Contempt of Court & the ABA Model Rules

[**CLE Ethics**]

On August 27, 1908, the American Bar Association adopted the original Canons of Ethics. Two days later, at an oral argument in *U.S. v. Shipp*, Supreme Court Justice Oliver Wendell Holmes publicly commented that it was a shame that the ABA's actions came too late to help Ed Johnson. Nine decades later, Delaware Supreme Court Chief Justice Norman Veasey, who chaired the ABA's Ethics 2000 Commission, stated that Noah Parden embodied a lawyer's responsibility to his/her client. Across the country, judges – state and federal, trial and appellate – have commented that there is no better example of how lawyers should and should not behave than the century old case of Ed Johnson. Jurist, such as the Hon. Roger Gregory, Patrick Higginbotham, and Judith Kaye, have stated that Parden and his partner, Styles Hutchins, and how they handled this case, should be the role model for all lawyers.

These judges say the Johnson/Shipp case is a clear reminder of why we became lawyers and how lawyers, in the words of the Preamble of the ABA's Model Rules of Professional Conduct, have a "special responsibility for the quality of justice." A good example occurs early in the case (pages 60-61) when the trial judge, Samuel McReynolds, chooses and appoints two lawyers because he knows they do not have the skills to win the case. The judge gets the approval of the district attorney, Matt Whitaker, before making the appointment official.

Preamble and Scope:
[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

(Pages 70-71) – The first lawyer appointed by Judge McReynolds to represent Johnson, Robert T. Cameron, tells the newspaper that he didn't want to represent Ed Johnson, that he was being forced to represent Johnson by the judge, that he hoped his clients wouldn't hold his involvement in the case against him (he made this statement after one of his best paying clients fired him), and that he hadn't made up his mind yet on the guilt of his client.

(Pages 71-72) – In a letter to the newspaper, Johnson's second lawyer, W.G.M. Thomas, writes that he didn't want to represent Johnson either, that he is doing so to obey the orders of the judge, that he is working to ascertain the guilt or innocence of Johnson, and that if Johnson is guilty, then he should die.

(Page 63) – Attorneys Cameron and Thomas do not object when the judge tells them that the case will go to trial in seven days. Nor did they object when the judge told them that they wouldn't have to do much work because Johnson's guilt was certain.

(Pages 122-127, 162-163) – Defense attorney Thomas goes behind his co-counsel's back to the judge and prosecutor, seeking the appointment of three additional lawyers to advise the defense on whether to provide an appeal. Thomas and these three new lawyers advise Johnson to waive his rights to appeal and accept the death sentence.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

(Pages 5-19, 173, 220) – Parden wrote about the case at length in Chattanooga's black-owned newspaper, *The Blade*, in an effort to better educate the public about the court system. He also spoke at churches and community functions. We know as much as we do about this case because of Parden's extensive writings.

(Pages 5-19, 150-187) – Parden was very mindful of the deficiencies in the administration of justice and the need for protection of the rule of law, as required above. It was this interest and commitment that led Parden and Hutchins to file this extraordinary, historic federal *habeas* petition at a time when such petitions were considered frivolous, and raising constitutional objections on issues that would resonate for the next century. This entire story is the struggle over this paragraph.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

(Pages 5-19, 136-187, 219, 234, 243-245) – Parden and Hutchins were clearly led by their personal conscience, morals, and beliefs, as well as a desire to improve the law and the legal profession. These lawyers knew accepting this case would destroy their practice, their financial livelihoods, and even threaten the lives of them and their families. This was the most politically and racially divisive case in decades. The homes and offices of these lawyers were destroyed. They had to flee Chattanooga for their lives. And their client was lynched. Through it all, these lawyers demonstrated their professionalism and commitment to the protection of the rule of law and the defense of their client's rights. Throughout all of this, Parden and Hutchins developed an extraordinary legal strategy (filing the federal *habeas* petition, convincing the U.S. District Court to let them question witnesses under oath, and then their direct appeal to the Supreme Court of the United States) that forever changed the criminal justice system in this country.

As Paragraph 16 states, **"The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."**

(Pages 159-160) – District Attorney Whitaker personally attacked Parden calling him a liar, and stating that Parden's claims were "made of a desire to misrepresent the judiciary and made with a malignant purpose and a wicked heart."

Client-Lawyer Relationship
Rule 1.1 Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(Pages 60-61) – The two original lawyers appointed by Judge McReynolds – Robert Cameron and W.M. Thomas – allowed themselves to be used by the judge. Cameron had tried only a handful of cases in his life, and those were no-fault divorces. He had never handled a criminal case and he certainly wasn't qualified for this one. Thomas openly admitted he didn't try criminal matters.

(Pages 70-71) – The first lawyer appointed by Judge McReynolds to represent Johnson, Robert T. Cameron, tells the newspaper that he didn't want to represent Ed Johnson, that he was being forced to represent Johnson by the judge, that he hoped his clients wouldn't hold his involvement in the case against him (he made this statement after one of his best paying clients fired him), and that he hadn't made up his mind yet on the guilt of his client.

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(Pages 122-127, 162-163) – Defense attorney Thomas convinces the judge to appoint three additional lawyers to help him convince Johnson that he should waive his right to appeal. Thomas claims that he has done his duty as a lawyer in representing Johnson at the trial, but that this obligation or responsibility does not continue. Thomas admits that the lynch mob influenced his decision-making.

(Pages 3-19, 150-187) – By contrast, Parden and Hutchins put everything at stake for their client and for the protection of the rule of law. Not only did the lynch mob not influence Parden and Hutchins, it made them more determined. They faced significant racial hatred, and even some in the black community felt they should back away. Instead, these lawyers actually intensified their efforts. The thoughtfulness and preparation Parden and Hutchins put in this case despite the extraordinary circumstances, was truly historic and a model for all lawyers.

Rule 1.7 Conflict of Interest: General Rule – The commentary (p. 1) on this rule is particularly interesting because it states, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." As noted above, Thomas and Cameron had no loyalty to their client and were far from independent, as their recommendations to their client and their actions in their representation of their client repeatedly demonstrated that they were influenced by the fear of the mob and by their fear of personal or financial harm that they might suffer. (Paragraph two of the commentary specifically states that "A lawyer may not allow business or personal interests to affect representation of a client.") By contrast, Parden and Johnson nearly sacrificed their careers and their lives to defend their client.

Rule 1.9 Conflict of Interest: Former Client – A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(Page 260) – Lewis Shepherd, who did zealously advocate for Johnson during the trial, suddenly shows up representing one of the leaders of the lynch mob in the contempt trial before the U.S. Supreme Court.

Rule 2.1 Advisor – In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

See response to Rule 1.1.

Rule 3.1 Meritorious Claims and Contentions – A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(Pages 3-19, 150-187, 250-270) – This is interesting on two fronts. First, under the existing law in 1906, Parden and Hutchins were clearly reaching in their federal *habeas* petition. And the Attorney General of the United States was clearly reaching when he brought the contempt case against Shipp and the others. But both were very legitimate. Most argued at the time that both actions were frivolous and not in good faith. These were the very reasons that Thomas argued post jury verdict that there should be no appeal of the verdict and that his client should be hanged.

Rule 3.6 Trial Publicity
(Page 79) – District Attorney Whitaker makes highly racist and prejudicial statements to the newspapers that were published the morning of the Johnson trial designed to heavily influence the jury pool.