ZEAL AND RESTRAINT IN APPELLATE ADVOCACY

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(Speech to San Diego appellate judges and lawyers on September 29, 2004)

Thank you. . . . It's a great honor.

Your invitation says: "The Inn seeks to bring together appellate lawyers and judges to enhance our profession." Let me try to provoke some thoughts and discussions on that subject.

I've been troubled for a long time about what "zealous advocacy" means in the appellate context. So I'm going to propose a new and better definition of that term, then talk about how to get there from here to enhance our profession.

We usually think of zeal and restraint as opposites, like the id and the superego in psychoanalytical theory. Id is the seat of primitive drives and animal instincts: hunger, lust, aggression. Superego is the restraining hand of civilization: Mind your manners as you pursue those drives and instincts.

In free market capitalism, zeal is the drive to acquisition and power. Just win, Baby. Whatever it takes. Restraint is the threat and force of law: Just don't get caught, Baby, breaking any rules. (*General Dynamics v. Superior Court*, a 1994 Cal Supreme Court case, says in-house counsel are the superego of their corporate employers.

And so it is with our legal profession. Zeal in this sense is aggression in advocacy: the drive to win, to defeat, to acquire, to take away, to strike and strike back at the enemy. And we want that zeal to be fearless, untrammelled, unintimidated by the threat of sanctions or reactive lawsuits, unrestrained by conflicts of interest. Zeal is the singleminded loyalty and mindset of a warrior, totally immersed in the cause and zeal of the client.

Restraints on advocacy are those pesky rules and civility codes. The confines of that record. The text of that precedent. That awful standard of review. Those petty page and format limitations. And that thing about courtesy, objectivity, and revealing adverse authorities. The call to be an officer of the court, not just the client? Isn't that the opposite of zeal?

Understandably, this kind of zeal -- especially in today's legal climate of zealous economic competition -- finds the demands of civility and professionalism to be annoying, quaint, and irrelevant. And while they still retain some force, they have been weakening for a variety of

sociological, economic, or other reasons. Though less so in the appellate arena, civility and professionalism in advocacy have been on the wane for some time, and will continue to wane in our field unless we do something about it.

First, let's consider a different definition of zeal in advocacy.

The standard English dictionaries define zeal as eager interest and enthusiasm; enthusiastic and diligent devotion in pursuit of a cause, ideal or goal. (Zealotry, by contrast, means excessive zeal; fanaticism.)

This is the zeal of the reformer, the lover, the hobbyist, the athlete. I think of Eric Lydell, the devout Christian runner in the classic film, *Chariots of Fire*, his head thrown back, his face in ecstasy as he accelerates for God. Competitive? Of course. But he competes with joy and satisfaction, not the cold grim face of the gladiator.

There are many rewards available in our profession, and many material rewards well justifying the zeal of conquest and acquisition in the traditional sense. But legal advocacy, and appellate advocacy in particular, holds out a reward too seldom identified and pursued. As today's gathering symbolizes, legal advocates participate with judges in a system designed to serve the greater good of society. Constitutions need concrete application. Legislation needs interpretation. Common law needs introspection and evolution. This is the essence of what appellate courts do, whether they publish their opinions or not.

Our zealous advocacy plays an integral role in this extraordinarily important process. We are advisers and advocates in the development of the law and the supervision of the trial courts. This is something well worth being zealous and proud about. Worth doing with eagerness, enthusiasm, diligence, and excellence. We try to find linkage between our clients' needs and the great vital mission of the law -- and if we can't, we tell the client to settle.

This kind of zeal requires no superego. The norms of professionalism are not restraints on advocacy. They are its wisdom, the tools of the trade. They make us more effective as advisers and advocates to the courts. And they help us to **enjoy** that role, to derive satisfaction from it beyond any paycheck.

But the problem is, it's hard to do this and enjoy this in isolation. So let's go back to sports for a moment.

Travel with me to the mountains of France, in the midst of the world's greatest and most competitive bicycle race. A hundred men, training for years to attain unimaginable, painful standards of fitness, sweating, straining, grunting up the mountain only inches from each other and the fanatical crowds, with minutes and sometimes only seconds separating the leader from the rest. This is grueling competition. (Litigation isn't any tougher than that.)

But when the leader takes a fall or a flat tire, the other riders all stop, waiting for the leader to get going again. What makes them perform that extraordinary act of sportsmanship? It's a custom, you say, an unwritten rule. But legal advocacy has written and unwritten rules of sportsmanship as well. So I repeat the question: what makes the bike racers **obey** their rule of sportsmanship? Why do they actually stop and wait for the leader?

I think it's the familiarity and cohesiveness of the group. They know each other. They see each other. They spend a lot of time together on those multi-week races around the world. They eat together. And they **enjoy** doing so, and know they're going to continue in this association over time. More pointedly, though, those who honor or violate the code of sportsmanship up on the mountain are going to hear about it one way or another back at the lodge or the airport -- either verbally, by looks of admiration or scorn, or by the nuances of social embrace or shunning. The prospect of such peer approval or disapproval gives powerful support to the rules of sportsmanship.

It's also the expectation of reciprocity. Lance Armstrong stopped the race when Jan Ullrich got a flat tire. A few years later Ullrich stopped the race when Armstrong took a fall. But consider the poor lawyer whose efforts are described in painful detail in a 2002 published opinion by Division 3 of this Court: (100 Cal.App.4th 158)

> In late May, [H] advised them this would not be a "courteous litigation." B responded, "[T]his office will remain courteous, reasonable and cooperative." Seeking H's reciprocating commitment to "a cordial and professional relationship," B enclosed in his letter a copy of the Code of Professionalism of the American Board of Trial Advocates (ABOTA), assuring H that B and his firm would "endeavor in every instance to handle this matter in accordance with that Code," and urging H to abide by and "hold us to this standard." H immediately replied: "Let me ask: from what planet did you just arrive. . . . "[Y]ou can take [the] ABOTA Code of Professionalism and shove it. . . .

How do we get past that? How in this far-flung legal world of lone rangers and warring law firms do we build a sense of commonality -- a community of advocates like the community of bicycle racers, practicing their profession with the zeal of enthusiasm and knowing and enjoying the fact that their common values are more or less shared?

1. Continue doing what you're doing here today. Meet and break bread together as often as you can. Invite your opposing counsel. You've already inspired the First District to put together a similar bench-bar lunch next month. Others will follow. Maybe even the trial courts and their advocates one day.

2. Expand your participants. Don't be satisfied preaching to a choir of more experienced advocates. Try to reach the whole congregation. And this will take nudging by the Court, not just participating -- although that is essential. Don't just invite; encourage and cajole participation. Use your roster of counsel with pending cases. Remember: it will increase your own job satisfaction, not just theirs.

3. Finally, one day I hope you'll establish a bar of this Court -- freely open to all and based on extremely minimal standards of experience. The point is to create a defined group of lawyers who will identify themselves as advocates before this Court, and who will take pleasure and pride in that identification because this bar practices with the right kind of zeal.

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In Shakespeare's *The Taming of the Shrew*, with the barristers in mind, a suitor invites his competitors to "do as adversaries do in law, [s]trive mightily, but eat and drink as friends." It is my great pleasure to be joining you in that endeavor today. Keep it going.