

Legal Ethics of the Trial Lawyer— How They Serve the Client

LEONARD M. RING*

The Code of Professional Responsibility of the American Bar Association contains ethical considerations aspirational in character and representative of the objectives toward which every member of the profession should strive. With respect to a lawyer's duty, Canon 7 provides:

The 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, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.¹

I fear that for many lawyers, such a view of a lawyer's duty with its emphasis on *zealous* pursuit of any lawful objective, subject solely to a cautionary reference to Disciplinary Rules and other enforceable regulations, is a sufficiently "aspirational" objective.²

* President, The Association of Trial Lawyers of America.

1. ABA CANONS OF PROFESSIONAL ETHICS No. 7.

2. See *Legal Ethics and Professionalism*, 79 YALE L.J. 1179, 1187 (1970): In spite of the aura with which the ABA has attempted to surround it, the

However, for me, and I believe for most trial lawyers, such a statement of a lawyer's duty is a dangerously narrow one. A trial lawyer who adopts it will ill serve those whom he represents in court.

I much prefer the view of an eminent British barrister, Hugh MacMillan, K.C., later a Judge of his nation's highest court. He described a barrister's duties in these terms:

The code of honour of the Bar is at once its most cherished possession and the most valued safeguard of the public. In the discharge of his offices the advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to the State, and a duty to himself. To maintain a perfect poise amidst these various and sometimes conflicting claims is no easy feat. Transgression of the honorable obligations which these duties impose upon the advocate is not like making a mere mistake in business. It involves infringement of his moral duty. It is a matter of conscience. And his offense cannot be hid, for all his work is done in the presence of his brethren and the public. His conduct is always exposed to the searching if salutary scrutiny of many critics.³

In this country, we have never adopted the formal, rigid British distinction between barristers and solicitors. However, through much of the United States a distinct category of legal specialists has evolved—the trial lawyers. They may not meet and dine amidst the medieval splendor of Gray's Inn or the Inner Temple. However, they do have distinguished professional associations, such as the Association of Trial Lawyers of America, the American College of Trial Lawyers, the International Academy of Trial Lawyers and the International Society of Barristers. The latter three limit their membership to a very small percentage of the trial bar, and admission is by invitation only. Numerous parochial associations also exist in every state or big metropolitan center where those who pursue the calling of advocacy congregate and exchange information concerning the latest decisions and trial techniques developed by their counterparts at the bar.

More important, in most communities these specialists in litigation are known to one another, in person, or by reputation. They encounter each other in court, day in and day out, year in and year out. And they are known to the judges, both at the trial and the

Code of Professional Responsibility is undeniably of political and economic, rather than spiritual, derivation.

3. MACMILLAN, *THE ETHICS OF ADVOCACY* 16 (1916). (Amer. Coll. of Trial Lawyers, ed. 1972).

appellate level. As a consequence, they are subject to the same type of scrutiny by their peers as has existed for centuries at the bar in England—in Lord MacMillan's phrase, "the searching if salutary scrutiny of many critics."

The trial lawyer, especially, must recognize that the entire basis of legal intercourse is ethical and moral. Even viewed solely from the standpoint of those whom he represents, the attorney who enjoys a reputation for high ethical standards receives favorable treatment from the court which inures to the benefit of the client. First of all, the court knows that whatever a trial lawyer says or does, he does so with the sincerity of his convictions, and also because he believes that it is the moral or proper thing to be done. The court is bound to attach greater weight to the statements and actions of a lawyer whose ethical standards are of the highest than to the conduct of one whose motives are often in question.

Over a period of time, a trial lawyer will often establish a reputation with both judges and fellow counsel as an expert in certain substantive or procedural areas of the law. If known for his ethical standards and high standards of probity, his summary of existing law (or the weight of authority) will often be accepted both by the court and by opposing counsel, thereby expediting the trial of the cause and frequently a favorable disposition of the matter.

Conversely, if a lawyer in such a position abuses his reputation, exaggerating the extent to which certain authorities favor his position, he may quickly find that for the future almost the exact opposite will be the case—that any statement he makes as to the state of law, even in an area once considered as his field of expertise, is viewed with suspicion not only by opposing counsel, but (much more seriously from his client's point of view) by the court. Most judges dislike to be reversed, and woe to the trial counsel, and to his future clients, who is believed to have deliberately led a court into the commission of reversible error.

As to questions of fact, the representation by a respected trial lawyer that such and such is or is not a fact, or can be proven or disproven by the testimony of a certain person, will be accepted. This saves both court and counsel considerable time. However, let this privilege be abused but once, and it is gone forever.

Similarly, the smooth and expeditious functioning of our court system depends greatly on the cooperation of opposing trial counsel, not only during the actual trial of a cause, but also during the often lengthy pre-trial period of preparation and discovery. In this situation, reputation of counsel for integrity and high ethical standards

is of the greatest importance and practical value to his client. A person so unfortunate as to be represented by an attorney believed to have been guilty of sharp practice in the past, or whose memory as to commitments has proved to be hazy, will often find himself confronted with what will seem to him inexplicable obstacles to the establishment of his claims or legal positions.

For the edification of clients, many lawyers post on the wall of their office a quotation from Abraham Lincoln: "A lawyer's time and advice are his stock in trade." A trial lawyer must also at all times keep before his mind's eye the salutary admonition: A trial lawyer's candor and integrity are his stock in trade.

This is particularly true with regard to a trial lawyer's relationship with the jury. Juries, regardless of the jurors' several stations in life, have a sixth sense and are able to see through a lawyer. This sixth sense tells them whether the attorney is doing something right as distinguished from something wrong, and which the lawyer *knows* to be wrong. And we trial lawyers have a tendency, however extensive our experience may be, to give ourselves away by our demeanor whenever we transgress the standards of ethical and proper trial conduct. Juries do not have to be pious to sense right from wrong. Unethical conduct is equally resented by the jury as by the court and opposing counsel, and it subconsciously affects the judgment of the jury—the weight it gives to disputed testimony and the inferences it chooses to draw from the evidence.

Regrettably, there always seem to be trial lawyers in a community who take pride in various trial techniques of a questionable nature. Dropping the law books just in time to interrupt the opponent's crucial cross-examination and erasing the diagram that the other side's witness laboriously drew on the blackboard are some of the disruptive stunts which come to mind.⁴ However, it has been my experience that such tricks are self-defeating—they prejudice the jury against the lawyer who engages in them, and consequently his client. Juries also pay close attention to the trial counsel's objections and the rulings of the court thereon. These matters do not go unnoticed by the jury and they are likely to regard

4. Waltz, *Some Thoughts on the Legal Profession's Public Image*, 23 DE-PAUL L. REV. 651, 653-54 (1974).

unfavorably those who in their opinion fail to play the game by the rules of "fair play."

As a rule, juries do not take kindly to attempts by a trial lawyer to inject prejudice or to play up to the minority or ethnic composition of the jury. Such appeals usually have a reverse effect from that which was intended. Jurors, even though harboring some prejudice, do not want to lay bare their human frailties by submitting to appeals of that type. The unethical lawyer here again subjects his client to the acrimony that the jury is bound to express (by its verdict) against the lawyer who has, in the course of the trial appeared to take measures and resorted to tactics which, in the jury's view, were inconsistent with high equitable and moral principles. Juries are not taken in by insincerity. It is such practices that have given the trial bar a stigma that has endured far too long.

Perhaps the classic expression of this deep rooted suspicion regarding the legal profession, and particularly trial lawyers, was that of Dr. Samuel Johnson:

Boswell: 'But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?'

Johnson: 'Why, no, Sir. Everybody knows you are paid for affecting warmth for your client, and it is properly no dissimulation: the moment you come from the Bar you resume your usual behavior. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his feet.'⁵

Needless to say, a trial lawyer who practices the artifices that Dr. Johnson describes serves neither his profession nor his clients. As I have previously noted, juries have a sixth sense that instinctively signals unfair and unethical conduct practiced by counsel. By and large, what is fair and equitable conduct is really that of common sense and good judgment. It is as basic as the Ten Commandments, even though seldom spoken of in such terms.

In conclusion, a comment is in order regarding the disrepute into which the legal professional has fallen as a result of scandals involving high public officials who were, or still are, members of the legal profession. The late Chief Justice Earl Warren has commented with a discernible sense of sadness on the number of lawyers involved in the complex web of scandalous conduct now compendi-

5. MACMILLAN, *supra* note 3, at 15.

ously known as the Watergate Affair.⁶ However, as a trial lawyer, I would point out that most of the lawyers involved in that group of scandals were not trial lawyers—indeed most of them appear to have been rarely, if ever, in court until the criminal proceedings in which they were parties defendant.

Nonetheless, trial lawyers, in common with the profession generally, must now more than ever take care to conduct themselves so as to restore confidence in the legal profession and raise the members of the trial bar to the popular respect enjoyed by their English counterparts, the barristers. This is an essential goal if the rule of law, so basic to our constitutional system and to our liberties, is to be preserved.

6. Warren, *Law, Lawyers and Ethics: A Challenge to the Profession*, 23 DEPAUL L. REV. 633, 635-37 (1974).