PROFESSIONAL ETHICS

THE ADVOCATE AND THE COURT

BY

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The author of this short paper has not been in private practice anywhere and apart from several occasions during a two year pupillage in London and seven months in the chambers of the Attorney General of Kenya never conducted a case in any court. On the credit side, however, there is a thirty year period in Kenya of deciding issues in trials or appeals in many of which advocates have appeared. It may have been wiser not to have chosen a one-eyed author for this exercise for if it is not, it is certain, to be published in the Kingdom of the blind.

Sir Robert Meggarry told an audiance at the University of Nairobi in November 1985 the advocate should do all that his client could fairly do for himself in a trial or an appeal. He repeated the word fairly.

He spoke of four absolutes in the relationship that should mark the advocate client relationship. They were honesty, reliability, confidentiality and trust. Let three of those underline the duty of the advocate as an officer of the court is the hope of any magistrate or judge here.

An honest advocate will find his applications or submissions much easier to urge than a dishonest one becouse the court will not be wary or keen to cross-check all he says. The same must be true for the reliable and trustworthy practitioner. There is presumably nothing in his professional duty to the bench which requires the seal of confidentiality but you may be provoked to produce several examples and then this paragraph may be amended.

Who can...../2

Who can tolerate the advocate who hands upan authority with a page torn out or who does not arrive before time in the right court with the correct brief or having managed to do all that has not read it or mastered it? Or the one who undertakes that his staff will file or serve before the hearing date an essential document? Or another who suggests an adjournment to enable the parties to negotiate a settlement out of court knowing that is improbable?

Probity and obedience to the Law Society's rules or conduct will have to be the hall mark of its members if it is not to be castigatedby laymen.

Advertising or soliciting for work ought not to happen in court but some try to do so. There is a small school of lawyers who prepare notes on their submissions clearly prepared for the gentlmen of the press. There are others who are prone to swing round to the folk behind them in court when they feel they have made a good quip or clever point. And what about the ones born aloft like sporting heroes in a lap of honour? Or the robed advocate and the client just acquitted of some alleged offence photographed together? This should be instinctively distasteful for the competent advocate. Ability and skill and not such histrionics should make a more satisfying living.

Pertinacity in an advocate is admired by the reasonable court but where the law and the facts are certain professional skill and honour alike dictate that there can be no profit in prolix plattitudes that provoke opponents and the courts.

If there is no cause of action or no defence in law how can an advocate sign a pleading that alleges anything to the contrary? Honesty, reliability and trust are smothered if he does. Fraud is dishonesty and to allege that instructions must be clear and the material enough to set up a <u>prima facie</u> case. The sensible client will understand if he is told fraud cannot be pleaded. He will

recommend the honest competent advocate is he is to retain the esteem and friendship of his peers.

The temptation to suggest to clients and their witnesses before they testify what they might say has to be overcome. It is usually fatal. It is something that is not avoided, however, or else how does a layman swear that his cattle had been wilfully and unlawfully slashed? Or a mechanic declare he came to take a course to his detriment because he relied on the opinion of the other party who held himself out to be an expert in that field and who was under a duty..... and so on? Beside being unethical it is unprer tive. The court might be deceived and do an injustice but not always.

So for the sake of his duty to the court and himself the advocate should not, for example suggest an alibi or defence to a client in a criminal trial.

The late Sir Malcolm Hilbery, a justice of the King's bench Division of the High Court of Justice in England, had this advice for a prosecutor

> ".....a particular attitude to the work in hand is required of him. As a prosecutor it is his duty to see see to it that every material point is made which supports the prosecution case or destroys the case put forward for the defence. But as prosecuting counsel he should not regard his task as one of winning the case. He is an officer of justice. He must present the case against the prisoner relentlessly, but with scrupulous fairness. He is not to make merely forensic points or debating scores. There is perhaps, no occasion when he is called upon to exhibit a nicer sense of his responsibili ies than when prosecuting. When defending he is always alowed more latitude. This does not mean that he can or should stoop to any doubtful means." (1)

This cannot, perhaps, be bettered.

He is careful to underline the duty of a barrister to make use of the material in his instructions and nothing else and to open his case with an outline of only the facts which he believes he is in a position to prove.

(1) Duty and art in advocacy by the Hon. Sir Malcolm Hilbery London, 1946 Stevens & Son Limited.

The House of Lords has reprimanded an advocate for not bringing to the notice of the House a decision on the point it was considering The English Court of Appeal rebuked another for not citing a report of another against his client even though it had declared it need not hear him. What would these great courts do to those who day after day cited no authorities at all through ignorance, laziness, overwork, sheer disinterest or the despairing doctrine of of I - leave - it - all - to - the - Court? Authorities for an ag against should be cited in even an ex parte matter. The honest, reliable, trustworthy advocate always does this.

The advocate has the right of audience. There is no call to preface every submission with the assurance that it is a 'humble' one and it cannot be right that a 'humble' submission is a fully considered one as was recently suggested in the Court of Appeal. Clean linen, hands, collars are what the litigant does so his advocate should do the same. And the layman would use what the hoped was appropriate language in addressing the court. He would require the same of the professional whom he hired.

It must be part of the advocate's duty to his client and to the court to remain serene and bring sweet reasonableness to the matters in issue. It is all infinitely more attractive and success full, understandably, than a bullying, hectoring, overwrought approach to them and to a court, assessors or witnesses. It might be a help to remember what Dr Johnson said about the advocate's approach to his work in court

> "A lawyer has no business with the justice or injustice of the case which he undertakes. The Justice or injustice of it is to be decided by the Judge."

Personal confidence in its right or wrong is out of place. Emotional involvement is wrong

Each...../5

Each profession has its rules of conduct. Offenders are denied the friendship and help of the others. This must be a miserable experience to endure.

Honest, reliable, trustworthy advocates are part of the workings of the courts in Kenya. An essential part. There was a suggestion that there would be no right of audience in the courts of the District Magistrates but the then Chief Justice, Sir John Ainley, would not hear of it. He was thinking of how essential that sort of an advocate was to the work of these courts just as it is in all the courts here. Over thirty years, then, my experience is that most advocates instinctively know these rules, written and unwritten. Everyone must put as much as he can back into his profession if he hopes to look back upon it as decent and worthwhile. Something marked by honour, integrity and even style.

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comply with the rules. They should be paid without a second thought. The courts in this country given the parties relief from the mistakes of the professionals who deal with them. The advocates should be prompt in doing the same. It is quite wrong and contrary to the way an advocate should treat his client to pass on such expenses.

Now, in the 31 years of my experience, there have been times when I have known or suspected that the proper standards of professional conduct have not been observed by those who have been appearing against me or before me. It is not suprising. Various matters which I have set out indicate in what respect these lapses have occurred because much which I have hinted at arises out of my experience. By and large, however, I have found that advocates do their best for their clients, for their colleagues, and try to help the court as much as possible if they can discern in what way the court needs their help.

All these are matters which should be inculcated by senior members of your Society who undertake to train those who pour out untinged by experience. It is not something which can be learned from a lecture or from a paper such as this one.

The Vice-Chairman of your learned society when he had read my paper in draft asked me to deal with two other aspects of this subject, namely,

(1) What role does the presiding judicial officer have to play in ensuring that professional ethics and conduct are maintained?

(2) Do I feel that advocates have maintained the proper standards of professional conduct during the 31 years I have been working in the courts here?

The presiding judicial officer should report any breach of professional ethics and conduct on the part of any advocate to your Society and its officers would deal with this. The other role he would have to play would be to encourage your members to support your Council and the Court in their attempts to enforce due observance of the right professional ethics and conduct. These seem to have been foreshadowed in the discipline which your Council has adapted during the past year. It may be, however, that the presiding judicial officers have not been as firm as they should be with advocates who fall below the standards set by your society and the courts.

Intergrity, hard work and sound learning are the corner stones of your profession and your conduct in it. And I trust that they are the same for a fruitful practice. Should your members stick to the rules then your profession will be trusted by the public and by the courts.

There are some difficult problems for advocates and the answers to them are not always clear. Advocates are not entirely free from pressure by certain people. They do not always employ trustworthy diligent hard working clerks. A certain amount must be left to the staff in each practice and it must be difficult for untrained staff or inexperienced staff to interview clents and witnesses and be informed on matters of procedure. There is also that odd matter which

will overtake the advocate or his clerk without warning and it would help if there were rules for dealing with it, but there are none.

Suppose the advocates finds out that his instructions are not reliable? Should he ask for leave to withdraw or should he doggedly try to make something out of the shambles? Sometimes advocates discover that the true case is not the one his client had given him so he advises against the course the client wishes him to take. The client can and often does instruct his advocate to proceed in a contrary way. Is it then the duty of the advocate to make this clear to the court? Is the phrase "I am acting entirely on the instructions of my client ....." proper and sufficient to indicate that what he says is for the record? Is it right that the advocate cannot do more than that in the course of his client and to the court?

It is, of course, a breach of professional ethics for an advocate to give undertakings about anything without proper instructions. This should be written out and signed by the client (if he or she is literate) because there have been occasions recently when the client denies giving those instructions or says he was made to sign something which was never read to him or to sign something which was read to him but he did not understand it.

And how much investigation of his given instructions should an advocate make as to the existence of certain facts?

The presiding judicial officer can ask the advocate to consider what he has just said or ask him to consider whether his submission is a proper one and in accordance with his instructions. He can always thank any advocate whose candour and adherance to the proper standards helped the court reach the right decision.

Advocates, should, in my view, pay the costs of any mistake made by them or their staff in matters of procedure on failure to

comply with ..../8