

# THE CHRISTIAN LAWYER: DEFENDING APPARENTLY GUILTY DEFENDANTS AND USING DECEPTIVE COURTROOM STRATEGIES AND TACTICS

AN EVANGELICAL BIBLICAL VIEW\*

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## I. INTRODUCTION

How can you defend a criminal defendant when you know he is guilty?

How can you be so deceptive in the courtroom?

These are two of the most burning questions asked of lawyers.

The first question assumes that the “criminal defendant” is “guilty” and then assumes the lawyer’s actual knowledge of guilt. The second question assumes that, regardless of morality, “lawyers do whatever it takes to win.” Most of us have learned from experience that it avails very little to argue the impropriety of these assumptions.

No matter how these questions come, the obvious moral issues are “How can you actually try to get a horrible criminal off just to commit a crime again?,” and “How can you not be fully truthful and honest in the courtroom?” These two questions and related moral issues are especially serious for Christian lawyers who are trying to present an upright moral image and a testimony of religious faith. This essay addresses issues faced by all lawyers, answering them from a Christian perspective.<sup>1</sup> As

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\* My objective in this statement is simply to clarify the viewpoint from which I speak and write and certainly not to create controversy. I fully recognize the risk of disclosing my religious persuasion at the beginning of this paper, that is, the risk of preconceptions discouraging some from reading further. Considering there are those who will stop reading here, however, I hope an equal or greater number will be curious enough to continue. There is a crying need for a different view in the world and in professional writing. I would characterize my Christian persuasion as accepting the Old and New Testaments as the Word of God, literally true, powerful, fruitful, internally consistent, and understandable through revelation by the Holy Spirit. I simply ask that you read with an open mind and permit the Holy Spirit to speak to you and form His views in your heart.

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<sup>1</sup> In this essay, I shall assume that we recognize the Holy Bible as the Word of God and our basis for Christian life. If that premise is contested, then an entirely different discussion would be necessary.

such, this essay is a faith paper for Christians, but I welcome all readers!<sup>2</sup>

We will consider the issues from the viewpoint of the Christian lawyer who wants to be faithful in a world of mixed religious faiths or none at all, and who is also faced with professional and governmental regulations that may conflict with the requirements of his faith. We cannot just ignore that faith. Every human being has some kind of faith. Airplane pilots have faith in their instruments. Drivers have faith in their vehicles. Lawyers, police, and judges have faith in the law. Children have faith in parents. Some adults have faith in other people even though that faith is sometimes misplaced and disloyal. Christians place their faith in Jesus Christ and believe that He will never leave them or forsake them.<sup>3</sup>

For the Christian lawyer, our two burning questions are not, or should not be, philosophical questions, nor are they exclusively questions of legal ethics, although professional ethics will certainly be involved in the Christian lawyer's final choice of action. Instead, for the Christian lawyer, these questions involve substantial biblical and spiritual issues.<sup>4</sup>

## II. PRELIMINARY MATTERS

### *A. Defining Terms: Of Christians and Non-Christians*

This discussion will necessarily involve Christians in their working relationships both with other Christians and with people of other religions or of no religion. Since it is directed primarily to Christians, I will very respectfully use the designation of "non-Christian" to include all persons of other religions and all non-religious folk. As we progress, it

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<sup>2</sup> Let me clarify that when I say "faith paper," I mean that this essay is not a religious paper. Too much of religion is pure intellectual analysis with little faith. Also, this essay is not denominational, nor is it institutional. As a faith paper, it will demonstrate the difficulties of non-faith answers; then, it will present solid Christian faith answers to these moral issues.

I have been warned that few will read this essay if it is "too religious" and not written as a standard "law review" article with analysis, synthesis, and analogy. Legal writing and scholarship has reached a point when it must loosen the bindings that constrain academic scholarship to only intellectual debate and footnotes. The law is about people and the rules that govern their activities. There must be a willingness to consider all factors that bear on those activities and on related legal problems and issues.

I truly fear that a "law review" article will never adequately address moral and spiritual issues from a Christian perspective. I am a Christian; therefore, I will deal with these issues as a Christian and not succumb to the temptation to seek readership acceptance and "law review" elegance and dialectic. Christianity is not solely an intellectual pursuit of knowledge. It is the pursuit of knowing the living person of Jesus Christ. See *John* 17:3 ("And this is life eternal, that they might know thee the only true God, and Jesus Christ, whom thou hast sent.").

<sup>3</sup> *Hebrews* 13:5.

<sup>4</sup> I shall refer to the Authorized King James Version of the Bible.

will be necessary to talk frankly about differences in the “belief structures” among Christian and non-Christian people. These beliefs differ greatly, and sometimes emotions run high and occasionally angry words are spoken. I certainly have no intent to offend anyone in recognizing and expressing these differences, which of course, arise out of the diverse makeup of the legal profession. My purpose is simply to recognize the “why” of what we do, with no intent to elevate or diminish either. We know there are those who will not agree with or even accept our definition of “Christian” or particularly our statements of Christian doctrine. It is this very co-existence of different types of people together in the same society and in the same profession, however, that requires the consideration of this essay. I simply ask the reader to read with an open mind and heart.

All of us probably believe that we know what it means to be a lawyer. Now we must make some assumptions as to what it means to be a Christian. In broaching the subject of “Christian” vis-à-vis “non-Christian,” it is apparent that the word “Christian” relates to Christ, and I shall therefore assume we believe the Christian attorney to be one who has accepted Jesus Christ as the Son of God and as Savior, who is born again, who knows God in a personal way, and who believes that God is involved and gives direction in his daily life.<sup>5</sup> Consistent with the “born again” requirement, the Apostle Paul makes the distinction between Christians and non-Christians in biblical terms of “natural man” and “spiritual man.”<sup>6</sup> The term “natural man” does not necessarily imply a person who is unpleasant or displeasing in any way, or inadequate or ignorant or even sinister. He may well be a very good and capable person, one who does many good works.

Paul simply tells us that “natural man” does not receive or understand spiritual things. He is unable to understand spiritual

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<sup>5</sup> Jesus says, “Except a man be born again, he cannot see the kingdom of God.” *John* 3:3. He distinguishes natural birth and spiritual rebirth, and reiterates that “Ye must be born again.” *John* 3:6-7. I take this to mean that our human spirit must encounter regeneration by the Holy Spirit of God as a discrete experience. If any reader is not sure of this relationship with God, and desires it, I encourage you to seek out Christians who can help you understand these concepts; or, you may certainly contact the author.

<sup>6</sup> *1 Corinthians* 2:12-15. Paul says:

Now we have received, not the spirit of the world, but the spirit which is of God; that we might know the things that are freely given to us of God. Which things also we speak, not in the words which man’s wisdom teacheth, but which the Holy Ghost teacheth; comparing spiritual things with spiritual. But the natural man receiveth not the things of the Spirit of God: for they are foolishness unto him: neither can he know *them*, because they are spiritually discerned. But he that is spiritual judgeth all things, yet he himself is judged of no man.

*Id.*

concepts and they are foolishness to him.<sup>7</sup> Natural man is said to be that person who does not personally know God and who has not been born again, regardless of how he labels himself. Paul also distinguished “true spiritual” Christians from individuals who are saved, but remain “babes in Christ,” neither growing in their faith nor exhibiting its fruits.<sup>8</sup>

The ability to recognize biblical and spiritual issues immediately sets the Christian in disparity with non-Christians. This difference usually does not create direct conflict in legal work because that work involves primarily secular law and factual issues. Christian and non-Christian lawyers have been able to cooperate and still oppose one another in the profession because they both know and obey the profession’s rules and customs. They can usually work in the profession without involving religious beliefs and each can go his own way in religious matters.

When we put together the two words “Christian” and “lawyer,” we actually create an apparently direct and significant conflict for the

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<sup>7</sup> *Id.*

<sup>8</sup> 6 MATTHEW HENRY, MATTHEW HENRY’S COMMENTARY 515 (Fleming H. Revell circa 1930) (1714).

Paul clearly distinguishes between spiritual Christians and carnal Christians. 1 *Corinthians* 3. This distinction is critical for Christians because growing and maturing in Christ enables us to understand the deep things of God. The carnal Christian, therefore, may not struggle with these issues that I will discuss and may look at them as does natural man. I hope Christians understand they should mature in their faith, which “should not stand in the wisdom of men, but in the power of God.” 1 *Corinthians* 2:5. I will refer to “carnal Christians” in this essay as being spiritually immature Christians and similar to “natural man.” If Christian readers find themselves possibly in the category of carnal Christian, please do not take offense and stop reading, but I ask you to receive that prompting in Christian love and read on. God may have something powerful for you. As I use the terms “non-Christian” or “natural man,” they will essentially mean the same, and I hope that there will be no offense taken by those terms. They are only meant to state differences in people that we all recognize. I hope that all readers will be excited to learn of the potential reality of God in all of our lives, and especially in our work.

As we deal with our two initial topic questions involving professional action within the legal profession, we can recognize that natural man probably is able quite easily to separate personal morality from professional morality, placing them in different categories that do not necessarily affect each other. That is, it is easy for many lawyers to say that their personal lives are separate from their professional lives. Having said that, it becomes easy to say that religion is part of their personal lives and therefore does not affect their professional lives. In other words, their religion has no bearing on their professional duties. For these lawyers, the professional duties are governed only by law and by professional ethics, and in any legal work they must or may do whatever is required or permitted under those rules.

For a considerable part of the author’s legal career of almost fifty years, this separation of personal and professional lives has been seen as the justification of both non-Christian and immature Christian lawyers in resolving professional moral conflicts without reference to religion. These Christian lawyers have not found biblical and spiritual answers to their questions, and perhaps do not understand what questions to ask.

Christian lawyer.<sup>9</sup> Some believe that to be both a Christian and a lawyer, individuals must separate personal faith from professional work. Others believe that individuals cannot be both a lawyer and a Christian. These beliefs presume that there is some irreconcilable conflict between being a lawyer and being a Christian.<sup>10</sup> I will demonstrate that this presumption is totally unfounded.

### *B. Setting the Stage: Our Two Topic Questions Explained*

Historically, the ethics of the legal profession recognized the “Creator” and the lawyer’s individual conscience,<sup>11</sup> but now we must candidly recognize that the modern “model” rules of legal ethics are primarily amoral in character. They were developed by majority vote in the committees and in the House of Delegates of the American Bar Association, with little, if any, introduction of Christian moral principles.<sup>12</sup> These rules have been subsequently adopted by the authorities of most states, with some modifications.

Generally, the rules of legal ethics require that a lawyer zealously represent the client within the bounds of the law,<sup>13</sup> provided that he never obstruct justice. The lines between proper and improper courtroom behavior are usually found at the outer boundary of “zealous advocacy” and the front edge of “obstruction of justice.”<sup>14</sup> In almost any cause, the natural lawyer or the spiritually immature Christian lawyer can zealously represent a client within the bounds of law, without judging the client’s prior acts, and still maintain an asserted strong and separate personal morality. Thus, our legal system does work because ethical and moral lawyers, including both non-Christians and Christians, can represent clients who may or may not be guilty—all without any

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<sup>9</sup> The classic “Christian Lawyer” joke goes: “How about going to the Christian Lawyer luncheon with me?” The response is “When did those two groups start meeting together?”

<sup>10</sup> See Michael P. Schutt, *What’s a Nice Christian Like You Doing in a Profession Like This?*, 11 REGENT U. L. REV. 137 (1998).

<sup>11</sup> ALABAMA LAWYERS HANDBOOK 27 (Walter Burgwyn Jones ed., 1944) (recognizing “[t]he attorney’s office does not destroy the man’s accountability to the Creator”).

<sup>12</sup> This statement is based on historical changes in ethics rules and my own experience of twenty-two years of law practice, twenty-seven years of teaching law, and thirty-seven years as a born again Holy Spirit baptized Christian. I attended the annual meeting of the American Bar Association (ABA) in 1983 when the ABA House of Delegates adopted the Model Rules of Professional Conduct, and I did not hear one single moral argument based on religion.

<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2002); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1; DR 7-101 (1980).

<sup>14</sup> *United States v. Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981).

reference to religious values.<sup>15</sup> Of course, this still only justifies what lawyers do in the legal system, but does not satisfy the nagging doubts in the hearts of many Christians.

Unfortunately, too many Christian lawyers avoid our two burning questions. When not avoidable, however, these Christians present timeworn systematic answers that are easily quoted by anyone acquainted with the law or with history or perhaps even with high school civics; none of them fully satisfy. Some of the standard answers of the legal profession are:

1. The accused person is entitled to a fair trial.
2. The accused person is presumed to be innocent.
3. The accused person is not guilty until the government proves guilt beyond and to the exclusion of every reasonable doubt.
4. The accused person is not guilty until the jury determines guilt.
5. Under our legal system, justice is presumed to result from the advocacy system of equally qualified lawyers on each side.
6. The advocacy system requires lawyers to take up the cause of persons accused of crime.
7. Every lawyer must zealously represent his client to the full extent of the law.

These responses are technically correct, sound good, and partially satisfy the intellect. They are the profession's explanations, but they too often do not satisfy the general public who disrespects lawyers and suspects them of dishonesty. For the committed Christian, these responses do not even begin to satisfy the heart even though they supply argument for the intellect. There is still a nagging and desperate need for a better explanation, giving us peace and understanding a sense of pleasing God.

My colleague and friend, Professor Michael P. Schutt, in his essay *What's a Nice Christian Like You Doing in a Profession Like This?*, thoroughly lays out the problems of the legal profession in its public moral image, or lack thereof.<sup>16</sup> Professor Schutt has greatly helped us in further defining the issues with concepts of "moral reasons," "professional sin," and professional roles as "ministers of the law." It is essential that we take the discussion much further to seek answers that satisfy the heart as well as the intellect. To help the Christian lawyer truly understand just why he can or cannot work to set a "guilty" person free, or can or cannot use deception in the courtroom, we must go deeper than man's idea of "rightness." We must understand God's righteousness.

Without the reality of God's presence in their daily lives, lawyers could and probably would act as would a natural lawyer. Therefore, as

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<sup>15</sup> For a discussion of the secular moral implications and justifications for the adversary system, see David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* (David Luban ed., 1983).

<sup>16</sup> Schutt, *supra* note 10.

Christian lawyers, our answers to the two topic questions must come from examining the effect of having the Most High God in our professional lives, that is, the effect of not separating professional lives from personal lives, morality, and religion. For the Christian, this higher calling requires a totally different look at the profession and the practice of law.

### III. QUESTION ONE: DEFENDING THE APPARENTLY GUILTY

Let us consider our first topic question involving the defense of a criminally-accused person known or believed to be guilty. The world's system not only permits but also strongly encourages lawyers to conduct such representation. But should a Christian lawyer take on the defense of such a person?

When seeking to resolve many modern questions of morality, we have difficulty finding specific biblical rules or examples. We search and search and then rely on some analogy or theological interpretation of the Bible, prayerfully seeking revelation from the Holy Spirit.

In regard to this first topic question, we should consider the Gospel of John where Jesus defends the woman taken in adultery. Jesus and everyone else knew she was guilty. The accusers sought to tempt Jesus, just as lawyers frequently are asked similar questions in a tempting manner, seeking to entrap them.<sup>17</sup> Jesus' answer may well be the foundational statement for the most common criminal defense strategy. In the case of the adulterous woman, Jesus did not defend the woman on the merits; rather, He tried the accusers: "He that is without sin among you, let him first cast a stone at her."<sup>18</sup> When no evidence was presented, Jesus dismissed the case and then gave a significant instruction to the accused: "Neither do I condemn thee: go, and sin no more."<sup>19</sup> Even today, defense lawyers do not really try only the guilt or innocence of the accused. Instead, criminal defense lawyers will point the finger of guilt in some other direction, if possible.<sup>20</sup> Of course, we understand the defense's purpose is to raise reasonable doubt in the minds of the jurors.

Relating this Scripture to modern day, the troublesome questions are: "Why would Jesus do that?" and "How does that affect me?"

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<sup>17</sup> *John* 8:1-11.

<sup>18</sup> *John* 8:7.

<sup>19</sup> *John* 8:11. We can accept the actions of Jesus, because of His identity. After all, He was the Son of God, and He could do whatever He chose. But that recognition does not mean that we understand His actions.

<sup>20</sup> There are examples in famous modern cases. In the O.J. Simpson trial, the defense attacked and tried the detective, Mark Fuhrman. See Stephanie Simon, *Attorneys for Simpson Build Defense*, L.A. TIMES, Jan. 6, 1997, at B1. In the Oliver North trial, the defense actually blamed the President of the United States. See Christopher Thomas, *Irangate Figures Don Mantle of Patriotism*, TIMES (London), Mar. 23, 1987.

Scripture does not answer the “why” question for us. To really understand, we must recall that during His earthly ministry Jesus stated that He spoke and acted only as the Father instructed.<sup>21</sup> Therefore, we must conclude He defended the adulteress because the Father told Him to do so. It was therefore righteous for Jesus to do so. The Father must have had a purpose for saving this woman.

But of what consequence is this example for us today? We can accept that God told Jesus what to do because Jesus was different from us. He was a special person who communicated directly with God. He was His Son. We, on the other hand, are just regular folk trying to be good lawyers, good people, and good Christians. How can that story mean anything to us? God never speaks to people today, does He? This thought process is a fairly accurate depiction of where most people today think they stand with God.

First, let us examine another passage from John’s Gospel that has great unrealized potential. Read as Jesus prays and speaks not only of the original disciples, but also about each one of us who has believed in Jesus Christ through their word, and then understand the relationship between spiritual people and the natural world:

And now come I to thee; and these things I speak in the world, that they might have my joy fulfilled in themselves. I have given them thy word; and the world hath hated them, because they are not of the world, even as I am not of the world. I pray not that thou shouldest take them out of the world, but that thou shouldest keep them from the evil.<sup>22</sup>

We see that the Father never intended that we should be taken out of the world. Jesus prayed accordingly that we would be protected from Satan. We are not strangers in a foreign land. Instead, we possess dual citizenship in the world and in the Kingdom of God. Since we are to be in the world, we must work in the world within its limits and the limits God puts upon us.<sup>23</sup> Thus, we practice law in the world’s justice system, but we are not *of* that system, and we are protected from Satan.

Now continue reading:

They are not of the world, even as I am not of the world. Sanctify them through thy truth: thy word is truth. As thou hast sent me into the

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<sup>21</sup> *John* 14:10 (Jesus says, “Believest thou not that I am in the Father, and the Father in me? The words that I speak unto you I speak not of myself: but the Father that dwelleth in me, he doeth the works.”).

<sup>22</sup> *John* 17:13-15.

<sup>23</sup> *See, e.g., Nix v. Whiteside*, 475 U.S. 157 (1986) (resting upon the ethical maxim that an attorney is limited to engaging in legitimate, lawful conduct, the Court held that the duty of confidentiality, which protects a client’s admission of guilt, does not cover a client’s announced plans of future criminal conduct; thus, although attorneys should take all reasonable and lawful steps to further their client’s objective, they are precluded from assisting the client in presenting false evidence).



world, even so have I also sent them into the world. And for their sakes I sanctify myself, that they also might be sanctified through the truth. Neither pray I for these alone, but for them also which shall believe on me through their word.<sup>24</sup>

It is important to first understand that this prayer of Jesus applies to us today. Also, notice that we are not of this world “even as I am not of the world,” that is, just like Jesus was not of this world.

Jesus continues, saying:

That they all may be one; as thou, Father, *art* in me, and I in thee, that they also may be one in us: that the world may believe that thou hast sent me. And the glory which thou gavest me I have given them; that they may be one, even as we are one: I in them, and thou in me, that they may be made perfect in one; and that the world may know that thou hast sent me, and hast loved them, as thou hast loved me.<sup>25</sup>

For the born-again Christian, these verses are among the most significant declarations in the New Testament. Notice Jesus prays that we may be *one* with the Father and *one* with Him. Can we even begin to understand what it means to be one with Jesus and one with God? But, that is what Jesus prays for us! Therefore, it must be possible. What does “oneness” mean? Is this actually how we as Christian lawyers are able to work in the natural world? How can we be in the world but not be *of* the world? Try to understand what this means! Being *one* with Jesus and *one* with the Father, among other things, must mean that my thoughts are His thoughts, my words are His words, and my actions are His actions. What could be God’s purpose in this extraordinary position? In fulfilling our calling as lawyers we can be part of His larger purpose for this world, sharing the gospel to all mankind.<sup>26</sup>

If we can accept that Christian lawyers can be directed by the Holy Spirit as they work in the world’s court system, we must then have some sort of guideline or touchstone. Matthew 6:33 speaks of our position in the world: “But seek ye first the kingdom of God, and His righteousness; and all these things shall be added unto you.”<sup>27</sup> Notice that seeking the Kingdom is not enough; but equally important is the instruction to seek His righteousness. Because we can be one with the Father, we should be able to know His righteousness. It seems that we must seek His way of doing things. We must understand His motivations and His actions. Scripture clearly tells us that His thoughts and His ways are not those of natural man: “For my thoughts *are* not your thoughts, neither *are* your

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<sup>24</sup> John 17:16-20.

<sup>25</sup> John 17:21-23.

<sup>26</sup> We can tell the world about the Father, about Jesus, and about their love for all of us. Notice when all of this is to happen: right now, not some time in the future, in order that the world may know, that the world may believe that the Father sent the Son. What an amazing understanding!

<sup>27</sup> Matthew 6:33.

ways my ways, saith the Lord. For *as* the heavens are higher than the earth, so are my ways higher than your ways, and my thoughts than your thoughts.”<sup>28</sup> If God’s righteousness were the same as my natural “rightness,” He and I would have done a number of things we find in Scripture differently: for example, smiting Uzza for steadying the falling Ark of the Covenant;<sup>29</sup> killing Amalek women, children, and animals and utterly destroying all they had;<sup>30</sup> and killing Ananias and Sapphira for lying to Peter and keeping some of the land sales money.<sup>31</sup> I would have thanked Uzza and rewarded him. The Amalek had several nice animals and certainly the children were innocent, so why kill them all? Ananias and Sapphira held back from the community some part of property sale money and told a little lie to the Holy Spirit—certainly not a death penalty situation for me. God’s ways do not necessarily fit human concepts of what is right or wrong. Even so, all of His ways are perfect, righteous, and holy.<sup>32</sup>

Although God’s righteousness may differ from our concept of rightness, if we are one with the Father and the Son, we can follow God’s direction in our lives, and then our acts will be righteous. If we represent the client whom He tells us to represent, that act is righteous. In the courtroom, if we zealously pursue the course He sets for us, our acts will be righteous. What an exciting concept! This perspective frees us from the heavy bondage of every natural man’s separate concept of what is “right” in any given situation. It must be His righteousness we strive to achieve.

As lawyers, we must be willing to do whatever is necessary to represent lawfully whomever the Lord directs. If the Father tells us to represent a person we believe to be guilty, our representation will be righteous. God is sovereign. His ways are not natural man’s ways, but His ways must become our ways as spiritual men and women. It may be that He plans a totally different result than natural man can imagine. Our place is to be obedient.<sup>33</sup> Sadly, many Christians are guilty of viewing our professional role as does a non-Christian. We may view the jury verdict and the court judgment as the final result of our legal representation. For many, this thought is true, but not for the spiritual person. In reality, God’s true purpose for our representation may not be apparent until sometime in the future. We may not know why God would require us to represent the defendant, but we do know, however, that the

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<sup>28</sup> *Isaiah* 55:8-9.

<sup>29</sup> *1 Chronicles* 13:9-10.

<sup>30</sup> *1 Samuel* 15:2-3.

<sup>31</sup> *Acts* 5:1-10.

<sup>32</sup> See, e.g., *Psalms* 18:30, 145:17.

<sup>33</sup> For a discussion from a natural viewpoint with religious history, see DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 141-84 (1973).

guilty person needs much more than freedom or due process. We know the guilty person needs to know the Lord Jesus Christ. He needs peace with God much more than we need any sense of self-rightness in our law practice. God's purpose may be simply for us to be a witness of the living Jesus to the defendant in the context of zealous representation. God's purpose may extend further, for this person to be found guilty and then to be a witness for Christ in prison. For example, even though I fully believe God wants me to represent this person, I still may lose the case.

Similarly, God may use a plaintiff in a civil case for His purpose. The action, the potential court judgment, and even loss of property are ways in which God may get the defendant's attention. We must understand that God's justice is His total justice, not necessarily what the world may perceive to be the immediate justice of the case.

As Christian trial lawyers, we practice our profession in the world's system with the supernatural advantage of the wisdom and knowledge provided by the Holy Spirit. We may represent guilty and innocent persons accused of horrible acts, despite severe criticism from individuals in the community and even in our churches. When God tells us to pursue a particular course or to represent a particular person, we must obey and be about the Father's business, regardless of what the neighbors or the local church leaders may say. We must hearken to God, not to man.<sup>34</sup>

Two essential elements must exist. The above conclusions are of no value if the lawyer (1) is not truly born again (for he cannot see the Kingdom of God unless he be born again<sup>35</sup>), and (2) does not know the reality and power of the Holy Spirit in his life.<sup>36</sup> To understand God's direction in our lives, Jesus must be more than just an intellectually understood historical figure. He becomes real in our lives by the Holy Spirit.<sup>37</sup> Subsequently, the lawyer is to do the works of Jesus and even greater works.<sup>38</sup>

In our law practice, the Holy Spirit speaks to us in our daily workings, not in audible words, but with such firm and clear direction that we know God has spoken. This direction usually occurs after prayer by experiencing God's real mantle of peace, which passes all understanding.<sup>39</sup> God requires us to be in the world but not of it.<sup>40</sup> Therefore, we may pursue the "worldly actions" as He directs to

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<sup>34</sup> *Acts* 4:18-20.

<sup>35</sup> *John* 3:3-8, 4:23-24.

<sup>36</sup> See, e.g., *John* 14:26; *Acts* 1:8, 2:38, 4:13, 33; 1 *John* 2:27.

<sup>37</sup> *John* 14:21-26.

<sup>38</sup> *John* 14:12 (Jesus says, "He that believeth on me, the works that I do shall he do also; and greater works than these shall he do; because I go unto my Father.")

<sup>39</sup> See *Philippians* 4:7; 1 *John* 3:19-22.

<sup>40</sup> See *John* 15:18-21.

accomplish His righteousness. As lawyers, we must prayerfully determine God's directive in any case wherein we propose to accept employment to be working in His righteousness. In many daily client requests, the sense of being in God's will can come quite easily. In our oneness with the Father and the Son, the morality (righteousness) of the proposed work in these cases is obvious, providing immediate peace about accepting employment. This path will not always be easy, and there will be legal matters initially causing much turmoil and doubt. In such cases, prayerful submission to the Father is necessary to hear His direction. God may very well have placed this criminal defendant before us, for God's purposes not ours.

To answer the first topic question, I believe we must conclude that Christian lawyers not only may, but must, represent persons believed to be guilty if the Father has so directed and provided peace about doing so. After accepting that client, the lawyer must then zealously represent him to the fullest extent of the law.<sup>41</sup>

#### IV. QUESTION TWO: STRATEGIES AND TACTICS

Having insight from the answers to the first topic question, let us consider the second, more general topic question concerning deceptive trial strategies and tactics. First, we will explore the place of truth and justice in the trial. Second, we will determine a Christian's role in that process.

Except for the unusual case of dishonest jurors, most of us believe trial juries generally want to do what is "right" and give the parties a fair trial. Probably the most we can expect from jurors is that they will rely on their natural belief of what is right. The trial lawyer's job as an advocate is to persuade the jury of the client's position within the bounds of the law and ethics of the profession.<sup>42</sup>

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<sup>41</sup> Taking this matter one step further, under the same principles discussed above, a Christian lawyer might well be called by God to full time criminal defense work as a solo practitioner, in a criminal defense firm, or in a public defender's office. All such work, including active defense of accused defendants, will be righteous work for the Christian lawyer as long as the calling is present, the lawyer's work is under submission to the Holy Spirit, and is performed competently. What a great opportunity this is for witnessing the Lord Jesus Christ and for disciplining immature believers!

<sup>42</sup> Our considerations will not include the criminal prosecutor, whose ethical and legal position is substantially different from all other trial lawyers in that he is bound by ethics and law to a higher duty of seeking justice. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669. The author concludes:

In the exercise of their charging discretion, prosecutors must make a fundamental choice about how they view themselves and their roles. In order to fulfill their obligation to seek justice, prosecutors must shed the adversary ethic reserved for the private interest lawyer and impose upon themselves the simultaneous duty and freedom to prosecute only those who are, to the prosecutors' satisfaction, guilty beyond a reasonable doubt.

We understand that the ethics of the profession place upon the trial lawyer no ethical duty to seek truth,<sup>43</sup> but the lawyer is affirmatively forbidden to do a number of specific things that would work to defeat truth, such as present false evidence, misrepresent the law to the tribunal, or misrepresent fact.<sup>44</sup> We hear judges and lawyers speak of trying to get to the “truth” in any particular case as if we could discover what really happened or find the absolute truth. In the courtroom, any “fact” presented is only secondary evidence of what witnesses remember of their sensory perceptions, assuming truthful intent. The assumed “truth” then, in any trial is not necessarily what happened; rather, it is, and must be, only what is implicit in the jury’s verdict. It is all based upon what the jury *believes* what the witnesses *believe* they saw or heard. In any trial, we may never really know what truly and actually happened.

Since there is no ethical duty to seek the truth, then the trial lawyer’s job as an advocate must be to present the known information in the very best light for his client in an effort to win over the jury. The problem is, however, there are two or more sides presenting the “truth” from their client’s perspective.

How then can Christians operate as lawyers in a system like this—in the jury system? How can we seek less than the absolute truth? We are working in a legal system shrouded in the language of absolute truth, but does not always fully honor that concept in attacking the opponent’s “truth,” in accepting secondary evidence, and in leaving the final determination of guilt to six or twelve jurors. Unlike the natural person, the Christian lawyer’s understanding of truth is not a philosophical concept. For the Christian, truth is found in the person of Jesus, who said, “I am the way, the truth, and the life.”<sup>45</sup> What does this mean for us? Of course, it means He is the “way” to salvation, and, of course, it means that Jesus’ words in Scripture are true, and of course it means that He leads us to eternal life. But, how is this helpful to me in the courtroom? In Scripture, Jesus has not spoken specifically about being a lawyer in the courtroom and certainly has not spoken about what we should do in any particular case. What a tangled web we weave! How can we disentangle ourselves and let Jesus be our truth?

Recall from our previous discussion that spiritual Christians are one with the Father and the Son, possessing the indwelling Spirit of God, and guided by the Holy Spirit. We, as spiritual Christians, then look at the issues of strategy and tactics differently than natural man.

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*Id.* at 704.

<sup>43</sup> See MELLINKOFF, *supra* note 33, at 1-15.

<sup>44</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.3.

<sup>45</sup> *John* 14:6.

Why would our view in the courtroom be different? Simply because we are one with Jesus. Jesus is the truth, and He is in us and we are one with Him. This is what He promised in Scripture. He promised we would do the works He did and even greater works,<sup>46</sup> and He promised, "I am with you always."<sup>47</sup> All the more, He prayed that we would be one with Him.

That being our identity and place of being, how do we then work in the world, and especially in the legal system? It seems that we must operate in the natural simply because we work in the world with natural people (non-Christians) as well as with other Christians. When working in the courtroom, we must assume we have natural people on the jury or at least one natural person whom we dare not offend. Therefore, it would not be effective to read Scripture or to speak of Spiritual things to the jury. Paul explained the futility of sharing Scriptural truths to non-Christians in 1 Corinthians: "But the natural man receiveth not the things of the Spirit of God: for they are foolishness unto him: neither can he know them, because they are spiritually discerned."<sup>48</sup> So then, how do Christians speak and work in the world? Clearly, we must speak of natural things with natural terms and natural logic, all directed toward natural persuasion, again because we probably have natural jurors or a natural judge.

Believing that we are spiritual Christians, one with the Father and the Son, we understand our thoughts are His thoughts, our words are His words, and our actions are His actions. Our conversations with Him become our prayers, and we understand Paul's admonition to pray without ceasing.<sup>49</sup> We must also clearly understand that the Father committed all judgment to the Son,<sup>50</sup> and, being one with the Son, we now judge all things through the mind of Christ.<sup>51</sup> We speak God's wisdom.

Once we accept employment in any legal case with His approval or direction, we are in the world's system with a righteous task. This representation will then be seeking a righteous result, because God's direction makes it righteous. In saying this, of course, we seem to equate

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<sup>46</sup> See, e.g., *John* 14:12 ("He that believeth on me, the works that I do shall he do also; and greater works than these shall he do; because I go unto my Father.").

<sup>47</sup> *Matthew* 28:20.

<sup>48</sup> *1 Corinthians* 2:14; see also Thomas L. Shaffer, *Making Religious Arguments in a Secular World*, 8 *QUARTERLY* 32 (1987) (reviewing CHRISTOPHER F. MOONEY, *PUBLIC VIRTUE AND THE SOCIAL CHARACTER OF RELIGION* (1986)).

<sup>49</sup> *1 Thessalonians* 5:17.

<sup>50</sup> *John* 5:22 ("For the Father judgeth no man, but hath committed all judgment unto the Son.").

<sup>51</sup> *1 Corinthians* 2:15-16 ("If any man's work shall be burned, he shall suffer loss: but he himself shall be saved; yet so as by fire. Know ye not that ye are the temple of God, and that the Spirit of God dwelleth in you?").

immediately the client's cause (right or wrong under natural man's standards) to a righteous cause (under God's standards), because it is our continued obedience to God's directions that makes our actions righteous. God's greater purpose in the matter subsumes the worldly legal process and makes the entire matter righteous, regardless of how it appears to the world. This is a major step or even a leap of faith. Its validity depends on our position of oneness with the Father and the Son. We dare not fool ourselves: God requires the Christian lawyer to obey the rules of the profession.<sup>52</sup> For every lawyer, the rules of professional responsibility require that we zealously represent our client to the full extent of the law.<sup>53</sup>

We must clearly understand that we are not talking about whether we can or cannot break the rules of legal ethics. The answer to that question is a resounding "no, we cannot." We are talking about the strategies and tactics that are either specifically or tacitly permitted by the rules of the profession. We are talking about any number of actions that might be ethically ambiguous or even believed morally wrong by lawyers and non-lawyers alike. I am writing about spiritual direction for the actions of a Christian lawyer. Remember, we do not know God's ultimate purpose in any situation, but we do know that whatever He does, and what we do in "oneness" with Him, is righteous.

In answering the second topic question, let us consider four specific examples of trial tactics and strategies. In so doing, we should remember the differences between God's righteousness and man's "rightness." We will again see that obedience to God and seeking His "righteousness" provide new ways to consider the many versions of man's "rightness."<sup>54</sup> Our four examples will be:

- A. using a cross-examination strategy to trap a witness;
- B. trying some other person or issue other than the defendant's guilt;
- C. cross-examining a "truthful" witness to destroy his credibility; and
- D. arguing "innocence" to a jury for a believed "guilty" defendant.

We will look at each of these from the viewpoint of a natural lawyer and a spiritual Christian lawyer, not necessarily to determine their course of action but their source of decisionmaking. We must recognize that, for the spiritual man, the objective is not really one of making a decision, but actually one of receiving and recognizing God's direction and being obedient.

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<sup>52</sup> See, e.g., *Matthew* 22:21; *Romans* 13:1; *Titus* 3:1; 1 *Peter* 2:13-14.

<sup>53</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1; DR 7-101 (1980).

<sup>54</sup> See, e.g., *Acts* 4:19-20.

### A. Using a Cross-Examination Strategy to Trap a Witness

During a trial, assume we believe the opponent's witness is lying or careless with the truth. May we use a cross-examiner's strategy to trap the witness? For instance, may we ask the witness a series of simple single-fact leading questions that take him down an unsuspected path to a point where his admissions seem to contradict his prior testimony, or where they seem to support the cross-examiner's theory? May we then refrain from asking the ultimate question that would permit explanation, and thereby avoid contradiction of the impression created, and thereby also permit a strong closing argument when the witness can no longer respond? This question will be answered in conjunction with the next question in subsection B.

### B. Trying Some Other Person or Issue Other Than the Defendant's Guilt

May we, as defense lawyers, with truthful but perhaps insufficient facts, pursue diversion strategies by trying other issues, or implicating other persons as suspicious actors, or blaming "poorly managed" or even "corrupt" law enforcement systems, all with the purpose of creating reasonable doubt about the defendant's guilt? This and the foregoing issue are substantially the same as the general trial strategy found in the earlier discussion of defending the guilty defendant. Here, however, our question involves *how* to defend rather than *whether* to defend.

We will first attempt to answer these two questions and then look at the remaining two examples. Both of these recognized strategies and tactics of the world's system take advantage of an impression created by half-truths without knowing the full truth of the particular matter. Would using these techniques ever be within God's will for us in any trial?

Exodus gives us some guidance regarding God's willingness for the use of deception against opponents. There we read God's clear intent to take the Israelites out of Egypt and into the Promised Land.<sup>55</sup> God then instructs Moses:

And they shall hearken to thy voice: and thou shalt come, thou and the elders of Israel, unto the king of Egypt, and *ye shall say unto him*, The LORD God of the Hebrews hath met with us: and now let us go, we beseech thee, three days' journey into the wilderness, that we may sacrifice to the LORD our God. And I am sure that the king of Egypt will not let you go, no, not by a mighty hand. And I will stretch out my hand, and smite Egypt with all my wonders which I will do in the midst thereof: and after that he will let you go. And I will give this people favour in the sight of the Egyptians: and it shall come to pass, that, when ye go, ye shall not go empty: But every woman shall borrow of her neighbour, and of her that sojourneth in her house, jewels of

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<sup>55</sup> *Exodus* 3:7-10.



silver, and jewels of gold, and raiment: and ye shall put *them* upon your sons, and upon your daughters; and ye shall spoil the Egyptians.<sup>56</sup>

God directs Moses to speak a half-truth to the king of Egypt, specifying that the Israelites *merely* want to go three days journey into the wilderness to sacrifice to the Lord. This half-truth was repeated to Pharaoh several times before he permitted the Israelites to leave.

In 1 Samuel God deals similarly with an adversary. The Lord rejected Saul as king of Israel and directed Samuel to go to Bethlehem to anoint David as the new king. Samuel feared that Saul would kill him.<sup>57</sup> Although God's purpose was to anoint David, He told Samuel, "Take an heifer with thee, and say, I am come to sacrifice to the LORD."<sup>58</sup> It seems that God clearly planned and executed a deception against Saul to protect Samuel.

These biblical illustrations lead to the conclusion that God may permit or even expect us to use similar methods as trial lawyers. If we do not use the tools of the legal system to which He has called us, not only will our client go to prison or lose his life or property, but, more seriously, we will miss God's purpose and perhaps His plan for this client whom He has brought to us.

Spiritual Christians believe that God calls them to His work in specific tasks or professions.<sup>59</sup> God has called us to be lawyers. Christian lawyers believe that when He called them, He knew what lawyers must do within the rules of the profession.

The great and joyous irony of this is that God's plan for our client may actually be imprisonment, or the loss of property, or even salvation before the death penalty. But we cannot know that purpose in advance. By not knowing, God thus permits us to provide the zealous advocacy required by the system and still accomplish His purpose.

As we grapple with these principles, we are of course dealing with the issue of truthfulness. This struggle requires us to examine Scripture's call to truthfulness.<sup>60</sup> As we read Scripture, it seems that the duty of truth is always present when not dealing with an enemy. Thus, we are told to speak truth to one another, that is, to our fellow believers, to our neighbors, and to those with whom we have ongoing relationships. We must speak truthfully when and where the hearer is entitled to hear the truth. As children of God, I believe that we usually are to speak

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<sup>56</sup> *Exodus* 3:18-22 (emphasis added).

<sup>57</sup> *1 Samuel* 16:1-13.

<sup>58</sup> *1 Samuel* 16:2 (emphasis added).

<sup>59</sup> See, e.g., *Acts* 13:2; *Romans* 8:28, 11:29; *1 Corinthians* 1:26, 7:20; *Galatians* 1:15; *2 Timothy* 1:9.

<sup>60</sup> See, e.g., *Exodus* 20:16; *Leviticus* 19:11; *Proverbs* 12:22, 24:28; *Zechariah* 8:16; *Ephesians* 4:25; and *Colossians* 3:9.

truth to all, unless we know in our hearts that there is a righteous reason to do otherwise.<sup>61</sup> For example, in the biblical lessons cited above, Pharaoh had no basis to expect truth, and, when Samuel anointed David, Saul was not entitled to truth because of his actions and disobedience.

We find this very concept of entitlement to truth in Genesis. God does not disapprove of Abraham's deception. While traveling in the land of Gerar, Abraham believed that "[s]urely the fear of God is not in this place," and feared for his life, thinking, "they will slay me for my wife's sake."<sup>62</sup> Because of his fear, when speaking of Sarah, his wife, Abraham asserted to King Abimelech: "She is my sister."<sup>63</sup> The king took Sarah into his household and Abraham lived.<sup>64</sup> Abraham's statement was actually a half-truth because Sarah was his wife and also a half-sister.<sup>65</sup> But to Abimelech, it was clearly a deception. God intervened and told Abimelech in a dream: "thou art but a dead man, for the woman which thou hast taken; for she is a man's wife."<sup>66</sup> After Abimelech's plea of innocence, God commanded him to "restore the man his wife, for he is a prophet, and he shall pray for thee, and thou shalt live."<sup>67</sup> Abimelech obeyed God, restored Sarah, and dealt kindly with Abraham, permitting them to sojourn in the land.<sup>68</sup> Later, those suspicions changed, and a new relationship of trust grew between these men. In the new relationship, Abimelech required Abraham to swear he would not deal falsely with him or his successors, but rather honestly according to the kindness Abimelech had extended.<sup>69</sup> Thus, as a potential enemy, Abimelech had no right to expect truth, but now as a trusted friend, he did have that right.

In Joshua, we find the account of Rahab, the harlot in Jericho, who believed that the Israelites worshipped the one true God.<sup>70</sup> As Joshua's spies sought to search out Jericho, Rahab hid the Israelites and asked only that she and her family and their belongings be saved when Jericho was captured.<sup>71</sup> She then lied to the king of Jericho saying they had come but had gone, and she sent the king's soldiers in false pursuit.<sup>72</sup>

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<sup>61</sup> 1 *John* 3:19-22.

<sup>62</sup> *Genesis* 20:11.

<sup>63</sup> *Genesis* 20:2.

<sup>64</sup> *Id.*

<sup>65</sup> *Genesis* 20:12.

<sup>66</sup> *Genesis* 20:3.

<sup>67</sup> *Genesis* 20:7.

<sup>68</sup> *Genesis* 20:8-15.

<sup>69</sup> *Genesis* 21:23-24.

<sup>70</sup> *Joshua* 2:1-24.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Scripture tells us of the total destruction of Jericho and its people except for Rahab and her family and all they owned.<sup>73</sup> Rahab had come to a faith decision that Israel worshipped the one true God. Since the king and inhabitants of Jericho worshipped idols and accursed things, they did not deserve to know the truth of the presence of Israel's spies.

Walking into a courtroom today, it is easy to think that surely the fear of God is not in this place, but the Christian lawyer is both in the natural courtroom and in the Kingdom of God. Jesus has promised that He is always with us. We must pray for the judge, the jurors, opposing counsel, opposing parties, our client, and ourselves. During a trial, we may not have time for quiet moments of Bible study and prayer, but we do know that He is there with us to work His will.<sup>74</sup> The spiritually-empowered Christian lawyer enters the courtroom possessing a truly great advantage, as Paul explains as we again read a Scripture considered earlier:

Now we have received, not the spirit of the world, but the spirit which is of God; that we might know the things that are freely given to us of God. Which things also we speak, not in the words which man's wisdom teacheth, but which the Holy Ghost teacheth; comparing spiritual things with spiritual. But the natural man receiveth not the things of the Spirit of God: for they are foolishness unto him: neither can he know *them*, because they are spiritually discerned. But he that is spiritual judgeth all things, yet he himself is judged of no man. For who hath known the mind of the Lord, that he may instruct him? But we have the mind of Christ.<sup>75</sup>

Notice particularly that the spiritual man judges all things. In dealing with a natural jury the spiritual lawyer must use the ways of natural man in order for natural man to hear. The spiritual lawyer can judge both natural and spiritual things. Notice, however, that the spiritual lawyer is not judged by any natural person because natural persons cannot discern divine revelation. The Christian lawyer must operate in the "natural" when facing natural fact-finders, while simultaneously operating in the "spiritual" with the mind of Christ. This is a fantastic understanding of spiritual and natural man in the conflicts of the courtroom and a striking picture of our place in the world and in God's Kingdom.

The lawyer who is simply a nominal Christian church member or is only a carnal Christian does not necessarily have this freedom in the courtroom, and also the spiritual Christian lawyer does not have the freedom to use deception as *he sees fit*. Even spiritual Christians can

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<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., *Proverbs* 3:5-6; *Matthew* 28:20; *John* 17:23; *Romans* 8:38-39; *Philippians* 2:13.

<sup>75</sup> *1 Corinthians* 2:12-16.

walk in the flesh and not in the Spirit, and in those fleshly times they are carnal Christians.<sup>76</sup> Even though we have God's approval or instruction to take on a particular cause, we must remain sensitive to the direction of the Holy Spirit lest we lapse into walking in the flesh. Paul's words are powerful instructions:

*This I say then, Walk in the Spirit, and ye shall not fulfil the lust of the flesh. For the flesh lusteth against the Spirit, and the Spirit against the flesh: and these are contrary the one to the other: so that ye cannot do the things that ye would. But if ye be led of the Spirit, ye are not under the law.<sup>77</sup>*

We must become and remain spiritual people and not be satisfied being carnal Christians. The Bible and the Holy Spirit will clearly point the way to walk in the Spirit for those who want and seek that knowledge.

In answering subparts A and B of this section, as Christian trial lawyers, we first recognize that in these considerations we are always involved in an adversary proceeding, that is, we are on one side of a contested disagreement and always facing opponents.<sup>78</sup> Within the bounds of professional ethics and the law, the Christian trial lawyer must zealously represent his client and his side of the case.

In the courtroom the Christian advocate faces opponents who will try to take his client's property, freedom, or even his life. God has called him to that position, and certainly he is in as serious a position as we have seen in the Scriptures described above. The attorney must use the strategies and tactics permitted in the adversary system. He must use the skills of an advocate.

In a criminal trial, defense counsel has the duty, among others, to require that the prosecution prove every element of the charges beyond every reasonable doubt. In so doing, he must present any other reasonable explanation of the event that may exonerate his client. He must present any evidence that suggests some other person is guilty or some other explanation exists.

### *C. Cross-Examining a "Truthful" Witness to Destroy His Credibility*

We must be very cautious when working to solve improbable and overly simplistic hypothetical questions. Just as in the old legal proverb, "bad cases make bad law," so also bad hypotheticals produce bad conclusions. Also, when we use the words "ethics" or "ethical," we should limit those words to legal ethics as set forth in the rules of professional

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<sup>76</sup> See *Galatians* 5.

<sup>77</sup> *Galatians* 5:16-18.

<sup>78</sup> See *Herring v. New York*, 422 U.S. 853, 862 (1975) ("[T]he very premise of our adversary system of criminal justice is that partisan advocates on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

responsibility. These terms should be distinguished from moral considerations. Many of the ethical rules of the profession are simply amoral.

In cross-examining a truthful witness, the real moral problem arises when the witness has personal traits of weakness and could suffer personal embarrassment as a result of the cross-examination. Such personal traits include: advanced age, fear of some condition, timidity, fear of the courtroom, being overly cautious, easily confused, or easily prodded to anger or to exaggeration.

There has been considerable debate on these ethical issues.<sup>79</sup> Both natural and Christian lawyers certainly must obey the ethical rules of the profession. For most jurisdictions, these rules are stated in the American Bar Association's Model Rules of Professional Conduct (Model Rules).<sup>80</sup>

Under the Model Rules, a lawyer should not ethically pursue this type of cross-examination if the only purpose is to embarrass, delay, or burden the witness.<sup>81</sup> Thus, if there is any other legitimate purpose, the lawyer may cross-examine on a personal trait of the witness, regardless of the effect on the witness.<sup>82</sup> This practice seems acceptable in the profession. Some lawyers, however, have serious moral concerns about the effect of a distasteful cross-examination on the witness, as well as on the jury.<sup>83</sup> It also prompts or exacerbates outside observers' perceptions that lawyers possess few moral principles.

Cross-examining a witness "believed to be truthful" is perhaps one of these overly simplistic hypothetical situations. But, in any event, let us assume the witness's harmful testimony against the defendant is truthful. Regardless of the lawyer's belief, it is his responsibility to his client to recognize the possibility that the testimony may in fact be untruthful. The lawyer usually has no actual knowledge and can judge based only on the words of others and the demeanor of the witness. The

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<sup>79</sup> For example, see the discussion in the dissenting opinion of Mr. Justice White in *United States v. Wade*. *United States v. Wade*, 388 U.S. 218, 250 (1967) (White, J., dissenting).

<sup>80</sup> We will refer to these Model Rules, but for state rules the reader should see the specific rules of that state. States make changes in particular rules and still refer to them as Model Rules of that particular state.

<sup>81</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2002).

<sup>82</sup> See *Shephard v. Am. Broad. Co.*, 62 F.3d 1469 (D.C. Cir. 1995).

<sup>83</sup> See John G. Douglass, Symposium, *Virtual Cross-Examination: The Art of Impeaching Hearsay*, 34 J. MAR. L. & COM. 149 (2003); Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441 (2003); Robert P. Lawry, *A Nation Under Lost Lawyers: The Legal Profession at the Close of the Twentieth Century: Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996); Jennifer Cole Popick, *California Supreme Court Survey: A Review of Decisions: May 1995—August 1996*, 24 PEPP. L. REV. 749 (1997).

“truthful” testimony may actually be based on faulty perception or recollection or bias or prejudice. So, regardless of belief about veracity, there may well be ethical and strategic reasons to test the witness. In these instances, the lawyer must do so and even attempt to discredit the witness’s credibility.

Some personal traits of weakness can possibly raise doubt and place in issue the witness’s actual knowledge. On the other hand, some of these personal traits may only shape the efficacy of the witness’s demeanor on the witness stand or just personally embarrass the witness. Therefore, questions about knowledge-related personal traits might be acceptable cross-examination, while questions about demeanor-related personal traits may be unnecessary, improper, and even morally wrong. In considering these demeanor-related factors, however, the advocate’s determination of his purpose is to be determined from his own perspective rather than that of the witness. There is no ethical violation of Model Rule 4.4 if the lawyer has a substantial valid purpose, even if the witness is personally affected.<sup>84</sup>

How does our professional reputation enter into this analysis—does it matter what the general public thinks of our actions? Loyal and zealous representation of the client requires the client’s interest to come first. At the same time, the lawyer is not required to press for every advantage that might be realized for a client, and must exercise discretion in consultation with the client.<sup>85</sup> The lawyer cannot always find definitive answers in the Model Rules; he must resolve some issues through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Model Rules.<sup>86</sup>

How is the lawyer to balance these concerns, assuming his belief in the truthfulness of the witness and that the only apparent source of cross-examination is the personal traits of the witness? Let us consider this dilemma from the viewpoints of natural man and spiritual man.

For natural man: In considering the nature of the harmful testimony, natural man’s wisdom begins with Model Rule 4.4, and deciding whether there is a cross-examination “purpose” other than to embarrass, delay, or burden the witness.<sup>87</sup> We must again assume the questioning can only make the witness look bad on the witness stand, and further assume we can not cloud his knowledge of facts (we again see the difficulty of “hypotheticals”). Is it proper to make the jury dislike the witness, even if we cannot budge him from the facts? Assuming that we have some ammunition, how do we know what we should do?

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<sup>84</sup> See *Shepherd*, 62 F.3d 1469.

<sup>85</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a); cmts. 1, 3; R. 1.3 cmt. 1 (2002).

<sup>86</sup> MODEL RULES OF PROF’L CONDUCT pmb. 8 (2002).

<sup>87</sup> MODEL RULES OF PROF’L CONDUCT R. 4.4 (2002).

Depending on the moral convictions of the lawyer, considerations may include: (1) how well he can make the knowledge and demeanor distinction in argument to the judge; (2) whether he can get away with the questioning without sanction; (3) the level of help in mitigating the harmful testimony; (4) the resentment of the jury against the lawyer for the personal hurt to the witness; (5) the degree of harm to the witness personally; (6) the relationship of the witness, if any, to the lawyer's client or to any other interested person; and, (7) the client's wishes. If there actually were a trait that could diminish the effect of knowledge, natural man would probably consider that the lawyer's duty to his client requires cross-examination. But even this pursuit might well be questioned and require consultation with the client, if the relevant information would also be extremely embarrassing or harmful to the witness. Obviously, the natural man will be forced to make a decision, consciously or subconsciously. For some, it will seem quite simple—zealously represent the client. For others, the decision to cross-examine is more difficult, requiring considerable discretion and consultation with the client.

For spiritual man: All the natural man's considerations are present, especially those involving the Model Rules. Discretionary decisions include consultation with the client, but spiritual man must go much further. We remember that the lawyer has accepted employment in this case after prayer and with the approval or direction of Almighty God. Once again, we are back to our discussion and conclusions about representing a guilty person and the tactics and strategies accompanying such a case. The lawyer is in a righteous cause because God had directed the representation. God knows His ultimate purpose for these parties, and He knows what they will do. His purpose for the lawyer may have something to do with witnessing Jesus to the client or to the opponents, but we do not know whether we are to win or to lose the case. We do know that He is in control, that we should do our best, and that we should be obedient to His leading through the trial. He knew this very situation would arise, He knows what He wants, and He will inform us of what He wants and expects us to do. If this spiritual answer sounds overly simplistic, let us again stop and re-examine who we are, where we are, and what power we have. We will either have peace about going forward, or the Holy Spirit will check our spirit. Simplistic hypothetical questions are a problem in the natural world. But God is simple when we know Him personally, when we know our position of power in Him, and when we know His sovereignty. When we do not fully know Him or attempt to understand God according to human understanding, then it all becomes very complicated.<sup>88</sup>

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<sup>88</sup> See 1 Corinthians 1:18-31.

In our discussion about defending the “guilty” person, recall our conclusion that God is always with us and provides us with definite direction. We have truly seen that God is real and involved in our professional lives. Of course, the spiritual lawyer will probably consider all of the things we discussed for the natural lawyer, but it is the Holy Spirit who will finally provide the answer. The spiritual Christian lawyer, with that answer and with the peace of God that passes all understanding,<sup>89</sup> will then pursue or not pursue the cross-examination accordingly. Natural man will think this is too simple to be true, but that comes from not knowing the reality of God. This is not a laborious decision process, but rather a simple question-answer session: “Lord, what shall I do?”

*D. Arguing “Innocence” to the Jury for a Believed “Guilty” Defendant*

Arguments, asserting innocence contrary to belief are again overly simplistic hypothetical situations. In every trial, the opening statement and closing argument must always be based on admissible evidence or the absence of evidence. The case of absolute proof of guilt is unlikely, even though possible. It is difficult to assume overwhelming evidence of guilt without *any* contrary evidence, weakness in the prosecution’s evidence or witnesses, possibility of blaming other persons or events, or a reasonable doubt argument. But if none of these defenses were available, how would a defense lawyer argue to the jury? Of course, the lawyer can never argue a personal belief or opinion of innocence.<sup>90</sup> He can, however, argue innocence based on the evidence. As a realistic and practical matter, the defense lawyer cannot zealously represent the client if he is going to look and sound ridiculous to the jury. If there is absolutely nothing to argue, then perhaps the lawyer says nothing or very little, but the possibility of such a case is so remote that trying to hypothesize some argument is impossible.

The quandary emerges when there is legitimate evidence that can be argued in defense, but the defendant has admitted guilt to the lawyer or when the lawyer personally believes the evidence showing guilt. As we noted above, the lawyer can never argue a personal belief or opinion of innocence,<sup>91</sup> but must always argue what the evidence demonstrates. A lawyer could make the argument of innocence if supported by any admissible evidence or the absence of evidence.<sup>92</sup> How can a lawyer in good conscience with this admission of guilt or with this personal belief stand before a jury and argue that the evidence demonstrates innocence?

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<sup>89</sup> *Philippians* 4:7.

<sup>90</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4 (2002).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*



At trial, it may be extremely difficult because the lawyer must project a belief of innocence. The jury will not believe the defendant is innocent unless it perceives that the lawyer also believes him so. Many lawyers will be able to make the argument and project a false enthusiasm for the defense. Regardless of the lawyer's appearance, zealous representation would seem to require that an argument be made with as much enthusiasm as possible, even if the argument is simply the failure of the government to prove its case.

Let us consider the spiritual Christian lawyer's response. Spiritual man's position seems rather simple because God is simple when we really know Him. We recall our previous discussion and our conclusion that God is always with us and provides definite direction. God knows what lawyers in the world are required to do. If there is a plausible defense, zealous advocacy requires argument. The great difference here is the presence of the Holy Spirit who will provide the argument, and in addition provide the spiritual Christian lawyer with the peace of God that passes all understanding,<sup>93</sup> so the argument will be received by the jury just as God intends it to be heard.

In searching for answers and as discussed earlier, we must remember we are never dealing with absolute fact, that is, we are always presenting evidence to fact-finders. As we have recognized, in the courtroom, any "fact" is only the secondary evidence of what witnesses remember of their sensory perceptions.

My conclusion to our second topic question is that a Christian lawyer not only may, but sometimes must, use deceptive strategies and tactics when pursuing a righteous cause and faced with a person or persons who do not deserve the truth.<sup>94</sup> We also must be willing to make the argument permitted by the evidence regardless of personal belief. God will accomplish His purpose through our obedience or in spite of our disobedience.<sup>95</sup> These strategies may be used to the extent permitted by the world's system, limited by our heart's direction.<sup>96</sup>

## V. CONCLUSION

We must be willing to be lawyers pursuing righteous causes, being zealous and even tough as the Holy Spirit leads us, willing to be part of God's total justice and discipline in the world, but not controlled by the

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<sup>93</sup> *Philippians* 4:7.

<sup>94</sup> God showed the use of deception in defeating Israel's enemies. See *Joshua* 2:3-21, 8:2-8; *Judges* 7:9-22; 2 *Samuel* 5:22-25; 2 *Chronicles* 20:20-27. In *Judges*, notice God's reason for use of the small army and deception rather than using the large army, "lest Israel vaunt themselves against me, saying Mine own hand hath saved me." *Judges* 7:2.

<sup>95</sup> Remember the disobedience of Saul in 1 *Samuel* 15.

<sup>96</sup> 1 *John* 3:19-21.

opinions of men. My desire in this essay is to open our minds and hearts to God, as lawyers working in the profession to which He has called us.