

The Real Deal on Zeal

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Prior to January 1, 2005, the caption to Oregon Disciplinary Rule 7 was “Zealously Representing Clients within the Bounds of the Law,” and the titles of DR 7-101 and DR 7-102 were “Representing a Client Zealously” and “Representing a Client within the Bounds of the Law.” Oregon’s new RPCs make no reference to zealous representation. Instead, the RPCs set out duties of competence in RPC 1.1 and diligence in RPC 1.3. Does this loss of zealous representation make a difference? If so, what difference does this make either to practicing lawyers or to the wider public?

One way to begin the assessment of this issue is to look at the matter historically. Canon 15 of the 1908 ABA Canons of Professional Ethics was entitled “How Far a Lawyer May Go in Supporting a Client’s Cause.” Canon 15 asserted, among other things, that a lawyer owed “entire devotion to the interests of the client [and] warm zeal in the maintenance and defense” of the client’s rights. Canon 15 borrowed that language from the 1887 Code of Ethics of the Alabama State Bar Association (the country’s first state bar ethics code), which provided in full:

An attorney owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability, to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be preformed within, and not without, the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

While Canon 15 did not include a reference to accountability to one’s creator or to obligations to one’s neighbors, Canon 15 nonetheless began with the assertion that “Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class * * * than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s case.” In addition, Canon 32 provided in part:

No client, corporate or individual, however powerful, nor any cause, civil or political, however, important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation.

In other words, zeal is a good thing, but zeal has its limits and, unlike winning in sports, is not the only thing. *See also* Canon 22 (“A lawyer should not offer evidence which he knows the Court should reject * * *”). In any event, it does not appear that any Oregon lawyer was ever disciplined for a lack of “warm zeal” as such under Canon 15, and the phrase “warm zeal” has never been used in a published Oregon Supreme Court decision.

In addition, and for the period of time from 1970 through 2004 when the DRs were in force, no Oregon lawyer was disciplined for insufficient zeal as such. This is not surprising since, among other things, the references to zeal were in the titles to the rules and not in the substantive portions of the rules for which discipline is imposed. Put another way, a lawyer who acted competently and diligently within the meaning of former DR 6-101 was not at risk of discipline for failing to act zealously as well. *Cf. In re Reciprocal Discipline of Coggins*, ___ Or ___, ___ P3d ___, 2005 WL 1039637 at *3 (2005), a recent case in which the Oregon Supreme Court declined to order reciprocal discipline in an opinion that includes the following language:

The Tenth Circuit's order reprimanding the accused faults him for his alleged "failure to zealously represent his client" and for his failure to respond to the court's March 5, 2004, order to show cause. The order is otherwise devoid of any identified factual findings and fails to identify any disciplinary rule of the Tenth Circuit that the accused violated. As a result, the Tenth Circuit's order is not in and of itself sufficient to establish that the accused's conduct in the Tenth Circuit violated an Oregon disciplinary rule as set out in the Oregon Code of Professional Responsibility.

See also, Brown v. Schiedler, 198 Or App 198, 203, 108 P3d 82 (2005):

“To prevail on a post-conviction claim of inadequate assistance of counsel under Article I, section 11, of the Oregon Constitution, petitioner must establish by a preponderance of the evidence that trial counsel failed to *exercise reasonable professional skill and judgment* and that petitioner suffered prejudice as a result. ORS 138.620(2); *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991). Similarly, to establish a violation of the Sixth and Fourteenth Amendments to the United States Constitution, petitioner must prove that counsel's representation fell below an objective *standard of reasonableness* in a way that prejudiced the defense. *Strickland v. Washington*, 466 US 668, 687-88, 104 S Ct 2052, 80 L Ed 2d 674 (1984).” (Emphasis supplied.)

Similarly, and as a matter of general civil malpractice liability, lawyers need only comply with what a reasonably prudent (i.e., not necessarily zealous) lawyer would do. *See, e.g., Vandevender v. Thierolf*, 172 Or App 331, 337, 18 P3d 473 (2001).

So if we were never under a legally enforceable duty of zealous representation, what difference does it make whether this phrase is or is not referenced in our rules? And if false claims of a duty of zeal by the unscrupulous, or even by the unwitting, can still do more harm than good, how much zeal do we want to favor in any event? We will address these issues in future columns.