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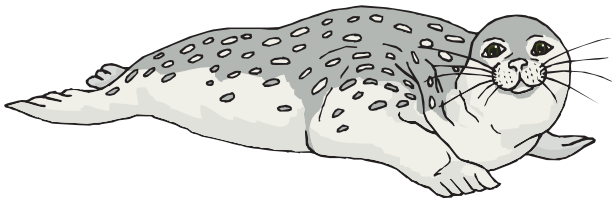
[LETTER to a young trial lawyer]

SAVE THE ZEALS: BALANCE ADVOCACY AND CANDOR WITH CARE

by DAVID K. BISSINGER

In their recent book "Making Your Case," U.S. Supreme Court Justice Antonin Scalia and Dallas lawyer writer Bryan Garner write, "Never overstate your case. Be scrupulously accurate." In most cases, lawyers follow this rule out of self-interest. Moreover, the trial process protects against misleading arguments with objections, limiting instructions and the like.

But, in this age of increasingly complex litigation, courts appear increasingly willing, even after trial, to go back into the record to sanction lawyers for misleading arguments. U.S. District Judge Richard P. Matsch of the District of Colorado wrote on Feb. 12 in *Medtronic Navigation Inc., et al. v. BrainLAB Medizinische Computersystems GmbH, et al.* that lawyers must "temper zealous advocacy of their client's cause with an objective assessment of its merit and be candid in presenting it to the court and to opposing counsel."



Trial lawyers may see such language as conflicting with their duty of zealous advocacy. For example, in the book "The Trial Lawyer: What It Takes to Win," David Berg recalls the advice a judge gave him and his peers as he swore them in decades ago: "You worry about winning. Let us worry about justice."

Likewise, as Michael Tigar observes in his memoir, "Fighting Injustice":

> It used to be that the rules of ethics required advocates to exercise "warm zeal" on behalf of the client. But now the rules leave those words out. Bar leaders are afraid to say "warm zeal." So, in the name of softening up the image of our profession, the warm zeals are an endangered species. They are clubbing the warm zeals to death to make coats for rich people. I don't approve. In litigation as in love . . . technical proficiency without passion is not wholly satisfying.

While the phrase "warm zeal" never appears in the American Bar Association Model Rules of Professional Responsibility or the Texas rules following them, most courts nevertheless recognize that duty.

Most courts should award sanctions, such as attorneys' fees, sparingly, noted U.S. District Judge Edward Weinfeld of the Southern District of New York in *Colucci v. New York Times* (1982), "lest the prospect thereof chill the order of proper and forceful advocacy."

The threat, for example, that a losing plaintiff in a Title VII case may have to pay defense attorneys' fees when the suit brought was neither vexatious nor meritless, "could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success," wrote U.S. Supreme Court Justice Potter Stewart in 1978's *Christiansburg Garment Co. v. Equal Employment Opportunity Commission.*

But advocates of sanctions can cite competing authorities. For example, 27 U.S.C. §1927 forbids parties from multiplying proceedings "unreasonably and vexatiously."

As Matsch observed in *BrainLAB*, "Costs and fees may be awarded under §1927 'when an attorney is cavalier or bent on misleading the court.' "

Similarly, Federal Rule of Civil Procedure 11 provides that, by signing a pleading, the attorney certifies she has made a reasonably inquiry as to the facts and the law and that the pleading is nonfrivolous and will likely have evidentiary support.

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Cases under Rule 11 often focus on parties' misrepresentation of the validity of a legal — as opposed to factual — position. As 7th U.S. Circuit Court of Appeals Judge Frank Easterbrook observed in 1987's *Szabo Food Services Inc., et al. v. Canteen Corp.*, Rule 11 sanctions are appropriate when a party engages in the " 'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist.' " When that happens, "counsel are either trying to buffalo the court or have not done their homework. Either way Rule 11 requires the court to impose a sanction."

As with the long-recognized duty of "warm zeal," none of these principles for awarding sanctions are new. As the great English judge Sir Francis Bacon stated in his essay "Of Judicature," courts find fault with advocates "where there appeareth cunning counsel . . . indiscreet pressing, or an over-bold defense."

Lawyers must know how to draw the line between ethical "warm zeal" and sanctionable argument. Finding that line depends in large part on the complexity or lack thereof in any given case.

As the legal or factual complexity of a case increases, so does a lawyer's duty to avoid "overbold" arguments. Part of the determination requires an understanding of the judge's perspective. Lawyers should know their audiences; in cases involving matters with which the judge has familiarity, the judge will tend to give lawyers some leeway. In those cases, a judge has a better sense of the context of the parties' arguments and can rule on evidence and instruct the jury with a higher level of confidence.

But in novel and complex cases — patent, antitrust or others with which the court has less familiarity — advocates should consider whether the judge, after all the evidence comes in, will continue to believe that the parties have made good-faith arguments. A lawyer must have the judgment to know what a neutral observer with a full understanding of the case would conclude. In the end, most judges respect "warm zeal," but they resent feeling duped. TL

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