



5-1-2016

Can Courts Require Civil Conduct?

Justice Douglas S. Lang
lang.doug@dorsey.com

Haleigh Jones
hjones@cwl.law

Follow this and additional works at: <https://commons.stmarytx.edu/lmej>



Part of the [Courts Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), and the [Legal Remedies Commons](#)

Recommended Citation

Justice Douglas S. Lang & Haleigh Jones, *Can Courts Require Civil Conduct?*, 6 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 222 (2016).

Available at: <https://commons.stmarytx.edu/lmej/vol6/iss2/2>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Journal on Legal Malpractice & Ethics by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

ARTICLE

Justice Douglas S. Lang | Haleigh Jones

Can Courts Require Civil Conduct?¹

Abstract. There is considerable controversy on the question of whether courts can require civil conduct by lawyers, not just in Texas but across the country. To answer that question, it must be determined whether lawyer civility is at least impliedly part of the court and disciplinary rules or whether “civility” is only part of the professionalism creeds and merely “aspirational.” This Article attempts to answer this by discussing three viewpoints on enforcing civility. Further, it argues for honest recognition of the multitude of concerns about incivility and asserts that the legal profession must cultivate an increase in the spirit of civility and professionalism.

Authors. Justice Lang is a member of the 5th District Court of Appeals, a member and Secretary of the State Commission on Judicial Conduct, a Trustee and member of the Executive Committee of the American Inns of Court Foundation, a past president of the Dallas Bar Association and the National Conference of Bar Presidents, and past chair of the Texas Center for Legal Ethics and Professionalism.

Haleigh Jones, University of Cincinnati, Bachelor of Arts in Spanish and Political Science, *summa cum laude*, 2012; Southern Methodist University Dedman School of Law, Juris Doctor, *magna cum laude*, 2015. Jones is a Briefing Attorney to the Honorable Justice Douglas Lang and a member of the Dallas Bar Association and its Professionalism Committee.

1. This Article first appeared in the Texas Bar Journal and has been substantially expanded for this publication. Douglas S. Lang, *Can Courts Require Civil Conduct?*, 78 TEX. B.J. 718 (2015).

ARTICLE CONTENTS

I. Introduction	223
II. What is Civility?	224
III. Three Diverse Viewpoints	228
IV. Is There an Incivility Problem?	230
V. Can Civility Be Enforced?	232
A. The <i>Dondi</i> Decision.	232
B. Other Federal Courts	234
C. Texas State Courts.	238
VI. Conclusion	241

I. INTRODUCTION

Can Texas Courts require civil conduct by lawyers? To answer that question, we must decide whether lawyer civility is at least impliedly part of the court and disciplinary rules or whether “civility” is only part of the professionalism creeds and merely “aspirational.”²

There is considerable controversy on this topic, not just in Texas but across the country. This Article attempts to answer the question raised in the title by discussing three viewpoints on enforcing civility. Also, this Article argues for honest recognition of the multitude of concerns about incivility and asserts that the legal profession must cultivate an increase in the spirit of civility and professionalism.

2. THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM (1989), reprinted in TEXAS RULES OF COURT: VOLUME 1—STATE 869–71 (West 2014) (referring expressly to civility and “civil” conduct and stating the “rules” contained in the Creed are “primarily aspirational”). See generally Alicia Grant, Comment, *The Texas Lawyer’s Creed: Exploring Its Origin and Impact over the Last Quarter Century*, 6 ST. MARY’S J. LEGAL MAL. & ETHICS 120 (2016) (chronicling the history of the Texas Lawyer’s Creed).

II. WHAT IS CIVILITY?

To engage in a constructive discussion of any viewpoint about lawyers' civility, the term civility must first be defined. One way to define civility is to distinguish it from "professionalism." The Conference of Chief Justices suggests civility is a component of the concept of professionalism and states the following:

Professionalism is a much broader concept than legal ethics—professionalism includes *not only civility* among members of the bench and bar, but also competency, integrity, respect for the rule of law, participation in pro bono and community service[,] and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethics are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs.³

In contrast to the distinction made by the Conference of Chief Justices, some commentators, like Donald E. Campbell, contend civility is distinct from professionalism and difficult to define.⁴ Campbell suggests that civility is sometimes described as a set of core values based upon common sense or manners.⁵ He cites the famous statement by Justice Potter Stewart about pornography, "[I] know it when I see it,"⁶ and examples of the Eleventh Circuit's description of bad faith actions of counsel.⁷ For example, in *Thomas v. Tenneco Packaging Co.*,⁸ the Eleventh Circuit stated that an attorney demonstrates bad faith sufficient to justify a court's imposition of sanctions under its inherent power "by delaying or disrupting the litigation or hampering enforcement of a court order."⁹ The court found the attorneys filed documents in bad faith when they inserted "patently offensive remarks in the five documents . . . for the purpose of deliberately provoking unnecessary personal animosity and

3. CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 2 (1999), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/National-Action-Plan-Full.ashx>.

4. 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, 146 (2011).

5. *Id.* at 142.

6. *Id.* at 141–42 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring)) (raising concerns about lack of "specificity" of some of the concepts of civility); see also Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J., Mar. 1988, at 79, 79 ("Call it the Rambo Reflex or 'hardball' lawyering—like pornography, you know it when you see it.").

7. Campbell, *supra* note 4, at 142 (citing *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1320–21 (11th Cir. 2002)).

8. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002).

9. *Id.* at 1320 (quoting *Barnes v. Dalton*, 158 F.3d. 1212, 1214 (11th Cir. 2002)).

conflict between opposing counsel and for the purpose of creating an unjustified and false impression that the opposing legal positions of the parties were the result of racism on the part of [opposing] counsel.”¹⁰

Campbell’s central complaint is that motley concepts of civility abound. From his analysis of the civility codes of thirty-two jurisdictions, he “distilled ten core concepts of civility.”¹¹ Those concepts are:

1. Recognize the importance of keeping commitments and of seeking agreement and accommodation with regarding to scheduling and extensions;
2. Be respectful and act in a courteous, cordial, and civil manner;
3. The obligation to be prompt, punctual, and prepared;
4. Maintain honesty and personal integrity;
5. Proper interactions with opposing counsel;
6. Avoid actions taken merely to delay or harass;
7. Ensure proper conduct before the court;
8. Act with dignity and cooperation in pre-trial proceedings;
9. Act as a role model to client and public and as a mentor to young lawyers; and
10. Utilize the court system in an efficient and fair manner.¹²

According to Campbell, most of those ten concepts lack the necessary “specificity” to be enforceable.¹³ He argues “there are enough vague provisions that the unwary lawyer can find herself at the mercy of an idiosyncratic judge’s view of civility.”¹⁴ He suggests the following three solutions to the “specificity” problem: (1) the courts could develop a common law, case-by-case definition of civility;¹⁵ (2) the codes could be drafted with more specific terms; and (3) the state bars could issue ethics opinions guiding the bar on specific civility issues.¹⁶ Campbell’s concerns

10. *Id.* at 1322.

11. Campbell, *supra* note 4, at 146.

12. *Id.*

13. *Id.* at 145.

14. *Id.* at 146.

15. *See id.* at 145 (“First, courts can essentially develop a common law of civility by setting out, on a case-by-case basis, a definition of what is ‘civil.’”). Courts are already beginning to define “civility.” *See, e.g.,* *Revson v. Cinque & Cinque*, 70 F. Supp. 2d 415, 434 (S.D.N.Y. 1999) (“[C]ivility refers to ‘more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to non[-]litigious resolution.’” (internal quotation omitted)). Additionally, even courts that do not define the term have discussed types of conduct that are uncivil. *See, e.g.,* *Gleason v. Isbell*, 145 S.W.3d 354, 360 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (mem. op.) (“[L]itigants should avoid the use of inappropriate language and inflammatory rhetoric. Restraint, tolerance, and self-control tend to foster civility. Name-calling, stridency, and rudeness have the opposite effect.”).

16. Campbell, *supra* note 4, at 146. *See Voluntary Standards for Civility*, D.C. BAR, <http://www.dcbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility/lawyers.cfm> (last

lend some support to at least one concern expressed by commentators, that using what some call the ambiguous and vague term civility to sanction lawyers could deny due process.¹⁷

However, Campbell's complex solutions are not the only way to find a serviceable meaning for "civility." One less complex method is to simply accept the common sense, plain meaning of civility identified by Justice Anthony Kennedy of the U.S. Supreme Court: civility is simply, "respect." Justice Kennedy explained, "[Civility] is not some bumper-sticker slogan, 'Have you hugged your adversary today?' Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual."¹⁸

Another method to "specify" the meaning of civility is to use the time honored method for interpretation of an undefined statutory term by considering its plain meaning. The plain meaning of terms is routinely found by courts in dictionary definitions.¹⁹ In this case, *Merriam-Webster Dictionary* provides an uncomplicated, helpful definition of civility as follows, "polite, reasonable, and respectful."²⁰

If the common sense or plain-meaning approaches are not sufficient for the observer to understand "civility," consider the context in which the Texas Supreme Court and the Texas Court of Criminal Appeals adopted the Texas Lawyer's Creed.²¹ In their November 7, 1989 order adopting

visited May 5, 2016) (indicating the principles lawyers should apply in and out of the courtroom); see also STATE BAR OF CAL., ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM 6 (2009), http://ethics.calbar.ca.gov/Portals/9/documents/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf (indicating ethics opinions by the courts are already in place to "delineate the standard of conduct for lawyers").

17. Cf. Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1221–22 (2011) ("Existing codes use words like 'civility,' 'disrespect,' and 'discourteous,' which experience suggests cannot be given a sufficiently narrow meaning in a pluralistic society. . . . The intent of the offender matters and perceptions of rudeness and disrespect are very subjective and contingent. However, assessing the mental state of lawyers at the time they misbehave is prohibitively difficult and worrisome. A psychological approach may produce an unpopular, de facto presumption against sanctioning attorneys for their rude outbursts, but it also avoids unnecessary intrusions into First Amendment rights and allays concerns about the due process implications of judges sitting in judgment of lawyers who are accused of insulting them.").

18. Louis H. Pollak, *Professional Attitude*, 84 A.B.A. J., Aug. 1988, at 66, 66 (quoting Justice Anthony Kennedy's address to the 1997 ABA Annual Meeting on Aug. 5, 1997).

19. See, e.g., *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437–38 (Tex. 2009) (applying *Black's Law Dictionary's* definition of "undertake").

20. *Civility*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/civility> (last visited May 5, 2016).

21. See generally Grant, *supra* note 2, at 120 (discussing adoption of the Creed).

the Creed, the courts identified the need for the Creed stating that “abusive tactics” in the practice of law must be eliminated.²² The courts explained, “The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics instead of being part of the solution have become part of the problem.”²³

This statement regarding the Texas Lawyer’s Creed expresses the concern stated succinctly by the legal maxim “Justice delayed is justice denied” that has appeared often in case law.²⁴ While judges have the inherit authority to control their dockets, lawyers also play a critical role in facilitating effective judicial process. Recognizing this role, the preamble to the Texas Disciplinary Rules states:

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. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.²⁵

Further, although not defining the term civility, the Texas Lawyers Creed cites the terms “civil” or civility three times when directing how

22. THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2.

23. *Id.*

24. See *People v. Ladd*, 691 N.E.2d 896, 899 (Ill. App. Ct. 5th Dist. 1998) (emphasizing the importance of a speedy process in securing “the orderly administration of justice.”); see also *Daewoo Int’l v. Monteiro*, 2014 IL App (1st) 140573, ¶ 90 (emphasizing the importance of a timely notice of appeal); *People v. Wasilewski*, 383 N.E.2d 31, 33–34 (Ill. App. Ct. 3d Dist. 1978) (addressing the threats to justice posed by appeals filed for the purpose of delay); *Gray v. Gray*, 128 N.E.2d 602, 606 (Ill. App. Ct. 1st Dist. 1955) (“The law’s delay in many lands and throughout history has been the theme of tragedy and comedy. Hamlet summarized the seven burdens of man and put the law’s delay fifth on his list. If the meter of his verse had permitted, he would perhaps have put it first. Dickens memorialized it in Bleak House[.] Chekhov, the Russian, and Moliere, the Frenchman, have written tragedies based on it. Gilbert and Sullivan have satirized it in song. Thus it is no new problem for the profession, although we doubt that it has ever assumed the proportions which now confront us. Justice delayed is justice denied,” and regardless of the antiquity of the problem and the difficulties it presents, the courts and the bar must do everything possible to solve it. We cannot entertain the indifference to it which some members of the trial bar have.”).

25. TEX. DISCIPLINARY RULES PROF’L CONDUCT pmb. ¶ 1, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR. R. art. X, § 9). The Michigan Rules of Professional Conduct’s preamble contains a similar provision, stating: “A lawyer should demonstrate respect for the legal system and for those that serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also the lawyer’s duty to uphold legal process.” MICH. RULES OF PROF’L CONDUCT r. 1.0.

lawyers should conduct themselves in relationships with lawyers,²⁶ clients,²⁷ the court, and court staff.²⁸ This common sense and plain meaning of “civility,” derived from the Texas Lawyer’s Creed, lays the foundation for courts to utilize the concept of civility and professionalism to address lawyer conduct.

III. THREE DIVERSE VIEWPOINTS

Generally, there are three viewpoints. Some contend aspirational goals requiring civility should be expressly incorporated into provisions of bar disciplinary rules and court rules. For example, Professor David Grenardo argues:

[C]ivility should be mandatory, i.e., compulsory, obligatory, required. In other words, if an attorney fails to act with civility, then he/she can be sanctioned or penalized. Each alleged violation of civility would be judged on a case-by-case basis. Thus, as with alleged violations of the rules of professional conduct, there might be no punishment in a particular case, or the sanction could fall somewhere within a whole range of punishment.²⁹

The courts in South Carolina have adopted this viewpoint and have disciplined lawyers for incivility. For example, when an attorney sent his opposing counsel an email accusing opposing counsel’s daughter of dealing drugs, the Supreme Court of South Carolina disciplined him for conduct “prejudicial to the administration of justice” and for violating the lawyer’s oath that includes civility.³⁰

26. “I will be courteous, *civil*, and prompt in oral and written communications.” THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2, ¶ III (1) (emphasis added).

27. “I will advise my client that *civility* and courtesy are expected and are not a sign of weakness.” *Id.* (emphasis added).

28. “[L]awyer to lawyer,” “I will be courteous, *civil*, and prompt in oral and written communications.” *Id.* (emphasis added). To counsel, parties, the court, and court staff, “I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and *civility*.” *Id.* (emphasis added).

29. David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 239, 261 (2013); *see also* David A. Grenardo, *An Uprising of Civility in Texas*, 5 HLRE 1, 8 (2014) (“The [Texas Lawyer’s] Creed is meant to be aspirational, but it can be enforced by the courts through their inherent powers and rules already in existence, such as discovery rules.”).

30. *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 636–38 (S.C. 2011). The following is an email for which the attorney was sanctioned:

I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where [also] . . . many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client

A second group argues that specific rules regulating incivility are unnecessary and unworkable.³¹ While there is consensus among those in this second group that civility codes are inappropriate, the reasons for this position and the alternative solutions that each scholar offers vary significantly. Some members of this group argue reports of uncivil behavior are exaggerated.³² Others assert that if civility were a part of any mandatory standard for lawyer conduct, it would be fatally ambiguous, would violate the First Amendment,³³ and would deny due process.³⁴

is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high[-]class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . . Street. Think about it. Am I right?

Id. at 636 (alterations in original).

31. See Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 663 (1994) (“Exploring the manner in which civility codes arguably give form and content to the partisan views of the bar’s powerful elite is illuminating in other respects as well. It reveals that these codes implicate a number of fundamental problems.”); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the “Civil” War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151, 152–53 (1998) (claiming the goal which the “leaders of the civility movement” wish to obtain would be more successfully achieved by other means than having the courts adopt civility codes).

32. Mashburn, *supra* note 31, at 664–65 (“[T]he perceived decline in professionalism among lawyers today might be an exaggerated, if not contrived, crisis.”); see also Katherine Sylvester, *I’m Rubber, You’re Sued: Should Uncivil Lawyers Receive Ethical Sanctions?*, 26 GEO. J. LEGAL ETHICS 1015, 1021 (2013) (“It is not settled that civility has actually declined in the legal profession.”). But see Craig Enoch, *Incivility in the Legal System? Maybe It’s the Rules*, 47 SMU L. REV. 199, 202 (1994) (discussing the existence of incivility in the practice of law as of the article’s date in 1994, suggesting incivility, i.e., “sharp” practices (also referring to them as “Rambo” tactics) in the law, are no more prevalent than in the past, “there are just more lawyers”); Mashburn, *supra* note 17, at 1148 (acknowledging the rise of uncivil conduct and stating: “Not only do we notice impolite acts by individuals in the public eye, but a perceived overall coarsening of manners and pervasive incivility have become familiar subjects of commentary.”).

33. See Smith, *supra* note 31, at 173 (“Many of the civility codes, whether general or specific, employ vague and aspirational words such as integrity, civility, and courtesy, which have been criticized as being ‘highly contingent, contextual and indeterminate’ words. Such words can be subject to many different interpretations and definitions and cover a broad range of behavior. If such broad words would lead a person to question exactly what kind of behavior is prohibited, the civility codes could be found unconstitutionally vague.”); see also *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d at 636–38 (disagreeing with respondent’s argument that the civility clause contained “within the lawyer’s oath is unconstitutionally vague and overbroad”); Mashburn, *supra* note 17, at 1221–22 (“Existing codes use words like ‘civility,’ ‘disrespect,’ and ‘discourteous,’ which experience suggests cannot be given a sufficiently narrow meaning in a pluralistic society. . . . The intent of the offender matters and perceptions of rudeness and disrespect are very subjective and contingent. However, assessing the mental state of lawyers at the time they misbehave is prohibitively difficult and worrisome. A psychological approach may produce an unpopular, de facto presumption against sanctioning attorneys for their rude outbursts, but it also avoids unnecessary intrusions into First Amendment rights and allays concerns about the due process implications of judges sitting in

Some in this group suggest alternatives to civility codes. Proposed solutions include “more stringent enforcement of existing disciplinary rules; preventative methods designed to educate, train and promote collegiality; the use of more general-aspirational creeds by non-mandatory bar associations; higher standards within the currently enforceable disciplinary rules”³⁵ and client-centered solutions that allow “uncivil lawyers to be separated in the market from civil ones, so clients may have the choice of what type of lawyer they employ.”³⁶

A third group argues that the obligation of lawyers to act in a civil manner—as described in lawyer creeds—is at least implied in court, and disciplinary rules and incivility can be addressed by enforcing statutes and rules that empower courts to protect their jurisdiction. This approach was adopted by the Supreme Court of Texas, which stated, “Compliance with the rules [of the Creed] depends primarily upon understanding and voluntary compliance, secondarily upon re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.”³⁷

IV. IS THERE AN INCIVILITY PROBLEM?

In contrast with the position of some observers³⁸ are the results of the Supreme Court of Illinois Commission on Professionalism’s 2009 survey. In that survey, 4,450 attorneys in Illinois were polled regarding their perceptions of civility in the legal profession.³⁹ “More than 85 percent of respondents reported experiencing at least one instance of uncivil or unprofessional behavior within the past six months, with sarcastic or

judgment of lawyers who are accused of insulting them.”)

34. Mashburn, *supra* note 17, at 1222 (stating that there are “concerns about the due process implications of judges sitting in judgment of lawyers who are accused of insulting them”).

35. Smith, *supra* note 31, at 185.

36. Sylvester, *supra* note 32, at 1028.

37. THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2; *see also* PNS Stores, Inc. v. Rivera, 379 S.W.3d 267, 276–77 (Tex. 2012) (holding the Texas Lawyer’s Creed is only enforceable through the courts’ inherent powers or by preexisting rules).

38. Mashburn, *supra* note 31, at 664–65 (“The Report’s observation that ‘one might think these words were written today,’ is both ironic and telling. The irony is that the ABA’s Commission on Professionalism ignored the obvious inference that the perceived decline in professionalism among lawyers today might be an exaggerated, if not contrived, crisis.”); Sylvester, *supra* note 32, at 1021 (conveying one observer’s viewpoint that “[i]t is not settled that civility has actually declined in the legal profession”); *cf.* Enoch, *supra* note 32, at 202 (suggesting the seeming pervasiveness of “sharp” practice in the legal profession only appears to have increased because there are more lawyers).

39. LEO J. SHAPIRO & ASSOCS. LLC & ILL. SUPREME COURT COMM’N ON PROFESSIONALISM, SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS 4 (2007), http://www.2civility.org/wp-content/uploads/2013/12/surveyonprofessionalism_final.pdf.

condescending attitudes, misrepresenting or stretching the facts, or negotiating in bad faith as the most reported unprofessional behavior.”⁴⁰

In relating these experiences, respondents identified three broad types of unprofessional behavior: “prejudice,⁴¹ rudeness,⁴² and strategic incivility.”⁴³ Strategic incivility was the most frequently experienced unprofessional behavior.⁴⁴ A summation of the survey results defined “strategic incivility” as “a more deliberate behavior on the part of uncivil lawyers, including the misrepresentation or stretching the facts, playing hardball, or indiscriminate or frivolous use of pleadings or motions.”⁴⁵ Finally, an overwhelming majority of respondents agreed that unprofessional and uncivil behavior “has a significant negative impact on the practice.”⁴⁶ “[Ninety-four] percent of respondents strongly or somewhat agreed that unprofessional behavior makes resolving a matter more difficult.”⁴⁷ “[Ninety-one] percent [of respondents] strongly or somewhat agree[d] that unprofessional behavior harms public [and] client confidence in the judicial system.”⁴⁸ Finally, “[eighty-nine] percent of respondents strongly or somewhat agree[d] that unprofessional behavior leads to an increase in litigation/transaction costs.”⁴⁹ These findings, and many opinions written by trial and appellate courts across the country, suggest that concerns about incivility are not exaggerated.⁵⁰

Further, those who are skeptical about the frequency and aggregate mass of reports of uncivil behavior in litigation should read the seminal,

40. *Results of 2014 Survey on Professionalism Released*, 2CIVILITY (May 28, 2015), <http://www.2civility.org/results-of-2014-survey-on-professionalism>.

41. “Prejudicial behavior includes inappropriate comments about a lawyer based on race, age, or gender.” *Id.*

42. “Rudeness includes a sarcastic or condescending attitude, or belittling language.” *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See generally* Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n, 121 F.R.D 284, 290 (N.D. Tex. 1988) (emphasizing the importance of upholding ethical standards); *In re* Anonymous Member of the S.C. Bar, 709 S.E.2d 633, 638 (S.C. 2011) (stating the civility oath is meant to protect “the administration of justice and integrity of the lawyer-client relationship”); *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 276–77 (Tex. 2012) (highlighting the Texas Lawyer’s Creed was implemented due incivility concerns); *see also* *Huggins v. Coatesville Area Sch. Dist.*, No. 07-4917, 2009 WL 2973044, at *3 (E.D. Pa. Sept. 16, 2009) (acknowledging the limitations of ethical standards while still emphasizing their importance); *Healix Infusion Therapy, Inc. v. Helix Health, LLC*, No. H-08-0337, 2008 WL 1883546, at *12 (S.D. Tex. Apr. 25, 2008) (mem. op.) (rebuking the attorneys for a lack of civility).

1988 *Dondi Properties*⁵¹ opinion rendered by the U.S. District Court for the Northern District of Texas.⁵² The court described the climate of litigation that compelled them to spend an inordinate amount of time “refereeing abusive litigation tactics that range from benign incivility to outright obstruction.”⁵³ Further, the court observed:

As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.⁵⁴

V. CAN CIVILITY BE ENFORCED?

A. *The Dondi Decision*

The next step is to determine whether civility can be enforced. While some believe the vagueness of civility precludes enforcement, *Dondi* is proof to the contrary.⁵⁵

The *Dondi* decision addresses conduct of counsel in two underlying lawsuits. The first, which the court referred to as “*Dondi Properties*,” was a suit brought to recover damages based upon “civil RICO, common law and statutory fraud, the Texas Fraudulent Transfer Act, federal regulations prohibiting affiliate transactions, civil conspiracy, negligent misrepresentation, and usury, arising in connection with activities related to the failed Vernon Savings and Loan Association.”⁵⁶ The second underlying lawsuit, referred to by the court as “*Knight*” was an action for “violations of the Texas Insurance Code and Texas Deceptive Trade Practices—Consumer Protection Act, and for breach of duty of good faith and breach of contract, arising from defendant’s refusal to pay plaintiff the

51. *Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D 284 (N.D. Tex. 1988).

52. *Id.* at 292 (adopting standards of litigation conduct for attorneys appearing in civil actions in the Northern District of Texas).

53. *Id.* at 286; *see also* Enoch, *supra* note 32, at 202 (“Perhaps our rules of conduct should be drafted with the fundamentals of the adversary system in mind, eliminating what parties may do to each other, and instead focusing on what must be done to advance one’s own case. The courts have tried to punish Rambo. It is now time to disarm him.”).

54. *Dondi*, 121 F.R.D at 286.

55. *Id.* at 287 (noting how the court can and will enforce civility in the courtroom per its authority).

56. *Id.* at 285.

proceeds of a life insurance policy.”⁵⁷

In the *Dondi Properties* action, the defendants filed a motion for sanctions against the plaintiffs for “failure to answer interrogatories, failure to comply with prior orders of the court pertaining to discovery, misrepresenting facts to the court, and improperly withholding documents.”⁵⁸ In *Knight*, the plaintiff filed a motion to “strike a reply brief that the defendant filed without leave of court.”⁵⁹ The plaintiff contended the court should strike the reply brief “because defendant did not, as required by Local Rule 5.1(f), obtain leave to file a reply, because defendant failed to seek permission immediately upon receipt of plaintiff’s response, and, alternatively, because defendant’s reply was filed in excess of [twenty] days after plaintiff filed her response.”⁶⁰ The plaintiff also requested leave to file an additional response in the event the court did not strike the reply brief.⁶¹

In response to these two sets of motions and at the request of a member of the court, the U.S. District Court for the Northern District of Texas convened en banc to craft a set of rules it enforces routinely to compel civil conduct citing rules, statutes, and a professionalism creed that espouses civility.⁶² Citing the Federal Rules of Civil Procedure, the court announced:

We are authorized to protect attorneys and litigants from practices that may increase their expenses and burdens (Rules 26(b)(1) and 26(c)) or may cause them annoyance, embarrassment, or oppression (Rule 26(c)), and to impose sanctions upon parties or attorneys who violate the rules and orders of the court (Rules 16(f) and 37).⁶³

The court also cited federal statutes for its authority to compel civil conduct: “We likewise have the power by statute to tax costs, expenses, and attorney’s fees to attorneys who unreasonably and vexatiously multiply the proceedings in any case,”⁶⁴ and “we are also granted the authority to punish, as contempt of court, the misbehavior of court officers.”⁶⁵ Finally, the court relied on its “inherent power to regulate the

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 286.

61. *Id.*

62. *Id.* at 287.

63. *Id.*

64. *Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284, 287 (N.D. Tex. 1988) (citing 28 U.S.C. § 1927 (2012)).

65. *Id.* (citing 18 U.S.C. § 401 (2012)).

administration of justice.”⁶⁶

Further, the court announced that it would not tolerate uncivil behavior and imposed new standards of conduct for practice in its district: the Dallas Bar Association’s Lawyer’s Creed and Guidelines of Professional Courtesy.⁶⁷ The Dallas creed and guidelines—which expressly provide for civil conduct⁶⁸—preceded the Texas Lawyer’s Creed and remain part of the fabric of the court’s rules of conduct. Finally, the court made it clear:

We think the standards we now adopt are a necessary corollary to existing law, and are appropriately established to signal our strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer’s conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play.⁶⁹

B. *Other Federal Courts*

Many federal districts in Texas have adopted rules similar to *Dondi*.⁷⁰ Additionally, the Fifth Circuit has also relied upon *Dondi* in recognizing a district court’s ability to sanction attorneys for uncivil conduct in accordance with the rules, statutes, and the professionalism creed *Dondi* cites. For example, in *In re Elliott*,⁷¹ the Fifth Circuit upheld a bankruptcy court’s imposition of attorney’s fees as a sanction against an attorney based upon a finding that the attorney acted solely for the purpose of “harassing

66. *Id.*

67. DALLAS BAR ASS’N, GUIDELINES FOR PROFESSIONAL COURTESY (2003), <http://www2.dallasbar.org/documents/DBA%20ProfGLsCourtesy.pdf> (last visited May 5, 2016).

68. *Id.* ¶ 1(a) (“Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.”); THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2 ¶ II.

69. *Dondi*, 121 F.R.D at 288–89.

70. See *In re Bradley*, 495 B.R. 747, 783 n.22 (Bankr. S.D. Tex. 2013) (“In 2001, the District Judges of the Southern District of Texas voted to adopt these Guidelines for Professional Conduct, to be observed by all attorneys appearing before any district judge, bankruptcy judge, or magistrate judge presiding in the Southern District of Texas. General Order 2001-7. The guidelines are derived from the decision rendered in [*Dondi*].”); *In re Armstrong*, 487 B.R. 764, 773 (E.D. Tex. 2012) (“The implication that the Northern District encourages an attorney to advance claims the attorney knows are baseless is especially ironic. The standards of conduct governing conduct in the Eastern District of Texas, set out in Eastern District Local Rule AT-3, are those enumerated in [*Dondi*].”); *In re Mortg. Analysis Portfolio Strategies, Inc.*, 221 B.R. 386, 389 (Bankr. W.D. Tex. 1998) (“Under Local Rule 1001(g) all counsel are to observe the standards of conduct set out in [*Dondi*].”); see also *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 636, 636–38 (S.C. 2011) (disciplining a lawyer for conduct prejudicial to the administration of justice and violation of the lawyer’s oath that includes “civility”).

71. *In re Elliott*, No. 93-1537, 1994 WL 24877 (5th Cir. 1994).

opposing parties” and counsel.⁷²

Other federal courts have imposed sanctions for uncivil conduct because such conduct frustrates orderly legal process.⁷³ A particularly interesting example is found in the *Huggins*⁷⁴ case, where the Eastern District Court of Pennsylvania considered sanctioning an attorney for conduct during a deposition that became “heated, personal, rude, and pointless.”⁷⁵ During the deposition, plaintiff’s counsel “threatened to have an unlicensed paralegal assistant complete the deposition.”⁷⁶ At another point in the deposition, the defense counsel remarked “about the skill of [opposing counsel’s] mother in imparting proper manners to her son.”⁷⁷ The court noted that “[e]ventually after incessant insult exchanges and aggressive questioning and objecting as documented in the deposition transcript, defense counsel and the witness walked out of the deposition.”⁷⁸ In addressing this conduct, the court began its opinion by stating:

When lawyers place a higher value on being heard than on being understood, when they trample on civility, or when their supposed devotion to their clients leads to stridency or worse, they undercut the belief in the law and in the legal profession. At a minimum, uncivil, abrasive, abusive, hostile or obstructive conduct by lawyers impedes the fundamental goal of resolving

72. *Id.* at *1 (citing *Dondi*, 121 F.R.D. at 287–88).

73. Enumerating all such cases is beyond the scope of this Article. However a few are cited as examples. See *Revson v. Cinque & Cinque*, 70 F. Supp. 2d 415, 436 (S.D.N.Y. 1999) (“If every lawyer and judge . . . would analyze every action she or he takes in light of the goal of ensuring that the system works fairly and efficiently for everyone, questions about professionalism would simply disappear—and tremendous good would result for our community.” (internal citation omitted)); *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F. Supp. 594, 597 (C.D. Ill. 1992) (finding civility and compliance with court orders to be “critical to the orderly processes” of the court); see also *Wise v. Wash. Cty.*, No. 10-1677, 2015 WL 1757730, at *34 (W.D. Pa. Apr. 17, 2015) (noting that “relentless bickering and rancor made this litigation more onerous on the [c]ourt” and “the conduct of both counsel multiplied the proceedings”); *Alford v. Aaron Rents, Inc.*, No. 3:08-cv-683 MJR-DGW, 2010 WL 2765260, at *7 (S.D. Ill. May 17, 2010) (“The court cannot turn a blind eye to conduct that negatively impacts its ability to promote the orderly administration of justice and resolve disputes fairly. . . . Unless restrained, courts would spend endless hours and resources serving as a referee for multiple discovery problems.” (internal citations omitted)); *Daniels v. Bursey*, No. 03 C 1550, 2004 WL 1144046, at *2 (N.D. Ill. May 19, 2004) (“Our system of justice does not work, or at least does not work well, if lawyers act like professional wrestlers hyping the next match rather than as members of the honorable profession to which they belong.” (citations omitted)).

74. *Huggins v. Coatesville Area Sch. Dist.*, No. 07-4917, 2009 WL 2973044 (E.D. Pa. Sept. 16, 2009).

75. *Id.* at *1.

76. *Id.* at *2.

77. *Id.*

78. *Id.* at *1.

disputes rationally, peacefully, and efficiently. Because such conduct tends to delay, and can even deny, justice, a presiding judge may be called upon to determine whether one or more adversary has committed sanctionable conduct. Events in this case present the Court with that unwelcome task.⁷⁹

In criticizing the behavior of both attorneys, the court cited the proposed “Principles of Professionalism” published by the Philadelphia Bar Association, which states that lawyers are to “[t]reat with civility opposing counsel, lawyers and their staffs, witnesses and the courts and court officers.”⁸⁰ The court denied the defendants’ motion for sanctions: “In determining the proper sanction for this misconduct, the [c]ourt recognizes that requiring [plaintiff’s counsel] and/or his client to pay the costs and fees [defendants] incurred in bringing the motion is not the most appropriate one, especially given [defense counsel] was not an innocent bystander in this debacle.”⁸¹ Instead, the court took a novel approach to addressing the incivility exhibited by all attorneys involved:

[The c]ourt will deny the specific defense request for fees, in favor of a sanction that the Court hopes will have greater long-term substantive effect. The [c]ourt shall require [plaintiff’s counsel] to attend a CLE course dealing with civility and professionalism. Because this case has not yet concluded and because defense counsel is not without blame for the embarrassing conduct of the professionals here, inasmuch as the working relationship between these opposing counsel will necessarily continue, the [c]ourt also will expect [plaintiff and defense counsel] to join each other for an informal meal in an effort to facilitate the repair of their professional relationship.⁸²

As its authority for such a sanction, the court relied on its “inherent

79. *Id.* at *2.

80. *Id.* at *3 n.13 (citing *Philadelphia Bar Association Principles of Professionalism*, PHILA. BAR ASS’N, <http://www.philadelphiabar.org/page/PrinciplesOfProfessionalism?appNum=1> (last visited May 5, 2016)).

81. *Id.* at *4.

82. *Id.* at *2. The court cited Shakespeare when ordering the attorneys to join each other for a meal:

Over 400 years ago, William Shakespeare apparently believed that that the legal profession provided a useful example for achieving civility when, in *The Taming of the Shrew*, he wrote ‘And do as adversaries do in law, Strive mightily but eat and drink as friends.’ At the end of the day, it should not be merely intelligence, skepticism, oratorical flourish or the like that truly distinguishes the legal profession from others. Rather, as Shakespeare recognized, one hopes and expects that it also is civility. Perhaps the adversaries in this case can be reinspired to achieve the Shakespearean vision and the aspirational goals of the very rules of professional conduct by which counsel have pledged to abide.

Id. at *4 n.14.

powers to control litigation pending before it, as well as the standards articulated by Rule 30(d)(2) of the Federal Rules of Civil Procedure and Rule 83.6.1 of the Local Rules of Civil Procedure for this District’ to sanction the attorney conduct.⁸³

Additionally, the U.S. District Court in the Southern District of Florida addressed incivility, labeling an attorney’s behavior “deplorable” when he scheduled depositions at Dunkin’ Donuts against opposing counsel’s request, attended these depositions in a t-shirt and shorts, drew pictures of male genitalia, and played the game “Angry Birds” during deposition testimony.⁸⁴ The court stated that the attorney’s “course of conduct in disparaging [opposing counsel], to [opposing counsel’s] clients . . . severely impacted these proceedings.”⁸⁵ While no sanctions were imposed, the court granted opposing counsel’s motion to disqualify the attorney.⁸⁶

In another case, the U.S. District Court for the Southern District of Texas strongly suggested a need for more civility between lawyers, even where there may be no conduct amounting to an ethical violation.⁸⁷ The court’s written opinion first addresses the issues raised on appeal, then pointedly expresses concern about the lack of civility demonstrated by all counsel in the case.⁸⁸ The court observed that in their pleadings and motions, “the parties have often forsaken cogent and well-researched arguments for sarcastic and pejorative insults.”⁸⁹ Then, the court listed two specific examples of the insults from both sides contained in pleadings, including when one counsel charged opposing counsel with violations of federal criminal statutes that prohibit making false statements to federal courts.⁹⁰ Also, the court noted that in the defendants’ pleadings, they “comment on [the appellant’s] ‘penchant for filing or threatening to file superfluous motions or pleadings’ . . . [and] question the motives of plaintiff’s counsel.”⁹¹ Additionally, the parties exchanged

83. *Huggins v. Coatesville Area Sch. Dist.*, No. 07-4917, 2009 WL 2973044, at *1 (E.D. Pa. Sept. 16, 2009).

84. *See Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346, 1370 (S.D. Fla. 2012) (describing the uncivil actions of one particular attorney).

85. *Id.*

86. *Id.* at 1370, 1373 (noting the attorney’s conduct was not “directly actionable” because the “conduct occurred in another forum”).

87. *See Healix Infusion Therapy, Inc. v. Healix Health, LLC*, No. H-08-0337, 2008 WL 1883546, at *12 (S.D. Tex. Apr. 25, 2008) (reprimanding the parties for their conduct and emphasizing its effect on the court).

88. *Id.*

89. *Id.*

90. *Id.* at *12 n.45 (citing 18 U.S.C. §§ 1001, 1623 (2012)).

91. *Id.*

offensive e-mails that stated: “[Y]our client has issues with the truth” and “[Y]ou are the obstacle in the case that’s keeping it from getting resolved. I’m sure Dr. Murphy appreciates having to pay for your antics.”⁹² To the court, the e-mails between the parties’ counsel were “emblematic of the apparent disdain of both counsel for each other and the court” where they contain accusations of “lacking an intention to comply with the rules and of having a goal to bombard defendants and the court with unfounded motions.”⁹³ While not finding that either attorney had violated an ethical duty,⁹⁴ the court directed “[c]ounsel for all parties . . . to read and reflect on the Creed . . . and conduct themselves accordingly.”⁹⁵ No sanctions were imposed, but the court attached a copy of the Texas Lawyer’s Creed to its opinion, “admonish[ing] the parties and their counsel to treat one another—and thus this court—with higher regard and with more civility and courtesy.”⁹⁶

C. *Texas State Courts*

While there are several Texas rules and statutes that address the administration of cases and the general conduct of the lawyers, there is no specific, enforceable requirement that lawyers conduct themselves in a “civil” manner as in the federal courts in Texas or as found in some other states.⁹⁷ However, Texas rules and statutes do impose standards of justice and fairness, which courts are required to enforce. Specifically, Rule 1 of the Texas Rules of Civil Procedure states: “The proper objective of rules of civil procedure is to obtain a *just, fair, equitable*[.] and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as *great expedition and dispatch and at the least expense . . .*”⁹⁸ In addition, Article 1.03 of the Texas Code of Criminal Procedure, entitled “Objects of this Code,” states:

This Code is intended to embrace rules applicable to the prevention and prosecution of offenses against the laws of this State It seeks: . . . 3. To

92. *Id.*

93. *Id.*

94. *See id.* (chastising counsel for their sarcastic comments).

95. *Id.* at *12.

96. *Id.*

97. *See In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 636, 636–38 (disciplining a lawyer for conduct prejudicial to the administration of justice and violating the lawyer’s oath that includes civility).

98. TEX. R. CIV. P. 1 (emphasis added).

*insure a trial with as little delay as is consistent with the ends of justice; . . . 5. To insure a fair and impartial trial.*⁹⁹

Similarly, the Texas Disciplinary Rules of Professional Conduct, which set out the minimum level of acceptable ethical conduct for lawyers, address many of the same issues as to efficient court administration as described in Rule 1 and Article 1.03 of the Texas Code of Criminal Procedure. For instance, lawyers are prohibited from causing unreasonable delay in an action or unreasonably increasing costs.¹⁰⁰ Likewise, the Texas Lawyer's Creed, although "aspirational," addresses these issues.¹⁰¹ Additionally, the Texas Disciplinary Rules of Professional Conduct are routinely cited by courts as guidelines for appropriate conduct when considering questioned lawyer conduct. However, because those rules are prohibited from use as a basis for civil claims or "procedural weapons," Texas courts, as with federal courts, do not cite those rules as grounds for sanctions—but, appropriately, cite them only as reference points regarding parameters of lawyer behavior.¹⁰² For example, in *Twist v. McAllen National Bank*,¹⁰³ the Corpus Christi Court of Appeals discussed a violation of Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct when an attorney misrepresented case law to the

99. TEX. CODE CRIM. PROC. ANN. art. 1.03 (emphasis added).

100. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR. R. art. X, § 9). "[A] lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or unreasonably delays resolution of the matter." *Id.* R. 3.02. "[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 rights of such a person." *Id.* R. 4.04.

101. The Texas Lawyer's Creed provides:

I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party. I will advise my client that we will not pursue tactics which are intended primarily for delay. I will advise my client that we will not pursue any course of action which is without merit. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2, ¶ 11.

102. TEX. DISCIPLINARY RULES PROF'L CONDUCT pmb. ¶ 15. Disciplinary rules are routinely cited by courts as the guidelines for behavior, not for sanctions. *See* *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 364–68 (Tex. App.—Corpus Christi 2007, no pet.) (concluding the Texas Disciplinary Rules of Professional Conduct may be taken into account when determining sanctions).

103. *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351 (Tex. App.—Corpus Christi 2007, no pet.).

court, imposing sanctions for this behavior and for bringing a groundless mandamus petition, under Texas Rule of Appellate Procedure 52.11(a).¹⁰⁴

The “Oath of Attorney” includes another important description of a lawyer’s responsibilities and requires the lawyer to state he will “honestly demean” himself and he will conduct himself “with integrity and civility in dealing and communicating with the court and all parties.”¹⁰⁵ While every lawyer must recite that oath when sworn in as a member of the bar, the “oath” stands alone without the support of a statute or rule that provides for its enforcement.¹⁰⁶

In *PNS Stores v. Rivera*,¹⁰⁷ the Texas Supreme Court made it clear that the Texas Lawyer’s Creed is not a basis for a party or a lawyer to seek sanctions.¹⁰⁸ Further, as stated in the order promulgating the Creed, “these standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.” However, the court also made it clear that although the Creed is “aspirational,” the law supports adherence to the principles, and “[c]ompliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.”¹⁰⁹

104. *Id.* at 364–68.

105. TEX. GOV’T CODE ANN. § 82.037(a) (West 2015).

106. Unlike Texas, South Carolina and Nevada have adopted rules that support the oath new attorneys are required to take. As a result, violations of the attorney oath, including the clauses in the oaths requiring civility, are violations of the rule, which allows the oath to be enforced and attorneys to be sanctioned when their conduct fails to conform to the standards set forth by the oath. *See In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 636, 636–38 (“To be admitted, the applicant must pay a fee . . . and take and subscribe the following oath or affirmation” and reciting the South Carolina “lawyer’s oath.” (citing S.C. APP. CT. R. 402(k))); *see also* NEV. S.C.R. 73 (2014) (stating “[u]pon being admitted, each applicant shall take and subscribe to the following oath” and offering the Nevada “attorney’s oath”).

107. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267 (Tex. 2012).

108. *See id.* at 276–77 (holding the Creed “does not create new duties and obligations enforceable by the courts”).

109. THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2; *see* *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239–40 (Tex. Crim. App. 1990) (en banc) (discussing the inherent powers of the court); *Houtex Ready Mix Concrete & Materials v. Eagle Constr. & Envtl. Servs., LP*, 226 S.W.3d 514, 524 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (“Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process.”); *Kutch v. Del Mar Coll.*, 831 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1992, no writ) (stating a court’s inherent power to impose sanctions is strongest when conduct complained of interferes with “core functions” of the judiciary, i.e., hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgment, and enforcing that

VI. CONCLUSION

Unless the legal profession diligently cultivates an increase in civility and professionalism, the legal system and those who use it will pay a significant toll for lawyer incivility. The decision in *Dondi Properties v. Commerce Savings & Loan Ass'n* graphically portrays the degree to which incivility negatively impacts the legal system.¹¹⁰ Incivility wastes judicial resources and delays justice.¹¹¹ Justice Sandra Day O'Connor sets a more positive tone for the future when she addresses the incivility problem. She exhorts lawyers and justices alike to effect an increase in the spirit of civility and professionalism, writing, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."¹¹²

In light of the described considerations, how then are Texas courts and lawyers to assure civility in state courts? The answer is: we will re-commit to our core values.

When the Creed says the standard is "My word is my bond,"¹¹³ it is clear that nothing short of respect for others and personal honesty is acceptable. The disciplinary rules require candor and honesty as well.¹¹⁴ Further, as described above, conduct detrimental to the administration of justice is scorned by the disciplinary rules, the rules of procedure, other statutes, and the Creed. While Texas state courts will not impose sanctions for violations of the tenets of the Creed, including the references to "civil" conduct or the disciplinary rules, the courts are not disempowered. In appropriate circumstances, the courts examine the conduct of lawyers, compare that conduct to the standards in those disciplinary rules and in

judgment); see also Bill Whitehurst, *A Plaintiff Attorney's Perspective*, 57 TEX. B.J. 1099, 1100 (1994) (referencing a court's inherent powers to enforce the Creed).

110. See *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988) ("We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers.").

111. *Id.*

112. Sandra Day O'Connor, *Professionalism*, 76 WASH. U.L.Q. 5, 8 (1998).

113. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2, ¶ I(1).

114. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2015) (TEX. STATE BAR. R. art. X, § 9) ("Candor Toward the Tribunal"); *id.* R. 3.04 ("A lawyer shall not . . . (b) falsify evidence, counsel or assist a witness to testify falsely . . . (d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal . . ."), *id.* R. 4.01 ("Truthfulness in Statements to Others").

the Creed, and determine appropriate sanctions—if any—under the authority of procedural rules or statutes.¹¹⁵

No matter how one parses the term “civility,” it means “respect.” Most lawyers are civil and respectful. However, disrespect and incivility can be fairly and effectively addressed. As the Texas Supreme Court observed, when necessary, all of the courts of our state have the tools to compel compliance with the law and the tenants of the Creed.¹¹⁶ If some lawyers will not voluntarily comply with the Creed, and peer pressure and public opinion have no effect upon them, then our courts may employ “their inherent powers and rules already in existence.”¹¹⁷

115. See *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 364–68 (Tex. App.—Corpus Christi 2007, no pet.) (citing the rule for sanctions found in TEX. R. APP. P. 52.11); see also TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 (stating a lawyer may not “make a false statement of material fact or law to the tribunal”); *Pine v. Deblieux*, 405 S.W.3d 140, 150 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (“Trial courts also have inherent powers on which they may call to administer justice and preserve their dignity and integrity. This power includes the ability to sanction bad faith conduct that occurs during the course of litigation.” (quoting *Metzger v. Sebek*, 892 S.W.2d 20, 51 (Tex. App.—Houston [1st Dist.] 1994, writ denied))); *Houtex Ready Mix Concrete & Materials v. Eagle Constr. & Envtl. Servs., LP*, 226 S.W.3d 514, 524 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (noting a court's inherent power to sanction helps to prevent abuses of the judicial process); *Order of the Supreme Court of Texas and the Court of Criminal Appeals*, 62 Tex. B.J. 399, 400 (1999) (emphasizing a lawyer should not miscite record or authorities).

116. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, *supra* note 2.

117. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 276–77 (Tex. 2012).