

Resume in Support of the Nomination of the Honorable Peter T. Fay, Senior U.S. Circuit Judge

Judge Fay's own words best epitomize his unparalleled professionalism, civility, and commitment to our profession: "our profession is one of the three noble professions and is the one responsible for maintaining our democracy and preserving our rights."

In 1985, Circuit Court Judge Peter T. Fay addressed the International Society of Barristers in his speech entitled, "Attorneys as Officers of the Court." The speech examined the ethical implications attorneys face in the midst of changing economic and social expectations. Judge Fay concluded that the solution to the current problems facing the profession centered around a return of a higher standard of ethics. Judge Fay emphasized loyalty to the system, to the search for truth, and to the diligence of professionalism. The speech was later published in the International Society of Barristers Quarterly in April of 1985 and reprinted in the Federal Bar News and Journal in July 1986. In his speech, Judge Fay observed, "Our entire system is based upon a search for the truth. What are the facts? What are the equities? What is the wrong, if one exists? But always - a search for the truth! We label ours an adversary system. But who are the adversaries? Attorneys advocate the cause of their client, but they perform this duty as officers of the court." Judge Fay's more informal mantra, whether counseling lawyers or law students, is direct and unequivocal: "play by the rules."

But Judge Fay not only talks the professionalism talk, he walks the walk. Judge Fay does not approach the issue of ethics from an academic standpoint. Rather, he bases his convictions on his more than sixty years' experience as an exceptionally talented trial lawyer and jurist. His unyielding commitment to professionalism and community service has been widely recognized during his distinguished career. In 1987, Judge Fay was rated the best-qualified judge in the Dade County (Florida) Bar poll. As one Miami attorney put it, "He's a real human being, a bright man and an able jurist. He's the type of person you aspire to being like and you want your children to look up to." As I have often commented, both privately and publicly, Judge Fay is—and has been throughout his distinguished career—the recognized "gold standard" for our profession. Of course, I am not alone in recognizing Judge Fay as an aspirational role model of professionalism and civility.

Judge Fay's many honors include Outstanding Federal Appellate Judge by the Association of Trial Lawyers of America, the Florida Bar's William M. Hoveler Judicial Professionalism Award, the Perry Nichols Award recognizing professional integrity, drive and sensitivity and honorary L.L.D. degrees from Rollins College, St. Thomas University and Nova University. Judge Fay was the recipient of the Sixth Annual William Hoveler Award for Ethics, Leadership and Public Service from the University of Miami School of Law. He was also recognized as a Legal Legend in 2008 by the Eleventh Judicial Circuit Historical Society. Last year, the St. Thomas University School of Law renamed itself in his honor.

Judge Fay is active in the legal community in promoting professionalism as evidenced by his continuous involvement in the Peter T. Fay Inn of Court at St. Thomas University School of Law and the Peter T. Fay Jurist-in-Residence Program at the University of Florida. Over his entire legal career Judge Fay has been a leader in the improvement of our legal community as evidenced by his enthusiastic participation in numerous moot court competitions at various law schools, his

countless speeches regarding professionalism to both students and practicing attorneys and his extensive participation in federal appellate and trial practice seminars. These seminars are a personal favorite of Judge Fay because they provide unique opportunities for others to see inside the federal court system and gain insight from both judges and the country's leading practitioners.

A program in which Judge Fay has been very involved is the University of Florida College of Law Peter T. Fay Jurist-in-Residence Program. (It is noteworthy, and reflective of Judge Fay's genuine humility, that the naming of this program was accomplished by his colleagues over Judge Fay's protestations.) This endowed program works on bridging the gap between the academics which students learn in law school and the practice of law. It provides students with a unique opportunity to understand the judiciary and the role it plays in protecting the rule of law. The program brings judges to the law school annually for three to five days of classroom visits and informal discussions to provide insights to students and faculty on a broad range of issues relating to the judicial process, substantive law, trial and appellate advocacy. Chief Justice John Roberts, when inaugurating the Jurist-in-Residence Program, applauded the fact that it will bring extraordinary judges, such as Judge Fay, to the law school to enrich the educational experiences of the students.

After years as one of the most respected, accomplished and professional trial lawyers in the State of Florida, Judge Fay took the bench in 1970. Judge Fay's judicial experience and services are extraordinary, reflecting his deep commitment to our profession:

- United States District Judge from 1970 - 1976
- United States Court of Appeals Judge from 1976 - present, taking senior status in 1994
- Member of Three Judge Panel appointing and supervising the Independent Counsel, 1994-2006
- National State-Federal Judicial Council Co-Chair
- Federal Judicial Center Faculty Member
- Attorney General's Advocacy Institute Faculty Member, Dept. of Justice
- Eleventh Circuit Standing Education Committee Chairman
- Judicial Conference Committee for the Implementation of the Criminal Justice Act
- Judicial Advisory Committee on the Codes of Conduct
- Appellate Rules Committee Member
- Federal Judges Association Member
- American Judicature Society Member
- Ad Hoc Committee on the Media Petition ("Cameras in the Courtroom")
- National Advocacy Center Faculty

Judge Fay's dedication to promoting, and being an exemplary role model for, professionalism in the legal community is evidenced by the following recognitions:

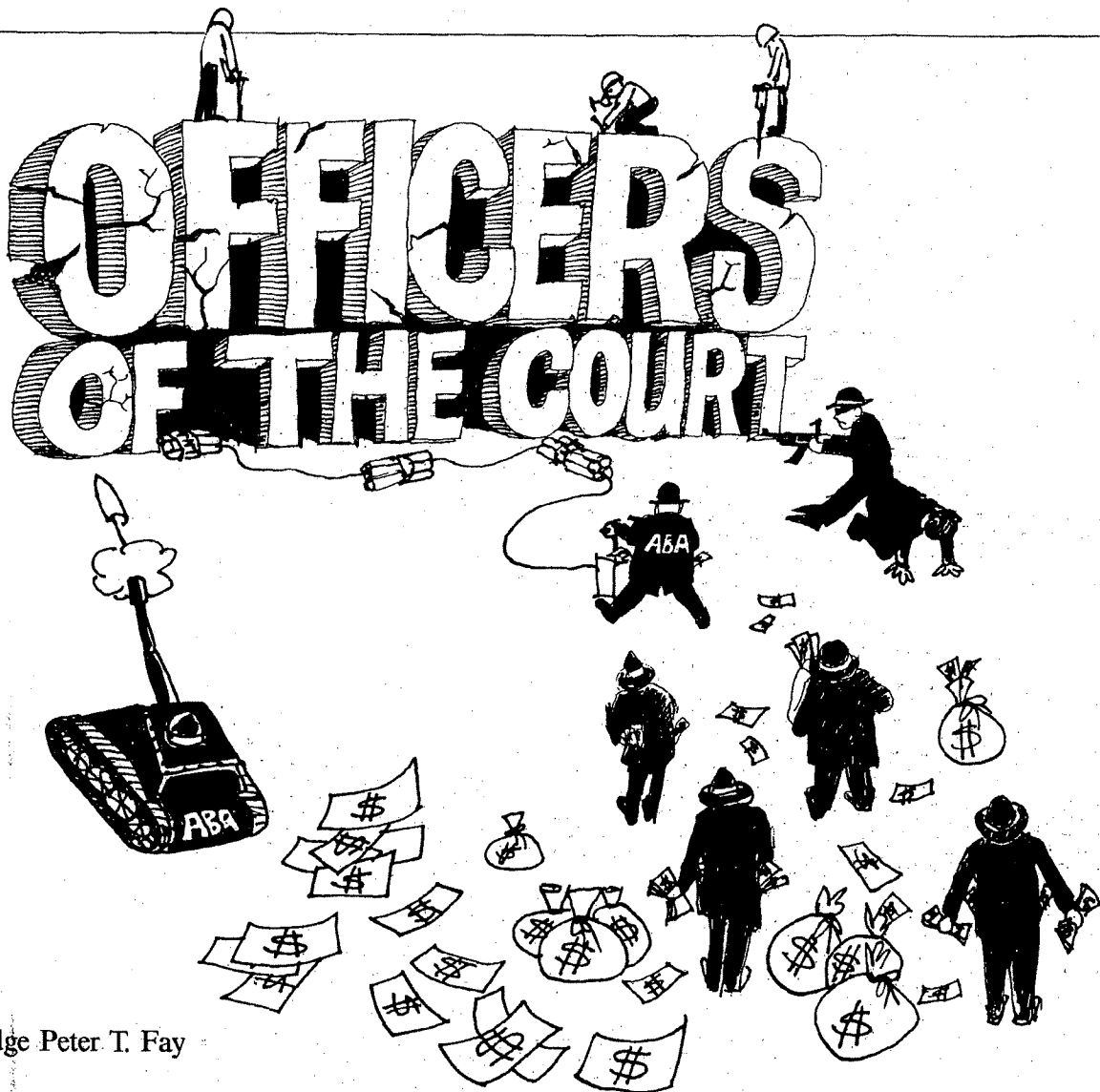
- 2010 Florida Bar William M. Hoeverler Judicial Professionalism Award
- 2018 American Inns of Court Professionalism Award for the Eleventh Circuit
- Peter T. Fay School of Law at St. Thomas University
- Peter T. Fay Inn of Court

Other background information that bears on this nomination includes:

United States Air Force 1951-1953
Inter-service Military Judges' Seminar
University of Florida Law School Board of Trustees
University of Miami Board of Trustees
Rollins College Board of Trustees
St. Thomas School of Law Advisory Board
University of Miami School of Law Visiting Committee Chairman
University of Florida Alumni Association Executive Council St. Thomas
American Inn of Court President
Law-Science Academy Fellow Orange Bowl
Committee
Executive Committee of the Miami Citizens Against Crime
Miami Coalition (citizens' organization to combat illegal drugs)
Board of Directors of Children's Service Bureau of Miami
Chamber of Commerce
Jaycees of Miami
United Way of Dade County
American Bar Association Committees Florida Bar
Association Committees
Dade County Bar Association Committees
Florida Bar Association Continuing Legal Education Programs Lecturer
Academy of Florida Trial Lawyers Board of Directors
Florida Bar Association Grievance Committees
Florida Bar Association Attorney for Presenting Grievances to the
Supreme Court of Florida
Florida Bar Association Junior Bar Section Board of Governors

Also, Judge Fay was a recipient of the Silver Medallion from the National Conference of Christians and Jews, Order of St. Gregory, designated as a knight by Pope John Paul II and inducted into the Rollins College Sports Hall of Fame.

Finally, and perhaps most importantly, Judge Fay is an all-around good human being deeply committed to his faith, his family, his country, and his profession. I can say with the greatest conviction that Pete Fay is the most accomplished, yet sincerely humble person, not to mention judge, that I, and countless others, have had the privilege of having as a role model. Judge Fay's unparalleled service to our profession is performed for all the right and unselfish reasons; never for self-promotion, recognition, or reward. That is precisely why Judge Fay deserves this unsolicited recognition from his peers.



by Judge Peter T. Fay

A few months ago a group of criminal defense lawyers met in Key West. During the welcoming remarks the chairman stated — and I quote:

The U.S. Attorneys who prosecute your clients are young scumbheads.

.....
Lawmakers who write anti-drug legislation are scumbags.

.....
Most of the judges who hear our cases are disgusting pieces of s_____

The meeting was attended by 200 officers of our courts.

On January 31, 1985, in a published opinion, the Eleventh Circuit Court of Appeals affirmed a fine of \$50,000 imposed upon two attorneys from one of the most respected law firms in Atlanta, Georgia. They had advised their client on how to violate a direct order of the U.S. district court. Experienced, respected officers of the court.

Last year a Wall Street law firm was fined \$50,000 for violating Rule 11 and making baseless allegations in court pleadings. In West Palm Beach, a district judge struck the pleadings of Piper Aircraft for deliberate violations of discovery orders by the principals of the corporation and counsel in a multi-million dollar death case.

In the *Dalkon Shield* case, there is now sworn testimony given by a young attorney concerning the deliberate destruction and withholding of records upon the advice of senior house counsel — all serving as officers of our courts.

The Third Branch of government is totally unique. Our entire system is based upon a "search for the truth." What are the facts? What are the equities? What is the wrong, if one exists? But always — a search for the truth!

We label ours an adversary system. But who are the adversaries? Attorneys advocate the cause of their client, but

they perform this duty as officers of the court.

Let's examine for a few moments the historical origins and meaning given this honored title. Let's examine the reality of the roles played by today's lawyers. Let's discuss the priority of loyalties upon which hinges the very survival of our way of life.

Historical Origins

While the precise origin of the term "officer of the court" is unclear, all agree it was an integral part of the English system when lawyers actually worked for the king, and were "directly amenable to the king as parts of his judicial system."¹ The first licensed practitioners were called "Servants at law of our lord, the King."²

In 1275, what is believed to be the first statute regulating the practice of law was enacted. It provided that :

[I]f any Sergeant, Pleader [Attorney] or other, do any manner of Deceit or Collusion in the

King's Court or consent (unto it) in deceit of the Court (or) to beguile the Court or the Party and thereof be attainted, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead . . . in (that) Court for any Man.³

It is notable that the very first attempt to regulate an attorney's professional conduct dealt with the prohibition of deceit upon the court.

Though the term "officer of the court" has acquired a slightly different meaning,

due to the differences between our legal system and that of the British, it is undisputed that "[t]he role of a lawyer as an officer of the court . . . became firmly embedded in our tradition."⁴

Courts now generally invoke the term to describe a whole host of duties owed by the lawyer to the court. Though the lawyer's duties are varied, they are essentially rooted in a notion of a requisite candor to the court — a duty which

exists independent of and separate from the duties owed to other parties, particularly the lawyer's client.

Little was done in this country to change the English concept until some states adopted codes of ethics. Alabama was the first in 1887. Other states followed and the American Bar Association joined suit in 1908.⁵ Canon 22 began with the statement: The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." This canon goes on to prohibit the citing of overruled cases or repealed statutes or the assertion of facts not proved. Canon 37 of the same code *required* the attorney to reveal "the announced intention of a client to commit a crime" and such information as necessary to prevent the act or protect those against whom it is threatened. Compare that with today's Model Rule 1.6 and its "weasel words."

In 1887, the Alabama Code had a canon entitled "Client is not the Keeper of the Attorney's Conscience." Canon 10 provided that "the attorney's office does not destroy the man's accountability to the Creator."

When most of you and I started practicing law, if an attorney was called to testify the judge would announce "there is no need for an oath as this witness is an officer of the court." How far have we progressed? The 1969 ABA canons did not even contain a section dealing with the lawyer's obligations to the court. Most of the lawyer's obligations were embodied in Canon 7 — the zealous representation rules. Of the ethical considerations, two were stressed. The first emphasized the uncertainties involved in determining the bounds of the law. The second stated clearly that when one serves as an advocate all doubts as to the bounds of the law should be resolved in favor of the client. This, to me, is a clear erosion of the concept of any loyalty to the system, to the design, to the search for truth and to the court.

Another example of the changing concept and erosion of any obligation to the court is Canon 4 — the "Fraud on the Tribunal" provision. As proposed it read:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

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But in 1974 it was amended. A proviso was added which read "except when the information is protected as a privileged communication." In view of the fact that virtually all fraud committed on the court will involve a confidential communication (attorney-client privilege), these words totally emasculate the mandate of disclosure.

Today's Model Rules

The Model Rules of Professional Conduct adopted by the ABA in 1983 reflect a continuing decline in a lawyer's obligations to the court or, indeed, to standards of decency. Nowhere will you find any reference to "officers of the court" or anything resembling such. Rule 1.6 says it all:

Confidentiality of Information*

(b) A lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the

client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation to the client.⁶

Notice the use of the word "*may*," to which I have added emphasis. The lawyer has no obligation as a professional. We can ignore the attorney-client relationship to collect a fee but have no obligation to do so to prevent a murder.

Though the lawyer's duties are varied, they are essentially rooted in a notion of a requisite candor to the court — a duty which exists independent of and separate from the duties owed to other parties, particularly the lawyer's client

Is it any wonder our credibility with the public is low?

The debate that raged within the ABA received wide coverage. Well-respected organizations, like the American College of Trial Lawyers, took sides.⁷ And what did they argue? The attorney's "*sole* responsibility is to render advice to his client concerning the legal means available to resolve a problem." How far we have come from the dual obligation expressly recognized by 19th and early 20th century commentators on professional ethics. As one of them stated:

An attorney owes to his client a duty of fidelity but he owes the same to the court. . . . He violates his oath of office when he resorts to deception or permits his client to do so, and by such acts forfeits his rights as an attorney.⁸

Model Rule 33, entitled "Candor to the Tribunal," is about all that is left of the early philosophy. It does prohibit false statements of material fact or law, proffering false evidence and the failure to disclose a material fact when disclosure is necessary to avoid assisting the client in criminal or fraudulent conduct. Of course, all of these duties are based upon a "knowing" act. There is no duty whatsoever to "aggressively ascertain the truth of the matter."⁹ The attorney is protected by ignorance. He obviates the mandate of the rule by simply not asking the client too many questions.¹⁰

The situation that exists today was summed up recently by Arthur Miller. He stated: "This behavior is easily explainable given a professional ethic mandating that lawyers owe complete allegiance to their clients, very little to the system, and none at all to the adversary."¹¹

Personally I am ashamed of the position of the American Bar Association and regret very much the discredit brought upon our profession by its action.

Loyalty to Whom

Our generation has seen marvelous advancements in the art of advocacy. Video depositions are routine. LEXIS and WESTLAW have revolutionized legal research. Hearings can be conducted

**Editor's note:* The Florida version of Model 1.6 is Rule 4-1.6, Rules of Professional Conduct and mandates disclosure by a lawyer of the client's intent to commit a crime and to prevent death or substantial bodily harm.

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through telephone conference calls. But the concept of advocacy has also seen other changes far from beneficial.

The judge and the attorney are not advocates. The court is not the attorney's "enemy." Attorneys are the most important players in the drama of the courtroom. It is the lawyers who marshal the evidence. It is the lawyers who present the testimony and exhibits. It is the attorneys who present the law and legal arguments. These "officers of the court" are the lynchpin of the whole system. They are the very mainspring of our chronometer.

We must return to the basic truths of our profession. We must return to the traditions of true barristers.

Attorneys' first, primary and overriding loyalty must be to the system. An attorney must be an "officer of the court" before he even meets a client and he must remain so throughout his relationship with that client. As Professor Pike puts it, the attorney must view his role as an "officer of the court," not merely as a restriction on his temptation to muck up the judicial process, but rather as a challenge to serve as a magistrate-in-the-first instance.¹² The client is entitled to sound, honest legal advice — but nothing more!

Attorneys must be loyal to themselves. We must return to the principle that attorneys act independently of the client. "A lawyer is not a hired representative who does solely the bidding of a client."¹³ We are not, and must not become, hired guns. Lawyers must reassert their roles as independent professionals.

And lastly, fraud on the court *must* be revealed, regardless of any breach of confidentiality. As Chief Justice Burger has pointed out, the duty to a client "never was and is not today an absolute or unqualified duty."¹⁴ The rendition of a judgment on the merits, with all the facts before the court, is the goal of our legal system. "Winning by lying" is never justified. "Winning by deceit" is no different.

In criminal cases we often tell juries that regardless of the verdict, guilty or not guilty, society wins when the defendant receives a "fair trial." This same principle applies in all cases. We all *win* when the parties receive a fair trial. We all *lose* when the system is cheated. We are engaged in a "search for truth."

Conclusion

The legal profession has sunk to new lows. The "drug kings" in South Florida

have "house counsel." Many attorneys throughout our land have become nothing more than mouthpieces for their clients. Moral values have become a thing of the past. Justice has been redefined. "Win at all costs" is the new motto. An why? This is the worst part of the problem — for money. Pure and simple — lucre!

Please understand. I have no sympathy toward the drug dealer who pays \$50,000 to his lawyer to work out a "plea bargain." But I am concerned about the lawyer who has "sold out" to the mob.

In criminal cases we often tell juries that regardless of the verdict, guilty or not guilty, society wins when the defendant receives a "fair trial." This same principle applies in all cases. We all lose when the system is cheated

I have no sympathy toward the corporation paying millions in attorneys fees because it was more profitable to continue marketing a known defective product. But I worry about the attorneys who advise and assist in the destruction of records.

As one early writer put it: "Let him [the attorney] begin by swerving from truth or fairness, in small particulars, he will find his character gone — whispered away, before he knows it."¹⁵

With deep regret, I suggest to you that the ABA has sold out. Sold out to the monied interests of today — to the "fat cats." Clients will be protected at all costs.

This is not the tradition of your namesakes. The title — Barrister — is still held in awe. Why? Because none

doubts the standards of such professionals. None even contemplates a possible compromise of values. Their loyalty to the court is like a flag flown high.

We must return to the standards of our forefathers. We must instill the old values throughout our profession. We must give real meaning to the title — "officer of the court." The price of failure is far too high. □

¹ G. WARVELLE, *ESSAYS IN LEGAL ETHICS* 28 (1920); see also *In re Griffiths*, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting) (role of attorney as officer of the court was carried over from the English).

² WARVELLE *supra* note 1, at 28.

³ First of Westminster, ch. 29, reprinted in H. DRINKER, *LEGAL ETHICS* 14-15 (1953).

⁴ *In re Griffiths*, 413 U.S. at 732 (Burger, C.J., dissenting).

⁵ H. DRINKER, *supra* note 3, at 23-26.

⁶ American College of Trial Lawyers, *REPORT OF THE LEGAL ETHICS COMMITTEE ON THE MAY 30, 1981 PROPOSED FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT* 17 (1982).

⁷ WARVELLE, *supra* note 1, at 195.

⁸ Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 810 (1981).

⁹ The ACTL objected strenuously to this rule, because of its stated belief that it undermined the confidential relationship between an attorney and his client. *REPORT, supra* note 6, at 27-28.

¹⁰ See, e.g., *Spevack v. Klein*, 385 U.S. 511 (1967).

¹¹ Lockhart Lecture by Arthur R. Miller, Univ. of Minnesota Law School, 17 (1984).

¹² Rosenthal Lecture by James A. Pike, Northwestern University Law School 36 (1963).

¹³ Alexander, *The History of the Law as an Independent Profession and the Present English System*, 1984 A.B.A. TORT & INS. PRACT. §15.

¹⁴ *In re Griffiths*, 413 U.S. at 732 (1973) (Burger, C.J., dissenting).

¹⁵ G. SHARSWOOD, *PROFESSIONAL ETHICS* 168 (1876).

Judge Peter T. Fay, U.S. Court of Appeals for the Eleventh Circuit, presented this address before members of the Federal Bar Association at their Orlando convention in May 1986. This address was adapted from an article written by Judge Fay, entitled "Officers of the Court" and originally published in 20 International Society of Barristers Quarterly 280 (April 1985). It was subsequently published in the July-August 1986 issue of The Federal Bar News and Journal, which granted permission to reprint here.