

ETHICS AND ADVOCACY

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When Ed Stein asked me to pinch hit for the scheduled speaker, I was glad to do so, but I thought of Mark Twain who said, when asked for a twenty minute speech, that it would take him at least a week to prepare, but forty minutes he could prepare in a couple of days, and if you want an hour then I'm ready right now. And I must say that 20 minutes on ethics and advocacy is a hard subject to talk about, most of all, because every such discussion has a ring about it of platitudes.

Platitudes are maybe that, though, because they are often the obvious virtues, coupled, alas, with the disagreeable sense that sometimes in some places and under some circumstances we ourselves may fail to live up to their message. It is easier for us to ignore the difficulties of ethical behavior if we attach that label - platitude. They still, however, haunt us. They are with us I suggest, no matter what the age or season. We always hear their voices.

Legal malpractice litigation is abundant. Unfortunately for the profession, mine is a growing practice. It is fertilized primarily by a bad lawyer image in what has become, in the modern era, a complex, competitive, contentious society. And lest you think for a moment that there is no connection between ethical behavior and legal malpractice, let

me tell you that in every state in the Union, evidence of an ethical violation is also evidence of malpractice, and is admissible in court as such.

Why? Why do we have such a rising tide of malpractice litigation? Why do we have a rising tide of perception that lawyers are somehow troubled ethically or do not behave that way? Well, there are a lot of reasons, I think. Some of them at least are these:

- Begin with the fact that in the modern technological age we transfer non-linguistic information at light speed in vast inassimilable quantities. So our tools - words - the things we lawyers use to persuade, to make the system work - words - lose their power and their prestige.
- Lawyers are bound by confidentiality in an era in which sensationalism and celebrity rule.
- Lawyers deal in subtleties when the 90 second sound bite on the television news, slanted to the intelligence of the average 13 year old, masquerades as understanding and analysis.
- Lawyers of all political persuasions stand for a courage and an essentially conservative rationality in an era of popularity, emotion and public opinion polls. Need it be said in these precincts anyway that the character who said "Let's kill all the lawyers" in Shakespeare's famous play was urging anarchy, and that that extreme act was how he was going to achieve anarchy as one of the worst villains Shakespeare ever created.

- We live in an era in which the bed, the barstool and the campaign contribution are, or at least sometimes seem, more powerful and slick public relations efforts more honorable than private battles fought in courtrooms every day all across our country on behalf of ordinary people.

- Lawyer jokes abound, and, what's worse, lawyers tell them. We have learned in this Advocacy Institute that neuropsychology is a profession which ten years ago didn't have a degree, a profession which some still call junk science. Let me ask you. When is the last time you heard a neuropsychologist joke, or told one?

- Lawyers are most of all, and especially we as trial lawyers most of all, are different from any other profession in that we advocate on behalf of people. Compare the physicians who have a wonderful reputation, by and large, in our society. It's as though you went in for medical treatment and there is one physician who's on your side who is treating you and another physician who is trying to help your disease along. That's the situations we are in under an adversary system. And maybe that explains why lawyers' bad image, I think sometimes like that of Congress, doesn't come from a client's own lawyer. Many people like their own lawyers generally. It's that son of a bitch on the other side of the case that they can't abide.

Most lawyers agree with the ideal that we are a profession. Most lawyers admit that the system will provide more and better justice if indeed we behave professionally and civilly and, most of all, ethically. Most lawyers acknowledge and wish to act

according to the ethical standards of that high model of lawyering. Most lawyers agree that they know and can perceive - instance by instance and case by case - that there is a line where partisanship ends and chicanery begins.

But many of us also see some difference between the ideal world of our books and our learning and our hopes and what we call the real world. We think of the real world as harsh and cutthroat. We adopt a kind of instrumental approach to ethics rules. We ignore them sometimes and abuse them sometimes when we are unethical to serve clients. We see high roads not taken by both our opponents and ourselves. We know that standards, behaviors and expectancies drift downward, and we have developed a kind of siege mentality in our lawyering, which breeds a cycle of self-fulfilling - and the emphasis here is on self-fulfilling - expectancies, especially expectancies of our adversaries. We distrust them. We engage in negative attribution and stylized posturing. We suspect their sincerity, their bona fides. That is, I suggest, what litigation in the 90s seems to be to some. It is what we fear may be, or what at least may be coming.

1990's litigation, when characterized by excessive partisanship, further erodes public trust and confidence in our legal institutions. Those institutions are now characterized by development of increasingly complex rules and regulations meant to check these mental tendencies. Witness Federal Rule of Civil Procedure 11 - and the sanctions ordered to enforce it. Those institutions are also now characterized by a

system in which it sometimes frustratingly seems that the powerful, the rich, the resistant and the uncivil thrive.

Today, I propose a survival kit - a survival kit for our profession, for its institutions, for each of us as human beings. My survival kit is a simple one, a simple idea, which I think is true and which I think this Advocacy Institute has proven to be true and which, if we carry no other message out of Ann Arbor and back into our real worlds of litigation, we ought to carry. The survival kit, simply enough, is a principle. It is the principle that good ethics is good advocacy.

Short term advantages and the gaining of them is distinctly different from long term prosperity. Anybody who has traveled along the Pennsylvania Turnpike has seen those signs at the rest areas, the pseudo-Amish signs. The phrase on them is always the same: "Kissin' wears out. Cookin' don't". My suggestion to you is that, for our profession, "Trickin' wears out, and winnin' don't." You as lawyers can and will win more often with good ethics than you ever will with bad ones. We do not have, need it be said in this experienced company, we do not have a perfect system. You can, in the short term and for the temporary moment, achieve gains with bad ethics, but you don't win with them. Advocates have faith in the system. Good advocates have faith not only in the system but in themselves; that's what gives good advocates license to be passionate for their clients, and that passion persuades.

Good ethics is good advocacy. First principle: never lie. This is something I

knew in kindergarten, in the parlance of the recently famous book. Never lie. A friend of mine once said nothing rings truer than the truth. When you no longer as an advocate believe, have a conviction about what it is you are telling the jury, what it is you are telling the court, then it is unlikely that others will believe you. Persuasion, after all, comes in part from credibility.

Good advocacy isn't proving that something which is untrue is true. Good advocacy instead is proving that your client ought to win because of what's true. It is telling the jury the why. Why should I win this case? Why should my client win this case? Why should you as a jury decide that way? Telling the jury why. We all know that we tend to trust those who are convinced of what they are telling us, and that we can be persuaded only by those who are themselves persuaded. Confucius' great line cautions us to beware the man whose stomach does not move when he laughs. And we all are. Juries sense sincerity. Juries sense that high tone of ethics. The best direct examinations have that tone.

Surprisingly enough, we even get some good advice from, of all places, the Commentary to the Rules of Professional Conduct, the model rules which have now been adopted in Michigan. Commentary to MRPC 3.3 contains the following: "A lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy." Now here's the punchline: "Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of the evidence and thus impair the

lawyer's effectiveness as an advocate." Absolutely. Amen.

Good ethics is good advocacy. First principle: never lie. Second principle: never cheat. Never cheat. Never hide evidence from a jury. We've seen in this Institute some efforts to do that, to select certain pieces of evidence for presentation and to omit others. And we can get our best advice on the wisdom of such a thing for an advocate who would persuade from Ecclesiastes, loosely paraphrased, which reads: He who digs a pit will fall into it. Absolutely the case.

There is even a different kind of cheating, and I don't mean any personal criticism here, but it was a technique that was shown to you in this Institute for a purpose, and that technique is continuing to ask a question in a court, in a trial, when an objection to the same question, or a similar line of questions, has already been sustained. Doing this is at least one of the main reasons why a cross examination you heard did not work.

Again, we even get some good advice in this regard from our Rules of Professional Conduct. At 3.4 the Commentary is: "An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."

Good ethics is good advocacy. First principle: never lie. Second principle: never cheat. Third principle: never steal. Good ethics is good advocacy. Let's look at the example of stealing time. Efficient examination of witnesses, and efficient argument persuades. Cross examinations that you have seen from this stage, the brilliant ones,

are commando raids. They are not the invasion of Normandy. Never steal.

Good ethics is good advocacy. First principle: never lie. Second principle: never cheat. Third principle: never steal. Fourth principle: never take unfair advantage. Behavioral scientists tell us that there is an expression of ourselves in everything we do. Never taking unfair advantage was exactly what you saw in effective cross examinations in this Institute. We, after all, and juries do the same thing, seek in others what we would cultivate in ourselves. We seek character, honor, fair play, good sense, hard work. Good ethics is good advocacy. Four simple ideas. Four principles. Never lie. Never cheat. Never steal. Never take unfair advantage. Ultimately, we do, because it's ethics after all, have to make some highly personal decisions. We all made one, each and every one of us who is a lawyer in this room made one, when we raised our hand and took an oath as an attorney and said, "I will employ such means only as are consistent with truth and honor." We have already made that most deeply personal decision. The irony of this oath and the difficulty of this oath is that it makes our highest duty as lawyers into our most intangible. It is hardest to grasp hold of. It is a duty of loyalty not to persons, not to our specific case nor to our particular client, but it is a duty of loyalty to the institutions and the procedures of the law which make it work, no matter how imperfectly.

We monopolize the legal system, and we are, because of that monopoly we have as lawyers, its trustees. We control the system and we are, because of that control, its

ministers. Partisan advocacy is public service. No question about it. Partisan advocacy is public service because it makes the system work to resolve conflicts and to decide disputes and to dispense justice.

We teach others. Every single day we represent a client in court, we teach others. We teach those who come to the system - some who have faith in it and others who have lost faith in it. We do not perform a public service if we obfuscate, and I suggest today that we do not win very often either. If we muddy the waters of decision making, we get muddy decisions.

Jury studies done in Chicago in the early 60s and those done in Massachusetts in the late 80s, all tell us that juries decide cases based on a story model. They decide what happened, and then they decide what do they want to do about it. They don't give a lick about burdens of proof. They decide what really happened. They don't go away with the crime unsolved or the accident undecided. And we seek in all of our cases, in order to appeal to that story model of jury decision making, to be on the side of some simple ideas. We seek, when the jury is deciding what happened, to be on the side of the simple truth. Don't we all as advocates like that as our theme in closing argument? The simple truth. (Never lie.) We seek to be on the side of common sense. (Never cheat.) We seek always to be on the side in our closing arguments of fair play. (Never steal.) We seek always in our closing arguments to be on the side of the jury's sense of simple justice. (Never take unfair advantage.) These are the principles which win our

cases. Good ethics is good advocacy.

Whether it is superstition, talisman or armor, when we teach trial advocacy we teach advocates to always, before they begin an exercise, always before they give an argument or conduct an exam, to stop a minute, take a deep breath and then begin. Stop, collect, and then begin. I think that we all need such a talisman and maybe superstition and definitely armor to help our good ethics become good advocacy. Here's mine. Well, not originally mine - originally Sir Thomas More's, but nevertheless mine in that I repeat it before every jury argument. More was a religious man so he began it this way, and the rest of it applies no matter what your religion: "Lord, let me be able in argument, accurate in analysis, correct in conclusion, candid with my clients and honest with my adversaries. Stand beside me in court so that I will not, in order to win a point, lose my soul."

Good ethics is good advocacy.

Thank you for your attention.