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Is it Time to Remove "Zeal" From the ABA Model Rules of Professional Conduct?

Why the term "zeal" as used in the ABA Model Rules is misleading and potentially harmful, and why its removal will result in rules that clearly set out a lawyer's ethical obligations while promoting the highest level of professionalism.

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The History of "Zealous Representation" in the Model Rules

The American Bar Association (ABA) Model Rules of Professional Conduct do not impose a duty of "zealous representation." They never have. Even before the ABA adopted the Model Rules in 1983, no such duty existed in the predecessor rules, the Disciplinary Rules under the Model Code of Professional Responsibility (CPR). While "zealous representation" was mentioned in Canon 7 and Ethical Consideration 7-1 of the CPR, these provisions were merely "aspirational"; they were neither mandatory nor a basis for professional discipline.

Under the Model Rules as they exist today, "zeal" and its derivatives appear four times, all in provisions outside of the actual rules themselves. In other words, there is no actual Model Rule that requires the "zealous" representation of a client.

Instead, the preamble to the Model Rules includes the following statements:

"As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system." Paragraph 2.

"Thus, when 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." Paragraph 8.

"These principles include the lawyer's obligation **zealously to protect and pursue** a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." Paragraph 9.

The problem with these statements in the preamble is that they can reasonably be interpreted as calling for all-out, no-holds-barred, single-minded pursuit of the client's goals—which is not what the Model Rules themselves require. In some instances, the kind of aggressive advocacy suggested by the use of the word "zealous" in these phrases may actually be a violation of the ethical obligations imposed by other Model Rules, such as Model Rule 3.4 requiring fairness to opposing counsel and parties and Model Rule 4.4 outlining a lawyer's duty to respect the rights of third parties.

"Zeal" appears a bit closer to an actual rule in the Comment to Model Rule 1.3. That comment states that a lawyer "must also act with ". . . zeal and advocacy upon the client's behalf." This comment is in dramatic contrast to the actual duty described in Model Rule 1.3, which is a single sentence: "A lawyer shall act with reasonable diligence and promptness in representing a client."

So what are lawyers to make of the use of these terms outside of any actual rule in the Model Rules? The scope provisions of the Model Rules in paragraph 21 clearly state that only the text of rules is authoritative and the comments are intended to explain, illustrate, and guide the interpretation of the rules. Given that the black-letter obligation in the rule describes the actual duty owed to the client, how are lawyers expected to reconcile the duty to exercise "reasonable diligence" with the explanatory statement for that same rule that a lawyer must act with "zeal"? While "diligence" and "zeal" are not defined in the Model Rules, applying the ordinary meaning of the terms can only lead to the conclusion that an obligation to act with "zeal" requires something greater than an obligation to act with "reasonable diligence."

And this is not merely a matter of semantics. The practical effect of the use of conflicting terms in Model Rule 3.1 and its comment is that lawyers are left to guess or assume which standard they are expected to meet. This, along with the attendant risk that in a disciplinary proceeding a lawyer may be held to the standard as stated in the comments rather than the rule are just two of the compelling reasons to eliminate the contradiction by removing the word "zeal" from the comment.

What Do the Courts Have to Say about "Zeal"?

The current use of "zeal" in the Model Rules does more than engender confusion among lawyers who endeavor, in good faith, to comply with their ethical obligations under those

rules. It also contributes to the problem of lawyers using a misinterpretation of the Model Rules to justify their own uncivil and even unethical behavior—after all, the ordinary meaning of the term "zealot" is a person who is fanatical and uncompromising. Any lawyer behaving in such a way would likely run afoul of any number of ethics rules and be far outside of the expected level of professionalism in any court.

And this is not just a hypothetical problem. Every experienced litigator has encountered opposing lawyers who rely upon what they imagine is their duty of *zealous* representation to justify making things unnecessarily difficult and, usually, more expensive, for both sides.

There are a vast number of reported decisions in which civil, criminal, and bankruptcy-court judges have rejected lawyers' attempts to rely upon a duty of "zealous" representation to justify or excuse uncivil, unethical, and even illegal conduct. For example, in *In re First City Bancorporation of Texas, Inc.*, a bankruptcy court imposed a $25,000 sanction against a lawyer for what it called "deplorable and wholly unprofessional" conduct. The unrepentant lawyer attempted to justify his behavior by claiming that it helped him "recover more money for his clients." In *U.S. v. Thoreen*, the criminal defense counsel sought to induce a misidentification by a prosecution witness by seating a third party next to him at counsel table rather than his client. The court thought that this behavior "crossed over the line from zealous advocacy to actual obstruction." In *Florida Bar v. Buckle* a defense lawyer was disciplined for sending an intimidating letter to a criminal complainant. The opinion notes that "zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained." Taking the word "zeal" to its natural conclusion, at least one court has made it clear that lawyers, as advocates and officers of the court, should not be "zealots." *State v. Richardson*.

What this line of cases makes clear is that the line between zealousness and zealotry—words synonymous with "fanatic," "extremist," "diehard," "militant," "maniac," and "radical"—is not clearly defined. Perhaps if the word "zeal" were not found in the Model Rules, lawyers would not be drawn so close to the hazy demarcation between zeal and zealotry—or even mere overzealousness. Removing the word and its derivations would help lawyers focus on the obligations and duties actually imposed by the Model Rules, such as the duties of competence, diligence, loyalty, confidentiality, and honesty, none of which require lawyers to be zealots.

The Trend Toward Removing "Zeal" from Ethics Rules Around the Country

Several states, including Arizona, Ohio, Indiana, and Washington, have already purged the word "zeal" and its derivatives from their ethics rules. In each instance, the adopting body generally noted that "zealous advocacy" was often invoked as an excuse for unprofessional behavior and, therefore, the phrase had no place in even the preamble or comments to the ethics rules.

The changes made by the State of Washington illustrate how to eliminate the word "zeal" while maintaining the call to a heightened level of advocacy. The Washington Supreme Court first adopted the preamble and official comments to the Washington Rules of Professional Conduct in 2006. The rules, preamble and comments were largely based on the ABA Model Rules. However, upon the recommendation of the Board of Governors of the Washington State Bar Association (WSBA), Washington replaced "zealous" with "conscientious and ardent" wherever it appeared in the preamble and replaced "zeal" with "diligent" in the comment to Rule 1.3, thus mirroring the duty set out in the rule itself. In support of these changes, the WSBA Board of Governors report stated: "Owing to its etymology, the word 'zealous' in this content could inappropriately be interpreted to condone the extreme or fanatical behavior of a type that would be inconsistent with a lawyer's professional obligations." (quoted in *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct,* 43 Gonz. L. Rev. 327, 333 (2008).

The Removal of "Zeal" Will Not Alter a Lawyer's Obligations to Their Client

Given the contradictions in the Model Rules' use of the term "zeal" and the ways in which the concept has been used by lawyers as an excuse for unprofessional conduct, removing the references to "zeal" from the Model Rules would serve a clarifying and positive purpose without altering the duties owed the client. Not only would clients be unharmed by the removal, but also, replacing "zeal" with terms consistent with those used in the actual rules may result in better outcomes for clients since, as is described above, lawyers who take the role of "zealous advocate" above all else can actually end up doing harm to their clients, other parties, and the court system in general.

For all the reasons noted in this article, the ABA should replace all forms of the word "zeal" where they appear in the preamble to the Model Rules and the comment to model Rule 1.3 with "diligently," "diligent," and "diligence," as appropriate. These changes reconcile the conflict between the black-letter requirements of the Model Rules and the referenced

provisions in the preamble and comment and remove an often-used excuse for uncivil and unethical behavior by lawyers. Replacing "zeal" with "diligence" will promote civility in the practice of law. It will also retain the urgency of a heightened duty of advocacy while avoiding the danger that lawyers will misinterpret their obligations and cross over into behavior that is less than professional.

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