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CHAPTER IX

THE LAWYER AS ADVOCATE

RULE

When acting as an advocate, the lawyer must treat the court or tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.¹

COMMENTARIES

Guiding Principles

1. The advocate's duty to the client is "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law"² must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.³

Prohibited Conduct

2. The lawyer must not, for example:

- (a) abuse the process of the tribunal by instituting or

function or the informality of their procedures.³⁵

Relations with Jurors

21. When acting as an advocate, before the trial of a case, a lawyer should not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel. A lawyer may investigate a person who is a prospective juror to ascertain any basis for challenge, but in doing so must not directly or indirectly communicate with that person or with any member of that person's family. When acting as an advocate, a lawyer should disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or prospective juror

- (a) has or may have an interest, direct or indirect, in the outcome of the case,
- (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any party, or
- (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness,

unless the judge and opposing counsel are already aware of the information. A lawyer should promptly disclose to the court any information of which the lawyer is aware concerning improper conduct by a member of a jury panel or by a juror toward another member of the panel, another juror, or a member of a juror's family. Except as permitted by law, when acting as an advocate, a lawyer should not during a jury trial communicate with or cause another to communicate with any member of the jury. A lawyer who is not connected with the case before a jury should not communicate with or cause another to communicate with any member of the jury about the case. A lawyer must have no discussion with a member of the jury about its deliberations after trial.³⁶

¹ Alta. 10-S.O.P.; ABA-MC Canon 7; ABA-MR 3.1-3.9; N.B. 8-R; N.S. R-10; Ont. 4.01(1). “The concept that counsel is the mouth-piece of his client and that his speech is the speech of the client is as unfortunate as it is inaccurate. He is not the agent or delegate of his client. Within proper bounds, however, counsel must be fearless and independent in the defence of his client’s rights.... He must be completely selfless in standing up courageously for his client’s rights, and he should never expose himself to the reproach that he has sacrificed his client’s interests on the altar of expediency...” *per* Schroeder J. A., “Some Ethical Problems in Criminal Law” in Law Soc. U.C. Special Lectures (1963) 87 at 102. An additional reference is The Advocates’ Society, *Principles of Civility for Advocates* (Ontario); see Appendix, below at 131.

² The sources of the quotations are comments of Lord Reid in *Rondel v. Worsley* (1969) 1 A.C. 191 at 227 and Canon 3(5) of the *Canons of Legal Ethics* of the Canadian Bar Association, adopted in 1920.

³ ABA-MC EC 7-1, 7-19; N.B. 8-R(b); N.S. R-9 Guiding Principle; Ont. 4.01(1) Commentary.

⁴ ABA-MC DR 7-102(A)(1); B.C. 8(1)(a).

⁵ B.C. 8(1)(b).

⁶ ABA-MC Canon 9, DR 9-101; B.C. 8(1)(c).

⁷ ABA-MC EC 7-34; B.C. 8(1)(d).

⁸ Alta. 10-R.14, R. 20(b); ABA-MC EC 7-25-27, DR 7-102(A)(3); ABA-MR 3.3(a)(1) (3). See also *Myers v. Elman* (1940), A.C. 282 at 293-94 (H.L.) *per* Viscount Maugham : “The swearing of an untrue affidavit...is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit.... He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon file.... A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act...”; *Re Ontario Crime Commission* (1962), 37 D.L.R. (2d) 382 at 391 (Ont. C.A.) *per* McLennan J.A.: “[Counsel] had full knowledge of the impropriety of the paragraphs in the affidavit...[and] is bound to accept responsibility for [them].... If he knows that his client is making false statements under oath and does nothing to correct it, his silence indicates, at the very least, a gross neglect of duty.”

⁹ ABA-MC DR 7-102(A)(5).

¹⁰ Alta. 10-R.19; ABA-MC EC 7-25, DR 7-106(C)(1); B.C. 8(1)(e.1); *R. v. Lyttle*, [2004] 1 S.C.R. 193.

¹¹ ABA-MC EC 7-23, DR 7-106(B)(1); ABA MR 3.3(a)(2); B.C. 8(1)(f). See *Glebe Sugar v. Greenock Trustees* (1921), W.N. 85 (H.L.) for a strong statement by Lord Birkenhead on the duty of counsel to disclose to the court authorities bearing one way or the other: “The extreme impropriety of such a course [withholding a known pertinent authority] could not be made too plain.”

¹² ABA-MC DR 7-109(B); B.C. 8(1)(g).

¹³ Alta. 10-R.24; B.C. 8(1)(h); N.B. 8-C.10.

¹⁴ Alta. 10-R.21.

¹⁵ Ont. 4.01(2).

¹⁶ ABA-MC DR 7-102(B), DR 4-101 (C)(2); N.B. 8-C.11; Ont. 4.01(5).

¹⁷ ABA-MC DR 2-110 (B)(2); ABA-MR 3.3[15]; B.C. 8(7), 8(8).

¹⁸ ABA-MC EC 7-24, DR 7-106 (C)(3), (4); ABA-MR 3.7; B.C. 8(9), (10); N.B. 8-C.6; N.S. C-10.11; Ont. 4.02. "It is improper, in my opinion, for Counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's cause," *per* Locke J. in *Boucher v. The Queen*, [1955] S.C.R. 16 at 26.

¹⁹ ABA-MC DR 7-109; B.C. 8(12), (12.2), (12.3); N.B. 8-C.4 (a), (b); Ont. 4.03.

²⁰ ABA-MC DR 7-104(A)(1); B.C. 8(12.1); N.B. 8-C.4(c); Ont. 6.03(7)-(9).

²¹ Ont. 6.03(9).

²² ABA-MC EC 7-38, 7-39, DR 7-106(C)(5); N.B. 8-C.7, C.8; N.S. C-10.1.

²³ N.B. 8-C.1, C.2(a), (b); N.S. C-10.2, 10.2A.

²⁴ Alta. 10-R.28; ABA-MC EC 7-13, 7-14, DR 7-103; ABA-MR 3.8; B.C. 8(18); N.B. 8-C.13; Ont. 4.01(3). "It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings," *per* Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24. See also Martin, "The Role and Responsibility of the Defence Advocate" (1969-70) 12 *Crim. L.Q.* 376 at 386-87.

²⁵ *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372.

²⁶ ABA-MC EC 7-24, DR 7-106(C)(4); N.B. 8-C.14a-c; N.S. C-10.3, 10.4; Ont. 4.01(1) Commentary.

²⁷ N.B. 8-C.14(d); N.S. C-10.5 to 10.7; Ont. 4.01(1) Commentary.

²⁸ ABA-MC EC 7.7; B.C. 8(20); N.B. 8-C.15; N.S. C-10.8; Ont. 4.01(9).

²⁹ Alta. 10-R.27(b).

³⁰ Alta. 10-R.27(a); Ont. 4.01(9) Commentary.

³¹ ABA-MC EC 7-38, DR 7-106(C)(5); Ont. 4.01(7) and Commentary; Ont. 4.01(5).

³² ABA-MC EC 7-36, DR 7-106(C)(6); Ont. 4.01(6) and Commentary.

³³ ABA-MC EC 7-19; N.B. 8-C.3(a),(c); Ont. 4.01(1) Commentary.

³⁴ N.B. 8-C.5; Ont. 4.04 provides as follows: "Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point;

- (b) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may properly discuss the evidence with the witness;
- (c) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched upon during the examination-in-chief;
- (d) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;
- (e) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;
- (f) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;
- (g) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and
- (h) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

Commentary[:] If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper. This rule applies with necessary modifications to examinations out of court." However, in John Sopinka, Donald B. Houston and Melanie Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1998), the authors comment at 128, "It is submitted with respect that in some respects [this commentary] may inhibit the discovery of truth and go beyond what was the practice in the Ontario courts."

³⁵ ABA-MC EC 7-15; N.B. 8-C.16.

³⁶ ABA-MC EC 7-29; Ont. 4.05.