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ATTORNEY AND CLIENT - CANONS OF ETHICS - ATTORNEY OF RECORD AS WITNESS FOR CLIENT

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ATTORNEY AND CLIENT — CANONS OF ETHICS — ATTORNEY OF RECORD AS WITNESS FOR CLIENT — In a suit commenced by bill in aid of execution, the attorney of record of one of the defendants was allowed to testify concerning a note given to the other defendant. *Held*, that although this is a violation of Rule 19 of the Canons of Professional Ethics, it is not reversible error. *Vozbut v. Pomputis*, 277 Mich. 212, 269 N. W. 149 (1936).

Improper remarks and various acts of misconduct of counsel in the trial of cases have led to frequent reversals. It is held to be reversible error if, for the purpose of inflaming the passions of the jury or arousing their prejudice, counsel abuses a witness without justification,[1] launches a vituperative attack on the opposite party,[2] or persists in propounding improper questions.[3] So also an intentional misstatement of evidence,[4] and an unjustifiable charge made to the jury that opposing counsel had lied [5] or that he was suppressing the truth[6] constitute grounds for reversal. While these and similar acts of misconduct

[1] Franko v. Crosby, 278 Ill. App. 416 (1935); see also 4 A. L. R. 414 (1919) and cases cited.

[2] Layton v. Cregan & Mallory Co., Inc., 269 Mich. 574, 257 N. W. 888 (1934); Sherwood v. Evening News Assn., 256 Mich. 318, 239 N. W. 305 (1931); Insurance Co. v. Heller, 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490 (1927).

[3] Van Hartesveldt v. Westrate, 264 Mich. 538, 250 N. W. 302 (1933). But it is not reversible error for counsel repeatedly to ask questions which have been ruled incompetent if he appears to have done so in good faith. De Saddler v. Yellow Taxicab Co., 216 Mich. 45, 184 N. W. 419 (1921).

[4] State v. Nyhus, 19 N. D. 326, 124 N. W. 71 (1909); cf. Varty v. Messmore, 132 Mich. 314, 93 N. W. 611 (1903).

[5] Collins v. Hastings, 283 Ill. App. 304 (1936).

[6] Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879 (1900); Insurance Co. v. McCurry, (Tex. Com. App. 1931) 41 S. W. (2d) 215, 78 A. L. R. 760. Cf. Fishleigh v. Detroit United R. Co., 205 Mich. 145, 171 N. W. 549 (1919), and State v. Fleming, 20 N. D. 105, 126 N. W. 565 (1910).

are breaches of professional ethics,[7] reversals on their account depend solely upon their probable prejudicial effect upon the jury.[8] Except as to matters within the client's privilege, an attorney's testimony is perfectly competent, the only objection to such evidence going to its weight.[9] But that an attorney of record should not testify on behalf of his client except as to formal matters is a well recognized rule of propriety.[10] In certain cases his testimony on vital issues may be essential to the ends of justice,[11] but when that becomes evident, the ethical procedure is for him to withdraw from participation in the case as counsel.[12] In England new trials have been granted on the ground of counsel's testifying on behalf of his client.[13] In this country, however, several courts hold

[7] Canons of Professional Ethics, Rule 22; printed in full in 60 A. B. A. REP. 683 (1935).

[8] 2 R. C. L. 242, 425 (1914); Rucklich v. American Car & Foundry Co., 218 Mich. 561, 188 N. W. 440 (1922).

[9] Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745 (1922); Wollschlaeger v. Mix, 364 Ill. 207, 4 N. E. (2d) 89 (1936); Kintz v. Menz Lumber Co., 47 Ind. App. 475, 94 N. E. 802 (1910); Buttruff v. Robinson, 181 Minn. 45, 231 N. W. 414 (1930); Pull v. Nagle, (N. J. S. Ct. 1931) 156 A. 271; Little v. McKeon, (N. Y. S. Ct. 1848) 1 Sandf. *607.

[10] Canons of Professional Ethics, Rule 19, 60 A. B. A. REP. 683 at 688 (1935); Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745 (1922); Sengebush v. Edgerton, 120 Conn. 367, 180 A. 694 (1935); First Calumet Trust & Sav. Bank v. Rogers, (C. C. A. 7th, 1923) 289 F. 953; Wilkinson v. People, 226 Ill. 135, 80 N. E. 699 (1907); Kintz v. Menz Lumber Co., 47 Ind. App. 475, 94 N. E. 802 (1910); Holbrook v. Seagrave, 228 Mass. 26, 116 N. E. 889 (1917); Jacobs v. Weissinger, 211 Mich. 47, 178 N. W. 65 (1920); Ferraro v. Taylor, (Minn. 1936) 265 N. W. 829; Hyman v. Hyman, 154 App. Div. 469, 139 N. Y. S. 65 (1913).

The impropriety recognized in the conduct of an attorney who testifies for his client is not present when he is called by his adversary. 1 THORNTON, ATTORNEYS 331 (1914). See also Loomis v. Norman Printers Supply Co., 81 Conn. 343, 71 A. 358 (1908); Buckmaster v. Kelley, 15 Fla. 180 (1875); Oliver v. Pate, 43 Ind. 132 (1873); State v. Tabor, 63 Kan. 542, 66 P. 237 (1901); Bishoff v. Commonwealth, 123 Ky. 340, 96 S. W. 538 (1906); State v. Cook, 23 La. Ann. 347 (1871); State v. Hedgepeth, 125 Mo. 14, 28 S. W. 160 (1894); Levers v. Van Buskirk, 4 Pa. St. 309 (1846).

[11] Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745 (1922); Kintz v. Menz Lumber Co., 47 Ind. App. 475, 94 N. E. 802 (1910); Cuvelier v. Town of Dumont, (Iowa 1936) 266 N. W. 517; Succession of Harkins, 2 La. Ann. 923 (1847); McClaren v. Gillispie, 19 Utah 137, 56 P. 680 (1899); Connolly v. Straw, 53 Wis. 645, 11 N. W. 17 (1881).

[12] Nanos v. Harrison, 97 Conn. 529, 117 A. 803 (1922); Onstott v. Edel, 232 Ill. 201, 83 N. E. 806 (1908); Cuvelier v. Town of Dumont, (Iowa 1936) 266 N. W. 517; Succession of Harkins, 2 La. Ann. 923 (1847); Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401 (1911); Garrett v. Garrett, 86 N. J. Eq. 293, 98 A. 848 (1916); Frear v. Drinker, 8 Pa. St. 520 (1848); Price v. Moses, 10 Rich. L. (S. C.) 454 (1857); McClaren v. Gillispie, 19 Utah 137, 56 P. 680 (1899); Connolly v. Straw, 53 Wis. 645, 11 N. W. 17 (1881).

[13] Stones v. Byron, 16 L. J. Q. B. N. S. 32 (1846); followed in Dunn v. Packwood, 11 Jurist 242 (1847). But see Cobbett v. Hudson, 1 El. & Bl. 11, 118 Eng. Rep. 341 (1852), wherein it is said that the ground of the decision in Stones v.

that it is error not to allow an attorney to testify,[14] and the weight of authority supports the instant decision in holding that this breach of ethics is not a ground for reversal.[15] Only the Supreme Court of Nebraska has taken a contrary position.[16] It is apparent from the large number of reported decisions that repeated admonitions from the courts have not sufficed to discourage a practice which is universally condemned as highly improper. The effect of an attorney's examining witnesses, taking the stand to contradict them, and then addressing the jury as to what weight should be given to his own testimony may be just as prejudicial as any act of misconduct which is now recognized as a ground for reversal. There appears to be no sound reason why the courts should not adopt the more drastic—but obviously necessary—position of the Nebraska court in declaring it to be reversible error for an attorney to continue as counsel when it becomes apparent that his testimony as a witness is vital to the interests of his client.

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Byron appears to have been that the evidence was received after defendant's case was closed and after plaintiff's advocate had replied, and that this irregularity unduly influenced the undersheriff who presided, and not that the rigid rule disqualifying an attorney from being a witness for his client should be followed.

[14] Kaeser v. Bloomer, 85 Conn. 209, 82 A. 112 (1912); Sengebush v. Edgerton, 120 Conn. 367, 180 A. 694 (1935); Little v. McKeon, (N. Y. S. Ct. 1848) 1 Sandf. *607; Follansbee v. Walker, 72 Pa. St. 228 (1872).

In Holbrook v. Seagrave, 228 Mass. 26 at 29, 116 N. E. 889 (1917), on appeal from a ruling of the lower court excluding from the witness stand the attorney who had drawn up the will in question, the court says: "While such a practice by an attorney is not to be commended, it was within the discretion of the single justice to permit the witness to testify."

In People v. McDonald, 110 Cal. App. 183, 293 P. 883 (1930), defendants argued that a ruling of the lower court that an attorney who took the stand could not argue the case to the jury, deprived them of rebuttal testimony. The ruling was held not error, the court pointing out that counsel did not take the stand and hence it could not be said that any such rebuttal was offered, or that defendants were deprived of any of their rights.

In State v. Gleim, 17 Mont. 17, 41 P. 998, 31 L. R. A. 294 (1895), it is held that a rule of court prohibiting an attorney who takes the stand as a witness from arguing the case to the jury unless by permission of the court, is not unreasonable.

[15] Sengebush v. Edgerton, 120 Conn. 367, 180 A. 694 (1935); Pastorious v. Whidby, 76 Fla. 571, 80 So. 513 (1918); Wilkinson v. People, 226 Ill. 135, 80 N. E. 699 (1907); Chicago Union Traction Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816 (1907); Waterman v. Bryson, 178 Iowa 35, 158 N. W. 466 (1916).

[16] Kausgaard v. Endres, 126 Neb. 129, 252 N. W. 810 (1934).