

Ethics, Zealous Advocacy, and the Criminal Defense Attorney



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Apart from being flattered, I am grateful to have been invited to address this distinguished gathering because it has caused me to focus on issues of ethics and morality that are daily companions of a practicing lawyer.

We are instructed by our codes of professional responsibility and told by professors, legal scholars, and mentors that we lawyers, as guardians of the law, play a vital role in the preservation of society, that we have an obligation to adhere to the highest standards of ethical and moral conduct, and that in our words and deeds we must promote respect for the law and our profession. We must deal candidly with others, and we should use our education, skills, and training to do public good. Finally, we are instructed to be zealous advocates on behalf of our clients.

I agree with all of this, and I have tried in 30-plus years of practice to honor these goals. But I would be less than candid if I said it was easy. At times, there is some moral conflict because these roles do not always work in harmony. The zealous advocate often speaks and acts in ways that to many are morally questionable, less than candid, and do not promote respect for the law in the eyes of the public.

I believe the legal profession has done a poor job of giving guidance to its members on how to resolve the tension among these sometimes conflicting roles. And we have done a miserable job in explaining our role to the public. We have avoided dealing with difficult ethical issues by using generic words in our disciplinary rules

and codes of responsibility and not dealing with the underlying problems. We act as if litigation is simply a “no holds barred” game and all you need to do is follow the rules to be morally and ethically pure.

This was most dramatically and forcefully stated by Lord Brougham in the 19th century when defending Britain’s Queen Caroline, who faced an attempt by her husband, King George IV, to obtain a divorce by charging her with adultery, thus ruining her name and putting at risk her fortune and position in society. Lord Brougham let it be known that in the queen’s defense he would prove that the king himself was guilty of adultery and had secretly married a Catholic, thus putting at risk his title to the throne. His tactics outraged many who felt he went beyond the bounds of ethical advocacy. He justified his conduct as follows:

“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons... And in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.”

A very strong case can be made that while Lord Brougham’s rhetoric was excessive, his actions on behalf of his client were appropriate. I am told that some years after the case was concluded, Lord Brougham attended a

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dinner at which the most respected Chief Justice Cockburn was speaker. Looking disapprovingly at Brougham, Cockburn stated that while it was appropriate to be a zealous advocate, a lawyer should not be an “assassin.”

How do we, in our adversary system, reconcile our roles as officer of the court, role model, and public citizen with that of the zealous advocate? I think we can all agree that the defense attorney’s obligation is to represent a client even if it means that the truth is undermined in a particular case. Defense attorneys are entitled to put the prosecution case to the test, and a defendant has a constitutional right to have his lawyer do so.

Our society has decided that a defendant must be free to be fully candid with his or her lawyer without suffering any consequences and that guilt is to be decided in the courtroom and not in the lawyer’s office. Sometimes the public unfairly criticizes us for seeking the acquittal of one we believe to be guilty or vigorously representing one whose innocence is not clear. This is particularly true when the crime is heinous.

Unfortunately, the public, by and large, believes that as officers of the court our only goal should be the truth. The Bill of Rights and in particular the Fourth Amendment prohibition against unreasonable searches and seizures often are obstacles to reaching the truth. Sometimes, in our legal system, the truth must be sacrificed for more important principles.

Also, let us not forget that we allow, and the courts condone, the police to engage in deception and ruse by lying to suspects about the evidence against them in the hope that they will confess their guilt. Is it appropriate for one who is an officer of the court to present a false

and faulty logic. Some lawyers offer the questionable notion that the only “truth” in a criminal trial is what a jury tells us it is. Sometimes lawyers hide behind the assertion that it is the job of the jury and not the lawyer to decide the case, thereby evading the tough moral questions.

Because we give special meaning to terms in our codes of conduct, our narrow definitions often do not comport with their general and common-sense meanings or notions of fairness. This leaves us vulnerable to public attack.

A few years ago I participated on a panel with some of the country’s best-known defense lawyers. To my astonishment, all of them said that they never tried to mislead or deceive jurors. Rightfully, there were snickers in the auditorium, including my own. These distinguished lawyers were not lying but giving very narrow and, I believe, insupportable definitions of the terms “misleading” and “deception.”

If we are to be honest, we must acknowledge that first-rate trial lawyers work very hard at inserting their own credibility into a trial for the benefit of their clients and, when necessary, use that credibility to argue to the jury propositions that they know beyond any reasonable doubt are false. At times we use our training and skills to discredit truth-telling witnesses hoping to make them appear to be fools or liars.

Yet the prestigious American College of Trial Lawyers, whose membership consists of the elite of the trial bar, tells us in their Code of Trial Conduct that in our representation of our clients we should not engage in chicanery.

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defense or to present evidence which supports such falsity? Is it appropriate for us to use every stratagem or device in an effort to lead the jury to reach a conclusion that the attorney knows is not the truth? How much maneuvering or, to put it more harshly, chicanery can we engage in without crossing ethical and moral boundaries? Can we be ethical lawyers and still engage in morally repugnant behavior?

One reason lawyers are criticized as much as we are is that rather than deal with the issues head-on, we often duck the hard questions by engaging in glib distinctions

Does such an admonition bear scrutiny? Doesn’t a good lawyer regularly try to induce beliefs in juries that the lawyer believes to be false, and in doing so deceive the jurors? And in picking jurors, don’t we often, where there is a strong case of guilt, seek out jurors who we believe, or at least hope, will disregard the evidence and return a verdict based on prejudice or passion? When we do these things, are we promoting respect for the law?

In his book *Ethics for Adversaries—The Morality of Roles in Public and Professional Life*, Arthur Isak Applbaum, associate professor of public policy at

Harvard University's Kennedy School of Government, asks, in a critical way, if lawyers can, simply because they are playing the role of a zealous advocate, describe a lie or a deception as something else and then claim the moral high ground for their actions. He compares us to Henri Sanson, the executioner of Paris during the French Revolution, who killed without moral concern because it was his professional job to do so. He tortured, beheaded, and mutilated people and argued that since his actions were performed in the fulfillment of his professional role, he was morally justified even if the same

ascertain or present the truth. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. More often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. As part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."

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actions would be condemned if committed outside his profession. Defense lawyers don't execute people, of course, but have we, like the executioner of Paris, defined our role in such a way that we avoid confronting the difficult moral issues raised by our actions?

Let us assume that your client confesses to you that he mugged an elderly victim and before she got a good look at him he knocked off her glasses. Your client wants to testify and deny he was the mugger. It is clear that you cannot ethically allow your client to take the stand and commit perjury. Section 7-102 A.4 of the Code of Professional Responsibility in New York states that in the representation of a client, a lawyer shall not "knowingly use perjured testimony or false evidence."

On the other hand, as zealous advocate, am I not permitted to rip the elderly victim to shreds on cross-examination, and try to distort what I know to be the truth by suggesting that she didn't get a good look at the mugger, or that her sight was bad, or her recollection faulty because of age? Most would agree that such advocacy is considered ethically appropriate.

While the general public has great trouble with such actions by a defense attorney, there is solid support for such activity. One of the very best articulations of that role is found in a dissenting opinion by former Associate Justice Byron White—no liberal jurist to be sure—on rights of defendants in *United States v. Wade* (right to counsel in line-up) 388 U.S. 218 at 256–258. After pointing out that law enforcement has an obligation not to convict the innocent and must always be dedicated to reaching the truth, he says:

"But defense counsel has no comparable obligation to

I agree with Justice White's comments, and I believe it would be appropriate to cross-examine the elderly victim in the way described, because the government has the burden of proving its case. But should we not acknowledge that we are engaging in conduct that raises moral issues because we are trying to discredit a truth-telling witness and that seems to conflict with the high-sounding principles in our Codes of Professional Responsibility, such as promoting respect for the law, acting with candor, and not engaging in chicanery? We must acknowledge that at times there are differences between what is ethical and what is moral.

I have been faced with several ethical conflicts in my professional life; one happened a very long time ago. At my first meeting with a client who was nervous and concerned about how much he should tell me, I explained the criminal process and my role as defense attorney. I told him he could be fully candid with me because even if he had accepted the payoff he was charged with taking, it would make "no difference in my representing him." Apparently feeling comfortable with me, he promptly admitted his guilt.

As the trial approached, he told me he wanted to testify and deny his guilt. When I told him I could not ethically allow him to give perjured testimony, he reminded me that I said "it would make no difference." He was right. I unintentionally misled him. What I should have said is that it will make no difference as to "whether I represent you, but it could make a difference as to how I will do it." Fortunately, the matter was resolved before this issue had to be resolved.

In the preamble to the Code of Trial Conduct, the

American College of Trial Lawyers tells us that we have a specific responsibility to strive for prompt, efficient, and just disposition of litigation. In light of this, how do you feel about the zealous advocate who wants his client to avoid judgment and plays the system by continuing his client's case by playing fast and loose with the court's docket, making one excuse after another for a delay? As a result, the complaining witness is worn down and the case is not prosecuted. In such a situation, are we to totally disregard the rights of the victim and society by taking advantage of the deficiencies of the system and by

above-mentioned activities than a civil advocate or legal counselor might have. However, it does not wholly relieve us of moral responsibility for our actions.

Although I have some concerns—as I have been sharing with you—I have never regretted my decision to be a lawyer. There is no greater professional satisfaction than to guide a client from peril to safety and preserve his or her freedom, future, reputation, and, at times, life. While client relationships can be a great source of satisfaction, they do present pitfalls which you can and should safely avoid. To clients in trouble, the law is not

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using trickery to delay and defeat a prompt and just disposition on the merits? While a defendant is entitled to a vigorous defense, is he entitled to game-playing with the court's docket?

Suppose a lawyer in a civil product-liability case were to follow Lord Brougham's rationale and effectively keep a defective and dangerous drug or product on the market by creating confusion and delay with aggressive litigating tactics. What if the advocate introduced into evidence a scientific report that said the product was safe but the attorney knew the report was based on faulty data? Could you use this as evidence?

In the 1990 case of *Lincoln Savings v. Danny Wall*, which dealt with the savings and loan crisis, U.S. District Court Judge Stanley Sporkin found that the Federal Bank Board acted properly in placing Charles Keating's bank in receivership because it was engaging in unsound business practices and skulduggery. The judge pointedly asked about the lawyers and accountants who reviewed or approved the bank's transactions: "Where were these professionals...when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? Where...were the...attorneys when these transactions were effectuated?"

These remarks and the lawsuits that followed against law firms raised serious questions about the duty of lawyers to their clients and the appropriate parameters of zealous representation. The fact that a criminal defendant is presumed under the law to be innocent and to have certain constitutional rights gives the criminal defense lawyer greater justification for many of the

about legal theory, morality, or ethics: It is about freedom, reputation, financial survival, and keeping what is theirs. Many clients don't care how their lawyer gets the results they want.

You will not be a good or responsible lawyer if you blindly follow a client's instructions. Sometimes, at the risk of losing a client, you must say you cannot do what the client wants you to do. As a lawyer you must constantly be attuned to the legal theory, ethics, or morality of a situation. They are your daily companions as a practicing lawyer.

And you must never become so close to your clients that you lose your independence, objectivity, or ability to do what is right. When you become a "player" with a personal interest, your objectivity will be clouded, your advice will be slanted.

The great Justice Oliver Wendell Holmes observed that the law is the witness and external deposit of our moral life and that the practice of it tends to make good citizens. But he goes on to observe that if you want to know the law and nothing else, you should look at it from the perspective of a "bad man." The bad man asks at what point, if I do something, does the public force come down upon my head? The bad man asks, where is the line I cannot cross without risk of punishment?

In your professional life you will run across those clients who view the law as a "bad man" does. Be careful. Your job is to get your client out of trouble, not get yourself into it.

And always remember that the most valuable asset you have is your reputation for honesty and integrity. Once lost, it can never be regained. ■