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Incivility in the Legal System - Maybe It's the Rules

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INCIVILITY IN THE LEGAL SYSTEM? MAYBE IT'S THE RULES*

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I. INTRODUCTION

IT is all the rage to criticize lawyers and attribute denigration of the legal profession to the unscrupulous tactics of the "Rambo" lawyer. What many people, both within and outside the legal community, fail to grasp is that the maladies of the profession are not exclusively, or even primarily, attributable to the zealous advocate. Rather, the lawyer is part of an adversarial system that arms the attorney with various rules which encourage, and

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sometimes require, the lawyer to use the very tactics that subject the profession to overwhelming criticism. Furthermore, there is a real tension in a system that places a duty on a lawyer to zealously advocate on behalf of the client while simultaneously observing a duty to the court.

A variety of rules and codes have emerged to attempt to curb the incivility of lawyers. Rather than having a curative effect, these rules and codes have spurred and threaten to continue to spur additional litigation and have compounded the incivility problem. A viable solution to the problem is to alter the focus from rules designed to punish the lawyer for over-zealousness to rules which eliminate the tools by which the lawyer abuses the system. Rules favoring automatic disclosure and focusing the scope of initial discovery during the pre-trial stage are a promising step in that direction.

[W]e judicially know that litigation is conducted today in a manner far different from years past. 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. — Dondi Properties[1]

A. *DONDI PROPERTIES CORP. V. COMMERCE SAVINGS AND LOAN ASSOCIATION*

Courts have authority to impose a variety of sanctions designed to control the conduct of litigants and attorneys. *Dondi Properties Corp. v. Commerce Savings and Loan Association*[2] enumerates the various sources of that authority.[3] In *Dondi* the judges of the United States District Court for the Northern District of Texas adopted standards of lawyer conduct from a civility code and required the standards to be followed under threat of sanctions. This action was in response to "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."[4]

The opinion addressed two actions before the court, *Dondi Properties Corp. v. Commerce Savings and Loan Association* and *Knight v. Protective Life Insurance Co.*[5] In *Dondi*, the magistrate was presented with over twenty pleadings and letters comprising various defendants' motions for sanctions involving the plaintiffs' alleged noncompliance with discovery orders.[6] Additionally, sanctions were requested against one plaintiff's counsel for contacting a witness without informing the witness that he was an attorney representing the plaintiffs.[7] In *Knight*, the plaintiff moved to strike a

1. Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (en banc and per curiam).
2. *Id.* at 284.
3. *Id.* at 287. The court primarily relies on Federal Rules of Civil Procedure 16(f) and 37, 18 U.S.C. § 401, and 28 U.S.C. § 1927. *Id.*
4. *Id.* at 286.
5. *Id.* at 285.
6. *Dondi*, 121 F.R.D. at 289.
7. *Id.* at 290.

brief filed in violation of a local rule that required leave of court.[8] After standards of conduct were set by the district court, both the judge in *Knight*[9] and the magistrate in *Dondi*[10] denied the motions for sanctions.

In addition to noting the sources of the court's sanction authority to require civility, *Dondi* also discusses the court's inherent power to regulate the administration of justice.[11] But, the *Dondi* court does not elaborate on the conduct it seeks to control. In addition, other than the facts outlined in conjunction with the sanctions requested in the *Dondi* actions, no evidence of the prevalence of these practices is proffered, although in a footnote, the court cites a report by the Texas Bar Foundation that recounts observations by leading judges, lawyers, and legal educators of inappropriate conduct.[12] The lack of concrete examples is perhaps because, as one commentator observed (with apologies to Justice Stewart), the problem is like pornography; it may not be readily defined, but "you know it when you see it."[13]

Dondi is unique because it takes aspirational standards set forth in a voluntary civility code and makes them mandatory. The standards described in *Dondi* are enforceable as follows:

> Malfeasant counsel can expect . . . an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."[14]

B. THE PROBLEM

Tension has always existed in our adversary system of justice between the lawyer's duty of zealous advocacy for the client, and that same lawyer's duty to the court and the system of justice generally. Rules of conduct developed for lawyers throughout this century, while confirming that an attorney's first duty is to the client, still subject that duty to limits imposed by the attorney's duty to the court. Early on, these limits were not much more than simply prohibiting the lawyer from committing a fraud upon the court. However, recent years have seen the evolution of procedural rules designed to force counsel to permit discovery where objecting is baseless, and prohibit counsel from making baseless discovery requests. This could be considered a second level of limitation on the lawyer's duty to the client. Rule 11 of the Federal Rules of Civil Procedure is also on this second level. Rule 11 requires lawyers not only to avoid misleading activities and harassing the opponent, but also to conduct a diligent review of the client's claim before asserting it in

8. *Id.* at 286.
9. *Id.* at 292.
10. *Id.* at 290.
11. *Dondi*, 121 F.R.D. at 287.
12. *Id.* at 286 n.6 (citing Texas Bar Foundation Conference on Professionalism (Dec. 1984)).
13. Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J. 78, 79 (Mar. 1988); *cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
14. *Dondi*, 121 F.R.D. at 288 (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc)).

court.[15] These rules heighten the tension between zealous advocacy and duty to the court and the system of justice because lawyers are required to "judge" their client's position.

Overlaying this second level, now, is the civility code. Is *Dondi* taking the civility code movement from an effort to address the sagging public image of lawyers and a simple plea for collegial relations in the legal community, to a substantive development, the result of which is to raise the tension between lawyer as advocate and as officer of the court to an explosive level? That is to say, is the legal profession's concern about professionalism forcing counsel to, not only temper their duty to the client with a conflicting duty to the justice system but, for the sake of "cooperation," give the benefit of the doubt to the opposition?

Today, legally binding canons of ethics have been adopted in every jurisdiction across the United States.[16] Federal and state rules of procedure have been enacted or amended to sanction improper litigation practices.[17] Also, an increasing number of voluntary bar associations as well as a growing number of integrated bars are adopting creeds of professionalism, commonly referred to as "civility codes."[18] Most recently, all this effort has been directed at the problems caused by "Rambo" litigators who employ "hardball" tactics.[19] A question should be posed, however, as to whether the methods used to curb these practices are valid.

First, it is debatable whether "sharp" practices are as pervasive as some have implied. Arguably they are no more prevalent than in the past except that there are just more lawyers.[20] These practices and the concerns of the bench, bar, and general public are not recent phenomena but are both long-

15. *See* FED. R. CIV. P. 11.

16. E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 577 (1961).

17. J. D. Page & Doug Sigel, *The Inherent and Express Powers of Courts to Sanction*, 31 S. TEX. L.J. 43, 46-69 (1990).

18. *See* Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 141 F.R.D. 371, 422-23 (1991) [hereinafter *Interim Report on Civility*] (noting that ethical creeds are used by the following bars: Akron (Ohio), Arizona, American Bar Ass'n Tort and Insurance Practice Section, Dallas (Texas), Hillsborough County (Florida), Houston (Texas), Kansas City (Missouri), Kentucky, Lafayette County (Mississippi), Los Angeles County (California), Maine, Massachusetts, Memphis and Shelby County (Tennessee), Mississippi, Montana, Multnomah (Oregon), Nashville (Tennessee), Nebraska, North Carolina, Pulaski County (Arkansas), Shreveport (Louisiana), and Texas); Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 949 n.10 (1991) (adding El Paso County (Colorado), Hinds County (Mississippi), and Oregon Association of Defense Counsel & Oregon Trial Lawyer's Association); Eugene Cook et al., *A Guide to the Texas Lawyer's Creed: A Mandate for Professionalism*, 10 REV. LITIG. 673, 691 (1991) (adding Austin (Texas)), Corpus Christi (Texas), and Texas Trial Lawyers' Association and Texas Association of Defense Counsel); William A. Brewer, III & Francis B. Majorie, *One Year After Dondi: Time to Get Back to Litigating?*, 17 PEPP. L. REV. 833, 833 n.1 (1990) (adding American College of Trial Lawyers, Beverly Hills (California), Colorado, and Louisville (Kentucky)); Foster D. Arnett, *The Trial Lawyer and Lawyering: Personal Values and Perceptions*, 33 TRIAL LAW. GUIDE 121, 122 (1989) (adding Cleveland (Ohio), Florida, Louisiana, Maryland, Minnesota, Rhode Island, and Virginia).

19. Brewer & Majorie, *supra* note 18, at 833-34.

20. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.4.1 (West 1986) (lawyer population has increased from 41,000 in 1870 to 530,000 in 1980).

standing and historically recorded. Second, much of the "hard" in "hardball" is derived from the actuality that someone has insisted on strict adherence to the rules of procedure, local rules of court, and legal customs. Finally, in this light, could it be said that courts, attempting to stem the tide of gamesmanship, have created rules that in fact exacerbate the game and send the search for truth to the showers?

II. HISTORICAL PERSPECTIVE

Dissatisfaction with the administration of justice is as old as law. [D]iscontent has an ancient and unbroken pedigree. — Roscoe Pound[21]

A. BIRTH OF RAMBO

To be sure, much is being written today about incivility in litigation and between opposing attorneys.[22] Rambo, the movie hero willing to fight to the death, is the vogue term used to describe the combative lawyer.[23] Rambo lawyers are accused of employing sharp practices, offensive or excessive gamesmanship, uncivil litigation maneuvers, and hardball tactics.[24] As expected, the public views this behavior as the natural consequence of the profession's motivation of greed and the thrill of winning the game, rather than a result of the nature of our adversary system. Although there is much ado over the "recent" birth of the Rambo lawyer, plenty was said about questionable practices of lawyers in previous decades. Lawyers have been disliked by the public for centuries.

One of the earliest recorded statements against lawyers was written in approximately 300 B.C. by Plato, the Greek philosopher, condemning the

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21. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395 (1906).

22. *See, e.g.*, S.G. Supply Co. v. Greenwood Int'l, Inc., 769 F. Supp. 1430, 1443 n.1 (N.D. Ill. 1991) (inordinate, unjustified burden on the court is created due to counsels' hardball tactics); *Dondi*, 121 F.R.D. at 286 (valuable judicial and attorney time is spent on unnecessary conflicts and sharp practices between lawyers); Unique Concepts, Inc. v. Brown, 115 F.R.D. 292, 292 (S.D.N.Y. 1987) (case was "marred from its inception by incivility and a consistent lack of cooperation between counsel"); Arnett, *supra* note 18, at 122 (noting that the media writes of the lack of legal professionalism "ad infinitum, ad nauseam and without surcease"); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 597-600 (1985) (detailing procedural abuses); Noel Fidel, *Waltz Me Around Again, Willie . . . Reflections on Discovery Practice, Sharp Elbows, Junk Yard Dogs, and the Elusive Spirit of Cooperation*, 27 FOR THE DEF. 26, 26 (Jan. 1985) (modern litigation is replete with endless, needless discovery clashes).

23. *See, e.g.*, Eugene Cook et al., *A Guide to the Texas Lawyer's Creed: A Mandate for Professionalism*, 10 REV. LITIG. 673, 674 (1991) (Rambo litigators have hired-gun mentality and use combative tactics); Interim Report on Civility, at 22 (incivility in litigation attributed to general meanness and Rambo tactics); Walter K. Olson, *System Overload*, 77 A.B.A. J. 70, 70 (Oct. 1991) (Rambo lawyers carry on like schoolyard bullies); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 637 (1990) (Rambo lawyers have "take no prisoners" attitude).

24. For some anecdotal accounts of Rambo tactics, see Judge Sidney A. Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy*, 20 TEX. TECH L. REV. 787, 789-92 (1989); Alexandra W. Albright, *Rambo Litigation Tactics: A Proposed Cure*, 7 ADVOC. 3, 3 (Dec. 1988).

"small and unrighteous" soul of the lawyer.[25] Between the years 300-500 A.D., some of the most prestigious law schools turned out hordes of young lawyers who invaded this "lucrative science . . . hot for riches."[26] *The Decline and Fall of the Roman Empire* has this interesting passage regarding new members of the Roman Empire bar:

> In the practice of the bar these men had considered reason as the instrument of dispute; they interpreted the laws according to the dictates of private interest; and the same pernicious habits might still adhere to their characters in the public administration of the state. The honour of a liberal profession has indeed been vindicated by ancient and modern advocates, who have filled the most important stations with pure integrity and consummate wisdom; but in the decline of Roman jurisprudence the ordinary promotion of lawyers was pregnant with mischief and disgrace. The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of freedmen and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits, and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the gravity of legal professors, by furnishing a rich client with subtleties to confound the plainest truth, and with arguments to colour the most unjustifiable pretensions. The splendid and popular class was composed of the advocates, who filled the Forum with the sound of their turgid and loquacious rhetoric. Careless of fame and of justice, they are described for the most part as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment; from whence, after a tedious series of years, they were at length dismissed, when their patience and fortune were almost exhausted.[27]

Shakespeare penned this line, oft quoted out of context, in the sixteenth century, "[T]he first thing we do, let's kill all the lawyers."[28] In the 1800s, Abraham Lincoln spoke of the "vague popular belief that lawyers are necessarily dishonest."[29] He also believed that this perception of lawyers was common, almost universal.[30] Nearly a century later, the great American poet Carl Sandburg wrote:

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25. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 589 (1985) (quoting Plato, *Theaetetus*, in THE DIALOGUES OF PLATO 143, 175 (Benjamin Jowett trans. 1937)).

26. 1 EDWARD GIBBON (1737-1794), THE DECLINE AND FALL OF THE ROMAN EMPIRE, Chapt. XVII, 533 (Modern Library ed. 1932).

27. *Id.* at 533-36.

28. William Shakespeare, *King Henry the VI, Second Part*, Act IV, Scene II, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 579 (1975). *Compare* Hoffner, *"The First Thing We Do, We'll Kill All the Lawyers,"* B. TABS, Feb. 1991, at 3, col. 1 (positing that Shakespeare's line, read in context, means that tyranny cannot exist in a free legal system) *with* Glenna Whitley, *Why We Love to Hate Lawyers*, D MAG., May 1991, at 48 ("Never mind the quote's context — it's the sentiment that's survived. . . .").

29. JOHN PAUL FRANK, LINCOLN AS A LAWYER 4 (1961) (quoting 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81, 82 (Roy Basler ed. 1954) ("Notes for a Law Lecture," July 1, 1850)).

30. *Id.*

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?[31]

Today, narratives of questionable practices by lawyers persist although the terminology has been modernized.

B. QUESTIONABLE PRACTICES

1. Sharp Practices

Case law reveals that attorneys have engaged in "sharp practices" or "sharp dealings" since the early days of American jurisprudence. Although no real definition for the term can be found, sharp practices are equated with chicanery and acting in bad faith.[32]

An example of a sharp practice is illustrated in a 1973 case involving a plaintiff's attorney who dismissed a party in a lawsuit to prevent the deposition of a witness from being taken.[33] This tactic forced a unilateral settlement upon the unsuspecting insurance carrier.[34] The court stated that the attorney's action was possibly unethical, however, no relief was accorded the insurance carrier nor were sanctions imposed on the attorney.[35]

Other court denominated sharp practices include lawyers questioning a witness in a manner suggesting answers to a jury, knowing the witness will assert the privilege against self-incrimination, lawyers failing to disclose evidence, and lawyers disclosing only half-truths to opposing counsel.[36]

2. Gamesmanship, the Sporting Theory of Justice[37]

As with sharp practices, instances of gamesmanship have been recorded since the early days of American history. Indeed, early judicial proceedings were characterized as "a battle of wits rather than a search for the truth."[38] The Federal Rules of Civil Procedure were originated in 1938 to take the

31. Carl Sandburg, *The Lawyers Know Too Much*, in SMOKE AND STEEL 85 (Harcourt, Brace & Co. 1920).

32. *See* Brown v. Royalty, 535 F.2d 1024, 1029 (8th Cir. 1976) (not in good faith); Carsey v. United States, 392 F.2d 810, 813, 815 (D.C. Cir. 1967) (Levanthal, J., concurring) (bad faith; chicanery).

33. Carter v. Aetna Casualty & Sur. Co., 473 F.2d 1071, 1074, 1077-78 (8th Cir. 1973).

34. *Id.* at 1079.

35. *Id.*

36. *E.g.*, National Treasury Employees Union v. Internal Revenue Serv., 735 F.2d 1277, 1279 (11th Cir. 1984) (failing to disclose); Brink's, Inc. v. City of New York, 717 F.2d 700, 715 (2d Cir. 1983) (Winter, J., dissenting) (questioning witnesses); United States v. DeMichael, 692 F.2d 1059, 1063 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983) (failing to disclose); United States v. Miranda, 526 F.2d 1319, 1323 n.3 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976) (failing to disclose); Prudential Ins. Co. v. Turner & Newall, P.L.C., 137 F.R.D. 178, 181 (D. Mass. 1991) (disclosing half-truths).

37. At least one court does not view "typical wrangling and cat-and-mouse gamesmanship" as objectionable behavior. *E.g.*, *In re* Data Access Sys. Sec. Litig., 103 F.R.D. 130, 148 (D.N.J. 1984).

38. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (1970).

"sporting element out of litigation."[39]

In *Hickman v. Taylor*, the Supreme Court of the United States explained:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving[,] issue-formulation and fact-revelation were performed primarily and inadequately by pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. . . . The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts . . . . Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[40]

However, these and subsequent innovations in American jurisprudence have yet to end gamesmanship in litigation.[41] The "sporting theory"[42] of

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39. Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961). Prior to the institution of discovery rules, procedural gamesmanship was characterized by "lawyers seizing upon mistakes made by their counterparts in order to gain some advantage." Outley v. City of New York, 837 F.2d 587, 590 (2d Cir. 1988). In 1941, the Supreme Court of Texas promulgated the Texas Rules of Civil Procedure under authority of the Rules of Practice Act of 1939. Nathan L. Hecht, *Refining Texas Court Rules: Toward a Faster, Less Expensive, Kinder, Gentler Justice System*, 8 ADVOC. No. 3a, 3 (1988).

40. Hickman v. Taylor, 329 U.S. 495, 500-01 (1947). Today, nearly fifty years after the *Hickman* decision, lawyers and judges define lawyers' uncivil conduct as "strategic non-compliance in discovery, including obstructing access to documents, burdensome requests for documents, refusals to make reasonable scheduling agreements, one-upmanship, gamesmanship, sarcasm as a weapon, a failure to cooperate, and winning by trick or at any cost." Interim Report on Civility, *supra* note 18, at 386.

41. A recent example was penned by Chief Judge Markey of the United States Court of Appeals for the Federal Circuit:

> Counsel on appeal have each engaged in lamentable attribution of ulterior motives to the other. Having unprofessionally charged unprofessionalism, each then cites that charge as warranting an award of costs and attorney fees. Pointing to misstatements of the record is appropriate. Motivational analysis is not. Nor will the latter prejudice the court. Judges have much and many better things to do than to referee irrelevant cat-fights of counsel.

Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1568 n.5 (Fed. Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987); *see also* Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1373 (6th Cir. 1976), *cert. denied*, 429 U.S. 862 (1976) (stating that a kind of gamesmanship occurs when the infringer, after months of discovery, sparring, and negotiation, agrees to a settlement, then repudiates it to start the battle all over).

42. The "sporting theory" of justice "stems from the original function of trials in courts as substitutes for private wars." *In re* Barnett, 124 F.2d 1005, 1010 (2d Cir. 1942). American use of this theory appears to be a carry over from British jurisprudence:

> [The game of litigation] is in part the continuance of a tradition, inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality.

Id. (quoting JOHN HENRY WIGMORE, EVIDENCE (3d ed. 1940)). "The sporting theory of justice" was criticized in Roscoe Pound's famous address of 1906 prior to the institution of discovery rules. *See* Pound, *supra* note 21, at 404. Pound noted:

> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community

justice continues to permeate much of the business of the trial courts.[43] A recent illustration involves a patent dispute in which the defendant obtained a partial summary judgment ruling that two of the plaintiff's claims were invalid.[44] The plaintiff prevailed in the trial on the merits on the remaining claim.[45] Both the plaintiff and the defendant appealed.[46] In the opinion, the court of appeals noted:

> Trial counsel succeeded in creating a muddled procedural puddle in the trial court, where the parties effectively engaged in two legal contests, each prevailing in one and losing in the other. Each has then tried on appeal, in briefs containing mischaracterizations of the law and the events below, to use the victory in one as a means of converting the loss to victory in the other.[47]

Gamesmanship is also said to occur when lawyers forum shop,[48] refuse to examine their own witnesses in depositions to prevent opponents from gleaning information,[49] file excessive or unnecessary motions,[50] institute lawsuits involving identical issues simultaneously in state and federal courts,[51] fail to obey court orders,[52] employ tactical delays,[53] file frivolous pleadings and engage in "recreational" litigation,[54] enter into settlement agreements in bad faith to strip federal courts of exclusive jurisdiction,[55] and exercise the removal jurisdiction of the federal courts in some cases.[56] Significantly, courts acknowledge that undue gamesmanship often occurs within the rules of procedure.[57] Arguably, much of the gamesmanship appears to involve not the

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> a false notion of the purpose and end of law. Hence comes, in large measure, the great American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it.

Id. at 408-09.

43. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975).

44. *Glaros*, 797 F.2d at 1566.

45. *Id.*

46. *Id.* at 1566-67.

47. *Glaros*, 797 F.2d at 1568.

48. *E.g.*, Nat'l Health Fed'n v. Weinberger, 518 F.2d 711, 714 (7th Cir. 1975); *In re* Republic Reader's Serv., Inc., 81 B.R. 422, 428 (Bankr. S.D. Tex. 1987).

49. Alaska Airlines v. United States, 399 F. Supp. 906, 917 (N.D. Cal. 1975).

50. *E.g.*, Canady v. Koch, 608 F. Supp. 1460, 1473 n.23 (S.D.N.Y. 1985), *aff'd*, 768 F.2d 501 (2d Cir. 1985); *Interim Report on Civility* at 388.

51. *E.g.*, LaDuke v. Burlington N. R.R., 879 F.2d 1556, 1560-61 (7th Cir. 1989); Lumen Constr., Inc. v. Brant Constr. Co., 780 F.2d 691, 693-94 (7th Cir. 1985).

52. *E.g.*, Morton v. Harris, 628 F.2d 438, 440 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 1044 (1981); Casson Constr. Co. v. Armco Steel Corp., 91 F.R.D. 376, 385 (D. Kan. 1980).

53. *E.g.*, Fournier v. Textron, Inc., 776 F.2d 532, 534 (5th Cir. 1985); Factor v. Mall Airways, Inc., 131 F.R.D. 52, 53 (S.D.N.Y. 1990).

54. *E.g.*, S & T Mfg. Co. v. County of Hillsborough, Fla., 815 F.2d 676, 679 (Fed. Cir. 1987); Colt Indus. Operating Corp. v. Index-Werke K.G., 739 F.2d 622, 623 (Fed. Cir. 1984); Beachboard v. United States, 727 F.2d 1092, 1095 (Fed. Cir. 1984).

55. *E.g.*, *Aro*, 531 F.2d at 1371; Sidewinder Marine, Inc. v. Nescher, 440 F. Supp. 680, 682 (N.D. Cal. 1976).

56. *E.g.*, Myers v. Hertz Penske Truck Leasing, Inc., 572 F. Supp. 500, 503 (N.D. Ga. 1983).

57. *See, e.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 710 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (disapproving delayed exchange of trial briefs in accordance with

violation of, but rather the strategic use of, court rules.

3. *Incivility*

Contempt proceedings have been instituted against lawyers for incivilities since the beginning of American jurisprudence.[58] For example, an attorney was disbarred in 1883 for conduct unbecoming an attorney when he joined a mob to remove a prisoner from jail and hang him from an oak tree in front of the courthouse.[59] In 1884, a lawyer was held in contempt of court for threatening the examiner during a deposition with an open knife and using insulting, indecent language.[60] A year later, a federal court remarked that lawyers entering "the temple of justice" armed with pistols should be found guilty of contempt of court and disbarred.[61] More recent examples of lawyer incivilities include threatening[62] or using physical violence on opposing counsel,[63] advancing personal attacks on opposing counsel in pleadings instead of legal arguments,[64] disparaging jurors,[65] exchanging invectives,[66] and displaying "contentious, abusive, obstructive, scurrilous, and insulting conduct."[67]

In a survey conducted in the Seventh Federal Judicial Circuit, over 1500 judges and attorneys commented on civility problems.[68] Civility in litigation was defined as professional conduct in proceedings involving judicial personnel and attorneys.[69] Approximately forty-one percent of those who responded said that civility problems exist.[70] Rather than citing to the extreme examples of incivility referenced above, however, the survey attributed incivility incidents not only to the dramatic increase in practicing lawyers and economic pressures, but also to Rule 11 of the Federal Rules of

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FED. R. CIV. P. 5(a)); Jones v. Diamond, 594 F.2d 997, 1025 (5th Cir. 1979) (remarking that gamesmanship and "trial by ambush" was within scope of FED. R. CIV. P. 34, but was contrary to its spirit). *But see* Hartford Accident & Indem. Co. v. Hop-On Int'l Corp., 568 F. Supp. 1568, 1569 (S.D.N.Y. 1983) (staying an action for federal declaratory judgment because plaintiff was manipulating procedures to win the race to the courthouse); Hammond v. Kolberg Mfg. Corp., 542 F. Supp. 662, 663 (D. Colo. 1982) (refusing to allow a defendant to engage in the "futile act" of impleading a party under FED. R. CIV. P. 14 because that party would immediately be dismissed).

58. As stated in an early Supreme Court case: "[A] court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts and, in gross cases of misconduct, to strike their names from the roll." *Ex parte* Wall, 107 U.S. 265, 273 (1883).

59. *Id.* at 267, 274, 290.

60. United States v. Anonymous, 21 F. 761, 762 (C.C.W.D. Tenn. 1884).

61. Sharon v. Hill, 24 F. 726, 733-35 (C.C.D. Cal. 1885).

62. *E.g.*, Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 779 (7th Cir. 1991).

63. *E.g.*, WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 223 (1991) (describing three lawyers involved in a fist fight during a deposition).

64. *E.g.*, Ross v. County of Lake, 764 F. Supp. 1308, 1311 n.5 (N.D. Ill. 1991).

65. *E.g.*, Tanner v. United States, 62 F.2d 601, 602 (10th Cir. 1932), *cert. denied*, 289 U.S. 746 (1933).

66. *E.g.*, *Ross*, 764 F. Supp. at 1311 n.5.

67. Unique Concepts, Inc. v. Brown, 115 F.R.D. 292, 294 (S.D.N.Y. 1987).

68. *Interim Report on Civility* at 371.

69. *Id.* The term was not restricted to good manners or social grace. *Id.*

70. *Id.*

Civil Procedure and discovery disputes.[71] Judges and lawyers should note: except for cases involving outright contemptuous behavior, court rules appear to be at the center of much of the civility problems identified.

4. Hardball Tactics

The "hard-nosed lawyer" employing "hardball tactics" surfaced in case law in the 1960s.[72] Although the terminology is of recent origin, hardball tactics are similar to the tactics described as gamesmanship and sharp practices.

"Repeated and abusive hardball tactics" attributed to defendants and their counsel were recently described by the Fifth Circuit:

> For example, the defendants unjustifiably refused to produce documents in response to discovery, violating an order to compel; they repeatedly and falsely denied having applied for and/or having patent rights in the air snorkel device; they misled the plaintiff about the nature of various documents; and, without any apparent reason, they were unwilling to state that certain information or claims should be directed to one Yamaha entity rather than the other. These "obfuscatory defense strategies" and the "gun shot approach to their defense" caused the district court "at a minimum a waste of conference and trial time," and unnecessarily led plaintiff on a "wild goose chase."[73]

A federal district court reported "hardball" tactics of a plaintiff's lawyer:

> The abuse of the judicial process and the misleading statements and half-truths made by counsel for plaintiff in briefs and oral arguments, the baseless allegations directed against this Court, and engaging in conduct that borders on being unethical, if it is not so, shall never be condoned or tolerated.[74]

It is also said that lawyers use hardball tactics when they use Rule 11 as a means for intimidation and harassment,[75] file excessive motions for sanctions[76] and other pretrial motions,[77] utilize "obstructionist strategy,"[78] re-

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71. *Id.*

72. *E.g.*, Federal Maritime Comm'n v. New York Terminal Conference, 373 F.2d 424, 427 (2d Cir. 1967).

73. Sheets v. Yamaha Motors, Corp., U.S.A., 891 F.2d 533, 539-40 (5th Cir. 1990).

74. Smith v. Our Lady of the Lake Hosp., 135 F.R.D. 139, 151 (M.D. La. 1991).

75. *E.g.*, Gaiardo v. Ethyl Corp., 835 F.2d 479, 485 (3d Cir. 1987); *In re* Express Am., 132 B.R. 542, 546 (Bankr. W.D. Pa. 1991). "Although Fed. R. Civ. P. 11 has its place, and there are certainly cases where sanctions are warranted, motions for sanctions have often become simply another weapon in the arsenal of hardball litigators who wish to burden opponents and the judicial system with every accusation possible." Eldon Indus., Inc. v. Rubbermaid, Inc., 735 F. Supp. 786, 794 (N.D. Ill. 1990).

76. *E.g.*, Roberts v. Lyons, 131 F.R.D. 75, 82 (E.D. Pa. 1990); Fleet Nat'l Bank v. Export-Import Bank of the United States, 612 F. Supp. 859, 871 (D.D.C. 1985); Ehret v. New York City Dep't of Social Servs., 102 F.R.D. 90, 93 (E.D.N.Y. 1984).

77. *E.g.*, S.G. Supply Co. v. Greenwood Int'l, Inc., 769 F. Supp. 1430, 1443 (N.D. Ill. 1991); McKnight v. General Motors Corp., 768 F. Supp. 675, 679 (E.D. Wis. 1991); Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 541 (S.D.N.Y. 1989).

78. *E.g.*, Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1557 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); Burgess v. Premier Corp., 727 F.2d 826, 841 (9th Cir. 1984).

fuse to extend deadlines for opposing counsel,[79] insist on strict compliance with the rules,[80] and treat discovery as a type of litigation weapon.[81] Here again, complaints appear to focus on the abusive use of court rules.[82]

III. THE RULES OF THE GAME

[Law is] a game which exacts skill, but which, like every game worth playing, exacts something more important, and that something is the sportsman's spirit, which is only another word for character. — Benjamin N. Cardozo[83]

A. RULES OF PROFESSIONAL CONDUCT

Rules of professional conduct have been associated with the practice of law for many years. The initial rules were adopted by lawyers in the early history of American jurisprudence to address public concerns over unprofessionalism in the practice of law.[84] Alabama was the first state to adopt a Code of Professional Ethics in the United States in 1887.[85] Several other states adopted professional responsibility codes or canons for lawyers thereafter.[86] In 1908, the American Bar Association adopted the Canons of Professional Ethics encouraging lawyers to subscribe to a moral level of conduct in the practice of law to promote public confidence in the profession.[87] The early canons were not regulatory in nature, rather they were designed to legitimize the professional stature of lawyers.[88] Within six years, most of the states adopted the American Bar Association Code substantially intact.[89] In 1969, the canons were superseded by the Model Code of Professional Re-

79. *E.g.*, First Interstate Bank v. Serv. Stores of Am., 128 F.R.D. 679, 680 (W.D. Okla. 1989).

80. *E.g.*, GFI Computer Indus., Inc. v. Fry, 476 F.2d 1, 4 (5th Cir. 1973); *First Interstate Bank*, 128 F.R.D. at 680.

81. *E.g.*, *Frank Music Corp.*, 886 F.2d at 1557; Koval v. PaineWebber Hous. & Healthcare Funding, Inc., 128 F.R.D. 654, 655 (N.D. Ill. 1989).

82. *E.g.*, Stephanie B. Goldberg, *Playing Hardball*, 73 A.B.A. J. 48 (July 1987) ("Hardball is when a lawyer . . . is personally antagonistic or insistent on all of the procedural rules being followed.").

83. Benjamin N. Cardozo, *The Game of the Law and its Prizes*, *reprinted in* BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 160, 168-69 (1931) (address at the 74th commencement of the Albany Law School, June 10, 1925).

84. HENRY S. DRINKER, LEGAL ETHICS 23-25 (1953).

85. *Id.* at 23.

86. *Id.*

87. *See* A.B.A. CANONS OF PROFESSIONAL ETHICS PREAMBLE (1908), *reprinted in* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 1180-93 app. (West 1986). The Preamble reflects the purpose for adopting the canons:

> In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied.

Id. at 1180.

88. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2 (West 1986).

89. HENRY S. DRINKER, LEGAL ETHICS at 25. Texas adopted the Canons in 1909. Cullen C. Smith, *The Texas Canons of Ethics Revisited*, 18 BAYLOR L. REV. 183, 183 (1966).

sponsibility, which is partially mandatory and partially aspirational in nature.[90]

Since 1983, the Model Rules of Professional Conduct have represented the American Bar Association's three-prong approach to the ethical practice of law.[91] First, some of the Model Rules are mandatory in nature and delineate minimum standards of conduct that if violated, may subject the errant lawyer to disciplinary action.[92] Second, other rules depict areas of lawyer conduct in which violations are not sanctionable in a disciplinary sense.[93] Third, several Model Rules suggest behavioral standards cast in terms of "a lawyer should" rather than "shall."[94] Today's Model Rules, for the most part, are legally binding with the use of sanctions including disbarment and suspension.[95] Perhaps changes in the legal profession warrant these changes in the ethical rules.[96]

For nearly two centuries, despite formalistic changes, the ethical rules have remained substantively the same.[97] As in 1908, the rules focus on the lawyer's duties of: (1) loyalty to the client; (2) confidentiality; and (3) candor to the court.[98] The obligations of loyalty and confidentiality legitimize client representation, while the obligation of candor to the court legitimizes lawyers' affiliation with the judiciary.[99] The resulting conflict of fidelities between the client and the courts is an unhappy by-product of the adversary

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90. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), *reprinted in* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 1021-94 (1986) (Model Code is comprised of Canons, Ethical Considerations, and Disciplinary Rules). Texas adopted the Texas Code of Professional Responsibility in 1971 consisting of Canons, Ethical Considerations, and Disciplinary Rules. *See* SUPREME COURT OF TEXAS, CODE OF PROFESSIONAL RESPONSIBILITY (1971).

91. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983), *reprinted in* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 1095-1169 app. (West 1986). Texas adopted Disciplinary Rules of Professional Conduct in 1990 relying on the American Bar Association Model Rules of Professional Conduct, codes and rules of sister state bar associations, and recent literature on legal ethics. *See* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Rules of Disciplinary Procedure); James B. Sales, *The Texas Disciplinary Rules of Professional Conduct: A Model to Replace the Outdated Texas Code of Professional Responsibility*, 52 TEX. B.J. 388, 390 (Apr. 1989).

92. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.4 (West 1986).

93. *Id.*

94. *Id.*

95. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991).

96. As noted by Geoffrey Hazard, Law Professor at Yale Law School and Reporter for the Model Rules Commission, in an analysis of the American Bar Association's canons, codes, and rules:

> [The legal profession's Model Rules] no longer represent the shared understandings of a substantially cohesive group. They are simply rules of public law regulating a widely pursued technical vocation. . . . "Legalized" regulation will undoubtedly continue to dominate the normative structure of the legal profession, through court-promulgated rules, increasingly intrusive common law, and public statutes and regulations. As a consequence, the dominate normative institution for the legal profession will no longer be "the bar," meaning the profession as a substantially inclusive fraternal group. The bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance.

Hazard, *supra* note 95, at 1279.

97. *Id.* at 1246.

98. *Id.*

99. *Id.*

system;[100] a system based upon the premise that the truth will emerge from competitive presentations of factual and legal considerations.[101] The evolvement of the rules of conduct from aspirational to mandatory is not without criticism.[102]

B. THE LAWYER AS ADVOCATE AND OFFICER OF THE COURT

Lawyers should be encouraged to behave in a manner that zealously guards the interests of the client but does not countenance obstruction of the legal process. Harvard Professor Alan Dershowitz asserts that lawyers must be aggressive on behalf of clients and must "go right up to the line of zealous advocacy."[103] What about the lawyer as officer of the court? The conflicting duties to the client and the court created by rules of ethics manifest themselves through the lawyer's obligation to act as an advocate and, at the same time, behave as an officer of the court.[104] This latter duty, believed to be a carryover from English courts,[105] was described by Chief Justice Benjamin Cardozo over sixty years ago: "Membership in the bar is a privilege burdened with conditions. [A member of the bar becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."[106] Cardozo explained that the duty of acting as an officer of the court requires a lawyer's cooperation whenever injustice would occur if co-

100. Rhode, *supra* note 25, at 595.

101. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

102. *See* Rhode, *supra* note 25, at 600-01 (1985). Rules of professional conduct are criticized as ineffective in curbing abusive litigation practices. *See, e.g.*, Ricardo G. Cedillo & David Lopez, *Document Destruction in Business Litigation from a Practitioner's Point-of-View: The Ethical Rules vs. Practical Realities*, 20 ST. MARY'S L.J. 637, 640 (1989) (ethical rules do not effectively deter evidence destruction); Rhode, *supra* note 25, at 601 (rules of ethics allow lawyers to present false or misleading evidence, and to counsel clients to refrain from voluntary disclosures); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 645 (1981) (Model Rules are ineffective as an instrument to promote ethical behavior). *But see* Stephen M. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 354-57 (1991) (rules of ethics have positive effect by causing some lawyers to counter clients' interests to allow unfavorable information to reach the tribunal). Professor Deborah Rhode of Stanford Law School remarks that the rules of ethics, by stressing the lawyer's duty to the client, relieve lawyers "of any responsibility for substantive justice" and of any duty to glean fair or rational results. Rhode, *supra* note 25, at 604. *But see* E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 591 (1961) (commenting that rules of ethics *interfere* with the advocate's obligations to clients). Professor Thode suggests that ethical standards should be amended to include the pledge: "I will always maintain an attitude of respect toward the court, but respect does not imply subservience. I am obligated to represent my client fully before the court, and a subservient attitude could be incompatible with such obligation." *Id.* at 592.

103. Stephanie B. Goldberg, *Playing Hardball*, 73 A.B.A. J. 48, 52 (July 1987).

104. *See* Roberts v. Lyons, 131 F.R.D. 75, 82 (E.D. Pa. 1990) (quoting Pioneer Liemel Fabrics, Inc. v. Paul Rothman Indus., Ltd., No. 87-2581, slip op., 1988 WL 36343 (E.D. Pa. April 18, 1988)) (lawyer's duty as an officer of the court conflicts with zealous advocacy requirement).

105. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.6 (West 1986); Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 42 (1989).

106. Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (citations omitted).

operation is withheld.[107]

The Supreme Court of the United States frequently refers to the lawyer's duty as an officer of the court,[108] and explains that this duty is defined by case law, court rules, and "the lore of the profession," as established in the attorney's home state rules of professional conduct.[109] For example, Rule 11 of the Federal Rules of Procedure requires that a lawyer's duty to clients cannot override his or her obligation to the justice system.[110] This obligation is further defined by the Second Circuit: "The quality of Justice depends upon our ability to control the flood of litigation. Rule 11 requires that members of the bar avoid haphazard, superficial research. That requirement places the responsibility for properly invoking the power of the court on counsel as officers of the court."[111]

In many instances, the duty to behave as an officer of the court is said to equal or outweigh the duty to the client. Case law has dictated that "[a]n attorney owes his first duty to the court."[112] The preamble to the Model Rules begins by stating that a lawyer represents clients, acts as an officer of the legal system, and maintains a special responsibility to justice as a public citizen.[113] The Dallas Bar Association Guidelines of Professional Courtesy, the inspiration of many other bar association civility codes, begins by stating

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107. *Id.* More recently a federal district court echoed Cardozo's sentiments that practicing law is an honor and privilege, but stated that as officers of the court, attorneys have a duty to show dignity and respect for the court and the administration of justice. *Our Lady of the Lake Hosp.*, 135 F.R.D. at 156.

108. *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 564 (1991) (Kennedy, J., dissenting); Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 453 (1990) (Blackmun, J., concurring in part, dissenting in part); *In re* Snyder, 472 U.S. 634, 644 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978); *In re* Sawyer, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting); Theard v. United States, 354 U.S. 278, 281 (1957); Powell v. Alabama, 287 U.S. 45, 73 (1932). The Texas Supreme Court and Texas Court of Criminal Appeals also assert that lawyers are officers of the court. *E.g.*, *Ex parte* Rose, 704 S.W.2d 751, 754 n.2 (Tex. Crim. App. 1984); Dow Chem. Co. v. Benton, 357 S.W.2d 565, 567 (Tex. 1962); Martinez v. State, 318 S.W.2d 66, 71 (Tex. Crim. App. 1958); *In re* Laughlin, 265 S.W.2d 805, 808 (Tex. 1954), *appeal dismissed*, 348 U.S. 859 (1954); *Ex parte* Norton, 191 S.W.2d 713, 716 (Tex. 1946).

109. *In re* Snyder, 472 U.S. at 645.

110. *In re* Ronco, Inc., 105 F.R.D. 493, 497 (N.D. Ill. 1985), *appeal dismissed*, 793 F.2d 1295 (7th Cir. 1986).

111. International Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388, 393 (2d Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989).

112. *In re* Integration of Neb. State Bar Ass'n, 275 N.W. 265, 268 (Neb. 1937). The court, noting that attorneys obligate themselves to the courts before ever obtaining clients, stated that "lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court." *Id.*

113. MODEL RULES OF PROFESSIONAL CONDUCT (1983), *reprinted in* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 1097 (West 1986). The preamble to the Model Rules asserts an optimistic viewpoint on these responsibilities: "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." *Id.* at 1098. Interestingly, the Texas State Bar Rules preamble, fashioned from the Model Rules, omits this language. *See* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Rules of Disciplinary Procedure) Preamble, *reprinted in* TEX. GOV'T CODE ANN. (Vernon Supp. 1991). The preamble of the Texas State Bar Rules does point out the three roles of the lawyer in the same manner as the Model Rules. *Id.*

that the lawyer's duty is primarily to the client, yet insists that "a lawyer must be ever conscious of the *broader* duty to the judicial system that serves both attorney and client."[114] As with rules of conduct, the notion of the attorney as an officer of the curt has also been criticized.[115]

C. RULES INTENDED TO STOP "RAMBO"

1. Rule 37(b) of the Federal Rules of Civil Procedure

Rule 37(b) of the Federal Rules of Civil Procedure[116] is a good illustration of a procedural rule designed to curb Rambo tactics used in the discovery

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114. DALLAS BAR ASS'N GUIDELINES OF PROF. COURTESY (1987) (emphasis added).

115. Gaetke, *supra* note 105, at 44 (1989).

116. Rule 37(b) of the Federal Rules of Civil Procedure [hereinafter Rule 37(b)] provides in part:

> (b)(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . the court in which the action is pending *may* make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> (E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that the party is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b) (emphasis added).

The Texas counterpart of Rule 37(b) is Rule 215 of the Texas Rules of Civil Procedure (hereinafter Texas Rule 215) which provides in part:

> 2.b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated . . . fails to comply with proper discovery requests or to obey an order to provide or permit discovery, . . . the court . . . *may*, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:
>
> (1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
>
> (2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
>
> (3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (4) An order refusing to allow the disobedient party to support or oppose

context,[117] but which often is the catalyst for Rambo activity. The Special Committee for the Study of Discovery Abuse of the American Bar Association's Section of Litigation delineates discovery abuse as misuse and overuse.[118] As summarized by one commentator, "[d]iscovery and motions practice provide a near inexhaustible repertoire of ways for litigants to tease, worry, irk, goad, pester, trouble, rag, torment, pique, molest, bother, vex, nettle, and annoy each other."[119] Although abusive and excessive discovery practices are attributed to a "leave no stone upturned" attitude, assigning discovery issues to overly zealous junior lawyers, and the desire to bill more hours,[120] often, overuse of discovery simply involves the exploitation of legit-

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designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

* * *

5. *Failure to Respond to or Supplement Discovery.* A party who fails to respond to or supplement his response to a request for discovery *shall not* be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

TEX. R. CIV. P. 215(2)(b) and (5) (emphasis added). *Compare* FED. R. CIV. P. 37(b) (permissive sanctions) *with* TEX. R. CIV. P. 215(2)(b) (permissive) *and* TEX. R. CIV. P. 215(5) (mandatory).

117. The policies for Rule 37 reflect a desire for "complete and fair adjudication of a case's merits" and a concern that law suits were becoming more like contests instead of a search for the truth. William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for their Attorneys' Procedural Errors*, 1988 DUKE L.J. 733, 746. For a summary of other federal sanction provisions see J. D. Page & Doug Sigel, *The Inherent and Express Powers of Courts to Sanction*, 31 S. TEX. L.J. 43, 51-61 (1990) (discussing 26 U.S.C. §§ 6673 and 7482(c)(4); 28 U.S.C. §§ 1447(c), 1912, and 1927; 42 U.S.C. §§ 1988 and 2000e-5(k); FED. R. CIV. P. 11, 16(f), 26(g), 37, 45(f), and 56(g); and FED. R. APP. P. 38 and 46).

118. Weyman I. Lundquist & Frank F. Flegal, *Discovery Abuse — Some New Views About an Old Problem*, 2 REV. LITIG. 1, 1 (1981).

119. WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 229 (1991).

120. Report of the Advisory Group of the United States District Court for the Eastern

imate methods to burden or harass the opposing party.[121]

Rule 37(b) was substantially amended in 1970 to encourage more frequent imposition of sanctions for discovery abuses.[122] However, Rule 37(b) and the states' counterparts to Rule 37(b) continue to be criticized for falling far short of restraining Rambo tactics and, notably, even encouraging such tactics.[123]

District of Pennsylvania Appointed under the Civil Justice Reform Act of 1990, 138 F.R.D. 167, 234 (1991).

121. Lundquist & Flegal, *supra* note 118, at 5. Such tactics are often employed by litigators "to induce settlement for nuisance value or to make continuation of the lawsuit infeasible or impossible." William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 770 (1984).

122. 8 WRIGHT & MILLER, *supra* note 38, § 2281; *see also* Advisory Committee Note to 1970 Amendments of Rule 37, 48 F.R.D. 487, 538 (1969) (1970 amendments were designed to rectify defects in the rule's language and to promote its purpose of sanctioning those unjustifiably resisting discovery). Texas Rule 215 was substantially renovated in 1984 to discourage discovery abuses. Kilgarlin & Jackson, *supra* note 121, at 770. The text of Rule 215 "evinces its potential to be forcefully used to advance the goal of substantive justice administered inexpensively with expedition and dispatch." *Id.* at 775. This goal was to be furthered by giving trial judges more flexibility and authority to impose sanctions on aberrant attorneys and parties in the discovery context. *Id.* A major change in Rule 215 allows Texas lawyers to apply for sanctions without first seeking a court order compelling discovery. William W. Kilgarlin, *Sanctions for Discovery Abuse: Is the Cure Worse than the Disease?*, 54 TEX. B.J. 658, 658 (1991). In federal practice, a court order is required. *See* FED. R. CIV. P. 37(b)(2).

123. A criticism of Rule 37(b) is that it offers an automatic second chance for parties resisting discovery because the judge must first order the recusant party to obey a discovery request before sanctions can be imposed. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1037 (1978). Often, the judge will supply even a third chance to the aberrant party by delaying the ultimate sanction unless further noncompliance occurs. *Id*; *see* Morton v. Harris, 628 F.2d 438, 438-40 (5th Cir. 1980), *cert. denied*, 450 U.S. 1044 (1981) (imposing sanctions after four court orders were obtained in an attempt to obtain tax records in discovery). Other criticisms involve the wide judicial discretion afforded in Rule 37(b)'s application and the possibility of constitutional violations when Rule 37(b) is invoked solely for deterrence purposes. *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, *supra* at 1055. The Supreme Court of the United States explained: "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 U.S. 197, 209-10 (1958); *see also* Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991) (discussing constitutional limits on rendering a default judgment based upon discovery abuses). Still another criticism of Rule 37(b) is that it is ineffective in the control of excessive and burdensome discovery abuses. Edna S. Epstein et al., *An Up-Date on Rule 37 Sanctions After* National Hockey League v. Metropolitan Hockey Clubs, Inc., 84 F.R.D. 145, 171 (1980).

Texas Rule 215 is blamed for causing both paper wars and the rampant spread of Rambo litigation practices in Texas. David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure*, 42 BAYLOR L. REV. 405, 447 (1990). One of Rule 215's strongest proponents, former Texas Supreme Court Justice Kilgarlin, now concedes that the amended rule has not curbed abusive discovery practices. Kilgarlin, *supra* note 122, at 658. He explains:

> Lawyers now, rather than taking the time to talk to their adversaries and learn how much additional time will be required to obtain discovery responses, turn immediately to the courts with requests that the most awesome of sanctions powers be invoked. Aided by memory typewriters and other improved forms of advanced technology, lawyers sit back and lob motion after motion against their opponents as if they were firing the 16" guns of the *U.S.S. Missouri* at some Iraqi stronghold.

Id. Kilgarlin advocates changes in Rule 215 to address the availability of mandamus for review of sanctions, the clarification of the standard for reviewing court ordered sanctions, and

2. *Rule 11 of the Federal Rules of Civil Procedure*

Another illustration is Rule 11 of the Federal Rules of Civil Procedure,[124] which requires federal courts to sanction lawyers and clients in order to deter the Rambo tactic of filing frivolous lawsuits.[125] Rule 11 was amended in

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the addition of a requirement that extreme sanctions be imposed only after a prior order is entered compelling discovery. *Id.* at 664-65. Other suggested changes include the clarification of terms, the implementation of certain factors in "good cause" analysis, and a requirement that communication between attorneys transpire before the sanction of exclusion of witness' testimony is imposed. Holman & Keeling, *supra*, at 449-57.

124. Rule 11 of the Federal Rules of Civil Procedure [hereinafter "Rule 11"] provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11 (emphasis added).

The Texas counterpart to Rule 11, Rule 13 of the Texas Rules of Civil Procedure [hereinafter "Texas Rule 13"], provides:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, *shall* be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, *shall* impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.
>
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

TEX. R. CIV. P. 13 (emphasis added); *see also* TEX. R. CIV. P. 215(2)(b) *supra* note 122. Texas Rule 215 became effective January 1, 1988. William W. Kilgarlin et al., *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 882 (1988); Anthony Benedetto & David Keltner, *Changes in Pleading Practices (Including the Frivolous Suit Question)*, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-3 (1987).

125. *See* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 534 (1991) (finding that the purpose of Rule 11 is "to deter baseless filings and curb abuses"); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 411 (1990) (Stevens, J., concurring in part, dissenting in part) ("Rule 11 is designed to deter parties from abusing judicial re-

1983 because the then existing Rule 11 was only reluctantly imposed on a voluntary basis.[126] The stated purpose of Rule 11 sanctions is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."[127]

Rule 11 creates a certification of "every pleading, motion, and other paper" signed by an attorney or party.[128] The certification calls for sanctions unless, to the best of the attorney's knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass or cause needless delay or increase in litigation costs.[129] Interestingly, these requirements already exist in rules of ethics and in the lawyer's duty to act as an officer of the court.[130]

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sources. . . ."). Texas Rule 13 was adopted because the Texas Supreme Court felt that baseless lawsuits were inadequately dealt with by existing laws and ethical provisions. John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 245, 344 (1988).

126. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 869-70 (5th Cir. 1988); *see also* Jeffrey N. Cole, *Rule 11 Now*, 17 LITIG. 10, 10 (Spring 1991) (stating that sanctions under pre-1983 Rule 11 required subjective showing of bad faith and were seldom imposed). For a synopsis of the differences between current Rule 11 and the pre-1983 Rule 11 see 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (1990). Due to complaints that it was ineffective, Texas Rule 13 was amended in 1990 to eliminate the 90-day grace period that was previously allowed for an offending party to either withdraw or amend pleadings to satisfy the court. TEX. R. CIV. P. 13 cmt.; *see also* Ernest E. Figari, Jr. et al., *Civil Procedure, Annual Survey of Texas Law*, 45 SW. L.J. 73, 81-82 (1991) (discussing changes in Texas Rule 13).

Amended Texas Rule 13 differs from Federal Rule 11 in five respects. First, Texas Rule 13, unlike Rule 11, provides that sanctions be imposed only when good cause is shown after overcoming the presumption of a good faith filing. *Compare* TEX. R. CIV. P. 13 (requiring good cause) *with* FED. R. CIV. P. 11 (silent on good cause). Second, Federal Rule 11 sanctions are mandatory while Texas Rule 13 sanctions are permissive in that they need not be imposed unless good cause exists. *Compare* TEX. R. CIV. P. 13 (requiring good cause) *with* FED. R. CIV. P. 11 (silent on good cause). Third, Texas Rule 13 requires notice and hearing as a prerequisite for sanctions while its federal counterpart does not. *Compare* TEX. R. CIV. P. 13 (requiring notice and hearing) *with* FED. R. CIV. P. 11 (silent) and Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) (holding that although evidentiary hearing is not required, notice and opportunity to be heard are required before imposing Rule 11 sanctions), *cert. denied*, 480 U.S. 918 (1987). Fourth, Federal Rule 11 provides for sanctions on a finding that a party has filed a "groundless" pleading while Texas Rule 13 allows sanctions if pleadings are groundless and something more. *Compare* TEX. R. CIV. P. 13 (requiring groundless and brought in bad faith or groundless and brought for harassment) *with* FED. R. CIV. P. 11 (requiring "groundless" alone). Fifth, Texas Rule 13, unlike Rule 11, does not apply to a general denial or to amounts requested for damages. *Compare* TEX. R. CIV. P. 13 (addressing general denial and requests for damages) *with* FED. R. CIV. P. 11 (silent).

127. Advisory Committee Note on the 1983 Amendments, 97 F.R.D. 165, 198 (1983). Factors considered by the Advisory Committee in drafting the 1983 amendments included: (1) the economic incentives to litigate; (2) the expansion of federal substantive rights; (3) the increased size in the bar; and (4) the easy access to federal courts. WRIGHT & MILLER, *supra* note 126, at 13.

128. FED. R. CIV. P. 11.

129. *Id.*

130. William W. Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 189-90 (1985). Model Rule 3.1 provides, in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or

Despite the lofty intentions behind it, Rule 11 is the butt of severe criticism.[131] Rule 11 is criticized on the grounds "that it generates wasteful 'satellite' litigation; chills both creativity and opposition to the status quo; and poisons the relationship between opposing counsel."[132] Other criticisms of Rule 11 include: its unpredictable application; the possibility of over-vigorous enforcement depriving parties and attorneys of their due process rights; its dubious necessity in light of existing statutes, ethical rules and the inherent power of courts to police conduct; and the impropriety of utilizing procedural rules to improve the quality of lawyering.[133]

In practice, studies show that Rule 11 is invoked almost exclusively by lawyers and not by judges, although judges have the authority to do so.[134] Litigators report that the main reason they request Rule 11 sanctions is to obtain the best possible result for clients — to win the lawsuit on the merits.[135] Arguably, Rule 11 is used to curb "not frivolous arguments, but dangerous arguments."[136]

3. *Local Rules*

As with Rules 37(b) and 11, which were designed for one purpose, but criticized for their contribution to Rambo's armament, local rules of court, which were designed to bring efficiencies to local court practice, are similarly criticized. Rule 83 of the Federal Rules of Civil Procedure allows district courts to make and amend local rules governing their practice, so long as the

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reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1969). There is some debate as to whether the duty of candor to the tribunal expressed in Model Rule 3.3 is implicated by Rule 11. Mallen, *Judicial Sanctions, reprinted in* THE DEFENSE RESEARCH INSTITUTE, A SPECIAL PUBLICATION 9-10 (1991).

131. One commentator stated after a review of Rule 11 case law: "The rule was amended to give judges a more focused standard for imposing sanctions, not carte blanche to reform the adversary system." Melissa C. Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1353 (1986).

132. Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 309-10 (1991); Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365-66 (1989); *see also* Don J. DeBenedictis, *Rule 11 Snags Lawyers; Critics Charge Rulings Will Discourage Civil-Rights Cases*, 77 A.B.A. J. 16, 16 (Jan. 1991) (stating that some critics claim that Rule 11 is a means to punish plaintiffs who file unpopular causes of action). *But see* Michael A. Mack, *Rule 11 — Myth v. Reality*, 33 FOR THE DEF. 2, 8 (Apr. 1991) ("[A]ssertions that Rule 11 will have far-reaching negative consequences for the practice of law appear to be unfounded."); Julian A. Cook, *Rule 11: A Judicial Approach to an Effective Administration of Justice in the United States Courts*, 15 OHIO N.U. L. REV. 397, 397-526 (1988) (conducting extensive evaluation of the federal judiciary implementation of Rule 11 and concluding that concerns over Rule 11 could be allayed by reasonable application standards); Goldberg, *supra* note 82, at 49 (Dean of Chicago's plaintiffs' bar comments that amendments to Federal Rules of Civil Procedure increase the tendency of federal courts to sanction and are effective deterrents).

133. 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332 (1990).

134. Stein, *supra* note 132, at 311.

135. *Id.*

136. *Id.* at 312.

local rules are consistent with the federal scheme.[137] Although creation of local rules under Rule 83 was expected only on rare occasions where the civil rules left gaps to be filled, the resultant proliferation of local rules is claimed to be responsible for "clogging the federal scheme and setting traps for the unwary."[138] Not only does each federal district court have a set of local rules, each judge has individual procedural rules to be followed in his or her court.[139] Local rules are also prevalent in state court systems.[140] And, local rules are used as an independent means to sanction attorney misconduct.[141]

Reasons for the proliferation of local rules include: (1) the dramatic rise in lawsuits; (2) the increase of complex cases; (3) the vast documentation in discovery; (3) the increase in new lawyers; (4) the increase in court personnel; and (4) the need to manage dockets and routinize operations.[142] "[P]erhaps the most frequently violated local rules deal simply with filing and preparation of motion papers."[143] Significantly, when a lawyer files a motion asking for dismissal of a complaint, the failure to oppose the motion in conformity with local rules may have the disastrous consequence of dismissal of the lawsuit.[144] It is of little wonder that local rules are implicated in Rambo litigation practices.[145]

4. *Civility Codes*

Bar associations began to adopt civility codes in the late 1980's as a further attempt to restrain excess litigation and encourage cooperation between opposing counsel.[146] Although rules of ethics and procedural rules also ad-

137. FED. R. CIV. P. 83. The corresponding Texas provisions are Rule 3a of the Texas Rules of Civil Procedure and Rule 1 of the Texas Rules of Appellate Procedure. TEX. R. CIV. P. 3a; TEX. R. APP. P. 1(b).

138. Tiedel v. Northwestern Mich. College, 865 F.2d 88, 91 (6th Cir. 1988).

139. Cindy R. Weir, *Order in the Court: Rules of Federal District Courts in Texas*, 54 TEX. B.J. 610, 610 (June 1991).

140. *See, e.g.*, Local Rules of Appellate Procedure for the Court of Appeals for the Fifth District of Texas at Dallas (1992); Dallas Civil District Court Rules (1993).

141. Roberts v. Lyons, 131 F.R.D. 75, 79 (E.D. Pa. 1990).

142. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018-19 (1989).

143. James J. Duane, *Local Rules in Ambush*, 17 LITIG. 33, 34 (Spring 1991).

144. *See, e.g.*, Black Unity League of Kentucky v. Miller, 394 U.S. 100, 100-01 (1969) (per curiam) (after plaintiffs failed to respond to defendants' motion to dismiss, therefore violating a local court rule, court properly granted defendant's motion); Tingle v. Parke, 894 F.2d 408, 408 (6th Cir. 1990) (court properly dismissed complaint with prejudice for failure to file an opposing memorandum to defendants' motion to dismiss in accordance with a local rule); Woodham v. American Cystoscope Co., 335 F.2d 551, 552 (5th Cir. 1964) (district court dismissed complaint after the plaintiff failed to comply with local rules); Burkett v. Zablocki, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (after plaintiffs failed to submit a response brief to defendant's brief, in accordance with local rules, defendant's motion to dismiss was granted).

145. Professor Subrin of the Northeastern University School of Law observes that local rules are often manipulated by ingenious lawyers in order to benefit clients. Subrin, *supra* note 142, at 2051. To quell such manipulation, Professor Subrin seeks the institution of uniform procedural rules. *Id.* at 2000. Texas has a rules project underway cataloguing rules under subject headings, denoting the various versions of the local rules. Hecht, *supra* note 39, at 6.

146. *See The Texas Lawyer's Creed — A Mandate for Professionalism*, *in* TEXAS RULES OF COURT (1993); Dallas Bar Ass'n Guidelines of Professional Courtesy (1987); *see also* Brewer &

dress these issues, the utilization of civility codes reflects the legal profession's belief that current rules are neither sufficiently observed nor effectively enforced.[147] The Dallas Bar Association Guidelines of Professional Courtesy appears in the Appendix as an example of a civility code.

Unlike ethical and procedural rules, civility codes are usually considered aspirational in nature. The Texas Lawyer's Creed illustrates the voluntary nature of civility codes: "These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence."[148] Yet, civility codes are doomed to generate satellite litigation and add to Rambo's arsenal.[149] Civility codes have been criticized for having no beneficial effect on trial dockets, but rather harming the legal profession by diverting attention from the merits of a case and by threatening zealous advocacy.[150]

D. RULES - WHO GETS BENEFIT OF THE DOUBT?

Common to these rules of the game is the burden they place on counsel to evaluate the client's case from an objective standard. The more stringent the rules, the greater the likelihood that counsel will face conflicting requirements of strategically advocating on behalf of the client while at the same time giving opposing counsel the benefit of the doubt. In an adversary system, rules drafted to allow each side to force the other to produce information coupled with emphatic rules to cooperate, invariably oblige counsel to make decisions against the client's interest. If the claim is arguably justifiable, it is also arguably frivolous. If the information sought is arguably relevant, it is also arguably objectionable. Under the historical approach to rule making, functional problems in the administration of justice are bound to compound.

IV. BEGINNING AGAIN

Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. — Benjamin N. Cardozo[151]

Majorie, *supra* note 19, at 844 (including as reasons for adopting civility codes the desire to decrease litigation costs and crowded dockets as reasons for adopting civility codes); Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 13 (stating that civility codes are adopted "to curb the abusive language, abusive tactics and abusive process that many lawyers think demonstrate zeal and competence").

147. Hazard, *supra* note 146, at 14.

148. The Texas Lawyer's Creed, *supra* note 146.

149. *See* Hazard, *supra* note 146, at 13 (stating that Texas can expect satellite litigation to determine whether the creed is meant to authoritatively interpret current disciplinary rules). Monroe Freedman, Hofstra University Professor of Legal Ethics, further states that civility codes conflict with disciplinary rules and should not be adopted by courts. Monroe Freedman, *In the Matter of Manners: Misjudgments on Courtesy*, TEX. LAW., Mar. 18, 1991, at 34.

150. Brewer & Majorie, *supra* note 18, at 846-50.

151. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921).

Concerns regarding manipulative litigation practices (especially discovery abuses) spawned the amendment and increased use of Rule 37 of the Federal Rules of Civil Procedure in the 1970s.[152] Rule 11 of the Federal Rules of Civil Procedure was substantially revised in 1983 to impose mandatory sanctions against attorneys or parties who assert frivolous legal arguments.[153] Not only were rules and statutes enacted or amended across the country to curb perceived abuses, but courts exercised their inherent powers to sanction conduct not specifically addressed by the rules.[154] Local rules and civility codes were also adopted to keep lawyers in line. The courts and the organized bar have deluged the system with these new rules to curb the vices of the profession. Yet, today's popular literature continues to reflect ancient sentiments that the legal profession is rank with questionable practices. *The New York Times* recently pointed out: "[M]any young persons entering law adopted the belief that lawyers were supposed to be rich and, lately, extravagantly rich. . . . Their relentless pursuit of money (and perhaps pressure put on them by partners) has virtually destroyed their ability to develop friendships with opposing lawyers."[155] A popular Dallas magazine described public discontent over "fear tactics . . . and absurd legalese."[156] The results of a national survey reveal that only twenty-seven percent of United States citizens believe that lawyers would not lie to juries.[157] All the while, legal commentators are far from unanimous as to whether lawyer misconduct (and judicial misconduct, for that matter) is more prevalent today than in years past.[158] Is there a better way? If questionable practices by lawyers are more

152. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1033-34 (1978). In 1984, Texas revised Rule 215, its Rule 37 counterpart, to impose mandatory sanctions for pretrial discovery abuses. William W. Kilgarlin, *Sanctions for Discovery Abuse: Is the Cure Worse than the Disease?*, 54 TEX. B.J. 658, 658 (July 1991).

153. Advisory Committee Note on the 1983 Amendments, 97 F.R.D. 165, 198 (1983). In 1988, Rule 13 of the Texas Rules of Civil Procedure was adopted by the Supreme Court of Texas to restrain the filing of groundless pleadings. William W. Kilgarlin et al., *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 882 (1988).

154. *See, e.g.*, Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2132 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); *Dondi*, 121 F.R.D. at 287.

155. David Margolick, *At the Bar; Does 'Polite' Really Mean 'Wimpy'? Or, What Has Happened to Civility in a Once-Noble Profession?*, N.Y. TIMES, June 14, 1991, at B9.

156. Glenna Whitley, *Why We Love to Hate Lawyers*, D MAG., May 1991, at 47.

157. *Viewing Lawyers from Prospective Jurors' Perspective*, 54 TEX. B.J. 1206, 1207 (Dec. 1991).

158. *Compare* Monroe Freedman, *The Golden Age of Law That Never Was*, TEX. LAW., Jan. 7, 1991, at 26 (arguing that recent changes in legal profession make previous practices look tarnished) *with* Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 640 (1990) (stating that more professional and judicial misconduct occurred in the early and mid-1900s than today) *and* Brewer & Majorie, *supra* note 19, at 841 (arguing that despite recent interest, no proof reveals that the bar is less civil today than in the past). *Compare* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 524 (1986) (questioning whether behavior of attorneys today may be consistent with behavior fifty years ago) *with Dondi*, 121 F.R.D. at 286 (pointing out that sharp practices between lawyers is of relatively recent origin) *and* Walter K. Olson, *System Overload*, 77 A.B.A. J. 70, 70 (1991) (stating "[t]he ethics of American lawyering have lately been in steep decline, and legal practice has gotten more ferociously adversarial") *and* Bradley W. Foster, Comment, *Playing Hardball in Federal Court: Judicial Attempts to Referee*

prevalent today, do these rules of the game cause more problems than they solve? If the practice of law is more pernicious now than in the days of Rome, one should not miss the irony. Today's terminology for inappropriate lawyering was largely developed *after* rules were instituted to curb such tactics.[159]

Legal theorists and commentators are beginning an unprecedented reevaluation of the entire judicial process.[160] Most of the proposals are aimed at pretrial and discovery practices. This is not surprising because most of the time and expense of litigation are attributed to these aspects.[161] Some suggest adopting civility training programs, amending or enforcing existing rules, or using civility codes.[162] These suggestions although laudable, only resort to traditional efforts that have been tried but have shown no measura-

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Unsportsmanlike Conduct, 55 J. AIR L. & COM. 223, 223 (1989) (commenting that lawyers increasingly approach trial advocacy in Rambo-like fashion) *and* Roger J. Miner, *Lawyers Owe One Another*, NAT'L L.J., Dec. 19, 1988, at 13 (observing that dishonesty between lawyers seems to be on the rise).

159. The first of the Sylvester Stallone Rambo films, FIRST BLOOD, was released in 1982. FIRST BLOOD (Orion 1982). Later Rambo films include RAMBO: FIRST BLOOD PART II (Orion 1985) and RAMBO III (Tristar 1988).

160. The Federal Judicial Center headed by Judge William Schwarzer, former Solicitor General Kenneth Starr, and former Vice President Dan Quayle, acting for the President's Council on Competitiveness, have each submitted proposals to reform discovery. William Abrams, *A Welcome Wrecking Ball for the Litigation System*, TEX. LAW., Jan. 13, 1992, at 22. Additionally, the Civil Justice Reform Act (the "Biden Bill") established advisory groups comprised of lawyers in 93 federal judicial districts to propose plans for reducing discovery delays and costs. *Id.* The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to the Federal Rules of Civil Procedure to modify discovery rules. Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 155 & n.1 (1991).

161. Loren Kieve, *Discovery Reform*, 77 A.B.A. J. 79, 80 (Dec. 1991); William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure be more Effective than Discovery?*, 74 JUDICATURE 178, 178 (1991). As stated by Arthur Miller, Harvard law professor and reporter for the Advisory Committee on Civil Rules of the Judicial Conference of the United States: "The chief source of frustration in processing cases is not outright rule violations or disobedience of court orders but rather sheer overuse of the system, which can take the form of frivolous claims, sham defenses, unnecessary motions, or abuse of the discovery system." Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 17 (1984).

162. In response to the complaints surrounding the shortcomings of Rule 11, the United States Supreme Court has proposed amendments to the rule which are to be effective December 1, 1993, upon approval of Congress. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, H.R. DOC. NO. 103-74, 103d Cong., 1st Sess. (1993). *Compare* ADVISORY COMM. ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED RULE 11, *reprinted in Bench-Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159, 171 (1991)) (citing the committee's proposed Rule 11 as expanding the certification requirement to include every "claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed," but permits a party to withdraw a pleading or other paper after a complaining party moves for sanctions). *Rule 11 as Proposed by the Advisory Committee on Civil Procedure*, 137 F.R.D. at 171-72. *Also compare Bench-Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159, 162 (1991). Judge Leon Higginbotham of the Third Circuit, Judge Patrick Higginbotham of the Fifth Circuit, Judge Mary Schroeder of the Ninth Circuit, along with Professor George Cochran and a number of practicing lawyers believe that the Advisory Committee's proposed Rule 11 will intensify the current problem of satellite litigation. *Id.* at 163. They propose a Rule 11 that condenses the existing rule and changes sanctions from mandatory to permissive, giving the court discretion as in Rule 37. *Id.* at 165-70; *see also* Melissa C. Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation*

ble success. On the other hand, the proposals calling for a radical change of the present discovery format, if adopted, hold promise for having the greatest effect on the conduct of counsel.

A novel approach to remedy discovery abuses and overuses is Judge William Schwarzer's proposal favoring a disclosure approach.[163] Under this procedure, parties in a lawsuit would be required to disclose the following to the opposition: (1) all material things and documents; (2) names and addresses of persons believed to possess material information; and (3) statements relinquishing material information of persons under the plaintiff's control.[164] This disclosure obligation would continue throughout the lawsuit and would require the parties to disclose matters promptly as knowledge is acquired.[165] After full disclosure, discovery would be permitted only under a court order specifying the scope and limits of the permitted discovery and the means for obtaining it.[166]

Judge Schwarzer's proposal could alleviate many of the current discovery issues that arm Rambo's gun and generate calls for civility. Under current rules, disclosure is required only after a "proper" request is made. As a consequence, the lawyer best serves the client first by not disclosing, and then disclosing only upon a "proper" request. Thus, the lawyer's duty to the client directly conflicts with any notion of cooperation because the lawyer must scrutinize each discovery request for loopholes in order to prevent disclosure whenever possible.[167] Civility codes calling for "cooperation" severely impinge on this duty.

To the contrary, under the disclosure approach advocated by Judge Schwarzer, "the obligation to act honorably is undiluted by the kind of ethical conflict (and opportunity for evasion) presented by ambitious, inept or objectionable discovery requests."[168] Significantly, the disclosure approach provides for no more discovery than already provided by the rules, it simply does so "without the intervening discovery game."[169] Further, this approach results in defining the issues early in the case.[170] This means that additionally required discovery is automatically conducted in the context of defined issues.[171] Again, with disclosure, there is less room for game

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and Punishment, 74 GEO. L.J. 1313, 1353 (1986) (arguing that Rule 11 should track the language of Rule 37(b)).

163. Schwarzer, *supra* note 161, at 178. *See generally* Mengler, *supra* note 160, at 155-65 (comparing Schwarzer's proposal with proposals from the Advisory Committee on Civil Rules, criticizing both, and concluding that more rulemaking is not the answer; rather, diversity jurisdiction should be abolished and more judges appointed to decrease courts' dockets).

164. Schwarzer, *supra* note 163, at 180.

165. *Id.* The use of Rule 11, protective orders, and privileges would remain available to the parties. *Id.*

166. *Id.* at 181. The burden of proving a particularized need for discovery would be on the party seeking it. *Id.*

167. *Id.* at 179. "Overall the discovery system creates the wrong incentives and breeds a conflict of interest between lawyer and client." *Id.*

168. *Id.* at 183.

169. *Id.*

170. *Id.* at 182.

171. *Id.*

playing.[172]

V. CONCLUSION

[W]e know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth. — Judge Marvin E. Frankel[173]

Societal animosity surrounding the practice of law is as old as law itself. Questionable tactics by lawyers have been recorded since the beginning of American jurisprudence. Over the past fifty years, the trend in the law has been to move away from trial by ambush and toward pretrial rules of procedure designed to allow opposing counsel to force each other to show their cards. The notion was undoubtedly that opening up the process would lead to better justice — the resolution of the dispute would rest less forcefully on lawyering and more on the truth of the facts. Since the institution of procedural rules in 1938, however, citizens are no more confident in judicial outcomes than they were before. In response, the profession has promoted the institution of harsh procedural rules, ethical rules, and civility codes in a continuing attempt to control the conduct of lawyers. Implemented without careful regard, these additional obligations adversely affect the lawyer's primary duty to the client without any salutary effect on the abuses sought to be curbed. Now, legal theorists and judicial officers are undertaking an unprecedented reevaluation of the judicial process, with a special focus on rules of discovery.

Lawyers and judges often state that the adversary system of justice is an effective means to resolve conflicts by finding the truth.[174] The system bases itself on the premise that truth may be ascertained by an impartial judge or jury when conflicting views are presented by the parties as persuasively as possible.[175] Techniques used by the advocates on each side include the use of the investigation process, pretrial discovery, cross-examination of the other side's witnesses, and marshalling the evidence in summations before the judge and jury.[176] After being given the strongest possible view of each

172. By order of The Supreme Court of the State of Arizona dated December 20, 1991, amending rules of civil procedure and rules of practice, a disclosure approach was implemented in the state courts in Arizona. ARIZ. REV. STAT. ANN., RULES OF CIVIL PROCEDURE (1955), Court Comment to Rule 26.1(A) (1991 Am.).

173. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

174. *See, e.g.*, Tehan v. United States, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . . ."); Pamela A. Rymer, *High Road, Low Road: Legal Profession at the Crossroads*, 25 TRIAL 79, 81 (Oct. 1989) ("Our entire system of justice is a search for truth"); Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER 172, 174 (David Luban ed., 1983) (premise of adversary system is that competitive analysis of facts produces a greater number of correct results); David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 468 (1981) (one justification for adversary system is that it is "the best method for arriving at the truth"); MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 3 (1975) (adversary system is efficient and fair method for determining truth).

175. FREEDMAN, *supra* note 174, at 4.

176. *Id.*

side, the factfinder is theoretically in the best position to make a fair and accurate judgment.[177]

At center stage in this performance is the advocate. The advocate is sometimes appreciated and loved, especially when he or she succeeds, but more often is denounced as a "Rambo litigator," "mouthpiece," "hired gun," "mercenary warrior," or "shyster."[178] Hired to fight and implored to win, the lawyer is condemned for working too devotedly at his trade.[179] The advocate's dirty work of obstructing, perverting, distorting, and blocking the search for truth is *required* in the nasty fighting for which lawyers are commissioned.[180]

Certainly, a fundamental irony of the adversary system is its rules drafted to keep the truth from the judge and jury.[181] For example, rules of professional conduct require lawyers not to reveal information associated with client representation.[182] Rules of evidence allow suppression of evidence relating to the character of witnesses[183] and some out of court statements.[184] Lawyers assert privileges to prevent the disclosure of relevant information.[185] Motions *in limine* are often filed to prevent the introduction of prejudicial (prejudicial because it's truthful and it hurts) matters before the jury.[186]

At the heart of all these rules are overriding policy considerations protecting attorney-client relationships, maintaining the dignity of witnesses and

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177. *Id.*

178. *See* MARVIN E. FRANKEL, PARTISAN JUSTICE 3 (1978); Judge Sidney A. Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy*, 20 TEX. TECH L. REV. 787, 789 (1989).

179. Frankel, *supra* note 178, at 4.

180. *Id.* at 3-4.

181. For examples of rules designed to silence the truth in the criminal context see FREEDMAN, *supra* note 174, at 2-3 (discussing presumption of innocence, right against self-incrimination, due process, and the State's burden of proof). Dean Freedman notes that the adversary system only allows a partial search for truth due to the greater consideration of maintaining the dignity of individuals accused of criminal acts. *Id.* at 2; Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063 (1975).

182. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). There are two exceptions. First, confidential information may be disclosed if the client is about to commit a crime involving death or substantial physical harm to another person. *Id.* Second, disclosures may be made in matters dealing with the lawyer-client relationship, such as a suit for payment for legal services. *Id. Compare* Model Rule 1.6 *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1969) (allowing disclosures only with client consent, when required by law, when the information is necessary to prevent the client from committing a crime, or in limited matters between lawyer and client).

183. FED. R. EVID. 404(b).

184. FED. R. EVID. 802.

185. A witness may assert the privilege against self-incrimination. U.S. CONST. amend. V. In Texas and in many other states, privileges may be asserted to protect certain communications. *See, e.g.*, TEX. R. CIV. EVID. 503 (lawyer-client communications); TEX. R. CIV. EVID. 504 (husband-wife communications); TEX. R. CIV. EVID. 505 (clergyman-communicant communications); TEX. R. CIV. EVID. 510 (communications occurring while receiving treatment for alcohol or drug abuse). In federal civil actions, State laws regarding privileges are applicable. FED. R. EVID. 501.

186. *E.g.*, Davis v. Stallones, 750 S.W.2d 235, 237 (Tex. App.—Houston [1st Dist.] 1987, no writ); *see also* FED. R. EVID. 403 (allowing exclusion of evidence on grounds of prejudice, confusion, or waste of time).

defendants, preserving confidential communications, and promoting court efficiency. Consequently, the adversary system and the rules of the game are designed both to find the truth and to hide the truth. Although many commentators advocate changing the fundamental structure of the adversary system,[187] the adversarial structure as we know it is deeply ingrained in our culture. Further, there is no evidence that the overwhelming administrative task of restructuring the adversary system would yield a preferable system.[188] Perhaps our rules of conduct should be drafted with the fundamentals of the adversary system in mind, eliminating what parties may do to each other, and instead focusing on what must be done to advance one's own case. The courts have tried to punish Rambo. It is now time to disarm him.

187. *See, e.g.*, Eric E. Jorstad, Note, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 YALE L.J. 1089, 1103 (1990) (litigation ethics in adversarial system should require trial lawyers to "mediate between the state's interest in the litigation and the private parties' struggles for power through the law"); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988) (lawyers in adversary system should be given discretion to consider relevant circumstances and take action most likely to advance justice); Frankel, *supra* note 173, at 1052 (advocating modification of adversarial ideal to make truth the paramount objective and to make that objective a duty imposed on contestants).

188. *See* Rhode, *supra* note 25, at 639.

APPENDIX

DALLAS BAR ASSOCIATION
GUIDELINES OF PROFESSIONAL COURTESY

PREAMBLE

A lawyer's primary duty is to the client. But in striving to fulfill that duty, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client. A lawyer owes, to the judiciary, candor, diligence and utmost respect.

A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

In furtherance of these fundamental concepts, the following Guidelines of Professional Courtesy are hereby adopted.

COURTESY, CIVILITY AND PROFESSIONALISM

1. GENERAL STATEMENT

(a) Lawyers should treat each other, the opposing party, the court and the members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(b) The client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(c) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

2. DISCUSSION

(a) A lawyer should not engage in discourtesies or offensive conduct with opposing counsel, whether at hearings, depositions or at any other time when involved in the representation of clients. In all contacts with the court and court personnel, counsel should treat the court and its staff with courtesy and respect and without regard to whether counsel agrees or disagrees with rulings of the court in any specific case. Further, counsel should not denigrate the court or opposing counsel in private conversations with their own client. We should all remember that the disrespect we bring upon our fellow members of the Bar and the judiciary reflects on use and our profession as well.

(b) Lawyers should be punctual in fulfilling all professional commitments and in communicating with the court and fellow lawyers.

DEPOSITIONS, HEARINGS, AND DISCOVERY MATTERS

1. GENERAL STATEMENT

(a) Lawyers should make reasonable efforts to conduct all discovery by agreement.

(b) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or his client.

(c) Requests for production should not be excessive or designed solely to place a burden on the opposing party, for such conduct in discovery only increases the cost, duration, and unpleasantness of any case.

2. Scheduling Lawyers should, when practical, consult with opposing counsel before scheduling hearings and depositions in a good faith attempt to avoid scheduling conflicts.

3. DISCUSSION

(a) GENERAL GUIDELINES

(1) When scheduling hearings and depositions, lawyers should communicate with the opposing counsel in an attempt to schedule them at a mutually agreeable time. This practice will avoid unnecessary delays, expense to clients, and stress to lawyers and their secretaries in the management of the calendars and practice.

(2) If a request is made to clear time for a hearing or deposition, the lawyer to whom the request is made should confirm that the time is available or advise of a conflict within a reasonable time (preferably the same business day, but in any event before the end of the following business day).

(3) Conflicts should be indicated only when they actually exist and the requested time is not available. The courtesy requested by this guideline should not be used for the purpose of obtaining delay or any unfair advantage.

(b) EXCEPTIONS TO GENERAL GUIDELINES

(1) A lawyer who has attempted to comply with this rule is justified in setting a hearing or deposition without agreement from opposing counsel if opposing counsel fails or refuses promptly to accept or reject a time offered for hearing or deposition.

(2) If opposing counsel raises an unreasonable number of calendar conflicts, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(3) If opposing counsel has consistently failed to comply with this guideline, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(4) When an action involves so many lawyers that compliance with this guideline appears to be impractical, a lawyer should still make a good faith attempt to comply with this guideline.

(5) In cases involving extraordinary remedies where time associated with scheduling agreements could cause damage or harm to a client's case, then a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

4. MINIMUM NOTICE FOR DEPOSITIONS AND HEARINGS

(a) Depositions and hearings should not be set with less than one week notice except by agreement of counsel or when a genuine need or emergency exists.

(b) If opposing counsel makes a reasonable request which does not prejudice the rights of the client, compliance herewith is appropriate without motions, briefs, hearings, orders and other formalities and without attempting to exact unrelated or unreasonable consideration.

5. CANCELING DEPOSITIONS, HEARINGS AND OTHER DISCOVER MATTERS

(a) GENERAL STATEMENT Notice of cancellation of depositions and hearings should be given to the court and opposing counsel at the earliest possible time.

(b) DISCUSSION

(1) Calling at or just prior to the time of a scheduled hearing or deposition to advise the court or opposing counsel of the cancellation lacks courtesy and consideration.

(2) Early notice of cancellation of a deposition or a hearing avoids unnecessary travel and expenditure of time by opposing counsel, witnesses, and parties. Also, early notice of cancellation of hearings to the Court allows the time previously reserved to be used for other matters.

ORDERS AND JUDGMENTS

1. GENERAL STATEMENT Proposed Orders to be submitted to the court should be prepared promptly, and should be submitted to opposing counsel before or contemporaneously with submission to the Court.

2. DISCUSSION

(a) GENERAL RULE

(1) Unless the Order or Judgment is to be immediately submitted to the Court, the attorney charged with preparing the proposed Order should prepare it promptly, generally no later than the following business day, and should mail it to the court for entry, simultaneously mailing a copy to opposing counsel.

(2) The transmittal letter to the court should advise the court to enter the Order unless the court has heard an objection from opposing counsel within five days from the receipt of the Order of Judgment.

(b) EXCEPTION

(1) In the event an Order or Judgment must be entered immediately, and hand delivery of the Order or Judgment to the Court is contemplated, the lawyer charged with preparing the Order or Judgment should have a copy of the Order or Judgment hand delivered to opposing counsel the same day it is delivered to the court.

(2) If hand delivery of the proposed Order or Judgment cannot be accomplished, then opposing counsel should be called and the proposed Order or Judgment read to the opposing counsel.

SERVICE OF PAPERS FILED WITH THE COURT

1. GENERAL STATEMENT Lawyers should not attempt to unfairly gain advantage by delay in service of pleadings or correspondence upon opposing counsel.

2. DISCUSSION

(a) When pleadings or correspondence are mailed to the court, copies should be mailed the same day to all other counsel of record, both local and out of town.

(b) When pleadings or correspondence are hand delivered to the court and a response is due or a hearing is scheduled within seven (7) days, or a ruling by the court is expected promptly, such papers should be hand delivered the same day to all counsel of record in Dallas County, and should be sent by overnight delivery to counsel residing in other cities.

AGREEMENTS AND STIPULATIONS OF UNDISPUTED MATTERS

1. GENERAL STATEMENT

(a) Lawyers should stipulate to undisputed matters not inconsistent with the client's interests.

(b) Lawyers should abide by all promises and agreements with opposing counsel, whether oral or in writing.

2. DISCUSSION

(a) Lawyers should be willing to agree to and stipulate to undisputed matters to avoid unnecessary utilization of court time and inconvenience. In doing so, the counsel seeking a stipulation should request a stipulation in writing.

(b) Opposing counsel should promptly inform the counsel requesting the stipulation whether the stipulation is agreeable or not so that a decision can be made by the party seeking a stipulation as to whether a hearing will be necessary.

(c) A reasonable time to respond to the request generally would require no more than one week from the time the request for stipulation is received.

(d) In the preparation of agreements, achievement of a jointly desired common goal is often hindered by the practice of preparing draft agreements which include terms neither desired nor insisted upon by the party. When preparing a draft of an agreement, a lawyer should attempt to state the true and anticipated agreement of the parties and avoid inclusion of terms which would hinder the finalization of the agreement.

(e) It is appropriate to honor requests of opposing counsel made during trial which do not prejudice the rights of the client or sacrifice tactical advantage. To this end, counsel could disclose the identity of the next witness to be called, the next depositions to be read, sharing of a projector or video tape screen, estimates of time and other matters of this nature routinely encountered in trial by trial counsel.

TIME DEADLINES AND EXTENSIONS

1. GENERAL STATEMENT Reasonable extensions of time should be granted to opposing counsel where such extension will not have a material, adverse effect on the rights of the client.

2. DISCUSSION

(a) Because we all live in a world of deadlines, additional time is often required to complete a given task.

(b) Traditionally, members of this bar association have readily granted any reasonable request for an extension of time as an accommodation to opposing counsel who, because of a busy trial schedule, personal emergency or heavy work load, needs additional time to prepare a response or comply with a legal requirement.

(c) This tradition should continue; provided, however, that no lawyer should request an extension of time solely for the purpose of delay or to obtain any unfair advantage.

(d) Counsel should make every effort to honor previously scheduled vacations of opposing counsel which dates have been established in good faith.

COMMUNICATIONS WITH THE JUDGE AND COURT PERSONNEL

1. GENERAL STATEMENT

(a) Only lawyers should communicate with the judge or appear in court on substantive matters.

(b) Non-lawyers may communicate with court personnel regarding scheduling matters and other nonsubstantive matters.

2. DISCUSSION

(a) Lawyers should make no attempts to obtain an advantage in a case by an ex parte communication with the court.

(b) Lawyers should avoid arguments or posturing through unnecessary

inclusion of the Court in correspondence. If a matter does not merit the filing of a motion or of an agreed order, it probably does not warrant involving the judge or clerk in correspondence or with copies of correspondence to the opponent. Only correspondence which has been requested by the Court, or is merely filed to record the service of documents, should be sent to the Court.

CONCLUSION

The conduct of the lawyer before the Court and with other lawyers should at all times be characterized by honesty, candor, and fairness.