

THE ZEAL SHORTAGE

*Anita Bernstein**

I. INTRODUCTION

Professional zeal, according to a leading treatise, “is found in the United States in a form that, for vigor, has no rival anywhere.”¹ Zeal manifests itself as a force in both the performance and the theory of advocacy: Lawyers practice it, and they preach it. As an element of advocacy as lawyers practice it, zeal is hard to measure.² As theory—the preached part, an ideal for the practice of law—zeal is more amenable to assessment, through review of a relatively contained written record. Basic source material suggests that as theory, zeal may have hit its peak in “vigor” about a hundred years ago.

Zeal never did enjoy universal acclaim in writings about lawyers’ ethics. When Henry Brougham thundered famously to the House of Lords in 1820 that a lawyer should work only for the interest of his client, no matter “the alarm, the torments, [or] the destruction” that such zealous advocacy might inflict on others,³ he expressed a sentiment unshared among most of his English contemporaries.⁴ In its picaresque passage through the United States over the next two centuries, zeal

* Sam Nunn Professor of Law, Emory University, and Wallace Stevens Professor of Law, New York Law School. I thank my Emory colleagues Robert Ahdieh and Timothy Terrell for their thoughtful comments on earlier versions of this Article, and Harvey W. Spizz, Esq. for supporting my participation in this Symposium. My thanks also to Roy Simon and the *Hofstra Law Review* for the honor of including me in this celebration of Monroe Freedman’s influential work.

1. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3.2, at 581 (Hornbook Series Practitioner’s ed. 1986).

2. Thanks to Chuck Wolfram for making this important comment to me at the live portion of this Symposium.

3. Brougham was hinting about a plan he had had to introduce evidence embarrassing to the King in the trial of Queen Caroline for adultery. WOLFRAM, *supra* note 1, § 10.3.1, at 580 (quoting 2 *The Trial of Queen Caroline* 8 (1821)).

4. James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2443-46 (2003) (noting the mid-nineteenth-century “tradition” of taking exception to Brougham’s expression of zealous advocacy).

found an important admirer in George Sharswood, whose *Essay on Professional Ethics*, published in 1860, became a source for the first American Bar Association code for lawyers, the ABA Canons of Professional Ethics.⁵ The Canons asked, “How Far a Lawyer May Go in Supporting a Client’s Cause.” Very far, they answered, in a bow to Sharswood:

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,” to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.⁶

After this rhetorical apogee, zeal as an American rule began to wither, at least in its written expressions. The Canons were drafted to be hortatory rather than disciplinary; a lawyer could dishonor them knowing he would in consequence suffer no punishment.⁷ This first expression by a national professional association of its ideals for attorneys nevertheless had an impact:⁸ Zeal, from the start accompanied by its prissy tag-along caution “within . . . the bounds of the law,”⁹ joined an expansive vision of what it meant to be a good lawyer.

5. The Canons were copied almost verbatim from the first state bar code on professional responsibility, the *Alabama State Bar Association Code of Ethics*, published in 1887. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 S.M.U. L. REV. 1385, 1435 (2004). The Canons omitted several portions of the Alabama code that later became ABA-drafted rules. In 1887 the Alabama code required prompt communication with clients, told lawyers to state clear fee arrangements in advance, and prohibited in detail representations that posed conflicts of interest. *Id.* at 1440-41.

6. A.B.A., OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND CANONS OF JUDICIAL ETHICS ANNOTATED 56 (1967) (reprinting CANONS OF PROF’L ETHICS Canon 15 (1908)). The quotation is from Sharswood’s *Essay on Professional Ethics*. WOLFRAM, *supra* note 1, § 10.3.1, at 578 n.73.

7. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980) (titled Canon 7 “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”) (emphasis added).

8. According to one reader, the Canons not only fixed a vision of “conscientious lawyering” on the profession but also articulated a belief in the goodness of regulation at a time when all national regulatory work was in its infancy. Altman, *supra* note 4, at 2499-2500.

9. A.B.A., OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND CANONS OF JUDICIAL ETHICS ANNOTATED 56 (1967) (reprinting CANONS OF PROF’L ETHICS Canon 15 (1908)) (stating “within and not without the bounds of the law”).

When the ABA adopted its first disciplinary codification, the Model Code of Professional Responsibility, the shaky status of zeal among professional norms became manifest. The Code omitted zeal from its enforceable rules, replacing the verb phrase “shall represent” with “should represent”—its Canon 7 read “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”¹⁰—thereby signaling mere guidance rather than a basis for discipline. The first Ethical Consideration following Canon 7 declared that “[t]he 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”¹¹—again, a hortatory rather than a disciplinary formulation. One might argue that, in the Code, zeal moved indirectly to the realm of discipline as part of the rule that “[a] lawyer shall not intentionally[:] . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules”¹² This rule seems to emphasize diligence more than zeal, however.

In its next zeal-disparaging maneuver, the ABA plucked “zealously” from boldface and blackletter in its most recent full-length codification for lawyers, the Model Rules of Professional Conduct, published in 1983.¹³ The Model Rules confine “zeal,” “zealous,” and “zealously” to the Preamble and comments, using “z”-words only to describe the lawyer as “advocate.”¹⁴ As described in the Rules, other lawyer roles including mediator and counselor lack even a faint endorsement of zeal.¹⁵ During the last ABA go-round, Ethics 2000, “several commentators urged elimination of all reference in the Model Rules to ‘zealousness,’ even in the Comment to Rule 1.3 (and in the Preamble).”¹⁶ These commentators’ wish did not carry the day. Zeal remains in the Model Rules now just as it appeared in 1983.¹⁷ Reform

10. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

11. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980).

12. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980).

13. Compare MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) (being entitled as “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”), with MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

14. See MODEL RULES OF PROF'L CONDUCT pmbL.; R. 1.3 cmt. 1 (1983).

15. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 83 (3d ed. 2004).

16. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.2, at 6-5 (3d ed. Supp. 2003).

17. See MODEL RULES OF PROF'L CONDUCT pmbL. ¶¶ 2, 8, R. 1.3 cmt. 1 (2004).

efforts of this era did, however, persuade a couple of states to expunge references to zeal from their rules governing lawyers.¹⁸

Zeal as a professional norm does have eminent defenders. Charles Wolfram, author of the aforementioned leading treatise, has written that “the principle stems from concepts of individual autonomy. Each individual in a society is the holder of rights, and the legal system provides mechanisms by which individuals can assert and claim the consequences of their rights.”¹⁹ Situated in an adversary system, lawyers must furnish zealous advocacy to their clients “for instrumental reasons: that attitude assures that the system will work well.”²⁰ The masterly *Law of Lawyering* by Geoffrey Hazard and William Hodes quotes a lexicon with approval:

A *zealous* person, according to the *Random House Dictionary of the English Language*, is “ardently active, devoted, or diligent,” all qualities that most clients (as well as most observers of the legal scene) would agree are admirable in a lawyer—as are the synonyms listed: “enthusiastic, eager, intense, passionate, and warm.”²¹

A symposium celebrating *Understanding Lawyers' Ethics*, a leading monograph on legal ethics, acclaimed this book as fundamental to the “client-centered approach to lawyers' ethics” that supports “client autonomy and zealous advocacy.”²² Monroe Freedman, joined by co-author Abbe Smith, has used *Understanding Lawyers' Ethics*, along with numerous other writings over decades, to applaud zeal.²³ Today Freedman and Smith are the leading academic advocates of this professional norm,²⁴ which they claim has a deep base away from rule-writers—who perhaps need to get out more, they suggest, away from the

18. Arthur J. Lachman & Peter R. Jarvis, *Zeal in Client Representation—FAQs*, PROF. LAW., 2005 Symposium Issue, at 83-84.

19. WOLFRAM, *supra* note 1, § 10.3.2, at 581.

20. *Id.* § 10.3.2, at 581-82.

21. HAZARD & HODES, *supra* note 16, § 6.2, at 6-4.

22. Katherine S. Broderick, *Understanding Lawyers' Ethics: Zealous Advocacy in a Time of Uncertainty*, 8 D.C. L. REV. 219, 220 (2004).

23. FREEDMAN & SMITH, *supra* note 15, at 71 (“The ethic of zeal is . . . pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations with ‘entire devotion to the interest of the client.’”). For other celebrations of zeal by the authors, see Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 63 (1996); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000).

24. See Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 264 (2005) (calling Freedman “the adversary system's greatest modern defender”).

American Bar Association and other rarefied environments.²⁵ However, inside the rule-writing bastion—and thus in legal ethics as it lives in libraries, codes, conferences, and much scholarship—zeal struggles.

As an admirer of zeal, I seek to help this value remain central to lawyers' ethics. Toward this end, I spend little time in this Article saying why. The literature skimmed over lightly in the last paragraph associates zeal with autonomy, individual rights, a need to curb excesses by the state, client satisfaction, and the achievement of substantively just results.²⁶ Lined up against its bevy of rivals, zeal has been amply acclaimed. Readers who still disapprove of zeal and hold out for a devastating new defense will not find one here.

Instead I argue that this great ideal—to my mind, up there in the professional-responsibility pantheon next to loyalty and competence—is too scarce, and I advocate reparative efforts to ease what I call a zeal shortage. Shortage of what? Because the professional-responsibility literature has not settled on a definition of zeal, two separate parts follow below on this question: Part II on what zeal is, and Part III on what it is not. Critics have accused zeal of fueling partisan excesses, giving a platform to bullies, and bringing falsity into venues that would otherwise, presumably, be clean and honest.²⁷ Not true, I contend in Part III. Wrongful conduct is wrong by itself, and has no necessary connection to zeal. Moreover, the absence of zeal can cause wrongful conduct. Lawyers who err deserve blame; zeal does not.

If there is a shortage, what explains it? Part IV explores zeal in the location that newcomers to the profession first learn in structured conditions how to be a lawyer: the American law school.²⁸ I look at the J.D. curriculum and the people who work with it, and consider zeal as it emerges—or rather, fails to appear—among newly trained lawyers in the

25. See FREEDMAN & SMITH, *supra* note 15, at vii (“This [book] is a traditionalist, client-centered view of the lawyer’s role in an adversary system, and corresponds to the ethical standards that are held by a large proportion of the practicing bar.”).

26. See, e.g., FREEDMAN & SMITH, *supra* note 15, at 71; WOLFRAM, *supra* note 1, § 10.3.2, at 581; Freedman, *supra* note 23, at 63, 69; Smith, *supra* note 23, at 953.

27. See HAZARD & HODES, *supra* note 16, § 6.2, at 6-4 to 6-5; see also John Conlon, *It’s Time to Get Rid of the ‘z’ Words*, RES GESTAE, Feb. 2001, at 50, 50; Allen K. Harris, *The Professionalism Crisis – The “Z” Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, PROF. LAW., Winter 2001, at 1, 1, 10; Allen K. Harris, *The Professionalism Crisis*, PROF. LAW., Spring 2001, at 1, 7-8.

28. Cf. Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 24 (2000) (“Any serious commitment to improvements in the practice of law and the regulation of lawyers must start in law schools. The foundations of our legal culture are laid in educational institutions.”).

early years of their careers. Part IV then ascribes baleful consequences to the loss of zeal.

In reaction to the zeal shortage in American legal education and post-graduate employment, Part V proposes that American professional-responsibility codes adopt new blackletter rules to bolster this inadequately supported professional norm. On the question of what these new zeal rules should provide, I acknowledge an ironic neutrality—my own shrug. Pretty much anything in drafting range that rehabilitates zeal would improve the rules. Bring back Canon 15.²⁹ Bring back zeal as stated in Canon 7 of the Code,³⁰ bring back EC 7-1.³¹ For readers who would like to see zeal recodified but believe that all superseded ABA provisions have moved forever off the table, I present two new ideas in Part V. They are examples of how the only profession that makes an explicit ethical duty of zeal might put in writing its commitment of passionate partisanship in assisting clients—persons and entities that, by hypothesis, need a lawyer's help.

II. REAL ZEAL

A recent article provides a clear working definition of zeal that can serve as a starting point. According to bar regulator Sylvia Stevens, zeal has two elements:

First, there must be partisanship, in the sense of caring that the client prevails in whatever is at stake, combined with emotional energy and commitment to the representation. Second, there must be a degree of independence, which allows for dispassionate judgment to prevent losing sight of legal and ethical boundaries as well as the risks of contemplated actions.³²

Below I present a concordant picture of zeal, with some divergence from this beginning. I too want to define zeal to have two parts, but I would reserve the second half of what Stevens provides for marginal commentary:³³ While independence is necessary to zealous advocacy, so are many other conditions, and the definition ought to address what is fundamental. Conversely, the first half—"caring that the client prevails

29. A.B.A., OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND CANONS OF JUDICIAL ETHICS ANNOTATED 56 (1967) (reprinting CANONS OF PROF'L ETHICS Canon 15 (1908)).

30. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

31. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980).

32. Sylvia Stevens, *Whither Zeal? Defining 'Zealous Representation,'* OR. ST. B. BULL., July 2005, at 27, 28.

33. See *infra* Part III.B (commenting on the relationship between zeal and agency).

in whatever is at stake, combined with emotional energy and commitment to the representation”—needs expansion. It contains two central themes: commitment to one side (rather than to a neutral search for truth), and passion.

A. *Partisan Commitment*

When fulfilling the duty of zealous advocacy, the lawyer sees his or her relationship with a client in partisan terms. Partisanship, in the helpful phrase of Monroe Freedman and Abbe Smith, means that a lawyer must represent a client “with an actual or potential adversary in mind.”³⁴ Litigation brings partisanship to the fore: parties and their lawyers line up against “actual” adversaries on the other side of the caption. In contexts outside litigation—counseling, “office practice,” and transactional work—partisanship will rest further in the background, but the lawyer still must keep this “potential adversary in mind.”³⁵ Overt conflict may never develop. Such a happy conclusion to the dealings would be nice. Should conflict ensue, however, a lawyer has performed poorly if she has not looked out in advance for the well-being of her client. Freedman and Smith remind conscientious lawyers to anticipate the possibility that harmony in business transactions will turn sour:

When a contract is negotiated, there is a party on the other side. A contract, a will, or a form submitted to a government agency may well be read at some later date with an adversary’s eye, and could become the subject of litigation. The advice given to a client and acted upon today may strengthen or weaken the client’s position in contentious negotiations or in litigation next year.³⁶

Keeping an actual or potential adversary in mind emphatically does not mean living by the infamous war metaphors that permeate descriptions of the American adversary system.³⁷ The lawyer who

34. FREEDMAN & SMITH, *supra* note 15, at 72.

35. *See id.*

36. *Id.* But see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 51, 55 (2000) (suggesting that “the degree of partisanship” suited to transactional work is less than that of litigation); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1182 (2005) (“But transactional lawyering lacks the essential elements of litigation: an impartial referee, orderly procedures, rules for obtaining, introducing, and excluding evidence, and a competent opposing party. It is so different from adversarial litigation that one wonders why anyone has ever thought to analogize the role of lawyer from one context to the other.”).

37. For a full catalogue of these clichés, see Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225, 232-37 (1995).

envisions adversaries need not harm them. Self-conscious partisan commitment might lead a lawyer to recommend eschewing a fight and to favor compromise, mediation, or other responses that validate where the adversary is coming from. As the zeal-skeptic Jonathan R. Cohen rightly points out in his recent article urging lawyers not to assist in clients' "denial" of responsibility vis-à-vis adversaries, an aggressive hyper-adversarial posture can enrich lawyers at the expense of their clients.³⁸ Maintaining a protracted fight or refusing to listen can make a defense lawyer look more like a "tough litigator," Professor Cohen adds, and generate many billable hours filled with pointless bloviation.³⁹

But zeal is not the culprit in these misdeeds. As fiduciary, the lawyer has a duty not to enrich herself at her client's expense. The lawyer in Cohen's examples may look zealous but is really just unethical if her barking-Doberman number hurts her client while making her richer. Even among lawyers who refrain from enriching themselves at their clients' expense, hyperpartisan postures plus bad manners do not add up to zeal. Cohen's lawyers might be interested only in hearing themselves roar, and might be indifferent to their clients' welfare. Keeping "an actual or potential adversary in mind" never precludes treating this adversary with kindness or even deference, if such treatment would serve the needs of one's client.⁴⁰

A proper kind of partisanship to adopt when one represents a client might be borrowed—*mutatis mutandis* and with a flip—from judicial codes, recusal motions, and motions to disqualify judges: the lawyer should represent a client with bias, interest, partiality, favoritism, and a lack of neutrality. To get a feel for zealous advocacy, lawyers should

38. Cohen, *supra* note 24, at 262-63.

39. *Id.* at 263. Cohen adds that no contingent-fee personal injury lawyer ever got paid in one-third of an apology. *Id.*

40. See FREEDMAN & SMITH, *supra* note 15, at 72. Thus it seems to me that zealous advocacy can coexist with the therapeutic, faith-rooted perspective that David Link, a successful lawyer who went on to a long tenure as dean of Notre Dame law school, recommended for lawyers:

The lawyer needs to seek out the spirit of the client and realize that what the client really wants is not to gouge someone, but to be at peace with his or her business transactions or personal life or whatever is involved. Historically, law, along with medicine and the clergy, has been one of the great healing professions. It is time for lawyers to reclaim their lives as healers and shift from the common perception that they are surrogate street fighters.

Peter Axelrod, *Discovery Practice Beyond the Law: An Antidote to Burnout and Boredom*, ARIZ. ATT'Y, July-Aug. 2001, at 24, 30; see also FREEDMAN & SMITH, *supra* note 15, at 124-25 (noting that, when Monroe Freedman served on a six-person panel that included several noted opponents of zeal, he was the only panelist who answered, in response to a hypothetical, that a litigator should say yes if opposing counsel asked for an extension to attend his son's graduation, when the extension would not harm the client).

peruse what the Code of Judicial Conduct and § 455 of Title 28 of the United States Code proscribe.⁴¹ The experience of zeal resembles how you feel when you have a stake in an outcome, when a member of your family is involved in a matter, when you know something material and central in a dispute, or when you have worked in the area and have been through its battles. Lawyers who represent clients should cultivate some of the traits and attitudes that get judges thrown off cases.

B. Passion

In their co-authored treatise, two leading authorities on legal ethics, Geoffrey Hazard and William Hodes, equate zeal with “effectiveness, creativity, and attention to detail.”⁴² While none of these three characteristics alone corresponds to zeal—especially “effectiveness,” which looks more at results than demeanor—in combination they convey some of what the duty of zealous advocacy demands. I would say “passion” instead, and I believe that Hazard and Hodes intend something similar.⁴³

This word, so full of emotional, religious, and sexual connotations, may seem alien at first to professional responsibility. Etymologically related to suffering⁴⁴ (as in the Mel Gibson blockbuster film of 2004⁴⁵), “passion” means intense feeling, often oriented toward an ideal or abstraction.⁴⁶ American professional-responsibility rules have not

41. MODEL CODE OF JUD. CONDUCT Canon 3(E)(1) (1995) (requiring a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”); 28 U.S.C. § 455(a) (2000) (providing that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”); *id.* § 455(b)(1) (adding that the judge should also disqualify himself if “he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding”); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (stating that “an unbiased judge’ is essential to due process”); *TZ Land & Cattle Co. v. Condict*, 795 P.2d 1204, 1211 (Wyo. 1990) (noting, in the judicial disqualification context, that “[p]rejudice involves a prejudgment or forming of an opinion without sufficient knowledge or examination. Bias is a leaning of the mind or an inclination toward one person over another”) (quoting *Cline v. Sawyer*, 600 P.2d 725, 729 (Wyo. 1979)).

42. HAZARD & HODES, *supra* note 16, § 6.2, at 6-4.

43. *See supra* note 21 and accompanying text (quoting Hazard and Hodes as noting that “passionate” is a synonym for “zealous”); *see also* Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1599-1601 (1999) (insisting on passion in criminal-defense litigation).

44. ONLINE ETYMOLOGY DICTIONARY (Douglas Harper ed. 2001), <http://www.etymonline.com/index.php?search=passion&searchmode=none> (last visited Mar. 4, 2006).

45. *See* THE PASSION OF THE CHRIST (Newmarket Films 2004).

46. *See* ENCARTA WORLD ENGLISH DICTIONARY (North American ed. 2005), *available at* http://encarta.msn.com/dictionary_1861724087/passion.html (last visited Mar. 4, 2006).

exactly embraced feelings.⁴⁷ Yet the duty of zeal implicitly recognizes that enthusiasm, energy, and benevolent effort are all central to advocacy. When Hazard and Hodes identify “creativity” as part of zeal,⁴⁸ for example, they cannot be using the word to reference an artistic tendency that is likely present before a person is born (such as the potential to compose music or draw figuratively); they must be talking about the application of an inspired force. The zealous lawyer summons up, and strains to deploy, imaginative resources to exceed the efforts of her adversary.

Here zeal manifests itself as absent when a lawyer feels bored by, indifferent to, or cut off from the mix of needs and questions that the client has presented. Zeal-as-passion can fail to appear right from the start of representation, as many junior associates in large law firms can attest.⁴⁹ It can show up at the beginning of a retainer, then fade later on. Distasteful revelations about a client or a matter can make it go away.⁵⁰ The loss of zeal can permeate a lawyer’s entire work experience, resembling or coexisting with clinical depression.⁵¹

With this reference to depression, I hope to keep separate two “z”-words: Our word is not zest, or what one dictionary defines as “heartily enjoyment.”⁵² Lucky lawyers experience zest and zeal in combination, and both words make reference to feeling; but whereas zest is a happy

47. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000) (stating that the duty of zealous advocacy does not mean “that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling”).

48. See HAZARD & HODES, *supra* note 16, § 6.2, at 6-4.

49. See *infra* text accompanying notes 98-99.

50. See discussion *infra* Part V.B.5.

51. Axelrod relates tedium to depression:

The work also can take on the flavor of unending routine, and we may find ourselves in a rut and feeling stale. It is not unusual for a lawyer to experience life as a runaway train perpetually riding on a circular track. If unchecked, burnout and boredom or even a situational, low-level depression can ensue, and life is not what we want it to be.

Axelrod, *supra* note 40, at 26. In this discussion of zeal, I want to put to one side depression as an illness, even though it may bear closely on the subject. American lawyers suffer disproportionately from both clinical depression and diffuse unhappiness or dissatisfaction, as happiness expert Martin Seligman and two lawyer-coauthors explain in a law review article. Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001); see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999). Seligman, Verkuil, and Kang suggest that Seligman’s construct, “learned optimism,” might be extended to brighten the work life of lawyers. See Seligman et al., *supra*, at 50. In a similar vein, I will claim that more zeal in the practice of law might induce more happiness among lawyers. See, e.g., *infra* text accompanying note 99.

52. ENCARTA WORLD ENGLISH DICTIONARY (North American ed. 2005), http://encarta.msn.com/dictionary/_zest.html (last visited Mar. 4, 2006).

condition, zeal need not be so.⁵³ Recall Hazard's and Hodes' "enthusiastic, eager, intense, passionate, and warm."⁵⁴ Negate each of the adjectives and you'll find an absence of both zest and zeal; but only the latter lack is a problem for professional responsibility.

III. MISTAKING ZEAL FOR SOMETHING ELSE

Continuing this theme of mixing up zeal with another quality, this Part explores two erroneous understandings of the word in professional responsibility. One error, equating zeal with *zealotry*, derives from aversion to zeal. The other error, equating zeal with *agency*, is a friendlier lapse but one still in need of rectification.

A. *Zeal* ≠ *Zealotry*

This erroneous understanding of zeal makes an obvious mistake. "Zealotry" is not a synonym for, but rather a pejorative twist on, the noun before us.⁵⁵ One can no more fairly equate "zeal" with "zealotry" than one can call religious faith "fanaticism," precision "nitpicking," careful teaching "pedantry," a slender person "emaciated," a sturdier one "morbidly obese," and so on.⁵⁶ Lawyers, of all people, ought to take better care with their words.

Nevertheless, too many lawyers think of zealotry when they hear "zeal." One critique of the profession proceeds as if lawyers have affirmed raw-meat, crazed zealotry as their professional ideal.⁵⁷ Contemporary movements that seek more civility, courtesy, or professionalism originated in the distaste that Warren Burger, former Chief Justice of the United States Supreme Court, felt for what he called "adrenalin-fueled lawyers"⁵⁸—or what Freedman and Smith tartly call "lawyers representing unpopular clients in civil rights, civil liberties, and criminal cases."⁵⁹ As Freedman and Smith go on to argue, the

53. Compare *id.* (defining "zest"), with *id.*, http://encarta.msn.com/dictionary/_zeal.html (last visited Mar. 4, 2006) (defining "zeal").

54. See *supra* note 21 and accompanying text.

55. Lachman & Jarvis, *supra* note 18, at 81.

56. See HAZARD & HODES, *supra* note 16, § 6.2, at 6-4 ("But that is not zealotry—it is zealotry run amok.")

57. Lachman & Jarvis, *supra* note 18, at 81 (citing THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT 129-32 (2004)). Lachman and Jarvis describe Rosenbaum's description of zealotry as "a four-page tirade" under the heading "Zealous Advocacy." *Id.*

58. FREEDMAN & SMITH, *supra* note 15, at 123.

59. *Id.*

professionalism movement and zealous advocacy cannot coexist.⁶⁰ We have noted that some state bar authorities dropped the duty of zeal from their rulebooks when they found it too easy to equate zeal with zealotry.⁶¹ Going further, Hazard and Hodes, who hold zeal in high esteem, report that critics have read into the duty of zeal as stated in Canon 7 of the Model Code of Professional Responsibility not only zealotry, but a justification or excuse for “unethical or otherwise wrongful lawyer conduct, so long as the activity was nominally carried out in the service of a client.”⁶²

To say that the duty of zeal or zealous advocacy refers to a lawyer’s license to act unethically is not only preposterous—why would a codification offering itself as a “model” for either “professional responsibility” (the ABA’s Model Code) or “professional conduct” (the ABA’s Model Rules) ever write in language giving attorneys permission to do the flat-out wrong thing?—but also refuted in American authoritative texts on lawyers’ ethics, all of which robustly reject the “zealotry” twist on zeal.⁶³ Our current rulebook, the Model Rules of Professional Conduct, falsifies this misunderstanding of zeal by condemning excess partisanship pervasively in a range of contexts. Commentary to the rule on diligence, Rule 1.3 (today the closest thing to a blackletter model zeal rule) reminds lawyers to fulfill this obligation without becoming abusive: “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.”⁶⁴ Rules captioned “Meritorious Claims and Contentions,” “Candor Toward the Tribunal,” “Fairness to Opposing Party and Counsel,” “Special Responsibilities of a Prosecutor,” “Truthfulness in

60. See *id.* at 127; David L. Lee & Sarah R. Masarachia, “Kiss My Grits!” and Other Eloquent Retorts: Incivility in Legal Writing, CHI. B. ASS’N REC., Apr. 1999, at 28, 29 (referring to a “myth” that incivility is “zealous representation”). For a slightly different view on this question, splitting the difference, see Sandra Day O’Connor, *Professionalism*, 78 OR. L. REV. 385, 389 (1999) (“In my view, incivility disserves the client because it wastes time and energy . . . [i]t is hardly the case that the least contentious lawyer always loses. It is enough for the ideas and positions of the parties to clash; it is wasteful and self-defeating for the lawyers to do so as well.”).

61. See *supra* note 18 and accompanying text; Allison Lucas, Note, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1630 n.175 (1999).

62. HAZARD & HODES, *supra* note 16, § 6.2, at 6-4. “Such an interpretation would be wrong, of course,” the authors continue, “for lawyers have never had a special dispensation to aid a client’s cause through unethical or unlawful means . . .” *Id.*

63. Lachman & Jarvis, *supra* note 18, at 81 (“Nowhere in any ethical rule or commentary is it even suggested that ‘zealotry,’ as opposed to ‘zeal,’ is an appropriate standard of lawyer conduct.”).

64. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2004). This addition to the Rule 1.3 comments came from the Ethics 2000 revision effort, codified in 2002.

Statements to Others,” “Dealing with Unrepresented Person,” and “Respect for Rights of Third Persons”⁶⁵ are only some of the rules and precepts that make excess partisanship, or what Hazard and Hodes call overzealousness,⁶⁶ a basis of professional discipline.

B. *Zeal ≠ Agency*

A recent article associates zeal with “a purely agency approach” to the task of representing clients. It finds this “agency approach” present in published works by Monroe Freedman, Geoffrey Hazard, William Hodes, and Charles Wolfram.⁶⁷ Because none of these writers uses this label to describe his own take on the duty of zeal, a reader should reflect before equating zeal with “agency.”

Associating zeal with agency is considerably more accurate than the zealotry slur but is not precise enough. Zealotry is entirely bad. Agency, not at all bad, functions alongside zeal, each adding separate elements to the relation between lawyer and client. In an agency relationship, parties come together united in interest. The agent can bind the principal by words or actions; the interests and wishes of the principal guide the agent.⁶⁸ Zeal, by contrast, is an aspect or attitude that makes the agent’s relationship to the principal more focused, fervid, and intense.

To see what the “agency approach” misses, one might work from “the torture memo,”⁶⁹ which became a trope among professional-responsibility scholars in 2004. Imagine a client, the President of the United States, who says to his lawyer, “I want to order the torture of noncombatant civilians and get away with it. Give me a memo saying

65. See *id.* at RR. 1.3, 3.1, 3.3-4, 3.8, 4.1, 4.3-4.

66. HAZARD & HODES, *supra* note 16, § 6.2, at 6-4. For a slightly different recitation of provisions in the Model Rules that oppose overzealousness, see *id.* § 6.2, at 6-5.

67. Lachman & Jarvis, *supra* note 18, at 85 & n.24.

68. See RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

69. In the summer of 2004, the Washington Post published a memorandum dated August 2002 and prepared by the Office of Legal Counsel, called “Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A.” This memorandum responded to a request for advice from the White House on how aggressively the CIA could interrogate men apprehended outside the United States who were suspected of being terrorists. Dana Priest, *Justice Dept. Says Torture ‘May Be Justified,’* WASHINGTONPOST.COM, June 13, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>. A PDF version of the memorandum is available. Memorandum for Alberto R. Gonzales, Counsel to the President, from the Office of Legal Counsel, U.S. Department of Justice (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. In December 2004, the Office of Legal Counsel repudiated the memorandum. See Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685, 689 (2005).

I'm acting lawfully when I do so." The "agency approach" urges the lawyer to act on his client's desire as his own, and work to remove barriers to the execution of the client's wishes. Under this agency approach, the lawyer probably ought to get busy finding and expressing a torture-permissive stance in the law.

Zealous advocacy, by contrast, decrees no such thing. Because this duty does not lay down a result that the lawyer must achieve, it does not preclude any outcome. Thus, whereas "agency" urges the President's lawyer to do the President's bidding, zealous advocacy tells the President's lawyer to favor the President vis-à-vis the President's actual or potential adversaries and to bring enthusiastic commitment to the task of advocacy. Certainly a zealous lawyer has no professional duty to obey anyone's orders to write memoranda. Partisanship favoring the President might lead the lawyer to any number of alternative responses. The lawyer might choose to render initially unwelcome advice,⁷⁰ undertake more "neutral" torture research to present a nuanced picture to the President, or probe the request to discover what this unique client "really wants." Later, after engaging with the President's desires and considering his or her own professional obligations,⁷¹ the lawyer might decide not to give this client what he wants. Again, because the duty of zeal takes form in attitude and aspect rather than in any particular action, the duty of zealous advocacy does not prohibit the lawyer from refusing, as an agent, to effect the wishes of others.

IV. ZEAL MISUNDERSTOOD IN THEORY AND PRACTICE

Having noted the suggestion that the rules on zeal come from an arid ivory tower rather than from the ethics of practicing lawyers on the ground,⁷² we may now explore the possibility of a link between the academy and anti-zeal ideology. To some this claim might sound utterly

70. See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2004) ("A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

71. One commentator has suggested that the memorandum created by the Office of Legal Counsel in 2002 evidenced a breach of professional responsibility. The lawyer-authors may have assisted or counseled a client in criminal activity. Lopez, *supra* note 69, at 712; see also Wendel, *supra* note 36, at 1228-29 (faulting the work product of the Office of Legal Counsel as a poorly written memorandum, because it included no reference to easily obtained primary material on point and failed to identify the position it took as outside the mainstream).

72. See *supra* note 25 and accompanying text (discussing how Freedman and Smith believe that the A.B.A. rule-writers may need to get out more).

contrary to fact. Ethics scholar Douglas Yarn, for instance, writes that “zealous advocacy is taught in law schools, permeates legal pedagogy, and is reinforced by legal institutions and the media.”⁷³ In this Part, I detail my disagreement with the portion of this criticism that addresses law schools. Professor Yarn’s claim that “legal institutions and the media” reinforce zealous advocacy is too vague for challenge, but legal pedagogy is relatively available for examination.

A. *Ideological Impediments to Zeal in Legal Education*

Neutrality and anti-partisanship are, *pace* Professor Yarn, virtues in the law school curriculum, where they may be getting stronger at the expense of zeal. This result derives from structures inside the law school. Some of these structures are longstanding, and some more recent. Neutrality is utterly praiseworthy in many settings—laboratories, for example, or tribunals. Neutrality also is useful to lawyers in application: an effective advocate must grasp the concept of disinterested truth. Inside a milieu that prizes neutrality, however, zealous advocacy becomes harder to teach.

The curriculum is mostly in the hands of tenure-track law professors, a group of lawyers with little experience advocating for clients. Upper-tier schools often hire entry-level teachers who have never practiced law,⁷⁴ as if having once pressed for a client’s advantage soils a candidate. Schools situated further down in the rankings do put seasoned lawyers onto their tenure tracks—some even have a rule or custom that insists on some practice experience—but a typical assistant professor will have spent fewer than five years in practice.⁷⁵ Although

73. Douglas H. Yarn, *The Attorney as Duelist’s Friend: Lessons from the Code Duello*, 51 CASE W. RES. L. REV. 69, 71 (2000).

74. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (describing the “reality that many ‘elite’ law faculties in the United States now have significant contingents of ‘impractical’ scholars, who are ‘disdainful of the practice of law’”).

75. See Stephen Wizner, *What Is a Law School?*, 38 EMORY L.J. 701, 710 (1989) (deploring law professors’ inexperience in law practice and endorsing the 1947 proposal of Jerome Frank that five to ten years of practice should become a minimum entering credential for this profession). One study found an apparent disdain for practice experience even among those who set pay for legal writing faculty. Legal-writing instructors are not paid more for more years of practice experience, even though “legal writing is a skills course.” Elizabeth M. Iglesias et al., *Labor and Employment in the Academy—A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section on Minority Groups*, 6 EMPLOYEE RTS. & EMP. POL’Y J. 129, 143 (2002) (citing Jan M. Levine & Kathryn M. Stanchi, *Women Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 573-74 (2001)).

many of this cohort have had the chance to deploy zeal on behalf of a client (especially if they have come from government), their relatively brief time in practice, and often their lack of client contact during this period, can leave them unfamiliar with the taste of professional zeal.

Within the law school as an institution, many faculty, students, and administrators alike find that eschewing zeal makes for a shrewd professional strategy under conditions of uncertainty. Here neutrality flourishes at the expense of zeal. It can look like purity, an absence of corruption and blemish. Neutrality has never suffered in the law school vernacular the way zeal gets twisted into zealotry. Why join the “raw-meat eaters, crazed and maniacal, easily volatile, eager to uncork, aggressive and competitive to the core,”⁷⁶ whoever these people may be? A student or professor or administrator (right up to the dean) would likely prefer to identify with the judge than the hireling-advocate. In law school, nobody criticizes anybody for being too neutral.

Meanwhile, within law as an academic discipline, zeal gets undermined by the facetiously named “physics envy,” a desire among law teachers to appear more like specialists in the hard sciences. A much noted shift over the last generation reported that law teachers have turned away from practice and toward theory.⁷⁷ The enlarged supply of applicants for new teaching positions not only raised standards for admission to the professoriat but also created a need for more refined criteria to help identify the best candidates. To suit both needs, a doctorate in a field other than law became a useful entering credential.⁷⁸

Physics-envy fields, if they may be so called (and anthropomorphized for this purpose), appear to take a dim view of zeal. Standing at the apex of the physics-envy hierarchy, the natural sciences remember a beleaguered Galileo at the end of his studies, vanquished by the tyranny of zealots. In some sciences, notably epidemiology, the powerful “null hypothesis” tells researchers always to believe in nothing until something almost undeniable emerges. The tort-reform catchphrase “junk science,” often intoned in the academy, was coined not to cover every type of bad science but only assertions that ascribe causality to antecedents without waiting for *p* values to show a reliable correlation—in other words, the kind of assertions that a zealous advocate would be inclined to make.

76. ROSENBAUM, *supra* note 57, at 132.

77. The seminal work is Edwards, *supra* note 74. Shepard’s reports 464 citations to that article (checked Mar. 28, 2006).

78. *See id.* at 48-50 (expressing concern that the “rise of the various ‘law and’ . . . movements” is endangering the balance between “practical” and “impractical” professors).

Quantitative measures of law schools—the infamous rankings—have also found a home inside this institution. Such measures do not quash zeal in the J.D. curriculum but may have helped to erode it. When law schools struggle (perhaps more than zealously enough) to gain at the expense of their near-peer institutions, they must cloak their efforts in an official ideology of neutrality. Players in the game who want better ordinal numbers make suggestions about which percentiles of LSAT scores to count, how to adjust median salaries of graduates to reflect regional differences, which new variables might go into the mix, and similar tinkering, rather than openly articulate a partisan stance. Living under conditions of perpetual ranking and reranking, law school faculties and administrators absorb the grind of data. The partisan crunching of numbers asks them to repudiate what accompanies zeal: unabashed favoritism, an emotional stake in outcomes, loyalty to a person or entity at the expense of methodological rigor, and the sense that one has a distinct adversary.

B. Consequences for the Training of Lawyers

The law school curriculum steeps students in distance and the educating of principles that are independent of any individual's particular interests. First-year students who visualize the formation of a hairy hand,⁷⁹ feel revolted when they hear about people claiming “necessity” to eat human flesh,⁸⁰ flinch to imagine being the wild fox that becomes property through capture,⁸¹ and so on quickly learn that the right response to the case law before them is detached analysis and that they were wrong—or, at best, they wasted their own time—when they thought and felt as they did. Assigned as mandatory reading, this case law becomes an exercise in finding correctness via synthesis: One partisan seeks one outcome; an adversary seeks the opposite outcome; the court decides.⁸² A case comes out one way and then another reverses course. Here an advocate is always the means to a more important synthetic end: the partisan attorney ranks below the impartial judge.⁸³

79. See *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

80. See *Regina v. Dudley*, 14 Q.B.D. 273 (1884).

81. See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

82. The point is a venerable one in critical legal scholarship and, as a descriptive matter, not controversial. For a classic expression, see Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38, 39-41 (David Kairys ed., rev. ed. 1990) (arguing that law school encourages students not to think about the client advocacy they will face after graduation).

83. Like prestige hierarchies generally, the superiority of the judge over the lawyer may seem inherent rather than fabricated by human beings. Yet it is possible for the hierarchy to be reversed.

In “Socratic” colloquy between instructor-Socrates and first-year student,⁸⁴ any claim or argument can provoke an equal and opposite rejoinder. The classroom spectacle prizes speed over loyalty. Students escape humiliation when they can swiftly bat away peripheries to score a point, and, as they hurtle through the semester, thoroughness means dispatching both sides of an argument rather than getting to the bottom of one party’s case. When students finish the term, final examinations often reward the neutrals who found and discussed every point of contention—as if each were no better and no worse than all others—above the partisans who advocated for one side over another.

The standard course on professional responsibility, presenting its codified hymns to zealous advocacy, provides a venue to consider zeal with more approval. Zeal turns up here in a bad light, however. Whereas other required courses disparage zeal only implicitly, classes about the legal profession frequently attack it head-on. Course materials frequently depict zeal as the root of evils: In the throes of too much zeal, a lawyer will lie, cheat, smear honest witnesses, snarl at opposing counsel, illicitly destroy documents, and so on. Some teachers interpret the buzzword “professionalism” as a response to zeal, identified as a problem.⁸⁵

Classroom critiques of zeal will seldom dwell on the possibility that lawyers’ affronts to truth and decency can originate in causes other than hyperpartisanship. A lawyer or a firm might be in the habit of dishonesty, for example, and persist in cheating adversaries or telling lies in a kind of path dependency, without any desire to do anything for a client. A more focused attorney or law firm might have lied in pursuit of a side agenda unrelated to partisanship. False statements and other rule-violating behaviors can result from carelessness as well as from an ardent desire to win. When zeal serves in the professional-responsibility classroom as shorthand for the opposite of truth and decency,⁸⁶ the result

See Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705, 747-48 (1988) (summarizing data to suggest that German judges enjoy less prestige than their American counterparts).

84. Marina Angel, *Women in Legal Education: What It’s Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 810 (1988) (“The Socratic method is based on several premises. First, the teacher is ‘God = Socrates.’ Second, there is truth, and ‘God = Socrates’ knows what it is.”).

85. See *supra* notes 58-62 and accompanying text; see also Yarn, *supra* note 73, at 72 (“In an effort to limit possible abuses made under the guise of permissible zeal, members of the bench and bar founded the professionalism or civility movement.”).

86. See, e.g., Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH. L. REV. 3, 58 (2002) (“[Z]ealous advocacy,’ however that term may

is not only a misrepresentation of zeal but an unfair exoneration of other sources of dishonesty and injury in the practice of law.

The extracurricular side of legal education also expresses some disapproval of zeal. Law reviews honor and demand impartial scholarship;⁸⁷ students who serve on these journals learn about the norm of confessing in the first footnote any personal stake that the writer has in the thesis of the article.⁸⁸ Used as judgments of articles or student notes under review, words like “advocacy” and “agenda” contrast pejoratively to an ideal of disinterestedness. Moot Court winners are proficient at arguing “off brief,” taking the opposite side of what they had argued for earlier in their writing.

The J.D. curriculum is not exactly a zeal-free zone, to be sure. Law schools manifest all sorts of fervor. As was just mentioned, schools advocate for themselves in fights over rankings and relative prestige. Some instructors are ideologues who stray from the credo that professes neutral principles. Some students push ferociously in pursuit of high grades and other scarce honors for themselves. In this professional-responsibility context, however, it is worthwhile to distinguish a lawyer’s zeal from the ambitions and agendas that turn up in law school. For a lawyer, zeal is the fuel of client advocacy: zeal seeks gain for another person or entity in particular. This kind of zeal is on one hand wider than what a person chases for herself alone and on the other hand narrower than pursuit of economic, social, or political change. Overlap among these three types of zeal does exist. A newly trained lawyer representing her first client can remember what passionate commitment feels like by recalling her own competition for distinction as a student,⁸⁹ or link one of her individual clients—the lead plaintiff in a class action, or a corporate defendant that refuses to settle a products liability action

be described or employed, has limits. Zealous advocacy does not encompass or excuse lawyers’ intentional violations of ethics rules.”).

87. See Jean Stefancic & Richard Delgado, *Outsider Scholars: The Early Stories*, 71 CHI.-KENT L. REV. 1001, 1003-05 (1996) (recounting anecdotes from “outsider scholars” about their experiences with law-review editors who treated their work as inflammatory or nonscholarly and pressured them to “tone things down”).

88. This precept dates back to William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 232 (1965). One endorsement of the idea would require the author to disclose even that he or she “regularly practices in the subject area addressed by the article.” Michael L. Clozen, *A Proposed Code on Professional Responsibility for Law Reviews*, 63 NOTRE DAME L. REV. 55, 58 (1988).

89. See Paula A. Monopoli, *Teaching Lawyers to Be More Than Zealous Advocates*, 2001 WIS. L. REV. 1159, 1160 (“[Law School] conveys the message that putting one’s own interests first in order to ‘win’ the game is the primary objective. That may be an adaptive lesson if transferred to successful advocacy on behalf of a client.”).

so as not to embolden a new generation of claimants—with a bigger cause.

But for the moment we are searching for lawyer's zeal—client-focused zeal—in the law school curriculum and, so understood, zeal appears only patchily. Clinical classes invite students to identify with the needs of a client. While a handful of law schools impose pro bono work as a graduation requirement,⁹⁰ these classes remain elective rather than mandatory—only a small minority of J.D. curriculum hours are devoted to clinical education—and the lively debate within clinical scholarship over “client centered lawyering”⁹¹ suggests that clinical education cannot be equated with any consensus that endorses zeal. As one scholar has argued, gaps of class and race that separate clinical law students from the clientele of poverty-based clinics may impede zealous advocacy.⁹² Nevertheless, clinical education does remain a zeal-venue for many students. Ironically, it is courses containing ideology opposed to zero-sum litigation competitiveness, such as Negotiations and Alternative Dispute Resolution,⁹³ that may teach zeal most forthrightly, through simulations that encourage students to attain partisan victories in class.⁹⁴

90. A law review article published two years ago reported that “twenty-seven schools have mandatory public interest requirements for graduation.” Lua Kamál Yuille, Note, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 905 n.242 (2004).

91. Client-centered lawyering combines some features of what this Article has classified separately as “agency” and “zeal.” See *supra* Part III.B. See generally NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 21-26 (3d ed. 2004) (summarizing the ideas of “client-centered” pioneer Murray Schwartz).

92. One scholar researched this question by distributing a questionnaire within clinical classes at seven law schools that measured students' attitudes toward the poor. Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOW. L.J. 257 (2001). Although she extracted provocative findings about the students' values, which included their sense of distance from the poor, she reported being unable to compose effective questions to measure how these values related to zealous advocacy. See *id.* at 283-85.

93. Carrie Menkel-Meadow is preeminent among theorists who have made an academic case for alternative dispute resolution. See, e.g., Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000); see also Yarn, *supra* note 73, at 73 (“[A]lternative dispute resolution . . . contrasts the role of the peacemaker with that of the zealous advocate, generally promoting the former and disparaging the latter.”).

94. On this irony, compare Freedman, *supra* note 23, at 63 (“I have always admired the adversarial advocacy with which Professor Carrie Menkel-Meadow attacks adversarial advocacy.”).

C. *The Zeal Shortage Moves into Practice*

A large—and possibly an increasing—fraction of the 40,000 newly minted lawyers who enter the profession each year⁹⁵ will take up their work with insufficient zeal. The plurality of these new graduates join firms in practices where they will have limited client contact. Others take no-zeal jobs, including clerkships with judges and nonadversarial work inside business organizations. A minority go right into zeal jobs: prosecutors' offices, criminal defense, the plaintiffs' bar. This minority of specialties has its own renewable sources of zeal; here I am thinking about the majority of lawyers. Having myself learned little about the duty of zealous advocacy in my law student days, and now teaching students who mostly go on to join firms, I am concerned about the possible connection between anti-zeal legal education before graduation, and graduates' work that may lack passionate commitment on behalf of clients thereafter. Because the literature in this area falls somewhere between spotty and nonexistent, I rely on anecdotes and conversations for the first two points below.

Partners in law firms have expressed disappointment to me about what I think is their junior associates' lack of zeal. They use other words. They complain about disengagement, passivity, carelessness about details,⁹⁶ not seeing a job through to the end, and not keeping “the big picture” in mind. It is admittedly hard to make much of this grumbling. First, I might have misunderstood what these lawyers told me. Second, these lawyers may have misperceived the work performances about which they were complaining: Perhaps they were making young lawyers scapegoats for their own inadequacies or were simply lashing out under the frustrations of a harshly competitive work environment. Third, I cannot know whether my informants comprise a representative sampling of senior lawyers in firms. Shortcomings of my “data” acknowledged, I myself am inclined to credit the impressions in it, if only because what these partners say aligns with my own observations inside a large firm nearly twenty years ago.

For a slightly different perspective, consider what younger lawyers have to say—equally anecdotally—about the same situation. These

95. The number for 2004 is 40,018. See A.B.A., *Joint Degrees*, <http://www.abanet.org/legaled/statistics/jd.html>; *Are Lawyers Being, Er, Overbilled?*, N.Y. TIMES, Dec. 4, 2005, § 3, at 1 (reporting an estimate that between 35,000 and 40,000 graduates emerge from ABA-accredited schools each year). It should be noted that unaccredited law schools also produce graduates who may be admitted to practice.

96. Cf. HAZARD & HODES, *supra* note 16, § 6.2, at 6-4 (associating “attention to detail” with zeal).

junior lawyers in larger firms⁹⁷ have expressed not only the familiar complaints—boredom, alienation, resentment of the pressure to work long hours—but also confusion over the question of business development as a condition for success in the organization. Some perceive mixed messages on whether they should try to bring in new clients. Perhaps this issue has nothing to do with zeal. I would relate it, however, to a wider professional ambivalence about whether it is right to compete openly and try to win. More directly connected to zeal is the absence of client contact for junior lawyers. Staffing practices in large (even medium-sized) firms mean that often a junior lawyer will deal only with support staff below, and senior colleagues in supervisory roles above, when carrying out work for a client. Junior lawyers in these settings give little or no advice to their clients, receive no direct feedback on how clients perceive and make use of their work product, and lack opportunities to see the effects of their decisions and strategies in practice.⁹⁸

Does it matter, one might respond, if lawyers are ventilating this way? Grumpy seniors lament the rot and decline of a younger generation—“When I was your age, I was so zealous I walked seven miles uphill in the snow! As a summer associate!”—while the well-paid junior cohort whines about its insufficient client contact and lack of fulfillment at the office. In this jaundiced eye, zeal takes on yet another pejorative aspect: shorthand for more pep or satisfaction at work, to which a complainant feels entitled.

Once again, zeal would be misunderstood—although this time it is I who may have invited misunderstanding through my claim that what my informants really want in their jobs in law firms is more zeal, for themselves and their colleagues. I do believe that zealous advocacy is a source of satisfaction to the advocate as well as a legal duty.⁹⁹ But that satisfaction is incidental rather than central. Zeal serves clients first, lawyers only secondarily.

Which brings me to my last claim about the consequences of the zeal shortage: when zeal retreats, a valuable source of support for pro bono work inside firms dwindles. Commentators have wondered why lawyers in private practice manifest so little taste for pro bono work

97. Mostly women, but my informal sample is tiny.

98. Schiltz, *supra* note 51, at 927 (noting the lack of client contact and other satisfactions in the workday of a “typical junior associate”).

99. See Lonnie T. Brown, Jr., “*May It Please the Camera, . . . I Mean the Court*”—*An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 85 (2004) (describing the duty of zealous advocacy as both “important and satisfying”).

when the rules and working conditions under which they live seem to encourage them to give this contribution.¹⁰⁰ Their professional duty to render pro bono work has (unlike the duty of zeal) appeared in ABA-written blackletter since 1983.¹⁰¹ Advances in communication technology can readily match volunteers with indigent clients.¹⁰² Solo practices are much rarer than they were a generation ago,¹⁰³ and so a lawyer can take on indigent clients knowing that if pro bono matters become demanding at a moment when the lawyer is busy with a paying case, partners or associates in the firm can lend support. American lawyers have benefited from expanded opportunities to work for the poor: Most lawyers who practice today came of age after poverty law clinics took root in law schools, and a growing number attended schools with a pro bono graduation requirement.¹⁰⁴

Seen through the lens of a zeal shortage, the pro bono shortage becomes less puzzling. The absence of one of these two goods both manifests and exacerbates the shortage of the other. An absence of pro bono work in the office normalizes the absence of pro bono work; an office without zeal makes a lack of zeal seem natural, while episodes of zeal stick out as alien to the culture; and so, in a typical firm, the two shortages tend to become more pervasive over time when they are not resisted. If passionate partisan commitment could be reborn or newly installed in an office, this sentiment would motivate lawyers there to seek out pro bono work as a means to achieve concrete results and to engage with the desires and responses of a distinct individual client. They would seek pro bono work for the sake of their own satisfaction as much as out of their sense of duty.

100. See, e.g., Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 *FORDHAM L. REV.* 1689, 1693-94 (2002) (listing ways in which a commitment to pro bono work comports with the economic or "rational" self-interest of large firms); Kenneth L. Jacobs, *How to Institutionalize Pro Bono at Your Office*, *MICH. B.J.*, Jan. 1999, at 52, 54-56 (reviewing and dismissing excuses that lawyers give for not doing pro bono work); Patricia J. Brown & Peggi Cornelius, *Dispelling the Myths of Pro Bono*, *ARIZ. ATT'Y*, Apr. 1996, at 15, 17 (pointing out how easy it can be to do pro bono work).

101. See Kellie Isbell & Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 *GEO. J. LEGAL ETHICS* 845, 849-50 (2002) (discussing the original 1983 rule and the amendments to it throughout the years).

102. Tanya Neiman, *Virtual Reality: Online Pro Bono Is Ready When You Are*, 26 *S.F. ATT'Y*, Oct.-Nov. 2000, at 35. For one website example among many, see <http://www.probono.net> (last visited Mar. 14, 2006).

103. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 *DEPAUL L. REV.* 183, 199 (2001).

104. See *supra* note 91.

In the same vein, were misconceptions about “zealotry” and even “agency” to go away,¹⁰⁵ zeal would win more prestige, and pro bono work on behalf of individual clients would gain value as a source of zeal-training. From my premise that client contact is a necessary condition to understand and then fulfill the duty of zealous advocacy (or, put another way, that distance from clients inhibits lawyers from becoming zealous), I make an instrumental claim about the uses of zeal: Increasing the prestige of zealous advocacy would help partners and supervisors in firms to see pro bono representation as a way to bring partisan engagement into their corridors and would help junior lawyers carry over this attitude toward their paying clients. Junior lawyers in turn would want to take on zeal-promoting pro bono work to learn a skill that partners and supervisors esteem.

V. RECODIFYING THE DUTY OF ZEAL

Absent emendation of the kind endorsed here, the Model Rules of Professional Conduct references to “zeal,” “zealous,” and “zealously” will remain only in the commentary. Literally marginalized in the Rules, these nonblackletter references to zeal appear first in the Preamble and later as comments to Rule 1.3, on diligence. The Preamble begins by invoking zeal descriptively: “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”¹⁰⁶ Maybe she does; maybe she doesn’t. Here zeal is paired with “advocate” only and is removed from the other functions noted in the paragraph: advisor, negotiator, and evaluator.¹⁰⁷ In the next reference, even more tepid, the Preamble says that zeal is not necessarily inconsistent with justice.¹⁰⁸ The final reference to zeal in the Preamble warns that zeal must coexist with courtesy, professionalism, and civility¹⁰⁹—as if zeal were the slightly boorish cousin at a genteel family reunion. A comment to Rule 1.3 maintains the same on-the-one-hand-but-on-the-other-hand tone: lawyers must advocate zealously, but they need not “press for every advantage.”¹¹⁰

Although certainly a lawyer can take zeal to excess, the Model Rules and their state counterparts treat zeal unfairly when they fail to add that neutrality can morph into ineffective assistance of counsel;

105. See discussion *supra* Part III.

106. MODEL RULES OF PROF’L CONDUCT pmb. ¶ 2 (2004).

107. See *id.*; see also *supra* notes 14-15 and accompanying text.

108. See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 8 (2004).

109. See *id.* at ¶ 9.

110. *Id.* at R. 1.3 cmt. 1.

competence and diligence can become obsessive-compulsive overpreparation that causes lawyers to neglect their other work or their families; over-obeying the rule of “candor toward the tribunal” can violate the rule that protects “confidentiality of information” and vice versa; expediting litigation can hurry too fast, and so on. Zeal also deserves a better place than marginal commentary to the Rules, a locus of “downgrading.”¹¹¹

Below I note two places in the Model Rules that might house new blackletter on zeal. I would prefer to add them both; either one would go a long way.

A. Revise Model Rule 1.3, on Diligence

Only in two jurisdictions do the professional-responsibility rules impose a duty of zealous advocacy. The District of Columbia version is the most emphatic: “A lawyer shall represent a client zealously and diligently within the bounds of the law.”¹¹² Massachusetts also puts zeal in its blackletter: “A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.”¹¹³ In most other jurisdictions, as was noted, zeal has been relegated to the Comments; in eight jurisdictions, “zeal,” “zealous,” and “zealously” appear nowhere in the Rules.¹¹⁴ This American array presents a menu of choices for rule-writers.

Rule-writers who share the thesis of this Article—that the practice of law is marred at least as much by a shortage as a surplus of zeal in advocacy on behalf of clients—would likely find the Massachusetts choice most congenial, and I endorse it here: Amend Model Rule 1.3 to say “Diligence and Zeal,” and tell lawyers to represent clients zealously

111. For references to placing precepts in the Comments rather than blackletter as a kind of downgrading, demotion, or otherwise dismissive gesture, see Brown, *supra* note 99, at 108-09; Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 91 (1997); Matthew Garner Mercer, Note, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel*, 39 BRANDEIS L.J. 713, 730 (2000).

112. D.C. RULES OF PROF'L CONDUCT R. 1.3(a) (2005) (captioned as “Diligence and Zeal”). In the Model Rules, 1.3 is captioned as just “Diligence.” See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2004).

113. MASS. RULES OF PROF'L CONDUCT R. 1.3 (2005).

114. See Lachman & Jarvis, *supra* note 18, at 83-84.

within the bounds of the law.¹¹⁵ In choosing the “should” verb form, Massachusetts regulators have laid down a standard that encourages rather than forces lawyers to follow a norm.¹¹⁶ Because comments are necessarily weaker than blackletter rules,¹¹⁷ “should” states a tougher standard than the prevailing comments-based approach, without reaching the toughness level of the D.C.-disciplinarian “shall.” The choice of “should” has another virtue: It links zeal with pro bono work—at the moment, the only other “should” in the Model Rules appears in the pro bono rule, 6.1—and zeal and pro bono work are related areas.¹¹⁸ Even if they were not, the presence of only one “should” rule in the Model Rules is jarring: The category of aspirational rules should not be a set of one.

Why not opt instead for the D.C. mandatory stance and require lawyers, at pain of being disciplined, to represent their clients zealously? If zeal is integral to professional responsibility, should it not occupy a place inside a real rule, complete with teeth? My view is that zeal could join a disciplinary rule but is not well suited to the mechanisms of discipline, which ask whether a lawyer committed or did not commit an offense. These mechanisms have a difficult enough time with claims that a lawyer’s performance lacked “competence” or “diligence,” and these terms have relatively clear benchmarks: The Rules contain a blackletter definition of competence,¹¹⁹ while a de facto definition of diligence, focusing on demonstrable (and usually chronic or repeated) neglect of

115. I have an ally in Oregon:

[T]he state bar should consider revising the black letter portion of the rule to expressly require lawyers to zealously represent their clients within the bounds of the law. We should incorporate into the code a positive expression of enthusiasm for and commitment to the best interests of our clients, rather than deleting already weakly worked references to zeal on their behalves. Zeal is not a dirty word or an inherently evil concept, as most clients would likely attest.

George A. Riemer, *Zealous Lawyers: Saints or Sinners?*, OR. ST. B. BULL., Oct. 1998, at 31, 32.

116. See MASS. RULES OF PROF’L CONDUCT Scope ¶ 1 (2005); see also MODEL RULES OF PROF’L CONDUCT Scope ¶ 14 (2004); Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 861 (1989) (noting the difference between the mandatory “shall” and the aspirational “should” in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct).

117. The ABA finesses this point: “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.” MODEL RULES OF PROF’L CONDUCT Scope ¶ 14 (2004). In the same paragraph, the following is stated: “Many of the Comments use the term ‘should.’” *Id.* It is therefore possible that comments are roughly equivalent to “should” statements in the blackletter. In my own reading, everything in blackletter (including a “should” rule) does add obligations to the Rules, whereas comments do not.

118. See *supra* Part IV.C, ¶¶ 6-8.

119. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2004) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

client matters, has emerged. Closely related to feelings, zeal does not form observable manifestations that a disciplinarian could look for while investigating an accusation of misconduct.

B. Revise Rule 1.18 to Approve More Discretion at the Intake Decision Point

Rule 1.18, “Duties to Prospective Client,” which originated in Ethics 2000 and joined the Rules in 2002,¹²⁰ offers a suitable home for the duty of zeal in blackletter. At present, Rule 1.18 begins with a couple of prescriptive “shall not” rules in the first substantive paragraphs ((b) and (c)), and then it moves to “permissible” options in (d).¹²¹ This construction leaves space at the end of the Rule, and so I propose a new paragraph (e) that would remind lawyers at this intake stage about their duty of zeal:

Rule 1.18(e): When a lawyer considers the question of whether to represent a prospective client who has sought representation on a fee-paying basis, the lawyer should bear in mind the duty of zealous advocacy. A lawyer who anticipates substantial difficulty in fulfilling the duty of zealous advocacy with respect to this representation should decline to represent the prospective client, provided that the lawyer reasonably believes the prospective client can obtain other counsel without hardship.

Some commentary on this text follows:

1. Another Rule Containing the Verb Form “Should”

This diction would provide valuable companionship for the currently isolated “should” choice in Model Rule 6.1¹²² and would underscore the relation between zealous advocacy and pro bono work. Because this new Rule 1.18(e) would come into play at a reflective moment for the lawyer, aspirational language suits the occasion, just as mandatory language fits well with decision-points that involve a choice about how to act. Blackletter elsewhere that makes lack of diligence a disciplinary offense offers the same useful contrast to the “should” of zeal. Disciplinary authorities should have the power to sanction the absence of zeal in advocacy, but only when this deficiency amounts to an objective lack of diligence. For more ambiguous, gray-area failures, which include lack of passion and insufficient partisan commitment, the

120. *Id.* at R. 1.18.

121. *See id.* at R. 1.18(b)-(d).

122. *See id.* at R. 6.1.

word “should” conveys the necessary tone and attitude to lawyers as they waver on proposed new undertakings with clients.

2. Zealous Advocates Meet Mediators, Advisors, and Counselors

When the ABA launched the Model Rules in 1983, it marked an important development in the history of American professional-responsibility codification: The Rules recognized at last that the near-million American lawyers should not experience regulation as one undifferentiated group. The first ABA effort at national-level guidance, the Canons of Legal Ethics, had spoken generally about this cohort as one profession. Succeeding the Canon, the Model Code of Professional Responsibility made occasional references to subgroups, including lawyers who “hold public office”¹²³ and those who participate in or are “associated with the investigation of a criminal matter,”¹²⁴ but overall did not seek to identify atypical occupational specimens in need of unique rules. For the most part, however, the Model Code treated all lawyers as similarly situated, down to the same gendered pronoun.

The Model Rules, by contrast, include special rules for matrimonial lawyers,¹²⁵ criminal defense lawyers,¹²⁶ prosecutors,¹²⁷ lobbyists,¹²⁸ former judges and mediators,¹²⁹ subordinates¹³⁰ and supervisors inside firms,¹³¹ and officially recognized specialists.¹³² They even recite a few sideline occupations in which lawyers often work.¹³³ One could have imagined taking a different path in 1983 whereby the Model Rules would, like the Code, seek to cover only topics that applied to all lawyers; other ABA-authored codifications could address the needs and

123. MODEL CODE OF PROF'L RESPONSIBILITY DR 8-101 (1980).

124. *Id.* at DR 7-107.

125. See MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(1) (2004) (providing that an attorney shall not charge a contingent fee in divorce proceedings); see also Martha Neil, *Suspended for Sexual Harassment: Prosecutor Hopes Stringent Sanction Sends Zero-Tolerance Message*, 4 A.B.A. J. E-REP. 34 (2005) (noting that “[t]he vast majority of attorney disciplinary cases [dealing with a violation of Rule 1.8’s prohibition of sexual relations with clients] involve male lawyers having affairs with female matrimonial clients”) (emphasis added).

126. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004)

127. See *id.* at R. 3.8.

128. See *id.* at R. 6.4.

129. See *id.* at R. 1.12.

130. See *id.* at R. 5.2.

131. See *id.* at R. 5.1.

132. See *id.* at R. 7.4.

133. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 9 (2004) (“Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.”).

obligations of particular professional subgroups.¹³⁴ Instead, the Rules contain some provisions that only apply to some lawyers and others that apply to all. Because lawyers must pass a written test on this document in order to practice law in the United States and then when licensed acquire a further duty to report violations of the Model Rules, a message emerges that all lawyers should know something about what other types of lawyers have to do and should not do, even when these obligations may not affect their own practice of law.

Regarding zeal, the Rules make only one occupational distinction: the Preamble assigns this duty most clearly to the lawyer who serves as advocate.¹³⁵ In response, commentators have divided on the question of whether, or to what extent, zeal applies to lawyers outside the context of litigation and similar settings where the client faces an adversary.¹³⁶ The definition of zeal that I have pressed in this Article—partisanship combined with passion—requires lawyers to honor this duty even in representations that do not anticipate litigation, although it interprets the Freedman and Smith phrase “an actual or potential adversary in mind”¹³⁷ as anticipating more partisanship and passion with respect to an actual adversary. In this view, every lawyer holds a duty of zealous advocacy, and what the lawyer must do to fulfill this ideal will vary from setting to setting. The duty is important enough to warrant impressing it on every lawyer, even though zeal emerges strongly within litigation-like contexts that involve “actual” adversaries and less fervently in those where only a “potential adversary” occupies the lawyer’s mind.

3. Subordinate Lawyers Standing at a Distance from Clients

We have had occasion to note that junior lawyers in firms often complain of little client contact and consequently may have to strain to bring zeal to their work. The growth of law firms and other organizational employers of lawyers, in contrast to the prevalence of sole practitioners a generation ago, may have eroded zeal.¹³⁸ In response to these conditions, rule-writers could conclude that zealous advocacy is obsolete in today’s bureaucracies and could make lack of client contact an excuse for lack of zeal, or perhaps remove zeal from lawyers’

134. The ABA Standards for Criminal Justice exemplifies this approach. While the Model Rules govern the entire bar of lawyers, only those lawyers who practice criminal law are collaterally governed, to the extent of their criminal law practice. *See* A.B.A., STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986).

135. MODEL RULES OF PROF’L CONDUCT pmb1. ¶¶ 2, 8, 9 (2004).

136. *See supra* notes 13-26 and accompanying text.

137. *See supra* notes 34-35 and accompanying text.

138. *See supra* notes 97-100 and accompanying text.

professional responsibility altogether. My proposed revision to Model Rule 1.18 takes the opposite tack. Zealous advocacy is far from obsolete; it will become obsolete only when the lawyer-client relationship itself ceases to matter. Whether client contact is abundant or scarce, the zeal shortage calls for energetic reinforcement rather than a thrown-in towel.

Thus even a new associate who receives a client-matter number naming a corporation he has never heard of, along with orders from a supervisor to get to work, needs to keep in mind his duty of zealous advocacy before accepting the new assignment. Nobody can blame this young lawyer for beginning with the idea that his supervisor, rather than some faceless fiction, is his client. Professional-responsibility rules should nevertheless remind him—before he enters the client-matter number into the timekeeping software on his computer—that he has undertaken to represent a real client; he has made an intake decision. Disciplinary law has always so held,¹³⁹ and the zeal-focused contemplation that new Model Rule 1.18(e) installs would reinforce other duties, including the associate's duty to supervise nonlawyer associates and his grownup responsibility for his own misconduct (that is to say, if accused of unethical conduct, he cannot rely on a “following orders defense”).

4. “On a Fee-Paying Basis” and the Chance to Obtain Other Counsel Without Hardship

The new duty to contemplate one's obligations of zealous advocacy would apply only to the decision to represent fee-paying clients, and not to other proposed retainers, nor to lawyers who work for government agencies or legal-services bureaus. It is also intended to exclude court-appointed representation, whether or not the client would pay a fee to the attorney.¹⁴⁰ I do not mean to shortchange poor clients on the zealous advocacy they deserve but rather begin from the premise that the

139. See, e.g., *McCurdy v. Kansas Dep't of Transp.*, 898 P.2d 650, 652-53 (Kan. Ct. App. 1995) (approving of a subordinate's decision to decline an assignment on her own conflict grounds without giving much information to her superior about her reason for doing so); Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 892-93 & nn.13-15 (1997) (surveying commentaries on Model Rule 5.2(b), all of which agree that subordinate lawyers stand in an attorney-client relationship with the firms' clients for which they work).

140. I believe my diction excludes court-ordered representation from the scope of proposed Rule 1.18(e) with adequate clarity. The Rules already address the lawyer who feels unenthusiastic about a court-ordered appointment. See MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (2004) (providing that “[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as . . . the client or the cause [being] so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client”).

decision to work for clients or causes that are not fee-paying individuals or businesses demands a Model Rule 1.18(e)-style query from the start, when the lawyer considers whether to go into this line of lawyering. Boredom and burnout are well-understood phenomena here, and so it is likely that the lawyer moving into these sectors will have occasion to check her level of zeal before any client is harmed by its absence.

The reference to the prospective client's ability to obtain other counsel covers similar ground. Lawyers who work for legal-services agencies or the government serve clients who typically cannot find other counsel without undue difficulty. Representation of these clients does not include the selection-and-retention pattern that prevails in the private sector. Some clients who offer to pay fees to one individual lawyer may, for various reasons, have trouble obtaining alternative counsel should this individual lawyer turn them away. Model Rule 1.18(e) encourages such individual lawyers to accept these difficult clients, despite their doubts about whether they could fulfill their duty of zealous advocacy. The chance to retain any lawyer is better than having no lawyer.

5. Capricious Rejection of Prospective Clients

A lawyer may encounter unobjectionable prospective clients who have done nothing to deserve being turned away—and feel a desire to put these hapless prospects out on the curb. Such clients would not be able to receive zealous advocacy from this lawyer, perhaps for no particular reason. The lawyer may be simply turned off. May a lawyer tell an unappealing prospective client to go away? In his treatise on legal ethics, published twenty years ago, Charles Wolfram expounded on the traditional *Yes*:

[A] lawyer may refuse to represent a client for any reason at all—because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.¹⁴¹

Subsequent decisional law disagreed, notably *Stropnick v. Nathanson*,¹⁴² a 1997 decision issued by an agency, the Massachusetts Commission Against Discrimination (“MCAD”). Joseph Stropnick had challenged the decision of attorney Judith Nathanson to represent only women, and never men, in her matrimonial work (Nathanson was willing to represent men in non-divorce matters).¹⁴³ She turned him

141. WOLFRAM, *supra* note 1, § 10.2, at 573.

142. 19 M.D.L.R. 39 (Mass. Comm'n Against Discrimination 1997).

143. *Id.* at 39-40.

away over the telephone, never meeting with him in her office.¹⁴⁴ The MCAD ordered Nathanson to pay \$5,000 in damages to Stropnicki for his emotional distress and also ordered Nathanson to cease her discriminatory intake practice.¹⁴⁵

Although *Stropnicki* drew attention as a First Amendment case—commentary sympathetic to Nathanson invoked Nathanson’s rights to associate with people she chose, uninhibited by government interference,¹⁴⁶ and to oppose compelled speech on behalf of clients or causes she disfavored¹⁴⁷—it can be seen here as a Rule 1.18(e) case. At the point of intake, a lawyer in Nathanson’s position must evaluate a prospective client, here Mr. Stropnicki, and consider whether she anticipates substantial difficulty in fulfilling her duty of zealous advocacy. If the lawyer does anticipate this substantial difficulty, she “should” decline to represent the client, provided that she believes the client will readily obtain other counsel.

My proposed Rule 1.18(e) does not necessarily conflict with state public accommodation laws or other antidiscrimination mandates. Of course, portions of the Model Rules already conflict with other law; this kind of clash has not been fatal to the Rules’ blackletter.¹⁴⁸ But it is not obvious that Rule 1.18(e) and antidiscrimination law, at least as presented by the facts of *Stropnicki*, stand in opposition to each other. If Joseph Stropnicki would not have been able to obtain other counsel, then under 1.18(e) Nathanson ought to have represented him. If Stropnicki had been able to obtain other counsel, then Nathanson is still not necessarily allowed to turn him away: Rule 1.18(e) says Nathanson

144. *Id.* at 39.

145. *Id.* at 42.

146. Steve Berenson, *Politics and Plurality in a Lawyer’s Choice of Clients: The Case of Stropnicki v. Nathanson*, 35 SAN DIEGO L. REV. 1, 53-54, 60 (1998).

147. Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49, 50-51 (1998).

148. For example, some states require individuals knowing of child abuse to report this abuse to the authorities and include no exception for lawyers. *See, e.g.*, MISS. CODE ANN. § 43-21-353(1) (West 1999); OHIO REV. CODE ANN. § 2151.42.1(A)(1) (LexisNexis 2002). The current Model Rule 1.6 permits disclosure of such confidential information, but predecessor versions did not. *Compare* MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2004) (allowing disclosure of confidential information that is adverse to the client “to prevent reasonably certain death or substantial bodily harm”), *with* MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (1983) (allowing disclosure to prevent substantial harm only if the client’s action is a criminal act), *and* MODEL CODE OF PROF’L RESPONSIBILITY Canon 4 (1980) (requiring strict confidentiality with very limited exceptions). Tensions also exist between the Rules and federal statutory law, procedural law, and Department of Justice policy memoranda. *See, e.g.*, Brandon Bortner & Douglas Miller, *Procedural Issues*, 40 AM. CRIM. L. REV. 933, 982 (2003) (suggesting a tension between attorneys’ duty of confidentiality and the prospect of facing criminal liability for not taking steps to prevent their clients’ criminal acts).

owed Stropnický full consideration as a prospective client and could not simply apply to him her stated policy of turning away men at the door of her divorce practice.¹⁴⁹

Done with sincerity, a reflection on her duty of zealous advocacy could have caused Nathanson to reconsider—and perhaps override—her initial thought about how to handle this prospective client.¹⁵⁰ Joseph Stropnický had presented himself to Nathanson as woman-like: he was in a financially weaker position than his estranged wife, and he wanted Nathanson to review his draft settlement agreement because she had advocated with skill for economically disadvantaged spouses.¹⁵¹ Whereas Massachusetts public accommodation law, as interpreted by the MCAD in its decision, compelled Nathanson to pay no attention to Stropnický's gender, Rule 1.18(e) invites a look at the client as a whole person—gender included, if relevant to the lawyer's zeal levels—and encourages the lawyer to focus on the duty of zealous advocacy rather than a preexisting posture.

Rule 1.18(e) does not, then, support the capricious rejection of clients, but it also rejects the “taxicab” metaphor that makes attorneys available equally to all clients who hail them from the street. Zealous advocacy does not comport with the lawyer as transportation vehicle or lunch counter, passively meeting the felt needs of a customer and exercising no discretion. Clients who get over the “should” hurdle of Rule 1.18(e) can experience a newer satisfaction from the experience of having been retained. Under current rules, clients know only they have been accepted. Under a regime that, by contrast, applies Rule 1.18(e) or another rule codifying zeal at the intake level,¹⁵² clients who are retained

149. There is reason to suppose that Nathanson did indeed reflect on what she was doing. Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 ALB. L. REV. 153, 182 (2000) (reviewing the record to find statements by Nathanson that she “needed ‘to feel a personal commitment to her client's cause in order to function effectively as an advocate’ and in family law matters, she only experienced this commitment when representing women”). Moreover, the day after Stropnický filed his complaint with the MCAD, Nathanson wrote him a letter of apology and offered to review his draft settlement agreement. *Stropnický*, 19 M.D.L.R. at 40. Stropnický refused the offer and proceeded to represent himself. *Id.* Thus, while Nathanson's Rule 1.18(e)-style reflection took place too late, it did occur.

150. See *supra* note 149 (observing that Nathanson did in fact reflect on and override her earlier reaction); see also Paul M. Rezendes, *The Fundamental Problem with Stropnický*, MASS. LAW. WKLY., Sept. 8, 1997, at A11 (suggesting “there was nothing about the Stropnický case suggesting an inability to represent zealously the particular would-be client”).

151. *Stropnický*, 19 M.D.L.R. at 39-40 (noting that Stropnický had ranked his own career as less important than his wife's and was earning a tenth of her salary).

152. While Rule 1.18, addressing duties to a prospective client, strikes me as the best locus for such a rule, other venues in the Rules could also work. See FREEDMAN & SMITH, *supra* note 15, at

can assume that the lawyer has, upon reflection, concluded that she can represent them zealously, while clients who are turned away can know that the lawyer expects them to find more passion and commitment from another source.

VI. CONCLUSION

After more than a century inside the discourse about American lawyers' ethics, zeal remains unsettling and ill understood. The task of defending this value in an effort to rescue it from misunderstandings may need to conclude with a metaphor that adverts to its complication. To this end, I invoke the lyric opera repertoire.

When looking at zeal as a professional norm, an opera aficionada might be reminded of a minority of protagonists—including Carmen, Billy Budd, and Delila of *Samson et Dalila*—whose parts are written in a lower register than what prevails in most starring roles. The dusker mezzo-soprano or baritone voice in a star part stands for complication, pertinent sexual history (whenever sex in the character's past doesn't matter—Rodolfo in *La Bohème*, the "courtesan" Violetta in *La Traviata*—the voice can stay high), or ambiguity in character. If lawyers' ethics were opera, the virtues of loyalty, competence, diligence, candor to the tribunal, and other uncontroversial ideals would sing tenor and soprano at the high-pitched end of the score. Observers regard them as simple and ingenuous, like the doomed leads in *Aida*. Zeal by contrast is a chiaroscuro hero, rippled with ambivalence: The professional-responsibility literature calls it both a virtue and a problem. Similarly, when they applaud the deeper-voiced singer-stars opera audiences are thinking about complex characters.

It is in the same spirit that I have applauded zeal in this Article. Legal ethics charge an attorney with a duty of partisan commitment. Deviating from the ethics of universalism and neutrality that animate Western philosophy, this corner of occupational responsibility tells this particular actor to favor clients over others and to bring energy and fervor to the task of representation. A client can easily obtain distance and indifference elsewhere and with luck will receive neutrality from a tribunal; from her lawyer, this person deserves partisan commitment. The phrase "zealous advocacy" expresses what a client ought to obtain from an attorney. In this Article, I have expounded on zealous advocacy

73 (suggesting that lawyers should reject some clients at the intake level—probably those whose causes are "repugnant" to the lawyer—and that this rejection is covered under the rules on conflicts of interest).

by discussing the meaning of partisan commitment, how this value has withered in professional-responsibility codes over recent decades, the roles that legal education and law firm structure have played in the dwindling of this value, and the possibility of reaffirming zeal in new professional-responsibility blackletter.

When endorsing zeal, writers customarily temporize. It is this backpedaling norm that gives the prim caveat “within the bounds of the law” its ticket to follow “zealous advocacy” everywhere, even though telling lawyers to hew to the law seems an otiose move in professional-responsibility codes, which take law-compliance for granted. Here are three temperate concluding statements for the reader who would be disappointed by their absence in a paean to zeal.

Foremost, zeal coexists with many other duties, not just the duty to obey the law, and zeal does not override these obligations. Second, zeal can be overdone even when excess does not violate the law, and lawyers should take care not to overdo it. Third, zeal on behalf of a client does not mean adopting the client’s desires unmediated as one’s own. And now, onward to facing the zeal shortage. This profession—a group trained to make distinctions and pursue multiple ends as it serves its clientele—can ameliorate this deficiency without threatening its other noble ideals.

QUESTION AND ANSWER

MR. SHIRLEY: I’m Evan Shirley. It seems that the two rules proposed are contradictory ones. One, you’re going to decline representation or you should be zealous, not shall be zealous—

PROFESSOR BERNSTEIN: Right.

MR. SHIRLEY: Can you comment as to what appears to be contradictory?

PROFESSOR BERNSTEIN: What I’m hoping to do is match the client with a lawyer who gives him or her this professional necessity. And if for reasons of taste or queasiness or even prejudice the lawyer couldn’t represent the client zealously, and that client can get the adequate representation for the client’s needs, I don’t see them as—

MR. SHIRLEY: But it shall—you shall decline representation if you can’t do it?

PROFESSOR BERNSTEIN: Okay. Well, I’ll change that. That’s no problem. I wanted to put a blackletter duty of zealous advocacy in “should” form. I didn’t mean to say that these rules are wedded to each other. A state deciding whether to adopt a change in the rule could pick

one or the other. And I was hoping to cover overlapping ground with the choices. One of them might be unpopular, the other one might be acceptable.

PROFESSOR SIMON: Roy Simon, Hofstra. My comment goes to your discussion of exams and how we treat zeal on exams, so I want to tell you about Norman Bloch. Norman Bloch I thought was the smartest guy in my law school class, and after the first year contracts exam, Norman was talking about the exam out in the hallway, and it was an exam where a mining company had mercilessly strip-mined a hillside leaving it bare of vegetation, and basically Norman said: "I really gave it to the mining company." As it turned out when we got the papers back, I did better on the exam than Norman did.

PROFESSOR BERNSTEIN: You did not give it to the mining company.

PROFESSOR SIMON: There were a lot of plausible arguments that could be made on behalf of the mining company, on the other side, but when Norman said to me, "I really gave it to the mining company." I said, "Norman you gave it to a blue book." So my question is, do you think that we ought to change the way that we grade exams to reward zeal more? I'm not sure if that's just a symptom or if you think that's something we really ought to try and do something more about.

PROFESSOR BERNSTEIN: That's an interesting question. I hadn't thought about my critiquing of too much neutrality in the first-year curriculum, and in the light that you just presented it. Maybe it's just me getting conservative in middle age, but I would hate the thought of drastically changing my torts class to reward zeal, when it seems to me that what you say about your mining question in contracts does test and look for something that's very important. My approach, if I was in charge of the curriculum, would be to retain the emphasis on neutrality that you demonstrated so well on your own final. But I'd want to say stop, enough already with the rhetoric about there being too much zeal in the curriculum. I think this fact about how we reward students, and how you rose among your classmates in law school, belies that comment, the conventional wisdom that we're overdoing zeal at law school.

PROFESSOR FREEDMAN: One way I deal with that problem, Roy, is to tell the students that I expect them to put themselves into context, so I do not use questions like "what are the rights and liabilities of the parties." If the question is: "You are an associate in a law firm, and you've been asked by the partner how much muscle she could put into her voice at a settlement conference at lunch tomorrow with the lawyer from the other side," then zeal is not what you want. What you

want is a balanced appraisal but with some emphasis on how we can best deal with their strongest arguments. On the other hand, if the context in which the student is put is to write a summary of an argument for your brief, and if the other side is the mining company, then you really ought to be putting it to them. They would be saying in an internal memo, we are really going to have trouble with the mining companies arguing that, but I think we can deal with it best this way, but in the summary of arguments, they would present something closer to what the mining company might argue, but that obviously is without merit, etc. So writing questions that put the student in context and not predicting each time what contexts they are going to be in, I think is both realistic skills training, and also it helps to deal with that problem. I wanted to suggest to you that one of the things that most offends me in the Model Rules is I think Rule 1.3, where instead of zeal we have diligence and promptness, which I expect from the people who launder my shirts, for example, but it seems a step down for a lawyer, and I don't think that reference to diligence adds anything of any use whatsoever if we're going to be talking about zealous representation.

PROFESSOR YAROSHEFSKY: Ellen Yaroshefsky. Thank you very much. It's a very engaging delightful presentation. I don't want to monopolize. I want to ask a number of questions, but I'll confine myself to two. In the clinical teachers' movement, this kind of issue, although it is not talked about as zeal, it is talked about: How do we restructure legal education? So I want to push this further than Roy's exam question. My view, and I want know if you share this in some way, is that, if we want to rethink about how to make students passionate about the client, they have to have clients, and we have to start off initially within the first year somehow introducing students to real live clients. One proposal that many people make, is a professional responsibility course, along with some client contact. It is only in the context of counseling, or a counseling course that it's really possible to teach students about zeal and teach them about the ways in which you really should have passion in the real world or maybe simulation, if we're willing to go that far, so that's one thought. Second, I often thought that one of the reasons that we've done away with zeal over time is that, because of the marginal behaviors that we don't like, courts are unwilling to sanction them, and if courts would step in and perform the traditional role in terms of really overseeing discovery and imposing sanctions then we wouldn't have been in this position. I wonder what you think about that.

PROFESSOR BERNSTEIN: Oh, Ellen, thank you. Those are both very widely separated. I think they're fascinating comments. I gather for the first point, you're recommending that in the first year of law school students be put in some kind of clinical setting where they have contact with a live human being in essence, serve his or her interests. I would tentatively support the idea. One hesitation though. There are a set of people who go to law school who don't see themselves as advocates for clients, and claim, I think possibly with some justification, that they have a right to a legal education that does not presume that they will be in the practice of law. I don't necessarily want to honor this perspective, but until I know more about it, I would hold off on my "yes" vote to see what that position claims. I don't know how much it costs. It doesn't seem terribly expensive; I don't think I would worry about it on cost. So I give a "thumbs up," wavering a little bit Professor Yaroshefsky's suggestion of mandatory clinical education, preferably in the first year.

I think your second point is that making a virtue of hating zeal is crude, it overdoes it, it's overbroad. Some of the behavior we want to criticize should actually be characterized as dishonesty or fraud. When we're overbroad, the fish will swim into the net. There'll be lying fish and cheating fish, and fish who bully witnesses. The price I think is too high. I would rather not go that way. I think it's better to focus on the wrong itself rather than use zeal as a proxy. It is worrisome for me to want to take that risk.

PROFESSOR POWELL: Professor Bernstein, I want to praise you, then I want to share an observation and finally actually ask a question. Praise-wise, it's wonderful to hear such a zealous defense of zealousness. I too have had a sense that we had reached a point where zealousness was indeed a defense, and that grows out of this observation. It seems to me that zealousness has gone on the defensive about the same time that we have in legal academia had a rise of mediation. Now, I do not see these two things as inherently in conflict with each other. Indeed, I believe that they support each other quite nicely, but for the first time we have an organized lobby in legal education that is urging that zealousness is not appropriate as a general characteristic throughout the curriculum. I disagree wholeheartedly with that, but I wondered what you might think about that observation. And then, finally, by way of a question, is it your sense that zealousness has lost ground in terms of the actual practice, the way lawyers actually represent clients, or are we more engaged in an academic literary debate?

PROFESSOR BERNSTEIN: Thank you. Let me see if I can be helpful. I want to react first to your statement that I defended zeal zealously. Monroe Freedman praised Carrie Menkel-Meadow, one of the leading enemies of zeal, for her zeal in defending alternative dispute resolution and alternatives to litigation. It's great to be in Menkel-Meadow's company, by way of this recommendation. Yeah, it does seem that it's concurrent. One point that you didn't mention, Burnele, that might be a fair extension of what you're saying, is that the attack on zeal is related to the rise of political conservatism in the country generally. Maybe standing up and being a little belligerent, a little bit aggressive, saying the status quo needs to be changed, is a healthy part of discourse that lawyers used to do better. Unfortunately, I don't know if I could measure the last kind of area you mention. I don't know whether zeal has gone down in the practice of law. I think that it probably has. But maybe as bad as that development is the lack of self criticism in the profession for its lack of zeal. When one rationalizes laziness and inertia as fulfilling some ideal, one is not growing as a service professional and one is not helping one's client.

PROFESSOR NEEDHAM: This is tremendously interesting. I did want to challenge you on one particular point. I wonder if there's some carryover and the literary logic side and zealous in zeal being perceived as emotional and irrational. But I want to challenge you on the idea that it's impossible for the potted plant to be zealous. And what I mean by that is, if you honestly think that it is courageous for the lawyer to withstand the prosecutor's attempt to get the lawyer to reveal the identity of their criminal defendant client, which in fact is a courageous and heroic kind of zealousness isn't it equally zealous? I mean, it's a potted plant stand, remaining silent. Isn't it essentially equivalent? And if it's not equivalent, you have to tease out why in what way they are distinguishable from the corporate lawyer who refuses valiantly to reveal to the IRS and SEC various doings. I'm not taking a position here, about how valiant potted plants can be—just to say we really have to distinguish those before they'll completely buy off.

PROFESSOR BERNSTEIN: Yes, Carol. I think you're right. I just want to add a little caution in agreeing with you. Certainly one can be zealous without saying a word. I worry though that one can leap too quickly to think that being grimly silent necessarily is good enough. In this light, the most zealous advocacy one can give is silence, and the more one babbles, the more diluted the representation becomes. I don't want to automatically equate silence with zeal. But the rest of your point I completely agree with.

MR. PERETZ: Hi. I'm Adam Peretz. I'm a 2002 graduate of Hofstra, and a former student of Professor Freedman, and I want to thank you for your education.

PROFESSOR FREEDMAN: Thank you.

MR. PERETZ: And thinking out of the box. I really appreciate that. Professor Bernstein, I just wanted to ask what you think of this, the focus on a first year law student's need for numbers in order to get interviews and, you know, get their first summer job and all that to get on their way—

PROFESSOR BERNSTEIN: You mean with class ranking or—

MR. PERETZ: Correct, absolutely, and with that in mind, that focus takes away from possibly the advocacy portion of the education at least in the beginning and that gives a lot of law students who come maybe right out of college who haven't had other life experiences, a focus on the numbers, and "how am I going to get that interview?" I just want your thoughts on that, and I want to maybe give pause to other advocacy education. I also have a master's in social work, and I think law schools can possibly look to that area to see how social work master's programs promote advocacy, which I think is a tremendous part of zealotry. Your thoughts on that.

PROFESSOR BERNSTEIN: Thank you, I think what you said is a valuable addition. I was looking at the numbers in ranking issues from the point of view of somebody who goes to faculty meetings where this issue is endlessly talked about. But students have their own version. They too are crunched into numbers. They too have to present themselves as data, fitting into someone else's model or having pleased other people. One says as a student hoping to get interviewed probably in the fall of the second year: I'm a really good number, and I submitted faithfully to the pedagogues that rank me as product, and now I'm a product that's better than nine out of ten of this school. And that is very unfortunate, and there are a lot of similarities, I think, between what I was saying about U.S. News rankings for law schools and what you're saying about the experience of going to interview programs not too long ago.

As for social work, that's a profession I've written about in part of another article. I admire the social work ethics codes that talk about not being neutral on the political and economic issues of the day. It seems if it's quixotic for me to write a rule about zeal, all the more so for us to recommend that law schools look to a profession that's known mainly for its low pay, which you know about better than I. I worry that if conservatism is part of the zeal problem, does that same desire or

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attitude make law schools recoil from social work as a model? It shouldn't: social work provides a model for teaching zeal to young people.

PROFESSOR BERNSTEIN: Thank you. [Applause]