



Reasonable (Not Zealous) Representation

by John Travis

The former Ohio Code of Professional Responsibility referred to “zealous” representation. In crafting the Ohio Rules of Professional Conduct the drafters avoided the use of that word, in apparent recognition of the tendency of some lawyers to invoke “zeal” as an excuse for inappropriate conduct. Those rules, which went into effect on February 1, 2007, now speak of “reasonable diligence.” Thus, lawyers, especially when serving as advocates, must be cognizant of the need to conform to that standard.

This article reviews the relevant portions of the Ohio Rules of Professional Conduct, addresses three cases in this area, and offers some general guidelines.

Ohio Rules

Rule 1.3 of the Ohio Rules of Professional Conduct succinctly states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Rule 1.0 of the same rules includes the following definition: “Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.” Although this definition uses circular logic in employing the word “reasonably” in defining what is “reasonable,” it does point to the objective standard of a prudent and competent lawyer. In determining what is prudent and competent, two useful sources are the Ohio Rules of Professional Conduct and the case law.

The Preamble to the Ohio Rules of Professional Conduct describes some of the duties of a lawyer. We are reminded that a lawyer has “a special re-

sponsibility for the quality of justice” and that lawyers have a “vital role in the preservation of society.” Of course, a lawyer’s conduct always should “conform to the requirements of the law.” Accordingly “[a] lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.” In addition “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.”

The case law sheds further light on what is, and is not, appropriate conduct. Reference must be made to the case law addressing the former Ohio Code of Professional Responsibility, given the newness of the Ohio Rules of Professional Conduct and the consequent lack of interpretive case law. Even so, that body of law offers insight into how courts deal with lawyer misconduct and also illustrates that a wayward lawyer may face not only ethical charges but also contempt proceedings. (Improper attorney conduct also may be dealt with in ways not addressed by this article, including sanctions under Civ. R. 11 Signing of pleadings, motions, or other documents and R.C. 2323.51 Frivolous conduct in civil actions.)

Case Law

The Supreme Court of Ohio in *Office of Disciplinary Counsel v. Donnell* (1979), 79 Ohio St.3d 501, 684 N.E.2d 36, considered a case where the respondent lawyer was charged with multiple improprieties related to a custody proceeding with his ex-wife. Acting as his own counsel (perhaps his first mistake) the respondent asked questions about drug use and pedophilia without any reasonable basis; asserted personal knowledge of facts with-

out testifying; constantly argued with and interrupted the judge; showed little respect for witnesses; and habitually failed to follow established rules of procedure by giving orders to the court, arguing with witnesses, cross-examining his own witnesses, and attempting to call opposing counsel as a witness.

The high court concluded that his conduct violated several disciplinary rules. The court stated that “judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties” and that a lawyer “should not engage in any conduct that offends the dignity and decorum of the proceedings.”

In another case the Supreme Court of Ohio frankly admitted that the bounds of proper conduct can be “elusive” but still made clear that certain conduct will not be countenanced. In *Disciplinary Counsel v. LoDico* (2005), 106 Ohio St.3d 229, 833 N.E.2d 1235, disciplinary counsel filed a complaint with the Board of Commissioners on Grievances and Discipline charging the respondent lawyer with engaging in a pervasive and continuing pattern of misconduct before two different judges. The misconduct included making inappropriate, loud, and rude statements wrongly impugning the integrity of a prospective juror during voir dire; continued disregard of court orders; dramatic and inappropriate facial expressions in front of the jury as witnesses testified; inappropriate and disrespectful comments during the trial and at side bars; and at one point throwing money and credit cards on the bench in anticipation of a sanction and telling the judge, “Go ahead and fine me.”

In an attempt to exonerate himself, the respondent argued that the defense of those accused of criminal activity “lends itself to a passion and zeal not typically seen in other types of litigation, often accompanied by a sense of stubbornness and righteous indignation necessary to adequately prepare and present a defense for clients***.” The Supreme Court was unpersuaded:

The law demands that all counsel engender respect and dignity for the adjudication process. Though duty-bound to afford their clients the most competent representation of which they are capable, counsel are equally constrained by the mandates of integrity and professionalism imposed on all counsel as officers of the courts in which they appear. No proper defense or strategy warrants the type of misconduct exhibited by respondent.

In our findings, we do not quantify the standards of civility that are imposed upon counsel or qualify the elusive boundary between zealous, aggressive advocacy and contemptuous, vituperative conduct. Nor do we reduce counsel to “obsequious sycophants in order to avoid offending the fragile sensibilities of judges.” *Disciplinary Counsel v. Briener* (1999), 89 Haw. 167, 173, 969 P.2d 1285. Rather, we “merely require that the members of [this] learned profession * * * act in accordance with the time-honored traditions that experience has taught us are necessary to protect the office of the court and the process of justice from devolving into the barroom brawl.” *Id.* We simply reinforce the mandate that our attorneys advocate within the rules of law, in the light of rational thought and reason rather than innuendo and incivility. Counsel must recognize that in every trial, the integrity of the process is as much at stake as the interests of the accused. See *Mayberry*, 400 U.S. at 468, 91 S.Ct. 499, 27 L.Ed.2d 532 (Burger, C.J., concurring).

Justice must always appear just. *Id.* at 465, 91 S.Ct. 499, 27 L.Ed.2d 532.

Criminal contempt was at issue in another case--*In re LoDico*, (June 26, 2000), Stark App. No. 1999CA00159, unreported. In that proceeding the record revealed that the defense lawyer interrupted the trial court on numerous occasions, verbally disputed or argued with certain rulings, talked over or continued questioning after an objection was made, would not slow down or ask one question at a time, and refused to keep his voice down at side bar. The Stark County Court of Appeals upheld the criminal contempt sanction and stated:

We are very aware that the severity of a case, the emotionalism of a baby death and the need for zealous representation impact the dynamics of any trial. Nevertheless, the tenor of appellant's actions were (sic) beyond the pale and not acceptable or conducive to the fair and impartial administration of justice. The purposeful attempt to put the trial court on the defensive with the false accusation that the trial court had called him inexperienced was in and of itself contemptible. Upon review, we find ample evidence to support the contempt citation and no manifest miscarriage of justice.

The foregoing case law demonstrates that the courts have not accepted zealousness as a defense where a lawyer commits unethical conduct. Therefore, abandoning any reference to “zealous” representation in the Ohio Rules of Professional Conduct simply may reflect the reality that the courts do not accept zeal as an excuse for being unethical.

Guidelines

Of course, there are innumerable ways a lawyer can violate the Ohio Rules of Professional Conduct. Nonetheless, the following guidelines, if observed,

should help avoid many potential problems:

Do not represent yourself. The old adage that “[a] lawyer who represents himself has a fool for a client” contains much wisdom. Those who represent themselves may lack the dispassionate, objective perspective that a lawyer offers a client.

Know the rules. Being aware of the Ohio Rules of Professional Conduct (and any applicable court rules) obviously is essential. Accordingly, lawyers should review those rules periodically so that they are fresh in mind.

Do not impugn the process of justice or the judge. The case law is replete with instances in which lawyers have exhibited disrespect for the process and the judge. Judges deserve our respect, and as a practical matter, they determine any violations and impose any penalties.

When in doubt, don't; instead consider seeking advice. Most lawyers have an innate sense of what is appropriate and inappropriate. If there is some doubt whether something is proper, err on the side of prudence and refrain from the questionable conduct. Where feasible, a lawyer should consider seeking the advice of an experienced practitioner or a bar association. ■

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