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One Year After *Dondi*: Time to Get Back to Litigating?

William A. Brewer III and Francis B. Majorie*

In the immediately preceding issue, the Pepperdine Law Review proudly published an article by The Honorable Thomas M. Reavley, Judge, United States Court of Appeals for the Fifth Circuit, entitled Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics. See 17 PEPPERDINE L. REV. 637 (1990). The Review is now honored to offer a view of the propriety of aggressive litigation tactics by presenting the following article, which is offered in response to Judge Reavley's. With the publication of these two articles, as well as Judge Reavley's brief response which follows, the Pepperdine Law Review hopes to contribute to the ongoing process of discovering the dimensions of effective advocacy and representation within ethical limitations. The Review expresses its appreciation to William Brewer III and Francis Majorie, as well as to Judge Reavley, for their contributions to this effort.

—Eds.

I. INTRODUCTION

In recent years, bar associations between California and New York, as well as those from Oregon to Texas, have either adopted or proposed codes of "courtesy" and "civility" which tell litigators how they should behave in their offices, their conference rooms, and the courtroom.1 Galvanized by the plethora of articles decrying "hardball" litigation tactics and the "Rambo" litigators who employ them,2 the

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1. See, e.g., Baird, Bedside Manners and Desktop Distractions, 13 Litigation 33

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"courtesy codes" emanate from a perception that the bar has become less personalized and more hostile, that the courts have become overburdened by a flood of litigation, and that the cost of resolving disputes is beyond the reach of many members of our society.3 We are told that the cause of these "ills" is the zealous advocate who forgets that the duty owed to a client is somehow circumscribed by a "broader" duty to society as a whole.4

To many, the significance of the courtesy codes was heightened on July 14, 1988, when an en banc panel of the United States District Court for the Northern District of Texas jointly decided Dondi Properties Corporation v. Commerce Savings & Loan Association5 and an otherwise unrelated case, Knight v. Protective Life Insurance Company.6 The Dondi Properties case arose out of a plaintiff's alleged failure to answer interrogatories, failure to comply with court orders concerning discovery, misrepresentation of facts to the court, and withholding of documents.7 Similarly, the Knight case involved a plaintiff's refusal to consent to the filing of a reply brief after it had been filed in violation of local rules.8

Both cases, now known collectively as the Dondi opinion, stand for much more than their procedural histories imply. Each was used by the Northern District to establish sua sponte "standards of litigation conduct to be observed in civil actions litigated in the Northern District of Texas."9 Because each can be found in the Federal Rules Decisions, Dondi has thrust the power of the United States into a debate which has important connotations for the continued strength of our system of law.10

This article examines the assumptions and conclusions of Dondi

3. See infra notes 51-84 and accompanying text.
4. Id.
5. 121 F.R.D. 284 (N.D. Tex. 1988) (en banc).
6. Id.
7. See infra notes 27-40 and accompanying text.
8. See infra notes 41-50 and accompanying text.
10. See infra notes 51-84 and accompanying text.
and related commentaries. Section II describes the cases giving rise to the opinion in Dondi and suggests that Dondi's adoption of a courtesy code was premised upon four unsubstantiated assumptions: the bar has become less civil and professional in the recent past; litigators' decreased civility and increased commercialism cause needless delays in the litigation of cases; lawyers' assumed lack of courtesy and growing "law as a business" perspective have unduly increased the costs of resolving disputes; and lawyers' hardball tactics are responsible for the profession's low esteem in society. Section III then examines each of these assumptions and concludes that they are without empirical verification and, in all likelihood, false.

Section IV of the article assumes, arguendo, that hardball tactics are responsible for the ills identified in Dondi, and examines whether those abuses will be eradicated by Dondi-like decisions or codes of conduct. Section V in turn discusses the harms that might be caused by the adoption of courtesy codes as authoritative rules of professional behavior. The article concludes that the codes divert attention from the real causes of delayed dockets, costly litigation, and negative public perspectives about our profession. The article also concludes that the codes may exacerbate the ills which they intend to allay by confusing the role of the advocate with opposing counsel, the judge, and the jury. In the end, the effects of Dondi and codes of courtesy may sacrifice clients' rights, chill social and legal change, and irreparably undermine our system of laws.

II. THE DONDI OPINION: AN EXERCISE IN JUDICIAL LEGISLATION?

The Dondi opinion was rendered on July 14, 1988, by an en banc panel of the eleven judges sitting in the United States District Court for the Northern District of Texas. The panel was convened at the request of a single, unidentified judge in what the court itself conceded was an "unusual" procedure. The two motions at issue in Dondi arose out of serious allegations of wrongdoing in discovery

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11. See infra notes 17-64 and accompanying text.
12. See infra notes 65-84 and accompanying text.
13. See infra notes 85-98 and accompanying text.
14. See infra notes 99-107 and accompanying text.
15. See id.
16. See id.
18. Id. at 286.
19. Id. at 286 n.3.
(the *Dondi Properties* case)\textsuperscript{20} and the allegation that a plaintiff improperly refused to consent to the filing of a reply brief (the *Knight* case).\textsuperscript{21} Curiously, those motions were *not* resolved by the panel, but were left instead to the individual judge and magistrate before whom they originally were pending.\textsuperscript{22} Both cases, however, were utilized by the panel as vehicles to promulgate a code of conduct designed to "end" what the court called "patterns of behavior that forebode ill for our system of justice."\textsuperscript{23}

\section{What Dondi Meant to the Litigants}

*Dondi Properties* arose out of the multi-million dollar failure of Vernon Savings and Loan Association and contained claims under RICO, the Texas Fraudulent Transfer Act, federal regulations prohibiting affiliate transactions, and common-law claims for fraud, negligent misrepresentation, usury, and civil conspiracy.\textsuperscript{24} *Knight* arose out of an alleged refusal to pay the plaintiff the proceeds of a life insurance policy and violations of the Texas Insurance Code, the Texas Deceptive Trade Practices Act, and the common law.\textsuperscript{25} The parties in both cases were represented by counsel from some of the largest and best-known law firms in Dallas.\textsuperscript{26}

\subsection{The Holdings in *Dondi Properties*}

*Dondi Properties* involved several motions for sanctions seeking dismissal of the plaintiffs' case. The motions were based upon two arguments: the plaintiffs had not complied with the court's orders regarding discovery; and the plaintiffs' counsel had improperly contacted the representative of an opposing party without first identifying himself as the plaintiffs' lawyer.\textsuperscript{27} The motions were resolved by Magistrate Sanderson, to whom they originally had been

\textsuperscript{20} See id. at 289-91; infra notes 27-40 and accompanying text.

\textsuperscript{21} See *Dondi*, 121 F.R.D. at 291-92; infra notes 41-50 and accompanying text.

\textsuperscript{22} *Dondi*, 121 F.R.D. at 286 n.4.

\textsuperscript{23} Id. at 286.

\textsuperscript{24} Id. at 285.

\textsuperscript{25} Id.

\textsuperscript{26} The plaintiff in *Dondi Properties*, for example, was represented by Dallas and Washington, D.C. lawyers from Arter, Hadden & Witts, a law firm which listed 26 Dallas lawyers in the 1988 edition of Martindale-Hubbell. *Id.* at 284-85; VI *MARTINDALE-HUBBELL LAW DIRECTORY* 2236B (1988) [hereinafter *MARTINDALE-HUBBELL*]. The defendants in *Dondi Properties* were in turn represented by Figari & Davenport; Jackson, Walker, Winstead, Cantwell & Miller; Davis, Meadows, Owens, Collier & Zachry; Well & Renneker P.C.; and Randall L. Freedman. Each of these firms respectively listed 12, 107, 19, and 3 attorneys in 1988. *Dondi*, 121 F.R.D. at 284-85; *MARTINDALE-HUBBELL*, supra, at 2306B, 2359B, 2293B, 2513B. Similarly, the plaintiff in *Knight* was represented by Figari & Davenport, and the defendants were represented by Thompson & Knight, a firm which then had 179 lawyers. *Dondi*, 121 F.R.D. at 284-85; *MARTINDALE-HUBBELL*, supra, at 2489B.

\textsuperscript{27} *Dondi*, 121 F.R.D. at 290.
Magistrate Sanderson denied the motions in all respects.

a. The Alleged Violations of the Court's Discovery Orders

First, Magistrate Sanderson found that there was "no showing of intentional or willful conduct on the part of plaintiffs or their counsel" with respect to the alleged violations of the court's discovery orders. The Magistrate also chastised the defendants for characterizing the plaintiffs' conduct as being in bad faith and in defiance of the court's prior orders. Specifically, Magistrate Sanderson stated that the defendants' accusations added "much heat but little light to the court's task of deciding discovery disputes."

Magistrate Sanderson also noted that the parties' disputes revealed "an inadequate utilization" of the pre-motion conference requirement imposed by the court's local rules. In the Magistrate's view, pre-motion conferences serve the useful purpose of resolving disputes without court intervention or at least of ensuring that disputes will be narrowed and focused before resolution by motion. In denying the motions, Magistrate Sanderson noted that discovery controversies "may well be resolved, or appreciably narrowed, following further communications among counsel."

b. The Alleged Improper Contact With a Party Witness

Magistrate Sanderson also denied the defendants' motion for sanctions against plaintiffs' counsel. He noted that the defendants did not seek to disqualify plaintiffs' counsel and did not show that they had been prejudiced by the lawyers' communication with the witness. Magistrate Sanderson also noted that, while the client bears the cost of a motion for sanctions in the litigation, the attorney him-

28. Id. at 289-91.
29. See infra notes 30-40 and accompanying text.
31. Id.
32. Id.
33. Id. The Local Rules provide, in pertinent part: "Before filing a motion, counsel for a moving party shall confer with the counsel of all parties affected by the requested relief to determine whether or not the contemplated motion will be opposed." N.D. TEX. R. 5.1.
34. Dondi, 121 F.R.D. at 289.
35. Id. at 290.
36. Id. at 290-91.
37. Id. at 290.
self bears the cost of defending a grievance procedure. Thus, the motion for sanctions was denied without prejudice to its renewal before a grievance committee. He also ordered that neither defendants’ nor plaintiffs’ counsel could “charge their clients for any time or expenses incurred” relating to the motion for sanctions.

2. The Holding in Knight

Knight involved a motion to strike a reply brief which the defendant filed without leave of court in violation of the court’s local rules. The motion was ruled upon by Judge Fitzwater of the District Court. The Judge began his analysis by noting that the “standards adopted by the court attempt to satisfy the goals of reducing litigation costs and expediting the resolution of civil actions.” Judge Fitzwater also specifically noted that the defendant “clearly violated a Local Rule” by filing the reply without permission and that “the determination of whether to permit a reply is discretionary with each judge.” Nonetheless, Judge Fitzwater denied the plaintiffs’ motion to strike.

Like the holding in Dondi Properties, the holding in Knight cannot be explained by a principled discussion of the conduct of counsel. According to Judge Fitzwater, counsel for both parties had acted unreasonably: defendants’ counsel “failed to cooperate because he did not ask him to agree to the filing of a reply”; and plaintiffs’ counsel “did not cooperate in connection with the filing of the reply brief,” thereby causing increased legal fees and an unnecessary expenditure of judicial time. Curiously, Judge Fitzwater did not enforce the conference requirement heralded in Magistrate Sanderson’s earlier decision in Dondi Properties by striking the improper, unconferenced reply. Rather, he concluded that it is a “well-established principle” that the “party with the burden on a particular matter will normally be permitted to open and close the briefing.” Thus, despite the clear-cut requirements of the local rule requiring court approval for the filing of a reply, and the defendant’s failure to confer, Judge Fitzwater permitted the reply to be filed and concluded that it “should

38. Id.
39. Id. at 291.
40. Id.
41. Id.
42. Id. at 286 n.4.
43. Id. at 291.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
... be rare that a party who opposes a motion will object to the mo-
vant’s filing a reply.\(^5\)

B. What Dondi Means to the Bar

1. The Court Posits the “Problem”

The holdings in Dondi Properties and Knight were said by the en
 banc panel of the court to be made in accordance with certain stan-
dards of conduct the court adopted in a pseudo-legislative move in
the beginning of its opinion.\(^5\) Despite the fact that the judicial
branch is “charged with the responsibility for deciding cases and con-
troversies and for administering justice,”\(^5\) the panel was determined
to deal with “a problem that, though of relatively recent origin, is so
pernicious that it threatens to delay the administration of justice and
to place litigation beyond the financial reach of litigants.”\(^5\)

The problem identified by the court is the “unnecessary contention
and sharp practices between lawyers.”\(^5\) According to the court,
judges and magistrates are asked “with alarming frequency” to
“devote substantial attention to refereeing abusive litigation tactics
that range from benign incivility to outright obstruction.”\(^5\) The
court also noted that those matters “do not advance the resolution of
the merits of the case” and do not promote justice because “the costs
of litigation are fueled unnecessarily to the point of being
prohibitive.”\(^5\)

Yet, despite its length, the Dondi opinion does not delineate the lit-
itigation tactics it viewed as unnecessarily contentious, sharp, or abu-
sive. Rather, the court noted:

As judges and former practitioners from varied backgrounds and levels of ex-
erience, we judicially know that litigation was conducted today in a manner
far different from years past. Whether the increased size of the bar has de-
creased collegiality, or the legal profession has become only a business, where
experienced lawyers have ceased to teach new lawyers the standards to be ob-
served, or because of other factors not readily categorized, we observe pat-
tens of behavior that forebode ill for our system of justice.\(^5\)

50. Id. at 291-92.
51. Id. at 286.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id. (emphasis added).
2. The Court Legislates a “Solution”

Despite its failure to delineate specifically the behavior which it identified as the “problem,” the court adopted a detailed “solution” in the form of a Code of Professional Courtesy.\(^5\) The court found the Dallas Bar Association’s recently adopted *Guidelines of Professional Courtesy* and *Lawyer’s Creed* to be “both sensible and pertinent to the problems” at hand.\(^5\) In tandem with failing to explain why the rules were sensible, the court provided no reasoning to suggest how the new standards would alleviate the problems identified.\(^6\) Nevertheless, the court concluded that every attorney appearing in civil actions in the Northern District of Texas must observe the following:\(^6\)

- Lawyers owe both a “primary duty to the client” and a “broader duty to the judicial system that serves both attorney and client”;
- A lawyer owes a duty to opposing counsel to be courteous and to “cooperate”;
- Lawyers “shall always treat adverse witnesses . . . with fairness and due consideration”;
- Lawyers “should not use any form of discovery, or the scheduling of discovery” to “harass opposing counsel or their client”;
- Lawyers “will not arbitrarily or unreasonably withhold consent” to a “just request for cooperation . . . or scheduling accommodation”; and
- “[M]embers of the Bar will adhere to a higher standard of conduct which judges, lawyers, clients and the public may rightfully expect,” and will recognize that “[e]ffective advocacy does not require antagonistic or obnoxious behavior . . . .”\(^6\)

Unfortunately, the court did not provide any specific content or definition for words and phrases such as courtesy, civility, or obnoxious behavior. Although the court emphasized that it did not “invite satellite litigation” similar to Rule 11, it stressed that “malfeasant counsel can expect that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in a Rule 11 context.”\(^6\) Thus, the court warned “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” that they “will find that their conduct does not square with the practices we expect of them.”\(^6\)

\(^5\) Id. at 287; see also, Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 Pepperdine L. Rev. 637 (1990).

\(^6\) Id., 121 F.R.D. at 287.

\(^5\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id. at 288. The Fifth Circuit has suggested a range of sanctions under Rule 11: “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.” Thomas v. Capital Sec. Serv., 836 F.2d 866, 878 (5th Cir. 1988).

\(^6\) Id., 121 F.R.D. at 288.
III. QUESTIONING THE PREMISE: IS THERE A CIVILITY CRISIS?

Dondi stems from the assumption that many of the problems facing our courts are caused by the emergence of a civility crisis at the bar. Such an assumption has been fostered by a number of commentators who have written about "Rambo" or "hardball" litigation tactics.\(^6\) Unfortunately, like the court in Dondi, many of the commentators simply have assumed that "the level of civility among lawyers is not what it should be . . . ."\(^6\) In addition, they assume that the lack of civility increases the costs of litigation, over-crowds dockets, and denigrates our profession's esteem in society.\(^6\) In this section, we examine these assumptions and conclude that they are by no means without doubt.

A. Are Lawyers Truly Less Civil Today?

Despite the recent spark of interest, there is no real proof that the bar is any less civil today than it was in the past. In fact, every generation of lawyers seems to delight in taking up the cudgels against incivility. For example, the Albany Law Journal wrote of the Bad Lawyers in 1887-ninety-nine years before Dondi.\(^6\) And in 1904, an

\(65\). See, e.g., id, at 286 ("Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.").

\(66\). See New York Code, supra note 2, at 739. The Committee Report acknowledges that "some will challenge" the conclusion that civility among lawyers has declined. Id. However, other commentators, and the Dondi opinion itself, simply assume that the profession is in a state of crisis. See, e.g., Dondi, 121 F.R.D. at 286 ("As judges and practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past."); Los Angeles Guidelines, supra note 1, at 1 ("Many believe that relations between lawyers have so declined that our profession nears a crisis—one that not only implicates how we deal with each other but threatens our usefulness to society, the ability of our clients to bear the cost of our work and the essential values that mark us as professionals."); Brown, supra note 2, at 55 (asking and briefly answering the question, "What can be done with reason and practicality to salvage the traditional grace and collegiality of the American bar?"); Sayler, supra note 2, at 79 ("Between spitball and slow-pitch softball exists an approach to trial advocacy warranting urgent attention because it is pernicious and on the rise."); Miner, supra note 2, at 14 ("[T]here is a civility crisis of major proportions involving the bar.").

\(67\). Dondi, 121 F.R.D. at 288 ("Effective Advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which . . . the public may rightfully expect.").

\(68\). See The Argonaut, The Bad Lawyers, 36 Alb. L.J. 140 (1887). What was a "Bad Lawyer" ninety-nine years ago? Apparently, he was a lot like today's "Rambo" litigator:

Once at the bar, he makes his way by bluster and cheek. What he lacks in
article entitled *Some Types of Lawyers* complained of the intimidation practices of bluffers.\(^69\) Indeed, the literature over the past 100 years is replete with complaints by older, more “seasoned” members of the bar about the manner in which their younger, more aggressive adversaries are upsetting the apple cart.\(^70\) That is not surprising, because our adversary system necessarily pits lawyer against lawyer in a win or lose dialectic before a panel of our peers.\(^71\)

B. Is Law Becoming Less of a Profession and More of a Business?

The concern that the law has become a business, rather than a profession, also has plagued our predecessors. Lawyers in ancient Rome and Egypt suffered this criticism.\(^72\) Almost eighty years ago, in 1912, an article in the *Yale Law Journal* bemoaned that:

> It is an easy matter for a young lawyer who starts out with the pursuit of law as a practice rather than a profession, who has always in mind fees and money as a first consideration, to slip into bad practices and little by little develop into a genuine shyster.\(^73\)

In 1906, another article complained that: “Eminent and well-esteemed counsel . . . unhesitatingly point out certain prevailing tendencies [in the bar] which they regard as detrimental.”\(^74\) The tendencies?

learning he makes up in impudence; if he lacks moral character, the law affords him the opportunity to practice rascality; if he is personally dishonest, he knows enough to hide his criminal practices; not only have the qualification, learning, industry of students, and personal character of students been lost sight of, but the whole moral plane of the profession has been depressed till [sic] there is no crime so dreadful that it cannot find men at the bar willing to consult in its perpetration. There is no crime so palpable, open and defiant of law that there is not a struggle among the members of the profession to defend the criminal. If there is money in a case, however notorious or bad, how many attorneys are there at the bar of San Francisco who will not find some excuse for accepting a retainer?

\(^{69}\) See Hopper, *Some Types of Lawyers*, 66 ALB. L.J. 51 (1904).

\(^{70}\) See, e.g., Sayler, * supra* note 2, at 79.

\(^{71}\) No one would call Abraham Lincoln a “Rambo” litigator by today’s definition. Yet, Lincoln reportedly provided the following advice to trial lawyers of his day: “When you have the facts, pound the facts. When you have the law, pound the law. When you have neither, pound the table.”

\(^{72}\) See Davis, *Lawyers vs. The Rest of Mankind*, 58 ALB. L.J. 265 (1898) (noting that ‘‘attack upon the advocate is not by any means modern . . . [and that], the ancient Egyptians expressly forbade advocates to plead in their courts, on the grounds that ‘they darkened the administration of the laws.’ ’’); Hopper, *Lawyers of Ancient Rome*, 66 ALB. L.J. 248, 249 (1904) (discussing Roman lawyers and noting that the “legalizing of fees was a sad blow to those who worshipped the old ideals, and complaint was made that the profession had degenerated into a love of pelf [sic] and that persons of the lower rank sometimes assumed the profession, and advocates made a shameful trade of their function by fomenting lawsuits, and lived upon the spoils of their fellow citizens”).


\(^{74}\) Chamberlayne, *The Soul of the Profession*, GREEN BAG, June 1906, at 396.
• The “basic evil of commercialism”; 75
• The “far too frequent opinion [that] it is the primary duty of a lawyer to be 'smart'”; 76
• The absence of a feeling that the lawyer is “in any degree responsible that the counterbalancing truth should be heard at all”; 77 and
• The pursuit of a client’s goals while overlooking that the lawyer serves “as an officer of the court” and shares “with the judge the responsibilities, honors, and privileges of a ministrant at the shrine of justice.” 78

However, there is no real evidence that recent changes in the bar have caused an increase in commercialism or that commercialism causes lawyers to be less civil today than in times past. 79

C. Are Lawyers Any Less Loved Today?

It has become popular in some circles to suggest that, not only are hardball litigators clogging our courthouses, they are engaging in conduct which holds the “profession” up to public scorn. However, there is substantial evidence that lawyers have been and always will be in a love/hate relationship with their clients and the public. Once again, the literature is replete with attacks upon the scruples and esteem of lawyers. 80 Empirical studies also confirm that lawyers have suffered low regard for quite some time. 81

In addition, life in the information age may distort the magnitude of our own declining sense of worth. As one lawyer noted in 1908 (well before the American Lawyer hit the streets):

In these days of perfecting (or is it perfection?) printing presses and other mechanical agencies for the diffusion of ready-made intelligence, we may think that attacks on lawyers are more numerous and more venomous than ever before. But that is not the case. So far as the number of attacks is con-

75. Id. at 396; cf. Platt, The Decadence of Law as a Profession and Its Growth as a Business, 12 Yale L.J. 441, 441 (1903) (stating that for “nearly a decade . . . the legal profession has been searching for an adequate explanation and understanding of why the volume of legal business grew steadily less for the individual practitioner despite the rapid and healthy upward movement in all classes of commercial pursuits”).
76. Chamberlayne, supra note 74, at 398.
77. Id. at 399.
78. Id. at 400.
79. See, e.g., In re Snyder, 472 U.S. 634, 647 (1985) (noting that “[a]ll persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants”). Contra Reavley, supra note 58, at 643-46.
80. See Denovan, The Lawyers of Dickens, 5 Canadian L. Rev. 296, 297 (1906). From the days of Chaucer, [lawyers] were a favorite subject of satire. The literature of the Commonwealth is peculiarly rich in this, and points to almost a universal belief that wearers of the ermine and gentlemen of the long robe would practice any sort of fraud or extortion for the sake of personal advantage.
cerned, we must remember that the New York Journal, for instance, reaches more people than were reached in the olden days by the town crier or the village scold. As to the malignity of the present-day attacks, we may rest assured that lawyers were long ago accused of every misdeed known at the time; and from what sacred and profane writings tell us of the tricks and manners of the ancients, we may comfort ourselves with the assurance that it would puzzle the ingenuity of moderns to invent crimes more unlovely than those known in the "good old days."  

D. When Were the Good Ol’ Days, Anyway?

It may then be that the profession is no more at a crisis point of incivility or commercialism today than 100 or 1000 years ago. Certainly, the notion deserves more proof than the "judicial knowledge" of the courts, as in Dondi, or the reminiscences of the establishment bar. Indeed, the following quote from a 1906 article entitled The Imaginary Decadence of the Modern Bar could have been written today:

We hear much nowadays from mournful critics who lament the decadence, the corruption, the commercialism of the modern bar, and long for a return of the good old days when all judges were honest, and all lawyers were simple but learned folk, free from guile, bent only on guiding the faltering steps of their fellow men along the rugged path of lawful living.

But when were those good old days?

IV. Questioning the Solution: Do Courtesy Codes Help?

The Dondi court and the several bar associations that have promulgated codes of courtesy have justified having done so in the belief that they would: (a) decrease the cost of litigation; (b) alleviate crowded dockets; and (c) increase the esteem of lawyers in society. But are courtesy codes an appropriate response to these alleged problems? In this section, we explain why we think they are not.

A. Remedies Already Exist for Curbing Litigation Abuses

Courtesy codes are adopted to curb litigation excesses and thereby control the costs of bringing or defending claims. But numerous

82. Myers, The Damnation of the Modern Bar, 12 L. NOTES 48 (1908).
83. See Dondi Properties Corp. v. Commerce Sav. & Loan Ass’n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (en banc).
84. J.C.M., The Imaginary Decadence of the Modern Bar, 9 L. NOTES 211 (1906); see Vance, Is the Legal Profession Losing its Influence in the Community?, 91 CENT. L.J. 77 (1920) (taking "little stock in the talk that we so often hear to the effect that the lawyers of this day do not occupy the position in the community which they had in the good old days of the heroic or that judges are not now honored in the same manner as they were in the days past").
85. See Dondi, 121 F.R.D. at 286 (stating that "justice delayed, and justice obtained at excessive cost, is often justice denied").
86. Id.
87. New York Code, supra note 2 at 739.
channels already exist to accomplish that goal. As *Dondi* recognized, the Federal Rules of Civil Procedure and the United States Code already provide the court and opposing parties with remedies for improper or abusive discovery tactics. Abuses can also be curbed by shifting attorneys' fees to the losing party—a rule which, in Texas at least, applies to all contract actions and therefore many of the commercial disputes which gave rise to the *Dondi* opinion.

Abuses also can be controlled by litigating the "Rambo" issue before the jury. In most jurisdictions, a litigant must show that his fees are reasonable. Proof of this element can—and should—in-volve the need to resort to so-called "hardball" tactics.

If, in fact, a party has taken his abusive tactics from the boardroom to the courtroom, that accusation can be established in court and itself presents an inference that the claims have merit. If, on the other hand, a jury cannot be convinced that the tactics were unreasonable, they do not raise the problems cited by *Dondi* and the commentators and should not be the subject of a *Dondi*-like solution.

**B. Hardball Tactics Will Stop If They Are Not Effective Representation**

There is no proof that "Rambo" litigators delay their cases or un-

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88. See, e.g., 28 U.S.C. § 1927 (empowering court with the ability to tax attorneys with costs and attorney's fees resulting from unreasonable and vexatious multiplication of proceedings); Fed. R. Civ. P. 11 (granting court the power to impose sanctions upon parties who sign pleadings, motions, or other documents, the purpose of which is to "harass or to cause unnecessary delay or needless increase in the cost of litigation"); id. at 37 (authorizing sanctions for attorneys and represented parties in violation of court rules and orders).

89. See Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (Vernon 1986) (providing for "recovery of reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract").

90. See Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144 (Tex. Ct. App. 1986), which states:

Factors to be considered in determining the reasonableness of attorney's fees include: (1) the time and labor involved; (2) the nature and complexities of the case; (3) the amount of money or the value of the property or interest involved; (4) the extent of the responsibilities assumed by the attorney; (5) whether other employment is lost by the attorney because of the undertaking; (6) the benefits resulting to the client from the services; (7) the contingency or certainty of compensation; and (8) whether the employment is casual or for an established or constant client.

*Id.* at 148-49.

91. See generally Annotation, Necessity of Introducing Evidence to Show Reasonableness of Attorneys' Fees Where Promissory Note Provides for Such Fees, 18 A.L.R. 3d 733 (1968).
duly increase costs through unnecessary motions. To the contrary, the modern day hardball, self-styled Rambo litigators push their cases hard and pride themselves in doing so. The simple truth is that hardball litigators recognize that commercial clients do not litigate in a vacuum and generally want a result which is quick, certain, and successful. These factors are not linear, and are balanced against each other as the needs of each case and client dictate. The factors also are balanced at numerous times in a lawsuit and may be weighed differently depending upon the nature and style of the proceedings. In short, an effective commercial litigator already considers the needs of his client and the burdens on the system when litigating the case. Courtesy codes are therefore superfluous to effective advocacy.

C. The Codes of Courtesy Have Not Had Any Apparent Effect

Finally, the adoption of courtesy codes has not had any apparent beneficial effect on trial dockets. The number of civil cases filed by private citizens in federal courts has not declined over the past few years. Nor does it appear that cases have been litigated with any more speed; the median age of a case from commencement to resolution

92. See Goldberg, supra note 2, at 48-52. Monroe Freedman, a legal ethics professor at Hofstra, notes: "Hardball is playing with a baseball, not a softball; ... [it] implies a high level of professionalism ... it doesn't mean spitball or sleaze ball." Id. at 49. Barry Montgomery, a personal injury trial attorney, notes: "A lot of people misconstrue hardball to mean we will do everything we can to keep the other side from getting the information ... we will obfuscate the facts, we will delay, we will make it as costly as possible for the opposition. That's not hardball." Id. at 48. Lindsey Lerman Miller agrees that "hardball" is played most often "not for sport but to give the client "'a clear advantage.'" Id. at 50. Raoul Felder, of the firm Raoul L. Felder in New York, says: "[Y]ou are obligated to go right to the limits of zealous advocacy for your clients ... hardball isn't bullying—it's a surgeon operating with a scalpel." Goldberg & Hengstler, Hardball is ..., A.B.A. J., July 1987, at 52. Gloria Allred says: "Hardball means being ready, willing and able to do whatever can legally be done to protect your client's rights—including preparation for trial." Id.

93. When a hardball litigator institutes a lawsuit for his client, he is ready to do whatever legally can be done to pursue and protect the client's rights. See id. at 52 (citing Gloria Allred). If he operates within the rules, not agreeing to needless time extensions or extra filings, he saves his client money. And when he uses "hardball" tactics to jockey for position prior to trial, then he has put his client in the best position to win at trial or to settle for a greater amount than he might otherwise. See id. at 50 (Lindsey Lerman Miller speaking about giving her client "a clear advantage").

94. See Morgan, Duties of Bar and Bench, 5 L. NOTES 29, 31 (1901) (stating that "codes of ethics are of little practical value .... To an upright lawyer they are unnecessary; and formal adoption of them, by way of a code, will not prevent their infraction by a lawyer who is not upright.").

tion is eight months. 96 Neither statistic is surprising. Many of the rules of courtesy suggested by Dondi involve accommodations to lawyers' schedules and conflicts. 97 Thus, at best, the codes are neutral and, at worst, actually promote delays in the resolution of cases. 98

The experience in the Northern District of Texas also supports this conclusion. Although Dondi suggested that it did not invite satellite motions, it has spawned a new type of satellite practice: making the other side appear unreasonable. Time and money now is often spent by lawyers in all types of cases in efforts to show that their adversaries are taking technically correct but unfair and unreasonable positions. Thus, the imposed requirement of civility often raises the stakes yet another notch—with no apparent effect on the docket or the number of motions which need resolution.

V. QUESTIONING THE SOLUTION: DO COURTESY CODES ACTUALLY HURT THE PROFESSION?

A. The Codes Divert Our Attention From the Real Issues

Like any panacea, courtesy codes may actually hurt rather than help efforts to decrease litigation costs, increase the speed in which cases are resolved, and improve the stature of our profession. Crowded dockets should be addressed through more judges, specialized courts for simple and complex cases, and other means—not the policing of lawyers. Similarly, the spiraling costs of litigation should be rectified by adoption of the English rule (loser pays fees) and other mechanisms for making litigation more cost effective (such as Alternative Dispute Resolution)—not rules which tie the hands of

96. In fact, in 1987, eleven percent fewer suits were terminated than the year before. See 1987 REPORT, supra note 95. Moreover, although a rise in civil terminations occurred in 1988, that year was "highlighted by increases in dispositions of asbestos products liability cases and several social security disability insurance cases." 1988 REPORT, supra note 95. "The median time from filing to disposition, excluding land condemnation cases, prisoner petitions, and deportation reviews, remained constant at eight months from 1987 to 1988." Id.

97. For example, the Dondi court promoted agreements about extensions of time for deadlines. See Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 294 (N.D. Tex. 1988) (en banc) (excerpt from the Dallas Bar Association Guidelines of Professional Courtesies). It is hard to see how an obligation to agree will promote faster adjudication of cases, especially when a danger exists that the requested party may be branded as uncooperative if he does not agree.

98. Indeed, under the guise of promoting courtesy and expedition of cases, the Dondi court allowed a reply brief to stand that had been filed by the defendant without the court's permission in admitted violation of two local rules of the court. Nonetheless, the court ruled that the plaintiff had improperly failed to "cooperate" with opposing counsel by moving to strike. Id. at 291-92.
counsel in the courtroom. Indeed, in our opinion, low public esteem for lawyers stems primarily from a belief that lawyers are not responsive to the needs of their clients—not that they are too aggressive on their clients' behalf. Thus, the bar should be more concerned that its members engage in a careful analysis of crowded dockets, a study of the pros and cons of the common-law system, and a honing of their own skills as lawyers. In short, continuing legal education, not civility, should be the focus of our profession.

B. The Codes Also Threaten the Role of the Advocate in our System of Justice

The codes of courtesy also have a more subtle, but potentially devastating, effect on the bar and the public. Our present code of ethics requires lawyers to zealously represent the interests of their clients. That means that a lawyer must use every available means of winning at his disposal. The obligation of zealous representation is the heart of the adversary process. Each attorney, as an advocate, asks for and seeks what in his judgment is best for his client, within the bounds authoritatively established. The advocate does not decide what is just in this case—he would be usurping the function of the judge and jury—he asks for and seeks for his client what he is entitled to under the law. He can do no less and properly represent the client.

Thus, as Professor Dershowitz (a self-styled “hardball” trial lawyer) has noted, if a lawyer is not prohibited by the canons of ethics from utilizing a tactic or strategy, they require that he do so.

The Dondi opinion and the anti-hardball commentaries threaten to emasculate the single-minded purpose of the advocate and stall crea-

99. Ethical Canon 7-1 provides that:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981); see Schlosser v. Trapoli, 609 S.W.2d 255, 258 (Tex. Ct. App. 1980) (lawyer filed suit but had not taken any other action in the three and a half years before the court's dismissal of the case).

100. This also was true almost 100 years ago. See Morgan, supra note 94, at 31.

In order to further or protect the interests of his client, counsel must resort to legal tactics. He may consider it advisable to carry his client's cause into court, even when he has no intention of forcing it to a trial. After the cause is in court, he may adopt a course of action, with a view to coercing the adverse party into a proper consideration of the subject of the controversy; in short he must manage his case, and manage it according to his own best judgment.

Id.

101. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981); Penegar, supra note 2, at 338.

102. See Goldberg, supra note 2, at 48.
tivity and effective advocacy. If, as Dondi suggests, a "client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct," is it permissible for an advocate to call a witness a "liar" (or even to imply that such is the case)? If, according to Dondi, members of the bar must consent to a "just request for cooperation," should a litigator agree not to press a valid motion because his colleague missed a filing deadline? Just how should a lawyer accommodate the two "duties" identified in Dondi: is the "broader" duty to the system as a whole a trump of the apparently "narrower" duty to the client? And just what does that broader duty "to the system" entail?

The answers to these questions, though clear under the codes of ethics and the rules of procedure, become hopelessly vague and difficult to apply if "courtesy" to one's colleagues and the other litigants is elevated to a duty. Certainly, the lawyers who brought Brown v. Board of Education were uninterested in the conventional "wisdom" that separate was equal and that the facts would prove that point. Were the lawyers who used "Brandeis-briefs" to sustain the validity of congressional delegations of power to administrative agen-

103. At least one commentator has openly admitted this possibility by noting that "[s]cholars are not convinced that adversarial litigation yields a more pure form of justice than other dispute resolution methods." Sayler, supra note 2, at 80.


105. Id.

106. The following passage reveals that there are no firm guidelines for the limits of advocacy other than the lawyer's "judgment":

We must in some way train out of our young man the excessive combat spirit. It is true that all legal procedure is, in a sense, a survival of the old ordeal of trial by battle. Human ingenuity has never devised any other way. It is difficult to protect a client with a good case and a poor lawyer from the merciless clutches of a capable lawyer with a poor case. There is no basic equality in human capacities and we must continue to allow for these differences in ability. But we can stress among our members the necessity of rendering service to the client and repressing the lawyer's individual love of a fight. Litigious lawyers gratify their vanity by excessive displays of combativeness, but the client seldom ever reaps any reward from the fray. A well trained lawyer, who considers carefully his clients' rights, should be the slowest man on earth to bring on a battle, the outcome of which, unless he is a fool or a knave, he knows must be uncertain.

Simms, Speed in the Administration of Justice, 16 A.B.A. J. 290, 291 (1930); cf. Goldberg, supra note 2, at 48. Don Reuben, chief counsel for the Chicago Tribune and the Archdiocese of Chicago, notes, "[h]ardball is consistent with fair play . . . . It does not mean being a jerk . . . . You don't litigate just to litigate. If you do you're a fool." Id.

cies "Rambo" litigators? They were certainly "antagonistic" and, at
times, even "obnoxious" in pressing their cases. Is it appropriate to
attempt to curb these "tactics" through judicial mandates of
courtesy?

We do not think so. Litigation of complex commercial cases is
time-consuming because it is a battle of perspectives, not just of
"facts." The promissory note case presented by the bank is a joint
venture case by the "borrower." Questions of good faith and bad
faith over a long-term relationship are answered bit by bit, not in
one-hour depositions in which the questions are directly put and the
bad faith is openly admitted. In the end, as in every case, the jury is
asked to determine which version of events is more likely, not more
conformable to fact. The advocate should be able to work within
these restrictions without second-guessing or being second-guessed.
Thus, the ultimate problem with the courtesy codes is that they may
chill effective advocacy and make the law so uncertain that it is of no
use to the litigant. They should be abolished.