Real Property, Probate and Trust Law Section

Executive Council Meeting

Opal Grand Resort

Delray Beach, Florida
June 3, 2023

10:00 a.m. (E.T.)

Supplemental Agenda

General Standing Division Report

(the following is intended to replace the previous General Standing Division Report to the Agenda in its entirety)

VI. General Standing Division Report — *S. Katherine Frazier, Division Director and Chair-Elect*

Action Item:

1. **Professionalism and Ethics Committee** – *Andrew Sasso, Chair*

Motion to amend Chapter 4 of the Rules Regulating The Florida Bar to remove the words "zealously" and "zealous" from the preamble to Chapter 4 and the word "zeal" from the comment to Rule 4-1.3. **p. 3**

Informational Items:

1. **Ad Hoc Bylaws Committee** – *Robert S. Swaine and William T. Hennessey, III, Co-Chairs*

Discussion regarding proposed amendment to the Bylaws of the Real Property, Probate and Trust Law Section. **p. 32**

A full copy of the bylaws is available on the RPPTL website www.rpptl.org.

2. **<u>Liaison with Judiciary Committee</u>** – *Judge Mary Hatcher, Judge Hugh D. Hayes, Judge Mark A. Speiser, Judge Michael Rudisill, Liaisons*

Update on matters of interest – Judge Rudisill

3. **<u>Fellows</u>** - *Christopher A. Sajdera and Angela Santos, Co-Chairs*

Update on matters of interest.

PROPOSED REVISIONS TO THE FLORIDA BAR RULES OF PROFESSIONAL CONDUCT, CHAPTER 4 PREAMBLE AND RULE 4-1.3 COMMENT

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT PREAMBLE: A LAWYER'S RESPONSIBILITIES

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer ~~zealously~~ asserts the client's position with commitment and dedication to the interests of the client under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. ~~Zealous~~ Commitment and dedication in advocacy ~~is~~ are not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

Comment

Conduct

All prior references in this Chapter to a lawyer's duty to act zealously, as a zealous advocate, or with zeal upon the client's behalf have been removed. Zealous advocacy has been invoked in our profession as an excuse for unprofessional behavior. In *Fla. Bar v. Buckle*, The Florida Supreme Court stated "[w]e must never permit a cloak of purported zealous advocacy to conceal unethical behavior." 771 So. 2d 1131, 1133 (Fla. 2000). These Rules are meant to illustrate the special responsibility and high standards of professionalism in this field and zealousness as it has been applied in practice does not align with these ideals. A lawyer's conduct should strive to be respectful, considerate, and diligent in the practice of law.

RULE 4-1.3 DILIGENCE

Comment

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 ~~and with zeal in advocacy upon the client's behalf~~. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

The Florida Bar
Real Property, Probate and Trust Law Section
Professionalism & Ethics Committee

WHITE PAPER

Subcommittee, Review of Words "Zealously", "Zealous" and "Zeal" in The Florida Bar Rules of Professional Conduct Preamble to Chapter 4 and Comment to Rule 4-1.3

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January 18, 2023

I. Introduction

In the Rules Regulating The Florida Bar, the Preamble (A Lawyer's Responsibilities) of Chapter 4 (the Rules of Professional Conduct) (the "Rules") and the Comment to Rule 4-1.3 (Diligence), the terms zeal, zealous, and zealously (the "Z-terms") are used to describe the way a lawyer advocates and pursues justice for clients. The Z-terms have a long history of both positive and negative definitions and connotations, with today's meaning often associated with more negative behavior and labels. Inclusion of the Z-terms in Rules of Professional Conduct appears to cause confusion about acceptable standards in professionalism, and in some cases, the Z-terms encourage or are used as a shield for unprofessional behavior. Therefore, the Professionalism and Ethics Committee of the Real Property, Probate and Trust Law Section of The Florida Bar (RPPTL Section) determined that it is a matter of importance to the practice of law to review the impact of including the terms zeal, zealous and zealously in the preamble to Chapter 4 and the Comment to Rule 4-1.3 of The Florida Bar Rules of Professional Conduct.

II. Approach

A subcommittee was formed on April 28, 2022 to determine whether or not the terms zeal, zealous, and zealously should be removed and replaced in the Preamble to Chapter 4 and the Comment to Rule 4-1.3 of The Florida Bar Rules of Professional Conduct (the "Subcommittee"). The Subcommittee chose four areas of research and review:

1. English Dictionary and Law Dictionary meaning, etymology of terms;
2. History of the Z-terms in Chapter 4 of The Florida Bar Rules of Professional Conduct;
3. Florida Case law; and
4. Other State Jurisdiction Rules of Professional Conduct.

The following sections of this paper summarize the key findings. Detailed reports for respective summary sections are found in the appendices.

III. English Dictionary and Law Dictionary meaning, etymology of terms

The Z-terms have long been defined as a positive quality tracing back to the 14th century. Merriam-Webster Dictionary defines *zeal* as an "eagerness and ardent interest in pursuit of something."[1] Black's Law Dictionary currently defines *zeal* as a "[p]assionate ardor for a cause, especially that of a client; perfervid eagerness to achieve some end, especially the successful resolution of a client's legal needs or difficulties."[2] However, prior editions of Black's Law Dictionary defined a zealous witness as "a witness, on trial of a cause, who manifests a partiality for a side calling him, and an eager readiness to tell anything which he thinks may be of advantage to that side."[3] While the Z-terms have retained their positive definition and meaning, with regard to the legal profession, Z-terms are regularly associated with unethical and unprofessional behavior. The Z-terms are now

[1] https://www.merriam-webster.com/dictionary/zeal
[2] Black's Law Dictionary, ZEAL (11th ed. 2019)
[3] Black's Law Dictionary, Zealous witness (5th ed. 1979)

often viewed as an uncompromisingly extremist attribute. Mixed meanings of the Z-terms create opportunities for misinterpretation. Lawyers sometimes use the Z-terms as a shield to excuse unethical behavior. Notably, while the definition and etymology of "zealous" focuses on devotion to the person or cause, the colloquial usage of "zealous" has expanded far beyond reasonable diligence to create an implied obligation of conduct at any cost in order to represent one's client with zeal. Further discussion of the etymology of the Z-terms is attached as Appendix A.

IV. History of the Z-terms in The Florida Bar Rules of Professional Conduct (Chapter 4 and Rule 4-1.3)

The Florida Bar Rules of Professional Conduct, which went into effect January 1, 1987, provide guidance concerning an attorney's ethical obligations in the practice of law and within these Rules there are aspirational comments and substantive rules. The word zeal has appeared in iterations of our ethical rules for over 100 years and has generally appeared in preambles and comments as guidance – not obligations. In our present Rules, the word zeal is purely aspirational.[4] We propose that any word which can be used as justification for unbecoming professional behavior does not belong in our Rules which are intended to reflect our best practices and suggest that this term be updated to truly reflect the ideals of legal practice. A detailed history of the Z-terms in The Florida Bar Rules of Professional Conduct is attached as Appendix B.

V. Florida Case Law

It appears Florida Courts have occasionally, mistakenly imposed a duty on an attorney to be a zealous advocate for his or her client. Recently stating a "requirement to provide zealous representation, as contemplated under our ethical rules" and the failure to represent a client zealously is a serious deficit in legal representation. However, the Courts are aware that zealous advocacy and professionalism may collide and the decisions place professionalism higher than zeal. A detailed report of Florida cases that include issues regarding the Z-terms as referenced in The Florida Bar Rules of Professional Conduct is attached as Appendix C.

VI. Other State Jurisdiction Rules of Professional Conduct

The Subcommittee examined the ABA Model Rules of Professional Conduct and all 50 state jurisdictions. The ABA Model Rules of Professional Conduct includes one or more of the Z-terms in the Preamble and Rule 1.3 Comment. Eleven state jurisdictions do NOT include any reference to the Z-terms in the preamble, rules, and/or comments of their respective states' rules of professional conduct, while 39 states still include the Z-terms. State jurisdictions, such as Arizona, California, Indiana, Maine, Ohio, and Washington, have removed the Z-terms from their rules, comments, and/or preamble, indicating that — the removal of the Z-terms was due to the belief that the Z-terms promote and justify unprofessional behaviors by lawyers in their quest to pursue

[4] The Preamble to the Rules states: "The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative" and reiterates "[t]hus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules."

justice for their clients. While Florida remains in the majority of states that currently include Z-terms in the professional rules of conduct, the trend appears to favor removing Z-terms with consideration to replacing the terms with words that more appropriately promote professional behavior and align with positive core values. Appendix D provides the breakdown of state jurisdictions that either include or exclude the Z-terms in their rules of professional conduct.

VII. Additional Consideration – Kind and Just

The Subcommittee researched standards and descriptive terms of professionalism and leadership across a range of professions, such as health care and the military, for a broader perspective on terms to consider in The Florida Bar Rules of Professional Conduct. The Subcommittee found that both fields value treating colleagues and those for whom they are responsible with respect and dignity. Two professionalism and leadership qualities repeatedly appeared in our research – *kind* and *just*. *Kindness* is not synonymous with merely being nice. It reflects a strength of character whereby one can be assertive or adversarial without being unnecessarily intimidating, embarrassing, humiliating, or otherwise acting to harass others. University of South Dakota School of Medicine identified *kindness* as a core value at its school.[5] Military tenets of leadership and professionalism include terms such as *kindly* and *just*. The Commandant of the U.S. Marine Corps wrote a letter to the Officers of the Marine Corps in 1922, titled *Kindly and Just*.

> "**You should never forget the power of example**. The young men serving as enlisted men take their cue from you. If you conduct yourselves at all times as officers and gentlemen should conduct themselves, **the moral tone of the whole Corps will be raised, its reputation, which is most precious to all of us**, will be enhanced, and the esteem and affection in which the Corps is held by the American people will be increased.
>
> **Be kindly and just in your dealings with your men**. Never play favorites. **Make them feel that justice tempered with mercy may always be counted on**. This does not mean a slackening of discipline..."[6]

An example of one of the earliest recorded tenets of leadership is noteworthy. *"Man is born for deeds of kindness"* – Marcus Aurelius. The Subcommittee unanimously voted to add language to the Preamble to the Rules emphasizing the importance of attorneys being kind and just – however, the Professionalism and Ethics committee, as a whole, voted not to include the language. The Subcommittee has purposely chosen to include our findings regarding the use of "kind and just" in our report with the hope that these terms may become more prevalent in the Rules in the future.

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[5] Mick Garry, Kindness is a Core Value at USD Medical School, https://news.sanfordhealth.org/neurology/kindness-usd-med-school/, March 2, 2020

[6] Major General John A Lejeune, Commandant of the Marine Corps, *Kindly and Just*, Letter No. 1, 19 Sep 1922, https://www.usmcu.edu/Research/Marine-Corps-History-Division/Frequently-Requested-Topics/Historical-Documents-Orders-and-Speeches/Kindly-and-Just/

VIII. Conclusions and Recommendations

The Subcommittee determined that the contemporary, plain language use of and reference to the Z-terms are often associated with negative extremist behavior and character. Use of the Z-terms in the Florida Bar Professional Rules of Conduct has a parallel negative course as well. It is important to note that the Z-terms are found only in Chapter 4 Preamble and Rule 4-1.3 Comment, which imposes no duty as a standard in advocacy. The Subcommittee determined these findings to be manifested in a significant body of Florida case law, with cases as recent as 2022, wherein there are several examples of attempts to justify unprofessional behavior. The Subcommittee concluded that the Z-terms in the Rules causes confusion and encourages or otherwise shields unprofessional behavior. Other state jurisdictions that have examined and removed the Z-terms from their professional rules of conduct consistently cite similar negative opinions regarding the Z-terms. Reactions to the work of the Subcommittee has been positive as exhibited by an article concluding "As I have said and written many times, the words zeal and zealous are related to the term zealot and the ordinary meaning of the term zealot is a person who is fanatical and uncompromising. There is no place in the Bar rules or in a lawyer's practice for fanatical and uncompromising conduct."[7] Therefore, the Subcommittee recommended and the Professionalism and Ethics Committee of the RPPTL Section unanimously voted that the Z-terms be removed from The Florida Bar Rules of Professional Conduct, Chapter 4 Preamble, and Rule 4-1.3 Comment and replaced with the language drafted by the Subcommittee. Appendix E provides the Subcommittee's proposed revisions to Chapter 4, Preamble and Rule 4-1.3 Comment.

[7] RES IPSA LOQUITUR "Florida Supreme Court issues opinion reminding lawyers not to violate Bar rules with "zealous advocacy" and Bar explores rule changes" by Joseph A. Corsmeier – referring to the work of the Subcommittee as reported in The Florida Bar News "DO 'Z' WORDS BELONG IN BAR RULES?" by Jim Ash, Senior Editor – both articles attached as Appendix F.

APPENDIX A

ENGLISH DICTIONARY AND LAW DICTIONARY MEANING, ETYMOLOGY OF TERMS

The term, *zeal*, traces its etymologic origin to the late 14th century as a "passionate ardor in pursuit of an objective or course of action, from Old French zel (Modern French zèle) and directly from Late Latin zelus 'zeal, emulation'."[8] *Zeal* is also connected to the term "jealousy" from "old French jalos/gelos meaning 'keen, zealous; avaricious; jealous'; from late Latin zelosus, from zelus, 'zeal'; and from Greek zēlos, which sometimes meant 'jealousy' but more often was used in a good sense ('emulation, rivalry, zeal')".[9] While it appears that the predominant meaning was positive, Z-terms derive from positive and negative meaning and usage.

The current Merriam-Webster Dictionary defines *zeal* as an "eagerness and ardent interest in pursuit of something."[10] The plain language definition infers an impactful effort but does not provide a context for such pursuit and could equally be applied in either a positive or negative situation.

Prior editions of Black's Law Dictionary defined a zealous witness as "a witness, on trial of a cause, who manifests a partiality for a side calling him, and an eager readiness to tell anything which he thinks may be of advantage to that side."[11]

Turning to the latest legal definitions, Black's Law Dictionary defines *zeal* as a [p]assionate ardor for a cause, especially that of a client; perfervid eagerness to achieve some end, especially the successful resolution of a client's legal needs or difficulties." Black's Law Dictionary also defines "zealous" as "[i]ncited by fervor; ardently devoted to a person or cause, esp. to a legal client."[12]

Under the entry for the term *zeal* in Black's Law Dictionary, the reader is referred to the *Principle of Partisanship*, which provides further instruction:

> "Let us ... look more closely at the principle of partisanship: When acting as an advocate, a lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client will prevail. This principle corresponds to canon seven of the ABA Code: 'A lawyer should represent a client zealously within the bounds of the law.' Canon seven's language is borrowed in turn from canon fifteen of the 1908 ABA Canons, which asserts that '[t]he 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,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.' The stock expression 'zealous advocacy,' often deployed in discussions of lawyers' ethics, derives from these rules, and the doctrine of zealous advocacy is

[8] https://www.etymonline.com/word/zeal
[9] https://www.etymonline.com/word/zeal
[10] https://www.merriam-webster.com/dictionary/zeal
[11] Black's Law Dictionary, Zealous witness (5th ed. 1979)
[12] Black's Law Dictionary, ZEALOUS (11th ed. 2019)

roughly equivalent to the principle of partisanship." David Luban, *Lawyers and Justice: An Ethical Study* 11 (1988).[13]

In fact, Black's Law Dictionary goes on to define the *Principle of Partisanship* as "the doctrine that a lawyer acting as an advocate must, within the established bounds of legal ethics, maximize the chances that his or her client will have a favorable outcome—Also termed *doctrine of zealous advocacy*."[14]

Unfortunately, the defined positive qualities and established bounds of the Z-terms are increasingly plagued by misuse and misinterpretation in the legal profession. As was pointed out in a recent ABA article, statements regarding zealous advocacy in the Preamble to Model Rules of Professional Conduct "can reasonably be interpreted as calling for all-out, no-holds-barred, single-minded pursuit of the client's goals—which is not what the Model Rules themselves require. In some instances, the kind of aggressive advocacy suggested by the use of the word 'zealous' in these phrases may actually be a violation of the ethical obligations imposed by other Model Rules, such as Model Rule 3.4 requiring fairness to opposing counsel and parties."[15]

[13] Black's Law Dictionary, ZEAL (11th ed. 2019)
[14] Black's Law Dictionary, PRINCIPLE OF PARTISANSHIP (11th ed. 2019)
[15] Daniel Harrington and Stephanie Benecchi, *Is it Time to Remove "Zeal" From the ABA Model Rules of Professional Conduct?*, Ethics & Professionalism, American Bar Association Litigation Section, May 26, 2021, https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2021/is-it-time-to-remove-zeal-from-the-aba-model-rules-of-professional-conduct/

APPENDIX B

HISTORY OF THE Z-TERMS IN THE FLORIDA BAR RULES OF PROFESSIONAL CONDUCT

History

The Florida Bar Rules of Professional Conduct (hereinafter "Rules") which are in effect today as Chapter 4 of the Rules Regulating The Florida Bar, were initially adopted by The Florida Supreme Court and went into effect on January 1, 1987[16]. As is the case with our current Rules, all prior rules providing guidance concerning an attorney's ethical obligations in the practice of law have largely been modeled after rules proposed by the American Bar Association (ABA) and adopted throughout the country. The history discussed within will address usage of the word "zeal" or a derivative thereof in relation to rules of professionalism in the practice of law.

The first ABA Canons of Professional Ethics (hereinafter "Canons") were written in May 1908[17] and adopted in Florida on November 4, 1936[18]. Canon 15 - *How Far a Lawyer May Go in Supporting a Client's Cause* states,

> "[n]othing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties 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 cause. . . . 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*," (emphasis added) to the end that nothing be taken or withheld from him, save by the rules of law, legally applied.[19]

The portion of the above quote in italics is believed to have been adopted from the 1887 Alabama Bar Association's Code of Ethics, which was borrowed this from Professor George Sharswood's essay on ethics published in 1860 at the University of Pennsylvania.[20] The notion of this unyielding loyalty by an attorney passionately championing his or her client's matter is believed to have originated in 1820, where Lord Henry Brougham was counsel for the newly ascended Queen Caroline. The House of Lords had been encouraged by King George VI to enact the Pains

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[16] *The Florida Bar re Rules Regulating The Florida Bar*, 494 So.2d 977 (Fla. 1986), *opinion corrected* 507 So.2d 1366.
[17] *See* Final Report of the Committee on Code of Professional Ethics, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf (last visited 5/26/2022)
[18] *In Re: Canons of Professional Ethics*, 125 Fla. 501 (1936). *Also See* 145 Fla. 754 (1941). (The second cite is not available on Westlaw)
[19] *Id* at 579.
[20] Paul C. Sanders, *Whatever Happened To Zealous Advocacy?,* Paul C. Sanders, 245 N.Y.L.J (Mar 11, 2011).

and Penalties Bill so that he could divorce the Queen whom he had accused of adultery[21]. Lord Brougham's masterful defense of the Queen saved her, and while the House of Lords passed the divorce bill, they chose not to enforce it. [22]

The Code of Professional Responsibility (hereinafter "CPR") superseded the Canons of Professional Ethics in 1970[23] and while there is one mention of "warm zeal" in the Canons, the word zeal is mentioned nine times in the CPR as follows:

- Canon 2, *A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,* Ethical Consideration 2-23. "A lawyer should be **zealous** in his efforts to avoid controversies over fees with clients . . ."
- Canon 7, *A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.*
    - Ethical Consideration 7-1. "The duty of a lawyer, both to his client and to the legal system, is to represent his client **zealously** within the bounds of the law."
    - Ethical Consideration 7-10. "The duty of a lawyer to represent his client with **zeal** does not militate against his concurrent obligation to treat with consideration all persons involved . . ."
    - Ethical Consideration 7-19. "[t]he advocate by his **zealous** preparation and presentation of fact and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments." . . . "The duty of a lawyer to his client and his duty to the legal system are the same, to represent his client **zealously** within the bounds of the law."
    - Ethical Consideration 7-36. "Although a lawyer has the duty to represent his client **zealously**, he should not engage in any conduct that offends the dignity and decorum of proceedings."
    - Ethical Consideration 7-39. "[p]roper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve impartiality of tribunals and make their decisional process prompt and just, without impinging upon the obligation of lawyers to represent their clients **zealously** within the framework of the law."
- Disciplinary Rule 7-101. Representing a Client **Zealously** (zeal is only listed in the title and not the substantive content of this rule.)

The use of zeal, and its derivatives, is significantly aspirational in the CPR – and is completely aspirational in the Rules, which went into effect on January 1, 1987 and are the operative ethical rules attorneys practice under today. Zeal is mentioned twice in the preamble to the Rules and once in a comment for Rule 4-1.3 Diligence. At no point is "zeal" listed in any of the substantive rules.

- 2nd paragraph of Preamble. "As an advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system."

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[21] https://api.parliament.uk/historic-hansard/lords/1820/aug/17/bill-of-pains-and-penalties-against-her (last visited June 8, 2022).
[22] Sanders, *supra*.
[23] See *In re The Integration of Rules of Professional Ethics*, 235 So.2d 723 (Fla. 1970).

- 8th paragraph of Preamble. "**Zealous** advocacy is not inconsistent with justice."
- Comment to 4-1.3 Diligence. "A lawyer must also act with commitment and dedication to the interests of the client and with **zeal** in advocacy upon the client's behalf."

As practicing attorneys, expansion on the ethical Rules which govern our profession is encouraged to clarify understanding of the ideals which we all strive for to effectuate the best representation for our clients; we know better than most that words are powerful, and they have different meanings to different people. The purposeful use of "zeal" in our Rules in the present day, however aspirational, may mean different things to different people. If we look back to its origin, the intent and meaning of "warm zeal" may translate in modern times to a "passionate and diligent" representation of a client or an "ardent and conscientious" representation. During the course of our research, zeal especially in today's vernacular, has a generally negative connotation and may be equated to someone who goes to extremes, which is not something that we want to aspire to in our Rules. There is also case law which is discussed further in Section V and Appendix C of this white paper where attorneys have used the term zeal to justify their unprofessional behavior. This is the best illustration of all that a word, which is purely aspirational in our Rules has been used as a sword and a shield. We propose that any word which can be used as justification for unprofessional behavior should not be in our Rules which are intended to reflect our best practices.

APPENDIX C

FLORIDA CASE LAW REGARDING THE Z-TERMS

The Florida Bar v. Roberts, 689 So. 2d 1049 (Fla. 1997)

A complaint was filed over Attorney Roberts's handling of an Estate. The substance of his actions was his failure to communicate with his client and his improper distribution of estate assets.

The Florida Supreme Court stated that "failing to represent one's client zealously, failing to communicate effectively with one's client, and failing to provide competent representation are all serious deficiencies, even when there is no intentional misrepresentation or fraud. The Court cited to *Florida Bar v. Sommers*, 513 So. 2d 665 (Fla. 1987) for its authority but made no mention of the Rules of Professional Conduct.

The Florida Bar v. Buckle, 771 So. 2d 1131 (Fla. 2000).

Complaint was filed against Attorney Buckle based on Mr. Buckle's attempts to contact the victim of the crime involving Mr. Buckle's client defendant. The final contact was by letter from Mr. Buckle which included religious materials. The referee found that the letter was humiliating and intimidating and had no substantial purpose other than to embarrass, intimidate or otherwise burden the victim. Mr. Buckle argued that his conduct did not violate any ethical rules and was, in fact, required by his duty to competently and zealously represent his client.

The Florida Supreme Court stated that the heart of the matter revolved around the lines of propriety involved in conflict between zealous advocacy and ethical conduct. The Court held that "We must never permit a cloak of purported zealous advocacy to conceal unethical behavior." The Court, citing *Florida Bar v. Machin*, 635 So. 2d 938 (Fla. 1994), held that the attorney must exercise sensitive professional and moral judgment guided by the basic principles underlying the rules [Rules of Professional Conduct].

The Court held that zealous advocacy cannot be translated to mean win at all costs, and although the line may be different to establish, standards of good taste and professionalism must be maintained while we support and defend the role of counsel in property advocacy. A lawyer's obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation.

The Florida Bar v. Cimbler, 840 So. 2d 955 (Fla. 2002)

Multiple complaints were filed against Attorney Cimbler in connection with his handling of two real estate transactions and lack of communication with his client in a commercial lease dispute matter. The Court found that Mr. Cimbler engaged in a long pattern of multiple client neglect. The Court, citing *Florida Bar v. Roberts*, stated that "we have made clear that even where there has been no finding of intentional misrepresentation or fraud, 'failing to represent one's client zealously, failing to communicate effectively with one's client, and failing to provide competent representation are all serious deficiencies.'"

Bowers v. Tillman*,* 323 So. 3d 322 (Fla. 5th DCA 2021)

This action involved the denial of a motion for new trial by the plaintiff after an automobile personal injury trial which motion was based on the misconduct of defense counsel. There was evidence that lead counsel for both plaintiff and defendant were rude to each other and had caused a mistrial during the first trial. Further, the defense counsel submitted into evidence a document that was excluded by a motion in limine.

The Fifth District cited to the Fourth District Court of Appeal which held that the courtroom is neither a football field, nor a wrestling ring, and attitudes appropriate for professional sport are not appropriate for the courtroom. The Fifth District observed that lawyers, as officers of the court, have a special duty "to avoid conduct that undermines the integrity of the adjudicative process."

In a concurring opinion, Judge Jay Cohen rejected attorney Gobel's explanation that his conduct was nothing more than zealous advocacy. Judge Cohen noted that the Bar is full of lawyers zealously representing their clients who do not resort to the types of behavior and tactics of Mr. Gobel. Judge Cohen cited the above cited holding in the *Florida Bar v. Buckle* that zealous advocacy cannot be translated to mean win at all costs.

The Florida Bar v. Schwartz, 334 So. 3d 298 (Fla. 2022)

Complaint filed against Attorney Schwartz based on his creation and improper use of two defense exhibits during a pretrial deposition. The Florida Supreme Court cited to *Florida Bar v. Roberts* ("the requirement to provide zealous representation, as contemplated under our ethical rules") and *Florida Bar v Buckle* and reiterated that failing to represent one's client zealously, in addition to other neglect, is a serious deficiency. Thus, as late as last year, the Florida Supreme Court is imposing an obligation on attorneys to be zealous advocated for his or her client – however, there is no obligation to be zealous in The Florida Bar Rules of Professional Conduct.

Additional Case Law

Huggins v. Siegel**,** 336 So. 3d 58 (Fla. 1st DCA **2022**)

Advocates are expected and encouraged to zealously advocate for their client. Citing R. Regulating Fla. Ba. 4-Preamble. But this duty of zealous advocacy must be tempered with respect, courtesy and decorum.

Christ v. Florida Association of Criminal Defense Lawyers, Inc., 978 So. 2d 134 (Fla. 2009).

In a criminal case, Justice Pariente stated that "Whether an indigent defendant is represented by an elected public defender, the appointed regional counsel or a private attorney appointed by the court, the attorney has an independent professional duty to 'effectively' and 'zealously' represent his or her client."

She further stated that "**The basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty *in any case."***

Cemoni v. Ratner, 322 So. 3d 197 (Fla. 5th DCA 2021)

A court possesses inherent authority to award attorneys fees for bad faith conduct against a party's attorney. This inherent authority is reserved for those extreme cases where a party acts in bad faith, vexatiously, wantonly or for oppressive means. In exercising this inherent authority, an appropriate balance must be struck between condemning an unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that attorneys will not be deterred from pursing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests.

Carnival Corporation v. Beverly, 744 So. 2d 489 (Fla. 1st DCA 1999)

As an advocate, an attorney has a duty to zealously represent his or her client within the bounds of the law and the rules of professional conduct. citing Bar Rule 4-1.3.

APPENDIX D

STATE JURISDICTION COMPARISON OF INCLUSION/EXCLUSION OF THE Z-TERMS IN THEIR RULES OF PROFESSIONAL CONDUCT

The Subcommittee examined the rules of professional conduct for 50 state jurisdictions for inclusion or exclusion of the Z-terms. Eleven (11) states do not include the Z-terms in the preamble, rule, or comments of that state's professional rules of conduct. All jurisdictions that removed the Z-terms reflected consistent opinions that inclusion of Z-terms in professional rules of conduct can reasonably cause misinterpretation and manifest in unethical behavior. The Subcommittee concurs with this reasoning and concluded that while the majority of state jurisdictions continue to include Z-terms in their professional rules of conduct, the Z-terms should be removed from The Florida Bar Rules of Professional Conduct. The by-state breakdown of inclusion or exclusion of the Z-terms is displayed in the tables below in Figure 1.

Jurisdiction	Zeal (Yes/No)
Arizona*	No
California*	No
Indiana*	No
Louisiana	No
Maine*	No
Montana	No
Nevada	No
New York	No
Ohio*	No
Oregon	No
Washington*	No

Yes	39
No	11

Jurisdiction	Zeal (Yes/No)
Alabama	Yes
Alaska	Yes
Arkansas	Yes
Colorado	Yes
Connecticut	Yes
Delaware	Yes
Florida	Yes
Georgia	Yes
Hawaii	Yes
Idaho	Yes
Illinois	Yes
Iowa	Yes
Kansas	Yes
Kentucky	Yes
Maryland	Yes
Massachusetts	Yes
Michigan	Yes
Minnesota	Yes
Mississippi	Yes
Missouri	Yes

Jurisdiction	Zeal (Yes/No)
Nebraska	Yes
New Hampshire	Yes
New Jersey	Yes
New Mexico	Yes
North Carolina	Yes
North Dakota	Yes
Oklahoma	Yes
Pennsylvania	Yes
Rhode Island	Yes
South Carolina	Yes
South Dakota	Yes
Tennessee	Yes
Texas	Yes
Utah	Yes
Vermont	Yes
Virginia	Yes
West Virginia	Yes
Wisconsin	Yes
Wyoming	Yes

Figure 1. By-state jurisdiction breakdown of inclusion/exclusion of Z-terms from that state's professional rules of conduct. An "" next to the state indicates documented removal of the Z-terms. In the other states that do not include the Z-terms, the Z-terms may have been removed or were never included.*

The May 2021ABA Litigation Section article discussed the trend toward removing *Zeal* from ethics rules around the country. Several states were noted as already having removed the Z-terms from their ethics rules, including Arizona, Ohio, Indiana, and Washington.[24] Each state that removed the Z-terms generally noted that **'zealous advocacy' was often invoked as an excuse**

[24] Daniel Harrington and Stephanie Benecchi, *Is it Time to Remove "Zeal" From the ABA Model Rules of Professional Conduct?*, Ethics & Professionalism, American Bar Association Litigation Section, May 26, 2021, https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2021/is-it-time-to-remove-zeal-from-the-aba-model-rules-of-professional-conduct/

for unprofessional behavior, and, therefore, the phrase had no place in even the preamble or comments to ethics rules.[25]

The May 2021 ABA Litigation Section article also noted:

> The changes made by the State of Washington illustrate **how to eliminate the word "zeal" while maintaining the call to a heightened level of advocacy**. The Washington Supreme Court first adopted the preamble and official comments to the Washington Rules of Professional Conduct in 2006. The rules, preamble and comments were largely based on the ABA Model Rules. However, upon the recommendation of the Board of Governors of the Washington State Bar Association (WSBA), Washington replaced "zealous" with "conscientious and ardent" wherever it appeared in the preamble and replaced "zeal" with "diligent" in the comment to Rule 1.3, thus mirroring the duty set out in the rule itself. In support of these changes, the WSBA Board of Governors report stated: **"Owing to its etymology, the word 'zealous' in this content could inappropriately be interpreted to condone the extreme or fanatical behavior of a type that would be inconsistent with a lawyer's professional obligations."** (quoted in *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 Gonz. L. Rev. 327, 333 (2008)[26]

This Subcommittee revealed similar findings for the states that removed the Z-terms. For example, under Maine's Model Rule 1.3 Diligence, Reporter's Notes: "The task force discussed the use of the term "zeal" as used in Maine's Model Rule 1.3 Comment [1] (2002). **The Task Force determined that the term "zeal" was often used as a cover for a lawyer's inappropriate behavior**. Moreover, the Task Force thought the term was not needed to describe a lawyer's ethical duties. Accordingly, the Task Force recommended its deletion."[27]

Under Arizona's ethics rules 1.3, Diligence, Comment [1]:

> "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. A lawyer is not bound, however, to press for every advantage that might be realized for a client. **For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.** The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."[28]

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[25] *Id.*
[26] *Id.*
[27] https://www.courts.maine.gov/rules/text/mr_prof_conduct_plus_2019-05-13.pdf
[28] https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/

APPENDIX E

PROPOSED REVISIONS TO THE FLORIDA BAR RULES OF PROFESSIONAL CONDUCT, CHAPTER 4 PREAMBLE AND RULE 4-1.3 COMMENT

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer ~~zealously~~ asserts the client's position with commitment and dedication to the interests of the client under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a

constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. ~~Zealous~~ Commitment and dedication in advocacy ~~is~~ are not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self- regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it

serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative.

Thus, comments, even when they use the term ""should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4- 1.6, which attach when the lawyer agrees to consider whether a client- lawyer relationship will be established. See rule 4-1.18. Whether a client- lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on

all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra- disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an
oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in the state of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral

official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

When used in these rules, the terms "fraud" or "fraudulent" refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent

failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed consent

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, these persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules state that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above.
Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on

the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake these procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Conduct

All prior references in this Chapter to a lawyer's duty to act zealously, as a zealous advocate, or with zeal upon the client's behalf have been removed. Zealous advocacy has been invoked in our profession as an excuse for unprofessional behavior. In *Fla. Bar v. Buckle*, The Florida Supreme Court stated "[w]e must never permit a cloak of purported zealous advocacy to conceal unethical behavior." 771 So. 2d 1131, 1133 (Fla. 2000). These Rules are meant to illustrate the special responsibility and high standards of professionalism in this field and zealousness as it has been applied in practice does not align with these ideals. A lawyer's conduct should strive to be respectful, considerate, and diligent in the practice of law.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); amended March 23, 2006, effective May 22, 2006 (933 So.2d 417); amended May 21, 2015, corrected June 25, 2015, effective October 1, 2015 (164 So.3d 1217), amended November 9, 2017, effective February 1, 2018 (234 So.3d 577).

RULE 4-1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

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 ~~and with zeal in advocacy upon the client's behalf~~. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

A lawyer's workload must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); amended March 23, 2006, effective May 22, 2006 (933 So.2d 417).

APPENDIX F

Florida Supreme Court issues opinion reminding lawyers not to violate Bar rules with "zealous advocacy" and Bar explores rule changes

By Joseph A. Corsmeier

This article will discuss the Florida Supreme Court opinion imposing a 3-year suspension on a lawyer who altered pictures of his client's face and used the images as exhibits at a deposition in a criminal case which the opinion characterized as overzealous and a proposal by a Florida Bar committee to remove the words zeal and zealous from the Rules Regulating The Florida Bar. The case is *The Florida Bar v. Schwartz*, SC17-1391 (February 17, 2022).

According to the Florida Supreme Court opinion:

(The lawyer), a criminal defense attorney who was admitted to the Bar in 1986, became the subject of the instant Bar proceedings based upon his use of two defense exhibits during a pretrial deposition. While representing the defendant in State v. Virgil Woodson, Circuit Case No. 13-2013-CF-012946-0001-XX (Miami-Dade County, Florida), Schwartz created the exhibits, two black and white photocopies of a police lineup. In each, Schwartz altered the defendant's picture. In one exhibit, he replaced the defendant's face with that of an individual whom witnesses other than the robbery victim had identified as the perpetrator. In the other exhibit, Schwartz changed the defendant's hairstyle. However, the altered photocopies used at the deposition retained the victim's identification of the defendant, including both her circle around what had been the defendant's picture and her signature at the bottom of the lineup, as well as a police officer's signature.

*Finally, we reiterate that the requirement to provide zealous representation, as contemplated under our ethical rules, see Florida Bar v. Roberts, 689 So.2d 1049, 1051 (Fla. 1997) ("**Failing to represent one's client zealously, failing to communicate effectively with one's client, and failing to provide competent representation are all serious deficiencies, even when there is no evidence of intentional misrepresentation or fraud."**), does not excuse engaging in misconduct, irrespective of one's intent to benefit the client. As we have previously observed, "[w]e must never permit a cloak of purported zealous advocacy to conceal **unethical behavior."** Fla. Bar v. Buckle, 771 So.2d 1131, 1133 (Fla. 2000.* (emphasis supplied).

The referee recommended a 90-day suspension; however, after reviewing previous Bar discipline cases, aggravating and mitigating factors, and noting the lawyer's prior disciplinary history, the Florida Supreme Court suspended the lawyer for 3 years.

The words "zeal," "zealous," or

"zealously," do not appear in the Rules Regulating The Florida Bar; however, they are used in the Preamble to Chapter 4 of the Rules Regulating The Florida Bar and in the Comment to Florida Bar Rule 4-1.3 (Diligence).

The Preamble to Chapter 4 of the Rules Regulating The Florida Bar, states, in part, that "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." The proposed revision would state, "As an advocate, a lawyer asserts the client's position with commitment and dedication to the interests of the client under the rules of the adversary system." Another sentence in the Preamble states, "Zealous advocacy is not inconsistent with justice." The proposed revision would state, "Commitment and dedication in advocacy are not inconsistent with justice."

The comment to Rule 4-1.3 (Diligence) states: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." The proposed revision would remove the words "and with zeal in advocacy upon the client's behalf."

After the opinion was rendered, Florida Bar's Real Property, Probate and Trust Law Section Committee began considering a proposal to remove the words zeal, zealous, and zealously, from the Rules Regulating The Florida Bar.

The RPPTL committee is also proposing to include the word "kindness" for the first time in a Florida Bar rule or comment. The proposal would add the following words to the final sentence in the comment to Rule 4-1.3: "kindness and punctuality are not inconsistent with diligent representation."

The proposed revisions are an early draft. If the RPPTL committee approves the proposed revisions, they would be placed on the agenda of the section's executive council for a final vote in December 2022. The Board of Governors would then review the proposed rule revisions and the Florida Supreme Court would decide whether to implement the revisions. If the revisions are implemented, Florida would join at least 13 other states, including Georgia, New York, and California, which have removed such words from their rules and comments.

Bottom line: As I have said and written many times, the words zeal and zealous are related to the term zealot and the ordinary meaning of the term zealot is a person who is fanatical and uncompromising. There is no place in the Bar rules or in a lawyer's practice for fanatical and uncompromising conduct.

Be careful out there.

Joseph A. Corsmeier is a Martindale-Hubbell "AV" rated attorney who practices in Palm Harbor, Florida. His practice consists primarily of the defense of attorneys and all licensed professionals in disciplinary and admission matters, and expert analysis and opinion and court testimony on ethics and liability issues. Mr. Corsmeier is available to provide attorney ethics and professionalism advice, provide expert opinions on ethics and malpractice issues, assist attorneys to ensure compliance with the Florida Bar Rules, and defend applicants before the Florida Board of Bar Examiners.

DO ‘Z’ WORDS BELONG IN BAR RULES?

Jun 08, 2022 By Jim Ash Senior Editor Top Stories

Andrew Sasso

A Real Property, Probate and Trust Law Section committee is considering a proposal to scrub so-called “Z” words — “zeal,” “zealous,” and “zealously,” — from the Bar rule book.

“It’s not just the legal profession, people in general relate someone who is ‘zealous’ to someone who is a zealot,” said RPPTL Professionalism and Ethics Committee Chair Andy Sasso. “And I don’t know anyone who would say that someone being a zealot is positive.”

If the committee’s proposed revisions were adopted, Florida would join at least 13 other states, including Georgia, New York, and California, that have removed “Z” words from their rules and commentary.

Sasso acknowledges that the words “zeal,” “zealous,” or “zealously,” don’t appear in Florida Bar rules — they appear in the preamble to Chapter 4, and in a comment to Rule 4-1.3 (Diligence).

But words matter, Sasso said, especially in the legal profession.

“You get into this whole thing, there is no requirement to provide zealous representation, because it’s in the comment, and that’s only aspirational,” he said. “I think it causes a lot of confusion for lawyers.”

Sasso said he decided to take the issue to his committee in April, after the Florida Supreme Court issued a ruling in a disciplinary case, The Florida Bar v. Schwartz, 334 So. 3d 298 (Fla. 2022).

“Finally, we reiterate that the requirement to provide zealous representation, as contemplated under our ethical rules … does not excuse engaging in misconduct, irrespective of one’s intent to benefit the client,” the justices wrote. “As we have previously observed, “[w]e must never permit a cloak of purported zealous advocacy to conceal unethical behavior.”

Sasso said he has been thinking about the issue since his first semester of law school, and his fiancé — now wife — gave him a copy of Black's Law Dictionary.

The only definition he found was a disparaging reference to a witness.

"It says an untechnical term, denotes a witness on a trial of a cause, who manifests a partiality for the side that is calling him, and an eager readiness to tell anything which he thinks may be of advantage to that side," Sasso said.

A recent article in "Ethics and Professionalism," a publication of the ABA Litigation Section, argues that "Z" words should be removed from comments to ABA Model Rules of Professional Conduct.

The authors warn that it "contributes to the problem of lawyers using a misinterpretation of the Model Rules to justify their own uncivil and even unethical behavior — after all, the ordinary meaning of the term 'zealot' is a person who is fanatical and uncompromising."

In Florida Bar rules, the Preamble to Chapter 4, states, in part, that "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."

The Professionalism and Ethics Committee proposed revisions would state, "As an advocate, a lawyer asserts the client's position with commitment and dedication to the interests of the client under the rules of the adversary system."

Another sentence in the preamble states, "Zealous advocacy is not inconsistent with justice."

The committee's proposed revision would state, "Commitment and dedication in advocacy are not inconsistent with justice."

The final "Z" word reference appears in the comment to Rule 4-1.3 (Diligence). It states, in part, "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

The committee's proposed revision would simply remove the last nine words of the sentence — "and with zeal in advocacy upon the client's behalf."

The committee is also proposing to introduce a word that has never appeared in a Florida Bar rule or comment — "kindness."

The proposed revision would add the following nine words to the final sentence in the comment to Rule 4-1.3 — "kindness and punctuality are not inconsistent with diligent representation."

Sasso said he was inspired by an historical document a subcommittee chair recently shared with him — a 1922 letter from Marine Corps Commandant John A. Lejeune to his officers.

"Be kindly and just in your dealings with your men," Lejeune wrote.

Sasso was intrigued.

"I thought that was really interesting," he said. "You've got the Marine commandant asking his men to be just and kind."

Sasso stressed that the proposed revisions are only a draft. If the committee approves them, they won't be presented to the section's executive council for a final vote until December. After that, the Board of Governors would weigh in. The Supreme Court would have the final say.

PROPOSED AMENDMENTS
TO THE
BYLAWS
OF THE
REAL PROPERTY, PROBATE AND TRUST LAW SECTION
OF
THE FLORIDA BAR

It is resolved that the By-Laws of the Real Property, Probate and Trust Law Section of The Florida Bar, Article IV, V, and Article VII, be amended as follows (additions are underlined; deletions are ~~struck out~~):

1) Article IV, entitled "Officers, Elected Positions, And Executive Committee" Section 4. entitled "Nominating Procedure":

(a) The long-range planning committee consists of all past section chairs who are members of the executive council, is chaired by the chair-elect, and submits nominees to the section for election of section officers ~~to the offices of chair-elect, secretary, real property law division director, probate and trust law division director, treasurer, at-large members director~~, and the positions of representatives for out-of-state members and at-large members. If the office of chair-elect becomes vacant during the year, the nominations submitted by the long-range planning committee for the following year must include a nominee for the office of section chair. The chair-elect ~~long-range planning committee~~ must notify the members of the section of the names of the nominees no later than ~~60~~ 30 days prior to the section's annual meeting ("election meeting"). In submitting nominations for at-large members, the long-range planning committee considers recommendations from the at-large members' director and the executive committee.

(b) No nominations for any elected office or position other than those made by the long-range planning committee will be permitted, except that nominations may be made by a written nominating petition signed by 25 or more active section members and submitted to the section chair not less than 30 days prior to the election meeting. If more than one person is nominated for any elected office or position, the section chair, assisted by any special committees appointed by the section chair, will determine the procedures to be followed for that election.

(c) Each nominee will be permitted to prepare a statement of no more than 500 words, to be reproduced and distributed by the section to its members, either as an article in the section's

publication, Action Line, or separately. Any statement will also be distributed at the election meeting.

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2) Article IV, entitled "Officers, Elected Positions, And Executive Committee" Section 5. entitled "Election and Term of Offices and Positions":

(a) The section officers, the representatives for out-of-state members, and the at- large members, are elected by majority vote of the active section members in attendance and voting at the election meeting held prior to July 1 of each year. Voting by proxy is not permitted. At the election meeting the ~~section chair, chair-elect, and~~ secretary determines the number of active section members in attendance and voting. ~~Voting is by written, secret ballot prepared in advance, except when a governmental state of emergency has been declared for that meeting's location or declared for any location that significantly impacts a substantial number of section members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available~~. If no nominee receives a majority vote for an office or position, additional balloting will take place between the 2 nominees receiving the greatest number of votes until the required majority is obtained. Results of the election will be immediately announced by the section chair.

(b) The nominees elected serve for a period of 1 year, beginning on July 1. The chair-elect automatically becomes section chair on expiration of the term as chair-elect or on the death, resignation, or removal of the section chair.

* * *

3) Article V, entitled "Executive Council" Section 4. entitled "Attendance":

Section 4. Attendance. Regular <u>in-person</u> attendance by executive council members at executive council meetings is requisite to the proper performance of their duties and responsibilities. Accordingly, if any past section chair is absent from 10 consecutive in-state executive council meetings, or if any other member of the executive council <u>fails to attend at least two in-state executive council meetings in-person</u> ~~is absent from 3 consecutive in-state executive council meetings~~ in any membership year, the member is deemed to have resigned from the executive council, and any section office or position held by that person is deemed vacant. <u>Virtual attendance, if otherwise permitted by the section chair at an in-state executive council meeting, will not satisfy the requirements of in-</u>

person attendance. The resigned member is not ~~be~~ eligible for election to or membership on the executive council for the next succeeding membership year unless: (i) the executive committee, on a showing of good cause for the absences, waives the attendance requirement for the membership year involved; and (ii) the waiver is announced at a formal meeting of the executive council and duly recorded in the minutes of the meeting. Any vacancy created by the absence of a member as provided here is filled as provided in these bylaws.

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4) Article VII, entitled "Meetings":
Section 1. entitled "Annual/Election Meeting of the Section":

Section 1. Annual/Election Meeting of the Section. The section chair designates the time, date and location in Florida of the annual meeting of the section at which the elections provided by Article IV will occur before July 1 each year. The meetings will be in-person unless the section chair, in the chair's full and complete discretion, specifies in the notice that virtual attendance and voting will be permitted.

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5) Article VII, entitled "Meetings":
Section 3. entitled "Quorum and Voting by the Section":

Section 3. Quorum and Voting by the Section. The active section members in ~~physical~~ attendance at any meeting of the section constitutes a quorum for the transaction of business and a majority vote of those in physical attendance and voting is binding. Voting by proxy is not permitted. ~~However, if a governmental state of emergency has been declared for the section meeting's location or declared for any location that significantly impacts a substantial number of section members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available, then the chair in the chairs' full and complete discretion may issue protocols permitting section members to be present and vote electronically~~.

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6) Article VII, entitled "Meetings":
Section 4. entitled "Executive Council Meetings":

Section 4. Executive Council Meetings. There are no fewer than 3 in-state meetings of the executive council each year.

(a) The executive council may act or transact business authorized by these bylaws, without meeting, by written or electronic approval of the majority of its members.

(b) The section chair must give at least 15 days- notice to all executive council members to call executive council meetings. The meetings will be in-person unless the section chair, in the chair's full and complete discretion, specifies in the notice that virtual attendance and voting will be permitted.

(c) Those present at a meeting of the executive council duly called will constitute a quorum and a majority vote of those present and voting is binding, unless a greater majority is required by these bylaws for a particular matter. Voting by proxy is not permitted.

~~(d) However, if a governmental state of emergency has been declared for an executive council meeting location or declared for any location that significantly impacts a substantial number of executive council members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available, then the chair in the chairs' full and complete discretion may issue protocols permitting executive council members to be present and vote electronically.~~

7) Article VII, entitled "Meetings":
Section 5. entitled "Executive Committee Meetings":

Section 5. Executive Committee Meetings. The executive committee meets as directed by the section chair, and holds an organizational meeting prior to each membership year at a time, date, and place selected by the section chair. The section chair fixes the date and location of each meeting and must give written, electronic, or oral notice of its date and location to each executive committee member ~~at least 7 days prior to the meeting~~. A majority of the executive committee may exercise its powers unless a greater majority is required by these bylaws for a particular matter. The executive committee may take action by mail, e-mail, telephone or other means without a formal meeting. Voting by proxy will ~~is~~ not be permitted.