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# Legal Ethics

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# Kentucky Law Journal

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## LEGAL ETHICS

By JUDGE ROBERT L. STOUT, of the Versailles Bar.

The history of Kentucky jurisprudence discloses a woful lack of knowledge of Legal Ethics, but for which ignorance, great shame, mortification and humiliation need not have been endured. This history is referred to only for the purpose of calling attention to the importance of the subject. It is a subject of such vast importance and wide scope, embracing as it does the whole conduct and duty of the lawyer, in all his relations to life and citizenship, as to preclude anything but a cursory presentation.

For the sake of convenience the subject has been divided and will be treated under four (4) different heads, to-wit: The lawyer's duty as a citizen, his duty to his client, his relation to the bar, and to the court and jury.

Taking the subdivisions in the order indicated. His first duty is as the citizen, and perhaps when this duty is well done, it embraces all the others.

Go to any civilized, enlightened, cultured community and the general rule is that the foremost, most influential citizens of that community are its lawyers; there must be reason for this, and reason there is. The high-class lawyer is the man who deals with his fellow men fairly, honestly and candidly. He is an exemplar. His fellow citizens look to him for leadership and direction, therefore what must be his life and the living of it? First of all he ought to be a man of strong character, standing for the law and its proper enforcement; no lawlessness should ever be countenanced by him, no matter what the provocation may be or the natural bent of his personal feeling. The most certain and effective way for the profession to become an offense, a byword and hissing, is for the lawyers to uphold or connive at lawlessness.

The lawyer ought to be mindful of the welfare of the state; he is, or should be, the educator in temporal affairs, as the prelate is, or should be, in spiritual affairs; to this end his habits ought to be strong and clear, his conversation chaste, his morals above reproach, his associates, men of quality. His learning should partake of a more general and universal character than that of any other profession.

In his private affairs, in the every day dealing with his neighbors, he ought to be a model citizen. His financial credit ought to be absolutely unquestioned; there must be with him no dodging the collector, when that begins, his influence is on the down grade. The lawyer must never be a stirrer up of strife, and particularly must be avoid litigation of a personal nature; but if he is compelled by his adversary, to go to law, let him not

plead his own cause, for verily there is no maxim truer than that "The lawyer who pleads his own case has a fool for a client." The most embarrassing thing to bench, bar and jury is the lawyer pleading his own cause, totally unconscious of the unmitigated asininity of his performance. (I feel that it is almost an insult to your intelligence to mention this, but there are members of the profession who are guilty of this enormity in defiance of all requirements of common every day decency.)

The lawyer's duty as a citizen is not at all confined to his dealings with client and court; he owes public duties, the performance of which frequently entails great sacrifice and financial loss, and one of the greatest of these is the duty of aiding his state or nation to make the laws. The greatest strength of a government is its legislative strength, and legislation is largely in the hands of lawyers. The next greatest strength is its strength of jurisprudence, which is almost entirely in the lawyer's hands. Legislation announces the law. Jurisprudence pronounces or interprets it. Can any one fail to see the paramount duty of the lawyer as a citizen when he is called to either of these stations? The paramount law is the Constitution, upon which rock so many laws split and go to wreck. If lawyers do not control or direct legislation, inextricable confusion must inevitably result, for a knowledge of Constitutional law and of Constitutions must guide and restrain legislators. It used to be, that Americans held in veneration the fundamental law of the Constitution. The great Chief Justice, John Marshall, in the case of *Marbury v. Madison*, 1 Cranch 177, made this statement which ought to forever set at rest and conclude the matter:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular causes must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the every foundation of all written Constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is, in reality, effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their

powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

This statement of the Court's opinion presents an unanswerable argument upon the question of the supremacy of the Constitution. No question for a Court's determination ever arises but that the bar materially aids the bench in reaching a proper conclusion or judgment, so that the lawyer has all to do with the jurisprudence of his country. His duty to the Court along other lines will be hereinafter considered.

The Emperor Justinian promulgated a code of law which to this day is known as "Justinian's Code; but 'twas hinted in Rome and whispered aloud in the Forum that the real moving spirit in the compilation of that system was Tribonian—that Tribonian, the lawyer, furnished the brains, in order that Justinian, the Emperor, might be immortalized. The lawyer's glory was that he had done a great thing for his countrymen and his contemporaries believe it true that—

"When our Souls shall leave this dwelling  
The glory of one fair and virtuous action  
Is above all the scutcheons on our tomb."

With this brief and frame-like statement of your duty as a citizen, we take up the duty to your client. The Common Law of England has been described epigrammatically as "the perfection of human reason." This is apparently extravagant, but when the sources from which it sprung are examined, the experiences which fostered and developed it, are even dimly realized, and the conditions surrounding its operation are presented, we know 'twas no extravagant admirer who so designated it. That law recognized certain relations as so intimate, confidential and sacredly necessary, that it would not permit communications made in pursuance and because of that relationship to be divulged in a court of justice, under any pressure of circumstance or necessity. One of those relations was and is that of the lawyer to his client; another, that of husband and wife, and still another was perhaps that of priest and confessing penitent. The sanctity of the company in which you find yourselves ought to give you pause and compel a realization of the great trust which in you is confided, of the great responsibility which on you rests. Nothing snort of absolute truth, fidelity, candor and honesty must nor can be tolerated: you must be as true to your client as the husband to the wife, as priest to conscience stricken penitent.

Legally you are responsible to your client only for want of ordinary care and ordinary skill. If you are deficient in those attributes, you probably will not be annoyed by many clients, so the legal responsibility need not give you great concern. However, you are not required, not even expected to know all the law all the time or any time. C. J. Abbott, afterwards Lord Tenterden, said, "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into."—*Montrion v. Jeffreys*, 2 C. & P. 113 (12 E. C. L. R. 50).

While it has been adjudicated that you are not even expected to know

all the law, yet that does not mean that you are not to master all the law and all the facts, too, in the particular case entrusted to your care and direction. A simple sense of fair dealing demands that you do master every scintilla of law and fact bearing upon your case; for that your client has the right to expect, nay, to demand. When your client's property, reputation, liberty, or his very life are placed in your hands, can your conscience remain quiet or unaccusing until you have done your best endeavor? If you do not give him your best efforts, if you are conscious of your delinquency, you either find your peace destroyed or you are unworthy of the high office of attorney-at-law.

You may have heard something of the lawyer who takes cases the fee depending upon the contingency of success; this is to be discouraged and discountenanced as a general rule. It is related of one of our most distinguished jurists, explanatory of the contingent fee, that upon one occasion he told his client who had stated his case, that he would take it upon a contingent fee. The client looked puzzled, scratched his head and finally said, "Say, Mr. Blank, what is a contingent fee?" "Well," said Mr. Blank, "it is this: If we get nothing by our suit, I get nothing. If we win the suit, you get nothing." The ambulance chaser is a discredit to and the disgraceful part of the profession; however, it must not be supposed or presumed that every lawyer who brings his suit for damages for personal injury inflicted is an "ambulance chaser." The right for redress for wrongful injury to the person is just as sacred as any other right guaranteed by the laws of our land and the lawyer who represents, honestly and decently, one seeking such redress is just as honorable, just as much entitled to the respect of his brethren, as any other lawyer in any other case; attempts to discredit him are just as reprehensible and contemptible as the practices of the most confirmed "ambulance chaser." The "ambulance chaser" has no place in the ranks of the profession; he frequently is a suborner of perjury, always a solicitor of the business which ought never to be. It is questionable if a lawyer ought to advertise even to the extent of putting his professional card in the newspaper; the clients must come to him, or he must be without clientele.

The lawyer must not be too conservative though; he ought to mingle and associate freely with the people, else how can he know the juries called to try his client's cause? To know your jury is a most important equipment; many an excellent case has been lost because a juror's prejudices and passions were unknown to the party accepting him. Some men are ignorant of their own bias or prejudice—but these same prejudices are known to every one of his acquaintances—when that sort of man is put upon his oath on the voir dire, he unhesitatingly qualifies as a competent juror, and honestly too. If you knew the existence of the disqualification, he would hardly sit upon your client's case unless your peremptory challenges were exhausted.

The topic of your duty to your client presents many problems most difficult of satisfactory solution. The boundary of your duty is very clear and plain when your client's contention coincides with your own ideas of justice and propriety. The other end of the question is not so easily solved. If your client's demand does not meet your own approval, notwithstanding which, you undertake its prosecution, what then is your duty to him? "That lawyers are as often ministers of injustice as of justice, is the common

accusation in the mouth of gainsayers against the profession. It is said there must be a right side and a wrong side to every lawsuit. In the majority of cases it must be apparent to the advocate, on which side is the justice of the cause; yet he will maintain, and often with the appearance of warmth and earnestness, that side which he must know to be unjust, and the success of which will be a wrong to the opposite party. Is he not then a participant in the injustice? It may be answered in general: Every case is to be decided by the tribunal before which it is brought for adjudication, upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence. No court or jury are invested with any arbitrary discretion to determine a cause according to their mere notions of justice. Such a discretion invested in any body of men would constitute the most appalling of despotisms. Law, and justice according to law—this is the only secure principle upon which the controversies of men can be decided. It is better, on the whole, that a few particular cases of hardship and injustice, arising from defect of evidence or the unbending character of some strict rule of law, should be endured, than that general insecurity should prevail the community, from the arbitrary discretion of the judge. It is this which has blighted the countries of the East as much as cruel laws or despotic executives. Thus the Legislature has seen fit in certain cases to assign a limit to the period within which actions shall be brought, in order to urge men to vigilance, and to prevent stale claims from being suddenly received against men whose vouchers are destroyed or whose witnesses are dead. It is true, in foro conscientiae, a defendant who knows that he honestly owes the debt sued for, and that the delay has been caused by indulgence or confidence on the part of his creditor, ought not to plead the statute. But if he does plead it, the judgment of the court must be in his favor.

Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that, which the client in person, from want of learning, experience and address, is unable to do in a proper manner. The lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible usurps the functions of both judge and jury."

You are not compelled to accept employment in any case, but after you have accepted it you are not to constitute yourself both judge and jury. This view, it seems to me, meets any sweeping objection which may be made as indicated. Each particular case stands upon its own merits and you will have to be the final arbiters as to the cases you take.

Those who are disposed to ridicule and belittle the sincerity of the profession frequently ask why lawyers defend men whom they know to be guilty of crime with which they stand charged. That question is easily disposed of: The law is extremely jealous of the lives and liberties of all men; in that jealousy it has hedged about the accused of crime, first of

all, the presumption that he is innocent, (2) that he must be proven guilty to the exclusion of a reasonable doubt, (3) that every fact and circumstance necessary to constitute his guilt must be established to the satisfaction of the jury beyond a reasonable doubt (4) that those facts must be established by legal evidence and (5) that the jury shall be told or instructed as to all the law of his particular case. Now, no matter what the guilt of the accused, he is entitled to every right the law affords him; he cannot obtain those rights if lawyers should refuse to appear in his behalf, or be denied him. If he can be deprived of these or of any safeguards vouchsafed by law, why then the innocent may also be deprived, for we all know that before the law "all men are equal." Every man has the inalienable right to have his case presented legally—to have only legal evidence produced against him and to have the law, applicable to his case, properly and correctly expounded. You may fully, freely and with clear conscience, defend any man charged with any crime, in order that he may have a trial according to law; any other trial is but a farce—is but legalized, judicial lynching.

So we may defend any criminal, at least to the extent indicated. You are not expected to assert your personal opinion in any case, indeed, in strict propriety, you ought never to inject into your argument your own personal views or opinions; you are fairly to aid both court and jury by presenting legal evidence in a legal manner, by using such arguments as the facts justify and your personality ought to have no bearing, no influence at all in the matter. I may be permitted to say that your duty to your client never requires you to surrender or smirch your self-respect, your manhood, your character or your conscience. If a case presents itself involving any one of these, flee from it as from the plague.

As a parting injunction on the subject of your duty to your client, let me beg of you at all times, under all circumstances; keep your temper under perfect control. If you, naturally are high or quick-tempered, you must be always on guard, ever watchful lest that most insidious and crafty of enemies overcomes you. With your temper goes the clearness of mental vision, and your speech becomes both intemperate and illogical: your adversary has you at a fearful disadvantage which even he cannot forego, since you, yourself, furnish vantage point and arms to him. It may have been—it could surely have been with the greatest certainty spoken of the lawyer: "Quos, Deus, vult perdere, dementia." You then not only owe it to yourself to keep your temper, but you owe it to your client. You have no right to destroy yourself when that destruction carries with it the life, fortune or reputation of him who has entrusted it to you for protection or preservation.

Your duty to the members of the bar is generally and ought always to be in its performance, the pleasure of your professional life. The life of the lawyer is essentially the "Strenuous Life," made endurable by the little civilities and amenities mutually extended in the brotherhood—Legal Fraternity it is called and brotherly love should abound. It ought to be that

"No quarrels have we of our own  
 We manage others' broils  
 And though we fight with all our might  
 We've buttons on our foils."

However, sometimes I have seen a lawyer abuse his fellow lawyer on the other side, indulge in harsh criticism and make himself generally obnoxious. An old lawyer told me that his rule was: If you have a bad case vilify the other side, you may raise such a dust that the real issue will be lost or obscured. I believe that his rule, or rather its reason, is the only justification, excuse or palliation for such conduct.

We subscribe to neither rule nor reason; and say most emphatically don't.

Never accept employment from litigant who has counsel, unless that counsel is consulted and heartily consents for you to co-operate with him. If you depart from this advice, it will often be to your humiliation and mortification—it will always be at the expense of loss of position among your brethren. To lose your brother lawyers' good opinion is a serious matter and must be quickly followed by the loss of the good opinion of the public. The outcast lawyer is the most pitiable spectacle in professional life, unless it be the outcast preacher and they are such rarities as not to count.

Another excellent way to lose caste in the profession is to settle your controversy directly with the litigant. No reasons here given specifically. I prefer to leave that to your imagination. I believe it was Sir Galahad who spoke no slander, nor listened to it. Speak no disparaging thing of your brother at the bar. If he offend, go to him, aid, comfort, advise and counsel him; if he be worthy of saving, save him. If he be unworthy, deal as gently with him as you can.

No matter how formidable, or how eminent and distinguished your opposing counsel may be, do not fear him, and above all, do not fear him so much as to be discourteous. Remember that your knowledge of the law, so far as it goes, is as good and valuable as his. The law is the same for you as it is for him. In such a predicament, if your cause is just, you know that you are thrice-armed—which seems sometimes but a poor, feeble equipment.

Now the last rule I shall lay down for your guidance among your brother lawyers applies with equal force to all your relations with life, and, like the name of Abou Ben Adhem, "leads all the rest." It is this: Always, everywhere—be a gentleman.

In the fourth relation, a disregard of the rule, just promulgated, makes the delinquent a sadder, but poorer man, but the disregard is so infrequent, that it shocks and horrifies bench, bar, jury and audience, when a lawyer is guilty of ungentlemanly conduct to the Court. The bar is always courteous to Court and jury, as Court and jury are courteous to bar. It seems strange then to admonish you not to be discourteous, not to reflect upon the integrity of the Court.

Surely no one need be admonished that it is not proper or permissible to use such language as follows, in framing a petition for rehearing, to-wit: "Your honors have rendered an unjust decree. The opinion is not in accordance with the facts of the case, and will be a source of regret to this court. The record has not been carefully examined and hundreds of pages have been entirely overlooked. Facts have been assumed which have no place in the proof, and others have been ignored which stood out on every page. With profound respect, not simulated, but real, I say that I fear this hon-



orable court was more attracted by the argument of counsel than by the literature of the record.

"I must not be misunderstood by these remarks. It is not in me or of me to cast reflections upon this honorable court. To do so were unprofessional, and I cherish no sentiment in accord with such a course. But the very aim and purpose of a petition for rehearing, the very nature of its existence, is to subject the action of the bench to a temperate but searching criticism of the bar. Wherefore, in obedience to my sworn and earnest duty to shield my client against injustice, I say, with abundant deference and unfeigned respect, that the opinion which this honorable court has rendered contradicts the undisputed facts on two hundred and fifty pages of record. My only excuse for making such statements is their truth, and I must now prove that they are true." Then follows the argument the attorney submitted. After which he concludes: "Your honors reversed the chancellor upon the law and reversed him upon the facts, and then affirmed all he decided. This can only be explained upon the ground that it takes two negatives to make an affirmative.

"But there is still worse behind. It is not the custom to copy vouchers in full in the records taken to this court. The report of the commissioner or comments of the chancellor have usually been considered sufficient copies. But after I saw the irregular opinion in this case, I sued out a certiorari, and brought to this court full copies of one hundred and thirty-one vouchers, running through the whole existence of the trust, and filling more than one hundred pages. Every one of these vouchers shows that H. G. alone held the funds, and that O. G. is as completely a stranger to them as the learned and respected judges of whom I am begging accurate justice. And yet your honors say not that the evidence is conflicting or insufficient, but that my client 'wholly failed to prove' that H. G. received the money. I have tried to be respectful because I feel so; but I have the right to complain of negligent reading of the records, and to appear in this honorable court and stand pro testem for the bar. A ruinous and disastrous decree has been rendered against my client, who is proved to be as wholly innocent of all offenses as those whom I have the honor to address. Indifference to the record may work his ruin, but it will not elevate the cause of administrative justice.

"All this is careless. It is very hard for my client that the record is not read as accurately by the bench as it was prepared by the bar. No error should be allowed to soil the judgment of an upright and impartial court, and to avoid that in this case a rehearing should be instantly granted, so that the former opinion may do no wrong to a suitor at the bar."

The counsel in that paper, if you can believe it was filed as quoted, charged the highest court in our state (1) that it had overlooked the facts in the case; (2) that it had assumed facts having no place in the record; (3) that it had ignored facts standing out on every page of the record; (4) that it was careless and indifferent to the rights of a litigant, and (5) that the result of that carelessness and indifference was a ruinous, disastrous and unjust judgment against a party wholly innocent of offense. That petition was actually filed in the Court of Appeals of the State of Kentucky by one of the most distinguished and ablest lawyers in the history of the state. He was a man of powerful intellect, of wonderful ability and learning, yet he committed this enormity contrary to the canons of all Ethics.

He did it because he never regarded a rule I have laid down for your careful, prayerful consideration, viz: At all times, under all circumstances, keep your temper under perfect control. I refrain from giving the name of this eminent lawyer—for he was an eminent lawyer in spite of his frailty—for the reason that "Nihil de mortuis, nisi bonum."

Candor and honesty must always characterize your dealings with a court, but it must not be that mistaken candor, which is only rudeness, nor that honesty which is only used to vent ill-temper.

You may try, and perhaps successfully for a time, to deceive or mislead the court. Your deception will, sooner or later, usually sooner, be discovered, then your usefulness before that court is over, gone, forever gone. You ought always in this connection to have before you that you are an officer of the court, an officer sworn just as the court itself is sworn, to faithfully perform your duties as an attorney-at-law; when you are in the discharge of your sworn duty, acting within and for your rights, do no act for which you feel it necessary or advisable to apologize, and never expect the court to apologize to you for his decision. An apology signifies at least that the act needs some excusing—if not positive defending. So do nothing which needs defending or excusing and apology will be unknown.

The most perfectly courteous lawyer I ever observed in a court, courteous with a graceful, charming courtesy to bench, bar, witness and jury, was the late lamented Col. W. C. P. Breckinridge. How often have I heard him in excepting to the ruling of the trial court, say with a deferential bow: "Perhaps I am wrong in my contentions, but with the permission of the court, I will except to your honor's ruling, and save the question." Is it possible that Colonel Breckinridge's client suffered because of the courtesy and deference paid by counsel to client? The question answers itself.

As for your relation to the jury "experience is the best teacher." The jury itself will teach every lawyer the duty that he owes to it. I may say though that it is the lawyer's duty to aid the jury in making a righteous verdict, not to confuse or obstruct them. And if you fail in your duty to the jury, you are going to find it out and that quickly.

Remember the admonition and warning of Lord Bolingbroke: "The profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious."