ETHICS & PROFESSIONALISM

- **How do the judges react to the issues of Ethics and Professionalism with ---**
- **The overzealous attorney**
- **The attorney who is less than credible with the court and other attorneys in litigation matters**
- **The complaints of the litigation attorney regarding the non-responsive and over-priced expert**

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Ethics and Professionalism: How do Judges react to the Issues of Ethics and Professionalism?
By: Marc C. Hebert[1]

Among her counterparts, the State of Louisiana stands alone as a representative of the civil law tradition.[2] The tradition of civil law, however, is neither governed by state history, nor landlocked by state borders. Rather, the practice of *civility* - the cornerstone of a civil law tradition - is the foundation of the legal profession, whether practiced in a common law or a civil law arena.

As we all know, there is nothing wrong with a lawyer being aggressive, proactive and zealously defending the interests of his or her client. In fact, in my opinion, it is to be expected

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He also would like to thank Stephie Prestridge, Esq. for her time and effort in assisting in preparation and writing of this paper. It is noted that there is profanity or what some may consider strong language in certain excerpts of judicial opinions contained herein, and please be assured that it is not meant to be offensive but rather illustrative of uncivil action among lawyers and witnesses.

[2] Indeed, Louisiana is a "civil law island in a common law sea." SHAEL HERMAN ET AL., THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL 3 (unpublished manuscript on file with Tulane Law School). The civil law developed from the Roman law of Justinian's Corpus Juris Civilis. Unlike the common law, which was developed by custom, civil law proceeds upon the application of codified legal principles rather than the application of facts to legal fictions. The difference between civil law and common law, however, lies less in the fact of codification, but, rather, in the methodological approach to codes and statutes. Under the civil law, legislation is the primary source of law upon which courts are to base their judgments. Civil law courts have to premise their reasoning upon general principles of the code. By contrast, in the common law system, cases are the primary source of law, while statutes are only seen as narrow incursions into the common law.

by the courts and the client that such should be the case, and counsel should strive to meet those expectations.[3] Maintaining civility and, thus, professionalism, while being a zealous advocate will help to ensure that an attorney is both candid and ethical with the court and opposing counsel, and, at the same time, able to zealously pursue his or her client's interests. It must be noted, however, that the judge also helps to set the tone for interaction between and among the lawyer and client, opposing counsel and the court. In many instances, it is up to the judge to help maintain civility in legal proceedings in the face of an overzealous advocate.

I. The Rule of Law: Louisiana Rules of Professional Conduct

Louisiana law requires an attorney to adhere to the rules of law governing professional conduct. The Rules of Professional Conduct have the force and effect of substantive law. *Succession of Cloud*, 530 So.2d 1146, 1150 (La. 1988). In Louisiana, the Rules of Professional Conduct require, among other traits, diligence, candor, and fairness when advocating on behalf of another.

[3] *See*, for example, the commentary of Michelle C. Christopher, wherein she argues that it is not the conduct of lawyers which is suspect, but, rather, a misunderstanding of the inherently adversarial nature of the practice of law. Michelle C. Christopher, *Changing the Philosophical Map*, LAW NOW, February 1, 2005, at *1, *available at* 2005 WLNR 4832618.

An attorney must "act with reasonable diligence and promptness" in the representation of a client.[4] In the exercise of reasonable diligence, an attorney should pursue matters on behalf of a client despite opposition, obstruction or personal inconvenience to the attorney. All lawful and ethical measures necessary to promulgate a client's cause or endeavor should be engaged. An attorney must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, an attorney's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. Hence, reasonable diligence and promptness – or zeal in advocacy – is permissive only of an ardent pursuit of principled representation.

A. The Zealous Advocate

The requirement of diligent representation stems from Canon 7 of the ABA Model Rules of Professional Conduct, which originally **mandated** "zealous representation" by attorneys. The ABA Model Rules, as well as the Louisiana Rules of Professional Conduct, were revised, replacing the black-letter duty of "zealous representation" with the duty of "diligent representation." Nevertheless, many lawyers remain under the misconception that zealous representation is a professional requirement. The misconception that "zealous advocacy" is the professional requirement likely fuels much of the unprofessional, uncivil practice of law, whether it be in litigation, office practice, or in transactional practice.[5]

Additionally, attorneys argue "zealous advocacy," regardless of the unprofessional, uncivil conduct it engenders, serves the best interests of each client.[6] There is often a perception

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[4] Rule 1.3 of the Louisiana Rules of Professional Conduct.

[5] Allen K. Harris, *The Professionalism Crisis – The "Z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 568-69 (Spring 2002).

[6] In other words, many attorneys believe zealous advocacy is not so much an ethical responsibility as it is the preferable weapon to use for clubbing opponents. John Conlon, *It's Time to Get Rid of the "Z" Words*, RES GESTAE, February 2001, at 50.

that incivility and rudeness are necessary to meet client expectations.[7] Attorneys argue that clients "...don't want a wimp. They want a lawyer who means business, an animal who's going to get the job done, whatever it takes."[8] In that vein, many believe that clients are best served by the intimidation of opponents, a refusal to accommodate, and tactical maneuvering to escalate an opponent's expenses. In fact, sometimes clients say they want an attorney that is mean, obnoxious, or a "bull-dog," thinking that only an attorney who harasses opposing counsel and their witnesses can accomplish the client's objective. Thus, zealous representation in many instances, and unfortunately, functions as a means by which to push all rules of ethics and decency to the limit:

> Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client, and, of course, for a price. Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyers' claims to officer of the court status.[9]

B. The Credible Lawyer

Credibility is the cornerstone of the legal profession. Without credibility and candor to the court, a lawyer lacks professionalism, can have difficulty in working with his colleagues in the legal profession, and certainly, whether zealous or not, will find it difficult to represent his client before the court as he will be viewed with skepticism and will be second-guessed.

Though an attorney has a duty to persuasively advocate a client's position, performance

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[7] In their article "The Uncivil Lawyer," Thomas Gee and Bryan Garner determine that this perception occurs as a result of the rise of consumerism. A client's expectation of the best representation may lead to an "I-don't-care-how-you-do-it, win-at-any-cost mentality." As such, clients may encourage uncivil behavior by attorneys. Thomas Gibbs Gee and Bryan A. Garner, *The Uncivil Lawyer*, 15 REV. LITIG. 177, 185 (Winter 1996).

[8] *See*, Sandra Day O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library*, 2002, 55 OKLA. L. REV. 197, 198 (Summer 2002).

[9] Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 767 (1994).

of that obligation is qualified by the duty of candor to the court.[10] Particularly, as set forth in Rule 3.3 of the Louisiana Rules of Professional Conduct,

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes to be false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Thus, though impartiality is not required of an advocate, an attorney must not allow a court to be misled by false statements of law, fact or evidence, which the attorney knows to be false.[11]

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[10] Rule 3.3 of the Louisiana Rules of Professional Conduct, Comment 2.

[11] *Id.*

An attorney's duty of candor, therefore, encompasses each arena of advocacy before the court: allegations of fact as set forth by parties and as argued by attorneys, principals of law governing the claims and defenses of each party, and the presentation of evidence to the court. An attorney may neither make nor suborn a material misstatement of fact. Legal principals, as set forth by statutory provisions and as interpreted by the courts, are to be properly disclosed, undistorted by citation and application manipulations. A lawyer's duty of candor also includes the duty to disclose controlling legal authority that is directly adverse to the position of the lawyer's client and which authority is not disclosed by opposing counsel. Moreover, regardless of a client's wishes, a lawyer may not introduce evidence known to be false.[12] Hence, all representations to the court, whether factual or legal in nature, must be forthright.

In that regard, it is the responsibility of every lawyer to undertake all necessary due diligence in defending his or her client's interests to seek out and properly develop the facts of the case so as not to misrepresent the issues therein. Indeed, each and every client, in furtherance of their case, should also work with their lawyer in developing the case in order to have the best chance of success come from representation by their lawyer. For either the lawyer or the client not to undertake this task may be seen as contempt to the court and disrespect to opposing counsel.

[12] A reasonable belief of falsity, however, will not suffice to preclude the presentation of evidence. According to Rule 3.3(a)(3), an attorney's duty of candor to not present false evidence applies solely to evidence that "the lawyer knows to be false." Rule 3.3 of the Louisiana Rules of Professional Conduct, Comment 8.

Recently, the Louisiana Supreme Court changed the provisions of Rule 3.3(a)(1) to include as an offense the failure to correct a material misstatement made by an attorney to the court. The interplay between attorney statements, or lack thereof, and candor toward the court and was addressed by the Connecticut Supreme Court in *Daniels v. Alander*, 17002 (Conn. 2004), 844 A.2d 182. According to the court, Rule 3.3 was not intended to be limited in application to parties making affirmative misstatements. *Id.* at 188. Rather, "[d]epending on the circumstances, the rule can pertain to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney." *Id.* Thus, by failing to prevent a misunderstanding by the court, an attorney's silence may constitute a false statement of material fact or law.

In addition to an advocate's duty of candor to the tribunal, an attorney must also act with fairness to opposing parties and their counsel. Rule 3.4 of the Louisiana Rules of Professional Conduct provides as follows:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when

testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocense of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The tenants of Rule 3.4 secure prohibitions against the destruction or concealment of evidence, the improper influence of witnesses, and obstructive tactics in the discovery procedure. In so doing, Rule 3.4 of the Louisiana Rules of Professional Conduct provides for fair competition among attorneys in the adversary system.

II. Professional Courtesy: An Uncivil Approach

Nevertheless, it appears as though "civil law is becoming an oxymoron."[13] Unprofessional conduct, guised as zealous advocacy, is rampant. In *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), for instance, the Delaware Supreme Court addressed the egregious incivility and professional misconduct of attorneys during the discovery process. Of concern was a particular act of misconduct during a deposition which, according to the Court, demonstrated ". . . such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future - a lesson of conduct not to be tolerated or repeated." *Id*. at 52. During a deposition, counsel engaged in a vicious verbal spar:

[13] Arthur Gilbert, *Civility: It's Worth the Effort*, TRIAL, April 1991, at 106. See, also, Al Ellis, *Ethics in Trial Practice: Overcoming the Classic Oxymoron*, TEXAS LAWYER, October 18, 1999, at *1 ("Just as the general public often believes 'honest lawyer' to be an oxymoron, it appears many in our profession have concluded a trial and ethical conduct are mutually exclusive.")

Answer: [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter] . . . I think I did read it, probably.

Question: (By Mr. Johnston [Delaware counsel for QVC]) O.K. Do you have any idea why Mr. Oresman was calling that material to your attention?

Mr. Jamail: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.

Mr. Johnston: No, Joe -

Mr. Jamail: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

Mr. Johnston: No. Joe, Joe -

Mr. Jamail: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

Mr. Johnston: Let's just take it easy.

Mr. Jamail: No, we're not going to take it easy. Get done with this.

Mr. Johnston: We will go on to the next question.

Mr. Jamail: Do it now.

Mr. Johnston: We will go on to the next question. We're not trying to excite anyone.

Mr. Jamail: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.

Mr. Johnston: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.

Mr. Jamail: Well, go on and shut up.

Mr. Johnston: Are you finished?

Mr. Jamail: Yeah, you -

Mr. Johnston: Are you finished?

Mr. Jamail: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing. Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

Mr. Johnston: Are you finished?

Mr. Thomas: Come on, Mr. Johnston, move it.

Mr. Johnston: I don't need this kind of abuse.

Mr. Thomas: Then just ask the next question.

Question: (By Mr. Johnston) All right. To try to move forward, Mr. Liedtke, . . I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D-1, and my question -

Answer: No.

Question: - to you, sir, is whether you've seen that?

Answer: No. Look, I don't know what your intent in asking all these questions is, but, my God, I'm not going to play boy lawyer.

Question: Mr. Liedtke -

Answer: O.K. Go ahead and ask your question.

Question: - I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.

Mr. Jamail: Come on with your next question. Don't even talk with this witness.

Mr. Johnston: I'm trying to move forward with it.

Mr. Jamail: You understand me? Don't talk to this witness except by question. Do you hear me?

Mr. Johnston: I hear you fine.

Mr. Jamail: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.

* * *

Mr. Jamail: You don't run this deposition, you understand?

Mr. Carstarphen: Neither do you, Joe.

Mr. Jamail: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your goddamn job, fat boy.

Mr. Carstarphen: Well, that's not your job, Mr. Hairpiece.

Witness: As I said before, you have an incipient - -

Mr. Jamail: What do you want to do about it, asshole?

Mr. Carstarphen: You're not going to bully this guy.

Mr. Jamail: Oh, you big tub of shit, sit down.

Mr. Carstarphen: I don't care how many of you come up against me.

Mr. Jamail: Oh, you big fat tub of shit, sit down. Sit down, you fat tub of shit.

Id. at 53-54. The case *Carroll v. The Jaques Admiralty Law Firm*, 926 F. Supp. 1282 (E.D. Tex.1996) also illustrates the gross language and conduct by a party defendant in a deposition. In the *Carroll* case, the defendant threatened and cursed the plaintiff's attorney in the following exchange:

Question: So, you knew you had Mr. Carroll's file in the - -

Answer: Where the f-- is this idiot going?

Question: - - winter of 1990/91 or you didn't?

Defendant's Counsel: Nonresponsive. Objection, objection this is harassing. This is - -

The Witness: He's harassing me. He ought to be punched in the goddamn nose.

Question: How about your own net worth, Mr. Jaques? What is that?

Defendant's Counsel: Excuse me. Object also that this is protected by a - -

The Witness: (interrupting) Get off my back, you slimy son-of-a-bitch.

Plaintiff's Counsel: I beg your pardon, sir?

The Witness: You slimy son-of-a-bitch [shouting].

Plaintiff's Counsel: You're not going to cuss me, Mr. Jaques.

The Witness: You're a slimy son-of-a-bitch [shouting].

Id. at 1286. As illustrated by the above excerpts, uncivilized conduct between attorneys (and sometimes witnesses) abounds, is not always limited to discussions between the attorneys, and is occurring more often as a commonplace reality rather than as an occasional anomaly.

A more extreme example of attorney incivility involves two Seattle attorneys. While advocating a contract dispute, Kevin Jung expressed to the court his growing frustrations with opposing counsel, William Joice. Mr. Joice repeatedly refused to provide documents and consistently failed to attend hearings. In correspondence to Mr. Joice, Mr. Jung stated, "You and your clients' failure to comply with court rules and unprofessional conduct on your part are just incomprehensible..." Ultimately, Mr. Jung requested that Mr. Joice be found in contempt of court and fined $2,000.00. The merits of Mr. Jung's allegations against Mr. Joice, however, were never heard by the court. On the morning of the hearing for the contempt motion, Mr. Joice shot Mr. Jung in the head.[14]

Incivility is not restricted to opposing attorneys: judges are often embroiled in attorney

[14] Gene Johnson, *Lawyer is Accused of Shooting Rival Attorney in Civil Case*, St. Louis Post-Dispatch, November 6, 2004, *available at* 2004 WLNR 6712858.

misconduct. After appearing over an hour late for trial, attorney Joseph Thomas engaged in a heated exchange with Judge Kerr of the New Orleans Civil District Court.

Judge Kerr:	All right. Mr. Thomas, this case was specifically set today, as a result of a conference call with your former assistant, and you were reminded that it was set for 8:15 during our conference call last week. Why weren't you here and ready to go-
Attorney;	My-
Judge Kerr:	-to trial at 8:15? And stand up when you're addressing the Court.
Attorney:	Your honor, do I detect some hostility to me?
Judge Kerr:	Yes, sir. You had-
Attorney:	And let me just say for the record-
Judge Kerr:	-everybody waiting here. Just a minute.
Attorney:	Before you said-
Judge Kerr:	You're not going to interrupt me. I'll give you ample time-
Attorney:	You interrupted me.
Judge Kerr:	-to speak. Yes. Sir.
Attorney:	You interrupted me.
Judge Kerr:	I'll-I may interrupt you quite frequently.
Attorney:	I don't-let me tell you. I object to that.
Judge Kerr:	Okay.
Attorney:	I object to you interrupting me.
Judge Kerr:	Okay. We've waited an hour and 45 minutes. Why did we have to do that?
Attorney:	Because I wasn't here is why you had to do it. Now, if you want to know why I wasn't here-

Judge Kerr: Yes sir.

In re Joseph W. Thomas, 2003-B-2738 (La. 2004), 2004 WL 345718. Despite counsel's hostility toward the court, Judge Kerr attempted to proceed with the merits of the trial. *Id*. Counsel, however, continued to act in a rude and arrogant manner, going so far as to refer to the court proceedings as a "joke." *Id.* In issuing a sanction against the attorney, the Louisiana Supreme Court described the insulting and abusive language toward Judge Kerr to be a shocking and unquestionable violation of the Louisiana Rules of Professional Conduct.[15] Thus, judges are also exposed to the incivility of the bar.[16]

Moreover, judges may be the source of incivility in the courtroom. For example, a Minnesota judge was disciplined for using gender-biased language in court proceedings by referring to a female attorney as a "lawyerette." *In re Kirby*, 354 N.W.2d 410, 414 (Minn. 1984). In a report published by the Committee on Civility of the Seventh Federal Judicial Circuit in the Chicago area, practitioners noted the following:

- Some federal judges seem more interested in "putting down" attorneys rather than practicing judicial temperament.
- Judges are usually rough with lawyers, threatening, scolding, ignoring arguments.
- Judges seem to blame attorneys for the judges' heavy caseloads.

Interim Report of the Committee of the Seventh Federal Judicial Circuit, 143 F.R.D. 371 (1991). Judicial *mis*-conduct, therefore, cannot only contributes to, but also aggravates the problem of incivility. Indeed, "[t]he judge sets the tone of the courtroom. If the judge is short tempered and

[15] Ultimately, the Louisiana Supreme Court suspended attorney Thomas from the practice of law for a period of three years. Mr. Thomas' suspension was based upon evidence of professional misconduct including, but not limited to, a physical alteration with opposing counsel and the abusive treatment of Judge Kerr. *In re Joseph Thomas, supra*.

[16] Consider for instance, the comments of a new judge: "I always pictured civil law as being just that. But when I started on the bench, I was amazed at how uncivil the lawyers were." Jean Godden, *Civil Law? The Judges Rate the Attorneys*, THE SEATTLE TIMES, November 15, 1991, at C1 (quoting an anonymous judge).

uncivil, he or she invites incivility."[17] "Finally, civility is relevant to judges, and especially trial judges because they are under greater stress than other judges, and subject to the tmepation to respond in kind to the insolence and mad manners of lawyers. Every judge must remember that no matter what the provocation, the judicial response must be a judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider."[18]

III. Diminishing Returns: The Consequences of an Uncivil Practice

Regardless of the source or justification for incivility, the repercussions of unprofessional conduct are widespread. Unethical and unprofessional conduct has lead to a serious decline in public respect for the legal profession.[19] Public respect for the legal system is necessary for the acceptance of judicial decisions. In order to maintain public respect, however, it is essential to maintain high standards of attorney conduct. Thus, as stated by recently retired Justice O'Connor of the United States Supreme Court, "[w]hen lawyers themselves generate conflict...it undermines our adversarial system and erodes the public's confidence that justice is being served."[20]

Overzealous advocacy and lack of candor also interferes with the truth-seeking mission of the justice system.[21] This is especially evident in the discovery process. According to some attorneys, the duty of zealous advocacy requires discovery requests of opposing parties to be

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[17] James A. George, *The "Rambo Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 LA. L. REV. 467, 489 (Winter 2002). [Emphasis Added]

[18] Warren E. Burger, The Necessity for Civility, 52 F.R.D. 211, 214-15 (1971).

[19] Allen K. Harris, *supra* note 5, at 555. According to surveys, approximately sixty percent (60%) of the people who had recently utilized the services of an attorney did not trust attorneys. In fact, attorneys were ranked just below used care salespersons among those the public thought it could trust. James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus*?, 62 LA. L. REV. 467,483 (Winter 2002).

[20] Sandra Day O'Connor, *supra* note 8.

[21] Allen K. Harris, *supra* note56, at 555.

strictly construed.[22] All doubts as to discovery responses are to be resolved in favor of non-disclosure. Such a stance, however, mutates "...a search for the truth to resolve a bona fide dispute between two parties" into "...an acrimonious personal war between the lawyers."[23] Additionally, unprofessional discovery practices, including a lack of candor, creates a conflict between an attorney's role as an advocate for non-disclosure in discovery and as an officer of the court to aid understanding via disclosure of relevant information.[24]

The practice of overzealous advocacy not only interferes with the truth seeking mission, but also impairs the speedy and inexpensive determination of claims. Overzealous attorneys manipulate the discovery and litigation processes, inundating the legal system with unnecessary, often frivolous, motions, memoranda and arguments. Expert wars are ignited, requiring each party to bear the cost of expert witnesses. Ultimately,

> [f]iling "everything imaginable" is highly rewarded; hence [the attorney] flourishes with fees for what amounts to authorized, largely unsanctioned, chicanery that is brining the legal profession into increasing disrepute. There is too little risk to the unscrupulous client and her pliable Rambo lawyer. They play expensive discovery games–the every day spectacles which get the profession much unfavorable public attention while [the attorney], in pursuit of a fee, takes advantage of his and the client's questionable use of the legal process.[25]

In the end, abuse of professionalism forces clients to pay additional and unnecessary fees for their lawyer's uncivil conduct.

Additionally, an attorney's overzealous representation may be harm a client's interests. For example, the Louisiana Supreme Court in *In re Kathleen M. Bilbe*, 841 So.2d 729 (La. 2003), considered the potential impact of an attorney's improper representations before a United

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[22] W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895 (1996).

[23] *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 149 (D. N.J. 1999).

[24] W. Bradley Wendel, *supra* note 21.

[25] Allen K, Harris, *supra* note 5, at 598.

States immigration judge. Attorney Kathleen Bilbe represented an individual seeking a status change from alien to permanent resident by virtue of marriage to an American citizen. *Id.* at 730. When arguing before the court, Ms. Bilbe falsely represented that her client's Immigrant Visa Petition had been approved and, based upon that approval, demanded the court issue a status determination. *Id.* at 731. Upon becoming aware that the Immigrant Visa Petition had not been approved, the court informed Ms. Bilbe that, if ruled upon that day, the status change would be denied and her client would be deported. *Id.* Nevertheless, Ms. Bilbe continued to demand adjudication, to which her client responded by terminating her representation. *Id.* In finding Ms. Bilbe's conduct to be in violation of the Rules of Professional Conduct, the Louisiana Supreme Court noted that "...respondent's conduct...went far beyond...advocacy. Indeed, Respondent's excessive zeal could actually have been detrimental to her client's interests." *Id.* at 739.

IV. Professionalism: The Need for Civility

The Rules of Professional Conduct do not function as a ceiling to the exercise of professionalism, but, rather, merely represent a baseline of acceptable conduct. As stated by the Georgia Supreme Court, "[e]thics is that which is required and Professionalism is that which is expected." *Evanoff v. Evanoff*, 418 S.E.2d 62 (Ga. 1992). Professionalism, "...entails what is more broadly expected of attorneys." *State v. Lentz*, 844 So.2d 837 (La. 2003). Ethics, therefore, constitute an enforceable conduct threshold, while professionalism refers to more desired conduct. The nature of professionalism, or "that which is expected," however, is subject to much debate.[26] Professionalism is a fluid concept, undefined by a single meaning or definition.[27] Nevertheless, much effort has been expended in an attempt to confine professionalism to a single, acceptable definition. Some define professionalism using an "I-know-it-when-I-see-it" approach.[28] Others define professionalism as charity, synonymous with a dedication to pro bono service.[29] Additionally, professionalism is defined by exclusion: professionalism is not legal ethics and, thus, comprises all conduct beyond that required by the Rules of Professional Conduct.[30]

An alternate perspective of professionalism focuses upon civility. Civility is courtesy, dignity, decency, and kindness.[31] According to Chief Justice Burger in a 1971 speech to the American Law Institute, civility is the lubricant "that prevents lawsuits from turning into

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[26] David J. Beck, *Exploding Unprofessionalism: Fact or Fiction*, 61 TEX. B.J. 534, 563 (1998). Beck notes that, though the lack of professionalism is often discussed, the term "professionalism" is seldom defined.

[27] *See*, Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 232 (Summer 2003).

[28] *Id.* at 233. Professor Ciolino equates the "I-know-it-when-I-see-it" approach to pornography: "Something that is difficult to articulate, but that is readily apparent to the eye, if only to the eye of the beholder."

[29] *Id.*

[30] *Id.*

[31] Allen K. Harris, *supra* note 5, at 555.

combat."[32] Chief Justice Berger's notion of civility has endured. In a concurring opinion issued in *Butts v. State*, Chief Justice Robert Benham of the Georgia Supreme Court described the integral role of civility in the legal system:

> Civility is more than just good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducing their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.
>
> To avoid incivility's evil consequences of discord, disrespect, unresponsiveness, irresponsibility, and blind advocacy, we must encourage lawyers to embrace civility's positive aspects. Civility allows us to understand another's point of view. It keeps us from giving vent to our emotions. It allows us to understand the consequences of our actions. It permits us to seek alternatives in the resolution of our problems. All of these positive consequences of civility will help us usher in an era where problems are solved fairly, inexpensively, swiftly, and harmoniously.

546 S.E.2d 472, 486 (Ga. 2001).[33] One year later in a speech to students and alumni of Oklahoma University Law School, Justice O'Connor reiterated the importance of civility:

> Lawyers must do more than know the law and the art of practicing it. A great lawyer is always mindful of the moral and social aspects of the attorney's power and position as an officer of the court. Our Constitution requires lawyers to represent their clients zealously, but nothing in the Constitution justifies advocacy so zealous that it exceeds the bounds of the law....Greater civility can only enhance the effectiveness of our justice system, improve the public's perception of lawyers, and increase lawyer's professional satisfaction.[34]

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[32] Warren E. Burger, *supra* note 25.

[33] *But, see*, David J. Beck, *supra* note 25, at 540, wherein he argues that if professionalism is defined as attorney competence, quality of legal work, and client satisfaction with legal services, professionalism is undisturbed.

[34] Sandra Day O'Connor, *supra* note 8.

Without civility, therefore, the legal process is not able to serve its purpose or achieve its objective.

The practice of civility is not irreconcilable with zealous advocacy. Indeed, "[t]here is no inconsistency ...between civility and zealous effective advocacy. In fact, quite the contrary, advocacy which is both civil and professional is by far the most effective."[35] Hence, **an attorney may be civil while still being aggressive, upset, angry, or intimidating**. Civility merely dictates that an attorney may not be rude.

Though the definition of "civility" is easier to articulate than that of "professionalism," the implementation is no less difficult to imagine. Chief Justice Burger suggested that lawyers have a great responsibility with regard to civility in the courtroom and beyond. Lawyers are "living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best."[36] In the implementation of civility, attorneys – "living exemplars" – should attempt to be Shakespearean legal adversaries: men and women who "strive mightily, but eat and drink as friends."[37]

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

[36] Warren E. Burger, supra note 25, at 214-15.

[37] William Shakespeare, THE TAMING OF THE SHREW, act 1., sc. 2.

Conclusion

Civility, though not an ethical requirement enforceable by courts, is the foundation of a successful adversary system. Without civility, the adversarial system is inundated with attorney hostilities, sowing nothing more than harmful repercussions. Civility, and, thus, professionalism and ethical behavior, must endure in zealously advocating a client's best interests and his or her case, which will promote candor with the court and opposing counsel. Civility, however, must be promoted by the lawyer, the judge, and the client. As described by Edmund Burke, "[m]anners are what vex or sooth, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in."[38] Just as manners either aid or corrupt morals, civility aids ethics, while incivility corrupts ethics.

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[38] George Weigel, *The Member from Bristol*, Commentary, June 1993, at 54, 56 (reviewing Conor C. O'Brien, The Great Melody: A Thematic Biography of Edmund Burke (1992)).