

# THE LAWYER'S DUTIES TO THE COURTS

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My first initiation into the problem of teaching legal ethics came some thirty years ago when I, as the youngest cub on the Yale law faculty, inherited that course by reason of the default of candidates more suitable. I think a lesson can be drawn from this incident. On the faculty at that time were not only law teachers of experience but also active practitioners and distinguished judges; their leader was the then Dean Swan, now Judge Swan, my chief for many years both in teaching and on the bench. As to this course, however, they were having none of it. That from a group of such rich background none but the youngest could be drafted for the service is a commentary upon its difficulties and somewhat doubtful rewards. My own experience, as it occurred, did not suggest that there was error in the valuation. It is my judgment that members of the profession who are rather prone to criticize teachers for apparent lack of interest in this subject should know and appreciate the difficulties involved. Institutes such as this are therefore especially to be welcomed both for the actual teachings they disseminate and for the opportunity for a realistic appraisal by both lawyers and teachers of that which is needed for instruction in the field.

The pedagogical problem stems mainly, to venture the assertion of a paradox, from both the simplicity and the difficulty of the subject. As an abstract matter everybody knows — or at least thinks he knows — the difference between right and wrong, between honesty and dishonesty. Thus the subject is buttoned up before it is really opened, the denouement made obvious before the plot is disclosed. In the rest of the law curriculum the challenge of the problem method, which is the essence of case study, is the opportunity to test one's powers of analysis, of expression, and of persuasion in the pursuit of truth, wherever it may lead. This challenge seems almost wholly removed when questions of legal ethics arise; for these, in the main, permit — or at least seem to permit — of but a single answer. Thus the problems tend to follow a pattern in which the result is hinted at from the beginning. So the typical law student, a college graduate of some degree

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of maturity, is likely to assume a cynical and disillusioned attitude toward what he regards as Sunday school problems.

In years of teaching and school administration I was unable to hit upon a solution that seemed completely satisfactory. I did conclude, however, that it is a mistake to isolate ethics and teach it as a course distinct from the whole process of law administration. The best approach, I came to believe, is to teach legal ethics as part of a complete course on the legal processes, showing the structure of courts of law, their organization and administration, the function of the lawyer as an officer of the court, the historical division of the profession in England between barrister and solicitor, the activities of bar associations in modern America, and the present-day movement for law reform. Such an approach gives a better perspective and a more correct emphasis; moreover, it stimulates interest to a greater degree.

Since these pedagogical adventures of mine the years have passed on, and I have now spent a decade and a half observing, from the bench, lawyers in their predestined place in the courtroom. And that brings me to the subject that your managers thought properly committed to my care: "The Lawyer's Duties to the Courts." Let me say that here, too, I find the same paradox noted above: the subject is most difficult, notwithstanding and perhaps because of its apparent simplicity. Whatever its difficulties, I am glad to tackle it, because it is one not only in which I believe proper perspective is most necessary but also in which lawyers genuinely interested in the standing of their profession tend to be unrealistic in their approach.

The trouble is that the bar leaders who organize and attend institutes do not need the benefit of them in the acute way that those who are not present do. Moreover, the trend of our practice in America to office work — a matter I shall advert to later — means that with success comes less and less courtroom activity and a greater separation of the leaders from the run-of-mine litigation in the courts. I doubt if many of you will appreciate as fully as judges — who seem here to be in complete agreement — the statement that the great majority of cases that come to us, even on the appellate level, seem to be ill prepared — many even shockingly so. Of course there always is and always will be an important residuum of cases, prepared by skilled lawyers who also know when to litigate and when to negotiate and settle, that are a delight to hear. But one must be blind indeed if he fails to recognize the trend in this country that is taking the top leaders of our profession away from the courtroom and leaving the

burden of the litigious process to those not the most capable of its performance.

I expect your first reaction to all this will be that I am wandering from my subject, that this is not a question of ethics at all. It may be one of preparation for the bar, of professional ability, of legal economics — but of morality, no. Such an objection may well have a measure of truth. This brings me actually to the main drive of what I should like to say. The problems we are asked to face in these discussions should not, and indeed cannot, be divorced from the total picture of the lawyer as he operates, and has to operate, as a part of the American legal process.

I have put the problem in the terms of actual case preparation, for that is the way that we on the bench see it from day to day. I could bring you many anecdotes, amusing or gay, or, at times and in contemplation of clients' predicaments, just downright sad. The situation, I realize, is not an altogether healthy one so far as concerns the courts themselves. We are left with an incentive to go off on "frolics of our own" in the pursuit of justice, and may often, as counsel complain, leave not only the lawyers but the case itself far behind.

I sympathize with the objections of counsel to consideration by the courts of matters not briefed or argued. And I can see the dangers of such judicial forays. One of the most famous we have with us daily in its consequences is the notorious case of *Erie R.R. v. Tompkins*, in which Story's hundred-year-old decision in *Swift v. Tyson* was overthrown and state law apotheosized in the national courts without the argument even having been presented in the extensive brief of appellant's very distinguished counsel.<sup>1</sup> The known ability of counsel there present might perhaps have suggested judicial caution; but the judicial tendency is natural and, I am bound to say after careful consideration, practically inevitable. Whatever the risk, a judge must decide a case as he thinks justice to the parties themselves actually requires; and he cannot shut his eyes thereto because counsel have failed to make the point properly.

I do not want to overstress the point I am making to the extent

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<sup>1</sup>*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842). See my Cardozo lecture before the Association of the Bar of the City of New York, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946), reprinted in JURISPRUDENCE IN ACTION 53-109 (1953); also account of the argument and reprint of the brief of Theodore Kiendl and associates for appellant Erie Railroad in HICKS, LEGAL RESEARCH 369-372, 376-377, 391-426 (3d ed. 1942).

of seeming querulous. I surely make no cause for criticism of our less fortunate brothers who cannot represent prosperous clients in luxurious offices but must spend their time in appearing before beggars like my colleagues and myself. What I do wish to show is the picture as it unfolds before us. The standard of good case presentation generally varies with the economic value of the litigation. Of course we should not be surprised by this. With an occasional noteworthy exception, usually in the field of personal liberties and often from assigned counsel — young, brilliant, and eager — the best presentation and argumentation come in the cases with the greatest stake at issue: those involving, for instance, corporate reorganizations, ships and cargo in admiralty, and unfair business competition. The most difficult, involving often the most intricate questions of state law, may well be the small bankruptcies.

I do not find a difference as between different court levels. In fact, justices of the Supreme Court have remarked on the inadequacy of preparation of many of their cases. Perhaps a remark of a former student of mine, now an outstanding New York lawyer, best highlights actuality here. When I asked him why, like other leaders of the New York Bar, he failed to appear regularly in my court, his answer, upon due consideration, was: "Well, to tell the truth, I cannot afford it. I cannot spend my time waiting around for you fellows when I can do much better in my office." The moral was not the less pointed when, a year later, I saw him in our courts representing one of the country's greatest movie companies. Then he could afford it!

That there are ethical aspects of the problem can be easily perceived. Thus Federal Rule of Civil Procedure 11, in dispensing with the verification of pleadings, substitutes instead the signature of counsel, which carries with it his undertaking that the pleading is meritorious and well taken and not intended merely for purposes of delay. It is contemplated that violations of these obligations will result in the discipline of counsel.<sup>2</sup> Often, however, it appears that there is so little basis for certain claims, indeed, for certain appeals,

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<sup>2</sup>"For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." The usual annotations disclose no case in which such action was taken; indeed, there is but a single case of consideration of such a step, and there the criticizing opinion was merely ordered indexed against the attorney's name so as to be available should his professional conduct ever be a subject of inquiry in any other connection, *American Automobile Ass'n v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952).

that violation of this rule must be assumed. More directly I have witnessed instances in which counsel have assured the court of support in the record for assertions as to the evidence, only to find the record citations untrustworthy. For this, punishment could obviously be invoked; and observers have sometimes been critical of us for not enforcing our requirements. But the nuances between carelessness and imperception are such that choice of a case to exploit as an example may be far from obvious; and extensive litigation may develop out of such a collateral order. Even so, to make it would be our duty, did it not appear much like sweeping out the ocean with a broom. One court alone can do little to raise the bar standards of a metropolitan community. Could concerted action be secured — a wholly impossible task because of the diverse sovereignties represented in the judicial tribunals — it is doubtful if this would go far toward changing conditions so rooted in economic realities.

Contemplation of these problems in our own tribunals leads one to look with some envy on more distant scenes. Our natural thought is of England, where the leaders of the bar, the barristers alone, appear for litigants in the high courts of general jurisdiction. From the standpoint of the judiciary there is no question of the attractiveness of the arrangement. To have always before one that fine gentleman and distinguished scholar the English barrister makes judging a high adventure in the company of finely tempered minds. But for the public at large there are problems. This, without doubt, is an aristocratic system, with both the advantages and the disadvantages resulting therefrom. It is as expensive as such a — to us — luxury must be expected to be. The English themselves have groaned under the cost, and the latest of many commissions appointed to report on the administration of justice was created in 1947 to consider specifically reforms in practice and procedure for the purpose of reducing the cost of litigation. The Committee on Supreme Court Practice and Procedure — the Evershed Committee, so called from its chairman, the learned Master of the Rolls — presented last July a documented report to Parliament, a mine of information to any student of the actualities of English law administration. From it, I think one can have no doubt that the doubling — perhaps trebling under the system of leaders and juniors — of counsel for important litigation is a prime source of the admittedly high financial burden of litigation there. For instance, the Committee did not feel able to recommend the American system of “pre-trial” because that would require the separate briefing of barristers at an early date in the litigation and consequent potential

doubling of retainer fees. The Committee did not feel it within its province to recommend a change in the traditional system in view of its many and wide ramifications in English life; but a somewhat more militant concurring minority indicated a belief that such more drastic methods must be contemplated and studied in the future.<sup>3</sup>

There are prices which one must pay for a democracy, in which justice is more nearly in the reach of all and financial means are not acceptable as a test of ability to stay in the courts. Because of the correlative price to be paid for aristocratic justice, I would not advocate it for us if it were politically feasible — as of course it is not. Hence, if I am to make any suggestions as the burden of my paper, the first is to recognize our system for what it is, with many defects and obvious imperfections in the machinery but with a sound core based upon accessibility to all. Even the contingent fee has its part in making justice accessible. I think, therefore, it is wise to build upon what we have, not upon some theoretical and idealistic system which we do not have and in any event do not want.

Now from this I go on to say that I expect no millenium. The economic forces to which I have referred will continue to operate in the future. I do not think they should be accelerated; the inability of courts to cope with their work load, the problem of congested dockets, and the use of substitutes for the courts represent on the whole undeniable developments impinging on that easy access to the courts which I have claimed previously as their chief glory. Hence, I regard as the chief problem for the courts, the point of attack of all organized bars, better court organization for the dispatch of judicial business. What has come to be known as the integrated court — the single court system, whatever the necessary divisions, under the efficient and businesslike direction of an effective administrator — is now a prime necessity. Its worth has been demonstrated in jurisdictions as widely separated as New Jersey and Puerto Rico.<sup>4</sup> The political force sup-

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<sup>3</sup>See discussion in my article, *The Evershed Report and English Procedural Reform*, 29 N.Y.U.L.Q. REV. 1046 (1954). The noted American advocate Lloyd Paul Stryker makes "A Plea for a Divided Bar" in his book *THE ART OF ADVOCACY*, c. XIII (1954), noting the attractive and glamorous features of the system without — it seems to me — full consideration of the problems, including the cost, that are in fact now giving concern to our English brethren.

<sup>4</sup>See, e.g., Clark, *Realistic Court Reform — A Study of Pending Proposals*, 27 CONN. B.J. 11 (1952); Clark and Clark, *Court Integration in Connecticut: A Case Study of Steps in Judicial Reform*, 59 YALE L.J. 1395 (1950); Clark and Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61

porting the status quo is always tremendous; it is usually led, too, by lawyers who are a part of the present system. Because of this it is particularly important that bar associations not directly entangled in the support of existing diversities take up and enthusiastically press for such better court organization, with all its demonstrated correlatives: court rule-making, modern rules of procedure, and a thorough-going business management ranging from finances through choice and assignment of personnel. No more important task faces the lawyer of today. As I had occasion to say at an American Bar Association section meeting in Boston last summer,<sup>5</sup> the career of the future great Chief Justice will be in the field of law administration, rather than of abstract law. He should be viewed as a vice-president or manager in charge of production!

It may seem a far cry from the lawyer's obligation as a court officer to the business organization of the courts for lawyers and clients. But if it is, I make no apology for the jump. I do not think the human animal can be greatly changed; nor will exhortation improve the caliber of the bar. Bar organization and planning will better its performance. In addition, more effective operation gives less chance for the drastic and potentially immoral short cut to save a sinking case. I will point out two interesting examples from current law reform to indicate how improvement in method means improvement in lawyer product. The first is pre-trial. The pre-trial conference, when adequately conducted, requires that the lawyer know his case thoroughly at the time of the conference, so much so that he can make the concessions as to proof properly to be required of him. Such proper preparation — and without it pre-trial is but a waste to all concerned — means that, in general, the lawyers know their cases so well that they do not need to litigate any but unsettled points of law. Settlements are appropriate and to be expected. The well pre-tried case is the well-prepared case. An important by-product, too, should be the training of junior lawyers as a part of this preliminary stage of pre-examination of the issues, thus offering opportunity for the breaking of the usual log-jam of court calendars by reason of too few and too busy trial lawyers.

The other example is from the appellate field, the shortening of

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YALE L.J. 1147 (1952); Vanderbilt, *First Five Years of the New Jersey Courts Under the Constitution of 1947*, 8 RUTGERS L. REV. 289 (1954).

<sup>5</sup>The Section of Judicial Administration in a discussion of "Log-jams in Metropolitan Courts."

records by the so-called appendix method, that is, the printing on appeal of only the essential facts from the original papers on deposit in the clerk's office as an appendix to the brief presented on argument.<sup>6</sup> This method has many advantages, one of the most important being the saving of printing expense, now an enormous burden to litigants.<sup>7</sup> But, from the standpoint of the court, the chief advantage is that counsel must study their records thoroughly before preparing their briefs and appendices. This is the time when the case should be studied from top to bottom, not later when the argument is imminent or half under way. Thus the problem of scanty preparation I have stressed above can be substantially minimized by adequate court and trial techniques.

In advocating more of an institutional and functional approach to all problems, ethical and otherwise, of the court process, I would not omit or lessen stress upon individual responsibility. I think that the long efforts to improve standards of legal education and admission to the bar should and must be continued. Where these are not yet adequate, as in many places they are not, it is the responsibility of the bar to exercise leadership in raising them. So the individual lawyer must bear responsibility for dereliction in duty; and punishment should be swift, sure, and timely. It is clearly settled that the courts have ample power in the premises. In fact, the question raised in one or two atypical cases, involving the spectacular so-called political trials — still a matter of debate in the courts and law reviews — is not one of ultimate power but of delay in its exercise after the immediate occasion is past.<sup>8</sup> In general, a court is the keeper of its own dignity. While decorum varies from court to court, I fear we must say that

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<sup>6</sup>See Dean, *Proposed Rule for Hearing of Appeals upon Original Papers*, 8 F.R.D. 143 (1948); Reuss, *Records on Appeal*, 13 F.R.D. 31 (1952), discussing the rules of the U.S. Courts of Appeals for the Fourth and Sixth Circuits, to which may be added the rules of the First, Third, Eighth, Ninth, and Tenth Circuits and the just adopted Rule 11 of the Second Circuit.

<sup>7</sup>A study, as yet unpublished, made by the Administrative Office of the United States Courts, indicates an average cost for the printing of records and briefs in federal appeals of about \$580 per case, even excepting the "Big Case" — about 7% of the total — where the printed record alone runs over 500 pages. Since that is the only average for the normal appeal and since there are many brief records for single-point appeals, the nature of the burden in individual cases can be realized.

<sup>8</sup>*Sacher v. Association of the Bar of the City of New York*, 347 U.S. 388 (1954), reversing *In re Sacher*, 206 F.2d 358 (2d Cir. 1953); *Sacher v. United States*, 343 U.S. 1 (1952), affirming *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950). Citations to law review comments on the earlier case are given in 206 F.2d at 363, n.1.



it tends generally to be what the individual tribunal desires and deserves. At least the legal principles are adequate.

Therefore, let us keep all the progress we have made in requiring proper conduct and ability on the part of the legal profession. But let us also take heed as to a certain correlative matter fully as important but not so well stressed in the past, namely, the most effective and modernized organization of the courts for their almost overwhelming tasks. Americans have shown a genius for organization and invention in things mechanical that is the wonder of the world. Not the same success has yet governed their efforts in purely human activities. This I think is because they have not felt the challenge in like measure, while the pressure of old shackles has been always heavy and immediate. Here is a vast opportunity; may the courts in the future prove an object lesson to show what the American genius can do also in that field of limitless possibility — human organization for the betterment of mankind!