

CREATING CIVILITY: USING REFERENCE GROUP THEORY TO IMPROVE INTER-LAWYER RELATIONS

INTRODUCTION

Civility is sometimes called the mortar that holds the bricks of our society together. We are taught in kindergarten that cooperation is fundamental to life. Our parents implore us to share with our siblings. Our grandparents try to teach us the Golden Rule. As we get older, however, we are driven by other concerns and often drift away from these mores. Lawyers certainly are no different. High-minded college graduates enter law school with ideas of helping others, helping themselves, and becoming great lawyers. In the end they are burdened by debt, looking for jobs, and seeking professional esteem.

Civility can and often does become lost in the chase. Competitiveness overcomes cooperation. The drive to win does not beget working with opposing counsel. The Golden Rule is supplanted by the Almighty Dollar. While law students are familiar with the concept of zealous advocacy, the concept of professionalism is often lost. Commentators have raised the issue of the loss of civility as a cause of practitioner job dissatisfaction, loss of judicial resources, and loss of public confidence in the legal system. There seems to be a demonstrated need for more civility in the practice of law, but the question often becomes how it should be achieved. Civility codes are one oft-mentioned means of increasing lawyer civility.

This Note focuses on civility codes as a means of achieving increased lawyer civility. Specifically, it argues that through the application of social-psychological principles, interested parties can draft civility codes that will carry currency in the real world. Part I of this Note examines the civility movement and the arguments for civility codes. Part II examines the arguments against civility codes and their possible drawbacks. Part III examines the social-psychological concept of reference group theory and its sociological underpinnings. Reference group theory is an explanation of how individuals interact with their social surroundings, specifically with regard to the formation of attitudes and beliefs. Finally, Part IV applies reference group theory to the problems that opponents of civility codes have raised and shows how potential code drafters might write and use a civility code that will have effective, real-world application by molding the attitudes and beliefs of lawyers in a way that will promote civility and adherence to the codes.

I. THE CIVILITY MOVEMENT

A. *The Problem: Lawyers Behaving Badly*

There are many examples of lawyer incivility. An attorney in New Hampshire threatened to rip a pro se litigant's face off.¹ In Florida, a pair of lawyers in an employment discrimination case behaved so poorly that the judge cited their actions as reason to significantly reduce an award of attorneys' fees.² One of the attorneys called opposing counsel a "Second Rate Loser."³ The attorney also asked opposing counsel, "How are you going to feel when I take all of your client's money?"⁴ They also showed their disdain for the court and the judge by openly laughing at his rulings.⁵ When confronted with their unprofessional behavior, the attorneys remained belligerent and launched into personal attacks against the judge.⁶ In another display of the decline of lawyer civility, an attorney attending a deposition for a case before a Delaware court got into a heated exchange with the attorney questioning his client.⁷ Joseph D. Jamail told his counterpart that he "could gag a maggot off a meat wagon."⁸ The case law surrounding lawyer incivility highlights a colorful array of invectives that have been tossed at court staff, opposing counsel, and witnesses.⁹

Examples such as these may sometimes be humorous, but they are representative of what some commentators lament as an overall decline of civility among lawyers.¹⁰ Incivility extends well beyond the use of verbal epithets and insults; it encompasses a wide range of behaviors that tend to be hostile and aggressive.¹¹ Some attorneys will use the threat of court sanctions to attack one another in a punitive manner.¹² Federal Rule of Civil Procedure 11 allows a court to impose sanctions, including "directives

1. *In re Kalil's Case*, 773 A.2d 647, 648 (N.H. 2001).

2. *Lee v. Am. Eagle Airlines, Inc.*, 93 F. Supp. 2d 1322, 1330-31 (S.D. Fla. 2000).

3. *Id.* at 1325.

4. *Id.*

5. *Id.* at 1327.

6. *Id.*

7. *Paramount Comm'n, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52-54 (Del. 1994).

8. *Id.* at 54.

9. See Ty Tasker, *Sticks and Stones: Judicial Handling of Invective in Advocacy*, JUDGES' J., Fall 2003, at 17, 17-18 (quoting an attorney calling defense witnesses "egg-sucking, chicken-stealing gutter trash" and an attorney referring to parties as "cowardly, dirty, low down dogs") (internal quotation marks omitted).

10. Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 3 (1993).

11. Comm. on Civility of the Seventh Federal Judicial Circuit, *Interim Report*, 143 F.R.D. 371, 386-91 (1991) [hereinafter *Interim Report*].

12. *Id.* at 388-89.

of a non monetary nature,” penalties paid to the court, or the payment of the attorney’s fees, for needlessly harassing an opponent, making frivolous claims or defenses, and making factual allegations or denials unsupported by evidence.¹³ The use of Rule 11, according to some attorneys, has become a routine strategy that shows up in nearly every contested matter.¹⁴

Much incivility arises within the context of discovery.¹⁵ In a response to a Seventh Circuit questionnaire, one attorney wrote that his colleagues used “discovery as a weapon rather than an information-gathering mechanism.”¹⁶ As was the case in *In re Golden*, depositions frequently become flashpoints of incivility.¹⁷ Lawyers deliberately schedule depositions at times they know to be inconvenient to their opponents, refuse to return phone calls or respond to correspondence, and force the opposing side to make motions to compel rather than voluntarily produce documents.¹⁸

The abrasive and abusive conduct also extends from lawyers to witnesses. In *Klemka v. Bic Corp.*, attorney Richard Kraemer, representing the defendant, began to light a lighter in front of the plaintiff during a deposition.¹⁹ Although this might be innocuous behavior in another context, the problem lay in that the lighter was allegedly used to start a fire that killed two of the plaintiff’s children. The court was concerned that Kraemer had “conduct[ed] himself in a way likely to . . . intimidate, distract, or disrupt discovery.”²⁰

In *In re Golden*, Harvey L. Golden’s antics brought him public reprimand.²¹ In a deposition, he berated Mr. Smith, who had a mental condition that required six hospitalizations.²² Golden spouted gems such as “You are coming across as an absolutely ridiculous person. But that’s okay, you will learn the hard way. . . . You are not smart enough to question my questions. You are not smart enough to even answer my questions. But do the best you can.”²³ Golden was described as sarcastic, intense, malicious, and bullying.²⁴ The court noted that Golden’s “conduct

13. FED. R. CIV. P. 11(b), (c)(2).

14. *Interim Report*, *supra* note 11, at 388–89.

15. *Id.* at 386–88.

16. *Id.* at 387.

17. *In re Golden*, 496 S.E.2d 619, 620–22 (S.C. 1998).

18. *Interim Report*, *supra* note 11, at 386–88.

19. *Klemka v. Bic Corp.*, No. Civ. A. 95-4548, 95-5538, 1996 WL 103830, at *6 (E.D. Pa. Mar. 11, 1996).

20. *Id.* at *7.

21. *In re Golden*, 496 S.E.2d at 624.

22. *Id.* at 619–21.

23. *Id.* at 620.

24. *Id.* at 622.

was outrageous and completely departed from . . . basic notions of human decency and civility.”²⁵ At another deposition, as further evidence of Golden’s lack of decency and civility, Golden told a witness that he would like to be locked in a room naked with her and a sharp knife.²⁶

Examples such as these abound in the case law surrounding lawyer incivility. They do not paint a pleasant picture of the legal profession and certainly do not portray lawyers as particularly professional as a whole. By themselves, cases and examples tend to make the lawyers look unprofessional, and the costs associated with lawyer incivility only add to the problem. While lawyer incivility may seem to affect only the lawyers themselves, there are hidden costs associated with inter-lawyer incivility that must be considered.

B. *The Costs of Lawyer Incivility*

These aggressive, uncivil, and obstreperous tactics have been given a name within the civility literature: Rambo.²⁷ Rambo tactics are often characterized as an amalgamation of “zealous advocacy,” a “scorched earth” policy, and “disdain for common courtesy.”²⁸ While some believe that Rambo tactics are useful and effective, other observers disagree and find them counterproductive.²⁹ Among the problems that can result from adversarial excesses are losses of credibility,³⁰ a waste of judicial resources,³¹ and a serious loss of public esteem for the legal profession in general.³²

25. *Id.*

26. *Id.* at 621.

27. Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 754 (1994); see also Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 81–83 (1991) (describing Rambo, the one-man army of film fame who “dispatched a brutish sheriff’s posse, mauled the North Vietnamese army, and mangled the minions of the Evil Empire in Afghanistan,” conquering the courtrooms of America).

28. Browe, *supra* note 27, at 755 (quoting Maurice E. Bone, *A Lawyer’s Choice—Civility or Hardball*, 79 ILL. B.J. 216 (1991); ABA COMM’N ON PROFESSIONALISM, AMERICAN BAR ASSOCIATION, *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM* 3 (1986); John J. Curtin Jr., *Civil Matters*, A.B.A. J., Aug. 1991, at 8).

29. Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 286–90 (1996).

30. *Id.* at 287.

31. Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 19–20 (2002).

32. See Kara Anne Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815, 815 (1999). “The perception of incivility within the legal profession . . . appears to be on the rise. According to a Harris Poll, thirty-six percent of the public in 1977 viewed lawyers as ‘very prestigious,’ compared with only nineteen percent in 1997.” *Id.* (citing Liane Leshne,

1. Rambo Lawyers Lose Their Colleagues' Respect

There is certainly much to be gained by earning victory in today's legal battles. In the last few decades, the size of the bar has grown significantly.³³ As a result, there is great competition for clients and the fees that legal work generates, which in turn makes winning the paramount concern for many lawyers.³⁴ The legal profession has become a business where "winning isn't everything; it's the only thing."³⁵ While winning might now be prized over inter-lawyer civility, this winner-take-all ethic has led to widespread dissatisfaction with the legal profession among lawyers and judges.³⁶ It is not a stretch of the imagination to believe that the widespread dissatisfaction judges and lawyers feel results in a great loss of respect for Rambo lawyers. In fact, several commentators affirm this idea.

One former litigator and commentator has noted that aggressive, Rambo tactics sometimes pay off.³⁷ The Seventh Circuit's *Interim Report* of its Civility Committee, published in 1991, affirms this assertion.³⁸ While Rambo litigators may win, their victories may be pyrrhic. Bartlett H. McGuire, who was a law firm partner for eighteen years, suggests Rambo lawyers claim victory often at the expense of their own credibility before the courts.³⁹ McGuire equates the use of personal attacks and invectives to static covering up a radio broadcast.⁴⁰ Judges and juries can turn against attorneys who abuse or mistreat their opponents, even to the point of assigning huge punitive damage awards in response to lawyer incivility.⁴¹ Furthermore, the use of invectives and insults can burden judges who must extract useful legal analysis from documents laced with pejorative statements.⁴² The courts' lost respect is not merely limited to the lost respect of judges; the loss of respect certainly extends to opposing counsel.⁴³ Lawyers give referral business to the lawyers they respect, and when a Rambo lawyer sacrifices the respect of the court for short-term gain,

Civility: Interview with Judge Marvin E. Aspen: It's How You Play the Game, TRIAL, Jul. 1998, at 28).

33. See *Interim Report*, *supra* note 11, at 382 (highlighting that in the decade leading up to the *Interim Report*, the number of licensed attorneys grew by nearly 75%).

34. *Id.* at 382–83.

35. *Id.* at 383.

36. *Id.* at 375.

37. McGuire, *supra* note 29, at 286.

38. *Interim Report*, *supra* note 11, at 382.

39. McGuire, *supra* note 29, at 283 n.1, 286–87.

40. *Id.* at 287 (quoting *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992)).

41. *Id.*

42. Tasker, *supra* note 9, at 19.

43. McGuire, *supra* note 29, at 289.

he also sacrifices future business.⁴⁴

Perhaps the most ironic cost of all is the cost to the Rambo lawyer's client. The Rambo lawyer is a representative of the winner-take-all mentality that has developed in the modern legal system, and presumably clients hire these types of lawyers because they will deliver results.⁴⁵ When an aggressive lawyer loses the respect of the court, however, and when the uncivil lawyer's antics overshadow the substance of his legal arguments, the client is the ultimate loser.⁴⁶ It has been noted, "A lack of civility can escalate clients' litigation costs while failing to advance their interests or bring them closer to their ultimate goal of ending disputes."⁴⁷ Furthermore, if an attorney begins to use uncivil behavior in advocacy, he may "reduce the client's chance of success by motivating an adversary to litigate with a thoroughness or vigor that otherwise would have been lacking."⁴⁸ If the goal of representation is to advance a client's interests, then certainly incivility that hinders reaching that goal is counterproductive for the client.

2. Rambo Lawyers Waste Client and Judicial Resources

Lawyers who act uncivilly not only sully their reputations but also waste judicial resources. This is a practical, and probably the most common, argument for civility.⁴⁹ Frivolous Rule 11 motions are a prime example of how incivility can cost time and money. As discussed earlier, a frequent and favorite tactic of uncivil lawyers is to bring frivolous motions, specifically Rule 11 motions, to delay and hinder discovery.⁵⁰ Rule 11 motions have often been used for intimidation and negotiation by lawyers looking to gain an advantage.⁵¹ As a result, especially in the Rule 11 context, attorneys will file countermotions to motions seeking sanctions.⁵²

Doubtless, delay tactics and wrangling between lawyers over issues that are, at best, tangential to the underlying conflict their clients seek to resolve use precious court time and money.⁵³ "[W]ith today's overcrowded dockets, judicial time is wasted resolving needless (often petty) disputes,

44. *Id.*

45. Interim Report, *supra* note 11, at 382.

46. McGuire, *supra* note 29, at 288–89.

47. Comm. on Civility of the Seventh Federal Judicial Circuit, *Final Report*, 143 F.R.D. 441, 445 (1992) [hereinafter *Final Report*].

48. Richmond, *supra* note 31, at 20.

49. Christopher J. Piazzola, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1209 (2003).

50. Interim Report, *supra* note 11, at 383.

51. Browe, *supra* note 27, at 760.

52. *Id.*

53. *Id.* at 756.

which, in turn, deprives those litigants who are ready for trial of the opportunity for a more expeditious hearing. Everyone is harmed.”⁵⁴ “It is no secret,” in the words of the Seventh Circuit Committee on Civility’s Final Report, “that a lawyer’s contentiousness causes more work for the lawyers on both sides and slows down the progress of the litigation.”⁵⁵ Incivility wastes time, thereby wasting client money without bringing the client any closer to resolving the issue that brought him to court.⁵⁶

3. Incivility Harms the Public Image of the Legal Profession

Public relations is another reason to be concerned about the lack of civility within the legal profession. As the public comes into contact with an increasingly uncivil legal community, the public’s respect for lawyers decreases.⁵⁷ There is concern that the public views the entire profession as moving away from the values of professionalism.⁵⁸

Very few Americans today feel that lawyers are honest or even ethical.⁵⁹ In fact, according to one commentator, nearly half believe words like “honest and ethical” do not even apply to lawyers.⁶⁰ Another commentator fears that if the public does not respect attorneys, public faith in the decisions rendered by the judicial system in general will necessarily decrease.⁶¹ If the public does not believe the judicial system is effective for resolving problems, the public may turn away from litigation, just as one observer who got fed up with lawyer incivility has done.⁶²

C. The Response: A Movement Is Born

The overall distaste for Rambo lawyering and the costs associated with it have spawned a movement aimed at fostering a more civil legal atmosphere.⁶³ There is extensive literature surrounding the issue, and many

54. *Final Report*, *supra* note 47, at 445.

55. *Id.*

56. *Id.*

57. Browe, *supra* note 27, at 756.

58. *See Final Report*, *supra* note 47, at 448 (declaring professionalism a “hallmark[] of a learned profession dedicated to public service”).

59. McGuire, *supra* note 29, at 292 (citing Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62).

60. *Id.*

61. Browe, *supra* note 27, at 756.

62. *See McGuire*, *supra* note 29, at 283 (discussing how after twenty-five years as a litigator, the author had found that the joys of litigation work were outnumbered by the frustrating aspects of litigation, such as personal attacks and tactics that aim to overburden opponents and cut ethical corners). McGuire, in frustration, left litigation practice to work as an arbitrator and teach law. *Id.*

63. *See generally* Raymond M. Ripple, Student Article, *Learning Outside the Fire: The Need*

commentators have offered their own solutions to the civility problem, including providing law students with civility instruction.⁶⁴ There are many approaches to solving the problem, including religious and secular philosophical analyses of the bases of civility.⁶⁵

One possible solution is using the courts' inherent powers to control lawyer incivility.⁶⁶ In several of the cases used as illustrations of lawyer incivility the judges took an active role in sanctioning attorneys who have misbehaved. For example, in *Paramount Communications Inc. v. QVC Network Inc.* the court raised the issue of lawyer incivility *sua sponte*.⁶⁷ Thus courts, as in *Paramount*, have sometimes taken it upon themselves to address lawyer incivility.

There is another approach, however, which will be the focus of this Note: the establishment of civility codes, which are intended to direct lawyers to aspire to a higher code of civil or interpersonal conduct.⁶⁸ Civility codes are born of a general dissatisfaction with the Model Rules of Professional Conduct, which outline only the floor of professional conduct.⁶⁹ While the Model Rules are useful, they provide lawyers with little instruction regarding what they should do when interacting with other professionals.⁷⁰ Civility codes aim to do just that.⁷¹

Perhaps the model example of a civility code is the United States Court of Appeals for the Seventh Circuit's *Standards for Professional Conduct*.⁷²

for *Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359, 359–60 (2001) (giving a brief overview of the "civility movement" and the scholarly literature that has surrounded it in recent decades).

64. *Id.* at 359, 374. See McGuire, *supra* note 29, at 290–99 (explaining that clients may use market forces to create change, that litigators can themselves use counter-tactics, and that judges may take a more active role in reducing incivility).

65. See generally Fr. Robert J. Araujo, S.J., *Humanitarian Jurisprudence: The Quest for Civility*, 40 ST. LOUIS U. L.J. 715, 718–19 (1996) (detailing the Christian theological approach as well as secular natural law and positivist philosophical approaches to civility).

66. *Klemka v. Bic Corp.*, No. Civ. A. 95-4548, 95-5538, 1996 WL 103830, at *7 (E.D. Pa. Mar. 11, 1996). See generally McGuire, *supra* note 29, at 297–303 (explaining the active role that judges might play).

67. *Paramount Commc'n Inc. v. QVC Network Inc.*, 637 A.2d 34, 52–57 (Del. 1994).

68. *Ripple*, *supra* note 63, at 369.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Final Report*, *supra* note 47, at 448–52; STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT,

<http://www.ca7.uscourts.gov/Rules/rules.htm#standards> (last visited Mar. 21, 2007) [hereinafter SEVENTH CIRCUIT STANDARDS]; see also *Ripple*, *supra* note 63, at 369–70 (outlining a Seventh Circuit study that found that a great number of lawyers surveyed were dissatisfied with civility in their practice and discussing how the Seventh Circuit's Committee on Civility proposed standards of professional conduct). The Seventh Circuit code became a precedent that other jurisdictions followed. *Id.* at 370.

The Seventh Circuit's standards are numerous, containing fifty provisions in total.⁷³ The provisions are divided into those that deal with lawyers' duties to one another, lawyers' duties to the court, and the court's duties to lawyers.⁷⁴ Among the duties that lawyers owe one another under the standards are duties to only ask questions that will lead to the discovery of a fact during a deposition, to make good faith efforts with regard to scheduling matters, not to intentionally file motions in a way that will oppress one's opponent, and to reasonably respond to document requests.⁷⁵ Many of these provisions deal directly with frequent issues brought up in the context of inter-lawyer incivility.⁷⁶

Some state bar associations have also taken up the issue of civility by promulgating civility or courtesy codes. Kentucky and Massachusetts are examples.⁷⁷ Kentucky's code slightly differs from the Seventh Circuit's code in that it is much shorter and less specific, containing only eleven provisions.⁷⁸ The Kentucky code urges lawyers to respect one another with regard to scheduling issues, generally discourages discourteous behavior, encourages prompt reply to correspondence and telephone calls, and sets up an expectation of professional courtesy both for courts and lawyers.⁷⁹ The Massachusetts Bar Association's *Statement on Lawyer Professionalism (Massachusetts Statement)* seems to take a much more aspirational approach to creating lawyer civility, stating in its preamble that the legal profession demands "an uncompromising integrity, a passionate desire for the truth, a practical respect for the law and the legal system, a broad and genuine understanding of the times in which we live, and, most of all, a love of life and humankind."⁸⁰ The *Massachusetts Statement* goes so far as to call advocacy a special kind of teaching about the law that is akin to caring for others.⁸¹ However, it is not considered a "restatement of prevailing standards or professional conduct" so much as it is meant to document the Massachusetts Bar's commitment "to [the legal] profession,

73. SEVENTH CIRCUIT STANDARDS, *supra* note 72.

74. *Id.*

75. *Id.*

76. *See supra* Part I.A.

77. CODE OF PROF'L COURTESY, Ky. Bar Ass'n, <http://www.kybar.org/Default.aspx?tabid=228> (last visited Mar. 21, 2007) [hereinafter KENTUCKY CODE]; MBA STATEMENT ON LAWYER PROFESSIONALISM, Mass. Bar Assoc., <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2001/december/mba-statement-of-lawyer-professionalism> (last visited Mar. 21, 2007) [hereinafter MASSACHUSETTS STATEMENT].

78. KENTUCKY CODE, *supra* note 77.

79. *Id.*

80. MASSACHUSETTS STATEMENT, *supra* note 77.

81. *Id.*

to each other, and to the people whom [they] serve.”⁸²

Despite the problem of lawyer incivility that exists within the legal profession today, civility codes are not without their detractors.

II. CRITICISMS OF CIVILITY CODES

Civility codes may address the problem of lawyer incivility, but the prospect of working beneath a code of conduct above and beyond rules of professional responsibility raises the hackles of some commentators. Critics see a host of problems inherent in civility codes.

Professor Amy R. Mashburn views professional civility codes as a means of maintaining the structure of bar hierarchy.⁸³ For Mashburn, this implicates variety of related problems. Among these are the creation of a false view of the legal profession as an integrated community, and an attempt by the professional elite within the legal community to impose their values and mores upon the rest of the legal profession to create a conformity that will ultimately benefit themselves.⁸⁴

It is important at this juncture to define precisely the composition of the professional elite. Mashburn’s definition comes from a historical look at the American bar.⁸⁵ According to Mashburn’s research, “the social status of a lawyer’s clientele governed the nature of the lawyer’s practice and also determined the lawyer’s social position within the profession.”⁸⁶ Accordingly, a lawyer’s social status was dependent upon who his clients were and their socioeconomic statuses.⁸⁷ Mashburn contends that the elite today are lawyers at large firms.⁸⁸ “[L]arge firms are invariably at the top of the prestige hierarchy within their occupational communities.”⁸⁹ Patrick J. Schiltz, writing about lawyer happiness, recognizes that many law students and lawyers aim to work in large firms, partly for the money that large firms offer, and partly because of the prestige that comes with arriving at what is considered the top of the legal hierarchy.⁹⁰ It then is safe to say that the legal elite are those who work at large law firms.

Mashburn’s first major criticism, that to view the legal community as a

82. *Id.*

83. Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 663 (1994).

84. *Id.* at 663–64.

85. *Id.* at 668.

86. *Id.*

87. *Id.*

88. *Id.* at 675–76.

89. *Id.* at 676.

90. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 897–98, 906 (1999).

coherent, integrated group is not realistic, seems to bear directly upon the growth and expansion of the bar across the country.⁹¹ When sociologists see the modern bar, they see increased diversification.⁹² The bar is increasingly young, and women are becoming an emergent bloc within the legal profession.⁹³ This, according to some, indicates that the bar is unable to “control the size and composition of its membership.”⁹⁴

According to Mashburn, while the face of the legal profession is changing, the face of the elite within the profession has not.⁹⁵ The elite within the legal profession have remained a fairly static group, and the legal profession is and has always been highly stratified.⁹⁶ Historically, the elite have been white, male, Anglo-Saxon, and Protestant.⁹⁷ In fact, those who made up the American Bar Association (ABA) at its inception intended to keep the practice of law out of the hands of those who were not upper-middle-class, white, Anglo-Saxon, and Protestant.⁹⁸ The ABA at its birth “was an organization with an exclusive membership and elitist agenda.”⁹⁹ According to Mashburn, the foreign-born, Jews, and others considered undesirable at the founding of the ABA were derided by the founders as being inept and morally challenged.¹⁰⁰ The make-up of the elite continues today.¹⁰¹ The elite in modern times are made up of white, Anglo-Saxon, Protestant men who went to the so-called “elite law schools.”¹⁰² Their fathers tended to also be professionals.¹⁰³

In contrast to the elite, those whose work involves clients on the lower end of the socioeconomic scale are not considered especially prestigious.¹⁰⁴ Lawyers who work in divorce, personal injury, or criminal defense law are sometimes considered unsavory.¹⁰⁵ These lawyers, although they do not enjoy the same type of prestige currency as their large-firm counterparts, in

91. Mashburn, *supra* note 83, at 665–66; *see also supra* text accompanying notes 33–36.

92. Mashburn, *supra* note 83, at 666.

93. *Id.*

94. *Id.* (quoting Sharyn L. Roach Anleu, *The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization?*, 19 WORK & OCCUPATIONS 184, 188 (1992)).

95. *Id.* at 674.

96. *Id.* at 668.

97. *Id.* at 670.

98. *Id.*

99. *Id.* at 669.

100. *Id.* at 670 (quoting MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 173 (1977)).

101. *Id.* at 674.

102. *Id.*

103. *Id.*

104. *Id.* at 676.

105. *Id.*

fact make up the majority of lawyers in America today.¹⁰⁶ As Mashburn explains, large-firm lawyers are in fact a very small percentage of the nation's lawyers.¹⁰⁷ While they are a small percentage of the total number of lawyers, they manage to dominate bar associations by occupying positions of leadership.¹⁰⁸ In Mashburn's opinion, their impact within the associations is thus disproportionate to their "representativeness of the larger legal profession."¹⁰⁹ The necessary result for Mashburn is that the legal elite will infuse a civility code with its values.¹¹⁰

Therein lies the problem for civility codes. For Mashburn, because civility codes are drafted by the elite within a bar association, the view propounded by civility codes does not necessarily reflect the attitudes espoused by the legal community as a whole.¹¹¹ Civility codes come to express what large-firm and elite legal culture deem to be civil and professional.¹¹² "The power to draft codes of conduct is the power to define . . . the very essence of what it means to be professional and, perhaps more importantly, unprofessional."¹¹³ The attitudes and values expressed may even be anachronistic, for if the bar today is diverse and the legal elite are a throwback to an earlier era, the resultant expression of civility may be based on a view that does not reflect modern beliefs and values.¹¹⁴

The result of Mashburn's analysis is that there is no real "occupational ideology" except the expressed ideology of large law firms, which does not represent the practice as a whole.¹¹⁵ With a minority imposing its view of professional behavior upon the broader and increasingly diverse legal culture, it is not hard to see how Mashburn concludes that the idea of an integrated legal community is off-base, if not wrong. The question might then become whether a civility code can be drafted at all if lawyers are so diverse. After all, if the codes are definitions of civility from the perspective of the elite, not of the remainder of the bar, it is reasonable to think that the remainder will not accept them, as Mashburn does not.¹¹⁶

106. *Id.* at 674.

107. *Id.*

108. *Id.* at 676.

109. *Id.*

110. *Id.* at 679.

111. *Id.*

112. *Id.*

113. *Id.* at 672.

114. *See id.* at 674, 679–80 (noting that large firms still bear the scars of prior discrimination and their homogeneous constituency, and that the values held by large firms tend to be conservative and based upon a sort of Victorian sensibility that may be outdated for today's legal atmosphere).

115. *Id.* at 679.

116. *See supra* text accompanying notes 109–14. *See generally* Mashburn, *supra* note 83 (rejecting civility codes because of the taint of class bias).

Mashburn also criticizes civility codes as an attempt by the professional elite to impose conformity upon the majority of the legal profession.¹¹⁷ Her “thesis is that [civility codes] seek[] to make the practice of law an upper-middle-class man’s game.”¹¹⁸ The elite, by way of their prestige within the profession, are disproportionately influential within the profession and hold leadership positions within the bar.¹¹⁹ With the prestige and leadership positions come a perceived entitlement to deference.¹²⁰ Within the prestige hierarchy, which places the large-firm attorney at the top and the solo practitioner at the bottom, because of the type of clients each has, Mashburn’s research suggests that lawyers at the low end of the totem pole ascribe good ethical qualities to those above them.¹²¹ The result is that attorneys on the lower end feel inclined to give their high-prestige peers great deference in ethical matters. “In fact, high-prestige lawyers are seen as particularly qualified to determine the ideals of professional behavior because they are viewed as embodying those very traits . . . that are the essence of its occupational ideology.”¹²²

With that deference, and seemingly because of the power the deference gives, Mashburn charges elites with trying to impose conformity to their values from above.¹²³ She sees the civility movement as a response to problems that the elite at large law firms may have created themselves. As both Mashburn and Schiltz write, large firms have created a great deal of competition for legal services, driven up lawyers’ salaries and billable-hour requirements, and generally contributed to the decline of ethical and civil behavior in the legal profession.¹²⁴

Instead of addressing what might be systemic problems, civility codes are instead an attempt to cure a problem that starts at the top with the elite.¹²⁵ The goal is to ensure compliance and at the same time head off what can be called the “proletarianization of the profession.”¹²⁶ Mashburn

117. *Id.* at 693.

118. *Id.* at 698 (emphasis in original omitted).

119. *See supra* text accompanying note 108.

120. Mashburn, *supra* note 83, at 693.

121. *See id.* at 676–78 (citing studies in Chicago and Detroit which show that lawyers at the bottom of the social hierarchy ascribe higher ethical scores to high-prestige attorneys).

122. *Id.* at 678.

123. *Id.* at 675–76.

124. *Id.* at 689–91; Schiltz, *supra* note 90, at 900–03.

125. Mashburn, *supra* note 83, at 689–91.

126. *Id.* at 698. In the modern era, bar membership is predicated upon graduating from an accredited law school and passing the bar. Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism,”* 41 EMORY L.J. 403, 412 (1992). In the past, bar membership was predicated upon completing an apprenticeship, a process which tended to exclude people on the bases of class and race. *Id.* at 410. According to Terrell and Wildman, when the bar changed from the apprentice system to the law school and bar examination system, the barriers to bar entry were significantly reduced. *Id.* at 411–

sees Rambo-style tactics as fundamentally contrary to patrician, genteel, upper-middle-class values, which hold politeness as an esteemed trait.¹²⁷ However, for some, particularly the low-prestige, lower-class lawyer, those Rambo tactics might be the most effective and courageous way to deal with a system that is sometimes unfair and stacked against the downtrodden.¹²⁸ With increased bar diversity, with more and more non-elites in the bar, elites need a way to command other lawyers to behave as they do.¹²⁹ Civility codes can do just that by the very nature of the structure in which they are drafted: by elites in an atmosphere that requires deference to the elites' opinions on ethical behavior.

For Mashburn, the coercive nature of civility codes leads to another strong criticism, namely that the coercive nature of the codes and the deference due to those who create them seem to imply that non-elites are more likely to engage in unethical behavior.¹³⁰ For Mashburn, this thinking seems to belie the idea that “[t]he capacity for responsible moral choice is highly individualistic.”¹³¹

Rob Atkinson makes the allusion to religious crusades when discussing civility codes.¹³² For Atkinson, the attempt to draft and impose codes of civility takes on the air of ridding the Holy Land of infidels.¹³³ “Anointed with this Pentecostal fire, apostles of professionalism have enlisted an imposing army of converts.”¹³⁴ Civility codes, in his view, are aptly characterized as attempts to instill an orthodoxy of professionalism upon the bar.¹³⁵

Thus, there are at least two major systemic critiques of the quest for civility and codes meant to guide lawyers and guard against the kind of problems facing the practice of law discussed in the first section of this Note. First, the profession is too fractured and the supposed leadership of the bar is too far out of touch with the bar's majority for that leadership to

12. As a result, today the bar is more demographically varied than in the past. *Id.* at 412. Terrell and Wildman therefore argue that there is a similar “moral diversity” within the bar at large, making it impossible to ascribe any particular values to attorneys. *Id.* at 413–14.

127. Mashburn, *supra* note 83 at 699.

128. *Id.* at 685–86.

129. *See id.* at 702 (asserting that civility codes are a way to ensure that upper-class elites do not suffer in the legal conflict that can arise when two lawyers of different socioeconomic backgrounds meet in court).

130. *Id.* at 694.

131. *Id.* (emphasis omitted) (quoting Kenneth L. Penegar, *The Professional Project: A Response to Terrell and Wildman*, 41 EMORY L.J. 473, 478 n.13 (1992)).

132. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 261–64 (1995).

133. *Id.* at 261.

134. *Id.*

135. *Id.* at 266–67.

draft an effective code. Second, these codes inevitably come across as attempts by the elite to impose their will upon the masses. Despite these valid concerns, the problem of incivility remains. The question thus arises as to how to identify a process by which a code can be drafted to answer those concerns.

III. REFERENCE GROUP THEORY

The concept of the reference group originated in the field of social psychology and “focuses . . . on the responses of individuals to their interpersonal and more extended social environment.”¹³⁶ The theory is commonsensical and probably has been recognized since ancient times.¹³⁷ At its simplest, the theory merely states that people act in reference to groups of which they are a part.¹³⁸ Reference groups provide a frame of reference for an individual to judge his behavior and to form his attitudes.¹³⁹ There is a degree of value assimilation involved in belonging to a group.¹⁴⁰ As the discussion of civility codes and Mashburn’s critiques have illustrated, however, simply being a member of a group—here the legal profession—does not necessarily mean that one will conform to the will of the group.¹⁴¹ A deeper investigation of group membership and reference group theory is necessary.

There are logically two types of groups whose values a person may choose from: those to which the person belongs and those to which the person does not belong.¹⁴² Although not pertinent to this discussion, non-membership groups may be useful in a discussion of creating civility within the bar because people sometimes choose to adopt the values of non-membership groups. There are a host of reasons for this that relate to the aspirations of the non-members.¹⁴³ One reason, Merton notes, is that people are likely to assimilate the values of groups that can confer prestige

136. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 335 (enlarged ed. 1968).

137. *Id.* at 336. It should be noted that Merton makes the distinction between the reference group and the reference individual or role model. For Merton, the reference individual provides a range of different analytical issues than reference groups do, but they can be thought of as broadly similar. *Id.* at 356–58.

138. *Id.* at 336.

139. *Id.* at 337.

140. *Id.*

141. *See supra* Part II.

142. *See generally* MERTON, *supra* note 136, at 338–51 (elaborating on the distinctions between membership and non-membership groups).

143. *See id.* at 359 (discussing how recent immigrants who aspire to become members of a society will assimilate its values and norms).

upon them.¹⁴⁴ This may be an important tool for conferring ideals of civility upon law students. Law students, by their very position as initiates in the legal profession, stand on the outside of bar membership. Earning a Juris Doctor and passing the bar examination can confer prestige, money, and respect. If a law school can propound civility as a fundamental component of professionalism and prestige, reference group theory suggests that law students will adopt civility as an internal value as a result of their aspirational goals, though this is admittedly beyond the scope of civility codes.¹⁴⁵

Membership groups are more pertinent to the discussion of civility codes, primarily because the codes pertain only to those who are *members* of the professional community, in this case members of the bar. Merton finds that membership groups are of particular importance because of “the generally acknowledged fact that it is groups of which one is a member that most often and most prominently affect one’s behavior.”¹⁴⁶ Membership groups (and also non-membership groups) can be categorized as either normative, comparative, or both.¹⁴⁷ A normative group is a group which a person uses to set and maintain standards for attitude formation; it is a source of value assimilation.¹⁴⁸ A comparison group “provides a frame of comparison relative to which the individual evaluates himself and others.”¹⁴⁹ Of course, the functions of these groups can overlap.¹⁵⁰ A group that provides instruction on what a person’s values should be can also be the same group that person measures his actions against. Other researchers detail the “associative effect” of reference groups, which allows an individual to evaluate himself in a positive light simply by identifying with the group.¹⁵¹

The crucial element in Merton’s analysis appears to be the choice or selection of a membership reference group and the particular purpose for

144. *Id.*

145. See generally Ripple, *supra* note 63, at 374–81 (arguing that teaching civility in law school might be a good option for reducing lawyer incivility because law school is truly the one unifying characteristic among all lawyers). Ripple’s approach to teaching civility in law school focuses on using the teaching atmosphere to inculcate values. *Id.* at 380–81. The merits of this approach may be related to the substance of this Note, but are beyond its scope, which is limited to using reference group theory to draft civility codes that are more generally acceptable. See *supra* Introduction.

146. MERTON, *supra* note 136, at 361.

147. *Id.* at 337–38. See generally Richard B. Felson & Mark D. Reed, *Reference Groups and Self-Appraisals of Academic Ability and Performance*, 49 SOC. PSYCHOL. Q. 103, 103–04 (1986) (providing a review of the literature surrounding the comparative and normative effects of reference groups).

148. MERTON, *supra* note 136, at 337.

149. *Id.*

150. *Id.* at 338.

151. Felson & Reed, *supra* note 147, at 104.

which that group is chosen as a reference point.¹⁵² People belong to a host of different groups in their lives. For a lawyer, the list could include his family, his law school class, his coworkers, the local bar, the national bar, his church, and so forth. However, it is generally recognized that under some circumstances people will select the groups they belong to as a referent for their behavior, while under other circumstances they will choose a non-membership group as a referent.¹⁵³

Further complicating the selection process, people tend to have a number of reference groups that vary with the different spheres of their lives.¹⁵⁴ A lawyer might consult a former mentor for career and economic instruction, his wife for social and family advice, his friends for political concerns, and his priest for ethical advice. However, the question remains how a person might come to choose a particular membership group as a reference group.

Richer, in his review of reference group literature, explains that reference group-taking is fundamentally a question of salience.¹⁵⁵ According to Richer, salience in this context has two dimensions: meaningfulness and visibility.¹⁵⁶ Merton describes meaningfulness in terms of knowledge. For a person to acquire the norms and values of the group, or to compare himself to another group, he must know of those values and know something about the group.¹⁵⁷ Richer views the issue of meaningfulness as essentially a question of the individual's concern with the prominence of the group.¹⁵⁸

Other scholars have elaborated on reference group selection. For Eisenstadt, the essential characteristic for determining whether someone will choose a particular group as his reference group is a self-interest in status.¹⁵⁹ According to Eisenstadt, for the majority of people, identifying a reference group is usually contingent upon the potential for status-conferral within the structure of society.¹⁶⁰ Therefore, one might arrive at the conclusion that people are inherently self-interested and will choose groups

152. See MERTON, *supra* note 136, at 361–80 (discussing twenty-six different group properties that affect why a person chooses a particular membership group as a reference group and how those properties affect a person's personality).

153. *Id.* at 358.

154. *Id.* at 380.

155. Stephen Richer, *Reference Group Theory and Ability Grouping: A Convergence of Sociological Theory and Educational Research*, 49 SOC. OF EDUC. 65, 66 (1976).

156. *Id.*

157. MERTON, *supra* note 136, at 390.

158. Richer, *supra* note 155, at 66.

159. S.M. Eisenstadt, *Reference Group Behavior and Social Integration: An Explorative Study*, 19 AM. SOC. REV. 175, 177 (1954).

160. *Id.*

that have an ability to give them status and prestige.¹⁶¹

Another important characteristic of visibility, which is “defined as the extent to which the reference group is available for observation,”¹⁶² deals with the characteristics of people high in the social ranks and the structure of the reference group. In order for the group to create effective authority, the leadership need to be in a position of effective communication.¹⁶³ As Merton writes, those of high social rank are those who should know the most about the group by reason of their rank within the organization.¹⁶⁴ If they are in an effective place for communication, these people will communicate with those beneath them in two ways. Those of high social rank will first receive information from, and then give information to, those beneath them.¹⁶⁵ Merton writes that in small groups, the means for communication are frequently present because the groups are small.¹⁶⁶ In large groups, like bar associations, they must be invented.¹⁶⁷ These factors in communication help increase group visibility.¹⁶⁸

Jiang Yu and Allen Liska argue that there is another, perhaps more human aspect to reference group theory, especially when discussing attitude and belief formation. Yu and Liska write that “[w]hile there is considerable debate on what social others, groups, and categories constitute reference points for people in forming and changing their attitudes and beliefs, most researchers . . . argue that affective ties (strong interpersonal relationships) and social similarities among people are crucial.”¹⁶⁹ This, like the whole of reference group theory, is very much a matter of common sense. Simply put, people take the values and attitudes of those with whom they have strong interpersonal relationships and those with whom they share social similarities.

Thus, the relevant factors for an individual in selecting a reference group are the group’s visibility (as defined by how observable the group is)

161. This assumption may be rationally deduced from reference group literature. This does not, however, rule out the notion that altruism is an element of human nature. See generally Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27, 58 (1990) (surveying literature from the fields of social psychology, sociology, sociobiology, and economics to arrive at the conclusion that humans do have some altruistic tendencies). As Piliavin and Charng acknowledge, however, “for a long time it was intellectually unacceptable to raise the question” of whether people were actually capable of true altruism. *Id.* at 28.

162. Richer, *supra* note 155, at 66 (citing MERTON, *supra* note 136, at 390).

163. MERTON, *supra* note 136, at 395–97.

164. *Id.* at 396.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 396–97.

169. Jiang Yu & Allen E. Liska, *The Certainty of Punishment: A Reference Group Effect and Its Functional Form*, 31 CRIMINOLOGY 447, 449 (1993) (citation omitted).

and the group's meaningfulness (defined by the group's prominence and the individual's concern with maintaining consistency with the group). Other important factors are the group's communication structure, the presence of affective ties, and social similarities amongst the group members.

IV. APPLYING REFERENCE GROUP THEORY TO CIVILITY CODES

Recalling the essential criticisms raised by Mashburn, there are two major problems with crafting a civility code. The first criticism is that the bar is too fractured, and its leadership too far out of touch with the majority of the bar to develop an effective code.¹⁷⁰ The second is that such codes, by their nature, will be perceived as attempts to impose the will of the elite drafters upon the majority. Both of these concerns can be addressed by applying reference group theory.

As previously stated, reference group theory deals with the relationship between an individual and his social environment. The theory places particular importance upon a set of specific relations between the individual and the group so that an individual will take the group to be his normative or comparative referent. Clearly, the goal of a civility code should be that it becomes an expression of a group's ideals and goals. The problem, as highlighted by Mashburn, is making the group, here the larger bar association (and perhaps its leaders), the operative reference group for an individual lawyer. Reference group theory can solve this problem.

First, civility codes are faced with the problem of elite leadership that is out of touch with a large and diverse bar association. One of the fundamental properties of effective leaders is the ability to communicate with those they lead.¹⁷¹ Perhaps the functional problem current civility codes present is that they are made by elites, who are somewhat out of touch with their legal colleagues.¹⁷² Perhaps the problem lies in the elite status of the drafters, in which case the proper response would be to change the composition of the bar's leadership. This might be a hasty and revolutionary action, and this Note does not suggest that swapping one leadership group for another will solve the problems with civility codes. Instead, to stay with the exposition of reference group theory, two effective responses would be to create a better communication structure between the drafters and the remainder of the bar and to involve a wide range of lawyers in drafting a civility code.¹⁷³

170. *See supra* text accompanying note 114.

171. *See supra* text accompanying note 163.

172. *See supra* text accompanying notes 111–14.

173. *See supra* text accompanying note 167.

This implies that the deference that lower-prestige lawyers give to higher-prestige lawyers must be replaced by a two-way working relationship. No longer should input about what it means to be a civil attorney come solely from above. This is ineffective communication. Mashburn is correct; each individual has the capacity to form moral and ethical judgments about the practice of law. The judgment of whether Rambo-style tactics are called for should not be reserved only for the elite. There may be times when hardball tactics are useful, and the discourse regarding when those times arise should not be one-sided. This will require both high- and low-prestige lawyers to recognize that deference is not necessarily due. These two groups will need to cooperate in order to create civility codes that truly represent the larger bar's beliefs about civility. The gain for civility proponents is that leadership will become more effective and the codes will, hopefully, take a less elitist tone. In order to tear down this deference, the bar should attempt to understand its demographics and beliefs about civility. This would provide both high- and low-prestige lawyers with a common ground for understanding the larger dynamic of civility within a local bar association.

A starting point for civility-code reform could be a sociological study of bar membership. This would essentially take the form of a well-constructed questionnaire administered to a representative—but random—sample of the bar. The study would gather information to help address the criticism of civility codes that those who draft codes are out of touch with the bar at large. A well-crafted sociological study of the bar would provide two key insights. First, it would be able to take a snapshot of a local bar's demographic composition. Beyond simple demographics such as age, race, gender, and religion, this information would inform bar leadership of the overall economic and practice structure of the bar. This is important because notions of elite and non-elite status are driven by an individual's practice area and social class.¹⁷⁴

With information regarding bar demographics at hand, bar leadership would be able to form a group of lawyers that represent the bar's demographics. It could offer membership in that group to a proportional number of solo practitioners, partners in large firms, transactional attorneys, and any other type of lawyer within the local bar membership. That group, made up of a proper proportion lawyers from each practice area, could then be charged with the task of creating a civility code. While this action alone would not address all problems, it would nullify Mashburn's critique that civility codes are drafted by elites who are out of touch with the remainder

174. See *supra* text accompanying notes 95–110.

of the bar. The committee charged with drafting the civility code would be representative of the bar, demographically speaking.

Next, the sociological study could provide an effective assessment of a bar's beliefs about civility. This can vary greatly. The Kentucky Bar Association's *Code of Professional Courtesy* differs greatly from the Massachusetts Bar Association's *Statement on Lawyer Professionalism*, but they both have the normative goal of influencing lawyer civility.¹⁷⁵ This is not to say that one state has a better or more useful statement on civility, only that the beliefs about what is civil or professional can differ between bar associations. A well-crafted sociological study could provide a bar association with a representative statement of the bar's beliefs about civility.

This study could be conducted by providing hypothetical examples of lawyer behavior and then asking the respondents to label the behavior as very uncivil, moderately uncivil, neutral, civil, or very civil in a questionnaire. Some hypothetical situations could mirror the extreme examples of lawyer incivility provided in Part I.A of this Note. Others could be more benign, ranging from making mildly taunting comments to opposing counsel, using delay tactics in discovery, threatening the use of Rule 11 sanctions, and not returning phone calls. Positive examples of civil behavior could also be evaluated by the respondents: polite and courteous interaction with a judge, honoring promises made to opposing counsel, and promoting the appearance of impartiality in a judicial proceeding.¹⁷⁶

The sociological study would provide detailed information about the degree of civility that lawyers of a local bar expect. In a sense, it would give potential civility code drafters a normative statement. The drafters could then consider the sociological data and the normative statement of civility that it describes and draft a civility code around that statement. If the local bar members express a strong preference towards civility in inter-lawyer communication, civility code drafters could respond by including provisions within their code that implore lawyers to avoid discourteous, contemptuous, and even hateful tones in their letters and phone calls. In areas where local lawyers show less sensitivity to civility issues, the drafters could write less restrictive code language or ignore the issue of civility in those areas all together.

175. Compare KENTUCKY CODE, *supra* note 77, with MASSACHUSETTS STATEMENT, *supra* note 77 (each stating that the goal of the document is to be an aspirational statement on lawyer professionalism but taking two very different approaches in terms of number of aspirational statements and detail provided).

176. See KENTUCKY CODE, *supra* note 77 (providing examples of civil lawyer behavior); MASSACHUSETTS STATEMENT, *supra* note 77 (same).

In addition to the sociological study, a bar association could also improve communication between the code drafters and the majority of the bar. As proponents of reference group theory point out, effective communication between members of a group, particularly its leadership, enhances the group's visibility.¹⁷⁷ Visibility, in turn, is one component of salience.¹⁷⁸ Salience is a key factor in getting an individual to make a particular group his or her reference group.¹⁷⁹

As Merton notes, in large groups effective communication structures need to be implemented; they do not occur naturally.¹⁸⁰ There are a number of ways that communication can be improved within a large group. One way that local bar leadership might communicate its civility ideals to the entire bar would be through a large and inclusive conference or symposium on the subject. A conference of this sort could have two positive effects. First, it would be a means for bar leadership and civility-code drafters to present their ideas to the rest of the bar. It would provide those not directly involved with code drafting an insight into the process used to derive the code and provide some meaningfulness to the code at the same time.¹⁸¹

Second, it would allow those not directly involved with code-drafting to provide their thoughts and critiques in a face-to-face, participatory forum. Enhanced communication would lead to greater interaction, and a forum such as this would allow lawyers to get together to address the issues that concern them regarding professionalism and civility. If done in a positive way, enhanced communication could have the added benefit of creating affective ties between lawyers, a component of reference group theory that Yu and Liska find crucial.¹⁸² In addition, getting a group of lawyers together to address a common problem could have the positive effect of fostering a sense of similarity, another crucial aspect of creating a reference group.¹⁸³

Mashburn's second criticism requires a more thorough application of reference group theory. Civility codes suffer from the perception that they are nothing more than an imposition of the values and mores of the elite on those with less prestige. This indicates a difference between the values held by the majority of the bar and the bar elites. The key issue here is perception. The problem becomes how the bar might construct a code in such a way that the values articulated by the elite and bar leadership might

177. See *supra* text accompanying notes 162–68.

178. Richer, *supra* note 155, at 66.

179. *Id.*

180. Merton, *supra* note 136, at 395–97.

181. See *supra* text accompanying note 157.

182. See *supra* text accompanying note 169.

183. *Id.*

be accepted by the bar as a whole.

The application of reference group theory would necessarily focus on encouraging the members of the bar to select civility codes as an expression of their own values. This means making the drafters of the code a reference group that is both normative and comparative. In that way, civility codes, as an expression of the reference group's ideals, would become an ethical measuring stick as well as a source of norms, mores, and values for attorneys.

To do this, the drafters would need to make their group meaningful and visible. In as much as visibility is concerned, attorneys must know something about the drafters and about the code. Without complete knowledge of how the group functions and what the norms are, no attorney can fully accept a civility code. As with the structure of the group, this is best served by an effective mode of communication between the drafters and those attorneys who are supposed to follow the code.

Perhaps more importantly, the codes need to be meaningful. They need to be a reflection of the status-conferring nature and prominence of the group. Lawyers are no different from any other people. They are self-interested and looking to get ahead in life. The key to acquiring compliance, and therefore establishing the bar as a reference group with the normative and comparative authority to effectively promulgate a civility code, is a carrot-and-stick approach. As one commentator noted, the current market for legal services handsomely rewards lawyers who engage in aggressive tactics.¹⁸⁴ Codes cannot offer monetary compensation, so they must offer moral and social compensation. The group must offer in return for compliance with its norms a measure of social status. Civility should be like currency. Lawyers who practice law in a civil manner should be considered exemplars of ethical behavior, regardless of their social position. If inherent value is placed on being a civil lawyer, people will change their behavior.

Proponents of civility codes need to create a system where civil behavior earns respect within the bar. This can be accomplished in two ways. A bar can promote and require civil behavior by punishing uncivil behavior and publicizing and rewarding civil behavior. If both systems are highly visible within and without the legal community, those punished or rewarded will be well-known, and the civil lawyer will earn respect that could translate into both esteem and economic reward.

A local bar association could take a punishment route to make civility

184. See Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 461-62 (2001) (describing a personal-injury lawyer who was notorious for foul language and sharp tactics and also had a net worth approaching \$1 billion).

codes more meaningful. Courts have the inherent power to control what takes place in the courtroom and punish bad behavior accordingly.¹⁸⁵ Local bar associations could take the initiative to collaborate with judges and court personnel to craft codes that address the problem of incivility and also fashion an appropriate judicial response. The codes, properly written, would guide judges who wish to rein in bad behavior in their courtroom. This is not to say that breaking a rule within a code would constitute a violation of the court's decorum per se, but the codes could aid judges by offering them a clearly defined set of civility guidelines that the bar deems acceptable. If a lawyer behaves in a way that clearly and consistently violates these rules, judges would have a code of conduct to refer to when they choose to assess penalties. The effect of such a system is to make civility codes a real factor in daily practice. Codes with no effect on a lawyer's life and practice are meaningless. Without meaningfulness, the codes are not salient; absent salience, it is unlikely that lawyers will accept the bar as a whole, and its expression of civility, as a reference group. By encouraging judges to give teeth to the codes, local bar associations can increase the likelihood that lawyers will accept the code as an expression of their own values.

Another way to increase the profile of civil lawyering is publicity. Publicity would create civility code visibility. If a local bar association were to compile a list of the lawyers in the local community who were exemplars of the spirit of a civility code, or gave an award to the most civil lawyers in the local community, the status of these lawyers would be elevated. The lawyers who win these awards should be promoted within and without the local bar as exemplars of civil behavior. This is not without practical consequences. Civility codes should, if they are properly created, be a statement of a local bar's beliefs about how a lawyer should conduct himself. Lawyers who not only conform to these beliefs but are models of civil behavior will earn the respect of their colleagues. Lawyers give referral business to the lawyers whom they respect.¹⁸⁶ When lawyers are rewarded for their civil behavior, they should gain respect in the legal community.¹⁸⁷ The civil lawyer is a person that the rest of the bar can trust to make litigation and negotiation a less-stressful and less-wasteful endeavor.¹⁸⁸ When presented with the choice of working with an uncivil lawyer or a model of civil behavior, it makes sense that people would choose to work with the latter. It is simply in a person's best interest to

185. *See supra* text accompanying notes 66–67.

186. *See supra* text accompanying note 44.

187. *See supra* Part I.B.1.

188. *See supra* Part I.B.

work with a lawyer who will not become abusive or unduly burdensome to the litigation process. As a result, civil lawyers should see more referral business simply because being a civil lawyer will act like social currency that one can exchange for more business. A civility award would provide winners with a credential that would help create a financial benefit.

In addition to intra-bar promotion of civil lawyers, the bar could also promote civil lawyers to the public as a whole. There is a declining respect for lawyers in general, and if a local bar promoted its exemplary members to the public, not only would those lawyers benefit from a good reputation, but other lawyers would note the beneficial effect of being a civil lawyer and conform their own behavior to a civility code out of self-interest. In short, civility, if properly promoted, could be a gateway to better business. Similarly, if a local bar association publicized the names of lawyers who acted in an uncivil manner, perhaps by creating a “wall of shame,” the visibility of the codes would also be increased. Lawyers who behaved badly would be known as lawyers in disrepute. Rather than run afoul of the codes and risk bad publicity, lawyers would choose to conform their behavior to the codes.

Incivility can decrease with the appropriate application of social-psychological principles. Civility codes can be made meaningful by creating mechanisms that can confer status, direct business, and assess penalties for the civil and uncivil lawyers, respectively. Civility codes can be made visible through promotion of civil lawyers and some public shaming of uncivil lawyers. When the codes are visible and meaningful, they can become expressions of a local bar’s civility beliefs. As expressions of civility beliefs, they negate the perception that the codes are merely attempts by the elite to make the rest of the bar follow the elite’s norms and values. Through the proper application of reference group theory, civility codes can overcome some of the more prevalent criticisms against them.

CONCLUSION

The American bar suffers today from a lack of lawyer civility. Rambo lawyers are vicious, spiteful, angry people whose harsh tactics can make the practice of law difficult for other lawyers. Case law and reports published by bar associations indicate a problem with civility that is plaguing the practice of law. Civility codes are one approach to solving lawyer incivility, but the current and historic structure of the bar make them prone to attacks regarding how representative they are of the bar in general and the motives behind promulgating them. An application of the social-

psychological concept of reference groups can help civility codes gain credence with bars that attempt to write them. The goal should be to make the codes visible and transparent with attendant benefits that accrue to those who practice law in a civil manner. Incivility is conquerable, as are the issues raised by critics. The drafters should act soon, before Rambo claims more victims in courtrooms throughout America.

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