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The Ethics of Trial Advocacy:

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PREFACE

Unlike physicians, politicians or government employees, ethical conduct by a trial lawyer is not simply a matter of personal opinion. The court of last resort sets the underlying principles upon which a trial lawyer's conduct is judged. Ethicists, disciplinary committees, and trial judges give advice and make decisions, but, the final result comes from the Supreme Court.

"Ethics" is a word whose derivation gives meaning to its importance in what trial lawyers do and how they are viewed by society. It originally meant "character." Character was always distinguished from intellect. Trial lawyers who have no character or who are unprincipled are perceived by society as unethical.

Ethics, as a daily part of trial practice, is the sum of the aggregate of the rules and standards by which disputes are resolved in the courtroom. Simple adherence to the rules of pleading, procedure and evidence will not suffice to establish one as an ethical trial lawyer. Character and principled action are equally important.

The "practice" of ethical trial lawyering is found in the professional associations, the trial colleges, the litigation firms, and the example set by the best of the trial lawyers. When and how the practice became established may not be known, nor is it material that it should be. It is sufficient that it exists.

It is important to distinguish between moral standards, i.e. "right and wrong" and ethical standards. The question of moral right and wrong has always been a debatable one and will doubtless continue to be so. To do something in court in an ethical way is not the same as doing it is a way that theologians would adjudge morally "right." Morality is obligatory on conscience, while ethical conduct is adherence to the letter and the spirit of the rules and standards established under the law.

Our bar and our judicial system is largely patterned after the English method of advocacy. But in medieval times the French Advocate, unlike his brother in England, was not left entirely to his own discretion in matters of professional morality.

The French Advocate was regulated by frequent royal edicts and conformity was enforced by disbarment. These edicts eventually were shaped into a code. [See, Appendix B. Chivalry of Advocacy Warvelle's Essays in Legal Ethics, Fred B. Rothman & Co. 19021

The French Code remained in force until the Revolution of 1790, when the Order of Advocates, along with nearly all other institutions was abolished. Among the prohibitions and restraints to which the 17th Century French lawyer was subjected are the following:

1. He was not to undertake just and unjust causes alike, without distinction; nor maintain such as he undertook with trickery, fallacies, and misquotations of authorities.

2. He was not in his pleading to indulge in abuse of the opposite party or his counsel.

3. He was not to compromise the interests of his clients by absence from court when the cause in which he was retained was called on.

4. He was not to violate the respect due to the Court, by either improper expressions or unbecoming gestures.

5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

7. He was not to lead a dissipated life, or one contrary to the modesty and gravity of his calling.

8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed.

These eight French rules of ethical conduct, along with most French lawyers, were severed *ala le guillotine* two hundred years ago when anarchy became law.

Litigation has become a recognized "right" of civil society. It exerts a powerful and, in some respects, dominating influence. When conducted in an honorable way, litigation is accepted and applauded. When conducted in a way perceived as solely for the purpose of "getting off" or "getting rich" it is a matter for public alarm.

Litigation affects every branch and level of society. An incredible magnitude of interests are placed in the hands of trial lawyers. Enormous responsibilities are assumed by trial lawyers. Life threatening and life saving confidences are entrusted to trial lawyers. Thus, there is demanded of them the highest qualities of loyalty, competence and honesty.

It is not an overstatement to say that the purity and efficiency of judicial administration depends as much on the character and demeanor of trial lawyers as upon the learning, impartiality and respect of trial judges.

Trial juries traditionally respect judges and suspect trial lawyers, but few would disagree that it is the trial lawyer who persuades the jury to come to whatever conclusion is made in any given dispute. For that reason alone, "ethics" in trial lawyering is at least as important as forensic skill.

If we do not adhere to our Code, we will be thought of as unprincipled and lacking in character. What befell all the lawyers in France in 1790 may be in store for us if we continue to "exhibit a sordid

avidity of gain, by putting too high a price upon our services."

ETHICAL TRIAL ADVOCACY IN GENERAL

Trials are conducted in courts. Courts are institutions with central importance in a democratic society. The population of the court is made up of judges, clerks, bailiffs, court reporters, jurors, witnesses, opposing parties, law enforcement officers, journalists, observers and lawyers. Deference is due the presiding judge; appropriate politeness is shown to clerks and other court staff and a respectful attitude is owed to witnesses and opponents alike.

The ethical trial lawyer need not sacrifice courtesy for firmness. Nor is he or she required to leave good manners behind the bar. All conduct in court by a lawyer is controlled by the ethical standards of trying cases.

The preamble to the Arizona Rules of Professional Conduct provides the most fundamental norm for trial lawyers: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Unfortunately too many lawyers remember only the "zealous" part and forget the qualifying language: "under the rules of the adversary system."

With respect to ethical trial conduct, the most important rules of the adversary system are:

Rule 41 of the Rules of the Arizona Supreme Court (Duties and Obligations of Members)

Ethical Rule 1.6 (Client Confidentiality)

Ethical Rule 3.1 (Meritorious Claims and Contentions)

Ethical Rule 3.3 (Candor Toward the Tribunal)

Ethical Rule 3.4 (Fairness to Opposing Party and Counsel)

Ethical Rule 3.5 (Impartiality and Decorum of the Tribunal)

Ethical Rule 3.6 (Trial Publicity)

Ethical Rule 3.8 (Special Responsibilities of a Prosecutor)

Ethical Rule 4.1 (Truthfulness in Statements to Others)

Ethical Rule 4.4 (Respect for Rights of Third Persons)

BALANCING ROLES: COUNSELOR & ADVOCATE

On almost every issue of ethical trial conduct, the ethical trial lawyer seeks a balance between the twin roles of "counselor" and "trial advocate." These two rules must be read in context with one another. Both rules are subservient to the specific mandates set forth in Rule 41 of the Arizona Supreme Court Rules. Rule 41 requires trial lawyers to give due respect to courts of justice, maintain only legal and just causes, refrain from misleading judges, maintain client confidentiality and abstain from all "offensive personality."

The phrase "offensive personality" was the subject of a recent Ninth Circuit opinion. In *United States v. Wunch, 1995 U.S. App. LEXIS 9679 (April 28, 1995*), a male attorney was sanctioned by a district judge for displaying gender bias in a letter sent to his opposing counsel, a female attorney. The sanction was based, in part, on California's Business and Professions Code which reads, in relevant part: "It is the duty of an attorney... to abstain from all offensive personality."

The court held that the sanction could not be based on the California Code language as it was "unconstitutionally vague." Constitutional or not, offensive personalities ought to avoid appearances in courtrooms. They make everyone's job harder and contribute much to the lawyer-bashing frenzy so popular in this country.

The two Arizona Supreme Court cases which best illustrate the necessary balancing of the trial lawyer's obligation to the court with his or her duty to the client are *Hitch v. Pima County Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985)* and *State v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984).*

In *Hitch*, the court addressed the fundamental issue of conflict between a criminal defense attorney's obligation to the client and to the court. The court cited the Preamble to the Rules of Professional Conduct for the proposition that a trial lawyer is both [sic) "a representative of [his] client, an officer of the legal system and a public citizen having a special responsibility for the quality of justice."

As a representative of the client, the trial lawyer must act as a zealous advocate, demonstrate loyalty to the client, give the client the best legal advice possible within the bounds of the law, and maintain client confidentiality. The court noted that "balanced against the attorney's obligation to his client is the attorney's obligation as an officer of the court which requires him [to aid] in determining the truth wherever possible."

Hitch was a special action brought by the defendant from a trial court order compelling his attorney to deliver potentially inculpatory physical evidence to the state. The trial court also required that the lawyer withdraw from the representation. The physical evidence was a wrist watch allegedly in the possession of the victim shortly before his death. The wrist watch came into the possession of the defense lawyer involved in Hitch's defense on a charge of first degree murder.

The issue was first submitted to the Ethics Committee of the Arizona State Bar, which

informed the lawyer that he had a legal obligation to turn the watch over to the state. The Ethics Committee also noted that he might be compelled to testify as to the original location and source of the evidence. The defense lawyer followed the advice of the Committee and informed the trial judge of the Committee's decision. The trial judge ordered that the watch be turned over to the state and that the attorney withdraw from the case.

The Arizona Supreme Court held that: (1) if the attorney believed that evidence was likely to be destroyed, the attorney was required to turn the evidence over to the prosecution, and (2) if defense counsel and the prosecutor could stipulate to the chain of possession with no reference to the fact that the defendant's attorney turned the matter over to the prosecution there was no need for the attorney to withdraw.

In its resolution of the balancing of obligations between court and client, the *Hitch* court reasoned:

> "We agree with defendant that any requirement that the defendant's attorney turn over to the prosecutor physical evidence which may aid in the conviction of the defendant may harm the attorney-client relationship. We do not believe, however, that this reason, by itself, is sufficient to avoid disclosure. We have stated that the "duty of an attorney to a client ... is subordinate to his responsibility for the due and proper administration of justice. [citing State v. Krutchen, 101 Ariz. 186, 417 P.2d 510] In case of conflict, the former must yield to the latter."

In *State v. Lee*, the client demanded that two witnesses be called to the stand despite the attorney's professional judgment, based on his personal investigation and interviews with the witnesses, that they would present perjurious testimony. Although the lawyer tried to convince his client not to call the witnesses, he finally acceded to the client's demands.

After placing the witnesses on the stand and securing a narrative account of the testimony, counsel told the court in chambers that he believed the two witnesses had perjured themselves. Counsel waived closing argument in the case and the defendant was convicted by the jury. The primary question on appeal was whether trial counsel's actions constituted ineffective assistance of counsel.

The Arizona Supreme Court held that trial counsel's conduct in calling the witnesses and waiving closing argument was less than minimally competent representation and thus could provide a basis for reversal, new trial, or resentencing by the trial court.

The court observed that trial counsel had "wrestled" between his ethical duty not to suborn perjury and his client's "right" to present a defense on his own behalf. The court recognized that trial counsel had perceived the ethical dilemma and noted that no previous Arizona authority existed to offer counsel guidance. The court also observed that the scholarly writing in this area supported the general duty not to use false testimony of persons other than the defendant. The court

reasoned that in succumbing to the client's demands, "counsel did not fulfill his duty to make tactical, strategic decisions and therefore fell below minimal standards."

With respect to the waiver of closing argument, the Court said:

> "We need not determine whether trial counsel's decision to waive closing argument was a tactical one or one dictated by conscience. In either case, the decision was unreasonable as it was below the threshold of what minimally competent defense counsel would have done under the circumstances. If trial counsel believed he was ethically precluded from making a closing argument because he had called two perjurious witnesses whose testimonies were in accord with the argument he planned to make, he was simply wrong. Counsel must not suborn perjury by urging a jury to believe perjurious testimony, [citations omitted] however counsel does not violate any ethical norm by urging a defense so long as he or she relies on the sound, non perjurious evidence introduced at trial and does not rely on the perjurious testimony.

One of the more significant opinions of the Arizona Ethics Committee on the ethical role of trial lawyers is Opinion 80-2:

> "At a time when the legal profession seems to be the object of increasingly frequent accusations of incompetence and lack of integrity, it is critically important that lawyers remember that justice rather than personal victory is the goal of our legal system. But it is not sufficiently reassuring to the public that we have satisfied ourselves that our conduct has been proper, reasonable and fair. For we are judged by those we serve not by how things appear to us, but rather how things appear to others. Although it is easy for the actions of lawyers and judges to be misconstrued, it is no excuse that the significance of our perfectly visible actions have been misunderstood by someone uniformed as to the true motives underling those actions. The integrity of the legal profession is judged in part -- and rightly so -- on the basis of the publicly visible actions and statements of lawyers and judges, and not private events or intentions or thoughts."

THE "COURT FIRST, CLIENT SECOND" DOCTRINE

The "court first, client second" doctrine was first articulated in Nebraska in 1937 as follows:

> "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court." *In re Integration of Nebraska State Bar Association, 275 N.W. 265 (1937).*

Chief Justice Burger (then Circuit Judge Burger) eloquently described the "court first, client second" doctrine in *Johnson v. United States, 360 F.2d 844 (D.C Cir. 1966)(per curiam)*:

> "A lawyer complying with the canons and traditions of the bar advocates but does not identify with his client. The alter ego or "mouthpiece" school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, i.e., the lawyer as an extension of the accused himself with a community of interest, motivation and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected by the legal profession and find no acceptance among honorable members of the bar."

The Supreme Court of Arizona has adopted the "court first, client second" doctrine:

> "The duty of an attorney to a client, whether in a private or criminal proceeding, is subordinate to his responsibility for the due and prober administration of justice. In case of conflict, the former must yield to the latter." *State v. Krutchen, 101 Ariz. 186, 417 P.2d 510 (1966).*

Complicating the doctrine of "court first, client second" is the well settled notion that trial lawyers have fewer first amendment rights than the ordinary citizen. For example, in *In re Sawyer,* the United States Supreme Court explained that "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." [360 U.S. 622 (1959). Nevertheless, free speech is a right which belongs to trial lawyers and to clients speaking through trial lawyers and has a strong presence in the courtroom.