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The Professionalism Crises - The "Z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution

Allen K. Harris

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THE PROFESSIONALISM CRISIS—THE ‘Z’ WORDS AND OTHER RAMBO TACTICS: THE CONFERENCE OF CHIEF JUSTICES’ SOLUTION*

ALLEN K. HARRIS**

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The professional [legal ethics] rules are merely the basement level, the lowest common denominator, of acceptable lawyer conduct. Lawyers who consider compliance with them to be complete fulfillment of legal ethics are the equivalent of the cave dwellers in Plato's The Republic who sincerely and contentedly believe that mere shadows are reality. But believing it so does not make it so.

Barrie Althoff, Director of Lawyer Discipline and Chief Disciplinary Counsel, Washington State Bar Association since 1994.¹

Professionalism goes beyond observance of the legal profession's ethical rules and serves the best interests of clients and the public in general; it fosters respect and trust among lawyers and between lawyers and the public, promotes the efficient resolution

1. Barrie Althoff, *Big Brother is Watching: Discipline for "Private" Conduct*, in 2000 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 81, 87.

of disputes, and makes the practice of law more enjoyable and satisfying.

Oregon Supreme Court/Oregon State Bar Joint Commission on Professionalism (est., 1994).²

I detect in law practice today a new meanness and blind insistence on the rights of clients with a serious lack of a spirit of compromise and sometimes even common sense. There's a time to take a stand and there's a time to find a way. Good lawyering is knowing the difference.

Georgia Supreme Court Justice Hardy Gregory.³

[T]here is the perception and frequently the reality that some members of the bar do not consistently adhere to principles of professionalism and thereby sometimes impede the effective administration of justice.

Resolution adopted by the Conference of Chief Justices, Nashville, Tenn., 48th Annual Meeting of the Conference of Chief Justices.⁴

I. INTRODUCTION: THE LOSS OF PROFESSIONALISM—SYMPTOMS AND CAUSES

After at least fifteen years of lament over the presence of Rambo lawyer tactics, Rambo and his progeny—discovery abuse, overzealous advocacy, excessive zeal, zealotry (“the ‘z’ words”), incivility, frivolous lawsuits, and other forms of unprofessional or unethical conduct—are very much in our midst,⁵ and, by

2. A.B.A. STANDING COMM. ON PROFESSIONALISM, A GUIDE TO PROFESSIONALISM COMMISSIONS 8 (2001) [hereinafter GUIDE]. The *Guide* is a twenty-five page report developed under the auspices of the ABA Center for Professional Responsibility and the ABA Standing Committee on Professionalism. The *Guide* was developed with the support of a grant from the Program on Law and Society of the Open Society Institute.

3. Justice Harold G. Clarke, Georgia Supreme Court, *Professionalism: Repaying the Debt*, 25 GA. ST. B.J. 169, 171 (1989) (quoting Justice Hardy Gregory of the Georgia Supreme Court in a speech to a group of lawyers assembled for the administration of the oath of admission), *reprinted in* Justice Harold G. Clarke, Georgia Supreme Court, *The Judiciary as the Guardian of Professionalism*, in A.B.A. SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 65, 79 (1997) [hereinafter TEACHING AND LEARNING PROFESSIONALISM]. In his address, Justice Gregory also quoted Barbara Tuchman, the Pulitzer Prize winning historian, from her *March of Folly* in which she referred to the British government’s blind insistence on its sovereign right to tax tea and other things, which prompted Benjamin Franklin to comment: “Everything one has a right to do is not the best thing to be done.” *Id.* at 78-79.

4. CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (Jan. 21, 1999), available at <http://ccj.ncsc.dni.us/natlplan.htm>.

5. *See, e.g.*, *Bush Ranch, Inc. v. E.I. DuPont De Nemours & Co.*, No. 4:95-CV-36 (M.D. Ga. Dec. 31, 1998); GUIDE, *supra* note 2; Judge Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L.J. 1049 (2000); John S. Athens, *The Decline of Professionalism*, OKLA. B.J., Mar. 28, 1998, at 1068; Roger C. Cramton, *On Giving Meaning to “Professionalism,”* in TEACHING AND LEARNING

example, continue to harm the legal profession and denigrate its once positive image to the public. In the apt words of Walt Kelly's *Pogo*, "We have met the enemy and he is us."⁶ Symptomatic of the public's attitude of the 1990s toward lawyers, a legal scholar has written: "The legal profession is dead or dying. It is rotting away into an occupation. On this, those assembled at the bedside concur"⁷

Carl M. Selinger, in his article, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, agrees: "This sense of decline is also widespread among practitioners themselves. For example, 82.7% of respondents to a *National Law Journal* poll of partners in the nation's 125 largest law firms agreed that the profession has changed for the worse."⁸ Among the causes of this crisis is the attitude that the law is less a profession than a mere competitive business in which its members face ever increasing economic pressures.⁹

But, does the problem go deeper than economic pressure? A former Seattle practitioner, who is now a law professor at Washington & Lee University, describes the challenge facing the legal profession in terms of the pertinent issue of lawyers' attitudes about legal ethics codes:

Anyone who has spent much time around practicing lawyers knows that many of them regard legal ethics as little more than the study of a lawyer-promulgated disciplinary code, which may or may not be enforced against them by overworked bar association officials. The dominant view in the organized bar has long been that ethical self-regulation should aim to do no more

PROFESSIONALISM, *supra* note 3, at 7; Robert C. Josefsberg, *The Topic Is Civility—You Got a Problem with That?*, FLA. B.J., Jan. 1997, at 6; Judge Thomas M. Reavley, *The Magnificent Profession*, 60 TEX. B.J., Nov. 10, 1997, at 1037 [hereinafter Reavley, *Magnificent Profession*]; Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) [hereinafter Reavley, *Rambo Litigators*]; Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 79; E. Norman Veasey, *Making It Right—Veasey Plans Action To Reform Lawyer Conduct*, BUS. L. TODAY, Mar.-Apr. 1998, at 42; Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994); CONFERENCE OF CHIEF JUSTICES, *supra* note 4. U.S. Court of Appeals Fifth Circuit Judge Thomas M. Reavley provides the following description of Rambo:

Rambo is the last name of a fictional United States Green Beret veteran characterized by 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.

Reavley, *Rambo Litigators*, *supra*, at 637 n.4.

6. Walt Kelly, *Pogo*, at <http://www.bpib.com/kelly.htm> (last visited Mar. 27, 2002).

7. Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861, 861 (1997) (citing Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 911 (1996)).

8. Selinger, *supra* note 7, at 861.

9. A.B.A. COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 112 F.R.D. 243, 261 (1986) [hereinafter BLUEPRINT].

than produce lawyers who are “professionally . . . no rottener than the generality of people acting, so to speak, as amateurs.” Proponents of this view argue that the misconduct of lawyers is no different in principle from a company’s unfair trade practices, a manufacturer’s sales of a product without adequate warnings, or the use of commodity forward straddles to shelter income from taxation.¹⁰

Writing eleven years ago, U.S. Court of Appeals Fifth Circuit Judge Thomas M. Reavley, an early leader in the development and establishment of the successful Texas professionalism program (Texas Center for Legal Ethics & Professionalism) referred to “the increased resort to unfair tactics and intimidation”¹¹ by Rambo litigators. “Regardless of the explanation for unprofessional conduct, this widespread trend will further damage the bar unless it is curtailed. Most experienced practitioners agree that this ‘Rambo,’ ‘take no prisoners’ attitude is not a new problem, but one that must be discouraged.”¹²

Judge Reavley’s article refers to the need to “discourage nasty tricks and belligerency and how to cope with this conduct when it is encountered.”¹³ Reavley points out that such misconduct has, however, been around for a long time, noting that 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 but more like a prize-ring combat.”¹⁴

Judge Reavley’s discussion of Rambo tactics versus legal ethics includes a quote from then-Solicitor General Kenneth W. Starr, III, in an address to the American Law Institute in May 1989:

[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.¹⁵

10. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 2 (1999) (footnotes omitted).

11. Reavley, *Rambo Litigators*, *supra* note 5, at 637.

12. *Id.* (footnotes omitted).

13. *Id.* at 638.

14. *Id.* at 638-39.

15. *Id.* at 638 (quoting Kenneth W. Starr, III, Address at 66th Annual Meeting of the American Law Institute (May 18, 1989)).

Starr continued:

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.¹⁶

A. Society's Respect for the Law vs. Society's Respect for Lawyers

There is a considerable difference in the public's respect for the law as opposed to the public's respect for lawyers. As Carl Bogus noted, "Respect for lawyers seems everywhere on the decline."¹⁷ In 1996, Bogus said: "The percentage of Americans who give lawyers high ratings for honesty and ethical standards has fallen from an already unimpressive 27% in 1985 to 17% in 1994."¹⁸ However, it has been accurately pointed out by Professor Craig Bradley, author of *The Rule of Law in an Unruly Age*,¹⁹ that respect for the law in society has actually increased.²⁰ Professor Bradley opines that the influence of law has grown due to the "uniquely American view of society that is characterized by a distrust of institutional power, both governmental and private, and a high regard for individual rights."²¹ Because of these attitudes, "law is more influential than such institutions as churches, schools, families, political parties, and unions. It has become the predominant external influence on how we, as well as these institutions, conduct affairs."²²

Professor Bradley cites the popular Shakespearean quote, "The first thing we do, let's kill all the lawyers,"²³ which is part of a substantial body of derisive lawyer humor so prevalent in recent years. However, Shakespeare's admonition is not generally understood in its true perspective. Professor Bradley notes that while Shakespeare's quote is used today to show antipathy toward lawyers, "[w]hat is less

16. *Id.* at 638.

17. Bogus, *supra* note 7, at 912.

18. *Id.* (citing Leslie McAneny & David W. Moore, *Annual Honesty and Ethics Poll: Congress and Media Sink in Public Esteem*, GALLUP POLL MONTHLY, Oct. 1994, at 2). The author points out that the poll also showed these results for other professions: "[P]harmacists enjoy high ratings of 62% for honesty and ethics by the public. Other professions rate as follows: medical doctors 47%, police officers 46%, business executives 22%, real estate agents 14%, insurance salespeople and members of Congress 9%, car salespeople 6%." *Id.*

19. Craig Bradley, *The Rule of Law in an Unruly Age*, 71 IND. L.J. 949 (1996).

20. *See id.*

21. *Id.*

22. *Id.*

23. *Id.* (quoting WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE SIXTH*, act 4, sc. 2, line 68 (Norman Sanders ed., 1981)).

well known is that the reason the rebels urge this course in *King Henry the Sixth, Part II* is so their claimant to the throne could act the tyrant—unconstrained by the dictates of law.”²⁴ Furthermore, “comparatively large numbers of lawyers in America today are a necessary aspect” of the “uniquely American view of society,” referred to above, that distrusts institutional power and sees lawyers as protection against such power.²⁵

The large gulf between society’s respect for the law as an institution and society’s growing disrespect for lawyers threatens the very institution of law itself. Undoubtedly, unethical and unprofessional conduct has led to a serious decline in public respect for the legal profession.²⁶ Public respect for the legal system is necessary for the acceptance of judicial decisions; in order to maintain public respect, it is essential to maintain high standards of lawyer conduct.²⁷ One court aptly puts the impact of the loss of lawyer professionalism in perspective:

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers.²⁸

The court continues:

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.

. . . Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.²⁹

Richard A. Gilbert, then-Chairperson of the Hillsborough County Bar Association’s (HCBA) Professional Conduct Committee in Tampa, Florida, wrote in 1991 about the threat that lawyer misconduct poses for the role of the legal profession:

24. *Id.* at 949.

25. Bradley, *supra* note 19, at 949.

26. See BLUEPRINT, *supra* note 9, at 261.

27. Catherine Thérèse Clarke, *Missed Manners in Courtroom Decorum*, 50 MD.L. REV. 945, 964 (1991).

28. *Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

29. *Id.*

Many believe that relations between lawyers have so deteriorated 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. Some perceive abusive conduct as gaining new adherence cloaked in the mantle of forceful advocacy. They perceive that clients are best served by the intimidation of opponents, a relentless refusal to accommodate, and the use of tactics that impose escalating expenses on an adversary.³⁰

B. Civility: Importance and Misconceptions

Why has there been such a marked decline in lawyer professionalism? In a book not about lawyers in particular, but generally about civility in America today, Yale law professor Stephen L. Carter laments the apparent perception that in law, and in politics, the job of the hired professional requires incivility.³¹ Similarly, Carter noted that New York divorce lawyer Raoul Felder, in response to New York's chief judge's proposed rules of civility between opposing counsel, stated, "I have never heard a client complain that his or her lawyer was rude."³² As Carter concludes, "In both cases, law and politics, rudeness is evidently justified on the grounds that rudeness is what the client is paying for."³³ Carter complains about the notion of professions for which incivility is a requirement:

I suppose I disbelieve it; or, rather, if there are such professions, I am skeptical of their morality, because they fail to convey a message that we are, all of us, not lone drivers but fellow passengers. It may be that law and politics seem so dismally rude because their principal ethic is merely one of victory, an ethic materially enriching and emotionally satisfying, but morally unimportant. If lawyers are paid to be rude and political consultants to be nasty, and if their incivility is linked to the fact that they are also paid to win, we should scarcely be surprised that professional athletes find it comfortable to brawl with fans, spit on umpires, take bites out of ears, and, in one unfortunate case nicknamed "Assassin," specialize in injuring fellow football players. After all, athletes want to win, too.³⁴

30. Richard A. Gilbert, *Standards of Professional Courtesy*, HCBA LAW., Jun.-Jul. 1991, at 30, 30.

31. See STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS AND THE ETIQUETTE OF DEMOCRACY* (1998).

32. *Id.* at 286.

33. *Id.*

34. *Id.*

"Civility" has also been the subject of much discussion by bar and judicial leaders in legal journals and court orders in recent years. Distinguishing civility from ethics and professionalism, the then Dean of the Academy of International Lawyers described civility this way:

Civility is different—it's how you treat others. A civil and courteous lawyer may, unbeknownst to you, be unethical. And the converse is also true; an ethical lawyer may be very rude, contentious and lacking in civility. . . . Professionalism is a larger category. It includes civility, ethics, being well prepared, and doing pro bono work.³⁵

The author goes on to place civility, an oft-misunderstood quality, in true perspective:

Civility is courtesy, dignity, decency, and kindness. It has been defined in the Virginia Bar Association's Creed as follows:

Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being.

Civility is not inconsistent with zealous advocacy. You can be civil while you're aggressive, upset, angry and intimidating; you're just not allowed to be rude. Unfortunately, some lawyers and the public don't understand the differences.³⁶

In a court order, Oklahoma U. S. District Judge Wayne Alley was critical of the discovery behavior of two lawyers:

[N]either side has conducted discovery according to the letter and spirit of the Oklahoma County Bar Association's Lawyer's Creed. This is an aspirational creed not subject to enforcement by this Court, but violative conduct does call for judicial disapprobation at least. If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.³⁷

In addition to his "hell" order, Judge Alley also issued his oft-quoted "dueling" order in regard to lawyer incivility:

35. Josefsberg, *supra* note 5, at 6.

36. *Id.* at 6-7 (emphasis added) (footnote omitted).

37. *Krueger v. Pelican Prod. Corp.*, No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989).

[The response] contains mutterings about bad faith and personal disputes between counsel. . . . I suppose counsel have a penumbral Constitutional right to regard each other as schmucks, but I know of no principle that justifies litigation pollution on account of their personal opinions. This case makes me lament the demise of duelling [sic]. I cannot order a duel, and thus achieve a salubrious reduction in the number of counsel to put up with.³⁸

In *Litigation News*, the following quote appeared: "There is no inconsistency . . . between civility and zealous effective advocacy. In fact, quite the contrary, advocacy which is both civil and professional is by far the most effective."³⁹

That the Rambo lawyer, some clients, and others misperceive civility as a sign of weakness seems clear. However, as Professor Stephen L. Carter said in *Civility: Manners, Morals and the Etiquette of Democracy*: "Civility" is a term that must also be understood and not misunderstood. Carter points out that "[c]ivility values diversity, disagreement and the possibility of disagreement"⁴⁰ and "[c]ivility allows criticism of others, and sometimes even requires it, but the criticism should always be civil."⁴¹ Carter states that "criticism, even sharp criticism, is not uncivil . . . A boss who does not correct an errant employee should not be a boss."⁴² Carter continues: "There are even Talmudic stories suggesting that love of our fellows requires that we criticize them when it is appropriate to do so."⁴³

C. Tensions Between Client Interests and a Just Legal System

Cornell law professor Roger C. Cramton discusses the reasons for the loss of lawyer professionalism in his paper entitled, *On Giving Meaning to "Professionalism,"* which was the keynote address to the ABA Symposium on Teaching and Learning Professionalism held in Oak Brook, Illinois in 1996.⁴⁴ Professor Cramton's message was that since 1955 (when he became a lawyer) the legal profession has neglected its central moral tradition.⁴⁵ He complains of "the modern heresy, endlessly repeated in multiple settings" that

the "client comes first," meaning "first and only." Some years ago the fidelity and loyalty owed to clients was balanced by a generally accepted understanding that the lawyer's primary

38. 4810 Partnership v. Nat'l Props., Inc., No. CIV-91-1196-A (W.D. Okla. May 29, 1992).

39. Joseph W. Ryan, Jr., *Things Your Mother Should Have Taught You*, A.B.A. LITIG. NEWS, May 1998, at 8, 9.

40. CARTER, *supra* note 31, at 284.

41. *Id.* at 283.

42. *Id.* at 109.

43. *Id.* (emphasis added).

44. Cramton, *supra* note 5.

45. *Id.* at 7.

obligation was to the procedures and institutions of the law. When tension arose between client interests and those of the legal system, the lawyer's respect for the rule of law—the maintenance and improvement of just and efficient legal institutions—almost always prevailed. *Our greatest need today is to regenerate this common faith.*⁴⁶

Cramton concluded his pertinent, timely remarks by saying:

What is legal and right is replaced by “what can we get away with?” The same sort of casuistry is then applied in interpreting and applying the profession's own ethics rules. The Hobbesian world of a war of all against all looms ahead, amidst the ruins of the rule of law.

...
 . . . The need today is to regenerate the ideal of the law as a public profession with large public responsibilities⁴⁷

Another opinion on the erosion in lawyer professionalism was offered by Indiana Supreme Court Justice Brent E. Dickson, in an article he co-authored, *Renewing Lawyer Civility*:⁴⁸

[M]ost observers would likely agree that there exists today a substantial civility deficit in the legal profession. This growing absence has recently received considerable attention. Numerous causes are likely: client expectations based upon frequent media portrayal of excessively aggressive lawyer styles, increased competition from growing numbers of attorneys, increasing law firm size with the resulting loss of senior partner mentoring and role-modeling, new emphasis on advertising, increased numbers of colleagues with resulting relative anonymity, and institutional incentives for aggressive utilization of procedural rules.⁴⁹

The perspective of long-time Tulsa trial lawyer John Athens is pertinent to this discussion. Athens urges more out of lawyer behavior in his article, *The Decline of Professionalism*, “[T]here appears to have been a marked erosion of professionalism with the passage of time. . . . [W]hat we have been doing is losing our personal honor. I urge all of us to do what we can to regain that honor. . . . The

46. *Id.* at 8 (emphasis added) (footnote omitted).

47. *Id.* at 24.

48. Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U.L. REV. 531 (1994).

49. *Id.* at 531-32 (footnote omitted). The authors cite an article by California Court of Appeals Justice Arthur Gilbert addressing the civility deficit in the legal profession. Arthur Gilbert, *Civility—It's Worth the Effort*, TRIAL, Apr. 1991, at 106, 106.

road we take does make a difference.”⁵⁰

We in the legal profession perhaps tend to lose sight of the impact of lawyer misconduct on not only clients and lawyers, but on the larger interests: (1) the influence of the law as an institution with a critical role in a democratic society; (2) the cost of administering the justice system; (3) the impact that the efficiency of the legal system has on society as a whole; and (4) the future of the privilege, often taken for granted, of lawyer self-regulation.

D. Judicial Concern and the Institutionalization of Professionalism

Efforts to increase lawyer professionalism have gained renewed impetus from the 1999 study and the position taken by the national Conference of Chief Justices in Williamsburg, Va.⁵¹ The study was directed at promoting lawyer professionalism and is entitled, *A National Action Plan on Lawyer Conduct and Professionalism*.⁵²

The Chief Justices’ study resulted in their recommendation for each state to establish “a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction.”⁵³ In January 2001, as a result of the concern of the Conference of Chief Justices, the ABA released its study, *A Guide to Professionalism Commissions*.⁵⁴ Following the Conference of Chief Justice’s report, the ABA study and resulting professionalism Guide states that its purpose is the encouragement and aiding of the nation’s Chief Justices in the establishment of state professionalism centers, “because of their individual ability to promote the future development and success of professionalism centers in their own states.”⁵⁵

The Conference of Chief Justices’ report concluded: “[T]he unprofessional and unethical conduct of a small, but highly visible, proportion of lawyers taints the image of the entire legal community and fuels the perception that lawyer professionalism has declined precipitously in recent decades.”⁵⁶ The report also concluded: “The implications of this behavior for the American justice system are extremely serious in that the behavior contributes to decreased public confidence in legal and judicial institutions as well as heightened stress and decreased professional satisfaction for those lawyers who endeavor to practice in a professional manner.”⁵⁷

50. Athens, *supra* note 5, at 1068, 1076.

51. See CONFERENCE OF CHIEF JUSTICES, *supra* note 4.

52. *Id.*

53. GUIDE, *supra* note 2.

54. *Id.*

55. *Id.*

56. CONFERENCE OF CHIEF JUSTICES, *supra* note 4, at 1.

57. *Id.*

ignore exhortations to set their standards at a higher level.⁶³

In other words, the ABA's observation demonstrates a crucial distinction: while a black-letter *Model Rules of Professional Conduct* (forty-two states and the District of Columbia) or other ethics rules (eight states),⁶⁴ may cover what is minimally required of lawyers, "professionalism" encompasses what is more broadly *expected* of them, both by the public and by the best traditions of the legal profession itself. "It is easy . . . to confuse compliance with the rules with being moral and . . . minimally acceptable conduct with acting as a professional."⁶⁵

Looking at the origins of legal ethics codes, one encounters language that is strikingly unfamiliar to today's professional rules and today's aspirational lawyer creeds, both in content and in tone. If lawyers today were to embrace the *Resolutions* of David Hoffman,⁶⁶ considered to be the father of American legal ethics, public respect, and lawyer respect, the legal profession could rise significantly. For example, the serious problem of frivolous lawsuits would be explicitly discouraged in unmistakable terms. Hoffman, a successful Baltimore lawyer, wrote the first statement of professional ethics for American lawyers.⁶⁷ His *Course of Legal Study* was published in 1817 and republished in 1836.⁶⁸ In the later edition, Hoffman expands his *Observations on Professional Deportment* to include *Some Rules for a Lawyer's Conduct Throughout Life*, consisting of fifty *Resolutions in Regard to Professional Deportment*.⁶⁹ Among the professional deportment resolutions proposed by Hoffman were:

If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be) cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonourable use of legal means, in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.⁷⁰

Another of Hoffman's *Resolutions*, number XIV, relevant to the legal profession

63. BLUEPRINT, *supra* note 9, at 259.

64. A.B.A., COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 555-56 (2001).

65. JACK L. SAMMONS, JR., LAWYER PROFESSIONALISM 64 (1988).

66. See DAVID HOFFMAN, *Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752-75 (Arno Press 1972) (1836).

67. *Id.*

68. THOMAS L. SHAFER, *The Gentleman from Baltimore*, in AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 59 (1985).

69. *Id.*

70. Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 635-36 (1997) (quoting HOFFMAN, *supra* note 66, at 754).

That a disturbingly high percentage of the American public has lost confidence in lawyers is well documented.⁵⁸ This loss of confidence and the corresponding loss of lawyer professionalism are a growing concern. The dramatic increase in the number of lawyers in America⁵⁹ (now numbering in excess of one million⁶⁰) as well as lawyer advertising and increased competition frequently receive the blame for incivility and the decline of professionalism. However, it is submitted that overreliance on lawyer ethical codes as the “complete fulfillment of legal ethics”⁶¹ or as the standard lawyers should aspire to, is probably a more accurate, fundamental cause of the malaise in legal professionalism. As Washington State Disciplinary Counsel Barrie Althoff points out, legal ethics rules are “merely the basement level, the lowest common denominator, of acceptable lawyer conduct.”⁶²

In 1986, the ABA ruefully reported that despite the fact that lawyers’ observance of the rules governing their conduct was sharply on the rise, lawyers’ professionalism, by contrast, was, at the same time, in steep decline:

[L]awyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. . . . [L]awyers have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to

58. See Bogus, *supra* note 7, at 912 (stating that only 17% of Americans give lawyers high ratings for honesty and ethical standards). Compare Sayler, *supra* note 5, at 81, in which Mr. Sayler, a litigation partner in Covington & Burling in Washington, D. C., stated:

A poll conducted by the ABA Commission on Professionalism detected that only 6 percent of corporate users of legal services rated “all or most” lawyers as deserving to be called “professionals.” Only 7 percent saw professionalism increasing among lawyers, 68% said that professionalism had decreased over time and 55% of state and federal judges also said that professionalism is declining.

Further indication that the public’s confidence in lawyers started declining some time ago, is found in a poll of the *National Law Journal* in 1986, *What America Really Thinks About Lawyers*, which reported a hardly positive view among the general public:

Responses to, “Of the following phrases, which most closely represents your view of the most negative aspects of lawyers?”: they are too interested in money (32%), they manipulate the legal system without any concern for right or wrong (22%), they file too many unnecessary lawsuits (20%), they are too interested in representing corporations, not people (12%), they are just “hired guns” (8%) (and “don’t know,” 6%).

RICHARD W. MOLL, *THE LURE OF THE LAW* 7 (1990).

59. Bogus, *supra* note 7, at 914. According to the Bureau of the Census, between 1970 and 1990 the number of law schools in America increased from 145 to 182, while most of the previously existing schools substantially increased their enrollment. *Id.* The number of lawyers in the United States increased from 320,000 in 1972 to 815,000 in 1993. *Id.* In 1972, there was one lawyer for every 656 Americans, by 1991, the ratio was 1:310. *Id.* Bogus, writing in 1996, concludes: “As measured strictly by these figures, therefore, competition became more than twice as stiff for lawyers over the past two decades, and with law schools now producing 38,000 new lawyers annually, the screw is tightening every year.” *Id.*

60. According to the ABA Membership and Marketing Department, as of year-end 2000, there were 1,048,903 lawyers in the United States.

61. Althoff, *supra* note 1, at 87.

62. *Id.*

today, 165 years later, states:

XIV. My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In *civil* cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it: and should the *principle* also be wholly at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country, when, if successful, it would be gangrene that might bring death to my cause of the succeeding day.⁷¹

Hoffman's *Resolution XXXIII* warns:

XXXIII. What is wrong, is not the less so from being common. And though few *dare to be singular*, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude.⁷²

Looking at these origins of our legal ethics codes,⁷³ one wonders if such moral admonitions should not be stressed to lawyers today in some prominent way, if not in ethics code preambles, at least in aspirational professionalism creeds, which have been sweeping the nation in the last fifteen years.

In her helpful work, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, which quotes extensively from Hoffman's *Resolutions*, Professor Teresa Stanton Collett also quotes Pope John Paul II's *Gospel of Life*:

To refuse to take part in committing an injustice is not only a moral duty—it is also a basic human right. Were this not so, the human person would be forced to perform an action intrinsically incompatible with human dignity, and in this way human freedom itself, the authentic meaning and purpose of which are found in its orientation to the true and the good, would be radically compromised. What is at stake therefore is an essential right

71. Collett, *supra* note 70, at 636 (quoting HOFFMAN, *supra* note 66, at 755).

72. *Id.* (quoting HOFFMAN, *supra* note 66, at 765).

73. Many of the ABA's 1908 *Canons of Professional Ethics* were modified versions of Hoffman's *Resolutions*. Collett, *supra* note 70, at 635.

which, precisely as such, should be acknowledged and protected by civil law.⁷⁴

The heightened yearning by lawyers, clients, and the public for renewed legal professionalism continues. Legal scholars, practitioners, and advocates of the professionalism movement attribute the rising concerns to a noticeable decline in lawyer professional conduct, most specifically to an increase in overzealous advocacy and a decline of discovery ethics.⁷⁵

The ABA Commission on Professionalism was formed in 1985 “because of the shared concerns of former Chief Justice Warren E. Burger and former ABA President John C. Shepard that the Bar was ‘moving away from the principles of professionalism and that it was so perceived by the public.’”⁷⁶

The stakes for lawyers, the state court systems, and the public interest are high indeed: client protection, the public interest, the cost of administering the justice system, the delivery of worthy legal services, and the privilege of self-regulation of the profession—all are adversely impacted by the negative consequences of the decline of lawyer conduct and professionalism that are inherent in Rambo lawyer tactics so prevalent today. This is especially so in cities large enough that many of the bar are not personally acquainted with each other and do not interact with each other professionally or socially. Legal ethics writer Donald Hubert, then-president of the Chicago Bar Association, whose practice focuses on representing respondents in lawyer disciplinary proceedings, articulated the public interest in increased professionalism in his presentation to the 1996 *ABA Symposium on Teaching and Learning Professionalism*.⁷⁷ His subject was competence, ethics, and civility as the core of professionalism:

We need to focus on these issues of professionalism not only because of lofty ideals, but because professional conduct makes everyone’s life easier, ensures that a better product is delivered to a client, and protects all of us from the generalized, negative view of lawyers that is so often held by the public.⁷⁸

74. Collett, *supra* note 70, at 635 (quoting POPE JOHN PAUL II, *THE GOSPEL OF LIFE* ¶ 74 (1995)).

75. See also Allen K. Harris, *The Effect of Overzealous Advocacy on Professionalism—What Is a Lawyer’s Duty Under Rule 1.3?*, 71 OKLA. B.J. 1472 (2000); Allen K. Harris, *Zealous Advocacy, Discovery Ethics and the Development of State Professionalism Commissions*, OCBA BRIEFCASE, Jan. 2001, at 1; Allen K. Harris, *Clarifying the Goals of the Professionalism Movement*, OCBA BRIEFCASE, Dec. 1999, at 1. The issues discussed herein were also addressed at the 1999 OBA-CLE seminar, “Where In The World Is Atticus Finch?,” in Oklahoma City, and at the First and Second “Annual John Shipp Memorial Symposiums on Professionalism, Civility and Ethics,” which were co-sponsored by the OBA and the Ruth Bader Ginsburg American Inn of Court, held in 1999 and 2000, in Tulsa and Oklahoma City, at which the author was a panelist.

76. Browe, *supra* note 5, at 752-53. Cf. BLUEPRINT, *supra* note 9, at 248.

77. Donald Hubert, *Competence, Ethics and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners*, in *TEACHING AND LEARNING PROFESSIONALISM*, *supra* note 3, at 113.

78. *Id.* at 117.

E. The Florida and Georgia Experiences

In 1989, the Florida Bar Association established a task force to study the cause of the "great decline in professionalism among lawyers in Florida."⁷⁹ The study addressed issues regarding the lack of civility among lawyers, the public's poor perception of lawyers and the steady decline of lawyers' satisfaction and fulfillment within their professions.⁸⁰ The task force report listed a multitude of problems and made broad suggestions as to how to address these problems, resulting in the creation of the Florida Bar's Standing Committee on Professionalism. In 1995-1996, the President and President-elect of the Florida Bar both "set the goal of making professionalism a higher priority to Florida lawyers."⁸¹ As a direct result of that partnership between President John A. DeVault, III, and President-elect Paul W. Frost, II, the recommendation came that the Florida Bar propose to the Florida Supreme Court the creation of a Commission on Professionalism and a free-standing Center for Professionalism.⁸² Seven years after the establishment of the task force, at a 1996 meeting of the Florida Bar Board of Governors, the Standing Committee, and the supreme court judiciary, Chief Justice Gerald Kogen, signed an administrative order creating the Commission and the Center.⁸³

The organizers of the Florida Bar's Center on Professionalism began with a vision, a mission, and a prescribed path.

The vision was "[t]o realize a just legal system and a legal profession warranting the trust of society;" the mission was "[t]o promote the fundamental ideals and values of the justice system and the legal profession, and to instill those ideals in all those persons serving and seeking to serve in the system;" and the path toward that objective was "[t]o identify the problems that have frustrated the achievement of the ideals of the system of justice and the legal profession; to suggest solutions; and to develop methods to improve our professional behavior through leadership, education and allocation of resources."⁸⁴

In Georgia, the Chief Justice's Commission on Professionalism was also established by the state supreme court, whose judges had previously written extensively on the subject of professionalism. The court order, dated February 1, 1989—the first in the country to establish a professionalism commission—described the impetus for its creation as the "recognition of the need

79. FLORIDA BAR CTR. FOR PROFESSIONALISM, *The History of the Professionalism Effort, in 1998 SYMPOSIUM ON PROFESSIONALISM*.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. GUIDE, *supra* note 2.

for emphasis upon and encouragement of professionalism in the law practice.”⁸⁵ The ABA’s *Guide To Professionalism Commissions* reports further on the creation of the Georgia Chief Justice’s Commission on Professionalism:

In part because of concerns about frequent changes in state bar leadership, the Commission was created separately from the bar and is, essentially, an agency of the Supreme Court. Its mission is “to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public and to fulfill their obligations to improve the law and the legal system and to ensure access to that system.”⁸⁶

The Georgia Commission summons lawyers to three tasks:

[T]o recognize that lawyers exist “to act as problem solvers performing their service on behalf of the client while adhering at all times to the public interest,” “[t]o utilize their special training and natural talents in positions of leadership for societal betterment,” and “[t]o adhere to the proposition that a social conscience and devotion to the public interest stand as essential elements of lawyer professionalism.”⁸⁷

The Florida and Georgia professionalism commissions are model examples of lawyer professionalism commissions and mandatory CLE professionalism programs.

Mandatory professionalism programs have sprung up elsewhere in response to the decline in professionalism and the Conference of Chief Justices’ recommendation. A leader in the effort to institutionalize professionalism in Georgia was Georgia Supreme Court Presiding Justice Harold G. Clarke. In his article, *Professionalism: Repaying the Debt*, Justice Clarke stated the Bar’s obligation to society as follows: “*In return for the right to regulate itself, the legal profession has accepted the implicit compact to act in the public interest.*”⁸⁸

The creation of state lawyer professionalism commissions are usually judicially established, but have occasionally been founded as a hybrid creation of the supreme court and the state bar association. The ABA’s findings on why such professionalism entities are needed at the state level, and why they are beneficial, are set forth in the ABA *Guide to Professionalism Commissions*.⁸⁹ The *Guide* states

85. *Id.*

86. *Id.*

87. *Id.*

88. Clarke, *supra* note 3, at 173 (paraphrasing Professor Bob McKay’s writing in the ABA Tort and Insurance Practice Section’s *Monograph on Professional Independence*) (emphasis added).

89. See GUIDE, *supra* note 2.

that professionalism entities came about in response to two insights:

The first is that, as the bar has become larger, more spread out geographically, more diverse, and more highly specialized, traditional informal mechanisms have become inadequate in and of themselves to educate lawyers about professional expectations and to encourage lawyers to strive to achieve the highest professional ideals. It has therefore become increasingly important for the legal profession, *collectively and more formally than in the past*, to promote professional values widely among practitioners and future practitioners.⁹⁰

The report continues:

The second insight is that, although existing entities in each state—in particular, state and local bar associations, law schools and the courts—currently make important contributions to promoting lawyer professionalism, this important objective can be further and materially advanced by a new entity—namely, a professionalism commission—which undertakes the task of promoting lawyer professionalism as its principal mission.⁹¹

II. PROFESSIONALISM VS. ETHICS

It is important to consider the meaning of the terms “ethics” and “professionalism.” A good definition of professionalism is that of Delaware Chief Justice E. Norman Veasey, Chair of the Conference of Chief Justices, who said:

What is the difference between ethics and professionalism? Ethics is a set of rules that lawyers *must* obey. Violations of these rules can result in disciplinary action or disbarment. Professionalism, however, is not what a lawyer *must* do or *must not do*. It is a higher calling of what a lawyer *should do* to serve a client and the public.⁹²

Former Georgia Justice Harold G. Clarke also well articulated the difference between ethics and professionalism. “[E]thical conduct is the minimum standard demanded of every lawyer while professional conduct is a higher standard that is *expected* of every lawyer.”⁹³

90. *Id.* (emphasis added).

91. *Id.*

92. Veasey, *supra* note 5, at 44.

93. HAROLD G. CLARKE, FIRST ANNUAL GEORGIA CONVOCATION ON PROFESSIONALISM 31 (Oct. 14, 1988) (emphasis added).

Washington, D.C., litigator Robert Sayler stated that Rambo lawyering or hardball lawyering is “like pornography, you know it when you see it.”⁹⁴ Sayler also said, “I have never lost to a ‘Rambo’-style litigator.”⁹⁵

Professionalism is often viewed as merely an aspirational goal, with the consequence that unprofessional behavior need not be accompanied by a concern of being disciplined by courts or bar disciplinary authorities. However, judicial attitudes toward such disregard are changing. Justice Veasey, who also chairs the Board of the National Center for State Courts, has stated:

Abusive litigation in the United States is mostly the product of a lack of professionalism. Lawyers who bring frivolous lawsuits who engage in abusive litigation tactics are unprofessional. They need to be better regulated by state supreme courts and better controlled by the trial judges who, in turn, are supervised by state supreme courts. . . .

Lack of professionalism is a cancer which also infects office practice.⁹⁶

The problem may be even more fundamental than the distinction between ethics and professionalism. Professor Wendel states, “[L]awyers’ understanding of legal ethics is, jurisprudentially speaking, decades behind their conception of the law as it applies to everyone else.”⁹⁷

A. Zealous Representation

One of the leading causes of the decline of professionalism is the probable misconception by many lawyers that former Canon 7’s duty of zealous representation remains a requirement in the ABA *Model Rules of Professional Conduct*, which have been adopted in some form in forty-two states and the District of Columbia.⁹⁸

When, for example, Rule 1.3 of the *Oklahoma Rules of Professional Conduct* replaced Canon 7 of the former *Code of Professional Responsibility* in 1988, it replaced the black-letter duty of “zealous representation” of Canon 7 with the duty of “diligent representation” in Rule 1.3.⁹⁹ The duty of “zealous representation” was purposely omitted from Rule 1.3.¹⁰⁰ The misconception that “zealous advocacy” is

94. Sayler, *supra* note 5, at 79.

95. Edward M. Waller, *Judicial Activists Wanted*, A.B.A. J., June 1998, at 116.

96. Veasey, *supra* note 5, at 42.

97. Wendel, *supra* note 10, at 5-6.

98. See *supra* note 64 and accompanying text.

99. OKLA. RULES OF PROF’L CONDUCT R. 1.3 (2002) (referring to the code comparison located at the end of Rule 1.3) (emphasis added).

100. The preamble to the *Oklahoma Rules of Professional Conduct* states: “As advocate, a lawyer zealously asserts the client’s position” *Id.* The Comment to Rule 1.3 states: “A lawyer should act . . . with zeal in advocacy” *Id.* However, these provisions do not substitute for, nor engraft onto,

required by Rule 1.3 is probably fueling the Rambo practice of law, whether it be in litigation, particularly in pre-trial discovery practice, in office practice, or in transactional practice.¹⁰¹ The misconception that zealous representation is required by the *Rules of Professional Conduct* was documented recently in public hearings of the Oklahoma Bar Association Task Force on Professionalism & Civility held in 1999, discussed further, at Part IV of this Article.

An article in *Tulsa Lawyer*, *This Is the Key to Improving Our Image*, documents the change in lawyer collegiality and professionalism: "We have much less a sense of shared values than we used to have. . . . There once was a common understanding of how you acted. You zealously represented your client, but you had respect for the other side and treated them with dignity. Afterward, you would all go out for a drink."¹⁰² The author, Phil Frazier, continues: "If professionalism is not dead within our ranks, then certainly it has been asleep for far too long. . . . Remember when the common phrase was 'doctors and lawyers,' not 'lawyers and used car salesmen.'"¹⁰³ But there is much more to the professionalism movement than improving lawyers' images. In the discussion of zealous representation in his article, it is clear from Mr. Frazier's remarks that he was concerned with resolving disputes "at the minimum expense to clients in both sides of the dispute,"¹⁰⁴ without discovery abuse or other unethical tactics. In other words, zealous advocacy, not *overzealous* advocacy, excessive zeal or *zealotry*.

In a 1997 article, endorsed by and appearing on the President's Page of the *Florida Bar Journal*, the author wrote about a lawyer who stopped practicing law: "I was tired of the deceit. I was tired of the chicanery. But most of all, I was tired of the misery my job caused other people. Many attorneys believe that 'zealously representing their clients' means pushing all rules of ethics and decency to the limit."¹⁰⁵

The phrase "zealous advocacy" is frequently invoked to defend unprofessional behavior and a "Rambo," or "win at all costs," attitude. An oft-quoted court order by Illinois Circuit Judge Richard Curry, concerning overly aggressive deposition behavior, states:

Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the

Rule 1.3 a duty of zealous representation or of zeal. The duty of Rule 1.3, notwithstanding inconsistencies appearing in the preamble and the comment, is the duty of diligent representation. *See infra* Part II.H.

101. The former *Oklahoma Code of Professional Responsibility*, Canon 7 states: "A Lawyer Should Represent A Client Zealously Within The Bounds of the Law." OKLA. CODE OF PROF'L RESPONSIBILITY (1987). The Code and the duty of zealous representation were replaced in Oklahoma in 1988 by the *Oklahoma Rules of Professional Conduct*.

102. Phil Frazier, *This Is the Key to Improving Our Image*, TULSA LAW., Oct. 1997, at 1, 1. Mr. Frazier is President of the Tulsa County Bar Association and is a member of the OBA Legal Ethics Committee and the OBA Professionalism & Civility Task Force.

103. *Id.*

104. *Id.*

105. Josefsberg, *supra* note 5, at 8.

doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done *ostensibly for a client, and, of course, for a price*. Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyers' claim to officer of the court status.¹⁰⁶

Judge Curry's admonition about the pitfalls of zealous advocacy is described by a law review author: "*This quote [by Judge Curry] symbolizes the [increasingly prevalent] view that the primary roles of an attorney should be to learn the truth and to protect the integrity of the court.*"¹⁰⁷

Stanford legal ethics scholar Deborah L. Rhode describes the true motivation of so many hardball litigators: "In a market-based system of legal representation, it is convenient for lawyers to leave no stone unturned for clients who pay by the stone."¹⁰⁸ Hardball lawyering has been frequently characterized as:

- A mind set that litigation is war and that describes trial practice in military terms.
- A conviction that it is invariably in your interest to make life miserable for your opponent.
- A disdain for common courtesy and civility, assuming that they ill-befit the true warrior.
- A wondrous facility for manipulating facts and engaging in revisionist history.
- A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.
- An urge to put the trial lawyer on center stage rather than the client or his cause.¹⁰⁹

One state supreme court has recently adopted a strong rule sanctioning lawyers for deposition abuses.¹¹⁰

B. Zealous Advocacy and Discovery

In another article, entitled *Rediscovering Discovery Ethics*, W. Bradley Wendel makes the important distinction that while lawyers have a duty to be advocates for their clients

106. Browe, *supra* note 5, at 767 (emphasis added).

107. *Id.* (emphasis added).

108. Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context*, 41 J. LEGAL EDUC. 29, at 38 (1991).

109. Sayler, *supra* note 5, at 79.

110. *See infra* Part II.D.

this duty does not apply with full force to discovery. The function of discovery within the litigation system requires that lawyers assist the court in adjudicating the dispute on the merits by disclosing the facts necessary for the court to make an informed decision. With limited exceptions, advocacy comes into play only after the facts are fully disclosed. . . . Courts are beginning to recognize that the discovery system is designed to facilitate truth-finding, and they are involving lawyers in this search for the truth. They are imposing public duties upon lawyers in discovery that are not merely rhetorical fluff, but have content and carry severe sanctions for their violation.¹¹¹

Wendel, a then-practicing attorney in Seattle who is now a law professor, advances the noteworthy solution that partisan advocacy in litigation should be confined to post-discovery practice and that an attorney cannot assist the client as a zealous advocate in nondisclosure of the facts or in selective disclosure of requested information.¹¹² A number of Rambo lawyer tactics come to mind, such as the use of a misleading or intentionally confusing description of, for example, *the hiding of*, items requested, or incorrectly alleging them to be privileged. This prevents the opposing side from a fair and reasonable discovery effort and, therefore, prevents an effective challenge of damaging items wrongfully withheld from a document production request. Another temptation for the Rambo lawyer is to resort to an artful, confusing response to a request for document production, calculated to confuse and mislead the adversary in order to suppress damaging facts. Wendel discusses the different roles of the lawyer in discovery and in the post-discovery trial phase after the facts are developed. Except for the work-product doctrine and the attorney-client privilege, the author states:

[T]he legal system does not frequently devalue truth to promote other ends in civil litigation. . . . Rules of relevancy in evidence, for example, operate only at trial. Information need not be admissible at trial to be discoverable, so long as it appears reasonably calculated to lead to the discovery of admissible evidence. *In short, suppressing information that may bear on the resolution of a dispute on its merits represents an internal good for the legal system in only a few, discrete, clearly demarcated instances.*¹¹³

The article also points out another significant difference in a lawyer's role in pre-trial discovery, the fact that an attorney and client do not have an absolute right to

111. W. Bradley Wendel, *Rediscovering of Discovery Ethics*, 79 MARQ. L. REV. 895, 895 (1996).

112. *Id.* at 935.

113. *Id.* at 934-35 (emphasis added).

confer during deposition.¹¹⁴

Wendel's reasoning in his article's thorough analysis and treatment of the issues poses the conflict between the lawyer's role as an advocate for non-disclosure in discovery versus her role as an officer of the court to aid the court and the legal system during the pre-trial phase in the broad duty of the parties to disclose relevant information. Wendel criticizes what he calls the "old school" argument that (1) a lawyer's obligation to represent her client must be given priority in litigation over the lawyer's duties as an "officer of the court;" (2) *civil discovery procedures are part and parcel of the adversary system of litigation*; and (3) under a lawyer's duty of zealous advocacy, the opposing party's requests are to be strictly construed and all doubts resolved in favor of nondisclosure.¹¹⁵

In view of the elimination of the duty of zealous representation in Rule 1.3 in forty-two states and the District of Columbia,¹¹⁶ Wendel's "counter-principles" in opposition to the "old school" argument are worthy of consideration in the search of a way to discourage unprofessional conduct in discovery, which today generates a very large part of the criticism of lawyer conduct and the expense of the legal process. Wendel's conclusions are:

- (1) With respect to matters of fact, the lawyer's primary obligation is to the discovery of the truth rather than to the advancement of the client's interest, unless some clear countervailing interest is recognized [i. e., attorney-client privilege and work product doctrine];
- (2) *The discovery system is not bound up with the adversary system; partisanship comes into play only after all of the facts have been revealed to both sides*;
- (3) (Derived from [1] and [2]) It is a breach of the lawyer's duty as an officer of the court to fail to disclose information that would assist the tribunal in determining the case on its merits.¹¹⁷

Under this reasoning, zealous advocacy (in those few states in which the Rules still require it) does not extend to assisting the client in an imaginative or creative development of the facts or "suppressing facts that may be damaging."¹¹⁸ The same reasoning should also militate against a lawyer "zealously" assisting a client by making a creative statement of fact, or an erroneous statement of fact or of the facts, in pleadings or other documents, without a due diligence inquiry as to the true facts, whether in pre-discovery, pre-litigation or non-litigation phases of representation, or in transactional or other office practice.

114. *Id.* at 936 n.186 (citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993)).

115. *Id.* at 929 (emphasis added).

116. A.B.A., *supra* note 64; Telephone conversation with Art Garwin, Professionalism Counsel, ABA Center for Professional Responsibility.

117. Wendel, *supra* note 111, at 935 (emphasis added).

118. *Id.* at 936.

The author makes clear that his proposed counter-principles apply only to discovery practice and do not limit the obligation of a lawyer to put the best "spin" on the facts to advocate how the facts should be weighted by the tribunal.¹¹⁹

In their article, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, ethics and trial advocacy Professor Janeen Kerper and Gary Stuart, a senior litigation partner in a Phoenix law firm, state: "Not surprisingly, the court first, client second doctrine is gaining increasing acceptance in this country today. . . . [T]here are numerous indicia that the American judiciary and the public at large are demanding that both civil and criminal attorneys begin to place justice first and the client second."¹²⁰

Other authors have also criticized the decline in the role of truth in the adversary system and the civil discovery system. A former University of Missouri Professor of Law, now U. S. Magistrate, Wayne D. Brazil of the Northern District of California, summed up his belief in mandatory disclosure in Federal Rule of Civil Procedure 26 as follows:

[The Rule must] shift[] counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interest and toward the court; impos[e] a duty on counsel to investigate thoroughly the factual background of disputes; impos[e] a duty on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information; narrow[] the reach of the attorney-client privilege and the work product doctrine; mak[e] early discovery conferences mandatory; substantially expand[] the role of the court in monitoring the execution of discovery; and requir[e] thorough judicial review of, or participation in, all settlements that exceed a specified dollar amount.¹²¹

U. S. District Judge Marvin Frankel of the Southern District of New York

119. *Id.*

120. Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103, 109-10 (1998). However, it has been noted that in the area of criminal defense:

[Under the duty of fidelity to her client], the criminal defense lawyer cannot be concerned with such criticism [of excessive zeal]. It is not for the defense lawyer to maintain the integrity or civility of the legal system. The defense lawyer has a client to focus on and, through that client, a cause.

David Poarch, Assistant Dean, University of Oklahoma College of Law, *Issues in Professionalism, "Criminal," Law 6400 Section 602*, 92 (Fall 2000). The University of Oklahoma College of Law also offers the course, *Issues in Professionalism, "Civil."* Kathleen P. Browe, in *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, observes that criminal defense attorneys see themselves as protectors of individual rights, while prosecutors see themselves as protectors of justice. See Browe, *supra* note 5, at 766-67.

121. Wayne D. Brazil, *The Adversary Character of Civil Discovery, A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1349 (1978).

concluded that “our adversary system rates truth too low among the values that institutions of justice are meant to serve.”¹²²

A 1998 federal court ruling in Georgia in the E. I. Dupont Benlate litigation demonstrates the serious financial consequences for lawyers and clients who engage in improper discovery conduct.¹²³ In December 1998, an Atlanta law firm was ordered by U. S. District Judge Hugh Lawson to pay \$250,000, and DuPont, its client, was ordered to pay \$11,000,000 for withholding unfavorable evidence in discovery involving the pesticide Benlate.¹²⁴

The court demonstrated concern for the lack of professionalism involved in discovery by the law firm and the client by ordering that the lawyers and the client pay the money to establish professionalism chairs of \$2.5 million each at four Georgia law schools, plus \$1 million to endow an annual professionalism seminar rotated among the four law schools.¹²⁵ The \$250,000 assessed to the large Atlanta law firm was ordered to be paid to the Georgia Chief Justice’s Commission on Professionalism for the purpose of enhancing professionalism of the practicing Bar in the State of Georgia.¹²⁶ The shock waves of the Benlate litigation ruling reportedly sent many local lawyers to their files for a second look at their handling of discovery in pending cases.¹²⁷

C. Critics’ View of Professionalism Crisis as Mere Need for Education by “Miss Manners”—Changing the Subject from the Serious Issue of Bad Lawyering to the “Smoke Screen” of Bad Manners

The professionalism abuses detailed above go far beyond incivility and bad manners. Nevertheless, it should be noted that critics of professionalism literature and of the professionalism movement sometimes wish to characterize and, therefore, dismiss, both as mere wailing by alarmists that the only thing Rambo lawyers need is education by “Miss Manners.”

Some critics of the professionalism and civility movement and/or critics of professionalism and civility writers have conveyed the impression that professionalism advocates are merely urging either (1) that the only decline in professionalism is lawyers’ failure to observe good manners or (2) that lawyers are not following unenforceable aspirational codes of civility and professionalism. It is submitted that such critics are misunderstanding the issues or begging the

122. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975). For a contrary view, see Monroe H. Freedman, *Judge Frankel’s Search for Truth*, 123 U. PA. L. REV. 1060 (1975) and H. Richard Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea*, 123 U. PA. L. REV. 1067 (1975).

123. *In re E.I. Dupont de Nemours & Co.—Benlate Litig.*, 918 F. Supp. 1524 (M.D. Ga. 1995), *overruled by In re E.I. Dupont de Nemours & Co.—Benlate Litig.*, 99 F.3d 363 (11th Cir. 1996). The trial court later imposed sanctions found to be reasonable. *See infra* notes 124-26.

124. *Bush Ranch, Inc. v. E.I. Dupont de Nemours & Co.*, No. 4:95-CV-36 (M.D. Ga. Dec. 31, 1998).

125. *Id.*

126. *Id.*

127. This information was related to the author by a member of the Georgia Bar.

question. In doing so, they avoid addressing the other serious misconduct by Rambo lawyers. Professionalism movement critics may thereby momentarily avoid the subject of some of the legal adversarial system's serious achilles heels—the prevalence of the Rambo lawyer's favorite, and, heretofore, overly safe, havens of: deposition-practice abuse, document-production manipulation and concealment, lawyer misrepresentation of facts which conveniently create spurious claims or positions for which Rambo charges unnecessary fees, and perhaps Rambo's leading money-maker and biggest waste of clients money and the public's tax dollars, the ever-prevalent weapon, the frivolous lawsuit.

These unprofessional abuses may surpass incivility in adverse impact on clients, adversaries, and the public. The taxpayers pay for the resulting slow, grinding pace of such abuses, which should be sanctioned and not tolerated in the first place (though the negative impact of incivility should not be understated). Critics of the professionalism movement seek to change the subject from the seriousness of bad lawyering to the smoke screen of bad manners. However, this does not conceal the need for concrete discovery abuse reform; nor the need for frivolous lawsuit reform (by restoring Federal and State Rule of Civil Procedure 11 to its former tighter petition requirements,¹²⁸ to close the loopholes through which the Rambo lawyer and his client jump with impunity, creating unnecessary expense and otherwise clogging up the justice system). Equally serious and often ignored, there is also non-litigation practice abuse involving factually and legally insupportable lawsuits, claims, and posturing to impress clients and churn a representation either for excessive fees or to pander to "the client from hell"¹²⁹ or both.

Deposition practice reform, enforced document production standards and cessation of false factual premises in litigation and non-litigation practice, are concrete ideas for reversing the decline of lawyer professionalism. To mischaracterize these serious deficiencies in lawyer behavior as mere lapses in manners or civility is to miss the point and engage in a dialogue of changing the subject and avoiding the discussion of serious Rambo abuses. Characterizing professionalism writers as mere whiners about the manners of Rambo lawyers adds nothing constructive or productive to the dialog about the decline of professionalism.

D. Sanction by Rule for Discovery Misconduct: The South Carolina Supreme Court Example—Rule 30(j)

The decline in professionalism clearly involves more than incivility, though incivility is usually involved in Rambo's tactics. The South Carolina Supreme Court has taken firm action against deposition abuse in its new Rule 30(j).¹³⁰ Rule

128. See *infra* Part VIII.

129. COMM. ON THE SUPREME COURT OF THE NEW YORK COUNTY LAW. ASS'N, INCIVILITY AND SHARP PRACTICE (1993) [hereinafter INCIVILITY AND SHARP PRACTICE].

130. S.C. R. Civ. P. 30(j).

30(j) sharply limits objections, off-the-record coaching, and instructions not to answer.¹³¹ The court described its rule as “one of the most sweeping and comprehensive rules on deposition conduct in the nation.”¹³²

The South Carolina Supreme Court criticized off-the-record conferences between the witness and counsel, stating that witness preparation may not continue after a deposition begins.

[A]n attorney and client may have an off-the-record conference only when deciding whether to assert a privilege or to discuss a previous undisclosed document. Before beginning such a conference the deponent’s attorney should note for the record that a break is needed for one of these purposes, and afterward the attorney should state on the record why the conference occurred and what decision was reached. Furthermore, deposing counsel may inquire into the subject of the conference to determine if there has been any witness coaching.¹³³

The court also declared: “Conferences called to assist a client in framing an answer, to calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanction.”¹³⁴

The South Carolina court’s anti-Rambo reform rule also prohibits “speaking” objections and brief interjections such as “if you remember” and “don’t speculate.”¹³⁵ Rule 30(j) also restricts when a lawyer may instruct a witness not to answer a question¹³⁶: (1) when counsel asserts a privilege where the information sought is protected by a court-imposed limitation on evidence or (2) when the witness’ counsel intends to file a motion for witness harassment.¹³⁷ The court said that it is generally improper to instruct a witness not to respond because the question has been “asked and answered.”¹³⁸ By enacting discovery reform in Rule 30(j), the South Carolina Supreme Court has given state trial courts backing to sanction the Rambo tactics of unprofessional deposition misconduct.

131. *Id.*

132. *In re Anonymous Member of South Carolina Bar*, SC No. 25346 (S.C. Aug. 20, 2001), reprinted in *Disciplinary Proceedings*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT, Sept. 12, 2001, at 551.

133. *Id.* at 552.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. ABA/BNA LAW. MANUAL ON PROF. CONDUCT, *supra* note 132, at 552.

E. Integral Role of Civility in the Legal System

Some critics of the civility movement do not appear to see the importance of civility to the success of the legal adversary system, or choose to ignore it.¹³⁹ Chief Justice Robert Benham of the Georgia Supreme Court sets forth in clear and unambiguous terms the integral role which civility plays in the legal system. In *Butts v. State*,¹⁴⁰ Benham, a thoughtful writer and speaker on professionalism, states in a concurring opinion:

While serving as advocates for their clients, lawyers are not required to abandon notions of civility. Quite the contrary, civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.¹⁴¹

Justice Benham continues:

Civility is more than good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.

To avoid incivility's evil consequences of discord, disrespect, unresponsiveness, irresponsibility, and blind advocacy, we must encourage lawyers to embrace civility's positive aspects. Civility allows us to understand another's point of view. It keeps us from giving vent to our emotions. It allows us to understand the consequences of our actions. It permits us to seek alternatives in the resolution of our problems. All of these positive consequences of civility will help us usher in an era where problems are solved fairly, inexpensively, swiftly, and harmoniously. The public

139. See Shawn Collins, *Be Civil? I'm a Litigator!*, NAT'L L.J., Sept. 20, 1999, at A22. The flaw in Mr. Collins analysis is that he assumes a lawyer cannot be professional and civil on the one hand, and loyal to the client and a strong advocate on the other hand. Also, he fails to mention duties owed as an officer of the court.

140. *Butts v. State*, 546 S.E.2d 472 (Ga. 2001).

141. *Id.* at 486 (Benham, J., concurring).

expects no less and we must rise to the occasion in meeting those expectations.¹⁴²

The criticism of civility codes by one author¹⁴³ overlooks or fails to understand the critical importance of civility to the adversarial system. Collins would abolish all “civility committees,”¹⁴⁴ and apparently all “professionalism committees” as well. However, the Jacksonville Bar Association’s *Professional Guidelines for Business Lawyers* state that a lawyer should not exaggerate any fact, opinion, or legal authority, nor permit the attorney’s silence or inaction to mislead anyone.¹⁴⁵ Another code instructing the legal professional is that of the Philadelphia Bar Association’s *Working Rules of Professionalism*, which provides that if your opponent in discovery is entitled to something, give it to him.¹⁴⁶ These are but two of the many examples of professionalism or civility codes which refute the notion that such codes are not relevant to what it means to be a professional lawyer.

F. Georgia Judicial District Professional Program—Local Grass Roots Solution to Incivility and Unprofessional Tactics

The importance of civility to the legal adversarial system is stressed nowhere more than in Georgia. In addition to the Georgia Chief Justice’s Commission on Professionalism, the Georgia Bench and Bar Committee has established the Judicial District Professionalism Program (JDPP).¹⁴⁷ The JDPP was established in response to concern about incivility’s negative impact on the Georgia lawyer’s oath to uphold the Georgia Constitution. The Georgia Constitution directs that the judicial system provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions which is what Georgia polls said the public expects of the legal system.¹⁴⁸

Accordingly, for the lawyers and judges who are under oath to serve that system, civility, fair dealing, and professionalism are not merely aspirational goals, but should be self-imposed minimum standards of conduct.

For a variety of reasons—business demands, increased competition, financial demands, the pressure to move

142. *Id.* (Benham, J., concurring).

143. Collins, *supra* note 139.

144. *Id.*

145. JACKSONVILLE BAR ASS’N, PROFESSIONAL GUIDELINES FOR BUSINESS LAWYERS, available at http://www.jaxbar.org/member/mi_professionalism.asp (last visited Mar. 25, 2002). *Cf. infra* note 205.

146. COMM. ON PROFESSIONALISM, PHILADELPHIA BAR ASS’N, WORKING RULES OF PROFESSIONALISM (June 28, 1990), available at <http://www.law.stetson.edu/excellence/litethics/philadelphiabar.html> (last visited Mar. 25, 2002).

147. See Robert D. Ingram & Judge Robert L. Allgood, *Judicial District Professionalism Program: Restoring Professionalism and Reigning in Rambo*, GA. B.J., Aug. 2000, at 48, 49.

148. *Id.* at 48.

cases—professional responsibility has become a forgotten notion for a few so-called “Rambo” lawyers and judges.¹⁴⁹

The Georgia JDPP uses peer pressure rather than the threat of formal disciplinary action in an effort to encourage professional behavior—local peer intervention to alter unprofessional conduct.¹⁵⁰ Each judicial district in Georgia has a Judicial District Professionalism Committee.¹⁵¹ It operates informally, privately, and voluntarily and does not address violations of the disciplinary rules or the *Code of Judicial Conduct*.¹⁵² It deals with inquiries from lawyers and judges only. In the absence of an agreement, it does not disclose inquiries and proceedings. The JDPP program “sends the message that unprofessional tactics are not acceptable and do not work.”¹⁵³

G. *Zealous Representation vs. Diligent Representation*

Lawyers who rationalize Rambo tactics as zealousness are, perhaps, confusing the former duty of “zealous representation,” contained in the former *Model Code of Professional Responsibility* (Canon 7), with the current duty to represent one’s client diligently as set forth in the *Model Rules of Professional Conduct* (Rule 1.3). Alternatively, such lawyers may be erroneously relying on the wording in the Preamble to the *Model Rules of Professional Conduct* or the language in the Comment to Rule 1.3. Some lawyers incorrectly assume that the former duty of “zealous” representation not only survives in present Rule 1.3, but that it justifies an attitude of “win at all costs,” “push the envelope,” be “vehement,” or be “abusive.” Dictionary definitions of “zealous” include: “ardently active, devoted or diligent,”¹⁵⁴ and “warmly engaged or ardent,” and “fervent partisanship.”¹⁵⁵ Therefore, under these definitions of “zealous,”¹⁵⁶ even if the duty of “zealous” representation in Canon 7 has not been replaced in a particular state by the duty of “diligent representation” in the *Model Rules of Professional Conduct*, a former, or surviving, duty of “zealous” advocacy does not authorize a “win at all costs” approach¹⁵⁷ or abusive or improper conduct toward opposing counsel.¹⁵⁸ Nor does

149. *Id.*

150. *Id.*

151. *Id.* at 50.

152. *Id.*

153. Ingram & Allgood, *supra* note 147, at 52.

154. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 2209 (1993).

155. WEBSTER’S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2657 (1981).

156. For contrary definitions, see Part II.H.

157. Under Ethical Considerations to Canon 7, EC 7-1 discusses the meaning of representing a client “zealously.” A review of EC 7-1 and the footnote material thereunder provides little comfort to the Rambo practitioner who invokes the duty of zealous representation to defend abusive or improper tactics, even in a state where the duty of “zealous representation” remains in the ethical standards. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1980). For example, footnote 4 to EC 7-1 states:

Rule 4.22 requires “candor and fairness” in the conduct of the lawyer, and forbids the making of knowing misquotations; Rule 4.47 provides that a lawyer should

it allow improperly coaching witnesses during a deposition; concealing discovery; falsely invoking a privilege; incorrectly describing documents asserted as privileged; or misrepresenting the law, facts, or understandings whether in letters, conversations, pleadings, or briefs and in litigation, pre-litigation, transactional, or other law practice. As the Conference of Chief Justices' report concluded: "Lack of professionalism and the need to cure it extend beyond litigation. It infects all aspects of law practice including transactional, government, public sector, non-profit, and in-house corporate and other organizational practices."¹⁵⁹

H. *"It's Time To Get Rid of the 'z' Words"*¹⁶⁰

John Conlon, a managing attorney for Safeco Insurance Companies, ably articulates the problem with the 'z' words—"zealous," "zeal," and "zealotry."¹⁶¹ "I nevertheless am convinced," says Conlon, "that there is a causal connection between incivility in the legal profession and zealous advocacy. . . . Sadly, among all too many attorneys today, zealous advocacy is not viewed so much as an ethical responsibility as it is a weapon to use to club opponents."¹⁶² Conlon traces the duty of "zealous advocacy" back to the requirement in Canon 17 of the 1908 edition of the *ABA Canons of Professional Ethics*, a time when "zealous" and "zealot" meant something different than they do today. "[T]he term 'zealous' is understood by the general public to describe someone who is something like a crackpot."¹⁶³ *Black's [Law Dictionary]* defines zealot as 'a word commonly taken in a bad sense, as

always maintain his integrity and generally forbids all misconduct injurious to the interests of the public, the courts, or his clients, and acts contrary to justice, honesty, modesty or good morals.

Id. at n.4. Disciplinary Rule 7-101 "Representing a Client Zealously" provides that "[a] lawyer does not violate this Disciplinary Rule . . . by avoiding offensive tactics." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101 (1980).

158. See *Principe v. Assay Partners*, 586 N.Y.S.2d 182 (Sup. Ct. 1992). In this case, an attorney's rude and condescending references to a female colleague during deposition constituted unprofessional conduct supported by no colorable argument and warranted sanctions on grounds of frivolous conduct. *Id.* at 188. The court cited the *Code of Professional Responsibility*, Canon 7, Disciplinary Rule 7-102(A)(1) as mandating that professional conduct be "'Within the Bounds of the Law' and requires an attorney not take action which would serve 'merely to harass or maliciously injure another.'" *Id.* at 187. Cf., MOLL, *supra* note 58, at 16 (indicating the perception of 47.4 percent of the country's lawyers who "reported they'd heard a male lawyer in their firm make a sexist remark recently, and 73.7 percent said they'd heard a male lawyer from another firm make a sexist remark").

See also *State Bar v. Martocci* where Martocci received a reprimand and probation for denouncing opposing counsel Diana Figueroa's client as "crazy" and a "nut case," belittling and humiliating Figueroa by telling her that "she did not know the law or the rules of procedure and that she needed to go back to school," that she was a "stupid idiot," and a "bush leaguer," and that depositions were not conducted according to "girl's rules." *The Florida Bar v. Martocci*, 791 So. 2d 1074, 1075-76 (Fla. 2001).

159. CONFERENCE OF CHIEF JUSTICES, *supra* note 4, at 5.

160. John Conlon, *It's Time To Get Rid of the "z" Words*, RES GESTAE, Feb. 2001, at 50, 50.

161. *Id.*

162. *Id.*

163. *Id.*

denoting . . . a fanatic,' while *Webster's* gives 'crank, fanatic or bigot' as synonyms for the word."¹⁶⁴ The 1908 requirement of "zealous advocacy" was later incorporated into the *Model Code of Professional Responsibility* that was adopted in 1969. Conlon states:

The duty of zealousness found in the various parts of the Code was specifically replaced by Model Rule 1.3 that requires a lawyer only to "act with reasonable diligence and promptness in representing a client."

Lest there be any doubt that the old standard of zeal was in fact being replaced, the Comments to Rule 1.3 in the Annotated Model Rules succinctly state that "*Rule 1.3 substitutes reasonable diligence and promptness for zeal.*" As if to put an exclamation point on this, the Comments to Rule 1.3 cite to a Minnesota Appeals Court opinion that "a trial lawyer cannot be a zealot."¹⁶⁵

Conlon points out that the drafters of the Model Rules left a conflicting provision in the preamble to the Model Rules, providing that, "[a]s advocate, a lawyer zealously asserts a client's position under the rules of the adversary system" and also that "a lawyer can be a zealous advocate on behalf of his client,"¹⁶⁶ not to mention the further confusion caused by another comment to Rule 1.3 which provides that attorneys should "act with zeal."¹⁶⁷ Conlon's answer to these conflicting provisions is convincing. He says that the Model Rules specifically provide that the Preamble and the comments "do not add obligations to the Rules."¹⁶⁸ Strictly speaking, then, attorneys today are under no actual ethical obligation pursuant to the Model Rules to be "zealous advocates."¹⁶⁹ Consistent with Conlon's sound argument, the content of the black letter rule, Rule 1.3, simply takes precedence over conflicting provisions in the preamble and the comment. Conlon's article presents a thorough analysis and criticism of lawyer misuse of "zealous advocacy" as an excuse for "over-the-top-advocacy," which "can also cause attorneys to run afoul of their other ethical obligations" to "courts, opposing counsel, other parties, the profession and to the public at large."¹⁷⁰ "It is highly unlikely," Conlon states, "if not impossible, for an attorney who is a self-described zealot on behalf of a client to adequately discharge the attorney's mandatory ethical

164. *Id.* But cf. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2209 (1993).

165. Conlon, *supra* note 160, at 50 (citing *State v. Richardson*, 514 N.W.2d 573 (Minn. Ct. App. 1994) (emphasis added); A.B.A., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 25, 26 (3d ed. 1996)).

166. Conlon, *supra* note 160, at 50 (quoting ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 165, at xv).

167. *Id.* (quoting ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 165, at 25).

168. *Id.* (quoting ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 165, at xvi).

169. *Id.*

170. *Id.*

duties to others.”¹⁷¹

In answering the question “What’s wrong with zeal?” Conlon states:

When you stop to consider the matter, it is not logical to believe that an attorney can adhere both to an ethical standard of “reasonableness” and an ethical standard of “zealousness” at the same time. Only in giving strained interpretations or relying upon secondary meanings can the two terms be made compatible.¹⁷²

III. PROFESSIONALISM AND CIVILITY STANDARDS

By adopting professionalism standards of conduct, bar associations have begun to address professionalism abuses by conveying the message that the local bench and bar do not condone such behavior. A number of the more recent professionalism codes adopted in the 1990s have come out specifically against discovery abuse and lawyer misconduct that interfere with the truth-seeking mission of the justice system. Reflecting the concern of practicing lawyers and the bench, many local bar associations have adopted such professionalism codes aimed at increasing civility and deterring sharp practices. According to the ABA Standing Committee on Professionalism, more than 100 county, city, and state bar associations have so acted in recent years to raise the professional conduct of lawyers above the rules.¹⁷³ According to Chief U. S. District Judge Marvin Aspen

171. *Id.* at 51.

172. Conlon, *supra* note 160, at 50.

173. Letter from Carole L. Mostow, then-Assistant Professionalism Counsel to the ABA Standing Committee on Professionalism, to Allen K. Harris, Esq. (Mar. 5, 1999). For example, the Mobile (Alabama) Bar Association’s “Lawyers Code of Professionalism” states:

Lawyers should not make factual or legal assertions that, to the best of their knowledge, are not truthful or accurate; they should not knowingly deceive another lawyer. Candor between lawyers is vital to open channels of communication, which in turn saves time and expense. . . .

MOBILE BAR ASS’N, LAWYER’S CODE OF PROFESSIONALISM (1990)

The Hillsborough County (Tampa, Florida) “Standards of Professional Courtesy” address unprofessional conduct in document production in discovery, as follows:

As to document demands:

- (3) In responding to document demands, a lawyer should not interpret the request in an artificially restrictive manner in an attempt to avoid disclosure.
- (4) A lawyer responding to document demands should withhold documents on the grounds of privilege only where appropriate.
- (5) A lawyer should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.
- (6) A lawyer should not delay producing documents to prevent opposing counsel from inspecting documents

of the Northern District of Illinois, standards of professionalism and civility have also been adopted in many federal courts throughout the nation.¹⁷⁴

The Seventh Circuit Court of Appeals has published comprehensive professionalism standards, preceded by a year-long study, for lawyers practicing before that court.¹⁷⁵ The Seventh Circuit requires that each lawyer certify in writing that he or she has read and will abide by these standards, as a precondition of admission.¹⁷⁶ The requirement is a commendable, workable way to enhance professionalism. A lawyer who certifies that she has read such professionalism standards is less likely to deviate from them, thus eliminating or discouraging Rambo tactics and raising the level of lawyer conduct beyond mere ethics rules. These standards were developed and recommended in June 1992 to the Seventh Circuit by a Court and Bar Committee chaired by Judge Aspen.¹⁷⁷ Judge Aspen's Committee did a thorough study, from April 1991 until June 1992, on the factors contributing to the perceived serious erosion of lawyer civility.¹⁷⁸ After the Seventh Circuit implemented the Committee's recommended standards of professional conduct, those standards were adopted by courts and bar associations nationwide.¹⁷⁹

prior to scheduled depositions or for any other tactical reason.

HILLSBOROUGH COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY, § F (1987).

Similar professionalism codes have adopted the same provisions. See LOS ANGELES COUNTY BAR ASS'N, LITIGATION GUIDELINES § 6 (1989); SANTA CLARA COUNTY BAR ASS'N, CODE OF PROFESSIONALISM, § 9 (June 1992), available at <http://www.scba.com/about/professionalism.cfm> (last visited Mar. 25, 2002).

The Philadelphia Bar Association's "Working Rules of Professionalism" provide: "If your adversary is entitled to something, provide it without unnecessary formalities. Discovery disputes and motion practice cost time and money. They should be a last resort." COMM. ON PROFESSIONALISM, PHILADELPHIA BAR ASS'N, *supra* note 145, at 5.

Oklahoma adopted "Guidelines for Professional Courtesy" and a "Lawyers Creed". These were first adopted by the Oklahoma County Bar Association in November 1988, and were adopted by the Oklahoma Bar Association as the "OBA Guidelines for Professional Courtesy" and the "OBA Lawyer's Creed" in November 1989. The Oklahoma "Creed" and "Guidelines" have not been revised since their original adoption; hence, they do not contain some of the more pervasive provisions of the professionalism codes and standards that have since been adopted in other jurisdictions, particularly in regard to prohibitions on abusive discovery tactics, dishonesty and other forms of misrepresentation, be it by acts of commission or omission.

174. Aspen, *supra* note 5, at 1059.

175. COMM. ON CIVILITY OF THE SEVENTH FED. JUDICIAL CIRCUIT FINAL REPORT, 143 F.R.D. 441 (1992) [hereinafter SEVENTH CIR. FINAL REPORT].

176. *Id.* at 447. Cf. Martha Middleton, *7th Circuit OKs Rules on Civility*, NAT'L L.J., Jan. 11, 1993, at 18, 18.

177. SEVENTH CIR. FINAL REPORT, 143 F.R.D. at 443.

178. *Id.*

179. Aspen, *supra* note 5, at 1049. Cf. Hon. Marvin E. Aspen, *A Response to Civility Naysayers*, 28 STETSON L. REV. 253 (1998); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 520-21 (1994); Marvin E. Aspen, *What We Can Do About the Erosion of Civility in Litigation*, JUDGES J., Fall 1997, at 32, 32; Jeffrey Cole, *Searching for Collegiality: An Interview with Judge Aspen*, LITIG., Winter 1996, at 24, 35.

IV. LAW SCHOOL, JUDICIAL, AND BAR ASSOCIATION REACTIONS TO OVERZEALOUSNESS, INCIVILITY, AND SHARP PRACTICE

A. Law School Reaction

In an article entitled, *The Professional Responsibilities of Professional Schools: Pervasive Ethics In Perspective*, by noted author and teacher Deborah L. Rhode, Professor of Law and Director of the Keck Center on Legal Ethics and the Legal Profession of the Stanford Law School, Professor Rhode writes:

In a recent keynote address on professional responsibility, Supreme Court Justice Ruth Bader Ginsburg recounted a well-loved story about a student's first encounter with legal ethics. The professor in a core first-year course was describing a lawyer's tactic that left the student "bothered and bewildered." "But what about ethics?" the student asked. "Ethics," the professor frostily informed him, "is taught in the second year."¹⁸⁰

Rhode goes on to say that the anecdote describes the experience at most law schools. She recommends a different approach to teaching ethics, i.e., "a 'pervasive ethics' framework that integrates professional responsibility issues throughout the core curricula. . . . The Professionalism Committee's [the Professionalism Committee of the ABA Section on Legal Education and Admissions to the Bar] view, which I share, is that law schools need to supplement the basic ethics course with pervasive ethics instruction."¹⁸¹

B. Judicial Reaction

Overzealousness also can take the form of incivility toward fellow lawyers. In a New York case, a lawyer in a deposition referred to a female colleague as follows: "I don't have to talk to you, little lady." "What do you know, young girl?" "Be quiet, little girl."¹⁸² In sanctioning the attorney, the New York court held that the attorney displayed a lack of civility, good manners, and common courtesy and that he "tarnishes the image of the legal profession. . . . [A]n attorney's 'conduct . . . that projects offensive and invidious discriminatory distinctions . . . based on race . . . or gender . . . is especially offensive.'"¹⁸³ He was disciplined

180. Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, in *TEACHING AND LEARNING PROFESSIONALISM*, *supra* note 3, at 25 (quoting Justice Ruth Bader Ginsburg, Keynote Address at the Hofstra University Law School Conference on Legal Ethics: The Core Issues (Mar. 10, 1996)).

181. *Id.* at 25-26 (footnote omitted).

182. *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992).

183. *Id.* For a more detailed discussion of the case, see Allen K. Harris, *Sexist Remarks: Attorney Sanctioned for Incivility and Condescension Toward Female Colleague*, OCBA BRIEFCASE, Apr. 2000, at 6, 6.

under the New York Code provision banning behavior undertaken primarily "to harass or maliciously injure another."¹⁸⁴ Similarly, the Preamble to the *Oklahoma Rules of Professional Conduct* states that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."¹⁸⁵ Oklahoma Rule 4.4 requires "Respect for Third Persons,"¹⁸⁶ and Rule 8.4(d) prohibits misconduct prejudicial to the administration of justice.¹⁸⁷

Similar disciplinary decisions have been handed down in various states. For example, in the North Dakota case of *Vitko v. Vitko*,¹⁸⁸ the husband's lawyer was sanctioned for gender-biased and sexist remarks because he said "[t]hrowing a man out of the house in my opinion is justifiable homicide in some cases,"¹⁸⁹ and "[t]hat's what they all say" in reply to statement that a twelve-year-old became pregnant because she was raped.¹⁹⁰ The court said that such remarks violated Rules 3.5, 4.4, and 8.4.¹⁹¹ In California, a male attorney was sanctioned for sexist comments in a letter to a female attorney: "Male lawyers play by the rules, discover truth and restore order. Female lawyers are outside the law, cloud truth and destroy order."¹⁹² A Minnesota lawyer was publicly reprimanded and suspended for six months for using anti-Semitic epithets at a deposition: "Don't use your little sheeny Hebrew tricks on me, Rosen."¹⁹³ The discipline was based on the lawyer's engaging in undignified or discourteous behavior, a clear violation of the *Minnesota Code of Professional Responsibility*.¹⁹⁴

A Minnesota judge was disciplined for using gender-biased language in court proceedings in referring to female attorneys as "lawyerette" and "attorney generalette."¹⁹⁵ Discipline was based on the requirement of treating everyone who appeared before the court with courtesy and respect.¹⁹⁶

In *Lee v. American Eagle Airlines Inc.*, a federal court held that the incivility of two trial lawyers in an employment discrimination action justified a drastic reduction in their hourly rate requested for an attorneys fee award.¹⁹⁷ Florida U. S. District Judge Donald Middlebrooks held: "[U]nprofessional and disruptive conduct of counsel which prolongs the proceedings and creates animosity which

184. *Principe*, 586 N.Y.S.2d at 187.

185. OKLA. RULES OF PROF'L CONDUCT, pmbl., para. 4 (2001).

186. *Id.* R. 4.4.

187. *Id.* R. 8.4(d).

188. 524 N.W.2d 102 (N.D. 1994).

189. *Id.* at 105.

190. *Id.* at 105 n.1.

191. *Id.* at 105.

192. *In re Swan*, 833 F. Supp. 794, 196 (C.D. Cal. 1993), *rev'd sub nom.* U.S. v. Wunsch, 84 F.3d 1110 (9th Cir. 1996).

193. *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987).

194. *Id.* at 398.

195. *In re Kirby*, 354 N.W.2d 410, 414 (Minn. 1984).

196. *Id.* at 415.

197. 93 F. Supp. 2d 1322, 1334 (S.D. Fla. 2000).

interferes with the resolution of a cause can be considered in determining an award of attorney's fees."¹⁹⁸ As the trial got underway, one of the offending attorneys said loudly to his client, "Let's kick some ass."¹⁹⁹ The court described as "crass incivility" the attorney calling defendant's counsel a "Second Rate Loser," and saying "[l]et the pounding begin" as the trial began each day.²⁰⁰ The court reduced one attorney's hourly rate from \$300 an hour to \$150 an hour for his pretrial work and \$0 for his trial work; the other attorney's rate for the case was reduced to \$0.²⁰¹ The judge stated that the two attorneys' conduct in the litigation of the case fell "far below acceptable standards" and was at odds with their claimed \$300 hourly rate.²⁰² Eleventh Circuit case law permits federal courts to consider an attorney's ability and skill when determining a reasonable hourly rate.²⁰³ "In my estimation," Judge Middlebrooks said, "the manner in which a lawyer interacts with opposing counsel and conducts himself before the Court is as indicative of the lawyer's ability and skill as is mastery of the rules of evidence."²⁰⁴

C. Bar Association Reaction

Zealotry, overzealousness, or excessive zeal, in the form of misrepresentations and misstatements of law or fact, can occur not only in litigation, but also in business practice in the form of documents, letters, and oral statements. The Rambo lawyer is often less reluctant to behave in such a manner in non-litigation matters because it appears to the lawyer that there is less chance of the court and bar association learning about the conduct. For example, the lawyer can misstate an adversary's position, shade facts or place false facts in letters or in other unsworn communications or memoranda, or employ other dishonest conduct. It may appear to such a zealot that this course of action is worth the risk of discipline because she assumes that it will win favor with a combative, but paying, client whose "facts," conduct, or position are not solid. In an effort to deter such conduct, the Jacksonville (Florida) Bar Association has adopted "Professional Guidelines for Business Lawyers" that provide: "A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to

198. *Id.* at 1324.

199. *Id.*

200. *Id.* at 1325.

201. *Id.* at 1330.

202. *Id.*

203. *Lee*, 93 F. Supp. 2d at 1330.

204. *Id.* See also Henry R. Chalmers, *Lawyers Sanctioned for Uncivil Behavior*, A.B.A. LITIG. NEWS, Sept. 2000, at 8. Mr. Chalmers quotes Barry S. Alberts, a Chicago attorney and Co-chair of the ABA Section of Litigation Ethics and Professionalism Committee, who said about the case, "Zealous advocacy in our professionalism tradition has always been constrained by lawyers' responsibilities as officers of the court." *Id.* Chalmers also quotes Celia Guldweg Barenholtz, a New York City attorney and Co-chair of the ABA Section of Litigation Ethics and Professionalism Committee, who opined, "If judges don't let advocates get away with this kind of behavior, then this kind of behavior will become less common." *Id.*

mislead anyone.”²⁰⁵

Zealotry, overzealousness, and excessive zeal also interfere with the truth-seeking mission of discovery and the lawyer’s duty to comply with the discovery rules that are designed with that purpose in mind. It is no excuse that a lawyer is employed to be a “hired gun,” to engage in sharp practice, and to turn the representation into a “win at all costs” combat. As Professor Wendel, a former practitioner, states in *Public Values and Professional Responsibility*: “[L]awyers in private practice should be more public-spirited and should ‘abandon their indifference to the ends of being pursued by their clients.’”²⁰⁶

“Sharp practice” has, in fact, been studied and defined by an in-depth report of the New York County Lawyers’ Association as follows:

“Sharp practice” means overreaching, crafty or underhanded conduct in litigation—in short, “dirty tricks.” Examples include, but are not limited to: placing false facts in unsworn memoranda, misquoting court opinion, having *ex parte* communications with the court, writing letters purporting to “confirm” agreements that never took place, coaching a witness during a deposition with “speaking” objections, misstating an adversary’s position, withholding discoverable documents, and other obstructionist tactics.²⁰⁷

Virtually all New York County lawyers surveyed said they had encountered such conduct by their adversaries. A clear majority reported that underhanded conduct is more prevalent in state court than in federal court proceedings.

Lawrence K. Hellman, Dean of the Oklahoma City University School of Law, wrote about the results of the 1999 public hearings held in various parts of Oklahoma by the OBA Task Force on Professionalism & Civility, which he co-chaired.²⁰⁸ Dean Hellman points out that most lawyers do not realize that the duty of “zealous advocacy” was replaced by the duty of “diligent representation” when the *Model Rules of Professional Conduct* were adopted in Oklahoma in 1988.²⁰⁹ “One wonders,” he says, “just how much unprofessional and uncivil conduct today is premised on this misunderstanding.”²¹⁰

V. IMPACT ON PROFESSIONALISM, LAWYERS, CLIENTS, AND THE PUBLIC INTEREST

The impact of Rambo lawyers on clients, the public interest, and the practice

205. JACKSONVILLE BAR ASS’N, *supra* note 145, § M, no.20.

206. Wendel, *supra* note 10, at 4 (citing Harry T. Edwards, *A Lawyer’s Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1160 (1990) (quoting D.C. Circuit Judge Henry Edwards)).

207. INCIVILITY AND SHARP PRACTICE, *supra* note 129.

208. Lawrence K. Hellman, *Professionalism Forums Reveal Common Themes*, OCBA BRIEFCASE, June 1999, at 9, 9.

209. *Id.*

210. *Id.*

of law is not going away. What lawyers do to change the way they conduct themselves in non-courtroom representation activities to prioritize the truth-seeking mission of the justice system could go far to raise the reputation of lawyers in the eyes of the client and the public. What lawyers do will also insure client protection in general, reduce client costs and client aggravation, and reduce lawyer stress, which has become a growing concern.²¹¹ Positive change will also aid in the truth-seeking mission of the discovery phase of the justice system and help preserve the lawyer's privilege of self-regulation of the legal profession. The 1986 *ABA Report on Professionalism* concluded with the following assessment of the legal profession:

Lawyers are now to a greater extent than formerly business men, a part of a great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class.²¹²

The *ABA Report of the Commission on Professionalism* also brings home the sobering possibility of regulation of the profession by outside forces if it does not reform itself:

Similarly, it behooves the legal profession to work voluntarily toward the implementation of these and other reforms that will make us more a profession "in the spirit of a public service." If such action is not taken, far more extensive and perhaps less-considered proposals may arise from governmental and quasi-

211. Professor Ronald Rotunda, in an address to the 1999 annual banquet of *The Journal of the Legal Profession*, stated: "A 1990 empirical study at Johns Hopkins University showed that severe depression is more likely to occur among lawyers than among members of 103 other occupations. A statistical analysis, this one at Campbell University in North Carolina, discovered that 11 [percent] of lawyers in that state thought of suicide at least once a month!" Ronald D. Rotunda, 23 J. LEGAL PROF. 51, 53 (1999) (citing Amy Stevens, *Why Lawyers are Depressed, Anxious, Bored Insomniacs*, WALL ST. J., June 12, 1995, at B1).

Washington, D. C., litigator Robert Saylor, also wrote:

A steady diet of hardball litigation cannot 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 5, at 80. Cf. Jane H. Herrick, *Dealing with Depression*, YOUNG LAW., Dec. 2000, at 1, 1 ("[L]awyers are particularly prone to depression, considering the many stresses in their lives. A 1991 study by Johns Hopkins University revealed that of the 12,000 workers interviewed, lawyers were the most likely to be depressed.").

212. BLUEPRINT, *supra* note 9, at 304 (citing Louis D. Brandeis, *The Opportunity in the Law*, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 16 (Geoffrey C. Hazard & Deborah L. Rhode eds. 1985). Though sounding like a statement written today, it was made by Louis D. Brandeis, at the time a Boston lawyer, in 1905.

governmental entities attempting to regulate the profession. The challenge remains. It is up to us to seize the opportunity while it is ours.²¹³

The advent of legislative term limits in many states, along with the often successful lawyer-bashing of lawyer-political candidates, is generally interpreted, probably accurately, to mean that not only will many incumbents who are lawyers be departing the legislatures, but that fewer and fewer will be elected to most legislatures in the years ahead. Therefore, lawyers likely will not be serving in positions of seniority and influence, at their current and past level of prominence, once term limits take effect. Anti-lawyer legislation, and the very principle of lawyer self-regulation itself, therefore, may be issues challenging the profession in the years ahead. This is true especially if the profession is not perceived by the public and the legislatures as controlling Rambo lawyer tactics, the resulting escalating legal expenses, and impact on clients and the public interest.

The potential adverse impact on the legal profession of far fewer lawyers serving in state legislatures was not a prospect on the horizon during the study that led to the *ABA Report of the Commission on Professionalism*. The above-quoted admonition of the ABA, "It is up to us to seize the opportunity while it is ours," clearly carries more urgency today than it did in 1986.²¹⁴

VI. MAKING IT RIGHT

The question then becomes, what can we do about this perceived lack of professionalism? The "zealots" and the "Rambos" comprise a growing percentage of lawyers, sufficient numbers to have caused serious alarm and numerous articles and reports coming out against Rambo tactics in rather strong terms. The Executive Director of the Texas Institute for Legal Ethics and Professionalism, Austin attorney Beryl Crowley, in a 1999 address to the OBA Task Force on Professionalism & Civility, noted that the problem lawyers, by their misconduct, irrespective of their percentage, tarnish the profession as a whole, and by their example influence younger, more impressionable lawyers.²¹⁵

In discussions between the author and litigators in large metropolitan areas where lawyer anonymity is more prevalent, the concerned lawyers point out a disturbing negative effect that the Rambo lawyer has on the justice system: Rambo makes it difficult for the ethical, professional lawyer, because the Rambo lawyer inevitably tends to lower the level of conduct, engage in obstructionist tactics, increase client costs, and often cause the ethical lawyer's client to blame her lawyer for not being a zealot too. "If their lawyer can do it, why can't you?" is the all too familiar refrain.

213. BLUEPRINT, *supra* note 9, at 305.

214. See *supra* note 212 and accompanying text.

215. Beryl P. Crowley, Address at the OBA Professionalism and Civility Task Force (Feb. 5, 1999).

In smaller cities and towns, where all of the lawyers know each other, the Rambo lawyer does not thrive so easily. One lawyer, from a city small enough that the hundred or so lawyers know each other, told the OBA Professionalism and Civility Task Force at a public hearing in 1999, that when she goes to the state's larger cities to try cases, she prepares herself for the inevitable Rambo lawyers she often encounters there. She related that, in her experience, Rambo is far more prevalent in such larger urban areas because of lawyer anonymity. Therefore, Rambo is not under the peer pressure to behave in a civil manner and conduct himself professionally and forthrightly as he would in the medium and smaller size city. There the local lawyers and the judge(s) all know each other, usually on a first name basis.

Delaware Chief Justice E. Norman Veasey is the Chairperson of the ABA Ethics 2000 Commission, which was charged with reviewing and updating the *Model Rules of Professional Conduct*. In his article, *Making it Right*, Veasey asks "How can we move from fragmented, *ad hoc*, stop-and-start professionalism to more enduring methods?"²¹⁶ He cites the following developments in various states and recommends them for implementation in others: (1) uniform codes of civility and professionalism; (2) professionalism commissions or ethics institutes; (3) teaching a separate law school course on professionalism *in addition* to the course on legal ethics; and (4) mandatory "bridging the gap" from law school to practice.²¹⁷ Ten state appellate courts and/or bar associations have established or sanctioned professionalism entities—Florida, Georgia, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, and Texas.²¹⁸

One may ask, why does something need to be done? And, what needs to be done? The 1996 ABA Symposium entitled *Teaching and Learning Professionalism* states:

Civility . . . embodies the notion that there is a type of social behavior that is acceptable within the legal profession and a type that is not

. . . Most of us would agree that over the years, there has been a decided decrease in civility, and an increase in some forms of unethical behavior.²¹⁹

The Conference of Chief Justices has recommended an establishment of a lawyer professionalism commission by the highest state appellate court to emphasize standards of attorney conduct higher than the rules of legal ethics.²²⁰ Another positive step was the (briefly effective) modification of federal civil discovery rules in 1993. This took the form of mandatory-early disclosure, under

216. Veasey, *supra* note 5, at 47 (emphasis added).

217. *Id.*

218. GUIDE, *supra* note 2.

219. Hubert, *supra* note 77, at 117.

220. See GUIDE, *supra* note 2, Introduction.

Rule 26, of information relevant to the subject matter of the litigation.²²¹ This step made misleading discovery responses by lawyers and other concealment devices a risky undertaking, thus curtailing trial by ambush.

Under the 1993 mandatory disclosure rules, both the plaintiff and defendant in civil litigation were required to make initial disclosures regarding potential witnesses, documentary evidence, damages, and insurance. For example, lawyers, as officers of the court, were involved in assisting the court during the pre-trial phase in disclosing the facts to the court and to the other side.²²² Further, the 1993 provisions required parties to disclose the identity of any expert witnesses and the particular evidence that may be used at trial.²²³

However, it should be noted that the United States Supreme Court has recently amended key provisions of the 1993 Rule 26 amendments by eliminating mandatory disclosure of all information relevant to the subject matter of the litigation, cutting back the requirement to that of disclosing *only* information that supports the party's claim or defense.²²⁴ As one observer puts it, "Although broad fishing expeditions have long been frowned upon, a party propounding discovery requests may now have to use a hook instead of a net."²²⁵ The modification to the 1993 amendment is viewed as a step backward in the effort to prevent discovery abuse in addition to the alarming expense that it entails for clients and for the profession.

The challenge faced by the judiciary in the professionalism area is perhaps best summed up by Professor Nathan M. Crystal, University of South Carolina School of Law, in his article, *Limitations on Zealous Representation in an Adversarial System*.²²⁶ It is Professor Crystal's view that because most professionalism standards are expressly stated to be nonbinding, the ultimate answer to discovery abuse lies in the absence of judicial oversight, giving lawyers the incentive and the opportunity to use the rules for their own interest rather than to live by the spirit of

221. Ernes V. Stevenson, *Mandatory Discovery Reform*, A.B.A. LITIG. NEWS, Oct. 1993, at 3; Ralph A. Taylor, Jr., *Revised Federal Rules Leave Lawyers and Judges with Questions*, A.B.A. LITIG. NEWS, Apr. 1994, at 1; Ralph A. Taylor, *Voluntary Disclosure of Expert Witnesses Now the Rule*, A.B.A. LITIG. NEWS, Feb. 1994, at 10; Armando J. Rosell, *The 1999 Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure: Will They Take Civil Litigation One Step Further to a Fairer and More Efficient System 1* (unpublished Note, Oklahoma City University School of Law) (2000) (on file with author).

222. As envisioned by W. Bradley Wendel in his article, *Rediscovering Discovery Ethics*. See Wendel, *supra* note 111, at 895.

223. Rosell, *supra* note 221.

224. For a concise summary of the recent amendments to Rules 5(d), 26(a)(1), 26(b)(2), 26(b)(1)(2), 26(d), 26(f), 30(d), and 37(c), see Gregory P. Joseph, *The 2000 Amendments to the Federal Rules of Civil Procedure: A Preliminary Analysis*, A.B.A. PRETRIAL PRAC. & DISC. COMM. NEWSL. Winter 2001, at 4. Mr. Joseph describes the 2000 Amendments as "(i) universally mandatory, (ii) generally toothless, (iii) but a dangerous trap for the unwary." *Id.*

225. Douglas E. Motzenbecker, *Supreme Court Amends Key Provisions of the Federal Rules of Civil Procedure*, ABA LITIG. NEWS, Nov. 2000, at 1, 1.

226. Nathan M. Crystal, *Limitations on Zealous Representation in an Adversary System*, 32 WAKE FOREST L. REV. 671 (1997).

the rules.²²⁷ Crystal states: “[M]any trial judges probably still remain reluctant to become involved in discovery disputes except in extreme cases. Until this judicial attitude changes, discovery abuse will continue to plague litigation.”²²⁸ Edward M. Waller Jr., a Florida attorney and Special Adviser to the ABA Standing Committee on Professionalism, stated: “Promoting lawyer professionalism from the bench is a fitting task for judges—when they speak, everyone listens.”²²⁹

The Conference of Chief Justices’ 1999 report is consistent with Professor Crystal’s opinion:

Section II of this report consists of specific recommendation for state courts to improve lawyer conduct and enhance professionalism. . . . These recommendations address all of the areas of professionalism that were identified by survey respondents in the national study. In addition, these recommendations recognize that judges must lead by example in demonstrating civility and other characteristics of professionalism. An effective system of lawyer regulation is a necessary base for any efforts to enhance lawyer professionalism. The obverse applies as well—enhancing lawyer professionalism should aid the goals of effective lawyer regulation. This report recognizes that each state’s appellate court of highest jurisdiction has ultimate authority and responsibility for ensuring that that base is sufficient to protect the public against lawyer misconduct of every degree—major and minor.²³⁰

The Conference of Chief Justices’ report explains why judicial oversight of lawyer behavior is so critical:

Institutional support alone is insufficient to reverse the decline in professionalism and restore the legal profession to good standing in the eyes of the public. Every member of the bench, from the chief justice to the magistrates, has a personal responsibility to contribute to efforts to improve lawyer conduct and enhance professionalism. Because of their visibility within the legal community and in the larger community, judges are uniquely positioned to affect the level of professionalism in their respective jurisdictions.

. . . Judicial leadership in promoting professionalism should extend beyond the confines of individual courtrooms.²³¹

227. *See id.* at 730.

228. *Id.* at 730-31.

229. Waller, *supra* note 95, at 116.

230. CONFERENCE OF CHIEF JUSTICES, *supra* note 4, at 1.

231. *Id.* at 4-5.

The Conference of Chief Justices' report continues:

A hallmark of the Court's institutional support for professionalism should be an administrative mechanism (e. g., Commission on Professionalism), the sole objective of which is to promote professionalism in the legal profession and the judiciary.

... It should be instituted as a permanent, rather than ad hoc, component of the judicial infrastructure. It should report directly to the Court and should be endowed with sufficient authority to carry out its designated responsibilities.²³²

The Conference of Chief Justices' report also explains the symbolic importance of establishing an independent professionalism commission: "Its existence as an independent vehicle serves an important symbolic function—analogous to a cabinet position in the executive branch of government. It demonstrates the importance that the Court places on promoting professionalism in the legal profession and the judiciary."²³³

A. Resolution 15, Conference of Chief Justices

In March 2001, the Conference of Chief Justices and the ABA Center for Professional Responsibility held a conference sponsored by the Open Society Institute for state supreme court justices entitled, "The Role of the Court in Improving Lawyer Conduct and Professionalism: Initiating Action, Coordination Efforts and Maintaining Momentum." A draft implementation plan for the National Action Plan was presented and discussed. At the Conference of Chief Justices in Seattle, Washington, on August 2, 2001, the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices further considered the National Action Plan and adopted Resolution 15, *Adoption of an Implementation Plan for the National Action Plan on Lawyer Conduct and Professionalism of the Conference of Chief Justices*.²³⁴ According to the Resolution, the Conference approved the *Implementation Plan* for the *National Action Plan* and the Conference "urge[d] its members to present the Implementation Plan to their respective courts for use as feasible and appropriate in their respective jurisdictions."²³⁵

232. *Id.* at 3.

233. *Id.*

234. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 15: ADOPTION OF AN IMPLEMENTATION PLAN FOR THE NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM OF THE CONFERENCE OF CHIEF JUSTICES (Aug. 2, 2001).

235. *Id.*

B. Boundaries and Bright Lines—Pitfalls of Incivility, Zealous Representation, and Greed

The challenge faced by attorneys was addressed by Richard F. Ziegler, who wrote about the “boundaries and bright lines” of sanctionable misconduct: “[O]nly some of them [boundaries that delineate sanctionable conduct] are bright lines. Others become visible only once crossed. So litigators who transgress rules of civility and responsible, professional courtesy risk finding out that they’ve made a costly mistake.”²³⁶ Ziegler concludes after a discussion of cases involving incivility, that “*it is insufficient to rely on a professional obligation to zealously represent the client as an excuse to act like a jerk. . . . The challenge for the effective, professional litigator is to be tough and aggressive while being civil and courteous.*”²³⁷

The challenge faced by lawyers was also addressed in an article by former U.S. Attorney General Benjamin Civiletti:

We should not simply accept the fact that the public holds such little esteem for us and do nothing about it. In fact, there is a great deal that we can and ought to do. And, in the process, we can make the practice of law more satisfying and more fun. Instead of worrying about our image, we should focus on two concepts—one, the full performance of our duty to practice our profession in the interest of the public, and two, the practice of our profession consistent with personal values and satisfaction. If we are faithful to these fundamentals, we will be better lawyers, citizens, and humans, and our standing will grow accordingly.²³⁸

Civiletti also urged against excessive fees or other indicia of greed (“not in the public interest”), criticized undue delay (“a major culprit in the cost spiral”), and urged lawyers to do more pro bono work.²³⁹

VII. THE LAW STUDENT LOAN DEBT CRISIS AND ITS IMPACT ON PROFESSIONALISM

No discussion on the decline of professionalism would be complete without emphasizing the burgeoning law student loan debt crisis and its perceived effect on lawyer professionalism. One author states:

[L]aw student debt is outpacing entry-level starting salaries at a staggering rate. The average student now graduates with an estimated \$55,000 in debt—425 percent more than students who

236. Richard F. Ziegler, *Litigation: The Price of Incivility*, NAT’L L.J., Feb. 7, 2000, at A16.

237. *Id.* (emphasis added).

238. MOLL, *supra* note 58, at 18-19 (quoting Benjamin Civiletti, NAT’L L.J., Aug. 16, 1986).

239. *Id.* at 19.

graduated in 1988 Starting salaries for recent graduates have increased by only 14 percent over that same time period. As a result, the average law student's debt-to-income level—the percentage of incoming salary that goes toward paying off a student loan—has grown from an estimated 6 percent in 1987 to 21 percent today.²⁴⁰

Nellie Mae Corp., the nation's largest non-profit student loan provider found that lawyers who have been out of school between one and three years made an average of \$37,200 in 1996, but had an average education related debt of \$52,600.²⁴¹ The \$52,600 figure can be misleading if the new lawyer graduated from a private university. In 1999, the OBA Law Schools Committee learned that the average law student loan debt at the Oklahoma private universities was between \$70,000 and \$80,000; the average graduate's debt at the state-supported law school was \$45,000.²⁴² According to the National Association for Law Placement, the national median pre-tax salary for 1999 graduates was \$50,000 and a \$1,000 a month student loan payment generally must be earmarked to repay law school loans.²⁴³

Money as a law student's priority was discussed in *The Lure of the Law*, which surveyed Southern and Midwestern universities and law schools.²⁴⁴ A Duke undergraduate prelaw adviser said that among the priority list of questions by undergraduates was, "Am I going to recoup my educational investment and live well soon?"²⁴⁵ A Vanderbilt Law School third-year student is quoted as saying: "The promise of Big Bucks is important here. The only overriding element is a sense of competition. Ethics and principles rarely figure in."²⁴⁶

There was concern by the OBA Law Schools Committee and elsewhere about the potential effect that such a staggering debt load has on the ethics, professionalism, and independent judgment of new lawyers whose student loan payment is larger than their house payment, especially in light of low starting lawyer salary levels. One solution is for lenders to offer to extend amortizations on student debt to all new graduates in order to lower the monthly payment and give new lawyers time to get on their feet. Professionalism would thereby be enhanced because the temptation to file frivolous lawsuits may thereby be reduced. The questions become: Will the profession survive the tuition affordability crunch? Does this economic pressure on thousands of new lawyers starting out every year

240. Jack Crittenden et al., *Lawopoly: Pass Go, borrow money, pay tuition. Repeat cycle. Welcome to the game of law school debt—where the money is real and the stakes are high*, NAT'L JURIST, Feb. 1999, at 14, 14-15.

241. Mark Hansen, *And Debt's All, Folks: To New Lawyers Paying Off Student Loans, "Budget" is Not a Bad Word*, A.B.A. J., June 1999, at 24, 24.

242. OBA Law Schools Committee, Interviews of students at the University of Oklahoma College of Law, Oklahoma City University School of Law, and Tulsa University College of Law (1999).

243. Lisa Stansky, *About Those Loans*, STUDENT LAW., Mar. 2001, at 24, 25.

244. See MOLL, *supra* note 58, at 23-24.

245. *Id.* at 24.

246. *Id.*

mean more frivolous lawsuits?

VIII. WHY RAMBO HAS NOT GONE AWAY

Regrettably, Rambo has, to date, little to fear in most jurisdictions, especially in state court due to appellate courts' unwillingness to uphold trial court sanctions. Rambo acts with impunity because he knows that the odds are low that his peers, or judges, will learn of or take action against his antics, especially in urban areas where there are more lawyers than ever before. Rambo takes comfort in the fact that most bar associations are overworked.²⁴⁷ Rambo knows that he can also misapply, with client and some peer encouragement, the misunderstood and generally extinct former black-letter rule requiring "zealous representation" not as an ethical responsibility, but as "a weapon to club his opponents."²⁴⁸ In forty-two states and the District of Columbia, zealous advocacy has been replaced by the duty of diligent representation in Rule 1.3.²⁴⁹ Rambo is also probably comforted by the knowledge that, except for urgings by bar presidents and other bar officials, exhorting lawyers to higher levels of professionalism or reminding them of aspirational lawyers' creeds (which often do not address "hot" issues such as frivolous lawsuits and other misrepresentations, discovery concealment and other discovery abuse), and unless he lives in one of the ten states that have created professionalism commissions or one of the few others that require professionalism CLE or have instituted peer review programs, he does not have to hear reminders about professionalism—at least not from any state or local authority that might influence his tactics.

In a society of increasing numbers of lawyers, particularly in urban areas, Rambo need not fear the potential sobering influence of professional or social interaction with his peers. The days of well-attended regular monthly county bar luncheons and lawyer social clubs is a thing of the past in many local bars due to lack of participation by lawyers. While Inns of Court are certainly a positive professionalism influence, the percentage of lawyers who are members is small.

Worse, Rambo gets encouragement from the very system itself. A lawyer's signature is a representation that all matters asserted therein are the truth to the lawyer's knowledge, information, and belief "formed after an inquiry reasonable under the circumstances," whatever that means.²⁵⁰ This requirement does not deter Rambo who, in his mind, can "pass the buck" to his client. His client, of course, is free from the penalty of perjury for the petition's content. To make matters easier for Rambo, the 1993 amendment to Federal Rule 11 (upon which Oklahoma Rule 2011 is based), was left "gutted" and "toothless," according to Justices Scalia and Thomas who dissented from the amendment's adoption.²⁵¹ They warned: "[T]he

247. Wendel, *supra* note 10, at 2.

248. Conlon, *supra* note 160, at 50.

249. See *supra* note 116; OKLA. RULES OF PROF'L CONDUCT R.1.3 (2002).

250. OKLA. STAT. tit. 12, § 2011 (West 1993 & Supp. 1994) [hereinafter "Rule 2011"]; see also FED. R. CIV. P. 11.

251. Stacey L. Haws, *1993 Changes to Rule 11 and Rule 2011*, 65 OKLA. B.J. 1119, 1124 (1994).

likelihood that frivolousness will even be challenged is diminished by the proposed rule."²⁵² The amendment to Oklahoma Rule 2011 that soon followed, like Federal Rule 11, eliminated the requirement that a pleading be "well grounded in fact."²⁵³ The author of *The 1993 Changes to Rule 11 and Rule 2011* states:

The new versions of Rule 11 and Rule 2011 eliminate the need to think, or investigate, first. An attorney is only required to perform inquiry "reasonable under the circumstances." The certification indicates only that he or she believes the allegations or factual contentions, or denials thereof, "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Thus the new Rules encourage the practice of pleading everything imaginable and hoping some allegation will survive discovery.²⁵⁴

One author has observed that trial judges are reluctant to become involved in discovery disputes,²⁵⁵ despite sanction authority to curb abuses.²⁵⁶ Perhaps there is a similar reluctance to sanction lawyers for filing frivolous lawsuits. Many lawyers assume that state trial judges refrain from imposing such sanctions because they are elected, whereas appointed federal judges, who have demonstrated more inclination to impose sanctions, do not have to face election and are not involved in needing lawyer support in that process. However, it appears that Justices Scalia and Thomas were closer to the real reason: Rule 11 (and Rule 2011) were rendered "gutless" and "toothless" by the 1993 amendments.

The unsurprising result of all of this is the objectionable filing by Rambo lawyers of frivolous petitions containing clever manipulations of the facts, out-and-out misrepresentations, misstatements, and even blatant falsehoods. These manifestations of Rambo's ability to revise history in alleging manufactured, manipulated, and convoluted facts, just to get into court, or his failure or refusal to conduct a due diligence investigation to obtain the real facts, are often intended, among other things, to create self-serving, but non-existent, issues of fact designed to defeat motions for summary judgment. Additionally, this conduct is used to harass the opponent in the hopes of extorting a settlement.

This devious tactic would not be possible if the requirement that a pleading be "well grounded in fact" were still the statutory standard, or if all petitions and answers containing assertions or denials of factual contentions were required by

252. *Id.* (footnote omitted).

253. *Id.*

254. *Id.* Cf. Charles W. Adams, *Recent Developments in Oklahoma Law—Civil Procedure*, 30 TULSA L.J. 485, 496 (1995). Adams, then-Chairperson of the Civil Procedure Committee, OBA, stated: "In addition, a party is now allowed to make allegations or factual contentions without evidentiary support as long as they are specifically identified and the party certifies that evidentiary support is likely to follow after a reasonable opportunity for discovery." *Id.*

255. See Crystal, *supra* note 226, at 730.

256. See, e.g., OKLA. STAT. ANN. tit. 12, § 3227 (West 1993 & Supp. 2002).

statute to be verified under oath by the client. The lawyer's preparation of such pleadings would then receive a degree of care that would rate the truth high in the preparation and filing of pleadings. The effect of Rule 11 and of Rule 2011, intended or not, is that truth is not highly rewarded. Filing "everything imaginable" is highly rewarded; hence Rambo flourishes with fees for what amounts to authorized, largely unsanctioned, chicanery that is bringing the legal profession into increasing disrepute. There is too little risk to the unscrupulous client and her pliable Rambo lawyer. They play expensive discovery games—the every day spectacles which get the profession much unfavorable public attention while Rambo, in pursuit of a fee, takes advantage of his and the client's questionable use of the legal process.

IX. CONCLUSION

Rambo will not go away until more is done to discourage and curtail his profitable tactics. Clearly the lawyer deserves the lion's share of the blame, not the client, because the lawyer can just say "No." Due to Rambo's conduct, there is a growing concern in the judiciary, the bar, and society about the importance of lawyer professionalism and civility as critical factors in both (1) the efficient and effective administration of justice; and (2) in the public's ability to afford legal services in an atmosphere of unprofessional tactics.²⁵⁷ Unprofessional and unethical lawyer behavior towards fellow lawyers and their clients degrades the mission of justice and impedes the settlement of disputes. U. S. Fifth Circuit Senior Judge Thomas M. Reavley, former Chair of the Texas Center for Legal Ethics & Professionalism, said: "Who will respect a profession that aspires to deceive and pretends that its system does justice by choosing the best liar?"²⁵⁸ The Texas Academy for Advanced Legal Ethics, in *The Foundations of Legal Ethics*, states: "It is not a trivial question, . . . what we are talking about is how one should live."²⁵⁹ The Foreword to *The Foundations of Legal Ethics* states its commitment to the study of legal ethics at a level "beyond the rules."²⁶⁰

The lawyer's reward for professional conduct was discussed by New Jersey Chief Justice Deborah T. Poritz at Professionalism 2000, the fifth annual professionalism conference of the New Jersey Commission on Professionalism in the Law at Seton Hall University School of Law.²⁶¹ "Professionalism, in the end," Justice Poritz said, "is a higher standard that leads to public respect, satisfaction for

257. See *Dondi Prop. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

258. Reavley, *Magnificent Profession*, *supra* note 5, at 1039.

259. TEXAS ACAD. FOR ADVANCED LEGAL ETHICS, TEXAS CTR. FOR LEGAL ETHICS & PROFESSIONALISM, *THE FOUNDATIONS OF LEGAL ETHICS* vii (1997) (citing BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 1 (1985) (quoting Socrates as reported by Plato)).

260. *Id.*

261. New Jersey Comm'n on Professionalism in the Law, *Professionalism 2000 Conference Offers a Regional Flavor*, COMMISSION Q., Fall 2000, at 1, 1.

a job well done, or a life and career well spent.”²⁶² Poritz also said that “young lawyers need to realize that professional conduct breeds success.”²⁶³

Georgia Chief Justice Robert Benham, speaking at the 2001 Law Day Luncheon of the Oklahoma City University School of Law, commented on the results of an ABA survey which indicated that, “People don’t want just the smartest lawyer, but the smartest and meanest lawyer.” In his speech on professionalism and lawyering entitled, *Lawyering for One America*, Benham stated:

Our lawyers are better educated, better trained, more committed and more tenacious than any other lawyers in the world. But that is not enough. To have a workable and profitable community, we need standards higher than the law. “It’s legal and I ought to be able to do it,” is too low; it’s just a basis. We should not consider the law a ceiling.²⁶⁴

The practical impact on the public, clients, and the justice system caused by unprofessional lawyer conduct has been the subject of growing concern and commentary in recent years. The impact on the judicial system was best summed up by former Justice Harold G. Clarke of the Georgia Supreme Court, opining that the truthfulness of Leo Durocher’s alleged quote, “nice guys finish last,” was not only doubtful on the baseball field, but more doubtful in the courtroom and law offices.²⁶⁵ The jurist concluded:

Polarization of lawyers and parties resulting from uncivil conduct frequently creates an unfortunate outcome for all concerned. Civility with the fellow lawyer lies in the *public interest* because of the likelihood of quicker resolution of disputes with better results. Long experience teaches that undue aggressiveness leads to the kind of polarization which often prevents settlement or at least deters more efficient resolution of contested disputes. *This even impacts on the public interest because of the increased financial burden on the judicial system.*²⁶⁶

Put another way, the late U. S. Supreme Court Chief Justice Warren Burger said:

Lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice. . . . I suggest the necessity for civility

262. *Id.*

263. *Id.*

264. Chief Justice Robert Benham, Georgia Supreme Court, Address at the Law Day Luncheon of the Oklahoma City University School of Law (Apr. 19, 2001).

265. Clarke, *Professionalism: Repaying the Debt*, *supra* note 3, at 172.

266. *Id.* (emphasis added).

is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court; and their worst conduct will be emulated . . . more readily than their best.²⁶⁷

Chief Justice Burger would no doubt have agreed with the need for lawyer mentoring urged by Justice Harold Clarke at the Georgia Convocation on Professionalism: “[L]aw firms ought to institute mentor programs. The older lawyers ought to make themselves available to the associates as counselors, role models, or even, according to one word that kept recurring, ‘heroes.’”²⁶⁸

Georgia Chief Justice Robert Benham, in his 2001 Law Day address in Oklahoma City, said that the legal profession is “marveled at by most, maligned by a few, and misunderstood by many.”²⁶⁹ A legal profession “misunderstood by many,” whose public image and reputation are injured by Rambo lawyers within its ranks, has ample reason to actively strive in an organized way to provide leadership through an institutional vehicle to encourage standards of professionalism which are beyond the rules. To achieve this goal, the above-referred to institutionalized professionalism programs in ten states have been established to encourage a level of lawyer professional behavior above the ethics rules.

Recognizing the marked decline in professionalism and its potential impact on the institution of the law, the legal profession, the well-being of lawyers, and the justice system, the Conference of Chief Justices and the ABA have done the bar and the judiciary a timely and needed service in issuing their reports *A National Action Plan for Lawyer Conduct and Professionalism* and *Guide to Professionalism Commissions*, respectively. These reports can only be considered landmark developments in the history of the profession. These reports recommend that each state establish a lawyer professionalism commission, as a free-standing entity to insure its independence and continuity; and that the commission have as its goal, the making of professionalism a higher priority to the state’s lawyers, the raising of the consciousness of lawyers about professionalism, persuading lawyers to conduct themselves at a level above the ethical rules, and encouraging law students, lawyers, and judges to exercise the highest levels of professional integrity in their relationship with clients, other lawyers, the courts, and the public.

267. Hubert, *supra* note 77, at 113.

268. Clarke, *The Judiciary as the Guardian of Professionalism*, in *TEACHING AND LEARNING PROFESSIONALISM*, *supra* note 3, at 75.

269. Benham, *supra* note 264.