

THE ETHICAL  
TRIAL LAWYER

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**PREFACE**

Unlike physicians, politicians, or government employees, the ethics of trial lawyers are not matters of personal opinion. In manifestations of ethical conduct, the court of last resort sets the underlying principles upon which a trial lawyer's conduct is judged. Thus, it is the opinion of that court that counts. My opinion might occasionally be helpful, but it is most assuredly not controlling.

Wherever possible, I have offered a case citation or bar committee authority in support of a statement of professional conduct. Where I was unable to find precedent, I have tried to state a precept of conduct which seems to have received the largest amount of adherence by respected trial lawyers. On occasion, I have offered my own opinion where there did not seem to be a clear choice of judicial authority or widespread acceptance in the trial bar.

This work turned out to be longer than expected, more wordy than necessary, and, perhaps, presumptuous. Having said that, I sincerely hope that the rare lawyer who reads the whole thing, will find it helpful. It is offered as a guide to one's own conduct, not as a resource manual for criticizing one's opponent.

“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, or that which relates to character as distinguished from intellect.<sup>1</sup> Trial lawyers who have no character or who are perceived by society as unprincipled are without ethics. They are unlikely to read this except in the pursuit of advantage over the opposing side or in defense of a sanction by a trial judge. 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 “law” of ethics consists of rules written by the court having the power to do so within a given jurisdiction. These rules do not aim at perfecting the character of trial lawyers. The rules do not even attempt to stress the importance of acting in a principled way. At best, the rules are minimal standards of conduct designed to produce a basic level of honesty, loyalty, and fairness in litigation. The ethical trial lawyer has always aspired to a higher level of conduct and is not satisfied with simple adherence to the letter of the rule.

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<sup>1</sup>See SIDGWICK'S HISTORY OF ETHICS, 1.

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.

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 “walking out scot-free,” it is a matter for public alarm. Litigation affects all 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 lifesaving 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 the trial judge. 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 to society as forensic skill.

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