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# THE ATTORNEY AS DUELIST'S FRIEND: LESSONS FROM THE CODE DUELLO

Douglas H. Yarn<sup>†</sup>

*I believe that nine duels out of ten, if not ninety-nine out of a hundred, originate in the want of experience in the seconds.<sup>1</sup>*

—John Lyde Wilson

*[T]here is not one case in fifty where discreet Seconds might not settle the difference and reconcile the parties before they come to the field.<sup>2</sup>*

—Abraham Bosquett

## INTRODUCTION

Could it be that nine trials out of ten, if not ninety-nine out of a hundred, originate in the want of experience in the attorneys? Could it be that there is not one lawsuit in fifty where discreet attorneys might not settle the difference and reconcile the parties before commencing litigation? Attorneys are agents of disputing, pursuing resolution of their clients' disputes either by legal judgment or negotiated settlement. In the course of this pursuit, they are increasingly called upon to function in non-adjudicative forums as peacemakers while simultaneously maintaining the role of advocate.

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<sup>1</sup> JOHN LYDE WILSON, *THE CODE OF HONOR: OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING* 10 (Charleston, S.C., James Phinney 1858) [hereinafter *WILSON CODE*]. Citations are to the more common second edition rather than the first published in Charleston by Thomas J. Eccles in 1838. Wilson, a former governor of South Carolina, was a noted duelist and died of natural causes soon after authoring this tract. Subsequent anonymous editors added diatribes against Northern states to the posthumous 2d, 3d, and 4th editions.

<sup>2</sup> ABRAHAM BOSQUETT, *THE YOUNG MAN OF HONOUR'S VADE-MECUM* 16 (London, C. Chapple 1817). The general tone of the *WILSON CODE* seems influenced by Bosquett's work.

Assuming that attorneys should and could do a better job preventing litigation and negotiating settlement of their clients' disputes, this Article posits that one of the reasons attorneys perform poorly as peacemakers is not merely from "want of experience" but from want of a functional role model that strikes an appropriate balance between the seemingly contradictory activities of being both a peacemaker and an advocate, of having to cooperate and compete at the same time.<sup>3</sup>

Ironically, a role model can be found in the formalities of dueling. After considering the necessity for such a model, this Article exhumes the roles of "friends" or "seconds" under early nineteenth-century dueling codes and illustrates their use in the context of several documented American duels. It examines how this historical model of the duelist's friend<sup>4</sup> offers modern attorneys a model of civility and a pattern of behavior that promote constructive dispute resolution without necessarily compromising the client's interests.

### I. THE NEED FOR A MODEL: THE TENSION BETWEEN ZEALOUS ADVOCACY AND PEACEMAKING

Attorneys are asked to perform two different functions in the resolution of civil disputes. On one hand, they are expected to be zealous advocates—competitive, tough, and uncompromising in pursuit of their clients' interests in an adjudicative forum. On the other hand, they are expected to be peacemakers—civil, cooperative, and conciliatory when pursuing their clients' interests through settlement in a non-adjudicative forum.<sup>5</sup> The tension between these functions centers around the problem of zealous behavior in advocacy.

Zealous advocacy has its roots in the concept of zeal as an aspect of client loyalty and is traceable back to the mid-nineteenth century in American lawyering.<sup>6</sup> The rationalization for zealous advocacy is

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<sup>3</sup> For purposes of this Article, "peacemaking" includes negotiated settlement of a legal dispute, which requires some level of cooperation to achieve. "Advocacy" connotes representation in an adversary system for adjudicated resolution of a legal dispute and tends to invoke a high degree of competition. The choice between cooperative and competitive behaviors is a complex matter involving many variables. See generally Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (discussing the role of lawyers and their degree of cooperation within the context of game-theory models). This Article focuses on the problem of attorneys having responsibilities in both roles, not when they choose one role over the other.

<sup>4</sup> The idea of lawyer serving as friend is not new. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

<sup>5</sup> See Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 52 (1998-1999) ("Society places a dual role on lawyers—in the popular culture lawyers are expected to be tough[,] . . . but lawyers are simultaneously expected to be a friend, gentle and kind . . .").

<sup>6</sup> See CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 578 n.73 (1986); Ray Paterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980). The standard con-

that it is necessary for a functional adversary method of adjudicative dispute resolution.<sup>7</sup> The organized bar deemed it a virtue of lawyering by incorporating the concept into its first set of ethical standards.<sup>8</sup> In addition to being embodied in the ethical standards of the profession, zealous advocacy is taught in law schools, permeates legal pedagogy, and is reinforced by legal institutions and the media.

But the question arises: What is the acceptable degree of zealous behavior? The concept can be abused when used to justify the extremely hostile, hyper-competitive adversary behavior commonly caricatured as the "Rambo litigator."<sup>9</sup> In this extreme form, the zealous advocate stops at nothing in dogged pursuit of victory for the client. Such a lawyer does not necessarily violate the law and ethical standards but simply seeks to win regardless of the economic and non-economic costs. Additionally, the zealous advocate ignores civility or violates non-obligatory professional norms requiring compromise or concessions or that imply weakness in the client's cause.<sup>10</sup>

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ception of zealous advocacy as unaccountable partisanship was strongly influenced by Lord Brougham's statement in defense of his spirited representation of Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 3 (New York, James Cockroft & Co. 1874).

<sup>7</sup> See WOLFRAM, *supra* note 6, at 563-92 (analyzing the appropriate role of lawyers in the U.S. system of justice). See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (discussing that morality requires lawyers to zealously represent their clients).

<sup>8</sup> This duty was included in the first set of ethical standards adopted by the American Bar Association ("ABA") in 1908. See *CANONS OF PROFESSIONAL ETHICS* Canon 15 (1969) ("The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability . . .") (internal quotation marks omitted).

The *CANONS* were superseded by the *MODEL CODE OF PROFESSIONAL RESPONSIBILITY*, which expressly retained the concept of zeal: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* Canon 7 (1983).

The *MODEL RULES OF PROFESSIONAL CONDUCT* were adopted in 1983 and also call for "zeal in advocacy." *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.3 cmt. 1 (1999). In addition, the Preamble provides that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* Preamble.

<sup>9</sup> Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 *PEPP. L. REV.* 637, 642-46 (1990) (discussing reasons for nasty tactics by trial lawyers). See Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, *A.B.A. J.*, Mar. 1988, at 79, for an example of the issue as discussed in professional journals; for an example in the popular press, see Sandra Torry, *Rambo Litigation and a Rash of Rudeness*, *WASH. POST*, July 20, 1992, at F5.

<sup>10</sup> See Robert J. Araujo, S.J., *The Virtuous Lawyer: Paradigm and Possibility*, 50 *SMU L. REV.* 433 (1997) (referring to this type of lawyer as the "victorious lawyer").

Although an attorney's duty to a client includes some level of zealous advocacy, unbridled zeal has never been condoned by the ethical standards. At a minimum, representational conduct must be within legal boundaries so as not to undermine the adversary system that justifies the behavior.<sup>11</sup> In addition, the various standards of conduct attempt to balance zeal with the attorney's own conscience and with consideration for the other side and fellow members of the profession.<sup>12</sup> Although staying within the bounds of legal conduct is a relatively clear and enforceable limitation, there is less clarity in limits to zealous behavior based on individual conscience and courtesy. Such limitations are necessarily more aspirational and are notable as being honored in the breach by the stereotypical Rambo litigator.

In an effort to limit possible abuses made under the guise of permissible zeal, members of the bench and bar founded the professionalism or civility movement.<sup>13</sup> Although generally concerned with a perceived erosion in the ideals of the legal profession,<sup>14</sup> the professionalism movement believes that the standard of zealous advocacy is often used as an excuse for incivility. As an antidote, it stresses the importance of courteous and moral behavior, which by definition is partly dependent on the individual attorney's enlightened conscience. Because the professionalism movement traces the problems of the profession to unbridled adversarial behavior, proponents of professionalism and of zealous advocacy are directly at odds.<sup>15</sup> Regardless

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<sup>11</sup> See sources cited *supra* note 8.

<sup>12</sup> Normative statements supporting such behavior are found in the various ethical standards, often as a direct counter-balance to zealous advocacy. See CANONS OF PROFESSIONAL ETHICS Canon 14 (1969) (requiring a lawyer to restrain unbridled zeal by "[obeying] his own conscience and not that of his client"); *id.* Canon 24 (discouraging lawyers from seeking every tactical advantage in incidental matters before trial and noting that "no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety"). The same concepts can be found in the more current standards; because of the difficulty in enforcing such norms, however, they are relegated to ethical considerations and comments. See *e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1999) ("[A] lawyer is also guided by personal conscience . . .").

<sup>13</sup> See Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253 (1998) (arguing that the duty of zealous advocacy cannot override the duty of professionalism); Marvin E. Aspen, *Let Us Be "Officers of the Court"*, A.B.A. J., July 1997, at 94, 95-96 (same).

<sup>14</sup> See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) (reviewing the effects of the loss of professionalism); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994) (tracing the loss of professionalism).

<sup>15</sup> Proponents of zealous advocacy view the professionalism movement with suspicion. They argue that professionalism standards can be abused by judges and have the potential to undermine the proper functioning of the adversary system. See Monroe H. Freedman, *The Ethical Danger of "Civility" and "Professionalism,"* CRIM. JUST. J., Spring 1998, at 17-19 (accusing the professionalism movement of being one of the most serious attacks on the ethic of zeal). See also Monroe Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995, at 54 (arguing that judicial interpretation and application of civility codes are problematic when

of its merits and despite its critics,<sup>16</sup> the professionalism movement questions competitive behaviors associated with zeal and calls for more cooperative behaviors as a counterbalance. In so doing, it contributes to the role dissonance of attorneys by pitting one conception of behavior against another.

Another legal reform movement, alternative dispute resolution ("ADR"), contrasts the role of the peacemaker with that of the zealous advocate, generally promoting the former and disparaging the latter.<sup>17</sup> The idea of the lawyer as peacemaker is nothing new<sup>18</sup> and has been associated with the role of counseling under the professional norms.<sup>19</sup> The ADR movement places a premium on the role of

judges value courtesy to other lawyers above "entire devotion to the interests of the client [and] warm zeal in the maintenance and defense of his rights").

<sup>16</sup> Other critics of the professionalism movement reject the "myth" of a golden age when lawyers were generally respected and law was an honored profession. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996); Kathleen P. Browne, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994).

<sup>17</sup> See Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998) (arguing that zealous advocacy as currently understood is incompatible with good representation in ADR); but see Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (asserting that lawyers who are active participants in ADR benefit the process).

<sup>18</sup> Famous lawyers throughout the ages have meditated on the relationship of lawyers to peacemaking. Abraham Lincoln advised:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the true loser—in fees, expenses, and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

Never stir up litigation. A worse man can scarcely be found than one who does this.

Abraham Lincoln, *Notes for a Law Lecture, in 2 COMPLETE WORKS OF ABRAHAM LINCOLN* 140, 142 (n.p., Lincoln Memorial Univ. 1894).

Confucius reflected the traditional Chinese attitude towards litigation: "The master said, I could try a civil suit as well as anyone. But better still to bring it about that there were no civil suits!" THE ANALECTS OF CONFUCIOUS 167 (Arthur Waley trans., Vintage Books, 1989) (1938).

Similarly, Gandhi said:

I realized that the true function of a lawyer was to unite parties . . . . [A] large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.

M. K. GANDHI, GANDHI'S AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 168 (Mahadev Desai trans., Public Affairs Press 1948).

<sup>19</sup> See CANONS OF PROFESSIONAL ETHICS Canon 8 (1969) ("Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or end the litigation.")

Current norms seem to discount the role of counselor. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.1-3 (1999) (recognizing, almost begrudgingly, the role of counselor—limiting it to a subtitle under which three rules, 2.1 (advisor), 2.2 (intermediary), and 2.3 (evaluation for use by third persons), are organized). Commentators quickly recognized that the prevailing professional standards focused largely on the role of advocate to the detriment of the counseling role. See E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 578-79 (1961) (expressing the need to reappraise the CANONS in light of the distinct function of counselor); see also *Professional Responsibility: Report of the Joint Conference*, 44

peacemaker by successfully institutionalizing processes of dispute resolution that emphasize negotiated settlement over adversarial adjudication. Today in most federal and state courts,<sup>20</sup> litigants are required to participate in some form of ADR process before trial.<sup>21</sup> Arguably, these institutional reforms have so changed the dispute resolution system that a new paradigm of lawyering is required.<sup>22</sup> As representatives in ADR processes,<sup>23</sup> attorneys have to consider whether their behavior facilitates or impedes achievement of their clients' objectives. There are some aspects of the standards which in an ADR-infused legal environment compel attorneys to consider their role as peacemakers when counseling<sup>24</sup> and when representing;<sup>25</sup>

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A.B.A. J. 1159, 1161 (1958) (noting that partisan behaviors are acceptable in trial but not necessarily acceptable when counseling).

Regarding trends in the profession undermining the counseling role, see ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993) (bemoaning the demise of the "lawyer-statesman").

<sup>20</sup> See, e.g., Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (establishing ADR in the federal courts); Minn. Stat. Ann. § 484.74 (West 1990) (establishing power of state courts to refer parties to ADR).

<sup>21</sup> ADR processes ordered by a court can include, but are not limited to, negotiation, settlement conference, mediation, early neutral evaluation, case evaluation, mandatory non-binding arbitration, and use of a discovery referee. See generally DOUGLAS H. YARN, *DICTIONARY OF CONFLICT RESOLUTION* (1999), for definitions of these and other court-related ADR processes.

<sup>22</sup> See Chief Judge Judith S. Kaye, *Lawyering for a New Age* (April 8, 1998), in 67 *FORDHAM L. REV.* 1 (1998) (positing that societal changes and changes in the courts, particularly the introduction of court-connected ADR and client-driven ADR, are creating pressures for a new type of problem-solving lawyering and reducing the demand for or relevance of the Rambo litigator).

<sup>23</sup> In addition to serving as representatives in these negotiations, lawyers are quickly claiming a new peacemaking role as mediators and third-party interveners. The ABA's current effort to revise the ethical standards, known as "Ethics 2000," has recommended recognition of this new role in a revision to the MODEL RULES. See ABA Ethics 2000 Website (visited Sept. 13, 2000) <<http://www.abanet.org/yld/ethics/welcome/html>>.

<sup>24</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1983) (prohibiting representation in a legal matter for which the lawyer is not competent or prepared); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1999) (requiring the lawyer to be competent and prepared). With the widespread institutionalization of ADR processes made available or mandated by courts or statutes, a lawyer could not provide competent counsel without advising the client about the ADR processes available or mandated. Requirements to consult with clients regarding the means of pursuing their objectives and to explain matters to the extent necessary for the client to make informed decisions probably already required lawyers to inform clients of ADR. See *id.* Rule 1.2(a) ("A lawyer shall . . . consult with the client as to the means by which [the objectives of representation] are to be pursued."); *id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation."). See also R. Cochran, *Must Lawyers Tell Clients About Alternative Dispute Resolution?*, 48 *ARB. J.*, June 1993, at 8 (discussing the effect of ethical requirements on counseling clients about ADR).

The ethical standards in some states have been modified to address the problem of counseling in ADR. See, e.g., GA. COMP. R. & REGS. r. 3-107, EC 7-5 (1993) ("A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.").

When the ethical consideration is stated in the imperative, the failure to counsel would probably not lead to discipline by the bar; the ethical consideration may be used as evidence, however, in a legal malpractice action. See *Allen v. Letkoff, Duncan, Grimes & Dermer, P.C.*,

however, the professional standards can be criticized as being formulated for lawyers to function as zealous advocates within the context of traditional, adversary adjudication and provide little or no guidance on how to behave in ADR.<sup>26</sup> Proponents of ADR are concerned that without such guidance, attorneys will engage in adversary behaviors that undermine the peacemaking function.<sup>27</sup> Thus, like professionalism, the ADR movement questions the appropriateness of some behaviors associated with zealous advocacy and promotes cooperative peacemaking as a counterbalance.

Although the civility issues in professionalism have focused more on abusive litigation tactics than on the problems of settlement,

453 S.E.2d 719 (Ga. 1995) (holding that while a bar rule is not conclusive, it is relevant to the standard of care in a malpractice case); *see also* Thomas v. White, 438 S.E.2d 366 (Ga. Ct. App. 1993) (holding that an attorney who fails to properly counsel a client regarding the effect of court-annexed ADR is potentially liable, punitive damages included, for malpractice).

<sup>25</sup> In a representative role, the attorney could not be competent without having some level of representational skill as well as knowledge of the ADR process in use. If these skills differ from those required in formal adjudication, the attorney must have competence in the appropriate skills. It is important to note that competent representation includes adequate preparation. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(2) (1983) (prohibiting representation in a legal matter without adequate preparation); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1999) (requiring competent representation, that is, "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

Query whether failure to participate in a settlement process, such as mediation, is malpractice. *See* Robert F. Cochran, *Suing Lawyers Who Sue*, 11 CAL. LAW., Apr. 1991, at 120 (suggesting that litigators should be liable for malpractice if they do not first offer mediation to clients).

<sup>26</sup> *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997) (discussing issues raised in ADR practices today and the need to develop ethical standards); Carrie Menkel-Meadow, *Ethics of ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3-6 (same).

<sup>27</sup> *See* Kimberlee K. Kovach, *Good Faith in Mediation Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997); sources cited *supra* note 26.

One view is that an adversarial and competitive strategy is a lawyer's only choice, thus the standard lawyer negotiation paradigm of adversarial positional bargaining relying on and fostering deception and misrepresentation, usually in the form of "bluffing" and "puffing" to inflate the strengths of a client's position and protect the "bottom line" from revelation. The MODEL RULES accept this state of affairs as the norm. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. 2 (1999) (prohibiting knowingly making false statements of material fact, but, "under generally accepted conventions in negotiation" certain statements are not statements of material fact). *See also* James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (1980) (discussing the issue of truthfulness within the context of Rule 4.2 of the MODEL RULES).

A contrary view is that a lawyer should be held to a higher standard of behavior when acting as a counselor or attorney in negotiations than when acting as an advocate in court because the absence of an umpire requires more self-restraint. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 685 (1978) (proposing a professional rule for a non-advocate attorney). According to one of the more influential theorists in negotiation, the integrative, problem-solving, or principled strategies of negotiation create less of the same ethical and moral tensions that underlie competitive strategy. *See* Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOTIATION J. 105 (1985) (outlining a detailed code for lawyers to follow in a negotiation to limit ethical problems).



the professionalism and ADR movements overlap, sometimes dramatically,<sup>28</sup> to highlight the relationship between incivility and impediments to settlement. Influential members of the bench have simultaneously promoted both causes.<sup>29</sup> ADR is an escape from the incivility in litigation,<sup>30</sup> and Rambo litigation is incompatible with compromise and settlement, merely adding to the client's costs.<sup>31</sup> Effective adversary behavior in an ADR forum may simply be counterproductive.<sup>32</sup> Proponents of ADR have expressed their concern

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<sup>28</sup> In Georgia, for example, the "Lawyer's Creed" counsels: "To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one." GA. COMP. R. & REG. Part IX, A Lawyer's Creed, app. (2000).

Other aspirational ideals of professional behavior in Georgia emphasize a constructive role for attorneys in ADR processes. This is confirmed by the following professional aspirations:

As a lawyer, I will aspire:

....

(b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.

....

(d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.

(e) To make the law, the legal system, and other dispute resolution processes available to all.

*Id.* at Part IX, General Aspirational Ideals. The aspirations continue: "As to clients, I will aspire . . . (b) To fully informed client decision-making. As a professional, I should: (1) Counsel clients about all forms of dispute resolution; [and] (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes; . . ." *Id.* at Part IX, Specific Aspirational Ideals.

The Georgia State Bar established a commission to identify, enunciate, and encourage adherence to non-mandatory, aspirational standards of professional conduct that are higher than those required by the ABA models. *See id.* at r. 9-102.

<sup>29</sup> For example, former Chief Justice Warren E. Burger was an early proponent of the modern professionalism movement as well as the modern ADR movement. *See* Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971) ("[F]ew subjects could be more relevant to discuss than the necessity for civility in the resolution of litigation in a civilized society."); Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274 (1982) (discussing the ADR movement). On a state level, former Chief Justice of the Georgia Supreme Court, Harold Clarke, formed both the Chief Justice's Commission on Professionalism and a Commission on Dispute Resolution during his tenure.

<sup>30</sup> *See* Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177, 195 (1996) (arguing that the rise of ADR is a partial antidote to the incivility related to modern litigation).

<sup>31</sup> *See* Reavley, *supra* note 9, at 642-46 (noting that Rambo tactics are inappropriate and of no advantage in a mediated settlement discussion and arguing that the problem of civility in litigation is not new). Although lay people often think that the best lawyer is the toughest and the meanest lawyer, the combat mode of advocacy is far more expensive than effective for the client. *See id.*; *see also* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991) (pointing out that the adversary system itself may be incompatible with some of the fundamental principles of ADR). *See* Evanoff v. Evanoff, 418 S.E.2d 62 (Ga. 1992), for a discussion on how the ideals of professionalism affect settlement negotiations.

<sup>32</sup> *See generally* Symposium, *Teaching a New Paradigm: Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?*, CARDOZO ONLINE J. DISP. RESOL. (visited

with adversarial behavior by attorneys in mediation and have called for revisions to ethical standards in order to control such behaviors.<sup>33</sup> Together, these movements envision a behavioral model that contrasts with the hyper-competitive and uncooperative behavior of zealous advocacy. The peacemaker engages in objective problem-solving, wisely counseling clients to avoid exacerbating conflicts and to explore reconciliation. Such a lawyer is sensitive to the drawbacks of adversarial adjudication and seeks an outcome that is less destructive to human relationships while stressing civility, compromise, cooperation, and mutual respect.

Zealous advocacy, professionalism, and ADR combine to confront the attorney with a seemingly irreconcilable set of contradictory models for behavior.<sup>34</sup> These models appear irreconcilable to such an extent that some commentators believe effective litigation and settlement require a different set of skills and thus that a single lawyer cannot simultaneously apply these skills and effectively balance the roles of litigator and conciliator.<sup>35</sup> They argue that the combination of

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Mar. 8, 1999) <<http://www.cardozo.yu.edu/cojcr/conresyml.html>> (exploring whether lawyers and law students must understand a different vision of lawyering, which incorporates a new set of skills to engage in negotiation and mediation, or whether they can use the adversarial mindset and combative techniques taught in traditional law school curriculum).

<sup>33</sup> See sources cited *supra* notes 26-27.

<sup>34</sup> See William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 376-82 (1999) (identifying five role models of lawyers in dispute resolution—the Champion, the Hired Gun, the Litigator (using litigation as a weapon to force settlement), the Healer, and the Problem-solver).

The “problem-solver” is an increasingly popular role model as evidenced by the Harvard Law School’s “The Lawyer as Problem Solver: A Symposium on Dispute Resolution and Legal Practice,” April 7-8, 2000, and Syracuse University College of Law 1999-2000 Lecture Series on “Lawyer as Problem Solver.” There is a law school-based center, the William J. McGill Center for Creative Problem Solving at the California Western School of Law, which sponsored a recent conference, entitled “The Lawyer as Creative Problem Solver,” Feb. 24-26, 2000, San Diego, California.

This “problem-solver” concept has been popularized by numerous scholars. See, e.g., Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (1995) (arguing that law schools need to start teaching people to be counselors, problem-solvers, and negotiators); Alan M. Lerner, *Law and Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107 (1999) (suggesting a plan to teach problem-solving techniques to first-year law students); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (criticizing the adversarial approach to legal negotiation and suggesting a “problem-solving” model). Compare Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999) (challenging law schools to shift their paradigms to include problem-solving approaches) with Carrie Menkel-Meadow, *Taking Problem-Solving Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999) (suggesting concrete ways in which law schools could respond to the challenge of incorporating problem-solving approaches).

<sup>35</sup> See Coyne *supra* note 34, at 367-69. See also Gary Mendelsohn, Note, *Lawyers As Negotiators*, 1 HARV. NEGOTIATION L. REV. 139 (1996) (arguing that the traditional adversary system in which lawyers litigate and negotiate tends to promote stalemates).

mental dissonance<sup>36</sup> and perverse incentives<sup>37</sup> make litigators poor negotiators and negotiators poor litigators. Instead, they suggest that the roles be assigned to separate legal counsel, each party having two attorneys, one to serve as settlement counsel and the other to litigate.<sup>38</sup> Unfortunately, the added cost of additional counsel and other impediments, including reliance on the other side agreeing to also use settlement counsel, will limit widespread use of dual representation.<sup>39</sup>

A variation of the settlement counsel approach is "collaborative lawyering."<sup>40</sup> Under this model, the parties and their respective law-

<sup>36</sup> See Coyne, *supra* note 34, at 369 (noting that "it is extremely difficult, psychologically, for an attorney to act as an effective advocate and, at the same time, to encourage settlement"); Mendelsohn, *supra* note 35, at 146 (noting that the zealous advocacy model promotes a win/lose mentality that values competition over cooperation, and that the lawyerly focus on the adversary system undermines creativity and reinforces psychological bias that inhibits settlement) (citing Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582-83 (1983)).

<sup>37</sup> See Mendelsohn, *supra* note 35, at 140-43 (noting that the financial incentives for an attorney working at an hourly rate create incentives for an attorney to extend the work to collect greater fees rather than to settle) (citing Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 203 (1987)). Non-financial incentives include an attorney's concern over reputation as a tough litigator or that litigating a case will advance her career more than settlement would. See *id.* at 141. Both financial and non-financial incentives can work either for or against settlement, but the motivation is often unrelated to the clients' best interest. See *id.* at 143.

Coyne believes that attorneys are, for the most part, reacting rationally to existing incentives and expectations. See Coyne, *supra* note 34, at 369. He lists the following incentives: the need to market services, the desire not to appear weak, the obligation to represent clients zealously, the thirst for justice, and the desire to maximize income. See *id.* These societal and structural incentives, including financial and psychological factors and the way in which society pictures the lawyers role, work against early settlement. See *id.* at 376.

<sup>38</sup> See Coyne, *supra* note 34, at 392-93 ("The pressure to be a Champion, or a Hired Gun, or a Litigator is reduced so that the problem-solving can take place."); Mendelsohn, *supra* note 35, at 148-66 (arguing that a pure negotiator has advantages over a litigator in overcoming certain barriers to settlement). This idea was originally articulated by Professor Roger Fisher. See Roger Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221, 1221 (1983) (suggesting that negotiation should be a field of specialty in the law). See also Roger Fisher, *He Who Pays the Piper*, HARV. BUS. REV. Mar.-Apr. 1985, at 150, 155-57 (presenting a "letter" to counsel suggesting that it is in everyone's interest to settle cases and that trial should be the option of last resort). There is also the notion that attorneys, even if devoted as settlement counsel, simply cannot be as effective as mediators. See Robert A. Baruch Bush, "What Do We Need a Mediator For?" *Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 36 (1996) (describing empowerment-and-recognitive centered mediation).

<sup>39</sup> See Mendelsohn, *supra* note 35, at 166-67 n.93 (noting the disadvantage of increased costs under the settlement counsel model and the problem arising from the other side refusing to use the model and hire a separate negotiator as well). Mendelsohn admits that if the client can find the "rare lawyer who is skilled in both litigation and negotiation, can shift between the two skills with ease, and keeps only her client's best interest in mind . . . the client can do no better than to stick with that one attorney." *Id.* See also Coyne, *supra* note 34, at 404-08 (noting that opposing parties are an obstacle to using problem-solving methods to the fullest extent).

<sup>40</sup> See generally D. Todd Sholar, *Collaborative Law—A Method for the Madness*, 23 MEMPHIS ST. U. L. REV. 667 (1993) (contrasting the collaborative law model and mediation and discussing the model in light of the ABA models); William van Zyverden, *Collaborative Law—Moving Settlement Toward Resolution*, 20 VT. B. J. & L. DIG. 35 (1994) (discussing the various aspects of collaborative law and settlement in a succinct manner).

yers commit to seek a resolution without court intervention. Used primarily in divorce cases, the attorneys and clients sign an agreement in which all the participants commit to open and constructive settlement negotiations. If a party breaks the rules (withholds information or hires a detective to spy on the other spouse), refuses the attorney's advice, or decides to pursue litigation, the collaborative lawyers will withdraw from representation, and their clients must engage litigation counsel.<sup>41</sup> As in the settlement counsel model, there are serious impediments to a widespread acceptance of the collaborative lawyering model. Attorneys can enter into collaborative lawyering agreements only with attorneys known to be active practitioners of the model. Because collaborative lawyers are committed to withdraw if the matter requires litigation, there are questions as to whether a collaborative lawyer can meet a duty of zealous advocacy while simultaneously refusing to litigate.<sup>42</sup> Other objections to collaborative lawyering are derived from this commitment to resign in the face of litigation.<sup>43</sup>

The presumption that the advocacy and peacemaking roles are mutually exclusive, requiring separate lawyers to perform separate functions, is supported by data indicating that the psychological and physiological profiles of individual lawyers make them better-suited for one role over another.<sup>44</sup> Nevertheless, lawyers may feel compelled to choose one role over the other simply to avoid the psychological toll of mentally and emotionally sustaining both.<sup>45</sup>

Although not insisting that the skills are mutually exclusive, other commentators have argued that it is to a client's advantage for lawyers on both sides of a dispute to help their clients commit to and

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<sup>41</sup> Although this approach purportedly eliminates the need for a separate mediator, other lawyers committed to the collaborative lawyering model can consult or intervene as mediators upon request. See Robert W. Rack, *Settle or Withdraw: Collaborative Law Provides Incentive to Avoid Costly Litigation*, 4 DISP. RESOL. MAG., Summer 1998, at 8.

<sup>42</sup> See *id.* at 9 (dispelling presence of an ethical problem if the client understands and agrees to the collaborative lawyer's role).

<sup>43</sup> See *id.* (discussing problems associated with collaborative law model breakdown, including costs of educating new counsel, compensating resigned collaborative lawyer, the need for interim relief, abuse of the process for discovery, and whether the process will work if opposing party is not represented by a collaborative lawyer).

<sup>44</sup> See Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 593 (1998) (noting that there are empirically-demonstrated lawyer attributes that would have to change to make lawyers happier and more efficient); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) (discussing lawyer attributes which would have to be changed to allow lawyers to fulfill both advocacy and peacemaking roles).

<sup>45</sup> See Rotunda, *supra* note 5, at 52 ("[T]hese self-contradictory expectations lead lawyers to be depressed.").

pursue cooperative, instead of combative, strategies in litigation.<sup>46</sup> Under this approach, developing and maintaining a reputation as a cooperative lawyer who works with other cooperative lawyers is valuable to clients. This approach is similar to the collaborative model discussed above and suffers from the same limitations. It works only if both sides are committed to cooperation and neither side defects into combative behavior. This model does not require two attorneys for each client, one cooperative and one combative, and withdrawal is not required if the matter goes to litigation. As a practical matter, however, the cooperative attorney would be pressured to withdraw in the face of combative behavior by the client or the other side, simply in order to preserve his or her cooperative reputation.

Finally, even if the skills are not mutually exclusive, it can be difficult to distinguish whether, in any given situation, one should be functioning as a zealous advocate or as a peacemaker. Arguably, zealous advocacy is limited to times when the attorney is representing a party in an adversarial forum.<sup>47</sup> If, however, the attorney sees no clear demarcation between adversarial and non-adversarial fora for resolution of the dispute, or believes that zealous advocacy outside the adversarial forum is necessary to preserve his client's cause within that forum, the attorney is likely to persist in the behavior.

Assuming that disputants are best served by having both a zealous advocate and a peacemaker and that attempts to circumvent the problem of reconciling the competing models are unsatisfactory, the conduct of seconds in dueling merits some consideration.

## II. A MODEL: THE CONDUCT OF SECONDS UNDER CODE DUELOS

### A. *A Brief History of Dueling*

Duels are "set fights" taking place under prescribed conditions.<sup>48</sup> While analogs of dueling can be found in most societies,<sup>49</sup> the modern

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<sup>46</sup> See Gilson & Mnookin, *supra* note 3, at 514-29 (suggesting that litigation can be viewed as a repeated prisoners' dilemma game using the standard game-theory terms "cooperate" and "defect").

<sup>47</sup> In the most current model standards, zeal is mentioned only in the context of advocacy. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1999) ("A lawyer should act . . . with zeal in advocacy upon the client's behalf."); *id.* Preamble, para. 2 (discussing many representational roles but mentioning zeal only when "asserting the client's position under the rules of the adversary system."). In its strict legal sense, an advocate is someone who represents another in the courts. See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 80 (1963) (noting that "advocate" is derived from the Roman *advocatus*—a pleader in the church courts).

<sup>48</sup> See V. G. KIERNAN, *THE DUEL IN EUROPEAN HISTORY* 20 (1988) (describing various traditions held in ancient societies).

The Italian word, *duello*, may be a contraction of the Latin terms for "two" (*duo*) and "war" (*bellum*). See DON C. SEITZ, *FAMOUS AMERICAN DUELS* 1 (Books for Libraries Press

conception of dueling—stylized combat between two individuals to resolve a matter of honor—evolved in Europe from forms of trial by ordeal or judgment by God.<sup>50</sup> The trial by ordeal involved a physical test, such as retrieving an object from a vat of boiling water—the accused, by surviving unscathed, established his or her innocence or truthfulness. The oath, which is closely related to trials by ordeal, is simply a more abstract form of divine judgment and remains in widespread use in legal institutions.<sup>51</sup> Applying the same logic, a combatant in trial by combat proves his cause by surviving. In medieval feudal society, sovereigns presided over public trials by combat or “judicial duels” between disputing nobility and would declare the winner.<sup>52</sup> In the early sixteenth century, Italian nobility drew upon this tradition, which was then in considerable decline, and established “extra-judicial duels”—private trials by combat—as a method of resolving disputes over personal affronts.<sup>53</sup> Other European nobility quickly adopted dueling, which flourished in various segments of European society from the sixteenth to early twentieth centuries.<sup>54</sup>

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1966) (1929). Billacois traces the use of “duello” to refer to single combat in France at the beginning of the seventeenth century. See FRANCOIS BILLACOIS, *THE DUEL: ITS RISE AND FALL IN EARLY MODERN FRANCE* 5-6 (Trista Jelous ed. & trans., Yale Univ. Press 1990) (1986) (defining “duel” as “a fight between two or several individuals (but always with equal numbers on either side), equally armed, for the purpose of proving either the truth of a disputed question or the valour, courage and honour of each combatant”).

<sup>49</sup> See KIERNAN, *supra* note 48, at 19-30 (summarizing dueling in classical, pre-modern, and non-Western societies).

<sup>50</sup> See BILLACOIS, *supra* note 48, at 15.

<sup>51</sup> See SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, 2 *THE HISTORY OF ENGLISH LAW* 596-99 (Boston, Little, Brown & Co. 1895).

<sup>52</sup> See generally ROBERT BALDICK, *THE DUEL: A HISTORY OF DUELING* 11-21 (1965) (distinguishing between judicial duels, single combat by champions, and warring armies in which the combatants, as part of a larger unit, bore each other no personal animosity). See also 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*337 (characterizing trial by *wager of battel* as of great antiquity); 3 LORD COKE, *FIRST INSTITUTE OF THE LAWS OF ENGLAND* \*453 (providing a more archaic description of trial by combat).

<sup>53</sup> See generally FREDERICK R. BRYSON, *THE SIXTEENTH-CENTURY ITALIAN DUEL* (1938) (discussing dueling and its various uses in Italy during the sixteenth century).

<sup>54</sup> See KIERNAN *supra* note 48, at 68-91 (detailing the spread of dueling across Europe, from England to Romania). See generally BEN C. TRUMAN, *THE FIELD OF HONOR: A COMPLETE AND COMPREHENSIVE HISTORY OF DUELLING IN ALL COUNTRIES* (New York, Fords, Howard & Hubbert 1884) (providing a less scholarly and slightly more romanticized perspective on dueling history).

The French quickly adopted the practice of dueling from the Italians. French nobility attended Italian fencing schools to better prepare themselves, but the practice died out in the early eighteenth century. See BILLACOIS, *supra* note 48, at 18-20. Dueling enjoyed a brief revival in the nineteenth century until the early twentieth century, particularly among university students and the officer corps in France and Germany. See generally UTE FREVERT, *MEN OF HONOUR: A SOCIAL AND CULTURAL HISTORY OF THE DUEL* (Anthony Williams trans., Polity Press 1995) (1991) (providing a history of dueling in France and Germany); KEVIN MCALEER, *DUELING: THE CULT OF HONOR IN FIN-DE-SIECLE GERMANY* (1994) (discussing the history of duelling in Germany). See Irina Reyfman, *The Emergence of the Duel in Russia: Corporal*

English dueling emerged in the late sixteenth century<sup>55</sup> and subsequently incorporated smooth-bore, single-shot pistols as a substitute for swords. This innovation greatly democratized dueling, which had previously required some expertise with edged weapons but now merely required the ability to squeeze a trigger.<sup>56</sup> Although dueling in the United States and Canada derived largely from British and continental European traditions, the lack of a noble class gave the practice a more egalitarian as well as political flavor.<sup>57</sup> Dueling flourished in America in the late eighteenth and early nineteenth centuries, primarily in the antebellum South and particularly in Georgia, South Carolina, and Louisiana.<sup>58</sup> As in Europe, it became associated with notions of chivalry and a broader code of honor—a collection of social customs, manners, and etiquette prescribing conduct befitting gentlemen of the upper classes. Adherence to this code, including dueling etiquette, was essential for achieving and maintaining one's status as a member of the dominant social class. Consequently, lawyers and judges made up a high percentage of participants in North American duels, along with politicians and newspaper editors.<sup>59</sup> Not only were such men more likely to be challenged because of statements they

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*Punishment and the Honor Code*, 54 *RUSSIAN REV.* 26-43 (1995), for the history of duelling in Russia and how the nobility attempted to reconcile it with the traditional honor code.

<sup>55</sup> See Cecilia Morgan, *'In Search of the Phantom Misnamed Honour': Duelling in Upper Canada*, 76 *CAN. HIST. REV.* 529, 534 (1995) (arguing that English dueling arose as a distinct form independent of continental European dueling traditions); but see TRUMAN, *supra* note 54, at 34-35 (tracing the emergence of English dueling to the publication of Italian fencing master, Vincent Saviolo's *Treatise of Honor*, in 1594). In Canada, however, the influence of French dueling traditions should not be dismissed. Among many factors, Kiernan credits the Thirty-Years War with the spread of the formal duel throughout Europe. See KIERNAN, *supra* note 48, at 78-89.

<sup>56</sup> See KIERNAN, *supra* note 48, at 144.

<sup>57</sup> Along with politicians, lawyers, and judges, all men with upwardly mobile aspirations attempted to adhere to codes of honor, which included obligations to duel. See Ipanne B. Freeman, *Dueling as Politics: Reinterpreting the Burr-Hamilton Duel*, 53 *WM. & MARY Q.* 289, 294-97 (1996).

<sup>58</sup> The only known dueling society in the United States was in Charleston, South Carolina. See BALDICK, *supra* note 52, at 117. See also HAMILTON COCHRAN, *NOTED AMERICAN DUELS AND HOSTILE ENCOUNTERS* 232 (1963) (providing a brief description of the Charleston dueling society). Several United States dueling compilations record a greater number of Southern duels than elsewhere. See *id.* at 231 (describing Southern gentlemen as more accustomed to firearms, quick-tempered, and sensitive to guarding honor than their Northern counterparts). See also TRUMAN, *supra* note 55, at 78 ("[T]he laws against the . . . custom have always been more vigorous and restraining in the Northern States than in the Southern . . ."). See generally WILLIAM OLIVER STEVENS, *PISTOLS AT TEN PACES* (1940) (tracing the rise and fall of dueling throughout American history).

<sup>59</sup> See Freeman, *supra* note 57, at 304-05. This phenomenon was not peculiar to the United States. Sir Jonah Barrington, a noted duelist and judge on Ireland's High Court of Admiralty from 1757-1791, recorded 227 official duels during his administration in which "the number of killed and wounded among the bar was very considerable." COCHRAN, *supra* note 58, at 14-15. Of course, many duels may have taken place between figures of less public and professional prominence and therefore were not publicly noted.

made about others in public forums, but they could ill afford to risk their social status by refusing to make or respond to challenges.

Dueling's decline was caused by many factors. Despite a proliferation of laws prohibiting dueling,<sup>60</sup> the practice continued seemingly unabated.<sup>61</sup> Subsequent harsher laws<sup>62</sup> and anti-dueling societies, combined with rising social disapproval and ridicule eventually

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<sup>60</sup> Such laws usually made both principals and their seconds subject to criminal punishment whether or not anyone was harmed, disqualified participants from holding public office, and required judges to issue warrants for arrest of participants when there were probable grounds to suspect they were about to engage in a duel. *See, e.g.*, Act of Dec. 17, 1819, 1819 Ala. Acts 64; Act of Nov. 10, 1801, 1801 Tenn. Pub. Acts 32; Act of May 22, 1852, 1852 Va. Acts ch. 105. There are several appellate cases involving dueling laws. *See* *Bundrick v. State*, 54 S.E. 683, 685 (Ga. 1906) (holding that crime of dueling is murder, not voluntary manslaughter, even if parties only meet casually and one kills the other before the appointed time for duel); *Harris v. State*, 58 Ga. 332, 333 (1877) (holding that consenting to act as a second is a crime regardless of whether a duel actually occurs); *Royall v. Thomas*, 69 Va. 53, 54 (28 Gratt. 130, 135) (1877) (holding that public official who aids in duel may be removed from office even if not convicted of offense in criminal action). *See also* Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 326-327 nn.21 & 23 (1984) (collecting dueling cases and statutes).

In Europe, there was concern that dueling-related deaths were needlessly diminishing the ranks of the nobility. *See* KIERNAN, *supra* note 48, at 102-04. Charles II issued a proclamation punishing duelists, yet during his reign, from 1660-1685, the record shows 196 duels took place in which 75 persons died and 108 were wounded. *See* TRUMAN, *supra* note 54, at 35.

<sup>61</sup> Factors making the laws ineffectual were many, but the most important factor was probably the social status of the participants. Known duelists and seconds were often influential politicians and were rarely prosecuted for their participation. *See infra* note 62. Despite its illegality, there was a high incidence of dueling in the military; the lack of prosecutions indicates tacit acceptance of the practice. *See* Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796*, 144 MIL. L. REV. 77, 104 n.113 (1994).

<sup>62</sup> The evolution of dueling laws in Georgia provides a good example of this increasing harshness. The first act prohibiting dueling simply excluded participants from public office. *See* 1809 Ga. Laws 429. A second act banned participants from holding public office and required an oath from all civil and military officers stating that they had not participated in a duel on or after January 1, 1829. *See* Act of Dec. 19, 1828, 1828 Ga. Laws 837. Subsequent laws banned participants from voting as well as from holding public office and subjected them to a \$500 fine and imprisonment. It made principals guilty of a high misdemeanor subject to four to eight years imprisonment with labor. If someone was killed, all participants, principals and seconds, were guilty of murder and subject to the death penalty. Officers of the law could be dismissed from office for not making an arrest when they had knowledge of a duel. *See* 1833 Penal Laws 203-06. Posting was also illegal. *See id.* at 207.

Arguably, the increasing severity of the anti-dueling laws made little impact. The hypocrisy of the first act was evident when it was signed into law in 1809 by Governor David Mitchell, who killed William Hunter in a duel at Savannah's customary dueling ground, the Jewish Cemetery, in 1802 shortly after serving as Savannah's mayor. The participants in the Dooly-Tait duel, *see infra* notes 115-26 and accompanying text, and in numerous other duels stemming from the Yazoo land swindle, went on to hold high public office. Despite the severity of their actions, several participants in a 1877 Georgia duel also held public office. *See infra* notes 127-31 and accompanying text. An amendment to the anti-dueling law in 1865 expressly provided for a method of commuting the murder penalty when someone died in a duel. *See* 1865-6 Ga. Laws 233.



eroded support for the institution.<sup>63</sup> By the 1880s, dueling had largely died out in the United States.<sup>64</sup>

### *B. Dueling as Alternative Dispute Resolution: The Underlying Objectives of Dueling Codes*

It is early morning on a foggy, isolated field. Two men, with their backs to each other and observed only by their solemn seconds, take up pistols, walk ten paces, turn, aim, and fire. One or both fall dead or are mortally wounded. This popular picture of dueling oversimplifies a complex social institution and obscures its underlying objectives. Ostensibly, the objective of dueling was to determine who would prevail in a question of honor. The method was formalized physical violence, in which the last one standing prevailed. Surprisingly, dueling was a recognized form of extra-judicial dispute resolution sharing some of the same objectives as modern ADR<sup>65</sup>—to avoid the courts, contain violence, and promote reconciliation.

#### *1. Avoiding Courts*

In Europe, the noble class sought to avoid the courts in disputes arising from real and perceived personal affronts. A person's honor and reputation were highly valued in these societies and perceived as particularly vulnerable. When and if disputes over honor were justiciable, the European nobility considered public judicial proceedings over such personal matters demeaning.<sup>66</sup> As in Europe, dueling in the United States was preferable over actions for libel or slander because it avoided using social inferiors sitting in judgment, provided an opportunity for the parties to prove they deserved a reputation as honor-

<sup>63</sup> See BALDICK, *supra* note 52, at 199-203 (attributing the decline more to ridicule than law, citing the example of Georgia's Judge Dooley, who joked his way out of numerous duels); STEVENS, *supra* note 58, at 284-86 (attributing the American rejection of dueling in part to Mark Twain's satire of the institution).

<sup>64</sup> According to one authority, the last duel in Georgia occurred in 1877. See Frank T. Wheeler, *Georgia's Last Duel*, GA. J., Nov/Dec 1996, at 14-18.

<sup>65</sup> In *Royall v. Thomas*, 69 Va. 53, 55 (28 Gratt. 130, 137) (1877), the court described it "as a mode of arbitrament."

<sup>66</sup> Petitioning Louis XIII to lift the ban on dueling, a French nobleman argued that he should "not have to entrust his honor to 'menial lawyers.'" KIERNAN, *supra* note 48, at 55. In sympathy with aggrieved noblemen, Montaigne notes the rise of "a fourth estate of Lawyers, breath-sellers, and pettifoggers," so much in control of the machinery of the law that its principles were often in conflict with the noble code. See MICHEL DE MONTAIGNE, *ESSAYS*, bk. I, chap. 22 (London, World Classics 1904-06) (1603), *quoted in* KIERNAN, *supra* note 48, at 55. Montaigne reflects the general sentiment of the day that legal proceedings could not adequately address personal insult or affronts. See *id.* In Russia, the nobility were not merely skeptical about the power of money to compensate for an indignity, but they resented the method of compensation for personal offenses under which the amount was determined by social rank. See Reyfman, *supra* note 54, at 28.

able men, and allowed redress for words that were not actionable or that would have yielded only nominal damages in court.<sup>67</sup> Purportedly, Andrew Jackson, the most prolific duelist among United States presidents, received the following advice from his mother: "Never tell a lie, nor take what is not your own, nor sue anybody for slander or assault and battery. Always settle them cases yourself."<sup>68</sup>

## 2. Containing Violence

Today, Mrs. Jackson's advice would be perceived as an open invitation to resort to violent self-help, but the code of honor that prescribed the formalities of dueling actually constrained this violence and reduced the lethality of the encounter. If one subscribes to this worldview, physical violence is an extremely powerful natural urge, and, according to some dueling apologists, part of the struggle necessary to achieve justice, much like wars and revolutions.<sup>69</sup> The unrestrained and easy resort to violence, however, did not befit gentlemen. The gradual formulation and acceptance of elaborate dueling codes and rituals, known as "code duellos," prevented the practice from becoming a violent free-for-all and distinguished the upper-class duel from a lower-class brawl.<sup>70</sup> These elaborate standards, written and unwritten, varied among different societies and were incorporated into the broader codes of social etiquette. Two code duellos of par-

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<sup>67</sup> According to the WILSON CODE, dueling was justified as a necessary supplement to court. See WILSON CODE, *supra* note 1, at 4 ("How many cases are there, that might be enumerated, where there is no tribunal to do justice to an oppressed and deeply wronged individual?"). See also TRUMAN, *supra* note 54, at 16-17 (noting that those in English-speaking countries defended dueling "on the ground that it compensates for the insufficiency of legal justice, . . . [assuming] that law is not as efficacious as lead"); Schwartz et al., *supra* note 60, at 325 (discussing factors that contributed to a preference for dueling over obtaining legal remedies).

<sup>68</sup> Wheeler, *supra* note 64, at 14.

<sup>69</sup> Dueling was justified as a "determined resistance to encroachments upon natural rights." WILSON CODE, *supra* note 1, at 4. When other remedies are unavailable, dueling becomes an act of self-preservation concomitant with the struggle within the natural order:

Those of different species are at perpetual warfare. The sweetest rose tree will sicken and waste on the near approach of the noxious bramble, and the most promising fields of wheat yield a miserable harvest if choked up with tares and thistles. The elements themselves war together . . . . The principal of self-preservation is co-extensive with creation . . . .

*Id.* at 4-5. Bosquett similarly noted that law could not suppress dueling because "[i]t has been custom from the earliest ages to decide differences and avenge injuries by single combat." BOSQUETT, *supra* note 2, at 16.

<sup>70</sup> See FREVERT, *supra* note 54, at 150-71 (discussing the social significance of dueling protocol); KIERNAN, *supra* note 48, at 145-46 (opining that the evolution of dueling parallels that of war, with the codification of dueling etiquette equated with the development of international conventions); cf. STEVENS, *supra* note 58, at 40 (noting that, considering the extent to which Georgians in the late eighteenth and early nineteenth centuries armed themselves, the duel provided a useful check on general murder).

ticular influence in the United States were the *Irish Code of Honor*<sup>71</sup> and its American version, authored by South Carolina governor John Lyde Wilson, known as the *Wilson Code*.<sup>72</sup> These and other code duellos<sup>73</sup> defined conduct that justified an injured party to issue the challenge, specified when a failure to issue a challenge would be dishonorable, prescribed the appropriate responses of the party challenged, regulated the conduct of seconds, and provided rules of engagement on the dueling ground.

Adherence to prevailing conventions of dueling, well known by the upper classes, was essential to proving one's right to be a gentleman among those who ascribed or aspired to high social status. This social pressure to conform to the dueling conventions had the functional purpose of forcing principals to channel their urge for violence into a rigid procedural framework that reduced the possibility of lethal injury. Dueling traditions discouraged parties from acting in the heat of passion by prohibiting challenges in immediate reaction to a perceived insult and before the offended party had sought advice and politely requested an acceptable explanation or apology, known as an *amende honorable*,<sup>74</sup> from the other party.<sup>75</sup> Although presumably the mere threat of lethal encounters had a sobering influence and inhibited some provoking behavior, gentleman could not demean themselves by fighting at the time of the insult, when their "blood ran hot," causing an uncontrolled melee.<sup>76</sup> If a duel was fought, the rules of engagement, prescribed by the code duello and negotiated by the seconds, prohibited unfair advantage, thus reducing the opportunity for

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<sup>71</sup> IRISH CODE OF HONOR [hereinafter IRISH CODE], reprinted in WILSON CODE, *supra* note 1, at app. The IRISH CODE was also known as the "twenty-six commandments." They were "adopted at the Clonmel Summer Assizes, 1777, for the government of duellists, by the gentlemen of Tipperary, Galway, Mayo, Sligo and Roscommon, and prescribed for general adoption throughout Ireland." BALDICK, *supra* note 52, at 33-34.

<sup>72</sup> WILSON CODE, *supra* note 1.

<sup>73</sup> The prevailing code in England was the Royal Code of Honor. See Schwartz et al., *supra* note 60, at 322 n.7. In Germany, as late as 1891, Gustav Hergsell authored the DUELL-CODEX (Vienna, Pest, Leipzig, A. Hartlebens Verlag 1891).

<sup>74</sup> See KIERNAN, *supra* note 48, at 139 ("It came to be the practice in French legal actions over insult or libel for the court to order the offender to make public withdrawal, by *amende honorable* and *reparation d'honneur*.").

<sup>75</sup> See WILSON CODE, *supra* note 1, at 12 ("Never send a challenge in the first instance, for that precludes all negotiation. Let your note be in the language of a gentleman, and let the subject matter of complaint be truly and fairly set forth, cautiously avoiding contributing to the adverse party any improper motive."). See also *id.* at 18 (explaining to a party receiving a note before a challenge, "[i]f the note received be in abusive terms, object to its reception, and return it for that reason; but if it be respectful, return and answer of the same character, in which respond correctly and openly to all interrogatories fairly propounded").

<sup>76</sup> See IRISH CODE, *supra* note 71, at 41-42 ("Challenges are never to be delivered at night, unless the party to be challenged intend leaving the place of offence before morning; for it is desirable to avoid all hot-headed proceedings.") See also *id.* at 38 ("[A] blow is strictly prohibited under any circumstances among gentlemen.").

one side to have a better chance of killing the other.<sup>77</sup> Additionally, the limitations of the prescribed weaponry reduced lethality. The official dueling pistol with its smooth bore was notoriously inaccurate except at close range and subject to misfire.<sup>78</sup> Although there was some variation based on the severity of the offense, the rules limited the number of shots fired and required the duel to terminate at first injury, thereby reducing the probability of lethal injury. The first eleven rules of the *Irish Code* specified, for example, to what degree a particular offense required the drawing of blood and limited the number of shots to be exchanged.<sup>79</sup> Under the *Wilson Code*, the duel should end if blood was drawn or, in the case of minor insults, after the first exchange of shots.<sup>80</sup>

### 3. Promoting Reconciliation

Another functional purpose and underlying objective of code duellos was to encourage peaceful resolution and personal reconciliation. In the preface of the *Wilson Code*, the author stresses the peacemaking function of the code's provisions and gauges his own success of applying them as a second.<sup>81</sup> Before the principals could

<sup>77</sup> The WILSON CODE counsels:

Duty of Challengee and His Second Before Fighting.

1. After all efforts for a reconciliation are over, the party aggrieved sends a challenge to his adversary, which is delivered to his second.
2. Upon the acceptance of the challenge, the seconds make the necessary arrangements for the meeting, in which each party is entitled to a perfect equality. The old notion that the party challenged, was authorized to name the time, place, distance and weapon, has been long since exploded; nor would a man of chivalric honor use such a right, if he possessed it. The time must be as soon as practicable, the place such as had ordinarily been used where the parties are, the distance usual, and the weapon that which is most generally used, which, in this State, is the pistol.
3. If the challengee insist upon what is not usual in time, place, distance and weapon, do not yield the point, and tender in writing what is usual in each, and if he refuses to give satisfaction, then your friend may post him.

WILSON CODE, *supra* note 1, at 21-22.

The fair play requirement was so important that a principal's own second could kill him for a breach. In an 1806 Georgian duel between William Crawford and General John Clark, the seconds negotiated terms that included the following: "Article 11. If either of the principals deviate from the . . . rules, or attempt to take any undue advantage, either or both the seconds are at liberty to fire at him." SEITZ, *supra* note 48, at 120.

<sup>78</sup> See KIERNAN, *supra* note 48, at 143-44 (estimating that only one in fourteen duels resulted in a mortal wound, while only one in six resulted in any wounds).

<sup>79</sup> See IRISH CODE, *supra* note 71, at 39-41.

<sup>80</sup> See WILSON CODE, *supra* note 1, at 25-26 (explaining the second's duty to stop the duel after shots have been fired and one person is injured).

<sup>81</sup> See *id.* at 10 ("Under these circumstances, the following rules are given to the public, and if I can save the life of one useful member of society, I will be compensated. I have restored to the bosoms of many, their sons, by my timely interference, who are ignorant of the misery I have averted from them."). Similarly, Bosquett stated that he had served twenty-five times as a second and that "life or honour were never lost in my hands." BOSQUETT, *supra* note 2, at 16.

take action, they were required to engage a "friend" as a second.<sup>82</sup> Seconds served to de-escalate the conflict. They were close or influential friends of the principals, of equal social rank, and familiar with prevailing dueling norms and procedures. They performed a variety of functions, including serving as witnesses, providing moral support, guarding against ambush or foul play, insuring adherence to the rules, and joining in combat with the principals if necessary.<sup>83</sup> While largely ignored by commentators, a second's most important function under both the Irish and American code duellos was to bring about a reconciliation between the parties.<sup>84</sup>

In the early nineteenth century, American dueling custom prescribed a content and order of procedure that facilitated the second's peacemaking role. Seconds were to have complete control. Principals were to give the entire matter over to the seconds and defer to their advice in all aspects of the dispute.<sup>85</sup> Seconds served as the intermediaries for all communications and insured that all correspondence between the parties was stylistically polite and formal.<sup>86</sup> The

<sup>82</sup> See WILSON CODE, *supra* note 1, at 12 ("When you believe yourself aggrieved, be silent on the subject, speak to no one about the matter, and see your friend, who is to act for you, as soon as possible.").

<sup>83</sup> See KIERNAN, *supra* note 48, at 137-40 (discussing the functions of seconds in emphasizing the duty of guaranteeing fair play). See also BILLACOIS, *supra* note 48, at 65 (describing how the French institutionalized the use of equal numbers of seconds, "thirds," or "fourths" by the late sixteenth century). In Spanish, the second was referred to as "godfather." See *id.*

Under the IRISH CODE: "When seconds disagree, and resolve to exchange shots themselves, it must be at the same time and at right angles with their principals." IRISH CODE, *supra* note 71, at 44.

<sup>84</sup> See *id.* at 43 ("Seconds are bound to attempt a reconciliation before the meeting takes place, or after sufficient firing or hits, as specified."); WILSON CODE, *supra* note 1, at 24-28 (outlining the conciliatory function of seconds). See also KIERNAN, *supra* note 48, at 138 (recognizing that cooperation in seeking a peaceful solution was also an accepted part of a second's duty under European dueling traditions).

<sup>85</sup> See WILSON CODE, *supra* note 1, at 12 ("When your second is in full possession of the facts, leave the whole matter to his judgment, and avoid any consultation with him unless he seeks it. He has the custody of your honor, and by obeying him you cannot be compromised [sic].").

The WILSON CODE also provides: "Second's Duty Before Challenge Sent. 1. Whenever you are applied to by a friend to act as his second, before you agree to do so, state distinctly to your principal that you will be governed only by your own judgment . . ." *Id.* at 13. The WILSON CODE continues:

Second's Duty of the Party Receiving a Note Before Challenge Sent.

1. When consulted by your friend, who has received a note requiring explanation, inform him distinctly that he must be governed wholly by you in the progress of the dispute. If he refuses, decline to act on that ground.

*Id.* at 20.

<sup>86</sup> The WILSON CODE counsels:

Second's Duty Before Challenge Sent.

.....

2. . . . Check hi m [sic] if he uses opprobrious epithet towards his adversary, and never permit improper or insulting words in the note you carry.

requirement of equal social rank<sup>87</sup> and friendship with the disputants gave weight to their opinions as to whether honor had been put into question or satisfied by the opposing party's response. It also gave them the influence to calm their principals down.<sup>88</sup> Before the issuance of a challenge, a second would seek to obtain an *amende honorable*—some acceptable statement, if not an outright apology, from the other side that would allow his principal to declare that his honor was intact or restored. Seconds were advised not to press the side offering the *amende honorable* for too much.<sup>89</sup> Alternatively, the seconds could achieve an "adjustment" by soliciting an exchange of statements from the principals that reframed the original offense as inoffensive. If the parties refused to reconcile, the seconds could investigate the facts and suggest an honorable solution that avoided a lethal encounter.<sup>90</sup> The *Wilson Code* allowed a second to withdraw when his principal refused to follow his advice or to settle on terms consistent with his findings of fact.<sup>91</sup> If the parties reached the dueling

3. To the note you carry in writing to the party complained of, you are entitled to a written answer, which will be directed to your principal and will be delivered to you by his adversary's friend. If this be not written in the style of a gentleman, refuse to receive it, and assign your reason for such refusal.

*Id.* at 14.

<sup>87</sup> See IRISH CODE, *supra* note 71, at 41 ("Seconds to be of equal rank in society with the principals they attend, inasmuch as a second may choose or chance to become a principal, and equality is indispensable.").

<sup>88</sup> The WILSON CODE provides:

Second's Duty Before Challenge Sent.

1. . . . You are supposed to be cool and collected, and your friend's feelings are more or less irritated.

2. Use every effort to soothe and tranquilize your principal; do not see things in the same aggravated light in which he views them; extenuate the conduct of his adversary whenever you see clearly an opportunity to do so, without doing violence to your friend's irritated mind. Endeavor to persuade him that there must have been some misunderstanding in the matter.

WILSON CODE, *supra* note 1, at 13-14. The WILSON CODE continues:

Second's Duty of the Party Receiving a Note Before Challenge Sent.

. . . .

2. Use your utmost efforts to allay all excitement which your principal may labor under; search diligently into the origin of the misunderstanding; for gentleman seldom insult each other, unless they labor under some misapprehension or mistake; and when you have discovered the original ground of error, follow each movement to the time of sending the note, and harmony will be restored.

*Id.* at 20.

<sup>89</sup> The WILSON CODE advised:

When an accommodation is tendered, never require too much; and if the party offering the *amende honorable*, wishes to give a reason for his conduct in the matter, do not, unless offensive to your friend, refuse to receive it; by so doing you may heal the breach more effectually.

*Id.* at 16-17.

<sup>90</sup> See *id.* at 18-19 (describing the conduct required of a party who receives a note from an equal before challenge). See also *id.* at 26-27 (describing the second's duty to reconcile the duelling parties after shots have been fired and no one has been hit).

<sup>91</sup> See *id.* at 18-19. See also *id.* at 25-26.

ground without reconciling and the seconds failed to suggest an acceptable adjustment preserving the honor of both disputants, the seconds were instructed to end the duel if no one was hit after the first round of shots by having the "principals meet on middle ground, shake hands and be friends."<sup>92</sup> The honor of the seconds was also at stake, and their success in resolving the matter depended greatly on their known integrity and ability to trust one another.<sup>93</sup>

#### 4. *Inquiry and Posting*

By the nineteenth century, the American code duello included two other widely accepted conventions—commissions of inquiry and posting. Under this first convention, seconds and other influential friends or members of the community would conduct their own investigation of the dispute and either recommend the content of an *amende honorable* or issue a finding of fact designed to mitigate the actions or words that caused the affront.<sup>94</sup> This is similar to commissions of inquiry under international law.<sup>95</sup> If such an inquiry produced a face-saving adjustment or a finding of fact declaring no reason to take offense, the principals could disengage with their honor intact or the seconds could abandon their principals on the grounds that there was no reason for them to duel. The seconds' refusal to continue service effectively removed the social imprimatur from the proceedings. While seconds could conduct these inquiries, additional friends, a step removed from the conduct of the duel, may have been more effective in this role.<sup>96</sup>

Posting was a dueling tradition unique to the United States. It was the act of making a public declaration either through the newspapers or by distribution of a handbill that one of the parties violated the code of honor. A classic example resulted from a dispute between General James Wilkinson and Congressman John Randolph of Virginia in 1807. Wilkinson challenged Randolph, but Randolph refused to be drawn out. After warning Randolph that he would post him and

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<sup>92</sup> *Id.* at 26. Such intervention was only acceptable in matters that were not a serious cause of complaint. If the insult was of a serious nature, the second of the challenger was instructed to refuse reconciliation until someone was injured or the offender offered adequate reparations. *See id.* at 26.

<sup>93</sup> *See* KIERNAN, *supra* note 48, at 138.

<sup>94</sup> *See id.* at 139 (noting that a cooperative examination of the facts was an accepted part of the role of seconds in European dueling practice).

<sup>95</sup> *See* Convention on the Pacific Settlement of International Disputes, July 28, 1899, 32 Stat. 1779, 187 Consol. T.S. 410, *as amended*, Oct. 18, 1907, 36 Stat. 2199, 205 Consol. T.S. 233. Under international law, inquiry is much like fact-finding as there are no recommendations accompanying the findings; however, an "enlarged inquiry" includes the issuance of recommendations and has been used to avoid duels. *See* YARN, *supra* note 21, at 88-89, 178-80.

<sup>96</sup> *See* text accompanying notes 106-09, 124-26 *infra*.

receiving no reply, Wilkinson placed the following notice at all taverns and street corners in Washington:

HECTOR UNMASKED.—In justice to my character I denounce to the world John Randolph, a member of Congress as a prevaricating, base, calumniating scoundrel, poltroon and coward.<sup>97</sup>

Under the code duello, the second of the offended party was allowed to post the offender if the offender refused to accept the note requesting an apology or explanation,<sup>98</sup> if the offender refused to meet either the challenger or the challenger's second based on claims of social inequality,<sup>99</sup> or if a principal came upon the dueling ground but refused to fight when required.<sup>100</sup> If the challenged party sought to gain some advantage on the dueling ground by insisting upon terms that were unusual in time, place, distance, or choice of weapon, the second of the challenger could post him.<sup>101</sup> Posting served as a declaration that a principal did not adhere to the code of honor and thus was not a gentleman. Not being gentlemen, posted individuals were not worthy of the privilege of dueling with gentlemen.<sup>102</sup> Others had the right to refuse a note or challenge from posted persons.<sup>103</sup> From a functional perspective, a duelist who could honorably avoid a duel with someone who might not adhere to the rules was avoiding a potentially more dangerous encounter.

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<sup>97</sup> COCHRAN, *supra* note 58, at 20.

<sup>98</sup> See WILSON CODE, *supra* note 1, at 15 (explaining the second's ability to ask for a reason for refusal of a note, and upon refusal for a reason, the ability to post the refusing party).

<sup>99</sup> See *id.* at 15-16 (explaining when the second is obligated to substitute himself for the principal due to social inequality between the principal and the challenger).

<sup>100</sup> See *id.* at 27 (explaining that the cowardly principal's second is required to state, "I have come upon the ground with a coward, and do tender you my apology for an ignorance of his character; you are at liberty to post him").

<sup>101</sup> See *id.* at 22.

<sup>102</sup> Since one could not challenge someone of lower social rank, a caning or a flogging would have to do. Thus, when Sen. Preston Brooks of South Carolina caned Massachusetts Sen. Charles Sumner senseless on the floor of the Senate in 1856, it could be argued that he was expressing his estimation of Sumner's social class.

Although he was not posted, since it was not the custom in Ireland, Leonard McNally could not get any Irish gentleman to accept his challenge. This caused him such distress that when Sir Barrington "out of Christian charity" decided to accept his challenge and wounded him, McNally said afterwards that Barrington's shot was his "salvation." TRUMAN, *supra* note 54, at 560-561.

<sup>103</sup> See WILSON CODE, *supra* note 1, at 19 (explaining that a party may refuse to receive a note if the challenger is a minor, has been posted, has been publicly disgraced, has an illegal occupation, or is a lunatic).



### C. Some "Successful" and Varied Applications of the Code Duello

The deadliness of duels is well-documented.<sup>104</sup> Despite the seeming barbarity of the practice, proponents of dueling sincerely believed that the formalities of dueling saved more lives than were spent. When applied correctly, code duellos aided reconciliation or at least reduced the chances of lethality. Such averted duels were rarely reported, however, due to a combination of the illegality of the practice and the lack of bloodshed. Beyond public recognition that everyone's honor remained intact, there was little reason for participants in such exchanges to make them public. Hence, there is a scarcity of well-documented "successful" code duello applications. This is similar to the practical absence of public paper trails of privately settled legal claims. Fortunately, there is sufficient contemporary information on four averted duels to illustrate the effective and varied use of code duellos in nineteenth-century America.

#### 1. The Lincoln-Shields Duel<sup>105</sup>

Despite his oft-quoted advice to engage in peacemaking,<sup>106</sup> Abraham Lincoln was no stranger to dueling. In 1842, James Shields, the Illinois state auditor, challenged Lincoln, an Illinois state senator, to a duel. The state bank had collapsed, and Shields, a Democrat, had to inform the people of Illinois that they could not pay their taxes with bank notes. Lincoln and the Whigs seized this opportunity to undermine the Democrats. A series of satirical letters generally thought to have been written by Lincoln appeared in the *Sangamo Journal* under the title, "Lost Township" and signed by "Rebecca." Shields felt that references to him in these letters crossed the line between the political and the personal. Discovering Lincoln to be the author, Shields sent a note through his "friend" John D. Whiteside to Lincoln demanding a retraction of the offending statements and an apology. Lincoln avoided a retraction and apology by complaining that Shields's letter was offensive for assuming too much about authorship of the letters and for lacking specificity as to which portions caused offense. Shortly thereafter, a frustrated Shields issued the challenge.

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<sup>104</sup> See sources cited *supra* note 58 (detailing famous American examples including Alexander Hamilton's death in the duel with Burr, Button Gwinnett's fatal wounding by McIntosh, and Stephen Decatur's by James Barron).

<sup>105</sup> See Douglas L. Wilson, *Lincoln's Affair of Honor*, ATLANTIC MONTHLY, Feb. 1998, at 64-72, for a discussion of the circumstances surrounding Lincoln's 1842 duel with James Shields. See also James R. Webb, *Pistols for Two . . . Coffee for One*, AM. HERITAGE, Feb. 1975, at 66-84 (describing Lincoln's "lampooning" of James Shields's politics in a local Illinois newspaper, which eventually led to the duel between Shields and Lincoln). The description of these events which follows is drawn from these sources.

<sup>106</sup> See *supra* note 18.

While dueling was against the law in Illinois and opposed by Lincoln, the code of honor had such considerable force that Lincoln was compelled to respond to the challenge or lose his social status. Lincoln named Elias Merryman as his "friend," or second, and Shields named Whiteside as his. At their initial meeting, the two seconds pledged to obtain a peaceful resolution of difficulties. To that end, Whiteside hoped that Governor Thomas Ford and General W. L. D. Ewing, an influential Democratic leader, could talk Shields out of the duel. Before Whiteside could enlist this assistance, however, he learned that Lincoln had already dictated the terms of the duel—weapons, time, and place—and had departed for Jacksonville without consulting his second.<sup>107</sup> Under these conditions, Whiteside could neither agree to terms nor negotiate further, nor could he consult his principal, who was traveling outside of Springfield. Whiteside withdrew his pledge to Merryman but agreed to advise Shields of what had transpired and to meet Lincoln's party on the appointed day.

On that day, both parties and their seconds accompanied by other friends arrived on the dueling ground, an island on the Mississippi River in the state of Missouri. With no adjustment in sight, Lincoln, as the challenged party, set forth his terms: broad swords within two enclosed rectangular spaces, out of which the combatants could not step. The rectangles were separated by a board on edge, over which the combatants faced each other but could not cross, and demarcated by back lines that were approximately a sword's length plus three feet from the board. While this obviously gave Lincoln, abnormally tall with disproportionately long arms, the clear advantage, he was willing to have the dispute adjusted. Shields was not so willing, however.

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<sup>107</sup> In an attempt to create an opportunity for conciliation, Lincoln wrote the following instructions for his second:

In case Whitesides [sic] shall signify a wish to adjust this affair without further difficulty, let him know that if the present papers be withdrawn, & a note from Mr. Shields asking to know if I am the author of the articles of which he complains, and asking that I shall make him gentlemanly satisfaction, if I am the author, and this without menace, or dictation as to what that satisfaction shall be, a pledge is made, but the following answer shall be given—

"I did write the 'Lost Township' letter which appeared in the Journal of the 2nd [instance] but had no participation, in any form, in the other article alluding to you. I wrote that, wholly for political effect. I had no indication of injuring your personal or private character or standing as a man or a gentleman; and I did not then think, and do not now think that that article, could produce or has produced that effect against you, and had I anticipated such an effect I would have forbore to write it. And I will add, that your conduct towards me, as far as I knew, had always been gentlemanly; and that I had no personal pique against you, and no cause for any."

Wilson, *supra* note 105, at 70. Reportedly, Whiteside told Merryman that an approach to reconciliation based on withdrawal of Mr. Shields's note would never be consented to by his principal. *See id.*

Two men present, John J. Hardin, a leading Whig, and Revill W. English, a Democrat, suggested the case be submitted to impartial judges.<sup>108</sup> The commission of inquiry was never formed as Shields's friends declared the offending note withdrawn. Lincoln's friends then accepted, responding that Lincoln had written the letters "solely for political effect" not intending to injure "the personal or private character or standing of Mr. Shields as a gentleman or a man."<sup>109</sup> All of this transpired without the knowledge of Shields and Lincoln.<sup>110</sup> Shields's friends had prevented the duel by effectively declaring it unnecessary. They believed his honor was no longer in need of vindication and forced him to accept the adjustment. The seconds stepped between the parties and took their swords from them.<sup>111</sup>

Lincoln's duel is a textbook example of reconciliation by seconds. When insulted, Shields enlisted the aid of Whiteside and issued his challenge only after sending a letter requesting an apology. Lincoln selected Merryman because of his familiarity with the code duello.<sup>112</sup> The seconds adhered to the code. Except for Lincoln's letter setting out the terms, all communications between the disputants were either through the seconds or in correspondence delivered by them. Whiteside and Merryman met and pledged to pursue reconciliation, which was thwarted by their principals. In fact, by setting forth his terms for the duel, Lincoln violated the code duello, which forbade the issuance of terms that would put the parties on unequal footing on the dueling ground. Moreover, under the *Wilson Code* the challenged party had no authority to demand choice of weapons.<sup>113</sup> This may

<sup>108</sup> See *id.* at 71.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* According to Whiteside, "This was all done without the knowledge or consent of Mr. Shields, and he refused to accede to it, until Dr. Hope, General Ewing, and myself declared the apology sufficient, and that we could not sustain him in going further." See *id.*

<sup>111</sup> Not all of the combatants' friends were prepared for an adjustment. William Butler, one of Lincoln's friends, regarded the efforts of the seconds to stop the fight as interference. Years later, he told Lincoln's presidential secretary, John G. Nicolay, "the duel was about proceed, when Hardin and English interfered and stopped it." *Id.* Nicolay continued:

Butler says he does not know how the matter was arranged—that he had become disgusted with the whole proceeding and was sitting on a log about thirty feet away expecting to see a bloody fight, when much to his astonishment the whole affair came to an end—the seconds suddenly stepping between the combatants and taking their swords from them.

*Id.*

<sup>112</sup> See *id.* at 69.

<sup>113</sup> The WILSON CODE provides:

Duty of Challengee and His Second Before Fighting.

1. After all efforts for a reconciliation are over, the party aggrieved sends a challenge to his adversary, which is delivered to his second.
2. Upon the acceptance of the challenge, the seconds make the necessary arrangements for the meeting, in which each party is entitled to a perfect equality. The old notion that the party challenged, was authorized to name the time, place, distance

have further inflamed Shields, who could have opted to post Lincoln and refused to fight,<sup>114</sup> and it undermined the seconds' attempt at reconciliation. Fortunately, additional friends of considerable social and political influence contacted by the seconds arrived at the dueling ground to affect an adjustment, through fact-finding if necessary. In response to Lincoln's admission that he wrote the second offending letter and his denial of intent to insult Shields personally, Shields's seconds concluded that their principal's honor was intact, thereby obviating the need for a duel. Because Shields insisted on proceeding, his seconds threatened to withdraw their support, in conformity with the code duello.

## 2. *The Dooly-Tait Duel*<sup>115</sup>

In 1802, Charles Tait—a Georgia lawyer who later served as a superior court judge—challenged John M. Dooly to a duel. Dooly was also a lawyer—he was to later serve as state solicitor general and superior court judge, and he also ran unsuccessfully for Congress. Dooly was known for using his wit to escape from fights.<sup>116</sup> In this instance, however, he was unable to extricate himself from the deadly political tensions growing out of the Yazoo land deal.<sup>117</sup> The Yazoo land deal was the primary source of tension between two emerging political parties in Georgia, the Troup and Clark parties. Tait was a member of the Troup party, and Dooly was a member of the Clark party. After a lawsuit in which Tait and Peter Lawrence Van Allen, a

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and weapon, has been long since exploded; nor would a man of chivalric honor use such a right, if he possessed it. The time must be as soon as practicable, the place such as had ordinarily been used where the parties are, the distance usual, and the weapon that which is most generally used, which, in this State, is the pistol.

3. If the challengee insist upon what is not usual in time, place, distance and weapon, do not yield the point, and tender in writing what is usual in each, and if he refuses to give satisfaction, then your friend may post him.

WILSON CODE, *supra* note 1, at 21-22. *But see* IRISH CODE, *supra* note 71, at 42 (allowing the challenged to choose any weapon including swords, unless the challenger swears that he has no skill with the sword).

<sup>114</sup> See *supra* Part II.B.4.

<sup>115</sup> See E. Merton Coulter, *A Famous Duel That Was Never Fought*, 43 GA. HIST. Q., 365-377 (1953) (summarizing the Dooly-Tait duel). This following account of the duel is drawn from this source.

<sup>116</sup> Subsequent accounts of this duel contain an interesting tale of Dooly avoiding an exchange of volleys by insisting he be allowed to sheath one leg in a hollowed-out gum tree because Tait had a wooden leg. See *id.* at 369-70. This embellishment of the Dooly-Tait duel is derived probably from reports of a duel in Louisiana between a Captain Foster, who did have a wooden leg, and one Mr. Molineaux. Foster reportedly insisted that Molineaux should lean a piece of wood the height to Foster's false leg up against his left leg so that the dueling ground would favor neither principal. Molineaux's shot is said to have shattered Foster's wooden leg. See TRUMAN, *supra* note 54, at 562-63.

<sup>117</sup> See HARNETT T. KANE, *GENTLEMEN, SWORDS AND PISTOLS* 153-67 (1951); SEITZ, *supra* note 48, at 110-112 (detailing the rise of the Yazoo land swindle).

friend of Dooly's, were involved, Tait challenged Van Allen to a duel. In turn, Van Allen asked Dooly to advise him on whether he was accountable to Tait. After some inquiries, Dooly advised him to refuse Tait's challenge on the grounds that Tait was not a gentleman, therefore not deserving of satisfaction. After attempting to maneuver Dooly into a duel with him over the effrontery of Dooly's advice, William Crawford, a friend of Tait, challenged Van Allen to a duel. Just prior to that duel, Tait sent letters to Dooly requesting an admission that he advised Van Allen that Tait was "no gentleman." Dooly sent a verbal reply that he had no answer "other than what Tait already knew."<sup>118</sup> A few days latter, Crawford killed Van Allen on the dueling ground. Tait continued to press for an encounter with Dooly; Dooly responded that, because of Van Allen's death, Tait's request was too late. In frustration, Tait finally issued a challenge on the fourth of August. Dooly delayed, responding that he was seeking advice on how to proceed now that his friend and former principal, Van Allen, was dead. After some delay, arrangements were made for both parties, accompanied by a "friend," to meet at Barksdale's Ferry on the third of September, cross into South Carolina, and there agree on the actual dueling ground.

In the intervening time between the issuance of the challenge and the date of the encounter, Dr. William Wyatt Bibb was hard at work on a compromise to avoid the duel. He put himself in the most unusual position by delivering Tait's challenge to Dooly and delivering Dooly's correspondence to Tait. Thus, although he accepted Tait's formal request to serve as his second, he effectively made himself the second of both parties. In addition, he agreed to be the standby surgeon for both. Van Allen was dead, and the rest of Dooly's friends were so opposed to dueling that he could not find a second, so he appeared alone at the dueling ground but for Dr. Bibb, officially Tait's second. Dr. Bibb in conference with Dooly worked out a written adjustment, which he and Dooly signed. In answer to Dooly's contention that Tait had applied too late for Dooly's explanation, Tait responded that he would have done so earlier had he not thought Crawford would and that he did so as soon after the Van Allen-Crawford duel "as his indisposition would permit."<sup>119</sup> In response, Dooly answered that he never gave the objectionable opinion of Tait to Van Allen.<sup>120</sup> Afterwards, "the parties shook hands on terms of mutual friendship."<sup>121</sup> This was a successful reconciliation as evidenced by

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<sup>118</sup> Coulter, *supra* note 115, at 375.

<sup>119</sup> *Id.* at 377.

<sup>120</sup> *See id.*

<sup>121</sup> *Id.*

the continuing relationship of the principals. Dooly, as state solicitor general, appeared frequently before Circuit Judge Tait. Dr. Bibb subsequently became a congressman, senator, and the first governor of Alabama.

While the intervention of Tait's second as a quasi-mediator is unusual, the overall incident follows the code duello's prescriptive pattern. The offended party withheld a challenge until after seeking an *amende honorable*. Lacking a satisfactory response, Tait issued his challenge. All communications were through Dr. Bibb. The failure of Dooly to find his own second may have been irregular, but it did provide a unique opportunity for reconciliation.

### 3. *The Jones-Gardner Duel*<sup>122</sup>

In 1843, another potentially lethal Georgia duel was adjusted by tactful intervention. The controversy, which followed the acquittal of William Platt for the fatal shooting of a prominent local Democrat, was fueled by the political rivalry between the Democrats and the rival Whig party.<sup>123</sup> Whig James Jones, co-owner and editor of the *Augusta Daily Chronicle and Sentinel*, was incensed by the acquittal and denounced the verdict claiming the sheriff had packed the jury with Democrats. Democrat James Gardner responded in defense of the sheriff through the editorial page of the *Augusta Constitutionalist* under the pseudonym "Fair Play," accusing Jones of purely political motives. Jones discovered that Gardner had written the editorials and confronted him. The letters between the antagonists illustrate the requirements of formality<sup>124</sup> and the use of seconds, Col. T. H. Kenan for Jones and John McKinne for Gardner, as intermediaries. As in the Lincoln-Shields affair, however, the seconds were unable to dissuade their principals without the help of additional influential interveners. In this case, Henry H. Cumming and Charles Jones Jenkins, respected Augustans who had defended Platt, formed a commission of inquiry. On August 5, 1843, they issued their findings in an exhaustive letter outlining the underlying facts of the dispute in such a way as to show that both men were "actuated by fair and honorable motives," and that their current reputation as gentlemen "is sufficient in a doubtful case,

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<sup>122</sup> See generally Lee Ann Caldwell Swann, *An Averted Duel: Augusta, 1843*, 65 GA. HIST. Q. 323-28 (1981) (providing a recent account of the 1843 duel). The following account of the controversy is drawn from this source.

<sup>123</sup> When introduced to Platt at a social function, Harding purportedly only bowed rather than shook hands. Gravely insulted, Platt subsequently shot Harding (just the sort of uncontrolled violence that might have been avoided had Platt ascribed to the code duello). See *id.* at 324.

<sup>124</sup> For an example of the polite formality required under the code duello, see *id.* at 324-26 (reproducing letters exchanged in the Jones-Gardner duel).

to entitle each to the most favorable construction of his language and conduct."<sup>125</sup> The commission concluded that neither man was justified in his charges against the other and recommended "that the controversy between these gentlemen be Terminated by each admitting what they and their respective friends claim for them, that which common benevolence ought cheerfully to concede . . . [that each had] fair and honorable motives."<sup>126</sup> Presumably, this was a sufficient adjustment to leave the principals' honor intact and put the matter to rest.

Unlike the Lincoln-Shields and Dooly-Tait affairs, this dispute was resolved before the parties actually stood on the dueling ground. An apology was sought before the challenge. While the principals used seconds as interveners and intermediaries, other influential parties effected settlement through fact-finding and skillful adjustment.

#### 4. *The Adams-Richards Duel*<sup>127</sup>

In May 1877, two lawyers, Samuel Barnard Adams and Rodolph Rufus Richards, represented opposing parties in the city court of Savannah, Georgia. Adams's client prevailed, winning a judgment of \$25.12, and Richards moved for a retrial. At the motion hearing, Richards objected to Adams's filing of a late brief. Believing Richards had agreed orally to the late filing, Adams moved to disbar Richards. Richards took this motion as a personal affront. In subsequent correspondence, Richards accused Adams of insulting him further in front of the tax collector's office shortly after the disbarment motion. Richards, in turn, had accused Adams of being a liar and restrained himself from slapping Adams's face there on the street. Instead, Richards sought out another lawyer, Edward Hollis, to act as his second and drafted a letter demanding an apology and withdrawal of the motion. This letter, delivered the next day by Hollis, accused Adams of insulting Richards verbally some three hours after the hearing and of failing to respond in a gentlemanly manner when Richards replied that he was a liar. Richards concluded that by filing the disbarment motion, Adams had not acted as a gentleman.

Adams immediately enlisted fellow lawyer Peter Meldrim as his second. In turn, Meldrim enlisted the aid of a "third," Dr. William Duncan. An exchange of notes took place between the principals in an attempt to achieve an *amende honorable*. The seconds conveyed

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<sup>125</sup> *Id.* at 328.

<sup>126</sup> *Id.*

<sup>127</sup> See generally Wheeler, *supra* note 64, for an account of the Adams-Richards Duel. Samuel Adams's documents, obtained by the Georgia Historical Society in 1996, contained the correspondence among the principals and seconds, the final written adjustment, and a detailed account of the duel written by one of the seconds.

the notes and carefully monitored them for offensive language, but an impasse was evident, and Richards soon issued the challenge:

I disagree with you in all you state. You have insulted me grossly and have refused to tender an apology, [sic] my correspondence with you Sir is at an end. I now ask at your hand's [sic] that satisfaction which all gentlemen under such circumstances have the right to demand and to expect.<sup>128</sup>

Adams accepted the next day, and the seconds arranged the terms, agreeing upon Brampton Plantation as the dueling ground.

During their meeting to negotiate and sign the "Articles of Agreement," Hollis and Meldrim discussed settling the matter peacefully, but Hollis refused to compromise on Richards's demands. Believing that a duel was unwarranted but that the opposing side had left Adams no option, Meldrim rejected a request from additional friends, Thomas Norwood and Julian Hartridge, to intercede and attempt an adjustment. After the principals and their seconds arrived at the plantation the next day, Norwood and Hartridge persisted by offering to arbitrate the matter. For most of the day, the duel was postponed while the seconds considered the offer and negotiated via an exchange of notes over the terms of acceptance. Although Meldrim and Hollis were willing to submit the matter to arbitration, Hollis would do so only on one condition—namely, that if the arbitrators found Adams in the wrong, then Adams agreed that he would place his apology upon the minutes of the superior court. Meldrim said his principal would do so only if the arbitrators directed, but he would not agree to a predetermined remedy.

At 6:15 p.m., negotiations ceased and the participants took their places on the ground—the principals facing each other, thirty-six feet apart, with their seconds standing across from one another at ninety degree angles from their principals. Adams and Richards exchanged one volley from short-barreled, smooth-bore dueling pistols and missed. The seconds discussed whether there should be a settlement or another exchange of fire. Dr. Duncan pressed for a prompt decision, noting that the increasing darkness would put Adams, who was nearsighted, at a disadvantage. Meldrim asked Hollis if his man was satisfied, and Hollis answered, "Mr. Richards has been grossly injured and unless Mr. Adams can make reparation, we should continue."<sup>129</sup> Meldrim responded, "Our position is the same now that it was . . . and . . . has always been. If you will address to me a courte-

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<sup>128</sup> Wheeler, *supra* note 64, at 16.

<sup>129</sup> *Id.* at 18.



ous note, I will give a courteous response.”<sup>130</sup> Hollis agreed; Meldrim drafted and signed an adjustment.<sup>131</sup> The principals stepped to the middle of the dueling ground, shook hands, and returned as friends and colleagues to Savannah in a carriage. Hollis died of tuberculosis two years after the duel, but Adams, Richards, and Meldrim went on to become prominent lawyers. Adams filled a term on the Georgia Supreme Court in 1902, was president of the state bar, and served as city attorney for most of his career. Meldrim served as alderman, mayor, and state senator. He also was president of the state bar and was elected president of the American Bar Association in 1915.

This duel literally “followed the book.” Apparently, the seconds used an actual copy of the *Wilson Code*. A torn-out copy of the title page with a note from Hollis to Meldrim was discovered among Adams’s documents. Adams himself credited the *Wilson Code* with discouraging vengeance, preventing unseemly brawls, and providing time for mediation and reflection. Richards refrained from making the challenge in the heat of passion, sought out the advice of a second, and requested an *amende honorable*. Hollis and Meldrim took complete charge of the matter, striving to find an adjustment while simultaneously protecting their principals’ honor. Additional parties tried to intervene and shape an adjustment through an inquiry and fact-finding. Although the duel ended successfully in reconciliation, the seconds and other friends failed to protect their principals from the risks of an exchange of fire, albeit from inaccurate weapons.

As these historical examples illustrate, the guiding principles of the early nineteenth-century American code duello promoted reconciliation and reduced lethality. Seconds and other interveners served crucial roles by conciliating and preserving the integrity of the process while concurrently protecting the honor of their principal. The ideal second would conciliate by using his personal skills to restrain his principal, defuse anger, lower levels of hostility, and reframe perceptions. He insured the integrity of the process by policing adher-

<sup>130</sup> *Id.*

<sup>131</sup> The adjustment provided:

I. Samuel B. Adams retract any insulting language to Mr. R. R. Richards in the City Court where upon Mr. R. R. Richards allows the case of Ambrose and Puff vs. Hudson and Sullivan to be reinstated by the City Court.

II. Mr. Samuel B. Adams apologizes for his language before the office of Captain McGowan to Mr. Richards.

III. Mr. Richards withdraws all imputation of falsity against Mr. Adams.

IV. Mr. Adams withdraws his motion against Mr. Richards in the Superior Court and expresses his regrets therefore.

Signed,

P. W. Meldrim, Second for S. B. Adams

Edward C. Hollis, Second for R. R. Richards

ence to the accepted norms of dueling and by negotiating terms of engagement based on principles of fair play and a level playing field. The rules themselves restrained the principals and seconds from acting impulsively. The seconds protected the principals' honor by negotiating a carefully worded adjustment that would not admit purposeful wrongdoing on the part of the challenged party while also recognizing the legitimacy of the challenger's sense of being offended. If such an adjustment could not be negotiated without compromise to a principal's honor, the seconds would provide unwavering support to their principals on the field, even to the extent of risking criminal prosecution and possibly their own lives. Intervention by others seeking to achieve an adjustment was also an accepted convention for promoting settlement. If a principal refused an objectively fair adjustment, the second could force compromise by threatening to leave his man unattended in the field. The examples also illustrate, significantly, that the bar was no stranger to these principles.

### III. APPLYING THE MODEL: THE ATTORNEY AS DUELIST'S FRIEND

This section of the Article explores the similarities between litigation and dueling and how the seconds' model could be applied to litigation. This section also discusses some of the limitations to the model's application and analyzes how well it reconciles zealous advocacy with peacemaking.

#### A. *Dueling as an Analogy to Civil Litigation*

Litigation can be seen a form of dueling. Both litigation and dueling are methods of resolving disputes. Moreover, the sequence of events in both processes is similar. The filing of a formal complaint to initiate a civil action is equivalent to issuing the formal challenge to duel.<sup>132</sup> The responsive pleading is the formal reply of the party receiving the challenge. The courtroom is the dueling ground, the rules of civil procedure governing the trial are the terms of the engagement, and the trial is the "combat" analogous to the duel itself. (Given the nature of much modern litigation, it may not be an exaggeration to describe it as a form of trial by combat.)

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<sup>132</sup> In late sixteenth-century France, the challenger, referred to as the "appellant" or "petitioner" (*demandeur*), "calls" (*appeler*) the offender out to a duel. The opponent is the "called" (*appelle*) or the "defender." The call was preferably in writing, by cartel. See BILLACOIS, *supra* note 48, at 9 ("Just as in a civil court case one proceeds by issuing a writ to the parties who must respond, so for combat (which we take to be a form of legal proceeding) one must call one's enemy by a cartel on which the matter of the quarrel should be put as briefly as can be done.")

The parties to the suit are the principals-duelists and their lawyers are their seconds. Like seconds, lawyers are agents of the principals. They become the primary conduits of communication, advising and guiding their clients through the process. They often serve as surrogates in negotiation, bear responsibility for pursuing their clients' interests, and try to prevent the other side from gaining unfair advantages.

Each discrete phase of trial—motions, voir dire, opening statements, presentations of the evidence, rebuttal, and closings—are sequential exchanges of fire. The skill of the duelists and their surrogates influences the outcome, but, to a large extent, the outcome is out of the duelists' and litigants' hands. As in dueling, the outcome of a trial may not favor the aggrieved party, nor may it reflect the actual facts underlying the dispute.<sup>133</sup>

Litigation and dueling are also strikingly similar in their objectives, both explicit and implicit, and in the procedures employed to fulfill them. On the surface, the explicit objective of both litigation and dueling as commonly understood, conceived, and depicted is the same—dispute resolution through truth-finding.<sup>134</sup> The explicit “means” of both processes serve this explicit “end.” Litigation ends a dispute by following rules of civil procedure that lead to and define conditions for an adversarial presentation. The process culminates in an authoritative finding or independent determination of the truth followed by an imposed judgment whereby the winner declares vindication. Dueling ends a dispute by following rules leading to and defining conditions for controlled combat. The process culminates in the injury or death of a party and “puts an end to the lie,” whereby the surviving or unscathed duelist has won and declares vindication for his veracity and honor. Although litigation has a third-party umpire and adjudicator, the divine judgment implicit in the outcome in dueling hints at another ultimate adjudicator, as well.

Implicitly, the objectives of both processes are to avoid courts, contain violence, and promote reconciliation. Like dueling, the ultimate cost and risk of a final adjudication can discourage its use and promote alternative means of resolution. In today's ADR-infused legal system, the implicit objectives of litigation are arguably the same as dueling—to divert civil cases into largely non-adjudicative

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<sup>133</sup> A duel is “a trial by strength taking the place of the legal form in the absence of a common judgment . . . a trial which decides no more than a war who is right.” *Id.* at 5.

<sup>134</sup> This is an obvious simplification, and others may describe the explicit function or objective of civil litigation differently. However, both dueling and litigation are dependent on the parties asserting a differing version of the facts, a differing opinion as to the applicable norms, or a differing interpretation of the effect of the facts in light of the applicable norms.

processes, contain violent self-help, avoid the imposition and enforcement of judgment (a form of state violence), and promote settlement and even reconciliation if possible. ADR processes are the means that serve the implicit ends of contemporary litigation and were the means serving the implicit ends of dueling. As the historical examples illustrate, the use of agents in negotiation, reconciliation, mediation, fact-finding, and inquiry were as familiar to experienced seconds as they should be to experienced litigators today.

### B. Attorneys as Seconds in Civil Litigation

Attorneys and seconds are agents of their principals in processes that have similar objectives. Each has to balance an appropriate level of zeal in advocacy with the cooperative behavior required for peacemaking. This section describes how attorneys might behave if attorneys adopted the seconds' model as a way to achieve this balance.

#### 1. Entering into the Relationship

Under this model, the potential client must adhere to two simple rules—do not aggravate the situation<sup>135</sup> and do not formally assert a claim before consulting the lawyer.<sup>136</sup> Lawyers, for their part, must establish their independence from potential clients before accepting the position.<sup>137</sup> Once the representation is undertaken, the client must clearly understand that his attorney will not blindly do his bidding, and the attorney must establish enough objective distance from his client to be a credible conciliator and to provide objective advice. Furthermore, the code duello requires the client to relinquish the entire matter to the attorney and not discuss it with the attorney unless

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<sup>135</sup> See WILSON CODE, *supra* note 1, at 11 (“Whenever you believe that you are insulted, . . . never resent it there . . .”); see also *id.* at 32-33 (regarding the extent to which intoxication may mollify the severity of the insult).

<sup>136</sup> See *id.* at 12 (“Never send a challenge in the first instance, for that precludes all negotiation. . . . When you believe yourself aggrieved, be silent on the subject, speak to no one about the matter, and see your friend, who is to act for you, as soon as possible.”).

<sup>137</sup> See *id.* at 13 (“Whenever you are applied to by a friend to act as his second, before you agree to do so, state distinctly to your principal that you will be governed only by your own judgment . . .”).

Canon 5 of the MODEL CODE promotes the exercise of “independent professional judgment;” the accompanying ethical considerations and disciplinary rules, however, focus on conflict of interest problems. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983). Ethical Consideration 2-30 implies that one should decline employment when personal feelings may interfere. See *id.* EC 2-30. Note that this is different from the concerns of the code duello—where the MODEL CODE focuses on preventing interests other than those of the client from influencing the attorney, the code duello prohibits the principal’s interests and emotions from unduly influencing the second.

the attorney initiates the discussion.<sup>138</sup> So long as the client defers to the attorney's judgment, the attorney can retain the position. No attorney can take on a client who is unwilling to at least listen to advice. Also, the attorney must terminate the relationship if his client refuses to act in accordance with what the attorney believes is fair or to follow the attorney's advice. Under the code duello, seconds could not support their principals on the dueling ground when the matter was inappropriate for dueling. When the client's cause is doubtful, attorneys must provide objective reality-testing to encourage resolution and to discourage potentially more costly courses of action like litigation. If litigation would be inappropriate even after attempting resolution, an attorney should counsel the client in alternative ways to resolve the matter but should not offer to represent the client in litigation. Every person should have access to counsel, but not every cause deserves advocacy.

## 2. Attempting Reconciliation

Like seconds, attorneys negotiate settlements.<sup>139</sup> Under the code duello, however, reconciliation would be the attorney's primary objective.<sup>140</sup> Reconciliation has only recently entered the lawyer's lexicon,<sup>141</sup> but if it were to become the attorney's primary goal, behaviors associated with Rambo litigation tactics would be unacceptable to the extent they undermine it.

Under the code duello, attempts at reconciliation should be made even before the issuing of the challenge. By analogy, attempts at legal settlements should occur before formally filing suit. Issuing a premature challenge to duel not only may anger the other side but also makes it more difficult for the other side to quietly apologize or explain their words or actions and still save face.<sup>142</sup> Similarly, the filing of a lawsuit without any prior communication between the par-

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<sup>138</sup> See WILSON CODE, *supra* note 1, at 12 ("When your second is in full possession of the facts, leave the whole matter to his judgment, and avoid any consultation with him unless he seeks it. He has the custody of your honor, and by obeying him you cannot be compromised [sic]."). See *supra* Part II.B.2, for a discussion about how this can trigger tension between client and lawyer over objectives and means.

<sup>139</sup> See KIERNAN, *supra* note 48, at 139 (noting the resemblance of seconds to "lawyers negotiating such a matter as a marriage contract," which reflected the intense legalism that typified Europe at that time).

<sup>140</sup> The terms reconciliation and settlement are conflated for the purposes of this discussion, even though the terms are not entirely synonymous—the former implying a resumption of friendly relations. See YARN, *supra* note 21, at 375.

<sup>141</sup> See GA. COMP. R. & REG. Part IX, A Lawyer's Creed (2000) ("To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation.").

<sup>142</sup> See BALDICK, *supra* note 52, for an example of a challenge letter, "which left little scope for peace-making."

ties both aggravates the situation and puts the respondent immediately on the defensive. Unless the statute of limitations is about to run or the other side cannot be found for communication, there is no reason to file suit before giving the other side an opportunity to ameliorate the situation.

Like the seconds in the Lincoln-Shields duel, the attorneys for both sides should meet promptly after engagement by the clients and pledge themselves to settle the matter.<sup>143</sup> Opportunities for both sides to save face and to adjust their competing positions become rarer as time passes and clients become more entrenched and invested in the adversarial process. If clients consult their attorneys early in a dispute, damages may be lessened and there may be more flexibility in constructing the terms of a settlement.

Often settlement is not possible without adjusting the perceptions of the client and taking the other side's interests and perceptions into account.<sup>144</sup> Under the code duello, the attorney as counselor should de-escalate the conflict by helping the client get control over emotions and provide objective perspectives on the perceived wrong. Settlement negotiations should be sensitive to the needs and interests of the other side and done so as to preserve face.<sup>145</sup> The code duello advises not to overreach on seeking an *amende honorable*. Similarly, an attorney may cause negotiations to fail by making unreasonable demands. All communications should be respectful and sensitive to the other side's emotions. Settlement is impeded by insults, real or perceived.

One method of settlement in dueling is for the seconds to meet together in an effort to compose an adjustment. While much lawyer-to-lawyer negotiation consists of positional bargaining in the context of what a judge or jury might decide if the matter is not settled, the code duello implies an objective, collaborative attempt to arrive at a mutually acceptable compromise.<sup>146</sup> Like seconds, the attorneys

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<sup>143</sup> If a party is not represented, this model is less useful because it relies on two seconds working together to achieve reconciliation. Nevertheless, the basic principles could still apply, and the single second could serve as a mediating influence as exemplified by Dr. Bibb in the Dooly-Tait duel. See *supra* Part II.C.2.

<sup>144</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 26-27 (1981).

<sup>145</sup> See Jeffrey Rubin, *Negotiation: An Introduction to Some Issues and Themes*, 27 *AM. BEHAVIORAL SCIENTIST* 135, 138-44 (1983) (discussing that concessions are more easily made when the negotiator feels the choice was made on the basis of his own competence as a negotiator rather as a result of force).

<sup>146</sup> Under the code duello, principals do not directly participate in the reconciliation efforts. Although the current wisdom in ADR seems to be that negotiations are more effective with the participation of the disputants, there are instances when face-to-face interaction by disputants only exacerbates the situation. The code duello suggests a form of negotiation by proxy more

could conduct an inquiry and issue a joint statement containing findings of fact and recommendations for settlement. They could invite other members of the bar or prominent members of the community to form a commission of inquiry and issue recommendations for settlement.<sup>147</sup> They could legitimately threaten to abandon their client if the client refuses to accept an objectively acceptable recommendation.

### 3. Pursuing Litigation

If efforts at reconciliation failed, seconds were entrusted to reduce the possibility that their principals would die on the dueling ground. They negotiated terms of engagement that would not give one party an advantage over the other. Similarly, attorneys should do all they can to reduce the costs, psychological as well as economic, of litigation. They could negotiate plans for pleading, discovery, motions, and trial that reduce costs and shorten the length of litigation. They must insist upon adherence to the rules, deplore foul play, and guard against ambush to ensure a level playing field. If one or the other side is severely "wounded" by evidence uncovered in discovery or presented at trial, both attorneys would have the obligation to intervene and seek to bring the matter to an end to avoid further expense to both sides.

Like seconds on the dueling ground, attorneys must be staunch supporters and representatives of their clients and their clients' causes throughout litigation and trial. Concurrently, they would have a duty to seek reconciliation in a dispassionate, objective spirit. They should control or at least monitor communications so that pleadings and other written and oral communications do not provoke the other side or exacerbate the conflict.

### 4. Posting

What if the opposing party and its attorney not only refuse to proceed under this model but fail to adhere to common rules of fairness? Under the code duello, a principal could refuse to duel with someone who violated the rules. The second could make public no-

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closely resembling ancient arbitrement. See WILSON CODE, *supra* note 1, at 21-22 (describing the negotiation process). See also YARN, *supra* note 21, at 36, for a definition of arbitrement.

<sup>147</sup> In many courts, the bar (and often laypersons) serve on mandatory, non-binding arbitration panels. The purpose of this process is to encourage settlement among the parties. The award is supposed to approximate a probable jury verdict in which one party wins and the other loses. In contrast, recommendations from a commission of inquiry can propose complex, integrative solutions designed to satisfy both parties. The proposals can be accompanied by reasons explaining why the parties should find them acceptable.

tice of the offender's ungentlemanly conduct so that others would be warned not to extend the honor of dueling to this dishonorable person.

What if lawyers could "post" the names and offending behavior of lawyers and disputants whom they feel have exceeded the bounds of acceptable behavior in negotiation and litigation?<sup>148</sup> Using this model, an attorney could put other attorneys on notice that a particular client or lawyer does not adhere to the rules of fair play. Although the client and attorney cannot refuse to litigate in the same way that a principal can refuse to duel with those who abuse dueling norms, the mere threat of posting may promote cooperative behavior consistent with the seconds' model. If parties and their attorneys fail to conform, by refusing to discuss settlement or making impossible demands, by using unnecessarily inflammatory language in their communications and pleadings, or by abusing discovery and other pre-trial procedures simply to delay trial and raise the costs of litigation, an attorney conforming to the seconds' model could post the offenders in the local legal organ, in bar publications, or at the courthouse.

### *C. Problems and Possibilities in Applying the Model*

There are a number of possible problems in using the code duello as a model for lawyering. Of primary concern is whether the current standards of professional conduct prohibit using certain aspects of the seconds' model. There appears to be little tension between the seconds' model and the requirement of zeal in advocacy. Seconds should not compromise their principal's honor just as attorneys should not compromise their client's rights. The seconds' model demands no less zeal in asserting the client's position at trial or in pursuing the client's interests through negotiation. It does limit Rambo litigation behavior, which undermines the possibility of settlement, but such a limitation does not necessarily offend the requirement of zeal.<sup>149</sup>

One area of tension between professional standards and the seconds' model is strategic control. The code duello requires the principal to defer to the second on all matters;<sup>150</sup> under professional standards, however, the client retains considerable control, certainly over

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<sup>148</sup> Analogies can be found on internet auction sites where purchasers rely very heavily on trusting unknown sellers. Bidders can access evaluations of the seller made by previous purchasers. Positive and negative comments are tallied under the seller's name.

<sup>149</sup> See *supra* notes 8, 12 and accompanying text, for the limitations on zeal provided by professional standards.

<sup>150</sup> See *supra* note 138.



objectives and arguably over choice of strategy.<sup>151</sup> This tension may be more illusory than real as neither the professional standards nor the code duello prohibit an attorney or a second from consulting with the client or principal as to objectives and matters of strategy. As a practical matter, attorneys can have considerable influence in the framing of objectives and choice of strategy when discussing employment or counseling the client. In addition, professional standards allow the attorney and client to agree *ex ante* on the allocation of responsibility over strategy.<sup>152</sup> If the client will not agree at the onset of the relationship to acceptable objectives<sup>153</sup> and an allocation of strategic

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<sup>151</sup> The MODEL RULES recognize a distinction between objectives and means, wherein the lawyer must abide by the client's choice of objectives but need only consult with the client regarding the means to achieve them. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1999). The MODEL RULES also provide that a lawyer does not have to "employ means simply because a client may wish that the lawyer do so;" however, it recognizes that the distinction may sometimes be difficult to draw. *Id.* Rule 1.2 cmt. 1. The choice of means may have a substantial impact on the objectives sought. Accordingly, the comment attempts to resolve such problems by stating that when means are in question "the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred." *Id.*

In contrast, the MODEL CODE does not so clearly distinguish objectives and means. It cautions that "[a] lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1983). A lawyer is allowed, however, to avoid "offensive tactics." *Id.* DR 7-101(A)(1). Moreover, "a lawyer is entitled to make decisions on his own" if the decision does not affect the merits of the case or substantially prejudice the client's rights. *Id.* EC 7-7. But the ultimate decision "whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client." *Id.* EC 7-8.

The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS draws no distinction between objectives and means. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(2) (Tentative Draft No. 5, 1992). The RESTATEMENT further provides that the lawyer is bound to follow the client's instruction during representation if consistent with the RESTATEMENT and any agreement between lawyer and client. *See id.*

<sup>152</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 4 (1999) ("The objectives or scope of services provided by a lawyer may be limited by agreement with the client . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 151, § 32 (referring to representation as consistent with "a valid agreement" between lawyer and client).

<sup>153</sup> Certain objectives are recognized as a bar to employment. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(A) (1983) (prohibiting lawyers from accepting employment if the client's objective is merely to harass or maliciously injure another or if the claim is frivolous); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 2 (1999) (same). An illegal objective is barred, of course. *See id.* Rule 1.16 (a)(1).

Additional guidance on acceptable litigation objectives can be derived from John Calvin's advice to Christians engaged in litigation. Calvin counseled:

[J]udicial processes are lawful to those who use them rightly; and that the right use . . . is this: . . . if the plaintiff . . . states his complaint . . . without any desire of injury or revenge, without any asperity or hatred, without any ardour for contention, but rather prepared to waive his right, and to sustain some disadvantage, than to cherish enmity against his adversary. . . . On the contrary, when their minds are filled with malevolence, corrupted with envy, incensed with wrath, stimulated with revenge, or inflamed with the fervor of contention, so as to diminish their charity, all the proceedings of the justest cause are inevitably wicked. For it ought to be an established maxim with all Christians, that however just a cause may be, no lawsuit can ever be carried on in a proper manner by any man, who does not feel as much benevolence

powers consistent with lawyering under the seconds' model, the lawyer does not have to accept the engagement.<sup>154</sup> If, after the lawyer accepts employment, the client decides to pursue unacceptable objectives and insists on strategic choices contrary to advice or the engagement agreement, withdrawal becomes an option.<sup>155</sup>

The issue of withdrawal also creates tension with professional standards of conduct. Under the code duello and as illustrated by the Lincoln-Shields duel, seconds could threaten to and even abandon their principals on the dueling ground. In contrast, lawyers are limited in their right to withdraw, particularly when the matter is in litigation.<sup>156</sup> Again, this could be resolved to some extent through the

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and affection towards his adversary, as if the business in dispute had already been settled and terminated by an amicable adjustment. Some, perhaps, will object, that such moderation in lawsuits is far from being ever practised [sic], and that if one instance of it were to be found, it would be regarded as a prodigy. I confess, indeed, that, in the corruption of these times, the example of an upright litigator is very rare; but the thing itself ceases not to be good and pure, if it be not defiled by an adventitious evil . . . .

2 JOHN CALVIN, *THE INSTITUTES OF THE CHRISTIAN RELIGION* 792 (John Allen trans. & ed., 7th ed. 1936) (1536). Calvin continued:

It is certainly incumbent on Christians, in all cases, to prefer a concession of their right to an entrance on a lawsuit; from which they can scarcely come out without a mind exasperated and inflamed with enmity to their brother. But when one sees that, without any breach of charity, he may defend his property, the loss of which would be a serious injury to him; if he do it, he commits no offense . . . . [C]harity will give everyone the best counsel; for, whatever litigations are undertaken without charity, or are carried to a degree inconsistent with it, we conclude them, beyond all controversy, to be unjust and wicked.

*Id.* at 795.

<sup>154</sup> See WILSON CODE, *supra* note 1, at 13 ("Whenever you are applied to by a friend to act as his second, before you agree to do so, state distinctly to your principal that you will be governed by your own judgment . . ."). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1983) ("A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client."). Although there are limits to this right to refuse employment, disagreement with the client's objectives and strategies is not among them. See *id.* EC 2-26 to 2-30 (encouraging acceptance of employment with clients who "may be unattractive to him and the bar generally").

<sup>155</sup> Withdrawal can be mandatory as well as permissive. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1983) (discouraging withdrawal in the majority of cases by severely limiting lawyers' opportunities for mandatory and permissive withdrawal); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)-(b) (1999) (allowing the lawyer to withdraw if the client insists on pursuing an objective the lawyer considers repugnant or imprudent, or if the client refuses to abide by an agreement concerning representation).

<sup>156</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1983) (requiring the lawyer to protect the client's rights from foreseeable prejudice before withdrawal); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1999) (allowing withdrawal so long as it does not have a materially adverse effect on the client's interests). Under either set of model standards, withdrawal is dependent on permission of the court. If the disagreement between lawyer and client is over strategy, the MODEL CODE is fairly restrictive by allowing withdrawal only if the client insists "that the lawyer pursue a course of conduct that is illegal or prohibited under the Disciplinary Rules." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(c) (1983). The MODEL RULES provide a broader right of withdrawal by allowing the lawyer to withdraw even if it has a materially adverse effect on the client, if the client insists on a repugnant or imprudent objective, but not a repugnant or imprudent strategy. See MODEL

use of *ex ante* agreements giving the attorney more power to withdraw. Such an agreement would cause few problems if withdrawal occurred before commencing litigation, but withdrawal after the commencement of litigation or during trial itself would raise problems. Unlike the settlement counsel or collaborative lawyering models,<sup>157</sup> the seconds' model does not require an attorney to withdraw if settlement efforts fail or one of the parties commences litigation. The seconds' model requires the attorney to advocate as well as collaborate. As seconds, attorneys must function on a dual track—doggedly pursuing settlement while staunchly supporting and zealously advocating for the client in litigation. Unlike the settlement counsel model, disputants do not have to hire two attorneys to pursue both tracks.

Another criticism of the settlement counsel and collaborative lawyering models could be leveled at the seconds' model. Both of those models require the other side to adopt the same model. During the golden age of dueling, one could duel only with someone of the same class and seconds had to be from the same social class.<sup>158</sup> Although far from elitist, the contemporary models work only if both sides are pursuing the process under the same rules and with other settlement counsel or collaborative lawyers representing them. Collaborative lawyering is working only in geographical areas or sub-disciplines where relatively large and committed groups of lawyers have formed organizational structures that support the process.<sup>159</sup> Like the old lawyer joke in which one lawyer in a town starves but two thrive, there have to be at least two collaborative lawyers for the process to work.

Arguably, the seconds' model suffers under a similar limitation because it works best if both attorneys and their clients understand and agree to the norms inherent in the model. Some procedures, such as a joint inquiry and recommendations for settlement, do require the cooperation of the other side's attorney. Nevertheless, the seconds' model is more a philosophy of representation than a process, allowing

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RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1999). The RESTATEMENT seems to allow withdrawal for strategy disagreements if the action directed by the client is "so harmful to the client or others that the lawyer cannot in good conscience . . . assist in its pursuit." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 151, § 44 cmt. h.

<sup>157</sup> See *supra* text accompanying notes 31-47.

<sup>158</sup> See IRISH CODE, *supra* note 71, at 41 ("Seconds to be of equal rank in society with the principals they attend, inasmuch as a second may choose or chance to become a principal, and equality is indispensable.").

<sup>159</sup> Although there are experiments elsewhere and the concept is growing, most collaborative lawyering is centered in Cincinnati, Ohio, home of the Collaborative Law Institute, a membership organization, and among divorce lawyers under the Family Law Project of the Collaborative Law Institute. See Rack, *supra* note 41, at 8.

one to adhere to the seconds' model independent of the other side. A lawyer can provide objective counsel, pursue settlement, insist on fair play, protect the client's rights, and zealously assert the client's position even if the other side does not use the model, whereas a lawyer can only be a collaborative lawyer if the other side agrees to the collaborative lawyering process.

The seconds' model may also be incompatible with existing monetary and non-monetary incentives. Parties using litigation for strategic business purposes or to delay resolution of disputes are less likely to want attorneys who favor settlement and efficient litigation under the seconds' model. Moreover, it is not altogether clear how current methods of compensating lawyers for their services would have to be altered for the seconds' model to work today. The relatively positive acceptance of ADR by business, government, and the bench and bar, however, indicates that it may be possible to adapt the conciliatory functions embodied in the model to current economic realities.

Through the mechanism of posting, the seconds' model discourages behavior that undermines settlement and raises litigation costs. Several possible problems with adopting the practice of posting must be addressed. First, one might ask whether posting conflicts with or duplicates existing disciplinary systems. The bar has a disciplinary system for violations of certain standards, and the courts have disciplinary powers over litigants and their representatives. But neither of these systems accomplishes the same objective as posting. Bar discipline systems react only to a limited set of prohibited behaviors (the most common of these being commingling of funds and client abandonment), most of which are unrelated to the more aspirational norms embodied in the seconds' model. Although some disciplinary actions are published, most take the form of private reprimands. Trial courts may punish certain abuses of the litigation process, but it is only the rare case that becomes broadly known among the bar, particularly in large communities. These systems of discipline fail to sufficiently publicize offenses or react to violations of many norms embodied in the code duello and seconds' model.

Second, there is the possibility that posting could be abused. One can imagine a nightmare of posting and counter-posting, or so much indiscriminate posting that most everyone gets posted and no one takes the practice seriously. An effective system of posting may have to be formalized and regulated in some way to be taken seriously. The role of libel and slander law in posting would also have to be examined.

Third, it is possible that posting would not actually deter undesirable conduct. The reality is that lawyers post other lawyers every-day through word-of-mouth and similar means. This informal system of posting is unlikely to deter conduct if the offender is unaware of the norms being applied or of the effect on reputation. In addition, the importance of reputation among one's peers may vary. Game theory suggests that reputation is more important in smaller legal communities where lawyers anticipate repeated encounters and where the actions of individuals can be well publicized.<sup>160</sup> A formalized system of posting independent of other disciplinary systems provides an opportunity to articulate the favored norms and make the offender aware that his conduct will affect reputation. An effective system of posting would have to reach those lawyers who are likely to encounter the offender in the future.

### CONCLUSION

An examination of the now-archaic code duello provides insight into two modern problems—the social efficacy of litigation and the role of attorneys in the resolution of disputes. While there are aspects of the code duello that offend modern sensibilities, there are other aspects of the practice that can serve as guiding principles for the resolution of disputes. On the surface, dueling was a violent, archaic ritual that relied on seemingly irrational social conventions that are almost impossible to imagine today. Under the surface, it was a very rational method of managing disputes in an elite society lacking acceptable alternatives to unrestrained violence. Similarly, litigation appears to be a costly, archaic ritual often relying on seemingly irrational social conventions that may be impossible for some future generation to imagine. Under the surface, however, it increasingly attempts to divert disputes towards less costly methods of dispute resolution. The success of this effort largely depends on attorneys adopting more appropriate roles and adapting their behavior, serving more as seconds than as surrogate combatants. Under the seconds'

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<sup>160</sup> See Gilson & Mnookin, *supra* note 3, at 565. Iterated prisoner's dilemma games show that expectation of repeated encounters will produce cooperative behavior and deter abusive behaviors. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1994) (describing Rich Riolo's computer simulation game). Ultimately with respect to fair dealing, lawyers should be restrained by pressure to maintain credibility with their peers, who are likely to be distrustful in negotiation and more wary in litigation with attorneys who previously lied or engaged in abusive litigation tactics. Over time, a lawyer's reputation for truthfulness, honesty, and fairness should make him a more effective negotiator in repeat encounters. As the profession's size and anonymity increases in an ever-growing society concentrated in large urban areas, the expectation of repeat encounters diminishes, perhaps explaining the stereotypes of uncooperative behavior by urban lawyers (the "Philadelphia attorney") contrasted to the cooperative behavior of small-town and "country" lawyers.

model, there is no need to choose between being a conciliator or zealous advocate.

A fencing master once said, "It is not the sword or the pistol that kills, but the seconds."<sup>161</sup> In dueling, bad seconds were potentially lethal, but good seconds could avoid injury and reconcile the disputants. In the contemporary context, it is not the court's judgment or order that brings ruin, but the attorneys. In legal disputes, bad attorneys can cause the client to incur considerable costs, win or lose, but good attorneys reduce the risks and cost of litigation and facilitate settlement. The historical precedent of code duellos illustrates how good attorneys can serve both clients and society better in the role of the duelist's "friend."

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<sup>161</sup> BALDICK, *supra* note 52, at 38.

