Would Clarence Darrow Defend the Branch Davidians?

Ethical Considerations for Second Amendment and other Bill of Rights Attorneys in Representing Members of Unpopular Groups

Continuing Legal Education Program Ethics Panel

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I. Ethical Obligation of Attorneys to Perform Public Interest Work

A. ABA Model Rules of Professional Conduct.

Rule 6.1 Voluntary *Pro Bono Publico* Service:

"A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

[Example for (a)(1): Defendant charged with carrying a firearm for personal protection in violation of a city ordinance.]

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters of furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would otherwise be inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

[Example for (b)(2): A police officer seizes an individual's car, because the individual allegedly did not comply with a city ordinance covering the

carrying of firearms in vehicles. (Denver and Chicago are among the cities which use seizure of personal automobiles to enforce gun carry ordinances.) The car is worth $3,000, and contesting the seizure would normally cost $5,000 in legal fees. Although the car owner could afford the $5,000, payment of such a large fee would be economically irrational to the car owner, even though his car was unjustly taken. Given the circumstances of the case, the individual has a "limited" ability to pay. Instead of charging $5,000, the attorney only charges $1,000.]

(3) participation in activities for improving the law, the legal system or the legal profession

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."

B. Comments

[2] "Legal services under these paragraphs [(a)(1)&(2), dealing with "persons of limited means"] consisted full range activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making in the provision of free training or mentoring to those represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law."

1. Thus, lobbying or similar policy work is included, to the extent that it is addressed at the problems of persons who would qualify or nearly qualify for assistance from programs funded by the Legal Services Corp. [comment 3, for qualification standards].

2. Included: lobbying to resist proposals to make it impossible for poor people to defend themselves, by making small, inexpensive handguns unaffordabe.

3. Not included: Class action lawsuit representing persons who wish to buy $3,000 rifles which have been unlawfully banned from importation into the United States.

[4] Award of statutory attorney's fees in *pro bono* cases "does not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means." Note that "section 1983" fees are available for violations of state constitutional rights to keep and bear arms, if the complaint is properly framed.

[6]. Regarding (b)(1): "Examples of types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups." Thus, paragraph (b)(1) would include work for Second

Amendment claims (similar to "First Amendment claims"), or for museums which cover firearms history or for historic re-enactment groups ("cultural").

[8]. Regarding (b)(3): "Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of many activities the fall within this paragraph." Law Day and similar educational opportunities offer the attorney an opportunity to explain the importance of the Second Amendment, and to correct misunderstandings of the Amendment. This paragraph encompasses any lobbying or similar work (not just for the benefit of poor people) to enhance protection for the Second Amendment, or any other provision of the Constitution.

[11]. "The responsibility set forth in this Rule is not intended to the enforced through disciplinary process." But the Rule still sets forth a mandatory standard of professional responsibility.

C. Prior Standard.

Ethical Consideration 8-9. "The advancement of our legal system is of vital importance in maintaining the rule of law... lawyers should encourage, and should aid in making, needed changes in improvements."

D. Preamble to the Model Code:

"As a public citizen, the lawyer should seek improvement of the law, the administration of justice and quality of service rendered by legal profession. As a member of a learned profession, it 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. It lawyer should be mindful of the deficiencies in the administration of justice and other factor the poor, and sometimes persons or not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf."

E. Some Additional Considerations for Lobbying and Similar Work To

1. Source: American Bar Association Commission on Professionalism, *"...In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism* (1986)(representing views of the Commission, but not necessarily the ABA House of Delegates).

2. Suggestion: "When not representing clients before legislative bodies, lawyers should put aside self-interest in should support legislation that is in the public interest."

3. Commentary: “We must recognize the need generally to simplify our laws for the sake of public. As Derek Bok and others have suggested, we as a society are ‘overlawed.’ [citation omitted]”

4. Thus, lawyer lobbying to simplify and reduce the burdens of complex gun control laws (such as those in California or New York City, or such as the National Firearms Act), is a particularly appropriate form of public service, in that such lobbying is aimed at enhancing the public interest (through enhancing public safety), and in correcting complex laws which apply to a large number of ordinary citizens.

II. Issues for Second Amendment Attorneys

A. Persons asserting Second Amendment rights may be members of unpopular groups.

1. Militias

2. Other organizations out of the political mainstream.

Radical feminist, anti-tax, anarchist, marginal religious groups.

B. Persons asserting Second Amendment rights may be unpopular individuals.

III. Why are marginal groups so frequently involved in constitutional litigation?

A. Group Factors

1. Absolutist worldview.

2. Unwillingness to compromise

3. Constitutional fundamentalism

B. Government factors

1. Desire to punish social deviancy.

a. Polygamy: Branch Davdians, Mormons.

b. Anti-government political beliefs. Socialist Workers Party.

2. Discretionary power may not be exercised against mainstream persons, only gets persons on the margins.

3. Desire to manufacture crime by deviants, so as to “defend” society against perceived threat.

a. Racist hermit Randy Weaver. Pestered for three years by BATF agent into selling sawed-off shotgun.

b. Waco raid as kick-off for BATF campaign against “armed cults.”

IV. Types of Misconduct Especially Likely to be Litigated

A. Surveillance of political dissidents.

Maryland state police video taping demonstrators at the state capital who protested gun control laws

B. Intimidation of political dissidents.

Rogue BATF agents telling gun store personnel to stop criticizing pro control congressmen.

C. Abuse of licensing law in regard to particular individual.

D. Abuse of licensing law in regard to groups.

For example, St. Louis police refusing to issue hand gun permits to Blacks.

E. Low-level violence. Rough manhandling of demonstrators.

F. High-level violence. Use of deadly weapons, military involvement.

1. Ludlow Massacre.

Government troops machine gun a tent camp containing striking miners and their families, and burn it to the ground, killing dozens. Easter Sunday, April 20, 1914, southern Colorado.

2. Kent State. 1971.

National Guard opens fire on anti-war demonstrators, killing four.

3. Waco. 1993.

Machine guns, flash-bang grenades, tanks, helicopters, and CS chemical warfare agent used against innocent women and children.

V. Why do unpopular groups deserve strong representation for their constitutional claims?

A. The Constitution is intended to protect everyone, not just the mainstream.

B. Allowing abuse of marginal groups sets the stage for abuse of others.

Pastor Martin Niemoller's "first they came" observation: Communists, Jews, homosexuals, trade unionists, Catholics, then finally dissident Protestants.

C. Some may actually be innocent.

1. Spies v. Illinois. Haymarket bombing.

2. Branch Davidians.

Acquitted of all charges for which self-defense was allowed to be considered.

3. Randy Weaver.

Acquitted of all charges except for failure to appear in court. Entrapment, self-defense.

D. Importance of Unpopular Groups in Expanding the Protection of Constitutional Rights.

VI. Case Study in how Legal Defense of Unpopular "Extremists" Expands the Scope of Everyone's Constitutional Freedom: The Jehovah's Witnesses and the First Amendment

A. Why were the Jehovah's Witnesses so unpopular?

1. Person-to-person/door-to-door proselytizing.

2. Radical hostility to other religions.

3. "Cultish" church organization.

4. Deliberate separation from mainstream of American society

5. Refusal to acknowledge political authority, or to serve in combat.

B. Background: weak state of the First Amendment before the 1930s.

C. First Amendment freedoms won in Jehovah's Witness cases.

1. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

a. City requires license for distribution of literature. Jehovah's Witness refuses even to apply for license.

b. Court holds that facially unconstitutional licensing law need not be obeyed.

c. Strong language against prior restraints.

2. *Schneider v. State*, 308 U.S. 147 (1939).

a. Jehovah's Witness canvasses house-to-house, to leave literature, and seek contributions.

b. Canvassing license statute unconstitutional because of its boundless discretion: "liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." 308 U.S. at 164.

3. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

a. Right not to be forced to salute the flag, or otherwise to express particular political beliefs.

b. “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” 319 U.S. at 638.

4. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

a. Jesse Cantwell, a Jehovah's Witness is convicted of common-law breach for playing an anti-Catholic phonograph record before two Catholic men on a street in New Haven.

b. Supreme Court reverses, because Cantwell’s action “considered in the light of the constitutional guarantees,” are not punishable under "the common law offense in question." 310 U.S. at 311.

c. Also, a Connecticut statute required a permit for religious solicitation. The statute gave officials discretion to determine was is religious, and therefore allowed “censorship of religion.”

5. *Jamison v. Texas*, 318 U.S. 413 (1943).

a. One of the first “commercial speech” cases. Defendant distributed handbills in downtown Dallas urging people to order various Jehovah’s Witnesses books, for a price.

b. Profit motive in distribution of religious handbills does not remove First Amendment protection.

6. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

a. Municipal ordinance imposes license fee for door-to-door sales.

b. As applied to a Seventh-Day Adventist, the city “may not have a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.” *Id.*at 113.

c. Court notes that “the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.” *Id.*at 116.

7. *Martin v. Struthers*, 319 U.S. 141 (1943).

a. City ordinance outlaws knocking on the door or ringing the doorbell of a residence in order to deliver a handbill.

b. City rationale: preventing crime; protecting privacy of industrial (war-time) workers who work the night shift.

c. Jehovah’s Witness convicted. Court rules that the ordinance “limits the dissemination of knowledge,” and can “serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.” *Id.*at 144, 147.

8. *Marsh v. Alabama*, 326 U.S. 501.

a. Chickasaw, Ala., was a company town, owned by the Gulf Shipbuilding Corp.

b. Jehovah's Witness distributes literature without a license on a sidewalk near the post office, and is convicted of criminal trespass.

c. Court: "Except for [ownership by a private corporation] it has all the characteristics of any other American town. town, including that covered by streets and sidewalks." Held: A state may not allow a corporation to take over the functions of a local government, if the corporation denies Constitutional rights.

9. *Niemotko v. Maryland*, 340 U.S. 268 (1951).

a. City requires a permit to hold meetings in a public park. Jehovah's Witnesses are denied a permit to use a city park for Bible talks, even other political and religious groups had been allowed to use the park. to analogous uses.

b. Because the city denied the permit out of "dislike for or disagreement with the Witnesses or their views," the Court finds that the permit denial violated "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments."

c. Early application of Equal Protection analysis to free speech issue. One of the foundational cases for the doctrine of "content discrimination."

d. City official's discretion for issue permits is limitless, and therefore void.

10. *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Similar to Niemetko.

11. *Wooley v. Maynard*, 430 U.S. 705 (1977).

a. Jehovah's Witness does not want to display the "Live Free or Die" motto on his New Hampshire license plate.

b. "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so."

c. Opinion recites the litany of Jehovah's Witness First Amendment cases.

D. Conclusion:

Along with organized labor, the Jehovah's Witnesses were the major group bringing cases urging the Supreme Court to stop underenforcing the First Amendment in the 1930s, 1940s, and 1950s. Many of the bedrock principles of modern First Amendment law–such as the prohibition on content discrimination, and the requirement that licensing laws be fairly applied and

not overly discretionary–were established by the attorneys who brought constitutional cases on behalf of members of a very unpopular group.

VII. Special Ethical Issues Involved in Advising Social Deviants.

A. It is legitimate to offer non-legal advice:

1. Rule 2.1 Advisor.

"In rendering advice, a lawyer may refer not only to law but other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

2. Persons outside the mainstream may have an especially high need for such advice.

B. A lawyer can advance novel theories, or can ask a court to protect rights which have been ignored by courts in recent decades:

1. Rule 3.1 Meritorious Claims and Contentions:

"A lawyer shall not bring or defend a proceeding, or assert or contravert an issue therein, unless there is a basis 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 incarceration, may nevertheless so defend a proceeding as to require that every element of the case be established."

2. Comment.

"...the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account was be taken of the law's ambiguities and potential for change."

3. DR 7-102(A)(2):

a lawyer may advance a claim or defense unsupported by current law if "it can be supported by good faith argument for an extension of, modification, or reversal of existing law."

4. Lawyer must reject client's instructions if the instruction would cause a violation of Rule 3.1.

Fontaine v. Ryan, 849 F. Supp. 242 (S.D.N.Y. 1994). This may be a particular issue for some clients at the fringe of the Patriot movement; for example, a client requests the filing of a lien which the attorney knows is unsupportable.

5. This Rule closely parallels the concerns addressed by Rule 11 of the Federal Rules of Civil Procedure (and in most parallel state codes), but is broader, in that it applies to non-civil cases.

C. Recent cases involving important changes from prior jurisprudence.

1. *United States v. Lopez*, 514 U.S. 549 (1995).

Declaring federal Gun Free School Zones Act unconstitutional. The first case in six decades for the Supreme Court to find a limit on the congressional power over interstate commerce.

2. *Wilson v. Arkansas*, –U.S.-- (1995).

Unanimous decision constitutionalizing the common law "knock and announce" rule as part of the First Amendment. Lower court decisions supporting the "war on drugs" had almost entirely obliterated the common law rule.

3. Prudence:

Rule 3.1 is not an excuse to do a test case sloppily, by failing to present the strongest plaintiffs possible, and by failing to consider carefully whether the court that will hear the case is ready to depart from erroneous practices of the past, or whether the case will simply provide an opportunity for a court to affirm and solidify bad precedent.

D. A lawyer may inform people about the possibility of bringing a lawsuit to enforce Constitutional rights, notwithstanding state bar rules about the solicitation of business.

NAACP v. Button, 371 U.S. 415 (1963)(state bar rule held to violate the First and Fourteenth Amendments).

VIII. Conclusion.

A. A lawyer need not like a person's ideas in order to defend the person's constitutional freedom.

1. Justice Oliver Wendell Holmes

Discussing his dissent in *Gitlow v. New York*, 268 U.S. 652 (1925), noted that he had voted "in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian dictatorship." Letters to Sir Frederick Pollock of June 18, 1925, in Holmes-Pollock Letters (Howe ed. 1946).

2. John Randolph Tucker.

a. Eminent, conservative Virginia Congressman, attorney, President of the American Bar Association, constitutional law professor at William & Mary.

b. Defended the anarchists who were (falsely) accused of murdering a policeman during the Haymarket riot. After the Supreme Court oral argument [*Spies v. United States*, 123 U.S. 131 (1890)], Tucker was asked how a constitutional conservative such as he could defend anarchists. He answered: "I do not defend anarchy; I defend the Constitution."

B. Evolution of civilization and the rule of law.

Can be judged by how well the law protects the rights dissidents and social deviants. The rule of law protects not only the right to self-expression, but also the right to personal security and self-defense.