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ETHICS OF ADVOCACY

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IT gives me great pleasure to spend an evening with editors of a law review. Law reviews form an outstanding contribution of the law schools of this country to legal scholarship and advancement of jurisprudence. They have played an important role in the development and growth of the law. Those of you who participate in these fascinating labors are privileged in being accorded an opportunity to do the exploratory research and constructive thinking that are comprised in the preparation and editing of the contents of a law review. In addition there is a purely personal reason why it is enjoyable for me to be here. My mind is brought back to my own law school days, when I, too, toiled in the editorial rooms of another law review.

As apprentices in the law you are no doubt impatiently awaiting and anxiously anticipating your entry into the daily routine of the legal profession. A lawyer may very properly be called a minister of justice. Daniel Webster observed that "justice . . . is the great interest of man on earth."[1] The function of a lawyer, whether he practices in the office or in the courtroom, is to safeguard and protect his client's rights. It is a service with high ideals.

Mr. Justice Holmes, one of the great jurists of this century, remarked that:

> Every calling is great when greatly pursued. But what other gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life—to share its passions, its battles, its despair, its triumphs, both as witness and actor?[2]

He observed on another occasion that "the law is the calling of thinkers."[3]

You have been devoting your endeavors to delving into the theory of the law. You have been scrutinizing and analyzing the law as a science. Such a study is indispensable at the threshold of one's professional life. In fact, a lawyer must continue to pursue it throughout his career. In connection with an investigation of legal theory, it also is essential to become well versed in procedure, as a knowledge of procedure is indispensable for the successful assertion and victorious vindication of one's clients' rights. Nevertheless, a knowledge of procedure, while fundamental and elementary, is not alone sufficient. For example, every artist must know how to mix his colors, for otherwise he cannot paint a picture. Yet mere skill in mixing colors does not alone make an artist.

While the law in a sense is a science, although not always logical or well-rounded, the administration of justice is much more than that. It constitutes a practical application of the science of the law to specific situations in human life.

The administration of justice consists, according to philosophers, of giving

* United States District Judge for the District of Columbia. This is an adaptation of a speech delivered at the Annual Banquet of the Buffalo Law Review on May 5, 1967.

1. Webster, Speeches & Oratories 532, 533 (Whipple ed. 1914).
2. Lerner, Mind and Faith of Justice Holmes 29 (1943).
3. *Id.* at 31.

every man his due. The law becomes but a tool or an instrumentality by which to achieve this ultimate aim, namely, to do substantial justice, but to attain justice under law. Thus the administration of justice is more than a science—it is an art.

The pursuit of a lawyer is not a trade or a business. It is a calling or a vocation. While naturally it is a means of earning a livelihood and supporting one's family, a primary duty that every member of the community must fulfill, it is, nevertheless, much more. A lawyer must have character. He must perceive the ideals, comprehend the ethics and grasp the standards of conduct that form the orbit surrounding and restricting his activities.

The legal profession is governed by principles of ethics. Every lawyer must conform to the precepts constituting this code. One may perhaps say that, after all, legal ethics is but an application of the Ten Commandments. Naturally every person knows the Ten Commandments. Problems arise, however, as to how these eternal verities and principles of morality are to be applied to numerous specific situations with which a lawyer is often confronted. Legal ethics is a detailed guide to the conduct of the lawyer, who must familiarize himself with it and follow it in his daily work. It lights his path as a beacon.

George Sharswood, a Philadelphia lawyer and judge, whose essay on professional ethics, first published over a century ago, still remains the classic work on the subject of legal ethics, pointedly made the following observations in his treatise:

> There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity; in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction.[4]

Cardozo, in his usual inimitable style, enunciated the canons of honor that must control the conduct of fiduciaries. These principles are equally applicable to members of our profession. He said:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.[5]

The principles of legal ethics are not a mere theoretical expression of lofty aspirations and noble ideals on the part of visionaries. They represent and con-

4. Sharswood, Essay on Professional Ethics 55 (5th ed. 1907).
5. Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

stitute a code of conduct developed over the centuries by a consensus of opinion of active members of the bench and bar and are actually followed in the day-to-day practice of lawyers. This statement is particularly true of those members of the bar who are well regarded and highly respected. Any deviation from these principles is not only frowned upon, but if detected may be followed by disciplinary action, as well as by the loss of respect and regard for the offender on the part of his brethren. No member of the bar may long maintain a high professional standing, if he fails, as some occasionally do, to conform to this code.

Current developments in the activities of lawyers make it appropriate to pause and to review these principles in some detail. Unfortunately, recently some heretical expressions have emanated from some sporadic and discordant voices. They do not come from active members of the bench or bar, and they do not represent the consensus of opinion of the profession. Like a Siren's song, they may at times perhaps mislead and entice some neophytes. This circumstance enhances the necessity and desirability of examining and studying the code of ethics that must govern the daily conduct of the lawyer. Such a need arises particularly out of the fact that under recent rulings of the Supreme Court of the United States, every defendant in a criminal case must be accorded an opportunity to be represented by counsel and, if he is unable to retain one, counsel must be appointed for him, unless he knowingly and intelligently waives this right and prefers to represent himself.[6] As a result, more than ever before, many young men find themselves assigned to represent indigent and impecunious defendants in the criminal courts. They should welcome the opportunity to perform this professional service. All too frequently, however, the young men so drafted have not been informed of the code of legal ethics that must govern their conduct. The law schools are too busy to devote sufficient time to giving adequate instruction in this very vital subject. It is appropriate, therefore, to review and summarize the principles that must guide the activities of the advocate. My subject on this occasion is "Ethics of Advocacy," and I shall not endeavor to cover the entire field of legal ethics, which is too broad, but refer only to those aspects that regulate the functions of a lawyer as an advocate in court—as a "barrister" to use the English term—and especially in criminal cases.

A lawyer representing a client in a litigated matter, and specifically appearing in a criminal case either as defense counsel or as a prosecuting attorney, is in a dual position. First, he is an officer of the court and owes a duty and obligation to the court in a very real and practical sense; second, he is counsel and advocate for his client and must represent him with fidelity and with enlightened and well directed zeal. Too many young lawyers, finding themselves defending persons charged with crime, imagine it to be their duty to use every possible effort to secure an acquittal of their clients, even by resort to stratagem and artifice if necessary, aye at times even chicanery and trickery. If this were,

6. Gideon v. Wainwright, 372 U.S. 335 (1963).

in fact, the lawyer's function, the profession would merit all of the castigation and reproach that occasionally is cast in its direction. Such, however, is not the lawyer's mission. His function is, indeed, to represent his client, but his activities are circumscribed and limited by certain principles of right and wrong that we call "ethics," and restricted by his duty as an officer of the court.

Each of the two aspects of the advocate's activities, that is, his status as an officer of the court, and his position as counsel for his client, will be discussed separately. Considering first his duties as an officer of the court, the advocate owes at all times undeviating respect and continuous courtesy toward the court. He must bear in mind that the aim of the judge is to facilitate the attainment of a just result and to do justice: specifically, in a criminal case, that no innocent person should be convicted, nor should any person who may be guilty but whose guilt is not proven beyond a reasonable doubt; and by the same token, that the guilty should be convicted, if his guilt is established by proof beyond a reasonable doubt. It is a great mistake, as well as being unethical, for the advocate to enter into combat or undertake a contest with the court. Honesty and candor, as well as respect and courtesy toward the court and one's adversaries, are fundamental and basic in the deportment of members of the bar. First and foremost, the bar is composed of gentlemen.

It is the duty of the advocate to be completely candid with the court. He must make no misstatements of any kind, nor even exaggerate or distort any facts. For example, in summarizing the contents of a record or some document, he must be objective and impartial and entirely accurate with exactness and precision, in order that the court may completely and unhesitatingly rely on his resume. The lawyer must avoid anything that savors of chicanery or trickery.

The second aspect of the lawyer's activities is his duty of fidelity not only to the court, but also to his client. Let me repeat that in a criminal case, it is not the duty of counsel to endeavor to use every possible means, honorable or dishonorable, to secure an acquittal of his client. On the contrary, his obligation is limited to making sure that his client's rights are properly accorded to him, and that the client is not convicted except in accordance with the law and on proof beyond a reasonable doubt, consisting of legally admissible evidence.

At the outset, counsel must make a thorough investigation of the case, in addition to conducting full conferences with his client. This investigation must include independent examination of the facts and interviews with witnesses, if available. It must also comprise a study of the applicable rules of law. It is the duty of counsel to advance on behalf of his client any defenses that are reasonably debatable and that would be helpful to his client if successful. At the same time, counsel must be in command of the case. While fully conferring with his client and apprising him of what he is doing, counsel must not permit his client to direct him or to manage the case. Counsel must always maintain control and determine the strategy and the tactics that should be pursued. Counsel is an advocate for his client, but not his *alter ego*.

Counsel may not advance specious or absurd arguments or defenses. He is under no obligation to stultify himself for his client, even if his client asks him to do so. A lawyer must always preserve and maintain his own independence and his own moral and intellectual integrity. His duty to his client does not include any obligation to sacrifice his own self respect.

Counsel may not call witnesses who he knows will give perjured testimony. For example, if the defendant desires to prove a false alibi, it is an absolute and inflexible duty of counsel firmly to refuse to do so. If the defendant wishes to take the witness stand with a view to giving false testimony, counsel must decline to call him, and if the defendant insists, counsel may well request the court to grant him leave to withdraw. Naturally, this should be done out of the presence or the hearing of the jury, in order that the defendant may not be prejudiced.

Counsel may not assert his personal belief in his client's innocence, although it is entirely proper for him to argue that the evidence is not sufficient to prove the defendant's guilt beyond a reasonable doubt. It is just as wrong for defense counsel to announce to the jury that in his opinion his client is innocent, as it would be for the prosecuting attorney to proclaim his own opinion to the jury that the defendant is guilty. If a lawyer does so, he practically becomes a witness, without being sworn and without subjecting himself to cross examination. Obviously, such a course is contrary to professional ethics.

In cross-examining witnesses, counsel must exercise a conscientious judgment in determining whether to propound questions that would unduly attack the witness' character or reputation. If the testimony of the witness is perfunctory, or if counsel has no reason to doubt its accuracy, an interrogation that would tend to bring the witness into disrepute is unnecessary and unethical. If his client directs counsel to conduct such an examination, counsel should firmly decline to do so.

An English manual on conduct and etiquette at the bar, which is regarded in the English courts as an authoritative guide, contains the following illuminating reflections on the duty of members of the bar, especially in those many instances in which the defendant admits his guilt to his counsel:

> His [*i.e.*, counsel's] duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.
>
> The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.
>
> If the duty of the advocate is correctly stated above, it follows that the mere fact that a person charged with a crime has in the circum-

> stances above mentioned made . . . a confession to his counsel, is no bar to that advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the advocate from his imperative duty to do all he honourably can do for his client.
>
> But such a confession imposes very strict limitations on the conduct of the defence. An advocate "may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud."
>
> While, therefore, it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence, which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, an advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.
>
> A more difficult question is within what limits, in the case supposed, may an advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go.[7]

The foregoing statement is an accurate summary of the duty of counsel in the contingencies to which it refers.

It is perhaps superfluous to emphasize that the duty of the advocate is confined to representing his client solely in legal proceedings in a dignified, ethical manner. He may not assist his client in suppressing testimony or in hiding evidence or in any other devious way. To do so would be not only a violation of the rules of ethics, but would also constitute a ground for severe professional discipline and at times even a criminal prosecution. Only within the past three months, the United States District Court in Richmond, Virginia, disbarred a lawyer who was counsel for the defendant in a case involving an armed robbery of a bank. The charge against the lawyer was that he took posssession of the stolen money and of a shotgun used in the robbery, in order to make them unavailable to the Federal Bureau of Investigation and to the United States Attorney, at the trial.[8]

At times laymen raise the question whether a lawyer has a moral right to defend a person charged with a crime, if he knows that the accused is guilty. Obviously the answer is in the affirmative. Every defendant in a criminal case

7. Boulton, Guide to Conduct and Etiquette at the Bar of England and Wales 56 (4th ed. 1965).

8. *In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967).

is entitled to be represented by counsel. Under recent decisions of the Supreme Court, the trial tribunal may not proceed unless the defendant is protected in this manner. In fact the court loses jurisdiction under such circumstances.[9] If a lawyer were free to decline to represent a defendant whom he knew or believed to be guilty, many defendants might be unable to find counsel, and the administration of justice would be frustrated and halted. In representing a defendant whom counsel knows to be guilty, however, counsel is rigidly bound and restricted by the limitations that have just been discussed. Even a guilty person has rights, and those rights must be protected by counsel in his behalf. Beyond protecting those rights, counsel may not go.

It is unfortunate that, at times, in the public eye, a lawyer and his client are associated as though they were one person, and the lawyer becomes tarred by his client's misdeeds. Manifestly this thoughtless attitude is unfair to the legal profession, because a lawyer representing the accused, even if the latter is guilty, is performing his professional obligation, provided he stays within the orbit of that duty. At the same time, however, a lawyer must retain control of the case and not permit his client to dictate to him. If the lawyer succumbs to a client's pressure, then some of the reproach and criticism of the legal profession may be well warranted.

It is interesting to note the English attitude in this respect. As is well known, the legal profession in England is divided into two groups—solicitors and barristers. The former may be roughly described as office lawyers. Only barristers may appear as counsel in the High Court of Justice and in the Court of Appeal. In other words, barristers are trial lawyers. A client retains a solicitor to conduct the preliminary investigation and prepare the case for trial. The solicitor retains a barrister to try the case. The latter may not be retained directly by the client. In England the barrister may not decline any case in which it is sought to retain him, provided his fee is tendered to him. No obloquy, therefore, attaches to a barrister who represents an unpopular client or a defendant who is charged with an obnoxious crime. In this country our rules of etiquette on this point are different. A lawyer has a right to decline any cause or refuse to represent any party. Nevertheless, the fact that he accepts a retainer in any case, no matter how disagreeable, should not reflect on him. This is especially so in instances in which counsel is assigned by the court to defend an indigent person.

All too frequently lawyers, in arguing cases in court, or addressing a jury, purport to advance their personal opinions or beliefs. It must be conceded that some excellent lawyers at times thoughtlessly fall into this error. A lawyer should never say, however, that in his opinion the law is so and so, or that he thinks the law is so and so, or that the facts are thus and thus. The better form is to say "I contend" or "I submit." Some comments on this point are found in a lecture delivered in this country by Lord Shawcross, former Attorney General of England:

9. Johnson v. Zerbst, 304 U.S. 458 (1938).

> Counsel in England never says "I think." He says "I submit" or, "I suggest," or, to the Judge or Jury, "You may think." But what Counsel thinks is as a rule irrelevant. To say—"I think my client is innocent" or "I think the correct view of the facts in evidence is this" is to make the personal judgment and reliability of Counsel an issue for the Court.[10]

The advocate represents his client solely before the courts. He is not his client's agent before the public. A lawyer must not confound his duties with those of a publicity agent or a public relations representative. It is no part of his function to create a favorable atmosphere, to vindicate his client in the eyes of the public or to vilify or embarrass the opposition. It is a serious breach of ethics for the advocate to make public statements to the effect that his client is innocent or that he is being unfairly prosecuted or any other similar assertions. By the same token, it is a grave violation for the prosecuting attorney to make a public statement to the effect that the defendant is clearly guilty, or to outline any part of the evidence against him before it is introduced in court. The only effect of such a course is to deprive either the public or the defendant of a fair trial, and to create bias and prejudice in the minds of prospective jurors. Under the English practice, it would be deemed a contempt of court. Cases should not be tried in the newspapers. It is an imperative obligation of lawyers as ministers of justice to prevent such a blot on the administration of justice.

Members of the bar must be ever mindful of their duty to carry on the great traditions of the legal profession, to abide by its precepts, and to act with integrity and dignity, both as officers of the court and as advocates. In doing so, they act as ministers of justice and as members of an ancient and noble calling.

10. Shawcross, Functions and Responsibilities of an Advocate 19 (1958).