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The Ethics of Advocacy

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I propose to address myself to a consideration of the conduct of the lawyers during the trial, and especially during a trial by jury, considering nothing which has not a distinctly ethical basis, and yet speaking of some things whose ethical sanction is not always borne in mind.

It is not my purpose to discuss the entire course of the trial, or all questions of conduct which present themselves to the trial lawyer. I cannot even claim the merit of novelty for what I am about to say; but it is my impression that these topics I am approaching have received attention more frequently from the standpoint of successful advocacy than from the standpoint of ethical advocacy. Yet there is little difference in the results. It will be found that in the long run at least correct advocacy becomes successful advocacy.

Most deviations from the rules of propriety are the result of too great zeal for success in the particular cause, or, if you prefer, too great zeal in support of the client’s interest. Great mischief has been done by the frequent quotation of a passage in Lord Brougham’s speech in Queen Caroline’s case. This passage standing alone, reads thus:

"An advocate, by the sacred duty which he owes to his client, knows, in the discharge of that office, but one person in the world—that client and none other. To save that client by all expedient means, to protect that client at all hazards and cost to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon the other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on, reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client’s protection."

It has frequently been pointed out that Lord Brougham was not speaking as broadly as the excerpt indicates, but that this characteristic outburst of eloquence was simply a threat to establish the marriage of George IV with Mrs. Fitzherbert.

It is entirely true that no selfish considerations should deter the advocate from performing his full duty toward his client. It is true that toward his client he owes his most direct and important duty. Having accepted a retainer, he is bound in honor as well as in law to see that his client’s case
is presented in its strongest and most favorable aspect. The client is entitled to have the law of his case determined finally by the court, and, in a law action, the facts by a jury. The advocate has no right, upon doubtful questions of fact or of law, to usurp the vocations of jury and judge, and finally and irrevocably determine such questions against his client, by refusing to submit them for consideration.

On the other hand, the lawyer must never forget that he is an officer of the court, and in that relation has as grave a public responsibility as the judge himself. He is trying the case with the object of winning it, and not of losing it, but of winning it in accordance with the facts and rules of law, and not by perverting facts or by distorting the law. He is not the servant of his client, employed to win if he can by any expedient, but the servant of the law, retained by the client to secure the lawful adjustment of his rights.

The trial of an issue either of fact or of law is essentially a contest, and I have scant sympathy with those doctrinaires who would attempt to eliminate the contentious element from litigation. Litigation is in its very nature contentious, and must be carried on by contentious methods. This means that in its very nature the trial of an action must tend to arouse what is known as "fighting blood," and without fighting blood to be aroused no advocate can hope for success or hope to do his client justice. But in all contests, from war to marbles, there are fair methods and foul methods, and the advocate must be ever on guard lest the excitement of the fray lead him beyond the domain of the fair. I suppose no lawyer can hope on all occasions to confine himself within the bounds of strict propriety. Those of us who have had any considerable experience in trials, I am sure, have lingering in our memories various courtroom scenes for which we were responsible, which we regret and would like to forget. The best safeguard I know against such lapses is in moments of temptation and excitement to remind yourself that you are in a court of justice, that you are a court of justice, and that you are an officer of the law.

You will find, as you become familiar with the courts, that there are certain conventions, some general and some local. You will find that in some courts it is customary for the bar to rise as the judges enters, and to remain standing until he takes his seat. You will find that in other courts no such custom prevails. If you are used to the custom, I believe you will experience something of a shock when you witness the opening of court where this trifling tribute of respect to the judicial office is not shown. By rule of court in this state, counsel is required to stand while addressing the court or examining a witness. No such rule should be necessary. Some lawyers snap out objections to testimony without rising from their chairs and with an abruptness that savors of rudeness. With a quick witness objections must be promptly interposed; but many advocates manage to interpose them with sufficient promptness and without any apparent violation of the rules of courtesy or good manners.

You will not infrequently observe lawyers within the bar, and not engaged in the case trial, conferring together—perhaps to the disturbance of the proceedings, and certainly in disregard of the dignity of the court. The lawyer should bring his manners into the courtroom. If he possesses none, he should borrow a set for courtroom use.

Sometimes, when motions are on hearing, there is a scramble about the judge's desk not altogether unsuggestive of a football scrimmage. The
court attendants should take care of that, and the judge should see that they do so. What is less readily handled is the habit of some lawyers who seem to take literally the phrase “to get the ear of the court,” and whose applications are made in whispers. Such lawyers should be taught to hand up their papers in silence or to stand back and talk like men and lawyers.

Such things relate to courtroom etiquette, but they have their ethical aspect. A respectful and dignified demeanor in court accompanies and evidences respect for the law and for its ministers. Can it be expected that jurors, witnesses, litigants, or casual spectators will feel a due respect for the law or its officers if the lawyers themselves fail in manifestations of respect. In these days, when the demagogues have discovered a certain popularity in reverting to the tactics of Jack Cade, it is especially important that lawyers should avoid, even in their slightest acts, all things which may tend to encourage disrespect for the courts, and therefore for the law itself.

The first and third of the Canons of Ethics deal specially with the relations between the lawyer and the judge. The first enjoins upon the lawyer a respectful attitude toward the court, “not for the sake of, temporary incumbent of the judicial office, but for the maintenance of its supreme importance.” The third warns the lawyer against “marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties.” It is not that there is serious danger of a judge being cajoled by such cheap flattery into extending undue favors to the fawning lawyer, but because such attentions place the judge in a false position, and subject both him and the lawyer to suspicion.

In court an advocate must be always respectful, but never sycophantic or servile. He must sustain, not only the dignity of the court, but the dignity of the advocate. The judge rests under the same duty. History affords, it is true, occasional instances of arbitrary, overbearing, or insolent judges. You may be called upon to appear before men of that type, but judicial bad manners must not tempt you into behavior of a retaliatory character. A dignified and respectful assertion of your own rights is the only proper rebuke. Fortunately the instances are rare when the lawyer is called upon to withstand this supreme test of his temper.

Courtesy toward one’s opponent is not so nearly universal as courtesy toward the court. Your opponent may assume a contemptuous attitude. He may provoke you by ridicule or by sneers. He may sometimes be openly and grossly insolent. It is hard under these circumstances to deal with him with good-natured courtesy. It is true he does not deserve it. But again your duty to the court and to the law demands that you observe your own good manners. It may be added that your duty to your client lies in the same direction. The jury has no sympathy with a rowdy. You are under no obligation to prevent its sympathy from drifting your way by convincing the jury that there are rowdies on both sides of the counsel table. If your opponent assumes untenable positions and advances absurd arguments, their character in that respect will impress itself upon the court or the jury or you can at the proper time demonstrate their character. The method of doing so is not by open manifestations of ridicule or contempt.

Serjeant Harris, Mr. Wellman, and I believe all others who have undertaken to instruct us in the art of advocacy, have dwelt on the general policy of treating witnesses with frankness, respect, and amiability. It is not only good policy, but it is your moral duty to do so. You will naturally be well disposed toward your own witnesses, at least unless they prove stupid, or
surprise you by testifying otherwise than as they have led you to believe. Still one's own witness sometimes tries one's patience. With your opponent's witnesses the trial is greater. Indeed, it seems to be the uniform method of some cross-examiners to proceed upon the theory that an adverse witness is necessarily a perjurer, to be bullied and threatened into self-contradictions. I again leave the policy of this system to Mr. Wellman, whose books should be read by every student.

But again policy and duty go hand in hand. Sometimes a witness commits deliberate out-and-out perjury. If you are sure the witness has done so, you owe him no duty of considerateness. Few witnesses, on the other hand, tell the complete and exact truth. They have not observed accurately. Their inferences, based upon what they did observe, have not always been correct. Their memory has not been perfect. For these reasons, their testimony may depart very far from what you believe to be the truth. And yet the witnesses have been honest, and they are entitled to be treated as honest men. You must remember that the witness is at a disadvantage. You have the sole power of directing the line of inquiry and determining its scope. He may do nothing but answer the question you put. You should confine yourself to putting questions, and to putting them fairly. In most cases he is not there because he wants to be there. Often he is not interested in the result. Presumably he is in attendance in furtherance of justice, and you have no right to treat him as if he were engaged in a conscious and deliberate effort to pervert justice, unless his own language and conduct have demonstrated this to be the fact.

I have spoken of putting questions fairly. You have no right skillfully to design to elicit from a witness—especially one unaccustomed to nice diction—answers which are literally false. You have no right to devise a question, and insist upon an answer which leaves the witness in a false position. You have doubtless heard of the advocate who said to a hostile witness, "Have you left off beating your wife?" and tried to compel him to answer it "Yes" or "No". The witness is entitled to fair treatment, not only during the examination, but in the argument. You must not put into his mouth words he did not utter, and you must not give to words he did utter a construction which you know he did not intend.

In thus dealing with the examination of witnesses, I have not meant to imply that you must show your hand before asking a question. In cross-examination it is frequently of great importance that the witness should not divine your object. You have an entire right to test his memory—to test his powers of observation and his opportunities for observation. You have an equal right to lead him into the disclosure of prejudices or interests which will affect his credibility. You have no right to undertake to terrify him into contradictions by shouting at him. You have no right to lead him into untruthful statements by confusing him. You have no right to send him away from the stand humiliated and conscious of having failed in accuracy, when he has in fact been trying to tell the truth. Aside from the rights of the witness in such matters, it must be remembered that a witness, leaving the court after having been browbeaten, bullied, and ridiculed, is likely to cherish resentment against lawyers in general, and that such resentment extends itself to courts and to the law.

What should be the advocate's attitude toward jurors? The twenty-third of the Canons of Ethics must be observed:
"All attempts to curry favor with jurors by fawning, flattery, or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause."

The caution against conversing privately with jurors about the case is obvious. The direct legal consequences of such conduct are usually a sufficient deterrent. Besides these, the suspicion of such conduct is enough in itself to ground an even graver suspicion, that of jury-fixing. Unfortunately there are lawyers who would not think of approaching a juror, who yet approach, or endeavor to approach, the judge. There are even those who do not seem to realize that there is any impropriety in an attempt at private conversation with the judges concerning a pending case. The canon referred to is chiefly aimed at subtler methods than private conversation with judge or jury. It refers to undue solicitation for the convenience or comfort of jurors. The comfort of the jury should be kept in mind. The juror's lot is not always a happy one. He may during the trial be corralled with his fellows in a hotel, and the hotel is often selected with more regard to economy than comfort. The jurors are sometimes marched back and forth between courtroom and hotel in such a manner as to suggest a jail rather than the hotel as one end of the route. Possibly such things are necessary; possibly they are not; fortunately we are not called upon now to decide.

The court should, and counsel may presume that it will, see to it that the physical comfort of jurors is as well looked after as is practicable. Judges and lawyers accustomed to long sessions of court sometimes forget that as a rule the task of listening hour after hour with close attention to testimony and argument is to most of the jurors, novel, and to all of them much more trying than to the more active and more experienced participants in the trial. Justice, as well as jurors, is likely to suffer if the sessions are unreasonably protracted, although the judge may be the recipient of thoughtless applause for vigorously pressing proceedings in such manner. I do not believe that counsel should be deemed guilty of any discourtesy toward the court if, when he observes that jurors are beginning to grow weary, he suggests a recess or adjournment. But no such suggestion should be made in the hearing of the jury.

The rather coarse flattery of jurymen by repeatedly referring to them as "intelligent and honest jurors" has largely gone into the waste basket of the advocate along with the perfervid oratory whereby Magna Charta, the Declaration of Independence, and the blood of our ancestors were invoked to determine the title to a heifer calf. A more professional and a more effective method is to assume the honesty and the intelligence of the jurors without telling them that you do so. Certain pernicious efforts to accomplish the same general object are, however, still observed. A turn of the head toward the jury, with a significant smile, as a witness answers a question or the court rules on an objection may have its effect with some men; but these and similar tricks should be carefully avoided, more especially so because they are difficult for the court to control. A smile or a nod of the head may be a gross contempt of court, but it is hard to put it on record.

While the canon I have quoted should be strictly observed, it should
also be remembered that jurors are entitled to courteous treatment and to fair treatment, and that this is true before they are sworn, as well as afterwards. Advocates are not prodigal with their peremptory challenges, and there is strong motive for disclosing, if possible, a cause for challenge in the case of a juror who seems undesirable. No one can quarrel with the asking of reasonable questions for the purpose of eliciting ground of challenge to the cause or to the favor. Here, however, is presented the shyster's opportunity of asking questions ostensibly to disclose bias or to test intelligence, but in fact intended to confuse the juror. Again, the best jurors are likely not to be overanxious to serve. It is astonishing on a murder trial what a large portion of the community seems to be violently opposed to capital punishment. It is very easy to dispose of jurors who ought to be acceptable by a little encouragement and a little leading in certain directions.

In this connection it may be well to utter a word of warning against the pernicious practice of endeavoring to try the case while impaneling the jury. The latitude necessarily permitted in the preliminary examination of jurors opens the door to advancing suggestions which may have a potent influence on the verdict, but relating none the less to matters which cannot be offered in evidence and which should not be considered in determining the merits. A single illustration will suffice:

There has arisen within comparatively recent years a group of insurance companies, commonly called casualty companies, whose business it is to insure against liability for damages for personal injuries. Employers of labor, especially in the more hazardous industries, quite generally avail themselves of the indemnity offered by these companies. It was soon perceived that juries would be more ready to give large verdicts for the plaintiff in personal injury cases if they knew that the loss would fall, not on a local industry, but on an insurance company. An attempt was made in New York to place that fact of insurance directly before the jury by evidence, on the theory that the defendant, if insured, was less likely to use due care. Such evidence was held inadmissible, and counsel quite severely rebuked for offering it. Cossmamon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854. Thereupon the device was resorted to of inquiring of prospective jurors whether they were stockholders or interested in any casualty company, or in a particular casualty company. This was supported on the theory that it tended to show interest adverse to the plaintiff in that class of cases, and therefore was ground of challenge to the favor. * Rinklin v. Acker, 125 App. Div. 244, 109 N. Y. Supp. 125; Hoyt v. Davis Manufacturing Co., 112 App. Div. 755, 98 N. Y. Supp. 1031.

In spite of several cases of this character, the point seemed to have been considered somewhat doubtful, and therefore the Legislature in 1911, by an amendment to section 1180 of the Code of Civil Procedure, expressly provided that such facts might be shown as ground of challenge to the favor.

There, therefore, can no longer be any legal objection to the asking of such a question, and it is possible that in some communities there may be grounds for suspecting that certain jurors may be stockholders or officers or employees of these casualty companies. I ask you; however, to consider, when you hear a lawyer ask every juror called on an ordinary panel if he is stockholder or an employee of a casualty company, whether he is honestly trying to ascertain if the jurors are so interested, or is he trying to get before the jury the suggestion that the defendant is insured, knowing that
he has no right to prove or to openly state the fact and perhaps knowing that the fact is contrary to the suggestion. As the question is now clearly admissible, it must be left to the moral sense of the lawyer to determine whether or not he will ask it.

In the examination of witnesses different lawyers present as great a contrast from the standpoint of ethics as from the standpoint of skill. It is generally true in this as in other matters that the course dictated by moral considerations is also the course that leads toward success. I would not venture to say that this is always true. Certainly devices resorted to by many successful advocates do not withstand any severe moral test.

The stupid advocate usually begins by objecting to every question asked by his adversary. The preliminary questions, which should be disposed of as quickly and directly as possible, are objected to as leading. The crucial questions are objected to as "incompetent, irrelevant, and immaterial." No more specific reason is given, because generally the only specific reason entertained by the objector is that the answer may hurt his side of the case. Persistent, groundless objections, due solely to stupidity, must be tolerated.

There is, however, another class of advocates, by no means stupid, who interpose persistent objections, stated as diffusely as possible, not because he believes the objections should be or will be sustained, but because he knows their effect will be to break up the continuity of the testimony, divert the attention of the jury, and lessen the effect of the adverse evidence. At last one judgment has been in recent years reversed, not because of error in any particular ruling, but in the cumulative effect of all the rulings, and of the constant interruptions of the counsel on trivial grounds, so as to prevent a fair trial. Venuto v. Lizzo, 148 App. Div. 164, 132 N. Y. Supp. 1066.

The right to object can hardly be curtailed, so here again the appeal must be to the moral sense of the advocate, not to abuse this right, and to use it only when there is fair ground for insisting upon the objection, and fair hope that it may sustained. Never should the right be used with a conscious feeling that the real object is to prevent the orderly introduction of evidence.

What shall we say to the propriety of offering evidence believed to be inadmissible under the rules of law? Upon this subject the twenty-second of the Canons says:

"A lawyer should not offer evidence which he knows the court should reject in order to get the same before the jury by argument for its admissibility."

This statement is sufficiently, and I believe properly, guarded. A distinguished judge has made this statement:

"Never press upon the court evidence you know to be incompetent, nor that which is even doubtful, unless you must have it or fail."

The reason he gives places emphasis upon the word press, and accounts for the rather remarkable qualification of his main statement. He adds:

"Too much persistency may prejudice you with the jury, wear upon the patience of the court, and, if by overpersuasion he yields, may result in a reversal upon appeal. If the case is one where you are likely to get a verdict, you cannot afford to imperil it by taking chances."

This is very well from the tactical point of view, but how about the ethical? It would seem that we may reach a reasonably safe conclusion from
certain premises which will not be seriously disputed. A lawyer should not endeavor to lead the court into error, and there are higher reasons for this precept than the mere danger of reversal upon appeal. Therefore a lawyer should avoid, not only pressing, but offering, evidence which he knows to be inadmissible. If his purpose in offering it is to place indirectly before the jury a fact which he knows the court would not permit to be proved directly, his moral offense is augmented.

On the other hand, much evidence is of such character that its admissibility may be doubtful. It is not the duty of the advocate, nor is it his right, finally to determine doubtful questions upon his own judgment and against the interests of his client. Within limitations it is the right of the client to have doubtful questions submitted for determination—doubtful questions of law to the court, as much as doubtful questions of fact to the jury. It may be that the lawyer is strongly impressed with the opinion that certain evidence should not be admissible. If he offers the evidence, if it be important, and submits the question for a decision, he fails, in this or in any other matter, express a personal opinion in support of his offer. Entire candor requires that the proffer should be made with a suggestion that it is not confidently advanced and calls for the exercise of deliberate judgment.

I have said that the lawyer fails in his duty unless he makes a proffer of such doubtful evidence. I have not been considering the tactical aspect of the problem, but this reacts upon the ethical. The weight of the doubtful evidence may be so slight that it is better to withhold it than to run the risk of a reversal. Your client has the right to have you exercise your judgment upon this feature. I only insist that, subject to this consideration, there is nothing unethical or unprofessional in offering evidence, the admissibility of which is open to doubt, and to present fair arguments for its admission. It is only when its admission is improperly pressed upon the court, or when there is an underlying motive to get before the jury indirectly what you believe you cannot place before it directly, that a just ground of criticism is presented. The canon refers only to the offering of evidence which one knows the court should reject, when coupled with the motive of placing it before the jury by argument. On the whole, therefore, I believe that the canon errs somewhat on the side of liberality.

The field upon which I have ventured opens almost indefinitely. I shall not explore it much further, but wish to mention one other topic. One of the many pernicious effects of the so-called "exchequer rule," whereby the appellate court reverses a judgment if it finds any error in the record, presuming prejudice from error, has been the creation of a practice of trying a case in order to make a record, rather than in order to win below, because on appeal the trial has been of the record rather than of the case. Lawyers have been scrupulous to avoid inviting error on their own side, but have been astute in leading the court to make erroneous rulings against them, provided they could see, what they knew the appellate court would ignore, that the ruling would not in fact prejudice their case. "I don't care much what the verdict will be. I have got error into the record." How often have lawyers made such statements after the retirement of the jury!

I shall not attempt to characterize that policy. A description of the
practice is sufficient, without express condemnation, and a proper characteriza-
tion might involve the use of extreme language. Recent statutes
providing in effect for the affirmance of judgments notwithstanding error,
unless it appears that the error was of such a character as to affect the
substantial rights of the appellant, will, I hope, be enforced by the appel-
late courts in such a manner as effectively to abolish the practice to which
I have referred by making it unprofitable.

It is a familiar comment by American lawyers who have attended
English courts that the English advocate tries his cases much more expedi-
tiously than the American; that he interposes fewer objections, because prac-
tically no evidence is offered except what is admissible, or may be fairly
argued to be admissible; that he is more candid with the court and more
courteous toward his adversary; that, on the whole, he is a more skillful
advocate, and has a keener sense of the proprieties. This is because his
whole training has been for and in trial work. It is not probable that we
shall ever have in the United States two legally recognized classes of
lawyers, such as solicitors and barristers; but a differentiation between
"office" and trial lawyers has begun to appear, and has in some of the largest
cities become quite well marked.

In England the office of barrister is deemed the more dignified and the
higher in rank. Here the tendency is to relegate the mere trial lawyer to
an inferior rank. This tendency may be in part due to the very just realiza-
tion on the part of the American Bar that the highest and most worthy office
of the profession is so to advise clients as to avoid controversies if possible,
and when controversies arise to adjust them by agreement, or if necessary
by compromise, at least where it is possible to do so with less sacrifice than
that involved in protracted and expensive litigation.

I fear, however, that the tendency is a resultant of the concurrence of
the cause of which I have just spoken and of one less flattering to the trial
lawyer; that is, that our trial lawyers have become such largely through
accident, and not by training. Too often their reputation is based upon
fluency of speech, nimbleness of intellect, and cleverness in producing
dramatic effects. Sometimes it is based in part at least upon willingness and
aptness in devising tricks to obscure the issues, hoodwink the jury, and
achieve a verdict against the truth—at least regardless of the truth.

It is to be hoped that, as the differentiation in the profession becomes
more marked, the young man who essays the role of the trial lawyer will
specially study and train himself for the part, and that he will take for
his exemplars, not the smart, shifty, and crafty practitioners, who threaten
to bring discredit upon trial work, if they have not already done so, but
the truly great advocates of today and of the past—men who know the
law; men who master the facts, and know how to arrange them and adduce
them; men who understand and perform their entire duty, not only to their
client, but to the court, to the state, and to the public.