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Conduct of Counsel

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CONDUCT OF COUNSEL

First of all an attorney should know and abide by the ethical rules of his profession. It is not only embarrassing to a presiding judge but also to fellow members of the Bar to see an attorney fail to live up to the Bar's high standards. And it is always well for one not to place oneself in the position of having to be called down in open court and above all not have oneself recorded as ethicalling lacking in a Supreme Court's decision. In this connection see *Hubbard v. Rowe, ante,* at pages 27-28. Know the canons of Professional Ethics.

At this point particular attention should be paid to Circuit Court Rules (which are also applicable to County Courts) 9, 11, 14, 31 and Supreme Court Rules 13, 14 and 15. Especial attention should be given Circuit Rule 77 which provides:

> No attorney shall, in argument of any cause before a jury, address or refer to by name any member of the jury he is addressing, or otherwise personally appeal to any member thereof.

An infraction of that rule can be very embarrassing to a juror. Although Rule 9, which is also applicable to County Courts, doesn't permit an attorney to become a surety as to any recognizance in the Court of General Sessions or upon any undertaking in the Court of Common Pleas, or County Court, violation of which Rule is punishable as for a contempt of court, nevertheless Section 49-10 allows any attorney to act as a notary.

As County Judge, an attorney took the stand in so many cases on factual issues that it became embarrassing to the attorneys on the other side, especially when the fact had to be argued as to who was telling the truth. The writer called the attorney's attention to the authorities on the subject, and he thereafter took a young attorney into his office who thereafter handled such facts, took the witness stand but did not handle the trial case at all. The reaction from the local bar was very satisfactory.

Particular instances of conduct by counsel: In some jurisdictions it is improper in a suit for damages by one who is a husband and father for plaintiff's attorney to bring before the jury the fact that plaintiff has a wife and a certain number of children. In those jurisdictions it is considered so improper that even an instruction to the jury that they must

pay no attention to the fact is not considered sufficient to undo the attorney's error. However, in South Carolina such facts can be brought into evidence and even used as basis of argument relative to the amount of actual damages which can be awarded, since in this state one is under a legal duty to support his wife and children. As said in *Youngblood v. Railroad Co.* (1900), 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, at page 14:

> * * * the testimony was admissible, not for the purpose of showing that the plaintiff was entitled to recover damages sustained by the members of his family, by reason of his injury, but as tending to show that one of the direct and proximate results flowing from the defendant's alleged negligence was to deprive him of the capacity to meet the obligation imposed upon him by law of supporting his family. *Johns v. R. R. Co.*, 39 S. C., 162; *Mathis v. Ry. Co.*, 53 S. C., 258. If this was a direct and proximate result of the injury, we see no reason why it should not have been considered by the jury in estimating the damages which he sustained. *Pickens v. Railway Co.*, 54 S. C., 498. A person is certainly damaged when he is deprived of the ability to meet a legal obligation. . . .

Other Rules of Court as bearing on conduct: At this point it may be well to call attention to other Rules of trial courts which every trial lawyer should thoroughly know and abide by.

Conduct in the Court Room: One should not smoke in a court room. Some South Carolina judges have rules to that effect in their respective circuits. Whether one can smoke in a judge's office, when a hearing is being had there, as in a magistrate's court, or before a quasi-judicial body, should always be ascertained before one begins to indulge. It is better to adopt that method than place the presiding officer in the embarrassing position of having to ask one to desist in the event he is against smoking in such environment.

Courtesy, graciousness and keeping one's equilibrium in the court room and also when entering and leaving always characterizes the outstanding practitioner. Anything less than that tends to lower one in the esteem of those who must work with him in that legal environment. It belittles a trial lawyer at a time when he should not only have in mind the winning of his client's case, but also winning the respect of Bench

and Bar, and ever mindful of prospective clients from among those present as well as through them to those who are absent. As in any other business it's the day by day impact that counts and one can't be too careful of each day's endeavor.

Rules of the Probate Court: These Rules went into operation in 1879. Although Section 15-447 gives the Supreme Court power to make changes in such rules, there is nothing to indicate anything has been done in that regard. Also, there is only one annotation and that is to Rule 1 as to what records the Probate Judge has to keep. This is a clear indication that none of the other rules have ever been to the Supreme Court and that they are seldom, if ever, used where the matter is covered by an applicable rule of the Circuit Court which is provided for in Probate Court Rule 15.

However, Rule 5, as to whose duty it is to "issue his summons" when a petition or complaint has been filed has no counterpart in any Circuit Court Rule and that duty is not touched upon in Section 15-448 of the 1952 Code; so Rule 5 is the only law on that phase. Therefore, like in the magistrate court, the Probate Judge "shall" issue, which usually means "sign", the summons. But immemorial custom in Richland County, and in many of the other counties the writer is informed, has changed Rule 5 so that the attorney signs the summons on the right and the Probate Judge only "attests" it at the lower left. Thus does time gradually change an important judicial step without the aid of court, or legislative action.

Rules 6 and 8 as to form, etc., of pleadings and necessary papers are in part like Circuit Court Rules 12 and 13. However, the requirements of the latter are much more comprehensive and detailed, and it is best that they be substituted in their entirety as allowed by Probate Court Rule 15.

Rule 7 should be compared with Circuit Court Rule 11, and Rule 9 with Rule 14, and Rule 11 with Rule 19.

Rules of Circuit and County Courts: Circuit Court Rules now apply also to County Courts. These rules are just as important as constitutional provisions or statutes. It is true, since they are court-made they can be court-waived, but one better not depend on his negligence or ignorance being so waived or over-looked by the court, as it is not often done, and usually only in criminal cases involving human liberty.

State v. O'Shields, 163 S. C. 408, 161 S. E. 692. In civil cases of much importance the Supreme Court, for instance, will over-look non-conformity to its rules. *Craig v. Pickens County,* 189 S. C. 164, 200 S. E. 825. But it must be remembered that such waiving of a rule is solely in the court's discretion.

Hence, every beginner should read the court rules carefully and study the annotations thoroughly before trying a case. It even pays as the years go by to go over them once in a while. It is impracticable, if not impossible, to carry all of any branch of the law in one's head.

Rules 12 and 13 should be carefully analyzed and applied when preparing any pleadings or necessary papers for court procedure. It will be noted that non-compliance with Rule 13 involves a severe penalty in that the "Clerk shall not file the same, nor will the Court hear any motion or application founded thereon."

Rule 18, first paragraph, can readily show up one's ignorance or negligence in the very first procedural step in a case, namely in drawing the necessary pleadings. It provides that every "distinct cause of action, defense, counterclaim or reply . . . shall be separately stated and numbered," and a counterclaim "shall be distinctly entitled and designated as such."

Since each paragraph in every pleading, if more than one, should be numbered also, it is well to keep in mind that the best trial lawyers use Roman numerals placed in the center of the page, for numbering separate causes, defenses, and a counterclaim, as follows:

I.

For a First Cause of Action

II.

For a Second Cause of Action

The same method is followed in designating and numbering each defense. If a counterclaim is to be also pled, the following appears in the center of the page:

III.

For a Third Defense and Counterclaim.

The paragraphs of each cause, defense and those of the counterclaim, are numbered with the ordinary numerals. If,

as in some pleadings, there have to be many paragraphs, the use of Roman numerals would be unweildy and confusing; and where there are more than one cause of action or defense, it is evident that a choice has to be made. To this extent one better not go by the forms set forth in Earle's Form Book and in some of the other Form Books.

Under Rule 19 time for answering or demurring will not be extended without a certificate from the attorney that there exists a meritorious defense. In other words a court won't allow its time to be wasted. Just as in applying Section 10-1213, *Savage vs. Cannon,* 204 S. C. 473, 30 S. E. (2) 70, held that a default judgment will not be vacated unless the defendant shows he has a meritorious defense.

Rule 25 must now be integrated with Section 38-65, which as heretofore noted allows either a blind person or a child under 10 years of age to draw the name of each juror as he is presented in a criminal case.

Rule 26 is largely dispensed with in counties, such as Richland, which have consolidated calendars. Section 10-1110 through 10-1121. In all other counties the Rule must be integrated with Sections 10-1101 through 10-1106.

Rule 29 provides that a plaintiff need not be present when the jury returns to deliver its verdict. However, it is always best for his attorney to be present so that if anything is wrong with the form of the verdict, a request can be made of the judge to have the jury go back and reconsider or correct it; otherwise, serious injury can be done to a client's rights with no further chance to have it remedied.

Besides the necessity of filing orders within a reasonable time, as pointed out in *Jordan v. State Highway Department* (1939), 190 S. C. 397, 3 S. E. 2d 201, Circuit Court Rule 68 as to filing of papers must be complied with. The failure to do so can result in serious loss to both client and attorney, as indicated by *Townsend v. Sparks,* 50 S. C. 380, 27 S. E. 801.

Rule 72, requiring a certain notice in a criminal case within the short time of two days after verdict should be kept in mind.

Rule 76 as to nonsuit or direction of a verdict for want of evidence, that is for legal insufficiency of same, is one of the most important procedural ones, as the numerous annotations thereunder clearly indicate. Also, the use of this is a condition

precedent to using Rule 79, which latter rule gives a litigant a chance to have a trial judge correct his error in not directing a verdict in his favor by rendering for such litigant a judgment notwithstanding the verdict. Its use is also a condition precedent to moving for a new trial on the ground of legal insufficiency of evidence to support the verdict. So, both rules, especially 76, should always be kept in the forefront when trying a case, whether the case be criminal or civil. It is true that the Supreme Court will sometimes waive a failure to comply with a court-made rule, but it is usually only done in criminal cases involving one's liberty, and seldom, if ever, in a civil case.

Arguments, oral and written: Oral argument is very important, whether it be to judge, magistrate, or a quasi-judicial functionary, such as Public Service Commission or a Hearing Commissioner in a workman's compensation case. There is always a right involved; your object is to convince the one who is to pass upon that right your client should win. To do so, be prepared on both the facts and the law; know what you are going to say; if so, the tongue won't have to hesitate while the mind catches up with an idea. In other words, keep static out of your argument. Uh, ah, um and their meaningless sound equivalents indicate (1) unpreparedness or (2) a habit of speech akin to stuttering. The former is easily remedied by preparation; the latter by practicing talking slowly when alone or with someone as an audience who will aid you. It will take time, but it will be worth it.

When radio has static, one can dial it off. When your voice has it, the hearer cannot dial you off. He must listen and he gets so he is listening to you but not hearing what you say. It is not registering; he becomes mentally too uncomfortable to follow your argument. You are doing anything but convincing him. Time is wasted. If in doubt, it will be human for him to decide in favor of your adversary.

The writer speaks from bitter experience. When first appearing in a literary society debate when starting college at Sewanee, he was informed by the hearing professor that he would never be a debater unless he rid himself of the stuttering habit. Following the professor's instructions, such as are given above, and although it took constant, careful effort for almost a year, the habit was overcome. The result: the writer finally won a place on the debating team which was

the first one to win a Sewanee-Vanderbilt debate. So, no matter how fixed that habit may be, fight it and win. A successful career can depend on such victory.

Before leaving the subject of oral argument, gradually train yourself to be relaxed; tenseness puts on the brakes. Here again preparedness is basic. Be concise, to the point, look whomsoever you are trying to convince straight in the eye. This means you must know your subject so well that you won't have to keep your eyes centered on a book or brief for the purpose of reading matter therein; make that reading only necessary when the matter must be quoted.

Use gestures — not too often and not flinging your hands and arms about — but when necessary to give backing to your utterance by the emphasis of a careful gesture, and thus the more readily drive home the point you are then making. Don't use "Your Honor" or "May it please the Court" and synonymous expressions too often. They can become tiresome to the hearer, and again he is *listening,* as he must, but *not hearing.* Always close your argument with a conclusion which is a brief, clear summary of the points made, together with a concise, specific summary of your supporting reasons. Helpful here will be the typical conclusions — one good, the other bad — quoted below with reference to written arguments.

Attorneys are human. Like others, each of them become individualistic — each is going to develop his own personality — so each will finally have his own style of argument. But in developing that style, each must have due regard for certain fundamentals; hence the procedure just outlined above for whatever help it may be. See "Curable Faults in Oral Argument" by Weiner, in Vol. 7, page 573, South Carolina Law Quarterly.

Some of that procedure can well be applied to written arguments, whether Briefs presented to the trial judge or quasi-judicial functionary, or those filed in appealed cases for use by appellate courts.

Here again, a proper conclusion can be of great aid in clinching an argument; an improper one can be of just as great aid in unclinching it.

An example of an improper conclusion to a 17 page appellate Brief is found in the following:

CONCLUSION

For the foregoing reasons this defendant respectfully submits a new trial should be granted.

Names of Attorneys
Attorneys for Appellant

Although *Powers v. Rawls* (1921), 119 S. C. 134, 112 S. E. 78, deals to a great extent with the duties of a trial judge, it also points out certain duties of a trial lawyer as an attorney and also as an officer of the court. From all angles the decision should be carefully studied before one tries his first case. As concerns the trial lawyer attention is called to what the Court said at the bottom of page 149:

> . . . Out of the almost insuperable difficulty of so charging the law as to comprehend all the possible points of view which a party may be entitled to have presented arise the duty and right of counsel to aid the Court in the function of instructing the jury by submitting appropriate requests to charge. . . .
>
> . . . The practice of counsel in tendering unduly numerous, lengthy, and involved requests is not to be commended. It is not only proper for the trial Judge to decline to give such requests in the form or language submitted, but it is his duty to do so in the interest of clearness if the meritorious points of the requests are fairly and adequately covered in his general charge.

And very important to the trial lawyer is the following on page 151:

> If the trial Judge is a responsible minister of justice, so likewise is the attorney at law. He is an officer of the Court charged with the duty of using all legitimate means skillfully and fairly to present his client's cause. Just as "the law clothes the Judges with the presumption of poise and dignity, and fairness in both mind and manner" (*State v. Driggers*, 84 S. C. 531, 66 S. E. 1042, 137 Am. St. Rep. 855, 19 Ann. Cas. 1166), so likewise it clothes the attorney with the presumption of good faith and of fair and candid dealing with Court and jury. It should always be assumed, therefore, that the painstaking labor of counsel in the preparation of elaborate requests to charge has been actuated by a sincere desire to aid and not to embarrass the Court in declaring the law. The

> duty of counsel in that regard is to be considered and interpreted in the light of numerous decisions of this Court to the effect that failure to request the Court to charge a particular proposition of law, or to charge the law more fully upon a given point, or to present the law as to a particular contention or theory fairly founded upon the evidence, will be deemed a waiver of the right to such instruction. [Cases Cited] If therefore error is committed in failing to give a sound and appropriate instruction prayed for, it cannot be justified or absolved upon the ground that the requests were unduly lengthy or complex. If necessary for that purpose, a recess should be taken, or the jury excused for a sufficient period of time to afford the Court opportunity to examine and consider the requests properly tendered.

A trial lawyer should never place himself in the unenviable position of having to be soundly criticized by the Supreme Court, or by any court for that matter, and have himself go down for misbehavior in a perpetual record as happened in *State v. Bigham* (1925), 133 S. C. 491, 131 S. E. 603. At page 502 of that decision one finds the following:

> It is true that his Honor excluded the evidence; yet he allowed the State's attorney to persist in asking questions which were in conflict with his Honor's ruling.
>
> The action of the assistant State counsel was highly reprehensible, and deserves the highest condemnation and censure; his Honor should have stopped and required him to adhere to the rulings of the Court. The attorney disregarded and practically defied the rulings of the Court, and should have been stopped and brought up and made to respect the rulings of the Court. He, by his disregard of his Honor's ruling, nullified the effect of the Court's ruling by his persistent and repeated violations of the same. He should have been brought up in short order and made to conform to the Court's ruling.
>
> The defendant was on trial for killing one person, yet every detail of the five homicides was presented to the jury, even to the skull of his mother. The defendant was not being tried for killing her, but was being tried for killing L. Smiley Bigham.

> . . . The cross-examination was not competent; it was unfair; in violation of the rulings of his Honor; and most deeply and highly prejudicial to the defendant.
>
> The defendant was practically on trial for killing five members of his family, although really on trial as charged for killing his brother, Smiley Bigham. He was under the Constitution entitled to a fair and impartial trial; the action of the assistant state counsel in the cross-examination of the defendant was insinuating, suggestive of other murders, unfair, in violation of the rulings of his Honor and in violation of the decisions of this Court.

State v. McGill (1939), 191 S. C. 1, 3 S. E. 2d 257, leaves no doubt as to the several duties of a solicitor as an officer of the court. At page 9 Justice Stabler declared:

> . . . "The rule that it is always the duty of the prosecuting attorney to treat the defendant in a fair and impartial manner applies to his argument to the jury." *State v. McDonald,* 184 S. C., 290, 192 S. E., 365, 370. He "is a *quasi*-judicial officer, and this Court has repeatedly held that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law." *State v. Parris,* 163 S. C., 295, 161 S. E., 496, 498. But this does not mean that he should not prosecute vigorously so long as he is just to the defendant, his duty to the State being coexistent with his duty to see that the accused is given a fair trial.

In the foregoing case it was held that the solicitor's argument was "indiscreet" but that it was harmless considering the entire testimony for the State. However, it is well to note the four (4) conditions precedent which are necessary for seeking a new trial because of unfair or improper argument. These are:

> " . . . (1) That timely objection was interposed to the argument;
>
> (2) the substance, at least, of the objectionable language;
>
> (3) the failure of the court to sufficiently warn the jury not to consider the improper argument; and (4) that the result was to materially preju-

> dice the right of the losing litigant to obtain a fair and impartial trial."

As pointed out in the foregoing case, like in *Anderson v. Ballenger* (1932), 166 S. C. 44, 164 S. E. 313, a refusal of a new trial for misconduct of counsel is within the trial judge's discretion. It is only when he abuses it that legal error will ensue. In the *Anderson* decision plaintiff's counsel while cross-examining defendant's witness in an accident case used an insurance report in plain view of the jury, and in this State insurance companies who "hold the bag" for private persons must be kept out of the picture. It is of course different where a statute requires such insurance, as with certain motor vehicles of public service companies. In such cases both the owner and the insurer can be sued jointly. *Benn v. Camel City Coach Co.* (1930), 162 S. C. 44, 160 S. E. 135. Sections 58-1481 and 58-1512.