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Monroe H. Freedman

Maurice A. Deane School of Law at Hofstra University

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HENRY LORD BROUGHAM AND ZEAL

*Monroe H. Freedman**

In a recent article, Professors Fred Zacharias and Bruce Green undertook to “reconceptualize” advocacy ethics.¹ In the course of that article, they rejected the ethic of zeal, and stated erroneously that Henry Lord Brougham had himself repudiated his famous statement on zealous advocacy.²

Inspired by Brougham almost two centuries ago, the “traditional aspiration” of zealous advocacy³ remains “*the fundamental principle of the law of lawyering*”⁴ and “the dominant standard of lawyerly excellence” among lawyers today.⁵ To paraphrase the ABA’s 1908

* Professor of Law, Hofstra University School of Law; author, *UNDERSTANDING LAWYERS’ ETHICS* (3d ed. 2004) (with Abbe Smith).

1. See Fred C. Zacharias & Bruce A. Green, “*Anything Rather Than a Deliberate and Well-considered Opinion*”—Henry Lord Brougham, *Written By Himself*, 19 *GEO. J. LEGAL. ETHICS* 1221 (2006).

2. See *id.* at 2; see also *infra* note 19 and accompanying text.

3. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS*, § 16 cmt. d (2000).

4. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE RULES OF PROFESSIONAL CONDUCT* 17 (Supp. 1998). The authors wrote this five years after the Model Rules were adopted. In their third edition the authors changed the phrasing, but expressly equated “diligence” in Model Rule of Professional Conduct 1.3 with zeal, for example, referring to “the basic duty of diligence (or zealousness).” *Id.* § 6.2 (3d ed. 2001).

5. *The Zealous Lawyer: Is Winning the Only Thing?*, *REP. FROM THE CENTER FOR PHIL. AND PUB. POL’Y*, Winter 1984, at 1, 4; see also L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 *EMORY L.J.* 909, 918, 947 (1980) (“The prevailing notion among lawyers seems to be that the lawyer’s duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer.”). *Accord* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 580 & n.84 (1986) (citing *In re Griffiths*, 413 U.S. 717, 724 n.1, (1973)). See also *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS*, § 16 cmt. d (2000).

Canons of Professional Ethics, the ethic of zeal requires that the lawyer give entire devotion to the interests of the client, warm dedication in the maintenance and defense of the client's rights, and the exertion of the lawyer's utmost learning and ability.⁶ Moreover, contrary to a suggestion by Zacharias and Green, neither Brougham nor anyone else has ever suggested that there are no lawful limits on zealous advocacy.⁷

To understand why the claim of repudiation by Brougham is false, the historical context of Brougham's statement on advocacy is critical. In 1820, Queen Caroline had been charged with adultery by George IV. Her conviction would have resulted in her divorce from the King and the loss of her title.

In his opening statement on behalf of the Queen at her trial, Brougham delivered a fearsome threat—or, as he described it afterwards, a “menace.” As Brougham explained in his autobiography, this threat was “neither more nor less than impeaching the king's own title, by proving that he had forfeited the crown.”⁸ The ground for the King's expulsion from the throne was that “[h]e had married a Roman Catholic . . . while heir-apparent,” and such a marriage is “declared by the Act of Settlement to be a forfeiture of the crown, ‘as if he were naturally dead.’”⁹ Therefore, to drive his threat home, Brougham had prefaced it by threatening that, if exposure of the King's illicit marriage were necessary to protect the Queen, he would not “hesitate one moment in the fearless discharge of [that] paramount duty.”¹⁰

Brougham's threat was particularly potent because of the dangerous social and political unrest at the time.¹¹ Many members of the army, like a large proportion the English people, enthusiastically favored the Queen over the King, and one cavalry regiment vowed that they would “fight up to their knees in blood for their queen.”¹² Other troops mutinied, and in daily demonstrations by mobs of people, “the soldiers showed plain signs of being with the multitude”¹³ Also, there were nights of mob

6. See CANONS OF PROFESSIONAL ETHICS Canon 8 (1908).

7. See, e.g., Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS, 1213 n.6 (2006). See also MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS §§ 4.01-4.12, at 71-127 (3d ed. 2004).

8. HENRY LORD BROUGHAM, THE LIFE AND TIMES OF HENRY LORD BROUGHAM, WRITTEN BY HIMSELF II, at 309 (1871).

9. *Id.* at 309-10.

10. *Id.* at 309, n.*.

11. See *id.* at 307-10; see also FLORA FRASER, THE UNRULY QUEEN: THE LIFE OF QUEEN CAROLINE 382-83 (1996).

12. BROUGHAM, *supra* note 8, at 307.

13. *Id.* at 308.

violence against the residences of the King's ministers and intimates.¹⁴ In Brougham's own view, if it had become necessary to carry out his threat, it could have meant that "civil war was inevitable."¹⁵

In the face of Brougham's threat, the charges against the Queen were subsequently dropped. Thus, Brougham successfully engaged in a classic case, and perhaps our earliest example, of what we now call graymail. The term refers to a threat by a criminal defendant to reveal, in the course of the defense, information that is harmful or embarrassing to the government, in order to induce the government to drop the charges.

Referring to that historical context, Brougham later remarked that his statement had been a "menace," rather than "a deliberate and well-considered opinion."¹⁶ What Brougham meant, in context, was that he had not been making a dispassionate legal argument, but, rather, that he had been leveling a threat of what today we call graymail. As he explained:

I was prepared, *in case of necessity*, that is, in case the Bill passed the Lords, to do two things—first, to resist it in the Commons *with the country at my back*; but next, if need be, to dispute the King's title What I said was fully understood by Geo. IV. [and others], and I am confident it would have prevented them from pressing the Bill beyond a certain point.¹⁷

Thus, the fact that Brougham's statement had been delivered as a "menace" was precisely what made it so powerful and that, at the same time, demonstrated just how far a lawyer should be prepared to go on behalf of a client. In short, the statement itself constituted the ultimate in zealous advocacy.

Moreover, Brougham's autobiography makes it clear that he never repudiated his famous declaration. Writing half a century after having delivered his graymail threat, Brougham proudly reiterated and defended that statement, with modifications that did not diminish either its substance or its force. As his final assessment of his role in the matter, Brougham wrote: "On looking back to that time of anxiety [and] serious hazards[,] . . . I feel that I had nothing wherewith to reproach myself"¹⁸

14. See FRASER, *supra* note 11, at 382.

15. BROUGHAM, *supra* note 8, at 311.

16. WILLIAM FORSYTH, *THE HISTORY OF LAWYERS: ANCIENT AND MODERN* 380 n.1 (The Lawbook Exch., Ltd. 1996) (1875) (quoting Henry Lord Brougham).

17. *Id.* at 380-81 n.1.

18. BROUGHAM, *supra* note 8, at 315-16.

Thus, only by ignoring the historical context of Brougham's statement, as well as ignoring Brougham's justification of his statement in his autobiography fifty years later, could one say that Brougham ever repudiated his statement by calling it a menace rather than a deliberate and well-considered legal argument. This was truly a case in which Brougham's very actions gave added power and meaning to his words, and those words have understandably reverberated in lawyers' ethics for almost two centuries.

Zacharias and Green subsequently added a second contention, which is a quibble over a phrase. It relies on insignificant differences between Brougham's statement at the trial, in 1820, and a variation of the statement in his autobiography, in 1871.¹⁹ In the statement at the trial, he said:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.²⁰

And in his autobiography, fifty years later, he rendered it this way:

[A]n advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection!²¹

The changes, obviously, are stylistic—the addition of capital letters and an exclamation point, and some variations in phrasing—but the

19. See Zacharias & Green, *supra* note 1, at 1224.

20. 2 TRIAL OF QUEEN CAROLINE 3 (1821).

21. BROUGHAM, *supra* note 8, at 311 n.*.

sense remains the same. What Zacharias and Green do, however, is to take one variation in phrasing out of context.

In 1820, Brougham said that “an advocate . . . knows but one person in all the world, and that person is his client. To save that client, by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty” The variation in 1871 was: “[A]n advocate . . . knows . . . but one person in the world, **THAT CLIENT AND NONE OTHER.** To save that client . . . at all hazards and costs to all others . . . is the highest and most unquestioned of his duties.”

Ignoring the full context and substance of the second quotation, and disregarding the capital letters that Brougham added for emphasis, Zacharias and Green have fastened on the phrase, “the highest and most unquestioned of his duties.”²² This implies, they say, that Brougham “recognized the existence of secondary duties.”²³ Well, yes. But what of it? As I stated at the outset, no one—not Brougham nor anyone else—has ever suggested that zealous advocacy is not limited by duties imposed by law. Can anyone seriously believe that Brougham’s reference to “the highest and most unquestioned of his duties” means that he repudiated his statement on zealous advocacy?

Ironically, when Zacharias and Green claim that Brougham repudiated his famous statement, their principal reliance is on a 1907 book by a lawyer named John Dos Passos.²⁴ Yet Dos Passos himself made a declaration in the same book that is strikingly similar to Brougham’s. Dos Passos wrote:

The one saving attribute for the lawyer, and through him of society, is *fidelity to the client*. Fidelity is the saving salt of human nature, and ennobles whatever it touches. . . .

It is not the exception, but the rule, for the lawyer to surrender his whole mental, intellectual, and physical power to his client’s cause. There are no sacrifices which he will not make, and no dangers that he will not incur, to advance the success of his employment.²⁵

22. Zacharias & Green, *supra* note 1, at 1224.

23. *Id.*

24. *See id.* at 1223 (citing JOHN R. DOS PASSOS, *THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE* 142-43 (Fred B. Rothman & Co. 1986) (1907)).

25. DOS PASSOS, *supra* note 24, at 121. To be sure, Dos Passos recognizes that the lawyer is also duty-bound to obey the law. *See id.* at 127. Again, this does not in any way contradict Brougham’s (or my) ideal of zealous advocacy.

That is, indeed, powerful stuff. The rule, and the one saving attribute for the lawyer, Dos Passos says, is that the lawyer will “surrender his whole mental, intellectual, and physical power to his client’s cause,” and that “[t]here are no sacrifices which he will not make, and no dangers that he will not incur, to advance the success of his employment.” That is virtually a paraphrase of Brougham.

Similarly, the Supreme Court has recognized that the lawyer’s traditional function is to serve the lawful interests of individual clients, even against the interests of the state. For example, Justice Lewis Powell wrote for the Court:

[T]he duty of the lawyer, subject to his role as an “officer of the court,” is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.²⁶

Eight years later, writing for a majority of eight, Justice Powell sharpened the point: “[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’”²⁷ In short, in a free society the lawyer’s function, as an officer of the court, is to serve the undivided interests of individual clients.

I return to where I began. Inspired by Henry Lord Brougham, the “traditional aspiration” of zealous representation²⁸ remains “the fundamental principle of the law of lawyering”²⁹ and “the dominant standard of lawyerly excellence” among lawyers today.³⁰ Brougham clearly meant it—indeed, acted on it—in Queen Caroline’s trial, and proudly reaffirmed both the statement and the action in his autobiography half a century later.

26. *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973) (citation omitted); see also *id.* at 728-29 (quoting *Cammer v. United States*, 359 U.S. 399, 405 (1956), which held that lawyers are more than just officers of the court “within the conventional meaning of that term”). *Cf. id.* at 731-32 (Burger, C.J., dissenting) (“[The duty of a lawyer includes] the obligation of first duty to client. But that duty never was and is not today an absolute or unqualified duty. It is a first loyalty to serve the client’s interest but always within—never outside—the law . . .”).

27. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981).

28. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 16 cmt. d (2000).

29. HAZARD & HODES, *supra* note 3, at 17.

30. *The Zealous Lawyer*, *supra* note 5, at 4.