

A lawyer is a utensil, like a knife or fork. It makes no difference who ate with it last, only that it was sufficiently sanitized between meals.

Roy Grutman, *Lawyers and Thieves* (1990)

[T]he adversary ethic is an inadequate aspiration for a community, and it is a pernicious moral principle. As an idea about power in the community, it depends not on goodness but on force and therefore reaches only the small, desperate residues of the community's life. As a moral principle it depends on the idea that one person should be able to buy the loyalty of another and often poisons the hope that people can grow together.

Thomas L. Shaffer, *On Being a Christian and a Lawyer* (1982)

✪ The feature of the U.S. legal system that is most fundamental to its definition, operation, and character is its central tenet: that conflict resolution is best achieved through an adversary process. The adversary process assumes: (1) that the primary responsibility for articulating the sides in a dispute is best left to those most closely affected by the dispute; (2) that the biases of self-interest necessarily produced by forcing partisan dialogue between disputants can best be offset by having this dialogue take place in a neutral forum before impartial arbiters; and (3) that the conflict and dialogue can be constrained by a system of universalistic procedural and substantive rules (that is, law) that sets forth the interests of the state in the outcome of disputes. The ultimate objective in the adversary process—winning a case—is realized when the state is enticed into joining the side of one disputant against the other.

Thus, in the adversary process, disputants are expected to marshal and present the best (that is, most effectively self-serving) arguments and evidence they can. Lawyers act as advocates for their clients in this process. In court, they stand in the place of their clients. Their credentials, their skills, their special knowledge, their influence, and even their personalities are for rent. As noted earlier, lawyers are sometimes said to be modern-day “hired guns.” Each of the readings in this chapter calls into question the meaning of advocacy, the relationship between lawyer and client, the neutrality of the law, and what may happen to law and justice as dispute resolution increasingly becomes private proceedings.

13.1 The Ethics of Advocacy Charles P. Curtis

I

I WANT FIRST OF all to put advocacy in its proper setting. It is a special case of vicarious conduct. A

From “The Ethics of Advocacy,” by Charles P. Curtis from *4 Stanford Law Review* 3 (1931). Copyright 1951, 1952 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission.

lawyer devotes his life and career to acting for other people. So too does the priest, and in another way the banker. The banker handles other people's money. The priest handles other people's spiritual aspirations. A lawyer handles other people's troubles.

But there is a difference. The loyalty of a priest or clergyman runs, not to the particular

parishioner whose joys or troubles he is busy with, but to his church; and the banker looks to his bank. It is the church or the bank, not he, but he on its behalf, who serves the communicant or the borrower. Their loyalties run in a different direction than a lawyer's.

So too when a lawyer works for the government. His loyalties hang on a superior peg, like the priest's or the clergyman's. For it is fiction to say that he only has the government for his client. The government is too big. It absorbs him. He is part of it.

Likewise with the general counsel for a corporation. His identification with his client is all but complete. Taft in some lectures at the Albany Law School,¹ referring to work in the legal department of a corporation, said, "Such employment leads to a lawyer's becoming nothing more than an officer of the corporation as closely identified with it as if he was the president, the secretary or the treasurer."² Indeed, he usually is a director or a vice-president.

Not so the lawyer in private practice. His loyalty runs to his client. He has no other master. Not the court? you ask. Does not the court take the same position as the church or the bank? Is not the lawyer an officer of the court? Doesn't the court have first claim on his loyalty? No, in a paradoxical way. The lawyer's official duty, required of him indeed by the court, is to devote himself to the client. The court comes second by the court's, that is the law's, own command. . . .

. . . How far must a lawyer accompany his client and turn his back on the court? . . .

The person for whom you are acting very reasonably expects you to treat him better than you do other people, which is just another way of saying that you owe him a higher standard of conduct than you owe to others. This goes back a long way. It is the pre-platonic ethics which Socrates had disposed of at the very outset of the *Republic*; that is that justice consists of doing good to your friends and harm to your enemies. A lawyer, therefore, insensibly finds himself treating his client better than others; and there-

fore others worse than his client. A lawyer, or a trustee, or anyone acting for another, has lower standards of conduct toward outsiders than he has toward his client or his beneficiaries or his patrons against the outsiders. He is required to treat outsiders as if they were barbarians and enemies. The more good faith and devotion the lawyer owes to his client, the less he owes to others when he is acting for his client. It is as if a man had only so much virtue, and the more he gives to one, the less he has available for anyone else. The upshot is that a man whose business it is to act for others finds himself, in his dealings on his client's behalf with outsiders, acting on a lower standard than he would if he were acting for himself, and lower, too, than any standard his client himself would be willing to act on, lower, in fact, than anyone on his own.

You devote yourself to the interests of another at the peril of yourself. Vicarious action tempts a man too far from himself. Men will do for others what they are not willing to do for themselves—noble as well as ignoble things. What I want to do now is to illustrate this in the practice of law by a number of perplexing situations. They raise ethical problems, but none of them, I think, has a simple right or wrong answer, and I know of no canons of ethics or morals which lead to any answer. How could there be when the cause of the perplexity is the difference between acting for another and acting for yourself? . . .

II

A lawyer is called on the telephone by a former client who is unfortunately at the time a fugitive from justice. The police want him and he wants advice. The lawyer goes to where his client is, hears the whole story, and advises him to surrender. Finally he succeeds in persuading him that this is the best thing to do and they make an appointment to go to police headquarters. Meanwhile the client is to have two days to wind up his affairs and make his farewells. When the lawyer gets back to his office, a police inspector is waiting for him, and asks him whether his client is in town and where he is. Here are questions which the police have every right to ask of anybody, and even a little hesitation in this unfortunate lawyer's denials will reveal enough to betray his client. Of course he lies.

¹The Hubbard Lectures in May 1914.

²Cheatham, *Cases and Materials on the Legal Profession* 60 (1938).

And why not? The relation between a lawyer and his client is one of the intimate relations. You would lie for your wife. You would lie for your child. There are others with whom you are intimate enough, close enough, to lie for them when you would not lie for yourself. At what point do you stop lying for them? I don't know and you are not sure.

To every one of us come occasions when we don't want to tell the truth, not all of it, certainly not all of it at once, when we want to be something less than candid, a little disingenuous. Indeed, to be candid with ourselves, there are times when we deliberately and more or less justifiably undertake to tell something else or something different. Complete candor to anyone but ourselves is a virtue that belongs to the saints, to the secure, and to the very courageous. Even when we do want to tell the truth, all of it, ultimately, we see no reason why we should not take our own time, tell it as skillfully and as gracefully as we can, and most of us doubt our own ability to do this as well by ourselves and for ourselves as another could do it for us. So we go to a lawyer. He will make a better fist of it than we can.

I don't see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is. Happily they are few and far between, only when his duty gets him into a corner or puts him on the spot. Day in, day out, a lawyer can be as truthful as anyone. But not ingenuous.

A lawyer is required to be disingenuous. He is required to make statements as well as arguments which he does not believe in. But the further his statements descend toward the particular, the more truthful he may be, indeed must be, because no one appreciates the significance of the particular better than a lawyer. In the higher brackets of generality, he has to be freed from his own beliefs and prejudices, for they are irrelevant, unless they are pressed into service for the client. But his insincerity does not extend to the particular, except, of course, particulars which do not belong to him, but are his client's secrets. Barring these, when he is talking for his client, a lawyer is absolved from veracity down to a certain point of particularity. And he must never lose the reputation of lacking verac-

ity, because his freedom from the strict bonds of veracity and of the law are the two chief assets of the profession.

I have said that a lawyer may not lie to the court. But it may be a lawyer's duty not to speak. Let me give you a case from the autobiography of one of the most distinguished and most conscientious lawyers I or any other man has ever known, Samuel Williston. In his autobiography, *Life and Law*, he tells of one of his early cases. His client was sued in some financial matter. The details of the claim are not important. Williston, of course, at once got his client's letter file and went through it painstakingly, sorting, arranging, and collating it. The letters, we may well believe, told the whole story, as they usually do in such a case. Trial approached, but the plaintiff's lawyers did not either demand to see the correspondence, nor ask for their production. "They did not demand their production and we did not feel bound to disclose them."³ At the close of the trial, "In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time."

This was a letter, a piece of evidence, a fact. Suppose it had been a rule of law. Suppose the Chief Justice had equally mistakenly given as a reason for his decision some statute or regulation which Williston knew had been repealed or amended, and it was not a letter but a copy of the new statute which he had in front of him. Williston would have interrupted the Chief Justice and drawn his attention to it. This is sometimes debated, but it is beyond dispute that this would have been Williston's duty, and there is no doubt at all that he would have performed it as scrupulously as he respected his duty to his client. . . .

III

"I must be cruel only to be kind," said Hamlet, on his way to his mother. And so likewise a lawyer has to tell himself strange things on his way to

³Williston, *Life and Law* 271 (1940).

court. But they are strange only to those who do not distinguish between truth and justice. Justice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned. It is to that end that each attorney must say the best, and only the best, of his own case.

This is not the method we have used in other endeavors, with not only more, but with conspicuous success. But the law has other things than success to think about. It must give the losing party, and his friends and his sympathizers, as much satisfaction as any loser can expect. At least the most has been said for him. The whole has been shaken out into the sun, and everyone concerned is given a feeling akin to the feeling of security which you get when you have told yourself the worst before you make a decision. The administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom.

Advocacy requires a lawyer to start with something to be proved, and this is as true of facts as it is of propositions of law. When he goes to interview a witness as well as when he goes to the law library, he goes to get something. He will waste a lot of time if he goes with an open mind. He must, of course, first formulate the issue in his mind, but he does this only to make it the easier to find what lies on his side of the issue. He fixes on the conclusion which will best serve his client's interests, and then he sets out to persuade others to agree.

The problem presented to a lawyer when he is asked to defend a man he knows is guilty or to take a case he knows is bad is perplexing only to the laymen. Brandeis said, "As a practical matter, I think the lawyer is not often harassed by this problem, partly because he is apt to believe at the time in most of the cases that he actually tries, and partly because he either abandons or settles a large number of those he does not believe in."⁴

It is profoundly true that the first person a lawyer persuades is himself. A practicing lawyer

will soon detect in himself a perfectly astonishing amount of sincerity. By the time he has even sketched out his brief, however skeptically he started, he finds himself believing more and more in what it says, until he has to hark back to his original opinion in order to orient himself. And later, when he starts arguing the case before the court, his belief is total, and he is quite sincere about it. You cannot very well keep your tongue in your cheek while you are talking. He believes what he is saying in a way that will later astonish himself as much as now it does others.

Not that he cares how much we are astonished. What he does care is whether we are persuaded, and he is aware that an unsound argument can do much worse than fall flat. For it may carry the implication that he has no better one. He will not want to make it unless he really has no better.

IV

The classical solution to a lawyer taking a case he knows is bad is Dr. Johnson's. It is perfectly simple and quite specious. Boswell asked Johnson whether as a moralist Johnson did not think that the practice of the law, in some degree, hurt the nice feeling of honesty.

"What do you think," said Boswell, "of supporting a cause which you know to be bad?"

Johnson answered, "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong, and he is right."

Dr. Johnson ignored the fact that it is the lawyer's job to know how good or how bad his case is. It is his peculiar function to find out. Dr. Johnson's answer is sound only in cases where the problem does not arise.

A lawyer knows very well whether his client is guilty. It is not the lawyer, but the law, that does not know whether his case is good or bad. The law does not know, because it is trying to find

⁴Brandeis, *The Opportunity in the Law*, 39 *Am. L. Rev.* 561 (1905).

out, and so the law wanted everyone defended and every debatable case tried. Therefore the law makes it easy for a lawyer to take a case, whether or not he thinks other people think it bad. It is particularly important that it be made as easy as possible for a lawyer to take a case that other people regard as bad.

We want to make it as easy as we can for a lawyer to take a bad case, and one of the ways the bar helps go about it is the canon of ethics which says, "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." It is called improper just so that the lawyer may feel that he does not have to. This, I think, must be its only purpose, for it is honored in no other way. . . .

No, there is nothing unethical in taking a bad case or defending the guilty or advocating what you don't believe in. It is ethically neutral. It's a free choice. There is a Daumier drawing of a lawyer arguing, a very demure young woman sitting near him, and a small boy beside her sucking a lollypop. The caption says, "He defends the widow and the orphan, unless he is attacking the orphan and the widow." And for every lawyer whose conscience may be pricked, there is another whose virtue is tickled. Every case has two sides, and for every lawyer on the wrong side, there's another on the right side.

I am not being cynical. We are not dealing with the morals which govern a man acting for himself, but with the ethics of advocacy. We are talking about the special moral code which governs a man who is acting for another. Lawyers in their practice—how they behave elsewhere does not concern us—put off more and more of our common morals the farther they go in a profession which treats right and wrong, vice and virtue, on such equal terms. Some lawyers find nothing to take its place. There are others who put on new and shining raiment. . . .

I have talked perhaps too lovingly about the practice of the law. I have spoke unsparingly, as I would to another lawyer. In a way the practice of the law is like free speech. It defends what we hate as well as what we most love. I don't know any other career that offers ampler opportunity for both the enjoyment of virtue and the exercise of vice, or, if you please, the exercise of virtue and the enjoyment of vice, except possibly

the ancient rituals which were performed in some temples by vestal virgins, in others by sacred prostitutes.

V

Let us now go back and reconsider, and perhaps reconstruct, in the light of my examples and our discussion, this "entire devotion" which a lawyer owes to his client.

The fact is, the "entire devotion" is not entire. The full discharge of a lawyer's duty to his client requires him to withhold something. If a lawyer is entirely devoted to his client, his client receives something less than he has a right to expect. For, if a man devotes the whole of himself to another, he mutilates or diminishes himself, and the other receives the devotion of so much the less. This is no paradox, but a simple calculus of the spirit.

There is authority for such detachment. It is not Christian. Nor is the practice of law a characteristically Christian pursuit. The practice of law is vicarious, not altruistic, and the lawyer must go back of Christianity to Stoicism for the vicarious detachment which will permit him to serve his client.

E. R. Bevan, in his *Stoics and Sceptics*,⁵ summarized the Stoic faith as follows: "The Wise Man was not to concern himself with his brethren . . . he was only to serve them. Benevolence he was to have, as much of it as you can conceive; but there was one thing he must not have, and that was love. . . . He must do everything which it is possible for him to do, shrink from no extreme of physical pain, in order to help, to comfort, to guide his fellow men, but whether he succeeds or not must be a matter of pure indifference to him. If he has done his best to help you and failed, he will be perfectly satisfied with having done his best. The fact that you are no better off for his exertions will not matter to him at all. Pity, in the sense of a painful emotion caused by the sight of other men's suffering, is actually a vice. . . . In the service of his fellow men he must be prepared to sacrifice his life; but there is one thing he must never sacrifice: his own eternal calm." . . .

⁵As quoted in 6 Toynbee, *A Study of History*, 146-47 (1939).

The Stoics gave us a counsel of perfection, but it is none the less valid. If a lawyer is to be the best lawyer he is capable of being, and discharge his "entire duty" to his clients, here in the Stoic sage is his exemplar. Here in Stoicism is his philosophy. Let him be a Christian if he choose outside the practice of the law, but in his relations with his clients, let him be a Stoic, for the better Stoic, the better lawyer.

A lawyer should treat his cases like a vivid novel, and identify himself with his client as he does with the hero or the heroine in the plot. Then he will work with "the zest that most people feel under their concern when they assist at existing emergencies, not actually their own; or join in facing crises that are grave, but for somebody else. . . ."⁶

How is a lawyer to secure this detachment? There are two ways of doing it, two devices, and all lawyers, almost all, are familiar with one or the other of them.

One way is to treat the whole thing as a game. I am not talking about the sporting theory of justice. I am talking about a lawyer's personal relations with his client and the necessity of detaching himself from his client. Never blame a lawyer for treating litigation as a game, however much you may blame the judge. The lawyer is detaching himself. A man who has devoted his life to taking on other people's troubles, would be swamped by them if he were to adopt them as his own. He must stay on the upland of his own personality, not only to protect himself, but to give his client the very thing that his client came for. . . .

The other way is a sense of craftsmanship. Perhaps it comes to the same thing, but I think not quite. There is a satisfaction in playing a game the best you can, as there is in doing anything else as well as you can, which is quite distinct from making a good score. . . .

A Lawyer may have to treat the practice of law as if it were a game, but if he can rely on craftsmanship, it may become an art. . . .

. . . I wonder if there is anything more exalted than the intense pleasure of doing a job as well as you can irrespective of its usefulness or even of its purpose. At least it's a comfort.

I have compared the lawyer to the banker who handles other people's money and to the priest who handles other people's spiritual aspirations. Let me go further. Compare the lawyer with the poet whose speech goes to the heart of things. "Yet he is that one especially who speaks civilly to Nature as a second person and in some sense is the patron of the world. Though more than any he stands in the midst of Nature, yet more than any he can stand aloof from her."⁷

Notes and Questions

1. Curtis asserts that lawyers who work for government or corporations are absorbed by their clients. Should such lawyers have no obligations to the public beyond those of their employers? Consider the following from the ethical code for lawyers in federal government employment:

The situation of the federal lawyer which may give rise to special considerations, not applicable to lawyers generally includes certain limitations on complete freedom of action in matters relating to Canon 8. [Canon 8 of the *American Bar Association Code of Professional Responsibility* states, "a lawyer should assist in improving the legal system."] For example, a lawyer in the Office of the Chief Counsel of the Internal Revenue Service may reasonably be expected to abide, without public criticism, with certain policies or rulings closely allied to his sphere of responsibility even if he disagrees with the position taken by the agency. But even if involved personally in the process of formulating policy or ruling there may be rare occasions when his conscience compels him publicly to attack a decision which is contrary to his professional, ethical or moral judgment. In that event, however, he should be prepared to resign before doing so, and he is not free to abuse professional confidence reposed in him in the process leading to the decision.*

What about lawyers who serve the government as prosecutors? Should they resign rather than prosecute someone whose behavior may be

⁷VII Writings of Henry David Thoreau, 289 (1906).

*Federal Bar Association, *Federal Ethical Considerations* (Washington, D.C.: FBA, adopted November 17, 1973).

⁶Cozzens, *Guard of Honor* 479 (1948).

illegal but not “wrong” in the prosecutor’s own moral or ethical judgment?

2. What about lawyers in firm practices? Recall the readings in the last chapter about preparing young lawyers for practice by dulling their moral sensitivity in this excerpt:

Before I ever became a lawyer, I both respected and was intrigued by lawyers’ ability to put their personal beliefs aside and zealously advocate positions they themselves didn’t support. Rather than perceiving lawyers as prostitutes of their legal skills, I saw their ability to defend seemingly indefensible positions as the purest form of advocacy. . . . But now I recognize that separating yourself from your work comes at a high price. The lawyer in the office for 12 or more hours a day is the same person who has to go home each night, and live with the consequences of their actions.

The nature of large firm practice often masks the harsh reality of selling out. As a general rule, as an associate you are expected to work on cases assigned to you, unless you have—and can articulate—very strong moral or ethical objections. This pressure means that associates must take a stand to get off cases they don’t want to work on, and that’s a potentially career-jeopardizing move. It leaves people looking down on you for not being a “team-player.” . . . Surrounded by other professionals who routinely put their personal beliefs aside, and surrounded by plush offices, expensive artwork, and state-of-the-art technology, I found it depressingly easy to overlook any distaste I harbored for certain clients and cases.[†]

3. In a case in Lake Pleasant, New York, two lawyers appointed to defend a man charged with murder were told by their client of two other murders that, unknown to police, he had committed. The lawyers, following the client’s directions, discovered the bodies in an abandoned mine shaft and photographed them. They did not, however, inform the police until several months later, after their client confessed to those killings. In addition, the parents of one victim had approached one of the lawyers seeking information about their

missing daughter. The attorney denied having any information.

Monroe Freedman, a law school dean and prominent writer on legal ethics, wrote of this case,

The adversary system, within which the lawyer functions, contemplates that the lawyer frequently will learn from the client information that is highly incriminating and may even learn, as in the Lake Pleasant case, that the client has in fact committed serious crimes. In such a case, if the attorney were required to divulge that information, the obligation of confidentiality would be destroyed, and with it, the adversary system itself.[‡]

Should there be any limits to a lawyer’s advocacy? Should society have any interest in the lawyer-client relationship so long as the lawyer is ethical?

4. Curtis claims that lawyers must be understood as playing a game. Lawyers commonly refer to legal practice as a game. Why is that? Other professionals—doctors, ministers, engineers, social workers, scientists, academics—don’t do it. Lawyer and novelist Louis Auchincloss also uses this metaphor when his character in *Diary of a Yuppie*, Attorney Robert Service, explains how things work to junior lawyers in the firm:

The trouble with you and Blakelock is that neither of you has the remotest understanding of the moral climate in which we live today. It’s all a game, but a game with very strict rules. You have to stay meticulously within the law; the least misstep, if caught, involves an instant penalty. But there is no particular moral opprobrium in incurring a penalty, any more than there is being offside in football. A man who is found to have bought or sold stock on inside information, or misrepresented his assets in a loan application, or put his girl friend on the company payroll, is not “looked down on,” except by sentimentalists. He’s simply been caught, that’s all. Even the public understands that. . . . You break the rules, pay the penalty and go back to the game.[§]

Does Curtis’s perspective necessarily lead a lawyer to the kind of cynical understanding of moral action described by Service?

[†]William R. Keates, *Proceed with Caution: A Diary of the First Year at One of America’s Largest, Most Prestigious Law Firms* (Chicago: Harcourt Brace Legal and Professional Publications, 1997), 132–133.

[‡]Monroe H. Freedman, *Lawyers’ Ethics in an Adversary System* (Indianapolis, Inc.: Bobbs-Merrill, 1975), p. 5.

[§]Louis Auchincloss, *Diary of a Yuppie* (New York: St. Martin’s Press, 1986), pp. 26–27.