, uncivil politician who promised to do something about these priorities.[94] On a darker note, perhaps President Trump's success indicates instead that Americans are willing to abandon dignified form as well as substance and settle for populist incivility. Either way, President Trump's victories appear to send a message that incivility will be tolerated by Americans as an acceptable means if it serves legitimate substantive priorities and objectives or even as a distraction from meaningful engagement on the merits of public policy concerns.

Some American lawyers may find the allure of visible successful incivility hard to resist. Rambo-style litigation was always just a metaphor for an aggressive style of practice, as John Rambo was a fictional, disturbed war hero, not a lawyer or a politician.[95] Most lawyers did not engage in Rambo style litigation tactics because they believed in civility as an aspect of professionalism, because they believed incivility would not be effective, and because many clients did not stand for incivility on their behalf. As belief in traditional professional values declines, lawyers may increasingly believe, in light of President Trump's victory, that incivility may be an effective style of practice: if it worked for President Trump and persuaded American voters, why would it not persuade American judges and jurors? Moreover, clients—a subset of the American public—may be increasingly willing to tolerate and even expect incivility as part of zealous advocacy of their interests, making market controls less likely to restrict incivility. Thus, while incivility has always been possible, Trump style lawyering is more of a threat to mainstream practice because the Trump era encompasses a decline in institutional and peer group controls that protected civility and a change in circumstances and culture that may make incivility part and parcel of legitimate market expectations.

In the political realm, with its relatively loose formal rules and a willingness to let the voters speak, President Trump's brash style was unconstrained and proved to be effective with American voters. In law practice, exactly because incivility has traditionally not been prohibited by a formal rule but rather constrained by an

93. *See, e.g.*, PUBLIC RELIGION RESEARCH INSTITUTE, UNDERSTANDING THE 2024 ELECTION: UNCOVERING THE KEY FACTORS INFLUENCING AMERICANS' PRESIDENTIAL VOTES (2025), https://prri.org/spotlight/understanding-the-2024-election-uncovering-the-key-factors-influencing-americans-presidential-votes/#:~:text=PRRI's%202024%20Post%2DElection%20Survey,in%20their%20responses%20as%20well [https://perma.cc/E6NJ-B2Q3] (finding that the economy consistently ranked as the most important issue for voters in 2024).

94. Khalea Robertson, *Poll Tracker: Attitudes on Immigration in the 2024 U.S. Elections*, AMS. SOC'Y/COUNCIL AMERICAS (Oct. 25, 2024), https://www.as-coa.org/articles/poll-tracker-attitudes-immigration-2024-us-elections [https://perma.cc/K6W6-NZ2A].

95. George, *supra* note 56, at 485.

informal mix of institutional and market controls, attorneys willing to pursue a Trumpian style of lawyering are going to find their conduct relatively unconstrained and perhaps increasingly effective with clients.

II. THE MODERN CASE AGAINST CIVILITY

Attacks on the rule of law and the likely appeal of Trump style lawyering make incivility in the practice of law a pressing concern, given the traditional silence of the *Rules* on civility. Yet, incivility as a pressing concern and a civility rule of professional conduct are two different things. The case for formal disciplinary civility controls faces an unexpected broad coalition of opponents, both liberal and conservative, advancing four significant critiques of a civility rule: lawyer exceptionalism, commitment to zealous advocacy, concerns about subjectivity, and First Amendment challenges. We turn to these obstacles next.

A. CIVILITY AND LAWYER EXCEPTIONALISM

Some research indicates that civility, once a cornerstone of societal interaction, is diminishing, leading to increased discord and even violence.[96] The 2023 annual ABA Survey of Civic Literacy found that 85% of United States residents believe civility is worse compared to 10 years ago.[97] A 2019 survey found that a significant majority of Americans view incivility as a major problem, citing diminished civility as a concern.[98] Over the last decade, the American polity has seemingly abandoned civility and increasingly resorted to anger, vitriol, and violence rather than dialogue to share its problems and express differences.[99]

Bemoaning the decline of civility implies that it is a desirable trait of public life. The root meaning of civility is linked to "the art of civil government," which acts as the glue that holds society together.[100] In a political context, civility is

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96. Lisette Montalvo, *An Evidence Based Synthesis of Civility and Incivility Literature: A Model to Explain Civil and Uncivil Behaviors in the Workplace*, THIRD ANNUAL INT'L CONF. ON ENGAGED MGMT. SCHOLARSHIP (Sept. 20, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327834 [https://perma.cc/T6BB-FYF5]. *But see* MARK CALDWELL, A SHORT HISTORY OF RUDENESS (David Stanford Burr ed., 1999) (exploring how perceptions of rudeness have evolved over time, and examining how societal norms and values have shifted and influenced what is considered rude behavior. Caldwell suggests that the notion of civility's decline is a long-standing perception that can be traced back to 1800).

97. AM. BAR ASS'N, AMERICAN BAR ASSOCIATION SURVEY ON CLINIC LITERACY 2023 (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/2023-civic-literacy-survey.pdf [https://perma.cc/HB2Z-LC5K] (a majority of people in the survey believed that proliferation of incivility on social media and media outlets is the main reason for this decline in civility).

98. Vincent Williams, Jacob Gottlieb & Tina Lee, *Declining Civility and Growing Political Violence at the Local Level: A Threat to American Democracy*, 54 STATE & LOC. GOV'T REV. 7, 9 (2022) (reporting a 2019 survey, which revealed that 93% of Americans identified incivility as a problem, with 68% considering it a major problem).

99. *Id.*

100. Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 6 (2011) (quoting Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 729 (1996)).

seen as a virtue that allows people to remain present and engaged even amid deep-rooted disagreements.[101] Civility provides a basis for coordination and mutual trust in political interactions.[102] It acts as a buffer against the escalation of conflicts in political settings since it requires political opponents to be part of a common process, ensuring they are in each other's presence in a formal sense.[103] Incivility, in turn, is perceived as a multidimensional construct encompassing behaviors such as insulting utterances and deception.[104] Incivility can escalate conflicts and lead to more severe forms of political disruption and violence.[105] The absence of civility can lead to disorder and a breakdown of societal norms that pose a significant threat to American democracy.[106] Such escalation can challenge the stability and authority of political institutions, making it difficult for them to maintain order and fulfill their roles effectively.[107]

So defined, civility in the political realm appears to be an unmitigated good. Perhaps unsurprisingly, more than 75% of respondents in a recent study recognized various indicators of political incivility.[108] Incivility can diminish public interest and engagement. While it may initially spark attention, it often leads to moral disapproval and reduced followership, as seen in studies of political figures.[109] The public reacts more negatively to political incivility than was previously thought, with observers' moral disapproval of incivility mediating diminished interest in what politicians have to say.[110] The public's negative reaction to incivility in politics suggests that fostering civil discourse could enhance political engagement and trust.[111]

And yet, in 2026, it is hard to deny the prevalence, even appeal, of incivility in American public life. When candidate Donald Trump first emerged on the political scene in 2015 with his brash style of name-calling, insults, ridicule of opponents, and half-truths, he was criticized for violating long-accepted norms of political civil culture, undermining substantive exchange, and distracting the American public. Yet, Trump's incivility appealed to many who considered him a maverick, a rebel, someone who could shake up the old-fashioned, dysfunctional establishment. As it turned out, following the 2016 elections, for every

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101. Jeremy Waldron, *Civility and Formality*, *in* CIVILITY, LEGALITY AND JUSTICE IN AMERICA 46, 58 (Austin Sarat ed. 2014).

102. *Id*. at 52.

103. *Id*. at 60–61.

104. *See* Robin Stryker et al., *What is Political Incivility?*, 83 COMMC'N MONOGRAPHS 535, 549 (2016).

105. Williams et al., *supra* note 98, at 7 ("[T]he American polity has abandoned civility and increasingly resorted to anger, vitriol and violence rather than dialog to share their problems and express differences.").

106. *See id*. at 9.

107. Waldron, *supra* note 101, at 57.

108. Williams et al., *supra* note 98.

109. Matthew Feinberg & Jeremy A. Frimer, *Incivility Diminishes Interest in What Politicians Have to Say*, SOC. PSYCH. & PERSONALITY SCI. (Nov. 15, 2022), https://scispace.com/papers/incivility-diminishes-interest-in-what-politicians-have-to-25lsnxlq [https://perma.cc/9KSV-XSKG].

110. *Id*.

111. *Id*.

American who was shocked by Trump's insults and name-calling and found his incivility distracting, there was an American who found the reductive, simplistic, populist messaging alluring and reassuring at times of social upheaval and change. Trump's ascendancy to the Oval Office and his brash style as President legitimized and bolstered mainstream incivility.

President Biden's victory in the 2020 elections suggested that perhaps the rise and popularity of Trump style incivility was a fluke. Biden, a veteran of American establishment politics and a symbol of civility, seemed to have restored respectability to American politics and culture. President Trump began to embody the dark side of incivility: he refused to acknowledge his loss, perpetrated the Big Lie false narrative, asserting that the elections of 2020 were stolen, and even emboldened a rioting crowd to assault the U.S. Capitol and disrupt the peaceful transition of power on January 6, 2021.

The Biden Administration may have restored civility on the surface, yet warning signs remained. In the years leading to the 2024 elections, President Trump and his supporters remained defiant and at times uncivil. The Big Lie narrative has proven successful, notwithstanding offering no evidence to substantiate its false claims.[112] As the 2024 elections drew near, more politicians refused to commit to accepting the results of the elections should they lose it.[113] President Trump himself has grown more uncivil, rude, and seemingly untroubled by half-truths. The American public appeared unfazed by Trump's incivility and name-calling. Then President Trump won a second term in office. Emboldened incivility could no longer be dismissed as a fluke, a recycled anecdotal claim, or a nostalgic yearn. In 2026, it must be investigated. The question is no longer whether political civility is in decline; the question is why.

The causes of the apparent decline in civil behavior in modern political society are multifaceted and influenced by various educational, social, cultural, and economic factors. The shift in educational priorities from character building to increased emphasis on academic achievements, a complex move supported by some compelling arguments and good intentions,[114] has nonetheless contributed to the decline in civil behavior. Historically, public schools played a crucial role in teaching civility and manners, which are essential for societal harmony.[115] However, the current educational focus on standardized testing and scores often neglects character building and civility, leading to a generation less equipped with and respectful of social and civic skills.[116]

Other character-building and civility-enhancing institutions have also been in decline, including the weakening of the traditional family unit, community

112. FINAL REPORT, *supra* note 76.

113. *Supra* note 79.

114. ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS (2015).

115. Keely Wilkins et al., *The Civil Behavior of Students: A Survey of School Professionals*, 130 EDUCATION 540, 541 (2010).

116. *Id*. at 540–41.

organizations, and religious structures.[117] In the twenty-first century, the influence of media, social media, and technology have further exacerbated this decline, as children are less exposed to civil behavior at home and in society. Thus, the perceived decline in civility is interwoven into anxiety about social and cultural changes and the demise of traditional institutions and hierarchies, especially for those who found the traditional status quo comfortable and empowering—Caucasian men. Mix in economic frustration and growing insecurity for the middle class and working Americans whose salaries in real dollars have stagnated for years,[118] and anger, vitriol, and incivility come in.

Such incivility is not limited to the political and public spheres. Rooted in deep social and cultural anxiety, incivility seeps into all walks of life. In the workplace, incivility is characterized by rude and disrespectful behaviors that disrupt firm culture and productivity. It is often linked to high-pressure environments, poor leadership, and ineffective communication.[119] The prevalence of incivility in workplaces can lead to negative outcomes, including increased stress, reduced job satisfaction, and high staff turnover. Research indicates that workplace incivility is influenced by insufficient training and development opportunities, stress, heavy workloads, and tight deadlines.[120] Also, if workers perceive incivility as common or accepted, they are more likely to act uncivilly.[121] In workplaces, fostering a culture of respect and engagement can improve well-being and productivity, reducing the prevalence of incivility.[122]

While incivility is grounded in majoritarian anxiety in the context of economic and cultural change and uncertainty, at the same time, incivility in modern society can also reflect the frustration of minorities with lingering power imbalances and can serve as a form of resistance against perceived injustices. Civility has its origins in aristocratic societies where rules of polite social interaction were based on deference. These rules were designed to maintain and reinforce the social order by ensuring that individuals of lower status showed respect and deference to those of higher status.[123] This indicates that civility can be used to exclude certain groups from social power and maintain hierarchical structures. Even in the

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117. ROBERT D. PUTNAM, BOWLING ALONE - THE COLLAPSE AND REVIVAL OF AMERICAN (2000) (documenting the decline of American civic institutions); *see also* Jason DeParle, *No Way Up*, N.Y. TIMES, Mar. 8, 2015, at 14 (describing Putnam as the "poet laureate of civil society").

118. *See, e.g.*, Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR. (Aug. 7, 2018), https://www.pewresearch.org/short-reads/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/ [https://perma.cc/XU63-U3JM].

119. Debra Jackson et al., *Workplace Incivility: Insidious, Pervasive and Harmful*, 33 INT'L J. MENTAL HEALTH NURSING 483, 484 (2024).

120. *Id.* at 484.

121. Ryan P. Jacobson, *The Effects of Descriptive and Injunctive Social Norms on Workplace Civility*, 54 J. APPLIED SOC. PSYCH. 30, 41 (2024).

122. Dan Hasson & Karin Villaume, *Incivility Is Systematically Associated with Indicators of Health, Stress, Well-being, and the Psychosocial Work Environment*, J. PUB. HEALTH 12 (2024) (documenting successful examples of workplace interventions specifically designed to counteract incivility and promote civility).

123. *See* Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1149 (2011).

context of American society, where European class distinctions were not directly applicable, there was an interest in class-based etiquette systems.[124] Some commentators argue that calls for increased civility are often an implicit defense of the status quo. Advocating for civility can sometimes serve to uphold existing power structures and resist change, thereby reinforcing social hierarchies.[125] It is therefore important to acknowledge that civility, while often seen as a positive social norm, can also function as a mechanism for reinforcing social hierarchies and maintaining existing power dynamics.

In this sense, while political civility, defined as respectful and kind engagement on the merits, sounds unobjectionable, unexamined civility is also sometimes a code for maintaining the status quo, covering up both majoritarian anxieties about changing and unstable social and cultural realities, and the frustration of minorities about the injustice and inequality embedded in the status quo. Addressing incivility requires a nuanced understanding of its causes and the implementation of strategies that promote civility while acknowledging legitimate concerns and grievances about the status quo. Incivility can be a response to deep-seated anxieties about change and economic uncertainty, as well as to systemic inequalities and power imbalances. It often emerges in environments where grievances are dismissed and inequitable conditions are maintained. Acts of incivility can serve as a form of perceived frustration and resistance, drawing attention to unaddressed concerns and injustices and prompting societal change, positive and negative.[126]

The exceptionalist objection to a civility push in the legal profession builds on this understanding of the roots of incivility in American society and culture: because the causes and drivers of incivility are found outside of the legal profession, attempting to mitigate incivility within the professional sphere is naïve and futile, a form of lawyer exceptionalism.

Lawyer exceptionalism objections to reform are nothing new. Some commentators argue that law firms' early diversity efforts, subsequently dubbed DEI initiatives, may have been well-intentioned but were somewhat naïve and futile, destined to result in diversity fatigue without much impact on the underrepresentation of women and lawyers of color in positions of power and influence in the legal profession, because the root causes of gender and racial discrimination and bias were external to the practice of law.[127] Expecting law firms to mitigate, let alone address discrimination and bias is thus naïve because these are too big societal challenges law firms are helpless to resolve. For example, some argue that until such time as the pipeline problem is addressed and law firms have a much larger pool of qualified law school graduates of color from which to recruit,

124. *Id*. at 1213.
125. CALDWELL, *supra* note 96, at 34–35.
126. Ryan Essex & Lydia Mainey, *Given Incivility a Chance,* 49 J. MED. ETHICS 679, 679 (2023).
127. Wald, *supra* note 69, at 1110–11.

race-based underrepresentation in positions of power and influence will never improve significantly. Yet addressing the pipeline problem is not something law firms can do because the reasons that explain the underrepresentation of students of color in law schools have to do with complex economic, cultural, and social factors, including the legacy of slavery and discrimination, lingering economic inequality, and deep distrust of the legal system and the rule of law.[128]

Similarly, exceptionalist objections pop up in discussions about the formation of professional identity of law students. Students, argue some commentators, arrive at law school as complete moral adults. The thought that law schools, and later law firms, can form law students and lawyers' professional identity is naïve and futile.[129]

At first, the exceptionalist objection to increased civility in the legal profession may seem compelling, because it appears that the drivers of incivility outside of the profession—majoritarian fears and anxiety over change and the decline of traditional structures and hierarchies, combined with minorities' frustration with the status quo and the slow rate of progressive change—apply within the profession.

The American legal profession is certainly experiencing ample change. For generations, a stable professional domain of White-Anglo-Saxon-Protestant (WASP) men of affluent backgrounds, law practice has grown incredibly heterogeneous and diverse.[130] In the early twentieth century, when waves of Jewish and Catholic men, typically sons of immigrants, and graduates of night-time and part-time law schools, as well as WASPs of lower socio-economic status, first sought to enter the profession in significant numbers, calls for civility were used by the organized bar and elite lawyers as a cover for exclusion and to justify barriers to entry. Following World War II, as the legal profession began to grow exponentially, featuring greater ethnoreligious, then gender, and then racial and ethnic diversity,[131] concerns about the decline of civility sometimes masked anxiety about the growing heterogeneity of the profession.[132] Civility, historically synonymous with claims about courtesy among the brethren of bar, seemed in decline when the profession welcomed women and lawyers of color.

In the twenty-first century, concerns about the decline of civility may overlap with laments about the decline of the in-person culture of law firms, where older, more senior lawyers complain about the lack of professionalism of a new generation of lawyers who is less inclined to come to the office five days a week.[133] Talk

128. *Id.* at 1111–12.

129. Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 429–32 (2012).

130. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1810–25 (2008); Wald, *supra* note at 69, at 1094–1103.

131. Wald, *supra* note 69, at 1094–1103.

132. JEROLD S. AUERBACH, UNEQUAL JUSTICE 14–73, 102–29 (1976); Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 559–62 (1996).

133. *See*, *e.g., ABA Survey: Most Lawyers Want Options for Remote Work, Court and Conferences,* A.B.A. (Sept. 28, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/ [https://perma.cc/6ZY9-EHCE].

about the good old days may reveal growing anxiety about increased competition both at the corporate hemisphere, which is experiencing instability, the collapse of law firms, the rising power of entity clients, and the de-equitizing of partners,[134] as well as at the individual hemisphere in which concerns about competition are heightened by the rise of artificial intelligence and fear of robo-lawyers and non-lawyers offering legal services reducing demand for lawyers' services.[135]

At the same time, women and lawyers of color, increasingly well-represented at law schools and entry-level positions but running into the glass-ceiling effect at positions of power and influence,[136] would be justified in experiencing civility angst, or at least be suspicious of calls for increased civility. Since greater substantive equality within the ranks of the legal profession did not turn out to be a self-correcting "no-problem" problem,[137] rebellious lawyers could legitimately question nostalgic calls for greater civility relating back to the days of a more "civil" homogeneous profession.

In this sense, civility talk within the legal profession, including complaints about its decline, seem to track civility talk in the political realm. Majoritarian lawyers' incivility may reveal their anxiety about losing their place atop the profession, and incivility among lawyers from previously excluded groups may reveal frustration with their inability to crack the legal profession's glass-ceilings. Imposing a civility rule instead of addressing these deep-seated concerns may mask complex problems instead of addressing them. Except that further scrutiny reveals it is not at all the case that incivility in the legal profession tracks incivility in the political realm. Specifically, the causes of incivility within the legal profession are not the same and do not reflect incivility trends in American culture. Accordingly, expecting lawyers to be civil would not be a form of naïve lawyer exceptionalism.

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134. On the reasons for the increased instability of large law firms and their collapses, see John Morley, *Why Law Firms Collapse*, 75 BUS. LAW. 1399, 1399 (2020); John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67, 69 (2009). On the rising power of entity clients and the corresponding declining power of large law firms, see Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751–53; MILTON C. REGAN, JR. & LISA ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM (2021). On de-equitizing partners, see Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-Equity Partners,* 58 U. KAN. L. REV. 507, 511–12, 533–544 (2010).

135. Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 179–86 (2018); Milan Markovic, *Rise of the Robot Lawyers?*, 61 ARIZ. L. REV. 325, 335–42 (2019).

136. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 297, 332 (1995); Wald, *supra* note 92; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 496 (1996).

137. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1736–55 (1991)*; see also* Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 47 (1994); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 586 (1996).

In the corporate hemisphere, equity partner anxiety is not driven by concerns about the growing heterogeneity of the associate and partner tracks but by the growing number of large law firms,[138] the growing power of large entity clients, client-imposed loyalty demands of outside counsel that are not reciprocated by giving law firms steady long-term legal work commitments,[139] loss of control over one's time,[140] and perhaps over being treated by clients as high-end service providers instead of respected professionals.[141] Partners from underrepresented backgrounds certainly face significant hurdles, from equity concerns such as receiving equal access to clients and opportunities to grow their books of business to receiving equal compensation for equal work, but they generally do not worry about exclusion from large law firms. Women and lawyers of color, for example, appropriately worry about being treated equally within BigLaw, not about toppling it. Associate anxiety is rooted in concerns about striking desirable balances between work and life, and in finding satisfaction and justice in the practice of law, not about making a living wage.[142] Similarly, in the individual hemisphere, lawyers are and have long been concerned about increased competition and managing the workload, not about economic and social instability.[143] Members of the American legal profession experience significant challenges, but they simply do not share Americans' majoritarian anxieties nor their minorities' dissent and angst.

To be sure, American lawyers are not fully insulated from the complex factors that drive incivility in American culture. To the extent that the decline of civility in American culture results in high school and college graduates who are less aware of, socialized in, and committed to civility, law schools will train and law firms will welcome less civilized law students. To the extent that the decline of civility in American culture results in clients expecting and even demanding uncivil conduct of their lawyers as part of zealous advocacy, lawyers will face market pressures to act uncivilly. Importantly, however, the external causes of incivility in American culture do not drive incivility within the profession. The problem of incivility within the profession is not a reflection of incivility outside of the profession, and lawyers are not helpless to combat incivility. To think that

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138. Eli Wald, *Getting In and out Of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. 1765, 1785 (2020).

139. David B. Wilkins, *Team of Rivals? Toward a New Model of The Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2076–85 (2010).

140. David B. Wilkins, *The In-House Counsel Movement, Metrics of Change*, LEGAL BUS. WORLD (Jan. 20, 2017), https://www.legalbusinessworld.com/single-post/2017/01/20/The-In-House-Counsel-Movement-Metrics-of-Change [https://perma.cc/ERK5-X5L8].

141. Wald, *supra* note 138; Bruce Green & Eli Wald, *Outside Counsel Guidelines: Power, Ideology, and the Evolution of the Corporate Bar*, 68 ARIZ. L. REV. (forthcoming 2026).

142. *See* Joshua Holt, *BigLaw Salary Scale*, BIGLAW INVESTOR, https://www.biglawinvestor.com/biglaw-salary-scale/ [https://perma.cc/ZAA2-EFXX] (last visited Oct. 23, 2025).

143. *See* Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 UMKC L. REV. 685, 695 (2021).

lawyers can and should act civilly, and that they should act as civics-teachers modeling civil engagement to clients is not naïve lawyer exceptionalism.[144] Nonetheless, understanding the causes of incivility within the profession, causes that differ from the grounds for increased incivility in American culture, is necessary before taking a stand for civility, and so we turn to exploring these causes next.

B. THE DECLINE OF TRADITIONAL PROFESSIONALISM AND THE RISE OF ZEALOUS ADVOCACY AND INCIVILITY IN THE LEGAL PROFESSION

In the existing legal literature, civility is framed as a core principle tied to professional identity. It is considered a defining characteristic of professionalism and good bar citizenship, which emphasizes the importance of civility in maintaining the integrity of the legal profession.[145] Civility is generally defined as acting with respect, kindness, courtesy, and graciousness toward everyone with whom a lawyer comes in contact.[146] It is often linked to professionalism and ethics, sometimes considered synonymous with professionalism, and other times seen as a facet of both professionalism and legal ethics—uncivil conduct, as we have seen, may breach the *Rules*.[147] Some commentators argue that civility is a moral virtue within the legal profession that promotes a professional culture that values courteous behavior.[148] A more functional viewpoint of civility sees it as a mechanism by which lawyers can manage conflicts and promote timely resolutions for the benefit of all parties involved without damaging relationships.[149]

From this seemingly straightforward definition, the traditional discourse moves to laments about the decline of civility, consisting of both infamous if anecdotal cases and more systematic studies. One notable case is that of Antonio Cordova-Gonzalez, who faced disbarment by two federal courts for engaging in inappropriate conduct that included using "vituperative statements" and "vitriolic slurs" in his written communications. His language was described as pervasive, abusive, and disrespectful of opposing counsel and judges.[150] Another notable case that led to disbarment is that of Julie Lynn Wolff, who used offensive and derogatory language to describe her client's developmentally disabled minor daughter during legal proceedings. She referred to the minor as "akin to broccoli" and a "tree

144. *See* Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 123–35 (2009); Wald & Pearce, *supra* note 129, at 428–29.

145. *See* Mashburn, *supra* note 123, at 1195.

146. David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 244 (2013).

147. *Id*. at 245–46; *supra* Part I.A.

148. *See* Alice Woolley, *"Uncivil by Too Much Civility"?: Critiquing Five More Years of Civility Regulation in Canada*, 36 DALHOUSIE L. J. 239, 240, 244, 248 (2013).

149. Melissa S. Hung, Comment, *A Non-Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism*, 48 SANTA CLARA L. RV. 1127, 1132 (2008).

150. *In re* Cordova-Gonzalez, 996 F.2d 1334, 1335–37 (1st Cir. 1993).

trunk" and characterized her testimony as "jibber jabber." Additionally, Wolff made "ad hominem attacks" against opposing counsel and disparaged the trial judge. Her conduct, deemed "shameful editorializing" and "gratuitous [and] offensive," led to her disbarment for multiple infractions.[151]

Beyond sensational cases, a common perception is that lawyer incivility is growing and becoming a major problem.[152] For example, the perception of growing incivility among lawyers was documented in 1991 in a survey of 1,500 lawyers and judges from three states.[153] Another study that aimed to identify patterns in how incivility is sanctioned across different contexts within the legal profession included 474 cases during a ten-year period from 1998 to 2008.[154] Each case was screened for relevance, allowing for a systematic examination of the nature and context of the uncivil behavior reported. The nature of the misconduct was a critical factor in judicial decision-making. The study categorized incidents as speech or behavior, with the majority of impolite speech being rude (67.7%) and defiant (59.7%). Threatening speech and racist statements were less common but still notable.[155] The study revealed that written or verbal condemnations were the most common type of sanction, occurring in 77.6% of the cases. Monetary and other penalties were less frequent, appearing in 34.3% of the cases.[156] The results suggest that defiant speech directed at judges is particularly correlated with sanctions, highlighting a critical area for further examination in the context of legal professionalism.[157] The study also found that a significant portion of these cases occurred in litigation-related contexts.[158]

In Canada, a study examining cases where lawyers were disciplined for incivility undermining the integrity of legal proceedings found a broad range of uncivil conduct and speech: filing false affidavits, being rude to other people, making unfounded allegations in litigation, engaging in personal attacks on other counsel, and physically assaulting clients.[159]

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151. *See In re* S.C., 41 Cal. Rptr. 3d 453, 458, 474 (Cal. Ct. App. 2006)*; see also* Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rumbo Run Amok*, 51 WASHBURN L. J. 365, 375, 380–81 (2011) (discussing *In re* S.C.).

152. *See* Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 114 (1995) (noting a "current crisis in civility"); *see also* Allen K. Harris, *The Professionalism Crises—The "Z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 551–52 (2002) (discussing an increase in uncivil litigation tactics).

153. *See* Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyers Civility*, 28 VAL. U. REV. 531, 532 (1994) (reporting 42% of responding lawyers and 45% of responding judges to a survey acknowledged the existence of a civility issue).

154. Mashburn, *supra* note 123, at 1158. Professor Mashburn's database was compiled by searching various Westlaw case files. The search focused on cases where courts used terms such as "offensive," "uncivil," "unprofessional," and related words to describe lawyers' behavior.

155. *Id*. at 1163.

156. *Id*. at 1164.

157. *Id*. at 1165. The study aimed to explore whether civility can be redefined in a way that serves justice in a democratic society, challenging the existing structures that prioritize deference over equality.

158. *Id*. at 1162.

159. Woolley, *supra* note 148, at 246–47.

These anecdotal examples and studies illustrate how uncivil actions in the legal profession can range from verbal misconduct to unethical and even criminal behavior, all of which can undermine the integrity of the legal system and public trust in it. They also demonstrate not actual increased incivility but the profession's preoccupation with the perception of increased incivility within its ranks. What then explains the preoccupation of lawyers with civility talk? Incivility laments among lawyers, as we have seen, are not primarily about majoritarian anxiety and minority frustration with the status quo, although these exist. Rather, incivility talk masks concerns about the decline of and changing nature of conceptions of professionalism among lawyers.

The legal profession, astutely observed Professor Deborah Rhode, appears to be in a perpetual state of crisis.[160] For more than a century now, commentators within and outside the profession have decried the decline of professional values and rise of commercialism. Lawyers used to be and think of themselves as professionals dedicated to serving clients but committed to the public good, the kind of professionals who according to Elihu Root, one of the nineteenth century most celebrated American lawyers, every once in a while had to tell "would-be clients that they are damned fools and should stop."[161] Root, among the founding members of a new breed of legal entities that would come to be known as the large law firm, seemingly embodied what Professor Robert Gordon has described as an ideal of legal professionalism—the lawyer-statesperson—who moved easily and repeatedly between private and public practice, capturing the commitment of lawyers as professionals to serve private interests consistent with the public interest.[162]

This so-called golden era of professionalism has been in decline, with lawyers gradually abandoning the lawyer-statesperson professional ideology in favor of a client-centered service ideology.[163] Some scholars, citing examples as diverse as lawyers' increased advertising and caseloads in the individual hemisphere and deference to entity clients in the corporate hemisphere, have described lawyers as selling out the public interest to serve paying clients and to help pursue their, and

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160. *See* Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) ("Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the bar.").

161. PHILIP C. JESSUP, ELIHU ROOT 133 (1938).

162. On the lawyer-statesman ideal, see Robert W. Gordon, *Lawyers as the 'American Aristocracy': A 19th Century Ideal that May Still Be Relevant*, 20 STAN. LAW. 1, 4–7 (1985); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 15, 32 (1988); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 265–66 (1990); Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1176 (2009); Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731 (2017). Whether leading corporate lawyers of the late nineteenth century and early twentieth century actually served the public good as opposed to the interests of their clients is a question for another day and another article. For purposes of this Article, note that these lawyers asserted and likely believed they were intermediaries between corporate clients and the people, serving the public interest.

163. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

the lawyers' own self-interest.[164] Others have described lawyers' retreat from traditional professional values as a paradigm shift,[165] complete with the emergence of a new market-based professional ideology grounded in client service and merit,[166] in which lawyers focus increasingly on clients' autonomous self-interest in lieu of relational self-interest.[167] The lawyer-statesperson ideal has been gradually abandoned in favor of the lawyer as a hired gun, a professional who acts as the longarm or mouthpiece of clients.[168] The new standard conception of the profession featured two governing principles: partisanship or zealous advocacy, and neutrality or non-accountability.[169] Clients and clients alone were to determine the objectives of the relationship subject only to the constraint of legality. Lawyers, exactly because their role was to be neutral and had no authority over the goals of the relationship, had no moral responsibility for the outcomes they helped bring about. Instead, lawyers' job was to zealously advocate on clients' behalf as partisans within the bounds of the law.[170] The practice of law has shifted, according to critics, from a professional calling to a service industry focused on the efficient delivery of services in a competitive market. This shift has led to a growing emphasis on financial rewards rather than personal satisfaction and public service, which traditionally motivated people to enter the legal profession,[171] and it has occurred primarily in corporate law firms, which since the 1970s have evolved into explicit profit-maximizing institutions.[172]

A lot of ink has been spilled debating the professionalism-business dichotomy.[173] For purposes of this Article, it suffices to point out that the simplistic claim of decline has been refuted by scholars from the left and from the right. From the left, critics have pointed out that the decline of traditional paternalistic professionalism and shift to client-centered service has empowered clients to

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164. *See, e.g.*, Russell G. Pearce & Pam Jenoff, *Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century*, 40 FORDHAM URB. L.J. 481, 488–96 (2012).

165. *See generally* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (arguing that lawyers' retreat from traditional professional values reflects not a moral decline but a Kuhnian paradigm shift, in which the traditional ideology of legal professionalism collapses and is replaced by an emerging conception of law practice as a business requiring a new normative and institutional framework).

166. Wald, *supra* note 92.

167. Pearce & Wald, *supra* note 100.

168. *Id.*

169. Simon, *supra* note 88.

170. *Id.*

171. Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1381–82 (2007) (questioning whether the profession can maintain its traditional values and attract individuals who are committed to these professional ideals).

172. Sung Hui Kim, *The Profit Principle: Tracing the Moral Decline of Corporate Law Firms*, 122 MICH. L. REV. 1321, 1324–25, 1329 (2024) (exploring the causes of the moral transformation of large law firms).

173. *See* JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? xiv (1916); Louis D. Brandeis, *Address Before the Harvard Ethical Society: The Opportunity in the Law* (May 4, 1905), 39 AM. L. REV. 555 (1905).

meaningfully participate in their own representation and pursue their autonomy.[174] From the right, critics have celebrated the demise of the mystique of non-competitive professionalism and the rise of merit-based and client-centered practice of law.[175] Both have cautioned against a nostalgic celebration of a golden era of professionalism that was also the era of overt, unabashed discrimination and exclusion of women, people of color, and other minorities from the legal profession.[176]

Nonetheless, this transformation, either a decline of law as a profession and corresponding rise of law as a business, or a paradigm shift to a market-based professional ideology, has contributed to a culture of incivility as lawyers increasingly act as neutral partisans, focusing on what they can achieve for paying clients and for themselves within the bounds of the law rather than on professional and public interest considerations.[177] The traditional approach to civility, as we have seen, was grounded not in formal direct disciplinary controls, but rather in an informal mix of institutional and market controls. Incivility was unprofessional because it was undignified, disrespectful to one's brethren at the bar, unbecoming of learned men, and inconsistent with respect to the law as a public calling. Yet, as the professional paradigm declined or transformed, these very bounds that guarded civility diminished. As professionalism came to be understood as neutrality and zealous advocacy, civility became a second-order commitment, overlooked if incivility was an effective means of successfully advancing the client's interests.[178] Incivility was not inherently unbecoming, it was an instrumental tool to be used as needed in advocacy. Civility was a relic of the past, to be cast away when the profession overcame its discriminatory and exclusionary brethren past and welcomed women, people of color, and others to its ranks.

In an era in which lawyers' primary professional responsibility has come to be understood to be to their clients (and their own self-interest), and obligations to the legal system and the public have been gradually set aside, civility has been in decline because treating all legal actors with respect has been downgraded from a primary to a second-order commitment. Civility may be considered and practiced if it is consistent with the lawyer's role as a hired gun and with pursuing clients' interests zealously. Otherwise, civility is an afterthought, or worse, an impediment to effective client-centered advocacy.

To be clear, no professional and institutional norms preach and promote incivility as a goal in and of itself. Indeed, incivility appears to have remained a

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174. *See, e.g.,* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 216–20 (1991).

175. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1682–1709 (1998).

176. Galanter, *supra* note 132, at 272.

177. Pearce & Wald, *supra* note 100.

178. *Id.*

favorite lecture topic for nearly-retired veterans of the bar and high-ranking judges.[179] Yet, the primacy of zealous advocacy has relegated civility to a second-order consideration in the practice of law. Exactly when the rule of law is under attack and respect for it, civility included, has never been more important, civility is not a first-order professional imperative for bar associations, law firms, and law schools, given the prevailing dominant hired gun ideology.

Similarly, the market-based ideology of the legal profession makes it less likely that market controls will uphold civility as they have done in the past. As is the case with institutional controls, it is important to note that market controls do not directly support incivility, rather, they indirectly weaken the commitment to civility. If and when particular clients disavow incivility and demand that lawyers representing them adhere to respectful advocacy, lawyers may very well comply. Yet, when clients are indifferent or worse, expect aggressive advocacy and even incivility, some lawyers will yield not only for fear of losing clients in a highly competitive marketplace to more zealous lawyers but also because they believe their role is to aggressively advocate for clients. Moreover, systemic workplace factors increasingly common at law firms, such as high pressure, heavy workloads, and leadership focused on the financial bottom line and profit per partner contribute to incivility. They can lead to aggressive behaviors and a lack of civility as people struggle to manage stress and deadlines.[180] Miscommunication and poor communication channels can lead to misunderstandings and incivility. A lack of clear communication policies exacerbates this issue by creating ambiguity about appropriate behavior.[181]

The so-called great divorce between the hired gun ideology and its principle of zealous advocacy on the one hand, and civility on the other, may explain increasingly uncivil practice realities but it does not justify them. Indeed, invoking zealous advocacy on behalf of clients as a justification for uncivil conduct is relatively easy to refute. As Richard Wasserstrom compellingly explains, the adversary system excuse, or the principles of zealous advocacy and non-accountability, only applies within the confines of the adversary system. "It is good, so the argument goes, that the lawyer's behavior and concomitant point of view are role-differentiated because the lawyer qua lawyer participates in a complex institution [the adversary system] which functions well only if the individuals adhere to their institutional roles,"[182] including zealous advocacy. But, insists

179. *See, e.g.*, Sandra Day O'Connor, *Speech to the American Bar Association*, SANDRA DAY O'CONNOR INST. (Dec. 12, 1993), https://library.oconnorinstitute.org/speeches-writings/speech-to-american-bar-association/#:~:text=The%20rediscovery%20of%20civility%20must,to%20disagree%20without%20being%20disagreeable [https://perma.cc/96ZN-G3L2] ("The rediscovery of civility must begin and [sic] many places. Many people have to make it part of their jobs. Law schools should teach by deed as well as by word that it is possible to disagree without being disagreeable."); Anthony M. Kennedy, *Law and Belief*, TRIAL 22, 24 (1998) ("Rationality and civility are the structure for the social order we seek to preserve and so these precepts must always be the hallmark of this profession.").

180. Jackson et al., *supra* note 119, at 484.

181. *Id.*

182. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 9 (1975).

Wasserstrom, this reasoning works only to the extent that the institution itself is justified. The adversary system is justified as the best system we know to ascertain the truth and resolve disputes according to the law.[183] It is essential for the adversary excuse to apply that disputes are resolved according to the law, not according to disruptions, distractions, and name-calling. Incivility that distracts from the search for the truth undermines the objectives of the adversary system and therefore cannot be justified by the principles of the adversary system, zealous advocacy included.

A weaker zealous advocacy defense of incivility, however, is somewhat harder to dismiss. The hired gun ideology, zealous advocacy included, does not directly justify incivility. Rather, the standard conception, by positioning client-centered advocacy as the primary goal of representation and relegating the duties of lawyers as officers of the legal system and as public citizens, including duties to justice and the rule of law, to secondary status, weakens the traditional commitment to civility. Specifically, the hired gun, market-based ideology makes it less likely that institutional and market controls, now explicitly and primarily focused on pursuing clients' interests and maximizing profits per partner will continue to prioritize civility. Yet this accurate explanation of the gradual demise of informal civility guardrails does not mean incivility ought to be tolerated, rather, it supports the need to adopt formal means of protecting civility, such as rules of professional conduct prohibiting incivility.

C. THE SUBJECTIVITY OBJECTION TO CIVILITY

Next, opponents of a civility rule may argue that civility is so broadly and inconsistently defined as to risk chilling legitimate zealous advocacy on behalf of clients. Some violations of civility are blatant, such as physically assaulting a witness or opposing counsel.[184] However, in some cases, civility can be reasonably interpreted differently by different lawyers. For example, some lawyers might believe that interrupting a witness's testimony is not a disruption of the process as described in Rule 3.5(d). In their view, they are acting to uncover the truth, and allowing a witness to continue speaking without interrupting their false testimony would be inconsistent with their client's best interests and would undermine the process. Therefore, interrupting a witness who (in the lawyer's reasonable opinion) is lying is considered civil, zealous behavior. The line between robust communication and incivility is indeed often blurred, raising questions about when strong advocacy crosses into unethical behavior.[185] Professor Alice Woolley, for example, has argued that the focus on incivility is counterproductive because it can overlook complex ethical issues and risks chilling proper advocacy,

183. *Id.* at 9–10.

184. *See* Stephanie A. Scharf & Roberta D. Liebenberg, *Bullying in the Legal Profession: A Study of Illinois Lawyers' Experiences and Recommendations for Change*, ILL. SUP. CT. COMM'N ON PROFESSIONALISM (2024).

185. Paula Baron & Lillian Corbin, *Robust Communications or Incivility—Where Do We Draw the Line?*, 18 LEGAL ETHICS 1, 2–4 (2015).

especially for vulnerable clients.[186] The subjectivity challenge consists of two related prongs: the definition of civility and the manner in which it can be regulated.

The existence of multiple civility codes signifies broad recognition of the incivility concern within the legal profession.[187] The multiple codes, however, with their varying definitions of civility, compound the definitional challenge. In 2011, an analysis of civility codes adopted by thirty-two state bar associations revealed ten common themes that encapsulate the core concepts of civility across various jurisdictions: (1) keeping commitments and seeking agreement and accommodation regarding scheduling and extensions; (2) being respectful and acting in a courteous, cordial, and civil manner; (3) being prompt, punctual, and prepared in professional dealings; (4) maintaining honesty and personal integrity in all professional interactions; (5) communicating effectively with opposing counsel to facilitate smoother legal processes; (6) avoiding actions that are taken merely to delay proceedings or harass others; (7) ensuring proper conduct before the court to uphold the dignity of the legal process; (8) acting with dignity and cooperation during pre-trial proceedings; (9) acting as a role model to clients and the public and serving as a mentor to young lawyers; and (10) utilizing the court system in an efficient and fair manner to ensure justice is served.[188] The term "civility" is employed in these codes to encompass a wide range of lawyers' conduct, including procedural actions, matters of professional etiquette, and aspects of disciplinary regulation.

We suggest a different approach to thinking about and defining civility designed to reduce the traditional ambiguity surrounding it. Our proposal is clustered around two concepts. First, civility defined as being respectful to all actors and participants in the legal system, narrowly construed to mean avoiding name-calling and making derogatory remarks. This cluster will include being respectful and acting in a courteous, cordial, and civil manner (Campbell's second prong), maintaining honesty in all professional interactions (consistent with Rule 8.4(c) and echoing Campbell's fourth prong, leaving aside the ill-defined and open-ended "personal integrity"), and ensuring proper conduct before the court to uphold the dignity of the legal process, clarified to mean complying with applicable rules of professional conduct, rules of evidence and procedure, and court rules (Campbell's seventh prong).

Second, civility defined as engaging cooperatively within the confines of the law and the adversary system, which is expected to increase the efficiency of the legal process and save legal costs.[189] Incivility in the sense of failure to

186. Alice Woolley, *Does Civility Matter?*, 46 OSGOODE HALL L. REV. 175, 187 (2008); Woolley, *supra* note 148.

187. Fischer, *supra* note 151, at 367; *see also*, Campbell, *supra* note 43, at 107–109 (conducting a content analysis of civility codes adopted by thirty-two state bar associations); Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1079 (2005).

188. Campbell, *supra* note 43, at 107–128.

189. Grenardo, *supra* note 146, at 288, 292.

reasonably cooperate can lead to increased litigation costs. When attorneys engage in uncivil behavior, it often results in prolonged legal proceedings as disputes become more contentious and less cooperative. This can lead to additional time and resources being spent on resolving conflicts, thereby increasing the overall costs of litigation.[190] This bundle will include avoiding conduct designed to delay proceedings or negotiations or harass others (similar to Cambell's sixth prong). For advocates, this will also include seeking agreement and accommodation regarding scheduling and extensions (first prong), communicating effectively with opposing counsel to facilitate smoother legal processes (fifth prong), and cooperating during pre-trial proceedings (eighth prong). Although we (and Rule 1.3) agree that lawyers ought to be prompt and punctual (third prong),[191] and we also support lawyers acting as role models to clients, civic teachers to the public, and mentors to young lawyers (ninth prong) as part of a commitment as public citizens to the rule of law,[192] we do not think these commitments are part of a reasonable definition of civility.

In terms of the manner in which civility can be regulated, the existing literature explores three approaches, which we analyze in the following order. The first is that civility should be mandatory. The second is that civility is important, but should be voluntary. The third, which is less common, calls for civility codes to be abolished.

Mandatory civility is obligatory—that is, required by disciplinary rules such as the jurisdiction's rules of professional conduct, which lawyers can be sanctioned or penalized for violating.[193] Implementing mandatory civility rules that clearly define required conduct is seen as the most effective way to reduce incivility. Admittedly, mandatory civility requires much more than general or even specific rules listing types of conduct that intentionally disrupt courts or negotiations with third parties. Of course, it is not enough to establish mandatory rules; accompanying actions are necessary. To begin with, the rules should be taught and studied in law schools and later as part of continuing education that every bar association and law firm should offer as part of the socialization of lawyers into the profession. Only through learning and practice will such rules be internalized. Next, regular reminders of the mandatory rules should be provided through mandatory continuing legal education requirements for all lawyers as a condition of renewing their annual registration and maintaining their licenses in good standing.

Another important action is the education and training of judges regarding mandatory civility rules, since they are expected, in the advocacy context, to identify violations and enforce them in the courtroom. Without the cooperation of judges, mandatory rules will become less effective and underenforced. Partial

190. *Id*. at 288.
191. MODEL RULES R. 1.3.
192. *See* Green & Pearce, *supra* note 144.
193. *See* Grenardo, *supra* note 146, at 261.

responsibility for applying the rules would lie with judges, who would be required to enforce them consistently. Courts should take an active role in discouraging incivility by imposing penalties for uncivil conduct. This includes penalizing lawyers for inappropriate language and initiating and referring to the disciplinary system those who engage in severe misconduct.[194] At the same time, courts should more often commend lawyers who maintain professionalism despite facing incivility from their opponents. Encouraging this behavior can help foster a more civil legal environment.[195] The final action that must always be taken is, of course, the consistent enforcement of the rules by disciplinary agencies.[196]

The second approach to civility recognizes its importance but treats it as a voluntary commitment. This is the prevailing approach among state bars that have ethical codes and statements addressing civility that are separate and distinct from the rules of professional conduct. These ethical codes are not enforceable or mandatory but offer voluntary guidance for lawyers regarding the expected standards of civil behavior. They serve as a reference for legal practitioners to consult in order to foster an understanding of the standards of professionalism expected in their interactions with clients, colleagues, and the court.[197] Although most of these civility codes are advisory, not mandatory, they can still impact behavior. Their mere adoption and incorporation into training and continuing legal education programs sends a message to practicing attorneys that civility matters, and courts' reference of these codes when addressing misconduct lends them further credibility and may motivate lawyers to follow the principles set forth in the codes.[198]

An example of the second approach is the State Bar of California's Civility Toolbox, which includes guidelines on civility and professionalism.[199] The guidelines were adopted by the Board of Governors in 2007 and last revised in 2014. The introduction to the guidelines clarifies that they are not to be used as a basis for disciplinary actions or professional negligence claims. This distinction is crucial to ensure that the guidelines are seen as aspirational rather than enforceable rules. By providing a framework for civil behavior, however, the guidelines

194. *See* Fischer, *supra* note 151, at 394.

195. *See id.* at 368, 394.

196. *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648 (1981) ("[S]tudy after study has shown that the current rules of professional conduct are not enforced."); Wilkins, *supra* note 42, at 493 (noting rules of professional conduct tend to be "systematically underenforced"); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 465 (2008) ("The enforcement of the Rules of Professional Conduct has been notoriously lax."); Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1512 (2002) (citing examples of lax lawyer discipline).

197. *See* Fischer, *supra* note 151, at 367.

198. *Id.*

199. *See* THE STATE BAR OF CALIFORNIA, *Attorney Civility and Professionalism*, https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism [https://perma.cc/K7A9-3759] [hereinafter *The California Guidelines*]; Hung, *supra* note 149, at 1147 (arguing that the Toolbox's voluntary nature encourages attorneys to practice civility without the fear of repercussions for any missteps).

encourage attorneys to conduct themselves respectfully and cooperatively, which can lead to more effective and amicable legal proceedings.

Another method to be used under the second approach is ongoing campaigns for civility within the legal profession that can help reinforce the values of respect and cooperation among lawyers.[200] For example, the California guidelines have been promoted through educational programs and bar association meetings, which aim to raise awareness and encourage voluntary compliance among lawyers.[201] This may also be achieved by implementing mentorship programs with experienced lawyers guiding less experienced ones with regard to ethical practices and the consequences of unethical behavior.[202] This helps mentees understand the practical application of non-binding ethical principles in real-world scenarios, bridging the gap between theoretical knowledge and practice.

Proponents of the second, voluntary approach worry that mandatory civility cannot be effectively enforced, arguing, for example, that enforcement and sanctions should focus only on clear cases of incivility, such as threatening the opposing party or using aggressive and disrespectful language in filed motions and briefs. Such instances are easily identifiable and enforceable, making them suitable for mandatory rules and sanctions. However, when it comes to less clear-cut situations, such as impolite remarks to a witness, it is inappropriate to have a mandatory rule since the rule itself is ambiguous. Opinions about what constitutes an impolite remark to a witness—as opposed to, say, a clearly identifiable racist statement—may differ. The perception of an impolite remark is often subjective and depends on the listener. In general, regulation of civility is seen as subjective, with assessments of impropriety being in the eye of the beholder.[203] Furthermore, it is unreasonable to expect judges to impose sanctions every time an impolite remark is made. The judge would need to pause the proceedings, allow the lawyer to explain why their remarks did not violate a civility rule, and then issue a ruling. Such an approach would slow down the legal process and likely lead judges to abandon enforcement altogether.

To the extent that the concern is grounded in the ambiguous nature of the traditional definitions of civility, our two-prong concise definition, encompassing respect, interpreted narrowly to mean avoiding name-calling and derogatory remarks, and cooperation, addresses the challenges. For example, Professor Woolley thoughtfully argues that while the bar need not eliminate civility requirements from its aspirational codes of conduct, it should be cautious in its attempts to legislate the ideal society and legal profession through civility. Law, explains Woolley, cannot create human goodness, and attempts to perfect the

200. *See generally* Fischer, *supra* note 151, at 394 (arguing that civility campaigns inspire courts and lawyers to maintain respectful conduct).

201. *See The California Guidelines*, *supra* note 199, at 13.

202. *See generally* Woolley, *supra* note 148, at 263 n.122 (discussing the value of civility discourse).

203. *See id*. at 245; Grenardo, *supra* note 146, at 286–87.

world through law may have unintended negative consequences.[204] This valid concern does not apply to our narrow definition of civility that, rather than purporting to legislate goodness or niceness in an abstract fashion, deals with avoiding name-calling and cooperation with opposing counsel and others within the confines of the adversary system.

To the extent that the objection is a more generic concern about the under-enforcement of disciplinary rules—a mandatory rule that is unenforced or is under-enforced significantly undermines the obligation embedded in it[205]—the concern is well-taken but not a reason not to adopt a particular rule of professional conduct. Instead, additional resources ought to be dedicated to the enforcement of the rules. Similarly, to the extent that the subjectivity concern is about uneven and unequal enforcement of disciplinary rules, for example, a 1998–2008 comprehensive database revealed that lawyers representing individual clients were more likely to face serious disciplinary actions compared to those representing corporations, suggesting a troubling bias in the enforcement of civility standards,[206] such a valid challenge should be addressed holistically, not by avoiding promulgating otherwise necessary rules of professional conduct.

The third approach, admittedly less common, calls for abolishing civility codes. This approach views the strengthening of professional norms and conduct among lawyers as an important goal but argues that focusing on civility will not achieve this objective. On the contrary, it would be a futile investment of resources because there is no clear way to define what constitutes civility, let alone enforce it. Because civility is subjective, there is a risk that legitimate expressions of criticism or strong advocacy could be misinterpreted as rudeness or incivility. Such misinterpretation could undermine the lawyer's ability to effectively represent their clients and challenge unethical conduct by others.[207] Because this approach relies heavily on the subjective nature of civility, our narrow, clear objective definition of civility fully addresses this concern.

More acutely, according to civility abolitionists, enforcing civility—whether through mandatory measures (the first approach) or by making it voluntary and merely recommending civility (the second approach)—undermines the duty of loyalty to the client. Lawyers would be compelled to censor their words and actions in their representation of a client. Lawyers might modify the intensity of their advocacy to avoid complaints of incivility, even if such complaints would not lead to disciplinary proceedings. This could prevent lawyers from advocating zealously for their clients.[208]

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204. Woolley, *supra* note 148, at 267.
205. *See* Pearce & Wald, *supra* note 100, at 40.
206. *See* Mashburn, *supra* note 123, at 1162.
207. Woolley, *supra* note 148, at 241.
208. *Id*. at 245.

This approach, which categorically rejects the requirement of civility, is grounded in the increasingly dominant standard conception, which holds that loyalty to the client is the lawyer's paramount, and perhaps sole, obligation.[209] Under this view, any lawful action taken by a lawyer to advance a client's legitimate interests is permissible. The imposition of civility expectations would curtail this freedom because lawyers would need to continuously monitor their words and conduct, fearing censure from the bench or even potential disciplinary action. For example, during legal proceedings, attorneys might hesitate to challenge a judge if they believe the judge's comments infringe upon their client's rights.[210] Concerned about potential criticism or sanctions, lawyers would likely choose not to address the judge's remarks, thereby allowing them to stand unchallenged. This reluctance to act would result in harm to the client's rights. Enforcing civility may undermine the right to a fair trial by inhibiting lawyers from acting zealously on behalf of their clients because they would be preoccupied with adhering to civility requirements.

Such an argument was raised and rejected in *State v. Turner*, in which the Kansas Supreme Court sanctioned a lawyer who verbally attacked opposing counsel during a civil proceeding.[211] The court rejected the lawyer's explanation that "fidelity to his client's cause impelled him to employ harsh tactics," explaining that an attorney's duty to act with loyalty and dedication on behalf of the client is constrained by the limits of the law, the very reasoning we advance in rejecting the zealous advocacy objection to civility.[212] The court emphasized that this duty "does not countenance unrestrained zeal on the part of an advocate; his ardent zeal, commendable in itself, is to be exercised within the bounds of the law."[213] The court's reasoning is consistent with our account, following Wasserstrom, that rejects the zealous advocacy excuse for incivility: uncivil conduct that distracts from and frustrates the very objectives of the adversary system cannot be justified in terms of the adversary system.[214]

A more moderate version of this approach criticizes civility for promoting a narrow conception of the "good lawyer," which may reinforce a patrician model of advocacy, one that discourages diverse styles of advocacy and limits the expression of legitimate positions.[215] Critics of civility codes argue that these codes can serve as a defense of the status quo and may be used as tools for

209. *See* Simon, *supra* note 88, at 36; W. BRADELY WENDEL, LAWYERS AND FIDELITY TO LAW 29 (Princeton University Press, 2010).

210. *But see*, MODEL RULES R. 3.5 cmt. 4 ("A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate," and "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

211. State v. Turner, 538 P.2d 966, 970–71, 976 (Kan. 1975).

212. *Id*. at 970; *supra* Part II.B.

213. *Id*.

214. *See supra* notes 182–183 and accompanying text.

215. *See* Woolley, *supra* note 148, at 242.

exclusion and maintaining hierarchy.[216] This critique suggests that civility codes may be more about maintaining control than fostering genuine respect and cooperative engagement.[217] According to this critique, civility codes could be misused by those in power to maintain their status and suppress dissent.[218] These are valid concerns when coupled with subjective, vague, and open-ended definitions of civility. Our objective, narrow definition of civility, however, addresses this concern effectively, by offering clarity as to what civility requires and preempting overbroad attempts to silence strong legitimate advocacy by referring to it as uncivil. Moreover, specific well-defined mandatory rules, notes Professor Grenardo, provide guidance to lawyers in a clear language that is aimed at eliminating the vagueness of the term "civility."[219] Detailed, mandatory rules are likely to significantly ameliorate this debate and clearly establish what constitutes uncivil behavior, for example, name-calling and making derogatory remarks. Mandatory rules will also let lawyers know in advance what will be considered uncivil, allowing them to moderate their behavior to avoid sanctions. Guiding behavior in advance is certainly an important interest that can be achieved only by binding rules.

D. THE FIRST AMENDMENT OBJECTION TO CIVILITY

Finally, mandatory civility rules might infringe on constitutional rights, particularly freedom of speech, because they might cause lawyers to refrain from constitutionally protected expression out of fear of repercussions.[220] The 1998–2008 comprehensive database surveying attorney misconduct revealed that the First Amendment played a significant role in judicial decision-making. Courts had to balance lawyers' rights to free speech with the need to maintain respect for the legal system. This balance often influenced whether sanctions were imposed.[221]

A prominent example of the First Amendment concern is a South Carolina Supreme Court decision that balanced lawyers' First Amendment freedom of speech against the state's interest in regulating incivility and found the civility requirements to be justified and constitutional. In the case, an attorney who undertook a state oath stating *inter alia* "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications,"[222] sent an inflammatory email to opposing counsel that contained a personal attack against a family member of opposing counsel unrelated

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216. *See* Mashburn, *supra* note 123, at 1215.

217. *See id*. at 1220.

218. *See* Pearce & Wald, *supra* note 100, at 7 (advocating for a broader relational approach to civility, emphasizing voluntary adherence to norms of mutual respect and meaningful engagement rather than strict enforcement through formal codes).

219. *See* Grenardo, *supra* note 146, at 267–271.

220. *See id*. at 307.

221. *See* Mashburn, *supra* note 123, at 1193–94.

222. *In re* Anonymous Member of S.C. Bar, 709 S.E.2d 633, 637 (S.C. 2011) (quoting S.C. APP. CT. RULES § 402(k)).

to the facts of the case.[223] Explaining that "A court analyzing whether a disciplinary rule violates the First Amendment must balance 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue,'"[224] and that "In those instances where a lawyer's unbridled speech amounts to misconduct which threatens a significant state interest, a state may restrict the lawyer's exercise of personal rights guaranteed by the Constitution[],"[225] the court found that the "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 Attorney Doe. . . There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship."[226]

While lawyers' First Amendment rights have become a hot topic,[227] and certainly played a role in the debate over the adoption of Rule 8.4(g),[228] we believe the constitutional objection to a civility rule may be a red herring. There is no doubt that lawyers' speech is protected by the First Amendment.[229] As the Supreme Court has repeatedly explained, however, the First Amendment's free speech is not an absolute right. States may regulate lawyers' speech, and the regulation will survive strict scrutiny if it advances a compelling state interest.[230] For example, the rules of professional conduct prohibit lawyers from lying to tribunals on behalf of clients because of the states' compelling interest in the search for the truth, including protecting courts from fraud.[231] The Court has also upheld the constitutionality of the rule of professional conduct limiting lawyers' commercial free speech. It has specifically sustained restrictions on in-person solicitation where the lawyer's primary motivation for soliciting clients was pecuniary because of the states' compelling interest in protecting clients from lawyers' vexatious conduct.[232]

The issue thus becomes not whether states can regulate lawyers' speech but whether states have a compelling interest in prohibiting lawyers from engaging in

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223. *Id*. at 637–38.

224. *Id*. at 638 (quoting Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073 (1991)).

225. *Id*. (quoting *In re* Johnson, 729 P.2d 1175, 1178 (1986)).

226. *Id*.

227. *See* MARGARET TARKINGTON, VOICE OF JUSTICE—RECLAIMING THE FIRST AMENDMENT RIGHTS OF LAWYERS (2018).

228. *See* Blackman, *supra* note 36; *supra* notes 30–41 and accompanying text.

229. *See* TARKINGTON, *supra* note 227.

230. Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL'Y 37, 51–66 (2022).

231. MODEL RULES R. 3.3(a)(3); 3.3(b).

232. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–62 (1978); *In re* Primus, 436 U.S. 412, 431–39 (1978); *see also* MODEL RULES R. 7.3(b) (codifying the Supreme Court's holdings in Ohralik and *In re* Primus).

disrespectful, uncivil speech. Recent, unprecedented attacks on the rule of law make this an easy question to answer: states have a compelling interest in protecting the rule of law by limiting lawyers' speech that undermines it. Lawyers are officers of the legal system and public citizens with a special responsibility for the quality of justice.[233] Moreover, lawyers have a duty to uphold the rule of law:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. *In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority*. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.[234]

Just as traditional restrictions on lawyers' free speech designed to protect the search for the truth and protect clients from vexatious lawyer conduct are content-neutral and narrowly crafted, so should narrowly tailored restrictions designed to protect the rule of law ought to be included in the rules of professional conduct: lawyers engaged in the practice of law may not resort to name-calling and may not make derogatory statements about other legal actors, legal parties, or third parties involved with the legal system.[235]

In the past, informal professional expectations, social norms, and market controls sufficiently deterred most lawyers from acting uncivilly, such that no formal rules of professional conduct were necessary to protect the rule of law and public trust in democratic and legal institutions. The decline of institutional and market controls now makes it necessary to adopt a mandatory rule of professional conduct designed to safeguard the states' compelling interest in protecting the rule of law and restoring public confidence in it by insisting the lawyers, as officers of the legal system and as public citizens, role-model respect for the rule of law and refrain from a Trump style of practice.

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233. MODEL RULES pmbl. cmt. 1.

234. MODEL RULES pmbl. cmt 6 (emphasis added).

235. *See*, Eli Wald, *Lawyers', Law Professors' and Law Students' Free Speech: The Rule of Law, Civility, and Informed Engagement*, 37 J. CIV. RTS. & ECON. DEV. 549, 574–81 (2026).

III. CIVILITY IN THE TWENTY-FIRST CENTURY—A PROPOSAL

The rule of law is multifaceted, encompassing the protection of human rights, ensuring justice, providing societal structure, balancing power, and maintaining regulatory frameworks. It is foundational to a healthy society.[236] While it is widely recognized that lawyers are essential to maintaining the rule of law, few comprehensive studies delve into how their everyday practices support this vital principle.[237]

Lawyers have a professional obligation to uphold the rule of law and ensure the proper administration of justice.[238] This includes acting with independence and integrity, avoiding conduct that could harm the reputation of the profession, and promoting equal access to legal services.[239] We believe that a fundamental way for lawyers to uphold the rule of law is to preserve civility. By doing so, lawyers can role-model respect to the law and legal institutions. Acting as civic leaders, lawyers have the capacity and the responsibility to model civility in professional life, thereby strengthening the rule of law. Indeed, we argue that maintaining civility in lawyers' daily conduct is a key factor in safeguarding the rule of law.

One constitutive aspect of the rule of law is respect and trust in legal institutions and legal actors. Lawyers should demonstrate deference to the rule of law by role-modeling respectful interactions in the practice of law, not only with their clients but also with opposing counsel and opposing parties, as well as with third parties, witnesses, support staff, and custodial staff. In particular, lawyers should publicly and visibly respect judges, judicial personnel, and the judicial process. To be sure, lawyers are welcome to disagree with specific judicial decisions, but such disagreement should be voiced with due respect. Such deference to the rule of law means that lawyers should always avoid name-calling and derogatory comments. Irrespective of how successful it may be, Trump style lawyering has no place in the practice of law as it is inconsistent with respect to legal actors and the legal system—a core tenet of the rule of law. Moreover, civility is consistent with zealous advocacy because our adversarial system calls for disputes to be resolved based on the merits of the parties' cases, not on which lawyer can yell

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236. RICHARD MOORHEAD, STEVEN VAUGHAN & KENTA TSUDA, WHAT DOES IT MEAN FOR LAWYERS TO UPHOLD THE RULE OF LAW: A REPORT FOR THE LEGAL SERVICES BOARD 52 (2023) [hereinafter REPORT FOR THE LEGAL SERVICES BOARD].

237. *Id*. at 2.

238. *Supra* notes 233–234 and accompanying text; *see also* Sung Hui Kim, *Reimagining the Lawyer's Duty to Uphold the Rule of Law*, 2023 U. Ill. L. Rev. 781, 830 (2023) (arguing that lawyers should safeguard the integrity of the legal framework and advance the rule of law beyond mere compliance with legal norms); Cummings, *supra* note 85, at 514–21 (exploring structural changes in the American legal profession, which eroded key democratic functions, leading to increased backsliding risk by reducing trust in the legal system and commitment to the rule of law).

239. REPORT FOR THE LEGAL SERVICES BOARD, *supra* note 236.

the loudest or intimidate opposing counsel. In this sense, civil engagement protects not only the rule of law but also merit-based dispute resolution and justice.

Another constitutive aspect of the rule of law is fairness: legal processes must be fair and protect the rights of individuals, ensuring that justice is served. Fairness in the justice system is vital. Justice systems play a key role in resolving disputes and conflicts peacefully. When justice systems are seen as unfair or biased, they fail to serve this purpose effectively. The erosion of public trust in the fairness of the justice system threatens the stability of a democratic society.[240]

Fairness is often operationalized through procedural guarantees, such as the right to a fair trial, and the opportunity to present evidence and arguments. These procedural elements are crucial in upholding the rule of law because they help ensure that legal processes are conducted impartially and transparently.[241] The fairness of legal processes contributes to the moral legitimacy of a legal system. When citizens perceive the legal system as fair, they are more likely to respect and comply with the law voluntarily. This perception of fairness is essential for maintaining social order and trust in legal institutions.[242]

Civility facilitates and supports fairness because it is a process-oriented norm that creates an environment in which lawyers and their clients behave in a manner that is, and perceived to be, just. Civility is not synonymous with justice, but it facilitates just behavior by ensuring respect for others as moral equals and settling disagreements without force. Fairness in the legal system is crucial for upholding the rule of law, and lawyers play a significant role in ensuring that fairness is maintained through honest, ethical, and civil practices.

Lawyers have a duty to uphold fairness by not taking undue advantage of opponents through excessive conduct in litigation, such as unlawfully obstructing another party's access to evidence, falsifying evidence, or disobeying an obligation under the rules of a tribunal,[243] which can diminish the capacity of opponents to exercise their rights. Intentionally misleading actions in negotiations or other legal contexts can undermine fairness. Lawyers are expected to be scrupulously honest because integrity is a core component of fair dealing and the rule of law.[244] Lawyers should ensure that their actions support the rule of law, which involves interpreting legal norms in good faith and respecting the substantive meaning behind these norms. This approach helps maintain the integrity of the

240. THE TASK FORCE ON JUSTICE, JUSTICE FOR ALL, FINAL REPORT 86 (2019) https://cic.nyu.edu/wp-content/uploads/2023/02/english_task_force_report_27jun19-min_compressed.pdf [https://perma.cc/5364-QPQ5]. The report, based on research conducted by the world's foremost justice organizations and experts, advocates for a transition from models that offer justice exclusively to a select few, to one that achieves tangible enhancements in justice for everyone.

241. Kim, *supra* note 238, at 58 (arguing that a broad understanding of the rule of law, which includes fairness, is necessary to prevent the arbitrary exercise of power).

242. *Id*.

243. MODEL RULES R. 3.4(a)(1)–(3).

244. REPORT FOR THE LEGAL SERVICES BOARD, *supra* note 236, at 32.

legal system and achieve fairness in the exercise of power.[245] Lawyers have a fiduciary responsibility to maintain the integrity of the legal system, ensuring that their actions do not undermine public trust in the law, and that their civil conduct affirmatively enhances the rule of law and public trust in it.[246]

In the face of the gradual decline of professional norms that articulate duties to the public, as well as the erosion of informal institutional and market controls that traditionally guarded against incivility, defending the rule of law requires the promulgation of concise mandatory rules of professional conduct. Such rules are essential to fostering respect for legal actors and for the legal system. They also encourage cooperation among lawyers as an integral aspect of fairness.

A. PROPOSED CIVILITY RULES OF PROFESSIONAL CONDUCT

Civility in the Practice of Law

Rule X.1—Respectful Law Practice

While engaged in the practice of law, a lawyer shall not knowingly act uncivilly by making derogatory statements about other legal actors, parties and third parties involved with the legal system.

Comment

[1] Lawyers are officers of the legal system and public citizens with a special responsibility for the quality of justice. See Preamble, Comment [1]. A lawyer should demonstrate respect for the legal system and for those who serve it and should not harass or intimidate others. See Preamble Comment [5]. As public citizens, lawyers should further the public's confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation, trust and support to maintain their authority. See Preamble, Comment [6].

[2] Support for the rule of law entails respectful interactions with clients, opposing counsel, counter-parties, third-parties, and all other participants in the legal system. In particular, lawyers shall act respectfully toward judges and judicial personnel, because public trust and confidence in our judicial system is a cornerstone of the rule of law.

[3] While representing a client, a lawyer shall not resort to name-calling or make any derogatory remarks about another participant in the legal system. Respect and deference to legal institutions is a core element of the rule of law. As officers of the legal system and as public citizens lawyers have an obligation to defend the rule of law by modeling respectful conduct toward legal actors and others involved with the legal system. Derogatory name-calling is reasonably certain to erode public trust and confidence in the rule of law. While engaged in the practice of law lawyers should act civilly toward each other and others above and beyond avoiding name-calling. Lawyers should also avoid derogatory speech outside of

245. Kim, *supra* note 238, at 816.

246. *Id*. at 811–12.

the practice of law, but such lamentable speech is not reasonably certain to undermine the rule of law and therefore cannot not be restricted by a rule of professional conduct.

Rule X.2—Cooperation in the Practice of Law
While engaged in the practice of law,

(a) A lawyer shall make reasonable efforts to cooperate with opposing counsel and expedite the resolution of matters consistent with the interests of the client.
(b) A lawyer shall not assert or controvert an issue, and shall not bring or defend a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, that includes a good faith argument for an extension, modification or reversal of existing law.

Comment

[1] Lawyers are officers of the legal system and public citizens with a special responsibility for the quality of justice. See Preamble, Comment [1]. As public citizens, lawyers should further the public's confidence in the rule of law and the fairness of the justice system by acting cooperatively to expedite the resolution of matters consistent with the interests of the client.
[2] A lawyer should use the law's procedures only for legitimate purposes. See Preamble, Comment [5]. A lawyer should avoid dilatory practices, which bring the administration of justice into disrepute and undermine public confidence in the rule of law. In determining whether a lawyer's conduct is reasonably cooperative, a relevant factor is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose in advancing the client's interests.

B. CIVILITY AND THE RULE OF LAW

Reconceptualizing civility as an integral component of a lawyer's duty to uphold the rule of law offers several advantages. First, our proposal addresses the challenge of defining civility concisely and narrowly, a task historically complicated by the pluralistic nature of modern societies. Political theorists often grapple with how to define appropriate behavior in contexts that accommodate diverse cultural and ethical values. Civility, as a rule of professional conduct, must reflect this complexity.[247] By linking incivility to disrespectful conduct that undermines fairness, we advance a clear definition: name-calling, making derogatory comments about participants in the legal system, and acting in an uncooperative manner that has no good faith purpose to advance a client's interests, which compromises fairness. Our approach not only simplifies the concept of civility,

247. Mashburn, *supra* note 123, at 1172.

offering a definition that addresses the traditional subjectivity concern, but also ties it directly to the rule of law.

A second advantage of viewing civility as part of the lawyer's obligation to support the rule of law lies in alleviating the perceived conflict between civility and zealous advocacy. Civility is not inherently at odds with zealous representation. On the contrary, advocacy that remains both civil and professional embodies the merit and justice of the adversary system. Such an approach benefits clients while fostering a more efficient, harmonious legal process that ultimately enhances fairness within the system.[248]

A third advantage of our proposal lies in its potential to improve public trust in the rule of law and public confidence in lawyers as officers of the legal system and as public citizens. By framing civility as central to the lawyer's duty to uphold the rule of law, this approach counters negative accounts (and stereotypes) that portray lawyers as combative or predominantly profit-driven.[249] Instead, our approach defines the role of lawyers as professionals dedicated to ensuring fairness for the benefit of clients and society as a whole. This emphasis on civility and fairness not only supports the rule of law but also elevates the profession's ethical standing and enhances its reputation and trustworthiness in the eyes of the public.

A fourth advantage of our proposal lies in its offering a more holistic view of lawyers' multifaceted and often conflicting roles,[250] emphasizing their responsibility to the legal system and society at large rather than focusing on client representation. Lawyers have long claimed to be three-legged stools, yet the promise of acting as officers of the legal system and as public citizens has often been a hollow, empty one.[251] Understanding civility as requiring respectful interactions and as a means of achieving fairness in our justice system reflects lawyers' commitment to the rule of law's ultimate purpose.

A fifth advantage of our proposal is that it would enhance the mental well-being of lawyers. Legal professionals are thought to experience higher levels of depression, anxiety, and stress compared to the general population.[252] A way to ease this problem is to create supportive, inclusive environments within the legal profession.[253] We believe that civility can play an important part in building a

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248. Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31, 38–39 (2005) (discussing the civility "crisis" for the young attorney).

249. Camp, *supra* note 171, at 1395–98.

250. MODEL RULES pmbl. cmt. 9.

251. Rhode, *supra* note 87.

252. INT'L BAR ASS'N, MENTAL WELLBEING IN THE LEGAL PROFESSION: A GLOBAL STUDY 20 (2021), https://www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study [https://perma.cc/RU3W-FTB6] (The International Bar Association (IBA) is a prominent global organization of legal practitioners, established in 1947. It includes over 80,000 lawyers, 190 bar associations, and 200 law firms across more than 170 countries. The Report prepared by the IBA Presidential Task Force focuses on mental well-being in the legal profession, aiming to create a culture of mutual respect and address poor behavior within the profession. It employs several methodologies to gather and analyze data regarding mental well-being in the legal profession).

253. *See id*. at 12.

supportive, inclusive legal profession. Advancing respect and fairness in the legal system through lawyers' civil behavior is a practice that enhances mental health and gives lawyers' daily work more profound meaning. Promoting positive mental well-being is beneficial for the practice of law, clients' interests, and the public interest. Lawyers who maintain good mental health are likely to perform better, leading to improved business outcomes for law firms and legal organizations.[254] Poor mental well-being can lead to diminishment of ethical judgment and an increase in workplace errors. This not only affects individual lawyers but also has broader implications for the reputation and effectiveness of the legal profession.[255]

Incivility among lawyers can significantly impact the legal profession by undermining professional relationships,[256] reducing job satisfaction, and potentially affecting the quality of legal services. Incivility can damage trust and professional relationships, leading to fragmented teams and isolation among colleagues. This is particularly detrimental in the legal profession, where collaboration and trust are crucial for effective case management and client representation.[257] Pervasive incivility can create a toxic work culture that may normalize and perpetuate such behavior. This can lead to increased stress and anxiety among legal professionals, exacerbating the problem.[258] Lawyers who are targets of incivility may suffer from decreased job satisfaction and withdraw emotionally from work, which can lead to higher turnover rates. This not only affects individual well-being but also disrupts the continuity and quality of legal services provided to clients.[259] Persistent incivility can also contribute to a negative public perception of the legal profession, which may be seen as lacking professionalism and failing to comply with ethical standards.[260]

Sixth and finally, the cumulative effects of incivility can be profound, affecting not only the legal profession but also the broader legal system. Incivility can indirectly affect the justice system by reducing the overall effectiveness and efficiency of legal proceedings.[261] Lawyers who are disengaged or dissatisfied are

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254. *Id*. at 13.

255. *Id*. at 22.

256. *See* Wald & Pearce, *supra* note 88.

257. Jackson et al., *supra* note 119; MODEL RULES R. 1.6 cmt. 2.

258. *Id*. *See also* Deborah L. Rhode, *Forward: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217, 224 (2008).

259. *See e.g*., Sharona Aharoni-Goldenberg, Aharon Tziner & Dana Barnett, *Repercussions of Incivility and Hostile Expressions in Academia: A Legal Perspective*, 12 INDUSTRIAL & ORGANIZATIONAL PSYCHOLOGY 385 (2019) (noting that discriminatory and abusive language hinders the creation of an atmosphere conducive to experimentation and creativity, potentially causing tension among students and faculty).

260. Fischer, *supra* note 151, at 369.

261. Joseph G. Bisceglia, *Professionalism and Civility in an Adversary System*, 96 ILL. B.J. 172, 172 (2008) (arguing that incivility "prevents a fair result"); Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 19–20 (2002); Sandra Day O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library,* 55 OKLA. L. REV. 197, 199 (2002) (explaining that when lawyers stir conflict instead of focusing on the merits of a case, their conduct "undermines our adversarial system and erodes the public's confidence that justice is being served").

less likely to exert discretionary effort, which can compromise the quality of legal representation and case outcomes.[262] A decrease in civility may therefore result in an increase in litigation costs because an uncivil lawyer is more likely to oppose suggestions of their opponent and delay the resolution of the claim, incurring additional fees.[263] The benefits of mandatory civility rest on the premise that lawyer civility is a crucial component of both the efficiency and the public image of the legal profession. Civil behavior can lead to more efficient legal proceedings. When lawyers and judges interact respectfully, unnecessary delays and conflicts are minimized, allowing the legal process to proceed more smoothly and effectively.[264] We believe this ultimately leads to greater fairness, a key aspect of the rule of law.

IV. CONCLUSION

The rule of law is under attack, and lawyers must do their part to defend it. One small measure of support would be for lawyers to shore up public trust and respect for the rule of law by acting civilly toward participants in the legal system, including clients, opposing counsel, opposing parties, judges, jurors, and third parties. Because traditional protections for civility—an informal mix of professional norms, institutional controls, and market controls—are in decline, the time has come to adopt a formal rule of professional conduct designed to guide lawyers' civil conduct in the practice of law.

A push for a civility stance, however, has faced tough opposition in the late twentieth and early twenty-first centuries in the form of four challenges we dismiss in this Article. First, we show that the causes of incivility in the practice of law do not map into and are not the same as the causes of growing incivility in American culture and politics. In the legal profession, incivility is not explained by majoritarian insecurities and minority frustrations with the status quo but rather by competitive pressures and changing professional ideologies. Worrying about incivility in the practice of law is not lawyer exceptionalism and enforceable rules of professional conduct are exactly the kind of measure that can effectively address incivility and help restore visible public trust in the rule of law.

Second, civility is not inconsistent with zealous advocacy on behalf of clients. Quite the contrary, we show that adversarial zeal is premised on and justified by the notion that disputes will be decided based on the merits, as opposed to by which lawyer is able to yell the loudest or intimidate the opposing counsel or the judge. Civility narrowly defined, to consist of respectful interactions with participants in the legal system and of cooperation within the confines of the adversary system, is consistent with zealous advocacy.

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262. Jackson et al., *supra* note 119.
263. Campbell, *supra* note 43, at 105.
264. *See* Camp, *supra* note 171, at 1378.

Third and relatedly, the subjectivity objection to civility can be addressed by defining civility narrowly and concisely, as demonstrated by our proposed rules, and by adopting mandatory rules of professional conduct that can be enforced easily by deeming incivility a form of misconduct. Finally, defining civility narrowly as a means of protecting the rule of law constitutes a compelling state interest such that the proposed civility rules of professional conduct can survive First Amendment strict constitutional scrutiny.

The rule of law is under attack, and "[t]here are clear choices facing our profession. We can choose to remain silent and allow these acts to continue or we can stand for the rule of law and the values we hold dear."[265] One way to protect the rule of law is to adopt rules of civility, guiding lawyers to act as civics teachers and role-model respect for the law, lawyers, judges, and other participants in the legal system.

265. Bay, *supra* note 5.