



The Zealous Lawyer: The Upper & Lower Boundaries of "Zeal"

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OVERVIEW

- **WHAT IS ZEAL?**
- **A LITTLE HISTORY**
- **RULES REQUIRE ZEAL**
- **LAWYERS SHOULD BE ZEALOUS**
- **UNDERLY ZEALOUS**
- **OVERLY ZEALOUS**
- **BALANCE**



[A]N ADVOCATE, IN THE DISCHARGE OF HIS DUTY, KNOWS BUT ONE PERSON IN ALL THE WORLD, AND THAT PERSON IS HIS CLIENT.

Henry Lord Brougham – More Later

BACKGROUND

- **MOST LAWYERS: EMPATHETIC, FEELING, AND CARING**
- **MOST LAWYERS: DISPASSIONATE & OBJECTIVE**
- **GOOD AND DETACHED ADVICE**
- **UNCOLORED BY EMOTIONAL CONCERN**
- **CARING ACTUALLY MAKES ANALYSIS STRONGER**
- **BUT: ARE ALL LAWYERS CARING? ARE ALL LAWYERS OBJECTIVE?**



WHAT IS “ZEAL”?

- **FERVOR**
- **EAGER DESIRE**
- **ENTHUSIASTIC DILIGENCE**
- **ARDOR**
- **TIRELESS DEVOTION**
- **DILIGENT ENTHUSIASM**
- **POWERFUL INTEREST**



WHAT IS “ZEAL”?

- DEDICATION OR ENTHUSIASM
- WILLING, ENERGIZED, AND MOTIVATED
- EAGERNESS AND ENERGY AND DEVOTION



THUS, “ONE IS ZEALOUS WHEN HE IS CONVINCED THAT HE IS DOING THE MOST IMPORTANT AND MOST NEEDY WORK IN THE WORLD.”

A LAWYER MUST BE ZEALOUS

- **ATTORNEY: LORD BROUGHAM**
- **CLIENT: QUEEN CAROLINE**
- **PLAINTIFF: KING GEORGE IV**
- **VENUE: HOUSE OF LORDS**
- **WHO WOULD DARE TAKE ON A CASE VERSUS THE KING?**
 - **AND ALSO ALLEGE THE KING WAS AN ADULTERER?**
- **YEAR: 1820**



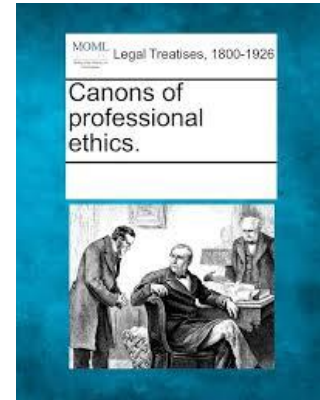
LORD BROUGHAM

- **BUT ONE PERSON IN ALL THE WORLD = CLIENT**
- **SAVE CLIENT BY ALL MEANS AND EXPEDIENTS**
- **AT ALL HAZARDS AND COSTS TO OTHERS & SELF**
- **NO REGARD FOR THE ALARM, THE TORMENTS**
- **RECKLESS OF THE CONSEQUENCES**
- **RESULT: CASE DISMISSED**
- **DO WE ENTER AND PURSUE EVERY REPRESENTATION WITH THAT ZEAL?**



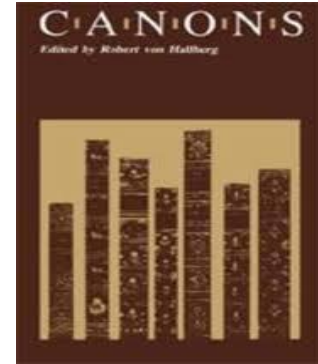
SOME HISTORY - CANONS OF PROFESSIONAL ETHICS

- ABA – 1908
- MANY OTHER STATES, INCLUDING KANSAS (1920)
- NOT JUST ZEAL = “**WARM ZEAL**”
- EXERTION OF UTMOST LEARNING AND ABILITY
- THAT NOTHING BE TAKEN OR BE WITHHELD FROM HIM
- NO FEAR OF JUDICIAL DISFAVOR OR PUBLIC UNPOPULARITY



MORE HISTORY - CANONS (CONT.)

- **WHETHER PROSPEROUS OR INDIGENT CLIENT**
- **BIG FEES OR NO FEES**
- ***“ENTIRE DEVOTION”***
- ***“WARM ZEAL”***
- ***“EXERTION OF HIS UTMOST LEARNING AND ABILITY”***
- **CASES – DISCIPLINE FOR INSUFFICIENT ZEAL & FOR EXCESSIVE ZEAL**



MORE HISTORY - THE MODEL CODE OF PROFESSIONAL CONDUCT

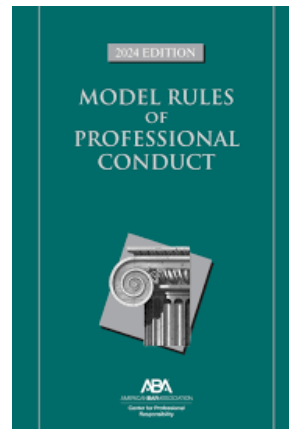


- ABA = 1969
- KANSAS = 1971
- CANON 7: “A LAWYER SHOULD REPRESENT A CLIENT **ZEALOUSLY** WITHIN THE BOUNDS OF THE LAW.”
- ETHICAL CONSIDERATIONS
- EC7-1: DUTY (TO CLIENT & TO LEGAL SYSTEM) =
 - TO REPRESENT THE CLIENT **ZEALOUSLY** WITHIN THE BOUNDS OF THE LAW
- CASES: DISCIPLINE FOR INSUFFICIENT ZEAL & FOR EXCESSIVE ZEAL

MORE HISTORY – CURRENT:

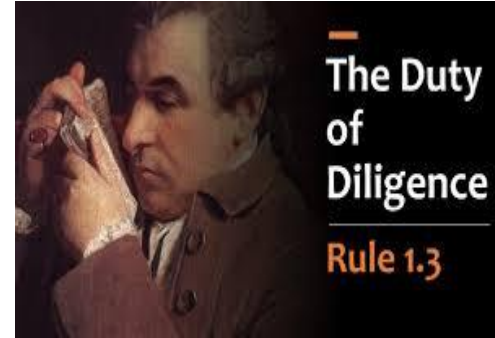
MODEL RULES OF PROFESSIONAL CONDUCT

- ABA = 1983
- KANSAS = 1989
- ALL STATES NOW
- **RULE 1.3: REASONABLE DILIGENCE AND PROMPTNESS**
- **COMMENT [1]:**
 - **DESPITE OPPOSITION, OBSTRUCTION OR PERSONAL INCONVENIENCE**
 - **WHATEVER LAWFUL AND ETHICAL MEASURES ARE REQUIRED TO**
 - **ACT WITH COMMITMENT AND DEDICATION FOR CLIENT AND**
 - **WITH ZEAL IN ADVOCACY UPON THE CLIENT'S BEHALF**



MODEL RULE 1.3

- COMMITMENT
- DEDICATION
- ZEAL
- "**ZEALOUSLY** AND DILIGENTLY WITHIN THE BOUNDS OF THE LAW"
- MUST NOT FAIL TO SEEK LAWFUL OBJECTIVES OF A CLIENT THROUGH REASONABLY AVAILABLE MEANS PERMITTED BY LAW
- MUST NOT PREJUDICE OR DAMAGE CLIENT



MODEL RULES – CASES:

INSUFFICIENT ZEAL

- **LACK OF PREPARATION**
- **LACK OF ATTENTION**
- **LACK OF VIGILANCE**
- **LACK OF COMMUNICATION**
- **ALL**
 - **UNDERMINES CALIBER OF ATTORNEY PERFORMANCE**
 - **UNDERMINES QUALITY OF THE RESULT**
 - **UNDERMINES THE RELATIONSHIP WITH THE CLIENT,**
 - **DIMINISHES CLIENT TRUST AND CONFIDENCE IN THE ATTORNEY**
 - **POTENTIAL MALPRACTICE CLAIM**
 - **POTENTIAL DISCIPLINARY COMPLAINT**



SO WHY BE ZEALOUS?

- CLIENTS = CANNOT SPEAK FOR THEMSELVES
- ZEALOUS REPRESENTATION = BASIS OF THE ADVERSARY SYSTEM
- THAT IS HOW AND WHY IT WORKS
- IF ONE SIDE OR THE OTHER **ROLLS OVER** – IS THAT JUSTICE?
- IF ONE SIDE OR THE OTHER IS OVERLY **AGGRESSIVE & MEAN** – IS THAT JUSTICE?
- SO: RULES AND LOGIC REQUIRE LAWYER TO REPRESENT CLIENTS "**ZEALOUSLY** AND **DILIGENTLY** WITHIN THE BOUNDS OF THE LAW."
- ARE ALL LAWYERS ZEALOUS?



INSUFFICIENT ZEAL – HOW DOES IT HAPPEN?

- LAWYER **TOO BUSY** – TOO MANY CASES
 - TOO MUCH WORK
 - CANNOT DO IT ALL
 - TOO **GREEDY** OR **PROUD** TO GET HELP
 - = INSUFFICIENT ZEAL
- LAWYER GETS **BORED** – ALL CASES ARE THE SAME, ROUTINE
 - FAILS TO SEE EVERY CASE AS UNIQUE
 - = INSUFFICIENT ZEAL
 - IT IS THE CLIENT'S ONLY CASE
- LAWYER GETS **LAZY** – EASIER TO IGNORE DEADLINES & DEMANDS
 - FAT, DUMB AND HAPPY
- LAWYER IS **DEPRESSED, DRUNK, DRUGGED, GAMBLING**
- NOT ABLE TO MEET DEADLINES & DEMANDS



INSUFFICIENT ZEAL - MANY CASES

- **MERE FAILURE TO TAKE ACTION**
- **FAILURE TO EXERCISE ORDINARY CARE**
- **NEGLECT IN THE PERFORMANCE OF ATTORNEY'S DUTIES**
- **= FAIL TO MEET TRADITIONALLY HIGH STANDARDS TO REPRESENT A CLIENT WITH ZEAL AND DILIGENCE**



EXAMPLES

INSUFFICIENT ZEAL – MORE CASES

- **LACK OF ATTENTION TO CLIENT'S CAUSE**
- **LACK OF ZEAL**
- **LACK OF DILIGENCE**
 - **NEGLECT OF CLIENT MATTERS**
 - **INACTIVITY**
 - **LACK OF ATTENTION**
 - **FAILED TO COMMUNICATE WITH CLIENT**
 - **FAILED TO TAKE NECESSARY STEPS TO PRESERVE CLIENT'S INTERESTS**



INSUFFICIENT ZEAL – MORE CASES

- **FAILED TO RESPOND TO DISCOVERY REQUESTS**
- **FAILED TO RESPOND TO COURT ORDER TO SHOW CAUSE**
- **= DISMISSAL OF THE CASE**

IN SUM: MANY LAWYERS DISCIPLINED FOR APPLYING *TOO LITTLE ZEAL*



EXCESSIVE ZEAL – HOW DOES IT HAPPEN

- LAWYER IS *INEXPERIENCED* - HIDES BEHIND ROUGH EXTERIOR
- LAWYER WITH *INFERIORITY COMPLEX* – BRAVADO
- LAWYER *NOT BUSY ENOUGH* – PURSUES ALL CASES WITH TOO MUCH VIGOR
- LAWYER IS *INFLUENCED BY CLIENT* – TAKES ON CLIENT'S ANGER
 - INSTEAD OF BEING THE COOL HEAD
- LAWYER IS *DRUNK, DRUGGED, DEPRESSED, GAMBLING* –
 - NOT IN FULL CONTROL OF SELF
- LAWYER IS *JUST MEAN* – THERE ARE SOME OUT THERE



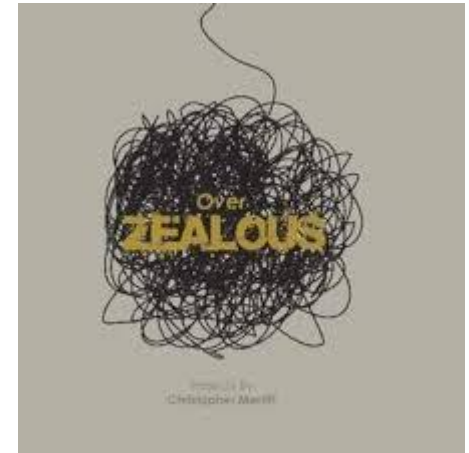
EXCESSIVE ZEAL – RESULTS

- **EXCESSIVE ZEAL:**
- **WINS NO CASES**
- **LOSES CLIENTS**
- **GETS NO NEW CLIENTS – EXCEPT CLIENTS WHO WANT A JUNKYARD DOG**
- **SANCTIONS**
- **DISCIPLINE**
- **MALPRACTICE**
- **JAIL**

excessive

EXCESSIVE ZEAL – MANY CASES

- TOO MUCH ZEAL IS JUST AS BAD
- MUST BE ZEALOUS – BUT RULE IS NOT WITHOUT LIMITS
- SIDEARMS OF A **WARRIOR** = YES
- DAGGER OF AN **ASSASSIN** = NO
- **NOT = HIGH DEGREE OF OBSTINACY**
- **NOT = VIOLATE COURT ORDERS**
- **NOT = BREAK ETHICAL RULES**
- **NOT = EXPRESS CONTEMPT OF COURT**



EXCESSIVE ZEAL - CASES

- ***GOFFER:***
 - “LIAR”
 - RUDE, HOSTILE
 - INTERRUPTING
 - SHOUTING
 - OBVIOUS DISRESPECT
 - YELLING
 - = DISBARRED



EXCESSIVE ZEAL – CASES (CONT.)

- *MALLOY*:
 - BARRAGE OF THREATS
 - ABUSIVE BEHAVIOR
 - DISHONESTY
 - FALSE ALLEGATIONS
 - FALSE, MISLEADING AND CONTRADICTORY AFFIDAVITS
 - = DISBARRED



EXCESSIVE ZEAL – CASES (CONT.)

- *FINA*:
 - INTERVIEWING WITNESS IN VIOLATION OF COURT ORDER
 - MISREPRESENTATIONS TO THE COURT
 - INTEMPERATE LANGUAGE
 - PROFANE HAND GESTURE DURING A CLOSING ARGUMENT
 - YELLING / POINTING AT DEFENDANT AND HIS COUNSEL
 - MISREPRESENTING EVIDENCE
 - DISCUSSING CASE WITH A REPRESENTED DEFENDANT
 - = DISBARRED



EXCESSIVE ZEAL – CASES (CONT.)

ROMIOUS (KANSAS):

- 1. GET HIS 'A--' IN THE COURTROOM**
- 2. REPEATEDLY RANG SERVICE DOORBELL**
- 3. ON ONE OCCASION:**
 - A. 'F--ING' FILE HIS PAPERWORK.**
 - B. 'F--ING BITCH.'**
 - C. POINTED FINGER / BETTER DO WHAT HE TOLD HER TO DO.**
 - D. SMARTER THAN ANYONE.**
 - E. 'F--ING BITCHES.'**
 - F. GET HER 'A--' IN THERE TO GET HIS MOTION.**
 - G. FAILED TO APPEAR AS ORDERED = (3 TIMES) - HELD IN CONTEMPT – 4 DAYS IN JAIL**



EXCESSIVE ZEAL – CASES – *ROMIOUS* (CONT.)

4. **FEDERAL COURT MAGNETOMETER - EFUSED - PROFANITIES – SCUFFLE - GUILTY**
 5. **INTERRUPTED PROCEEDING.**
 6. **LOUD AND RUDE.**
 7. **A 'JOKE' AND A 'TRAVESTY.'**
 8. **JUDGE ' RECKLESS, BIAS, PREJUDICE, RACIST ACTIVITY AND CONDUCT.'**
 9. **'PROCEEDING WAS A JOKE' – 'SIT [HIS] A-- UP THERE.'**
 10. **'CORRUPTING AND STINKING UP THE CASE' AND 'CORRUPTING THE SYSTEM.'**
 11. **LOUD, RUDE, AND ANGRY.**
 12. **REFUSED TO STOP TALKING - IGNORED ORDER.**
 13. **ASKED THE JUDGE IF HE IS A 'PEDOPHILE.'**
 14. **MANY OTHER ACTS**
- = DISBARRED**



ROMIOUS – LATER CASES

- **BROUGHT BULLETS INTO FEDERAL COURTHOUSE - GUILTY**
- **BATTERY ON 2 POLICE OFFICERS - GUILTY**
- **CHARGED WITH ASSAULT ON TWO MEN ON STREETCAR – FELONY HATE CRIME – RESULT ?**
- **SIX CIVIL LAWSUITS - \$500 TRILLION – ALL DISMISSED**



ANALYSIS AND CONCLUSION

– BALANCE

- MUST BE **ZEALOUS**
- NOT LET OVERLOADED DOCKET OR LAZINESS = NEGLECT
- NOT LET SMALL DOCKET = OVERDO THE JOB
- NOT LET DUTY GO TOO FAR = ANGRY AND AGGRESSIVE FRIVOLITY
- NOT ELEVATE **ZEAL** OVER **FAIRNESS**
- NOT INFLUENCED BY CONTAGION IF CLIENT ANGER
- QUIET CLIENT ANGER – BE THE COOL HEAD
- ZEAL IS GOOD
 - BUT EXERCISE WITHIN LIMITS
 - INCLUDING THE BOUNDS OF PROFESSIONAL RESPONSIBILITY



CONCLUSION - BALANCE

- **ZEAL** IS GOOD – RECOGNIZED AND APPLAUDED
- *NELSON V. MILLER*, 227 KAN. 271 (1980).
- TRADITIONAL KANSAS LAWYERS [YOU] = **ZEAL AND PROFESSIONAL COMPETENCE**
 - = PRESERVED BASIC LIBERTIES OF THE PEOPLE
 - = OUTSTANDING CONTRIBUTIONS
 - REPRESENTATION OF THE POOR AND UNDERPRIVILEGED
 - DEVELOPMENT OF NEW PRINCIPLES OF LAW
 - MEET THE NEEDS OF CHANGING SOCIETY
- **MUST BE ENCOURAGED**

**LET'S BE ZEALOUS ADVOCATES –
WITHIN THE LIMITS OF ETHICS &
PROPRIETY**

THANK YOU!

NICK BADGEROW

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