

Are There Public Interest Limits on Lawyers' Advocacy?

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Are there no limits (short of violating criminal laws and rules of court) to the partisan zeal that an attorney should exert on behalf of a client who may be a murderer, a rapist, a drug pusher, or a despoiler of the environment? Is the lawyer never to make a conscientious judgment about the impact of the client's conduct on the public interest and to temper the zealousness of his or her representation accordingly?

My answer to those questions is determined in substantial part by the premise from which I begin. I believe that the adversary system is itself in the highest public interest, that it serves public policy in a unique and in a uniquely important way, and that it is, therefore, inconsistent with the public interest to direct lawyers to be less than zealous in their roles as partisan advocates in an adversary system.

The adversary system proceeds from the assumption that the most effective way to determine truth and to do justice is to pit against each other two advocates, two adversaries, each with the responsibility to marshal all of the relevant facts, authorities, and policy considerations on each side of the case, and to present those conflicting views in a clash before an impartial arbiter. In the performance of that adversarial role, zealous advocacy is, of course, an essential element in producing an effective clash of opposite views.

The classic statement of the role of the zealous advocate was expressed by Lord Brougham in Queen Caroline's case, a case in which Brougham threatened, literally, to bring down the kingdom. Brougham said:

. . . An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring

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upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of advocacy that I would want to have as a client and that is the kind of representation I feel bound to give as a lawyer. It is fair to note again, however, that that quotation tells only part of the story. There is also an advocate on the other side and an impartial judge and/or jury sitting over both. The heavens do not really have to fall, therefore, unless justice indeed requires that they do.

It has been suggested that I embrace zealotry (and also the bond of confidentiality between lawyer and client) as ends in themselves; but that would be absurd. I see both zealotry and confidentiality as essential mainstays of the adversary system, which in turn is the foundation of some of the most important values in our system of government. In order to appreciate this, it is useful to consider, by way of contrast, the role of a criminal defense attorney in a totalitarian state. As expressed by law professors at the University of Havana, "the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanctions which will best rehabilitate him." Similarly, a Bulgarian attorney began his defense in a treason trial by noting that: "In a Socialist state there is no division of duty between the judge, prosecutor, and defense counsel. . . . The defense must assist the prosecution to find the objective truth in a case." In that case, the defense attorney ridiculed his client's defense, and the client was convicted and executed. Some time later the verdict was found to have been erroneous, and the defendant was "rehabilitated."

The emphasis in a free society is, of course, sharply different. Under our adversary system, the interests of the state are not absolute, or even paramount. The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination. Thus, although the defendant may be confronted by the entire "Commonwealth of Virginia" or all of "The People of the State of New York" (which is the way criminal prosecutions are captioned), the defendant is at least afforded that one advocate, that "champion against a hostile world," whose zealous allegiance is to him or her alone.

Although I have stressed the centrality of the dignity of the individual in the adversarial model for the administration of justice, there is an important corollary to the adversary system—a mistrust of official power. As expressed by the conservative political philosopher Ernst van den Haag, the American constitutional structure is one of “institutionalized mutual mistrust.” That is, we recognize that anyone who is in a position to wield the power of the state, whether in a criminal proceeding or otherwise, is a potential menace to civil liberties. Thus we have a system of checks and balances, one of the most important of which is the power of one or more citizens to call the government itself before the bar of justice in an adversarial proceeding.

Because I hold these views about the importance to civil liberties of a vigorous adversary system, I find the attacks by Ralph Nader and Mark Green against zealous advocacy to be particularly threatening to the public interest. An illustration was the picketing conducted by Nader and a group of law students against a law firm, charging that the firm had acted unethically in its zealous representation of General Motors. General Motors had been charged by the Department of Justice with having engaged in a conspiracy to delay the installation of anti-pollution devices in automobiles. The law firm succeeded in obtaining a consent decree, thereby avoiding the expense and bad publicity of a trial. It also thereby precluded extensive discovery by the government of information about the company’s activities, which information might have been useful to private litigants in treble-damage anti-trust actions against the company.

Nader’s contention was that the lawyers had violated professional ethics by negotiating the consent decree, despite the fact that such a decree was lawfully available to the clients. Implicit in that position is the premise that the attorney has an obligation to serve not only as the client’s advocate, but as the client’s judge as well, and to withhold zealous advocacy of the client’s lawful rights in accordance with that judgment. In reaching that conclusion, however, Mr. Nader failed to distinguish between two issues. The first is a personal one for the lawyer: Is this a client whom I want to represent, or a cause with which I want to be associated? The second question is the professional one: Having undertaken to serve this client, should I provide less than the most competent and effective service of which I am capable?

As to the first question, the answer is well established both in rule and in practice. Mr. Nader has no obligation to serve General

Motors, I have no obligation to be a public prosecutor, and other lawyers can properly withhold their representation from murderers, drug pushers, and anti-war demonstrators. Lawyers can and do decline clients for a variety of reasons (including, all too frequently, the client's inability to pay an adequate fee). Once the lawyer has assumed responsibility for a client's case, however, it would be a betrayal of trust for the lawyer to provide that client with less than what the law allows. The client is entitled to have his or her case determined under the standards and processes duly established by law, rather than by the vagaries of the individual conscience of the particular lawyer who has taken the case.

A contrary system, one that made the client's rights turn upon the lawyer's conscience, would put a premium upon clients finding the least conscientious lawyers. A more fundamental objection, however, is that a rule imposing the lawyer's conscience upon the client is paternalistic and elitist. Mark Green says, ". . . Although a reputed democracy with a First Amendment must tolerate a speaker of verbal pollution, it need not constitutionally tolerate a producer of industrial pollution." That is certainly true, but it misses the point in a significant way. The issue is not whether a democratic society "must tolerate" industrial pollution. Rather, it is this: If, through their constitutionally established processes of democratic government, the people of this country have determined that particular instances of industrial pollution are to be tolerated, should lawyers, as a private elite, choose to reject the democratic will in the course of representing their clients? By what authority is the lawyer to deprive the client of a right that society has chosen to grant?

To acknowledge that the lawyer's function is to advance the client's claims, rather than to forego asserting them, is not to say that the lawyer's conscientious judgment is irrelevant to effective and ethical representation of a client. Posing a very different question, Mark Green asks, "When if ever should a lawyer tell a client that a proposed argument or policy is unjust?" The answer is clear: A lawyer has a professional obligation to advise a client whenever the lawyer believes that a proposed argument or policy is unjust. We are our clients' servants, however, not their masters. Some of us, moreover, are not infallible. The ultimate decision, therefore, as to whether the lawyer's advice is to be followed, must be the client's.

Green then puts another question: "What does a lawyer do with a pharmaceutical client whose dangerous drug can also 'murder' or pain thousands of people tomorrow, albeit at a discreet distance

from the client?" Green's answer is surprising in a number of respects. He proposes a "new lawyer's ethic":

When a Washington counsel, on a continuing retainer for past and future legal liability, represents a corporation in a civil or legislative proceeding, he or she should make a judgment about the likely impact on the public, and if this client desires tactics based upon political influence or seeks a demonstrable though avoidable public harm, the lawyer should quit the account.

In some respects, that rule is not new at all. In another respect, it does not go far enough.

As we have already noted, the lawyer can properly refuse to take the case at the outset, and the lawyer should advise the client to do what the lawyer considers to be morally right. In addition, the lawyer must withdraw from the case if the lawyer's feelings are so strong that he or she would be burdened by a personal conflict of interest, in the sense that the lawyer might be induced, consciously or unconsciously, to act inconsistently with the client's interests.

Green's reference to the dangerous drug that can kill or injure thousands of people, raises at least a suggestion, however, that the lawyer has knowledge of company data of which the public is unaware. (Presumably, if the public were aware that a drug can murder thousands of people, something would be done.) The ultimate question—not answered by Green's "new lawyer's ethic"—is: What should the lawyer do when he or she learns in the course of receiving confidential communications from the client that the client is about to market a lethal drug, and the appropriate authorities are ignorant of the drug's dangerous qualities. Under the Code of Professional Responsibility, the attorney is *permitted* to reveal sufficient information to prevent the client's criminal conduct from being carried out. Since we are dealing not only with a future crime, but one that involves life and death, I believe that standards of professional conduct should *require* that the attorney reveal sufficient information to prevent the crime from occurring.

In other writings, Nader and Green indicate agreement on that point. Indeed, they would go further, as I understand them, and forbid the lawyer to continue representing the client who desires to market the dangerous product (" . . . the lawyer should quit the account"). I believe, on the contrary, that the lawyer can properly present to the appropriate public officials the client's view that the potential good of the product outweighs the potential harm, leaving

the resolution of that issue to the adversary process and to the public officials charged with responsibility for judging where the public interest lies.

Let me illustrate my point with what would appear to be a difficult case for my side of the argument. The client is the manufacturer of children's sleepwear, and wants to persuade the government that the company should not be required to make their product flame-retardant. There are, in fact, such regulations in effect, and reports from burn treatment units show a substantial reduction in burn incidents among children who have worn the treated sleepwear. There is obviously nothing to be said for the manufacturer's side of the case—until, that is, you hear the manufacturer's side.

Clothing is made flame-retardant by treating it with synthetic chemicals. All such chemicals are suspected of being carcinogenic, and there is significant scientific evidence that the chemical most commonly used to make children's sleepwear flame-retardant (popularly known as Tris) causes cancer. Even so, those scientists who are most concerned are reluctant to urge chemical substitutes for Tris, because they fear that other flame-retardant chemicals would be equally dangerous or more so. Thus, according to a report in the *New York Times*, some scientists are borrowing old children's sleepwear, manufactured before the flame-retardant regulations were promulgated, or are stocking up on cotton pajamas when they travel abroad. In short, the risk of cancer may be greater than the risks of injury from fire.

The adversary process is designed to draw out those competing concerns and to resolve them in a rational way. The lawyer, as advocate for either side, plays an essential role in that process. Yet, cannot the lawyer rely in some cases on the expert judgment of some responsible keepers of the public conscience or of the public good—for example, the Environmental Protection Agency, or disinterested public interest groups that are concerned only with preserving the environment for the benefit of all of us?

Not long ago a family in New York found a fawn that had been seriously injured. They named it Feline, they nursed it with a baby bottle, and they brought it back to health. Feline had become a beloved pet for the children, when the New York Environmental Protection Agency swooped down, picked up the fawn despite the protests and tears of the family, and shot the fawn with a tranquilizer so they could take it away. As a result of the tranquilizer and/or the excitement, Feline regurgitated, choked, and died. The officer who took the deer away was quoted as saying, in the finest bureau-

cratic tradition, "I am simply following orders from my superiors." Ogden Reid, who is the head of the New York Environmental Protection Agency, said publicly, "We goofed. We were just plain wrong. It will never happen again."

Just two days later, an officer of the Environmental Protection Agency of the State of New York came upon another fawn that had been injured, and had been nursed back to health by a family. The family named it Bambi, and were planning to keep it only long enough to wean it, at which time they intended to take it to the local zoo. The officer, however, believing he was doing his duty, and despite the protests and tears of the family, took the fawn away. He then made the expert judgment that the fawn would not be able to survive in the wildlife refuge, and so he shot it through the head—thereby destroying it in order to save it.

It may well be suggested that I have selected an unfair illustration, involving as it does fawns, tearful children, and obviously stupid conduct on the part of the authorities. There are, after all, clear-cut issues, like preservation of the environment, or maintaining the American Indians' historic rights to ancient shrines—issues that are truly beyond reasonable dispute, and where the lawyer can make the judgment as to where the public interest lies without the need for an adversary proceeding.

One possible illustration is that of the Taos Indians, who are involved in a struggle to get back their sacred Blue Lake Country, which was an historic tribal shrine. The people on the other side have argued—with appalling condescension—that "the Indians claim the land as a religious shrine, although there is nothing in existence on the land to suggest a shrine as most of us commonly recognize one." The problem is, of course, that it is the environmentalists with whom the Indians are contesting. The environmentalists want to conserve the property as a national park, and they believe that the Indians' interest is inconsistent with conservation and with the broader interests of the general public.

At one point during one of the deer cases, the mother of the family that had adopted the deer said, "I want someone to explain to my kids how they can trust the law." What her children had seen, after all, were representatives of the law, in full uniform, taking the deer away and then, within less than twelve hours, succeeding, once by accident and once purposely, in killing the deer. "I want someone to explain to my kids," she said, "how they can trust the law."

The answer to that question is really very simple. Those children cannot trust the law—any more than any of us can trust the

law. The law is neither to be trusted nor mistrusted, because the law is not self-executing. The law depends upon the people who represent the government to carry it out—that is, the bureaucrats, or, as Russell Baker referred to them in a column dealing with one of the deer cases, “government people.” There is an old rabbinical saying that the Sabbath was made to serve man, not man to serve the Sabbath. Similarly, Baker wrote: “The difficulty about government people is that they tend to get things backwards. Government is supposed to exist for the convenience of people . . . but, increasingly governments behave as if people . . . exist for the convenience of governments.”

As between the Indians and the environmentalists, I do not know who was right. I do not even know for sure that the government people of the Environmental Protection Agency were wrong in what they did. As an advocate, I believe I could make a respectable case that they were not wrong. What I do know is that there is only one way to keep the law “trustworthy”—only one way to keep the bureaucrats honest, and to make the law work. That is, by making sure that there is an independent Bar, prepared to challenge governmental action, and to do so as zealously and effectively as possible, irrespective of whether the client is a big corporation, an organized crime figure, a wealthy heiress, or just another citizen such as you or I.

We do need reform. We need reform to make the adversary system function better, to inform people about their rights and about how to vindicate them, to ensure effective representation on both sides of every case, and to provide competent judges in all cases. In short, we need to build on the strengths of the adversary system, a system which is itself in the highest public interest, and which serves public policy in a unique and in a uniquely important way.