Trial Counsel's Misconduct as Reversible Error

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THE obstacles to the true administration of justice through law are many and serious.

There are, of course, imperfections in the law itself. There is inherent difficulty in the application of general rules to constantly differing combinations of facts. There are also regrettable deviations caused by the personal failings of some of the judges: lack of capacity, indifference, false pride in an opinion or conclusion once expressed, prejudice, corruption (the latter of which, unfortunately, is not wholly lacking). There is the more subtle deflection caused by a judge's personal sense of what is fair and just which, when in conflict with the law applicable to a given situation, leads him to bend his findings of fact to allow the end suggested by his sense of justice. Most of the latter is unconscious; when deliberate, it is idealized in the judge's mind as being in the interest of "substantial justice" or "true" justice, forgetting, for the moment that if judges decided cases in accordance with what to each appeared just and fair, we would have no law, and overlooking also our boast that ours is a "government of law and not men." The failings—some of them unavoidable—which afflict our judges, prevail among our juries even to a greater extent.

A more potent inherent source of difficulty, rarely realized, is the very nature of litigation. Disputants who are fair-minded and honestly disposed toward each other do not, as a rule, resort to litigation for the determination of an honest dispute between them. Such disputants compose their differences, either by themselves or with the aid of friends, associates, attorneys or mutually agreed upon experts. Litigation, as a general rule, takes place only where either or each of the disputants is dishonest (ethically or intellectually) or unreasonable. An accident happens; an injury results; were the parties involved fair and frank with each other, they would encounter little difficulty in fixing the blame and the fair compensation; but usually the injured
person wants compensation whether he be in the right or in the wrong, and the other party to the accident is just as bent on avoiding compensation whether he be to blame or not; an action at law results. A contract calls for the delivery of a specified kind and quality of adequately described goods; where an honest controversy arises as to whether or not goods delivered under the contract meet the requirements, it is quickly disposed of by resorting to the opinion of reliable experts; but usually either the seller or the purchaser is deliberately seeking to take advantage of the other: the buyer might find that he has no further use for the ordered goods; he desires to avoid paying for them; hence the goods become not up to warranty, either by unjustified mere say-so or clandestine sabotage; or the seller, not having the required goods to deliver, masquerades inferior goods as those called for by the contract and insists upon acceptance thereof; litigation follows. A contract exists; performance becomes unprofitable or impossible on the part of one of the parties; he seizes upon loop-holes in the contract or the other party's performance to escape a fair adjustment of the situation; litigation follows. A life insurance policy provides, in conformity to statute, that it shall be incontestable after remaining in force two years; shortly after the expiration of the two years, the insured dies; the insurance company discovers that he died as a result of a disease which he had at the time the insurance was issued but which he failed to disclose; in such circumstances it requires a high conception of one's contractual obligations to pay the amount of the policy without contest; when that is lacking, there follows an effort to escape somehow the clear provisions of the contract. Other typical examples present themselves to every mind.

Litigation, in all such instances, is a form of warfare. It calls into play the ugliest man is capable of; ethics sink low and temper rises high. Generally speaking, right or wrong matters not. To win is the all-important, controlling objective. All else becomes subordinate.

Such is the attitude and mood of the clients whose causes attorneys are retained to advocate. As his client's advocate, the lawyer absorbs the latter's aim to win; in addition, as a human being, he suffers from that desire on his own account.
As a result, the lawyer is extremely zealous in the trial of his client's cause. He should be. But as one trained and disciplined in detached consideration and judgment no less than in advocacy, the lawyer knows what is fair in the trial of a case and what tactics constitute unfair advantage. Yet the resort to "tricks" is a common spectacle in our courtrooms. The tendency for the lawyer's zeal for victory to propel him beyond the bounds of proper advocacy is a great menace to the administration of justice.

The recent trial at Charlotte, North Carolina, of the Gastonia strikers accused of murder in the second degree, is a case in point. The defendants were not being tried by a jury of their "peers," in any true sense of the term. The beliefs and non-belief of the defendants were anathema to the jurymen. The jurymen were simple, provincial farm folk, devout worshippers of God in the manner of their ancestors, attached to the traditional political and economic order. The defendants were non-conformists in every respect: atheists (blasphemers, in the eyes of the jury), communists, fomentors and leaders of strikes; in addition, they had come from the North for the express purpose of changing the order of things in North Carolina. The general prejudice against the defendants was so great that the venue had been changed from one county to another. The situation called for the most calm presentation of the case and the rigid exclusion of extraneous considerations, to the end that the defendants would be judged on competent evidence of the crimes charged and not their general unacceptability to the jurors. Instead, the prosecutors bent every effort to bring before the jury the fact that the defendants were "communists" (a term which to the jurymen signified everything that is outrageous, vile and hateful), and that not only did the defendants not worship God in the same way as the jurymen but did not believe in God at all. While the trial Judge restricted—he did not wholly exclude—proof of communism as prejudicial, he allowed, on cross-examination, proof of atheism on the ground that non-belief in God was a pertinent factor (as a matter of statutory provision and common sense) in determining the
credibility of the witness.\(^1\) Assuming that as a matter of local law proof of atheism could not legally be excluded by the trial Judge, it does not follow that the prosecutors, themselves ministers of justice, should not have abstained from bringing it in, because the positive prejudice it was known the proof would work far out-balanced its highly questionable probative value.

But, it seems, the prosecutors conceived it their duty to procure a conviction, by whatever means possible. This appears from their closing speeches, which were reported thus in the New York Times:

> "The State painted the defendants as 'red revolutionists,' atheists and murderers. * * *

Clyde R. Hoey, brother-in-law of Governor Gardner, and Jake Newell sought to drive home to the jury that the defendants, particularly Beal and Clarence Miller, were emissaries of the communist party, bent on overthrowing the government and destroying the foundations of law, order and religion. On frequent objections from the defense, Judge Barnhill ordered Mr. Newell to curb the force of his attack." \(^2\)

> "Solicitor Carpenter referred to the defendants as 'devils with hoofs and horns, who threw away their pitchforks and shotguns' and as 'traitors to the cause of law, law enforcement, and our government,' and appealed to the jury with the words 'Men, do your duty; do your duty, men, and in the name of God and justice render a verdict that will be emblazoned across the sky of America as an eternal sign that justice has been done.'

The solicitor emphasized his plea by lying down on the floor of the court to illustrate some of the testimony, kneeling and praying before the jury and hold-

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\(^1\) It is probably true that a very pious man does not, when under oath, consciously tell an untruth; but that is the result of piety and not mere belief or worship. On the other hand, it is equally true that a non-believer, of high ethics, does not consciously tell an untruth on any occasion at which he solemnly undertakes to tell the truth. Therefore, the credibility of a witness depends not upon his belief or unbelief in God but upon the standards of ethics and morality he lives by.

\(^2\) New York Times, October 18, 1929.
ing the hands of Mrs. Aderholt, the slain chief's widow, who, attired in mourning, sat wiping her eyes before the jury box.

He handed the gunshot-riddled coat of her husband to Mrs. Aderholt and told her to 'take it home.' At the height of his emotional appeal to the jury, Judge Barnhill called him to order and instructed him to follow the evidence.

** * * Mr. Carpenter, referring to the defendants, declared that 'peace has returned to Gastonia since these men have gone away.'

Picturing Gastonia as a peaceful and contented community before the advent of Beal and others from the North, Mr. Carpenter denounced the 'foreign communists' as 'fiends incarnate,' saying 'they came sweeping like a cyclone, like a tornado, to sink their fangs into the heart and lifeblood of my community.'

'Mine is a holy gang, a God-serving gang * * *

'Do you believe in the flag, do you believe in North Carolina, do you believe in good roads?' continued the solicitor as he paced before the jury box and painted the havoc and destruction, which, he said, the communists were seeking to bring about by their propaganda and activities.

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The solicitor contended that Beal and his communist associates did not go to Gastonia 'to help the mill workers' but to engage in revolutionary and subversive activities.

This was also the contention of Mr. Cansler who referred to the Loray Mill trouble as a 'fake strike' and to the National Textile Workers' Union as a 'fake union.'

'Life and property cannot be safe where a concern like the International Labor Defense is let loose,' Mr. Cansler told the jury." 3

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The above weird antics and high-power histrionics having occurred in a case that was receiving country-wide attention, it was natural for the lay public to assume that that was permissible procedure in our courts. Indeed, at least one of the great daily newspapers of the country, in advocating editorially that the verdict of the jury be accepted as a final and proper disposition of the case, pronounced the trial "fair" "according to the American system of jurisprudence." 4

If such were our "system of jurisprudence," of what avail would be our meticulous rules of evidence by which it is designed to have a case determined only on first-hand evidence bearing exclusively and directly on the issues involved? In order that a case may be properly determined, it is not enough that the evidence be carefully restricted to relevant and competent matter; it is equally important that the conduct, remarks and argument of counsel be free of aim or effort to have the jury base its verdict on anything but the competent evidence on the true issues, calmly, thoroughly and impartially considered.

"They (unsupported declarations most of which would have been ruled out as immaterial or incompetent if evidence had been offered to show that they were true) violated the reason upon which the law of evidence is founded by spreading facts before the jury without any proof, and virtually, also the rule of evidence which prohibits immaterial and incompetent facts from being proved." 5

"It would seem utterly vain and quite useless to caution jurors, in the progress of trial, against listening to conversations out of the courtroom in regard to the merits of a cause, if they are to be permitted to listen in the jury box to statements of fact calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous and interested counsel. * * * Statements of facts not proved and comments thereon are outside of a cause; they stand legally irrelevant to the matter in

5 People v. Fielding, 158 N. Y. 542, 552, 53 N. E. 497 (1899).
question, and are, therefore, not pertinent. If not pertinent, they are not within the privilege of counsel.”

“If he [the district attorney] becomes a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.”

It is interesting to note that the Supreme Court of North Carolina, fifty-four years before the Gastonia case, reversed a conviction because the prosecuting attorney in addressing the jury said: “The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known.” “The purpose and natural effect of such language,” said the Court, “was to create a prejudice against the defendant not arising out of any legal evidence before them.” In the same case, the Court held that it was reversible error for the prosecutor to have also told the jury that he had received a note from the “bold, brazen-faced rascal” (referring to the defendant) begging him not to prosecute and threatening that if he was prosecuted he would get the Legislature to impeach the prosecutor. The alleged letter, said the Court, “was not in evidence, and could not be, yet its alleged contents were allowed to go to the jury with all the force and effect of competent testimony.” In an earlier case the Supreme Court of North Carolina ordered a new trial because the trial Judge had refused to intervene, beyond stating that he did not approve of the remarks, when the State’s attorney said to the jury with reference to one of the defendant’s witnesses: “Will you give a verdict upon the evidence of this Pennsylvania Yankee—this Rich Square grog-shop keeper?”

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7 People v. Fielding, supra Note 5 at 547.
8 State v. Smith, 75 N. C. 306 (1876).
9 State v. Williams, 65 N. C. 505 (1871).
10 For other North Carolina cases, criminal and civil, see infra, Footnotes 14, 19, 23, 40, 41 and text in connection therewith.
In the trial of criminal cases, deliberately unfair conduct on the part of a prosecutor is particularly reprehensible because the State is as much concerned with acquitting the innocent as with convicting the guilty, and, therefore, its representatives should be particularly careful to accord every defendant a scrupulously fair trial. A public prosecutor is a "quasi-judicial officer representing the people of the State, and presumed to act impartially in the interest only of justice."  

A prosecutor "representing the majesty of the people" "should put himself under proper restraint, and should not in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of reasonable moderation."  

He must conduct himself with due regard for "regularity and decorum" and with "becoming gravity and dignity." "Intemperate language, unproved assertion or pernicious appeals" have no place in a criminal prosecution. In short, every prosecution must be conducted with scrupulous fairness and on a plane above reproach.

Of course, it is the prosecutor's duty to present the case fully and forcefully against the defendant.

"The trial by jury aims to secure popular justice regulated by law. The rules respecting the admission of evidence suffice to protect the defendant from prejudice by irrelevant and hearsay testimony, and declarations unsupported by evidence. It is the right of the People no less than of the accused to address the jury upon every matter legitimately bearing upon the case. The general rule is that each party must keep within the evidence. But the evidence may be examined, collated, sifted and treated in his own way. Whatever of argument, suggestion or inference can be constructed or deduced from it in support of guilt, on the one hand, or of inconsistency, upon the other, is permissible and may be presented with ingenuity, persuasion, vehemence, fervor and effectiveness.

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1 Supra Note 5 at 547.
2 People v. Greenwall, 115 N. Y. 520, 526, 22 N. E. 180 (1889).
3 Supra Note 5.
4 State v. Noland, 85 N. C. 576 (1881).
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* * * they [the jury] are presumed to be the better qualified for their duty after they have considered every phase of the case which the interest and earnestness of the contestants present." 15

But the prosecutor must limit himself to the introduction of proper evidence and to "fair argument, comment and appeal." 16 Where a prosecutor steps beyond those limits, he deprives the defendant of "a fair and impartial trial according to law and according to those methods alike ancient and honorable which still obtain in all enlightened courts," 17 and it is generally held that the defendant is entitled to a new trial. 18

This applies to inflammatory summations; 19 unduly emotional or dramatic exhortations to convict; 20 arguments that the public expects a conviction and that by convicting the jurors would win public acclaim, whereas by acquittal they would suffer public condemnation or other punishment; 21 portrayal of the defendant as already convicted by the public at large; 22 intimidation or coercion of the jury or any of them; 23 appeals to the local pride of the jurors, par-

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15 People v. Mull, 167 N. Y. 247, 253-4, 60 N. E. 629 (1901).
16 Supra Note 5 at 546.
18 Cases cited, Footnotes supra, 5, 6, 8, 12, 14, 15, and 17; infra, 23-26, 30-34; London v. U. S., 149 Fed. 673 (C. C. A. 5th, 1906); Tennille v. State, 159 Ala. 51, 48 So. 662 (1909); State v. Fuller, 142 Iowa 598, 121 N. W. 3 (1909); State v. Leek, 152 Iowa 12, 130 N. W. 1062 (1911); Slaughter v. Commonwealth, 149 Ky. 5, 147 S. W. 751 (1912); Polson v. Commonwealth, 32 Ky. Law Rep. 1398, 108 S. W. 844 (1908); State v. Lee, 130 La. 477, 58 So. 155 (1912); State v. Clark, 114 Minn. 342, 131 N. W. 369 (1911); Sykes v. State, 89 Miss. 875 (1907); Windhana v. State, 91 Miss. 845, 45 So. 861 (1908); State v. Zorn, 202 Mo. 12, 100 S. W. 591 (1907); Wilson v. State, 87 Neb. 638, 128 N. W. 38 (1910); State v. Kaufman, 22 S. D. 433, 118 N. W. 337 (1908).
19 See, particularly, People v. Fielding, supra Note 5 at 542, 546-556; People v. Mull, infra Note 15 at 247, 254-5; State v. Smith, supra Note 8.
20 People v. Fielding, supra Note 5.
21 People v. Mull, supra Note 15.
22 People v. Fielding, supra Note 5; People v. Mull, supra Note 15.
23 Besette v. State, 101 Ind. 85 (1884); State v. Noland, supra Note 14. In the first of these cases, the district attorney in the course of his summation said: "The defense has already succeeded, perhaps, in making a young man of the jury believe this is a black-mailing scheme. I think I know who he is, and I think he has become greatly impressed with that theory." In criticizing that statement, the Court said that the allusion to the possible state of mind of one of the jurors was reprehensible in that it was "well calculated to impair the independence of mind and judgment which it was the right and duty of the juror to maintain." As to State v. Noland, see infra p. 200 and footnote 41.
particularly where the defendant comes from another locality; reference to a prior reversed conviction of the defendant for the same offense. It also applies to statements which play on the racial, religious, political or social prejudices of the jury; the undue vilification of the defendant or his witnesses; the argument that defendant’s personal appearance proves that he is a criminal; the ridiculing of, or adverse comment upon, a witness for the defense because of his election to affirm instead of taking an oath. The prosecution may not bring before the jury persons (not witnesses) whose relation to the alleged crime or criminal excites antipathy to the accused. Nor may the victims of, or sufferers from, the alleged crime be presented to the jury as “silent witnesses.” The prosecutor may not, to the jury or within the jury’s hearing, make assertions of fact not in evidence or offer explanations not based upon or justified by the evidence; nor

People v. Mull, supra Note 15; State v. Smith, supra Note 8; State v. Williams, supra Note 9; Dingus v. Commonwealth, 149 S. E. 414 (Va.) (1929); see footnote 52, infra.

Supra Note 17.

State v. Tyson, 133 N. C. 692, 705-7, 45 S. E. 838 (1903).

State v. Williams, supra Note 9; State v. Noland, supra Note 14.

Besette v. State, supra Note 23, where the prosecuting attorney, in summation, said defendant “has a bad-looking face; ** if his face does not show him to be a bad man, then I am not a good judge of the human countenance.”

State v. Williams, supra Note 9.

Dingus v. Commonwealth, supra Note 24; People v. Michor, 226 App. Div. 569, 235 N. Y. Supp. 386 (1st Dept. 1929). In the latter case, a prosecution for robbery, the district attorney, toward the close of the trial, caused the defendant’s wife to be brought into the court-room and to stand at the rail, stating: “I want the jury to see her.” He then interrogated the defendant as to whether or not the woman was his wife and, upon receiving an affirmative answer, asked him whether he was making $30 a week, and when that was answered affirmatively, asked whether the wife worked, to which the wife answered, “Yes”; and when the Court inquired as to what was the purpose of the performance, the district attorney stated, “I want the jury to see the wife of the man making $30 a week.” The innuendo was put into words in the summation, in the course of which the district attorney made these remarks to the jury: “Did you see the beauty that came in yesterday? Is that the wife of a man that is making $30 a week sweeping floors? Did you see her in her finery? Now, put one and one together.” The conviction in that case was reversed although the appellate court deemed the verdict “amply justified” by the evidence, because the conduct of the prosecution “exceeded the bounds of proper advocacy.”

People v. Buzzi, 238 N. Y. 390, 402, 144 N. E. 653 (1924), where the Court disapproved of the “unnecessary and dramatic presentation to the jury of the defendant’s former husband and Schneider’s former wife as silent witnesses against the defendant.”

Mitchum v. State. 11 Ga. 615, 629-635 (1852).
may he state what witnesses had said off the stand or would testify to if called.\textsuperscript{33}

The rule is not limited to improprieties committed in the course of summation. It applies to suggestive questions asked, even though never answered because of sustained objections thereto.\textsuperscript{34} It applies to every act, statement or innuendo, in the presence of the jury, which might reasonably be deemed to influence the verdict and which is not proper evidence or fair comment thereon.\textsuperscript{35}

The extent to which prosecuting attorneys have sometimes departed from the dictates of fair dealing is amazing.

In a New York case\textsuperscript{36} against a deputy commissioner of city works, tried for the crime of connivance with respect to the auditing or allowance of a false or fraudulent bill or claim against the city, the district attorney in his summation said:

“Defendant changed his style of living from a frame house on Prospect Avenue to a palatial residence on Eighth Avenue, which every man knows cannot be maintained in the style of that neighborhood for less than ten thousand dollars a year. * * * Go and spend an hour in the tax collector’s office the day after the tax levy is confirmed, and look at the long line. * * * I say, visit the tax office on the day after the annual taxes are confirmed and look at the long line, that stretches out into and down the street, of people that are willing to stand there all day in order to save the little rebate which early payment secures. Those people are the victims of the defendant’s fraud. * * * I say the people that you will find there on the line on that day are the victims of the defendant’s crime. You will find there the widow that has starved her brood of little children and seen their faces get pinched and

\textsuperscript{33} Laubach v. State, 12 Tex. Ct. App. 583 (1882); Newton v. State, 21 Fla. 53 (1884). In the latter case, the prosecutor stated in open court, in the jury’s hearing, that a witness’s testimony was contrary to what the witness had told him and others.

\textsuperscript{34} \textit{Supra} Note 31.

\textsuperscript{35} Cases, Notes 5, 6, 8, 12, 14, 15, 17, 23–26, 30–34, \textit{supra}.

\textsuperscript{36} People v, Fielding, \textit{supra} Note 5.
haggard, in order that she might be sure that tax day should not find her with empty hands. It is that woman’s money, coined out of her blood and the blood of her children, that the defendant has stolen and squandered. If you will indulge the pitiful sentiments of your hearts, think of her. Oh, there are unwritten tragedies of that sort enacted, not in the luxurious habitations of Eighth Avenue, but behind the shabby front doors of poor neighborhoods. Look at the old man, standing in line, clutching in his knotted fingers his last year’s receipt. * * * I say you will see old men in that line clutching in their knotted fingers rolls of dirty one-dollar bills. Look at their worn and shabby garments; look at the marks of painful labor written all over their aged and clumsy limbs; it is the money of these people which the defendant has stolen and squandered. These are the people whose cause I plead. They are the victims of the defendant’s crime. These are the people who now, by tens of thousands, are waiting outside for your verdict. Will you do them justice, or will you not? If you shall let this man, loaded with his guilty plunder, escape, then I say you have committed the unpardonable sin.”

The New York Court of Appeals reversed the conviction in that case and ordered a new trial because, by reason of the district attorney’s summation the defendant did not have “the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well-established rule in his case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and the precedent may, at some time, aid in depriving an innocent man of his liberty or his life.” In that case, the trial Judge rebuked the defendant’s counsel for interrupting the district attorney’s remarks with objections and exceptions. In his charge, however, the Judge instructed the jury that the “popular clamor” whether or not it exist and of which the Judge said he “never heard” and the “burden of the tax-payers,” were “considerations which should not control or influence them.” He also warned that the defendant “must be tried only for the crime he has committed, if he has committed one” and that the jury are not “to consider any facts but those which have been proven by the witnesses or the exhibits.” The Court of Appeals held that it could not “be sure that the general and placid language of the charge wholly counteracted the pointed and vigorous words of the district attorney” and that it was the duty of the trial Court “of its own motion” to have “sternly interrupted” the district attorney, “so as to exclude improper statements and comments from the consideration of the jury, for objections made after the district attorney had said what he wanted to were objections made after the harm was done.”
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In another New York case, the district attorney in summation indulged in the following:

"A failure by you, gentlemen, to convict this man of this crime which has been so clearly proven against him; cannot fail to excite widespread comment and indignation among the whole body of citizens of this county but if there is a man before (among) you who will be so callous to public opinion and to the respect of his fellow-citizens, who would be so forgetful and reckless of his oath, so negligent and heedless of the welfare of his family, as to say that Archie Mull did not commit this crime, then I am deceived. * * * It is no wonder that your neighbors have concluded that the integrity and decency of this panel of jurors, instead of Archie Mull, is on trial here today. Don't let it be said, don't let it be said, I beseech you, that twelve honest men cannot be found within the borders of Rensselaer county; don't let it be said of you that, from all the integrity and virtue and respectability of this great county, twelve men cannot be gotten together who will do justice. A failure to convict in this case, where there is no defense and where there is no doubt, cannot fail to create again another epidemic of murder in this county. It cannot fail to bring within our borders hordes of desperadoes and criminals, who rely upon the puerile inefficiency and weakness of jurors here, and will select this as a safe field in which to operate. The consequences of your failure to convict in this case, in my judgment, cannot be weighed or gauged or measured at all. How could a more brutal, wanton and pathetic tragedy be committed than this? * * * but a failure by you now to convict and punish the murderer would seem to me to be a mimicry and mockery against God. It seems to me that this

38 People v. Mull, supra Note 15.
In a North Carolina case, the attorneys for the State on two successive days in the course of the trial and in the jury's presence made motions to withdraw a juror on charges against three of the jurors to the effect that two of them were related to the defendant and that all three had predeterminded to acquit and had promised and agreed to acquit. The motions were denied as unsupported. In the course of his closing address one of the counsel for the State told the jury that one of them had declared that he would not credit the prosecutrix's testimony, "if sworn to until she was as black as his hat." Later in the course of his remarks "he stepped upon the foot of juror James (one of the accused jurors), saying to him, 'I beg your pardon, I only wanted to wake you up,' the juror, as the Court states, not only being awake, but demeaning himself in a manner altogether proper."
In another North Carolina case, the defendant, a negro, a former slave, was charged with the arson of a barn and pack-house on the plantation which had been his former master’s and on which defendant had lived the greater part of his life and on which he was then living as a tenant. Defendant’s counsel, in his summation, spoke of the defendant’s attachment to his old master and the members of the family and argued that the defendant could not in sight of the old dwelling have set fire to the barn. In reply the State’s solicitor said that “it did not appear that he [the defendant] was strongly attached to his old master and his family, as it appeared that when the test came he had a gun in his hand ready to shoot his young master, and is now drawing a pension for it.” There was not “a particle of evidence that he ever came near his young master or that he ever tried or intended to do him the slightest harm,” the solicitor’s remarks being “a mere figure of speech,” intended to call attention to the fact that, during the Civil War, defendant abandoned his master and joined the Union army, and that at the time of trial the defendant was receiving a pension from the government.

for the administration of the law that general respect and confidence which it is of the highest public interest it should enjoy, it is absolutely essential that the business of the courts should be conducted with becoming gravity and dignity; that their judgments should be seen to be temperately considered and impartially delivered; and, above all, that the verdict of the jury concerned should be known to be the result of serious convictions after dispassionate and free deliberations. * * * The treatment of the juror assailed was altogether without excuse. * * * Its effect must have been to fill the juror’s mind with resentment or subdue him with moral fear, and in either event he could not longer be capable of giving it an unimpassioned or a just consideration such a course of conduct after its commission, under the circumstances, admitted of no cure by anything that could be said in the charge. The subjection of the mind of the juror, his loss of self-respect and his apprehension of responsibility to public opinion could not be relieved. The prisoner is entitled to a trial by another jury, because he was not fairly tried by twelve independent competent jurors.”

In that case the entire court agreed that the solicitor’s remarks were in abuse of his privilege and prejudicial. The majority, however, held that inasmuch as no objection was taken at the time of the utterance of the remarks and not until after the verdict was rendered, the appellate court could not or would not interfere. Two of the judges dissented on the ground that the solicitor’s remarks were so prejudicial and damaging that the injury could not have been cured “by anything that could have been said by the Court” and, therefore, the absence of timely objection and exception by defendant’s attorney was of no consequence.
In those jurisdictions where appellate courts do not reverse for harmless error, any error of the prosecuting attorney will not suffice to bring about a reversal, no more than any error of the trial Judge would suffice. The disposition of the case depends upon whether or not the error was prejudicial. If it was, reversal follows; if it was not, the conviction is sustained notwithstanding the error. There are, of course, no satisfactory means of ascertaining the effect upon the jury of a particular error. If the error is slight and the trial Court acts vigorously to overcome it by rebuking counsel and giving proper instructions to the jury, it will be overlooked. Where the Court does not take proper measures to correct the error, and proper objection and exception is taken, the appellate tribunal reverses. Where the offense is highly damaging or it is repeated or there are a number of offenses of cumulative effect, it is held that the defendant is entitled to a new trial even though the trial Court do all it can in an effort to render the error harmless.\(^4\) For “instructions to the jury do not always neutralize either as a matter of law or fact, the effect of improper remarks in their presence.”\(^4\) Where the error is grave, some courts order a new trial even in the absence of objection or exception,\(^5\) and even withdrawal by the prosecuting attorney of the damaging statement is not a sufficient cure.\(^6\)

While the duty to be scrupulously fair in the conduct of the trial of a case rests more impressively upon attorneys representing the People, our system of jurisprudence imposes upon counsel for private parties no lesser duty to act within the requirements of fairness and justice.

“The orderly administration of justice requires counsel for the respective parties to honestly and in good faith aid the Court and jury in determining the questions at issue.”\(^47\)

“We think counsel should learn that the verdict is not the only thing to obtain in a trial in a court of

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\(^4\) The conclusions set forth in this paragraph are derived from the cases noted above.

\(^5\) People v. Fielding, *supra* Note 5.


\(^7\) Laubach v. State, *supra* Note 33.

justice, but that it must be obtained in an orderly and proper manner, and that, if counsel transcend just and proper bounds, the result obtained by such methods cannot stand."

Consequently, attempts by counsel to win a verdict by means or tactics which run foul of justice and fairness are condemned by the courts. The reports chronicle a great variety of the forbidden strategy and reflect the ingenuity that is being exercised constantly to gain unfair advantage.

It is improper to endeavor to win sympathy for a plaintiff by showing his necessitous situation; hence, statement by counsel in his opening address that the plaintiff has a wife and five children is prejudicial error. It is equally improper to attempt to prejudice the jury against the defendant by stating or attempting to show that it is a powerful or wealthy corporation, or that it is a "trust" or a monopolistic combination, or that there exists public dis-

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48 Quoted from Scott v. Barker, 129 App. Div. 241, 249, 113 N. Y. Supp. 695, 701 (1st Dept. 1908). Equally and even more vigorous statements are contained in many of the reports. Typical examples are:

"*** when he [an attorney] attempts to defeat the justice of a cause by interjecting into the trial a wholly foreign and irrelevant matter for the manifest purpose of misleading the jury, he fails to observe the duty required of him as an attorney and his conduct should receive the condemnation of the court. This condemnation can and should be made effective." Wagner v. Hazle Township, 215 Pa. 219, 64 Atl. 405 (1906).

"*** a trial obtained by incorrect statements or unfair argument or by an appeal to passion or prejudice stands on but little higher ground than one obtained by false testimony." Saxton v. Pittsburgh Ry. Co., 219 Pa. 492, 68 Atl. 1022 (1908).

"*** a trial in court is never *** "purely a private controversy *** of no importance to the public." The state, whose interest it is the duty of the court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice." N. Y. Central Co. v. Johnson, 279 U. S. 310, 318, 49 Sup. Ct. Rep. 300, 303 (1929).


satisfaction therewith.62 Equally improper is it to attempt to place before the jury the fact that it would not mean much to the defendant, because of his great wealth, to pay a substantial judgment,63 or that someone other than the defendant would stand the consequence of a verdict of the defendant; hence, it may not be shown that the defendant in an action for personal injuries is protected by liability insurance,64 or that the defendant is entitled to indemnification by a third party under an agreement with the latter.65 The fact of insurance may not be shown to counteract the natural prejudice in favor of a defending charitable organization.66 Conversely, the defendant may not show or indicate that the plaintiff would be compensated by another, if the defendant be held not liable.66a

66a Regan v. Frontier Elevator & Mill. Co., 211 App. Div. 164, 208 N. Y. Supp. 239 (4th Dept. 1924). There a verdict and judgment for the defendant were reversed because the defendant's counsel asked one of the witnesses: "When these men are injured, if they don't sue and get the money out of the elevator, your company has to pay compensation, doesn't it?" And in summa-
Great ingenuity has been exercised in an effort to circumvent the rule against disclosing the existence of insurance: Admissible conversations bearing upon the issues have been utilized as a vehicle for the incidental disclosure of insurance, either by quoting defendant’s reference thereto, or by the identification of persons present thereat as representatives of the insurance company. Witnesses called by the defendant have been cross-examined as to their connection with, or employment by, a named casualty company; the opportunity for such cross-examination readily presents itself where a doctor or expert takes the stand for the defendant; inquiry as to who employed him or at whose instance he made the examination or investigation or to whom he rendered his report, usually brings out the name of the insurance company. In one case counsel for the plaintiff resorted to the device of saying to the jury in the course of his summation:

“There is no evidence that he [the defendant] was insured, most of these people are. There is no evidence that there was anything of this kind here * * * many people get insured, but there is no evidence of any such thing in this case at all.”

Whatever may be the form and whatever the particular occasion, the evil is the same and equally condemned. Indeed, the more studied the stratagem is, the more reprehensible it becomes. It matters not whether the information comes in

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57 Rodzborski v. Amer. Sugar Refining, supra Note 54.
58 McCarthy v. Spring Valley Coal Co., supra Note 49; Simpson v. Foundation Co., supra Note 54.
the form of express statements or is brought out only by suggestion or innuendo or indirection. Hence, the mere asking of questions which suggest the existence of insurance call for a new trial even though no answer be made thereto by reason of the Court's sustaining of objections.51

Equal error is committed by bringing out the fact or creating the impression of insurance on the *voir dire* examination of the jury. At that stage of the trial, however, it is proper for the plaintiff to ascertain whether any of the proposed jurors are connected with or interested in insurance companies or other concerns who frequently defend actions for personal injuries, for such a connection might very well prejudice a person against the plaintiff. Therefore, it is held that plaintiff's counsel may inquire as to whether or not any of the jurors are connected with, or interested in, any liability insurance company or a particular one mentioned by name; 62 but the question is permitted for the sole purpose of

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In the Cosselman case the asking of the question, "Do you know whether they carry insurance for accidents to their employees?" was held to require a new trial, even though the question was not answered, the Court saying:

"While the learned trial Judge made a proper disposition of the matter, nevertheless the propounding of the question was calculated to convey an improper impression to the jury. The inquiry into the matter of insurance is not material, and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible, and, where the trial Court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby, it should, for that reason, set aside the verdict."

In the Manigold case, plaintiff's counsel, in cross-examining a witness who had mentioned a "Dr. Rockwell," asked the witness who the doctor was. Upon objection thereto being sustained, several more questions were asked designed to bring out the identity of the doctor, and finally the witness was asked directly whether the doctor was not representing the insurance company "back of this" defendant. Upon objection being made and sustained, no answer was made thereto. In holding that reversible error was committed, the Court said:

"In order to protect the defendant, its counsel was forced to object to the question and yet, by doing so, he, in effect, admitted the fact; otherwise no objection would have been made."

ascertaining the qualification of the jurors and it may not be used as an excuse for conveying the information that the defendant is insured. The mere inquiry as to the jurors’ connection with a liability insurance company, however colorlessly done, may unwittingly carry with it the suggestion of the existence of the insurance; but that is unavoidable; it is just as important to protect the plaintiff from trying his case before jurors biased against him as it is to protect the defendant from the creation, in the course of the trial, of bias against him. Any suggestiveness carried by the necessary questioning may, and usually is, avoided by questions by the defendant’s counsel concerning the jurors’ connection with or interest in other types of corporations, thereby avoiding, and justly so, the attachment of particular significance to the questions asked by plaintiff’s attorney. Where counsel for the plaintiff goes beyond mere inquiry into the jurors’ interest in insurance companies or in a particular insurance company by a statement or indication that the defense is being carried on by an insurance company, reversible error is thereby committed.

Counsel, on the cross-examination of a witness, may not place him in a false light by unwarranted questions or unwarranted comments concerning his appearance or demeanor. He may not address to the witness unwarranted,

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63 Supra Note 62.

64 Kolacki v. American Sugar Refining Co., 164 App. Div. 417, 150 N. Y. Supp. 93 (2nd Dept. 1914), (where the jurors were asked whether they were interested in the Employers Liability Co. which is “defending this case”); Davis v. Saltzer, 192 App. Div. 921, 183 N. Y. Supp. 108 (2nd Dept. 1920), (where plaintiff’s attorney, after ascertaining that one of the jurors was in the insurance business, remarked “then you issue policies such as these things here,” thus suggesting that the defendant had insurance protection). In North Carolina inquiry concerning the jurors’ interest in an insurance company is permitted on the voir dire only in cases where it is shown that the defendant is protected by insurance, for the limited purpose of disqualifying any juror connected with or interested in the particular insurance company involved. Featherstone v. Cotton Mills, 159 N. C. 429, 74 S. E. 918 (1912); Norris v. Cotton Mills, 154 N. C. 490, 70 S. E. 919; Walters v. Durham Lumber Co., 165 N. C. 388, 81 S. E. 453 (1914); hence, where the existence of insurance does not appear, asking the proposed jurors if they are connected with any liability insurance company is regarded as unnecessarily conveying an improper innuendo, and, where such questioning takes place, a verdict in favor of the plaintiff is set aside. Starr v. Oil Co., 165 N. C. 587, 81 S. E. 776 (1914). This holding is unsound, as appears from the reasoning of Grant v. National Ry. Spring Co., supra Note 62.

65 Weber v. Chic. B. & Q. R. R. Co., 142 Ill. App. 550 (1908) (the witness was asked on cross-examination: “Are you now perfectly cool?” and the witness
abusive or insulting questions or remarks.\textsuperscript{65a} He may not distort the witness's answers by comments thereon or incorrect repetition thereof.\textsuperscript{65b}

Counsel may not, while his adversary is cross-examining, prevent a damaging admission, by making a remark which prompts the witness, nor may he curb or dissipate the effect of an admission by there and then offering an explanation.\textsuperscript{66}

Counsel may not procure the benefit of excluded evidence by persistent questioning or by remarks which convey to the jury the substance of the excluded testimony.\textsuperscript{67} Nor may he tell the jury what uncalled or incompetent witnesses would have testified.\textsuperscript{68}

Counsel may not, under the guise of arguing upon the admission or rejection of evidence, repeatedly or persistently sum up to the jury;\textsuperscript{69} nor may he by peculiar phrasing of his questions, in effect, testify himself rather than elicit testimony.\textsuperscript{70}

Counsel may not distort a trial into a campaign of bickering, vituperation, and appeal to passion and prejudice.\textsuperscript{70a}

Counsel may not make statements to the jury not supported by the evidence or legitimately inferred therefrom.\textsuperscript{71}


\textsuperscript{65b} Philpot v. Fifth Avenue Coach Co., \textit{supra} Note 47.

\textsuperscript{66} Keenan v. Metropolitan Street Ry. Co., \textit{supra} Note 50.

\textsuperscript{67} Friedman v. Press Publishing Co., 64 Misc. 85, 117 N. Y. Supp. 946 (1909), where the fact of the arrest of defendant's driver in connection with the accident involved was thus brought to the jury’s attention.

\textsuperscript{68} Boone v. Holder, 87 Ark. 461, 112 S. W. 1081 (1908).


\textsuperscript{70} \textit{Ibid.}

\textsuperscript{70a} Chertok v. Effremoff, \textit{supra} Note 65a.

He may not tell the jury the results of other allegedly similar cases, or of the prior verdicts or judgments in the same case,\textsuperscript{72} or of settlements by defendant of claims of other parties arising out of the same transaction or occurrence.\textsuperscript{73} Nor may he appeal for damages outside the proper measure.\textsuperscript{74} He may not read, discuss or exhibit matter not in evidence; \textsuperscript{75} he must confine himself within the "four corners of the evidence." \textsuperscript{76} He may not present considerations which have no legitimate bearing upon the case and which the jury would have no right to consider.\textsuperscript{77}

Counsel may not indulge in excessive invectives or epithets nor in unwarranted attacks upon witnesses or attorneys or the latter's conduct of the case.\textsuperscript{78} He may not misrepresent the nature or character of the other party's case or defense.\textsuperscript{79} He may not charge the other party with the suppression of evidence, in the absence of proof thereof.\textsuperscript{80}


\textsuperscript{74} Kinne v. International Ry. Co., 100 App. Div. 5, 90 N. Y. Supp. 930 (4th Dept. 1904); Brown v. Central Traction Co., 237 Pa. 324, 85 Atl. 362 (1912). In the latter case the jury was urged to bring in a verdict that would serve as a punishment and warning to the defendant.

\textsuperscript{75} Koelges v. Guardian Life, 57 N. Y. 638 (1874); Williams v. Bklyn. Elevated, 126 N. Y. 96, 26 N. E. 1048 (1891).

\textsuperscript{76} Williams v. Bklyn. Elevated, \textit{supra} Note 75. Within the "four corners" "counsel has the widest latitude, by way of comment, denunciation or appeal in advocating his case."

\textsuperscript{77} Williams v. B. E. Rr. Co., \textit{ibid.} at 102; Selby v. Ry., 122 Mich. 311, 81 N. W. 106 (1899). In the latter case counsel resorted to the "ingenious invitation" of the jury to render a substantial verdict by stating: "I do not want you to go to the jury room to cut down, on the ground that there will be a settlement in this case; they will go to the Supreme Court; they will always go there."

\textsuperscript{78} White v. Moran, \textit{supra} Note 71; Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116 (1907); Reed v. Louden, 153 Mich. 266, 116 N. W. 1073 (1908); Niff v. City of Cameron, 213 Mo. 350, 111 S. W. 1139 (1908); Keenan v. Metropolitan Street Ry. Co., 118 App. Div. 56, 103 N. Y. Supp. 61 (1st Dept. 1907); Orendorf v. N. Y. Central & H. Rr. Co., 119 App. Div. 638, 104 N. Y. Supp. 222 (4th Dept. 1907), (calling defendant's engineers and firemen "murderers"); Coble v. Coble, 79 N. C. 589 (1878). (where counsel said: "No man who had lived in defendant's neighborhood could have anything but a bad character; defendant polluted everything near him, or that he touched; he was like the upas tree, shedding pestilence and corruption all around him").

\textsuperscript{79} New York Central v. Johnson, \textit{supra} Note 48.

Counsel may not comment unfairly on the other party’s failure to call witnesses. He may not refer to the other party’s previous counsel in such a way as to charge or insinuate that he withdrew because he was convinced that merit was lacking.

Counsel may not prejudice the defenses in the case, by criticizing the law upon which they are predicated; nor may he criticize to the jury adverse applicable decisions.

Counsel may not address the jury in such a way as to inflame them against the other party or arouse their passions or prejudices.

Counsel’s conduct must be fair towards the Court and the opposing party and attorneys throughout the trial and at every stage thereof: in the impanelling of the jury; opening address; presentation of his evidence; cross-examination of witnesses; arguments to, or colloquies with, the Court, in the presence of the jury; statements to, and colloquies with, opposing counsel, within the hearing of the jury; summation; interruption of opposing counsel’s summation; in the making of requests to charge and in taking exceptions to the charge. What counsel may not do directly, he may not attempt indirectly, by demeanor, innuendo, insinuation or other means of creating an atmosphere hostile to the other party.

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83 McCoy v. C. & A. Rr. Co., 268 Ill. 245, 253–6 (1915), where the fellow servant and assumption of risk rules were denounced by counsel as “relics of barbarism” and a “disgrace” to the law. Even though the trial Judge in that case sustained objections to those remarks and told the jury that the remarks were improper and should not be considered, judgment for the plaintiff was reversed and a new trial was ordered because of counsel’s remarks.
85 Ibid. (where counsel exclaimed “for 50 years the railroads in Illinois have been stained red with human blood”); Chicago City Ry. Co. v. Reddish, 139 Ill. App. 160 (1908); Rudolph v. Landwerlen, 92 Ind. 34 (1883); Reed v. Louden, 153 Mich. 521, 116 N. W. 1073 (1908); Williams v. Bklyn. Elevated Co., supra Note 75; Cattano v. Met. St. Ry. Co., 173 N. Y. 565, 66 N. E. 563 (1903); Stewart v. Met. St. Ry. Co., supra Note 50; N. Y. Central v. Johnson, supra Note 48. In the case last mentioned, reference to defendant as an “eastern railroad” whose witnesses and records had been “sent on from New York” and to its defense as a “claim agent defense” were condemned “as an appeal to sectional or local prejudice.”
86 An aggravated example of what counsel’s conduct should not be is presented in Philpot v. Fifth Avenue Coach Co., supra Note 48.
Counsel's misconduct should be promptly and vigorously suppressed by the Court of its own motion. \(^{37}\) The Court should do that in vindication of its own processes, particularly since objection by opposing counsel might prove embarrassing. Constant objection, even though sustained, is apt to have an unfavorable reaction upon the jury. There is also the risk not only of bringing forth prejudicial repartee on the part of offending counsel but also that the objection might be overruled and thus reinforce the harm. \(^{38}\) In any event, placing upon the opposing counsel the onus of objection, places him before the jury in the light of an obstructor while he is in the very act of promoting justice.

A departure from the requirements of fairness is error. Whether or not such error entitles the other party to a new trial depends upon the extent of the prejudice wrought by the error and the curability thereof. \(^{39}\) If the error is inadvertent and of slight effect, it will be disregarded if proper steps are taken by the trial Judge by way of immediate admonition or rebuke to the offending counsel and proper instruction to the jury. \(^{40}\) Where the trial Court does not act properly, the error will be disregarded on appeal only where it is obvious that it did not influence or affect the result. \(^{41}\) Where counsel's misconduct is deliberate, new trials should be ordered and where the trial Court fails so to do, even though it does all it can, by rebuke and instructions to the jury, to cure counsel's error, judgments in favor of the erring parties are reversed on appeal, because the courts take into consideration not only the prejudice worked thereby but also the moral consideration that one should not be permitted to secure the benefit of an ill-gained result. \(^{42}\) A highly prejudicial remark

\(^{37}\) Cases supra. See, for example, N. Y. Central v. Johnson, supra Note 48, Chertok v. Effremoff, supra Note 65a. Regan v. Frontier, supra Note 56a.

\(^{38}\) See Benoit v. N. Y. Central & H. R. Rr., supra Note 52.

\(^{39}\) Cases supra. See, for example, Waldron v. Waldron, supra Note 71.

\(^{40}\) Cases supra. See, for example, Benoit v. N. Y. Central, supra Note 52.

\(^{41}\) Cases supra. See for example, City of Shawnee v. Sparks, 26 Okl. 665, 110 Pac. 884 (1910).

or act of counsel requires a new trial, whether or not corrective measures are taken by the trial Court, even where counsel withdraws the statement or apologizes for the act, because the effect thereof cannot be erased from the minds of the jury. Where the error is great and serious, an appellate court will order a new trial even though no objection or exception was taken by the other party.

The duty of the trial Court to suppress impropriety on the part of trial counsel and to take adequate measures for the protection of the rights of litigants from adverse counsel's misconduct, is clear. The standards the law imposes in the trial of a case accord with the dictates of morality and proper professional esprit de corps. They are idealistic in that they run counter to the selfish interests and instincts of the persons involved—they curb the predatory conduct incited by the will to win and the rewards of victory. But they are of practical necessity to the proper functioning of our courts.

In this respect, as in many others, the fault is not in our law nor in our codes or rules of procedure. More legislation—whether of addition, modification or subtraction—will not help. Nor will lectures or exhortations to the Bar or its prospective members, or greater selectivity in admission to the Bar, be of any avail so long as skill in misconduct will "bring home the bacon." We are dealing here with a weakness of human nature. To expect all the members of the Bar to voluntarily rise and remain above a failing common to mankind (particularly in the face of their economic and social necessity to please their clients) is to flatter the Bar as comprised exclusively of great men. The Bar, probably, has more than its pro-rata share of men of high character; but no calling ever was, or can reasonably be expected to be, exclusively of the great.

Yet the administration of justice can easily be rid of counsels' misconduct in open court. The power rests with our trial judges. We have seen from the cases considered that the higher courts, throughout the land, do not hesitate to set

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93 I. C. Rr. v. Sanders, 178 Ill. 585, 53 N. E. 408 (1899); Chic. City Ry. Co. v. Reddich, supra Note 85.
aside judgments tainted with counsel's misconduct. But so long as the trial judges do not discharge their duty in this matter rigidly and vigorously, reversals on appeal do not have the necessary restraining effect. Every lawyer knows that procuring a reversal on appeal is a difficult task; and those lawyers whose sole concern is the attainment of the desired result endeavor to win their objective at all hazards, being perfectly content to run the risk of a reversal should an appeal be taken, particularly since the taking of an appeal is not always financially practicable. Moreover, the trial judge acts in the presence of the clients and the witnesses, and a rebuke in open court or the declaration of a mistrial visits upon the offending attorney immediate and forceful discipline of great deterrent power.

It has sometimes been urged that requiring a new trial because of counsel's misconduct is to visit upon the litigant punishment deserved only by his attorney. This argument was answered in one case,\textsuperscript{9} thus:

"We are not unmindful of the fact that by our decision the error of the plaintiff's counsel will be visited upon his client, but that fact cannot be permitted to affect our judgment; all the more that possibly this decision may have a salutary influence, in restraining counsel to the end that the rights of parties litigant may be protected, and not abused."

As a matter of fact, counsel's incentive to go beyond the bounds of propriety is the additional retainers that success will bring. Litigants want success, and, ordinarily, are not concerned with the means used in obtaining it. The lawyer who gets for the litigant the desired result, is the lawyer whom he wants. If litigants should find—as they soon would if trial judges performed their full function in the premises—that success cannot be obtained by counsel's unfair tactics, that type of practice would cease to be profitable and become obsolete.

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\textsuperscript{9} Halpern v. Nassau and Electric Ry. Co., \textit{supra} Note 52.