

## A Lawyer's Ethical Duty to Represent the Unpopular Client

*Stephen Jones\**

Now it is difficult for any man, however wise or eloquent, to speak for himself, when fortune, reputation, happiness, life itself are in jeopardy and rest on the decision of strangers, sworn before God to find an impartial verdict from the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling; for into his keeping are entrusted the dearest interests of other men. His responsibility is wider in its scope than a physician's, and more direct and individual than that of a statesman; he must be something of an actor, not indeed playing a well-learned part before painted scenery, but fighting real battles on other men's behalf, in which at any moment surprise may render all rehearsal and preparation futile . . . .

. . . .  
The advocate must have a quick mind, an understanding heart, and charm of personality. For he has often to understand another man's life-story at a moment's notice, and catch up overnight a client's or a witness's lifelong experience in another profession; moreover, he must have the power of expressing himself clearly and attractively to simple people, so that they will listen to him and understand him. He must, then, be histrionic, crafty, courageous, eloquent, quick-minded, charming, great-hearted.

—Edward Marjoribanks<sup>1</sup>

Following an impressive term of service in World War II, James Daniel Gilliland attended law school at Wake Forest College. Upon graduation in 1948, he returned to his native town in Warren County, North Carolina to practice law. Not long after his

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\* Stephen Jones was the court-appointed lead attorney for Timothy James McVeigh, who was charged with and convicted of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995. One hundred sixty-eight known victims died, 500 were injured, and \$751 million worth of property damage was inflicted. Mr. Jones is a graduate of the University of Oklahoma Law School, 1966, having completed his undergraduate education at the University of Texas at Austin. He was admitted to the Bar in 1966. He currently resides in Enid, Oklahoma, where he is engaged in the private practice of law. Mr. Jones wishes to acknowledge the assistance of Alicia Carpenter, a graduate of the University of Missouri Law School, Columbia, 1996, for research in the preparation of this essay.

<sup>1</sup> EDWARD MARJORIBANKS, *FAMOUS TRIALS OF MARSHALL HALL* 9-10 (1989).

arrival, Gilliland found himself Commander of the local American Legion post, an officer in the Veterans of Foreign Wars, secretary of the Lion's Club, master of the Masonic Lodge, approved for membership in local country clubs, and solicitor in the local recorder's court. Unfortunately, his popularity quickly plummeted following two incidents that would scar his legal career forever. First, he was asked to expound upon and explain the landmark *Brown v. Board of Education*<sup>2</sup> decision for his fellow Lion's Club members. He supported the Court's decision and proceeded to display his approval. Soon after, he defended eleven alleged Communists in Charlotte, North Carolina on charges of un-American activities. The response from the residents of Warren County to these two incidents was prompt and harsh. Gilliland was immediately stripped of both the Lion's Club and the country club memberships and his solicitor responsibilities. In addition, disbarment proceedings were initiated against Gilliland, founded upon accusations of questionable tactics regarding two divorce cases he had handled. The final retaliatory blow came when the North Carolina State Bar Association demanded his disbarment. Fortunately, following an appeal to the North Carolina Supreme Court, he was "awarded" a jury trial and granted an acquittal.<sup>3</sup>

The treatment of attorneys, such as James Daniel Gilliland, has too often chilled the desire as well as the willingness of most attorneys to accept controversial clients. The inevitable, but unfortunate, result is a compromise of the constitutional rights that are to be guaranteed to each and every criminal defendant. In order to curtail these consequences, and to prevent the failing of constitutional guarantees, the American Bar Association has instituted definite and applicable stipulations to guide the conduct of attorneys and more specifically, to emphasize and articulate their obligations and their duties as participants in the American judicial system.

## I. CONSTITUTIONAL GUARANTEES

It is a right which all freemen claim, and are entitled to complain when they are hurt; they have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.

—Andrew Hamilton<sup>4</sup>

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<sup>2</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

<sup>3</sup> Daniel H. Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C. L. REV. 9, 10 (1964).

<sup>4</sup> WILLIAM M. KUNSTLER, *THE CASE FOR COURAGE* 40 (1962).

Before analyzing the ABA's methods of safeguarding these rights, a brief reference to the constitutional source is helpful. Initially, and most fundamentally, each defendant has a Sixth Amendment right to counsel.<sup>5</sup> "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.'<sup>6</sup> This foundational assertion is further supported through Justice Stevens' *Cronic* opinion: "Without counsel, the right to a trial itself would be 'of little avail,' as this court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'<sup>7</sup> The noble premise for this guarantee is, of course, the quest for the truth, and the best means to achieve this end is to discover "powerful statements on both sides of the question."<sup>8</sup> Only the adversarial system can effectuate the search for the truth. The alternative is a nonadversarial society whereby one being accused is the equivalent of one being convicted. If criminal defense lawyers do not "put the government to its proof whenever necessary or whenever the client requires it, then we are close to those totalitarian states where accusation equals guilt or the criminal defense lawyers are but an adjunct prosecutor expected to make the client confess and aid in his or her rehabilitation."<sup>9</sup> Hence, if criminal defendants are not represented, the foundation of the judicial system is eroded and the lawyers become the judges of guilt or innocence by their very decision to accept or reject those criminal clients. After all, pronounces John W. Davis, "since the law, however, is a profession and not a trade, I conceive it to be the duty of the lawyer, just as it is the duty of the priest or the surgeon, to serve those who call on him unless, indeed, there is some insuperable obstacle in the way."<sup>10</sup>

## II. ABA STANDARDS

Coupled with the aforementioned constitutional guarantees, are standards promulgated by the American Bar Association to further ensure the defendant's right to counsel is secure. How-

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<sup>5</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

<sup>6</sup> *United States v. Cronic*, 466 U.S. 648, 653-54 (1984) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

<sup>7</sup> *Id.* at 654 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), and *Walter V. Schaefer, Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

<sup>8</sup> *Id.* at 655 (quoting *Irving R. Kaufman, Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569 (1975)).

<sup>9</sup> JOHN WELSLY HALL, JR., *PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER* § 9:12, at 297-98 (2d ed. 1996).

<sup>10</sup> WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 199 (1973).

ever, the implementation of these particular standards lies in the discretion of each respective jurisdiction. These standards can be instituted as the law, as rules of practice, or as simple guidelines for attorneys to look to in their everyday practice. Regardless of their treatment in each jurisdiction, the ABA standards should nonetheless be regarded by all attorneys as governing standards by which to judge their conduct.

Therefore, according to ABA Defense Function Standard 4-1.2(a), "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused." The lawyer's function, consequently, is to present the case at law, and to leave to the judges and the juries of the system the ultimate responsibility of determining whether the client has acted consistently or inconsistently with our system of justice.<sup>11</sup> The lawyer is simply, but pivotally, "an equalizer, cutting down to legal size the man 'above the law,' increasing the stature of the man who doesn't 'know' anybody, so that each may approach the law as an ordinary man."<sup>12</sup>

### III. THE UNPOPULAR CLIENT

The issue becomes exponentially more complicated and more critical, though, when the defendant is one who is decidedly unpopular. When confronted with this situation, attorneys should adhere to the standard set forth in ABA Defense Function Standard 4-1.6(b), that "all . . . qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant."

#### A. Ethical Considerations of the Model Code of Professional Responsibility

Furthermore, the Canons of the Model Code of Professional Responsibility, although referenced as "norms," nonetheless prescribe conduct that is expected of lawyers in their relationships with the public and with the legal system. Specifically, the Model Code stipulates "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."<sup>13</sup> This guideline is supported by several ethical considerations, commonly referred to

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<sup>11</sup> "The function of the lawyer then is not to condemn men but to put into practice for all of us what we have decided on as abstract principle, that no man 'be put from that he ought to have by the law.'" DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 157 (1973).

<sup>12</sup> *Id.*

<sup>13</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981).

as "EC's," which present objectives toward which every member should strive. The considerations also prescribe specific guidance as to the obligation of lawyers to take on controversial or unpopular clientele. EC 2-26 states: "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally."<sup>14</sup> EC 2-27 provides further encouragement for attorneys to abide by this legal responsibility: "History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."<sup>15</sup> Not only is this responsibility condoned, but those attorneys who are faithful to these considerations are given the utmost esteem by members of the ABA: "[o]ne of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public."<sup>16</sup>

Although accepting unpopular clients seems meritorious, the ethical considerations of the Code imply that, essentially, there is no realistic choice available for lawyers in these circumstances. EC 2-29 stipulates that "when a lawyer is appointed to defend an unpopular client by a court, a 'compelling reason' that might justify the lawyer's asking to be excused from the appointment does 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 . . . ." Therefore, the lawyer's claim that there would be a potential threat of "antagonizing powerful adversaries or others is not a good reason."<sup>17</sup> The ethical considerations of the Model Code address this behavior as well and warn against any attorney that would decline employment for fear of "rocking the boat."<sup>18</sup>

At first glance, EC 2-29 seems to be irreconcilable with EC 2-30, which warns that a lawyer should not accept employment "if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a pro-

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<sup>14</sup> *Id.* at EC 2-26.

<sup>15</sup> *Id.* at EC 2-27.

<sup>16</sup> Lon L. Fuller and John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 43 A.B.A. J. 1159, 1216 (1958).

<sup>17</sup> CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 10.2, at 577 (1986).

<sup>18</sup> EC-2-28 condemns this conduct: "The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-28 (1981).

spective client. . . ."<sup>19</sup> The distinction created between EC 2-29 and EC 2-30 is grounded upon the issue of repugnancy—essentially, if the lawyer is able to represent the client effectively, despite the repugnancy of the cause, then the attorney has no “good reason” to decline employment. According to the Code of Professional Responsibility, the attorney now has a definite obligation to accept the employment and to defend the rights of the unpopular client. Mellinkoff accentuates this point—that the lawyer has one duty that is of paramount importance regarding the unpopular client: to defend the client’s rights and not to investigate or to judge the morality of the alleged misconduct.

It is the lawyer’s important task to see to it that the principle is adhered to despite public excitement, and without regard to personal enthusiasm or hate for the particular litigant . . . . The lawyer who does his duty advises by the law of the land, seeing to it that his clients receive that measure of shelter the law says they are entitled to. This is a large and essential assignment . . . as a lawyer his expertise is law not morality, and it is the client who must live and die with the client’s conscience.<sup>20</sup>

While the attorney is pursuing this lofty goal of discarding his own moral opinions of his client, he must simultaneously be exerting every effort and expending every bit of energy in pursuit of his client’s cause. This behavior is articulated appropriately in Canon 15:<sup>21</sup>

The lawyer owes “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,” to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense . . . .

Edward Bennett Williams, the famous trial lawyer, who defended the likes of Jimmy Hoffa, Senator Joe McCarthy and Frank Costello, and who most assuredly did not allow a fear of unpopularity to discourage him from ensuring that his clients were provided with “every remedy and defense that is authorized by law,” felt he was upholding his obligation as a criminal lawyer because

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<sup>19</sup> *Id.* at EC 2-30.

<sup>20</sup> DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 157 (1973).

<sup>21</sup> Canon 15 was included in the original ABA Canons of Professional Ethics which consisted of 32 rule-like Canons that were adopted by the ABA in 1908 and subsequently supplemented and amended. The 1908 Canons are no longer enforced in their original form in any jurisdiction, but continue to be applied through the Canons in the Model Code.

he was protecting the disadvantaged.<sup>22</sup> Williams illustrated through his career the critical need for criminal defense attorneys. He was a trailblazer in the judicial battle against unchecked police power in the 1950s and 1960s, and was given credit as the individual who initially discovered the illegal acts of the FBI—the acts that prompted the demise of J. Edgar Hoover.<sup>23</sup> The criminal defense lawyers of Williams' era also felt they were doing their duty by upholding and defending several constitutional rights: the 6th Amendment right to counsel, the 4th Amendment freedom from search and seizure, and the 5th Amendment right against incrimination. Williams espoused these motives for defending the accused in a 1957 speech given to the New York State Bar Association. Because he felt there was an epidemic of "guilt by client," he warned of the "insidious identification (that) would scare off lawyers from standing by the unpopular and degraded. When a doctor takes out Earl Browden's appendix, nobody suggests that the doctor is a Communist. When a lawyer represents Browden (head of the American Communist Party), everybody decides that lawyer must be a Communist, too."<sup>24 25</sup>

## B. Model Rules of Professional Conduct

The ABA's Model Rules of Professional Conduct (adopted in 1983) also lend support to the cause of the unpopular client.<sup>26</sup> Model Rule 6.2 reiterates the importance of lawyers accepting any and all appointments. "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ."<sup>27</sup> The comment to Rule 6.2 espouses: "All lawyers have a

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<sup>22</sup> "Williams held himself out as the protector of the down-trodden . . . . By giving the poor all the legal protection enjoyed by the rich, a criminal defense lawyer works against alienation and class resentment and thus fosters respect for the 'system.'" EVAN THOMAS, *THE MAN TO SEE* 121 (1991).

<sup>23</sup> *Id.* at 17.

<sup>24</sup> Consequently, the ABA attempts to rescue the defense attorney from this erroneous assumption through its promulgation of Model Rule 1.2(b): "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1994).

<sup>25</sup> EVAN THOMAS, *THE MAN TO SEE* 122 (1991).

<sup>26</sup> Although the Model Rules did not enjoy the same universal acceptance as that of the Code of Professional Responsibility, they have been adopted by approximately 75% of the states. JOHN WESLEY HALL, JR., *PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER* 5 (1996).

<sup>27</sup> Good cause could consist of factors 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. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1994).

responsibility in providing pro bono publico service . . . .<sup>28</sup> 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."<sup>29</sup> While the Code of Professional Responsibility did not attempt to establish rules that would impose discipline or civil liability on those who chose not to abide by them,<sup>30</sup> the Rules of Professional Responsibility impose disciplinary ramifications.

### C. The Duty to Rescue versus The Duty to Represent

In order to more clearly define this responsibility, duty, or obligation, owed to the unpopular client, Charles W. Wolfram, in *The Good Lawyer*, draws a comparison with the duty to rescue. In determining if there is indeed a duty to rescue, or a duty to represent, a number of considerations exist; (1) the capacity to rescue—is the lawyer competent to handle the legal service which has been asked of him?; (2) the risk to the rescuer and others—is there an economic risk that the attorney will be taking upon acceptance of the client?; and (3) the danger to the victim—is there a high likelihood of imminent danger?<sup>31</sup> In other words, are there many other lawyers available and willing to handle this case; if other lawyers, for economic or morally objectionable reasons cannot accept the employment, it would appear to increase the danger to the client. The small likelihood that other lawyers would be available and willing to accept a particular unpopular client creates a stronger obligation for the attorney to accept such employment. According to Wolfram, even though this increase in danger is created because of other lawyers' neglect of their moral duty, "the duty to represent a necessitous client exists even when a professional regulation or custom states that there is no duty of representation. It is the client's need, and not the third-party cause of it, that generates a duty to act."<sup>32</sup>

The significance of the "repugnancy" of the issue is revisited by Wolfram, who distinguishes between this term as attached to the client himself, or as attached to the legal right that is being pursued. The Nazi client may be pursuing a legitimate constitutional right—the pursuit of which is not repugnant. Therefore, it is essential to make this distinction, for the need for available and

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<sup>28</sup> See Model Rule 6.1, which provides a lawyer should aspire to render at least 50 hours of pro bono service per year.

<sup>29</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. (1994).

<sup>30</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981)

<sup>31</sup> Charles W. Wolfram, *The Good Lawyer*, in *A LAWYER'S DUTY TO REPRESENT CLIENTS, REPUGNANT AND OTHERWISE* 219-22 (D. Luban ed., 1984).

<sup>32</sup> *Id.* at 222.

willing criminal defenders becomes crucial when there are legitimate human needs being advocated.<sup>33</sup> Justice Marshall, in his concurring opinion in *Ohralik v. Ohio State Bar Ass'n*,<sup>34</sup> simply looked at the issue from the perspective that if the client was in need, then the obligation was present: "The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available 'where the litigant is in need of assistance, or where important issues are involved in the case,' has long been established."<sup>35</sup>

The consequence, Wolfram asserts, as a result of continual refusals by lawyers to accept unpopular clients, will be a misplacement of the "uniform judgment of lawyers in a position of veto over the considered judgment of public officials—those who promulgated the legal right . . . . The resulting 'lawyers' trump' replaces official judgments and policies with private moral ones."<sup>36</sup> In effect, unless there is some mechanism that exists that would test lawyers' opinions by a court of review, the resulting system would be "informal and, arguably, illegitimate in a representational democracy."<sup>37</sup>

Ultimately, the effectiveness of these constitutional guarantees is contingent upon the conduct of attorneys, and whether they are willing to respect or whether they will neglect those guarantees. The lawyer's function is to defend the rights that are guaranteed to every American individual. The lawyer is neither awarded, nor allowed, the luxury of determining the guilt or innocence of any client. The constitutional rights of every individual are at risk when they are stripped from even one criminal defendant no matter how unpopular the defendant may be. If the system allows lawyers to determine the fate of an accused by denying the defendant the constitutional right of representation by counsel, then the system lies precariously in unworthy and unconstitutional hands.

If the lawyer fulfills these professional responsibilities, then the legal system has a fighting chance of securing those rights which it purports to secure. A client pursues an attorney to defend rights, not to judge guilt or innocence, or even to weigh the client's rights. The client is entitled to say to counsel "I want your advocacy, not your judgment; I prefer that of the court."<sup>38</sup>

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<sup>33</sup> *Id.* at 229-31.

<sup>34</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

<sup>35</sup> *Id.* at 470.

<sup>36</sup> Wolfram, *supra* note 31, at 232.

<sup>37</sup> *Id.*

<sup>38</sup> DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 157 (1973) (quoting *Johnson v. Emerson*, L.R. 6 Ex. 329, 367 (1871)).

The great British advocate, Norman Lord Birkett, in a remarkable series of addresses on the BBC Radio, which were then republished by him as *Six Great Advocates*,<sup>39</sup> expressed the following:

Many, I know, regard the law as something of a mystery, and I am quite conscious of the prejudice against the advocate which exists in the mind of many members of the public. I cannot hope to remove that prejudice, but I am sure I ought to try to do so. From the moment that I was called to the Bar I have been brought face to face with the widespread misconception of the true function of the advocate in our courts of law and of his place in our way of life. There cannot be any member of the Bar who has not been faced at some time or other with the old and familiar question: "How can you possibly defend a guilty man?" or some question of a similar kind. Such questions were asked at Athens in the days of Demosthenes and at Rome in the days of Cicero and they have been asked at every stage of our legal history.<sup>40</sup>

They were asked of me, "How could you possibly defend a man charged with killing 168 individuals, including 19 children?"

I quite realize how strange and, indeed, wrong it must seem to the ordinary citizen that a lawyer, who may be respected among his fellow citizens, should defend a client whom the lawyer must know in his heart to be guilty of the crime charged, and further to be paid for doing so:<sup>41</sup> "How is it possible . . . for an advocate to resist an argument that appears to be founded on truth, and to seek to make the worst appear the better reason?"<sup>42</sup> Or, to put it quite starkly, many people believe the advocate cannot possibly be sincere, or indeed, honest in fulfilling the conduct of his profession; for the ordinary citizen only espouses a cause because "he believes in it, but the advocate espouses a cause because he is paid to do so, whether he believes in it or not."<sup>43</sup>

In practice, if there are good reasons why an advocate should not undertake a certain case, then [the lawyer] can quite easily decline it. But, as Erskine so eloquently said, "if the advocate refuses to defend from what he may think of the charge or the defence (sic), he assumes the character of the judge . . . and puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principles of English Law makes all presumptions."

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39 NORMAN BIRKETT, *SIX GREAT ADVOCATES* (1961).

40 *Id.* at 97-98.

41 *See generally id.* at 98-99 (this paragraph and the two which follow include direct quotes and paraphrases of Lord Birkett's book, with thoughts from the author intermixed).

42 *Id.* at 98.

43 *Id.*

Still, the charge against the advocate remains and was put into [caustic] form by that strange and erratic genius, Dean [Jonathan] Swift, in *Gulliver's Travels*, when he said of the Bar that "they were a society of men bred up from their youth in the art of proving by words multiplied for the purpose, that white is black and black is white according as they are paid."<sup>44</sup>

Now, the plain truth is that the advocate is not pleading, stating or advocating personal views and indeed, has no right whatever to do so. Indeed, lawyers are bound by very strict rules of conduct and an equally strict code of honor, especially designed to allow them to discharge their duties in the administration of justice without being false to themselves or their conscience, and without failing in their duty to the community in which they live. The function of the advocate is to present one side of the case with all the skill available so that the judge, or the judge and jury can compare counsel's presentation with that of the advocate on the other side, and then decide, after full investigation, where the truth lies. This pursuit of justice is the essence of the adversarial system.

And what is the duty of the advocate who shoulders the heavy burden of defending a prisoner such as Mr. McVeigh on this most horrible and gravest of all charges, involving the largest terrorist act in American history: 168 people dead, 500 injured, and \$751 million worth of damage in an act that disrupted the social fabric of Oklahoma's capital city and for which tens of thousands otherwise have suffered emotionally, physically and financially. My duty was to devote myself completely to this task, whatever I may have thought of the charges, and to lay aside every other duty, so that I could act constantly in the interest of the accused, and to say for Tim McVeigh all that he would wish to say for himself, were he able to do so. The purpose of this procedure in our law is not that a guilty person shall escape, but to make certain, so far as human fallibility can do so, that no innocent person shall suffer.

Once the defense of such an individual as Tim McVeigh has been undertaken in a high-profile case, the interest of the media will be aroused. In the defense of Mr. McVeigh, Chief Judge Matsch, the trial judge, in an order<sup>45</sup> in the case specifically recognized the right of Mr. McVeigh's lawyers to address public issues concerning the case. He wrote: "The Supreme Court has recognized that in circumstances such as those surrounding this case, the function of defense counsel includes representation 'in the court of public opinion.'"<sup>46</sup>

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<sup>44</sup> *Id.* at 98-99.

<sup>45</sup> See Order of the Court, filed March 17, 1997, in *United States v. Timothy McVeigh*, No. 96-CR-68-M, 1997 WL 117369 (D. Colo.).

<sup>46</sup> *Id.* at \*2 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991)).

Judge Matsch also addressed the issue of attorney's fees and costs in the same order:

Foundational fairness requires that the person accused has legal counsel with the skill, competence, experience and courage to provide him with effective representation of his interest at all stages of the proceedings. When counsel are appointed, they must be given adequate resources to support a separate and independent investigation, including technological tools and the expertise of those who have relevant knowledge and experience to assist in preparing the challenge the charges made against the defendant . . . . There can be no doubt about the foundational fairness provided for the defendant in this case. He has lead counsel who had consistently demonstrated his skill and experience as an advocate with a complete and dedicated commitment to his professional responsibility in the representation of Timothy McVeigh. Mr. Jones has the assistance of other capable and responsible lawyers, selected by him for particular assignments.<sup>47</sup>

Of course, this license must be exercised professionally and appropriately. The purpose of public exposure in defending the unpopular client is not for the lawyer to be mesmerized by the press or to engage in self-aggrandizement or grandstanding or to subvert the due course of justice. Rather, the lawyer's duty is to stand as a guardian and protector of the trial rights of the accused, and ultimately the safety of the community itself, by explaining in calm, dispassionate tones in as summary a form as possible what is factually occurring in the case. To do so, of course, runs the risk of criticism from the media, and perhaps others. On the one hand, if counsel appears too frequently, the media or the public will accuse the attorney of self-promotion. Conversely, if the lawyer fails to respond to the media's questions, then the accusation of "hiding" will arise. One cannot please the media, nor should one try. In the final analysis, in defending an unpopular cause or client, the lawyer must be true to his own personal sense of honor and conscience, and professional responsibility. If the lawyer truly believes he is doing the right thing, then he should not be anxious. The advocate needs to know, however, that because of the rules of confidentiality he may never be able to explain the reason for individual acts or exercises of judgment.

When I agreed to represent Mr. McVeigh, I felt it important that a trial lawyer from the Oklahoma bar be ready to accept the court's appointment. If no competent or experienced trial lawyer in Oklahoma was willing to defend Mr. McVeigh, it would have been a black mark not only against justice but against the bar

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<sup>47</sup> *Id.* This quote is from the portion of Judge Matsch's order relating to defense costs that must be incurred so that defense counsel is fully prepared.

association and ultimately our state and society. No inconsistency exists in being a good citizen and accepting the court's appointment.

Nor did I seek the appointment nor use it to advance my own cause or interest. When the case was over, I returned to Oklahoma to live, practice and work much as I did before that terrible day in April 1995, which became the standard by which all Oklahomans measure time. In conclusion, let me quote Reverdy Johnson:

[B]y education, character and profession (the advocates) are especially qualified by their example to influence the public sentiment of their states, and to bring those states to the complete conviction which, it is believed, they must largely entertain—that to support and defend the Constitution of the United States . . . is not only essential to their peoples' happiness and freedom, but it is a duty to their country and their God.<sup>48</sup>

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48 WILLIAM M. KUNSTLER, *THE CASE FOR COURAGE* 156 (1962).

