

“Truthful Questions” aka “A New Oath of Lawyering”

By: Gary L. Stuart
Jennings, Strouss & Salmon
Phoenix, Arizona

"Do you solemnly swear to ask for the truth, the whole truth and nothing but the truth, so help you God?" Since no Oath-abiding judge would allow a witness to answer questions until she swore to tell the truth, why does the judiciary allow lawyers to ask "untruthful questions?" And, while I am in a questionable mood, why do those of us who are proud to be trial lawyers not insist on truthfulness in questioning?

The hard questions put to us by our not-so-adoring public after reveling in the tabloid and main-stream criminal trials over the last few years include: "how can you sleep at night"; "aren't lawyers liars"; and, "what can you expect, they aren't interested in the truth, they only want to win". For the tens of thousands of us who abide our oath of office, the answers are: "I sleep well, thank you"; "No, most lawyers are honest"; and, "I want the truth, no matter what."

The hopelessly literal among us will quickly observe there is no such thing as a "truthful" question. Truthfulness is an attribute of a fact or a statement, not an interrogatory. What I am looking for is truthfulness in the examiner, the one asking the questions, as well as the one giving the answers.

In far too many cases, lawyers attempt to discredit or impeach witnesses they know to be telling the truth. Sometimes, lawyers put questions to witnesses designed only to confuse or hide the truth. In at least a few cases, lawyers use patently false facts to form "hypothetical" questions for the sole purpose of evading liability or guilt.

What some of my colleagues in the trial bar need are remedial civics, a touch of constitutional fervor, and a heaping handful of the golden rule. The few trial lawyers responsible for the justifiable criticism of how our system produces civil and criminal justice are unlikely to read this essay. Some prosecutors and criminal defense lawyers are motivated more by winning than by insuring constitutional compliance in the courtroom. On the civil side, some lawyers enter the pit of the courtroom for the money they will make, not for the cause of just and fair compensation for the client.

Those whose conduct is motivated only by money or wining cannot be relied on to ask for the truth, the whole truth and nothing but the truth so help them, God.

We need a new way to start the trial. Maybe even a new "Oath of Lawyering". One given to the trial lawyer at the commencement of every trial: "Is counsel ready to begin and do you promise to ask for the truth, the whole truth and nothing but the truth, so help you God?"

It isn't as though we are short of oaths from which to choose. We could go back to the French Advocate's Code, which remained in force until the Revolution of 1790.ⁱ That Code required the advocate to undertake courtroom causes without "trickery, fallacies or misquotations of authorities." It also insisted that the trial advocate "not exhibit a sordid avidity of gain, by putting too high a price upon his services."

We could reaffirm the oath we took upon admission to practice. ". . . to counsel or maintain no other action, proceeding or defense than those which appear to [us] legal and just."

Or, we could repeat the one contained in the most state professionalism codes. ". . . I will remember that, besides commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good."ⁱⁱ

Perhaps we could go so far as aspiring to the concept of *noblesse oblige* where true civilization is measured by "Obedience To the Unenforceable."ⁱⁱⁱ

Failing all of that, we could follow the wisdom of Justice Stone who said: "It is needful that we look beyond the club of the policeman as a civilizing agency to the sanction of professional standards which condemn the doing of what the law has not forbidden."^{iv}

For most of this century the American legal profession was widely respected because it was composed of "good" men and women. One of the oldest works on Professional Ethics focused on something that rings loud and true today:

No man can ever be a truly great lawyer, who is not in every sense of the word, a good man . . . There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth -- our fortunes, reputations, domestic peace, the future of those dearest to us, nay liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but also without suspicion. From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity and candor: they are the cardinal virtues of a lawyer.^v

The Ethical Rules are replete with admonitions against the admission of false evidence. The Rules of Evidence, in turn, are designed to admit only trustworthy evidence. Unfortunately, neither the rules of evidence nor the ethical rules expressly require a trial lawyer to seek the truth, the whole truth and nothing but the truth. Our rules do not make trial lawyers put questions to witnesses for the express purpose of seeking the truth.

The ethical rule that covers "falsity" in most state ethical codes is similar to ABA Model Ethical Rule 3.4. It prohibits the presentation of "false evidence" or the counseling or assisting of any witness to testify "falsely". Our profession would be well served by a rule that would expressly mandate lawyers to offer in court only that evidence which is "true."^{vi}

Among other ethical challenges, some trial lawyers fail to distinguish between moral standards, i.e., "right and wrong" and ethical standards. They equate the client's "right" to trial by jury with the client's desire to win. They equate any adverse verdict as "wrong" for the client. Those few bring great disrepute to the profession and the justice system served by the rest of us. They do so out of a misplaced reliance on the need for "zealous advocacy."^{vii}

The "my client made me do it" defense is loudly echoed but rings hollow with the vast majority of lawyers. The vast majority cares more about the integrity of the system than about the perceived need of one client to win at any cost.

We need and are entitled to lawyers instilled with tireless industry, unbounded enthusiasm, delight in the institution of the law and joy in the advocacy system. We must somehow rid ourselves of those few who have no loyalty to the ideals of the profession or to the traditions of civil and criminal justice under the Rule of Law.

Perhaps it's back to the future we need to go. Perhaps its wishful thinking but a new "Oath of Lawyering" sounds good to me. I for one am ready to say at the commencement of every trial:

"I am ready to begin and I promise to ask for the truth, the whole truth and nothing but the truth, so help me God."

ⁱ See, Appendix B. Chivalry of Advocacy, Warvelle's Essays in Legal Ethics, Fred B. Rothman & Co. (1902).

ⁱⁱ See, for example, A Lawyer's Creed of Professionalism of the State Bar of Arizona, adopted by the Board of Governors, State Bar of Arizona, and May 19, 1989.

ⁱⁱⁱ As expressed by Lord Moulton as a prefatory comment o Legal Ethics, Henry S. Drinker, Columbia University Press, New York, (1953).

^{iv} See, 48 Harv. L. Rev. 1, 13 (1934).

^v See, Sharswood, Professional Ethics, pp. 168, 169 (1854).

^{vi} I am neither alone nor am I the first to observe the need for a change in our rules. The Arizona Supreme Court has before it the "Plattner" proposal that would essentially require truth in questioning.

^{vii} The Preamble to the ABA Model Rules of Professional Conduct is the oft-quoted source of the zealous advocacy rule. When read in its entirety it is of little solace to those who use it as an excuse for winning at any cost. In context, it provides: "As advocate a lawyer zealously asserts the client's

position *under the rules of the adversary system.*” Those rules do not even imply that a lawyer can be untruthful in putting questions to witnesses.