

A NEW PROFESSIONALISM FOR ARIZONA ATTORNEYS:
THE ELIMINATION OF “ZEALOUS” REPRESENTATION WITH THE
FOUNDATION OF CIVILITY AND FAIRNESS

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Most attorneys have encountered a client who wants the attorney to be a “bulldog,” “shark,” “snake,” or (you pick the noun) to “hammer,” “maim,” “kill,” or (you pick the verb) the adverse party and opposing counsel. Most attorneys graduate law school believing in a “take-no-prisoner” approach without regard for its consequences. This type of approach has resulted in disgruntled attorneys and a public perception that “lawyers are greedy, manipulative and corrupt.”¹ In fact, only twenty percent of Americans view attorneys as ethical and honest.² Unfortunately, the more clients become acquainted with the legal profession, the more pervasive this opinion becomes.³

Since 1984, there has been a sharp decline in the number of attorneys satisfied with their profession.⁴ The American Bar Association (“ABA”) conducted two national studies in 1984 and 1990, entitled *A National Survey of Career Satisfaction/Dissatisfaction*, that revealed both a shrinking satisfaction within the profession, as well as a growing dissatisfaction with relationships between attorneys.⁵ In 1992, seventy percent of California attorneys indicated they would change careers if given the opportunity.⁶

Until 1983, the ABA’s Model Code contained Canon 7, entitled “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.”⁷

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¹ Sara Parikh, *Public Perceptions of Lawyers Consumer Research Findings*, 2002 A.B.A. SEC. LITIG. 33.

² Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers*. A.B.A. J., Sept. 1993, at 62.

³ *Id.*

⁴ See Raquel Aviña Hunter, *The Alarming Growth of Dissatisfaction Among Lawyers*, 4 UCLA WOMEN’S L.J. 117, 117 (1993) (reviewing DEBORAH L. ARRON, *RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION* (1989, 1991)).

⁵ *Id.* at 117 n.1.

⁶ Maura Dolan, *Miserable with the Legal Life*, L.A. TIMES (June 27, 1995), http://articles.latimes.com/print/1995-06-27/news/mn-17704_1_legal-life.

⁷ MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980).

Unfortunately, attorneys too often confuse zealousness with zealotry.⁸ The line between these terms is blurry: “zealous” is defined as conjuring enthusiasm, whereas “zealotry” is defined as extreme fanaticism.⁹ Even the State Bar of Arizona’s Oath of Admission¹⁰ and Lawyer’s Creed of Professionalism¹¹ is inconsistent with the perceived impression of zealous advocacy. This inconsis-

⁸ Paul D. Friedman, *Win-At-All-Costs Litigation: States Reconsider the Damage Done by ‘Zealous’ Representation*, LAW. USA, June 30, 2008, at 17.

⁹ *Id.*

¹⁰ *Oath of Admission*, STATE BAR OF ARIZ., <http://www.azbar.org/membership/admissions/oathofadmission> (last visited Nov. 11, 2012) (“I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor; I will never seek to mislead the judge or jury by any misstatement or false statement of fact or law . . .”).

¹¹ *A Lawyer’s Creed of Professionalism of the State Bar of Arizona*, ST. BAR ARIZ (May 20, 2005), <http://www.azbar.org/membership/admissions/lawyer’screedofprofessionalism>. Relevant portions of A Lawyer’s Creed of Professionalism of the State Bar of Arizona (May 2005) states:

- A. With respect to my client: . . .
 - 4. I will advise my client against pursuing litigation (or any other course of action) that is without merit and I will not engage in tactics that are intended to delay the resolution of the matter or to harass or drain the financial resources of the opposing party;
 - 5. I will advise my client that civility and courtesy are not to be equated with weakness. . .
- B. With respect to opposing parties and their counsel:
 - 1. I will be courteous and civil, both in oral and in written communication;
 - 2. I will not knowingly make statements of fact or of law that are untrue;
 - 3. In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
 - 4. I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;
 - 5. I will not utilize litigation or any other course of conduct to harass the opposing party;
 - 6. I will not engage in excessive and abusive discovery, and I will comply with all reasonable discovery requests;
 - 7. I will not utilize delay tactics;
 - 8. In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful;
 - 9. I will not serve motions and pleadings on the other party or the party’s counsel at such a time or in such a manner as will unfairly limit the other party’s opportunity to respond;
 - 10. In business transactions I will not quarrel over matters of form or style but will concentrate on matters of substance and content;
 - 11. I will identify clearly, for other counsel or parties, all changes that I have made in documents submitted to me for review.
- C. With respect to the courts and other tribunals:

tency is the reason why numerous states removed the word *zealous* from their Rules of Professional Conduct.¹²

The Arizona Supreme Court adopted the ABA Model Rules of Professional Conduct in 1984.¹³ Even though Arizona adopted all but seven of the ABA Model Rules by September 1984, the Arizona Supreme Court did not remove the word “*zealous*” from the Preamble to the Arizona Rules of Professional Conduct until 2003.¹⁴ Prior to 2003, the Preamble to the Arizona Rules of Professional Conduct stated:

[A]s an 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

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1. I will be an honorable advocate on behalf of my client, recognizing, as an officer of the court, that unprofessional conduct is detrimental to the proper functioning of our system of justice;
 2. Where consistent with my client’s interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;
 3. I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit;
 4. I will not file frivolous motions;
 5. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;
 6. I will attempt to resolve, by agreement, my objections to matters contained in my opponent’s pleadings and discovery requests;
 7. When scheduled hearings or depositions have to be canceled, I will notify opposing counsel and, if appropriate, the court (or other tribunal) as early as possible;
 8. Before dates for hearings or trials are set - or, if that is not feasible, immediately after such dates have been set - I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;
 9. In civil matters, I will stipulate to facts as to which there is no genuine dispute;
 10. I will endeavor to be punctual in attending court hearings, conferences and depositions;
 11. I will at all times be candid with the tribunal.

¹² Lawrence J. Vlado & Vincent E. Doyle III, *Where Did the Zeal Go?*, 2011, A.B.A. SEC. LITIG. at 1.

¹³ ARIZ. R. SUP. CT. 42 (“The professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association . . .”).

¹⁴ Preamble, ARIZ. R. SUP. CT. 42 (1983) [hereinafter Preamble 1983] (amended 1984); Mark I. Harrison, *The New Arizona Rules of Professional Conduct*, ARIZ. B.J., Dec.-Jan. 1985, at 12.

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.¹⁵

In December 2003, the Preamble to the Arizona Rules of Professional Conduct removed the reference to zealous advocacy. The Preamble currently states:

[2] As a representative of clients, a lawyer performs various functions As advocate, a lawyer asserts the client's position under the rules of the adversary system

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. 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 the lawyer's duty, when necessary to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[8] 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.

[9] In the nature of law practice, however, conflicting responsibilities are encounteredThese principles include 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.¹⁶

Along with the Preamble, Arizona established Ethical Rule 3.4 to provide fairness to the opposing party and counsel:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other

¹⁵ Preamble 1983, *supra* note 16 (emphasis added).

¹⁶ Preamble, ARIZ. R. SUP. CT. 42.

- 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 innocence 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.¹⁷

These changes also coincide with the 1992 Zlacket Rules, which ultimately became Arizona's current disclosure rules.¹⁸ Arizona appointed a bar committee in March 1990 to study Civil Litigation Abuse, including civil litigation problems that were causing undue expense and delay.¹⁹ Consequently, a new Arizona Rule of Civil Procedure, Rule 26.1, was instituted to deal with "discovery abuse and discovery abusers."²⁰

Attorneys and prospective attorneys will derive significantly more satisfaction if their peers treat them with respect and civility. Clients will have a sense that lawyers are part of a profession with integrity if there is an open and honest exchange in which they can portray their story without obstruction, dishonesty, or game-playing.

¹⁷ ARIZ. R. SUP. CT. 42, ARIZ. RULES OF PROF'L RESPONSIBILITY ER 3.4 (2003).

¹⁸ ARIZ. R. CIV. P. 26.1.

¹⁹ *Id.* at cmt. to 1991 amendment.

²⁰ *Id.*

Arizona has established the rules to institute civility, and law students and current practitioners should understand that the profession no longer condones advocacy approaches that disregard and disrespect opposing parties. Lawyers can effectively advocate for clients without attacking or being dishonest with the adverse party and counsel. Clients should be instructed that attorneys are not “paid mercenaries,” and that attorneys form the legal profession with integrity, responsibility, and accountability.

The goal of the adversary system of justice should not be to “win at all costs.” Instead, the goal should be for attorneys to advocate to the best of their ability while maintaining civility so that the system provides a “win-win” situation.²¹ Civility enables clients and adverse parties to be heard and understood. Respecting opposing counsel and adverse parties increases the positive image of the legal profession with the public, which in turn benefits the profession and community.

²¹ Friedman, *supra* note 8.