

Outside Counsel

Expert Analysis

Whatever Happened To 'Zealous Advocacy'?

Zealous advocacy seems to have disappeared. The word “zeal” appears nowhere in the new New York Rules of Professional Conduct. It was there when the proposed rules were drafted by the New York State Bar Association’s Committee on Standards for Attorney Conduct; it was there when the proposed rules were adopted by the state bar in piecemeal fashion in 2006 and 2007; and it was there when the proposed rules were forwarded to the Chief Judge of the Court of Appeals and the four presiding Appellate Division judges for their final review and approval. But when that approval came in mid-December 2008, the word “zeal” had disappeared.

What happened? Somewhere along the line, the word “zeal” was removed from the only place it appeared in the proposed new rules, the Comment to Rule 1.3. The sentence in question, which was exactly the same as the corresponding sentence in the ABA’s Model Rules of Professional Conduct, originally read:

A lawyer must also act with commitment and dedication to the interests of the client and *with zeal* in advocacy upon the client’s behalf.

But when the rules were finally approved and came into effect, the words “with zeal” were removed from the sentence, rendering the last part of the sentence unintelligible. (“A lawyer must also act...in advocacy...”) There has been no official explanation and nobody seems to know who removed the words or why.

What is known, however, is that the debate over the inclusion of the word “zeal” and the exhortation of lawyers to engage in “zealous advocacy” (or not) is not new. There are those like Sylvia Stevens, the assistant general counsel of the Oregon State Bar, who believe that zealousness is “the highest manifestation of professionalism.”¹ Others like John Conlon, the managing attorney for SAFECO Insurance Companies, believe that “zealous advocacy is not viewed so much as an

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ethical responsibility as it is a weapon to use to club opponents.”²

It appears that the deletion of the words “with zeal” was not inadvertent. In his commentary in the Oxford treatise on the new rules, Andral Bratton, principal attorney for the Appellate Division, First Department, wrote:

The text of Rule 1.3(a) is new and represents a shift from the old language contained in the former Canon 7, namely, ‘A lawyer shall represent a client zealously within the bounds of the law.’ Nowhere in the new rules are the terms ‘zealous’ or ‘zealously’ used, perhaps to deter practitioners who, in attempting to be zealous advocates, forget the term ‘within the bounds of law’ or, more implicitly, within the bounds of ethical advocacy. The requirement now is ‘reasonable diligence and promptness.’³

In New York, the word ‘zeal’ does not appear anywhere in the rules, not even in the preamble.

Origins of the Term

Where did the concept of “zealous advocacy” come from and why has it led to so much debate? The word “zeal” (actually, “warm zeal”) appeared in the very first ABA Canons of Professional Ethics in 1908. Under the heading “How Far a Lawyer May Go in Supporting a Client’s Cause,” Canon 15 said, “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,’ to the end that nothing be

taken or be withheld from him save by the rules of law, legally applied.”

The internal quotation marks, which were in the original version, suggested that that sentence came from someplace else, but the original version did not say where.⁴ However, it seems pretty clear that the words came from the 1887 Alabama Bar Association’s Code of Ethics, which in turn took the identical words from University of Pennsylvania Professor George Sharswood’s seminal work on ethics, *Essay on Professional Ethics*, published in 1860.

The sentiment of undivided loyalty to the client’s cause did not originate with Professor Sharswood. The same sentiment was expressed 40 years earlier—in 1820—by Lord Henry Brougham, counsel for Queen Caroline in what became known in England as *Queen Caroline’s Case*.⁵

It seems that George, the Prince of Wales, son of King George III, had been secretly married to a Catholic but he was so deeply in debt that he was later forced to marry the very ugly and repulsive Caroline of Brunswick in order to produce an heir. Caroline was so repulsive that the Prince stayed drunk for three days before their wedding and then he refused to live with her. She moved away and in 1814 she was seen dancing “not dressed further than the waist” at a party in Geneva.

King George died in 1820, and Caroline thus became Queen Caroline. When she came back to England, the House of Lords asked her to appear before it so the Lords could dissolve the new King’s marriage on the ground of adultery. (She was said to have had an affair with an Italian “of low station”). The Lords passed the divorce law but, following a brilliant oration by Lord Brougham, Queen Caroline’s counsel, decided not to enforce it.⁶

What does this have to do with “zealous advocacy?” Lord Brougham practiced it masterfully. According to Jane Robins:

Brougham professed to have the facts at his disposal to make a charge of recrimination against George, adding that he would produce this material only if the case began to go against him. In the final analysis, his duty must be to his client, whatever the consequences. The highest duty of an advocate, he told the

Lords, is to promote his client “at all hazards”: “I must not regard the alarm, or the suffering, the torment, or even the destruction I may bring upon another—nay, separating the duties of a patriot from those of an advocate, I must go on, reckless of the consequences, though my fate should be to involve his country in confusion and conflict.”⁷

Lord Brougham’s oration is cited as the most forceful example we have of “zealous advocacy.” If necessary to save his client’s marriage, Lord Brougham threatened to reveal the fact that the new King had been secretly married to a Catholic, even if doing so brought down the monarchy (“involv[ing] his country in confusion and conflict.”)

Much has been written about Lord Brougham’s speech and much is still written about it. Professor Monroe Freedman, an expert on legal ethics, quoting two other experts, Professors Geoffrey Hazard and William Hodes, pointed out that inspired by Lord Brougham’s speech, “‘the traditional aspiration’ of zealous advocacy remains ‘the fundamental principle of the law of lawyering’ and ‘the dominant standard of lawyerly excellence among lawyers today.’”⁸ Others disagree. For example, Illinois Circuit Judge Richard Curry has written:

None of us who have practiced for any length of time can fail to note the dramatic decline in the level of civility between lawyers. Today we live in a ‘me’ society not a ‘we’ society and that regrettable change has been made manifest by certain of our colleagues. ‘Zealous advocacy’ is the buzz-word which serves to legitimize the most outrageous conduct, conduct which regrettably debases the profession as well as the perpetrator.⁹

Moving Away From the Term

For almost 40 years, the New York Code of Professional Responsibility urged lawyers to practice “zealous advocacy.” Canon 7 said that “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law” and Ethical Consideration 7-1 said that “The duty of a lawyer, both to the client and the legal system, is to represent the client zealously within the bounds of the law...”¹⁰ The ABA Model Code of Professional Responsibility was identical.

However, the ABA Model Rules of Professional Conduct, adopted in 1983, moved away from that formulation and the word “zeal” was removed from the rules and placed in the non-binding Comment to Rule 1.3.¹¹ Professor Anita Bernstein explains how that happened:

During the last ABA go-round, Ethics 2000, ‘several commentators urged elimination of all reference in the Model Rules to ‘zealousness,’ even in the Comment to Rule 1.3 (and in the Preamble).’ These commentators’ wish did not carry the day. Zeal remains in the Model Rules now just as it appeared in 1983.¹²

In New York, however, the word “zeal” does not appear anywhere in the rules, not even in the preamble.

New York is not alone.¹³ Other states have also removed the words “zealous advocacy” from their rules. Six states adopted the ABA Model Rules but without the comments.¹⁴ Two other states adopted the Model Rules but eliminated the reference to “zeal” in the comments, just like New York. Only two jurisdictions, Massachusetts and the District of Columbia, include “zeal” in their Disciplinary Rules and only one, the District of Columbia, affirmatively requires “zeal.”¹⁵ The Massachusetts formulation is merely precatory.¹⁶

It is fair to say, therefore, that whoever deleted “with zeal” from the New York Rules was following an emerging trend. The deletion reflected a dissatisfaction with the concept of “zealous advocacy.” Some say that “zeal” led to “Rambo” tactics.¹⁷ But that point of view has been vigorously challenged. “Zealous advocacy,” as Professor Bernstein has observed, is different from zealotry. It is an important professional requirement. She has argued persuasively that the shortage of zeal has adversely affected the practice of law, even to the point of causing “a valuable source of support for pro bono work inside firms” to dwindle. “An office without zeal,” she argues, “makes lack of zeal seem natural.” “Increasing the prestige of zealous advocacy,” she says, “would help partners and supervisors in firms to see pro bono representation as a way to bring partisan engagement into the corridors and would help junior lawyers carry over this attitude to their paying clients.” She argues, therefore, that the requirement of “zealous advocacy” should be returned to the rules.¹⁸

Conclusion

“Zealous advocacy” is the time-honored response to the question lawyers often receive: “How can you represent someone who is guilty?” It permits the Army JAG lawyer who is representing a young Private who is frightened about what might happen to him and who has never spoken to an officer before to say to his client: “I am on your side and only on your side.” “Zealous advocacy” is what clients expect, and it is what they deserve.

This debate is far from over. The proponents of the retention of the “zealous advocacy” requirement, including such heavyweights as Professors Hazard, Hodes, Freedman and Bernstein, have made powerful arguments for the benefits of reinstating the requirement. In fact, most practicing lawyers who grew up with a requirement of “zealous advocacy” are probably unaware that the requirement ever went away.

One might have hoped that before such an important change was made in the New York Rules, it would have been the subject of a robust—and public—debate. In New York, however, that does not seem to have happened. If the debate is to continue, it should be carried on openly in forums such as those offered by the state bar and the city bar. To paraphrase President Woodrow Wilson, we should have “open Rules, openly arrived at.”

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1. Stevens, “Whither Zeal?” Oregon State Bar Bulletin, July 2005.

2. Conlon, “It’s Time to Get Rid of the ‘Z’ Words,” Res Gestae, February 2001.

3. The New York Rules of Professional Conduct, Oxford, Fall 2010, edited by the New York County Lawyers’ Association Ethics Institute, p. 41. It should be noted that Mr. Bratton was not writing in his official capacity.

4. Later versions eliminated the internal quotation marks altogether.

5. See generally Robins, “The Trial of Queen Caroline: The Scandalous Affair That Nearly Ended a Monarchy,” (Free Press 2006).

6. Caroline was not invited to her husband’s coronation, but she showed up at Westminster Abbey nevertheless. At the door, she shouted, “I am the Queen of England” but the pages, under orders to “do their duty,” slammed the door in her face. She died 19 days later.

7. Robins, *supra*, pp. 247-248.

8. See, e.g., Freedman, “Henry Lord Brougham and Zeal,” 34 Hofstra L. Rev. 1319 (2006).

9. Curry, “Lawyers of Conscience Enforce the Unenforceable,” Illinois Bar Journal, November 1985.

10. Disciplinary Rule 7-101 did not mention “zeal” except in its title, “Representing a Client Zealously.”

11. In addition, the words “zealous” or “zealously” appear three times in the preamble: “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” “[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.” “These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law.”

12. Bernstein, “The Zeal Shortage,” 34 Hofstra L. Rev. 1165, 1167 (2006), quoting Hazard & Hodes, “The Law of Lawyering,” Section 6.2 pp. 6-5 (3d ed. Supp 2003).

13. See generally Lachman & Jarvis, “Zeal in Client Representation—FAQs,” Prof. Law. 2005 Symposium Issue, p. 81.

14. See, e.g., Ohio Rules of Professional Conduct. By contrast, 35 states have adopted the ABA Model Rules in their entirety, including the reference to “zeal” in the Comments to Rule 1.3.

15. “A lawyer *shall* represent a client zealously and diligently within the bounds of the law” DC Rule 1.3 (emphasis added).

16. “The lawyer *should* represent a client zealously within the bounds of the law.” Mass. Rules of Professional Conduct, Rule 1.3 (emphasis added).

17. See, e.g., Harris, “The Professionalism Crisis—The ‘Z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution,” Prof. Law. Winter 2001 pp. 1, 10.

18. Bernstein, *supra* pp. 1165, 1186.

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