



The Duties And Accountability Of Lawyers

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Eminent Jurist Soli Dastur draws upon his rich experience of the past five decades to lay down the duties and accountability of lawyers and how they should deal with several ethical issues and areas of conflict that arise in day-to-day practice. With his usual candour and clarity of expression, he examines the issues threadbare and provides invaluable and authoritative guidance on what they should do in difficult situations so as to keep their professional integrity intact at all times. Though written in the context of lawyers, the article provides guidance to professionals in all fields

A story going the rounds is that the Chairman of a company after referring to the next speaker as a lawyer added “*he is nevertheless a nice person.*” But is the jibe deserved? Before passing judgement it would be appropriate to consider the duties a lawyer owes to his client, to his profession and to the Court, his accountability therefor and the conflicts which arise in discharging the separate and distinct duties. Recently, the emphasis has shifted to the lawyer’s duty to Society. Though one cannot ignore this duty it is a duty subordinate to his primary duties of accountability to his client, profession and to the Court. The meticulous performance of these duties with care and precision is itself the performance of his duty to Society. Though not normally referred to, there is a fifth and equally – if not more - important duty – his duty to himself.

Very often the lay person raises a question as to how a lawyer could defend a particular person or a particular action of his client which in the lay mind was indefensible. The Bar Council of India has framed a code of conduct to be followed by all advocates. One of the duties of an advocate is to accept a brief in the Courts or Tribunals in or before which he normally practices. If, however, his brief requires him to argue contrary to his beliefs and there is a conflict of duty to his client and to himself then, his duty to himself may justify his returning the brief. It is not for him to choose which is a good case and which is not. The central function of a lawyer is to represent his client and to say in legal parlance what the client would have said if he was to argue his own case and had the required legal acumen. **James Boswell** in his **Life of Samuel Johnson** records having asked the great man “*What do you think of supporting a cause which is known to be bad?*” Dr. Johnson’s reply was to the effect: “*Sir, you do not know it to be good or bad till the judge determines it. You are to state facts clearly, so that your thinking or what you call knowing a cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive ...*”

Lord Macmillan in “**Law and Other Things**” has said that the advocate by the rules of his profession has, theoretically at least no choice in the selection of the cases he takes up. He quotes Erskine as saying that if an advocate is permitted to say that he will not stand between the Crown and the subject arraigned in the Court on the basis of his opinion above the correctness of his client’s stand “*from that moment the liberties of England are at an end.*”

It is the duty of an advocate to uphold the interest of his client by all fair and honourable means without regard to any unpleasant consequences to himself or to any other. An issue which sometimes arises is whether in discharging this duty there would be a conflict with the advocate's duty to the Court. Whilst he must uphold in all ways the interest of his client at the same time he must not put forward as a fact when he knows (as distinct from what he suspects) to be untrue. For example, if the client has told him that he has done something the advocate cannot urge that he has not done it though he would be justified in taking the stand that it is for the other side to prove that his client had indeed done the act as alleged by the other side. Many people take the view that this is a facetious distinction which lawyers draw. However, the rule of law requires that it is for the plaintiff or the prosecutor to establish his case with acceptable evidence and if the lawyer does not take this stand he would be cutting at the root of the rule of law. It is also urged that a lawyer's duty to society requires that he should not defend someone who he believes to be guilty of what is alleged against him. Those who would so urge should ponder over whether if a man sentenced to death for murder falls sick whilst in jail should a doctor attend to him or decline to do so in the belief that Society would be well served by his early demise. A lawyer's duty is to his client and to the Court and if one may say so to the law. In my opinion these override any amorphous duty to Society which is spoken of so glibly. An advocate's loyalty is to the law and the law requires that no man should be punished without adequate evidence. The cynic may counter that it is fortunate that people are born whose moral standards are sufficiently flexible to enable them to practise the calling of law!

Section 126 of the Indian Evidence Act provides that except with the client's consent a lawyer cannot disclose any communication made to him by the client or to reveal the contents of any document to which he has become privy in the course of his professional employment or disclose the advice tendered by him to his client. Contrary to this specific provision of law the activist, who champions the lawyers so called duty to Society, would urge that the lawyer must not keep secret his knowledge about an illegality committed by his client. In my view there is no such duty and the importance of complete and free communication between a lawyer and his client is itself for the welfare of Society at large.

An interesting issue arises when a client wants to know the consequences of his acting in a manner which is contrary to the law. It would appear that it is the lawyer's duty to explain what would be the decision in law if the misdeed is discovered but he should in no way be a party to facilitate on such misdeed. A fine issue arises – is it the duty of the lawyer to tell the client that what he proposes to do is contrary to the law and he ought not to embark on the act. It would appear (though there may certainly be two views on the issue) that it is not for the lawyer to be a moralist but leave it to the client to decide whether knowing the consequences ethical and otherwise, of what he proposes to do, he should still go through with his earlier scheme. Here also the protagonist of "*duty to Society*" may take a contrary view.

An arguing Counsel owes a duty to his client and to the Court for attending the hearing of an appeal from the beginning to the end. It is not enough that the lawyer attends Court only at the time his turn comes to argue the case for his client and thereafter on completing the argument leaves the Court with some excuse or the other proffered to the judge. The lawyer's defence is that he owes a duty to other clients for whom also he is to appear on the very day. I feel that unless the lawyer is present throughout the hearing of the appeal and has heard the arguments of opposing Counsel he would not be able to give off his best to the client or to render full

assistance to the Court. He should choose which case he will attend to and return the other briefs in good time or have the other hearing adjourned. In a witness action the position may be different.

Sometimes a possible conflict arises when a judge seeks Counsel's opinion on a particular matter which is in issue between the contesting parties. If the lawyer was to express his opinion or what he believes to be the right position in law he may be acting adversely to his client's interest. He would therefore be justified in politely declining the judge's request to give his opinion. Some purist may contend that in taking this stand the lawyer is not discharging his duty to the Court. Though the lawyer's duty to the client is certainly not more important than his duty to the Court, nevertheless the "*inquisitive*" judge should have realized that the duty of the lawyer is to argue his case and not to express his opinion on the issue involved. Undoubtedly, tact of a high degree is required in meeting such a situation. People must realize that what a lawyer believes and what he argues are not the same.

A related issue is to what extent the duty of a lawyer to the Court compels him to cite all possible decisions which he is aware of even though some of them may be contrary to what he is briefed to argue. Whilst the lawyer must bring to the notice of the Judge any judgement which is binding on the judge like that of the Supreme Court of India or of the Federal Court or the Privy Council (when the opinion of the Privy Council is as of a point of time when the same was binding on the Indian Courts). He will also have to disclose to the Court any judgement of the High Court of the state where he is arguing the matter as the same may be binding or if the judge wants to take a contrary view he may have to refer the matter to a larger Bench. It is not the duty of the lawyer to cite decisions rendered by other Courts which are not binding. It is for the opposing lawyer, if he so thinks fit, to bring such decisions to the notice of the Court. This shows that the lawyer can honour his duty both to the Court and to the client in respect of a particular matter without infringing either.

Sometimes a very piquant situation arises. A judge recuses himself from a case on the ground that one of the parties has "*approached*" him. Should the lawyer of the alleged defaulter also opt out of the case? In my opinion, he should first of all satisfy himself that indeed a representative on behalf of his client had approached the judge, with the client's authority to do so. Unfortunately, there are today people who without being instructed by the client to do so approach a judge in a pending matter of which they are aware and then approach the client with the offer of procuring a favourable judgement. Once he is satisfied that the judge was indeed approached under his client's instructions he should return the brief though it is possible that this may prejudice the client adversely if the brief is returned in the midst of a hearing. It would also show his client in poor light. This sort of situation really calls for a fine balance being drawn between the lawyer's duty to the client and to the Court.

When discharging his duties to his client the lawyer often is faced with matching the same to his duty to the profession and to his co-professional. Though it may be in the interest of his client for the lawyer to interrupt the other side's Counsel so as to distract him from his trend of thought or interfere with the flow of his arguments, it would be a breach of his duty to a co-professional and he must not indulge in it. I must say that I have found that in the southern states of India the respect for the right of the opposing professional to have full uninterrupted opportunity to express his views is far more evident than in the northern and, may I add, western states?

It is undoubtedly the duty of the lawyer to the Court always to be courteous and deferential to the judge but that does not mean he has to be obsequious. If for any reason it appears that the judge is acting unreasonably and making comments which are wholly uncalled for either against the litigant or the lawyer or the legal profession it is his duty to stand up to the judge and, as politely as possible, to correct him. It is not the lawyer's duty to the Court to submit to insults to himself or his profession or to fawn for petty favours. I remember an occasion when a judge was unreasonably giving a junior lawyer a tough time. As the Court rose for lunch a senior lawyer, who was waiting for his case to be called out got up and suggested that perhaps the junior lawyer deserved a more patient hearing. The judge – full marks to him – saw reason and his attitude changed post lunch. It is remarkable that the senior lawyer really did not know the junior at all but the incident shows the importance of standing up to a judge even when it does not affect the lawyer personally.

It sometimes happens that a “*succeeding*” lawyer in the course of his argument takes a stand different from what his predecessor, who was then representing the client, had taken. If it is in the client's interest for him to take a contrary stand he should do so but without in any way decrying or condemning the stand previously taken by the predecessor lawyer. In this manner he fulfills his duty both to the client and to the profession.

Sometimes a lawyer may feel that it would be advisable for a client to consult another lawyer or even to brief another lawyer rather than himself. He should frankly advise the client to do what is in client's interest though it may conflict with his own pecuniary interest. A lawyer is sometimes asked to recommend the name of a junior to assist him. The lawyer should either leave it to the client to choose the junior lawyer or suggest 3 or 4 names preferably not only from his chamber and leave it to the client to decide who should be briefed. This would fulfill the duty of the lawyer to his co-professional by not depriving a junior outside his chamber from being briefed.

In the practice of the profession sometimes peculiar situations arise which have a bearing on conflict of duties. It may happen that after a case is heard and decided the advocate reliably learns that the judgement was improperly procured. This would mean that even though the client may not himself be guilty of any improper conduct there was a miscarriage of justice. Is it the duty of the advocate in these circumstances to bring these facts to the notice of the Court for considering whether to order a retrial? The purist would undoubtedly say that it is advocate's duty to do so but there may be practical difficulties.

An interesting instance of conflict of duties may arise when a lawyer accepts a directorship. It may happen in this way: the company of which he is a director may be confronted with a particular problem and looking to the facts of the case the company may have to adopt a particular stand in law and the director would have voted in favour of taking such a stand. In the light of this peculiar position his view of what is the correct position may get warped and he may not be able to render independent advice to another company facing a similar problem. For a similar reason a lawyer who is a director of a company must not appear in Court for the company as he may not be able to maintain the sense of independence and detachment required of him. In similar vein a firm of solicitors, a partner of which is a director on the Board of a company, is not allowed to represent the company in Court. This is sometimes overcome by the solicitors firm interposing a dummy lawyer. But that is really a case of failure of duty to one's conscience!

A common source of conflict is where each of two partners of a firm represents persons arraigned against each other. They build some sort of a Chinese wall to urge that they both function independently. However, there is no gainsaying the fact that there is bound to be at some stage a conflict of duties and the firm may tilt in favour of the client who is more important to it; namely, from whom it hopes to earn a larger fee in the long run.

It goes without saying that an advocate cannot be a party to procuring evidence by inducement. By procuring evidence the advocate may further the cause of justice but may he be guilty of breach of his duty to the Court or the profession and perhaps even to society. For example, a suit is filed by A claiming damages from B who had assaulted him. X was the only witness to the incident. When the matter is to be heard in Court X suggests to A's lawyer that he may not come to give evidence and if he is summoned he may plead that he did not remember what exactly happened. He may slyly add that he could be induced to state the truth. If the lawyer spurns X's suggestion it may mean that his client who was entitled in law to succeed may not be able to prove his case. On a strict view of the matter it would appear that the advocate is in breach of his duty to the Court and the profession if he succumbs to the suggestion made by the witness. If he does not succumb to X's demand is he in breach of his duty to the client because the client may fail in a cause where he deserved to succeed? The puritan will undoubtedly opine that upholding the process of law and justice is more important than an individual client's obtaining of damages for the wrong done to him. On the other hand, one may think that it is reasonable to do a little wrong to achieve a higher good in the form of a person justly succeeding in the litigation launched by him. It appears that whichever way he acts the lawyer may later have pangs of conscience. A self saving action on the part of the lawyer may be to tell his client to contact X if he so deemed fit. Of course this would mean that the lawyer would have to live with the disconcerting fact that he, at least passively, was a party to "*procuring*" evidence.

An advocate undoubtedly owes a duty to his fellow professional: not to run him down or attempt to take over his brief. Does it mean that he should not appear in a matter in which his fellow professional is sued? The answer obviously is that his duty to his client, who claims relief against a professional brother, is higher than his duty to a fellow professional or to the profession. If a lawyer declines to appear against a brother lawyer it would mean that the affected party may not be able to find a lawyer to represent him.

Sometimes a client realizes that he is bound to fail in his plea before the Court but he would like to postpone the evil day. It would appear that the advocate's duty to the client permits him to obtain an adjournment on whatever grounds are available but without putting forward a false excuse. The fact that thereby there is a delay which is adverse to the interest of the other side does not mean that the advocate is in breach of his duty to the profession or to the Court.

The lawyer's duty to the client does not extend to carrying out all his instructions. For example it is not his duty to oppose the grant of an adjournment sought by the other side because his client says so or to urge an argument the client insists on even though the lawyer feels it would be counter productive or not ethical to do so, then, the advocate's duty to himself, to the Court and to the profession must prevail. However, he should communicate his decision to the client in good time and he should give the client the option to brief another Counsel. In similar light is the case where the opposing side's Counsel has slipped up. Should the advocate take advantage of that position? The classical view would be he should not. I do not know how far that is

practical because surely it is not Counsel's duty to say that his co-professional has made a slip in not pressing a particular point or not pressing it forcefully enough and the judge should consider the same.

I have referred above to a lawyer's duty to Society. It would be apt to mention Society's duty to "law." Nowadays the media pronounces upon a case and lawyers comment on a case in progress. This may prejudice the interest of one of the litigants in the case. Society and all of us owe a duty to law and its fair administration and to desist from action which can conflict with a litigant's right to a fair and free trial. I am conscious that if it were not for the interest taken by the media several matters of grave concern which involve prominent politicians and other personalities may have gone unattended to. Even so one should try to reconcile duties of the media to law and to Society.

Finally does the advocate-writer of an article owe a duty to his reader not to bore him even though his personal vanity tempts him to continue? I should think so and so in deference thereto and to fulfill a higher duty I shall wind up this piece!

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