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Features

CBA President's Message to Members

The Myth and the Mischief of Zealous Advocacy

by Steve C. Briggs



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*An incompetent attorney can delay a trial for months.
A competent attorney can delay one much longer.¹*

Last month, I discussed possible explanations for why some lawyers engage in conduct that contributes to the negative image of lawyers. This behavior ranges from incivility to overbilling to abuse of the discovery process, including various forms of lying. I suggested that none of these explanations are real justifications.²

Interestingly, the most common justification offered by these lawyers for their conduct is a claimed conflict between their duties as advocates for their clients and as officers of the court. This supposed conflict is in fact a fallacy, based on a myth that contributes nothing but mischief to our legal profession and our image. It is the myth of the duty of zealous advocacy.³

The Lack of Need for "Zealous Advocates"

Let's begin with our actual duties as described in the Colorado Rules of Professional Conduct ("Rule" or "Colorado Rules"). Under Rule 1.1, a lawyer must provide competent representation. Rule 1.3 requires that a lawyer act with reasonable diligence and promptness, and not neglect a legal matter. Under Rule 1.6, a lawyer shall not reveal confidential information relating to representation of a client. Rule 1.7 proscribes conflicts of interests.

Aside from the duties to the client, Rule 3.1 provides that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue, unless there is a basis for doing so that is not frivolous. Rule 3.3 addresses a lawyer's duty of candor toward a tribunal. Rule 3.4 states that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal evidence, or knowingly disobey an obligation under the rules of a tribunal. That includes the rules of discovery.

A lawyer also shall not allude to evidence that the lawyer does not reasonably believe is relevant or is otherwise inadmissible. Rule 4.1 provides that a lawyer shall not make a false or misleading statement of fact or law to a third party. Rule 8.4 defines unprofessional misconduct to include engaging in conduct that is prejudicial to the administration of justice.

Diligence, competence, confidentiality, with no conflicts of interest: elegant simplicity. The rules are comprehensive, describing a lawyer's duties not only to clients, but also to others. In short, the word "zealous" is not a word needed to describe a lawyer's ethical duties.

Now let's look at where the word actually appears in our Rules. The Preamble includes the following: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." The Preamble further states:

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. 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.

This does nothing to explain what the supposed duty encompasses. The commentary to Rule 1.3, the rule on diligence, states in part: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Again, there is no mention in the rule itself or definition in the commentary.

The actual extent of the supposed duty of zealous advocacy has been the subject of careful scrutiny by the American Law Institute:

The Preamble to the ABA Model Rules of Professional Conduct (1983) . . . and EC 7-1 of the ABA Model Code of Professional Responsibility refer to a lawyer's duty to act "zealously" for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. *For legal purposes, the term encompasses the duties of competence and diligence.*⁴ (*Emphasis added.*)

If that's all there is to it, what is the genesis of this non-existent duty? One scholar has traced the history of the phrase back to a comment in a speech to the English Parliament in 1820 by Lord Brougham:

The Restatement view [that the term merely encompasses the duties of competence and diligence] is in line with a more nuanced understanding of the Lord Brougham defense, which was never intended as a maxim of legal ethics. Brougham made his statement in the context of a parliamentary debate, not a judicial proceeding, and the speech was intended as a veiled political threat to King George IV. In any event . . . it can hardly be argued that the Brougham speech describes the prevailing norms of the English Bar in 1820. *It certainly has no general applicability.*⁵ (*Emphasis added.*)

Some might argue that zealous advocacy is part of what distinguishes the legal profession from a business. The distinction between a profession and a business is certainly important. Many occupations have appropriated the term "profession," but only the clergy, doctors, and lawyers actually occupy that special position in society. The distinction, however, does not rest in any part on being a zealous advocate. Instead, the law, medicine, and the clergy are entitled to be called professions because their members work within a confidential relationship to provide services based on a special trust with deeply personal matters—services rendered only after highly specialized training.

Others might argue that zealous advocacy is part of the ideals of our profession. However, the ideals of being fearless in representing an unpopular cause and being conscientious, even tireless, in the efforts expended for a client are already described in the Comment to Rule 1.3, Diligence: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer. . . . A lawyer should act with commitment and dedication to the interest of the client."

So that's it for the role of the zealous advocate: the duties of competence and diligence. And those duties are adequately described in the Colorado Rules. The phrase "zealous advocacy" is full of sound and fury, signifying nothing.

Impact of the Supposed Duty Of Zealous Advocacy

The duty of zealous advocacy may be empty of meaning, but it is not without import. Put simply, the duty to be a zealous advocate is the single most common justification used to claim that the duty to the client is paramount, and that a lawyer is therefore justified in minimizing or even ignoring the other duties expressly stated in the Colorado Rules. It is often treated as synonymous with a duty to be ruthless—even dishonest.

Am I alone in my view? Here's just a sampling of views from others who have studied the matter:

- Lawyers will continue to argue that obligations to their clients require them to give discovery rules the most narrow interpretation possible and that throwing roadblocks in opposing counsel's path is merely part of being a zealous advocate. . . . Many of the worst abuses lawyers have inflicted on society have come under the banner of zealous advocacy, often with the judiciary as its herald.⁶
- We believe the adversary system and the duty of zealous representation often serve to justify . . . objectionable behaviors and help to create and reinforce the very cynicism, selfishness, and social mistrust that [the] legal culture instead should attempt to overcome.⁷
- The civil litigation system has fostered an adversarial culture in which legal professionals practice delay and deception, and rationalize such conduct based on an ideal of zealous representation.⁸
- Justifying one's ethical deliberation through reliance on the role prescribed by the zealous-advocate model raises the potential for ethical problems from the very moment the attorney-client relationship is formed.⁹
- The amoral professional role has been blamed for fostering unprofessional tactics and actions by lawyers in the name of zealous advocacy.¹⁰
- What often parades as zealous advocacy for a client is merely unrestrained competitiveness driven by an obsessive desire to win and a compulsive fear of losing.¹¹
- I believe the root cause of this professional pathology is the increasingly combative and aggressive nature of the legal profession. I suggest that too often we treat ruthlessness, paranoia and insensitivity as professional virtues, cloaking these traits in the amiable guise of zealous advocacy. . . .¹²

To recognize the pernicious impact of the perceived duty of zealous representation is not to indict the adversary system of justice. The problem is that too many lawyers rely on their duty to be a zealous advocate to subvert our adversary system into a mechanism for distorting truth, subverting justice, and treating others with incivility.¹³

This is *not* about refusing to represent clients who may have different life goals and morals. This is a pluralistic society. Legal ethics must be understood as a discipline that accepts conflicting values. Thus, although a client may need the advocate to espouse a legal position inconsistent with the lawyer's personal values, it is not necessarily contrary to personal values to represent such a client. A lawyer understands the importance of having all voices in society properly represented. Nevertheless, this *is* about representing the client within the bounds of our adversary system, our current Colorado Rules, and our own personal conscience.¹⁴

When a lawyer ignores personal conscience and abuses the system or acts with incivility, the impact is suffered not only by others. "A conflict arises between a lawyer's own personal values and morals and the behavior she believes is necessary to fulfill her professional role to advocate zealously for the client."¹⁵ It is the offending lawyer who then suffers the consequences:

It is small wonder that lawyers, who are trained in the ethics of the jugular attack [and] all-out battles, find it difficult to sustain stable, convivial and compatible work groups, not to mention families. . . . You can't work there sixty hours a week and then shed its influence as you return to the more civilized suburbs. . . . In a very real sense people merge with the roles they play. What begins as a role becomes part of a person's identity. . . . Because they are so comprehensive and time demanding, professional roles tend to be particularly dominant and threatening to personal identity.¹⁶

As Rabbi Harold L. Kudan has put it: "That which dominates our imagination and our daily thoughts will determine our life and character. Therefore it behooves us to be careful what we are worshipping, for what we are worshipping we are becoming."¹⁷

Conclusion

Perhaps in the not-too-distant future we can follow the lead of Arizona and Montana and remove from our own Colorado Rules the remaining vestiges of the myth of zealous advocacy.¹⁸ In the meantime, let us start this new year, not just with a resolution, but with true resolve: we will stand up to clients who want us to win for them at all costs; we will educate our clients and the public about our real duties; and we will engage in conduct at the office that reflects our morals and values at home. It is a long, difficult journey, but let us resolve to take this first step on the road to earning a more positive public image.

NOTES

1. Ethicist Michael Josephson, "Ethics Beyond the Code," speech given at the Colorado Bar Association Annual Meeting (Sept. 1994).
2. Briggs, "A Pause—For Seasons, Celebrations, and the Image of Lawyers," 33 *The Colorado Lawyer* 23 (Dec. 2004).
3. Much of this material was first published in Briggs, "Zealous Advocacy—The Route of Many Evils," *Colorado Daily Journal* (June 17, 2002).
4. *Restatement of the Law (Third)*, "The Law Governing Lawyers," § 16 (American Law Institute, 1998) at 148.
5. Wendel, "Public Values and Professional Responsibility," 75 *Notre Dame L.Rev.* (1999) at 1, n.205.
6. Zitrin and Langford, *The Moral Compass of the American Lawyer* (New York, NY: Ballantine Books, 1999) at 65-66 and 233.
7. Symposium, "Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent," Panel Discussion Responses to the Keynote Address, 26 *Fordham Urb. L.J.* (1999) at 841, n. 54 (Moderator Rabbi Gerald Wolpe, Respondents Eugene W. Harper, Jr., Nanette H. Schorr, and Mohammed Fadel).

8. Nelson, "The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation," 67 *Fordham L.Rev.* 773 at 805.

9. Higgins, "Ethical Rules of Lawyering: An Analysis of Role-Based Reasoning From Zealous Advocacy to Purposivism," 12 *Geo. J. Legal Ethics* 639 at 650.

10. Daicoff, "Asking Leopards to Change Their Spots," 11 *Geo. J. Legal Ethics* 547 (Spring 1998).

11. Josephson, *supra*, note 1.

12. Schuman "Beyond the Waste Land," *Oregon State Bar Bull.* (May 1991) at 10.

13. Here in Colorado, the late Cathlin Donnell chaired the Legal System Dynamics Subcommittee of the Professionalism Committee. In 1993, the Subcommittee reported as follows:

-The underlying perspective of most of the subcommittees is that unprofessional conduct is a problem created by certain individual lawyers within the profession who are unaware of appropriate professional standards, or who are not convinced that they need comply, and who may well gain advantage and success by not complying. This Subcommittee has been exploring a contrary perspective, namely that our legal system itself, not the misbehavior of particular individuals, is the principal cause of growing unprofessionalism. [The reasons include our] ethical rules and the "lawyer culture" which require zealotry. . . .

14. The Preamble to the Colorado Rules contains an important statement, commonly overlooked: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience. . . ." As one scholar has put it: "A . . . guiding principle calls for lawyers to accept personal moral responsibility for the consequences of their professional acts. . . . The rationale for professional actions cannot depend on retreats into roles that deny the need for reflection at precisely the moment when reflection is more needed." See Rhode, "The Professionalism Problem," 39 *Wm. & Mary L.Rev.* 283 (Jan. 1998).

15. Daicoff, *supra*, note 10 at 561.

16. Rand and Crowley Rand, *Moral Vision and Professional Decisions* (New York, NY: Cambridge Univ. Press, 1989). In his article on professionalism, Daniel Coquillette vehemently argues that lawyers are deluding themselves if they believe that they can resolve the internal conflict by divorcing their personal lives from their professional lives. Citing Aristotle, he stresses that "one's person or professional actions and identity cannot be independent from one's personal morality. . . . [O]ne's behavior determines one's character." Coquillette, "Professionalism: The Deep Theory," 72 *N.C. L.Rev.* 1271 (1994).

17. Schuman, *supra*, note 12.

18. Two years ago, *The Colorado Lawyer* reported on the work of the CBA's Professionalism Reform Task Force, which included the recommendations of the various working groups. The "Lawyer-To-Lawyer Working Group" listed as its first two recommendations: (1) remove all references to "zealous advocacy" from the preamble and comments to the Rules of Professional Conduct; and (2) use the occasion of the removal of zealotry from the Rules for seminars and other presentations by well-respected members of the bar on the reasons for its removal and the pernicious effects of dishonesty on a lawyer's reputation, on the well being of clients, on the public, and on the profession as a whole. See "Colorado Bar Association PRI Task Force Interim Report to the Board of Governors, May 2002," 31 *The Colorado Lawyer* 53 (July 2002). Two states, Arizona and Montana, have already removed any reference to "zealous advocacy" from their versions of the Model Rules of Professional Conduct. See Arizona Rules of

Professional Conduct; Montana Rules of Professional Conduct. My similar request is pending before the Colorado Supreme Court Committee on the Colorado Rules of Professional Conduct.

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