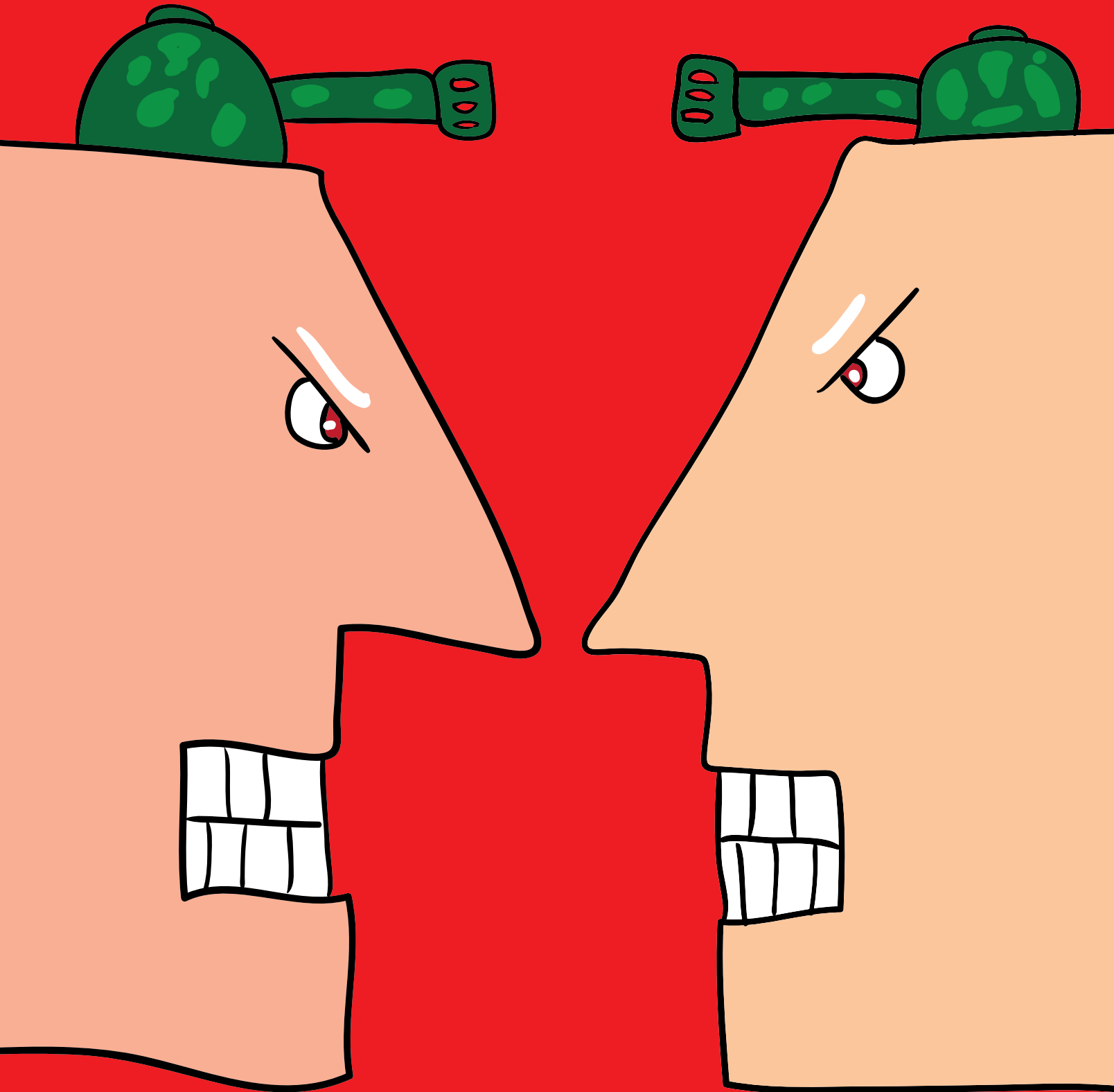


# When Lawyers Behave Badly

## The "Z" Word, Civility & the Ethical Rules



# Several years ago,

when the Arizona Supreme Court adopted our new Rules of Professional Conduct,<sup>1</sup> one of the most important changes from the prior rules got almost no notice at all in Arizona: The word “zealous” was eliminated from every sentence in the rules, including the Preamble and the comments to them. With these changes, Arizona became the first state to abandon the notion of “zealous advocacy,” a step others have since followed.<sup>2</sup> In Arizona, we now embrace the notion that lawyers “act honorably,” not “zealously,” in pursuit of their clients’ interests.

The elimination of the concept of “zealousness,” which has been called “The Arizona Solution,” drew quite a bit of attention nationally, and it stands as a leading example of one state’s reaction to the perception that zealous advocacy long ago stopped being an ethical responsibility and had become instead a pretext for bullying, rude and sometimes frightening behavior.<sup>3</sup> As one commentator put it so articulately:

Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. ... [It is] the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyer’s claim to officer of the court status.<sup>4</sup>

It’s probably not very realistic to think that we are all going to act like society hostesses in a professional world that is often so contentious and where so much is often at stake. But, in Arizona at least, lawyers will no longer be able to point to the once aspirational concept of zealous advocacy to justify what everybody else had no trouble recognizing as just plain bad manners.

- If you think all of this was simple over-reacting, consider the following: In one matter involving an Arizona lawyer, the lawyer called one of the treating doctors in his case a “f\_ \_ \_ ing ass\_ \_ \_ \_”

in front of the doctor’s staff and threatened to hold the doctor’s fee “in trust until he died.” He also announced to all present in the lobby of the Glendale Justice Court that some of the non-lawyer pro tem justices of the peace there were “f\_ \_ \_ ing lousy,” called opposing counsel a “liar” during a pretrial conference and later told a Superior Court Judge that his ruling of a claim of attorney–client privilege was “crazy.” The lawyer followed up on this remark by calling the judge names until he was cited for contempt. In addition, during an earlier deposition, the lawyer told opposing counsel to “go perform an unnatural sex act on himself.” The lawyer’s defense to all of this? That he was zealously protecting his clients in accordance with duties described in the Preamble to the Rules of Professional Conduct then in effect. The Disciplinary Commission did not agree, and censured the lawyer.<sup>5</sup>

- In another case, the lawyer called opposing counsel, including an Assistant United States Attorney, a “stooge,” a “puppet,” a “deadhead” who “had been mentally dead for 10 years” and “an underling who graduated from a 29th tier law school.” When a U.S. Bankruptcy Court imposed a \$25,000 sanction against the lawyer, he appealed, arguing that his conduct, while offensive, helped him recover more money for his clients and served him well in settlement negotiations and was therefore appropriate. The Fifth Circuit found the lawyer’s behavior to be “egregious, obnoxious and insulting” and affirmed the sanction.<sup>6</sup>
- Even legal luminaries such as Joseph Jamail of the Texas Bar fall victim to the sins of zealousness and bad behavior. During a deposition taken in a Delaware case contesting the terms of a corporate merger in which Mr. Jamail had not yet been admitted *pro hac vice*

but was participating anyway, Mr. Jamail objected to the form of a question in the following unfortunate fashion: “Don’t ‘Joe’ me, ass\_ \_ \_ \_ . You can ask some questions, but get off that. I’m tired of you. You could gag a maggot off a meat wagon.”

The court found Mr. Jamail’s behavior “outrageous and unacceptable” and gave him 30 days to explain his actions and to show cause why his conduct should not be considered as a bar to his participating any further in the proceeding.<sup>7</sup>

An article in *The Professional Lawyer*<sup>8</sup> details other instances of atrocious lawyering, presumably the direct or indirect result of zealous representation. It is hard to read the stories set forth there without having your jaw occasionally hit the top of your desk.

And if that article does not bother you, just read the litany of examples set forth in the proposed Comment to new Rule 41 when it was being considered by the Arizona Supreme Court.<sup>9</sup> Suffice it to say that there are a number of lawyers who have demonstrated that they should not be practicing law but who continue to hold licenses because “over-zealousness” usually only draws a censure or at most a short suspension from the disciplinary authorities.

## Background of the Problem

The concept of zealous advocacy first found its way into legal ethics via Canon 7, found in the Code of Professional Responsibility. It stated that “a lawyer shall represent a client zealously within the bounds of the law.”<sup>10</sup>

The Code has not been in effect in Arizona since 1985, when the Arizona Supreme Court adopted the ABA’s Model Rules of Professional Conduct. ER 1.3 of the Model Rules, the provision that replaced Canon 7, intentionally dropped

the “zealous” requirement, stating only that “a lawyer shall act with reasonable diligence and promptness in representing a client.” The problem with the then-new ER 1.3 was that the Preamble to the Rules of Professional Conduct and the Comment to ER 1.3 both retained and tacitly embraced the concept of zealous behavior. Known as the “Zealous Advocacy Loophole,” the zealous behavior references in the Preamble and the ER 1.3 comments still seemed to condone some really bad behavior. Even the heralded revisions of the most recent Model Rules developed by the ABA’s Ethics 2000 Commission didn’t resolve the problem.

Although the comments and new ER 1.3 dropped reference to zealous representation, the Preamble left them alive and well. It was in this context that the Arizona Supreme Court, when it adopted the ABA Model Rules, put its own “brand” on them, one of which was to eliminate the “Z” word everywhere, and to make sure Arizona’s lawyers knew why such action was taken.

### More Help on the Way

Have we run out of weapons against offensive personality? Hardly.

The Arizona Supreme Court recently amended Rules 31(a)(2), 41 and 53 of the Arizona Supreme Court, effective Jan. 1, 2008, to make it very clear that boorish behavior is now regarded as potentially violating one or more specific ethical rules, with attendant disciplinary consequences.<sup>11</sup>

Rules 31, 41 and 53 probably do not get read very much by most practicing lawyers.

Rule 31(a)(2) contains certain definitions to be used in the Supreme Court rules

that regulate the practice of law in Arizona. The new rules add a definition for “unprofessional conduct” at subpart E of Rule 31(a)(2) to include substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer’s Creed of Professionalism of the State Bar of Arizona.

Remember the oath of admission? In case you forgot to commit it to memory, look at page 7 of your current Membership Directory. It sets forth a number of broad aspirational objectives, but it also includes a promise to “at all times faithfully and diligently adhere to the rules of professional responsibility and a lawyer’s creed of professionalism of the State Bar of Arizona.”<sup>12</sup> The Lawyer’s Creed is found at pages 6 and 7 of your current Membership Directory,<sup>13</sup> and sets forth some very specific non-aspirational commands. If you have not read the Creed recently, you might refresh your recollection of it. Violations of it might well soon get you an invitation into Arizona’s disciplinary system.

Rule 41 sets forth the duties and obligations of members of the Arizona bar, including those prescribed in Rule 42, which is where Arizona’s Rules of Professional Conduct are found. Rule 41(g) used to require members “to abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged.” The new rule requires members “to avoid engaging in unprofessional conduct” rather than (and in place of) “to abstain from all offensive personality.”

Remember that the new Rule 31(a)(3)E would define “unprofessional conduct” to include violations of the oath of admission

to the bar and the Lawyer’s Creed. Rule 53 has also been amended to add a new Rule 53(j), making it a disciplinary offense to engage in “unprofessional conduct” as defined in new Rule 31(a)(2)(E).

Together, the amendments clarify what most of us have always known in the first place: That offensive and abusive lawyers are engaging in “unprofessional conduct.” Now, instead of arguing that such conduct violates, depending on the circumstances, ERs 3.4 (Fairness to Opposing Party and Counsel), 4.4 (Respect to Rights of Third Persons) and 8.4(d) (Misconduct, specifically engaging in conduct that is prejudicial to the administration of justice), the State Bar will be able to point specifically to Arizona Supreme Court Rules 41 and 53 and seek discipline as a result.

### Rules Are Not Enough

All of these new rules won’t change the habits of the true sociopaths among us, but they should give those lawyers tempted to misbehave occasionally a reason to consider other options.

None of the Supreme Court’s new rules is going to be truly effective unless the judiciary embraces them and reports lawyers to the State Bar and sanctions them under court rules. And none of the State Bar’s efforts is going to be truly effective unless lawyers start reporting the obvious violations. There is a natural reluctance to report a fellow lawyer, especially for an isolated instance of unprofessional behavior. But when bad behavior becomes a habit, even in the stressful situations in which we often find ourselves as lawyers, do not expect a resolution of the problem unless you become a part of the cure. **af**

### endnotes

1. Rule 42, ARIZ.R.S.C.T.
2. Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon and Washington have omitted all reference to zealousness in their rules, preambles and commentary.
3. Allen K. Harris, *Increasing Ethics, Professionalism and Civility: Key to Preserving the American Common Law and Adversarial System*, PROF. LAW. (2005 Symposium Issue), at page 109.
4. Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 767 (1994).
5. John T. Banta, Disciplinary Commission report, found at [www.supreme.state.az.us/dc/disciplinarycommission.htm](http://www.supreme.state.az.us/dc/disciplinarycommission.htm) (Disciplinary Cases Matrix, 2004 cases).
6. *In re First City Bancorporation of Texas, Inc.*, 282 F.3d 864 (5th Cir. 2002).
7. *Paramount Commc’ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 53-54 n.29 (Del. 1994).
8. Harris, *supra* note 3, at 200 *et seq.*
9. See [www.supreme.state.az.us/rules/prulsc.htm](http://www.supreme.state.az.us/rules/prulsc.htm), at R-05-0021.
10. Model Code of Professional Responsibility, Canon 7 (1980).
11. See [www.supreme.state.az.us/rules/Recent\\_rules.htm](http://www.supreme.state.az.us/rules/Recent_rules.htm).
12. A Lawyer’s Creed of Professionalism of the State Bar of Arizona, unanimously adopted by the Board of Governors, State Bar of Arizona, on May 19, 1989.
13. The Oath and the Creed also appeared recently in ARIZONA ATTORNEY. See Jim Lee & Patricia Sallen, *New Professionalism and Lawyer Discipline Rule Adopted*, ARIZ. ATT’Y, Dec. 2007, at 32 and 34.