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Introduction: The Bounds of Advocacy

by

Robert H. Aronson†

I was asked, as Reporter for the American Academy of Matrimonial Lawyers' Bounds of Advocacy, to provide an Introduction to the substantive issues discussed by members of the Committee in succeeding articles. This article will therefore "set the stage" by indicating the need for the Bounds of Advocacy, the charge to the Committee, the process by which the Standards and Comments were drafted, re-drafted, and then re-drafted again, and the appropriate scope, purpose and use of the Standards and Comments.

I. Commencement of the Project

The Bounds of Advocacy Committee was appointed by then Academy President James T. Friedman in November, 1987. His initial thought was that it should be entitled, *The Bounds of Advocacy, a Guide to Fair Play in Divorce*, and that since potential readers would likely include lawyers, judges, litigants, the media and the public at large, the writing style should not be legalistic.¹ In his letter to the drafting committee President Friedman stated:

Our practice sometimes demands even higher standards in certain situations than the Code of Professional Conduct because of the uniqueness of our practice, and the ironic conflict between the adversary system and a client's best interests. . . . The publication should increase the visibility of the Academy and should govern the conduct of Academy Fellows. Academy applicants will be forewarned of the higher degree of professionalism that will be expected of them should they become Fellows.²

After several meetings in early 1988, the Committee spent a number of months deciding on appropriate topics, grouping them into categories, and formulating questions within each of the categories. During the rest of 1988 and early 1989, the Committee drafted and refined questionnaires which were sent to the over 1200 Academy members in May, 1989. They provided room for fairly

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¹ Personal letter of James T. Friedman on file in the office of Robert Aronson.

² Id.

detailed comments and responses on a diverse array of issues. The Academy members were divided into sixths, with a different questionnaire sent to each group. In late May, 1989, the Committee's Chair, Steve Sessums, forwarded to me: (1) the originals of all responses to the questionnaires; (2) summaries from each Committee member of the responses and issues raised concerning the subject matter covered in his or her group of questions; and (3) a suggested format for the final product. Following a meeting of the entire Committee, I agreed to take the preliminary drafts of the issues and recommendations and attempt to draw them together in a comprehensive statement and consistent style.

II. Evolutionary Process for Drafting of Bounds of Advocacy

I started with the section on Conflict of Interest and circulated a sample draft to ensure that I understood what the Committee envisioned for the scope and style before attempting additional sections. In addition to the chapter draft, I enclosed materials to enable the Committee to see my drafting strategy and methodology. First, I reviewed the returned questionnaires from Academy members and the summaries by members of the Committee, making a list of all of the issues raised, but concentrating on conflict of interest. I then made a more detailed listing of conflicts issues raised by Academy members and merged the analyses of conflicts issues that Committee members had drafted. Finally, I organized the material into descriptive topic headings, from which I drafted the chapter. This method was adopted to ensure inclusion of issues raised by Academy members in the questionnaires and Committee members in their summaries and analyses. The same procedure was followed for the first drafts of all subsequent chapters or sections.

The Committee suggested substantial changes in the draft. The first Conflicts draft was 15 pages and contained 37 footnotes that included references to codes of ethics, cases, treatises and law review articles. The Committee's comments included: "style is too scholarly"; "Too fluffy, not pragmatically oriented"; "Nobody will read"; "Do not need to summarize majority versus minority views"; and "Citations should be reserved for those areas in which there is possible conflict among the authoritative statements of professional ethics, or on which we are taking a position in conflict with one of

these.” There were also a number of substantive suggestions and changes proposed by the Committee, for example: “an attorney should never have a sexual relationship with his client,” “no attorney should cooperate, promote or encourage any client to intentionally go meet with another lawyer so they would be disqualified from representing their spouse,” and “there is a duty to children which is as important as the duty to our client which the attorney has an obligation to balance.”

In addition, the Committee determined that a number of conventions should be employed in drafting the Standards. For example, the ethical codes in different jurisdictions differ from the ABA Model Code of Professional Responsibility (CPR) and Model Rules of Professional Conduct (RPC), and from each other. It would be virtually impossible to address all of the differences and variations. Over 30 states have adopted some form of the RPC, with the remainder retaining either the form or substance of the CPR.³ The Committee decided to use the official, ABA version of the RPC, while pointing out areas in which there is significant variation among the states.

The next draft of the Conflicts section went from 15 pages and 37 footnotes to 10 pages and 21 footnotes. An edited draft (now 9 pages and 17 footnotes⁴) was reviewed by the Committee in early 1990, and was again substantially revised. This process of drafts by me, review by the Committee, re-drafts, and additional consideration by the Committee, was repeated for the remaining sections until all of the issues had been addressed.

The Committee met in July and September, 1990 to review re-drafts of all the sections, and incorporated the suggestions and changes from the various meetings. The re-drafts were then merged into a single, coherent whole. At the September meeting, the Committee revised the new draft and approved it for distribution to a limited number of family law experts (including the AAML Executive Committee, members of the Board, and a few highly regarded law professors).

At several meetings in late 1990 and early 1991, the Bounds of

³ California, of course, has to do everything differently, and has its own numbering system and even some different substance! *Compare, e.g.*, Rules of Professional Conduct of the State Bar of California Rule 3-310 (1988) with Model Rules of Professional Conduct Rule 1.7, 1.8(f), 1.8(g), 1.9 (1983).

⁴ The final draft of the Conflicts section is a trim 4 pages and 9 footnotes.

Advocacy Committee considered every comment in every letter returned by the family law experts, and the draft was revised in light of those comments. The re-draft of the entire Standards, incorporating all of the revisions, was considered and approved (with the addition of a number of suggested language changes) by the AAML Executive Committee in February, 1991. The substantive provisions were approved by the Board of Governors in March, and the final version, including all minor editing and language changes, was printed in the Fall, 1991.

III. Why Another Code of Ethics?

Since every state has an ethics code modeled on the ABA Code of Professional Responsibility or Rules of Professional Conduct, the first question that might be asked is "Why did the AAML believe it was necessary or desirable to promulgate the Bounds of Advocacy?" Three primary rationales underlay the determination to draft the Standards: (A) The importance of providing guidance for attorneys to practice at an ethical level well above the minimum necessary to avoid discipline; (B) the need to address ethical issues unique, or particularly relevant, to family law practice; and (C) the inherent value in evoking reconsideration and discussion of ethical issues by family law attorneys.

(A) *The Need for Aspirational Guidelines.*

Canon 7 of the ABA Code of Professional Responsibility (CPR) provides: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Ethical Consideration 7-1 indicates that the "bounds of the law" includes "Disciplinary Rules and enforceable professional regulations." Many courts, bar disciplinary committees, and individual lawyers interpreted the CPR to require that an attorney do everything the client desired, unless the conduct would violate the law.⁵ Those attorneys who believed that certain desired conduct was harsh, ethically distasteful, or unnecessarily harmful to opposing parties, counsel, or other persons under-

⁵ See William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1085 (1988) (explaining and criticizing this "Libertarian" model of lawyering). *But see* Model Rules of Professional Conduct Rule 1.2 cmt. (1983) (attorneys not required to do everything the client directs); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1988).

stood the CPR to require that they must nonetheless defer to their clients' directives.

Partly in response to the overzealous representation occasioned by the CPR and overly narrow interpretations of the "bounds of the law," the ABA Rules of Professional Conduct ("RPC") omit the zealous representation language. The Scope section of the Preamble to the RPC provides that Rules cast in the terms "shall" or "shall not" are imperatives and

define the proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.⁶

The Scope section further states, however, that the Rules do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."⁷ One of the primary purposes of the AAML Standards of Conduct is to provide some guidance concerning moral and ethical considerations not fully explored or regulated in the CPR or RPC.

In recent years, an increasing number of individual lawyers and associations of lawyers have observed that a substantial gap exists between the minimum level of ethical conduct mandated by the RPC, and the much greater level of professionalism to which all attorneys should aspire.⁸ It has been noted that some attorneys have ignored the Preamble's caution that the Rules do not "exhaust the moral and ethical considerations" relevant to the practice of law at the highest level. Local and state bar associations, along with a number of state and federal courts, have adopted codes of professionalism in an attempt to establish a level of ethical practice well above the minimum necessary to avoid discipline.⁹

The effort to provide guidance concerning elevation of the ethi-

⁶ Model Rules of Professional Conduct, Preamble (1983).

⁷ *Id.*

⁸ See, e.g., Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 Ohio St. L.J. 551, 579 (1991); William C. Heffernan, *The Moral Accountability of Advocates*, 61 Notre Dame L. Rev. 36, 47 (1986).

⁹ See, e.g., *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n.*, 121 F.R.D. 284 (N.D. Tex. 1988) (federal court adopted Dallas Bar guidelines as court rules). See also Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 Md. L. Rev. 945, 948 (1991) ("...Over twenty-six state and at least thirty-six local

cal practice of matrimonial law beyond the minimum necessary to avoid professional discipline is particularly appropriate for an organization whose creed is: "To encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be preserved."¹⁰

(B) *The Unique Nature of Family Law.*

The RPC, of necessity, are addressed to all lawyers, regardless of the nature of their practice. Although some Rules deal with specific issues relating to criminal defense lawyers or prosecutors or other government attorneys, the general applicability to all lawyers requires that issues relevant only to a specific area of practice cannot be dealt with in detail, or cannot be addressed at all. Further, as stated in the Preamble:

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.¹¹

The RPC attempt to provide a framework for resolving such conflicts, but, in an effort to provide rules of general applicability, the resolution of conflicting responsibilities may not always be most appropriate for a particular area of practice. Experience with the Rules has led many Fellows of the American Academy of Matrimonial Lawyers to observe instances of insufficient guidance or apparently undesirable balancing of the family law attorney's responsibilities in commonly encountered situations.¹² It was therefore important for the Academy to address issues specifically relevant to family law attorneys and provide guidance in resolving some of the most difficult conflicts between attorneys' obligations to their clients, other persons affected by family law disputes, and their own desire to see that justice is achieved.

In many ways, family law practice is unlike any other area of legal representation. Family law disputes often result in a volatile

bar associations have conducted studies on professionalism or adopted codes of professional conduct").

¹⁰ Creed, American Academy of Matrimonial Lawyers (established in 1962).

¹¹ ABA Model Rules of Professional Conduct, Preamble (1983).

¹² See Leonard L. Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 Fam. L.Q. 461 (1984).

and emotional atmosphere. It is extremely difficult for family law attorneys to adequately represent the interests of their clients without addressing the interests of other members of the clients' families.¹³ Unlike most other disputes in which the parties may harbor a substantial amount of animosity, resentment or unresolved personal issues, the parties in matrimonial disputes may be required to interact for years to come. In addition, the responses to the questionnaires sent to Academy Fellows revealed that many matrimonial lawyers believe there should be greater recognition of their obligation to consider the best interests of children, regardless of which family member they may represent in a particular case. The questionnaire responses indicated that the harm done to children in an acrimonious family dispute was seen as the most significant problem for which there is insufficient guidance in the RPC.

One of the most troubling conflict issues in family law relates to the obligations a lawyer may owe to children. Although the substantive law in most jurisdictions concerning custody, abuse, and termination of parental rights is premised upon the "best interests of the child," the ethical codes provide little (or contradictory) guidance for attorneys whose client's expressed wishes or interests are in direct conflict with the well-being of one or more children. Examples of this dilemma, repeatedly raised by members of the Academy, include:

- (1) The client asks his attorney to contest his wife's custody of the children even though he concedes that his spouse is an effective parent. He wants to do so either to gain leverage with respect to the financial issues or simply out of spite.
- (2) The client asks his attorney to vigorously attempt to gain custody of the children. While engaged in efforts on the client's behalf, the attorney becomes convinced (or the client may even admit) that the client has abused one of the children. Or the client is the wife, and may herself be a good parent, but her live-in lover has abused one of the children.
- (3) The client indicates to her attorney that she is angry and vindictive toward her spouse and wants the attorney to cause as much grief, discomfort and cost to her spouse as is humanly possible. Or the client instructs her attorney to interview one or more children

¹³ See, e.g., Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687 (1985).

for the purpose of confirming allegations of poor parenting on the part of the husband.

Some courses of action are clearly consistent with the attorney's obligation under the RPC or CPR to promote the interests of his client. First, although the client has the right to determine the "objectives of representation," the attorney may limit the objectives (with the client's consent) and the means by which the objectives are to be pursued (after consultation with the client).¹⁴ Some dissension and bad feelings can be avoided by a frank discussion with the client at the outset of the representation concerning how the attorney handles cases such as the client's, including what the attorney will and will not do with respect to vindictive conduct or actions likely to adversely affect the children's interests. Although not essential, a letter to the client confirming the understanding, before specific issues or requests arise, is advisable. To the extent that the client is unwilling to accept any limitations on objectives or means, the attorney should consider declining the representation.

If such a discussion did not occur, or the client despite any understanding subsequently asks the attorney to engage in conduct the attorney believes to be imprudent or morally repugnant, the attorney may attempt to convince the client that family harmony (or at least armed neutrality!) or the interests of the children should be taken into consideration.¹⁵ In many cases, conduct in the interests

¹⁴ Model Rules of Professional Conduct, Rule 1.2 (1983); *see also* Model Rules of Professional Conduct, Rule 1.2 Comment (1983):

[A] lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. . . . The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

See generally, David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman*, 90 Colum. L. Rev. 1004 (1990) (Response to criticisms of *Lawyers and Justice* in which Luban examines the partisan, non-accountable standard conception of the lawyer's role).

¹⁵ Rule 2.1 provides in part: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Model Rules of Professional Conduct, Rule 2.1 (1983). Model Code of Professional Responsibility EC 7-36 (1980) provides:

Advice of a lawyer to his client need not be confined to purely legal considerations. . . . A lawyer should bring to bear upon this decision-making

of the children or family unit will be in the client's long run best interests as well.¹⁶

But what if, despite the attorney's efforts, the client insists that the attorney assist in pursuing objectives or means the attorney believes to be morally unacceptable? The attorney may withdraw if the client will not be adversely affected and if permission, when required, is granted by the court.¹⁷ It may also be appropriate to seek the appointment of a guardian ad litem or attorney for the child or children.¹⁸ It should be noted that there is significant disagreement among family law practitioners concerning the ethics of such a course of action. According to one view, if suggestion of the need for a guardian or attorney would be likely to affect the client adversely (e.g., discovery of abuse or that the client is not an effective parent), then the suggestion constitutes and impermissible under-

process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

¹⁶ See, e.g., Virginia A. Simons et al., *A Study of Families in High-Conflict Custody Disputes: Effects of Psychiatric Evaluation*, 18 Bull. Am. Acad. Psychiatry Law 85 (1990); Kathleen A. Camara & Gary Resnick, *Styles of Conflict Resolution and Cooperation Between Divorced Parents: Effects of Child Behavior and Adjustment*, 59 Am. J. Orthopsychiatry 560 (Oct. 1989); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 Am. J. Orthopsychiatry 576 (Oct. 1989); Andre P. Derdeyn, *The Post-Divorce Family, Legal Practice, and the Child's Needs for Stability*, 18 Children Today 12 (May-June 1989); Janet R. Johnston et al., *Ongoing Postdivorce Conflict and Child Disturbance*, 15 J. Abnormal Child Psychol. 493 (Dec. 1987); Laurence Loeb, *Fathers and Sons: Some Effects of Prolonged Custody Litigation*, 14 Bull. Am. Acad. Psychiatry Law 177 (1986).

¹⁷ See Model Rules of Professional Conduct, Rule 1.16, and Comment (1983).

¹⁸ See, e.g., Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 Pepp. L. Rev. 255 (1991); Abigail B. Sivan & Mary Quigley-Rick, *Effective Representation of Children By the Guardian Ad Litem: An Empirical Investigation*, 19 Bull. Am. Acad. Psychiatry 53 (1991); Tara Lea Mulhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. Rev. 633 (1990); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681 (1987); Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. Rev. L. & Soc. Change 177 (1974).

mining of the client's interests.¹⁹ At the least, the client's consent, after a full explanation of the risks, would be required, according to this view.

A substantial number of Academy members, on the other hand, believe that a request for appointment of a guardian or attorney is either presently permitted under the ethical rules or should be permitted (if not required).²⁰ In their view, the entire thrust of the family law system is intended to give the best interests of the child and child's well-being the highest priority. Therefore, an attorney should not be able to justify her failure to act by relying on the vindictiveness of a parent, ineffective legal representation of the spouse, or the failure of the court to perceive *sua sponte* the need to protect the child's interests. In addition, many Academy members believe that even the appointment of a guardian or attorney for the child is insufficient if the attorney is aware of abuse or similarly severe parental deficiency. Nor would withdrawal (even if permitted) solve the problem if the attorney is convinced that the child will suffer extremely adverse treatment by the client.

In the most extreme cases, RPC 1.6(b)(1) would permit the attorney to reveal information the lawyer reasonably believes necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."²¹ Many states have retained CPR DR 4-101(C)(3) permitting the attorney to reveal the intention of the client to commit *any* crime and the information necessary to prevent it, while others have broadened the RPC 1.6(b)(1) exception to the same effect. However, *past* conduct, and conduct that may be severely detrimental to the well-being of the child but not criminal, would not

¹⁹ See American Academy of Matrimonial Lawyers Bounds of Advocacy Committee meeting minutes, and responses of Academy members to questionnaires.

²⁰ *Id.*

²¹ The ABA Comment to Rule 1.6 states:

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

be covered under either exception.²²

It would seem the essence of professionalism that an issue with such substantial moral implications should permit greater discretion on the part of family law practitioners. For those attorneys who strongly adhere to the adversary system, with its emphasis on absolute loyalty to the client, RPC 1.6 and DR 4-101 are permissive only; the attorney may choose not to reveal information that is important to the well-being of the child but adverse to the client. At the same time, the ethical codes should permit disclosure by those practitioners (presently constituting a substantial number of Acad-

²² The ABA Comment to RPC 1.2 states: "An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." Therefore, it is at least arguable that, unless Rule 1.6 is amended to permit (not require) disclosure of information the attorney reasonably believes necessary to protect the well-being of a child, it would be impermissible for the attorney to condition representation on the client's consent to disclosure.

Arguably, the parent's fiduciary obligation with respect to the well-being of a child provides a basis for the attorney's consideration of the client's best interests consistent with traditional adversary and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries or those to whom the fiduciary's obligations run. *See, e.g., Fickett v. Superior Court*, 27 Ariz. App. 793, 558 P.2d 988 (1976) (holding lawyer for former guardian of incompetent's estate liable to conservator of incompetent for negligently failing to discover guardian's scheme and misappropriation). To the extent that statutory or decisional law imposes a duty on the parent to act in the child's best interests, the attorney for the parent might be considered to have an obligation to the child that would, in some instances, justify subordinating the express wishes of the parent. *See, e.g., ABA Comments to RPC 1.14* ("If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct") and *RPC 1.2* ("Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary"). *See also Ohio Cas. Ins. Co. v. Mallison*, 354 P.2d 800, 802 (Or. 1960) ("the duty owed by a parent to a child of tender years to preserve and protect his interest . . . is of a fiducial character"); *cf.* 1990 amendment to *Wash. RPC 1.6*: "A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court-appointed fiduciary." It would be anomalous, to say the least, to permit an attorney to report a parent's misuse of the child's money, but not permit reporting child abuse. *See also Daly v. Derrick*, 230 Cal. App. 3d 1349, 281 Cal. Rptr. 709, 717-18 (1991) (holding that a teacher who stands *in loco parentis* has same fiduciary duty of disclosure of child abuse of his or her students as the students' parents). For this analysis to be of benefit to family law practitioners, however, a clearer mandate would have to be adopted as part of the ethical code or the official interpretations of it.

emy Fellows) who reasonably believe it to be necessary to the well-being of one or more of the children. Fairness to the client and RPC 1.2 would require complete disclosure to the client, preferably at the very outset of the representation. Either the Comments to the RPC would have to make clear that such an agreement as to limitation of means is permissible, or the rules would have to be amended. In any event, guidance in this crucial area is clearly needed, and AAML Standards of Conduct 2.23 to 2.27 and their Comments attempt to provide that guidance.

Academy members believed the RPC to provide insufficient guidance or regulation with respect to “Bombers” who engage in “hardball” or “Rambo” tactics in an effort to wear down the opponent. Those lawyers who believe that “scorched earth” tactics are the key to success in matrimonial litigation justify their “win at any cost” behavior on the basis of zealous advocacy on the client’s behalf.²³ In some cases this approach intimidates or wears down the opponent, resulting in victory for the offensively aggressive (and aggressively offensive) lawyer. More often, however, such tactics simply cause delay and divisiveness, increase expense, and waste judicial resources.²⁴ Enlightened lawyers hold the view that courteous behavior is not a sign of weakness, but is consistent with force-

²³ See, e.g., Stephanie B. Goldberg, *Playing Hardball*, 73 A.B.A. J. 48 (July, 1987); Roger C. Cramton, *The Trouble With Lawyers (and Law Schools)*, 35 J. Leg. Educ. 359 (1985); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don’t Work*, 74 A.B.A. J. 79 (Mar. 1988); Andrew R. Herron, *Collegiality, Justice, and the Public Image: Why One Lawyer’s Pleasure is Another’s Poison*, 44 U. Miami L. Rev. 807 (1990).

²⁴ See, e.g., *Wrona v. Wrona*, 592 So.2d 694, 697, 1991 n.4 (Fla. Ct. App. 1991) (“trial courts should understand that they have authority to take steps designed to avoid needless expense during a divorce proceeding, especially if that expense adversely affects the best interests of the children or jeopardizes the sources for payment of needed alimony”); *Katz v. Katz*, 505 So. 2d 25, 26 (Fla. App. 1987) (“Without responsible direction, not only will the parties—who are represented—have their assets dissipated without good cause, but also their innocent, unrepresented children will see their opportunity for higher education vanish in a nightmarish plethora of motions, transcripts and time sheets.”). See also *Dondi Properties Corp. v. Commerce Sav. & Loan Ass’n.*, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (adopting the Dallas Bar Association “Guidelines of Professional Courtesy” as mandatory court rules):

Malfeasant counsel can expect . . . that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: “a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory

ful and effective advocacy. The spirit of cooperation and civility does not simply foster collegiality of the Bar, although that is certainly a welcome side effect, but also promotes justice and efficiency in our legal system. The general public, as well as clients, have a right to expect and demand a high standard of conduct by lawyers.

Various reasons have been advanced for the increased prevalence of rudeness and hardball tactics. These include the increase in the number of practicing lawyers, resulting in less frequent interaction with the same attorneys, youthful zeal and inexperience, self- or partner-imposed financial pressures, and emphasis on winning at all costs. These underlying factors are unlikely to be eliminated. Rather, the problem is more likely to be solved, or at least ameliorated, by individual lawyers, firms, local bar associations, and groups such as the AAML adopting practices that recognize and require professionalism, respect and courtesy.

Academy Fellows indicated that the Bounds of Advocacy should address issues of professionalism, from those as seemingly trivial as returning phone calls promptly to issues as basic as always keeping one's word. In addition, a number of areas of frequent abuse were cited:

- (1) Timing of motions and discovery;
- (2) Scope of discovery requests and responses;
- (3) Conduct at depositions; and
- (3) Professional respect in oral and written communications.

Academy members, along with courts and commentators, stress that although litigation can breed hard feelings between the liti-

legal education, monetary sanctions, or other measures appropriate to the circumstances.”

A number of judges around the country have drafted or adopted similar individual standards for the conduct of attorneys in cases before them. All attorneys are presented with a copy of the standards at the time a case is assigned to the judge. And there is always resort to an order such as the one issued by Judge Wayne Alley (W.D. Okla., 2/24/89) in *Krueger v. Pelican Production Corp.*:

If the recitals in the briefs from both sides are accepted at face value, neither side has conducted discovery according to the letter and spirit of the Oklahoma County Bar Association Lawyer's Creed. This is an aspirational creed not subject to enforcement by this Court, but violative conduct does call for judicial disapprobation, at the least. If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.

gants, those sentiments need not and should not be imposed upon the attorneys who represent those litigants, nor should those feelings dictate how lawyers treat one another. The fundamental principle is that lawyers should at all times treat each other with respect, courtesy and fairness. Civil litigation should no longer be viewed as an oxymoron. Standards 3.1 to 3.14 proved guidance in this area for family law practitioners.

(C) *The Role of the Standards of Conduct in Evoking Discussion of Ethical Issues.*

Probably the most valuable aspect of the entire Bounds of Advocacy project has been to engender a renewed interest in ethical issues among Academy Fellows. From the thoughtful responses to the questionnaires sent out in 1989, to the comments received by Committee members throughout the drafting process, to the discussions by Academy Fellows at Annual Meetings, the amount of attention paid to important questions of the ethical practice of family law has been dramatic. The Standards are aspirational and self-enforcing. Since they are not intended to be the basis for discipline, their primary value is in sensitizing attorneys to the issues and providing guidance concerning difficult problems.

In stating appropriate conduct above the minimum level mandated by the RPC, choices among possible alternatives had to be made. The very failure of any authoritative group to provide guidance for family law attorneys with respect to professionalism, civility, and the most difficult ethical issues provided the impetus for the numerous codes of professionalism and the Bounds of Advocacy project. The Standards of Conduct do represent preferences, some of which are controversial, concerning the most appropriate conduct in situations that frequently confront matrimonial lawyers. In such situations, it would be impossible to obtain universal agreement concerning the proper balancing of an attorney's obligations to the client, opposing parties and others affected by the representation, the attorney's own interests, and the interests of society.

The local and national publicity concerning the project and promulgation of the AAML Standards of Conduct has resulted in substantial discussion and debate about the practice of family law. Whether matrimonial lawyers agree or disagree with particular Standards and Comments, the Bounds of Advocacy has achieved one of its major functions simply by engendering the debate.

IV. The Standards of Conduct and Malpractice Liability.

Whenever an organization of professionals drafts guidelines entitled "Standards of Conduct," the use of those guidelines to establish the standard of care in a discipline or malpractice action becomes a matter of concern.²⁵ The Standards were intended to address "gray" areas which are either unclear or not addressed at all in the RPC or CPR. They provide guidance for attorneys who wish to practice at an ethical and professional level well above the duty of care defined for purposes of either professional discipline or malpractice liability. As stated in the "Preliminary Statement" of the Standards:

Conduct permitted by the RPC cannot be the basis for state bar or court discipline. Hence, the Standards here established for matrimonial lawyers use the terms "should" and "should not," rather than "must," "shall," "must not" and "shall not." Clearly, since these Standards promote a level of practice above the minimum established in the RPC, their use to establish a duty of care in a malpractice action is inappropriate.²⁶

Undoubtedly, efforts will be made by plaintiffs in legal malpractice actions to introduce evidence of violations of the Standards of Conduct whenever it would support their cause of action. Despite the disclaimer in the RPC regarding use of violations of its Rules as a basis for malpractice liability,²⁷ courts have differed in the extent of their application of the disclaimer. A few courts, relying on the statement in the Scope section of the RPC,²⁸ have refused

²⁵ See generally Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 Ga. L. Rev. 1327 (1991); Xavier G. Medina & Virginia Coyle, *Texas Disciplinary Rules of Professional Conduct: Additional Liability for Texas Lawyers*, 21 St. Mary's L.J. 733 (1990); Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 Temp. L.Q. 1351 (1988).

²⁶ American Academy of Matrimonial Lawyers, *BOUNDS OF ADVOCACY*, Standard (1991).

²⁷ The "Scope" section of the RPC provides:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

²⁸ Courts in jurisdictions governed by the CPR have interpreted similarly

to admit any evidence of the violation of the RPC,²⁹ and several courts have held that the violation of the RPC (or CPR) constitutes a rebuttable presumption of a breach of the duty of care.³⁰ However, the majority of courts have held that the ethical code “‘does not undertake to define standards for civil liability of lawyers for professional conduct’ Nevertheless it certainly constitutes *some evidence* of the standards required of attorneys.”³¹

The majority rule makes sense. If an attorney violates one of the RPC Rules that are “imperatives, cast in the terms ‘shall’ or ‘shall not’ ” and thereby “define proper conduct for purposes of professional discipline,”³² it would be difficult to claim that the attorney’s conduct had not fallen below that expected of a reasonably competent and prudent lawyer. On the other hand, the violation of a disciplinary rule in and of itself should not establish a violation of the duty of care.³³ The extent to which the rule was designed to

the language in the CPR “Preliminary Statement”: “The Code makes no attempt to . . . define standards for civil liability of lawyers for professional conduct.”

²⁹ See, e.g., *Hizey v. Carpenter*, 119 Wash. 2d 251, 830 P.2d 646 (1992). See also Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 Ohio N.U. L. Rev. 1, 20 (1982) (arguing that Code of Professional Responsibility is too vague to be of value in malpractice litigation).

³⁰ See, e.g., *Lipton v. Boesky*, 110 Mich. App. 589, 313 N.W.2d 163, 166-7 (Mich. App. 1981):

The Code of Professional Responsibility is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession. Holding a specific client unable to rely on the same standards in his professional relations with his own attorney would be patently unfair. We hold that, as with statutes, a violation of the Code is rebuttable evidence of malpractice.

³¹ *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980). See also *Mirabito v. Liccardo*, 4 Cal. App. 4th 41, 5 Cal. Rptr. 571 (1992) (not error to allow Calif. RPC into evidence and use as basis for jury instructions); see also *Gomez v. Hawkins Concrete Constr. Co.*, 623 F. Supp. 194, 199 (N.D. Fla. 1985); *Ambrosio & McLaughlin*, *supra*, n.25 at 1362 n.52; Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. Rev. 281, 286 (1979).

³² Model Rules of Professional Conduct Scope section (1983). See also Model Code of Professional Responsibility Preliminary Statement (1969): “The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”

³³ See, e.g., *Hizey v. Carpenter*, 119 Wash. 2d 251, 830 P.2d 646 (1992); *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 673, 457 N.W.2d 538, *rev.*

protect clients, as opposed to opposing parties or non-parties, the nature of the surrounding circumstances, and the gravity of the violation, are all relevant in determining whether there was a breach of the standard of care.

In any event, evidence of a violation of the AAML Standards of Conduct would be unlikely to be admissible, even in courts employing the most expansive use of RPC violations in defining the malpractice standard of care. Unlike the RPC and CPR, the Standards contain no mandatory provisions ("shall" or "shall not"). And, unlike the RPC and CPR, the Standards contain no provisions that "state the minimum level of conduct below which no lawyer can fall."³⁴ Rather, the Standards (like the Comments to the RPC and Ethical Considerations of the CPR) are aspirational in nature and are intended to "describe optimum ethical behavior toward which attorneys should strive."³⁵ They are "directed primarily to the 'gray' zone where even experienced, knowledgeable matrimonial lawyers might have doubts."³⁶ Since the Standards do not state a minimum level of care and, in many instances take positions with which reasonable matrimonial lawyers might disagree, they are for the most part irrelevant to whether a particular attorney's conduct fell below the standard for malpractice.

Although the Standards themselves should be inadmissible in a malpractice action, a court might permit an expert witness to discuss specific Standards as part of the basis for his or her opinion concerning the duty of care.³⁷ In such cases, the Standards are unlikely to create an additional basis for liability for two reasons:

den., 458 N.W.2d 533 (1990) (no intent in code to create tort liability); *Brown v. Samalin & Bock, P.C.*, 155 A.D.2d 407, 547 N.Y.S.2d 80 (2d Dept. 1989) (even if attorney violated code, such violation did not "in itself, generate a separate cause of action"). See generally Ronald E. Mallen & Jeffrey M. Smith, *LEGAL MALPRACTICE* § 6.27 (3d ed. 1989).

³⁴ Model Code of Professional Responsibility Preliminary Statement (1969).

³⁵ American Academy of Matrimonial Lawyers, *BOUNDS OF ADVOCACY*, Standard Preliminary Statement (1991). See generally discussion *supra* pp. 4-5 and 12-13.

³⁶ *Id.*

³⁷ *But see*, *Hizey v. Carpenter*, 119 Wash. 2d 251, 830 P.2d 646, 654 (1992): Such testimony may not be presented in such a way that the jury could conclude it was the ethical violations that were actionable, rather than the breach of the duty of care. In practice, this can be achieved by allowing the expert to use language from the CPR or RPC, but prohibiting explicit reference to them.

First, to the extent that an expert believes that statements in the Standards or Comments accurately reflect the present duty of care of practicing family law attorneys, the expert would have so stated in any event.³⁸ Where a particular Standard simply addresses the applicability of the RPC in the family law context, an expert who believes the attorney acted improperly could just as easily rely upon the underlying RPC.³⁹

Second, even if an attorney is found to have violated the duty of care at least in part based on a violation of the Standards, the violation must be shown to have proximately caused any damage.⁴⁰ Thus, fears that failure to return telephone calls or respond to letters within a day will result in liability based on any duty set forth in one of the Standards,⁴¹ are misplaced. It would be a rare case where any reputable expert would be willing to testify that the failure to return a telephone call within a day constituted conduct be-

³⁸ The author has served as a consultant and expert witness in numerous malpractice cases. If an attorney's conduct violated a Disciplinary Rule or RPC, it most often (but not always) fell below the standard expected of a reasonably competent, ethical and prudent attorney. If an attorney's conduct was permissible under the relevant ethical code, but did not constitute what most practitioners would consider "good practice," the plaintiff had no difficulty obtaining experts who would state that the attorney violated the duty of care, *despite the absence of any (even aspirational) guidelines on the subject*. In such cases, the attorney presented opposing experts, and the trier of fact determined credibility. Thus, an expert, who believes that an attorney violated a Standard in the Bounds of Advocacy that accurately states what an ethical, prudent matrimonial would do in a case in issue, would testify that the attorney violated the standard of care, whether or not the Standards had been adopted.

³⁹ The Bounds of Advocacy Committee received comments from three nationally recognized ethics experts applauding Standard 2.16 ("An attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation."). It was clear from their comments that they would have no hesitancy testifying, on the basis of RPC 1.7(b), that a sexual relationship that proximately caused damage to the client constituted malpractice.

⁴⁰ *See, e.g., Phillips v. Carson*, 240 Kan. 462, 731 P.2d 820, 832-33 (1987). In applying the attorney's violation of DR 5-104 (business relations with a client) in a legal malpractice action, the court stated: "Finally, we agree with the trial court that Carson's extensive breaches of the Code of Professional Responsibility proximately caused injury to his client, and that she sustained substantial actual damages."

⁴¹ *See, e.g., American Academy of Matrimonial Lawyers, BOUNDS OF ADVOCACY*, Standard § 2.6 (1991) and Comment (attorney or staff member should respond to telephone calls, "normally by the end of the next business day").

low that reasonably expected of competent attorneys. And it would be an even rarer case where the proximate cause of a client's financial injury was due to failure to return a telephone call within a day.

V. Conclusion.

The Standards of Conduct demonstrate the American Academy of Matrimonial Lawyers' commitment to elevate the ethical standards and practice of matrimonial lawyers, and to encourage the study and discussion of ethical issues. The Academy has boldly promulgated guidelines that bridge the gap between the minimum required by the RPC and CPR to avoid discipline and the high level of ethics and professionalism to which all Academy Fellows aspire, but the parameters of which are not always clear. Not only Fellows, but all matrimonial lawyers, will benefit from the thought, debate and analysis that resulted in the promulgation of the Standards.

The Standards of Conduct also serve as a model for other organizations of attorneys. The generality of the RPC of necessity precludes application and elaboration specific to a particular area of practice. Organizations of attorneys with unique ethical problems would provide a substantial benefit to members by emulating the efforts of the AAML.

At a time when public opinion of lawyers may well be at an all time low, an essential element in restoring public esteem may well be the Academy's voluntary effort to provide guidelines designed to reduce the financial and emotional cost of matrimonial litigation, establish better attorney-client communication and interaction, and enable family law attorneys to rely on the candor, fairness and civility of opposing counsel.

