

## The Real Deal on Zeal, Part II

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In our prior column, we reviewed some of the historical references to a lawyer's duty of zealous representation. We also pointed out that as a matter of disciplinary and civil liability, lawyers have been held subject to standards of reasonable competence and diligence, and not to standards of zealousness beyond what is reasonable. We further noted that this is even true for criminal defense lawyers.

This is not in any sense a denigration of the standards of competence and diligence to which lawyers are held, nor do we offer apologies for substandard lawyering. If, however, the law of averages means anything, it means that when all is said and done, only the rarest of individuals will always be able to give 110% or 120% of "average" to every client on every matter, and such goals are clearly out of reach for lawyers as a whole. We are, after all, as human as the clients we represent.

We therefore turn to a new question: If zealous representation is not required, when, if ever, is it permitted? Our answer is "often, but not always."

At our best, lawyers are a thoughtful, creative and hard-working lot. Other things being equal, the public, the courts and the Bar generally commend lawyers who "go the extra mile" and take extra care to research client matters and to draft or review client documents. Most lawyers, if not also most clients, know and appreciate superior work when they see it.

This does not mean, however, that the sky is the limit. As noted in the prior column, for example, the phrase "zealous representation" was and is typically followed by an essential qualifier: "within the bounds of the law." If, in other words, it is illegal for non-lawyers to defraud investors or to shred documents that are subject to a subpoena, no resort to duties allegedly owed to clients will justify lawyers who themselves perform illegal acts or who knowingly assist clients in violating the law. *See, e.g., In re Albrecht*, 333 Or 520, 42 P3d 887 (2002) (attorney participated in an illegal money-laundering scheme to disguise the fact that his client's funds were proceeds of unlawful drug activity); *In re Garvey*, 325 Or 34, 932 P2d 549 (1997) (attorney disciplined following conviction for assisting client to escape). And as *Albright* and *Garvey* reflect, lawyers who do act zealously in these respects are subject to civil, as well as criminal and disciplinary sanctions for their conduct.

Moreover, the ends typically will not justify the means when illegal conduct is involved. Consider, for example, a zealous criminal defense lawyer who believes that the State's eyewitness identification of the defendant is weak and who is concerned that if the eyewitness is simply allowed to identify the individual sitting next to the lawyer at counsel table, the client will be convicted. Even if the lawyer's objective is to expose the weakness of the State's case, the lawyer cannot have another individual sit at counsel table as if that individual were the client in order to trap the State's witness into a false identification. *See, e.g., In re Jensen*, 1 DB Rptr 107 (1986).

Substantive law does not provide the only limitations on lawyers' freedom of action. We are also limited by rules that are particular to lawyers—now known in Oregon and in most states as the Rules of Professional Conduct or the RPCs. For example, new Oregon RPC 4.4(b) requires a lawyer in both litigation and non-litigation matters to alert an opposing counsel or unrepresented party if the lawyer receives documents not intended for the lawyer's review. This is true even when no crime has been committed and even when the documents are not subject to attorney-client privilege.

In other words, conduct that is illegal or that would require a lawyer to violate a Rule of Professional Conduct cannot be justified as zealous representation. In fact, lawyers are generally authorized by the Rules of Professional Conduct to refuse to engage in conduct that may cross one or both of these lines even though a good faith argument can be made that no violation would occur. *See, e.g.*, RPC 1.16(b).

These are not the only potential imitations on zeal, however. The so-called professionalism movement was propounded by those who believed it was necessary to counteract what they saw as an outbreak of excessive zeal that sometimes was and is referred to as "Rambo lawyering." *Cf.* MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 123 (3D ED 2004). For present purposes, we need not determine how often the answer to a question about when excessive zeal is present will, like beauty, depend upon the eye of the beholder. We also need not determine how often so-called Rambo tactics actually violated court or disciplinary rules and thus needed no ostensibly higher or aspirational rules of professionalism to counteract them. We also believe that condemning or sanctioning lawyers for conduct that is consistent with applicable statutes and rules is a risky business.

At the end of the day, however, we believe that there is such a thing as excessive or unprofessional zeal, and we suggest the following three categories as a starting point:

- *Zeal coupled with inadequate factual or legal knowledge.* Sooner or later, most of us meet this kind of zealot—the "true believer" in the client's cause who has not done sufficient "homework." This kind of misplaced zeal may be entirely within the bounds of the law; for example, the positions taken by such a lawyer may be sufficiently colorable not to be technically "frivolous." Nonetheless, this kind of lawyering wastes time and money.
- *Zeal coupled with inadequate objectivity.* We have all met this kind of zealot, as well. We need to be careful, however, to distinguish between a lawyer with a lack of objectivity on the one hand and a lawyer who is objective but has an aggressive, but lawful, client on the other. The former disserves his or her clients *and* the system at large. The case against the latter is less clear. Although a lawyer with an overly aggressive client can and arguably should remonstrate with the client about whether the client's chosen course makes sense, we believe that a lawyer whose client knowingly, and in spite of long odds, wishes to press ahead should not generally be condemned for excessive zeal. Our view is consistent with rules such as former DR 7-102(A)(1), which only prohibited lawyers from taking an "action when the lawyer

knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”

- *Zeal coupled with too much “offensive personality”*. This category covers the unnecessarily if not also counterproductively rude and disrespectful lawyer. *Stowbridge v. City of Chiloquin*, 130 Or. 444, 448, 277 P. 722 (1929) (“Abuse is not argument; calumny is not convincing; defamation is not determinative of an issue; perversion of speech is not persuasive. \* \* \* We note again that at least to some degree and in some circumstances, the personal approach to a matter taken by a lawyer may reasonably reflect the preferences of the lawyer’s client. Nonetheless, there can be ‘too much of a bad thing.’”).

As we hope these three categories reflect, the separation of “good” from “bad” zeal cannot be done on the basis of conclusory and rhetorical references to lawyers as “officers of the court” or on the basis of lawyer or non-lawyer opinion polls. Life and the practice of law are too complex for that.

We will return to this subject in our next column.