

EFFORTS OF THE BENCH AND BAR TO MAINTAIN RESPECT FOR THE LEGAL PROFESSION

Shapiro v. Kilgore Cleaning & Storage Co.
108 Ohio App. 402, 156 N.E.2d 866 (1959)

Plaintiff sustained injuries in a head-on collision between a car driven by the plaintiff, an attorney, and a truck driven by defendant's employee. In closing argument to the jury, counsel for the defense intimated that the plaintiff was a "shyster" and stated that "lawyers do not have a most savory reputation." Counsel for the defense later apologized in open court before the jury. The trial judge attempted to cure the error by his general charge. The court of appeals held that this conduct was a gross abuse of the lawyer's privilege to argue the merits of his case and was so prejudicial as to constitute grounds for a mistrial.¹

There are two basic problems to consider in this case: (1) the conduct of counsel was prejudicial to a party and therefore constituted grounds for a mistrial; and (2) this conduct consisted of an attack by one lawyer on another which slandered the legal profession in general. While the former problem cannot be overlooked and, indeed, is most important to the disposition of this case, the primary concern is what steps the courts and the legal profession can and should take to prevent such unwarranted attacks on the profession by one of its members and to maintain respect before the public.

It is the accepted rule that counsel in closing argument to the jury must base his argument on the evidence introduced at the trial.² In the instant case, the remarks made by defendant's counsel were not based upon any evidence presented and further they reflected upon the reputation and trustworthiness of every member of the legal profession. The lawyer is often very intimate in his relationships with his clients. Frequently, it is essential that the business secrets of the client, or information pertaining to his difficulties or family relationships be placed in the confidence of the attorney. If the lawyer is to retain the public's confidence, the legal profession must maintain its dignity.³ Unless the members of the bar inspire respect for the profession, it would be idle to expect more from the public. Because the lawyer occupies this position of responsibility, he takes his professional life into his own hands when he violates the rules and customs of his profession.

The steps taken by the court to prevent misconduct by counsel may take one of three forms. First, and perhaps most important, is the responsibility of the court to protect the innocent litigant who has been victimized by the prejudicial conduct of counsel. It may be necessary for the court to

¹ *Shapiro v. Kilgore Cleaning & Storage Co.*, 108 Ohio App. 402, 156 N.E.2d 866 (1959). The court reasoned that, "once a dagger is thrust through the heart, it can not be withdrawn without injury or damages." 108 Ohio App. at 407, 156 N.E.2d at 869.

² *Wilson v. Dyer*, 116 Vt. 342, 75 A.2d 677 (1950).

³ *Whitsitt v. Bar Rules Committee*, 233 Ark. 860, 269 S.W.2d 699 (1954).

award the party a new trial in order to secure fair administration of justice.⁴ If the prejudicial nature of the remark is of a lesser degree, proper instruction to the jury may be sufficient and the expense and inconvenience of a new trial is avoided.⁵

Secondly, the contempt process is an inherent power in the court to protect its dignity and honor.⁶ Although counsel has the right to make an impassioned address on behalf of his client,⁷ he may not make inflammatory remarks to the jury.⁸ If he persists in such an abuse of privilege it may be a contempt of court.⁹ This jurisdiction also is derived from the supervisory and disciplinary power which the court exercises over its own officers. The advocate, being an officer of the court, is under its immediate control.¹⁰

Third, the court has the power to enforce the principles of professional ethics by the summary proceedings of disbarment, suspension and reprimand.¹¹ It must be borne in mind that this power to discipline advocates is administered not for the sake of punishment,¹² but to assert the dignity of the profession and vindicate the authority of the ethical code.¹³ Disbarment is the most severe of the summary proceedings and has been exercised in the United States and England from the earliest times.¹⁴ However, this penalty is so severe, since it extinguishes the lawyer's professional life, that it is used only where there is a flagrant disregard of professional ethics or of moral duty.¹⁵ For this reason the sanctions of suspension or reprimand are more commonly used.¹⁶

State and local bar associations can do a great deal to help establish and enforce high ethical standards for the profession.¹⁷ In many jurisdictions, professional "courts of honor" have appeared on the scene. They are committees created by the state bar associations to hand down opinions

⁴ *Jones v. Macedonia-Northfield Banking Co.*, 132 Ohio St. 341, 7 N.E.2d 544 (1937); *Shapiro v. Kilgore Cleaning & Storage Co.*, *supra*, note 1.

⁵ *Plas v. Holmes Const. Co. Inc.*, 157 Ohio St. 95, 104 N.E.2d 689 (1952); *Gibbons v. Baltimore & O.R.R.*, 92 Ohio App. 87, 109 N.E.2d 511 (1952).

⁶ *Raiden v. Superior Court for Los Angeles County*, 34 Cal.2d 83, 206 P.2d 1081 (1949).

⁷ *Texas Employer's Ins. Ass'n v. Scott*, 233 S.W.2d 171, (Tex. Civ. App. 1950).

⁸ *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421 (Mo. 1958).

⁹ *Eizerman v. Behn*, 9 Ill. App.2d 263, 132 N.E.2d 788 (1956).

¹⁰ *In re Schofield*, 362 Pa. 201, 6 A.2d 675 (1949).

¹¹ *Ex parte Wall*, 107 U.S. 265 (1882).

¹² *In re Veach*, 365 Mo. 776, 287 S.W.2d 753 (1956); *In re Morford*, 46 Del. 144, 80 A.2d 429 (1951).

¹³ *State ex rel. Nebraska State Bar Ass'n v. Wiebusch*, 153 Neb. 583, 45 N.W.2d 583 (1951).

¹⁴ *People v. Turner*, 1 Cal. 143 (1850); *Leigh's Case*, 15 Munf. 568, 15 Va. 468 (1810); *Anonymous*, 6 Mod. 187, 87 Eng. Rep. 942 (1705).

¹⁵ *Sacher v. Ass'n of the Bar of the City of New York*, 347 U.S. 388 (1954).

¹⁶ *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

¹⁷ *Commonwealth v. Jones & Robbins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947).

construing questions on the professional code of ethics.¹⁸ The "courts" also render opinions with relationship to its violation in specific cases.¹⁹ The professional "courts of honor" have developed into a new procedure for enforcing the code of ethics.

Individual lawyers can and do bring disrespect to the profession by dishonest and sharp practice.²⁰ It is the duty of the bar to correct such persons or remove them from its midst.²¹

It is submitted that such gross and reckless misconduct of defendant's counsel has no place during the progress of a trial and should not be allowed.²² Trials before juries should be conducted with dignity and in such a manner as to bring about a verdict based solely on the law and the facts.²³ Moreover, where conduct of counsel is not only prejudicial to a party but also amounts to an attack on his own profession, as in this case, the courts should impose a more severe sanction. Nothing could be more disconcerting to an already suspicious public than to see a *lawyer* in a *judicial proceeding* slandering the *legal profession*. A lawyer is an officer of the court, and as such he is bound to work for the efficient administration of justice and should not be allowed to strike out on reckless and unwarranted assertions that can only prejudice a litigant and bring ridicule to his profession.

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¹⁸ Robbins, *American Advocacy* 256 (2d Ed. 1913).

¹⁹ *In re Kenkel*, 279 S.W.2d 770 (Ky. 1955), at 771, the court said, "We have adopted the canons of the American Bar Association as a sound statement of the standards of professional conduct required of members of the Bench and Bar, and the court regards these canons as persuasive authority in all disciplinary proceedings against members of the Bar." The Ethics Committee of Kenton County Bar Association found the attorney guilty and recommended a reprimand. The court issued the reprimand.

²⁰ *State ex rel. Nebraska Bar Ass'n v. Niklaus*, 149 Neb. 859, 33 N.W.2d 145 (1948).

²¹ *Supra*, note 17.

²² *Supra*, note 9.

²³ *Hancock v. Crouch*, 267 S.W.2d 36 (Mo. 1954).