

CONTEMPT OF COURT CLE PROGRAM

OUTLINE OF ETHICS/PROFESSIONALISM ISSUES

Ethical Issues Under the Rubric of Due Process

- Before the trial proceedings began, the trial judge improperly and prejudicially announced to the court appointed attorneys defending Ed Johnson that neither a Motion to Continue nor a Motion to Change Venue would be granted and that the judge would be angry if such motions were made. In so doing, the judge coerced and intimidated court appointed counsel so that they did not seek a continuance or a change in venue when justice demanded both to secure a fair trial. The bias of Judge McReynolds, his racist remarks, and lack of judicial independence due to public pressure was a huge factor.
- Judge's appointment of incompetent counsel—neither had ever tried a criminal case let alone a capital case. Canon 1A—"A judge should participate in establishing, maintaining and enforcing high standards of conduct."
- Judge's insistence on having trial in 11 days—not sufficient time for defense to prepare. Canon 3B(7)—a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. This also applies to the judge bullying the court appointed counsel into not making motions to continue or change venue.
- The Johnson/Shipp case is clear reminder of why we became lawyers and how lawyers and judges have "a special responsibility for the quality of justice." Preamble, ABA Model Rules of Professional Conduct. Here, the trial judge, Samuel McReynolds picks two lawyers because he knows they do not have the skills to win the case and abdicates this responsibility.
- Canon 3B(2)—"a judge shall not be swayed by partisan interests, public clamor or fear of criticism". Here, Judge McReynolds decisions to hold trial so quickly and the appointment of inexperienced counsel was obviously influenced by the public outcry and media attention surrounding the alleged offense.
- The judge gets the approval of the District Attorney, Matt Whittaker, before making the appointment of counsel official. Abdication of judicial independence. Canon 1—A judge should uphold the Integrity and Independence of the Judiciary.
- Johnson was denied a public and fair trial by an impartial jury in that only selected members of the community were allowed into the courthouse which was kept under armed guard by the Sheriff's Department; the jury consisted of only white men with African Americans being improperly and systematically excluded from jury service. The three white court appointed counsel were intimidated into

failing to challenge the denial of Johnson's fundamental constitutional and due process rights

- Johnson was denied fundamental fairness at his trial in that the complaining witness, the victim, could not swear under oath that Johnson was the man who attacked her; and, one of the jurors was so enraged that he had to be physically restrained from physically attacking Johnson as he uttered: "If I could get my hands on him, I would tear his heart out!" Johnson's court appointed lawyers did not request and the court did not grant a mistrial.
- Following his conviction of capital murder and imposition of the death penalty, Johnson's court appointed lawyers abandoned him. Moreover, despite the complete lack of due process and fairness in the proceedings, Johnson's court appointed lawyers, fearing community outrage and the danger of a lynching, persuaded Johnson to not exercise his constitutional right to appeal his conviction. Johnson's court appointed counsel failed to competently and diligently advise and represent Johnson. ABA MRPC, Preamble, cmt [2]: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Moreover, the court accepted Johnson's waiver of his right to appeal, knowing that it was not an intelligent and voluntary waiver, but coerced out of fear of being lynched. Under no stretch of the imagination, even in 1906, was this a knowing, intelligent and voluntary waiver.
- Under current constitutional law and the rules of conduct, court appointed counsel are required to pursue the defendant's right of appeal even when there is no merit unless granted leave of court to withdraw. *Anders v. California*. Granted, counsel is bound by the client's decision not to appeal a conviction, but here Johnson's counsel talked Johnson out of exercising his right to appeal a conviction when an appeal had substantial merit. ABA Rule 1.16 allow a lawyer to withdraw from representation only for good cause or if withdrawal can be effected without material adverse effect. Johnson's counsels' conduct was tantamount to an improper withdrawal from representation under the current rules and constitutional precedent.

Professionalism/Ethics

- By contrast, Parden and Hutchins put everything at stake—their reputations, careers and safety—for their client and for the protection of the rule of law. ABA Model Rules of Professional Conduct, Preamble, cmt. [2]: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."
- MRPC, Preamble, cmt. [4]: "In all professional functions a lawyer should be competent, prompt and diligent."

- MRPC, Preamble, cmt. [6]: “As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.”
- Noah Parden wrote at length about Johnson’s case in Chattanooga’s black-owned newspaper in an effort to educate the public about the legal system. He spoke about the case at length at social and church functions. Much of what we know about Johnson’s case may be attributed to Parden’s extensive writings. Parden was very mindful of the deficiencies in the administration of justice and the need to protect the rule of law. It was this commitment that led Parden and Hutchins to file this extraordinary, historic federal habeas petition at a time when such legal actions were considered frivolous.
- ABA MRPC, Preamble, cmt. [7]: “Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.”
- ABA MRPC, Preamble. cmt.[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

- Parden and Hutchins were clearly driven by their personal conscience, morals and beliefs, as well as a desire to improve the law and profession. These lawyers knew that accepting this case would threaten their practice, livelihoods and even the personal safety of their families. The homes and offices of these lawyers were destroyed. They had to flee Chattanooga for their lives and their client was lynched while the case was in the USSC. Through all this, these lawyers demonstrated their courage, moral convictions, professionalism and commitment to the rule of law. Parden and Hutchins developed an extraordinary and novel legal strategy by filing a federal habeas petition and convincing the district court judge to allow them to question witnesses under oath, and then they took a direct appeal to the Supreme Court of the United States.
- As the ABA Preambles to the Rules of Conduct state: “The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.” ABA MRPC, cmt. [16]; Parden and Hudgins conduct of the Johnson case went far above the minimum standards set by the Rules of Conduct.
- When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, the lawyer should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case

Duty to Accept Unpopular Cases or Clients

- Johnson’s original court appointed counsel did not decline to take Johnson’s case, but they may just as well have, given the level and quality of their service to Johnson. As a practical matter, they abandoned him and thus violated the spirit if not the letter of these rules:
- ABA MR 6.2: A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
- Cmt. [1] “A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is,

however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.”

- ABA MR 6.2, cmt. [3]: “An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality”

Duty of Competent Representation

- The two original lawyers appointed by Judge McReynolds—Robert Cameron and W.M. Thomas were not competent to handle a capital murder defense. Cameron had tried only a handful of cases in his career and those were no-fault divorces. He had never handled a criminal case and was certainly not qualified for Johnson’s case. Thomas openly admitted he didn’t try criminal matters.
- ABA Model Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Applying the Ethical Issues in Today’s Legal Environment

- It is the rule of law and our judicial system that sets the United States apart from much of the rest of the world. As Supreme Court Justice Sandra Day O’Connor warned in the recent Supreme Court decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), involving an American citizen who was detained as an enemy combatant, “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”
- In June 2008, the U.S. Supreme Court ruled in *Boumediene v. Bush* that detainees at Guantanamo Bay have a right to appeal their detention in federal courts. Yet, facing Kafkaesque obstacles, lawyers representing detainees at the Guantanamo facility have been fighting for more than six years for meaningful, confidential access to their clients, and some have never actually met their clients. Detainees dubbed “enemy combatants” are not entitled to access to classified evidence against them. Some detainees have been held without formal charges for more than six years. Some have refused outright to cooperate or even communicate with their appointed counsel, severely hampering their defense. Pro bono attorneys have continued, despite these conditions, to persevere in efforts to provide due process and other basic protections for these clients. Lawyers from several private law firms have been honored for their pro bono service.

- Elizabeth Wohlford, Esquire in her article “Representing Repugnant Clients: Every Lawyer’s Duty?” writes: Naturally, a lawyer must be concerned about the financial impact of or public reaction to publicly sensitive representation. Yet if law school loans prevent an attorney from protecting the Constitution and the efficient administration of justice, then that attorney is in the wrong profession and should never have incurred those loans in the first place.” American Bar Association, *GP Solo*, No. 7, Vol.22 (Oct./Nov. 2005).
- The late Frank W. Dunham, Jr. succumbed to brain cancer and died in 2006 but not after having defended two notorious terrorism suspects, Zacarias Moussaoui and Yaser Esam Hamdi. Dunham and his lawyers battled the government all the while his client despised and personally attacked Dunham and his team. In spite of all the obstacles, Mr. Dunham personally argued before the U.S. Supreme Court the case of Hamdi, a U.S. citizen held as a combatant by the military. That case produced an important decision that upheld the government's power to detain Hamdi but allowed that he could challenge that detention in U.S. courts. Hamdi was released and flown to Saudi Arabia.

Ethical Duties of the Prosecutor

- The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel
- ABA Model Rule 3.8, cmt [1]: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.” Va. Rule 3.8 is identical *that it excludes the duty of taking special precautions to prevent and rectify the conviction of innocent persons.*
- On the morning of the trial, District Attorney Whitaker makes highly racist and prejudicial statements to the newspapers were published the morning of Johnson’s trial calculated to heavily influence the jury pool.
- ABA Model Rule 3.6 (a): A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Ethical Issues Regarding the Habeas Proceedings

- ABA Rule 3.1 (Meritorious Claims and Contentions): A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
- Under the law as it existed in 1906, Parden and Hutchins were clearly stretching in their federal habeas petition. Also, the Attorney General of the United States was clearly reaching when he initiated contempt proceedings against Shipp and others. Most argued at the time that these actions were frivolous and not well grounded in law or fact, and not brought in good faith.

