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REFORM OF THE ARIZONA STATE BAR’S RULES OF PROFESSIONAL CONDUCT: FROM ZEALOUS ADVOCACY TO HONORABLE REPRESENTATION

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REFORM OF THE ARIZONA STATE BAR’S RULES OF PROFESSIONAL CONDUCT: 
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Zachary M. Rawling

INTRODUCTION

In 2003, the Arizona Supreme Court announced “a historic and significant change” to the State Bar’s Rules of Professional Conduct, eliminating the obligation of attorneys to be “zealous” advocates of their clients in favor of a duty to “act honorably” to further their clients’ interests.1 Chief Justice Charles E. Jones described the change as “a significant foundational change in the Rules of the Court, and one that is designed to send a distinct message to attorneys.” The principal impetus for the amendment was an increase in the number of attorneys improperly citing zealous advocacy as a defense for “unprofessional and potentially belligerent conduct;”2 however, the amendment does more than eliminate a defense for uncivil conduct. It calls into question the fundamental role of attorneys in the American legal system.

Historically, an attorney has been both an advocate for his client and an officer of the

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1 Arizona Supreme Court approves ‘historic’ amendments to governing rules, MARICOPA LAWYER (Maricopa County Bar Assoc.), July 2003, at 3. The former Preamble to Arizona’s Rules of Professional Conduct stated: [A]n advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system, and that a lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold the legal process. 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 assumes that justice is being done.

ARIZ. R. S. CT. 42, Preamble (A Lawyer’s Responsibilities) (2003). The amended Preamble states: As advocate, a lawyer asserts the client’s position under the rules of the adversary system. . . . A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. 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 an advocate on behalf of a client and at the same time assume that justice is being done.

Id. (2006).

court, imbuing legal practice with both private and public functions.³ The Rules of Professional Conduct underscore both roles by promoting three core values: loyalty, confidentiality and candor to the court.⁴ Legal ethics scholar Geoffrey Hazard explains: “The duties of loyalty and confidentiality legitimate the representation of clients” in an adversarial system, while “[t]he duty of candor to the court legitimates the bar’s affiliation with the judiciary.”⁵ Prior to the 2003 amendments, the principle of zealous advocacy overlaid the Rules, elevating an attorney’s advocacy role to paramount importance. As noted in the revised preamble to the Rules, “[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.”⁶ In theory, attorneys’ commitment to zealous advocacy might serve as a tiebreaker when those attorneys’ duties as advocate and officer of the court conflict. In practice, the Arizona Supreme Court believes that attorneys improperly relied on the zealous advocacy ideal to justify abandonment of their public duties entirely, rendering their role as officers of the court “a metaphor with little substance.”⁷

The 2003 amendments to the Arizona Rules of Professional Conduct have been both hailed as a “triumph of legal scholarship” critical of the “role morality” of attorneys,⁸ and

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³ *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (“Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients.”).
⁴ Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, YALE L.J. 1239, 1246 (1991); see also Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 792-94 (2006) (identifying three values of legal ethics: (1) zealous advocacy; (2) justice; (3) morality).
⁷ Frederick J. Martone, *Adversary Adjudication on Trial*, 21 Ariz. St. L. J. 227, 233 (1989); see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13 (1988) (“I know perfectly well that when lawyers start talking . . . about their public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and the Bar Association after-dinner speech – inspirational, boozily solemn, anything but real.”).
condemned as sounding the death knell of the adversarial system. Both reactions likely exaggerate the impact the removal of references to zealous advocacy in the Rules will have on the practice of law in Arizona. The purposes of the 2003 amendments are: (1) to prevent attorneys from using zealous advocacy as a defense for unprofessional conduct; and (2) to change attorneys’ attitudes toward their public duties as officers of the court. The achievement of those objectives would enhance rather than subvert the proper functioning of the adversarial system. Ultimately, the Arizona State Supreme Court’s attempt to restore the balance between attorneys’ duties as advocates and as public officials is conservative, not revolutionary.

I. ORIGIN AND EVOLUTION OF ZEALOUS ADVOCACY

Adversarial proceedings, in which zealous advocates advance the parties’ interests through “ritualized battle,” are a hallmark of the American legal system. As observed by Geoffrey Hazard, “[t]he narrative of the American legal profession conveys a . . . clear ideal: that of the fearless advocate who champions a client threatened with loss of life and liberty by government oppression.” Citing Abraham Lincoln’s defense of a murder suspect and Thurgood Marshall’s civil rights litigation as examples, Hazard notes that in both cases, the “lawyer is . . . an instrument of both liberty and political justice,” vindicating individual rights

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9 Posting of Marc J. Victor to LewRockwell.com, http://www.lewrockwell.com/orig/victor4.html (Jan. 10, 2004) (“[T]he Arizona Supreme Court recently decided that the age-old duty of zealous advocacy is no longer appropriate. . . . I interpret this change to mean the government has determined it is no longer in the government’s interest for criminal defense attorneys to be zealous when they fight the government. No kidding. One could expect nothing different so long as the government supplies all the judges, the prosecutors and strictly regulates all criminal defense attorneys.”).

10 STEPHEN YEAZELL, CIVIL PROCEDURE 1 (6th ed. 2004); see also GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 120 (1979) (noting that the antecedent to the modern adversarial system is thought to be the Norman trial by battle, in which disputed issues were resolved by the outcome of a duel).

11 Geoffrey C. Hazard, Jr., The Future of Legal Ethics, YALE L.J. 1239, 1243 (1991). Interestingly, if Law & Order is representative of public sentiment, the narrative also champions government attorneys who zealously prosecute criminals to vindicate the public’s collective rights to order and security.
from governmental oppression. The narrative transfers, albeit imperfectly, to commercial legal practice performed by a substantial portion of the Bar. Instead of upholding individual liberty, attorneys protect corporate property from government regulations or civil suit by other private litigants. “Viewed in this way, the legal profession’s basic narrative is a defense of due process. The lawyer’s work consists of resistance to government intervention in the lives, liberty, or property of private parties.” The narrative compels attorneys to pursue the advancement of their clients’ interests zealously, and in fact, professional zeal “is found in the United States in a form that, for vigor, has no rival anywhere.”

Despite the legal profession’s commitment to the ideal of zealous advocacy, long-standing skepticism of the adversarial system is also part of American culture. Progressives object to the substantive outcomes generated by adversarial proceedings between unequal parties. Market allocation of legal services typically guarantees powerful interests access to superior legal counsel relative to financially weaker adversaries. When powerful interests, usually corporations, employ attorneys to defeat the claims of less powerful interests, usually individuals, the narrative of the zealous advocate as champion of individual rights is perverted.

As Louis Brandeis stated in 1905, “able lawyers have, to large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.” Conservatives meanwhile decry Americans’ propensity to

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12 *Id; see also* James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 740-43 (1992) (describing Atticus Finch, the lawyer in Harper Lee’s *To Kill a Mockingbird* who defends a black man falsely accused of raping a white woman, as “a wonderful literary example of the internalization of zealousness and its ritual re-appearance in a virtuous act of courage”).
14 CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 10.3.2, at 581 (1986).
litigate disputes rather than to seek informal resolutions to conflict, and they condemn attorneys as parasites, profiting from the social conflict they help engender while increasing the prices consumers pay for basic goods and services like health care.¹⁷

Given the widely varied and conflicting opinions of the adversarial system and zealous advocacy, Stephen Yeazell concludes:

> Ambivalence pervades debate about the behavior of courts and lawyers. As a society we demonstrate a strong belief in the efficacy of lawsuits to solve social, business, and personal problems, and we extol the rule of law as a distinguishing virtue of our culture. But at the same time we worry about what many believe is an excessive willingness to seek legal solutions. The ensuing debate ranges from the role of courts in restructuring social institutions to the question of whether lawyers exacerbate disputes and waste social resources by reflexively behaving in competitive, adversarial ways.¹⁸

Changes in the standards of professional responsibility governing attorney conduct reflect that ambivalence, and fluctuation in the prominence of zealous advocacy in those standards parallels evolving social conceptions of the proper role of attorneys in the legal system.¹⁹

A. In Defense of Queen Caroline

Lord Brougham issued the classic statement of an attorney’s duty of zealous advocacy to the House of Lords in 1820:

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¹⁷ See, e.g., President George W. Bush, Remarks by the President at the Newspaper Association of America Annual Convention (April 21, 2004), available at http://www.whitehouse.gov/news/releases/2004/04/20040421-5.html. [W]e've got to have a balanced legal system. I'm deeply concerned about a legal system that is fraught with frivolous and junk lawsuits which make it harder to form businesses, make it less desirable to risk capital. A competitive business environment that will encourage lasting prosperity must mean there needs to be balance in our legal system. There must be tort reform. . . . And [Congress] ought to [act] on medical liability reform, as well. . . . I [see] what frivolous lawsuits and the defensive practice of medicine do to the federal budgets. They cost us a lot of money. . . . And so Congress needs to pass medical liability reform—not only to send a message that tort reform is vital, but also to help us control the cost of medicine, which is a . . . necessary ingredient for there to be lasting prosperity.


¹⁹ Mary Joe Frug, The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, or Legitimating the Status Quo?, 26 VILL. L. REV. 1121, 1122 (1981) (“Historically, the profession can trace the development of each of its formal codes to a crisis of the social order and the complicity of lawyers in that crisis.”)
[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion.20

Brougham’s articulation of the zealous advocacy ideal was controversial in Britain at the time;21 however, it strongly influenced the American Bar’s understanding of the proper role of attorneys in an adversarial system.

B. Golden Age of Zealous Advocacy

Because the zealous advocacy ideal champions individual autonomy against governmental encroachment, its popularity with the Bar during the Golden Age of American industry and classical liberalism is unsurprising. Nineteenth century legal ethicist George Sharswood embraced Brougham’s conception of zealous advocacy and promoted it in his Essay on Professional Ethics, first published in 1860 and reprinted in multiple editions over several decades.22 Sharswood declared that attorneys owed their “[e]ntire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability.”23 Furthermore, every “party has a right to have his case decided upon the law and the evidence . . . . [an attorney] is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in

21 Id. at 1165 n.4, citing James M. Altman, Considering the A.B.A.’s 1908 Canons of Ethics, FORDHAM L. REV. 2395, 2443-46 (2003).
22 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (6th ed. 1930).
23 Id. at 78-80.
his favor.”

C. 1908 ABA Canons of Professional Ethics

The American Bar Association formally adopted Sharswood’s articulation of the duty of zealous advocacy when it published the first ABA Canons of Professional Ethics in 1908. Canon 15 stated: “The lawyer owes ‘entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,’ to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.”

Canon 15 marked the “rhetorical apogee” of the zealous advocacy ideal.

Mary Frug posits that the adoption of the Canons was the Bar’s response to the public’s “revolt against unregulated industrialization in the United States.” Perhaps because of the legal profession’s conservatism, the 1908 Canons continued to reflect the traditional nineteenth century understanding of zealous advocacy. In addition, the Canons were “hortatory not disciplinary” and could not expose attorneys to liability for their violation. The Canons did not impose legal sanctions because the Bar believed that community mores, not legal rules, were the appropriate mechanism for enforcing ethical standards. As Sharswood cautioned attorneys, “[a] very great part of a man’s comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren. . . . He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them. . . . It is not only morally

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24 Id. at 84. Sharswood recognized that in some instances an attorney should decline to represent a client if “it would be on [the attorney’s] part an immoral act to afford that assistance, when his conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him.” Id. at 96.


26 Id.


28 Id.
wrong but dangerous to mislead an opponent, or put him on a wrong scent in regard to the case. . . . Let him shun most carefully the reputation of a sharp practitioner.”

D. 1970 ABA Model Code of Professional Responsibility

The effectiveness of community mores in regulating professional conduct depends upon the size and cohesiveness of a professional group. During the Twentieth Century, the Bar increased dramatically in size and fractured into a multitude of specialized practice areas to accommodate economic growth and the rise of the regulatory state. In response to those changes in the practice of law, the American Bar Association promulgated the Model Code of Professional Responsibility in 1970, which proposed formal legal standards to regulate the practice of law. The prominence of zealous advocacy in the Model Code subtly, but significantly, decreased. The title of Canon 7 stated: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” Thus, while the Model Code imposed a set of legally enforceable ethical duties on attorneys, zealous advocacy became optional. Frug attributes the diminished role of zealous advocacy in the Model Code to “mounting dissatisfaction with inequality in the social order . . . and lawyers’ efforts to preserve the status

29 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 73-74 (6th ed. 1930).
30 Mary Joe Frug, The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, Or Legitimating the Status Quo?, 26 Vill. L. Rev. 1121, 1128 (“The efficacy of an ethical code is related to the cohesion of the professional group and the influence the organization has on its individual members. The more closely individuals identify with a professional group, the more they are likely to accept and internalize the group’s rules as standards without the necessity of exercising enforcement procedures and sanctions.”)
31 See, e.g., Stone, The Public Influence of the Bar, 48 HARV. L. REV. 1, 6-7 (1934) (“The rise of big business has produced an inevitable specialization of the Bar . . . . At its best the changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most antisocial manifestations.”); Norman Bowie, The Law: From a Profession to a Business, 41 VAND. L. REV. 741 (1988); see also AMERICAN BAR FOUNDATION, THE REAPPRAISAL OF THE CANONS OF ETHICS: A FUNDAMENTAL RESPONSIBILITY OF THE BAR (July 1956).
quo” during the 1960’s.\textsuperscript{33}

E. 1983 ABA Model Rules of Professional Conduct

The decline in the prominence of zealous advocacy continued in 1983, when the American Bar Association replaced the Model Code with the Model Rules of Professional Conduct, which remain in effect in most states. Rule 1.3 states: “A lawyer shall act with reasonable diligence and promptness in representing a client.”\textsuperscript{34} References to zealous advocacy appear only in the commentary and the preamble. Comment 1 to Rule 1.3 states that “a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf;”\textsuperscript{35} however, Comment 1 limits that duty by stressing that the rules do not require a lawyer to: (1) “press for every advantage that might be realized for a client;” or (2) “use offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”\textsuperscript{36} The preamble similarly circumscribes attorneys’ role as advocates by stressing their duties as officers of the court: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the equality of justice . . . . As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system . . . .”\textsuperscript{37}

F. 2003 Amendments to Arizona’s Rules of Professional Conduct

Prior to 2003, the Arizona Supreme Court had adopted the 1983 Model Rules almost verbatim. The 2003 amendments to the Arizona Rules made two principle changes to the Model Rules, removing: (1) all references to zeal in the preamble; and (2) the phrase “with zeal in


\textsuperscript{36} Id.

\textsuperscript{37} ARIZ. R. S. CT. 42, Preamble (A Lawyer’s Responsibilities) (2006).
advocacy upon the client’s behalf” from the comments to Rule 1.3.38 Like the 1983 Model Rules, the Arizona Rules continue to stress the multiple private roles of attorneys, including their functions as advisors, advocates, negotiators, and evaluators. The public role of attorneys as officers of the court limits each of those private functions:

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.39

The message of the 2003 amendments for attorneys is unambiguous. Instead of being zealous advocates for their clients to the exclusion of their public duties, attorneys are “to protect and pursue a client's legitimate interests, within the bounds of the law, while acting honorably and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”40

Viewed in an historical context, the removal of references to zealous advocacy in the Arizona Rules of Professional Conduct is not a radical change; the 2003 amendments are the most recent incremental decline of zealous advocacy in the standards of professional conduct that has occurred over the past century. Mary Frug’s hypothesis is that the decline in zealous advocacy is a response to: (1) “a crisis in the legitimacy of professionalism . . . that threatens to undermine the current role of the legal profession in the social order;”41 and (2) “a diffuse sense of lawyers’ amorality”42 American Law Reports verify an increase in uncivil and unprofessional

39 Id.
40 Id. at Preamble.
42 Id. at 1124. See also Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613.
conduct on the part of attorneys: “The legal profession has seen an increasing number of attorneys engaging in conduct that is personally and professionally offensive. State-Bar disciplinary action results because of findings that an attorney has engaged in flagrant disrespect toward a court, opposing counsel, and adverse party, or the attorney’s own client.” The general sense of lawyers’ amorality is likely a consequence of lawyers’: (1) complicity in high-profile substantive legal abuses, most notably massive fraud at Enron, WorldCom, Tyco, Adelphia and others; and (2) abuse of legal procedures, including discovery, cross-examination, delay of trial, and presentation of evidence to confuse a jury, which frustrate the legal processes’ objective of resolving conflicts based on the substantive merits of claims.

II. CAUSES OF DECLINE IN CIVILITY AND PROFESSIONAL MORALITY

Complaints about attorneys’ unprofessional conduct and amoral behavior are likely natural consequences of two dominant themes in the history of the legal profession during the past century: (1) the growth in size and competitiveness of the Bar; and (2) the corresponding transition from community mores to legal standards as the dominant method of regulating the practice of law. The effect of increased competition is generally assumed to be negative, but as


44 Charles W. Joiner, Our System of Justice and the Trial Advocate, 24 U. SAN FRANCISCO L. REV. 1, 15 (1989); see Deborah L. Rhode, Symposium on the Law Firm as a Social Institution: Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 597 (1985) (“In large-scale litigation, principal pathologies include endless wrangling over peripheral issues, as well as over- and under-production of discoverable material. Pretrial proceedings too often give rise to casuistic constructions of discovery requests, disingenuous assertions of the attorney-client privilege, or ‘Hiroshima’ responses to document demands (with any damaging items buried in a mass of trivia).”)

45 DEBORAH L. RHOSE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 54 (2002); see also Charles W. Joiner, Our System of Justice and the Trial Advocate, 24 U.S.F. L. REV. 1, 14-19 (1989) (identifying several procedural abuses by “hardball advocates”); Robin West, The Zealous Advocacy of Justice in a Less than Ideal Legal World, 51 Stan. L. Rev 973, 973 (1999) (“If lawyers were to zealously pursue justice according to law, rather than zealously pursue through all marginally lawful means whatever ends their clients happen to desire—the moral quality of litigation would improve, as would the reputation of the bar, and likewise the justice of the law itself.”).

46 Id. (attributing the increase in abusive adversarial practices to: (1) the growth in substantive rights that can give rise to legal claim; (2) the growth in scale and complexity of some forms of litigation; (3) the growth in size and competitiveness of the bar; and (4) the related decline in informal community relationships of social control); see also R.J. Gerber, Victory v. Truth: The Adversary System and Its Ethics, 19 ARIZ. ST. L.J. 3, 14 (1986).
Richard Posner states, “this is only half right.” Lawyers have two sets of ethical obligations: (1) to the client, represented by the duties of loyalty and confidentiality; and (2) toward society, represented by the duty of candor to the court and professionalism during legal proceedings. Because attorneys are compensated by their clients, and not the court, attorneys’ economic incentives promote: (1) ethical behavior towards clients, because attorneys must compete for their business; and (2) unethical behavior towards the court if such behavior would benefit clients’ interests while externalizing costs on society. In fact, Posner claims: “Competition is pretty certain . . . to erode the lawyer’s ethical obligation to society [because] the more competitive a market is, the less likely are the sellers in it to sacrifice their customers’ interests for a social benefit for which the sellers are not compensated.”

The transition in the standards governing attorneys from social mores to legal standards likely exacerbates both the decline in professionalism and the rise of unethical conduct among attorneys. In small legal communities, attorneys have a strong incentive to maintain their reputation for integrity because of personal relationships with potential opposing counsel and judges. In larger legal communities, those personal relationships are less common, and greater anonymity tends to correspond to weaker social sanctions for violation of community mores. Reputation remains a highly valued asset for attorneys; however, a reputation for winning may

48 Id.; see also See Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System, 26 J. Legal Stud. 575, 605 (1997) (explaining that the private incentive to sue is to redistribute resources to the plaintiff while the public incentive to permit lawsuits is to facilitate the optimal allocation of society’s scarce resources). For a comprehensive analysis of the economics of disputes see Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Econ. Lit. 1067, 1094 (1989).
be as important as a reputation for ethical or civil conduct when soliciting new clients.\textsuperscript{49} As Robert Josefsberg laments, “[i]n a system fixated on winning, civility has become a meaningless issue, discarded, not even debated, by whoever is left standing.”\textsuperscript{50}

The legal rules that have largely replaced mores in regulating attorney conduct do not carry the same moral weight. Competitive forces ensure that rules which purport to establish the minimum standards of acceptable conduct represent the actual standard of conduct exhibited by attorneys. Geoffrey Hazard explains: “A client not only does not have to listen to ‘morally concerned’ legal advice; he does not have to seek it. As long as some lawyers are willing to give whatever advice the client wants to hear, a lawyer who accepts some kind of responsibility for his client’s conduct is vulnerable to being flanked. To avoid being outflanked, he has to display resiliency and to exercise some judgment about how he gives advice when a difficult matter has to be dealt with. His alternative in the real world is not to be more moral but to be amoral or unemployed.”\textsuperscript{51} The resulting decline in legal ethics is a classic illustration of market failure.

III. ACADEMIC CRITICISMS OF ZEalous Advocacy

Since the 1970’s, legal academics have argued forcefully that the zealous advocacy ideal exacerbates the decline in civility and professional ethics attributable to the growth of the bar and

\textsuperscript{49} Deborah L. Rhode, \textit{Symposium on the Law Firm as a Social Institution: Ethical Perspectives on Legal Practice}, 37 STAN. L. REV. 589, 627 (1985) (“Reputation for integrity remains a profitable commodity in many circles, and notorious impropriety may seriously devalue a practitioner’s standing. Yet in other circles, some slight devaluation may prove desirable.”); see also Larry E. Ribstein, \textit{Ethical Rules, Agency Costs, and Law Firm Structure}, 84 Va. L. Rev. 1707, 1716 (1998) (arguing that ethical rules enforced at the law firm level are best suited to regulating the legal profession because of the value of reputations to law firms: “The law firm’s role is analogous to that of a franchiser that builds a national reputation in order to encourage customers to buy from franchised outlets.”)


\textsuperscript{51} Geoffrey C. Hazard, \textit{Ethics in the Practice of Law} 146 (1979) (describing the competitive process as a “Gresham’s law” where unethical attorneys tend to drive ethical attorneys out of the market).
competition. Those criticisms have generated proposals for alternatives to the current adversarial system. Three models of legal ethics now maintain strong proponents among legal academics.

A. Adversarial Model

The distinguishing features of the adversarial model are: (1) an impartial tribunal of defined jurisdiction; (2) formal procedural rules; and (3) assignment to the parties of the responsibility to present their own cases and challenge their opponents. Attorneys act as the agents of their clients, and their duty is to advocate zealously on their client’s behalf within the confines of the procedural rules. Proponents of the model identify three principle virtues advanced by zealous advocacy: (1) discovery of the truth; (2) protection of litigants’ legal rights; and (3) safeguards against abuses by the government or opposing parties.

Monroe Freedman explains that partisan “investigation, pretrial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence” ensures optimal inquiry


54 Commentators are skeptical of whether adversarial proceedings are well-suited to discover the truth. For example, Richard Posner hedges when describing the truth-seeking function of the adversarial system: “[T]he competition of vigorous one-sided advocates is the best warrant of finding the truth. Maybe.” RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 604 (6th ed. 2003). Marvin Frankel states: “[T]he 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.” Marvin Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. La. Rev. 1031, 1055 (1975)

55 See MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARIAL SYSTEM 2 (1975) (“Under our adversarial system, the interests of the state are not absolute, or even paramount. The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination.”); Id. at 3, citing United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., dissenting) (“Defense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. . . . [W]e . . . insist that he defend his client whether he is innocent or guilty.”); Irvin Younger, Ten Commandments of Cross-Examination, reprinted in DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 70 (1988) (Rule One is “never ask anything but a leading question”; Rule Two is “never ask a question to which you don’t already know the answer”; Rule Three is “never permit the witness to explain his or her answers”; Rule Four is “don’t bring out your conclusion in the cross-examination. Save them for closing arguments when the witness is in no position to refute them.”).

56 Id. at 67; see also MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARIAL SYSTEM 24 (1975) (“In attacking zealous advocacy, we not only do damage to the public interest, but we also endanger a precious safeguard that one of us may have occasion to call upon if we should come to need our own champion against a hostile world.”).
into the truth and provides a nonpartisan “judge or jury [with] the strongest possible view of each side, [creating] the best possible position to make an accurate and fair judgment.”

Attorneys public role as officers of the court is subordinate to their private advocacy role. Justice Powell states:

[T]he duty of the lawyer, subject to his role as an ‘officer of the court,’ is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.

Two principles of zealous representation emerge from the adversarial model, which Murray Schwartz identifies as: (1) the Principle of Professionalism; and (2) the Principle of Nonaccountability. The Principle of Professionalism states: “When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail.”

The Principle of Nonaccountability states: “When acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved.”

B. Umpireal Model

Among the most ardent critics of the “role morality” demanded of attorneys in an

57 MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARIAL SYSTEM 4 (1975); see Deborah L. Rhode, Symposium on the Law Firm as a Social Institution: Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 595 (1985) (referring the premise that competitive presentations of relevant factual and legal considerations as “the Adversary System’s Invisible Hand”).

58 See, e.g., Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060 (1976) (describing a lawyer as “his client’s legal friend” who “makes his client’s interests his own insofar as this is necessary to preserve and foster the client’s autonomy within the law.”); but see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 81-87 (1988) (critiquing Fried’s theory of legal ethics).


The adversarial system is Judge Marvin Frankel:

We should face the fact that the quality of the ‘hired gun’ is close to the heart and substance of the litigating lawyer’s role. As is true always of the mercenary warrior, the litigator has not won the highest esteem for his scars and his service. We have had to reckon for ourselves in the dark hours with the knowledge that ‘selling’ our stories rather than striving for the truth cannot always seem, because it is not, such noble work as befits the practitioner of a learned profession. The struggle to win, with its powerful pressures to subordinate the love of truth, is often only incidentally, or coincidentally, if at all, a service to the public interest.\(^{62}\)

Frankel believes that an attorney should be “more truth-seeker than combatant” and argues for three modifications to the adversarial model: (1) elimination of the zealous advocacy ideal; (2) elevation of truth, not vindication of individual legal rights, as the paramount objective of litigation; and (3) imposition of an ethical duty on attorneys to disclose the truth.\(^{63}\) More concretely, Frankel suggests abandoning the attorney-client privilege and compelling attorneys to disclose any potentially damaging information to their adversary, including attorney work product.\(^{64}\) Attorneys’ public duties as officers of the court would in all cases trump their obligations as private advocates.

C. Discretionary Model

The discretionary model is a synthesis of the adversarial and umpireal models. The fundamental principle of the model proposed by William Simon states: “The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely

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\(^{63}\) Id. at 1052, 1056; see also Charles W. Joiner, *Our System of Justice and the Trial Advocate*, 24 U.S.F. L. REV. 1, 7 (1989) (“In fulfilling his or her responsibilities to the client, an advocate must be conscious of the broader duty to the judicial system that serves both the attorney and the client. When the duty to the client conflicts with the duty to the system, the duty to the system must prevail.”).

\(^{64}\) Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. LA. REV. 1031, 1056-58 (1975). Implementation of those reform proposals would gut the adversarial system. *See Hickman v. Taylor*, 329 U.S. 495, 516 (1947) “[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.” (Jackson, J., concurring).
to promote justice."  

In the criminal context, the principle already governs the conduct of prosecutors who are charged with a public duty to promote justice, not to maximize convictions. In the civil context, the principal requires attorneys to evaluate the “legal merits” of a claim and to represent their clients in a manner calculated to achieve those legal merits.

More specifically, “[i]n situations in which the procedure is sufficiently reliable that the lawyer need not assume direct responsibility for the substantive merits, she retains a duty to take reasonably available actions to make the procedure as effective as possible and to forego actions that would reduce its efficacy. When she need not consider the substantive merits herself, she should do what she can to facilitate the adjudicator in doing so.” To illustrate the principle, Simon offers the following hypothetical: On cross-examination an attorney is considering whether to impeach a handwriting expert by surreptitiously replacing the writing sample previously examined by the witness with a different sample, hoping that the witness will falsely identify the incorrect sample as containing her client’s signature. In the first case, the attorney believes that the witness correctly matched the sample signature to her client’s signature, but she knows that the witness is nervous while testifying and is not likely to recognize the substitution while on the stand. Simon argues that the impeachment tactic would frustrate the court’s ability to reach the legal merits, so impeachment is unethical. In the second case, the attorney believes that the witness employed unreliable methodology and improperly matched the sample signature to her client’s. Simon argues that the impeachment tactic would enhance the court’s ability to reach the legal merits, so impeachment is ethical.

The discretionary approach is not wholly incompatible with zealous advocacy, rather it

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68 Id.
requires that attorneys exhibit zeal in advocacy commensurate to their assessment of the strength of the legal merits of their clients’ underlying claims.

D. Case Study: Spaulding v. Zimmerman

A case study illustrates the differences among the three models of adjudication. In Spaulding v. Zimmerman,69 a twenty year-old boy suffered broken ribs and a concussion while riding in a car involved in a traffic accident. The boy’s guardian, assisted by counsel, entered settlement negotiations with the insurance company of the driver who was at fault. Prior to reaching the settlement, the insurance company hired a doctor to examine the boy. That physician discovered an aortic aneurysm, a life threatening condition, that the boy’s own doctor had not detected. Rather than disclose the information, the insurance company settled the case for nominal damages and never informed the boy of the aneurysm. Fortuitously, a military physical revealed the condition, and the boy had emergency surgery that saved his life. A district court set aside the settlement, and the State Supreme Court affirmed on appeal.

Under the adversarial model, the insurance company’s attorneys fulfilled their duty of zealous advocacy by declining to disclose that the boy had suffered an aneurysm. In his opinion, Justice Gallagher stressed: “There is no doubt of the good faith of both defendants’ counsel. There is no doubt that during the course of the negotiations, when the parties were in an adversary relationship, no rule required or duty rested upon defendants or their representatives to disclose this knowledge.”70 Gallagher instead faulted the incompetence of plaintiff’s counsel for failing to conduct adequate discovery.

Under the umpireal model, the insurance company’s attorneys behaved egregiously by concealing the boy’s life-threatening condition; the concealment jeopardized the boy’s life and

69 116 N.W.2d 704 (Minn. 1962); see also Roger C. Cranton, Spaulding v. Zimmerman: Confidentiality and Its Exceptions, in LEGAL ETHICS: LAW STORIES (Deborah L. Rhode and David J. Luban eds. 2006).
70 Spaulding, 116 N.W.2d at 352.
allowed the insurance company to shirk its legal obligation to compensate the boy for his injuries. Under the discretionary model, the command “to do justice” would require the disclosure of the life-threatening condition. Even if the condition were less serious, the discretionary model would still favor disclosure because the “legal merits” of the claim entitled the boy to full compensation for his injuries sustained in the crash, and the incompetence of the plaintiff’s counsel put an additional ethical burden on the insurance company’s counsel to ensure that the “legal merits” were achieved.

IV. 2003 AMENDMENTS TO THE ARIZONA RULES OF PROFESSIONAL CONDUCT

The 2003 amendments to the Arizona Rules of Professional Conduct do not make substantive changes to the duties of loyalty and confidentiality, which are the foundation of the adversarial system. The amendments are largely aspirational, not obligatory, but they do call into question the appropriate role of attorneys in an adversarial system. As Robert Gordon states: “The real dispute . . . is over . . . what lawyers’ attitudes toward the [legal] framework should be, including the manner and degree to which they should consider attending to the framework’s integrity as one of their professional responsibilities.”

The revised preamble to the Rules contains two references to the discretionary model. First, the Rules caution that “many difficult issues of professional discretion can arise [within the framework of the rules]. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by . . . the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while acting honorably and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”

Second, “when an opposing party is well represented, a lawyer can be an advocate on behalf of a

client and at the same time assume that justice is being done.” The encouragement to “exercise . . . sensitive professional and moral judgment,” taking into account the competence of opposing parties’ counsel, clearly elevates the discretionary model as an ideal. The Rules do not enact the substantive provisions of the discretionary model, but they do encourage attorneys to be more circumspect before advocating positions intended to frustrate reaching the legal merits of a claim.

The most salient changes in the 2003 amendments are the removal of references to zeal when describing attorneys’ duties as advocates and the emphasis on attorneys’ public roles as officers of the court. Both changes emphasize the independence of attorneys from their clients. Anita Bernstein explains: “The experience of zeal resembles how you feel when you have a stake in an outcome, when a member of your family is involved in a matter.” Ultimately, Bernstein equates zeal with passion. After the deletion of zeal from the comments to Rule 1.3, the Rules now require attorneys to act with “reasonable diligence and promptness in representing a client.” In contrast to zeal, diligence equates with methodical and dispassionate representation.

The Arizona Supreme Court attributed two abuses to excessive passion in advocacy: incivility towards the court and opposing counsel and abuse of procedures. The revised preamble addresses both issues directly: “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials;” and “[a]

73 Id.
74 Id.
76 Id. at 1175, citing Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 6.2. at 6-5 (3d ed. Supp. 2003) (defining zeal as “enthusiastic, eager, intense, passionate, and warm.”); RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993) (defining zeal as “fervor for a person, cause, or object; eager desire or endeavor”).
77 Anita Bernstein, The Zeal Shortage, 34 Hofstra L. Rev. 1165, 1167 (2006), citing MODEL RULES OF PROF’L CONDUCT R. 1.3 (1983); see RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993) (defining passions as “(1) any powerful or compelling emotion or feeling, as love or hate; or (2) a strong or extravagant fondness, enthusiasm, or desire for anything”).
lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.” Nonetheless, the deletion of references to zeal prevents attorneys from evading those professional responsibilities by claiming zealous advocacy as a defense.

The more troubling problem confronting the legal profession is the perception that attorneys facilitate substantively unlawful conduct by their clients. The 2003 amendments are clearly intended to alter attorneys’ attitudes toward courts and opposing counsel. They may also affect attorneys’ attitudes towards their clients. George Sharswood recognized: “When passion is allowed to prevail, then judgment is dethroned.” The principal concern is that attorneys have become so focused on “winning” that they have lost the objectivity necessary to advance their clients’ long-term interests. In fact, “hardball” litigation tactics and opportunistic behavior “have long-term corrosive effects on the infrastructure of business conventions” and have negative reputation effects in the market, increasing transactions costs and diminishing market demand for goods and services. The most poignant recent example of zealous advocacy leading to irrational and myopic behavior is the assistance outside counsel gave to Enron to manipulate quarterly earnings. Operating under a three month time horizon, Enron’s outside counsel ensured that the company met quarterly earnings projections. They also hastened the insolvency of the company, which declared bankruptcy in 2001.

Attorneys have an obligation to clients to protect their long-term interests, even at the

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79 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (6th ed. 1930); but see David Luban, Reason and Passion in Legal Ethics, 51 STAN. L. REV. 873, 899 (1999) (“[T]here is a back-and-forth dialectic between emotions and reasoned judgments. . . . A large part of moral education consists in learning to experience the emotions appropriate to situations in which we find ourselves. . . . [O]ur emotions are not just a complement to moral reasoning, they are a component of it; that is why the classical opposition of reason and passion is a misleading half-truth.”)
80 Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1, 18 (1988) (“Untempered adversarial advocacy of the kind that exploits every opportunity offered by formal legalism may have long-run corrosive effects on the infrastructure of business conventions, and thus should be avoided where possible. On this view, one purpose of legal advice is to remind clients who may be tempted to ignore the infrastructure for the sake of short-term profits of the usefulness of underlying business conventions as well as of the explicit rules of the legal framework.”); see also ROBERT AXELROD, THE EVOLUTION OF COOPERATION (cooperation often leads to wealth-maximization).
expense of short-term gains. As Geoffrey Hazard states: “The practice of law largely involves persuading people to do things that are very unpleasant; a lawyer who cannot induce his client to do what must be done is almost certainly incapable of exercising such persuasion on others.”

A competent attorney is able to control his client’s unethical or opportunistic impulses and advise him of ethical courses of action that will promote the client’s long-term welfare.

Revisiting Spaulding, the issue is: “[H]ow could the lawyer have risked an innocent life for the financial benefit of the client?”

Stephen Pepper hypothesizes that “it is probably the lawyer and client ‘playing off’ one another: lawyer and corporate client each assuming a ‘hardball’ money-oriented stance, neither pausing to consider a wider context, neither urging such consideration on the other. If either had focused upon and articulated to the other the possibility that they might cause the death of an innocent person, they might have sought a more creative solution to their problem.”

While the attorney’s actions in that case may be able to pass for “zealous advocacy”, they do not amount to “honorable representation.” The greatest potential of the revised Rules is that they will encourage attorneys to reassert their independence. If the 2003 amendments succeed, they will help curb unethical and opportunistic behavior in the practice of law and restore honor to the Bar.

CONCLUSION

The 2003 amendments to the Arizona Rules of Professional conduct are principally aspirational, and their impact depends upon their ability to influence the attitudes of attorneys about the practice of law. Any effect on attorneys’ attitudes toward legal practice will influence

83 Id.
behavior at the margins of ethical conduct.\textsuperscript{84} As a result, the impact of the changes to the Rules is difficult to measure.\textsuperscript{85} In addition, there is likely a lag between adoption of the amendments and internalization of the norms they represent.

The first case to cite the 2003 amendments to the Rules was \textit{In Re John Thomas Banta}.\textsuperscript{86} In that case, Banta faced disciplinary proceedings on three counts: (1) for shouting epithets at a doctor during a settlement and for telling the doctor that he would hold funds in trust until his death if the doctor did not compromise; (2) for telling the judge his decision was “crazy” after an unfavorable evidentiary ruling and for beginning a verbal tirade lasting several minutes, in which he directed “abusive language” at the judge; and (3) for telling opposing counsel: “Why don’t you go perform an unnatural sex act upon yourself.”\textsuperscript{87} The initial hearing officer recommended only nominal punishment, finding:

\begin{quote}
There was no selfish motive; to the contrary, Respondent was motivated by zealous advocacy on behalf of another. Other evidence, while not rising to the level of clear and convincing evidence of an ethical violation, convinces me that Respondent may not always appropriately temper his zealousness. Such conduct, however, permeates the profession. For these reasons . . . a strong sanction is not warranted.\textsuperscript{88}
\end{quote}

The Disciplinary Commission that subsequently reviewed the case found otherwise:

\begin{quote}
“Respondent engaged in offensive conduct and demonstrated an overall lack of professionalism and self discipline in his conduct towards judges, court personnel and opposing counsel.”\textsuperscript{89} The Commission proceeded to cite the revised preamble as authority for its disciplinary recommendation:
\end{quote}

\textsuperscript{84} Stephen L. Pepper, \textit{Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering}, 104 \textit{Yale L.J.} 1545, 1610 (1994) (“[We must] (1) formulate a set of . . . rules and principles and (2) work to create a culture that will cultivate a professional practical wisdom for applying them”).

\textsuperscript{85} Anita Bernstein, \textit{The Zeal Shortage}, 34 \textit{Hofstra L. Rev.} 1165, 1165 (2006) (stating that zeal is hard to measure.

\textsuperscript{86} \textit{In Re John Thomas Banta}, Judgment and Order (Nos. 02-1070, 02-1628, 02-2066) (Mar. 23, 2005).

\textsuperscript{87} \textit{In Re John Thomas Banta}, Hearing Officer’s Report and Recommendation (Nos. 02-1070, 02-1628, 02-2066) 4-5 (Mar. 15, 2004).

\textsuperscript{88} \textit{Id.} at 8.

\textsuperscript{89} \textit{In Re John Thomas Banta}, Disciplinary Commission Report (Nos. 02-1070, 02-1628, 02-2066) 5 (Aug. 16, 2004).
Perhaps the word ‘zealous’ has since been removed from the *Preamble* because of the acts of misguided lawyers who believed the term to be a carte blanche invitation to act without discipline and self control. The amended *Preamble* has expanded its guidance on what is considered professional behavior. In fulfilling their professional calling, lawyers should also be mindful of their obligations and relationship to the legal system. It is unfortunate that some officers of the court need specific instruction on how to act honorably and professionally.90

Ultimately, Banta was formally censured and placed on one year of probation.91 The 2003 amendments were a determinative factor in the significant sanction Banta received. Over time, the Rules in combination with strict penalties for unprofessional conduct likely will succeed in changing attorneys’ attitudes towards the practice of law. While the ultimate impact of the 2003 amendments is still unknown, early evidence suggests that the amendments are advancing their principal goals of curbing incivility and reviving attorneys’ public duties as officers of the court. Symbolic changes in the Rules have begun to produce substantive results.

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90 *Id.* at 9-10.
91 *In Re John Thomas Banta*, Judgment and Order (Nos. 02-1070, 02-1628, 02-2066) (Mar. 23, 2005).