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## Misconduct of the Trial Attorney

William L. Libby\*

EVERY SOCIAL GROUP DEPENDS upon some standard of correct behavior of its members. Particularly, professional groups have codified acceptable modes of conduct. Lawyers have done this by statute, court decisions, and Canons of Professional Ethics. For varying reasons, the standards of conduct are not always self-imposed, but sometimes are created by pressures of the general public.

Charles Dickens saw many abuses in the English courts in his time. He was particularly irritated by the way witnesses were handled by attorneys at trial. Several of his works<sup>1</sup> describe the badgering that witnesses had to withstand from counsel. Today, many former abuses have disappeared. Yet, today, a court record may speak of counsel's conduct as being "improper," "wrong," "misconduct," conduct "involving moral turpitude," "in error," or creating "passion and prejudice."

An attorney is licensed and is sworn as an officer of the court. Common law proclaims him to be a "minister of justice in aid of the court."<sup>2</sup> Attorneys are the chief instruments of the Anglo-American system of law.<sup>3</sup> An attorney at a trial is not a contestant like unto a gladiator seeking to *prevail at any cost*.<sup>4</sup> His cause of action, as well as his opponent's, depends upon a fair and impartially conducted trial. The jury's verdict should be based upon the issues made by the pleadings and evidence, and not upon deceptions created by misconduct.<sup>5</sup>

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<sup>1</sup> Dickens, *Posthumous Papers of the Pickwick Club* (New York, Modern Library Edition, 1958); *Ibid.*, *Bleak House* (New York, Heritage Press, 1942).

<sup>2</sup> *Turner v. Abin*, 118 Ohio St. 527, 533, 161 N. E. 792 (1928); *Cancellieri v. De Modica*, 57 N. J. Super. 598, 155 A. 2d 167, 170 (1959); *In re Estate of Wright v. Persky*, 123 N. E. 2d 52, 56 (Ohio App., 1954); *In re McBride*, 164 Ohio St. 419, 132 N. E. 2d 115 (1956).

<sup>3</sup> *Turner v. Abin*, *supra*, note 2.

<sup>4</sup> *Jones v. Macedonia-Northfield Banking Co.*, 132 Ohio St. 341, 350, 7 N. E. 2d 544 (1937).

<sup>5</sup> *Oslund v. State Farm Mutual Automobile Ass'n.*, 242 F. 2d 813 (9th Cir., 1957); *Critcher v. Fick*, 315 S. W. 2d 421 (Mo., 1958).

### Discretionary Power of the Court

Trial courts have broad inherent and statutory powers.<sup>6</sup> These powers include the power to prevent misconduct with or towards a witness. Statutes<sup>7</sup> enable the court to suspend, remove, or reprimand attorneys for improper conduct, or for any acts affecting "the substantial rights of the parties."<sup>8</sup> Misconduct that can not be removed from the minds of the jurors by corrective action of the court will usually result in a mistrial. For instance, a judge in his discretion may prohibit an attorney from interrogating a witness. The Supreme Court of Alabama has set forth guides to assist its courts in determining whether the probative value of interrogation is outweighed by: (1) an undue amount of time; (2) a substantial prejudice resulting; (3) a confusion of the issues; (4) the misleading of the jury; (5) unfairly surprising an opponent who could not reasonably anticipate evidence being offered.<sup>9</sup> The trial judge also has the right to question witnesses. He does so in order to clarify testimony, amplify details, or to supply omissions.<sup>10</sup> However, it is not proper for him to conduct an extended examination,<sup>11</sup> nor to interrupt counsel threatening the witness with jail if he does not speak louder.<sup>12</sup>

For all practical purposes the judge must see to it that counsel does not create a trial surcharged with passion or prejudice.<sup>13</sup> When necessary, contempt of court charges may be brought against offending counsel. For example, in a personal injury case<sup>14</sup> repeated references to defendant's syphilis in childhood were improper. Asking questions which were irrelevant and repetitious in relation to the issues of the case was sufficient for counsel to be charged with contempt of court

<sup>6</sup> *Ex parte Wall*, 107 U. S. 265, 273, 276-81 (1882); *Ex parte Secombe*, 60 U. S. (19 How.), 9, 13 (1856).

<sup>7</sup> Ohio R. C. 4705.02 (1958).

<sup>8</sup> Federal Rules of Civil Procedure, Rule 61, 28 U. S. C. A.

<sup>9</sup> *Phoenix Insurance Co. of New York v. Leonard*, 119 S. 2d 217 (Ala., 1960).

<sup>10</sup> *People v. Rigney*, 3 Cal. Rptr. 855 (Calif. App., 1960).

<sup>11</sup> *People v. Cole*, 349 Mich. 175, 84 N. W. 2d 711 (1957); *Shandor v. Lischer*, 349 Mich. 556, 84 N. W. 2d 816 (1957).

<sup>12</sup> *State v. Lawrence*, 162 Ohio St. 412, 123 N. E. 271 (1954); See note, 7 West. Res. L. R. 274 (1955).

<sup>13</sup> *Jones v. M.-N. Banking Co.*, 132 Ohio St. 341 (1937); *Addison v. Tessier*, 62 N. M. 120, 305 P. 2d 1067 (1957).

<sup>14</sup> *Bennett v. Superior Court in and for San Diego County*, 166 P. 2d 318 (Calif. App., 1946).

and fined \$250. In the case of *Re Sacher*<sup>15</sup> severe charges of serious misconduct resulted in disbarment. Usually, disbarment or contempt proceedings are brought only after the court has repeatedly warned the offender and he has ignored the court's rulings. It would appear that a court might merely reprimand the attorney for misconduct if it is the result of fervor of the controversy rather than of deliberate contempt.<sup>16</sup>

### Objections of Opposing Counsel

It is axiomatic that testimony, in order to be admissible, must relate and connect with the transaction it is intended to explain. This connection must not be "remote, or forced, strained, or mere conjectural conclusion."<sup>17</sup> It must have a reasonable tendency to prove or disprove a material fact in issue.<sup>18</sup>

Besides the judge, opposing counsel has a right to object to inadmissible testimony. The purpose of the objection is to make clear to the court the grounds relied upon by the objector. If a party believes himself or his case to be prejudiced by improper questions asked of a witness, he should ask for a mistrial.<sup>19</sup> A recent decision<sup>20</sup> held that if an objection to a question of the opposing counsel was not made until some time after the responsive answer by the witness, the objection came too late, and could not be raised as an issue to permit an appellate review based upon the prejudicial effect of the question. The reason for the appellate court's denying a review is that counsel may have been gambling on a favorable verdict. The weight of evidence being apparently unfavorable to him, he had sought to raise an objection to a prior question, hoping thereby to be granted a new trial.<sup>21</sup> However, if the misconduct of counsel is so grossly improper and prejudicial that neither retraction by offending counsel nor rebuke by the trial court would destroy the prejudicial effect on the jury, the above rule would not apply.<sup>22</sup> A New Jersey court<sup>23</sup> has made a distinction between

<sup>15</sup> *In re Sacher*, 206 F. 2d 358 (2d Cir., 1953).

<sup>16</sup> *United States v. Sacher*, 182 F. 2d 416 (2d Cir., 1950).

<sup>17</sup> *Birmingham Baptist Hospital v. Blackwell*, 221 Ala. 225, 128 S. 389 (1930).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Morrow v. U. S.*, 101 F. 2d 654 (7th Cir., 1939), cert. den. 59 S. Ct. 836, 307 U. S. 628, 83 L. Ed. 1511.

<sup>20</sup> *Posey v. St. Clair County*, 116 S. 2d 743 (Ala. 1959).

<sup>21</sup> *Jones v. Hogan*, 351 P. 2d 153 (Wash., 1960).

<sup>22</sup> *Colquette v. Williams*, 264 Ala. 214, 86 S. 2d 381 (1956); *Anderson v.*

(Continued on next page)

questions prejudicially objectionable and ones irrelevant. The court stated that if counsel objects to an irrelevant question, he may not contend on appeal that the question posed to the witness was prejudicially injected into the case.

### Counsel's Conduct Toward Witness

As has been noted, the trial attorney in handling a witness must be cognizant of what the judge may rule as proper or improper, and what opposing counsel may object to as prejudicial or irrelevant. What acts are sufficient to be termed misconduct? And if misconduct results, how does the court react?

Counsel must necessarily subordinate his methods of handling witnesses to the court's rules, and to how the judges enforce such rules. On most occasions, counsel is allowed great latitude in presenting his case. However, deliberately violating rules of practice constitutes misconduct.<sup>24</sup> The misfeasance may be single or comprised of many details. It may be inferred after repeated admonitions by the judge. On the other hand, unintentional acts, such as asking irrelevant questions, may be misconduct also. The basic criterion of most courts in determining what is misconduct appears to be to ask what effect, if any, did such conduct have on the jury in reaching a verdict? Some courts<sup>25</sup> will set aside a judgment if, in all *reasonable probability*, the jury's verdict was influenced. The Supreme Court of South Carolina<sup>26</sup> upheld a trial court's decision on the basis that the testimony was not so incompetent or prejudicial, and was not *intended* to influence the jury. The court, in *Pope v. Boston & M. R. R.*,<sup>27</sup> stated that whether counsel was guilty of misconduct was a *question of fact*. Alabama courts<sup>28</sup> have held that the *verdict is a decisive*

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State, 209 Ala. 36, 95 S. 171, 179 (1922); *Harvey Ragland Co. v. Newton*, 268 Ala. 192 (1958); *Alabama Great Southern R. Co. v. Gambrell*, 262 Ala. 290, 78 S. 2d 619 (1955).

<sup>23</sup> *Troast v. Lascari*, 59 N. J. Super. 110, 157 A. 2d 346 (1960).

<sup>24</sup> *Louisville & N. R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352, 19 Am. Cas. 294 (1909); *Dermony v. Fanny*, 56 P. 2d 1150 (Ore., 1936).

<sup>25</sup> *Twachtman v. Connelly*, 106 F. 2d 501 (6th Cir., 1939); *New Amsterdam Casualty Co. v. Harrington*, 274 F. 2d 323 (5th Cir., 1960); *Hansen v. Boots*, 41 S. D. 96, 168 N. W. 798 (1918).

<sup>26</sup> *Welch v. New York Life Insur. Co.*, 189 S. E. 809 (S. Car., 1936).

<sup>27</sup> *Pope v. Boston & M. R. R.*, 79 N. H. 52, 104 A. 403 (1918).

<sup>28</sup> *Alabama Power Co. v. Powers*, 252 Ala. 49, 39 S. 2d 402 (1949); *Southern Railway Co. v. Stallings*, 268 Ala. 463, 101 S. 2d 873 (1959); Authority vested in courts to disturb verdict of a jury on ground of excessive damages is to be used with great caution.

factor in determining whether the misconduct had sufficient effect on the jury. These cases have held that if the verdict is excessive, and if misconduct occurred on the face of the record, the court will allow a new trial. A Florida court<sup>29</sup> held that if the cumulative impact of prejudicial conduct impairs "a calm and dispassionate" consideration of the evidence, the judgment should be reversed. Yet in another jurisdiction,<sup>30</sup> the court did not find such *clear and convincing* prejudice of counsel's questioning intended to mislead the jury as to warrant a new trial. In Ohio, the Supreme Court<sup>31</sup> held that the permission by the trial court of misconduct is prejudicial error which should be reversed unless it affirmatively appears that by instructions of the court, or retraction of counsel, or by both methods, the prejudicial tendency of misconduct has been averted. As mentioned previously, courts of appeal rely on the sound discretion of the trial court. They will not ordinarily reverse the trial courts unless on the face of the record the trial judge abused his discretion in allowing misconduct or error.<sup>32</sup>

Misconduct of an attorney in handling the witness is based on his violating rules of procedure, evidence, and proper courtroom decorum. He may be admonished for shaking a finger in the face of a witness,<sup>33</sup> referring to a word like insurance,<sup>34</sup> or ridiculing an uneducated witness as to his ungrammatical speech.<sup>35</sup> These acts are misconduct, yet they are distinguishable. Waving a finger is improper behavior which *ordinarily* would not cause undue prejudice in the jury sufficient for a mistrial. On the other hand the courts have held that inadvertent use of the word insurance can cause prejudice in the jury. Ridiculing a witness may bring about adverse effects. The witness may feel coerced or so confused that his answers are not responsive to the question. Similarly, questions may cause embarrassment, shame, or anger, leading the witness to such

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<sup>29</sup> Seaboard Air Line Railroad Co. v. Strickland, 88 S. 2d 519 (Fla., 1956); Apalachicola N. Railroad Co. v. Tyus, 114 S. 2d 33, 37 (Fla. App., 1959).

<sup>30</sup> Friesland v. City of Litchfield, 24 Ill. App. 2d 390, 164 N. E. 2d 606 (1960).

<sup>31</sup> Cleveland, Painesville & Eastern Railroad v. Pritschau, 69 Ohio St. 438 (1904).

<sup>32</sup> Uhl v. Echols Transfer Co., 238 F. 2d 760, 764 (5th Cir., 1956).

<sup>33</sup> E. G. Buchseib, Inc. v. Frey, 20 Ohio Abs. 205 (1935).

<sup>34</sup> McAdams v. Blosser, 31 Ohio Abs. 92 (1938).

<sup>35</sup> *Supra*, note 31.

demeanor and utterances that the impression produced does not give true perspective to his testimony.<sup>36</sup>

The words which sometimes appear to be used interchangeably to describe misconduct are: improper, extraneous, irrelevant, and incompetent. When applied to an attorney's questioning, the words as a group mean that such statements are not germane to the issues before the court and are: (1) violative of rules of procedure or evidence, (2) thereby sidetracking or confusing the jury in reaching a just verdict. While these terms are used for deliberate or unintentional conduct, courts tend to hold that misconduct is a deliberate act on the part of counsel.<sup>37</sup>

Most courts state that misconduct by counsel arises when improper, repetitious interrogation of a witness occurs, having an adverse effect upon the jury. For example, if the question is so stated that one is led to believe that the facts assumed in it actually exist, it gives a false impression of trying to keep facts from the jury.<sup>38</sup> Ordinarily, the propounding of an improper question is not sufficient to warrant setting a judgment aside or granting a mistrial, unless it is fairly apparent that counsel acted in bad faith and opposing counsel was substantially prejudiced.<sup>39</sup>

In *Brook v. Gilbert*,<sup>40</sup> a policeman at the scene of an accident drew a chalk circle on the ground to show the point of impact. He had not been present, but took the stories of others as to the point of the impact. He then took photographs of the chalked area. The attorney, by 13 repetitious questions regarding the photograph, attempted to convey the impression that the chalk circle was the actual place of impact. The Supreme Court of Iowa held that the results of such repetitious questions, though objections were sustained, could not blot from the minds of the jurors the fact that the circle was the point of impact, and therefore such conduct was held prejudicial.

Similar facts are found in *Hulburd v. Worthington*.<sup>41</sup> In this personal injury action, despite admonitions and the sustaining of objections, counsel sought to convey the impression that a police officer had issued a citation for violation of the law, when

<sup>36</sup> Wigmore on Evidence, 781 (3rd Ed., 1940).

<sup>37</sup> *Mandella v. Marino*, 61 R. I. 163, 200 A. 478, 479 (1938); *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172 (1872).

<sup>38</sup> *Supra*, note 25.

<sup>39</sup> *Dyess v. W. W. Olde & Co.*, 132 F. 2d 972, 974 (10th Cir., 1942).

<sup>40</sup> *Brook v. Gilbert*, 250 Ia. 1164, 98 N. W. 2d 309 (1959).

<sup>41</sup> *Hulburd v. Worthington*, 134 P. 2d 832 (Calif. App., 1943).

in fact he had not once done so. However, in the *Hulburd* case, though the court found such behavior to be misconduct, the court held that there was not sufficient prejudice to affect the verdict. The court further commented that, despite the misconduct of counsel, the court would not set aside the verdict or grant a new trial merely for the sake of punishing him. Are these two cases distinguishable? The facts are different, but perhaps the distinguishing factor lies in the inherent and broad discretionary powers of the trial court system itself. If on the face of the record, the trial court has used sound discretion, an appellate court will not reverse it, for the trial court decided and weighed the circumstances as they occurred.

Sometimes both the judge and the attorney are at fault. In an action for false arrest and imprisonment and for malicious prosecution, the judgment was reversed when misconduct was twice repeated.<sup>42</sup> Counsel, during cross-examination of a witness, asked about an interrogation room to which the plaintiff had been taken by a peace officer. The witness replied that it was a room in which they "put you through the mill." The attorney, dissatisfied with the answer, asked: "Did they call it a rubber hose room?" Opposing counsel objected, and the judge, being either non-attentive or hard of hearing, asked the court reporter to repeat the statements. The appellate court reversed the judgment, stating that the jury had probably been influenced by having heard the statements twice.

In some instances, under the rules of evidence, refreshing the mind of the witness is allowed.<sup>43</sup> However, showing a witness a photograph and then asking him to testify from memory what was on the photograph was held to amount to giving the answer before the question was asked.<sup>44</sup> In another case,<sup>45</sup> it was prejudicial error when, under the pretense of refreshing a witness's memory, counsel read evidence previously given, and then asked the witness to recall certain facts in it. While it is improper to put answers in a witness's mouth, it is also improper to ask opinions and conclusions of him. For example, such questions as: "why did an accident occur?" or "could the accident have been avoided?" are questions of pure conjecture. It is for the

<sup>42</sup> *Kraft v. Montgomery Ward & Co.*, 348 P. 2d 239 (Ore., 1959).

<sup>43</sup> *In re Estate of Kelly*, 399 Pa. 153, 159 A. 2d 739 (1960).

<sup>44</sup> *Kavazanjian v. Brookhatten Trucking Co.*, 20 Misc. 2d 780, 199 N. Y. S. 2d 750 (1960).

<sup>45</sup> *People v. Thomas*, 359 Mich. 251, 102 N. W. 2d 475 (1960).



jury to determine the ultimate fact whether the conduct was careless, reckless, or negligent.<sup>46</sup> This kind of misconduct infringes upon the rights of the jury, because the witnesses' *only* duty is to state evidentiary facts.<sup>47</sup>

Statements whose sole purpose is to arouse sympathy in the jury may be misconduct. Thus counsel asked in a Federal Employment Liability Act suit<sup>48</sup> how many children the witness had. Or sympathy can be swayed by character witnesses. One attorney, in his eagerness to get character witnesses before a jury, disobeyed the judge's rulings, resulting in contempt charges being lodged against him. In *Re Schofield*,<sup>49</sup> the judge ordered counsel not to call certain persons to the witness stand. Nevertheless counsel asked leave to call the witnesses. The judge reiterated his directive. In spite of this the attorney wheeled about and, addressing the court room, said: "The character witnesses who were asked to be here are excused. Thank you all very much for coming. Thank you Judge Connelly, Thank you Judge McDevitt, Thank you Judge \_\_\_\_\_." The court held that counsel expressly violated its rulings. If he wished to challenge the legality of the ruling he could have done so by appeal. Contempt of court proceedings resulted in a public reprimand and censure.

Perhaps the worst misconduct of an attorney is his allowing,<sup>50</sup> or soliciting,<sup>51</sup> a witness to give false testimony. This, of course, is a violation of his oath, and is conduct sufficient for disbarment.

Sometimes a problem arises when an attorney testifies for his client. The *Canons of Professional Ethics* state that "When

<sup>46</sup> Buehman v. Smelker, 68 P. 2d 946 (Ariz., 1937).

<sup>47</sup> *Ibid.*

<sup>48</sup> Affleck v. Chicago & N. W. Ry Co., 253 F. 2d 249 (7th Cir., 1958).

<sup>49</sup> In re Schofield, 362 Pa. 201, 66 A. 2d 675 (1949); Neff v. Morrison, 191 Pa. Super. 36, 155 A. 2d 397 (1959).

<sup>50</sup> In re Barach, 279 Pa. 89, 123 A. 727 (1924); People ex rel. Attorney General v. Beattie, 137 Ill. 533, 27 N. E. 1096 (1891); State v. Rush Circuit Court, 234 Ind. 650, 130 N. E. 2d 460, 461 (1955).

Drinker, H. S. *Legal Ethics* 75 (1953): As chairman of the Standing Committee on Professional Ethics and Grievances of the American Bar Association, in his treatise on legal points to the forceful language in People ex rel. Attorney General, *supra*, on p. 1103: "The lawyer's duty is of a double character. He owes to his client the duty of fidelity but he also owes a duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. \* \* \* He violates his oath of office when he resorts to deception, or permits his clients to do so."

<sup>51</sup> Taylor v. Commonwealth, 233 S. W. 895 (Ky. App., 1921).

a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client."<sup>52</sup> It would appear at least in one state that an attorney's appearance in court in the dual capacity of counsel and witness was disfavored.<sup>53</sup> One court stated that this was improper conduct, but insufficient to authorized disciplinary action.<sup>54</sup> Another court in the same state held that the attorney who assumed such a role does so at "very great detriment to the credibility of his testimony."<sup>55</sup>

On the whole, courts seem to allow a good deal of leeway in an attorney's behavior. One court stated that, as long as the lawyer is acting conscientiously, although he may be mistaken as to the law, he should not be charged with misconduct.<sup>56</sup> This is true even when he reasonably and respectfully insists that his views are correct,<sup>57</sup> or exaggerates the facts,<sup>58</sup> or when his conduct is the result of zeal for his client's cause and is not intentional wrongdoing.<sup>59</sup> However, he can not claim inadvertence<sup>60</sup> when it appears that he acted intentionally, or claim on appeal<sup>61</sup> that the court already chastised him when admonishing him for asking improper questions.

### Conclusion

In setting out some of the basic factors affecting the handling of witnesses by an attorney in the court room, it has been noted that the trial judge has broad discretionary powers, enabling him to reprimand, declare a mistrial, or bring contempt proceedings against an offender. On the other hand, opposing counsel has a right to make timely objections to improper questions. Both of these officers serve to restrain or prevent misconduct.

<sup>52</sup> Canons of Professional Ethics, Canon 18 (1957).

<sup>53</sup> *In re Obartuch*, 386 Ill. 323, 54 N. E. 2d 470 (1944).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Crescio v. Crescio*, 365 Ill. 393, 6 N. E. 2d 628 (1937).

<sup>56</sup> *Carroll v. Krause*, 15 N. E. 2d 323 (Ill. App., 1938).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Bicker v. Schmidlapp*, 30 Ohio N. P. 483 (1933).

<sup>59</sup> *Maland v. Tesdall*, 5 N. W. 2d 327 (Ia., 1942).

<sup>60</sup> *Fike v. Grant*, 39 Ariz. 549, 8 P. 2d 242 (1932).

<sup>61</sup> *Sheldon v. Schmidt*, 351 P. 2d 288 (Colo., 1960).

If they fail, the appellate courts are the forum for redressing any injustice which may have occurred.

The tests used by courts to decide how conduct affects the verdict vary. Ordinarily the misconduct of an attorney in handling the witnesses is based upon his violation of the rules of procedure, evidence, and proper court room decorum. The net effect is that an attorney is allowed great latitude in presenting his case; however not such broad tactics or techniques as to distract or unduly influence a jury, so that a verdict is the by-product of misconduct rather than of the actual issues. Needless to say, the court's main purpose is to insure that a trial is fair and honest and that a just verdict results. In achieving this objective, the basic criterion of the courts is what effect, if any, did the conduct have upon the verdict of the jury?