

**THIRTY-SECOND ANNUAL
SOUTHEASTERN BANKRUPTCY
LAW INSTITUTE**

**ATLANTA, GEORGIA
APRIL 6 – 8, 2006**

***LITIGATION: PROFESSIONALISM -
CANDOR, CIVILITY AND LOYALTY***

**The Honorable Thomas F. Waldron
United States Bankruptcy Judge
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Dayton, Ohio 45402**

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I. INTRODUCTION

The assigned topic, which this material addresses, is a consideration of a major, multifaceted component of bankruptcy practice – zealous advocacy, in a manner consistent with professional responsibility involving candor, civility and loyalty.

The preceding sentence evokes a series of familiar tensions:

- When does a lawyer’s zealous advocacy cross a line and become conduct prohibited by the applicable provisions governing professional responsibility, and, which principles aid in resolving the tension between zealous advocacy and professional responsibility?
- How can a lawyer fulfill the requirements of professional responsibility, including candor, civility and loyalty when others violate, seemingly without consequence, the applicable provisions governing professional responsibility, and, what principles aid an attorney in resolving the tension between fulfilling professional responsibility and a world where others fail to fulfill theirs?
- Do the issues of candor, civility and loyalty arise both in the context of ethics – “You got to.” and professionalism – “You ought to.”?

The short answer is that principles providing guidance for resolving these questions are found in the applicable standards governing professional conduct.

There are a number of the provisions of the ABA Model Rules of Professional Responsibility frequently referred to by courts in the context of zealous advocacy and professional responsibility. They will appear throughout the remainder of this material. Despite the necessity for careful consideration of the particular provisions governing professional responsibility in a specific context, to a great extent the Model Rules and sections referenced in this material are applicable in all the areas under consideration. (Although not specifically detailed in this material, there are similar provisions in the ABA Model Code of Professional Responsibility. See Model Code Of Professional Responsibility Canon 5 – A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client, Canon 6 – A Lawyer Should Represent A Client Competently, Canon 7 – A lawyer Should Represent A Client Zealously Within The Bounds Of The Law, Canon 9 – A lawyer Should Avoid Even The Appearance Of Impropriety)

Additionally, it should be recalled that, at a minimum, Bankruptcy Rule 9011 provides an independent basis for a bankruptcy court to examine attorney professionalism and take appropriate action. Further, the potential of problems arising from the application of preclusion principles always require attention.

II. PROFESSIONALISM

It may seem unnecessarily fundamental; however, some attention must be paid to the meaning of the term professionalism, which despite its widespread use, is not easily defined. Although a clear consensus on the meaning of the term professionalism may not be readily apparent, a more textured understanding of the term may emerge from a review of some recent writings:

Although courts and bar associations are increasingly evangelical about helping us cure what ails us, widespread and fundamental uncertainty remains about the meaning of the term "professionalism" itself. In a 1986 report, an American Bar Association commission on professionalism observed that "professionalism is an elastic concept, the meaning and application of which are hard to pin down." One law professor succinctly commented that, "[p]rofessionalism is an elusive notion."

Despite that the term "professionalism" is indeed difficult to define, many have tried. Some have defined professionalism as civility. This definition, which equates professionalism with common courtesy and social etiquette, extolls the virtues of being cordial, pleasant, of promptly returning phone calls, exhibiting kindness at depositions, and the like. Those who champion civility often rail against bellicose "Rambo" litigators who shoot with their mouths and ask questions never.

Others have defined professionalism as charity. For example, the ABA Professionalism Committee's 1996 Report on Teaching and Learning Professionalism defines professionalism as follows: "A professional lawyer is an expert in law pursuing a learned art . . . in the spirit of public service . . . as part of a common calling to promote justice and public good." On this view, "professionalism" is synonymous with a dedication to pro bono service.

Others have defined professionalism using an "I-know-it-when-I-see-it" approach. For example, Westlaw is replete with essays and speeches lauding an honoree-usually a dead law dean, law professor, or judge - with the perfunctory and conclusory observation that his life was "a model of professionalism." On this view, professionalism is like pornography: something that is difficult to articulate, but that is readily apparent to the eye, if only to the eye of the beholder.

Finally, and perhaps most predominantly, professionalism has been defined comparatively by distinguishing what it isn't. On this view, whatever professionalism is, it's not "legal ethics" - at least to the

extent that the term "legal ethics" denotes the professional norms enforced through the lawyer disciplinary process. In contrast to "legal ethics" - which is concerned with what lawyers "shall" and "shall not" do - "professionalism" is concerned with the "shoulds" and the "should nots." For example, in *Evanoff v. Evanoff*, one justice of the Georgia Supreme Court observed that: "[e]thics is that which is required and professionalism is that which is expected." The Louisiana Supreme Court likewise has declared that, "[p]rofessionalism . . . entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency, and pro bono obligations."

Although all of these definitions recur in the professionalism conversation, none, in my view, sufficiently channels the discussion. Consider, first, professionalism-as-civility. Civility is something that everyone agrees is good. However, where civility ends, and where incivility begins is notoriously indeterminate. As a result, to define professionalism as civility is to leave it undefined.

Consider, next, professionalism-as-charity. Charity is also good. However, this view reduces professionalism to a single, politically-biased (and politically-correct) view of helping the poor, forsaking commercialism, and dedicating a meaningful portion of one's practice to providing legal services to those in need.

Consider, finally, the professionalism-as-not-ethics definition. Granted, professionalism norms must never be confused with disciplinary standards. And granted, our profession needs hortatory principles-the "shoulds" and the "should nots" - to supplement its disciplinary standards. Indeed, this is probably more true today than ever before considering that lawyers have increasingly "tended to look at nothing but the rules," and "to ignore exhortations to set their standards at a higher level." However, concluding that professionalism is "something extra" over and above what is mandated by disciplinary rules provides no guidance regarding what this "something extra" is, how we are to deliver that which is more "broadly expected" of us, and who exactly is "expecting" whatever it is he is expecting.

Thus, although everyone agrees that professionalism is good, no one has yet defined it in a way that everyone else can unconditionally accept. As Professor Roger Cramton has opined, "in today's world of moral relativism, deconstruction and denial of foundational truth, it is not enough to be for 'justice' and 'the public good' because they lack agreed-upon content." Given that

everyone is talking about professionalism and lots of people are doing something about it, has the time come to reach a consensus regarding what it is?

Many commentators think so. In an article entitled, Rethinking "Professionalism," Timothy Terrell and James Wildman complain that, "lawyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes." They conclude that, "for law schools or Bar associations or anyone else to acknowledge and preach the values of professionalism, lawyers must first agree on the nature and substance of the sermon." One of our country's foremost thinkers on all things, Yogi Berra, summarized the need for a shared sense of direction best: "If you don't know where you're going, when you get there, you'll be lost." (footnotes omitted)

Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 Loy. L Rev. 229, 232-35 (Summer 2003).

Another legal writer urged a particular understanding of the term professionalism:

In this Article, I wish to defend what I call the interpretive attitude of professionalism. Professionalism is a stance toward the law which accepts that a lawyer is not simply an agent of her client (although the lawyer-client relationship is obviously governed by the law of agency). Rather, in carrying out her client's lawful instructions, a lawyer has an obligation to apply the law to her client's situation with due regard to the meaning of legal norms, not merely their formal expression. A professional lawyer must respect the achievement represented by law: the final settlement of contested issues (both factual and normative) with a view toward enabling coordinated action in our highly complex, pluralistic society. The attitude of professionalism has both negative and positive aspects. In the negative aspect, this obligation of respect means that a lawyer must treat legal norms as precluding the moral and other reasons that would otherwise justify or require a different action in the circumstances. Conversely, the positive aspect is the demand that a lawyer should take a certain attitude toward the law, manifesting her recognition that the law is legitimate--that is, worthy of being taken seriously, interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client's goals.

Law is an achievement, but not one that will persist without custodians and defenders. It is the job of lawyers to maintain the institution in good working order, instead of subverting it. As

Jeremy Waldron puts it, any attempt to circumvent the law should be accompanied by feelings of distaste and dishonor, not pride in defeating something that is regarded as an adversary. In addition, this obligation of custodianship demands that lawyers provide a public, reasoned justification for an interpretation of legal texts -- one which is plausible in light of the interpretive understandings of a professional community.(footnotes omitted)

W. Bradley Wendel, *Professionalism As Interpretation*, 99 Nw. U.L. Rev. 1167, 1168-70 (Spring 2005).

Additional information may be found in: Benjamin H. Barton, *The ABA, The Rules, And Professionalism: The Mechanics Of Self-Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons*, 83 N.C. L. Rev. 411 (January 2005); Orrin K. Ames III, *Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed*, 28 Am. J. Trial Advoc. 531 (Spring 2005); Leslie C. Levin, *The Ethical World of Solo And Small Firm Practitioners*, 41 Hous. L. Rev. 309 (Summer 2004).

Despite the absence of consensus on the meaning of the term professionalism, a more detailed analysis of some related concepts may further understanding of the term.

III. ZEALOUS ADVOCACY

Whatever zealous advocacy may mean, it DOES NOT mean a mouthpiece without a mute control, a hired gun without a restrictive holster, or a Rambo without restraint.

The sad fact is whether we like it or not, “hard-ball” tactics, “scorched earth” strategies, and so-called ‘take no prisoners’ litigation are the trend these days, a means of choice by increasing numbers of litigators. Judges routinely see these tactics in our courtrooms, and we see them even more frequently in depositions, a forum in which there is usually no referee, no umpire, no judge to call a halt to *ad hominem* tactics, harassment and abuse.

The problem is that if incivility as a trend becomes culturally institutionalized and accepted, it threatens the pursuit of justice in very real ways, as well as the credibility of the justice system, judges and the courts, and ultimately the rule of law itself. I believe that leaders of the Bar, as well as judges, have an obligation to step in before it is too late and say how far is too far, how much is too much.

But how did we even reach this point? Unfortunately, what’s happening in the law simply is a reflection of what’s going on in society at large. “Law, like the larger society has been coarsened. Win-at-any-cost is now the norm.” There is less civility in public discourse generally, in politics and government, on television, certainly in the sports world, and, of course, in the tabloid press. Many younger people – including young lawyers – have grown up in this environment, and they will practice what they see around them because that’s how the world they have come to know seems to function.

Unless, that is, the rewards and incentives of the system forbid it. Unless they are told, if not required, by the more experienced among us that such an approach is unacceptable and in the long run counter-productive. Unless they are persuaded, as Justice Sandra Day O’Connor has said, that “[i]t is enough for the ideas and positions of the parties to clash; the lawyers don’t have to.” This will only work, however, if senior lawyers at law firms and government agencies and the leaders of the Bar have not themselves turned their backs on traditional notions of civility and professionalism. And if we judges also accept our responsibility for changing the tone and making sure that we in no way award obnoxious or over-the-top tactics. We cannot allow the increased stake of lawyers, firms and client have in success – and the

prevalent notion that law is more than a business than a profession – to be an excuse for the “hired gun,” “Rambo” mentality that breeds incivility and lack of professionalism.

Judge Paul L. Friedman, *Civility, Judicial Independence and the Role of the Bar in Promoting Both*, 2002 FED. CTS. L. REV. 4 (2002) (footnotes and internal citations omitted).

Model Rule 1.1 – Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Model Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer – . . . [A] lawyer shall abide by a client’s decisions concerning the objectives of representation, and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

Model Rule 1.4 – Communication – (a) A lawyer shall: (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Model Rule 3.1 - Meritorious Claims and Contentions - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

Model Rule 3.4 - Fairness To Opposing Party and Counsel - A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant

Model Rule 4.4 - Respect For the Rights Of Third Persons - (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use

methods of obtaining evidence that violate the legal rights of such a person.

Model Rule 8.5 – Disciplinary Authority: Choice Of Law (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct

[All citations to and quotations from ABA Model Rules are to the 2002 edition.]

The bankruptcy court imposed sanctions totalling \$650.00 against the debtor and \$250.00 against his attorney and noted in discussing mouthpieces and hired guns:

FRCP 11, the Second Circuit has said:

[E]xplicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir.1985).

Sanctions are called for " 'when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is asserted in' a pleading, motion or other paper signed by a party or his counsel." *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1268 (2d Cir.1987) quoting *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986).

An exhaustive consideration of FRCP 11 says respecting it:

Rule 11 gives legal force to the ethical directive that a lawyer's duty to his client cannot be permitted to override his duty to the justice system. Notwithstanding a counsel's duty vigorously to represent his client, his pre- eminent duty is to the fair administration of justice. Rule 11 pronounces that diligence, candor and independent professional judgment, rather than unbridled zeal, are the primary responsibilities of counsel. It rejects the notion that attorneys can ignore conflicts between client's interests and the fair administration of justice; lawyers cannot indiscriminately play the role of mouthpiece or hired gun for their clients, but must dissuade clients

from pursuing specious claims. Ultimately such conduct is in the best interest of each client, as it enables a jury, judiciary, efficiently to resolve cases properly before it. Note: The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility. 61 NYU Law Review 300, at 316-317 (May, 1986)

In re Bono, 70 B.R. 339, 344 (Bankr. E.D.N.Y. 1987).

Courts have clarified that the provisions governing professional responsibility operate whether the issues arise inside or outside a courtroom and that there is no room for Rambo in any circumstance. Abusive or Rambo style tactics often occur in discovery:

Plaintiff's deposition was properly noticed pursuant to Fed.R.Civ.P. 30 and commenced October 28, 1993; it was conducted over the course of six hours from 10:10 a.m. through 5:45 p.m., with recesses for lunch and other breaks. Plaintiff's deposition was not completed when it was adjourned. Plaintiff is a 68-year-old woman with a master's degree who held a position of Assistant to the President of Iowa State University, with a salary of \$60,500 in 1992. See alleges she was wrongfully terminated from this position due to age discrimination. From a review of the transcript of the deposition, it appears she has no difficulties understanding or communicating in the English language. However, her counsel, Mr. Barrett repeatedly took it upon himself to restate Defendants' counsel's questions in order to "clarify" them for the Plaintiff. Mr. Barrett consistently interrupted Mr. Young and the witness, interposing "objections" which were thinly veiled instructions to the witness, who would then incorporate Mr. Barrett's language into her answer. "The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mode a legally convenient record. It is the witness- not the lawyer- who is the witness." *Hall v. Clifton Precision*, 150 F.R.D. 525, 527 (E.D. Pa. 1993)

Counsel for both parties engaged in extensive colloquy which interrupted the flow of the deposition, and made for inefficient use of everyone's time. Mr. Barrett repeatedly objected to the form of Mr. Young's questions. He also engaged in *ad hominem* attacks on Mr. Young's ethics, litigation experience, and honesty. * * * * *

The style adopted by Mr. Barrett, and responded to in kind by Mr. Young, has become known as "Rambo Litigation." [FN2] It does not promote the "just, speedy and inexpensive determination of every action," as is required by Fed.R.Civ.P. 1. This style, which may prove effective out of the presence of the court, and may be

impressive to clients as well as ego- gratifying to those who practice it, will not be tolerated by this court. Merely because depositions do not take place in the presence of a judge does not mean lawyers can forget their responsibilities as officers of the court. They should conduct themselves accordingly.

FN2. See *Judicial Conference, Federal Circuit*, 146 F.R.D. 205, 216-232 (1992), for a discussion of the causes and solutions to this syndrome. See also *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371 (1991); *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441 (1992).

Pilsum v. Iowa State Univ. of Sci. and Tech., 152 F.R.D. 179, 180-81 (S.D. Iowa 1993) (footnote omitted). Bankruptcy litigation is not immune to this type of Rambo litigation:

Counsel for the deponent has a very limited role during the taking of a deposition and conversing with the witness is limited to discussions about whether the objection of privilege should be asserted. *Hall*, 150 F.R.D. at 529. He is prohibited from acting as a intermediary, interpreting questions, assisting deponent with formulation of the answers or deciding which questions should be answered. *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 59 (E.D.Pa.1993). Counsel's understanding or interpretations of questions asked are irrelevant and should not be at issue at a deposition.

The record supports that Mr. Vazquez engaged in extensive and unnecessary colloquy, asserted groundless objections, improperly objected and took every opportunity to interrupt and argue with opposing counsel. While this style may project zealotry, " 'Rambo Litigation' ... does not promote the 'just, speedy and inexpensive determination of every action,' as is required by Fed.R.Civ.P. 1" and is not tolerated by this court.

In re Amezaga, 195 B.R. 221, 228 (Bankr. D.P.R. 1996).

An attorney, who represented Plaintiffs in a class action lawsuit, settled claims in the bankruptcy proceeding. During the bankruptcy proceeding, Plaintiffs' counsel's actions "allegedly made several abusive and threatening remarks directed to the [deponent] and his attorney." As the court noted, the complaints about Plaintiffs' attorney were much broader:

Greenfield's obnoxious behavior, however, was not limited to Abboud's deposition. Some of the other statements made by Greenfield during the bankruptcy proceeding--noted by both the district court and the bankruptcy court--are the following:

- He characterized other attorneys, including an Assistant United States Attorney, as (1) a "stooge"; (2) a "puppet"; (3) a "weak pussyfooting 'deadhead' " who "had been 'dead' mentally for ten years"; (4) "various incompetents"; (5) "inept"; (6) "clunks"; (7) "falling all over themselves, and wasting endless hours"; (8) "a bunch of starving slob"; and (6) an "underling who graduated from a 29th-tier law school."
- He called the chairman of First City a "hayseed" and a "washed-up has been," and he also called other First City directors "scoundrels."
- He referred to one law firm, Carrington, Coleman, Sloman & Blumenthal, L.L.P. as "stooges" of another law firm, Vinson & Elkins, L.L.P.
- He referred to the work of other attorneys as "garbage" that demonstrated "legal incompetence" while involving "ludicrous additional time and expense."
- He asserted that Vinson & Elkins was using First City as a "private piggybank."
- He described an executive compensation plan approved by the bankruptcy court as a "bribe."

Greenfield v. First City Bancorporation of Texas, Inc. (In re First City Bancorporation of Texas, Inc.), 282 F.3d 864, 866 (5th Cir. 2002), *aff'g*, 270 B.R. 807 (N.D. Tex. 2001).

The bankruptcy court imposed a sanction of \$22,500 and barred the attorney from practicing in the Bankruptcy Court for the Northern District of Texas. That decision was remanded and, upon remand, the sanction barring the attorney from practice was removed, but the monetary sanction was raised to \$25,000 to cover the costs of other parties responding to a motion to remove all sanctions. The District Court affirmed and the 5th Circuit subsequently affirmed. The 5th Circuit particularly noted the attorney's remarkable position at oral argument:

After listening to the oral arguments of the parties and closely examining the record, we conclude that the sanctioned lawyer in this case, Harvey Greenfield, was appropriately sanctioned by the bankruptcy court. His attitude and remarks toward opposing attorneys, opposing parties, and the bankruptcy court were--to understate his conduct--obnoxious. Although incivility in and of itself

is call for concern, what is most disconcerting here is the rationale Greenfield gives for his behavior. Greenfield asserts that his deplorable and wholly unprofessional conduct helps him recover more money for his clients. Unremorsefully and brazenly, Greenfield contends that his egregious behavior serves him well in settlement negotiations and is therefore appropriate. Because we find that the bankruptcy court did not abuse its discretion when it issued sanctions in this case, we affirm the district court's judgment affirming the bankruptcy court's sanction order.

Id. at 865. The court rejected the attorney's arguments:

Greenfield does not dispute the factual basis of the bankruptcy court's sanction order. He thus concedes that he made the myriad rude and insulting comments outlined above. Greenfield defends his comments in two ways. First, he argues that the statements he made were, for the most part, correct. We find this argument utterly meritless. Greenfield was never engaged in stating plain facts--he was engaged in hurling gratuitous and hyperbolic insults. Second, Greenfield argues that the actions of both the court and the opposing attorneys caused his abusive conduct. Obviously, any error on the part of the court or motive on the part of opposing attorneys in filing the sanction motion did not give Greenfield carte blanche to launch personal attacks and to defy the court's directive to cease his wholly unprofessional conduct.

Id. at 867.

For more extensive citations and commentary on methods and consequences of improper behavior in depositions, See Janeen Kerper and Gary L. Stuart, *Rambo Bites The Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103 (Spring 1998) and Jean M. Cary, *Rambo Depositions: Controlling An Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (Winter 1996).

It should also be noted that courts have their own role to play in recognizing and fostering civility in the profession and a kind word to counsel is, at times, appropriate.

In an involuntary case, dismissed for lack of sufficient creditors (§ 303), the court noted:

The Court commends counsel for the petitioning creditors, John Genovese and David Cimo and counsel for the alleged debtor, Herbert E. Stettin for their highly professional preparation and presentation of their respective client's cases. The Court also notes that counsel demonstrated civility to each other and opposing litigants during this lengthy conflict in the finest tradition of the legal profession. It is unfortunate that such civility is absent from many of today's contested proceedings. Counsel on both sides in this case demonstrated that a client may have zealous representation without the abandonment of civility and professionalism.

In re Apache Trading Group, Inc., 210 B.R. 869, 871-72 (Bankr. S.D. Fla. 1997).

In a non-bankruptcy appeal, the Eighth Circuit noted:

Civil law is not always practiced in a civil manner. We commend both attorneys in this difficult case for their professionalism. They skillfully litigated the contentious issues and zealously represented their clients without sacrificing civility, a linchpin of our legal system. At oral argument, we learned the attorneys (one from Georgia, the other from Iowa) not only treated each other with the proper respect, but became friends. We applaud their devotion to the highest standards of the law.

Cisar v Home Depot U.S.A., Inc., 351 F.3d 800, 804, fn. 5 (8th Cir. 2003).

In an appeal to the Eleventh Circuit of the highly charged Terri Schiavo case, the court noted:

Finally, the court would be remiss if it did not once again convey its appreciation for the difficulties and heartbreak the parties have endured throughout this lengthy process. The civility with which this delicate matter has been presented by counsel is a credit to their professionalism and dedication to their respective clients, and Terri.

Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289, 1303 (11th Cir. 2005).

IV. PROFESSIONAL BEHAVIOR

A recent decision from the Florida Supreme Court attempts to clarify the elusive concept of professionalism.

In this case we impose discipline on two attorneys for their use of television advertising devices that violate the Rules of Professional Conduct. These devices, which invoke the breed of dog known as the pit bull, demean all lawyers and thereby harm both the legal profession and the public's trust and confidence in our system of justice.

We conclude that attorneys Pape and Chandler (“the attorneys”) violated Rules Regulating the Florida Bar 4-7.2(b)(3) and 4-7.2(b)(4) by using the image of a pit bull and displaying the term “pit bull” as part of their firm's phone number in their commercial. Further, because the use of an image of a pit bull and the phrase “pit bull” in the firm's advertisement and logo does not assist the public in ensuring that an informed decision is made prior to the selection of the attorney, we conclude that the First Amendment does not prevent this Court from sanctioning the attorneys based on the rule violations. We determine that the appropriate sanctions for the attorneys' misconduct are public reprimands and required attendance at the Florida Bar Advertising Workshop.

The Florida Bar v. Pape, __ So.2d __, 2005 WL 3072013, *1 (Fla. Nov. 17, 2005)

(footnote omitted).

In announcing this decision, the Florida Supreme Court was required to reject the referee's findings that the lawyers' logo and advertising were permissible. The

Court noted:

Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system. Were we to approve the referee's finding, images of sharks, wolves, crocodiles, and piranhas could follow. For the good of the legal profession and the justice system, and consistent with our Rules of Professional Conduct, this type of non-factual advertising cannot be permitted.

Id. at *5 (footnote omitted).

Again, applicable principles reflected in the Model Rules of Professional Conduct provide guidance in this area:

Model Rule 1.16 – Declining Or Terminating Representation – (a)
Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law

Model Rule 5.1 – Responsibilities Of Partners, Managers, and Supervisory Lawyers –

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in a law firm in which the other law firm practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 5.2 – Responsibilities Of A Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Model Rule 5.3 – Responsibilities Regarding NonLawyer Assistants
With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 8.3 - Reporting Professional Misconduct – (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . .

Model Rule 8.4 – Misconduct - It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

A selected review of existing case law demonstrates that this guidance has not always been observed by counsel.

The United States Trustee (UST) sent a letter to debtor counsel regarding deficiencies in his client's case and the possibility that a motion to dismiss or convert might follow. Such letters are routinely sent. The Debtor called the UST and informed them that he was seeking new counsel. The UST agreed to delay the motion. The new debtor counsel spoke with the UST and stated he would review the file and follow up with a phone call. Counsel did not follow up and the UST filed a motion to dismiss or convert. Subsequently, the new counsel called the UST and threatened to file a Bankruptcy Rule 9011 sanction motion if the UST motion was not withdrawn. The UST sent a letter stating the matter could be resolved by a consent order with a date for filing a disclosure statement and plan. Instead, the debtor litigated the UST motion, which led it to it being denied on the condition of a filing a disclosure statement and plan. (This was, in essence, the same result the UST wanted in the consent order.) The Debtor filed a motion to amend or alter the judgment. That motion was denied. The

Debtor moved for sanctions, which was denied. The Debtor then appealed the denial of the sanctions motion. The District Court found the appeal frivolous and noted it would have entertained a sanctions motion from the UST.

Meanwhile, before the original sanctions motion, another motion was filed captioned “Motion Against U.S. Trustee Regarding Accusations on Possible Conflicts of Interests.” This motion was based on a phone call in which the UST indicated, based on filings by Debtor’s counsel in another case, a possible conflict of interest might exist. That motion was also denied.

The appeal before the D.C. District Court stemmed from an objection to the debtor’s fee application. The response to the motion accused the UST’s attorney of “blatantly discriminat[ing]” against the debtor and lying to Debtor’s counsel. He also indicated the response was a “soapbox” to defend himself against “miscreants” at the Department of Justice. The UST moved to strike the response. The court ruled fully in favor of the UST on the objection to the fee application. Debtor’s counsel moved for 9011 sanctions again. The court denied this motion and ruled the motion to strike was moot. The decision noted the UST was “fully justified” in moving to strike “ad hominem attacks” against the UST’s counsel. The debtor filed another motion to alter the judgment, which was denied, and subsequently appealed again.

The District Court affirmed. It found the factual basis for the motion to strike was clear, the motion to strike was proper (under the bankruptcy court’s inherent power and § 105) and the Debtor’s First Amendment rights were not violated. The court generally found an abuse of the judicial process. The district

court concluded that it would entertain a motion of the UST for sanctions, under 28 U.S.C. § 1927, for defending a frivolous appeal.

In re Johnson, 236 B.R. 510 (D.D.C. 1999).

In an involuntary chapter 7, the court approved the Trustee's settlement motion, despite its opposition by the creditor who held the overwhelming bulk of the claims in the case. The court noted the Trustee is not a "hired gun":

The invocation of this Court's jurisdiction comes at a cost. While the trustee's obligation is to marshal assets for the benefits of creditors, that task is assumed as a fiduciary relationship to the estate itself and not as some sort of "hired gun." The trustee is not the employee or agent of the creditors; they do not have the right to direct how the trustee chooses to perform the statutory duties of the position. The trustee is in essence an independent third party charged with the responsibility of maximizing assets for the estate. A bankruptcy trustee is an officer of the court that appoints him or her. *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir.1996); *In re Vebeliunas*, 231 B.R. 181 (Bankr.S.D.N.Y.1999). When persons perform duties in the administration of the bankruptcy estate, they act as "officers of the court" and not private persons. *In re Evangeline Refining Co.*, 890 F.2d 1312, 1323 (5th Cir.1989). They are held to high fiduciary standards of conduct, and these duties are owed not only to the entire creditor body but to the debtor as well.

In re Vasquez, 325 B.R. 30, 37-38 (Bankr. S.D. Fla. 2005).

Counsel for the Plaintiffs moved to compel discovery, which had not been provided by the date defendant's counsel promised. The Defendant's response contained all the promised discovery. The Defendants asserted they would have responded if counsel for the Plaintiff had stated he would file a motion to compel. The court found the standards of professionalism would support such an obligation on plaintiff's counsel, but it did not change the legal obligations of the Defendants to provide the promised discovery. As stated by the court: "Neither the Bankruptcy Rules nor the local rules impose such a duty, however.

Therefore, Plaintiff's attorney's failure to extend the degree of courtesy directed by the tenets of professionalism does not relieve Defendants' attorney of the more serious breach of both the tenets of professionalism and the procedural rules which establish the duty to timely respond to discovery requests. Plaintiff's attorney's conduct is, however, relevant to an assessment of sanctions for the failure to timely respond to discovery requests.” Noting a phone call by Plaintiff's counsel to Defendant's counsel concerning the promised discovery might have resolved the need to file the motion, the court awarded sanctions against the Defendants' attorney (not the Defendants) in the amount of \$200.

Lithonia Chiropractic Clinic v. Peters, 154 B.R. 610 (Bankr. N.D. Ga. 1993).

Corporate Debtor filed adversary alleging creditor's malicious prosecution action violated the automatic stay. The court dismissed the adversary and sanctioned Debtor's counsel. The trial court found a technical stay violation, but noted stay relief to pursue the action was granted shortly after the suit was filed. The court also held, as a corporation, § 362(h) damages were not available. In addition, there was no prejudice, because the Debtor was not even served with the complaint until after receiving stay relief. On appeal, the district court affirmed and separately sanctioned Debtor's counsel for “unsupported inflammatory allegations” against the creditor. The 9th Circuit affirmed the bankruptcy court's decision and the district court's sanctions. The court found the appeals frivolous. The court noted “Chen's failure to abide by or even recognize his duty to include only true factual representations in his briefs to the district court justify the award of sanctions there.” Additionally, the court noted it

should have been clear his appeal lacked any chance of success. The court declined to further sanction debtor's counsel due to a further use of judicial and legal resources, but noted that debtor's counsel showed a "regrettable lack of professionalism."

Cable and Accessories, Inc. v. Brewer (In re Cable and Accessories, Inc.), 92 Fed Appx. 435 (9th Cir. 2004).

Attorney knowingly misrepresented that his client had filed for bankruptcy to delay a creditor's collection efforts. The court found this material false statement violated the Alabama Rules of Professional Conduct and justified a fine of \$1,500. In regard to the appropriate amount of sanctions, the court noted:

The imposition of sanctions should accomplish several ends. First, it should be designed to punish the individual who has committed the violation. Lee has been practicing law for 18 years and appears to be an experienced litigator. His aggressive, scorched-earth approach to litigation is calculated and intentional. He has not been candid with this Court in the past.^{FN5} Lee has been hostile and antagonistic with opposing counsel and has been disparaging of the Plaintiff. The misrepresentation for which Lee is to be sanctioned is not an isolated instance, but rather the culmination of a pattern of uncollegial, rude and now unethical conduct.

FN5. *Smith v. Homes Today*, 296 B.R. 46, 59-63 (Lee repeatedly flouted orders of the Court and made misrepresentations to the Court concerning his absence at a scheduled pretrial conference).

In re Smith, 306 B.R. 5, 10 (Bankr. M.D. Ala. 2004).

In reviewing an appeal considering chapter 11 fees, the court noted and commented on an argument of the Committee:

Next, the Committee challenges Needler's \$175.00 hourly rate charged. The Committee maintains that the quality of the work

produced by Needler does not justify the hourly rate charged. The Committee directs the Court's attention to what it characterizes as one "example of substandard legal services-the Debtor's plan and disclosure statement." ^{FN13} Needler argues that he agreed to charge less than his normal billing rate.

FN13. Unfortunately, it is exactly this type of ad hominem attacks and other vitriolic exchanges between counsel for the Debtors and counsel for the Committee that has resulted in a detriment to the estates-increased legal fees exacerbated by sometimes blatant lack of civility. The Court, once again, reminds all attorneys that they are bound by the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, adopted on December 14, 1992

In re Spanjer Brothers, Inc., 191 B.R. 738, 755 (Bankr. N.D. Ill. 1996).

After denying a motion to strike a motion for summary judgment, the court felt compelled to address some of the allegations in the motion regarding the interaction of counsel:

Unfortunately, the Court must address some of the allegations in Merce's motion to strike. According to counsel for Merce, he and counsel for the Debtor are "unable to cooperate" and all telephone conversations have "quickly degenerate[d] into childish behavior." Further, counsel for Merce alleges that counsel for the Debtor telephoned his office between twenty and thirty times in one day in an effort to harass counsel for Merce. Additionally, and most troubling, counsel for Merce contends that on at least two occasions, counsel for the Debtor threatened physical violence against him by stating he would "come over there and beat the crap out of [counsel for Merce]" and would "come over and see [counsel for Merce]." In his reply to the motion for summary judgment, counsel for the Debtor contends that these statements are "outrageous, untrue and potentially defamatory."

The pending motions are not the appropriate procedural mechanism to decide the truth or falsity of such allegations. The Court is both disheartened by and disgusted with the level to which the professional relationship between opposing counsel has degenerated. While the Court makes no findings at this time regarding the truth or falsity of such allegations in the motion to strike, the mere fact that these allegations were even made demonstrates the lack of civility that has too often permeated the

legal profession over the years, and in particular, that has infected this adversary proceeding. The Court reminds both attorneys that the Standards for Professional Conduct within the Seventh Federal Judicial Circuit, adopted on December 14, 1992, are applied in this Court. The Court advises that both attorneys carefully read and follow same. This Court will not tolerate members of the bar threatening physical violence against one another, nor any further uncivil behavior either before the Court or in papers filed in this matter. Both parties' attorneys are expressly required by the Standards for Professional Conduct to act in a professional and civil manner when dealing with one another. Enough said on this point.

In re Silverman, 1999 WL 326328, *6 (Bankr. N.D. Ill. May 18, 1999).

Chapter 13 Debtor counsel sanctioned \$5,512.50 for failure, in bad faith, to serve, secured Creditor attorney with a copy of a motion to approve a chapter 13 plan. Despite being in negotiations with Creditor counsel and that counsel having filed a relief from stay, the Debtor counsel served the motion on a different counsel for the same creditor who had entered a notice of appearance. Despite that counsel requesting a copy of the motion several times, Debtor counsel instead filed a certificate of no response. The court found this objectively unreasonable. The Third Circuit affirmed the decision. It is worth noting a disingenuous argument noted by the appellate court, as exemplary of the problem:

Leinbach's counsel argues in part that the only evidence in the record regarding Fein's motion for sanctions came from the brief testimony that Leinbach gave at the hearing on Fein's motion, and that the courts erred when they relied on other evidence. That argument is frivolous. The hearing on the motion for sanctions was preceded by a hearing on the motion to vacate the court's order approving the amended plan. During the earlier hearing, Leinbach testified at length regarding his reasons for not serving Fein with a copy of the motion to approve the amended plan. Fein also offered various faxes and other communications between her and Leinbach to show that Leinbach knew that Fein wanted a copy of the motion and planned to oppose it. See June 15, 2000 Tr. at 47-49, 52-56,

84-86. At the later hearing on the motion for sanctions, Leinbach's attorney protested against him needlessly testifying against. Leinbach's counsel requested an offer of proof regarding Fein's reasons for calling Leinbach to the stand again because "[w]e sat here four hours last time and had him testify to everything that appears to be discussed in the motion." January, 18, 2001 Tr. at 4.

Leinbach now attempts to use the absence of his testimony at the second hearing as grounds for reversing the sanctions order. That argument appears to be yet another manifestation of what might best be described as Leinbach's proclivity for avoiding candor with the court.

Leinbach v. Fein (In re Amoroso), 123 Fed. Appx. 43, 2004 WL 2429624, at * 46, fn. 6 (3rd Cir. 2004).

In *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306 (11th Cir. 2002), the Eleventh Circuit reminded attorneys that they are never mere conduits for a client's concerns, but, at all times, remain officers of the Court subject to professional standards. In a race discrimination lawsuit, counsel for two parties had "several bitter disputes" concerning discovery. *Id.* at 1308. The district court resolved these issues with a protective order concerning certain personnel records of defendant and a discovery schedule. *Id.* at 1309. Apparently unsatisfied with the resolution, Plaintiff counsel (Munson) took further legal action:

Munson challenged the district court order by filing a writ of mandamus with our court. In the petition, Munson referred to opposing counsel's law firm as "[t]he white [] law firm," . . . and she described the entire discovery dispute over the production of documents and scheduling of witnesses in racial terms. Concerning the deposition schedule instituted by the district court, Munson alleged that "[t]he white law [] firm representing the defendant-employer . . . was permitted to set defendant's deposition schedule without any interference from the court or plaintiff's African-American counsel (a civil rights attorney)." That is, Munson maintained that "unusual deposition schedules [were] forced upon the African-American plaintiff while the white law firm set its own schedule and proceeded at its own pace."

Id. (internal citations omitted). Munson also had pointed remarks about the Court and Judge presiding over the litigation:

Munson inserted into the mandamus petition derogatory remarks about the Middle District Court of Georgia, and about the district judge hearing the case in particular, in order to suggest that racial bias permeated the discovery order. For example, in one footnote, Munson stated that “civil rights attorneys outside of this jurisdiction have knowledge of the reputation of the Middle District and are not desirous of appearing in that forum.” Later she remarked: “Although a motion for recusal was considered, such did not appear to be a viable alternative given plaintiff’s counsel’s prior experience in the Middle District of Georgia.” Munson further contended in the petition that the tone of the district court judge towards her was “extremely and unusually hostile” and “combative” during one telephone conference. She speculated that “[s]uch seeming[] resentment could be the result of the court having to rule for the plaintiff [on a separate issue] when it did not want to do so,” again insinuating that the district court judge was biased against her and her client. Concluding that all of these allegations were without merit, we denied the petition for writ of mandamus.

Id. at 1309-10 (internal citations omitted).

Counsel, in response to summary judgment motion of Defendant, again raised similar issues unrelated to the merits of the case, including the following:

As exhibits, Munson submitted several affidavits, including the affidavits of [the Plaintiff] and of Helen Blair. Both of the affidavits contained *ad hominem* attacks directed at opposing counsel. With respect to the Thomas affidavit filed by Munson, paragraph 12 failed to discuss the underlying promotions claims at issue in the case. The paragraph instead contained Thomas’s demeaning description of opposing counsel during the two times that he deposed Thomas. For instance, in reference to opposing counsel, Thomas stated that he “was uncomfortable being around that type of a white person” during his deposition. Thomas also remarked therein that opposing counsel “spit out” and “snarled” his words at the deposition, and that opposing counsel was “a little man sp [] ewing venom.” Furthermore, Thomas alleged that persons conducting the deposition were laughing at opposing counsel, give that “his hair was standing up on his head, he was biting on a pencil and he was turning red.”

When Defendant counsel denied these allegations, Munson responded, in part, as follows:

[Opposing] counsel’s bald denial even if genuine does not mean that his conduct was not racially offensive. Plaintiff believes the same of [the] Sixth Circuit’s most learned jurist[s] . . . who declared in an interview “A lot of white people don’t understand that what they are doing is racist.” Who is plaintiff to believe on the issue of racism, a learned, Sixth Circuit, African-American appellate jurist or a white defense counsel trying to win a case? Plaintiff’s counsel certainly would try to make her copy of the

foregoing available to [opposing] counsel. It appears as if he is uninformed as to pervasiveness of the race problem not only in the judicial system but also in America.

Id. at 1315.

The district court ruled in favor of defendant on the merits and on appeal, the decision was affirmed. *Id.* at 1315-16. The district court issued a show cause order on why plaintiff's counsel's actions should not result in sanctions against her. *Id.* at 1316. The district court "formally rebuked and censured Munson for her conduct" to opposing counsel. The court found the racism charges unfounded and intolerable. *Id.* at 1317-18. The court decided not to address comments toward court. *Id.* at 1318. On appeal, the 11th Circuit affirmed, noting the following:

Case law is replete with instances where an attorney has been sanctioned for his or her own unsubstantiated accusations and demeaning, condescending, and harassing comments directed at opposing counsel, [FN29] and such accusations and comments are present in these two documents written and filed by Munson. Thus, irrespective of whether Munson can be held responsible for the offensive remarks contained in the affidavits and declaration, the sanctions imposed still were appropriate based on her own written remarks contained in the Plaintiff's Amended Supplement and in footnote 2 of the Plaintiff's Response to Defendant's Motion to Exclude.

FN29. See, e.g., *In re First City Bancorporation of Texas, Inc.*, 282 F.3d 864, 866 (5th Cir.2002) (per curiam) (upholding imposition of fine upon attorney who, among other things, characterized other attorneys as "various incompetents" and as "stooges") (internal quotations omitted); *In re Cordova-Gonzalez*, 996 F.2d 1334, 1336 (1st Cir.1993) (per curiam) (upholding disbarment of attorney from practicing before district court, as well as disbarring attorney from practicing before the court of appeals, in part because attorney made "vitriolic and, as far as the record shows, unfounded personal assaults" upon the judge and opposing counsel in the pleadings); *Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322, 1325 (S.D.Fla.2000) (reducing attorney's fees award to two plaintiff's attorneys in part because of belligerent comments directed at opposing counsel, such as by calling the counsel a "Second Rate Loser") (internal quotations omitted); *United States v. Kouri-Perez*, 8 F.Supp.2d 133 (D.P.R.1998) (reprimanding and fining defense attorney who, among other things, filed

motion papers containing accusations that the Assistant United States Attorney was the granddaughter of a former Dominican Republic dictator); *In re Plaza Hotel Corp.*, 111 B.R. 882 (Bankr.E.D.Cal.1990) (disqualifying attorney from representing debtor in part because attorney made sexist comments to attorney representing the United States trustee); *Attorney Grievance Comm'n v. Alison*, 317 Md. 523, 565 A.2d 660, 664 (Md.1989) (suspending attorney whose misconduct included referring to opposing counsel's argument as "particularly absurd" and who referred to the attorney as a "son of a bitch") (internal quotations omitted); *Mullaney v. Aude*, 126 Md.App. 639, 730 A.2d 759 (Md.Ct.Spec.App.1999) (holding that protective order could be issued and attorney's fees awarded based on sexist comments made by one attorney to another during deposition); *In re Williams*, 414 N.W.2d 394 (Minn.1987) (per curiam) (upholding public reprimand of attorney who, among other things, made an anti-semitic comment to opposing counsel during a pretrial deposition); *In re Vincenti*, 114 N.J. 275, 554 A.2d 470 (N.J.1989) (per curiam) (suspending attorney whose misconduct included challenging opposing counsel to a fight and who made profane and racist remarks about opposing counsel); *In re Eisenberg*, 144 Wis.2d 284, 423 N.W.2d 867, 870 (Wis.1988) (per curiam) (suspending attorney from practice in part for calling prosecutor, among other things, a "dummy" and stating to the prosecutor, "[Y]ou don't even know what you are talking about or what you are doing in this courtroom").

In addition, we reject Munson's assertion that, because she only filed the documents with the district court, she cannot be held responsible for the offensive remarks contained in the Thomas and Blair affidavits and the Mercer declaration. Accordingly, we also reject her assertion that the district court, before holding her responsible for the affidavits and the declaration, had to hold an evidentiary hearing and had to make a specific factual finding either that she drafted the offensive remarks, or that she counseled the affiants and the declarant to insert the remarks into the submitted documents. DR 7-102(A)(1) of the Georgia Code makes clear that an attorney cannot "assert a position ... or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Georgia Code DR 7-102(A)(1) (emphasis added); cf. Georgia Rule 3.1(a) (substantively identical to DR 7-102(A)(1) but made gender neutral). "Other action on behalf of his client" is a broad, catch-all phrase, and it surely includes within its ambit the filing of affidavits or declarations. It follows, then, that DR 7-102(A)(1) prohibits an attorney from submitting to the court affidavits or declarations when it is obvious that the documents contain remarks that serve merely to harass another, as was the case with the Thomas and Blair affidavits and the Mercer declaration. Munson's position, therefore, is contradicted by DR 7-102(A)(1) of the Georgia Code. [FN30]

FN30. Although the district court did not rely on Federal Rule of Civil Procedure 11 to impose sanctions upon Munson, we note that Munson's position concerning the filing of affidavits and declarations is inconsistent with that rule, which states in part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
Fed.R.Civ.P. 11(b)(1).

Moreover, we reject Munson's position because, if we were to accept her reasoning, we would be endorsing a passive role for attorneys with respect to filings made with a court. An attorney should not be an unreflecting conduit through which the opinions or desires of a client or witness are permitted to flow unchecked. As the Georgia ethics rules indicate, an attorney has a duty to "exercise independent professional judgment." Georgia Code Canon 5 (capitalization and italics omitted); *cf.* Georgia Rule 2.1 (same). Independent judgment is an essential ingredient of good lawyering, since attorneys have duties not only to their clients, but also, as officers of the court, to the "system of justice" as a whole. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir.1993) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly."). Given this duty, it follows that an attorney cannot "file first and think later," *In re TCI Ltd.*, 769 F.2d 441, 442 (7th Cir.1985), thereby neglecting to employ his or her independent professional judgment to consider the plausibility and the appropriateness of what is asserted in the filed document.

Furthermore, with respect to an attorney's relationship with his or her client, "[i]t has been noted that an attorney is not merely the client's alter ego functioning only as the client's mouthpiece." *Morrison v. State*, 258 Ga. 683, 373 S.E.2d 506, 509 (Ga.1988) (internal quotations omitted). Even though the client has decision making authority regarding the objectives of the representation, the client's attorney can pursue those objectives only through lawful and ethical means. See Georgia Code DR 7-101(A)(1) (stating that an attorney can pursue "the lawful objectives of his client through reasonably available means permitted by law and the [ethics] [r]ules"); *cf.* Georgia Rule 1.3 cmt. 1 (providing that "[a] lawyer ... may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor"). Consequently, an attorney cannot silently acquiesce to a client who demands that the attorney pursue measures in the litigation that conflict with applicable ethics provisions. [FN31] Rather, the attorney must stand his or her ground and refuse to act in a manner that flies in the face of the relevant ethics rules. And, if the foregoing is true with respect to a client, it is even more true with respect to a witness, to whom the attorney does not owe a duty of loyalty. Thus, in the present case, Munson cannot shield herself from sanctions by asserting that her role was merely the passive one of filing the affidavits and the declaration with the district court. By filing the documents containing remarks that served no purpose other than to harass and intimidate opposing counsel, Munson at best silently acquiesced to litigation tactics that flew in the face of baseline professional norms.

FN31. Several other Georgia Code provisions indicate that an attorney cannot escape sanction by claiming that he or she was just following the orders of the client. See, e.g., Georgia Code DR 1-102(A)(1) & (2) (stating that an attorney shall not "violate a Disciplinary Rule" or "circumvent a Disciplinary Rule through actions of another"); DR 2-110(B)(1) & (2) (stating that a lawyer "shall withdraw from employment, if ... he knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person [or if] he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule"); DR 7-102(A)(3)-(5) (providing that an attorney cannot "conceal or knowingly fail to disclose that which he is required by law to reveal," "knowingly use perjured testimony or false evidence," or "knowingly make a false statement of law or fact").

The same is true with respect to the Georgia Rules. See, e.g., Georgia Rule 1.2(e) ("When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."); R. 1.16(a)(1) (stating that "a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if ... the representation will result in violation of the Georgia Rules of Professional Conduct or other law"); R.3.3(a)(2) ("A lawyer shall not knowingly ... fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client"); R. 4.1(b) ("In the course of representing a client a lawyer shall not knowingly ... fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by" the attorney-client confidentiality rule); R. 8.4(a)(1) (noting that it is a violation of the ethics rules "for a lawyer to ... violate or attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

Based on these considerations, we decide that Munson could be sanctioned under the district court's inherent power [FN32] not only for the Plaintiff's Amended Supplement and footnote 2 of the Plaintiff's Response to Defendant's Motion to Exclude, but also for paragraph 12 of the Thomas affidavit, paragraph 5 of the Blair affidavit, and the Mercer declaration. Under the circumstances here, Munson's conduct "cross[ed] the line from passionate advocacy ... into sanctionable conduct evincing bad faith." *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 117 (2d Cir.2000). The district court acted well within its discretion in formally censuring and reprimanding Munson. The court also acted properly in stating that any future documents filed by Munson that were found, after notice and an

opportunity to be heard, to contain such remarks would be stricken without an opportunity to amend or withdraw. [FN33]

FN32. We also note that, as an alternative to a district court's inherent power, several federal provisions provide possible avenues for imposing 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."); Fed.R.Civ.P. 11(b)(1) ("By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."); Fed.R.Civ.P. 56(g) (providing that "[s]hould it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this [summary judgment] rule are presented in bad faith[,] ... any offending party or attorney may be adjudged guilty of contempt."). That sanctions may have been possible under these provisions, however, did not negate the district court's inherent power to levy sanctions against Munson for her misconduct. The "inherent power [to sanction errant lawyers] can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49, 111 S.Ct. at 2135; see also *In re Mroz*, 65 F.3d at 1575 ("The fact that rules such as Rule 11 and Bankruptcy Rule 9011 have been promulgated by Congress does not displace a court's inherent power to impose sanctions for a parties' bad faith conduct."). Indeed, "[t]he inherent power to sanction is both broader and narrower than ... other means of imposing sanctions." *In re Mroz*, 65 F.3d at 1575.

FN33. Having reviewed the remaining arguments that Munson raises concerning the sanctions issue, we conclude that they are without merit.

Id. at 1325-29.

In commenting on incivility in legal profession, former Solicitor General Kenneth W. Starr III stated:

[T]he legal literature teems with concern over the decline of civility in our profession, with its ancient tradition of vigorous but nonetheless civil and responsible advocacy [T]he growing consensus is that misconduct is on the rise in our large and overcrowded courthouses. Thoughtful members of the bar and

some members of the bench . . . are . . . quick to suggest that wrongdoing within the profession is increasing and is going unpunished as overburdened courthouses, become like society itself, large and impersonal.

Starr continued:

We are called upon as a profession to remember that, at its greatest, the profession stands not for profits, it stands for the rule of law. It stands not for amassing billable hours, it stands for human dignity, for the recognition of the ultimate value of every man, woman, and child

Attention to the permanent things means attention to the community. It means fostering a sense of community, within the profession and beyond. It means integrity and candor in our professional labors. It means civility. It means scholarship.

Allen K. Harris, *The Professionalism Crisis – The ‘Z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549., 553-54 (Spring 2002) (footnotes omitted).

V. OBSERVATIONS

While there still may be no universal consensus on the meaning of the term professionalism and despite the difficulty of its application in specific factual circumstances, an attorney's duties concerning candor, civility and loyalty only occur within the ambit of the legal profession, a privilege subject to regulation and development through state and federal law, including continual decisions. A constitutive element of the practice of law is a duty to remain aware of the applicable developing standards governing professional conduct.

1. Zealous advocacy and professionalism issues are complex and require careful analysis.
2. Zealous advocacy and professionalism are acquired skills, habits enhanced through repeated practice by you and all others associated with you.
3. Zealous advocacy only exists within the confines of professional behavior; otherwise, it is conduct subject to federal and state disciplinary actions, including civil and criminal consequences.
4. Courts will, in properly presented proceedings, assist in clarifying the boundaries of zealous advocacy and professionalism, generally to the detriment of at least one of the parties.
5. Be certain you can promptly contact at least one respected person who will candidly tell you if, in a particular circumstance, you have engaged, or are about to engage, in zealous advocacy which violates professional requirements.
6. If you or firm becomes the subject of a zealous advocacy/professionalism bankruptcy court proceeding, STOP AND ASK WHAT LED TO THE PROBLEM as much as how you plan to resolve the issue.
7. In connection with such a proceeding, engage separate non-firm counsel with the best reputation for professionalism.
8. Try to resolve the issue at the trial level. If possible, without a finding or a referral to a state disciplinary authority.
9. If you are successful in avoiding a bankruptcy court zealous advocacy/professionalism decision, AGAIN, STOP AND ASK WHAT LED TO THE PROBLEM.

APPENDIX: LISTING OF ARTICLES AND CASES ARRANGED BY CIRCUIT

ARTICLES:

Orrin K. Ames III, *Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed*, 28 Am. J. Trial Advoc. 531 (Spring 2005)

Benjamin H. Barton, *The ABA, The Rules, And Professionalism: The Mechanics Of Self-Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons*, 83 N.C. L. Rev. 411 (January 2005)

Jean M. Cary, *Rambo Depositions: Controlling An Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (Winter 1996)

Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 Loy. L. Rev. 229 (Summer 2003)

Judge Paul L. Friedman, *Civility, Judicial Independence and the Role of the Bar in Promoting Both*, 2002 FED. CTS. L. REV. 4 (2002)

Allen K. Harris, *The Professionalism Crisis – The ‘Z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549 (Spring 2002)

Janeen Kerper and Gary L. Stuart, *Rambo Bites The Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103 (Spring 1998)

Leslie C. Levin, *The Ethical World of Solo And Small Firm Practitioners*, 41 Hous. L. Rev. 309 (Summer 2004)

Edward D. Re, *Professionalism For The Legal Profession*, 11 Fed. Circuit B.J. 683 (2001-2002)

W. Bradley Wendel, *Professionalism As Interpretation*, 99 Nw. U.L. Rev. 1167 (Spring 2005)

CASES ARRANGED BY CIRCUIT:

D.C. Circuit:

In re Johnson, 236 B.R. 510 (D.D.C. 1999)

1st Circuit:

In re Amezaga, 195 B.R. 221 (Bankr. D.P.R. 1996)

2nd Circuit:

In re Bono, 70 B.R. 339 (Bankr. E.D.N.Y. 1987)

3rd Circuit:

Leinbach v. Fein (In re Amoroso), 123 Fed. Appx. 43, 2004 WL 2429624 (3rd Cir. 2004).

5th Circuit:

Greenfield v. First City Bancorporation of Texas, Inc. (In re First City Bancorporation of Texas, Inc.), 282 F.3d 864 (5th Cir. 2002), *aff'g*, 270 B.R. 807 (N.D. Tex. 2001).

7th Circuit:

In re Silverman, 1999 WL 326328 (Bankr. N.D. Ill. May 18, 1999)
In re Spanjer Brothers, Inc., 191 B.R. 738, 755 (Bankr. N.D. Ill. 1996)

8th Circuit:

Cisar v Home Depot U.S.A., Inc., 351 F.3d 800, 804, fn. 5 (8th Cir. 2003).
Pilsum v. Iowa State Univ. of Sci. and Tech., 152 F.R.D. 179 (S.D. Iowa 1993)

9th Circuit:

Cable and Accessories, Inc. v. Brewer (In re Cable and Accessories, Inc.), 92 Fed Appx. 435 (9th Cir. 2004)

11th Circuit:

In re Apache Trading Group, Inc., 210 B.R. 869 (Bankr. S.D. Fla. 1997)
The Florida Bar v. Pape, __ So.2d __, 2005 WL 3072013 (Fla. Nov. 17, 2005)
Lithonia Chiropractic Clinic v. Peters, 154 B.R. 610 (Bankr. N.D. Ga. 1993)
Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289, 1303 (11th Cir. 2005)
In re Smith, 306 B.R. 5 (Bankr. M.D. Ala. 2004)
Thomas v. Tenneco Packaging, Inc., 293 F.3d 1306 (11th Cir. 2002)
In re Vasquez, 325 B.R. 30 (Bankr. S.D. Fla. 2005)