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A PRESCRIPTION FOR HEALING THE CRISIS IN PROFESSIONALISM: SHIFTING THE BURDEN OF ENFORCING PROFESSIONAL STANDARDS OF CONDUCT

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Perhaps the greatest challenge confronting American lawyers in the 1990s is a "Crisis in Professionalism." [FN1] Increasingly, lawyers have come to believe that litigation is "war" and, accordingly, that litigation requires the warrior to engage all her weapons against opposing counsel. [FN2] The results have been predictable. As a general rule, lawyers no longer cooperate with opposing counsel in efforts to streamline pre-trial proceedings. [FN3] Rather, in the guise of advancing the interests of their clients, lawyers attempt to beat their opponents into submission with questionable motions and procedural tactics that are designed to stall litigation. [FN4] Complex lawsuits, and sometimes even simple lawsuits, have become mired in tedious discovery disputes and procedural objections.

The usual medicine that commentators have prescribed for unprofessional conduct in the legal profession is stronger punitive measures to be used by judges to rein in recalcitrant lawyers. [FN5] Obediently, most federal and state courts have adopted some form of sanctions or fee shifting provision that judges can impose against lawyers. [FN6] Regrettably, these punitive provisions have spawned more abuse than they have eliminated. Lawyers have learned to manipulate these provisions and use them as a bludgeon against opposing counsel. After reviewing the scope of the "Crisis in Professionalism," this Article will examine the various punitive measures that courts have adopted to control unprofessional behavior and the reasons that these measures have been unsuccessful. The Article will then propose an alternative prescription for the "Crisis in Professionalism:" limiting the most severe judicial punitive measures to bad faith conduct and placing greater emphasis upon institutional codes of conduct.

I. THE CRISIS IN PROFESSIONALISM: DEFINING THE PROBLEM

Traditionally, the term "professionalism" described an unwritten code of conduct that reflected the allegiance lawyers pledged to the goals of their profession. [FN7] Lawyers believed that their own economic interests--and even the interests of their clients--were subservient to their interests in effecting justice and social reform. [FN8] Because opposing lawyers shared the same ultimate interests, they were willing to waive burdensome procedural limitations and cooperate in pre-trial proceedings. [FN9] The unwritten professional code of conduct encouraged mutual cooperation, and indeed, it required lawyers to abjure nuisance suits and tactical maneuvers that were inconsistent with this goal. [FN10] Lawyers who violated the code of conduct could expect two consequences: they would lose their social standing with fellow members of the legal profession, and, given the small size of the organized bar, [FN11] they would suffer appropriate retaliation in kind. [FN12]

With changing economic conditions, however, legal fees became more expensive and the organized bar became larger and more diverse. [FN13] The increased incomes that lawyers generated from higher fees seduced them to shift their allegiances. Gradually, the unwritten professional code of conduct, which originally encouraged lawyers to devote themselves to the profession, succumbed to a view that encouraged lawyers to devote themselves to their own self-interests and the interests of their clients. [FN14] No longer sharing similar interests in the goals of the profession, opposing lawyers found fewer incentives to cooperate with each other. [FN15] With an influx of new lawyers entering the profession, the traditional enforcement

mechanisms against unprofessional behavior lost their effectiveness. [FN16] American lawyers began conducting their practices more like businesses and less like professions. [FN17]

Curiously, the evolving curriculum in law schools also contributed to the decline in professionalism. Expanding areas of legal specialization and discussion reduced the amount of time that law schools could devote to professional ethics. Under the new law school curriculum, law students received little exposure to professional ethics beyond the formalistic requirements of the disciplinary rules. [FN18] Moreover, some of the new areas of legal discussion, like Critical Legal Studies and Legal Realism, fostered an impression that "justice" was arbitrary. Recent law graduates began to enter the practice with the idea that creative legal representation has a greater effect upon the outcome of particular cases than do the legal merits. Their legal education gave them no sense of professional values. [FN19]

As a consequence of the changing economic conditions in the profession and the evolving law school curriculum, the "Crisis in Professionalism" has now reached epidemic proportions. Many lawyers perceive themselves as "hired guns," owing foremost allegiance to their clients. [FN20] Under the guise of zealous representation, these lawyers--often called "Rambo" or "hardball" litigators [FN21]--attempt to overwhelm their opponents with procedural obstructions and a ton of paperwork. At the most basic level, their tactics include attacking opposing witnesses with irrelevant facts and refusing to extend opposing counsel even simple courtesies. [FN22] More egregious tactics include, among other things: (1) filing complaints and answers that have questionable legal or factual merit, [FN23] (2) instructing their clients and favorable witnesses to avoid answering direct questions in depositions, [FN24] (3) conducting long and tedious depositions of opposing witnesses, [FN25] (4) filing discovery motions that request useless information, [FN26] (5) answering valid discovery motions by burying relevant material within volumes of useless information, [FN27] (6) refusing to confer with opposing counsel before filing default judgments or other dispositive motions, [FN28] and (7) filing groundless sanctions motions. [FN29] These tactics share a common characteristic: they bend but do not quite break the relevant rules of civil procedure. [FN30]

Procedural rules have become the most powerful weapon in the arsenal of the hardball litigator. Implemented to ensure that the parties in litigation stand upon equal ground, [FN31] procedural rules instead have given the hardball litigator a springboard with which she can gain a technical advantage over opposing counsel. [FN32] The rules of procedure suffer from an inherent weakness. Because procedural rules are designed to control the judicial process, the rules do not attempt to address the root causes of unprofessional behavior--the economic conditions that encourage abuse and the lack of professional values in recent law graduates. [FN33] The rules thus cannot eliminate the potential for abuse. Most courts draft procedural rules that are flexible enough to provide guidance in a range of procedural fact situations. Flexible rules, however, are subject to manipulation. Amending the procedural rules to make them more specific does not solve the problem. As the rules become more specific, it becomes easier for hardball litigators either to distinguish the rules or to dodge them entirely. [FN34] Even if specific procedural rules could eliminate some abuses, they would not affect the conditions that spawn procedural manipulation. Absent a renaissance of professional values, even the most exhortative procedural rules are insufficient to discourage hardball litigators from seeking a technical advantage against their opponents. [FN35]

The most unfortunate consequence of the procedural battles that hardball litigators wage against their opponents is that, ultimately, they force the parties in litigation to sacrifice substantive justice for procedural detail. Hardball litigators gamble that groundless motions and abusive discovery tactics will compel their opponents to give up the fight. [FN36] More often than not, the gamble works. Procedural tactics shackle opposing counsel with reams of paperwork, producing exorbitant litigation costs. [FN37] Further, procedural tactics shackle the trial court with rounds of satellite litigation, causing huge delays and driving litigation costs even higher. [FN38] Faced with these obstacles, even the most deserving opponents are constrained

to initiate settlement negotiations. To paraphrase an old maxim, "justice delayed, and justice obtained at excessive cost, is often justice denied." [FN39]

Besides exacerbating the costs and inefficiencies of litigation, the "Crisis in Professionalism" has also eroded public confidence in the legal profession. [FN40] The public has perceived, correctly, that lawyers use unprofessional tactics to win lawsuits. [FN41] The ABA Commission on Professionalism reported in 1986, for example, that a mere six percent of the corporate users of legal services believed "all or most" lawyers deserved to be called "professionals." [FN42] The National Law Journal reported that a large segment of the American public believed lawyers "manipulate the legal system without any concern for right or wrong." [FN43] Throughout the nation, the public has seen procedural manipulation and uncivil conduct weaken the adversarial process. [FN44] The public believes that the legal profession is responsible for the abuses, regardless of the percentage of lawyers who, in fact, practice hardball tactics. Until the profession takes active steps to eliminate these abuses, the public will continue to hold the legal profession in the same moral contempt that it reserves for used car salesmen. [FN45]

Hardball litigators argue that these concerns--the costs of litigation and the public perception of the legal profession--should have no impact upon the manner in which they conduct their business. [FN46] They believe that they are paid to advance the interests of their clients and, therefore, that they would be derelict in their duties if they subordinated client interests to the vague goals of "professionalism." [FN47] The problem with this reasoning is that it grants clients too much power to decide the fate of the legal process. [FN48] Out of a desire to advance their self interests, clients themselves have often asked their lawyers to pursue hardball tactics. [FN49] Legal clients, however, do not have a right to win lawsuits "at all costs." [FN50] A client with a legal problem should have no more right to demand that his lawyer use unprofessional tactics against opposing counsel than the client would have to demand that his lawyer murder or maim opposing counsel. [FN51]

At least in the most egregious cases, the argument that lawyers must elevate client interests over the interests of the profession is a red herring. Much of the conduct pursued in the name of "client interest" is designed to harass opposing counsel or stall pre-trial proceedings. [FN52] Harassing or stalling tactics find their genesis in a bad faith desire to win lawsuits through subverting the legal process. Even the most abrasive and contentious trial lawyers should know that "zealous representation" does not encompass bad faith litigation tactics. [FN53] The mere idea that client interests should allow lawyers to engage in maneuvers with the express intent to harass opposing counsel or stall pre-trial proceedings is offensive. No client interests are important enough to permit lawyers to undermine the judicial process. [FN54]

A tougher question is whether zealous representation justifies conduct that is uncooperative but does not reflect a bad faith desire to harass opposing counsel or stall pre-trial proceedings. Some uncivil behavior is, of course, an inevitable consequence of the adversarial process. [FN55] The legal profession is not for the faint-hearted: zealous representation will require that a lawyer stand toe to toe with opposing counsel. A lawyer must reject proposed agreements that disadvantage his client. He must impugn the character of hostile witnesses who have fudged the truth. He must be prepared to argue his case stridently and, if necessary, to raise his voice in outrage. If a lawyer is unable to sacrifice a certain amount of civility for the best interests of his client, the lawyer cannot be an effective advocate. [FN56]

While zealous representation might require that a lawyer express some degree of uncivil behavior toward participants in the trial process, however, such representation does not require that a lawyer either eschew all forms of cooperation with opposing counsel or inflict needless pain upon opposing parties or witnesses. [FN57] A lawyer can be both firm and reasonable. His zeal in representing a client can--and indeed should--be tempered with professional courtesy. [FN58] The two are not inconsistent. [FN59] To state an obvious example, a lawyer can represent his client with fervor and still agree to postpone a deposition after

opposing counsel becomes ill. Postponing the deposition does not prevent the lawyer from being an effective advocate: he can still conduct the deposition and challenge the deponent. A hardball litigator who refuses to postpone a deposition under these circumstances might gain a brief technical advantage for his client, but in the long run all he does is rob the profession of its compassion and add to the perception that cases are decided on the basis of technicalities rather than on the merits. [FN60]

Certainly, the diminishing cooperation between opposing lawyers is not as serious a concern as bad faith litigation tactics. Nonetheless, it illustrates the problems that have arisen from the "Crisis in Professionalism." Hardball litigators and their ilk have succeeded in shifting the focus of litigation from the legal positions of the competing parties to the talents and personalities of the competing lawyers. [FN61] Mutual cooperation--e.g., shared discovery, [FN62] sufficient advance deposition notice to allow the lawyers and witnesses to prepare adequately, [FN63] and quick settlement in cases that involve undisputed liability [FN64]--might ensure that deserving parties receive justice more swiftly and efficiently. For hardball litigators, however, justice is not their goal. Indeed, their goal is the exact opposite. [FN65] Hardball litigators desire to prove that they can defeat justice--or, at least when the balance of circumstances support their position, that they can bully justice into compliance--through the sheer force of their creative drive and abrasive demeanor. [FN66]

Unfortunately, the tactics of the hardball litigator have become more and more tolerated in the legal profession, if not altogether accepted. [FN67] Although courts and state legislatures have pursued methods to curb hardball tactics [FN68]--often out of ambition to reduce the costs of litigation--the legal profession has done little to control its own "Crisis in Professionalism." [FN69] Older members of the bar, who remember the traditional professionalism and who would not themselves initiate hardball tactics, have been unwilling to take active measures to protest unprofessional behavior. [FN70] Their silent acquiescence has tended to legitimate hardball litigation for newer members of the bar. [FN71] Many younger lawyers, even those who possess a strong sense of moral responsibility, have embraced hardball litigation as the wave of the future in trial practice. [FN72]

Unless the legal profession shakes itself out of its doldrums and resolves its "Crisis in Professionalism," the profession might awake one morning and find that the adversarial process has collapsed from its own weight. [FN73] Unprofessional conduct, whether manifested in bad faith procedural maneuvering or a simple refusal to cooperate with opposing counsel, has increased the costs of litigation and slowed the progress of justice. [FN74] As a result, litigation is fast becoming an impractical, if not unavailable, method of resolving legal disputes. The adversarial process cannot handle the strain of hardball litigation much longer. The question is "What should be done?" As will be demonstrated, [FN75] judicial sanctions and tort reform are insufficient to resolve the "Crisis in Professionalism." Indeed, if anything, these "solutions" have contributed to the problem. The answer instead lies within. The legal profession itself must initiate measures that will curb unprofessional conduct.

II. PUNITIVE REMEDIES TO THE CRISIS IN PROFESSIONALISM: EXACERBATING THE PROBLEM

Most of the proposed solutions for unprofessional conduct have involved some kind of punitive measure against the offending lawyer. Generally, these proposed solutions take three forms: (1) judicial sanctions, [FN76] (2) statutes requiring the offending lawyer to pay her opponent's fees, [FN77] and (3) tort causes of action against the offending lawyer. [FN78] Since the late 1970s, most jurisdictions have adopted one or more of these solutions in an attempt to control procedural maneuvering and other tactics that increase the costs of litigation. [FN79] In practice, however, these solutions have not proven successful. Hardball litigation is just as pervasive--in fact, more pervasive--in the 1990s as it was when most jurisdictions adopted their "solutions" to unprofessional behavior in pre-trial and trial proceedings. [FN80]

A. Judicial Sanctions

The increasing use of judicial sanctions against lawyers and their clients has perhaps been the most significant recent development in federal and state civil procedure. [FN81] To attempt to curb abusive litigation tactics, [FN82] federal and state courts have enacted a web of sanctions provisions. In the federal courts, sanctions provisions include: (1) Federal Rule of Civil Procedure 11, which authorizes sanctions against individuals who sign frivolous pleadings or motions; [FN83] (2) Federal Rule of Civil Procedure 37, which authorizes sanctions against parties who abuse the discovery process; [FN84] and (3) 28 U.S.C. § 1927, which authorizes sanctions against lawyers who unreasonably and vexatiously multiply the proceedings in a case. [FN85] The state courts have likewise adopted sanctions provisions against frivolous pleadings and other forms of abusive conduct. [FN86]

Despite their laudable purposes, sanctions provisions have been ineffective in controlling unprofessional behavior. Two conditions contribute to their ineffectiveness. First, sanctions affect individual incidents of professional misconduct, not the root causes of the problem. Sanctions therefore cannot eliminate the conditions that gave rise to hardball litigation in the first place. [FN87] Second, the imposition of judicial sanctions is an expensive and time-consuming process. [FN88] As it is, with the continuing "War on Drugs" and the resulting increase in criminal prosecutions, judges have a limited amount of time to devote to their civil dockets. [FN89] Sanctions motions, and subsequent sanctions hearings, make matters even worse. [FN90] To save time and expense, judges will often decline to assess sanctions--at least where they have discretion to do so [FN91]-- unless the sanctions have the effect of removing the litigation from the civil docket. [FN92]

Given these factors, many lawyers are willing to run the risk of sanctions: either they believe that the cost of the sanctions does not outweigh the benefits in pursuing unprofessional tactics or they believe that the likelihood of receiving sanctions is slight. [FN93]

Rule 37 illustrates the inherent shortcomings in a system that depends upon judicial sanctions to compel professional behavior. [FN94] Under Rule 37, a federal district court has broad discretion to impose sanctions against litigants who abuse the discovery process. [FN95] Available sanctions include excluding important evidence, striking parts of pleadings, and even rendering judgments against disobedient parties. [FN96] Despite the potential severity of these available sanctions, however, discovery abuse continues. [FN97] One might ask, "Why?" The obvious answer is that, in many cases, the benefits of using abusive tactics exceed the risk and cost of even the most severe sanctions. [FN98] Some discoverable information is important enough that hardball litigators will sacrifice life and limb to acquire or suppress it. [FN99]

Rather than controlling abuses, in several instances sanctions provisions have served to spawn abuses. The chief problem is that sanctions provisions are procedural rules, and like all procedural rules, [FN100] sanctions provisions are susceptible to manipulation. [FN101] Unlike most procedural rules, however, sanctions provisions do not just prescribe the duties that a lawyer must perform. They also prescribe the punishment that a court must inflict upon a lawyer who has performed inadequately or improperly. Accordingly, sanctions provisions offer an even greater potential for abuse. Because sanctions provisions are punitive in nature, [FN102] they are not just a potential tool for evasion, but also a potential bludgeon against opposing counsel. [FN103]

Hardly cowed by the threat of judicial sanctions, hardball litigators have learned to use sanctions provisions affirmatively. For example, hardball litigators practicing in federal court have learned to deflect attention from their own actions with repeated motions for Rule 11 sanctions against opposing counsel. [FN104] This tactic serves several useful functions. Rightly or wrongly, it suggests that opposing counsel is even more evil and manipulative than the hardball litigator who filed the Rule 11 motions. [FN105] It

stalls pre-trial proceedings while the judge examines the law and facts that underlie the motions. [FN106] It influences the judge to reach a favorable decision on the merits. [FN107] And if, for one reason or another, one of the Rule 11 motions prevails, [FN108] it gives the hardball litigator a chance to recover some of the fees she expended during the litigation. [FN109]

If the courts are serious about reducing hardball tactics, then absent the most egregious circumstances, the courts must divorce punishment from the adversarial process. [FN110] Rule 11 allows severe sanctions in indefinite situations--a dangerous combination. Bad faith is not a prerequisite to Rule 11 sanctions. All that is required is a pleading or motion that is not "well grounded in fact" or not "a good faith argument for the extension, modification, or reversal of existing law." [FN111] Thus, whenever opposing counsel files a motion that stands less than an even chance of succeeding, a hardball litigator can seek Rule 11 sanctions, knowing that the difference between an erroneous motion and a motion that is frivolous and sanctionable is a simple matter of advocacy. [FN112]

Similar problems arise in state court. One of the most glaring examples of a state sanctions provision that hardball litigators have used as a bludgeon against their opponents is Texas Rule of Civil Procedure 215(5). Enacted with the idealistic hope that it would compel a fair exchange of information between competing parties, [FN113] Rule 215(5) provides that Texas courts cannot allow a litigant to present evidence or introduce witnesses that the litigant failed to disclose in response to an appropriate discovery request. [FN114] Interpreting Rule 215(5) in conjunction with Texas Rule of Civil Procedure 166b(6), the Texas Supreme Court has concluded that if a litigant fails to disclose the names and current addresses of its expert witnesses "as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial," the trial court must exclude the expert witnesses from testifying. [FN115] Like Federal Rule 11, Texas Rule 215(5) authorizes severe sanctions in less than certain circumstances.

The ambiguous language "as soon as is practical" creates a serious potential for sanctions abuse. A hardball litigator in Texas will send opposing counsel an appropriate request for disclosure of witnesses and then sit back and wait. The chances are good that opposing counsel will wait for the last possible moment to compile his witness list. [FN116] The hardball litigator can then, for the first time at trial, [FN117] request under Rule 215(5) that the court exclude some or all of the expert witnesses named in the response, arguing that opposing counsel failed to disclose them "as soon as is practical." [FN118] Even if the excluded witnesses would not have affected the outcome of the trial, the hardball litigator gains a significant tactical advantage in disrupting the presentation that opposing counsel had prepared for trial. [FN119]

The lesson from these examples is that federal and state courts should wean themselves from their dependence upon severe sanctions to compel professional behavior. With increasing unprofessional conduct in litigation, the usual response by the courts has been to increase the number and size of available sanctions. [FN120] In most cases, however, all that these sanctions have accomplished is to add to the combative atmosphere in pre-trial and trial proceedings. [FN121] Severe sanctions do not eliminate abuses, and the more severe the sanction, the more probable that a hardball litigator can use it as a bludgeon against opposing counsel. Like all lawyers, hardball litigators are trained to find loopholes in legal rules and regulations. The hardball litigator will find loopholes in sanctions provisions, and he will exploit the loopholes to gain a procedural advantage. Attempting to close the loopholes will not work: any such attempt just creates more material with which a hardball litigator can create more loopholes. [FN122] Instead, the answer to this dilemma is to remove sanctions provisions from the procedural playing field. Absent circumstances involving bad faith or an intent to harass, federal and state courts should not be allowed to use severe judicial sanctions to control the behavior of competing lawyers.

B. Fee Shifting Provisions

Most courts in the United States require that each side in litigation bear its own attorney fees. [FN123] This practice, known as the "American rule," [FN124] is well established in both federal and state civil procedure. [FN125] Increasingly, however, the "American rule" has come under attack. Several commentators have recommended abrogating the "American rule," arguing that it creates undue incentive for lawyers to abuse the judicial process. [FN126] Although few jurisdictions have adopted fee shifting provisions for the express purpose of controlling hardball litigation tactics, [FN127] the trend seems to be moving in that direction. Some states have experimented with fee shifting provisions in their efforts to expedite tort reform. [FN128] Further, as a means of controlling frivolous litigation, the now defunct Council on Competitiveness recommended that Congress enact legislation awarding fees to the prevailing parties in diversity actions in federal court. [FN129]

Many sanctions provisions are latent, if not overt, fee shifting provisions. For example, although designed to deter frivolous litigation and not to compensate injured parties, [FN130] Rule 11 has become one of the most prevalent vehicles for escaping the "American rule." Frequently and repeatedly, federal district courts have used Rule 11 as the basis for awarding fees to parties who prevail in sanctions proceedings. [FN131] State courts also possess at least some power to impose fee awards as sanctions. Several state sanctions provisions allow prevailing parties under certain circumstances to recover their fees. [FN132] The implied reasoning behind these fee shifting sanctions is that the best method with which to deter litigation abuse is to smack recalcitrant lawyers in their pocketbooks. [FN133]

Unfortunately, fee shifting sanctions provisions, and other fee shifting provisions designed to control unprofessional behavior, have not produced their intended effect. Even with the threat of fee shifting in federal and state court, litigation abuse continues. [FN134] Just as with all other procedural rules, fee shifting provisions create the potential for even greater abuses. [FN135] Fee shifting provisions allow lawyers to advance personal economic interests at the expense of the judicial process. [FN136] As might be expected, therefore, fee shifting provisions induce lawyers to flood the courts with fee requests. [FN137] These fee requests produce considerable satellite litigation, which increases the total costs of litigation. [FN138] Proving the extreme measures that some lawyers will take to make a fast buck, the documents that support fee requests often contain exaggerated calculations of expenses and billable hours. [FN139]

The experience in Alaska demonstrates the extent to which fee shifting provisions engender abuse. Alaska is the one jurisdiction in the United States that does not follow the "American rule" as a matter of course. [FN140] Alaska Rule of Civil Procedure 82 allows prevailing parties in civil litigation to recover part of their attorney fees. [FN141] Although the purposes behind Rule 82 are admirable, [FN142] the rule has been the subject of extended debate in Alaskan legal circles. [FN143] The main focus of the criticism leveled against Rule 82 is that it inspires more contention than it eliminates. Fee awards, for instance, are the single most appealed issue in civil cases in Alaska. [FN144] Literally, the Alaskan appellate courts have become clogged with appeals seeking either to increase a favorable fee award or to decrease or eliminate an unfavorable award. [FN145]

Another problem with Alaska Rule 82, as well as with other less ambitious fee shifting provisions, is that it imposes an unjust penalty against parties who present good faith claims or defenses. [FN146] The federal and state courts are not designed, like the Greek Areopagus, to showcase model debating technique. Rather, courts in the United States are designed to resolve disputes; and for some if not most disputes, the law does not guarantee a winning side and a losing side. [FN147] Honest people can disagree about the facts that underlie a dispute, and honest lawyers can disagree about the legal standards that underlie a dispute. Penalizing the loser in litigation even though she asserted her claim in good faith is unjust. [FN148] If the goal of fee shifting provisions is at least in part to punish and deter bad faith litigation tactics, then provisions

that allow fee shifting in all cases, regardless of the intent of the losing litigant, cut too large a swath. [FN149]

Fee shifting provisions are not the answer to unprofessional litigation tactics. Instead of reducing needless litigation, fee shifting provisions create even more litigation as lawyers grapple to recover their fees. [FN150] Moreover, because most fee shifting provisions do not discriminate between good faith and bad faith claims, they often direct a punishment against individuals whose offense is nothing more than seeking justice in American courts. [FN151] Fee shifting provisions might not be as troublesome if they were limited to bad faith claims or defenses that lawyers advanced for the purpose of harassment or delay. In that event, however, the fee shifting provisions would be largely redundant. Most jurisdictions have existing sanctions provisions against bad faith litigation. [FN152] The best solution is to eliminate fee shifting provisions and use other more effective measures against litigation abuse.

C. Tort Actions

Most states have adopted some kind of tort cause of action that provides damages to a defendant who has been forced to defend a baseless or unjustifiable civil prosecution. [FN153] Typically, this tort action is limited to instances in which the defendant can prove that the plaintiff exercised "malice" in bringing the original baseless action. [FN154] This tort action thus has little effectiveness in deterring frivolous litigation or other unprofessional conduct. [FN155] Accordingly, some commentators have suggested that states should expand their malicious civil prosecution causes of action either (1) to allow plaintiffs to bring a tort action against defendants who pursued a baseless defense in the original action, [FN156] or (2) to eliminate the "proof of malice" element. [FN157]

At least one state has responded to the suggestion for expanding the malicious civil prosecution cause of action. The Georgia Supreme Court in Yost v. Torok [FN158] redefined the elements of the state common law cause of action for malicious civil prosecution. It concluded:

> Any party who shall assert a claim, defense, or other position with respect to which there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense, or other position; or any party who shall bring or defend an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment; or any party who unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures, shall be liable in tort to an opposing party who suffers damage thereby. [FN159]

This formulation satisfies both of the suggested reforms that the commentators have advanced. [FN160] The new cause of action in Yost allows tort actions against former defendants and eliminates the "proof of malice" requirement in the traditional civil prosecution cause of action. [FN161] Moreover, the decision in Yost goes even farther and expands the cause of action to allow damages for injuries resulting from all unprofessional conduct that expands litigation unnecessarily. [FN162] Essentially, the decision in Yost creates a tort cause of action for conduct that would merit Rule 11 or Rule 37 sanctions in federal court. [FN163]

The Georgia Supreme Court in Yost required that parties plead the new cause of action "as a compulsory counterclaim or compulsory additional claim...." [FN164] The court believed that this procedural requirement would eliminate the prospect of continuous reciprocal litigation. [FN165] In fact, under Yost, lawyers in Georgia cannot pursue causes of action for "unfounded litigation" after the litigation that provides the basis for the action has ended. [FN166] More than offsetting the time that the Georgia courts have saved in

avoiding reciprocal litigation, however, is the increased time that the courts have expended in resolving Yost claims. Within a few months after the Georgia Supreme Court released its opinion in Yost, Georgia lawyers already had filed hundreds of Yost claims in pending litigation. [FN167] The number of Yost claims in Georgia state courts has continued to increase. Filing a Yost claim is now a common tactical response to the claims and defenses that an opposing litigant raises in a Georgia state court. [FN168] With each Yost claim that a trial court must entertain, the amount of time that the court devotes to resolving the original lawsuit increases dramatically. [FN169]

Just like procedural sanctions and fee shifting provisions, tort causes of action for unfounded litigation are subject to abuse. [FN170] A hardball litigator in Georgia can file a Yost claim to stall proceedings and force a trial court to postpone its decision upon the merits. [FN171] Further, a hardball litigator can file a Yost claim to drive a wedge between opposing counsel and her client. The decision in Yost held that the "party" which conducts unfounded litigation is liable in tort, even when the party's lawyer is responsible for the conduct that provides the basis for the Yost claim. [FN172] Accordingly, when a Yost claim is filed, a conflict arises between the interests of the client and the interests of the client's lawyer. For example, a client that wishes to settle a Yost claim might face resistance from the lawyer if the settlement suggests that the lawyer acted irresponsibly. [FN173] As a result, Yost allows a hardball litigator to disrupt the ability of opposing counsel to represent her client and, in some situations, allows the litigator to remove opposing counsel entirely. [FN174]

In sum, if state courts expand their malicious civil prosecution actions to provide an additional punitive measure against unprofessional conduct, the result will be the opposite of the result the courts intend. As the Georgia experience proves, tort causes of action for unfounded litigation do not reduce litigation. On the contrary, they create even more litigation as hardball litigators learn to use the causes of action to stall proceedings and disadvantage opposing counsel. [FN175] Tort causes of action for unfounded litigation, quite simply, serve more harm than good. To achieve the desired result, the existing punitive structure must be replaced with a structure that does not itself foster abuse. Rather than expand the punitive measures in the common law and procedural rules, the courts must decrease their dependence upon punitive measures. The legal profession, in turn, must fill the resulting gap with institutional codes of conduct that allow it to police its members effectively and forcefully.

III. SHIFTING THE BURDEN OF ENFORCING PROFESSIONAL STANDARDS OF CONDUCT FROM THE COURTS TO THE LEGAL PROFESSION: SOLVING THE PROBLEM

The "Crisis in Professionalism" is nearing the point where it endangers not just the legal profession but the judicial process as well. Punitive measures directed against unprofessional behavior have been unsuccessful in healing the "Crisis in Professionalism," and indeed, the punitive measures may have contributed to the problem. If the courts and the profession are serious about eliminating unprofessional behavior, then together they must embark upon an altogether different course of action. The solution involves two parts. [FN176] First, the courts, in conjunction with legislative and other rule-making bodies, must limit severe punitive sanctions to situations involving bad faith litigation conduct. [FN177] Second, the various state and federal bars must enact and enforce strict institutional codes of professional conduct and initiate measures to eliminate the root causes of litigation abuse. [FN178]

A. Limiting Punitive Measures to Bad Faith Conduct

Controlling professionalism with punitive measures is about as effective as controlling forest fires with gasoline. Each new punitive measure that the courts and legislatures create as a device to curb hardball tactics and reduce burgeoning dockets produces the opposite effect. Invariably, each new measure increases satellite litigation and increases the potential for procedural abuse. The reason is simple: punitive measures

do not intimidate hardball litigators. Indeed, with each new punitive measure, hardball litigators know that they gain an additional weapon in the arsenal they can aim against opposing counsel and litigants. Obviously, it would be counterproductive to eliminate all punitive measures. The federal and state courts must retain some power to punish conduct that threatens to subvert the legal process. The trick is to strike a balance that reduces the punitive measures hardball litigators can use against their opponents and still preserves enough punitive measures to protect the legal process. [FN179]

The first step in healing the "Crisis in Professionalism" must be to eliminate (1) punitive fee shifting provisions and (2) tort causes of action for unfounded litigation that go beyond the traditional elements for malicious civil prosecution. For the most part, these two forms of punitive measures overlap with existing sanctions provisions and are no more effective. All that punitive fee shifting provisions and tort causes of action for unfounded litigation add to the procedural rules and common law are greater opportunities for litigation abuse. [FN180] Sanctions provisions, if narrowly tailored, are adequate in themselves to protect the legal process and punish lawyers for egregious conduct.

The next step is, of course, to tailor sanctions provisions narrowly. Sanctions provisions must limit severe penalties, such as large fee awards or sanctions that involve excluding evidence or dismissing parties, [FN181] to cases that involve "bad faith" conduct--i.e., conduct that reflects a willful intent to harass the opposing side or to stall pre-trial or trial proceedings. [FN182] In addition, the sanctions provisions must require clear evidence of bad faith as a prerequisite to imposing severe sanctions. It is not enough that a lawyer filed a meritless motion or conducted a long and tedious deposition. Rather, for severe sanctions to be appropriate, the court must have evidence--either direct or circumstantial--that the lawyer filed the motion or conducted the deposition with the willful intent to harass her opponent or to stall the proceedings. [FN183] In the absence of evidence reflecting bad faith, the conduct in question, even if unprofessional, should not be punishable with sanctions more severe than a reprimand or nominal fine.

Limiting severe sanctions to "bad faith" conduct creates several advantages. Most directly, courts would be less crowded and would not have to spend as much time resolving sanctions motions. [FN184] Perhaps more significantly, hardball litigators would have less incentive to abuse the sanctions process. Because severe sanctions would not be available without evidence of bad faith, hardball litigators would be less able to use sanctions provisions as a bludgeon against opposing counsel. Obviously, it is much more difficult for hardball litigators to manufacture an argument that opposing counsel acted with a willful intent to harass than it is to manufacture an argument that opposing counsel filed a frivolous pleading or a burdensome discovery request. [FN185]

To further limit the opportunities for abuse, sanctions provisions must be as specific as possible. [FN186] Thus, sanctions provisions must detail the types or severity of the sanctions that are reserved for bad faith conduct. [FN187] So-called "death penalty" sanctions, such as orders dismissing an action or striking pleadings, would fall within the list of severe sanctions reserved for bad faith conduct. [FN188] Sanctions that exclude evidence or preclude the litigation of certain issues likewise would fall within the list. Large fee awards also should appear in the list of severe sanctions--after all, one of the main reasons that hardball litigators pursue sanctions awards is to recover their fees. The term "large," however, is contextual; an award of $10,000 might be "large" in one case but insignificant in another. A hardball litigator could argue that, even though his opponent did not act in bad faith, he is nonetheless entitled to recover the $10,000 in fees that he expended because that amount was not "large" under the circumstances. To avoid this result, a sanctions provision should define the term "large" as restrictively as possible. A monetary sanction "large" enough to be limited to bad faith conduct would be any monetary sanction more than a nominal amount, which the sanctions provision could define as $50 or $100. Defining the term "large" with reference to a specific amount prevents hardball litigators from manipulating sanctions provisions for their own personal gain. [FN189]

Similarly, sanctions provisions must outline the specific forms of unprofessional conduct that merit an award of sanctions. Sanctions provisions that proscribe "frivolous" litigation must define the word "frivolous" in a manner that leaves litigants free to pursue novel legal theories. Existing sanctions provisions, such as Rule 11, give lip service to the notion that sanctions should be unavailable when a litigant makes a good faith argument for extension or modification of existing law. [FN190] But in practice, sanctions provisions often define "frivolous" so broadly that the provisions encourage hardball litigators to seek sanctions even when the opposing side argues in good faith for a novel or creative result. [FN191] Consequently, existing sanctions provisions against "frivolous" litigation have chilled creative legal argument. [FN192] Courts must change their sanctions provisions to narrow the definition of the word "frivolous" and to state more clearly that litigants are free to pursue novel legal theories. [FN193]

Further, sanctions provisions that proscribe discovery abuse must provide lawyers specific time limits for filing discovery motions and responses. A provision stating that a lawyer must file a motion or response "as soon as is practical" provides no standard at all. Such a provision is ripe for abuse: in virtually every case, it allows a hardball litigator to argue that his opponent did not file its motion or response "as soon as is practical." [FN194] If a lawyer is going to be subject to sanctions for filing a late motion or response, then the lawyer must have some notice of the exact time when the motion or response is in fact "late." The sanctions provision could state, for instance, that a motion or response is "late" if it is not filed a specified number of days before trial. But regardless of the particular language that a court adopts, the sanctions provision must provide a specific and ascertainable time limit.

Like all other sanctions provisions, those for discovery abuse should authorize severe penalties only in instances in which the sanctioned lawyer or litigant acted in "bad faith." Thus, a lawyer should not be subject to severe judicial sanctions for conducting excessive discovery or filing evasive or incomplete discovery responses absent proof that the lawyer acted with the intent to harass her opponent or to stall trial proceedings. [FN195] A narrow exception arises in cases in which the lawyer files a discovery motion or response after the deadline in the relevant sanctions provision or after a court-imposed deadline. When a statute or a court sets time limits for its proceedings, then the court should possess the power to enforce the time limits. Accordingly, in this limited situation, a late filing in itself can constitute circumstantial evidence of "bad faith." [FN196] The provision could state that if the motion or response is not filed within the specified time period, then the trial court is entitled to presume that the motion or response was filed in "bad faith" and that the motion or the information contained in the response is subject to exclusion.

Nonetheless, even when a sanctions provision allows a trial court to presume that a lawyer filed a late motion or response in "bad faith," the sanctions provision must give the lawyer a chance to demonstrate that the circumstances do not warrant severe sanctions. Any number of circumstances short of an intent to stall proceedings might cause a lawyer to file a late motion or response: illness, forces of nature, administrative mistakes, a pending motion for continuance of the litigation, pending settlement negotiations, or the misstatements or misrepresentations of opposing counsel and witnesses. [FN197] Allowing severe sanctions under these circumstances would punish litigants--even to the extent of impairing their ability to assert a claim or defense--despite the fact that their counsel acted in good faith or with good cause. [FN198] In effect, then, the same bad faith requirement should govern sanctions for late discovery motions and responses that would govern sanctions for other discovery abuses. All that would be different is the burden of proof. In most cases the burden would fall upon the party seeking sanctions to demonstrate that the opposing lawyer acted with the intent to harass or to stall proceedings; however, in cases involving potential sanctions for a late discovery motion or response, the filing lawyer must demonstrate that he did not act in bad faith.

The bad faith requirement for severe sanctions does not leave courts powerless to redress litigation abuses. Even in instances that lack the imprimatur of bad faith, courts would retain the power to reprimand lawyers and to impose nominal fines against them. [FN199] A formal reprimand, in particular, can be a useful

sanction. Indeed, for most lawyers--who as a group are painfully conscious of their public image--a formal rebuke in open court is perhaps the best available sanction against conduct that is not intended to subvert the legal process. [FN200] Especially when the sanctionable conduct is nothing more than sloppiness, neglect, or accident, a reprimand is adequate to deter future misconduct and educate the sanctioned lawyer to be more attentive. [FN201]

The grand experiment in broad sanctions powers has failed. It is time to retrench. The federal and state courts must reduce their dependence upon punitive measures to compel desirable behavior in litigation. Initially, the courts in each jurisdiction should consolidate wide-ranging punitive measures into existing sanctions provisions. Next, the courts should limit the extent to which hardball litigators can use the sanctions provisions as a weapon against opposing counsel and litigants. Severe judicial sanctions, in sum, must be reserved for bad faith conduct. Outside of bad faith conduct, the burden to police the legal profession should fall upon the shoulders of the profession itself, not the courts. [FN202] The legal profession occupies a better position than the courts to enforce its own standards of conduct.

B. Enacting and Enforcing Codes of Professional Conduct

One of the principal characteristics of a profession, as opposed to a business, is that a profession enforces standards for membership. A graduate of a business school is not required to take an entrance exam before she enters business, but a law school graduate must pass a state bar examination before she can hang a shingle. A corporate president is not required to obey any rules of conduct other than the criminal laws of her state and her own moral standards, but a partner in a law firm must observe the professional rules of legal ethics. A profession, in short, possesses institutional control over its members. With changing social and economic conditions, however, the legal profession is becoming more and more reluctant to enforce its institutional control. The old methods of enforcement are anachronistic. The bar exam no longer serves as an effective device to inhibit unqualified or unmanageable persons from entering the profession. [FN203] Rules of legal ethics, by design, are limited in their coverage and do not attempt to provide comprehensive standards of conduct for opposing litigators. [FN204] Moreover, despite the rising "Crisis in Professionalism," the legal profession has failed to initiate new measures for preserving professional standards among its members. [FN205]

The time is ripe for the legal profession to reassert institutional control over its members. [FN206] Initially, to reverse the frightening decline in professionalism, federal and state bar associations must enact and enforce institutional codes of conduct. The bar associations could include these codes of professional conduct as amendments to existing rules of legal ethics, but the codes must go farther than the rules of legal ethics. The codes must inform lawyers that their duties to clients are subservient to their duties to the justice system. The codes must inform lawyers that they cannot refuse reasonable requests from opposing counsel for cooperation in stipulating agreed facts or setting time limits for procedural motions. The codes must inform lawyers that they cannot file discovery motions that request useless information or answer discovery motions by burying relevant material within volumes of useless information. Codes of professional conduct, in sum, must be more than a broad exhortation that lawyers should treat each other with greater respect and civility. [FN207]

One of the few state or local bar associations that has adopted a code of professional conduct is the Dallas Bar Association. [FN208] Several provisions in the Dallas Bar Association Code of Conduct offer useful language for crafting standards of professionalism, including the following:

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

> The client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct....
>
> ****
>
> A lawyer should not engage in discourtesies or offensive conduct with opposing counsel, whether at hearings, depositions or at any other time when involved in the representation of clients.... Further, counsel should not denigrate the court or opposing counsel in private conversations with their own client....
>
> ****
>
> A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or his client.
>
> Requests for production should not be excessive or designed solely to place a burden on the opposing party.
>
> ****
>
> If a request is made to clear time for a hearing or deposition, the lawyer to whom the request is made should confirm that the time is available or advise of a conflict within a reasonable time (preferably the same business day, but in any event before the end of the following business day).
>
> ****
>
> Depositions and hearings should not be set with less than one week notice except by agreement of counsel or when a genuine need or emergency exists.
>
> ****
>
> Calling at or just prior to the time of a scheduled hearing or deposition to advise the court or opposing counsel of the cancellation lacks courtesy and consideration.
>
> ****
>
> [N]o lawyer should request an extension of time solely for the purpose of delay or to obtain any unfair advantage. [FN209]

Provisions like these give lawyers specific warning that bar associations will no longer tolerate hardball tactics and other forms of unprofessional behavior.

It is not enough, however, that bar associations promulgate codes of professional conduct. The mere existence of a code of conduct will no more compel professional conduct than have the countless articles in bar association journals urging lawyers to clean up their acts. To eliminate unprofessional behavior in litigation, bar associations must enforce the codes of professional conduct. As with violations of the rules of legal ethics, bar associations can pursue an enforcement action against a lawyer whenever it receives a written complaint from a judge, litigant, or another lawyer. Most state bar associations should be able to enforce their codes of conduct through existing mechanisms for enforcing the rules of legal ethics. For those

bar associations that do not have existing enforcement mechanisms, such as federal district court bar associations, the courts should appoint a committee to hear complaints and prescribe appropriate penalties. [FN210]

The range of available penalties for a violation of a code of professional conduct should be broad. For egregious violations, a bar association could suspend the offending lawyer from practicing or require that the offending lawyer pay the bar association a large fine. [FN211] For less severe violations, a bar association could consider the following penalties: (1) censuring the offending lawyer publicly or privately, (2) requiring the offending lawyer to send the victim of her conduct a formal written apology, (3) imposing a nominal fine, (4) requiring the offender to attend additional continuing legal education classes, or (5) requiring the offender to attend some kind of ethics program or seminar available through the bar association. Regardless whether the violation is egregious or not, the bar association must ensure that the punishment it imposes against the offender is commensurate with the circumstances. [FN212]

Using institutional codes of conduct to enforce professional standards would produce fairer results than continuing the outmoded structure of judicial punitive devices. While some, if not most, hardball litigation tactics are intentional attempts to harass opposing counsel or to stall pre-trial or trial proceedings, a good amount of the conduct that might merit sanctions is much more innocent. Some litigation misconduct is the result of mere inadvertence or excusable neglect. Some litigation misconduct is the result of a lack of education: either the offender does not know that her actions were wrong or the offender believes that the actions of others have legitimized her conduct. [FN213] For innocent misconduct like this, an order requiring the offender to attend an ethics seminar or other appropriate continuing legal education classes might be sufficient to deter future misconduct and to educate the offender that her actions were wrong. Under the existing structure, the courts would likely impose a fee award or other monetary sanction, at least in part because the courts lack the resources to enforce an order requiring more continuing legal education. [FN214] Unlike the courts, however, bar associations conduct continuing legal education classes and, through existing enforcement mechanisms, ensure that their members receive the minimum number of continuing legal education credits. Bar associations, simply, stand in a better position than the courts to enforce a broad range of penalties against lawyers who breach professional standards of conduct.

Even more significantly, institutional codes of conduct are less subject to abuse than judicial punitive devices. Punitive devices such as sanctions provisions spawn abuse because, by their nature, they are part of the litigation process. Hardball litigators will invoke these punitive devices whenever they believe it would advance the interests of their clients, either to force opposing counsel to take the defensive or to delay an unfavorable decision on the merits. [FN215] Institutional codes of conduct, however, are divorced from litigation. [FN216] Outside of spite or ill will, hardball litigators would have no incentive to threaten opposing counsel with proceedings under a code of conduct. Such proceedings would not allow hardball litigators to recover their fees. [FN217] And because such proceedings would occur after the parties had completed the underlying litigation, initiating proceedings under a code of conduct would not increase the burdens upon opposing counsel during trial or prevent courts from reaching a quick and expedient decision on the merits. [FN218]

Unquestionably, institutional codes of conduct serve a more efficient and useful function than judicial punitive devices do. Despite their advantages, though, institutional codes of conduct should not and cannot be the sole response to the "Crisis in Professionalism." The penalties for a violation of a code of conduct might deter some litigation abuses, but they cannot guarantee an end to all abuses. In addition to enacting and enforcing institutional codes of professional conduct, bar associations must initiate measures that address the root causes of unprofessional behavior in litigation. First, bar associations must attempt to mitigate the economic conditions that encourage law firms to operate more like businesses than professional enterprises. [FN219] For example, to persuade law firms that the costs of unprofessional conduct outweigh its benefits,

bar associations should publish in professional journals and local newspapers the names of lawyers who receive large sanctions penalties or who commit repeated violations under the various codes of conduct. [FN220] Moreover, to slow the emerging business orientation of law practice, bar associations should discourage lawyers from engaging in business ventures [FN221] and forbid law firms from offering clients "ancillary business" services that have nothing to do with the practice of law. [FN222]

Second, bar associations must initiate measures to ensure that lawyers know and understand their duties to the legal profession. To counteract the reduced emphasis that law schools have placed upon professional ethics, [FN223] bar associations could sponsor seminars addressing topics that are not part of the usual ethics classes for third-year law students. [FN224] Bar associations could require that lawyers take a course on professionalism within two years after entering the legal profession as part of their continuing legal education. Further, bar associations could create permanent "ethics schools" to provide all lawyers with refresher courses in professional ethics. [FN225] These suggestions, if adopted, would assist in educating lawyers that greater professional standards are needed to preserve the adversarial process. Above all else, the legal profession must erase the developing notion that refusing to cooperate with opposing counsel and engaging in procedural tactics are effective and appropriate means of representing a client. [FN226]

The prescription for healing the "Crisis in Professionalism" might seem a bit complicated, but if the legal profession is serious about eliminating unprofessional conduct in litigation, it must do more than publish bar journal articles that urge its members to act responsibly. The various bar associations must enact institutional codes of conduct outlining the appropriate standards that members of the legal profession are expected to uphold. Additionally, bar associations must initiate measures that will educate their members regarding the appropriate standards of professional conduct and that will eliminate the conditions spawning litigation abuse. In the absence of these measures, hardball litigation and other forms of unprofessional behavior will continue unimpeded, and the legal profession will be accountable for the consequences.

IV. CONCLUSION

Judicial punitive measures, such as sanctions provisions and tort causes of action for unfounded litigation, have failed to resolve the "Crisis in Professionalism." Instead of coercing lawyers into obedience, judicial punitive measures have done nothing more than provide lawyers with an additional weapon against opposing counsel in litigation. It is time for a new approach to the "Crisis in Professionalism." Courts and legislatures must limit judicial punitive measures to bad faith conduct and leave the onus of punishing most unprofessional behavior to the legal profession itself. The legal profession, in turn, must (1) enact and enforce institutional codes of conduct and (2) initiate measures to eliminate the root causes of litigation abuse. Leaving the enforcement of professional standards to the courts does not just encourage litigation abuse--it is, in fact, an embarrassing cop out. No institution stands in a better position than the legal profession to enforce professional standards against lawyers. To heal the "Crisis in Professionalism," the legal profession must reverse the passive attitude that it has taken in the past towards unprofessional behavior in litigation. The profession must assert its power to enforce professionalism.

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The author wishes to thank Professors Elaine Shoben and David Raupp of the University of Illinois College of Law and Professor Terrill Pollman of Stetson University College of Law for their helpful comments and suggestions.

[FN1]. See W. Frank Newton, Crisis in the Legal Profession, 21 TEX.TECHL.REV. 897, 897-98 (1990).

[FN2]. See Edwin J. Wesely, Pretrial Development in Major Corporate Litigation, LITIG., Spring 1975, at 8, 12 ("Litigating the big case is the ultimate in civilized warfare. It is warfare--strategy and tactics are at least as important as the law and the facts. It is civilized--there is a resolution short of bloodshed and short of medieval trial by combat."); see also Robert N. Sayler, Rambo Litigation: Why Hardball Tactics Don't Work, A.B.A.J., Mar. 1, 1988, at 80 (describing the martial attitude that "Rambo" litigators take in pre-trial and trial proceedings); cf. Christopher D. Balch, Comment, The Art of War and the Art of Trial Advocacy: Is There Common Ground?, 42 MERCER L.REV. 861, 871-72 (1991) (discussing "ambushes" that lawyers set for one another).

[FN3]. See infra text accompanying note 15.

[FN4]. See infra text accompanying notes 22-30.

[FN5]. See infra text accompanying notes 76-78.

[FN6]. See discussion infra part II.

[FN7]. See Eugene A. Cook, Professionalism and the Practice of Law, 23 TEX.TECHL.REV. 955, 960-61 (1992) ("Professionalism is more than educational background, self-governance, or a collective responsibility to assure adequate availability of legal services. Professionalism means being civil to other lawyers.... It means placing the integrity of the profession above self-interest."); see also ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) ("The term refers to a group ... pursuing a learned art as a common calling in the spirit of public service--no less a public service because it may incidentally be a means of livelihood."); cf. Jewel Arrington, Everyday Professionalism, 56 TEX.B.J. 232, 232 (1993) ("In the broadest sense, 'professionalism' refers to an aspirational standard of conduct that exceeds the mandates of the Disciplinary Rules of Professional Conduct.").

[FN8]. See Tommy Prud'homme, The Need for Responsibility Within the Adversary System, 26 GONZ.L.REV. 443, 454 (1991).

[FN9]. See Cook, supra note 7, at 960.

[FN10]. Some misconduct in litigation, of course, has always been a part of the adversarial process. For example, as Judge Thomas Reavley has observed, "Clarence Darrow wrote in 1932 that trials were not being conducted in a dignified effort to find the truth but more like a prize-ring combat." Thomas M. Reavley, Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics, 17 PEPP.L.REV. 637, 638-39 (1990) (citing CLARENCE DARROW, THE STORY OF MY LIFE (1932), reprinted in CLARENCE DARROW, THE STORY OF MY LIFE, THE LEGAL CLASSICS LIBRARY 352 (1988)). Current conditions in the legal profession, however, exacerbate the problem of litigation abuse. See infra text accompanying notes 13-17. Trials that resembled a prize-ring fight in 1932 now might be tame by comparison.

[FN11]. Even in large cities, the relative number of lawyers per resident was small until the 1970s. See Cook, supra note 7, at 961 (the ratio for the United States as a whole has gone from one lawyer for every 695 persons in 1951 to one lawyer for every 340 persons in 1988). Over one-half of the lawyers either were solo practitioners or practiced with one or two partners. See Prud'homme, supra note 8, at 454.

[FN12]. See Cook, supra note 7, at 960 ("The system was driven by the familiar maxim 'what goes around comes around.' "); Prud'homme, supra note 8, at 454 (stating that "because of the small size of the corporate bar, these lawyers saw each other many times in the course of their careers. Playing by the rules helped grease the skids for future contact with a particular lawyer and also helped to maintain good social standing

in the eyes of peer lawyers."). The traditional rules of conduct, and the ostracism that can result from violations of these rules, are still evident in many smaller rural communities. See also Donald D. Landon, Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice, 1985 AM.B.FOUND.RES.J. 81, 107 (discussing the nature of legal practice in rural communities).

[FN13]. See Cook, supra note 7, at 962-63.

[FN14]. See Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 MINN.L.REV. 1, 17 (1984); Andrew R. Herron, Comment, Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure is Another's Poison, 44 U.MIAMI L.REV. 807, 808 (1990). Professional ethics scholars use the term "communitarianism" to describe the traditional professional code of conduct; conversely, they use the terms "individualism" or "liberalism" to describe the emerging emphasis upon client interests. See generally Stephen L. Pepper, Autonomy, Community, and Lawyers' Ethics, 19 CAP.U.L.REV. 939 (1990) (discussing lawyers' ethics based upon autonomy as opposed to those based upon a communitarian morality).

[FN15]. See Miller, supra note 14, at 17.

[FN16]. See Cook, supra note 7, at 960. The increasing size of the bar meant that lawyers were less able to retaliate against peers who had "done them wrong." Particularly in urban areas, lawyers were unlikely to encounter the same opponent repeatedly. See Cook, supra note 7, at 960.

[FN17]. See Newton, supra note 1, at 898; Timothy J. Sullivan, The Crisis in Lawyers' Professionalism, FOR THE DEF., June 1991, at 25, 27. The legal profession seems to have accepted the notion that lawyers can "merchandize" their services. See Fred Woods, Sanctions--Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction?, 17 PEPP.L.REV. 665, 677 (1990) ("It has even been suggested that we are only a prospectus away from selling shares to investors as a means of financing lawsuits.").

[FN18]. See John O. Mudd, The Place of Perspective in Law and Legal Education, 26 GONZ.L.REV. 277, 320 (1991); see also Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L.REV. 227, 232 (1973) ("Law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners, and etiquette as things basic to the lawyer's function."); Barry Vickrey, Law Schools, Bench, and Bar: A Needed Partnership for Lawyer Competence and Professionalism, 21 CAP.U.L.REV. 821, 823 (1992) ("My experience in teaching professional responsibility is that most students already know the fundamental ethical principles that underlie the Model Rules of Professional Conduct. They do not, however, appreciate how these principles may apply in a professional setting....").

[FN19]. See R.J. Gerber, Victory vs. Truth: The Adversary System and its Ethics, 19 ARIZ.ST.L.J. 3, 22-23 (1987); Mudd, supra note 18, at 320.

[FN20]. Herron, supra note 14, at 808.

[FN21]. See, e.g., Cook, supra note 7, at 971; Sayler, supra note 2, at 79- 80.

[FN22]. See Cook, supra note 7, at 971; cf. Charles W. Joiner, Our System of Justice and the Trial Advocate, 24 U.S.F.L.REV. 1, 16 (1989) ("Cross-examination based on factually unsupported innuendo, irrelevance, or dissembling and hiding facts are all hallmarks of the hardball advocate.").

[FN23]. See Arney v. Bryant Sheet Metal, Inc., 96 F.R.D. 544, 545 (E.D.Tenn.1982) (listing numerous defenses that may be construed as frivolous); Kinee v. Abraham Lincoln Fed.Sav. & Loan Ass'n, 365 F.Supp.

975 (E.D.Pa.1973) (describing a class action against multiple defendants without first determining the exact defendants involved in the alleged wrongful conduct). Cf. John M. Johnson & G. Edward Cassady III, Frivolous Lawsuits and Defensive Responses to Them--What Relief is Available?, 36 ALA.L.REV. 927, 928 (1985) ("An unfortunate truism is that, as more people learn to use the legal system for legitimate purposes, many more also learn to use it for illegitimate purposes."); Miller, supra note 14, at 7 (noting that many corporations use lawsuits as a means of business competition).

[FN24]. See Cook, supra note 7, at 973 (describing an incident in which hardball litigators, "in a series of depositions that stretched out over 15 days, asked the opposing attorney to define 'when,' 'where,' 'own,' and 'describe.' "); see also Michael E. Wolfson, Addressing the Adversarial Dilemma of Civil Discovery, 36 CLEV.ST.L.REV. 17, 42 (1988) (observing that abusive practices in depositions include "evasive or incomplete answers" and "frivolous or marginal objections").

[FN25]. See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C.Cir.1988) (noting a 15 hour deposition including questions that were far afield from the disputed legal and factual issues), cert. denied, 488 U.S. 825 (1989); Ferguson v. Ford Motor Co., 92 F.Supp. 868 (S.D.N.Y.1950) (observing documents totalling more than 100,000 pages). Cf. Dominick W. Savaiano, Note, Excessive Discovery in Federal and Illinois Courts, 11 LOY.U.CHI.L.J. 807, 809 (1980) ("Excessive discovery includes the frequent use of long, time-wasting depositions....").

[FN26]. See, e.g., Colorado ex rel. Woodard v. Schmidt-Tiago Const. Co., 108 F.R.D. 731 (D.Colo.1985); Alexander v. Parsons, 75 F.R.D. 536 (W.D.Mich.1977); People ex rel. General Motors Corp. v. Bua, 226 N.E.2d 6 (Ill.1967). Cf. Gerber, supra note 19, at 12-13 ("Where the object is to 'beat every plowshare into a sword,' attorneys can employ excessive discovery as crushing weaponry to avoid reaching the merits.").

[FN27]. See Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN.L.REV. 589, 597 (1985) ("Pre-trial proceedings too often give rise to ... 'Hiroshima' responses to document demands (with any damaging items buried in a mass of trivia)."); Richard W. Sherwood, Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure, 21 SANTA CLARA L.REV. 567, 570 (1981) ("In addition to using discovery to prolong litigation, parties can conceal requested information by disclosing vast amounts of information that was not requested.").

[FN28]. See, e.g., Caribbean Agencies, Inc. v. Agri-Export, Inc., 384 So.2d 281 (Fla.Dist.Ct.App. 1980); Resto v. Walker, 383 N.E.2d 1361 (Ill.App.Ct.1978); Sprung v. Negwer Materials, Inc., 727 S.W.2d 883 (Mo.1987) (en banc); Silverman v. Polis, 326 A.2d 452 (Pa.Super.Ct.1974). Cf., Caribbean Agencies, 384 So.2d at 284 (Hersey, J., concurring) ("Suffice it to say that in this case a great deal of time and energy has been wasted for want of a single, simple telephone call that a decade ago would have been considered the rule rather than the exception.").

[FN29]. See infra part II.A.

[FN30]. These tactics occur most often in large and complex tort cases that will support the resulting added costs and risk of sanctions. See Earl C. Dudley, Jr., Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure, 26 U.S.F.L.REV. 189, 195 (1992). Nonetheless, abuses will occur "in cases of all sizes." Id. at 196. Wherever and whenever a hardball litigator believes that harassing or stalling tactics will advantage her client, she will pursue them regardless of the size of the lawsuit. Id.

[FN31]. See United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) (noting that procedural rules are designed to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"). The Federal Rules of Civil Procedure, which became

effective September 16, 1938, were "a landmark in the history of American jurisprudence." Wolfson, supra note 24, at 33-34. Their sweeping effect prompted several states to use them as the basis for their own state procedural rules. See John B. Oakley & Arthur F. Coon, The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure, 61 WASH.L.REV. 1367, 1369 (1986). Even the states that did not borrow the federal rules verbatim adopted some of the procedural devices that found their genesis in the federal rules. See id. at 1427.

[FN32]. See Rhode, supra note 27, at 597 (observing that "extensive procedural protections generate frequent opportunities for evasion, harassment, and delay").

[FN33]. See Wolfson, supra note 24, at 45.

[FN34]. See Prud'homme, supra note 8, at 461. Prud'homme explains that procedural abuse has created a "geometrical progression" in the complexity of procedural rules. See id. As lawyers discover a loophole in a procedural rule, the courts attempt to close the loophole with still another procedural rule. Lawyers, with their remarkable ability to split hairs, find more loopholes in the new rules. The increasing number of procedural rules--and their resulting loopholes--thus increases the potential for procedural maneuvering. Id.; cf. Miller, supra note 14, at 18 ("When prolonging pre-trial and overuse of discovery are in the interests of both client and attorney, hyperactivity naturally follows.").

[FN35]. See Wolfson, supra note 24, at 45 ("Limiting discovery may cut down the opportunity for abuse, but does little to change the approach to discovery that adheres to the maxim--never be candid, never be helpful, and make your opponent fight for everything he seeks.").

[FN36]. See Joiner, supra note 22, at 19 ("Clients do not receive decisions in accordance with the truth (assuming they ever get a decision because of delay or cost); they win or lose because they have an abuser of the adversary system."); Prud'homme, supra note 8, at 462 (The focus of procedural maneuvering "is not on who is right, [but] rather on who can wear who[m] down through the use of judicial machinery.").

[FN37]. See Sidney A. Fitzwater, Toward a Renaissance of Professionalism in Trial Advocacy, 20 TEX.TECHL.REV. 787, 787 (1989); Miller, supra note 14, at 2.

[FN38]. See Joiner, supra note 22, at 17-18; Sayler, supra note 2, at 81.

[FN39]. Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D.Tex.1988) (en banc) ("Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive."); cf. Silverman v. Polis, 326 A.2d 452, 455 (Pa.Super.Ct.1974) (stating that "attempts to utilize every niggling procedural point for maximum advantage demeans the legal profession, reducing its procedures to a vulgar scramble"); Fina Oil & Chem. Co. v. Salinas, 750 S.W.2d 32, 35 (Tex.App.--Corpus Christi 1988, no writ) ("Justice is defeated when the lawyers' strategy is obstruction and delay.").

[FN40]. See Cook, supra note 7, at 967. Some part of the public resentment against the legal profession is, of course, an inevitable consequence of the adversarial process. See Fitzwater, supra note 37, at 792. Lawyers are not supposed to be pushovers. The adversarial process will often require that effective advocates expose testimonial inconsistencies and impugn witnesses. Unquestionably, the victims of this advocacy will take a dim view of the legal profession. See Fitzwater, supra note 37, at 792.

An interesting historical question asks whether the public has always perceived the legal profession negatively. Compare Rhode, supra note 27, at 589 (arguing that the profession has never lacked critics, and

citing Plato, who observed that lawyers have "small and unrighteous" souls) with Cook, supra note 7, at 956 (arguing that the profession has never lacked advocates, and citing Cicero, who described a friend as "so just and virtuous a man that he seems to be a lawyer by nature, rather than by training"). This question, which has about the same flavor as the enduring "chicken or egg" debate, has little relevance in the present context. Regardless of the views that the public has taken toward the legal profession in the past, it is indisputable that unprofessional behavior between lawyers has eroded the existing public perception of the profession. See infra text accompanying notes 41-45.

[FN41]. See Thomas M. Reavley, A Perspective on the Moral Responsibility of Lawyers, 19 TEX.TECHL.REV. 1393, 1393 (1988); see also Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass, 75 CAL.L.REV. 379, 386 (1987) (stating that "lawyers are especially disliked because they manipulate the legal system in the interests of their particular clients, without regard to the common, universal values of right and wrong").

[FN42]. Report of the Commission on Professionalism of the American Bar Association, "... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 254 (1986) [[[hereinafter Report on Professionalism]. Sixty-eight percent of these corporate clients observed that legal professionalism was declining. Id. After another recent poll, Texas A & M University researchers reported that only 39% of Texans gave lawyers high ratings for honesty and ethical standards. See Cook, supra note 7, at 967 (discussing poll results).

[FN43]. What America Really Thinks About Lawyers, NAT'L L.J., Aug. 18, 1986, at S-1, S-3.

[FN44]. See William J. Brennan, Jr., Are Citizens Justified in Being Suspicious of the Law and the Legal System?, 43 U. MIAMI L.REV. 981, 982 (1989) ("Law is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society."); Herron, supra note 14, at 832 ("The image problem can be traced to a number of sources: cases decided on technicalities instead of on the merits; lawyers who seem interested in promoting their own interests over those of society or the profession; and the ever-increasing amount of time and expense required to gain access to our judicial system.").

[FN45]. See Reavley, supra note 41, at 1393. Public frustration with the justice system has contributed to the growth of methods of alternative dispute resolution (ADR). While ADR can be helpful in many situations, its growth suggests that the justice system is "in serious jeopardy and may be beyond being saved." Joiner, supra note 22, at 18.

[FN46]. The choice of the word "business" is no semantical accident. Virtually all hardball litigators share the belief that the practice of law should be conducted more like a business. See supra text accompanying note 17.

[FN47]. See M. FREEMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9-26 (1975) ("Let justice be done--that is, for my client let justice be done-- though the heavens fall. That is the kind of advocacy that I would want as a client and that I feel bound to provide as an advocate...."); cf. Sayler, supra note 2, at 79 (noting one justification that hardball litigators advance for their style of litigation is that it "proves you love your clients, they love you and anything short of it compromises them").

One of the more interesting--and indeed mystifying--defenses of hardball litigation is illustrated in William A. Brewer III & Francis B. Majorie, One Year After Dondi: Time to Get Back to Litigating?, 17 PEPP.L.REV. 833 (1990). Without much more support than a couple of war stories and a list of hypothetical questions, Brewer and Majorie assume that hardball litigation is not just desirable, but a requisite of the concept of zealous representation. See id. at 848-49. The bulk of their "defense," however, is not an emotional plea for elevating client interests. Rather, despite clogged courts and a rising number of pre-trial

motions and discovery disputes, Brewer and Majorie argue that the "Crisis in Professionalism" is a mirage. See id. at 841-44. According to Brewer and Majorie, "there is no real evidence that recent changes in the bar have caused an increase in commercialism or that commercialism causes lawyers to be less civil today than in times past." Id. at 843. Even if this were true, as Judge Reavley recognized in response, misconduct in litigation still "should be resisted and condemned." Thomas M. Reavley, Response to One Year After Dondi: Time to Get Back to Litigating?, 17 PEPP.L.REV. 851, 851 (1990).

[FN48]. See Miller, supra note 14, at 17 (arguing that abuses are explainable "given a professional ethic mandating that lawyers owe complete allegiance to their clients, very little to the system, and none at all to the adversary").

[FN49]. See Report on Professionalism, supra note 42, at 279-80; see also Sullivan, supra note 17, at 27 (stating that "lawyers have not infrequently allowed client demands to supplant their own best professional judgment"). With the changes in the legal profession, many clients now believe that their lawyers should accede to all their requests. See Wolfgang Hoppe, Professionalism--Can We Return to the Future?, 68 MICH.B.J. 846, 847 (1989).

[FN50]. See Cook, supra note 7, at 979 (noting that the mere fact that a client desires "scorched earth" tactics does not make the tactics either fair or just); Joiner, supra note 22, at 7 ("The public, and more specifically clients, have no right to expect a system biased in their favor.").

[FN51]. See Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1454 (11th Cir.1985) (Fay, J., concurring) ("No client--large or small, rich or poor, with or without influence--can be allowed to corrupt our system of jurisprudence to protect his, her or its self interests."). Even for the hardball litigator, the notion that "the client is the boss" only goes so far. Every practicing lawyer has at some time or other dissuaded a client from pursuing a wasteful or destructive course of action. See Warren Lehman, The Pursuit of a Client's Interest, 77 MICH.L.REV. 1078, 1082 (1979).

[FN52]. See supra text accompanying notes 36-39.

[FN53]. See Fitzwater, supra note 37, at 792.

[FN54]. See REPORT ON PROFESSIONALISM, supra note 42, at 280 ("Where the two conflict, the duty to the system of justice must transcend the duty to the client."); see also Caribbean Agencies, Inc. v. Agri-Export, Inc., 384 So.2d 281, 284 (Fla.Dist.Ct.App. 1980) (Hersey, J., concurring) (stating that "counsel's obligation to his client does not outweigh his duty as an officer of the court").

[FN55]. See Fitzwater, supra note 37, at 792. Undoubtedly, there is tension between the obligation to represent a client zealously and the obligation to act professionally, and the Model Code contributes to this tension. On the one hand, the Model Code exhorts the advocate to "urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1980). On the other hand, it provides that "[a] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client." Id. at EC 7-38. See also id. at EC 7-37 ("In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers.").

[FN56]. See Fitzwater, supra note 37, at 792.

[FN57]. See id. at 793 ("Within the bounds of zealous advocacy, an attorney may nevertheless extend courtesies to opposing counsel and accede to reasonable requests."); cf. Sayler, supra note 2, at 80 (noting that litigation is not war, but even if it resembles war in the limited sense that it produces winners and losers, "it is nonsense to assume that it requires the use of martial arts").

[FN58]. Hardball litigators complain that professional courtesy is a euphemism for the "old boys network," in which lawyers collude to reach results that might be inconsistent with the interests of their clients. See John W. Bickel II & William A. Brewer III, "Professionalism": A Byword for the Old Boy Network?, TEX.LAW., Aug. 19, 1991, at 18, 18; cf. Nancy J. Moore, Professionalism: Rekindled, Reconsidered or Reformulated, 19 CAP.U.L.REV. 1121, 1124 (1990) (noting that the calls for more courtesy and cooperation among professionals represent "little more than the selfish efforts of certain occupations to obtain a state-sanctioned monopoly for their services"). Admittedly, too much cooperation between opposing lawyers is antithetical to the adversarial process. To suggest that lawyers should avoid any cooperation with opposing counsel, however, is absurd. The danger of possible collusion does not require stripping all civilized conduct from legal affairs. See Sayler, supra note 2, at 79-80. A middle ground should be possible. Lawyers should be able to cooperate without submitting to agreements that appear collusive. See Herron, supra note 14, at 834 n. 154.

[FN59]. See Fitzwater, supra note 37, at 793.

[FN60]. See supra text accompanying note 43. Moreover, the existing evidence does not even lead to the conclusion that an uncooperative attitude gives a client much of a technical advantage. See Reavley, supra note 10, at 646 n. 41. Indeed, the evidence suggests that if a judge or jury believes a lawyer is being uncooperative or mean-spirited, the judge or jury will find the lawyer less credible. See id. at 649 ("My observations over the past forty years have been that nasty and devious lawyers seldom enjoy either good standing or prosperity. Their attitude shows--on their faces and in their voices. Jurors and judges dislike what they see.").

[FN61]. See Sayler, supra note 2, at 80; cf. Rhode, supra note 27, at 596- 97 (rejecting the premise that adversarial litigation produces justice, and asking the rhetorical question "Why assume, to paraphrase Macaulay, that the fairest results will emerge from two advocates arguing as unfairly as possible on opposite sides?").

[FN62]. The lack of cooperation between opposing lawyers during discovery has moved several commentators to suggest a complete overhaul of discovery rules. See, e.g., Marvin E. Frankel, The Search for Truth Continued: More Disclosure, Less Privilege, 54 U.COLO.L.REV. 51, 61-62 (1982) (discussing the attorney-client privilege in the context of discovery rules); William W Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U.PITT.L.REV. 703, 721-23 (1989). But see Thomas M. Mengler, Eliminating Abusive Discovery Through Disclosure: Is It Time Again for Reform?, 138 F.R.D. 155, 164-65 (1991) (acknowledging discovery abuses, but arguing against radical changes in the discovery rules).

[FN63]. To attempt to catch their opponent off guard, hardball litigators often have waited until the last possible moment to give notice of depositions. Cf. Cook, supra note 7, at 960 ("When I wanted to take a deposition of the other side, I simply picked up the telephone and called the other lawyer. I would ask the other lawyer to furnish several mutually convenient dates. It was a simple process and it worked. It did not result in receiving fax notices after 5:00 p.m. on Friday....").

[FN64]. Particularly in complex tort cases involving multiple liability, hardball litigators will attempt to prolong proceedings and avoid settlement. For example, in asbestos litigation, lawyers for defendant manufacturers have long refused to enter settlement negotiations with plaintiffs, principally because the

manufacturers desire to avoid paying claims until they can seek bankruptcy protection. See generally Margaret I. Lyle, Note, Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System, 61 TEX.L.REV. 1297, 1300-01 (1983) (discussing asbestos lawsuits automatically stayed by bankruptcy courts). But see Alvin B. Rubin, Mass Torts and Litigation Disasters, 20 GA.L.REV. 429, 435 (1986) (noting that lawyers for asbestos manufacturers should not be faulted for dilatory tactics because "[t]hese lawyers are only making diligent efforts to protect those whom they are hired to represent....").

[FN65]. Cf. Hoppe, supra note 49, at 847 ("Gone is ... the idea that substance and justice are more important than form.").

[FN66]. See supra text accompanying notes 36-39.

[FN67]. See Herron, supra note 14, at 817.

[FN68]. See infra part II.

[FN69]. See Rhode, supra note 27, at 597-98 (noting that the bar believes that hardball tactics "should be left to the procedural rules and sanctions of the court involved") (quoting Philadelphia Bar Association, Evaluation and Report, 2 ABA MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT, Item 554, at 38 (1982)). In their current form, the respective codes of professional responsibility are insufficient to control hardball tactics. The Model Code, for example, leaves an unclear message whether hardball tactics are appropriate. See supra note 55. Few bar associations have adopted guidelines that proscribe, in specific detail, unprofessional conduct. But see DALLAS BAR ASS'N GUIDELINES FOR PROFESSIONAL COURTESY (discussed in Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 287-88 (1988)).

[FN70]. Cf. Brennan, supra note 44, at 984 ("Older lawyers have come to the complacent conclusion that the task of remedying the inequities in our law and legal system is the responsibility only of the younger members of the Bar.").

[FN71]. See Reavley, supra note 41, at 1400 (one reason for decreasing professionalism is "the failure by those who do hold high values to understand and do what is necessary to preserve them"); Rhode, supra note 27, at 645 ("Attorneys who blink at over-billing, misrepresentation, or procedural belligerance thereby legitimate forms of professional acculturation that are debilitating for practitioners as well as litigants.").

[FN72]. See Prud'homme, supra note 8, at 449. Interestingly, some lawyers have embraced hardball litigation not because they think it is fair or proper, but rather because they fear that they might be subject to a malpractice suit if they give opposing counsel any leeway. See Herron, supra note 14, at 817.

[FN73]. See Miller, supra note 14, at 29 ("If conditions continue to deteriorate, we might as well chisel off the legend above the Supreme Court's door, 'Equal Justice Under Law,' and replace it with a sign that says, 'Closed--No Just, Speedy, or Inexpensive Adjudication for Anyone.' ").

[FN74]. See supra text accompanying notes 36-39.

[FN75]. See infra part II.

[FN76]. See REPORT ON PROFESSIONALISM, supra note 42, at 291 ("Judges should impose sanctions for abuse of the litigation process."); see also Miller, supra note 14, at 28 (recommending that courts expand the available range of sanctions against unprofessional conduct).

[FN77]. See Albert A. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CAL.L.REV. 792, 799 (1966); Calvin A. Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 IOWA L.REV. 75, 86-87 (1963); Michael F. Maver & Wayne Stix, The Prevailing Party Should Recover Counsel Fees, 8 AKRON L.REV. 426, 442 (1975); Phillip A. Middleton, To the Victor, the Spoils: Proposal to Abandon the American Rule, 41 J.MO.B. 79, 79 (1985); William B. Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U.COLO.L.REV. 202, 210-11 (1966).

[FN78]. See John W. Wade, On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions, 14 HOFSTRA L.REV. 433, 494-95 (1986) (noting that tort causes of action could be extended against frivolous litigation and other forms of unprofessional conduct).

[FN79]. See generally John M. Johnson & G. Edward Cassady III, Frivolous Lawsuits and Defensive Responses to Them--What Relief is Available?, 36 ALA.L.REV. 927, 931-68 (1985) (discussing the various punitive solutions to frivolous litigation and other forms of unprofessional conduct).

[FN80]. See Newton, supra note 1, at 898; Herron, supra note 14, at 817.

[FN81]. See Neil H. Cogan, The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit, 42 SW.L.J. 1011, 1011 (1989) (commenting that sanctions litigation has become the "hot topic" of federal civil procedure); see also Paul Marcotte, Rule 11 Changes: Blessing or Curse, A.B.A.J., Sept. 1, 1986, at 34, 34 (commenting that sanctions litigation is fast becoming a "cottage industry").

[FN82]. See Johnson & Cassady, supra note 79, at 931; cf. William W Schwarzer, Sanctions Under the New Federal Rule 11--A Closer Look, 104 F.R.D. 181, 181 (1985) ("Widespread concern over frivolous litigation and abusive practices of attorneys led to the amendment in 1983 of Rule 11 of the Federal Rules of Civil Procedure.").

[FN83]. Fed.R.Civ.P. 11. Rule 11 provides, in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.

[FN84]. Fed.R.Civ.P. 37. Under subdivision (b)(2) of Rule 37, a district court may impose such sanctions "as are just," including the following: (1) an order refusing to allow the disobedient party to support or oppose designated claims or defenses; (2) an order prohibiting a party from introducing designated matters in evidence; (3) an order striking pleadings or parts of pleadings; (4) an order staying further proceedings until the discovery abuses are remedied; (5) an order dismissing the action or proceeding; or (6) an order rendering a judgment by default against the disobedient party. Id.

[FN85]. 28 U.S.C. § 1927 (Supp.1993). Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the

court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.
Id.

[FN86]. See Johnson & Cassady, supra note 79, at 958-60 (discussing the state sanctions provisions against frivolous litigation); Wade, supra note 78, at 457-68 (same); see also William W. Kilgarlin & Don Jackson, Sanctions for Discovery Abuse Under New Rule 215, 15 ST. MARY'S L.J. 767, 793-820 (1984) (discussing the Texas sanctions provisions against discovery abuse); Sherwood, supra note 27, at 594-610 (discussing the California sanctions provisions against discovery abuse); Maryann C. Hayes, Note, Recent Trends in the Enforcement of Discovery: Sanctions in the Federal Courts and in Illinois, 11 LOY.U.CHI.L.J. 773, 792-804 (1979) (discussing the Illinois sanctions provisions against discovery abuse).

[FN87]. See Wolfson, supra note 24, at 45.

[FN88]. See Rhode, supra note 27, at 598; Abraham D. Sofaer, Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment, 57 ST. JOHN'S L.REV. 680, 718 (1983).

[FN89]. See, e.g., Janet S. Eveleth, Justice System Drowning in a Drug Tidal Wave, MD.B.J., Mar./Apr. 1991, at 33, 33-34 (Maryland courts); Marcus M. Kaufman, Crisis in the Courts, CAL.LAW., Aug. 1990, at 28, 28 (California courts); Michael Wells, Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee, 1991 B.Y.U.L.REV. 923, 923-24 (federal courts).

[FN90]. Sanctions engender substantial satellite litigation. See infra note 105. Part of the problem is that sanctions motions breed even more sanctions motions:

> Motions for sanctions usually are incorporated into a case as a matter of course.... Arthur Miller, a Harvard Law School professor, once illustrated the frivolous nature of sanctions in a "Kafkaesque dream," or perhaps a nightmare, "in which motions for sanctions would be countered with motions to sanction frivolous motions for sanctions, which would be similarly countered with more motions for sanctions, ad infinitum."

Woods, supra note 17, at 666 n. 2 (quoting from Daniel S. Hinerfeld, The Sanctions Explosion, CAL.LAW., Nov. 1987, at 33, 82).

[FN91]. Some sanctions provisions are mandatory. Rule 11, for instance, requires that federal courts impose sanctions where the requisite conditions for Rule 11 sanctions are established. Fed.R.Civ.P. 11. While mandatory sanctions provisions eliminate the problem of allowing judges to refuse to impose sanctions, mandatory sanctions carry problems of their own. See Sofaer, supra note 88, at 719 (noting that mandatory sanctions provisions give "no consideration to the many practical and equitable factors that might countervail the imposition of a sanction").

[FN92]. As sanctions jurisprudence develops, commentators have noticed that while courts often decline to impose smaller sanctions awards, they show little reluctance in imposing large fee awards as sanctions. Compare Judith L. Maute, Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine, 20 CONN.L.REV. 7, 26 (1987) (noting that trial judges are reluctant to impose sanctions awards) and Sofaer, supra note 88, at 718 (noting that judges can seldom afford the time to go through the steps needed to impose sanctions) with Sam D. Johnson et al., The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions, 43 BAYLOR L.REV. 647, 659 (1991) (noting that judges seem to have become more and more willing to impose severe sanctions as a docket control device).

Even when not coupled with a dismissal, large fee awards can produce "devastating professional and financial consequences" that have the effect of ending litigation. See George Cochran, Rule 11: The Road

to Amendment, 61 MISS.L.J. 5, 6 (1991). Recently, for example, a state court judge in Texas assessed a $994,000 sanction against two solo practitioners and their client for filing a frivolous pleading. The sanctioned parties could not post the bond necessary to delay collection of the debt pending appeal, and they risked being unable to appeal their sanction and the underlying judgment. See Mark Ballard, Losers Face $1M Fine for Trial Tactics: Rule 13 Sanctions Catches Task Force's Eye, TEX.LAW., May 25, 1992, at 1, 30.

[FN93]. See Wolfson, supra note 24, at 45 ("Threatening punishment as a means of achieving compliance with the rules is only effective if, (1) the sanction clearly outweighs the benefit of the egregious behavior, (2) its imposition is clear and swift, and (3) the likelihood of getting caught is substantial. The current approach to the use of sanctions has clearly failed on all grounds....").

[FN94]. Fed.R.Civ.P. 37.

[FN95]. Id.

[FN96]. See supra note 84.

[FN97]. See Wolfson, supra note 24, at 45-46.

[FN98]. See John K. Setear, Note, Discovery Abuse Under the Federal Rules: Causes and Cures, 92 YALE L.J. 352, 357 (1982).

[FN99]. See id. at 356 ("Information garnered from discovery can increase the strength of a litigant's position in settlement negotiations or his chances of victory if the case goes to trial.... Discovery may also provide information useful to the litigant outside the context of the instant litigation.").

[FN100]. See supra text accompanying notes 31-35.

[FN101]. See Charles F. Herring, Jr., The Rise of the "Sanctions Tort," TEX.LAW., Jan. 28, 1991, at 22.

[FN102]. See Batson v. Neal Spelce Assocs., Inc., 765 F.2d 511, 516 (5th Cir.1985) (stating that sanctions are "penal in nature"); cf. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (observing that the "central purpose" of sanctions is deterrence).

[FN103]. See Sofaer, supra note 88, at 717 ("Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative and less effective in bringing controversies to just, speedy, and inexpensive resolutions."); cf. Michael H. Dettmer, Observations on Professionalism, 68 MICH.B.J. 842, 843 (1989) ("Increased judicial pressure imposed on our profession [from sanctions and growing malpractice problems] causes us to lash out against each other.").

[FN104]. See Fitzwater, supra note 37, at 800; see also David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV.L.REV. 799, 838 (1992) (stating that "adversaries may gain a number of strategic advantages from reporting lawyer misconduct"); Comment of the Chicago Bar Association to the Committee on Rules of Practice and Procedure 6 (Nov. 2, 1990) ("The increasing number of attorneys who have been threatened with Rule 11 sanctions bears little relationship to the number of attorneys who have engaged in frivolous litigation. The threat of Rule 11 sanctions is, therefore, often viewed as (and, in many cases, is) a tactic unrelated to the merits of the litigation.").

[FN105]. A sanctions motion can have a powerful stigmatizing effect, even if the motion is unfounded. See Byron C. Keeling, Neither an Elephant Gun Nor a Cardboard Sword: Due Process Requirements in Sanctions Litigation, 12 REV.LITIG. 343, 353 n. 47 (1993).

[FN106]. See Fitzwater, supra note 37, at 800 ("Practitioners should recognize that unfounded Rule 11 motions must be ruled upon and that district courts are required to give the motions sufficient attention to facilitate appellate review. This likewise diminishes available resources and gives rise to the dual evils of delay and excessive cost."). If the conditions support sanctions under Rule 11, then sanctions are mandatory. Fed.R.Civ.P. 11. See Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 876-77, 882-83 (5th Cir.1988) (en banc) (noting that courts still have discretion in shaping the sanctions to suit the particular facts of the case). Accordingly, problems regarding Rule 11 interpretation engenders substantial satellite litigation because it requires judges to spend time examining the factual and legal basis for sanctions. See Melissa L. Nelken, Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions, 41 Hastings L.J. 383, 387-88 (1990). A hardball litigator seeking to stall litigation "may welcome the resulting proliferation of proceedings as serving his purposes." Schwarzer, supra note 82, at 183-84.

Professor Maute has argued that the explosion in Rule 11 satellite litigation is a temporary phenomenon that will last only until the courts of appeals formulate standards for imposing sanctions. She explained: "When fully incorporated into the litigation process and adversary ethic, [Rule 11] can recede into the background as law that affects lawyers' conduct, but does not dominate litigation activity." Maute, supra note 92, at 27. In the six years since Professor Maute wrote those remarks, however, the courts of appeals have drafted standards for imposing Rule 11 sanctions. Unfortunately, satellite litigation has, if anything, increased rather than decreased. See Nelken, supra at 388.

[FN107]. A Rule 11 motion suggests that the position of opposing counsel "is so wrong that it is frivolous." See Mark S. Stein, Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments, 132 F.R.D. 309, 315 (1990). Understandably, the opposing counsel in this situation feels compelled to recapture the offensive. See Fitzwater, supra note 37, at 801 ("Unfounded requests for sanctions that accuse the opposing lawyer of filing a claim or defense that is not based upon an adequate investigation of the facts or analysis of the law can trigger an instinctive reaction in the adversary to launch a retaliatory strike."); Wilkins, supra note 104, at 840 n. 176 ("The party seeking sanctions risks retaliation by the other side, in the form of either a cross motion for sanctions or a general escalation in the intensity of the litigation.").

[FN108]. Because Rule 11 sanctions are not limited to bad faith conduct, the margin for error is great. Even unfounded sanctions motions sometimes persuade a court to grant sanctions. See Georgene M. Vairo, Rule 11: Where We Are and Where We Are Going, 60 FORDHAM L.REV. 475, 489-90, 490 n. 84 (1991); cf. Cochran, supra note 92, at 9 ("Arguments found frivolous and sanctionable by a district court are, less than a year later, found meritorious by the United States Supreme Court.").

[FN109]. An award of fees is the favored form of sanction under Rule 11. See Johnson et al., supra note 92, at 649. Professor Nelken has concluded that some form of fees award is assessed in 96% of all cases involving a Rule 11 violation. Melissa L. Nelken, Sanctions Under Amended Federal Rule 11-- Some "Chilling" Problems in the Struggle Between Compensation & Punishment, 74 GEO.L.J. 1313, 1333 (1986). Cf. Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 NW.U.L.REV. 943, 956-57 (1992) (concluding that some form of monetary sanction is imposed in 95% of all cases involving a Rule 11 violation). The potential for recovering fees expended in litigation "has become a tempting carrot for the litigious horse." Fitzwater, supra note 37, at 799.

The United States Supreme Court has approved an amendment to Rule 11, effective December 1, 1993, that would forbid a fee award unless the offended party files a motion for Rule 11 sanctions. This amendment would limit the available range of sanctions only in cases in which the court awarded sanctions sua sponte.

Because most Rule 11 sanctions are not made sua sponte, but rather on the motion of one of the parties, this amendment will not have much of an impact in reducing the number of fee awards under Rule 11. See Kerian Bunch, Note, Taming the Fury: Do the 1991 Proposed Amendments to Rule 11 Go Far Enough?, 5 GEO.J. LEGAL ETHICS 957, 969 (1992); Johnson et al., supra note 92, at 665.

[FN110]. See discussion infra part III.A.

[FN111]. Fed.R.Civ.P. 11.

[FN112]. See Fitzwater, supra note 37, at 800-02. Amendments to Rule 11, effective December 1, 1993, will (1) make the imposition of sanctions discretionary rather than mandatory and (2) give litigants who file a frivolous pleading an opportunity to retract their pleading before sanctions are imposed (the "safe harbor" provision). While these amendments will improve the existing version of Rule 11, see Johnson et al., supra note 92, at 663-66, they do not eliminate the incentive for hardball litigators to file sanctions motions as a tactical maneuver. If nothing else, hardball litigators can file sanctions motions under amended Rule 11 in an attempt to coerce opposing litigants to retract undesirable pleadings.

[FN113]. See Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex.1989), cert. denied, 493 U.S. 1074 (1990); Braniff, Inc. v. Lentz, 748 S.W.2d 297, 301 (Tex.App.--Fort Worth 1988, writ denied); see also Kilgarlin & Jackson, supra note 86, at 816-17 (stating that Rule 215(5) is "intended to frustrate any effort to unfairly surprise an opponent with undisclosed evidence").

[FN114]. Tex.R.Civ.P. 215(5). Rule 215(5) states:

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

Id. The "good cause" exception to exclusion under Rule 215(5) seldom arises. The Texas Supreme Court has interpreted the exception narrowly. See Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex.1992) ("To relax the good cause standard in Rule 215(5) would impair its purpose. Counsel should not be excused from the requirements of the rule without a strict showing of good cause.").

[FN115]. Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex.1990) (per curiam) (quoting Tex.R.Civ.P. 166b(6)). See also E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex.1987) (stating that an expert witness' identity has to be disclosed no more than 30 days before the trial starts). For witnesses other than experts, the Texas rules do not require disclosure "as soon as is practical." Tex.R.Civ.P. 166b(6). Thus, if the requesting party submits an appropriate request, the offering party is required merely to disclose its fact or lay witnesses no less than 30 days before trial. See Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex.1987); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex.1986) (per curiam).

Interestingly, the Texas Rules of Civil Procedure do not specifically authorize the discovery of fact witnesses, and therefore, an offering party is not required to disclose its witnesses in response to a request for the disclosure of "fact witnesses." See Employers Mut. Liab. Ins. Co. v. Butler, 511 S.W.2d 323, 324-25 (Tex.Civ.App.–Texarkana 1974, writ ref'd n.r.e.). However, the Texas rules authorize the discovery of "persons having knowledge of relevant facts." Tex.R.Civ.P. 166b(2)(d) ("A party may obtain discovery of the identity and location ... of any potential party and of persons having knowledge of relevant facts."). Just as with undisclosed expert witnesses, persons having knowledge of relevant facts may not testify if the offering party failed to disclose them in response to an appropriate discovery request. See Clayton v. First

State Bank, 777 S.W.2d 577, 580 (Tex.App.--Fort Worth 1989, writ denied); Farm Servs. v. Gonzales, 756 S.W.2d 747, 751 (Tex.App.-- Corpus Christi 1988, writ denied).

[FN116]. An untimely disclosure is just as likely to result in exclusion as a complete failure to disclose. See David W. Holman & Byron C. Keeling, Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure, 42 BAYLOR L.REV. 405, 430 (1990). Unfortunately, however, the Texas rules do not express an unambiguous time limit for the disclosure of expert witnesses. At least one Texas appellate court has excluded expert witnesses whom it believed the offering litigant had not disclosed "as soon as is practical," even though the witnesses were disclosed more than thirty days before trial. Builder's Equip. Co. v. Onion, 713 S.W.2d 786, 788 (Tex.App.--San Antonio 1986, no writ). The ambiguous language in the Texas rules gives hardball litigators a dangerous weapon against opposing counsel: in virtually any case, a hardball litigator can argue that his opponent failed to disclose his experts as soon as is practical. See Holman & Keeling, supra, at 450-51; cf. William W. Kilgarlin, Sanctions for Discovery Abuse: Is the Cure Worse than the Disease?, 54 TEX.B.J. 658, 658 (1991) ("Lawyers now, rather than taking the time to talk to their adversaries and learn how much additional time will be required to obtain discovery responses, turn immediately to the courts with requests that the most awesome of sanctions powers be invoked.").

[FN117]. Under the Texas rules, a litigant can wait until trial to object to an undisclosed witness. See Holman & Keeling, supra note 116, at 429.

[FN118]. See id. at 447.

[FN119]. There should be no reason for a hardball litigator in Texas to lie behind the log and surprise opposing counsel at trial with a motion to exclude unfavorable witnesses. At a minimum, competing lawyers should be able to share witness lists before trial and cooperate in arranging a reasonable time for deposition. See supra text accompanying notes 57-60. Unfortunately, hardball litigators have legitimized attempts to exploit Rule 215(5): motions for exclusion of witnesses are a common fixture in Texas trial proceedings. See Holman & Keeling, supra note 116, at 447 (observing that Rule 215(5) "has contributed to the now epidemic wave of 'Rambo' litigation in our courts and to the 'paper wars' that have proliferated among the parties"); see also REPORT OF TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 86 (1993) ("The two rules that currently govern pre-trial disclosure of witnesses, Rules 166b(6) and 215(5), were designed to serve the salutory purposes of preventing trials by ambush and facilitating settlements. In their current form, however, the rules have created several problems and received substantial criticism."); cf. Herring, supra note 101, at 23 ("The sanctions pendulum [in Texas] has swung too far and needs to return closer to the middle range.").

[FN120]. See supra text accompanying notes 81-82.

[FN121]. See supra note 103.

[FN122]. See supra note 34.

[FN123]. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); see also DAN B. DOBBS, LAW OF REMEDIES § 3.8 (1973) (observing that the rule in the United States "has long been that attorneys' fees are not ordinarily recoverable"). Courts in the United States have carved out several exceptions from the "American rule." The three most common circumstances in which a fee award is appropriate are the following: (1) when the common fund doctrine or its substantial benefit expansion applies; (2) when one of the litigants acted in bad faith or committed some form of egregious misconduct

during litigation; and (3) when a statute authorizes the award. See Dan B. Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 DUKE L.J. 435, 440.

[FN124]. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967).

[FN125]. As early as 1796, the United States Supreme Court reasoned that unless a federal statute authorized fee shifting, prevailing parties in litigation should not be able to recover their fees from their opponents. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). See also Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 219 (1872) (suggesting that counsel fees should not be allowed as part of the remedy); Day v. Woodworth, 54 U.S. (13 How.) 363, 371-73 (1851) (confirming that counsel fees should not be allowed unless provided for by statute). Likewise, within the next hundred years, most state courts adopted the "American rule." See John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, LAW & CONTEMP.PROBS., Winter 1984, at 9, 22-23.

Most countries follow the "English" or "double or quits" rule, which requires losing parties to pay the fees that their opponents have expended in litigation. The significance of this fact, however, "cannot be assessed in a vacuum." Dobbs, supra note 123, at 435 n. 1. Litigation costs are not as expensive in foreign countries, and extensive governmental legal aid programs underwrite the cost of some forms of litigation. See Werner Pfennigstorf, The European Experience with Attorney Fee Shifting, LAW & CONTEMP.PROBS., Winter 1984, at 37, 44-61; see also Tim Cornwell, Quayle Likes the 'English Rule' But Brits Have Their Doubts, LEGAL TIMES, Feb. 10, 1992, at 1, 12 (noting that the English system works due to the extensive governmental legal assistance).

[FN126]. See Miller, supra note 14, at 10 ("The 'American rule' of letting costs lie where they fall removes a powerful disincentive to legal combat that is present in most other countries--the knowledge that the loser must pay the litigation costs, including attorneys' fees, of the winner."); Sofaer, supra note 88, at 726 ("Perhaps the mightiest catalyst for discovery abuse is the so-called American Rule.... The effect of this rule on discovery is profound: a party can have as much discovery as it wants by paying only the costs of seeking that discovery; the costs of compliance are generally borne without recompense by the opposing party."); see also sources cited supra note 77 (proposing the abandonment of the American Rule).

[FN127]. See Wade, supra note 78, at 468.

[FN128]. See, e.g., Conn.Gen.Stat. § 52-240a (1991) ("If the court determines that the claim or defense is frivolous, the court may award reasonable attorney's fees to the prevailing party in a products liability action."). Florida experimented with a statute authorizing state courts to award prevailing parties their fees "in any medical malpractice action." Fla.Stat.Ann. § 768.56 (repealed 1985). Most interested parties discovered, however, that the statute "was ineffective to prevent suits or encourage settlements." F. Townsend Hawkes, The Second Reformation: Florida's Medical Malpractice Law, 13 Fla.St.U.L.Rev. 747, 766 n. 94 (1985). The Florida legislature repealed the statute in 1985. See Wade, supra note 78, at 469.

[FN129]. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA, Aug. 1991, at 24-25. See also How Bush Administration Would Borrow English Rule, LEGAL TIMES, Feb. 10, 1992, at 13, 13 (setting out the legislation proposed by the President's Council on Competitiveness).

[FN130]. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 552 (1991); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

[FN131]. See Johnson et al., supra note 92, at 652 ("In practice, Rule 11 has become one of [the] exceptions to the American rule. Rule 11 permits district courts to award attorneys' fees to a prevailing party in a

sanctions proceeding, and district courts have frequently done so."); see also supra note 109 (discussing the prevalence of monetary sanctions awards in Rule 11 sanctions proceedings). Another sanctions "provision" that serves as an exception to the American rule is found in Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991), which allows federal courts, in the exercise of their "inherent power," to assess fee awards against litigants who have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. at 2133 (quoting F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 129 (1974)). In a sense, Chambers is even broader than Rule 11 because it is not limited to matters contained in pleadings, motions or papers filed in federal district court. See Johnson et al., supra note 92, at 653 n. 28. Nonetheless, at least as long as Chambers is confined to cases involving egregious conduct, Chambers will not be as troubling an exception to the American rule as is Rule 11. See Johnson et al., supra note 92, at 653; see also infra part III.A.

[FN132]. For a small sample of these provisions, see Colo.Rev.Stat. §§ 13-17-101 to 13-17-106 (1987 & Supp.1992) (recovering fees where the action or defense "lack[s] substantial justification"); Fla.Stat.Ann. § 57.105 (West Supp.1993) (recovering fees where there is "a complete absence of a justiciable issue of either law or fact"); Kan.Stat.Ann. § 60-2007(b) & (d) (Supp.1992) (recovering fees where the action or defense is "without a reasonable basis in fact and not in good faith"); Wis.Stat.Ann. § 814.025 (West Supp.1992) (recovering fees where the action or defense is "frivolous").

[FN133]. See Wade, supra note 78, at 492. These sanctions provisions have limited deterrent value because their coverage is limited. A complete abrogation of the "American rule" would have greater deterrent value, but it would deter more than just litigation abuse. See infra text accompanying notes 146-49. Several commentators believe that a rule assessing fees against a losing litigant would deter legitimate claims and defenses. See Roxanne B. Conlin & Clarence L. King, Jr., The "Loser Pays" Rule: Who Pays for Injustice?, TRIAL, Oct. 1992, at 58, 60 ("No matter whether we think the English rule is intended to be an aggressive response to litigation or a mechanism of fairness, it will always deter litigation and inevitably create some injustice where it is implemented."); Herbert M. Kritzer, Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario, LAW & CONTEMP.PROBS., Winter 1984, at 125, 133 ("The potential of having to pay the other side's costs may create a very substantial barrier to litigation, particularly for individuals and especially when the potential litigant is not 100% sure about his or her case."); John F. Vargo, The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice, 42 AMER.U.L.REV. 1567, 1635 (1993) ("In general, the English Rule operates as a greater impediment to access to justice than does the American Rule."); cf. Herbert M. Kritzer, A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases, 14 L. & SOC. INQUIRY 167, 174 n. 30 (1989) (noting that an overwhelming majority of persons interviewed in England would not pursue a lawsuit if the going rate for the injury were $10,000 American dollars and their chances of winning were only 80%).

[FN134]. See supra part I.

[FN135]. See supra text accompanying notes 31-35.

[FN136]. See Charles W. Wolfram, The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline, LAW & CONTEMP.PROBS., Winter 1984, at 293, 319.

[FN137]. See Dobbs, supra note 123, at 436.

[FN138]. Id. at 489.

[FN139]. See id. at 436 n. 11.

[FN140]. See Wade, supra note 78, at 467; Gregory J. Hughes, Comment, Award of Attorney's Fees in Alaska: An Analysis of Rule 82, 4 UCLA--ALASKA L.REV. 129, 129 (1974). The Alaskan rejection of the "American rule" dates back to the Act of Congress that established a civil government in Alaska. The Act authorized fee shifting in civil litigation:

The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs.

Act of June 6, 1900, ch. 786, § 509, 31 Stat. 321, 415.

[FN141]. Alaska R.Civ.P. 82. More precisely, Rule 54 of the Alaska Rules of Civil Procedure allows the trial court to award "costs" to the prevailing parties in litigation. Alaska R.Civ.P. 54 ("Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs...."). Rule 82 includes attorney fees as part of the "costs" of litigation, and it contains a table for calculating the amount of the fees that can be shifted. With amendments effective July 15, 1993, Rule 82 provides:

(a) Allowance to Prevailing Party. Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering money judgment in a case.

	Judgment and, if awarded,		
Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested
First $ 25,000	20%	18%	10%
Next $ 75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30% of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20% of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;
(B) the length of trial;
(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;
(E) the attorneys' efforts to minimize fees;
(F) the reasonableness of the claims and defenses pursued by each side;
(G) vexatious or bad faith conduct;
(H) the relationship between the amount of work performed and the significance of the matters at stake;
(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case exceeding $50,000 must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule is not to be construed as fixing the fees between attorney and client.

Alaska R.Civ.P. 82. The Alaska Supreme Court upheld Rule 82 against constitutional attack. See Stepanov v. Gavrilovich, 594 P.2d 30, 36-37 (Alaska 1979), modified on other grounds sub nom. In re Soldotna Air Crash Litigation, 835 P.2d 1215 (Alaska 1992).

[FN142]. See Hughes, supra note 140, at 169, who states:
The American Rule discourages litigation of all claims in which a substantial money recovery is not possible, because the cost of the attorney must then be borne directly by the litigant, whether or not he is successful. Also, the American practice causes court congestion, by abetting the use of dilatory, bad-faith tactics intended to increase the expense of litigation and force unjust settlements.... The Alaskan system was designed to alleviate these problems by re-allocating the expenses of litigation.
Cf. DeWitt v. Liberty Leasing Co., 499 P.2d 599, 602 (Alaska 1972) (noting that the purpose of the fee shifting provision in the Alaska Rules of Civil Procedure is, at least in part, to compensate prevailing parties).

[FN143]. See Wade, supra note 78, at 491-92.

[FN144]. See Hughes, supra note 140, at 145 (citing James Blair, former president of the Alaska Bar Association).

[FN145]. See Hughes, supra note 140, at 164; cf. Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1190 (5th Cir.1990) ("Perhaps the fiercest legal battles emerge not from knotty questions of a plaintiff's right to justice, but rather from comparatively trivial questions of an attorney's right to compensation.").

[FN146]. See Hughes, supra note 140, at 164-65.

[FN147]. See Johnson et al., supra note 92, at 676 ("There are few shades of black or white, and on the most difficult questions, there often are only varying shades of gray."); cf. Rhode, supra note 27, at 619 ("No system of governance could function if certitude became a requisite for liability.").

[FN148]. See Hughes, supra note 140, at 165 ("Assessment of an attorney's fee against the losing party [without a finding of bad faith] simply is unjustified and indefensible."). The unfairness in fee shifting provisions is amplified when the provisions allow a "prevailing" litigant to recover its fees from an opponent who settles. Such provisions reward hardball litigators who desire to overwhelm their opponents and force them into settlement. See supra text accompanying notes 36-39.

[FN149]. See Hughes, supra note 140, at 165. Under the 1993 amendments, the Alaska fee shifting provision perhaps cuts an even greater swath than it did before. The new amendments eliminate judicial discretion to refuse a fee award. Trial judges in Alaska must grant a fee award to the prevailing parties in litigation. Alaska R.Civ.P. 82. But see Vargo, supra note 133, at 1626 (noting that the 1993 version of Alaska Rule 82, unlike the old version, allows courts to consider mitigating factors that might reduce the amount of a fee award).

[FN150]. See supra text accompanying note 135.

[FN151]. See supra text accompanying notes 146-49.

[FN152]. See Conlin & King, supra note 133, at 60-61.

[FN153]. See Johnson & Cassady, supra note 79, at 931-32; Wade, supra note 78, at 437; John R. Jones, Jr., Note, Liability for Proceeding with Unfounded Litigation, 33 VAND.L.REV. 743, 746 (1980); Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 YALE L.J. 1218, 1218-19 (1979).

[FN154]. Restatement (Second) of Torts § 674 (1976). The Restatement recognizes the following elements for a malicious civil prosecution action: (1) the defendant has instituted, continued, or procured a civil claim; (2) the proceedings terminated in favor of the plaintiff; (3) the defendant acted without probable cause to believe in the validity of the prior proceeding or pursued the claim with malice toward the plaintiff; and (4) the plaintiff was injured. See id. The malice element "generally requires that the initial suit be brought intentionally to harm the plaintiff." Johnson & Cassady, supra note 79, at 938 n. 48.

[FN155]. See Wade, supra note 78, at 434. Further limiting the effectiveness of tort actions for malicious civil prosecution is the fact that because most state courts recognize that their forums should be open to public use, the courts have declared that malicious civil prosecution actions are disfavored. See Wade, supra note 78, at 434 n. 3 (citing Berlin v. Nathan, 381 N.E.2d 1367 (Ill.App.Ct.1978), cert. denied, 444 U.S. 828 (1979); Wong v. Tabor, 422 N.E.2d 1279 (Ind.Ct.App.1981); Young v. First State Bank, 628 P.2d 707 (Okla.1981)).

[FN156]. See Johnathan K. Van Patten & Robert E. Willard, The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation, 35 HASTINGS L.J. 891, 923-24 (1984).

[FN157]. See Scott S. Partridge et al., A Complaint Based on Rumors: Countering Frivolous Litigation, 31 LOY.L.REV. 221, 254 (1985); Wade, supra note 78, at 494.

[FN158]. 344 S.E.2d 414 (Ga.1986).

[FN159]. Id. at 417.

[FN160]. See supra text accompanying notes 156-57.

[FN161]. 344 S.E.2d at 417.

[FN162]. Id.; see also Drake v. Page, 393 S.E.2d 89, 91 (Ga.App.1990) (noting that a tort claim can be based upon unjustifiable expansion of proceedings in requesting unnecessary discovery); Efstathiou v. Saunders, 376 S.E.2d 413, 415 (Ga.App.1988) (stating that a tort claim can be based upon unjustifiable expansion of proceedings in filing a Yost claim).

[FN163]. The Yost cause of action is not the sole Georgia remedy against unfounded litigation. The Georgia legislature has enacted a state statute which, like Federal Rule of Civil Procedure 11, allows a litigant to recover his attorney fees from a party or attorney that instituted a groundless or abusive action against him. Ga.Code Ann. § 9-15-14 (1986) provides, in pertinent part:

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against the party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

Id. There are two significant differences between the scope of the Yost cause of action and the scope of the Georgia sanctions provision. First, unlike the sanctions provision, the Yost cause of action does not explicitly exclude good faith attempts to establish a new theory of law. See Anne P. Dupre, Comment, Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem, 21 GA.L.REV. 429, 442-43 (1986). Second, unlike the sanctions provision, the Yost cause of action directs its remedy against parties, not attorneys. See id. at 465. Ostensibly, the Georgia Supreme Court created the Yost cause of action to supplement, rather than supplant, the Georgia sanctions provision. Yost allows the claimant to recover "special damages other than attorney fees and expenses of litigation." Yost, 344 S.E.2d at 417 (emphasis in original). A claimant who desires to recover its fee expenses presumably should file a claim under section 9-15-14. In practice, though, the relationship between the sanctions provision and the tort cause of action is less than clear. For example, Georgia case law still has not established whether the good faith exception to section 9-15-14 also applies to the Yost cause of action. See Ferguson v. City of Doraville, 367 S.E.2d 551 (Ga.App.1988) (suggesting that the good faith exception is inapplicable in Yost actions), overruled on other grounds, Vogtle v. Coleman, 376 S.E.2d 861 (Ga.1989). If the exception does not apply, then the reach of the Yost action extends far beyond the reach of the sanctions provision: Georgia litigators can file a Yost counterclaim regardless of whether the original claim was filed with a good faith intent to establish a new theory of law.

[FN164]. 344 S.E.2d at 418.

[FN165]. Id.; cf. Porter v. Johnson, 23 S.E. 123, 126 (Ga.1895) ("If the law were otherwise, the ending of an action would be merely the beginning of litigation. The defendant, immediately upon the failure of the action, would begin one against the plaintiff; and if the latter action should fail, the defendant therein would in turn bring another action; and so on ad infinitum.").

[FN166]. See Robert A. Elsner & John A. Bender, Jr., The Torok Tort: Recovery for Abusive Litigation, 23 GA.ST.B.J. 84, 85 (1986) (stating that "by requiring that the claim be brought as part of the underlying proceedings, the Court eliminated the prospect of such never ending chain link litigation").

[FN167]. See Charles T. Huddleston & J. Randolph Evans, Litigators on Trial: Professionalism Implications of Yost v. Torok, 23 GA.ST.B.J. 88, 88 (1986).

[FN168]. See Dupre, supra note 163, at 464 n. 167 (" 'I'll Yost you' is becoming the battle-cry of the Georgia litigator."). But see Michael Gruber, Battling the Many-Headed Hydra: Abusive Litigation in Georgia, 25 GA.ST.B.J. 65 (1988). Gruber cites a survey he conducted of 17 trial court judges in metropolitan Atlanta for the proposition that "the flood of abusive litigation counterclaims which was anticipated two years ago has not materialized." Id. at 65. One might question whether a survey of 17 judges gives an accurate picture of the effects of Yost. But even without considering methodology, the statistics that Gruber gleaned from his survey are less than conclusive. According to Gruber, 13 of the judges reported that less than 25% of the cases on their dockets included requests for sanctions, one judge reported that between 25% to 50% of his cases included sanctions requests, and three judges gave no answer. Id. at 69. If 25% of the 100,000 or so civil cases handled annually in the Georgia courts included sanctions requests, Georgia judges would have to handle 25,000 additional claims or motions. Even a conservative estimate of 10% would put the amount of sanctions requests each year at around 10,000--a huge number of sanctions requests for the courts to resolve.

[FN169]. See Huddleston & Evans, supra note 167, at 88; cf. Wade, supra note 78, at 455 ("One objection made to the action is that it contends that the first suit should not have been brought, and then seeks to cure one unnecessary suit clogging the courts by the bringing of another suit, clogging them even further.").

[FN170]. See L. Ray Patterson, Yost v. Torok: Taking Legal Ethics Seriously, 4 GA.ST.U.L.REV. 23, 51 (1988) ("The danger is that the Bar will view Yost as providing lawyers with another weapon in the arsenal of litigation."). A Yost claim is the natural response to litigation that is charged with emotion. As Dupre has observed:

> [W]hen a lawsuit is filed, the defendant is typically angry and hurt and wishes to retaliate against the plaintiff. Under the old system, the underlying claim might have settled or have been tried before the defendant filed for malicious use or abuse of process. During that period, the defendant could cool down and reassess whether he or she wished to continue litigation. The Yost system, however, by requiring immediate filing, plays upon a defendant's highly emotional state immediately following the initiation of a lawsuit. Therefore, the abusive litigation tort may foster the very litigation it was designed to prevent.

Dupre, supra note 163, at 465.

[FN171]. See Huddleston & Evans, supra note 167, at 88. It should be noted that some Georgia lawyers file Yost claims not because they desire to intimidate or badger opposing counsel, but rather because they fear that they may face a malpractice claim if they do not. See Dupre, supra note 163, at 465; see also supra note 72.

[FN172]. 344 S.E.2d at 417 ("Any party who shall assert a claim ... or any party who shall bring or defend an action ... shall be liable in tort to an opposing party.").

[FN173]. See Dupre, supra note 163, at 447.

[FN174]. See id. at 448. When a conflict of interest arises between a Georgia lawyer and her client, the lawyer must tell her client that the conflict exists. See Georgia Code of Professional Responsibility EC 5-11 (1978). The lawyer cannot continue her representation until the client waives the conflict of interest. See Georgia Code of Professional Responsibility DR 5-101(A) (1978). If the client refuses to waive the conflict, then the lawyer must withdraw from the case. See Young v. Champion, 236 S.E.2d 783, 785 (Ga.Ct.App.1977). Consequently, "[a] party could conceivably use the Yost counterclaim to remove any opposing attorney with whom the party does not wish to deal." Dupre, supra note 163, at 451.

[FN175]. See supra text accompanying notes 167-74.

[FN176]. Professor Rhode has complained that proposals for solving the "Crisis in Professionalism" often do not "venture beyond some brief evocation of traditional ideals and vague exhortations to selflessness." Rhode, supra note 27, at 593. To the extent that one does not recommend increasing sanctions or other punitive measures against unprofessional behavior, this complaint may be unavoidable. The "Crisis in Professionalism" will not end until the profession teaches its newer members the traditional ideals and exhorts its newer members to dedicate themselves to the goals of the profession and not their own selfish interests. Hopefully, however, the prescription in this part of the Article contains enough substance to survive the criticism that it is either "brief" or "vague."

[FN177]. See infra part III.A.

[FN178]. See infra part III.B.

[FN179]. See Wade, supra note 78, at 434. As Judge Henry Edgerton observed in a related context: "The law tries to avoid both too much discouragement and too much encouragement of litigation. Some sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights." Soffos v. Eaton, 152 F.2d 682, 683 (D.C.Cir.1945).

[FN180]. See supra part II.

[FN181]. See infra text accompanying notes 187-89.

[FN182]. See supra text accompanying notes 52-54.

[FN183]. In some instances, monetary sanctions may also be appropriate against a client where there is some evidence that the client authorized the bad faith conduct and knew that the conduct violated professional standards. See supra text accompanying notes 48-51.

[FN184]. See Jeffrey W. Stempel, Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing it with Pre-Verdict Dismissal Devices, 60 FORDHAM L.REV. 257, 257 (1991) (noting that sanctions motions were far less frequent when Rule 11 used a subjective standard). Critics might complain that resurrecting a subjective bad faith standard for severe sanctions would leave the courts powerless to control the judicial process. Such an objection reflects the bias inherent in the existing system that only severe punitive measures are adequate to enforce professional behavior. See Johnson et al., supra note 92, at 657. Perhaps more than anything else, this bias has contributed to the escalating abrasive behavior

between opposing attorneys in litigation. See supra text accompanying note 103. Less severe sanctions, like reprimands and nominal fines, are more than adequate to punish attorneys for their innocent mistakes. If the facts reveal that attorneys did not act innocently, then the courts can and will impose more severe sanctions. Cf. David J. Webster, Note, Rule 11: Has the Objective Standard Transgressed the Adversary System?, 38 CASE W.RES.L.REV. 279, 294 (1987) (observing that the reluctance of the federal courts before 1983 to issue sanctions was less attributable to an inability to prove bad faith and more attributable to the lenient spirit of the Federal Rules of Civil Procedure at the time).

If the courts are less crowded with sanctions motions, they presumably would have more time to ensure that the subjects of potential sanctions awards receive adequate due process safeguards. See generally Keeling, supra note 105.

[FN185]. See supra text accompanying note 112. If a hardball litigator filed a motion for severe sanctions without evidence that his opponent acted in bad faith, the motion for sanctions in itself might be some circumstantial evidence that the hardball litigator filed the sanctions motion to harass his opponent.

[FN186]. See Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX.L.REV. 639, 642 (1981) (suggesting that the Model Rules are ineffective because they "are drafted with an amorphousness and ambiguity that render them virtually meaningless"); cf. Wilkins, supra note 104, at 810-11 (stating that when the norms are ambiguous or incomplete, "conferring enforcement authority is tantamount to empowering a particular set of actors to place their own interpretation on these ambiguous professional norms").

[FN187]. The Litigation Section of the American Bar Association has drafted a list of sanctions available under current Rule 11, roughly arranged in order from least severe to most severe:

a. a reprimand of the offender;
b. mandatory continuing legal education;
c. a fine;
d an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;
e. reference of the matter to the appropriate attorney disciplinary or grievance authority;
f. an order precluding the introduction of certain evidence;
g. an order precluding the litigation of certain issues;
h. an order precluding the litigation of certain claims or defenses;
i. dismissal of the action;
j. entry of a default judgment;
k. injunctive relief limiting a party's future access to the courts; and
l. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

ABA Section of Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 124 (1988). As a general rule, all of the sanctions listed above from (d) through (l) should require some form of bad faith as a prerequisite. The sanction listed in (c)--a fine--likewise should require bad faith as a prerequisite if the amount of the sanction is more than nominal. See infra text accompanying note 189.

[FN188]. See TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex.1991).

[FN189]. In addition, a sanctions provision could state that, in most circumstances in which monetary sanctions are permissible, they should be in the form of a fine payable to the court clerk. Such a clause would reduce the incentive to use the sanctions provision as a fee-shifting device "for personal gain." John P. Frank et al., Bench-Bar Proposal to Revise Civil Procedure Rule 11, 61 MISS.L.J. 31, 36 (1991). However,

sanctions provisions should not altogether forbid fee awards. In egregious cases, the victim of sanctionable conduct should be entitled to recover fees and costs incurred as a result. See Johnson et al., supra note 92, at 669.

[FN190]. See supra text accompanying note 111.

[FN191]. Some commentators have suggested that if the existing sanctions structure had been in place in the 1940s, defendants would have enjoyed an even greater advantage against African-Americans who tried to assert their civil rights. See, e.g., Patterson, supra note 170, at 49. Because the law at that time approved "equal but separate" facilities, African-Americans might have been subject to sanctions for pursuing integrated facilities. See, e.g., Patterson, supra note 170, at 49.

[FN192]. See Nelken, supra note 109, at 1340-41. At least in state court, sanctions provisions that chill creative legal arguments are inconsistent with the "open courts" provisions in most state constitutions. See Johnson & Cassady, supra note 79, at 928 (stating that "any attempt to devise a system for responding to spurious actions is, by its very nature, in conflict with the value placed on free access to courts in American society").

[FN193]. One commentator has recommended that the word "frivolous" be defined narrowly to include only those claims or defenses "lacking any basis in fact or law or unsupported by a colorable argument for a change in the law." Gregory Joseph, Redrafting Rule 11, NAT'L L.J., Oct. 1, 1990, at 13, 14. Judge Easterbrook in the Seventh Circuit goes even farther. He has suggested: "[S] omething is frivolous only when (a) we've decided the very point, and recently, against the person reasserting it, or (b) 99 out of 100 practicing lawyers would be 99 percent sure that the position is untenable, and the other 1 percent would be 60 percent sure it's untenable." Ronald Rotunda, The Litigator's Responsibility, TRIAL, Mar. 1989, at 98, 100 (quoting a letter from Judge Easterbrook to Professor Sanford Levinson (Jan. 29, 1986)).

[FN194]. See supra text accompanying notes 116-19.

[FN195]. See supra text accompanying notes 181-83.

[FN196]. See supra text accompanying note 183.

[FN197]. See Holman & Keeling, supra note 116, at 452-56.

[FN198]. See id. at 448 ("Courts should not dispose of litigation because it is the speedy or expedient thing to do; rather, courts should dispose of litigation when it is the just and right thing to do. It is not just and right for a litigant to be penalized by the most severe sanctions and to lose the opportunity of trial on the merits simply because of a technical error or an excusable mistake of her counsel.").

[FN199]. See supra text accompanying note 187.

[FN200]. See Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 841 (1st Cir.1990) (agreeing that often the "biggest sanction" is telling the sanctioned individual from the bench that his conduct was wrong). In some circumstances, a formal reprimand can be a rather strong sanction. See Schwarzer, supra note 106, at 201 ("Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive, can also damage a lawyer's reputation and career."). Therefore, trial judges must fashion their reprimands to ensure that the reprimands are commensurate with the offense. See Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 878 (5th Cir.1988) (en banc).

[FN201]. See Johnson et al., supra note 92, at 657.

[FN202]. Admittedly, removing the bulk of the sanctioning power from the courts to the legal profession gives pro se litigants some greater impunity to confound the courts with "groundless" lawsuits. The fact that courts will no longer be able to punish pro se litigants with severe sanctions absent a finding of bad faith, however, is not a serious concern. First, it is questionable whether the threat of severe sanctions under the existing system has much of a deterrent effect upon pro se litigants anyway. See Jane P. Mallor, Punitive Attorneys' Fees for Abuses of the Judicial System, 61 N.C.L.REV. 613, 642-43 (1983). Second, under the proposal in this article, courts will retain the ability, even absent a finding of bad faith, to craft less severe sanctions against pro se litigants. See supra text accompanying notes 195-96. For example, pro se prison litigants who file repeated groundless complaints against prison officials could be required to receive court approval before filing an action. See Douglas A. Blaze, Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation, 31 WM. & MARY L.REV. 935, 988 (1990).

[FN203]. See Jeffrey M. Duban, The Bar Exam as a Test of Competence: The Idea Whose Time Never Came, N.Y.ST.B.J., July-Aug. 1991, at 34, 35.

[FN204]. See Arrington, supra note 7, at 232. Some commentators argue that the power to punish professional misconduct should not be reserved to the profession itself because its disciplinary agencies are slow and inefficient. See Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 MINN.L.REV. 793, 798 (1991); Deborah L. Rhode, The Rhetoric of Professional Reform, 45 MD.L.REV. 274, 288 (1986). This argument is self-defeating. The principal reason that disciplinary agencies are slow and inefficient is that existing rules of ethics are, for the most part, limited to egregious ethics violations. See Wilkins, supra note 104, at 806 n. 22 ("The traditional goal of professional discipline is to cleanse miscreants from the profession."). Because the punishment for egregious violations tends to be severe--sometimes even banishment from the profession--disciplinary agencies must provide more time consuming due process safeguards than, for example, courts imposing Rule 11 sanctions. See Wilkins, supra note 104, at 806 n. 22 (noting that sanctions for ethics violations are "limited to official reprimands, which could be either public or private, or the restriction of the professional license by means of suspension or disbarment"); cf. Keeling, supra note 105, at 355 (observing that larger sanctions require greater due process safeguards).

[FN205]. See supra text accompanying note 69.

[FN206]. See Weston, supra note 103, at 925. Professor Maute argues that "[i]t is naive and unrealistic to believe that lawyers' ethical standards for litigation conduct could be effectively enforced by the disciplinary authorities of local bar associations." Maute, supra note 92, at 55. Perhaps this is true, but even Professor Maute concedes that the threat of sanctions compels lawyers to retaliate. Maute, supra note 92, at 55. Unless measures are implemented to eliminate sanctions provisions as potential bludgeons against opposing counsel, the judicial system will continue to be awash in sanctions motions and hearings. Naive or not, the legal profession itself must improve its disciplinary agencies to ease the pressure upon the judicial system.

[FN207]. See supra note 176.

[FN208]. Only a smattering of state bar associations have adopted codes of professional conduct: Kentucky, Massachusetts, Mississippi, Montana, Texas, and Virginia. See Arrington, supra note 7, at 234 n. 19. Several local bar associations, like the Dallas Bar Association, have adopted codes of professional conduct, but these local codes often have no enforcement mechanisms. See Arrington, supra note 7, at 234 n. 19.

[FN209]. DALLAS BAR ASS'N GUIDELINES OF PROFESSIONAL COURTESY (1987).

[FN210]. Fines for violations of the codes of conduct would offset part of the administrative costs for these enforcement committees. See infra text accompanying notes 212-13.

[FN211]. Bar associations should not authorize fee awards--or other fines payable to a litigant as opposed to the bar association--as penalties for violations of a code of conduct. Fee awards should be left to the courts as sanctions for bad faith violations of a sanctions provision. See supra text accompanying notes 188-89.

[FN212]. In the Rule 11 context, the federal appellate courts have cautioned the district courts to enforce the "least severe sanction adequate" to deter future misconduct. See, e.g., White v. General Motors Corp., 908 F.2d 675, 685 (10th Cir.1990), cert. denied, 498 U.S. 1069 (1991); Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir.1989); Thomas v. Capital Sec.Serv., Inc., 836 F.2d 866, 878 (5th Cir.1988) (en banc). "Regrettably, the district courts have ignored the 'least severe sanction adequate' requirement." Johnson et al., supra note 92, at 655. The courts have assessed large Rule 11 sanctions awards regardless of whether the awards were appropriate or the least severe under the circumstances. Id. Bar associations should not make the same mistake in assessing an appropriate punishment for unprofessional conduct.

[FN213]. See supra text accompanying notes 67-72.

[FN214]. See supra note 109.

[FN215]. See supra part II.

[FN216]. Interestingly, the Northern District of Texas in Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D.Tex.1988), turned a good idea into a bad idea. See 121 F.R.D. at 287. Observing that the Dallas Bar Association had drafted a workable code of professional conduct, see supra text accompanying note 208, the court in Dondi adopted portions of the Dallas code and concluded that it would enforce those standards against miscreant lawyers in federal district court. 121 F.R.D. at 287-88. Essentially, the Northern District took a code of conduct that was divorced from the litigation process and molded it into a sanctions provision that hardball litigators could abuse just like Rule 11 or any other federal sanctions provision. See supra part II.A.

[FN217]. See supra note 212.

[FN218]. See supra text accompanying notes 36-39.

[FN219]. See supra text accompanying note 17.

[FN220]. See Wolfson, supra note 24, at 45.

[FN221]. See James W. Jones & Dennis J. Block, Law Firm Diversification: Is it the Wave of the Future?, A.B.A.J., Sept. 1989, at 52, 53 ("Abandoning their traditional roles as advisers and becoming businessmen and investors distracts lawyers from the zealous representation of their clients and heightens distrust of the legal profession.").

[FN222]. "Ancillary businesses" include financial management services, public relations services, accounting, and international trade consulting. Adding these services to the traditional legal services available in a large law firm increases the marketability of the firm, but it also increases the potential for unprofessional conduct. See Block, supra note 218, at 53 ("Multidisciplinary law firms ... threaten the ability of attorneys to render disinterested professional judgments."); L. Stanley Chauvin, Jr., A Conscientious

Conclusion: Ancillary Businesses Too Risky for Clients and Lawyers, A.B.A.J., Mar. 1990, at 8, 8 ("These non-law diversifications are a major threat to professionalism. They invite conflicts of interest. They raise serious issues involving ethics in the practice of law.").

[FN223]. See supra text accompanying notes 18-19.

[FN224]. See Joiner, supra note 22, at 19-23; Vickrey, supra note 18, at 826.

[FN225]. California and Virginia have already established "ethics schools." See Arrington, supra note 7, at 234 n. 20. In addition, the Nashville Bar Association has established a "colleagues program" in which seasoned members of the bar meet regularly with younger members of the bar to discuss issues related to professionalism. See Arrington, supra note 7, at 234 n. 20.

[FN226]. See supra text accompanying note 72.