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THE LAWYER'S ROLE BEFORE LITIGATION

LEE LOEVINGER*

A lawyer is consulted regarding antitrust aspects of proposed business activities; or regarding the possibility that his client may have a cause of action under some antitrust law. What is his role at this stage? What are his responsibilities? Would these be substantially different if the client's problems had no antitrust element?

The system of formulating legal principles and studying and teaching law on the basis of the decisions of litigated cases has one serious shortcoming, at least, in its tendency to obscure the dual role of the lawyer: first as counsel, and second as advocate. Both lawyers and laymen tend to think of the lawyer as an advocate for his client's cause, rather than as a counsel in avoiding litigation or in determining whether or not there should be any cause. The result is that lawyers tend to think and act as advocates, generally to the prejudice of their role as counsel.

The distinction is, however, an important one. The function of the advocate is to marshal all the evidence, assemble all the precedents and present all the arguments favoring a particular result sought by the client. The effort is to urge and secure a particular result rather than to determine whether or not the result is justifiable or desirable. The function is an indispensable and legitimate one. The function of counsel, on the other hand, is not simply to justify the result desired by a client but to determine whether a particular end is a justifiable or desirable one from the legal viewpoint and then to advise the client accordingly. The counsel is, in a very real sense, acting as an *ex parte* judge at a pre-trial stage of a transaction that may never reach the trial stage.

The inconsistency of the roles of counsel and advocate can be illustrated by recalling the objections to the combining in a single person or agency of the function of prosecutor (or advocate) and judge. The objection to the combination of these functions is not that any particular individual is or will be corrupt, but that psychologically the human mind cannot both seek to persuade and weigh the argument formulated by itself in the same matter.

This inconsistency has very practical applications to the lawyer's functions in private practice. When the lawyer serves as advocate for his client's cause he seeks to justify his client's conduct by urging upon the court the most favorable version of the evidence and the most favorable precedents that can be found, even though the weight

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of evidence and authority may appear to be against him. Indeed, the lawyer as an advocate may even urge that the court should go beyond any precedents and make new law favoring his client's cause. However, when the lawyer acts as counsel he is helping the client decide whether or not to undertake a particular course of action—either following some course the legal consequences of which may be doubtful or instituting or defending a lawsuit. A reasonable decision as to the wisdom of prospective action cannot be made on the basis of a partisan or one-sided view of the evidence and the law, but requires the most nearly objective evaluation of the situation and the applicable legal principles that the lawyer is capable of formulating. Consequently the lawyer who acts as an advocate for the view he thinks his client holds when he is called upon to counsel a client is in reality doing a disservice to the client. The lawyer acting as an advocate has not only the right but the duty to urge the resolution of all doubts in favor of his client. On the other hand, the lawyer who counsels a client on the basis of resolving numerous doubtful points in favor of a desired result will usually mislead the client into a much less favorable position than was anticipated.

Consequently a client who seeks the advice of a lawyer, either as to a future course of conduct or as to the institution of litigation, is entitled to receive judicious and judicial (or quasi-judicial) counsel regardless of the fact that the client may desire and even request a partisan opinion. The fact that the client may desire to act contrary to his lawyer's advice is another matter, as is the question of whether or not the lawyer should bring an action contrary to his own judgment of the controversy. In most cases a client will take his lawyer's advice on the institution of a lawsuit, but in any event the lawyer is bound to render proper advice.

The problem of advising a client as to whether or not litigation should be initiated is surely one of the most difficult and important tasks any lawyer performs. Unfortunately there is very little to guide the lawyer in this field. Most of our legal principles are derived from the decisions of cases that have been litigated; and every litigated case obviously represents the judgment of some lawyer that litigation is justified in that situation. The courts are seldom willing to add insult to injury by declaring not only that the loser should be thrown out of court but also that he should never have come into court. Probably the court rarely has sufficient knowledge of the evidence available to the parties before trial to be willing to make such a declaration. The Canons of Ethics mark only the outermost limits of permissible action, and are of little assistance in setting up guides to proper or prudent action. The professors often lack the practical experience necessary to judgment in this area and the law school

curricula make no provision for the study of such prosaic problems.

Ultimately the determination to incur the expense and inconvenience of a lawsuit must be an intensely practical decision. This is no mere hypothetical question as to what the law is or ought to be on an assumed state of facts. This is an irretrievable commitment of time, money and labor—in an antitrust case much of all three. Experienced trial lawyers always look for three essential elements in a case before deciding to sue: Liability—damages—and solvency.

Obviously there is no use in bringing an action unless liability exists. The "nuisance suit" may appeal to the layman, to the irate or disgruntled, or to the paranoiac, but every competent trial lawyer knows that, all other considerations apart, in the short run it is not worth his time and in the long run it will destroy his effectiveness and standing in the profession. The existence of apparent liability as an indispensable condition to bringing a suit involves two quite different things. First, there must be a substantive violation of law, or contravention of legal principles imposing liability as a consequence. This is the matter that is typically considered in law schools, seminars and discussions, law review articles, and appellate decisions. Whether or not a given state of facts involves liability under prevailing principles of law is the subject of innumerable volumes in every field of law, occupying endless shelves and stacks in law libraries throughout the world. It is the first topic with which the aspiring law student is confronted; and the ultimate issue considered by the judges of the court of last resort in their final opinion denying the last petition for rehearing. The minimum qualification of any lawyer qualified to practice must be the ability at least to address himself to the solution of this problem in a given situation.

Of course, this does not mean that there is a neat or decisive answer to every question as to the existence of liability on a given state of facts. Particularly in the developing field of trade regulation there are numerous questions as to which the answer is doubtful. As to these, however, the lawyer must evaluate the probabilities of the various results by weighing analagous cases and doctrines in the familiar and usual manner. Most often, though, the result reached will depend more upon the facts assumed, or proved, than on the legal principles invoked. There are few cases, indeed, in which the result reached could not be reversed by changing only a few of the many facts involved in the situation. Consequently the second, and possibly most important, aspect of determining the existence of liability lies in ascertaining the evidence.

Note the last word. Lawyers and judges often talk about the "facts" of a case, but in reality there are no such things so far as litigation is concerned. Lawsuits are decided on evidence, not on facts. The evi-

dence may, and is assumed to, correspond more or less closely to the facts. But this is not necessarily or always true. There may well be facts without any competent evidence to prove them. They are of no significance in the decision of a lawsuit. A lawyer may gamble on being able to establish certain facts from evidence becoming available during the trial but not in his possession prior to trial, as, for example, testimony expected to be elicited from adverse witnesses on cross-examination. But there is no justification whatever for going to trial because of a belief as to "facts" which has no support in evidence either known or reasonably foreseeable. Therefore the existence of liability depends upon either having in possession or having a reasonable probability of getting evidence from which a state of facts can properly be inferred which on the basis of established substantive principles of law will support a conclusion of liability.

How far a lawyer should go in order to assure himself of the existence and availability of such evidence before bringing suit must be determined by the personal judgment of the lawyer in each case. It is clear that the more thorough the investigation prior to the filing of suit the smaller will be the possibility of surprise or disappointment in the result of the suit. Further, experience strongly urges that there be at least some investigation of the facts beyond the questioning of the client. A lawyer must keep in mind that his client is an adverse witness from the viewpoint of the opposition and a highly interested witness from the viewpoint of the court. The lawyer should place no more reliance on the unsupported testimony of his client than he would on the unsupported testimony of any other witness. It may be assumed that clients are no more reliable than any other class of witnesses, and are more interested than ordinary witnesses. Coherence and plausibility are no guarantee of accuracy or veracity, although their absence may well impugn testimony. The pre-trial discovery procedures contained in the Federal Rules of Civil Procedure provide a means of obtaining evidence from adverse parties and neutral witnesses after action has been started and before trial. But they have nothing to do with investigation of the evidence that is in the control of a party. Since the opposition will certainly "discover" this evidence, and since it will be necessary for the lawyer to go over all such evidence prior to trial in any event, common prudence would dictate that all evidence in the possession of the client should be inspected before reaching any decision as to the bringing of suit. Ordinarily there will be some documentary evidence or disinterested testimony to corroborate or impeach the story of the client. In the rare case where the lawyer is unable to secure any evidence other than his client's story prior to starting action, great caution is indicated in weighing the other factors that must be considered at this stage.

After ascertaining that there is a legitimate claim for relief under the law, and that the available evidence will establish the facts showing this claim, the lawyer must consider how substantial the claim is—how large are the damages suffered or threatened. This is particularly true in an antitrust or trade regulation case which is almost certain to be lengthy, complex and difficult. It is absurd to start an action which, if successful, will profit the client no more than the cost of suit and attorney's fees. It might appear that this has no application to an action under statutes like the antitrust laws which provide for the recovery of treble damages plus reasonable attorney's fees. In practice, this principle has particular application to antitrust actions.

To begin with, as the laws now stand, attorney's fees are not recoverable in a suit in which the only relief afforded is an injunction; they are awarded only when damages are also recovered. Consequently when the principal relief sought is an injunction, even though there may also be some prayer for damages, it should be assumed that the monetary recovery from the defendant will be minimal, and the lawyer must be sure that the client is confident that injunctive relief will be sufficiently valuable to the client to justify the payment of the expenses of suit including an adequate attorney's fee.

In the second place, it must be kept in mind that "costs," under the American plan of litigation, are essentially nominal and do not in fact include more than a small fraction of the usual out-of-pocket expenses of preparing and trying a protracted or difficult case, such as an antitrust suit. The cost of travel, investigation, court reporters, depositions, accountants, preparation of exhibits, stenographic services, photostating, and the numerous other expenses of preparation and trial can, and in an antitrust suit usually do, run into many thousands of dollars that are not allowable as statutory costs.

Finally, it must be said that, in my opinion, the courts almost never allow as a "reasonable attorney's fee" an amount that is, under present conditions, adequate to compensate a lawyer for his services in trying an antitrust suit through to judgment. While this is necessarily a subjective judgment, it is based upon an examination of most of the reported antitrust cases involving the allowance of an attorney's fee and upon fairly wide inquiry among attorneys as to prevailing standards of charges. Therefore a lawyer who undertakes to handle a private suit under the antitrust laws must almost as a matter of economic necessity look to his client for compensation in addition to the court allowance of a statutory fee. Needless to say, this will, in most cases, involve a sharing in the damages recovered on a contingent and percentage basis.

In this connection, it must also be kept constantly in mind that

even in cases where a cause of action is established and damage to the plaintiff is proved, the courts are very cautious in holding evidence competent to establish the amount (as distinguished from the fact) of damages.¹ Furthermore, even where the facts are readily established, it is impossible to predict with any assurance how the court or a jury will interpret the facts in calculating the amount of damages. Therefore it is necessary to be extremely conservative in preliminary estimates of the "value" of an antitrust or similar case from the plaintiff's viewpoint prior to trial.

On the other hand, expenses are very likely to exceed early estimates. Some companies that have been involved as defendants in a number of antitrust cases have adopted deliberate policies of taking extended depositions, engaging in extensive pre-trial proceedings, and contesting almost every point when forced to trial. This inevitably runs up expenses to all parties to a very substantial degree. Even where this is not undertaken as a trial tactic, the pre-trial and trial proceedings in a complex trade regulation case are likely to become very expensive to all parties, and to be felt most keenly by those parties with the most limited resources. Thus, before starting action in a trade regulation matter, the lawyer must determine that a conservative estimate of the damages recoverable indicates an amount sufficient to cover a liberal estimate of costs and expenses, to permit payment of an adequate fee to the attorney, and to leave an amount sufficient to compensate the client for his time and trouble in the prosecution of the case as well as to make some contribution toward reparation of his damages. Viewed in this light it will be found that many cases which might initially appear to justify legal action simply are not economically practical. The damages suffered or threatened must be very substantial to justify the institution of an antitrust suit on behalf of a private plaintiff.

Finally, even where there is a good cause of action based upon available evidence and the damages are substantial enough to pay all expenses and to compensate both the attorney and the party, there must still be the assurance that the damages recovered can be collected. In personal injury actions this is usually a matter of personal solvency or of the existence of insurance. In antitrust and trade regulation actions the defendants are more likely to be sufficiently solvent to pay the judgments, but there is no insurance for those cases where defendants do not have assets subject to execution that are sufficient to pay any judgment recovered.

1. See, e.g., *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); Loevinger, *Enforcement of the Robinson-Patman Act by Private Parties in How to Comply with Robinson-Patman Act*, in *ANTITRUST LAW SYMPOSIUM* (CCH 1957); cf. *Enterprise Industries v. Texas Co.*, 240 F.2d 457 (2d Cir. 1957).

After investigating, analyzing and weighing the evidence, ascertaining the applicable law, and determining the economic value of a case, there still remain a number of points which a lawyer should consider before bringing suit. In all situations an effort should be made to determine the practical problem which brings the client into the lawyer's office in the first place. With the exception of a few neurotic litigants, most people and most businessmen dislike litigation or the prospect of litigation, and will consider it only when they feel that they have been dealt with unjustly and severely injured or are threatened with severe injury. Their estimate of injustice and injury may not coincide with the legal view, but it should certainly be taken into account. It may be found that what the client seeks is something less than or different than he might secure by legal action, or that some adjustment in business relations will solve the practical problem presented without involving the legal issues. This may permit of a solution to the client's problem without the necessity of litigation or even negotiation (as where a different method of doing business or a different source of supply may avoid supposed discrimination). More typically, this may present an opportunity to dispose of the problem by negotiation and settlement before the positions of the parties have hardened into the adversary posture assumed in litigation. Certainly the possibility of adjustment or settlement of the difficulty presented should be fully examined and, if possible, explored before any commitment to litigation is made in a trade regulation matter. As such cases are typically more complex than ordinary cases, so are they also more flexible and various in offering the possibility for exercising ingenuity in devising solutions or settlements other than litigation.

A point that must concern any lawyer contemplating suit almost as much as the merits of the cause is the character of the client. That the client must be honest and credible and not subject to legitimate attack as to his own conduct in the transactions involved should go without saying. Beyond this, the lawyer must be reasonably sure that the client is genuinely concerned and determined and able to bear the expenses, the pressures and the delays of litigation. Many people, perhaps most of us, will go through periods of intense indignation and outrage during which they will be willing to undertake almost any difficulty in order to secure satisfaction or assuage their feelings. When the intensity of emotion generated by the immediately inciting incident has subsided it is common to want to forget the matter, or, at least, to avoid further difficulty concerning it. Most lawyers have had some experience with the client who is willing to spend his "last cent" to avenge some injustice—until the case is called for trial, when he suddenly decides he's willing to settle on any basis. The

lawyer must take extraordinary care to avoid being put in such a situation in a trade regulation case for the reason that the preparation, pre-trial and trial are likely to be so protracted and difficult as to exhaust even the determined and stable individual, much less the vacillating or unstable one. Unless the client himself is sufficiently determined and stable to be willing to persist in his course throughout the time necessary to pursue such a case, the lawyer can hope for no better result than sheer catastrophe.

The suggestions that have been offered as to the considerations a lawyer should weigh before advising or undertaking litigation have been based primarily on prudence rather than law or ethics. But principles of both law and ethics are involved. This is necessarily so in our legal system. It is basic to the American system of administering justice that the courts are open to any and every one who has, or thinks he has, a complaint. However many things of which people are wont to complain are trivial, based on surmise or incapable of proof, or are not cognizable at law. It would be an intolerable load for our already overburdened courts to be forced to hear and determine the tale of every individual who fancied himself aggrieved by another in any situation. The preliminary task of sorting out the grievances which at least deserve the attention and time of a court from those that do not is, in our system, necessarily performed by the lawyer in his office. So, the lawyer is acting in a very real sense as an officer of the court and a quasi-judge when he counsels a client either to undertake or not to undertake litigation.

There are wide limits within which a lawyer may properly exercise his own judgment and discretion in discharging this function. The limits are, undoubtedly, even wider than those within which a trial judge has freedom to decide. But, in both cases, there are limits beyond which action may not properly go. It has been said:

[A] lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right; and it should be understood that they are subjected to the same responsibilities. They have a duty, to their clients; but that is not the first duty, as is generally supposed. Their first duty is the administration of justice, and their duty to their client is subordinate to that.²

It is self-evident that both law and professional ethics proscribe the making of claims in litigation that are based on falsehood or fabricated evidence. It should be almost equally obvious that it is improper to base claims on a client's desire to be malicious or vexatious. These principles are specifically stated in the Canons of Professional Ethics,

2. *In re Thomas*, 36 Fed. 242 (C.C.D. Colo., 1888).

which are generally recognized and given the effect of court rule or law in most states.³

Even beyond this, there is a vague but inescapable duty of the lawyer to be more than honest and moral in bringing matters before a court. It is difficult to define in general terms what this "more" consists of. In one case a court has said that a lawyer having knowledge of suspicious circumstances throwing grave doubt on claims asserted should have declined to represent a claimant. The court defined the duty of the lawyer in terms of the canon of ethics by stating:

Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring in Court for plaintiffs, what cases 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.⁴

Contrary to popular (and some professional) opinion, it is neither the function, duty nor right of the lawyer to urge purely technical points without regard to the basic merits of a case. As to this one court has observed:

Obsolete technicalities, which the people cannot understand, have no more place in the law than dog latin and Egyptian hieroglyphics would have, and it is the duty of the courts to cut them out. The lawyers who resist this are the real quacks of the profession.

. . . . [T]rying . . . cases on the basis of technicalities, without reference to merit or justice . . . is not practicing law; it is practicing quibbling, and the courts are to be blamed for permitting it to be done.⁵

In sum, it seems fair to say that the ethical and legal duty of the lawyer with respect to litigation is a duty to be reasonable, however vague and broad the standard of reasonableness may be in any given situation. It has been held by the United States Supreme Court that conduct by lawyers which is so unreasonable as to interfere with the expeditious, orderly and dispassionate administration of justice may be grounds for a finding of contempt or even disbarment.⁶ It is important to note that insofar as the rule of these cases can be generalized the conduct involved was not dishonest, deceptive or immoral, but merely unreasonable; and therefore they stand unequivocally for the proposition that there is a legal obligation of lawyers to be reasonable with respect to litigation.

It is also important to bear in mind that the principles which have

3. Canons of Professional Ethics of American Bar Association, canons 15, 30.

4. *In re Wendel's Estate*, 159 Misc. 443, 287 N.Y.S. 893 (Surr. Ct. 1936).

5. *Ostendorf v. State*, 8 Okla. Crim. 360, 128 Pac. 143 (1912).

6. *In re disbarment of Isserman*, 345 U.S. 286 (1953); *Sacher v. United States*, 343 U.S. 1 (1952).

been discussed and the legal duties of the lawyer regarding litigation are applicable equally to both plaintiffs' and defense counsel. It seems sometimes to be assumed that although it is improper to base a complaint upon allegations that are contrary to the facts and evidence, an answer to a complaint is a formal matter that is expected to deny all allegations of the complaint without regard to the facts or evidence. Clearly this is not the case. It is not only improper, but is grounds for disciplinary action to interpose false pleadings or general denials in response to plainly true allegations.⁷ The principles of the cases and the Canons of Ethics which have been mentioned apply equally and explicitly to the defense of a cause and to the institution of an action.

An attorney who is counsel or prospective counsel for a party who has been sued is certainly in a different practical position than an attorney who is consulted by a prospective plaintiff. Some of the practical problems which confront a prospective plaintiff's counsel do not appear, and the decision as to whether there shall be litigation at all has obviously been taken. However, there is still a wide area of choice as to whether the litigation shall be contested and, if so, in what manner and as to what issues. Defense counsel is haunted by the fear that if liability is conceded or an attempt is made to settle the case at an early stage the plaintiff will be encouraged to demand an unreasonable amount in damages. But just as a plaintiff has the right to bring his claim into court regardless of the position the defendant may take, so the defendant has a right to insist on a decision in court if the plaintiff is unreasonable in his demands. So the assumed rapacity of plaintiffs is no more excuse for unreasonableness by defendants than the assumed intransigence of defendants is an excuse for unreasonableness by plaintiffs. As one court has recently observed, in a case with substantial merits, it is equally unreasonable for defendant to seek settlement for a nominal sum before trial and for plaintiff to demand an excessive sum.⁸

Lawyers sometimes seek to justify unreasonable positions with the excuse that they are merely representing the position of a client and that the client is entitled to legal representation in any event. Indubitably there is a right to legal representation in all criminal cases, and possibly in cases involving "civil rights," such as the right to worship and speak freely, to travel about, to be free of official oppression, to vote, to have one's children educated, and so forth. However, this

7. *United States v. Frank*, 53 F.2d 128 (D.C. N.J., 1931); *Bruns v. State Bar*, 213 Cal. 151, 1 P.2d 989 (1931); *People v. Beattie*, 137 Ill. 553, 27 N.E. 1096 (1891); *In re Tinney*, 187 App. Div. 569, 176 N.Y.S. 102 (1st Dep't 1919); *In re Schreiber*, 170 App. Div. 543, 156 N.Y.S. 398 (1st Dep't 1915); *In re Greenbaum*, 161 App. Div. 558, 146 N.Y.S. 969 (1st Dep't 1914).

8. *Cangemi v. Silverman*, 2 Misc. 2d 199, 155 N.Y.S.2d 854 (Sup. Ct. 1956).

discussion is confined to a consideration of what may be called "private cases," primarily those involving the protection of individual or corporate economic interests. In such cases there is no right to representation unless the cause is just and the position reasonable. No lawyer is obliged to act either as adviser or advocate for everyone who may wish to become his client; and every lawyer has the right and the duty to decline to serve or to withdraw as counsel for a client who attempts to press an unjust course or an unreasonable or frivolous case or defense.⁹

The determination of what is just and unjust, reasonable and unreasonable is always a difficult and delicate task. It is particularly so in the circumstances in which a lawyer is ordinarily called upon to make the determination: an *ex parte* recital of testimony from highly biased witnesses, limited opportunity for investigation of the facts, and strong pecuniary motivation to take a particular view. But this inescapable task will be somewhat easier if the lawyer will bear in mind that he is an advocate only after the case has started. Before the litigation has started, or before the lawyer has become involved on behalf of his client, his role is that of counsel, and this is a quasi-judicial role. There are no specific rules, short of the whole body of substantive and procedural law, that can be laid down to guide a lawyer in knowing when and how to initiate litigation or interpose a defense. But it is the lawyer's duty as counsel in such matters to advise and act in a reasonable manner. This is his duty to his client, to himself, and, above all, to the law and its ideal of justice. These general principles will not, by themselves, solve the specific problems of any lawyer. But they may aid the lawyer in orienting himself toward the solution of specific problems. A conscientious effort by lawyers before litigation to act as counsel rather than advocate and to be reasonable as well as honest would probably result in substantially less contested litigation than there is today.

9. Canons of Professional Ethics of American Bar Association, canons 31, 44; *Smith v. Chicago & N.W. Ry.*, 60 Iowa 515, 15 N.W. 291 (1883).

