



1-1-2004

Civility in the Legal Profession: A Survey of the Texas Judiciary.

Catherine M. Stone

Kimberlyl S. Keller

Shane J. Stolarczyk

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



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Catherine M. Stone, Kimberlyl S. Keller & Shane J. Stolarczyk, *Civility in the Legal Profession: A Survey of the Texas Judiciary*, 36 ST. MARY'S L.J. (2004).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol36/iss1/3>

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 Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

CIVILITY IN THE LEGAL PROFESSION: A SURVEY OF THE TEXAS JUDICIARY

CATHERINE M. STONE*
KIMBERLY S. KELLER***
SHANE J. STOLARCZYK***

I. Introduction	116
II. The 2003 Texas Judiciary Study	116
III. Civility in the Courtroom	117
A. Civility in General.....	118
B. Civility Among Attorneys.....	119
C. Civility Between Attorneys and Judges	120
D. Civility Among Judges	120
IV. Focusing on Specific Characteristics of Attorneys.....	122
A. Gender Comparison.....	122
B. Comparing Attorneys Based on Experience	123
V. Areas of Practice	124
VI. Stages of the Litigation Process	126
VII. Sanctions Given and Their Effectiveness.....	128
VIII. Recommendations	131
A. For the Bar	131
B. For the Judiciary	132
IX. Conclusion.....	133
Appendices:.....	134
Appendix A: Texas Lawyer's Creed	134
Appendix B: Statistical Tables	140

* Justice, Texas Fourth District Court of Appeals; J.D., St. Mary's University School of Law. The authors would like to thank all of those who participated in the professionalism survey forming the basis of this Article. The authors also thank the Texas Office of Court Administration and Jessica Simmons Jourdan for assisting with this survey.

** Assistant Professor of Criminal Law, University of Texas at San Antonio; J.D., St. Mary's University.

*** Staff Attorney, Texas Fourth District Court of Appeals; J.D., Albany Law School.

*As the law becomes more of a business and less of a profession, we behave more like businessmen (persons) and less like honorable professionals. Almost makes one long for white wigs and black robes for all.*¹

I. INTRODUCTION

Each year more than one million lawsuits are filed in Texas.² Unfortunately, accompanying this large number of lawsuits is uncivil behavior by attorneys and judges alike. Our legal system depends upon the integrity of individual members of the bar to follow the rules and codes of the legal profession. In Texas, the Lawyer's Creed sets the benchmark for professional conduct of attorneys.³ The Lawyer's Creed was adopted in 1989 by the Texas Supreme Court and the Texas Court of Criminal Appeals to restore public confidence in the legal profession, which was believed to be in jeopardy because of the abusive tactics of some lawyers.⁴ It has been more than a decade since the adoption of the Lawyer's Creed. Has the incivility, abusive advocacy, and intemperate conduct declined since the Lawyer's Creed was adopted? This Article addresses the extent of the civility problem within the Texas legal profession from the perspective of Texas trial court judges and appellate justices.

II. THE 2003 TEXAS JUDICIARY STUDY

In the spring of 2003, a committee from the Fourth District Court of Appeals in San Antonio, with the assistance of the Texas Office of Court Administration, polled the Texas Judiciary to de-

1. This is one of the many comments written by a member of the Texas Judiciary in response to questions about whether there is a lack of civility in Texas. Throughout this Article numerous quotations are attributed to the comments provided by the respondents of this survey; however, because the respondents wish to remain anonymous, their identity will be preserved.

2. 75 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 85 (2003), available at <http://www.courts.state.tx.us/publicinfo/AR2003/activity/index.htm>. Approximately 840,440 cases were filed in district court: 550,633 civil cases, 250,791 criminal cases, and 39,016 juvenile cases. *Id.* The remaining 770,218 causes were filed in county court: 145,283 civil cases, 531,748 criminal cases, 8,459 juvenile cases, 55,716 probate cases, and 29,012 mental health cases. *Id.*

3. TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (adopted by the Supreme Court of Texas and the Court of Criminal Appeals, Nov. 7, 1989), reprinted in TEXAS RULES OF COURT 587-89 (West 2003).

4. *Id.*

termine whether a civility problem exists within the state's legal profession.⁵ To gain an understanding from the judiciary's perspective, the Committee informally polled judges from Texas district courts, county courts, intermediate appellate courts, Supreme Court, and Court of Criminal Appeals. The responding group of judges was comprised of 105 district and county court judges, 19 appellate judges, 2 judges describing their position as "other," and 2 judges who did not designate their position within the judiciary.

Within the study, civility was defined as the professional conduct of attorneys and judges during the course of adversarial proceedings. The study explained that civil conduct is characterized by honesty, courtesy, fairness, and respect. The study asked whether a civility problem exists in Texas, and if so, in what stages of litigation incivility is most predominant. Further, the study delineated practice areas and types of attorneys to determine whether civility is more or less prevalent in certain areas of the law or within certain groups of attorneys.

III. CIVILITY IN THE COURTROOM

*I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules.*⁶

Civility is a broad term, but most legal professionals would describe it as professional courtesy. When it comes to maintaining civility in the courtroom, a place that many attorneys see as a place to do battle, the question arises: Is it possible to maintain civility during a battle? As eloquently stated by one of the judges sur-

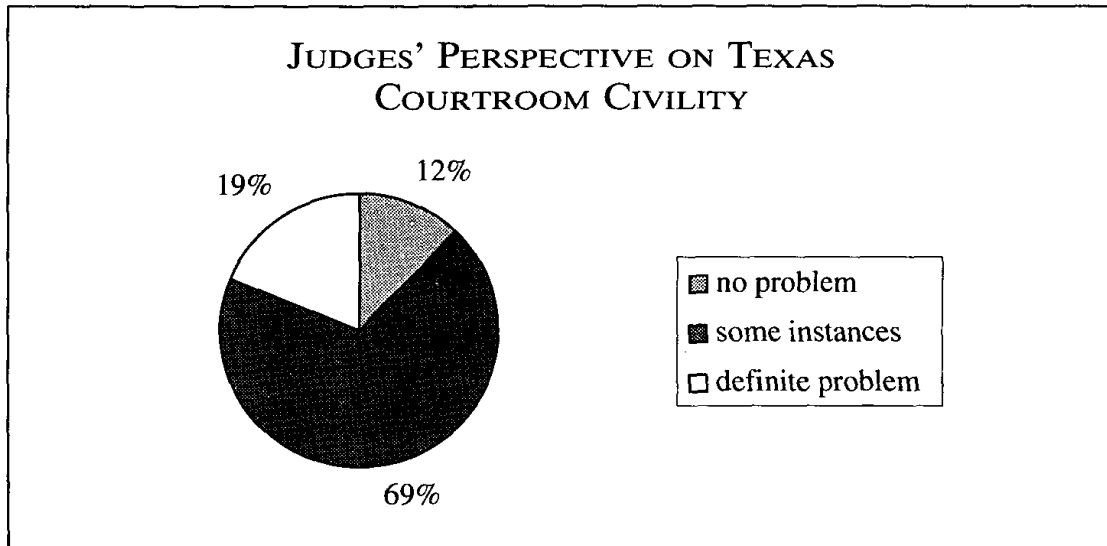
5. A committee from the Texas Fourth District Court of Appeals was organized to study attorney civility in the State of Texas after members of the Court perceived what they believed to be a growing problem of incivility in the legal profession. The survey forming the basis of this Article was created to facilitate the Committee's study. The survey was adapted from a study used by the Committee on Civility of the Seventh Federal Judicial Circuit during the early 1990's. Ronald S. Katz, *Ethical Concerns: Ad Hominem Attacks*, 695 A.L.I.-A.B.A. 351, 360 (1991). Six hundred eighty-seven members of the Texas Judiciary were asked to participate in the judicial professionalism survey. One hundred twenty-eight members of the judiciary responded to the survey.

6. TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, (adopted by the Supreme Court of Texas and the Court of Criminal Appeals, Nov. 7, 1989), *reprinted in* TEXAS RULES OF COURT 587-89 (West 2003).

veyed, "our adversarial system is the genesis of a large amount of 'incivility.' Rather than seeking the truth, many lawyers, with the blessing of our discovery rules and other rules of civil procedure, play hide and seek with the truth. This, I think, breeds 'incivility.'"

A. *Civility in General*

When asked the general question of whether there is a civility problem in Texas courtrooms, judges responded:



One judge reasoned that the lack of civility is a reflection of the changing society: "I think our society as a whole is becoming less tolerant, more demanding, [and] less sensitive to the feelings of others. Our courts reflect our society."⁷

Another judge offered this commentary on the issue of civility in Texas courtrooms:

I think the civility issue and the few high profile excessive attorney fee cases, i.e. tobacco settlement, [are] driving the current public and legislative lawyer and judge bashing. People at all levels don't have respect for the institution of the judiciary. The legislature, commissioner's court[,] and other funding bodies want to control the courts['] decisions with money. There is a push to eliminate the third

7. It is important to note that, although the majority of judges recognized some form of a civility problem, many judges had positive things to say about the attorneys practicing before them and their colleagues. One judge stated that "[a] majority of attorneys who practice in my court are extremely civil," and another commented, "I believe we have, generally, a wonderful and very civil and professional judicial and legal system."

arm of government as an independent one. There is a desire to reduce us to administrative law judges or something less. It is serious and a constant attack on the independent judiciary. There is [a] perceived . . . weakness [by the public] on the judiciary's part for not taking part in the politics of the day and our ethics is [sic] simply something to hide behind. I am concerned that within 10-20 years or so we will have legislated away most of what the judiciary does and with it there will be a serious imbalance of power with the judiciary and the legislature. I personally think the snowball is rolling down the hill and we can't stop it.

Over sixty percent of the judges who believe a civility problem exists indicated the civility problem has worsened from their perspective, while only fourteen percent indicated the civility problem has improved.⁸ Twenty-six percent of the judges think the civility problem has remained constant.⁹

The study delved deeper into the issue of civility in the courtroom, looking for patterns of uncivil behavior. The study asked whether incivility arose in attorneys' dealings with one another ("attorney-to-attorney" incivility), attorneys' dealings with judges ("attorney-to-judge" incivility), or judges' dealings with one another ("judge-to-judge" incivility).¹⁰ The results demonstrated that civility problems exist in all three areas.

B. *Civility Among Attorneys*

*A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.*¹¹

When the judges were asked whether they perceived a civility problem amongst attorneys, over 95% answered in the affirmative. Specifically, 30% believed there is definitely a civility problem,

8. Appendix B to this Article, Table 2.

9. *Id.* at Table 2.

10. *Id.* at Tables 1-14.

11. TEXAS LAWYER'S CREED-A MANDATE FOR PROFESSIONALISM, (adopted by the Supreme Court of Texas and the Court of Criminal Appeals, Nov. 7, 1989), *reprinted* in TEXAS RULES OF COURT 587-89 (West 2003).

while about 65% believed that a problem exists only in some instances.¹² One judge commented on attorney-to-attorney incivility: “win at all costs is dangerous in the courtroom.” Another judge advocated a zero tolerance policy for attorney-to-attorney incivility, stating:

I am not certain what . . . causes incivility; whether it is a function of economic stress or just the desire to impose oneself upon opposing counsel. I absolutely refuse to allow attorneys to verbally attack each other or the other party during hearings/trials. It is my perception that once the attorney realizes what is unacceptable behavior, he or she will not repeat it.

C. Civility Between Attorneys and Judges

*Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.*¹³

When the survey asked whether attorney-to-judge incivility exists, approximately 71% answered affirmatively. In particular, 7% believed there is definitely a civility problem between attorneys and judges, while 64% stated that a problem exists in some instances.¹⁴ One judge suggested that attorney-to-judge incivility is contingent on the experience of the judge:

As a judge, I had more problems with civility of attorneys when I first took the bench. I have been on the bench for over 8 years, and believe I have fewer problems in this area now possibly because I have earned their respect. I don't mistreat attorneys and most don't mistreat me.

D. Civility Among Judges¹⁵

As stated by one of the judges surveyed, “Judges have lost the ability to disagree without being disagreeable.” When the judges

12. Appendix B to this Article, Table 3.

13. TEXAS LAWYER'S CREED-A MANDATE FOR PROFESSIONALISM, (adopted by the Supreme Court of Texas and the Court of Criminal Appeals, Nov. 7, 1989), *reprinted* in TEXAS RULES OF COURT 587-89 (West 2003).

14. Appendix B to this Article, Table 9.

15. Currently, there is no provision in the Texas Lawyer's Creed specifically governing “Judge to Judge” relations. TEXAS LAWYER'S CREED-A MANDATE FOR

were asked whether they perceived a civility problem among judges, the majority (63%) of judges answered they did not believe a civility problem existed.¹⁶ The remaining 37% of the judges, however, disagreed.¹⁷ One judge stated that the real problem is not attorney-to-judge incivility, but rather judge-to-judge incivility:

I absolutely love my job. A lawyer lied to me today about notice to opposing counsel, so this is [a]typical. [Ninety-nine percent] of the attorneys are professional and courteous, but there are some who have [sic] not and they have often not faced consequences before. It takes getting their attention. The judicial politics really bothers me more. These are my contemporaries and, in some cases, were [j]udges I appeared before as an attorney. We have trouble solving issues as a group.

In general, the judges who believe there is lack of civility between judges describe the problem as a “lack of collegiality,” which includes:

- (1) speaking badly of one another;
- (2) lack of patience;
- (3) lack of consideration of opposing viewpoints;
- (4) refusal to share caseloads;
- (5) sniping in (appellate) opinions;
- (6) seeking preferential treatment by the legislature;
- (7) undermining orders or decisions of a fellow judge;
- (8) negative reactions to media exposure;
- (9) refusing to cooperate in scheduling proceedings in which an attorney also appears before a fellow judge;
- (10) abuse of visiting judge assignments; and
- (11) refusing to share staff or resources.

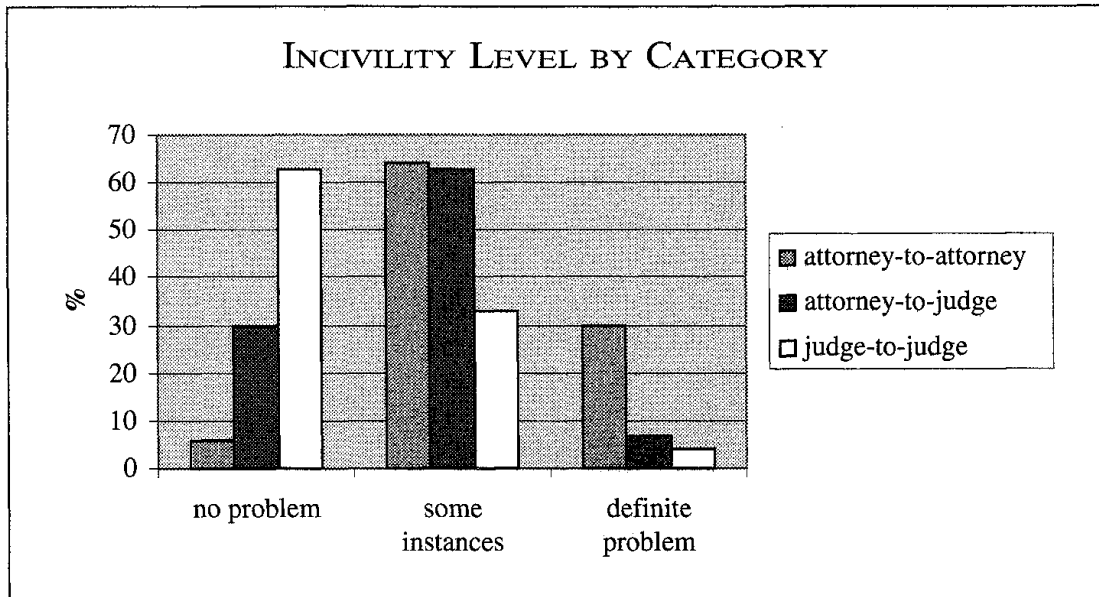
E. *Comparing the Different Types of Incivility*

When comparing the differing forms of incivility, it is clear that judges believe attorney-to-attorney incivility to be the most prevalent form. Further, judges responded that judge-to-judge incivility occurs on a much lower scale than other forms:

PROFESSIONALISM, (adopted by the Supreme Court of Texas and the Court of Criminal Appeals, Nov. 7, 1989), *reprinted* in TEXAS RULES OF COURT 587-89 (West 2003).

16. Appendix B to this Article, Table 14.

17. *Id.*



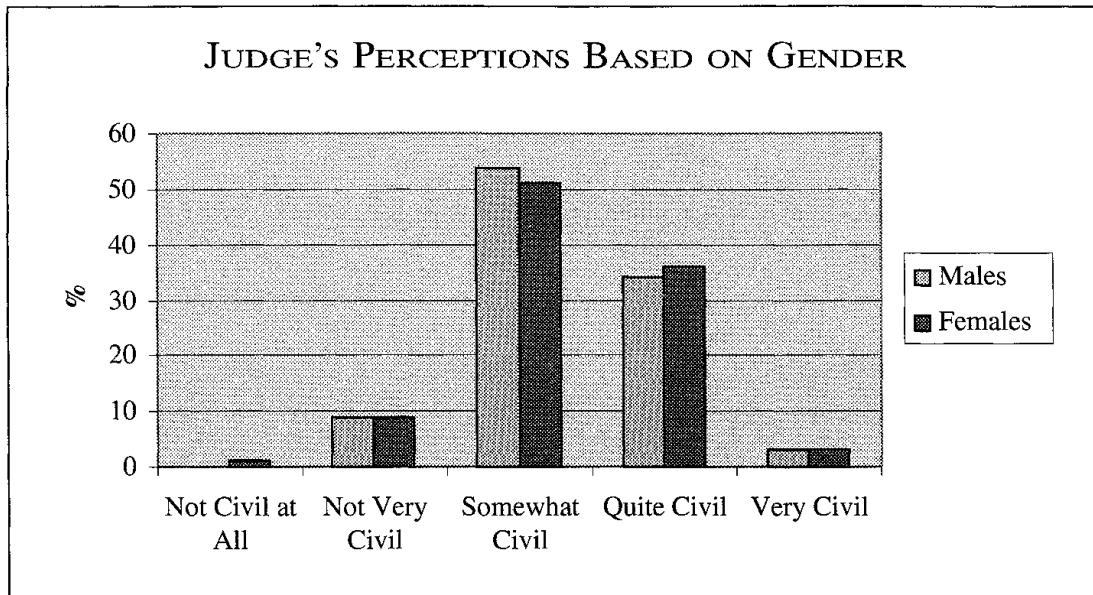
The lower occurrence of incivility among judges suggests that removal from the active ranks of the adversarial system increases civility. Judges do not face the same economic pressures or uncertainties as practicing lawyers; thus, it is less likely emotion will overcome good judgment in any given instance. The higher degree of civility amongst judges could be a reflection of the perspective gained as a result of being on the bench. Ultimately, it appears that attorneys can learn a lot from judges regarding how to work civilly among their colleagues.

IV. FOCUSING ON SPECIFIC CHARACTERISTICS OF ATTORNEYS

The study asked specific questions about attorneys based on their gender, experience level, and area of practice to determine whether incivility is more or less prevalent in certain groups of attorneys or areas of the law.

A. *Gender Comparison*

When comparing the civility demonstrated by male and female attorneys, judges did not note any statistically significant difference:

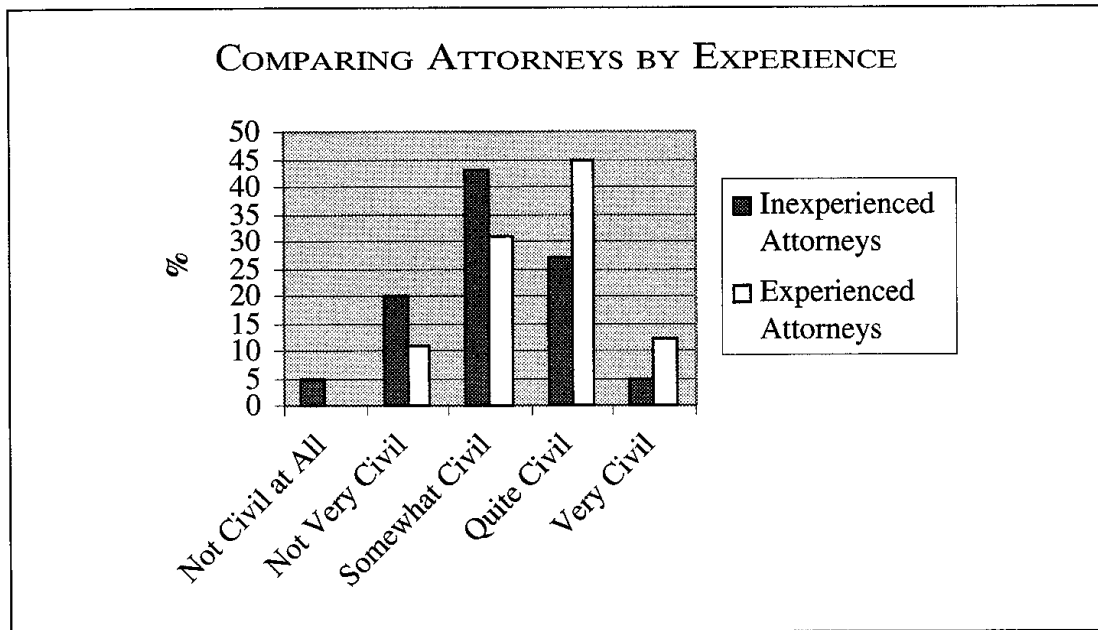


Female attorneys, however, ranked 2% higher in the “Quite Civil” category, ranking at 36%, while their male counterparts ranked at 34%.¹⁸

B. *Comparing Attorneys Based on Experience*

The results of the survey showed a clear disparity between inexperienced and experienced attorneys. One judge commented: “I have not noticed any particular group of lawyers that were not civil. (In other words, not plaintiff’s lawyers, not defense attorneys, [and] not family lawyers). It has mostly been newer attorneys that have had no training about how to act in the courtroom or elsewhere.”

18. *Id.* at Table 5.



Another judge stated:

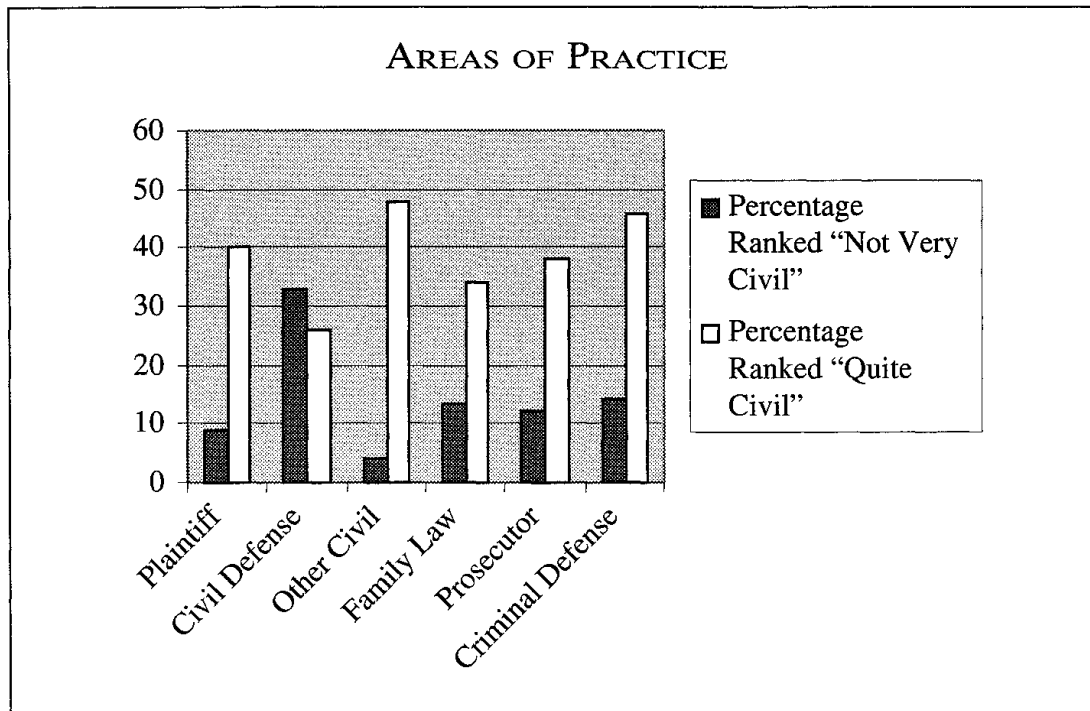
I am shocked at the new lawyers (who have probably been watching too much of 'The Practice' and 'Judging Amy') who do not realize the effect that their actions have on the bench . . . or, worse yet, do not care. When a judge must correct the attorney's decorum and demeanor, the entire reason that the lawyer is even in court is easily lost.

However, one judge noted that, when it came to a need for sanctioning, it was the experienced lawyers who triggered action:

I do not see the lack of civility on the appellate court level like I did on the trial court bench. While serving as a trial court judge, I threatened sanctions against attorneys a couple of times. In general, I think inexperienced lawyers tend to lack the civility that experienced lawyers have. However, saying that, the time I threatened sanctions against both attorneys while on the trial court, it was two very experienced lawyers.

V. AREAS OF PRACTICE

When comparing lawyers based on their type of practice, judges said there were noticeable disparities, as reflected in the chart below.



Discussing lawyers practicing civil law, one judge linked the lack of civility to greed, stating: "In my experience, the lack of civility is due to over-zealousness on behalf of their clients and greed. . . I trace the greed factor back to the U.S. Supreme Court opinion opening up lawyer advertising . . . which made some lawyers become businessmen rather than professionals." Another judge surveyed stated that incivility is triggered by a lack of reasonableness:

I see instances where it is apparent that a party is not being very reasonable in there [sic] position and an attorney presents that position in court when I believe the attorney has a responsibility to counsel his client on being reasonable in all their decisions. This will at times cause the matter to take on a certain flavor of lack of civility. Said another way, a frivolous lawsuit or one of questionable merit will often bring out lack of civility.

When discussing lawyers practicing criminal law, one judge focused on the interaction between prosecutors and criminal defense attorneys, stating:

[S]ometimes prosecutors act high-handed toward defense attorneys and are demanding in how they want to handle the cases (def[endant] either takes the state's offer or it's withdrawn and they will enhance, etc, and such statements are often done in the courtroom in front of others which makes it seem threatening to the pub-

lic). Counsel can get along too well at other times and smile and joke with each other and that looks bad, as though they are on the same side, according to def[endant]s. When the court doesn't slam a def[endant] as hard as a prosecutor wants, some pros[ecutors] slam their books and storm out the door. They are heavier-handed and in some cases prima donas when dealing with defense, and it shows in the courtroom. Some people think [T.V.] shows are reality and try to make the courtroom into a [J]erry [S]pringer mentality and show. This doesn't happen all the time[,] but we have all seen the grandstanding.

One judge noted that the lack of civility may be intentional: "Some criminal defense courses teach lawyers to bait judges to produce error; most learn quickly enough that it is unproductive."

Another judge discussed a disparity in civility among local attorneys and "out-of-town" attorneys, stating:

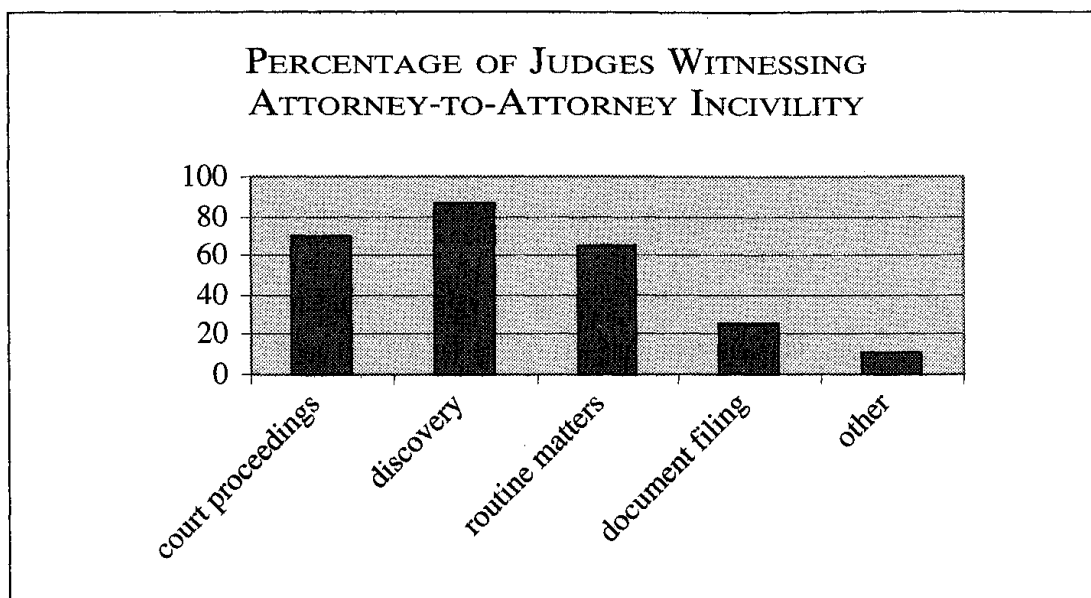
Rarely do I find local lawyers to be rude or uncivil. Most incivility comes into this six county district from outside—primarily Houston. [W]e have a few lawyers, particularly in the Family Law area, who don't return calls to opposing lawyers, seek ex parte communication with the Court, and are generally rude, locally. But they are few and it affects their practice. The trouble with outside lawyers is they don't care because it won't affect their practice. I don't know how you deal with that type of problem.

VI. STAGES OF THE LITIGATION PROCESS

Of the judges surveyed, most judges witnessed attorneys acting without civility towards other attorneys during the discovery process and is generally unsupervised by the court.¹⁹ Notably, judges also saw a high likelihood of incivility during "routine matters," such as telephone calls and scheduling, and during court proceedings.²⁰

19. *Id.* at Table 4.

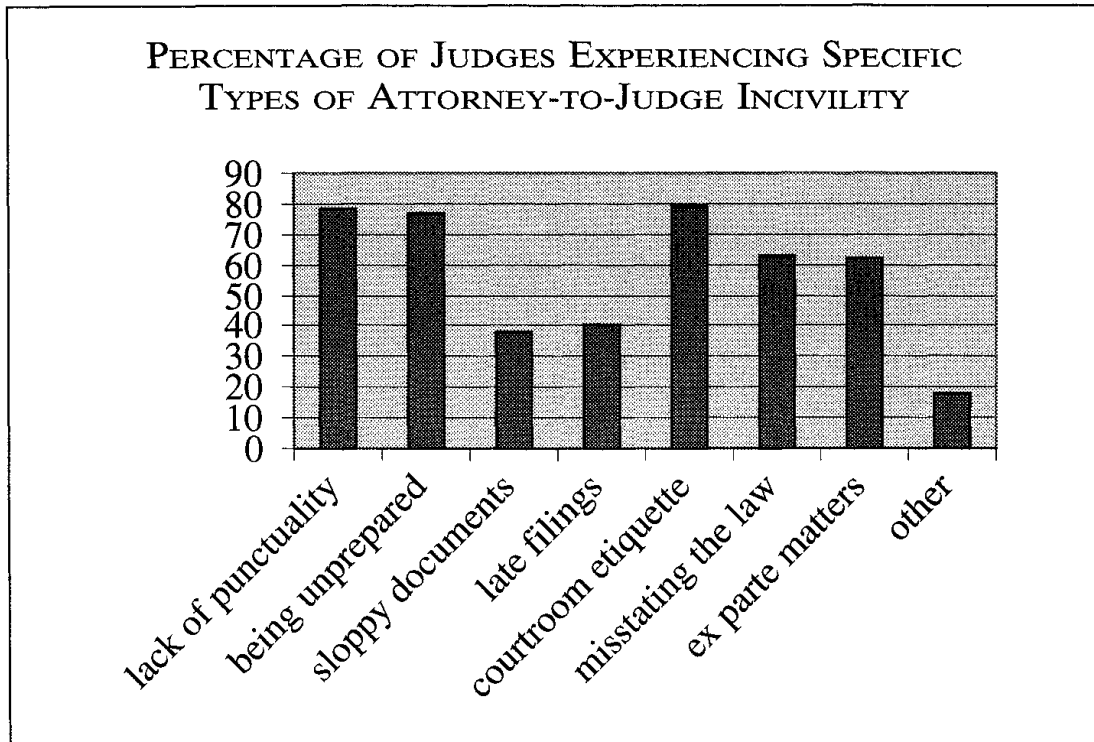
20. *Id.*



The high percentage of incivility at the discovery stage should not be surprising considering that discovery is the backbone of the litigation process and is generally unsupervised by the court. As suggested by one judge, incivility at the discovery stage is likely the result of the “hide and seek with the truth” that is played by the parties.

When judges were on the receiving end of attorney incivility, it occurred most often when the attorney lacked courtroom etiquette.²¹

21. Appendix B to this Article, Table 10.



When looking at how judges defined “other” types of incivility, judges referred to the following: misstating facts, attacking intelligence and integrity of judges and attorneys in briefs and motions, routine matters with the court (not returning phone calls from the court), outside courtroom behavior (badmouthing judges, taking steps to undermine the court’s ruling, and attempting to retaliate against the judge), and goading the judge to lash out against counsel during trial to make the court look biased toward his or her client. As one judge summed it up: “There is a general decline in professionalism among attorneys. Irrespective of the way they treat one another, they are bringing that same combative attitude into the court and acting hostile towards the judge.”

VII. SANCTIONS GIVEN AND THEIR EFFECTIVENESS

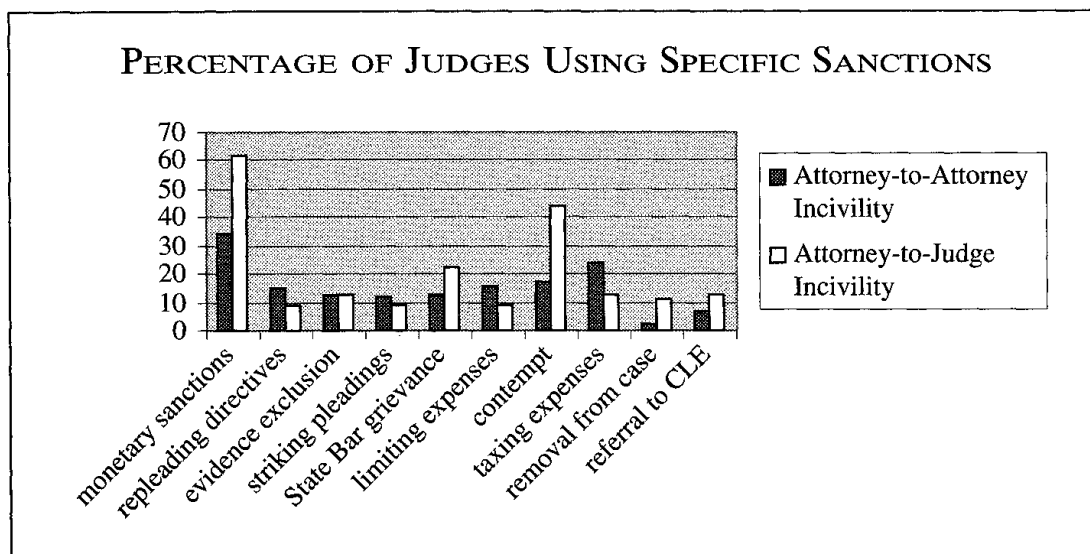
In this study, the term “sanction” included, but was not limited to:

- (1) monetary sanction;
- (2) repleading directives;
- (3) exclusion of evidence;
- (4) striking of pleadings;
- (5) removal from a case;

- (6) referral to a continuing legal education activity;
- (7) referral to the State Bar Grievance Committee;
- (8) contempt;
- (9) limiting further discovery;
- (10) taxing expenses of discovery; and
- (11) other.

Approximately 43% of the judges responding have imposed sanctions to curb an attorney's incivility toward another attorney.²² Of those judges imposing sanctions, more than 75% indicated that the sanction imposed had a positive effect on curbing the attorney's negative behavior.²³ By contrast, less than 10% of the judges believed that the sanction imposed had no effect on the attorney's behavior.²⁴

When it came to sanctioning attorneys for attorney-to-attorney or attorney-to-judge incivility, the percentages are as follows:



In an effort to curb an attorney's uncivil conduct toward another attorney, approximately 10% of the judges noted that they have

22. *Id.* at Table 6.

23. *Id.* at Table 8. Nearly 57% of the judges who have imposed sanctions on an attorney believe that the sanction lessened the attorney's negative behavior to some degree, while almost 19% believed that the sanction imposed eliminated the unwanted behavior altogether. *Id.*

24. Appendix B to this Article, Table 8. No judge indicated that the use of sanctions increased an attorney's negative behavior. Approximately 15% of the judges responded that they did not know how the sanctions affected the attorney's behavior. *Id.*

imposed other sanctions such as granting a new trial, removing the attorney from the court appointed attorney list, ordering the attorney to perform community service, ordering the attorney to make a donation to a charity, ordering the attorney to serve a jail term, removing the attorney from the courtroom, and verbally admonishing the attorney.²⁵

One judge described his or her philosophy on the use of sanctions as a deterrent to incivility:

Sanctions are always the last resort and usually imposed near or at the end of the case. My experience has shown that a conference in chambers corrects most in-court behavior problems, but does little to correct the out-of-court occurrences between lawyers (and occasionally worsens the out-of-court behavior between the lawyers). Sanctions also are rarely supported by the appellate courts, so I usually only resort to sanctions as a last resort. While referral to the state bar grievance system is an option, the requirement for dedication of the time necessary to invoke such a course of action and the cost to the county for the preparation of a record has resulted in the use of this option on only one occasion in almost 18 years on the bench.²⁶

Interestingly, only 35% of the judges responding to the survey indicated that they have previously imposed sanctions on an attorney for uncivil conduct toward the court.²⁷ Of those judges who have used sanctions for such conduct in the past, nearly 64% believed that the sanction imposed had a positive effect on the attorney's behavior.²⁸ By contrast, 25% of the judges answered that the sanctions had no effect on the attorney's behavior.²⁹

25. *Id.* at Table 7.

26. One judge emphasized the lack of necessity of sanctions in his judicial career:

[T]he question of civility is too broad. There are so many times when an attorney must confront his counterpart in a not so civil of ways, but generally they resolve their differences quite well. I have been a state District Judge for such a long time and I have only held and or sanction[ed] an attorney approximately ten times.

27. Appendix B to this Article, Table 11.

28. *Id.* at Table 13. Approximately 52% of the judges who have imposed sanctions on an attorney for uncivil conduct toward the court believe that the sanction lessened the attorney's negative behavior to some degree, while more than 11% believe that the sanction eliminated the negative behavior completely. *Id.*

29. *Id.* Over 11% of the judges responded that they did not know how the sanctions affected the attorney's behavior. No judge indicated that the use of sanctions increased an attorney's negative behavior. *Id.*

VIII. RECOMMENDATIONS

The instances and causes of incivility noted by Texas judges are similar to the observations of other judges and legal commentators. The advent of lawyer advertising, the increased commercialization of the practice of law, the ever expanding size of the bar, and the changing attitudes of society in general are often noted as causes of increased incivility in the legal profession.³⁰ Texas judges, however, have some recommendations for curbing incivility.

A. *For the Bar*

As suggested by one judge surveyed:

I believe that civility between lawyers and conduct of lawyers in court has improved in the past few years. The turning point, I believe, was the adoption of the Texas Lawyer's Creed by the [Texas] Supreme Court, and it has continued to improve since then. I think law schools need to do a better job of instilling professionalism in potential lawyers rather than training them to be totally adversarial.

Similarly, one judge recommended a "mandatory pro bono 'civility training' internship for newly licensed attorneys under the supervision of trained 'mentoring' judges." From such comments, it is evident that the Bar should make an effort to educate law students and newly licensed attorneys about legal professionalism before they establish themselves within the legal community.

The Bar should likewise make an effort to reach practicing attorneys to remind them that incivility, abusive advocacy, and intemperate conduct will not be tolerated within our profession. Judges mentioned that they focus lawyers' attention on the Lawyer's Creed by including it in official court documents:

The Texas Lawyer's Creed is the best control device available to trial judges. Unfortunately, most lawyers and even judges today are unaware of the Creed. I incorporate it into my Scheduling Orders and make it clear from the earliest signs of incivility that it is enforced in my court by whatever means are available for enforcement. After about six and one-half years, no one has failed to get the message.

30. See Jed S. Rakoff, *Is the Ethical Lawyer an Endangered Species?*, 30 A.B.A. J. Litig. 3, 6 (2004) (examining lawyer advertising); Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177, 181-88 (1996) (discussing the possible reasons for incivility); Ronald S. Katz, *Ethical Concerns: Ad Hominem Attacks*, C695 A.L.I.-A.B.A. 351, 382-85 (1991) (examining the causes of incivility).

The Creed should be included in Sec[ti]on 9 [of the] Texas Disciplinary Rules. I keep a supply of the State Bar forms and hand them to the lawyers to be certain they understand the conduct expected in [my court].

Similarly, one appellate justice noted that “[i]n an attempt to raise the level of professionalism and civility, our court includes a copy of the Standards for Appellate Conduct as proscribed [sic] by the Court of Criminal Appeals and the Supreme Court . . . with the court’s first correspondence to each attorney.” Thus, it is advisable that members of the Bar familiarize themselves with the Lawyer’s Creed and ethical codes of conduct and dedicate themselves to following their dictates.

B. *For the Judiciary*

Before the judges of this state can offer truly credible solutions to the issue of incivility within the legal profession, they need to do some housekeeping of their own. While incivility among judges was not reported as frequently as incivility among lawyers or between lawyers and judges, a certain level of discontent was reported. Lack of cooperation between judges in both judicial and administrative functions was noted by the responding judges, as well as posturing for political and publicity purposes. Perhaps the most public display of incivility by judges cited by respondents to the survey is the “[p]ublic criticism [of other judges] of a personal nature in opinions, law reviews, and media. Members of the two high courts have been the worst and most frequent offenders in their written opinions.” It would seem that judges need to remain mindful not only of the aspirations of the Texas Lawyer’s Creed, but also of the dictates and spirit of the Texas Code of Judicial Conduct. Acting within the parameters of the Code of Judicial Conduct at least generates credibility for judges when they seek to establish and maintain civility in their courtrooms.

In addition to routinely providing copies of the Texas Lawyer’s Creed, Rules of Professional Conduct, or the Standards of Appellate Conduct to practicing attorneys, judges can set the standard of civility by example. Judges are in a unique position – not burdened by the constraints of billable hours, demanding clients, or inexperience in the profession – to set the tone in their courtrooms. As generally noted by several respondents, attorneys generally comply with the judge’s expectations once they realize what behavior is

unacceptable. Since sanctions clearly reveal to attorneys what behavior is unacceptable, the use of sanctions, or the threat of sanctions, may well be the key for judges to establish what the level of expected conduct is in their court.

On the general premise that affirming the positive is generally more successful than stressing the negative, judges would do well to consider some of the positive suggestions of their peers. Intervening quickly to defuse tensions in the courtroom has been suggested as a positive means of maintaining civility. Likewise, participation in Inns of Court or other mentoring programs have met with success in various jurisdictions to create more dialogue between the bench and bar regarding attorney professionalism.³¹

IX. CONCLUSION

Although many judges have responded positively about the current state of the legal profession,³² many more responded negatively. As one judge stated: "The general professionalism of attorneys in court, in all respects, has declined over the last 30 years and the decline has accelerated every decade. It is on the verge of bringing down the profession and our system of justice if not curbed." Based on the comments of the judges, it is evident that many lawyers have forgotten that the law is more than just a business. It is a profession that requires all members of the bar to exercise good judgment and self-restraint and to abide by the codes of ethical conduct and the Texas Lawyer's Creed. Uncivil conduct will persist only if such behavior is tolerated. If every member of the bar is committed to conducting himself or herself like an honorable professional, the uncivil lawyer will cease to exist.

31. Cf. Ronald S. Katz, *Ethical Concerns: Ad Hominem Attacks*, C695 A.L.I.-A.B.A. 351, 364 (1991) (proposing that lawyers and judges in the Seventh Federal Judicial Circuit should participate in various Inns of Court to improve the standards of civility).

32. One judge commented:

I indicated no perception of incivility problem among various legal professionals, yet, as a judge, I have imposed sanctions for those problems in two different areas. This may appear to be contradictory, but it is not. Those sanctions incidents were isolated instances that are not fairly representative of the vast majority of legal professionals I have contact with. By and large I am extremely proud of the professionalism shown in our community, and I think it is much improved from what was going on in our profession in the 1980s.

APPENDIX A

THE TEXAS LAWYER'S CREED

A MANDATE FOR PROFESSIONALISM

Promulgated by The Supreme Court of Texas and the
Court of Criminal Appeals November 7, 1989

I am a lawyer; I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. 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.
7. 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.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. 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.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor per-

mit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, witnesses, the Court, and members of the Court staff with courtesy and civility and will not manifest by words or conduct bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

ORDER OF THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

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.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

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.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt "THE TEXAS LAWYER'S CREED — A MANDATE FOR PROFESSIONALISM" described above.

In Chambers, this 7th day of November, 1989.

THE SUPREME COURT OF TEXAS
Thomas R. Phillips, Chief Justice
Franklin S. Spears, Justice
C. L. Ray, Justice
Raul A. Gonzalez, Justice

2004]

CIVILITY IN THE LEGAL PROFESSION

139

Oscar H. Mauzy, Justice
Eugene A. Cook, Justice
Jack Hightower, Justice
Nathan L. Hecht, Justice
Lloyd A. Doggett, Justice

THE COURT OF CRIMINAL APPEALS
Michael J. McCormick, Presiding Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge
Marvin O. Teague, Judge
Chuck Miller, Judge
Charles F. (Chuck) Campbell, Judge
Bill White, Judge
M. P. Duncan, III, Judge
David A. Berchermann, Jr., Judge

APPENDIX B
 STATISTICAL TABLES
 JUDICIAL RESPONSES

TABLE #1		
Question #1: As "civility" is defined above, do you believe there is a problem with civility in the Texas Judicial System?		
No	15	11.72%
Some Instances	89	69.53%
Yes	24	18.75%
Total	129	

TABLE #2		
Question #2: Do your experiences lead you to believe that the civility problem in Texas has:		
Decreased	16	14.16%
Remained Constant	29	25.66%
Increased	68	60.18%
Total	115	

TABLE #3

Question #3: Do you perceive a civility problem among attorneys?		
No	7	5.51%
Some Instances	82	64.57%
Yes	38	29.92%
Total	130	

TABLE #4

Question #4: In what context does the civility problem among attorneys (A to A) arise? Check all that apply.	Blank		No		Yes		Total
Civility problem among attorneys occurs in the context of <i>court proceedings</i>	8	6.67%	36	30.00%	84	70.00%	120
Civility problem among attorneys occurs in the context of <i>discovery</i>	8	6.67%	16	13.33%	104	86.67%	120
Civility problem among attorneys occurs in the context of <i>routine matters</i>	8	6.67%	42	35.00%	78	65.00%	120
Civility problem among attorneys occurs in the context of <i>document preparation/filing matters</i>	8	6.67%	90	75.00%	30	25.00%	120
Civility problem among attorneys occurs in <i>some other context</i>	8	6.67%	107	89.17%	13	10.83%	120

TABLE #5

QUESTION #5 Rate the following categories of attorneys on a scale of 1 (least civil) to 5 (most civil). Mark "unable to score" if you have no experience with that category of attorney.

	BLANK	0 = Unable to Score					1 = Not at all Civil		2 = Not Very Civil		3 = Somewhat Civil		4 = Quite Civil		5 = Very Civil		Totals
Plaintiff	14	25	0	0.00%	8	8.99%	42	47.19%	36	40.45%	3	3.37%	89				
Family Law	15	24	0	0.00%	12	13.48%	43	48.31%	30	33.71%	4	4.49%	89				
Civil Defense	17	20	4	4.40%	30	32.97%	32	35.16%	24	26.37%	1	1.10%	91				
Other Civil	21	28	0	0.00%	3	3.80%	33	41.77%	38	48.10%	5	6.33%	79				
Criminal Prosecutor	18	19	1	1.10%	11	12.09%	32	35.16%	35	38.46%	12	13.19%	91				
Criminal Defense	19	19	0	0.00%	13	14.44%	33	36.67%	42	46.67%	2	2.22%	90				
Inexperienced	15	5	5	4.63%	22	20.37%	47	43.52%	29	26.85%	5	4.63%	108				
Experienced	15	5	0	0.00%	12	11.11%	34	31.48%	49	45.37%	13	12.04%	108				
Male	14	6	0	0.00%	10	9.26%	58	53.70%	37	34.26%	3	2.78%	108				
Female	14	6	1	0.93%	10	9.26%	55	50.93%	39	36.11%	3	2.78%	108				

TABLE #6 and 7

Question #7: What type of sanction have you used to curb incivility between attorneys? Check all that apply.

	No		Yes		Totals
Question #6: Have you ever imposed sanctions to curb attorney incivility toward another	73	57.48%	54	42.52%	127
Monetary Sanctions	84	66.14%	43	33.86%	127
Repleading Directives	108	85.04%	19	14.96%	127
Exclusion of Evidence	110	86.61%	17	13.39%	127
Striking of Pleadings	112	88.19%	15	11.81%	127
Removal from Cases	125	98.43%	2	1.57%	127
Referral to CLE Activity	118	92.91%	9	7.09%	127
Referral to State Bar Grievance Committee	111	87.40%	16	12.60%	127
Contempt	105	82.68%	22	17.32%	127
Limiting Further Discovery	107	84.25%	20	15.75%	127
Taxing Expenses of Discovery	97	76.38%	30	23.62%	127
Other	114	89.76%	13	10.24%	127

TABLE #8

Question #8: How did the sanctions affect the attorney's conduct?

Response Codes		
Increased Behavior	0	0.00%
Had no Effect	5	9.43%
Decreased Behavior	30	56.60%
Eliminated Unwanted Behavior	10	18.87%
Unknown	8	15.09%
Total	53	

TABLE #9

Question #9: Do you perceive a civility problem between attorneys and judges?

Response Codes		
No	37	29.13%
Some Instances	81	63.78%
Yes	9	7.09%
Total	127	

TABLE #10

Question # 10: In what context does the civility problem between attorneys and judges occur? Check all that apply.

Response Codes	Lack of Punctuality		Being Unprepared		Failure to attend to detail in motions/briefs		Late filing of motions/briefs		Poor Courtroom Etiquette		Misstatements of law		Approaching judges in an ex-parte manner		Other	
	1	%	1	%	1	%	1	%	1	%	1	%	1	%	1	%
Non Response	1		1		1		1		1		1		1		1	
Some Instances	20	22.22%	21	23.33%	56	62.22%	54	60.00%	19	21.11%	33	36.67%	34	37.78%	74	82.22%
Yes	70	77.78%	69	76.67%	34	37.78%	36	40.00%	71	78.89%	57	63.33%	56	62.22%	16	17.78%
Totals	90		90		90		90		90		90		90		90	

TABLE #11 and 12

Question #12: What type of sanction have you used to curb incivility between attorneys and judges?
Check all that apply.

	No		Yes		Totals
Question #11: Have you ever imposed sanctions to curb incivility between attorneys and judges?	82	64.57%	45	35.43%	127
Monetary Sanctions	17	37.78%	28	62.22%	45
Repleading Directives	41	91.11%	4	8.89%	45
Exclusion of Evidence	39	86.67%	6	13.33%	45
Striking of Pleadings	41	91.11%	4	8.89%	45
Removal from Cases	40	88.89%	5	11.11%	45
Referral to CLE Activity	39	86.67%	6	13.33%	45
Referral to State Bar Grievance Committee	35	77.78%	10	22.22%	45
Contempt	25	55.56%	20	44.44%	45
Limiting Further Discovery	41	91.11%	4	8.89%	45
Taxing Expenses of Discovery	39	86.67%	6	13.33%	45
Other	34	75.56%	11	24.44%	45

TABLE #13

Question #13: How did the sanctions affect the attorney's conduct?	
Response Codes	
Increased Behavior	0 0.00%
Had no Effect	11 25.00%
Decreased Behavior	23 52.27%
Eliminated Unwanted Behavior	5 11.36%
Unknown	5 11.36%
Totals	44

TABLE #14

Question #14: Do you perceive a civility problem between judges?	
Response Codes	
No	81 63.28%
Some Instances	42 32.81%
Yes	5 3.91%
Total	128

