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Whatever Happened to Zeal?

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Not too long ago, I was standing in a grocery store checkout line when I overhead a shopper in the next line telling the checker that they were a law student, they planned to go into litigation, and that the first rule of an advocate is to zealously represent their client. Assuming the student was studying the ABA Model Rules, there are still a few scattered references to "zeal." But, "zeal" disappeared from the Washington professional rules 40 years ago. Like the law student in checkout line, however, lawyers often speak of "zeal" as if it was still there.[1]

In this column, we'll look at what happened to zeal and why. We'll then turn to what replaced the concept of "zeal' in the Washington RPC.[2]

"***Zeal"***

Zeal first entered the professional rules in 1908 when the ABA adopted the Canons of Professional Ethics. Canon 15 encouraged lawyers to represent clients with "warm zeal." Washington followed with its own version of Canon 15 encouraging "warm zeal."[3] Neither, however, used the word "zeal" in the sense of "zealot."[4] Instead, "zeal" was defined as being attentive to a client's interests: "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning

and ability[.]"[5] The Washington Supreme Court, for example, disciplined a lawyer under Canon 15 for taking on a case in 1956 and essentially letting it lie dormant until it was finally resolved through the intervention of another lawyer for the client in 1962.[6]

In 1969, the ABA replaced the Canons with the Model Code of Professional Responsibility. "Zeal" was elevated to the title of Canon 7—"A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"—and the title of accompanying Disciplinary Rule 7-101—"Representing a Client Zealously[.]" Again, Washington followed.[7] At least as defined by these rules, however, the notion of "zeal" continued to be uncontroversial: "A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law[.]"[8] The Washington Court of Appeals, for example, found no lack of zeal in a criminal case where a lawyer presented—but did not embellish—his client's alibi testimony.[9]

In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct. At that point for reasons discussed in the next section, the word "zeal" began to play a less prominent role in the professional rules. A new rule—Model Rule 1.3 on diligence—incorporated the concepts of thoroughness and timeliness that broadly reflected the notion of "zeal" as used in the Canons

and the Model Code.[10] "Zeal," by contrast, moved to Comment 1 to Model Rule 1.3 and two mentions in a new Preamble.[11]

When Washington followed in 1985 by replacing the CPR DR with the RPC, "zeal" disappeared. Although Washington adopted RPC 1.3 on diligence, Washington did not adopt comments to the RPC in 1985.[12] Similarly, Washington kept the older Preamble to the CPR rather than the ABA Model Rule Preamble.[13]

Zeal almost made it back into Washington's professional rules in the early 2000s with a comprehensive update to the Washington RPC known as the "Ethics 2003" amendments. Among the changes adopted by the Washington Supreme Court were a Preamble and comments patterned generally on their ABA Model Rule counterparts. Although the WSBA Ethics 2003 Committee had recommended both the Preamble paragraphs and the comment to RPC 1.3 referencing "zeal" found in the ABA Model Rules, the WSBA Board of Governors substituted the phrase "conscientiously and ardently" in the Preamble before sending the amendments to the Supreme Court and the Supreme Court, in turn, substituted "diligence" for "zeal" in the comment to RPC 1.3.[14] Those amendments became effective in 2006.[15]

In short, "zeal" last made an appearance in Washington's professional rules 40 years ago.

Why did it disappear?

Although read in the context of the Canons and the Code zeal was not meant to condone "bad behavior," that was sometimes the unfortunate result as lawyers used it as an excuse for plainly unprofessional conduct. The Reporter to the Ethics 2003 Committee put it this way in explaining the Board of Governors edits to the Preamble:

> Although the Model Rules version of paragraphs [2], [8], and [9] of the Preamble includes the terms "zealous" and "zealously," Washington has, since the adoption of the RPC in 1985, scrupulously avoided use of such terminology. Owing to its etymology, the word "zealous" in this context could inappropriately be interpreted to condone extreme or fanatical behavior of a type that would be inconsistent with a lawyer's professional obligations. In order to maintain continuity in Washington in this regard, "conscientious and ardent" has been substituted for "zealous."[16]

Professor Tom Andrews and his late colleague at the University of Washington, Professor Rob Aronson, echoed this observation from both a local and national perspective in their *Law of Lawyering in Washington*:

> The [treatment of zeal] . . . reflect[s] a growing sense that the aspiration to zeal has traditionally been used to justify a "Rambo" style of scorched-earth lawyering that is counterproductive. Perhaps this is why in adopting the ABA comments, our Supreme Court replaced the word "zeal" with the word "diligence," in keeping with its deletion of the concept of zeal

> from the preamble. In other words, advocacy can be carried too far and, at least in Washington, the concept of zeal was thought to be sufficiently problematic that it should be expunged from the RPC altogether.[17]

Although there are many examples nationally of lawyers misbehaving while ostensibly zealously representing their clients,[18] *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), offers a local contribution to this unfortunate genre. The lawyer conduct involved occurred during a trial in the Western District of Washington. The case turned on testimony by a government agent who had cited the defendant for illegal salmon fishing. The defense lawyer got the bright idea of testing the agent's identification by substituting an imposter at counsel table and having his client sit in the spectator area of the courtroom in disguise. The bright idea did not include telling either the judge or the prosecutor and the lawyer represented throughout the trial leading up to the agent's testimony that the imposter was his client. When the dramatic cross-examination occurred (and the agent initially got the identification wrong) and the story unspooled (and the agent then corrected the identification), the judge was not amused. The lawyer defended his conduct by arguing that his duty of zealous representation required the ruse. The judge found the lawyer in criminal contempt and the Ninth Circuit affirmed.

Diligence

When the ABA Model Rules were being debated in 1983, the American College of Trial Lawyers proposed that "diligence" in Model Rule 1.3 be replaced by "zeal."[19] In doing so, it argued that "zeal" "'connotes strong motivation and extraordinary effort.'"[20] It lost.[21] As discussed in the preceding section, by that point zeal's once-laudable luster had dimmed and the term had instead come to be viewed as an excuse for bad behavior.

It is important to remember, however, that "diligence" does not suggest milk toast advocacy. Comment 1 to RPC 1.3[22] makes that plain:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client with diligence in advocacy upon the client's behalf.

The phrase "conscientiously and ardently" that was substituted into the Washington Preamble essentially makes this same point.

It is equally important to remember that clients intuitively understand diligence, which the text of RPC 1.3 frames as: "A lawyer shall act with reasonable diligence and promptness in representing a client." Although clients may not appreciate the more obtuse procedural elements of a case, they

understand if a lawyer doesn't return their calls or emails and appears to have lost interest in their case. In fact, diligence failures are usually a "Top Five" source of client complaints (and rule violations) in the WSBA's Discipline System Annual Reports.[23] In other words, while "zeal" might make good fodder for late night TV, the statistics suggest that clients want professional advocates who pursue their matters with appropriate deliberation, competence, and communication.[24]

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[1] *See, e.g., State v. King*, 2023 WL 3478545 at *4 (Wn. App. May 16, 2023) (unpublished) (lawyer arguing that he had a duty to "zealously advocate for his client"). To be fair, judges also still occasionally use the word "zeal." *See, e.g., State v. Cannata*, 2018 WL 3414625 at *10 (Wn. App. July 12, 2018) (unpublished) (trial judge noted that lawyer was "zealous advocate").

[2] For convenience, this column uses the word "zeal" to collectively encompass "zeal," "zealous," and "zealously."

[3] *See generally In re Holtz*, 64 Wn.2d 424, 427, 392 P.2d 242 (1964) (discussing Washington Canon 15).

[4] Black's Law Dictionary (12th ed. 2024) defines a "zealot" as "[s]omeone who is an immoderate, fanatical, or overzealous adherent to a cause or ideal[.]"

[5] Former ABA Canon 15. *See generally* Henry S. Drinker, *Legal Ethics* 146 (1953) (discussing the history of Canon 15, including the phrase "warm zeal").

[6] *In re Holtz*, *supra*, 64 Wn.2d 424.

[7] *See generally State v. Darnell*, 14 Wn. App. 432, 440, 542 P.2d 117 (1975) (discussing Washington CPR 7 and DR 7-101).

[8] Former ABA DR 7-101(A)(1).

[9] *State v. Darnell*, *supra*, 14 Wn. App. at 439-440.

[10] *See* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 65-70 (2013) (ABA Legislative History) (outlining the history of Model Rule 1.3).

[11] ABA Legislative History, *supra*, at 66 (Model Rule 1.3, cmt. 1), 1-2 (Preamble, ¶¶ 2, 7). Paragraph 7 to the Preamble was renumbered to Paragraph 8 in 2002 and an additional reference to zeal was added to the Preamble in Paragraph 9. *See* ABA Legislative History, *supra*, at 6. Use of the word "zealous" also remains in the ABA Criminal Justice Standards for the Defense Function (4th ed. 2017) in ways that broadly parallel its remaining use in the ABA Model Rules.

[12] *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 827-28 (1986) (critiquing the failure to adopt comments).

[13] *See* Thomas R. Andrews, *The Law of Lawyering in Washington* at 3-5 (2012) (discussing the retention of the CPR preamble).

[14] *See* Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct at 1-2 (proposed preamble) and 13 (proposed RPC 1.3, cmt. 1) (2004); WSBA Board of Governors' Revisions to Ethics 2003 Committee Recommendations at 4-5 (2004) (WSBA BOG Revisions) (on file with author) (with alteration noted to preamble); Washington Supreme Court Order 25700-A-851, July 10, 2006 (with alteration noted to Comment 1 to RPC 1.3).

[15] Washington Supreme Court Order 25700-A-851, *supra*, at 1.

[16] WSBA BOG Revisions, *supra*, at 5.

[17] Thomas R. Andrews and Robert H. Aronson, *The Law of Lawyering in Washington* at 5-6 (2012) (footnote omitted).

[18] For nuanced discussions of this issue from national perspective, *see generally* Geoffrey C. Hazard, Jr., W. William Hodes, and Peter R. Jarvis, *The Law of Lawyering* § 7.02 (4th ed. 2021), Restatement (Third) of the Law Governing Lawyers § 16, cmt. d (2000), and Charles W. Wolfram, *Modern Legal Ethics* § 10.3 (1986).

[19] ABA Legislative History, *supra*, at 65-66.

[20] *Id*. at 66.

[21] *Id*.

[22] RPC 1.3 was surveyed in this space in November 2024 as "Hard at Work: Diligence under RPC 1.3." 78, No. 9 Wash. St. Bar News 12 (Nov. 2024).

[23] Washington Discipline System Annual Reports are available at: https://www.wsba.org/for-legal-professionals/professional-discipline.

[24] *See also* RPC 1.1 (competence) and 1.4 (communication).