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Whatever Happened to “Zeal”?

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Earlier this year, I watched a trial where a lawyer-witness testified unreservedly that “zealous representation” was the first duty of all lawyers under the Oregon Rules of Professional Conduct. On cross-examination, the lawyer conceded that the word “zeal” nowhere appears in the Oregon RPCs. The lawyer then backtracked, saying in essence: “Well, it used to be in there somewhere and many lawyers think it still is.” Although the lawyer-witness lost the battle with the cross-examiner, there was more insight in the verbal backpedaling than the lawyer-witness may have realized.

Next month marks 20 years since “zeal” disappeared from Oregon’s professional rules because it had devolved over time from a laudable goal into an excuse for bad behavior. At the same time, the kernel of its original concept remains—albeit expressed in different terms. In this column, we’ll first briefly survey the freighted history of the word “zeal” in the professional rules. We’ll then look at how the intended meaning of “zeal” still underlies many of our contemporary professional rules.

Brief History

“Zeal” first entered the legal lexicon when the ABA adopted the Canons of Professional Ethics in 1908. Canon 15 counseled that lawyers should pursue their clients’ interests with “warm zeal.” The ABA Canons were adopted in

Oregon in 1935 with the State Bar Act and related approval by Oregon Supreme Court (see *In re Porter*, 320 Or. 692, 701, 890 P.2d 1377 (1995)). When the ABA replaced the Canons with the Code of Professional Responsibility in 1969, “zeal” found its way into DR 7-101 which encouraged lawyers to represent their clients “zealously.” Oregon followed the next year when we moved to the Oregon Code of Professional Responsibility—although in Oregon the word only appeared in the title to DR 7-101.

Neither the Canons nor the Code used the term “zeal” in the vein of “zealot.” Canon 15 encouraged lawyers to be devoted to their clients. DR 7-101, in turn, defined the notion as “seek[ing] the lawful objectives of the lawyer’s client through reasonably available means permitted by law[.]” Nonetheless, over time “zeal” came to have a distinctly negative connotation both nationally and here in Oregon. Hazard, Hodes and Jarvis in their leading national treatise *The Law of Lawyering*, for example, note (at 7-4) that “critics within and without the profession remained concerned that ‘zealousness’ might be interpreted to mean ‘zealotry,’ thereby justifying or excusing unethical or otherwise wrongful lawyer conduct, so long as the activity was nominally carried out in the service of a client.” The Oregon Supreme Court in *In re Hockett*, 303 Or. 150, 160, 734 P.2d 877 (1987), discussed the same problem in a case involving a lawyer who

assisted clients with fraudulent conveyances, noting pointedly that “zealous representation” included the qualifier “within the bounds of the law.”

In light the unfortunate evolution of “zeal” from laudable duty to sorry excuse, when the ABA replaced the Model Code with the Model Rules in 1983, “zeal” was eliminated from the text and moved to a comment under Model Rule 1.3, which addresses diligence, along with three benign references in the Preamble. The comment, in turn, used “zeal” in the uncontroversial vein of “commitment and dedication to the interests of the client[.]” Oregon moved to RPCs based on the ABA Model Rules in January 2005. Because Oregon has neither a preamble nor comments, “zeal” nowhere appears in our RPCs.

Continuing Relevance

Hazard, Hodes and Jarvis point out in the same passage quoted earlier that although “zeal” came to have a pejorative connotation, the basic notion intended to reflect an admirable duty rather than an excuse for bad behavior: “[Z]ealous representation always had to be *within* the bounds of the law in order to pass muster, no matter how popular culture portrayed (and often misrepresented) lawyer activity, and no matter how badly some individual lawyers behaved, while wrapping themselves in the flag of client loyalty.”

Comment 1 to ABA Model Rule 1.3 attempts to rehabilitate “zeal” by bracketing it with its intended meaning:

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. . . . The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

As noted earlier, Oregon does not have comments to our RPCs (or a preamble). Nonetheless, RPC 1.1 on competence obliges lawyers to “provide competent representation to a client . . . [that] . . . requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Similarly, RPC 1.3 on diligence, enjoins lawyers from “neglect[ing] a legal matter entrusted to the lawyer.” RPC 4.4(a), in turn, prohibits lawyers from “us[ing] means that have no substantial purpose other than to embarrass, delay, harass or burden a third person[.]” Similarly, RPC 1.2(c) prohibits lawyers from “assist[ing] a client . . . in conduct that the lawyer knows is illegal or fraudulent.”

While “zeal” was left out of the text of both the ABA Model Rules and the Oregon RPCs because it had become an excuse for bad behavior, its original intended meaning of working hard for our clients within the bounds of the law very much remains in the DNA of the RPCs.

ABOUT THE AUTHOR

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