The Attorney and the Supremacy of Law

Frank M. Johnson Jr.

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*The Honorable Frank M. Johnson, Jr.**

A MODERN attorney is constantly reminded that the art of legal advocacy—the practice of law—is a profession and not a business. For this reason, an attorney's daily performance must meet certain professional standards. For example, all attorneys must fulfil their (1) duty of public service—often without remuneration[1] (2) duty as an "officer of the court" to assist in the administration of justice, discharged by sincerity, integrity, and reliability at all times in dealings with the court,[2] (3) duty in a fiduciary capacity to clients,[3] (4) duty to

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1 The duty of public service by representation of indigent defendants has exacted significantly more effort from the legal profession since the decision of Gideon v. Wainwright, 372 U.S. 335 (1963). See also Escobedo v. Illinois, 378 U.S. 478, 492 (1964); Douglas v. California, 372 U.S. 353 (1963); Alden v. Montana, 234 F. Supp. 661 (D.C. Mont. 1964). However, in federal courts financial remuneration for such cases has been provided the attorney by statute. See 18 U.S.C. § 3006A (1964). Designated the Criminal Justice Act of 1964, this legislation furnishes counsel for indigent defendants charged with felonies or misdemeanors other than petty offenses at every stage in the proceedings from his initial appearance before the United States commissioner or court through any appeal. The act provides compensation for the attorney at a rate of fifteen dollars per hour for time expended in court or before a commissioner, and ten dollars per hour for time reasonably expended out of court, in addition to reimbursement for expenses reasonably incurred. Except in extraordinary cases, total reimbursement is limited to $500 in felony cases and $300 in misdemeanor cases. The same rates and limitations are applicable for representation in an appellate court. Attorney General Robert F. Kennedy explained the need for compensation of attorneys appointed to represent indigents:

> Far more often, however, the assignment will go to a young and inexperienced lawyer, unable to finance the careful search for witnesses and evidence and the time-consuming preparation and trial which an adequate defense may demand. Representation so limited—late in time, lacking in money, and short on experience—is representation far short of that contemplated by the framers of our Constitution.

H.R. REP. No. 864, 88th Cong., 1st Sess. 6 (1963).

2 Canon 22 of the ABA Canons of Professional Ethics sets forth the requirement of candor and fairness in dealing with the courts, providing in part:

> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed . . . . These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

ABA Canons of Professional Ethics No. 22 (1963).

3 The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and

colleagues, which must be characterized at all times by fairness, candor and understanding.[4] However, in addition to these enumerated duties, the attorney must consistently uphold the supremacy of law. This fundamental duty is the bedrock upon which the legal profession is based. Today, more than ever before, the importance of the supremacy of law should be reexamined and perhaps reemphasized.

The lawyer has played a major role in the history of the world, especially in the development and administration of government. For the most part, he has borne his full share of responsibility in safeguarding life and liberty and in promoting peace and happiness. This has been particularly true in America. Lawyers have served as draftsmen of constitutional documents, legislators, executives, judges, advisers, defenders of the people, and also as quiet practitioners who have molded public opinion and hence, in large measure, regulated the life of their times. These lawyers were average men with human failings, but they were devoted to their country and made great contributions to its traditions. Both the lawyers of yesterday and today inherited the same traditions and principles of the common law, the supremacy of the law, and the inestimable benefits of a free and independent judiciary. These principles, born in the minds of tolerant, patient lawyers, became the pattern for the traditional American lawyer.

During the same period of growth, the courts as a free and independent judiciary were the great source of law and protection for the individual and his property. Consequently, the people of America have learned to have faith in their courts and pride in their judges. Most lay citizens cannot understand jurisdictional problems or legal procedures; nevertheless, the individual citizen has confidence in the law. He knows that oppression has its limits; that no agency or power can transgress him or his property except by judgment of a duly constituted court applying the law of the land; that for any wrong there is a remedy under the Constitution and laws of this country. Judges will be appointed and will pass away. One generation rapidly succeeds another. But regardless of who comes and goes, the courts and the law they dispense—with the assistance of a qualified Bar—remain supreme. Strong in traditions, consecrated by memories, fortified with the steadfast support of the profession that surrounds them, the courts have existed

ability to the end that nothing be taken or withheld from him, save by the rules of law, legally applied.

ABA Canons of Professional Ethics No. 37 (1963).

4 See ABA Canons of Professional Ethics No. 22 (1963).

independently of the men who have served upon them. In this manner have our courts become symbols of the supremacy of the law.

In light of these great traditions and institutions, what is the present day obligation of the attorney to the concept of the supremacy of the law? Surely it is to keep the courts always unsullied and free from the pressures of men, to keep them out of controversial political strife and ambitions, and to submerge individual opinions and pride. However, today this is not enough. During a time when government is seen either as the embodiment of power or as the embodiment of justice; during a time when over our world hangs the dread uncertainty arising from idealogies that seek to destroy our form of government—and with it, of course, our system of law, more is required of every attorney.

All good judges welcome constructive criticism as an invaluable aid in improving the process and substance of judicial decisions, and certainly there is an obligation on the attorney to constantly appraise and evaluate the judicial process. However, in recent years, some of this criticism has not only been devoid of good taste but even worse, has been bred by ignorance of the precise questions presented to and decided by the courts. This criticism has failed to consider that courts do not create the issues presented to them and that, in defense and explanation of their decisions, judges cannot engage in popularity contests. The judge must, regardless of the temptation, remain objective and detached. Therefore, judges are necessarily vulnerable, and cannot respond even to unjust and unfounded criticism and condemnation. Therefore, as a part of his duty to maintain the supremacy of the law, the lawyer owes an obligation to the courts, if not to the individual judges, to cease irresponsible criticism and substitute a program of constructive analysis and elucidation. This is mandatory if the profession is to merit its position of leadership; if it is to continue in its traditions. The present concern of lawyers must be for something more fundamental than any one decision or any group of decisions. It must be for the proposition that the law in the United States is supreme. It is this obligation on the part of the lawyers that Section 1, American Bar Association Canons of Ethics, recognizes when it states:

> It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are

peculiarly entitled to receive the support of the bar against unjust criticism and clamor.[5]

A typical example of a State Bar Code of Ethics on this subject is:

> The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, cannot excuse the withholding of the respect due the office . . . .
>
> The proprieties of the judicial station, in a great measure, disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct . . . .
>
> Courts and judicial officers, in their rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways . . . .[6]

Performance of the lawyer's highest duty presents a direct, current challenge to the entire legal profession, especially since some lawyers, a few judges, some public officials and certain leaders of sociological movements manifest a continuing disregard of the principle of supremacy of the law and constitutional processes. The lawyer must condemn the conduct of those leaders, both political and social, who are busily engaged in the frustration of the law for personal gain. The attorney of integrity has a positive duty to intercede when persons with public responsibility make a mockery of law by prostituting legal process and stultifying the forms of law in defiance of their sworn duty to uphold the Constitution and the laws of the land. That same duty is required when some of the powerful leaders in the social field, reinforced by a multitude of blind followers, engage in demonstrations that inevitably foment violence and preach moral defiance of judicial decisions designed to protect the rights of all citizens. In both instances, these persons are motivated by personal gain, be it economic, social or political,

5 ABA Canons of Professional Ethics No. 1 (1963).

6 ALA. Code of Ethics, reprinted in 2 ALA. LAW. 259, 260-61 (1941).

without regard for the rights of fellow citizens, constructive efforts by government and the courts, or the supremacy of the law.

It is the sacred and unique responsibility of the individual members of the legal profession to quietly illuminate the path of reason and to loudly proclaim the supremacy of the law, especially during a time when a brutal attack is being launched against such fundamentals of a democratic society as the administration of justice by impartial courts, and the consensus of acceptance and respect for judicial decision.

The lawyer should remember that the man who defies or flouts the law is like the proverbial fool who saws away the plank on which he sits, and that a disrespect or disregard for law is always the first sign of a disintegrating society. Respect for the law is the most fundamental of all social virtues, for the alternative to the rule of law is violence and anarchy. To those not versed in the law, the lawyer must proclaim that the heart of our American system rests in obedience to the laws which protect the individual rights of our citizenry. No system can endure if each citizen is free to choose which laws he will obey. Obedience to the laws we like and defiance of those we dislike is the route to chaos. In times of riot and disrespect for judicial decisions, the lawyer must speak. To remain slient is not only a violation of his oath but is tantamount to cowardice and is a grievous injustice to the free society which men of law, by conscience and sworn duty, are bound to maintain. The voice of moderation must be heard above the cries of the far left and far right. Although these extremes talk of social and political freedoms, individual liberties and states rights, they are driven by fanaticism. They invariably espouse democracy, but do not begin to understand its very heart: supremacy of and respect for the law—whether we like it or not.

> A people may prefer a free government, but if, from indolence, or carelessness or cowardice, or want of public spirit, they are unequal to the exertions necessary for preserving it; if they will not fight for it when it is directly attacked . . . in all these cases they are more or less unfit for liberty; and though it may be for their good to have had it even for a short time, they are unlikely long to enjoy it.[7]

In my opinion, the principles and traditions of the American lawyer require that his voice be raised at this crucial time in support of the never-ending struggle to maintain the supremacy of the law.

[7] MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 3 (peoples ed. 1865).

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