

4-15-1990

Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics

Thomas M. Reavley

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



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

Recommended Citation

Thomas M. Reavley *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 Pepp. L. Rev. Iss. 3 (1990)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol17/iss3/3>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics

Thomas M. Reavley*

I. INTRODUCTION

A common topic today among lawyers, particularly trial lawyers, is the increased resort to unfair tactics and intimidation by some of their adversaries.¹ Regardless of the explanation for unprofessional conduct,² this widespread trend will further damage the bar unless it is curtailed.³ Most experienced practitioners agree that this "Rambo,"⁴ "take no prisoners" attitude is not a new problem, but one that must be discouraged.⁵ Solicitor General Kenneth W. Starr, III,

* Judge, United States Court of Appeals for the Fifth Circuit; B.A., University of Texas, 1942; J.D., Harvard University, 1948; L.L. M., University of Virginia, 1983; Lecturer, Baylor University Law School; Adjunct Professor, University of Texas Law School.

1. See, e.g., Arnett, *The Trial Lawyer and Lawyering: Personal Values and Perceptions*, 33 TRIAL LAW. GUIDE 121, 121-32 (1989); Broder, *When the Opponent Plays Hardball . . . The Practitioner Need Not Play Lowball*, TRIAL, Aug. 1989, at 62-67; Rymer, *High Road, Low Road: Legal Profession at the Crossroads*, TRIAL, Oct. 1989, at 79-83; Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79; Albright, *Waging Unconditional Warfare*, Tex. Law. Newspaper, Sept. 5, 1988 at 18, col. 1.

2. See *infra* notes 21-22 and accompanying text.

3. One court aptly noted:

Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill of our system of justice.

Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (footnote omitted).

4. Rambo is the last name of a fictional United States Green Beret veteran characterized in a novel by John Morrell and later portrayed by Sylvester Stallone in several recent films. See *First Blood* (Orion 1982); *Rambo: First Blood Part II* (Orion 1985); *Rambo III* (Tristar 1988). The character is the ultimate military warrior, always willing and able to fight to the death.

5. Arnett, *supra* note 1, at 123. Arnett specifically stated:

said to a meeting of The American Law Institute in May 1989:⁶

[T]he legal literature teems with concerns over the decline in civility in our own profession, with its ancient tradition of vigorous but nonetheless civil and responsible advocacy [T]he growing consensus is that misconduct is on the rise in our large and overcrowded courthouses. Thoughtful members of the bar and some members of the bench . . . are . . . quick to suggest that wrongdoing within the profession is increasing and is going unpunished, as overburdened courthouses become, like society itself, large and impersonal.⁷

Solicitor General Starr continued:

Especially in this transitional period of our social history, we in the legal profession must be particularly attentive to the permanent things that undergird our profession and ultimately our very way of life. We are called upon as a profession to remember that, at its greatest, the profession stands not for profits, it stands for the rule of law. It stands not for amassing billable hours, it stands for human dignity, for the recognition of the ultimate value of every man, woman, and child

Attention to the permanent things means attention to the community. It means fostering a sense of community, within the profession and beyond. It means integrity and candor in our professional labors. It means civility. It means scholarship. . . .⁸

This article will propose some suggestions on how the bar might discourage nasty tricks and belligerency and how to cope with this conduct when it is encountered. However, it should be recognized that this misconduct has been around a long time. For example, after fifty years as a trial lawyer, Clarence Darrow wrote in 1932 that trials were not being conducted in a dignified effort to find the truth

I deeply regret that there appears to be a significant erosion in the historic lawyer-client and lawyer-to-lawyer relationships of mutual respect and confidence with an accompanying decrease in public appreciation of the extremely important role that a trial lawyer can and should play in the lives and affairs of this great nation.

Id. at 125. Arnett further noted:

My reflections upon the state of the legal profession "then" and "now" reveal two trends which I find particularly troubling: The diminution of Honor and Integrity as non-negotiable values for the profession and the significant erosion of collegiality and congeniality and cordiality and comradery and civility (and yes, Friendship!) amongst the various elements of the practicing Bar, the federal and state Benches, the teaching Bar and that new full employment entity which we call house counsel or the corporate Bar.

The second trend to which I refer concerns the marked erosion in the civility and collegiality and courtesy which should characterize our dealings, one with the other.

Id. at 127. Arnett also observed:

Indeed, and as an illustrative example of professional and public concerns, recently the Dallas Bar Association has adopted "Guidelines of Professional Courtesy" and its "Lawyer's Creed" and the Cleveland Bar Association has published its "A Lawyer's Creed of Professionalism," which was in turn adopted by the TIPS Section of the ABA. And, as we know, many other Bars have been addressing these professional responsibility issues, i.e., the ABA Center for Professional Responsibility and, among others, the states of Rhode Island, Kentucky, Maryland, Virginia, Florida, Louisiana and Minnesota.

Id. at 122.

6. Luncheon address by Kenneth W. Starr, III, 66th Annual Meeting of The American Law Institute 23 (May 18, 1989) [hereinafter Starr].

7. *Id.* at 32.

8. *Id.* at 35.

but more like a prize-ring combat.⁹

II. IT WAS WORSE BACK THEN . . .

During my eighteen years as a practicing trial lawyer,¹⁰ before and in between my years on the bench,¹¹ there were always opposing lawyers who would not hesitate to employ foul means to serve their purposes. Deception and intimidation between lawyers is not a recent development¹² within the giant impersonal firms that fight for recognition and big money.¹³ Because giant multi-city firms are driven by high expenses, as well as heightened modern greed, they often focus upon money rather than upon other important goals or the consequences of their conduct.¹⁴

The predicament of young lawyers on the partnership track, driven to large billings, may partially explain current problems.¹⁵ If unable to curtail these practices in another manner, each firm should have

9. C. DARROW, *THE STORY OF MY LIFE* (1932), reprinted in C. DARROW, *THE STORY OF MY LIFE*, THE LEGAL CLASSICS LIBRARY 352 (1988).

10. I was engaged in private practice from 1948 through 1964, and from 1977 through 1979.

11. District Judge, 167th District, 1964-67; Justice, Supreme Court of Texas, 1968-77; Circuit Judge, Fifth Circuit, 1979-present.

12. In 1935, the Supreme Court commented on unfair trial tactics. The Court said that a prosecutor "may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935).

13. A survey by the *American Lawyer* indicated that in 1985 five law firms had gross revenues of over \$100 million, and that by 1987, this figure had increased to 20 law firms. Lacayo, *Tremors in the Realm of Giants*, *TIME*, Dec. 7, 1987, at 58.

The mega law firm has emerged as a new and important institution within our profession. But query: How can such a law firm—or any such financially driven organization—possibly afford to represent a continuum of little old ladies in tennis shoes in landlord-tenant controversies when the newest associate in that firm is earning \$65,000 or \$75,000 a year and is expected to generate a substantial *minimum* number of billable hours?

Arnett, *supra* note 1, at 126 (emphasis in original).

14. Recent years "have seen a boom in alleged ethical lapses at even the bluest of blue-chip firms." Lacayo, *supra* note 13, at 58. "Twenty years ago, lawyers said to clients, 'You can't do this.' . . . Now the old professional values have been eclipsed by the desire to 'make the deal.'" *Id.* (quoting Cardozo Law School Professor William Bratton). "Many lawyers say that law has always been a business . . . Now it's just acting like one." *Id.* (quoting Stanford University Law Professor Robert Gordon).

"[S]uccess is measured by high-style offices and high-stakes competition for clerks, associates, partners, and clients." Rymer, *supra* note 1, at 79.

15. An attorney may resort to sharp tactics to increase billable hours as the resulting delays and additional activity—repeated requests, motions, protracted depositions and trials—mean more hours of attorney time.

This practice "makes cases slower, more expensive and more unpleasant." Margolick, *The Law; at the Bar*, *N.Y. Times*, Aug. 5, 1988, § B, at 5, col. 1. "[F]or lav-

at least one partner who is available to ensure the young lawyer's professionalism and to discuss problems involving legal ethics and morals.¹⁶

During the 1930s, when I frequented the offices of local lawyers in the small towns of East Texas, looking for some justification to be near them and their work, with or without pay, some of these local lawyers boasted of the tricks played on their opposition. During my practice there in 1948, some of the trial lawyers regularly interfered with deposition testimony by coaching their own witnesses, usually off the record, and by employing tactics to upset adverse witnesses. Young opposing lawyers were verbally abused and even threatened with physical attack. Promises were made about disclosure, settings, settlements, and continuances, only to be violated. Sidebar remarks during trial were common. Elected state judges offered the victims no protection because their objectives were to avoid hassle and to be reelected without opposition.

Lawyer tactics frequently were worse than that. We encountered more professional and judicial misconduct in those days, misdeeds which would lead to disbarment today.¹⁷ For example, I recall a spe-

ishly paid young lawyers anxious to impress superiors, dragging things out means more hours to bill for." *Id.* For example, one commentator recently stated:

[T]he competition for top law students has driven starting pay to above \$70,000 a year in some places. But to earn their keep, new associates are expected to rack up at least 2,000 billable hours annually. That leaves little time for personal lives or for pro bono work, the free services provided to indigent clients or public-service groups.

Lacayo, *supra* note 13, at 58.

"Advancement is paced as much by billable hours as professional honor"

Rymer, *supra* note 1, at 79.

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1983). Rule 5.1 states:

Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.

"The calling that is our profession must be passed on. By precept, impact to your colleagues what it is to be a lawyer; inspire by example. Let it be known that nothing less will do than the highest standards of professional competence and conduct." Rymer, *supra* note 1, at 83.

17. "The old Historic 'Canons of Professional Ethics' were replaced by the 'Code of Professional Responsibility' and later replaced by the 'Model Rules of Professional Conduct.'" Arnett, *supra* note 1, at 122. "[T]he 1980 amendment to 28 USC § 1927 and

cific case of jury tampering. In the early 1960s, I tried a case which affected the ownership of millions of dollars in timber and land in the redwood forests of California and the piney woods of Texas. My client lost because of an adverse jury verdict. Years later, the court reporter told me that the judge had allowed the opposing local lawyer to name the jury commissioners who selected the panel from which the trial jurors were selected.

In another city, there was a lawyer who regularly conducted ex parte business with the judge about his cases.¹⁸ When he later came to the hearing or trial, he was quick to find some excuse to exercise his enormous capacity for righteous indignation *against me*.

In 1977, after fourteen years on the bench,¹⁹ I left to take a trial docket as a practitioner. After looking at the first file on my desk, I called the opposing lawyer and proposed that we each take depositions of the other's expert witnesses. The lawyer had been a long time friend of mine, and I expected a pleasant experience in working with him on the case. Although he knew the names of my two experts, I had no information concerning either his prospective witnesses or the engineers employed by his client who would be familiar with the circumstances leading to the litigation. He informed me that he would need additional time to get the names of his witnesses and experts, and that he would get back to me. The next day, however, I received notices for the depositions of my two expert witnesses on an inconvenient date. Despite my attempts to arrange a new date, he did not respond to my telephone calls, and the depositions of my experts proceeded. Several weeks later, the lawyer finally informed me that he had located the witnesses who could competently testify about the events at issue and that we could schedule a week in the upcoming month for a complete set of deposi-

the more recent amendments to Rule 11 of the Federal Rules of Civil Procedure were an attempted judicial response to abuses within the adversarial system." *Id.* at 128.

Formal rules of conduct have become a partial substitute for an eroding sense of personal responsibility and professional community. As Grant Gilmore [sic] once said: "The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."

Albright, *supra* note 1, at 19, col. 1 (quoting G. GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977)).

18. For the ethical rules regarding ex parte communications with the court, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(B) and EC 7-35 (1988).

19. District Judge, 167th District, 1964-67; Justice, Supreme Court of Texas, 1968-77.

tions. Nevertheless, when the scheduled date arrived, and after I had traveled 200 miles, the lawyer presented me with a bundle of pages listing thousands of his client's employees in the geographical area, any one of which I could select to be deposed. Despite these initial impediments, the jury awarded my client everything asked for in this case. Ironically, my old friend could have settled this case at a considerable saving to his client upon our initial contact.

No one expects to transform all lawsuits into friendly efforts resulting in mutual agreement. Although cooperation with opposing counsel is desirable, there inevitably will be cases on the docket in which witnesses and parties resist the disclosure of unfavorable evidence or their attorneys attempt to dominate the proceedings in and out of court. Circumstances and people also differ. However, at a minimum, the legal community is entitled to expect an opposing attorney to be honest, to fulfill promises, and to give reasonable accommodation on deadlines and settings.²⁰

III. REASONS FOR NASTINESS . . .

Three principal explanations exist for sharp and nasty practices by

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-38 (1981) states: "A Lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client." *Id.*

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1981) states:

A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Id.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981) states:

In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Id.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(5)-(6) (1981) states:

In appearing in his professional capacity before a tribunal, a lawyer shall not: . . . (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intention not to comply. (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

Id. Arnett also noted:

[T]here is no place whatever in our noble profession for rudeness, discourtesy, and "cheap shots." In my judgment, there is simply no place in the trial lawyer's lexicon for "sharking" and "take no prisoners" and "hard ball" . . . in the worst definitional sense of the *last* pejorative phrase. Those words and phrases involve demon devices and are inconsistent with how our system is intended to work and how our learned craft is intended to function.

Arnett, *supra* note 1, at 127 (emphasis in original).

"It is absolutely necessary and essential that a lawyer's representation or word be as 'good as gold.'" *Id.* at 128.

trial lawyers. First, many consider these practices a natural aspect of the adversarial system.²¹ Second, some lawyers believe these practices win lawsuits.²² Third, there are lawyers who believe these practices pay because their clients want them.

IV. ANSWERS . . .

Bar associations by resolutions,²³ leading lawyers by their speeches,²⁴ and professors in their classroom instruction²⁵ widely condemn abusive and unprofessional behavior. This condemnation is important. Lawyers, particularly young ones, should know that this behavior is improper²⁶ because they are officers of the courts,²⁷ serv-

21. Monroe H. Freedman, a professor of legal ethics at Hofstra University School of Law, hails "taking every advantage available within the bounds of the rules." Frey, *Nice Guys Don't Have to Finish Last*, Manhattan Law., Aug. 9, 1988, at 9. Professor Freedman remarks that "[t]he idea of some old-boy obligation to forgo tactics that are both legal and ethical and in the interests of the client is a highly offensive notion." *Id.* "Lindsey Miller-Lerman, head of the litigation department at Kutak, Rock and Campbell in Omaha, Neb., holds a similar view . . ." *Id.*

The erroneous notion that responsibility to clients supersedes all other professional responsibilities seems to be gaining popularity among members of the bar. This notion has led an increasing number of lawyers to ignore agreements they have made with opposing counsel in order to advance the perceived interests of their clients. It also has led to a general decline in fair dealing between counsel during the course of litigation as well as in the performance of the other duties lawyers owe to one another.

Miner, *Lawyers Owe One Another*, Nat'l L.J., Dec. 19, 1988, at 14, col. 1.

22. In many cases these tactics are used to run up the opponent's expense and force the client to settle or abandon the lawsuit if the costs are prohibitive. "Rambos win with a body count and a lawsuit becomes a war of attrition. The last client to finish the case is the one who wins." Taylor, *Texas Sets Its Sights on 'Rambo'; A Style of Litigation Draws Fire*, Nat'l L.J., July 31, 1989, at 24, col. 1 (quoting Justice Cook, Texas Supreme Court). While these tactics are of limited value in small cases, they are not effective in large cases where the stakes are high.

23. Some bar associations include: California, Georgia, Dallas, Association of the Bar of New York City, Cleveland, and Little Rock, Arkansas. Frey, *supra* note 21, at 9.

24. See Starr, *supra* note 6; Arnett, *supra* note 1.

25. See H. CALDWELL, G. NICHOLS & S. STEDING, CALIFORNIA TRIALBOOK (1990); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (1980).

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1981) states: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." *Id.*

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-36 (1981) states:

Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He

ing public justice²⁸ and the judicial system.²⁹ It is unacceptable for a lawyer to deceive and abuse another member of the legal profession.³⁰ Furthermore, it makes life and the practice of law unpleasant³¹ and unhealthy.³² The federal district judges of the Northern District of Texas, using guidelines and a creed promulgated by the Dallas Bar Association, sat en banc in two cases pending before that court to announce the standards of litigation conduct.³³ On November 7, 1987, the Supreme Court of Texas and the Court of Criminal Appeals of Texas promulgated and adopted "The Texas Lawyer's Creed—A Mandate for Professionalism" addressing the lawyers' professional relationship with clients, judges, other attorneys, and the legal system.³⁴ A copy of the creed is appended at the end of this article because it reflects the Texas courts' concern regarding abusive, unprofessional conduct, and the judges have set forth *in detail* the conduct they expect from lawyers.

I believe it is time for us to reexamine our concepts and the operation of the adversarial system. Recently, an appellant at the outset of the argument in his brief lamented: "The judicial system in our

should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

Id. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(2) (1981) states: "In appearing in his professional capacity before a tribunal, a lawyer shall not: . . . (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other party" *Id.*

For the text of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-38, see *supra* note 20. For the text of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), 7-102(A)(1), 7-106(C)(5)-(6), see *supra* note 21.

27. See *Mallard v. U.S. District Court for S. Dist. of Iowa*, 109 S. Ct. 1814, 1823 (1989) (Kennedy, J., concurring); *id.* at 1825 (Stevens, J., dissenting) (noting that "[a]ttorneys are officers of the court . . .") (quoting *Powell v. Alabama*, 287 U.S. 45 (1932)); *In re Snyder*, 472 U.S. 634, 643 (1985); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1867); Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown Off the Bar*, 35 S.C.L. REV. 541, 543-48 (1984).

28. Fisch, *Coercive Appointments of Counsel in Civil Cases in Forma Pauperis: An Easy Case Makes Hard Law*, 50 MO. L. REV. 527, 539 (1985).

29. *Theard v. United States*, 354 U.S. 278, 281 (1957).

30. For the lawyer's duty to cooperate with opposing counsel and the court, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-38, *supra* note 20. For the lawyer's duty to be courteous to opposing counsel and the court, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(5)-(6), *supra* note 20.

31. "[I]t makes cases slower, more expensive and more unpleasant." Margolick, *supra* note 15, at 5, col. 1.

32. "Rambos . . . may not live as long as their peers." *Id.* at 5, col. 1.

In the long run, hardball litigation is bad for the lawyer. A steady diet of hardball litigating can not be good for a lawyer's health and personal life. No one can prove this although I am aware of a statement by the head of a New York litigation department that no partner in the firm's long history had ever lived past age 66, and that a large number had died in their 40s and 50s. Suffice it to say that 12 hours of bile a day somehow will take its toll.

Saylor, *supra* note 1, at 80.

33. See *Dondi Properties Corp. v. Commerce Savings and Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988).

34. See Appendix for the text of the "Texas Lawyer's Creed."

country is based entirely upon the adversarial system. That is, it is generally a combat zone for attorneys where the judges act as moderators."³⁵ I believe that truth and justice, as well as economy, will suffer in such a system or at the hands of those who see things this way.

Henry Brougham told the House of Lords in 1820 that saving the client "at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."³⁶ If the preceding quote is indeed the attitude of counsel, one might not expect the advocate's conduct to be exemplary. Unfortunately, that concept of hardball litigation has a long and proud history.³⁷ Many lawyers are deeply dedicated to that erroneous view of trial conduct and their participating roles.³⁸ This

35. The specific brief is not cited here because it will not add anything to the argument; however, this proposition has been put forward by others in a slightly different form in the past. See generally Goldberg, *Playing Hardball*, A.B.A. J., July 1, 1987 at 48.

Rather than seeing themselves as professionals with the self-imposed duty of integrity, in whose hands the search for justice lies, too many lawyers today view themselves "solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice," the Northern District [of Texas] judges said in their order [in *Dondi Properties*].

Albright, *supra* note 1, at 19, col. 1.

36. 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1821), quoted in M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975); D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 189 (1973).

37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) states: "A Lawyer Should Represent a Client Zealously within the Bounds of the Law." *Id.* For the lawyer's duty to use lawful means to meet the client's objective, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), *supra* note 21. For the lawyer's duty to balance the client's interests with the obligation of being considerate to others, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10, *supra* note 26.

"In the Journal article, proponents of hardball claimed that it was not just permissible, but obligatory for fulfilling an advocate's duty to serve his clients." Saylor, *supra* note 1 at 79.

Every month, more judges are thundering at counsel perceived to be hardballers, as did Illinois Circuit Court Judge Richard Curry, who wrote in a recent decision: "Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. . . . Zealous advocacy is the modern-day plague which infects and weakens the truth finding process and which makes a mockery of the lawyers' claim to officer of the court status."

Id. at 81 (citing *Hanna v. American Nat'l Bank & Trust Co. of Chicago*, No. 87CH4561 (Cook County Cir. Ct., Ill. 1987)).

38. Goldberg, *supra* note 35, at 48. Barry Montgomery, Philip Corboy, Gerry Spence, Bill Colson, Monroe Freedman, Lindsey Miller-Lerman, and Don Reuben are hardball players. *Id.* Alan Dershowitz, Judah Best, Raoul Felder, Robert B. Fiske, and Gloria Allred also support hardball tactics. Goldberg & Hengstler, *Hardball Is . . .*, A.B.A. J., July 1, 1987, at 52.

attitude also permeates the general public and business community.³⁹ When lay people have to go to court, they usually want the toughest lawyers to represent them. The client often thinks that the best lawyers are the bulldogs who take every advantage and means to win.⁴⁰

V. DOES NOT PAY . . .

For these clients and lawyers, the combat mode of advocacy is far more expensive than effective.⁴¹ Offending lawyers speak of the duty of zealous representation of the client.⁴² Although earnest, forceful, and devoted representation is both zealous and proper, Rambo and kamikaze lawyers lead themselves⁴³ and their clients to zealous extinction.

Elaborate pretrial proceedings and protracted courtroom battles

39. "The failure of these lawyers to hold themselves to a higher ethical standard has created a distrust among lawyers and low esteem for the profession in the eyes of the public, to the detriment of our system of justice." Albright, *supra* note 1, at 19, col. 1. "Will Rogers put it thus: 'I don't think you can make a lawyer honest by an act of legislature. You've got to work on his conscience. And his lack of conscience is what makes him a lawyer.'" Rymer, *supra* note 1, at 81.

40. Albright specifically observed:

Lawyers who employ these abusive tactics successfully receive tremendous amounts of publicity in [the *Texas Lawyer Newspaper*] and others. They develop a reputation for being "tough," exactly what many clients engaged in bitter business disputes want. They make a great deal of money. In the competitive business climate that the law practice has become, more and more attorneys are tempted to use abusive tactics to attract clients and keep them happy.

Albright, *supra* note 1, at 18, col. 2. "No doubt a few clients feel more 'loved' if their lawyer is Attila the Hun—some lawyers have been retained for just this reason." Sayler, *supra* note 1, at 79. "While all lawyers play hardball at some time in their careers, some do so routinely, relishing their bulldog image and the adrenalin rush of battle." Goldberg & Hengstler, *supra* note 38, at 52.

41. Typically the discovery period will be prolonged and the costs will be substantially higher. Frey, *supra* note 21, at 9. The trial will be delayed and take longer. There is no empirical evidence to support the assertion that these tactics result in more favorable verdicts or awards for their proponents. In fact, most attorneys believe that when judges and juries recognize these unfair tactics, they find their proponents less credible and treat them accordingly.

"Robert Sayler, a division director of the American Bar Association's Section of Litigation and a partner at Covington & Burling in Washington D.C., said 'combativeness and mean-spiritedness' almost never win over the judge or jury." *Id.*

42. For the lawyer's duty to zealously represent his client, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, *supra* note 37. For the lawyer's duty to balance the client's interest with being considerate to other persons, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10, *supra* note 26. For the lawyer's duty to use lawful means to achieve the client's objectives, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), *supra* note 21.

43. "Rambos don't get referrals from other lawyers, are rarely picked to lead multiparty litigation teams, and may not live as long as their peers." Margolick, *supra* note 15, at 5, col. 1. "Hardball litigation tends to dry up those sources of business generated by word of mouth. Every time a trial lawyer handles a case, he is being judged by a multitude of colleagues. The impressions they form often bear decisively on future business prospects." Sayler, *supra* note 1, at 81.

often do not serve the client's best interest and seldom serve any other purpose, when the opponent is reasonably fair-minded, except to increase legal fees. Alternative dispute resolution is exposing the futility and waste of the combat mode of advocacy.⁴⁴ During one week in September 1989, the district courts of Travis County, Texas, inaugurated a settlement week employing mediation.⁴⁵ The mediators, assigned by the court, were practicing attorneys who had completed a mediation seminar course.⁴⁶ Any party in a pending case could place the case on the settlement docket.⁴⁷ All attorneys were required to have their clients present during the mediation session. Forty-four percent of the cases were settled that week, and the issues were narrowed in another thirty-three percent.⁴⁸ The highest incidence of settlement occurred in pre-discovery cases.⁴⁹ Products liability cases, involving multiple parties and amounts in controversy in excess of \$300,000, had a fifty-percent incidence of settlement.⁵⁰

This experience in using mediation is interesting because of its success for clients and the court docket. However, it also says something about the folly of combat adjudication. In the presence of a knowl-

44. Alternative dispute resolution "refers to non-litigation or non-judicial processes for resolving legal disputes." Lowry, *Alternative Dispute Resolution: How Will Lawyers Respond?*, 49 ORE. ST. BAR BULL. 1, 1 (May 1989). "The movement is widespread and pervasive." *Id.* It encompasses negotiation, mediation, arbitration, mini-trials, and multi-door courthouses. "The track record of non-litigation processes strongly confirms their value if wisely and appropriately used." *Id.* at 2.

The compelling need for quicker, less expensive, and more effective means for managing and resolving disputes has changed corporate expectations regarding legal services. Recent attention to the expansion of corporate legal departments, dramatic reforms in the billing practices of major law firms, and increased interest in preventive practices all confirm that high legal costs will no longer be tolerated.

Henry, *Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s*, 1 J. DISPUTE RESOLUTION 113, 113 (1985). The corporate mini-trial "is an effective mix of adversary, mediation, and negotiation techniques that has resolved many protracted corporate disputes in a matter of weeks." *Id.* at 114. "The costs of a mini-trial are estimated to be ten percent of ordinary litigation." *Id.* at 117. "The mini-trial can greatly reduce the time spent on a lawsuit." *Id.* "A further benefit of the mini-trial is the degree of confidentiality not found in formal litigation." *Id.* "Ultimately, the solutions constructed by business executives are often more pragmatic and supportive of business objectives than those reached in traditional settlements or issued by the courts." *Id.* "The dispute resolution movement is progressing at a swift rate, significantly changing the procedural processes of the American legal system." *Id.* at 120.

45. Galton, *Settlement Week Report*, 11 AUSTIN LAW. J. 1, 1 (Nov. 1989).

46. *Id.* at 2.

47. *Id.* at 3.

48. *Id.* at 1.

49. *Id.*

50. *Id.*

edgeable mediator and the client, posturing by the attorney was inappropriate and of no advantage. The mediators reported no abusive behavior.⁵¹ Absent abuse and pretense, the parties made progress toward an acceptable resolution.⁵²

Judges and lawyers should speak out more about the unsatisfactory results of unprofessional conduct,⁵³ and more thought should be given to methods which will ensure a proper penalty for misbehavior.⁵⁴ For those lawyers who are contemplating this unprofessional method of doing business, the undesirable consequences should be explained.⁵⁵ At the same time, for those who choose this manner of doing business, we should make it bad business.⁵⁶

VI. IT IS WRONG . . .

How to best obtain success and monetary reward is not the only issue attending our conduct in an adversary system. The lawyer has a moral obligation—to himself and his client, as well as to others.⁵⁷ In *Spaulding v. Zimmerman*,⁵⁸ a personal injury suit had been advanta-

51. *Id.* at 1-2.

52. *Id.* at 3.

53. The courts have long recognized that the judge has a responsibility for the orderly conduct of a trial. *See, e.g.,* *Viereck v. United States*, 318 U.S. 236, 248 (1943) (noting that "the trial judge should have stopped counsel's discourse without waiting for an objection"); *United States v. Turtenko*, 490 F.2d 678, 683 (7th Cir. 1973) (stressing the importance of decorum in the courtroom and stating that "[t]he judge is not a spectator at a gladiatorial contest"); *see also* *United States v. Cook*, 432 F.2d 1093, 1107 (7th Cir. 1970).

54. "[T]he 1980 amendment to 28 USC § 1927 and the more recent amendments to Rule 11 of the Federal Rules of Civil Procedure were an attempted judicial response to abuses within the adversarial system." Arnett, *supra* note 1 at 128.

Furthermore, "sanctions are available to the trial court that are more specifically directed at the attorney. The court may deliver a reprimand either immediately or after the jury has been excused from the courtroom. In the event of flagrant misconduct, the attorney may be held in contempt of court." Caldwell, *Name Calling at Trial: Placing Parameters on the Prosecutor*, 8 AM. J. TRIAL ADVOC. 385, 394 (1985).

"Many attorneys, like Corboy [a hardball player], believe that the increasing tendency of federal courts to impose sanctions for rule violations is proving an effective deterrent." Goldberg, *supra* note 35, at 49.

55. Arnett noted:

I have practiced before some very great jurists . . . Then, as now, those finer jurists—as paragons of integrity—would accept without qualification reputable counsels' representations of fact and law. This phenomenon is of inestimable value to clients but counsel should constantly be mindful of that fragile virtue: it takes years to earn a reputation for credibility with our practicing and juristic colleagues and that reputation can be destroyed in a moment.

Arnett, *supra* note 1, at 128.

"In court or out, integrity is the greatest influence on reputation, and the reputation that precedes and follows a lawyer is the single most valuable asset he or she can ever have." Rymer, *supra* note 1, at 81.

56. *See supra* note 43 and accompanying text.

57. *See* Reavley, *A Perspective on the Moral Responsibility of Lawyers*, 19 TEX. TECH L. REV. 1393 (1988).

58. 116 N.W.2d 704 (Minn. 1962).

geously settled by the defendant's insurer without the disclosure of the defendant's medical expert's finding of an aneurysm in the plaintiff's aorta.⁵⁹ Although defense counsel knew of the aortic aneurysm, that it was life threatening,⁶⁰ and that the plaintiff was unaware of this condition,⁶¹ counsel proceeded to settle and close the case without disclosing the plaintiff's condition.⁶² The Minnesota Supreme Court upheld the vacation of the settlement because the plaintiff had been a minor during the settlement and the trial court had not considered all of his injuries in approving the minor's settlement.⁶³ Neither court questioned the ethics or good faith of the defense counsel's settling without disclosing the presence of a condition which endangered the plaintiff's life without prompt surgery.⁶⁴ Presumably, if the plaintiff had been twenty-one years of age at the time of settlement, instead of twenty, that would have been the end of the matter. Whatever the legal consequences between the plaintiff and the defendant, how can the defendant's counsel justify this conduct? At the very least, the lawyer should have called his client for permission to disclose the medical report to the plaintiff. The consequences here were so serious that the lawyer should not be permitted to participate in adversary representation because he not only cheated the plaintiff, but he endangered the plaintiff's life.

I reiterate that insidious conduct does not obtain its desired results.⁶⁵ My observations over the past forty years have been that nasty and devious lawyers seldom enjoy either good standing or prosperity.⁶⁶ Their attitude shows—on their faces and in their voices. Jurors and judges dislike what they see.⁶⁷ Unfair advocates are distrusted.⁶⁸ Jurors customarily first decide the credibility of the

59. *Id.* at 708.

60. *Id.* at 707.

61. *Id.* at 708.

62. *Id.*

63. *Id.* at 709.

64. *Id.*

65. "Avoid cheap remarks. Doing so will maintain your credibility as an advocate throughout the trial. The lawyer that wins the race for credibility is the one who is a strenuous advocate, fights for his client, yet operates within the bounds of fundamental fairness." T. MAUET, *supra* note 25, at 21.

66. The "Goliaths of the Bar were without exception honorable people." Arnett, *supra* note 1, at 128.

67. "[T]he lawyers, as well as the parties, are on trial. That trial begins when you first enter the courtroom and lasts until the court rules on the last post-trial motion. Remember that your conduct as counsel is constantly being evaluated and compared by everyone in the courtroom." T. MAUET, *supra* note 25, at 21.

68. Mauet noted that:

lawyers and then weigh the evidence accordingly.⁶⁹ Furthermore, the role of the lawyer in the judge's decision-making depends upon the lawyer's credibility with the judge.⁷⁰ Careful and accurate treatment of the record and legal precedent is mandatory.⁷¹ Misstatements and overzealous arguments are costly to the advocate because the judge likely will discount the lawyer's role in the court's decisional process. The mission of advocacy is forfeited when credibility is lost.

VII. WHEN CLIENTS WANT IT . . .

The need for credibility and fairness is a message that must be demonstrated to business clients. Too many people in business believe that influence with the judge and obstreperous bulldog advocacy win lawsuits.⁷² They need enlightenment.⁷³ They are the ones who must pay the extra costs of protracted motion and discovery warfare, and they must suffer the defeat when unfairness boomerangs against them.⁷⁴ However, there are clients and lawyers whose objective is not a fair trial, or any trial, but surrender and vengeance.⁷⁵ They harass other litigants with motions and discovery un-

Surveys of jurors have shown that the most favorable impressions are created by lawyers who act and look well prepared and knowledgeable, have effective verbal abilities and demonstrate dedication to their client within the bounds of fairness. The least liked qualities are unnecessary theatrics and lack of preparation, particularly when it wastes time.

Id. at 21.

69. For suggestions concerning maintaining credibility, see *supra* notes 65, 67, 68.

70. For a lawyer's ability to slowly build, and quickly lose, his or her reputation, see Arnett, *supra* note 1, at 128; see also *supra* note 55.

71. "Courts are overpapered with backbiting and underpapered with citation to relevant authority." Rymner, *supra* note 1, at 79.

72. Saylor, *supra* note 1, at 79.

73. "[H]e wins because he's ornery. But judges regularly contend that the reverse is true. It defies all common experience to believe that meanspiritedness is persuasive." *Id.*; see also McKeon, *The Effect of ADR on the Corporate Bottom Line*, in COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, TORT AND INSURANCE PRACTICE SECTION, AMERICAN BAR ASSOCIATION ANNUAL MEETING (Aug. 10, 1988). In the Connecticut ADR Project, 80% of the over 1000 cases agreed to participate and "[o]ver 90% of cases heard in some type of forum were settled." *Id.* at 3. Travelers Insurance Company reported that the use of ADR has reduced the life of claims files by approximately seven months and produced a legal expense saving of \$1,000 per case. *Id.* at 13. Since Travelers uses staff counsel, "its reasonable to assume that companies that use outside counsel would experience significantly greater savings." *Id.*

"[W]ith increased emphasis on streamlined business operations, cost effective management, and a desire of all corporate entities to reduce their dispute-related transaction costs, ADR has taken a foothold that will not be relinquished." *Id.* at 5.

74. For the advantage of using alternative dispute resolution in business disputes, see Henry, *supra* note 44, at 113.

75. "The basic theme is to make life miserable for an opponent and win the lawsuit." Broder, *supra* note 1, at 62.

Meanwhile, the parties are so uncooperative that discovery and resolution of the underlying dispute are stalled. The abusive lawyer's client, however, is well-prepared for the cost and delay, because it may well have been part of

til frustration or exhaustion causes their victims to capitulate.⁷⁶ Furthermore, some clients care more about embarrassing and burdening the enemy through abuse perpetrated by their hired bulldogs than actually resolving the case. This is where judges must take a firm stand.⁷⁷ Although judges typically are reluctant to intervene in discovery disputes or to sanction lawyers,⁷⁸ they must recognize that exceptions should be made when abuses of the profession and legal process can be prevented or remedied only by the judge. Judges should be more alert to the problem and be willing to act.

VIII. WHEN YOU ENCOUNTER IT. . .

How should one cope with unfair tactics by an adversary? Leave nothing to the unwritten word and bring deceit and unfair tactics to the attention of the judge and jury whenever possible. Confirm all

the overall war plan. The opposition unfortunately is forced to spend a like amount of attorneys' fees or fold up his tent and go home, either by settling or filing for bankruptcy protection. Abusive tactics thus are rewarded and justice often is denied.

Albright, *supra* note 1, at 18, col. 2.

76. See Taylor, *supra* note 22, at 24, col. 1.

77. One commentator observed:

Judges are speaking out in opinions, in legal education programs and in stern lectures from the bench. A judge can control counsel behavior—including behavior outside his presence—by making it clear that obnoxious conduct will not succeed in court, by inviting motions on lawyer misconduct, by imposing sanctions and the like.

Saylor, *supra* note 1, at 81. The court in *Dondi Properties* specifically stated:

Those litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them. Malfeasant counsel can expect instead that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."

Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (citation and footnote omitted). The court further noted: "We do intend, however, to take the steps necessary to ensure that justice is not removed from the reach of litigants either because improper litigation tactics interpose unnecessary delay or because such actions increase the cost of litigation beyond the litigant's financial grasp." *Id.*

78. The reason for this reluctance stems from a variety of reasons. Chiefly, it rarely is clear to a judge exactly who is the proper person to sanction. During the discovery phase of litigation, a judge's familiarity with each party's behavior incident to the lawsuit is minimal. For this reason, the judiciary has a difficult time policing all the disputes which arise during the early stages of litigation. Additionally, to appropriately decide a motion requesting sanctions requires a tremendous time expenditure which the courts simply cannot afford.

verbal agreements by letter. At depositions, make sure that the court reporter records everything that is said and nothing is treated as "off the record" without the agreement of all attorneys present. Never fight fire with fire by returning abuse for abuse.⁷⁹ An attorney can be firm and deny all concessions to abusiveness without initiating it. Only by conducting himself in a professional manner, precisely correct, can an attorney establish the opponent's unfair tactics. If the opponent cuts off his expert witness after a partial answer during a deposition, the other attorney should ask the witness to complete the answer. If the opponent tells the witness not to answer, the attorney should tell the witness that he may answer.

The attorney's goal should be to record the full picture and responsibility for the refusal to respond. If an attorney continues to block the answer and the witness complies by not answering at the attorney's initiative, then the record is complete. However, a mere objection by an opponent to a deponent's testimony does not mean that the answer may not be given.⁸⁰ Objections are subsequently ruled on if the deposition is offered in court.⁸¹

If the attorney expects that the opponent will attempt to exhaust or anger a witness by personal accusation or by arguing over the meaning of simple words, the witness should be prepared in advance to stay calm and to answer with information and not argument.⁸² The witness simply may explain that the testimony is exactly as stated and that the lawyers are responsible for arguing the fine points of law and definition. If the opponent is objecting because some simple word is too vague, the attorney should attempt to see whether or not the witness himself has any difficulty with the vagueness of the word. If the witness joins in this attempt to obfuscate or conceal, his absurd answers to some of these deposition questions

79. "The short answer is that when Raging Bull is at the other counsel table, the practitioner must assume the role of matador and move around the ring, constantly directing the jury's attention to substantive issues until summation, here he will have the opportunity to gore the bull." Broder, *supra* note 1, at 67. "By responsible litigation, the bar can do much to discourage lowball tactics and to demonstrate that the practitioner does not need lowball to hit an opponent's curve ball out of the park." *Id.*

80. See FED. R. CIV. P. 30(c) (stating that "[e]vidence objected to shall be taken subject to the objections . . .").

81. See *id.* 32(b) ("[O]bjection[s] may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.").

82. "Practitioners must respond to hardball during all phases of trial, but always in a cool and lawyerlike fashion." Broder, *supra* note 77, at 64.

The most effective way of coping with a rampaging opponent is to invoke the assistance of the court. Where the opponent's conduct has been particularly egregious, the court may allow the practitioner to make that record in front of the jury, at which time the practitioner should ask the court to give emphatic and immediate curative instructions.

Id. at 66.

may be admissible on cross-examination in court.⁸³ A clear attempt to avoid disclosure also may be admissible on the ground that it tends to prove the witness regarded disclosure as being adverse. Thus, it could be construed as an admission by a party or a prior inconsistent statement by a witness.⁸⁴

If the opposing attorney's abuse actually prevents the witness from answering deposition questions, the injured attorney may go to the judge or magistrate to obtain relief.⁸⁵ It is very important to take this step, and to perhaps even seek sanctions, when the misconduct of the opposing lawyer is sufficiently egregious.⁸⁶ Because the magistrate or judge does not relish this sort of dispute, he or she can readily disregard the dispute if the misconduct appears mutual. Thus, if the complaining attorney has done anything to contribute to the difficulty, the judge is not likely to be receptive to that attorney's pleas. However, if the attorney has acted properly, and the other lawyer's conduct is clearly unacceptable, the attorney has a much better chance of obtaining relief, and he also will have established the objectionable nature of the adversary in the mind of the judge.⁸⁷

When the trial date arrives, if the attorney can convince the jury of the adversary's unfairness, he will seize the advantage. If clearly justified, an attorney should look for an acceptable ground to admit epi-

83. See FED. R. CIV. P. Rule 32(a)(1). This rule states, in part:

At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions: (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

Id.

84. See *supra* note 83.

85. See FED. R. CIV. P. Rule 37(a)(2)-(3). This rule states: "If a deponent fails to answer a question propounded or submitted under Rules 30 or 31 . . . the discovering party may move for an order compelling an answer . . . (3) For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer." *Id.*

86. Rule 37(b)(1)-(2) provides:

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. (2) If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just . . .

FED. R. CIV. P. 37(b)(1)-(2).

87. This can be a substantial benefit because an attorney who is not credible with the judge must prove everything and nothing he says or does is accepted without question. See Arnett, *supra* note 1, at 128; Rymer, *supra* note 1, at 81.

sodes of unfairness into evidence.⁸⁸ These episodes may come during the trial itself. If the opponent makes a sidebar remark, the other attorney should ask the court to instruct the jury to disregard the remark—if the judge does not do so without request. If the judge does not admonish the offending lawyer for this conduct, and the other attorney has to represent his client without the protection of the judge, that attorney should list every statement made by the opposing counsel which has been unsupported by proof. Then, in the course of final summation, the attorney should mention all of those statements, explaining that the opponent must have made them with the intent to deceive the jurors. This tactic also works when the opponent makes a statement during voir dire of the jury panel or during an opening statement, but then fails to support that statement with evidence.

IX. CONCLUSION

I began this article by telling about the lawyer misconduct I encountered during my early years as a practitioner. There is a big difference between the prospects for successful misconduct in those days and the prospects for similar behavior today. In days gone by, jurors not only tolerated but expected melodrama and “great performances” by lawyers on behalf of clients. Judges also went along with this gamesmanship as central to the skills of practice. Nevertheless, jurors and judges today want to get down to business and decide their cases correctly;⁸⁹ they do not want performances and game-playing.⁹⁰ Instead, they will give their attention to the lawyer who

88. For example, an attorney may wish to expose the opposition's attempts to coach witnesses by comparing live testimony with differing deposition responses. Moreover, an attorney guilty of over-reaching, casting aspersions, and launching personal attacks and insinuations is easily thwarted in closing argument before the jury. Counsel may employ an effective two-step process. First, calmly remind the jury that the scathing remarks advanced by the opposition were not proven by the evidence. Second, ask the jury what that says about the character of opposing counsel and his or her respect for the intelligence of the jury.

89. “Perhaps the most troubling symptom of all is a win-at-any-cost—indeed, a very high cost—mentality.” Rymer, *supra* note 1 at 80. Judge Rymer also stated:

Integrity means honor and civility as well: never to cut a corner or miscite a case, fudge a material fact, go back on your word, or take a position because you can get away with it instead of because it is the right thing to do; to always be helpful, courteous, polite, and professional to the judge and jury, and be considerate of opposing counsel and the other side.

Id. at 81.

90. See Broder, *supra* note 1, at 64.

[T]he legitimate hardball player may make a lot of niggling but technically legitimate objections to torture an opponent and convince the jury of his correctness and his adversary's errors. As with any technique that does not concentrate on the merits of the case, this tactic will easily backfire since juries have small patience with technicalities, whether legitimate or not.

Id.

knows the case and presents it honestly and fairly. Competence and trustworthiness win sympathetic attention.⁹¹ Tricks, pretense, and the slightest sign of unfairness invite rejection.⁹² Credibility is the objective for the litigator today.⁹³ Rambo may succeed in the theater, but he self-destructs in the courtroom.

91. "[T]he Appellate Division nevertheless granted relief on account of defense counsel's *obnoxious* behavior." *Id.* (emphasis added).

92. "Lack of civility does not win cases; it often loses them. Civility in fact brings advocacy to the fore and focuses the case where the focus ought to be. It is part of the creed not to lose objectivity or let personalities interfere with judgement." Rymer, *supra* note 1, at 81.

93. See *Dondi Properties Corp. v. Commerce Savings and Loan Ass'n*, 121 F.R.D. 284, 289 (N.D. Tex. 1988). The court explained:

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

Id.

Appendix



**THE TEXAS LAWYER'S CREED --
A MANDATE FOR PROFESSIONALISM**



PROMULGATED BY
**THE SUPREME COURT OF TEXAS
THE COURT OF CRIMINAL APPEALS**

NOVEMBER 7, 1989

**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 re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

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" as attached hereto and made a part hereof.

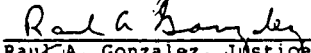
In Chambers, this 7th day of November, 1989.

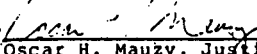
The Supreme Court of Texas

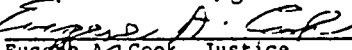

Thomas R. Phillips, Chief Justice

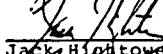

Franklin S. Spears, Justice



C. L. Ray, Justice


Raul A. Gonzalez, Justice


Oscar H. Mauzy, Justice


Eugene A. Cook, Justice


Jack Hightower, Justice


Nathan L. Hecht, Justice

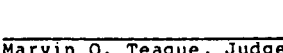

Lloyd A. Doggett, Justice

The Court of Criminal Appeals

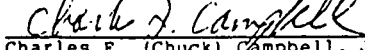

Michael J. McCormick, Presiding Ju.

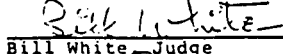

W. C. Davis, Judge


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. Berchelmann, Jr., Judge

THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS

THE TEXAS LAWYER'S CREED -- A MANDATE FOR PROFESSIONALISM

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 permit 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, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

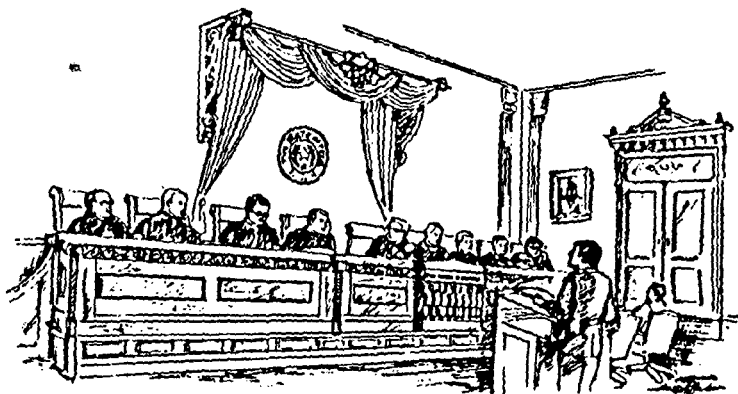
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

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.





THE TEXAS LAWYER'S CREED --
A MANDATE FOR PROFESSIONALISM

