Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts

Gideon Kanner
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I. INTRODUCTION

One-man army John Rambo,\(^1\) having dispatched a brutish sheriff’s posse, mauled the North Vietnamese army, and mangled the minions of the Evil Empire in Afghanistan, is looking for new worlds to conquer. Where? In the courtrooms of America, of course. "Rambo litigation" has become the \textit{au courant} topic among lawyers and judges who report with alarm that deception, nastiness, intimidation and general lack of civility among lawyers are permeating the litigation process.\(^2\)


1. DAVID MORRELL, \textit{FIRST BLOOD} (1972).

2. \textit{See INTERIM REPORT OF THE COMMITTEE ON CIVILITY IN THE SEVENTH FEDERAL JUDICIAL CIRCUIT} 6-7 (Apr. 1991) [hereinafter \textit{INTERIM REPORT}]; Arthur Gilbert, \textit{Civility: It's Worth the Effort}, \textit{TRIAL}, Apr. 1991, at 106, 108 (commenting on rising incivility among judges) (author is associate justice of California Court of Appeal); Thomas M. Reavley, \textit{Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics}, 17 \textit{PEPP. L. REV.} 637, 637-38 (1990) (author is federal judge on Fifth Circuit) [hereinafter Reavley, \textit{Rambo Litigators}]; see also David A. Kaplan & Ginny Carroll, \textit{How's Your Lawyer's Left Jab?}, \textit{NEWSWEEK}, Feb. 26, 1990, at 70, 70: Bad-boy lawyers file fribbling motions, spill brewed decaf on transcripts, arrive 20 minutes late for all meetings and harass opposing counsel with volumes of paper on Christmas Eve. They obfuscate, they procrastinate, they infuriate—all in the name of zealous advocacy. They behave so badly that a federal judge in Oklahoma in a recent order wishfully consigned two lawyers to hell. To detractors, the business cards of these foul practitioners could just as well read ‘Rambo, Esq.’


Honorable mention must go to David Margolick, the \textit{New York Times} legal columnist who, in reporting on the \textit{Interim Report} observed that the judges “could have just paraphrased Thomas Hobbes and said that lawyers are increasingly making the practice of law nasty, brutish and long.” David Margolick, \textit{At the Bar: Does ‘Polite’ Really Mean ‘Wimpy’? Or, What Has Happened to Civility in a Once-Noble Profession?}, N.Y. TIMES, June 14, 1991, at B10.

It also seems appropriate at the outset to make a note on terminology and what it con-
What in the world is going on? How could this happen? Aren’t “officers of the court” subject to preventive and corrective judicial action? Are there no rules that prohibit this sort of stuff? In theory, yes; in practice, no. Too often the rules are bent or simply not enforced. The sad fact is that too many judges simply do not care enough, or for some reason are repelled by the concededly distasteful task of having to police their courtrooms. This Article’s premise is that the problem of

calls. In fairness to the fictional John Rambo, his vicious and deadly tactics were appropriate to the life-or-death combat situations he was facing. Not so in litigation which supposedly rises above trial by combat, and functions as a civilized “search for truth” infused with professionalism and subject to enforceable rules governing behavior of the participants. A friend has aptly suggested that Mr. Rambo be given an honorable discharge, and that the term “Godzilla litigation” be used instead. Terms such as “scorched earth” and “take-no-prisoners” litigation are also used. Id.

3. As Brewer & Marjorie correctly point out, a distinction must be drawn between “hardball” litigation—a process of pushing one’s case to judgment aggressively, but within the rules—and misconduct that violates those rules. Brewer & Marjorie, supra note 2, at 846 n.93. This Article addresses the latter situation, although it follows that if judges will not enforce the rules in cases of outright misconduct occurring in their courtrooms before their eyes, it should not come as a surprise that they will not do much of anything about lapses from professional civility, or about harassing tactics outside the courtroom, even though they can easily influence those for the better.


In Sabella, the plaintiff was injured while working on the defendant’s freight car. Id. at 313, 449 P.2d at 751, 74 Cal. Rptr. at 535. He sued, alleging negligence. Id. During the trial, plaintiff’s counsel attempted to elicit sympathy from the jury by repeatedly referring to the defendant as “inhuman” and “heartless,” “cheapskates’ attempting to... deprive plaintiff of his just due” and of “sending plaintiff ‘down the tubes’ and casting him on the ‘human trash pile.’” Id. at 317, 449 P.2d at 753, 74 Cal. Rptr. at 537. Defendant’s counsel objected only once to these references and never asked that the jury be admonished to disregard them. Id. at 319, 449 P.2d at 754, 74 Cal. Rptr. at 538. On appeal, defendant claimed, among other things, that plaintiff’s counsel’s remarks constituted prejudicial misconduct. Id. at 317, 449 P.2d at 753, 74 Cal. Rptr. at 537. The court agreed, but held nevertheless, that the claim was not entitled to consideration because defendant’s counsel had failed to make a timely objection and to request a jury admonition. Id. at 320, 449 P.2d at 754, 74 Cal. Rptr. at 538.

5. See, e.g., Love v. Wolf, 226 Cal. App. 2d 378, 391, 38 Cal. Rptr. 183, 190 (1964). Wolf involved outrageous misconduct by trial counsel. Examples of trial counsel’s “intentional, blatant and continuous” misconduct included claiming that the manufacturer of a medication was a “con outfit,” that it had no “regard at all for humanity,” that there were “reports of people dying from [the medication]” from “all over the country,” that the medication was a “death dealing drug,” that the manufacturer bribed the head of the Federal Drug Administration, and that the manufacturer misrepresented its profits from the sale of the medication. Id. at 385-86, 38 Cal. Rptr. at 186-87. Other misconduct involved abusing opposing counsel by referring to him as “an idiot” and a “laughing hyena,” characterizing his objections as “asinine” and “hogwash,” telling him to shut up, and accusing him of suborning perjury. Id. Yet, in spite of all this, the trial judge failed to respond. The California Court of Appeal noted:

An able, highly respected, jurist of many years’ experience and a well-earned reputa-
lawyer misconduct is not new. It has been around for a long time, and
has grown in incidence and severity largely because of judges’ tolerance,
and their unwillingness to interdict it effectively even when it occurs
before their eyes in their own courtrooms. This Article then suggests
that such judicial tolerance of the intolerable is a substantial factor which
lies at the root of the Rambo litigation phenomenon.

II. THE JUDICIAL APPROACH—OR LACK THEREOF

An example of the misguided judicial approach to the problem is
offered by a recent article authored by Judge Thomas M. Reavley of the
United States Court of Appeals for the Fifth Circuit. Judge Reavley
offers the view that in cases of lawyer misconduct where both attorneys
have done something to contribute to “the difficulty,” judges are not
likely to respond to either side’s pleas to restore civility to the proceed-
ings. Why not? Shall we just let ‘em slug it out in the gutter, the brutes?
Why is that an acceptable approach to the problem? Even if the stake of
individual litigants in fair trials does not transcend their lawyers’ quarrel
of the moment, Judge Reavley unfortunately does not appear to appreciate
fully the stake society has in keeping trials fair. Moreover, judges
also have a substantial interest in setting the tone and standards of behav-
ior in their own courtrooms.

And what if only one side engages in nasty behavior and victimizes
the other? Then, according to Judge Reavley, the faultless attorney “has
a much better chance of obtaining relief.” Only a chance? Don’t some
reliably enforceable rules control such situations? Not really.

The real relief, according to Judge Reavley, is for the victimized
lawyer to get his opponent’s “episodes of unfairness into evidence” even
if they “come during . . . trial,” and to “list every statement . . . unsup-
ported by proof . . . made by the opposing counsel.” Then, “in the
course of final summation, the attorney should mention all of these state-
tion for courtroom control presided at this trial. Loss of such control [over the pro-
cedings] in this case is unexplained and to us very puzzling. Excepting one mild
caracterization of conduct by counsel at [sic] ‘a little bit disgraceful’ (made in such a
manner that a reader of the transcript is left uncertain at which attorney the criticism
was directed) and several expressions of disgust, such as, ‘Let’s all go home. What
do you say we all go home,’ there was almost no effort to keep the proceedings within
the confines of propriety.

Id.
6. See supra note 5 and accompanying text; infra notes 8-25 and accompanying text.
7. See infra notes 66-74 and accompanying text.
8. See Reavley, Rambo Litigators, supra note 2.
9. Id. at 653.
10. Id.
11. Id. at 653-54.
ments, explaining that the opponent must have made them with the intent to deceive the jurors.” Judge Reavley, however, does not tell us just what is to be done with such a list, how this “evidence” is to be put on, when and by whom, what its relevance might be to the issues dividing the litigants—as opposed to their lawyers’ shenanigans—and how the jury is to be instructed on its legal significance. Similarly, he does not say why faultless lawyers unfairly subjected to misconduct by their adversaries should have to waste their efforts and limited summation time dissecting and refuting their opponents’ improper statements—which should not have been made in the first place—rather than arguing the merits of their own clients’ cases. Also, shouldn’t the offending lawyer have a right to rebut such evidence? If so, how? After all, even murderers are entitled to due process; why not nasty lawyers?

In short, Judge Reavley’s proposed cure may be worse than the disease. It substitutes a discussion of the “merits” of the improper and often false assertions constituting the misconduct in place of the issues that are properly before the court and jury—which is exactly what the misbehaving lawyer wants.

All this sounds suspiciously like a fastidious expression of distaste for policing the courtroom, if not a defacto abdication of judicial responsibility. Judge Reavley appears to believe that, ultimately, virtue is its own reward because, as he puts it, “[i]ricks, pretense, and . . . unfairness

12. Id. at 654. This remarkable prescription fails to note that final summation is often the misbehaving lawyer’s favorite time to unleash improper, inflammatory, and just plain false arguments to the jury. See, e.g., infra note 13. It is unclear how Judge Reavley’s prescription would work in this context. Moreover, such a prescription would tend to transform final summation into a real lawyers’ slanging match.

13. An example of the problem is provided by Garden Grove School District v. Hendler, 63 Cal. 2d 141, 403 P.2d 721, 45 Cal. Rptr. 313 (1965). The principal issue in that eminent domain case was the value of the condemned land—a matter that involves technical and, at times, dreary testimony which taxes advocates’ skills when the time comes to argue it to the jury. Id. at 142, 403 P.2d at 722, 45 Cal. Rptr. at 314. Yet, in his jury argument, the condemnor’s counsel launched a scurrilous personal attack on the condemnee. Id. at 143 & n.1, 403 P.2d at 722 & n.1, 45 Cal. Rptr. at 314 & n.1. Surely, requiring the victimized party’s attorney confronting such an outburst to disrupt the planned jury summation and spend his or her precious argument time attempting to persuade the jury to disregard the improper assertions would only play into the hands of the wrongdoer by diverting the jury’s attention from valuation issues to the litigants’ personalities and the lawyers’ behavior. Under such circumstances, the substantive cause of the victimized party is likely to suffer, as indeed it did in Hendler. Hendler was reversed due to plaintiff’s counsel’s misconduct. Id. at 146, 403 P.2d at 724, 45 Cal. Rptr. at 316. Following reversal, the case was retried without misconduct; this time, in place of the vacated $73,000 verdict, id. at 142, 403 P.2d at 722, 45 Cal. Rptr. at 314, the jury came in with a $194,000 award. Telephone Interview with Jerrold A. Fadem, attorney for defendants-appellants (Sept. 5, 1991).
invite rejection." Maybe. Then again, maybe not.15

In the real world trickery and unfairness succeed all too often.16 That is one reason why we have courts. In any event, such a genteel vision of justice triumphant—even if justified, which it often is not—is cold comfort to a client who has to spend a fortune on litigation, only to be unjustly vilified or otherwise abused in the courtroom, and then be forced to watch helplessly as the merits of his cause are obscured by an unprofessional sideshow of lawyers pursuing irrelevant *ad hominem* quarrels before an aloof judge.17


15. Consider, for example, the sad case of six-year old Heidi Rossi who was struck by a car while crossing the street. Rossi v. Osborn, 2d Civ. No. 40100, slip op. at 2 (Cal. Ct. App., 2d Dist., Apr. 27, 1973). In the ensuing trial for negligence—which naturally took place a considerable time after the accident, at a time when Heidi's injuries had healed—the defense successfully moved for bifurcation, and obtained an *in limine* ruling that the nature and extent of the injuries not be brought out by either side in the liability phase of the trial. *Id.* at 3. The defense also displayed Heidi before the jury, although she was not called as a witness. *Id.* With the stage thus set, and although this was a trial of liability only, defense counsel suggested to the jury that Heidi's evident condition militated against recovery. *Id.* The jury, not having heard any evidence of the injuries, returned a defense verdict. *Id.* at 1-2. The trial judge later acknowledged that this ploy had been in bad faith but nevertheless denied a new trial. *Id.* at 4-5. The court of appeal affirmed. *Id.* at 18. The California Supreme Court denied hearing. Telephone Interview with Zaida Heraldez, Deputy Clerk for Court of Appeal, Second District (Sept. 10, 1991).

Now, what was that about trickery inviting rejection?


17. Judge Reavley's detached approach to this problem overlooks one important point. Where a litigant, or counsel, is subjected to personal invective but the judge either does nothing or belittles the incident, as judges are wont to do, see, *e.g.*, *supra* note 5 and accompanying text, jurors may surmise that these accusations must have some factual basis, or else surely the judge would respond favorably to the protesting lawyer's objections. This occurs *a fortiori* where the lawyer requests a jury admonition and the judge either refuses to grant it or grants it only in a lukewarm or equivocal fashion. See, *e.g.*, *infra* note 40.

Such overly restrained judicial reaction is motivated by judges' desire to appear impartial, and not to encourage juries to take cues from the severity of the judges' language. But even if such punctiliously benign judicial motivation is assumed, serious courtroom misconduct should leave no ethical person in doubt as to who is the "good guy" and who is the "bad guy." To the extent a morally healthy, discernible judicial reaction has to redound to *someone's* disadvantage, the case for letting the "good guy" suffer while protecting and *de facto* rewarding the "bad guy" lacks any defensible moral foundation. Unfortunately, in an effort to
What in the world is going on in our courts? Too much. But there are rational, if not good, reasons for it. Lawyers are by and large neither stupid nor irrational. They do what they think will help their cause and put pressure on their opponents. But above all, they do what they think judges will let them get away with. And these days, make no mistake, judges are letting the bad guys get away with a lot.

See, for example, United States v. 320 Acres, decided in Judge Reavley's circuit. There, government lawyers, in a huge eminent domain case, presented their arguments to a congenial district judge without notice to scores of their pro se adversaries. Then, when caught red-handed, they refused to stipulate to vacating the resulting ex parte judgments. True, those judgments were eventually vacated on appeal, but why should an appeal have been necessary on such facts? What did the trial judge think he was doing? Once the United States Court of Appeals for the Fifth Circuit found misconduct of such dimension to be present, did anyone get disciplined or sanctioned? Hardly. A stern tut-tut was the extent of it. The opinion characterized the United States Attorney's behavior as "contentious" and "intransigent," and that was that. Not a word of criticism of the trial judge. In fact, the next federal mass condemnation case to hit southern Florida was assigned to the same district judge, who then conducted himself so as to be eventually

appear impartial to the jury, judges often do treat the transgressor and the victim alike, thereby encouraging the former and de facto legitimizing the improper conduct in the jury's eyes.

18. 605 F.2d 762 (5th Cir. 1979).
19. Id. at 777 n.22.
20. Ironically, as the balance of 320 Acres makes clear, that case raised important issues of valuation law; it was no routine matter. See id. at 827.
21. Id. at 828.
22. Trial courts can display an astonishingly callous attitude when confronted with lawyers' misconduct. See Hendler, 63 Cal. 2d at 143 n.1, 403 P.2d at 721 n.1, 45 Cal. Rptr. at 314 n.1 (trial judge made no effort to interdict plaintiff's counsel's prejudicial remarks and activities and overruled defendant's counsel's objections to them); Regents of the Univ. of Cal. v. Morris, 266 Cal. App. 2d 616, 630-32, 72 Cal. Rptr. 406, 414-15 (1968) (trial judge first announced intent to strike misconduct-tainted testimony but after witness left stand and was no longer subject to continuous cross-examination, judge vacated ruling and admitted testimony); Sunshine Canyon, Inc., 2d Civ. No. 36371, slip op. at 15-18, 20, 29 (same); see also City of Los Angeles v. Decker, 18 Cal. 3d 860, 870-71, 558 P.2d 545, 551, 135 Cal. Rptr. 647, 653 (1977), vacating sub nom. City of Los Angeles v. Hall, 55 Cal. App. 3d 854, 127 Cal. Rptr. 768 (1976). In Decker, the Deputy City Attorney falsely argued to the jury that there was an excess of parking in the area so that the condemned property's highest and best use could not have been for parking as contended by the condemnee. Id. at 864-67, 558 P.2d at 547-48, 135 Cal. Rptr. at 649-50. In fact, the city's environmental impact report showed a parking shortage in the area. Id. Neither the trial court nor the court of appeal saw anything wrong with that argument. Id. at 870, 558 P.2d at 548, 135 Cal. Rptr. at 650.
23. See 320 Acres, 605 F.2d at 778-80 n.22.
24. Id.
recused by a writ of mandate issued by the court of appeals over the spirited opposition of the government. And who had to bear the cost of all that legal maneuvering? Here is a clue: it wasn’t the bad guys.

III. DOUBLE DUTY FOR THE VICTIM OF MISCONDUCT IN CALIFORNIA

In California, the prevailing rule is that a lawyer who engages in misconduct in open court is home free, and need not do anything to cure the resulting adverse effects—not even if the conduct is outrageous and highly prejudicial. Rather, the victimized counsel—in order to preserve the point on appeal—must go through an elaborate ceremony of objecting to every instance of misconduct in the right way, assigning the improper remarks as misconduct, and requesting a jury admonition. An objection without more is insufficient. All of this ceremonial rigmarole often tends to emphasize the improper statements for the jury while it fails to “unring the bell.” Moreover, if the trial judge gives the requested admonition, the misconduct is deemed cured, except in

25. United States v. 0.21 Acres, 803 F.2d 620, 622 n.1 (11th Cir. 1986). The 0.21 Acres opinion fails to note that it took two writ petitions to obtain that result. Telephone Interview with Toby Prince Brigham, attorney for defendants-appellants (Aug. 22, 1991).


27. Id.


30. See, e.g., Sabella, 70 Cal. 2d at 320, 449 P.2d at 755, 74 Cal. Rptr. at 539; Horn, 61 Cal. 2d at 610, 394 P.2d at 565, 39 Cal. Rptr. at 725.

31. See Sabella, 70 Cal. 2d at 320, 449 P.2d at 755, 74 Cal. Rptr. at 539.

32. Simmons v. Southern Pac. Transp. Co., 62 Cal. App. 3d 341, 356, 133 Cal. Rptr. 42, 50 (1976) (citing Love v. Wolf, 226 Cal. App. 2d 378, 392, 38 Cal. Rptr. 183, 191 (1964)). Note, however, that another California Court of Appeal asserted that it is “bromidic to say that one cannot unring a bell.” Regents of the Univ. of Cal. v. Morris, 266 Cal. App. 2d 616, 638, 72 Cal. Rptr. 406, 419 (1968). This assertion was followed by the astonishing statement that the misconduct “was a plus in favor” of the victimized party. Id. at 639, 133 Cal. Rptr. at 420. Some “plus.” As it turned out, reality was not kind to the court’s idea of litigational advantage. The vacated jury award in Morris was $3,700,000. Id. at 621, 133 Cal. Rptr. at 408. However, when the case was retried sans misconduct, the second verdict came to $4,800,000. Telephone Interview with Jerrold A. Fadem, attorney for defendants-appellants (Aug. 30, 1991).

33. In Sabella, the California Supreme Court indicated that where the misconduct is severe, the trial judge should intervene sua sponte. 70 Cal. 2d at 321 n.8, 449 P.2d at 756 n.8, 74 Cal. Rptr. at 540 n.8. That appears to be at most a hortatory statement, since the court, in affirming the misconduct-tainted judgment, hewed to the position that the victimized counsel
egregious cases.\textsuperscript{34}

But if the victimized lawyer is caught off guard and misses a beat by failing to go through this litany, the misconduct is deemed waived.\textsuperscript{35} Waiver, however, seems like an entirely inappropriate basis for such a result. By settled law, waiver is the \textit{voluntary} relinquishment of a known right,\textsuperscript{36} and it must be shown by clear and convincing evidence.\textsuperscript{37} It is difficult to envision a lawyer ambushed by an adversary’s misconduct with only seconds to act as somehow making an informed, voluntary decision to relinquish a client’s vital right on which the outcome of the case may ultimately turn. Nor is the clear and convincing standard to prove waiver honored here. The offending lawyer need not offer “clear and convincing evidence” of anything. In fact, the victimized lawyer is presumed to have waived his client’s rights.\textsuperscript{38} Thus, application of waiver seems inappropriate in this context, and such a requirement is neither fair nor realistic.

Practically speaking, this is an extremely harsh and unjustified rule demonstrating the appellate courts’ insensitivity to the burdens facing trial counsel. Good lawyers with good cases prefer to pursue the merits, not harangue their opponents. It is an old legal saw of enduring merit that lawyers who have the facts on their side argue the facts, those who

\footnotesize{must go through the usual ceremony as to each instance of misconduct before appellate relief would even be considered. \textit{Id.} at 318-21, 449 P.2d at 754-56, 74 Cal. Rptr. at 538-40.}

\textsuperscript{34} Tingley v. Times-Mirror Co., 151 Cal. 1, 23, 89 P. 1097, 1106 (1907) (“It is only in extreme cases that the court . . . cannot, by instructing the jury to disregard such matters, correct the impropriety . . . and remove any effect [a lawyer’s] conduct or remarks would otherwise have.”). This limitation, however, must be taken with a grain of salt. It is hard to imagine more egregious misconduct than in \textit{Horn} and \textit{Sabella}. In \textit{Horn}, for example, plaintiff’s counsel repeatedly disparaged defendant, without referring to particular testimony, and told jurors to put themselves in the shoes of the plaintiff when assessing damages. \textit{Horn}, 61 Cal. 2d at 607-09, 394 P.2d at 564-65, 39 Cal. Rptr. at 724-25. For facts of \textit{Sabella}, see supra note 4. Yet both these judgments were affirmed.

\textsuperscript{35} An objection without a request for jury admonition is insufficient to preserve the error for appellate review. \textit{Sabella}, 70 Cal. 2d at 320, 449 P.2d at 755, 74 Cal. Rptr. at 539. The victimized lawyer must object, assign the improper behavior as misconduct, and request a jury admonition. \textit{But see} People v. Kirkes, 39 Cal. 2d 719, 726, 249 P.2d 1, 5-6 (1952) (where objectionable statements made by attorney were of such character that error could not be cured by admonition, appellate court may reverse judgment when it appears there has been miscarriage of justice).

\textsuperscript{36} City of Ukiah v. Fones, 64 Cal. 2d 104, 107, 410 P.2d 369, 370, 48 Cal. Rptr. 865, 866 (1966) (waiver is intentional relinquishment of known right after knowledge of facts and party claiming waiver has burden of proof).

\textsuperscript{37} Hittle v. Santa Barbara County Employees Retirement Ass’n, 39 Cal. 3d 374, 390, 703 P.2d 73, 82, 216 Cal. Rptr. 733, 742 (1985).

\textsuperscript{38} \textit{See} \textit{Sabella}, 70 Cal. 2d at 318, 449 P.2d at 754, 74 Cal. Rptr. at 538 (claim of misconduct not entitled to consideration on appeal unless record shows proper objection and request for admonition).
have the law on their side argue the law, and those who have neither pound the table and yell loud. Still, once the improper considerations are introduced into the case the ethical lawyer is thrust into a dilemma. Should he or she be content with the judge's often wishy-washy admonition (if one is to be had), get on with arguing the merits of the case and hope for the best, or does prudence require that some countermeasures be taken, particularly when the improper accusation is not only irrele-


40. An object lesson on the hazards involved is provided by City of Burbank v. Burbank Generators, 2d Civ. No. 40197 (Cal. Ct. App., 2d Dist., July 2, 1973). There, in a condemnation case, counsel for the city made an improper appeal to the jurors as taxpayers (an argument expressly proscribed by Garden Grove School District v. Hendler, 63 Cal. 2d 141, 403 P.2d 721, 45 Cal. Rptr. 313 (1965)). Id., slip op. at 3-4. Following an objection and a request for mistrial, the trial court ruled as follows:

All right. The motion for mistrial is denied.

Mr. Soper [counsel for plaintiff], I think it would be unwise on your part, and the Court directs you not to speak in terms of taxpayers. I think here the jury is sophisticated and will follow the instructions of the Court, and they understand that the City of Burbank will pay any judgment.

Id. at 4 (emphasis added).

Thus, the trial court's "admonition"—apart from its milquetoast characterization of the clearly improper remarks as "unwise" and its utter failure to admonish the jury to disregard them—only emphasized the prejudicial taxpayer concerns. Moreover, it was factually incorrect; that particular project was not being funded with city funds, but with gas tax monies in the nature of a statewide user tax, and the ambushed defense counsel said so. Id. The trial judge's response to his error was something less than sensitive to the revelation that he had just misinformed the jury: "THE COURT: Well, all right. Public funds, counsel." Id. at 4-5.

The aggrieved lawyer then made a command decision to deal with the problem in his jury argument, which failed to carry the day. On appeal the court held that "if any prejudice resulted from the quoted remarks, the responsibility for such result rests largely on counsel for defendants." Id. at 10. Why? Because in dealing with the misconduct in his jury arguments, the aggrieved lawyer tried to dispel the prejudice engendered by the improper remarks (coincidentally, the very prescription suggested by Judge Reavley, see supra note 12 and accompanying text) but to no avail. Therefore, any prejudice that resulted from the improper appeal to jurors as taxpayers was the fault of the victimized counsel who, said the court, by his argument emphasized these matters, rather than the fault of the lawyer who made the improper argument. Id. at 10-11.

In another case involving similar misconduct—an appeal to jurors as taxpayers in a condemnation case—the aggrieved lawyer duly objected but did not argue the matter to the jury. People ex rel. Department of Pub. Works v. Graziadio, 231 Cal. App. 2d 525, 533-34, 42 Cal. Rptr. 29, 33-34 (1964). Incredibly, the trial judge ruled: "As a demonstration or example, I think there is no impropriety in it. Obviously we are concerned with rules concerning the matter of market value which will be explained to the jury, but this is, I presume an example." Id. at 533, 42 Cal. Rptr. at 34. On appeal, after gently characterizing the misconduct as "error" the court affirmed because it found no prejudice. Id. at 534, 42 Cal. Rptr. at 34.

The lesson to victimized counsel that emerges from the juxtaposition of Burbank Generators with Graziadio is that you're damned if you do, and damned if you don't. The misbehaving lawyer, on the other hand, gets to laugh all the way to the bank.
vant and inflammatory, but also false?\textsuperscript{41} There are serious hazards either way. The first approach runs the risk that the jury may find it suspicious that the accusations, a staple of courtroom misconduct, are not refuted. Of course, the second approach opens the door to claims of waiver and diverts the jury's attention from the merits of the case properly before it, which plays into the hands of the misbehaving lawyer.\textsuperscript{42}

Many instances of courtroom misconduct take the form of improper assertions launched out of the blue during jury arguments,\textsuperscript{43} while the victimized lawyer is absorbed with taking notes on the adversary's argument and is continuously revising his own in order to respond effectively. Under these circumstances, counsel may well be caught by surprise so that the objection-\textit{cum}-assignment-and-request-for-admonition litany is imperfectly articulated.\textsuperscript{44} Also, the victimized lawyer's tactical forensic considerations may counsel a restrained approach, lest the jury be irritated or the improper accusations emphasized.\textsuperscript{45}

Assuming the victimized lawyer does everything right procedurally, the appellate court may still decide that the error was not prejudicial.\textsuperscript{46}

\textsuperscript{41} E.g., Hendler, 63 Cal. 2d at 143-44 n.1, 403 P.2d at 722-23 n.1, 45 Cal. Rptr. at 314-15 n.1. There, the condemnor's counsel, among other things, falsely accused the condemnee of speculating in condemnation lawsuits, whatever that means. \textit{Id.} How can trial counsel effectively deal with such a charge when there is no longer an opportunity to present evidence that would dispel it, or indeed any evidence at all? \textit{See supra} note 13 and accompanying text.

\textsuperscript{42} See \textit{supra} note 40.

\textsuperscript{43} See, e.g., Hendler, 63 Cal. 2d at 143 & n.1, 403 P.2d at 722 & n.1, 45 Cal. Rptr. at 314 & n.1.

\textsuperscript{44} "The victim's attorney must be agile in trying to protect his client and his record. Sometimes the professional oversight of failing to object and to observe the formality of requesting an instruction that misconduct be disregarded appears more serious than the misconduct." 1 RAYMOND G. STANBURY, CALIFORNIA TRIAL AND APPELLATE PRACTICE § 561, at 604 (1958).

\textsuperscript{45} This gives rise to a most difficult matter of litigation strategy. Having been an appellate lawyer for over two decades, I have often participated in the time-honored exchange in which the appellate lawyer criticizes the trial lawyer for not making as good a record on appeal as is desirable, while the trial lawyer criticizes the appellate lawyer for an unrealistic view of the trial process, and explains in vivid language a trial advocate's need for flexibility that is sensitive to the perceived courtroom dynamics of the moment. Both sides to this timeless argument have meritorious points, but appellate judges generally tend to insist on a clear record even if that is unrealistic in the context of persuasion of the trier of fact. \textit{C'est la vie}. That does not, however, justify an undue judicial tolerance of misconduct.

\textsuperscript{46} The better approach, however, was voiced in \textit{Gee v. Fong Loy}, where the court concluded that the "harmless error" doctrine did not apply in cases of this type, and "the appellate courts should not be called upon to spread it, like 'a mantle of sweet charity,' over intentional acts of misconduct." 88 Cal. App. 627, 647, 264 P.2d 564, 572 (1928).

It is indeed difficult to see why the miscreant should be entitled to the benefit of speculation as to the extent of the harm inflicted by his or her improper behavior. \textit{See} Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin, 283 U.S. 520, 521-22 (1931) (refusing to speculate on effect of counsel's misconduct on verdict and holding "no verdict can be permitted to stand which is
When the court does so by an unpublished opinion—which is increasingly "par for the course"—no one outside the parties and their lawyers even knows that the misconduct occurred.47

These courtroom improprieties are tolerated by the bench not because California courts favor misconduct, but because they rationalize away the immorality of their approach for the sake of preferred outcomes and case dispositions—usually affirmances which avoid retrials.49 These pragmatic considerations are evidently considered to be of higher priority than effective enforcement of ethical trial lawyer conduct.

There are two additional judicial justifications for this approach. First, requiring the victimized lawyer to seek a prompt jury admonition to disregard the improper statements is likely to prevent repetition of the misconduct.51 Also, the courts are concerned that a client with a meritorious case should not suffer because of his lawyer's behavior.52

But these justifications do not withstand analysis. In many cases, the misconduct permeates the proceedings, or is the centerpiece of jury arguments, so that one has to view it as consciously pursued trial strategy rather than a lapse in proper behavior occurring in the heat of the

47. CAL. CT. R. 976 (West 1981) (rules for publication of appellate opinions). Since the inception of the non-publication practice in the mid-1960s, see Gideon Kanner, The Unpublished Appellate Opinion: Friend or Foe?, 48 CAL. ST. B.J. 386, 388 (1973), the incidence of unpublished opinions has soared, so that by now most court of appeal opinions do not appear either in the official court reporters or in the electronic data bases, such as Lexis or Westlaw. See CAL. CT. R. 976(b) (court of appeal decisions presumed unpublishable).


49. The California Supreme Court has left no doubt that considerations of judicially preferred trial outcomes are an appropriate factor in the judicial calculus employed in the decision whether to affirm or reverse. See Sabella, 70 Cal. 2d at 320-21, 449 P.2d at 755-56, 74 Cal. Rptr. at 539-40. See id. (affirming lower court).

50. Id. at 320, 449 P.2d at 755, 74 Cal. Rptr. at 539. It must be noted, however, that in Sabella the aggrieved defense counsel objected to no avail. See id. at 322-24 n.1, 449 P.2d at 756-58 n.1, 74 Cal. Rptr. at 540-42 n.1 (Traynor, C.J., dissenting). Still, the supreme court refused to reverse the judgment, suggesting that the objections were directed to only one instance of misconduct and this was not enough. Id. at 319, 449 P.2d at 754, 74 Cal. Rptr. at 538.

51. Id. at 321, 449 P.2d at 756, 74 Cal. Rptr. at 540.

52. For example, in Sabella the court noted that the law firm whose member engaged in misconduct in that case was also involved in similar misconduct in two other cases. Id. at 321 n.9, 449 P.2d at 756 n.9, 74 Cal. Rptr. at 540 n.9. Yet, of the three cases, two were affirmed on
battle. Such behavior should be interdicted on principle, not rewarded
with affirmances. But the prevailing California rule, however parsed, ef-
effectively rewards these improprieties.

For example, misconduct is often unleashed as an ambush in the
midst of jury arguments. 54 When that happens, the harm is done then
and there, cannot be addressed by additional evidence, and is not likely
to be undone by an admonition to disregard it. By then the parties’
presentations on the merits are concluded—and at times so is a substan-
tial part of the victimized party’s summation—and little, if anything, can
be done by way of re-presenting the case 55 to dispel or seriously mitigate
the prejudice engendered by the improper statements. My favorite simile
on this point is that this kind of misconduct is tantamount to the guilty
lawyer turning a skunk loose in the courtroom, with adverse counsel
lucky if this event is followed by the judge’s admonition that the jurors
pay no attention to the smell. Experienced lawyers and sensible people
generally understand that in forensic combat, just as in a physical one, a
single underhanded dagger thrust can be just as lethal as repeated blows
with a blunt instrument. Neither situation lends itself to being cured
with Band-Aids applied after the fact.

The courts’ justification for their equivocal approach to misconduct
as being based on concern for the misbehaving lawyer’s client who, it is
said, should not suffer for the lawyer’s transgressions is equally uncon-

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appeal. Id. at 321, 449 P.2d at 756, 74 Cal. Rptr. at 540 (affirming lower court); Horn, 61 Cal.
d at 611, 394 P.2d at 566, 39 Cal. Rptr. at 726 (same); Love v. Wolf, 226 Cal. App. 2d 378,
404, 38 Cal. Rptr. 183, 199 (1964) (reversing lower court). If those results reflect the odds
facing a California trial lawyer contemplating misconduct tactics, the cynic might well be
justified in observing that “two out of three ain’t bad.”

As is amply illustrated by the cases cited, the victimized lawyer’s plea to the trial judge
to interdict the misconduct, often not only fails to achieve the requested admonition and
whatever theoretical benefits are supposed to flow from it, but on the contrary tends to pro-
duce either express approval of the improper assertions, or an “admonition” that is so luke-
warm and equivocal as to be tantamount to a de facto depiction of the properly objecting
lawyer as an obstructionist. See supra notes 5, 13, 15, 16, 22 & 40 and accompanying text.

54. See, e.g., Hendler, 63 Cal. 2d at 143 & n.1, 403 P.2d at 722 & n.1, 45 Cal. Rptr. at 314
& n.1 (attorney personally attacked opposing party during jury argument); Burbank Genera-
tors, 2d Civ. No. 40197, slip op. at 3–4 (attorney made improper appeal to jurors as taxpayers).

55. As all experienced lawyers and judges well know, each side to a properly presented
case has a “theme” in mind, which the advocates use in an effort to convince the trier of fact of
the merits of their respective contentions. Getting into a position to do so is a painstaking
process in which lawyers try to introduce and arrange evidentiary bits and pieces into a coher-
ent and persuasive image of the facts in controversy, which they then hope the jury will accept
after hearing the summation. However, when the misbehaving lawyer unleashes entirely inap-
propriate factual or emotional considerations in the midst of that process of persuasion—after
all evidence is in and the painstakingly built-up “theme” cannot be reconstructed anew—it is
unrealistic to suggest that a few restrained, if not equivocal, words from the bench are likely to
undo the harm.
This argument betrays something less than complete impartiality on the part of the courts espousing it. After all, are not both sides to a lawsuit entitled to a fair trial? It is difficult to see why the ethical lawyer's client should receive a lesser measure of judicial concern over being fairly treated than the misbehaving counsel's client. As Chief Justice Traynor put it in his dissent in \textit{Sabella v. Southern Pacific Co.}:\(^{57}\) "The right to a fair trial includes the right to an impartial trier of fact and the correlative right to a trial free of appeals to passion and prejudice."\(^{58}\) That right, one would think, applies equally to both parties in the lawsuit.

California courts refuse to grant sanctions as a matter of decisional law,\(^{59}\) taking the position that absent statutory authority such decisions "may imperil the independence of the bar."\(^{60}\) \textit{Bauguess v. Paine}\(^{61}\) held that the only remedy for misbehavior is to hold the offending individual in contempt of court—a "remedy" totally useless in trial misconduct cases where the behavior, though occasionally outrageous \textit{vis-à-vis} the actor's opponent, does not usually reach the level of interference with the proceedings or defiance of court orders that would justify a finding of contempt.\(^{63}\)

In any event, if courts are indeed concerned with fairness to clients, the misbehaving lawyers who caused the financial burdens of litigational inefficiencies should bear them. These burdens should not be borne by their clients, and certainly not by their victims.\(^{64}\)

\(^{56}\) \textit{Sabella}, 70 Cal. 2d at 321, 449 P.2d at 756, 74 Cal. Rptr. at 540.


\(^{58}\) \textit{Id.} at 326, 449 P.2d at 759, 74 Cal. Rptr. at 543 (Traynor, C.J., dissenting).

\(^{59}\) \textit{See} \textit{Bauguess v. Paine}, 22 Cal. 3d 626, 586 P.2d 942, 150 Cal. Rptr. 461 (1978) (explaining that California appellate courts have disallowed fee awards as sanctions under theory of inherent supervisory power, but superseded by \textit{CAL. CIV. PROC. CODE} § 128.5 (West 1982 & Supp. 1991) which provides that trial court shall have power to order party to pay attorney's fees incurred by opposing party "as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay").

\(^{60}\) \textit{Id.} at 638, 586 P.2d at 949, 150 Cal. Rptr. at 468.


\(^{62}\) \textit{See id.}


There comes a point beyond which judicial equivocations—which in the end give economic aid and comfort and thus de facto encouragement to misbehaving lawyers—must yield to elemental decency. Otherwise, the process of judicial conflict resolution cannot command public respect. That idea was well captured by Justice Friedman:

In our exalted moments we of the bench and bar are wont to describe a trial as a "search for truth." Forensic hijinks such as the present make a mockery of that description. The financial stakes in personal injury trials are high. The participants are engaged in a relentless struggle. Appellate wrist-slappings are not going to stop the unseemly stagecraft which characterizes many jury trials.\(^6\)

IV. JUDICIAL TOLERANCE AS A FACTOR ENCOURAGING RAMBO-STYLE TACTICS

To the extent recent concerns with "Rambo tactics" reflect an increase in lawyer misconduct,\(^6\) what is going on here is an interplay of incentives and disincentives. When unethical conduct is not interdicted in the courtroom, and is de facto treated no worse than proper behavior, it should not be surprising that the former displaces the latter as the prevailing norm. High-minded, abstract exhortations in appellate opinions are not likely to make many converts among lawyers predisposed to such tactics, when those opinions simultaneously affirm the wrongdoers' lucrative victories.\(^6\) What is at stake is money—lots of it. Recent years have seen a dramatic escalation in the stakes involved in many lawsuits. Seven-figure verdicts are now common.\(^6\) It is therefore unrealistic to


\(^6\) But see Brewer & Majorie, supra note 2, at 841-44, where the authors argue that lamentations about the decline in professionalism among lawyers are hardly new. It does give one pause to reflect on the possibility that what we are at the moment deploring as Rambo litigation are the "good old days" for the next generation of lawyers.

\(^6\) See Sabella v. Southern Pac. Co., 70 Cal. 2d 311, 317 n.4, 449 P.2d 750, 753 n.4, 74 Cal. Rptr. 534, 537 n.4, cert. denied, 395 U.S. 960 (1969) (noting that members of personal injury bar have written books "suggesting a variety of somewhat deceptive means of eliciting sympathy for litigants appearing before a jury. Such tactics are not a part of the repertoire of the ethical professional man." (citations omitted)).

In spite of such pieties, the widely reported upsurge in Rambo litigation seems to confirm the pessimistic view that, increasingly, lawyers would just as soon forego the appellation of "ethical professional" men and women and take the money instead.

\(^6\) These days, a million dollars may not be what it was when the California Supreme Court decided Horn and Sabella. Still, paraphrasing the bon mot of the late Senator Everett
assume that misbehaving lawyers will mend their ways when the bottom line of the opinion in which their conduct is in issue, is in fact a bankable victory, albeit one accompanied by a toothless admonition to go and sin no more.\textsuperscript{69}

The primary moral blame for courtroom excesses must, of course, be placed squarely on the misbehaving lawyers. That, however, is not quite the end of the story. The name of the game is litigation. Lawyer misconduct of this type takes place in courtrooms which are the domain of judges. Judges formulate and administer the rules by which litigation is conducted. Judges control litigation and set the tone and norms of acceptable courtroom behavior. They are the one branch of a tri-partite government that can interdict misconduct within their own domain anytime they choose.\textsuperscript{70} But all too often they simply do not.\textsuperscript{71}

Lawyers are partisan and have large stakes in the outcome of litigation. Thus, while it may be deplorable, it is only to be expected that some of them will succumb to the temptation to cut corners. That is why we have rules governing lawyers' conduct.\textsuperscript{72} Judges, on the other hand, are supposed to be neutral and committed to nonpartisan public interest. They are the government officials charged with the administration of fair, even-handed justice, and their job is to enforce the rules. It is therefore indefensible for a judge to wash his or her hands of the problem, let the litigation process seek its lowest tolerable level, and then say—as \textit{de facto}

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Dirksen, a million here, a million there, and pretty soon you're talkin' real money. Allan Sloan, \textit{Anchor Savings Bank Deal with FDIC Leaves Much to Be Desired}, WASH. POST, Apr. 2, 1991, at D3. Even in these post-inflationary days, astonishingly large sums are commonly obtainable through the judicial process, and once obtained, they can set one up for life. Thus, the temptations to engage in improper conduct in order to secure victory, as well as the opportunity to yield to these temptations, are considerable and widespread.

\textsuperscript{69} See \textit{Sabella}, 70 Cal. 2d at 321, 449 P.2d at 756, 74 Cal. Rptr. at 540.

\textsuperscript{70} Many judge-made substantive rules, particularly in the law of torts, unequivocally demand and impose with a vengeance, reasonable, good faith conduct on lay members of society. In this context, it is simply absurd to suggest that those same judges are somehow incapable of effectively imposing similarly high-minded standards of behavior on "officers of the court" intimately involved in the transaction of essential judicial business in their own courtrooms.

\textsuperscript{71} See, e.g., \textit{Sabella}, 70 Cal. 2d at 322-24 n.1, 449 P.2d at 756 n.1, 74 Cal. Rptr. at 540 n.1 (Traynor, C.J., dissenting) (setting out portions of transcript that make clear ineffectiveness of trial judge who frequently did not even bother to rule on aggrieved lawyer's objections).

Adding insult to injury, the \textit{Sabella} majority stated "a [trial] court should on its own initiative intercede to prevent potentially prejudicial conduct of counsel. Such action here, directed either at counsel or to the jury, not only might have mitigated the prejudice here alleged, but it would have enhanced the dignity and demeanor of the proceedings." \textit{Id.} at 321 n.8, 449 P.2d at 756 n.8, 74 Cal. Rptr. at 540 n.8. Of course, the trial court did no such thing, but the judgment was affirmed nevertheless.

\textsuperscript{72} See, e.g., \textit{Model Rules of Professional Conduct} (1983).
did the California Supreme Court in Sabella—that the end justifies the means. That is nothing short of a surrender to the barbarians among us.

Such concerns are not only important to the litigants, but to the courts as well. Because courts are physically the weakest branch of government, judges must scrupulously cultivate a public perception that what transpires in their courtrooms under their eyes represents a relentless quest by dedicated people for fairness and even-handed enforcement of rules by which all must live. This they must do to maintain public respect indispensable to long-term successful court operations. True, in an imperfect world this can only be an ideal to be strived for. Nonetheless, when judges cease such striving and permit self-styled Rambos to transform their temples of justice into jungle habitats, they trifle with the very foundations of their stature in society. 73

Judges ask that we pay homage to them by rising when they enter a courtroom, by addressing them as “Your Honor” and the like. A judge is the only official in the American system of government who can summarily imprison a citizen for no more than being rude in dealing with him or her. 74 To justify that level of adulation and power, judges owe us something in return. At a minimum they owe us a fair roll of the dice, untainted by tolerance of abuse, intimidation and deception. They owe us—you should pardon the expression—justice. That can be an elusive commodity at times, but Americans are entitled to the judicial best in its pursuit. If that is not the essence of the judicial function, then what is?

V. THE SYNERGISTIC EFFECTS OF SOCIAL AND POLITICAL FACTORS

To sum up, it is clear that Rambo litigation is new in name only. As a style of litigation it has been with us for some time. It does, however, appear to be more pervasive now. But whether then or now, it thrives because it is effective often enough to be attractive to lawyers who care more about results than anything else, and because judges, for all their

73. It is beyond the scope of this Article, and yet it cannot go without mention, that one visible response to the growing dissatisfaction with what goes on in the courts—of which misconduct of counsel, disregard for professional proprieties, and the alarming decline in civility are but one part—has been the explosive growth of private judging. In this process, the lawyers of parties interested in prompt and fair dispute resolution walk away from the public courts, and stipulate to the appointment of mutually agreed upon retired judges who act as referees or judges pro tem and decide cases—usually quickly and fairly. Gideon Kanner, Rent-A-Judges A Result, Not Cause, Of Court’s Problems, L.A. DAILY J., May 15, 1991, at 7.

74. See 18 U.S.C. § 401 (1988) (allowing federal court power to fine or imprison at its discretion for contempt of its authority any person for misbehavior in or near its presence, misbehavior of court officers, or disobedience to a lawful writ, process order, rule, decree or command); CAL. CIV. PROC. CODE § 1209 (West 1982 & Supp. 1991) (establishing acts or omissions which are contempts of authority of court).
familiar pieties, do not care enough about lawyers' behavior taking place in their courtrooms to interdict excesses effectively. Because of the absence of effective disincentives to improper conduct and because it has gone on for so long, misconduct has become a folkway of a significant segment of the profession, and—if the many anecdotal reports are anywhere near correct—that segment is growing. If judges really mean to do something about the problem, it will take something more on their part than an occasional sermon to civilize the litigation process.

Admittedly, many judges bear heavy burdens, particularly in busy metropolitan courts where they have to confront a tidal wave of cases presenting them with a daunting incidence of ill-prepared lawyers of doubtful competence and even more doubtful ethics, pressing their clients' causes every which way they can, as the old saying goes. Having to instruct such a “clientele” in the rudiments of civilized courtroom behavior may well be a difficult task that busy judges rightly find distasteful. Well might they ask: isn't that a job for law schools?

It certainly is—in the first instance. But as experienced teachers know all too well, it is folly to suppose that what is taught is learned, particularly when the learning is not reinforced by real world experience. For example, in the wake of the Watergate scandals, law schools instituted expanded mandatory legal ethics instruction programs, and the bar exam now includes an ethics component. The results? In 1989, forty-one percent of the California Supreme Court opinions dealt with lawyer discipline cases. In the immortal words of Archie Bunker: “I rest my case.”

One reason these shocking statistics prevail is that under the rubric of legal ethics, the California State Bar disciplinary apparatus is called upon to deal with lawyer behavior that, in addition to what we think of as legal ethical transgressions (such as conflicts of interest and commingling client funds) is generally dishonest, tortious, or even criminal, and has little to do with the “legal” qualifier. For example, when a lawyer takes a client’s money and fails to file a lawsuit which was the object of the transaction, that, one hopes, will result in bar disciplinary action.

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75. See Lisa Stansky, 5-Year Evolution of Court Caseload Causes Concern, RECORDER (San Francisco), Jan. 9, 1990, Supplement, at 4. During the following year, 1990 to 1991, attorney discipline cases accounted for 38% of California Supreme Court opinions. Gerald F. Uelmen, The Disappearing Dissenters, CAL. LAW., June 1991, at 34, 37. To give these figures some context, as recently as 1986 attorney discipline cases consumed only eight percent of the court's opinions. Id.

76. All in the Family (CBS television broadcast).

77. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (governing attorney's failure to act diligently).
Yet there is nothing "legal" about that any more than in any other transaction in which consideration is paid, but the contracted for services or goods are not forthcoming. For some strange reason this distinction is often missed. While law schools can teach legal ethics, it is difficult to understand how anyone can seriously expect law schools—graduate professional schools teaching adult college graduates—to perform the function of revealing to their students that it is wrong to steal clients' money or to commit insurance fraud. Isn't that a job for one's Mom and Dad? Or is the teaching of morals in the home a hopelessly old-fashioned concept? It must be.

The first recommendation of the Interim Report of the Committee on Civility in the Seventh Federal Judicial Circuit is that law schools implement "civility training." I do believe this recommendation appears to be serious. It does note, however, that "some legal educators say" that "[t]eaching civility may be equally, if not more, difficult than teaching ethics." Indeed. What is one to teach in such a course? That the students refrain from being obnoxious liars operating on the premise that the end justifies the means? Didn't Mom and Dad mention anything about that either?

78. I was once a percipient witness to a conversation between a colleague and a distinguished jurist, in which the latter, evidently in all seriousness, expressed a wish that law schools would step up their ethics teaching because of the alarming rise in bar disciplinary matters involving such serious transgressions as armed bank robbery and insurance fraud. The speaker, a highly regarded and intelligent man, did not seem to comprehend that by the time one is of an age to be a law student, it would seem to be a bit late in the game to teach him or her that it is wrong to rob banks. Nonetheless, ever after that conversation I have duly cautioned students not to do so. At least thus far, no word has reached me that any of my former charges has heisted a bank.

79. INTERIM REPORT, supra note 2, at 47.

80. Id.

81. It is not my intention to appear unduly flippant about this distressing problem. I note with approval the Interim Report's further recommendations that considerations of civility be a part of the Inns of Court program and—probably more importantly—of law firm training. Id. at 48-49. The American Inns of Court Foundation provides legal education and training of law students which continues throughout an attorney's career. Id. at 48. Its purpose is to promote excellence in legal advocacy and enhance individual capability. Id. at 49. Of course, the Inns of Court program is voluntary, so this may be a case of preaching to the converted. Still, stress laid on proper behavior by serious professional role models is far more likely to make an impression than lectures by professors, many of whom these days would be hard put to find the courthouse, much less really know what goes on inside.

Moreover, in the case of law firms—assuming that they are indeed committed to civility in litigation, which is not an assumption to be lightly made—these role models have the added persuasive power of being the individuals who get to pass on the trainees' salaries and partnership potential. That is pretty likely to get the trainees' attention. Of course, all that may be wishful thinking, because much of the overly aggressive behavior of young lawyers follows what they perceive to be the desire and example of their law firm peers and superiors. And there's the rub. Aggressive, contentious litigation generates contested court appearances,
Thus, neither the courts nor the law schools can look to each other for salvation in this regard. Given the all too evident lacunae of parents,\(^{82}\) it is difficult to see how these institutions can be expected to reform the basic ethical values of adults in the space of three years. And so, the job is an ongoing one—a part of the never-ending struggle. Here as elsewhere in life, Edmund Burke's observation that for evil to succeed it is only necessary that good people do nothing,\(^{83}\) holds true. A solution can only come from an interaction of the two institutions: law schools must teach the rules that govern legal ethics and proper courtroom behavior and the courts must enforce them. There is room for improvement in both institutions.\(^{84}\) But neither can rectify a quarter-century of parental and societal failures by insisting on a three-unit "civility" course in graduate school.

which generate billable hours and make it that much easier for a gung-ho young associate to hit the expected 2000+ billable hours per year. If elaboration is needed, see INTERIM REPORT, supra note 2, at 21, describing the practice of large firms that seek Rule 11 sanctions as a routine strategy in virtually every case. See ALSO Alan Abrahamson, INSURER'S SUIT WARNS LAWYERS TO WATCH BILLS, L.A. TIMES, July 1, 1991, at D1 (reporting $1.5 million settlement against law firm charged with "scorched-earth" policy in preparing insurer's cases for trial in manner generating millions of dollars in fees).

There is nothing new about lawyers from large "downtown" firms being arrogant and disdainful of their opponents. This attitude provides fertile ground for the more serious excesses that we are witnessing.

82. Mom and Dad, it would appear, have been so busy lately working hard and pursuing the good life that their lapses with regard to their offspring are manifold. Over the years, to me fell the task of instructing hundreds of young—and anything but underprivileged—adults on how to dress for court. Many thanked me privately for that, explaining that in their highly self-indulgent, informal young lifestyle, it was a rare occasion to have to select proper suits and haberdashery for an occasion of some formality, so that many of them simply did not know about the importance of business suits, appropriate shirts and ties, conservative dresses, proper grooming and similar matters of interest to lawyers appearing in court.

83. See EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS (1770).

84. I once flunked one-third of a senior class in legal ethics. It was an objective, blind-graded exam of no great difficulty. In the wake of the ensuing hue and cry, the law school administration permitted the "flunkees" to take the exam over again. But I digress. Or do I?

Nor is my experience in that regard unique. A similar incident took place at the University of California at Berkeley School of Law. See Rex Bossert, IRKED BOALT STUDENTS GET THE BETTER OF A PROFESSOR, S.F. DAILY J., Sept. 9, 1991, at 1. The students there found the teaching of legal ethics boring, and did not attend class properly. On the average, attendance was less than one-third of the class—an experience not too dissimilar to mine. Id. at 8. The students were duly warned that if they did not do the work, they would have difficulty on the exam. The warning went unheeded with predictable results: some 14% of the exam takers flunked. Id. So what did the law school administration do? You guessed it! It afforded the "flunkees" a make-up exam, and made special arrangements to let them take the bar exam in spite of their temporarily failing grades. Id. Explained Boalt Hall Dean Jesse Choper: the law school took the unusual step of permitting the re-examination because it "fails very few people." Id.

And so it goes. RES IPSA LOQUITOR.
Yet for all their common interests, there is a point at which law schools and courts diverge. Law schools can only take the horse to water, but the courts have to make the beast drink.\textsuperscript{85} It is the courts' special job to enforce the law. To the extent lawyers violate legal rules that are supposed to govern their conduct, the job winds up in judges’ laps, the same as all other law violations. That goes with the territory, and with the black robe.

An additional problem that needs to be considered is the recently hatched and widely huckstered image of the legal profession as affluent, powerful and glamorous.\textsuperscript{86} This “L.A. Law” syndrome has attracted to the law hordes of bright, aggressive, highly motivated careerists who are sometimes temperamentally, and at times, morally unfit\textsuperscript{87} for lawyers' work of truly professional caliber. Many of them enroll in law school without any formed career goals or any understanding of what lawyers do.\textsuperscript{88} To make matters worse, they are increasingly taught law by a
philosophically and ideologically oriented professorate that decries sta-

8. bility of legal rules, 89 is more interested in “changing the system” than in un-

9. understanding it, that increasingly disdains private practice, has little un-

10. derstanding of it and to an alarming extent is alienated from the main-

stream of traditional American societal and professional values. 90 This is

hardly an atmosphere tending to engender respect for the practice of law and its traditions. All these factors contribute to significant numbers of lawyers entering the profession who are not “into” the spirit of lawyering as an adversarial and occasionally tough, and yet civilized way of resolv-

91. ing disputes. The lawyer’s equivalent of the code of chivalry—the idea

that one is free to deliver hard blows but is not at liberty to strike foul ones—

is growing quaintly anachronistic.

This new mindset is to a significant extent rooted in the excesses of the 1960s when the bizarre idea of continuously ongoing social destabilization as a virtue took root, and when it somehow became ac-

ceptable, and indeed fashionable to engage in vehement verbal or even physical assault on the ideas and individuals with whom one disagrees, and to substitute invective for discourse. People influenced by such matters in their formative years are not likely to mature with an understand-

Id. at 1258.

89. If anyone thinks these observations to be hyperbolic, refer to the Journal of Legal Education, where there may be found a debate as to whether there is even such a thing as a “wrong answer” to a legal question. See Paul T. Hayden, On “Wrong” Answers in the Law School Classroom, 40 J. LEGAL EDUC. 251 (1990); Paul R. Joseph, Yes, Virginia, There Are Wrong Answers: A Reply to Professor Hayden, 40 J. LEGAL EDUC. 473 (1990); David P. Leon-

90. ard, On “Right” and “Wrong” Answers: A Reply to Professor Hayden, 40 J. LEGAL EDUC. 477 (1990). In the immortal words of the legal columnist for the New York Times, today’s law professors would rather be teaching anything but law. David Margolick, At the Bar: Conclave in Herringbone Ponders Lofty and Mundane in Legal Education’s Muddled Mission, N.Y. TIMES, Jan. 13, 1989, at B6; see also Johnson, supra note 88, at 1239 & n.30 (attributing line to Professor Jay Westbrook of University of Texas).

90. See Johnson, supra note 88, at 1238-39.

Law schools, at least elite law schools, now attempt (poorly, I believe) to educate their students in economics, political philosophy, hermeneutics, and epistemology. Perhaps we are doing a splendid job of preparing our best and brightest students to become law professors, molded in our own image. However, for the remaining stu-

91. dents something is missing, and I contend that the something may be the study of legal doctrines and legal rules beyond the first year of law school and the study of the legal profession qua legal profession.

Id. at 1239 (footnotes omitted).

91. See Berger v. United States, 295 U.S. 78, 88 (1935) (holding that misconduct of U.S. Attorney may be so gross and persistent as to call for stern rebuke, even for granting of mistrial and that U.S. Attorney has duty to refrain from improper methods meant to produce wrongful convictions as well as to use every legitimate means to bring about just ones), overruled on other grounds by Stirone v. United States, 361 U.S. 212 (1960).
ing of and commitment to self-discipline and adherence to a traditional
code of honor. Moreover, such behavior patterns, once released from
their societal Pandora's boxes and legitimized as acceptable conduct, do
not take kindly to being stuffed back in. One has to live with them for a
long time, with changes long in coming. Such changes are, of course,
beyond the courts' ability to bring about by decree, however much some
judges may have once thought that to be the case. But like it or not,
the courts like other institutions, have to contend with the end product of
it all, at least insofar as these latter-day notions of morality surface in
litigation.

Another concern, however, involves the courts more directly.
Recent years have seen an alarming decline in intellectual self-discipline
among judges, so that inconsistencies and outright conflicts in the law are
common. The gradual acceptance by both sides of the political spectrum
of freewheeling judicial activism as a legitimate method of governance,
has with the passage of time tended to load the bench with individuals
more concerned with advancement of ideological agendas than with dis-
pute resolution. The ongoing tensions between the different judicial
"wings" has by degrees led to a candid—or perhaps cynical—recognition
that the resolution of one's case may depend entirely on the identity of
the judge to whom fate has dealt the task of presiding over the litiga-

92. See Matthew O. Tobriner, Can Young Lawyers Reform Society Through the Courts?,
47 CAL. ST. B.J. 294, 297-98 (1972), in which the author, then an Associate Justice of the
California Supreme Court, called for a "social revolution" to be accomplished through the
courts.

93. In a tragicomic display, liberal jurists who only yesterday proudly marched under the
unfurled banner of judicial activism are now loudly denouncing their conservative counter-
parts for the sin of—you guessed it—judicial activism. See Raoul Berger, The Name of the
Game is "Two Can Play," L.A. TIMES, Aug. 27, 1991, at B7 (arguing that if liberals can be
"activist," so can conservatives); Judge Stephen Reinhardt, "Conservative" Rehnquist Court
Unmasks its Naked Activism, L.A. TIMES, May 7, 1991, at B7 ("A far different term from
'conservative' is needed to describe the activist right-wing majority that is currently rewriting
U.S. constitutional law in its own image."); Stuart Taylor Jr., Scalia's Views, Stylishly Ex-
pressed, Line Up With Reagan's, N.Y. TIMES, June 19, 1986, at D27 ("While conservative
critics of the Supreme Court have often assailed its 'liberal judicial activism,' Judge Scalia has
recognized that judicial activism is a tool sometimes used by conservatives as well as
liberals.").

94. Again, detailed exploration of such matters is beyond the scope of this Article, but the
fact is that conflicts in the law are endemic, so that in many areas it borders on the impossible
for a lawyer to advise a client reliably what acts need to be done, or refrained from, to conform
to "the law" that ostensibly governs the situation at hand.

Each lawyer no doubt has his or her own favorite area in which this is the case. In my
own field of substantive expertise (eminent domain and inverse condemnation) the United
States Supreme Court has conceded its own inability to articulate a set of constituent elements
produced such case loads as to render both state and federal supreme courts incapable of shaping and pruning the developing law. As a result many judges at the intermediate appellate level operate in the apparent belief that their decision-making is all but immune to supreme court review on the merits. Consequently, conflicts in the law are commonplace.

This pervasive uncertainty erodes the perception of "the law" as a set of rules to live by, and it is folly to believe that the intellectual anarchy growing by degrees within the law can neatly confine itself to penetrating various substantive, procedural, and remedial rules, but will obligingly stop at the boundaries of those that govern lawyers' behavior. Increasing, and increasingly open, judicial result-orientation engenders an attitude among lawyers that virtually anything is worth trying, because—who knows?—perhaps the particular judge before whom one appears will like the sought-for result, and will find a way to achieve it, even if, figuratively speaking, holding his or her nose. Or if not the trial judge, then perhaps the fates will be kinder on appeal.

York City, 438 U.S. 104, 124 (1978). As for the question of when such a cause of action—assuming one knows how to state it—is sufficiently "ripe" under Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), to allow the would-be plaintiff access to federal courts in an action under 42 U.S.C. § 1983 (1988), terms such as "arcane," "byzantine," "talmudic," "jesuitical," and "mindboggling" come readily to mind, and even they probably fail to do justice to the complexity, unreliability—if not outright treacherousness—of such rules as may be discerned from the bewildering and contradictory case law even by highly knowledgeable and experienced practitioners.

Those readers who have not had occasion to slog through this swamp may find an interesting introduction in Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I - A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989), which demonstrates that United States Supreme Court decisions in this field are devoid of any consistency or discernible underlying doctrine. As for the procedural aspects of that subject, see Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges Into Fruit Peddlers*, 1991 INST. ON PLANNING, ZONING & EMINENT DOMAIN 7-1.


96. Appeal in this context, does not, of course, include those situations in which lawyers take on the difficult task of trying to persuade the courts to "make new law." That is a horse of a different color. Rather, this criticism is directed at cases where lawyers seek and obtain appellate rulings that either ignore or contradict existing law, without any effort at intellectual reconciliation.

For a statistical overview of how differently different appellate judges see the law, see, for example, Gideon Kanner & Gerald F. Uelmen, *Random Assignment, Random Justice*, L.A. LAW., Feb. 1984, at 10, 12, demonstrating that in the California Court of Appeal for the Second District (Los Angeles) the most important correlation factor with regard to affirmance
Such concerns, of course, involve hotly debated substantive, philosophical and ideological matters that go far beyond the scope of this Article. Nonetheless, this factor of pervasive uncertainty in the formulation and application of the ostensibly governing rules must be kept in mind. What the misconduct of counsel problem is ultimately about is a spreading belief among lawyers that they are not really bound by the rules that are supposed to govern their conduct, and can flout them with impunity, because, when it comes right down to it, they can win in spite of the fact that "the law" ostensibly proscribes their methods. After all, bending or disregarding "the law" often works for clients whom they represent; why shouldn't it work for them too?

The irony of the present Rambo litigation problem is that its coming was predicted. In the concluding words to his dissent in Sabella v. Southern Pacific Co., Chief Justice Traynor foreshadowed the future. After noting the judicial inconsistency in guarding parties' rights by insisting on first selecting fair-minded jurors shielded from knowledge of the contested facts, and then permitting those jurors to be exposed to inadmissible and sometimes false factual assertions and improper arguments of counsel, he said:

It is a minimum propriety to guard against calculated attempts to prejudice the jury inside the courtroom, for they do violence to the substantial rights of a litigant. Still worse, they would in the long run so debase the judicial process that no one could enter a courtroom confident of a fair trial.

It is now twenty years later; welcome to Rambo litigation.

Nor was the Chief Justice alone. The argument made to the California Supreme Court in Heidi Rossi's unsuccessful petition for hearing by her appellate counsel, Edward L. Lascher, late dean of the California appellate bar, was eloquent and prescient and warrants repetition:

It is submitted that a principal reason the courts experi-
ence periodic outbreaks of the disease of misconduct is their own stout refusal to utilize any curative or preventive medicine. That, of course, is the way of diseases.

As long as those described by the late Raymond Stanbury (certainly no hothouse-flower in the courtroom) as "the buccaneers of the profession" know that the worst they are risking by such tactics is a mild (and probably unpublished) "tut-tut"—knowing that a verdict they obtain that way is impregnable against any attack except the impossible height of proving that the victim would have won otherwise—they are going to be tempted to employ misconduct as a regular weapon of advocacy. And they will yield to the temptation.

Indeed, a case may be made (however distastefully) for the proposition that they should do so. After all, the advocate's first duty is to his client, not to fairness or the dignity of the profession or anything of that sort. He must utilize all lawful means to advance his client's interest. Current decisions seem to conclude that misconduct is a lawful means unless it can be proved that, absent misconduct, the opposite result would have been reached. Therefore, any lawyer who knows that there is a reasonable possibility that his client could win even without misconduct, is acting lawfully when he fortifies that possibility by embracing misconduct.

Such is a horrifying and cynical view of an honorable profession and the state of judicial administration, but it is unmistakably coming over the horizon.100

VI. CONCLUSION

The California rule governing misconduct of counsel was never good law—certainly not law that is defensible on any basis other than the dubious proposition that the end justifies the means. It was a Faustian bargain with expediency, that de facto elevated trial lawyer misconduct, even at its most prejudicial, into a quasi-legitimate forensic technique.


In emphasizing these bits of prescience, it is not suggested that it is this judicial tolerance of misconduct that is the cause of our present predicament. Rather, this tolerance lowered the barriers so that when the more recent pressures of greater competitiveness among lawyers, greed and attendant billing pressures, to say nothing of the behavioral changes engendered by the Great American Temper Tantrum of the 1960s, impacted on the litigation process, the newly enlisted Rambos found the situation ripe for picking. But that, as Lascher noted twenty years ago, is the way of all diseases, isn't it?
But as is the case with such bargains, the time comes sooner or later when consideration must be paid—with interest. The tragedy is that because of the time lag that is inherent in such matters, it is not the lawyers, judges and clients who nolens volens entered into the bargain that must pay the price. Rather, the succeeding generation gets stuck with the tab for the free lunch, and must face the hard fact that the bargain, apart from being immoral, produces increasingly intolerable side effects. That is usually the case with institutional arrangements that contradict basic notions of morality subscribed to by a society. There often are good, pragmatic reasons underlying ethical rules, but that may not be fully apparent until the rules are discarded and a lapse of time follows.

Overruling Horn v. Atchison, Topeka & Santa Fe Railway Co. 101 and Sabella v. Southern Pacific Co., 102 would be a desirable step toward a solution to the problem of lawyer misconduct. As a minimum, a rule should be imposed shifting the burden of defending the prejudicial aspects vel non of the misconduct to the party who has been its beneficiary in the trial court.103

A model for this conceptual approach already exists in Chapman v. California 104 which, obverting the usual allocation of burdens in demonstrating prejudice on appeal, requires that in cases of constitutional violations, the respondent is required to demonstrate freedom from prejudice.105 There is no principled reason why such a modest step should not be taken at least in cases in which serious misconduct of counsel is judicially acknowledged. If nothing else, that would send a signal to the growing battalions of legal Rambos that the courts will no longer acquiesce in their style. In any event, the Horn rule—that outrageous misconduct of counsel, even if prejudicial, is not even entitled to consideration on appeal unless the victim first goes through the ineffective ceremony of objecting, assigning the misconduct as misconduct, and requesting a jury admonition106—should be recognized for what it is: an

103. After all, it is a California maxim of jurisprudence that he who takes the benefit must bear the burden. CAL. CIV. CODE § 3521 (West 1970 & Supp. 1991).
104. 386 U.S. 18 (1967).
105. Id. at 22-24.
106. Horn, 61 Cal. 2d at 610, 394 P.2d at 565, 39 Cal. Rptr. at 725. This is reminiscent of the discarded practice of lawyers having to take exception to trial courts' rulings or be deemed to have waived their points. Compare CAL. CIV. PROC. CODE § 647 (West 1976 & Supp. 1991) (party need only object and "all other orders, rulings, actions or decisions are deemed to have been excepted to") with ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 77-78 (1970) ("Ordinarily a litigant must alert the trial court to the error and set forth the grounds of
embarrassment to California’s judiciary. It warrants a swift trip to the legal trash heap for recycling into something, anything, better. There is something undeniably shocking about a rule of law that recognizes the occurrence of serious and prejudicial wrongdoing, imposes no curative or even ameliorative duties on the wrongdoer, but does impose them—with a vengeance—on the victim. There has got to be something terribly wrong with that.

Judicial concerns about differentiating between lawyers’ conduct and clients’ interest should not be ignored. To begin with, the barrier to courts acting in this area, established by Bauguess v. Paine, has been breached by section 575.2(b) of the California Civil Procedure Code which expresses a legislative intent that any sanctions imposed in the context of failure to comply with local court rules be imposed on the lawyer, and not adversely affect the rights of the client. Cases applying this section make it clear that the interests of the misbehaving lawyer and the innocent client can be judicially separated, while still making the lawyers toe the line. While this statute is limited to violations of local court rules, there is no reason why courts cannot take the legislative policy determination that a client should not suffer for a lawyer’s transgressions as a basis for fashioning decisional rules accordingly. But in any event, a moral judgment has to be made somewhere, and if it comes down to a contest between John Rambo on one side, and Atticus Finch on the other, it is absurd to suggest that the former is free to march into morally uninhibited litigational battle by driving his client ahead of him as a shield, while the latter (and his client) must just stand

his objection.

107. See Horn, 61 Cal. 2d at 610, 394 P.2d at 565, 39 Cal. Rptr. at 725. This harsh assessment is justified by the cases discussed ante, which demonstrate that the vaunted “admonition”—far from possessing the talismanic powers attributed to it by the reviewing courts—is far too often either de facto not available at all, or where available is ineffective as a cure.


111. See Bragg, 183 Cal. App. 3d at 1026, 228 Cal. Rptr. at 581.


there and take it. That is neither good law nor good ethics. Nor is it efficient in the long run, as we are learning.

The idea of efficiency that is supposed to flow from avoidance of retrials must also be considered. Considerations of efficiency must take into account the proliferation of litigation inspired by "Rambo-style" tactics and the widely held belief that one does not have to follow the rules to prevail. Indeed, shifting the cost of misconduct onto the lawyers prone to engage in it would likely turn the concept of efficiency to constructive use by providing economic disincentives for improper behavior. Moreover, there are bigger fish frying here. In a society that was first persuaded to embrace governance by a principled "rule of law" as its salvation, and is now increasingly told that the law is too busy to act in accordance with elemental decency, this adds to accumulating social dynamite. The public is growing disenchanted with the operation of the

114. If efficiency is all that important, we should perhaps take Ambrose Bierce at his word, and consider replacing the appellate process with an impeccably honest roll of the dice. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 17 (1911) (defining "appeal" as "to put the dice into the box for another throw"). At least in some areas of the law that might even be an improvement. See supra note 94.

115. I am not so naive as to envision a popular political revolt inspired by too many "Rambo-style" lawyers running loose in the courthouse. My concerns center on the fact that perceptions and ideas not only have consequences, but also synergistic and unanticipated effects. It is not all that difficult to envision a popular politician taking to the stump and fortifying his or her election chances with an occasional bit of public handwringing that it is getting so that an honest person cannot get a fair hearing in our courts, while convicted murderers get dozens. Need I go on?

We may have put too many eggs into our legal basket. The courts have taken on too much, and the people have been conditioned to expect too much from them. The debate about the courts, their composition, functioning, and proper role has grown shrill, with no abatement of intensity in sight. The same is true of the intramural tensions among judges, particularly as highlighted by the increasingly sharp tone of majority and dissenting opinions. See Interim Report, supra note 2, at 39-40 (major source of discord among judges is "unnecessary lecturing" and "personal criticism" of trial judges by circuit judges who sometimes "fail[] to recognize that professionals may disagree without sarcasm"); Gilbert, supra note 2 (discussing incivility among judges).

The operation of the criminal courts on the edge of collapse in the large drug-infested cities, and the incidence of violent crime with the law's all too evident inability to control it, are also factors with an unknown but indisputably corrosive effect. How these factors will combine with other public concerns about the law, and other concerns (such as, for example, a truly serious economic downturn), or what political forces may emerge to capitalize on such concerns, are things not known to me.

But all that certainly should inspire some hard, and hard-headed, thinking about the law's future. It should also inspire within the legal profession a healthy concern about husbanding its shrinking public goodwill. The profession is increasingly viewed as parasitic and dragging down American productiveness, competitiveness and efficiency, and at worst as a bunch of unprincipled shysters eager to lay off any misfortune on the nearest solvent bystander. See Julie Johnson & Ratu Kamlani, Do We Have Too Many Lawyers?, TIME, Aug. 26, 1991, at 54; Michael Kinsley, TRB From Washington: Quayle's Case, NEW REPUBLIC, Sept. 9, 1991, at 4,
legal system as it is. The spreading perception of "the law" as crudely rapacious or an instrument of ideology, rather than the vaunted "search for truth" in the cause of neutral dispute resolution, is not likely to do the beleaguered courts any good, to say nothing of the legal profession. Thus, any accounting of costs must include the demoralization costs suffered when judicial institutions ostensibly dedicated to fairness actually operate with crude unfairness.

In the meantime, what is happening in the courts is the ongoing operation of a variant of Gresham's law.\textsuperscript{116} When lawyers' misconduct exacts no meaningful disincentives and indeed enjoys the same currency in the courtroom as ethical behavior, we should not act surprised when by degrees the former replaces the latter, and deception, intimidation and nastiness become the \textit{de facto} behavioral standards of the mainstream of a once great profession. "The fact that 'Rambo' lawyers get results, no matter what the personal cost in lawyer relations, begets more 'Rambos' as client expectations and loyalties change."\textsuperscript{117}

\textsuperscript{4} Even if reality does not justify these perceptions, I demur. In politics, public perceptions are the ultimate reality.

\textsuperscript{116} Gresham's law is a law of economics which holds that where intrinsically valuable and base currencies receive the same acceptance, the bad currency displaces the good. 5 New \textsc{Encyclopaedia Brittanica} 489 (15th ed. 1988).

\textsuperscript{117} \textsc{Interim Report}, supra note 2, at 13.