

THE TEXAS LAWYER'S CREED A FEW OBSERVATIONS

BY GREGORY HUFFMAN

We have a tendency to believe the past was a happier, saner, more orderly time than the present. We lament generally the passing of the good old days, and in particular the demise of lawyers' professionalism and cordiality. Yet in reality there have always been lawyers who would bend the rules, gloss the truth, and engage in misconduct when no one was looking. Indeed, those lawyers have often benefited handsomely in doing so.

Clients can be quite able in selecting lawyers with certain traits. Sometimes a client is very aggressive in business and personal affairs and wants a lawyer who matches that approach. Sometimes a client is personally not aggressive, but feels aggrieved by the opposing party and wants to use the legal system to inflict pain on the opponent. Sometimes a client views the legal process as a form of combat with different, more aggressive rules than everyday life and wants a champion who can joust at that level. We have all heard persons say they want "junkyard dogs" to represent them. Matters involving such "Rambo" lawyers, however, tend to generate many battles and higher attorneys' fees.

None of these client motivations is new. Hence, very aggressive lawyers, even those who skirt the rules, are not a new phenomenon.

But something changed in the 1980s that made matters worse and led to the Supreme Court's promulgation of the Texas Lawyer's Creed 20 years ago.

Texas in the 1970s and 1980s was experiencing an economic boom following the Arab Oil Embargo of 1973 and the Iranian Oil Crisis of 1979. The price of oil, and the Texas economy, soared. As an example, the number of oil and gas wells completed annually more than tripled in the 10 years following 1973.

At the same time as Texas businesses were flourishing, a dramatic increase in the legal profession occurred. State Bar membership rose from 24,082 in 1973 to 46,840 in 1985. Dallas Bar membership increased even more — 120 percent. This development was not limited to Texas. The post-war baby boomers were entering the profession all across the United States, expanding the number of lawyers everywhere.¹

The influx of new lawyers, and new clients, in this time period lessened the social cohesiveness of the local bars. Where there is stability in the size and membership of a group, social norms are more easily maintained. When companies deal repeatedly with each other they will tend to forego one-time ploys that violate social norms. The same is true for lawyers. If a company or lawyer, whether incumbent or newcomer, is dealing with another on a one-shot basis, existing social norms have less sway. As a business or professional community becomes



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larger, informal social norms tend to be less effective.

In the mid-1980s, the concept of Rambo lawyers gained currency, apparently reflective of the change going on in society and in the legal community. While there had always been lawyers using overly aggressive tactics, this type of lawyering appeared to become more prevalent. As the Northern District of Texas remarked in its en banc decision in *Dondi Properties Corp. v. Commerce Savings and Loan Ass'n*, this was a “problem that, although of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers.”²

By the time of the *Dondi* decision in 1988, bar associations and courts had become active in promulgating codes of conduct to make explicit the informal norms that had existed before. Texas was a leader in the process. The issue of what to do about Rambo tactics was first raised at a Dallas Bar Association board meeting in September 1986. That discussion evolved into a task force that promulgated the Dallas Bar Association's Guidelines of Professional Courtesy and Lawyer's Creed the following year, followed by guidelines from the Houston and Travis County bar associations in 1989, and the Texas Lawyer's Creed promulgated by the Supreme Court and Court of Criminal Appeals in November 1989.

Other bars around the country also became active in this area. At least 149 lawyer professionalism codes have been promulgated by bar associations and courts, starting in 1986 with codes in Arkansas and Montana.³

The Texas Lawyer's Creed, the 20th anniversary of which we celebrate this month, was one of the first codes promulgated by a state supreme court. It announced principles applicable to all lawyers in the state for civility and courtesy between lawyers and honesty in statements to judges and lawyers.

Lawyer behavior seems to have improved since the issuance of the Creed and the other codes of conduct. Whether that improvement is due to the codes or to stabilization in the legal and business communities is uncertain, but the problem of overly aggressive legal conduct is still and will always be present. That is a reason for the continuing need for the Creed.

What has happened to the Creed? It is still on the books, but is seldom mentioned. The reporting experience of John Council, a reporter for *Texas Lawyer*, is very instructive. “I have interviewed hundreds of judges, virtually all of whom complain about lawyer conduct in which they argue with each other incessantly, but none of the judges has ever mentioned the Texas Lawyer's Creed to me.”⁴

This judicial silence has some serious implications. Although most lawyers act cordially and professionally with each other, either as a matter of internal principle or to comply with social norms, there are cases where a lawyer resorts to Rambo conduct. Judicial pressure on lawyers to adhere to the Creed is essential in those cases, because no one other than judges may effectively be able to curb the behavior. Clients who deliberately hire Rambo lawyers do not constrain their lawyers; indeed, in many instances, the clients encourage and reward behavior that

contravenes the Creed. Opposing lawyers and parties often have only one way to constrain Rambo behavior — matching Rambo tactic with Rambo tactic, all to the detriment of the legal system. Juries are not an effective constraint because most of the challengeable conduct occurs before the jury is empaneled and seldom is brought to their attention.

That leaves the trial judge as the last constraint. If the trial judge fails to step forward, the legal system will fail both those parties without the financial resources to counterattack, as well as those who are forced to expend resources and time needlessly in side battles.

We need the Texas Lawyer's Creed — to be used and cited, not ignored.

NOTES

1. The estimated number of lawyers in the United States rose by 78 percent in the same 1973–1985 time period. Archived Data, American Bar Association (various dates).
2. *Dondi Properties Corp. v. Commerce Savings and Loan Ass'n*, 121 F.R.D. 284, 287 (N.D. Tex. 1988)
3. American Bar Association, Professionalism Codes, available at <http://www.abanet.org/cpr/professionalism/profcodes.html>.
4. Interview with John Council, *Texas Lawyer*, in Dallas (Sept. 10, 2009).

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