Clarence Darrow's Lessons For Today's More Ethical Lawyer

A Dramatic Interactive Legal Ethics Seminar
Developed by ProEthics, Ltd. for the
Maryland Bankruptcy Bar Assocation
May 4, 2018 – Annapolis, MD

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Your Facilitators

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And

Paul Morella

Jack Marshall is the president and founder of ProEthics, Ltd., and the primary author of Ethics Alarms (www.ethicsalarms.com), an ethics commentary blog on everything from legal ethics and politics to sports and popular culture. He has taken the experience gleaned from a diverse career in law, public policy, academia and theater and applied it to the field of legal, business and organizational ethics. Over 21 years he has developed more than 200 programs for bar associations, law firms, Fortune 500 companies, trade associations, local and national government agencies and non-profit organizations, has worked to develop rules of professional responsibility for attorneys in emerging African democracies through the International Bar Association and for the new judiciary of the Republic of Mongolia through USAID. He also serves as outside ethics counsel for a number of US firms.

A member of the Massachusetts and DC Bars, Mr. Marshall has served as an adjunct professor of legal ethics at the Washington College of law at the American University School of Law in Washington, DC. He co-authored and edited, with Pulitzer Prize-winning historian Edward Larson, The Essential Words and Writings of Clarence Darrow. (Random House, 2007).

Marshall is a graduate of Harvard College and Georgetown University Law Center. His articles and commentary on topics ranging from leadership and ethics to popular culture have appeared in numerous national and regional publications, and he has appeared on a variety of talk shows to discuss ethics and public policy.

He is also an award-winning stage director, and as the founder of The American Century Theater, a professional non-profit theater company dedicated to producing classic American plays, he served as artistic director for 20 years. He lives in Alexandria, Virginia with his wife and business partner, Grace Marshall, their son Grant, and their Jack Russell Terrier, Rugby. Like all who are truly interested in the nature of good, evil, justice, and chaos, Marshall is a lifetime fan of the Boston Red Sox.

Paul Morella is a professional actor who has performed in regional theatre, film, television, and radio for more than 35 years. Originally from Washington, DC, his extensive credits include more than 55 leading roles in over 125 professional productions, from classical to contemporary, as well as 19 world premieres. A multiple Helen Hayes Award nominee, Mr. Morella has performed at some of the most prestigious theatres in the country, including The Shakespeare Theatre, Arena Stage, the Kennedy Center, the Studio Theatre, Signature Theatre, LA Theatre Works, the National Players, American Showcase Theatre, the Delaware Theatre Company, the Contemporary American Theatre Festival, and many others. No stranger to lawyers, he received unanimous critical acclaim and a Helen Hayes Award nomination for his portrayal of Roy Cohn in both parts of ***Angels In America***, and has appeared as prosecuting attorney Horace Gilmer in the world premiere of ***To Kill A Mockingbird***, as well as attorney Jarreld Schwabe opposite Julia Roberts in ***The Pelican Brief***. He has worked on the HBO series, ***The Wire***, and was a recurring cast member of the CBS television show, ***The District***, with Craig T. Nelson. A Master in Fine Arts (Acting) graduate of Catholic University, he has also portrayed three felons and two victims on the Fox-TV series, ***America's Most Wanted***, and was recently chosen as one of only two actors to be featured on their special 700th Capture episode. For the past 10 years, he has presented his original adaptation of Charles Dickens' ***A Christmas Carol***, a one-man production he conceived, directed and performed, recently chosen by *The Washington Post* as the area's best version of the holiday classic. In addition to Clarence Darrow, he has appeared as John F. Kennedy, Abraham Lincoln, Harry Truman, Franklin D. Roosevelt, and most recently, as Teddy Roosevelt in a world premiere production at the Kennedy Center, in conjunction with the White House Historical Society.

In 2000, along with Jack Marshall, Mr. Morella collaborated on an original one-person drama, ***A Passion for Justice***, and thus began his long association with twentieth century's greatest trial lawyer, Clarence Darrow. Following a successful run at The American Century Theater, Mr. Morella began touring with the production on his own, and for the past 15 years, he has performed the show before some of the most elite and prestigious trial lawyers, law firms, legal organizations, and law schools in the country. He was invited by Tom Girardi (Erin Brockovich's lawyer) to present the show before the International Academy of Trial Lawyers at their annual convention in Puerto Vallarta, Mexico. In 2009, the production enjoyed an extended run at Olney Theatre, followed by a sold-out run at Everyman Theatre in Baltimore.

Mr. Morella has been a faculty member of the Washington College of Law for over 20 years, where he teaches the art of persuasion as part of their Trial Advocacy Program. His professional union affiliations include membership in the Screen Actors' Guild, the American Federation of Television and Radio Artists, and Actors' Equity Association.

Today's Schedule

1. Opening Statement: "Clarence Darrow: The Dark Side Of Lawyers, The Brilliant Side Of The Profession"

2. Zealous Representation and the Scopes Trial

3. Courtroom Stunts, Sharp Practice and the Culture of Legal ethics

4. Ethics and the Progressive Lawyer

5. Darrow and Integrity

6. "Humanity is the Ultimate Conflict"

7. Summation: The Verdict on Clarence Darrow

Appendix I: Hypotheticals and References

Appendix II: The 1908 Canons of Ethics

1. Clarence Darrow:
The Dark Side of Lawyers, The Brilliant Side of the Profession

A. Introduction: Meet Clarence Darrow

From "The Essential Words and Writings of Clarence Darrow" by Edward Larson and Jack Marshall (2007)

…Although he is primarily remembered today as a trial lawyer (nearly three quarters of a century after his death, Clarence Darrow still routinely tops all surveys and polls as the lawyer most admired by other legal practitioners), he embraced this profession primarily for the opportunities it provided him to do the things he really cared about: arguing, opposing powerful institutions, and pursuing social reform (he didn't mind the money and fame, either.) He certainly had no love for the law itself, which he looked upon less as the connective tissue of civilization than as a truncheon wielded by the strong and rich to control the weak and poor. Once, when a prosecutor accused Darrow of helping a criminal evade the law, Darrow responded, "The law? To hell with the law! My business is to save this defendant from the law!"

…Clarence Darrow (1857-1938) was the son of a mother who turned her family home into a stop on the Underground Railroad, and a father who loved books better than people and who was, in Darrow's words, both "the village infidel" and its undertaker. From the mother he inherited progressive and humanistic instincts, and from the father a love of history and literature as well as an unrestrained delight in voicing unpopular opinions. And from the undertaker's trade he seems to have contracted a strain of dark fatalism that often waged war with Darrow's soaring aspirations for the human race.

Clarence Darrow got a late start on his epic career. Until the age of 31, he was seemingly content to be country lawyer in Ashtabula, Ohio, where his most exciting case was a dispute over a fifteen dollar harness. But a banker acquaintance in Ashtabula fired Darrow's dormant passion for social reform when he gave him a little book entitled "Our Penal Code and Its Victims" by Judge Peter Altgeld of Chicago. It inspired Darrow to move to Chicago, where he became close friends with its author, soon to become the Governor of Illinois. And it taught him how powerful the written word could be in changing minds and lives.

Darrow became a Chicagoan in 1888, just as the Haymarket bombing signaled that labor unrest was heating to a boil. Very quickly he was thrust into the pot, defending labor leader Eugene V. Debs in the railroad union strike. Darrow's defense failed, but his skill and passion for the cause impressed Debs' allies, and it proved to be the start of Darrow's twenty year run as the labor movement's courtroom champion. The often violent clashes between unions and industry during this period produced many high-profile criminal cases. Darrow became a national figure as he dominated sensational trials in which he was called upon to defend labor organizers charged with conspiracy or worse.

His success in opposing these emotion-charged prosecutions reached its zenith with the Big Bill Hayward murder trial in 1908. Darrow delivered an epic eleven-hour closing argument that persuaded a jury to acquit the flamboyant union leader charged with paying an assassin to explode a strike-breaking former governor of Idaho. Almost immediately after the Hayward victory, Darrow's own life exploded. He developed an ear infection requiring life-threatening surgery that incapacitated him for months, and he lost most of his savings in a stock market crash. Worst of all, he met with professional disaster, much of it of his own making, when he took on the defense of another pair of union leaders accused of murder.

A dynamite explosion at the resolutely anti-labor Los Angeles Times had killed twenty-one men, and the McNamara brothers, leaders of the printers union, were charged with the sensational crime. As newspapers pronounced the Times bombing "The Crime of the Century," labor icons Eugene V. Debs and Samuel Gompers persuaded Darrow that it was his duty as labor's advocate to prove the brothers innocent, and thus prevent the public from rejecting the labor movement as the dominion of thugs and criminals. But the

evidence against the McNamaras was overwhelming, and when Darrow decided that he could not win acquittals for them, he had no choice but to have them plead guilty.

No choice, that is, after he had been caught attempting to guarantee a deadlocked jury by bribing two jurors.

The labor movement regarded the McNamaras's guilty plea as a capitulation and betrayal by Darrow, who was never again entrusted with a major union client. But that blow paled compared to Darrow's travails in escaping Los Angeles with his freedom and his law license. Ultimately, Darrow's argument against conviction in his two trials for jury tampering amounted to a call for jury nullification, as he rhetorically asked if the world would be a better place with Clarence Darrow in prison or fighting for justice. The strategy worked, and at the age of 55 he found himself free but facing the massive task of rebuilding a shattered career and reputation.

F. Scott Fitzgerald famously declared that "there are no second acts in American lives." Darrow proved him wrong, for he authored a boffo second act that virtually erased his McNamara debacle from historical memory. Freed from the demanding unions, he applied his skills to a full spectrum of progressive causes: equal rights, intellectual freedom, abolition of capital punishment, pacifism, free speech, and more. Darrow continued to write and speak, in court and out, about these and his own philosophical convictions until his death in 1938.

B. The Evolution of Legal Ethics

1) The Standard Conception

2) The Canons of Ethics (1908)

3) From the Code to the Rules

4) Character and Legal Practice

5) The Relevance of Professionalism

C. Alan Dershowitz on Darrow, the Law and Character

"…There can be no justification for any lawyer taking the law into his own hands. The ends -- even if the ends here were noble -- do not justify the use of criminal means, even in a legal system that was rife with corruption.

"Despite the low esteem in which the bar is currently held by public opinion, the fact is that this is the golden age of American law. Lawyers have never been more ethical, and judges and juries have never been more incorruptible than they are today. This does not mean that there is no room for improvement. There certainly is. But let us not glorify the past without understanding that most "golden ages" appear to glitter only with the distance of time."

2. Zealous Representation and The Scopes Trial

A. Introduction

B. Clarence Darrow for the Defense, Opening Statement (excerpted), *The State of Tennessee v. John Thomas Scopes, 1925, State of Tennessee*

> *"…Along comes somebody who says "we have got to believe it as I believe it. It is a crime to know more than I know." And they publish a law to inhibit learning. This law says that it shall be a criminal offense to teach in the public schools any account of the origin of man that is in conflict with the divine account in the Bible. It makes the Bible the yardstick to measure every man's intellect, to measure every man's intelligence and to measure every man's learning. Are your mathematics good? Turn to Elijah 1:2. Is your philosophy good? See II Samuel 3. Is your astronomy good? See Genesis 2:7. Is your chemistry good? See - well, chemistry, see Deuteronomy 3:6, or anything that tells about brimstone. Every bit of knowledge that the mind has must be submitted to a religious test. It is a travesty upon language, it is a travesty upon justice, it is a travesty upon the Constitution to say that any citizen of Tennessee can be deprived of his rights by a legislative body in the face of the Constitution.*
>
> *Of course, I used to hear when I was a boy you could lead a horse to water but you could not make him drink. I could lead a man to water, but I could not make him drink, either. And you can close your eyes and you won't see, cannot see, refuse to open your eyes - stick your fingers in your ears and you cannot hear - if you want to. But your life and my life and the life of every American citizen depends after all upon the tolerance and forbearance of his fellow man. If men are not tolerant, if men cannot respect each other's opinions, if men*

cannot live and let live, then no man's life is safe, no man's life is safe.

Here is a country made up of Englishmen, Irishmen, Scotch, German, Europeans, Asiatics, Africans, men of every sort and men of every creed and men of every scientific belief. Who is going to begin this sorting out and say, "I shall measure you; I know you are a fool, or worse; I know and I have read a creed telling what I know and I will make people go to Heaven even if they don't want to go with me. I will make them do it." Where is the man that is wise enough to do this?

If today you can take a thing like evolution and make it a crime to teach it in the public school, tomorrow you can make it a crime to teach it in the private school, and the next year you can make it a crime to teach it from the hustings or in the church. At the next session you may ban books and the newspapers. Soon you may set Catholic against Protestant and Protestant against Protestant, and try to foist your own religion upon the minds of men. If you can do one you can do the other. Ignorance and fanaticism are ever busy and need feeding. Always they are feeding and gloating for more. Today it is the public school teachers, tomorrow the private. The next day the preachers and the lecturers, the magazines, the books, the newspapers. After a while, Your Honor, it is the setting of man against man and creed against creed until, with flying banners and beating drums, we are marching backward to the glorious ages of the sixteenth century when bigots lighted torches to burn the men who dared to bring any intelligence and enlightenment and culture to the human mind.

C. Darrow's Direct Examination of Williams Jennings Bryan

D. Darrow's Lesson on Technology and The Law

Ethics Quiz: Darrow's Dilemma

Considering the purpose of the representation, the fact that his client wanted to be prosecuted, as well as the ethical duties of the legal profession…

Question: *How should Darrow have responded to Scopes' statement that he hadn't taught the evolution lesson?*

1. Exactly as he did respond. This was a client confidence.
2. Exactly as he did respond, except for telling Scopes to make sure his students didn't spill the beans.
3. He should have revealed this to the prosecutor and the judge.
4. He should have instructed Scopes not to testify.
5. I have another answer.

VA, MD, DC, ABA Model Rules of Professional Conduct:
1.1, 1.2, 1.4, 1.6, 1.7, 2.1, 3.3, 8.3, 8.4

3. Courtroom Stunts, Sharp Practice And the Culture of Legal Ethics

A. Darrow and the cigar

B. The evolving culture of legal ethics

C. Questionable trial tactics in fact and fiction

- Lincoln's "phantom document"
- The spectacled murderer, and other costuming tricks
- Darrow's lawyer's defendant switch, and gunplay tactic
- The alphabet blocks
- Mel Belli's bloody hunk

Ethics Quiz:
Tricks of the Trade

Question: *Which of the following tactics are unethical?*

A. The phantom document

1. Unethical.
2. Zealous representation.
3. It depends.

B. The spectacled murderer

1. Unethical.
2. Zealous representation.
3. It depends.

C. Darrow's lawyer's defendant switch

1. Unethical.
2. Zealous representation.
3. It depends.

D. The alphabet blocks

1. Unethical.
2. Zealous representation.
3. It depends.

E. Mel Belli's bloody hunk

1. Unethical.
2. Zealous representation.
3. It depends.

DC, ABA Model Rules of Professional Conduct:
1.1, 1.2, 1.3, 3.5, 8.3, 8.4

4. Ethics and The Progressive Lawyer

A. Darrow and the Thomas I. Kidd case

Closing Argument: *State of Wisconsin v. Kidd, Zentner and Troiber*

"Gentlemen:

If a boy should steal a dime, a small fine would cover the offense. He could not be sent to the penitentiary. But if two boys plot to steal a dime but do not do it, then both of them could be sent to the penitentiary as conspirators. Not only could they be, but people are constantly being sent under similar circumstances.

This is an historic case that will count much for liberty or against liberty. The charge of conspiracy, since the days of tyranny in England, has been a favorite weapon of every tyrant. It is an effort to punish the crime of thought. It is an effort to keep the powerless in chains by denying them the right to make up in numbers what they lack in wealth.

You have heard a great deal of evidence as to whether Thomas I. Kidd provoked this strike. I don't care whether he did or not, for whatever its form, this is not really a criminal case. It is but an episode in the great battle for human liberty, a battle which was commenced when the tyranny and oppression of man first caused him to impose upon his fellows and which will not end so long as the children of one father shall be compelled to toil to support the children of another in luxury and ease.

The Paine Company may hire its lawyers and import its leprous detectives into your peaceful community; it may send these defendants to jail; but so long as injustice and inhumanity exist, so long as employers grow fat and rich and

powerful through their robbery and greed, so long as they build their palaces from the unpaid labor of their serfs, so long as they rob childhood of its life and sunshine and joy, you will find other conspirators, thank God, that will take the place of these as fast as the doors of the jail shall close upon them.

Gentlemen, I leave this case with you. Here is Thomas I. Kidd. It is a matter of the smallest consequence to him or to me what you do. No man ever entered this struggle for human liberty without measuring the cost, and the jail is one of the costs that must be measured with the rest. But, gentlemen, I do not appeal for him. That cause is too narrow for me, much as I love him and long as I have worked by his side. I appeal to you for the long line – the long, long line reaching back through the ages, and forward to the years to come – the long line of despoiled and downtrodden people of the earth. I appeal to you for those men who rise in the morning before daylight comes, and who go home at night when the light has faded from the sky and give their life, their strength, their toil, to make others rich and great. I appeal to you in the name of those women who are offering up their lives, their strength and their womanhood on the altar of this modern god of gold; and I appeal to you, gentlemen, in the name of these little children, the living and the unborn, who will look at your names and bless them for the verdict you will render in their aid.

Gentlemen, the world is dark; but it is not hopeless. Here and there through the past some man has ever risen, some man like Kidd, willing to give the devotion of his great soul to humanity's holy cause. Here and there all through the past these men have come, and through the future they will come again. They will come to move the world onward and upward; they will come beckoning their fellow-men to follow in their lead; they will point to a sunrise far away, so distant that the ordinary mortal cannot see, but which is clear to their prophetic eye.

Tis coming up the steep of Time,
And this old word is growing brighter,
We may not see its dawn sublime,
Yet high hopes make the heart throb lighter.

We may be sleeping in the ground,
When it awakes the world in wonder,
But we have felt it gathering round,
And heard its voice of living thunder.

It has fallen to your lot, gentlemen, to be the leading actors in one of the great dramas of human life. Not, perhaps, because you are wiser or greater or better than your fellow-men. History is not made that way. Men do not make events, but events make men. For some mysterious reason Providence has placed in your charge for today, aye for ages, the helpless toilers, the hopeless men, the despondent women and suffering children of the world; it is a great, a tremendous trust, and I know you will do your duty bravely, wisely, humanely and well; that you will render a verdict in this case which will be a milestone in the history of the world, and an inspiration and hope to the despairing millions whose fate is in your hands."

B. Darrow and the Ossian Sweet Case

C. Clarence Darrow's Closing Argument, *State v. Sweet* (1925)

My friend Mr. Moll says, gentlemen, that this isn't a race question. "We don't want any prejudice. Race and color have nothing to do with this case. This is a case of murder."

…[But]There is nothing but prejudice in this case; if eleven white men had shot and killed a black while protecting their home and their lives against a mob of blacks, nobody would have dreamed of having them indicted. I know what I am talking about, and so do you. They would have been given medals instead.

Eleven colored men and one woman being tried by twelve jurors, gentlemen. We haven't one colored man on this jury. We couldn't get one… I want to put this square to you, gentlemen. I haven't any doubt but that every one of you are prejudiced against colored people…

A number of you have answered the question that you are acquainted with colored people. … that you had employed colored people to work for you, are even employing them now. All

right…How many of you jurors, gentlemen, have ever had a colored person visit you in your home? How many of you have ever visited their homes? …Probably not one of you.

Now, why? There isn't one of you men but that know just from the witnesses you have seen in this case that there are colored people living right here in the City of Detroit who are intellectually the equals and some of them superior to most of us. Now, why don't you individually, and why don't I and why doesn't every white person whose chances have been greater and whose wealth is larger, associate with them? There is only one reason, and that is prejudice. ….

Now, gentlemen, I say you are prejudiced….You will overcome it, I believe, in the trial of this case. But they tell me there is no race prejudice, and it is plain nonsense.

You need not tell me you are not prejudiced: I know better. We are not very much but a bundle of prejudices anyhow. We are prejudiced against other peoples' color. Prejudiced against other men's religion; prejudiced against peoples' looks. Prejudiced about the way they dress.

We are full of prejudices. … Here and there some of us haven't any prejudices on some questions, but if you look deep enough you will find them; and we all know it.

My friend, Moll, said that my client here was a coward…Who are the cowards in this case? …Eleven people with black skins, eleven people, gentlemen, whose ancestors did not come to America because they wanted to, but were brought here in slave ships, to toil for nothing, for the whites… They have had to take what is left after everybody else has grabbed what he wanted.

The only place where he has been put in front is on the battle field. When we are fighting we give him a chance to die, and the best chance. But, everywhere else, he has been food for the flames, and the ropes, and the knives, and the guns and hate of the white, regardless of law and liberty. Were they cowards? No, gentlemen… They may have tried to murder, but they were not cowards.

… I wonder who we are anyhow, to be so proud about our white ancestry? We had better try to do something to be proud of ourselves; we had better try to do something kindly, something

humane, to some human being, than to brag about our ancestry, of which none of us know anything.

… Aren't you glad you are not black? You deserve a lot of credit for it, don't you, because you didn't choose black ancestry. People ought to be killed who "chose" black ancestry!

… Gentlemen, nature works in a queer way. I don't know how this question of color will ever be solved… It will be after we have learned in the terrible and expensive school of human experience that we will be willing to find each other and understand each other…

Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourselves colored for a little while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black men for a little while; long enough, gentlemen, to judge them, and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case, gentlemen. They were black, and they knew the history of the black.

… I should imagine that the only thing that two or three colored people talk of when they get together is race… I imagine that it is with them always. I imagine that the stories of lynchings, of murders, and of oppression are a topic of constant conversation… carried from one to another until every man knows what others know, upon the topic which is the most important of all to their lives.

Suppose you were black. Do you think you would forget it, even in your dreams? Suppose you had to watch every point of contact with your neighbor and remember your color, and you knew your children were growing up under this handicap. Do you suppose you would think of anything else?

…The jury isn't supposed to be entirely ignorant, they are supposed to know something. These black people were in that house with the black man's psychology, and with the black man's fear, based on what they had heard and what they had read and what they knew…

I don't even need to talk about the Chicago riots, where testimony showed that a colored boy on a raft had been washed to a white

bathing beach, and men and boys of my race stoned him to death. A riot began, and some hundred and twenty were killed.

Let us take this city… I appeal to you, gentlemen, to do your part to save the honor of this city, to save its reputation, and to save the poor colored people who cannot save themselves…

… Some other men, reading about this land of freedom that we brag about on the 4th of July, came voluntarily to America. These men, the defendants, are here because …their ancestors were captured in the jungles and on the plains of Africa, , torn from their homes … loaded into slave ships, packed like sardines in a box, half of them dying on the ocean passage… and brought here. They were bought and sold as slaves, to work without pay, because they were black.

They were subjected to all of this for generations, until finally they were given their liberty, so far as the law goes—and that is only a little way, because, after all, every human being's life in this world is inevitably mixed with every other life and, no matter what laws we pass, no matter what precautions we take, unless the people we meet are kindly and decent and human and liberty-loving, then there is no liberty. Freedom comes from human beings, rather than from laws and institutions.

… If our race owes anything to any human being, or to any power in this universe, they owe it to these black men.

… It is not often that a case is submitted to twelve men where the decision may mean a milestone in the progress of the human race. But this case does. And, I hope and I trust that you have a feeling of responsibility that will make you take it and do your duty as citizens of a great nation, and, as members of the human family, which is better still.

… Now, gentlemen, just one more word … I am the last one to come here to stir up race hatred, or any other hatred. I do not believe in the law of hate. I may not be true to my ideals always, but I believe in the law of love, and I believe you can do nothing with hatred. I would like to see a time when man loves his fellow man, and forgets his color or his creed. We will never be civilized until that time comes.

I believe the life of the Negro race has been a life of tragedy, of injustice, of oppression. The law has made him equal, but man has

not. And, after all, the last analysis is "What has man done?" and not "What has the law done?" I know there is a long road ahead of him before he can take the place which I believe he should take. I know that before him there is suffering, sorrow, tribulation and death among the blacks, and perhaps the whites. I am sorry. I would do what I could to avert it. I would advise patience. I would advise toleration. I would advise understanding. I would advise all of those things which are necessary for men who live together.

… I have watched, day after day, these black, tense faces that have crowded this court. These black faces that now are looking to you twelve whites, feeling that the hopes and fears of a race are in your keeping. This case is about to end, gentlemen. To them, it is life. …Their fate is in the hands of twelve whites. Their eyes are fixed on you, their hearts go out to you, and their hopes hang on your verdict.

This is all. I ask you, on behalf of this defendant, on behalf of these helpless ones who turn to you, and more than that on behalf of this great state, and this great city which must face this problem, and face it fairly —I ask you, in the name of progress and of the human race, to return a verdict of not guilty in this case!

E. Darrow and the Duty of Competence

F. The Pro Bono Obligation and Professionalism

Reference: Rules of Professional Conduct: Rule 6.1--Pro Bono Public Service

A lawyer should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorney's fees or who are otherwise unable to obtain counsel. A lawyer may discharge this responsibility by providing professional services at no fee, or at a substantially reduced fee, to persons and groups who are unable to afford or obtain counsel, or by active participation in the work of organizations that provide legal services to them. When personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel.

Comment

[1] This rule reflects the long-standing ethical principle underlying Canon 2 of the previous Code of Professional Responsibility that "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The rule incorporates the legal profession's historical commitment to the principle that all persons in our society should be able to obtain necessary legal services. The rule also recognizes that the rights and responsibilities of individuals and groups in the United States are increasingly defined in legal terms and that, as a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do. The rule also recognizes that a lawyer's pro bono services are sometimes needed to assert or defend public rights belonging to the public generally where no individual or group can afford to pay for the services.

[2] This rule carries forward the ethical precepts set forth in the Code. Specifically, the rule recognizes that the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and that every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.

[3] The rule also acknowledges that while the provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services. A lawyer also should not refuse a request from a court or bar association to undertake representation of a person unable to obtain counsel except for compelling reasons such as those listed in Rule 6.2.

[4] This rule expresses the profession's traditional commitment to make legal counsel available, but it is not intended that the rule be enforced through disciplinary process. Neither is it intended to place any obligation on a government lawyer that is inconsistent with laws such as 18 U.S.C. §' 203 and 205 limiting the scope of permissible employment or representational activities.

[5] In determining their responsibilities under this rule, lawyers admitted to practice in the District of Columbia should be guided by the Resolutions on Pro Bono Services passed by the Judicial Conferences of the District of Columbia and the D.C. Circuit as amended from time to time. Those resolutions as adopted in 2009 and 2010, respectively, call on members of the D.C. Bar, at a minimum, each year to (1) accept one court appointment, (2) provide 50 hours of pro bono legal service, or (3) when personal representation is not feasible, contribute the lesser of $750 or 1 percent of earned income to a legal assistance organization that services the community's economically disadvantaged, including pro bono referral and appointment offices sponsored by the Bar and

the courts.

[6] Law firms and other organizations employing lawyers should act reasonably to enable and encourage all lawyers in the organization to provide the pro bono legal services called for by this rule.

VA, MD, DC, ABA Model Rules of Professional Conduct: 1.1, 1.3, 6.1, 8.3, 8.4

5. Darrow and Integrity

A. Darrow and the Death Penalty

B. The Leopold and Loeb Case

C. Clarence Darrow, Closing argument *Illinois vs. Nathan Leopold and Richard Loeb*

Your Honor:

Once in England they hanged children seven years of age. They weren't necessarily hanged for punishment, because hanging was never meant for that; it was meant for exhibition...

On a certain day, without any motive or any reason these two boys picked up little Bobby Franks right in sight of their own homes, surrounded by their neighbors. They hit him over the head with a chisel and killed him. They pull the dead boy into the back seat and wrap him in a blanket. The car is driven for 20 miles. They stop and leave little Bobby Franks, soaked with blood, in the car, and get their dinner. There is not a sane thing in all of this from the beginning to the end. It was a senseless, useless, purposeless, motiveless act of two boys.

Why did they kill Bobby Franks? Not for money, not for spite, not for hate. They killed little Bobby Franks as they might kill a spider or a fly, for the experience.

They killed him because they were made that way.

Because somewhere in the infinite processes that go to the making up of the boy or the man, something slipped, and these unfortunate lads sit here hated, despised, outcasts, with the community shouting for their blood.

What is the public's idea of justice?

"Give them the same mercy that they gave to Bobby Franks."

Is that the law? Is that justice? Is this what a court should do? Is this what a state's attorney should do? If the state in which I live is not kinder, more humane, more considerate, more intelligent than the mad act of these two boys, I am sorry that I have lived so long.

They say we come here with a preposterous plea for mercy. When did any plea for mercy become preposterous in any tribunal in all the universe? I am not pleading so much for these boys and I am for the infinite number of others to follow, those who perhaps cannot be as well defended as these have been, those who may go down in the tempest without aid. It is of them I am thinking and for them I am begging of this court not to turn backward toward the barbarous and cruel past.

I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? Nothing. And I think here of the stanza of Housman:

> *Now hollow fires burn out to black,*
> *And lights are fluttering low:*
> *Square your shoulders, lift your pack*
> *And leave your friends and go.*
> *O never fear, lads, naught's to dread,*
> *Look not left not right:*
> *In all the endless road you tread*
> *There's nothing but the night.*

I do not know but that your honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind.

Your honor, none of us are unmindful of the public. I cannot say how people feel. I have stood here for three months as one might stand at the ocean trying to sweep back the tide. I hope the seas are subsiding and the wind is falling, and I believe they are, but I wish to make no false pretense to this court. The easy thing and the popular thing to do is to hang Dickie Loeb and Babe Leopold. I know it. Men and women who do not think will applaud. The cruel and thoughtless will approve. It will be easy today; but in Chicago, and reaching out over the length and breadth of the land, more and more fathers and mothers, the humane, the kind and the hopeful, who are gaining an understanding and asking questions not only about these poor boys, but about their own - these will join in no acclaim at the death of my clients. They would ask that the shedding of blood be stopped, and that the normal feelings of man resume their sway.

But, Your Honor, what they shall ask may not count. I know the easy way. I know your honor stands between the future and the past. I know the future is with me, and what I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and all girls; for all of the young, and, as far as possible, for all of the old. I am pleading for life, under-standing, charity, kindness, and the infinite mercy that considers all.

I am pleading that we overcome cruelty with kindness, and hatred with love. I know the future is on my side. You may hang these boys; you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way through the mazes which only childhood knows. You may save them and make it easier for every child that sometime may stand where these boys stand. You will make it easier for every human being with an aspiration and a vision and a hope and a fate. I am pleading for the future; I am pleading for a time

when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

I feel that I should apologize for the length of time I have taken. This case may not be as important as I think it is. If I should succeed in saving these boys' lives and do nothing for the progress of the law, I should feel sad, indeed. If I can succeed, my greatest reward and my greatest hope will be that I have done something for the tens of thousands of other boys, for the countless unfortunates who must tread the same road in blind childhood that these poor boys have trod - that I have done something to help human understanding, to temper justice with mercy, to overcome hate with love.

I was reading last night of the aspiration of the old Persian poet, Omar Khayyam. It appealed to me as the highest that I can vision I wish it was in my heart, and I wish it was in the hearts of all.

So I be written in the Book of Love,
I do not care about that Book above;
Erase my name or write it as you will,
So I be written in the book of Love.

6. "Humanity Is the Ultimate Conflict"

A. The McNamara Case (1910)

B. Ethics Issues

- Pre-Unethical conditions: When a lawyer needs his fee.
- The Third Party payment problem before mandatory ethics rules: Were the labor unions the clients, or the MacNamara Brothers, or both?
- Darrow's buttons: biasing the courtroom?
- Rationalizing misconduct: How dirty can you play when the other side plays dirty?
- Darrow decides bribery is the most ethical option.

C. Clarence Darrow, Closing Argument, *The People vs. Clarence Darrow*

These men are interested in getting me out of the way. Do you suppose they care what laws I might have broken? I have committed one crime, one crime which cannot be forgiven. I have stood for the weak and the poor. I have stood for men who toil. And therefore, I have stood against them, and now is their chance. Let me say, that if they send me to prison, within the gray dim walls of San Quentin there will brood a silence more ominous and eloquent than any words my poor lips could ever frame. All right, gentlemen, I am in your hands, not in theirs, just yet.

…

The settlement of the McNamara case has cost me many friends, friends that have been coming back slowly, very slowly, as more and more of this matter is understood. Was the settlement, the guilty plea, wise or unwise? Was it right or wrong? You might have done differently, I don't know. I heard James and Joseph McNamara speak of their brothers, of their mothers, of the dead; I saw the human side; I wanted to save them, and I did what I could to save them.

I could have tried the McNamara case, and a large class of the working people of America would have believed, if these men had been hanged, that they were not guilty. I could have done this and saved myself.

But I knew that if these men hanged, a hatred would have settled in the hearts of a great mass of men, a hatred so deep, so profound, that it would never die away.

And I took the responsibility, gentlemen. Maybe I did wrong, but I took it. Here and there I got praise for what was called a heroic act, but where I got one word of praise, I got a thousand words of blame, and I have stood that for nearly a year.

I have tried to live my life and to live it as I see it, regarding neither praise nor blame, both of which are unjust. No man is judged rightly by his fellow men. Some look upon him as an idol and forget his feet are clay, as are the feet of every man. Others look upon him as a devil and can see no good in him at all. Neither is true. I have known this, and I have tried to follow my conscience and my duty the best I could and to do it faithfully, and here I am today in the hands of you twelve men who will pass on my fate.

Gentlemen, there is not much more to say. You may or may not agree with my philosophy. I believe we are all in the hands of destiny, and if it is written in the book of destiny that I shall go to the penitentiary, that you twelve men before me shall send me there, I will go. If it is written that I am now down to the depths and that you twelve men shall liberate me, so it will be.

As one poet has expressed it:

Life is a game of whist.
From unknown sources
The cards are shuffled and the hands are dealt.
Blind are our efforts to control the forces
That though unseen are no less strongly felt.
I do not like the way the cards are shuffled,
But still I like the game and I want to play,
And through the long, long night, I play unruffled
The cards I get until the break of day.

I have taken the cards as they came: I have played the best I could. I have tried to play them honestly, manfully, doing for myself and for my fellow man the best I could, and I will play the game to the end, whatever that end may be.

…If you should convict me, there will be people to applaud the act. But if in your judgment and your wisdom and your humanity, you believe me innocent, and return a verdict of not guilty in this case, I know that from thousands and tens of thousands and yea, perhaps millions of the weak and the poor and the helpless throughout the world, will come thanks to this jury for saving my liberty and my name.

D. The Evolving Ethics of Jury Nullification

Reference: D.C. Ethics Opinion 320

Jury Nullification Arguments by Criminal Defense Counsel

A lawyer defending a criminal case may zealously advocate for the acquittal of his client using any evidentiary argument for which he has a reasonable good faith basis. Current legal standards strongly disfavor jury nullification and prohibit express exhortations that a jury nullify the law. Accordingly, a lawyer may not, consistent with the rules of professional conduct, expressly urge a jury to disregard the law. Nor may a lawyer disregard a ruling of the tribunal limiting the scope of permissible argument. The legal system continues, however, to permit juries to exercise the power to nullify. A lawyer may, therefore, within the bounds of zealous advocacy, advance arguments that have a good faith evidentiary basis even though those same arguments may also heighten the jury's awareness of its capacity to nullification.

Ethics Poll: Crocodile Tears

Question: *If a lawyer can feign great emotion and shed tears to influence the jury, is it ethical to do so?*

1. Sure!

2. No. It is misrepresentation.

3. If he can shed real tears, it's ethical. If uses onions, it isn't.

4. It depends.

5. Argue for mercy anyway.

VA, MD, DC, ABA Model Rules of Professional Conduct: 1.1, 1.2, 1.3, 3.5, 8.4

7. Summation: The Ethics Verdict on Clarence Darrow

APPENDIX I

Issues, Comments and References

1. Section #2 – Ethics Quiz: *"Darrow's Dilemma"*

Best Answer : #2, though I am not confident about it.

The attorney's first duty is to the client. This is a confidence. The question is whether it is a fraud on the court requiring disclosure anyway. As I read Rule DCRPC 1.6, I don't think any of the exceptions apply.

Comments:

- This is an "ethics incompleteness principle" scenario. The rules assume that clients want to win, not lose. They do not apply well to the Scopes trial.

3. Section #4 ~ Ethics Quiz:: "*Tricks of the Trade"*

Best Answers:

A. The phantom document

1. Unethical

B. The spectacled murderer

3. It depends

C. Darrow's lawyer's defendant switch

1. Unethical

D. The alphabet blocks

1. Unethical

E. Mel Belli's bloody hunk

1. Unethical

5. #6 – Hypothetical: Darrow's Record Endangered"

Best Answer: 4. Follow their wishes.

6. Section #7 –Ethics Poll: "Crocodile Tears"

Best Answer: 1.

Comments

- This is still a troubling area where the spirit of the rules and traditions of trial practice are not in complete agreement.
- A prominent Florida attorney revealed that he used onion juice to accomplish what Darrow did naturally. I don't think this is a material distinction, ethically.

Appendix II

ABA CANONS OF PROFESSIONAL ETHICS (1908)

Preamble

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all
just men.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the

enumeration of particular duties should not construed as a denial of the existence of others equally imperative, though not specifically mentioned.

Canon 1. The Duty of the Lawyer to the Courts.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

Canon 2. The Selection of Judges.

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protect earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

Canon 3. Attempts to Exert Personal Influence on the Court.

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

Canon 4. When Counsel for an Indigent Prisoner.

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

Canon 5. The Defense or Prosecution of Those Accused of a Crime.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise, innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

Canon 6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Canon 7. Professional Colleagues and Conflicts of Opinion

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct and indirect, in any way to encroach upon the employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nonetheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

Canon 8. Advising Upon the Merits of a Client's Cause.

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reasons of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

Canon 9. Negotiations with Opposite Party.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

Canon 10. Acquiring Interest in Litigation.

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

Canon 11. Dealing with Trust Property

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other just property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

Canon 12. Fixing the Amount of the Fee

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration. In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client.

No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a bar association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

Canon 13. Contingent Fees

A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a Court, as to its reasonableness.

Canon 14. Suing a Client for a Fee.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

Canon 15. How Far a Lawyer May Go in Supporting a Client's Cause.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the

unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in the mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

Canon 16. Restraining Clients from Improprieties.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards the Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

Canon 17. Ill Feeling and Personalities Between Advocates.

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the cause. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

Canon 18. Treatment of Witnesses and Litigants.

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

Canon 19. Appearance of lawyer as Witness for His Client.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

Canon 20. Newspaper Discussion of Pending Litigation.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.

Canon 21. Punctuality and Expedition.

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

Canon 22. Candor and Fairness.

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

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, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

Canon 23. Attitude Toward Jury.

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal conduct 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.

Canon 24. Right of Lawyer to Control the Incidents of the Trial.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

Canon 25. Taking Technical Advantage of Opposite Counsel; Agreements with Him.

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing as required by rules of Court.

Canon 26. Professional Advocacy Other Than Before Courts.

A lawyer openly, and in his true character, may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

Canon 27. Advertising, Direct or Indirect.

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended, with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar association and committees thereof, in legal and scientific societies and fraternities; foreign language ability; the fact of listings in other reputable law lists; the names and addresses of references; and,with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee of Law Lists may be treated as evidence that such list is reputable.

It is not improper for a lawyer who is admitted to practice as proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office to so use the designation "patent attorney" or "patent lawyer" or "trademark attorney" or "trademark lawyer" or any combination of those terms.

Canon 28. Stirring Up Litigation, Directly or Through Agents.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any othergrounds of action in order to secure them as clients, or to employ agents or runners

for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or other, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof to the end that the offender may be disbarred.

Canon 29. Upholding the Honor of the Profession.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Canon 30. Justifiable and Unjustifiable Litigations.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's cause is one proper for judicial determination.

Canon 31. Responsibility for Litigation.

No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what causes he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

Canon 32. The Lawyer's Duty in Its Last Analysis.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and he is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

Canon 33. Partnerships-Names

Partnerships among lawyers for the practice of their profession are very common

and are not to be condemned. In the formation of partnerships and the use of partnership names care should be taken not to violate any law, custom, or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the state, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this issue. When a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.

Partnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.

Canon 34. Division of Fees

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

Canon 35. Intermediaries

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

"The established custom of receiving commercial collections through a law agency is not condemned hereby."

Canon 36. Retirement from Judicial Position or Public Employment.

A lawyer should not accept employment as an advocate in any matter upon the merit of which he has previously acted in a judicial capacity. A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

Canon 37. Confidences of a Client.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the

confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

Canon 38. Compensation, Commissions and Rebates.

A lawyer should accept no compensation, commission, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

Canon 39. Witnesses.

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand.

Canon 40. Newspapers.

A lawyer may with propriety write article for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

Canon 41. Discovery of Imposition and Deception.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

Canon 42. Expenses of Litigation.

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

Canon 43. Approved Law Lists.

It is improper for a lawyer to permit his name to be published in a law list the conduct, management or contents of which are calculated or likely to deceive or injure the public or the profession, or to lower the dignity or standing of the profession.

Canon 44. Withdrawal from Employment as Attorney or Counsel.

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

Canon 45. Specialists.

The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

Canon 46. Notice to Local Lawyers.

A lawyer available to act as an associate of other lawyers in a particular branch of the law or legal service may send to local lawyers only and publish in his local legal journal a brief and dignified announcement of his availability to serve other lawyers in connection therewith. The announcement should be in a form which does not constitute a statement or representation of special experience or expertness.

Canon 47. Aiding the Unauthorized Practice of Law.

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.