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Responses

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LAWYER'S DUTY OF LOYALTY—II.

*George Cotsirilos**

Ramsey Clark referred to some problems inherent in criminal defense work. Today I will try to focus on what I consider to be the important duties of a criminal defense attorney.

I entered the field of criminal law about thirty-five years ago. It was and still is considered by many to be a dirty business. There are rewards, however, to being in this so-called "dirty business." There are also special responsibilities that attach to a criminal defense lawyer.

If you are going to be in the criminal law field, your first and only objective should be to provide your client effective assistance of counsel. In criminal law, that means you provide the best defense in order to obtain the best result for your client. This is what the adversarial system is all about.

Providing effective assistance is your duty as a criminal defense attorney, regardless of the inordinate amount of time that might need to be expended on the case or the extraordinary expenses involved in investigating the crime. Thus, if a client retains you and has paid a portion of your fee, you have a duty to carry the case through to the finish. This is true even if it involves a jury trial that will last two or three weeks and he has paid you on a per diem or per hour basis for only one week. A lawyer with any conscience, who believes in the oath he took, must go to trial and conclude that case in the manner that is best for his client. If he does less, he has not earned the title of lawyer because he has failed to live up to the oath that he has taken. This holds true regardless of whether one is involved in private criminal defense practice or the public defender's office.

I would like to briefly discuss the practicalities of handling criminal work and performing a service for the client and at the same time maintaining the duties and responsibilities of a lawyer. Your job as a criminal defense attorney is to dispose of the matter as expeditiously as possible at the cheapest cost for the client. One very important thing to keep in mind is that there are many cases that should be disposed of without trial. These are usually cases where the attorney should attempt to secure a negotiated plea between his client and the state.

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Although there is a tendency to think that every case should be tried before a jury, the practicalities of criminal defense work are that a full trial is not always in the client's best interests. Of course you can only know this after you have researched and investigated the case thoroughly and properly. When deciding whether to take the case to trial, you must determine whether you are presenting the defendant in a truer light than you would want him to be seen, or putting him in a position where evidence of other crimes is brought into the case. For instance, if you are representing an individual who has had problems in the past, and you can enter a plea for him and dispose of the case with a minimum sentence, then you have performed a greater service than if you had tried a case for a month and expended a huge amount of money.

The critical question, for young lawyers, then, is how can a criminal attorney make this decision of whether a trial is in his client's best interest? The ability to make this decision comes from the good judgment obtained through your trial experiences. This good judgment is crucial to the development of every attorney's ability to adequately represent his client's interest. Experience in the criminal defense field is critical to the development of this judgment.

In summary, what you have to do whether you are a public defender or work in a firm, is to remember that you are a lawyer first and foremost. It is your sworn duty to conscienciously represent your client's best interests. This means fulfilling the duties and responsibilities you undertake when you agree to represent someone and exercising your best judgment for each client under the circumstances of each case.

LAWYER'S DUTY OF LOYALTY—III.

Frank Covey *

I am going to examine the duty of loyalty from an entirely different point of view — the civil side of private practice. However, I think you will see that there is a considerable congruence of some of the advice that you have heard from the preceding two speakers.

Today we have been discussing the lawyer's duty of loyalty. The dictionary often lists loyalty as being synonymous with fidelity.

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The words loyalty and fidelity, however, actually connote dissimilar concepts, especially as they relate to the practice of law.

I believe in the power of words and how they control our thought processes. The root word for loyal is "lex," which is the Latin word for law. The root word for fidelity is the Latin word "fides," which means faith. Consider the impact of attaching a negative prefix to these two purportedly synonymous words: Disloyal brings to mind political tests, the McCarthy era and the like. In contrast, unfaithful conjures up images of character flaws and sexual peccadillos.

In the final analysis, loyal appears to be more synonymous with "true" than with "fidelity." Loyalty is actually more black and white than fidelity. Like a true or false question, loyalty allows for no middle ground. Moreover, this trait of loyalty inures primarily to the object of that loyalty. Contrastingly, faithful turns out to be more synonymous with steadfast or resolute. It is more a virtue of the person possessing it, the donor, than the person receiving it, the donee.

These two potentially conflicting character traits manifest themselves differently in the practice of law. The conflict becomes apparent when we examine justifications that many lawyers currently use for their courtroom conduct. The ABA's March 1984 litigation magazine contains an article by Gerry Spence. This is the same Gerry Spence who was the foe of Kerr-McGee in the Silkwood case, the foe of Hustler in the Miss Wyoming case, and recently, the foe of McDonald's in Cook County's ice cream case. The thesis of Spence's article, as well as his lecture circuit talks, is that an attorney should get as much improper evidence before the jury as possible by way of questions he knows are improper. Spence reasons that if one adequately prejudices the jury in this manner, he need not worry about the facts or the law — the jury will decide the case in his favor.

In justification of this conduct, we are often referred to Lord Brougham's frequently cited dictum on the duty of the advocate:

> An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save the client at all expedient means, to protect that client at all hazards and cost to all others, and among them to himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, or the destruction which he may bring on any other.

This statement, read literally, is donee related, not donor related.

It emphasizes loyalty to an individual client, not faithfulness to the institution of law.

By the time legal ethics achieved any prominence in our country, there were three correlative duties of the advocate: loyalty to the client, candor to the court, and fairness to others, including your opposing counsel. Early treatises on the subject treated these three duties as coextensive. The concept of loyalty to the client in these documents was interpreted as fidelity to the client's interests consistent with the client's rights and duties under the law.

This concept changed quickly, however, as lawyers began to identify their responsibility to the client as their primary, if not exclusive moral obligation. This change resulted from several factors. First, attorneys began to view litigation as an extension of corporate strategy. The classic example of this was the attempted takeover of the Erie Railroad by the New York Central Railroad in the 1860's. The attorneys involved, which included David Dudley Field (the father of the Field Code), filed twenty-six different lawsuits throughout the State of New York, all involving basically the same parties and the same issues. Field, author of the New York Code of Ethics, defended his tactics by stating, "I have done not only what I have a right to do but what I was bound to do." Second, the concept of confidentiality transformed from a legal right of the client under the attorney/client privilege to a moral obligation of the lawyer. Third, lawyers began to realize that a client never wants to be told that he cannot do what he wants to do; he wants to be told *how* to do it, and it is the lawyer's business to tell him how.

As a result of these developments, the prevailing notion among lawyers today seems to be that the lawyer's duty of loyalty to the client is his first and foremost, and occasionally his only duty. This notion is potentially misleading. Perhaps the best kept secret in American jurisprudence is that the rules of ethics limit the lawyer's duty of loyalty to his client by imposing additional duties of candor to the court and fairness to others, including opposing counsel and parties.

Lawyers operate within the adversary system, in which each person has the responsibility for protecting his or her own rights. In a pure adversary system, the race would always be to the swift, and the victory to the strong, even if neither the swift nor the strong were always in the right. To alleviate this potential injustice, we developed rules of the game. Unfortunately, the rules of the game are not always clear. Substantive and procedural rights often be-

come confused because lawyers tend to ignore a fundamental fact: the rules of the adversary system are procedural rules designed to ensure the fair and complete presentation of both sides. These procedural rules are designed to outline the presentation of a case, not to determine its merits.

Whether in a courtroom or otherwise, a lawyer who wants to be fair cannot always rely on the fact that his opponents will also be fair. Thus he himself might choose not to be fair rather than risk the client's rights and interests on the altar of principles. This type of conduct provides a classic justification and explanation for the American public's disrespect for the members of the American Bar.

Chief Justice Warren Burger noted in his annual message on the administration of justice:

> The entire legal profession, lawyers, judges, and law teachers, have become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should not lawyers be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?

In my view we need to de-emphasize the litigation as war and the lawyer as hired gun role. To do this, we must look again to the balanced role of the lawyer's ethical duties, loyalty and fidelity to the client, but also respect for and candor to the court, and fairness to others, including opposing counsel and parties.