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Review of "Trying Cases: A Life in the Law" by Haliburtan Fales II

Jay C. Carlisle

Elisabeth Haub School of Law at Pace University, jcarlisle@law.pace.edu

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Haliburton Fales II, *Trying Cases: A Life in the Law* (New York: New York University Press, 1996), 212 pp., \$30.00 (US).

Reviewed by Jay C. Carlisle.*

THE LIFE OF A TRIAL LAWYER

In his celebrated biography of Lord Carson, Marjoribanks wrote “a great lawyer’s fame is always written in sand, and he leaves behind him no permanent memorial”.¹ This astute observation does not apply to Haliburton (“Hal”) Fales II, a former president of the New York State Bar Association who for almost fifty years was one of the United States’ most successful and highly respected corporate trial lawyers. He has written *Trying Cases: A Life in the Law*. This 212-page autobiography focuses on his career as a trial lawyer. He describes what it was like for him to participate, frequently at centre stage, during a dynamic period in the history of the American legal profession.

Fales’ autobiography follows in the tradition of George Wharton Pepper’s acclaimed autobiography *Philadelphia Lawyer*,² and is a must-read for trial lawyers, law students and members of the bar who aspire to try cases. Unlike most recognized autobiographies by trial lawyers,³ a significant portion of his book is devoted to issues of professional

* Jay C. Carlisle, A.B. (California, Los Angeles), J.D. (California, Davis), admitted to the Bar of New York State (1970), recipient of the American Bar Association-American Law Institute Harrison Tweed Special Merit Award for Contributions to the Continuing Legal Education. Elected Fellow American Bar Foundation. Professor at Pace University School of Law, White Plains, New York.

¹ See J.C. Carlisle, “Civil Practice” (1988) 39:1 Syracuse L. Rev. 75.

² G.W. Pepper, *Philadelphia Lawyer*, (Philadelphia: J.B. Lippincott Co., 1944).

³ See C. Darrow, *The Story of My Life*, (New York: Gossett & Dunlap, 1932); E.B. Williams, *One Man’s Freedom*, (New York: Athenaeum, 1962); L. Nizer, *My Life In Court*, (New York: Pyramid Books, 1961); M. Belli, *Ready for the Plaintiff*, (New York: Henry Holt & Co., 1956); M. Dees, *A Season For Justice*, (New York: Charles Scribner’s Sons, 1991) and G.W. Pepper, *Philadelphia Lawyer*, (Philadelphia: J.B. Lippincott Co., 1944).

responsibility and the legal profession (pp. 206-7).⁴ Fales' discussion of ethical questions such as lawyer competence, client confidentiality, conflicts of interest, contact with represented parties, communication with jurors, the duties of supervising lawyers, substance abuse and the fitness to practice law, and the ethical prohibition against gender bias are presented in the context of real life examples which are of current interest to the bench and bar.⁵

This book review will focus on Fales the Lawyer and Public Servant, and Fales' views on Professional Responsibility.

I. FALES THE LAWYER AND PUBLIC SERVANT

"The action is where the squares are."⁶

Hal Fales' autobiography successfully captures the essence of his time in the law and presents readers with a series of the author's life experiences as a lawyer and leader in his profession. Fales was born in

⁴ The Index sets forth lengthy references to ethics sections in the autobiography with cross references to the Lawyers' Code of Professional Responsibility, in effect in New York State.

⁵ Fales' real-life examples of ethical dilemmas illustrate how law is practiced in a time of economic, political and social change. S.H. Hobbs, "Ethics In The Age of Entrepreneurship" (1948) 39:2 S. Tex. L. Rev. 599 at 601-602:

... entrepreneurship entails the source of two ethical challenges for lawyers. The first is that clients, who are also impacted by the entrepreneurial age, now demand that lawyers deliver service which add value to their endeavors ... Second, to succeed in a profession which is increasingly competitive, a lawyer must be creative and innovative in delivering and marketing his or her professional services."

See also J.P. Martinez et al., "Profession In Practice" (August 1998) ABA J. 48; W.S. Sessions, "Professional Obligations" (August 1998) ABA J. 62; L.H. Pollak, "Professional Attitude" (August 1998) ABA J. 66; J.J. Shestack, "Taking Professionalism Seriously" (August 1998) ABA J. 70 and M. Higgins, "Fine Line" (May 1998) ABA J. 52.

⁶ "During the 1960's I often repeated to my five children 'the action is where the squares are'. I was not trying to instil conservatism but to promote achievement so that they could have fun and make their points where it counted. Experience has wedded me to my aphorism (p. vii)."

New York City on August 7, 1919. His father and both grandfathers were lawyers. One practiced law into his nineties until his death in 1956. In 1941, following his junior year at Harvard, Fales, by then an ensign in the US Navy, married Katherine (“Kak”) Ladd, the daughter of the chief surgeon at Children’s Hospital in Boston. After the war Fales was admitted to the Columbia School of Law. Hal and Kak then moved to New York City, where they rented an apartment near Columbia for \$75.00 a month.

Fales’ favourite law professor at Columbia was the legendary Richard R. Powell who made his students write research memorandums of law from their first month in law school (p. 9).⁷ Fales was elected to the Columbia Law Review, graduated with a LL.B degree in 1947, and joined the New York City law firm of White & Case in October of that year. After a short stint in the managing clerks’ office, Fales became part of a legal research team known as the “bullpen”. There he drafted memorandums of law and worked under his first mentor Herbert F. July (p. 6).⁸ After honing his trial skills, while on loan from White & Case with the New York City Legal Aid Society, Fales argued his first important jury trial, representing the well-known publishing company McGraw-Hill in an antitrust matter. The case was tried in the United States District Court for the Southern District of New York before Judge Inzer Wyatt. The jury returned a verdict for McGraw-Hill.

⁷ Over fifty years thereafter Fales recalls, “I remember my lawyer father advising me to imagine that Powell’s first question concerned a problem he himself faced. ‘Put yourself in his position and try to help him if you can’, my father recommended. ‘Don’t mislead him by any favorable answer to overlook the obstacles, but find a way for him to do what he wants if you can and tell him the worst that is likely to happen if he has to take something of a risk’”. Fales concludes, “[t]his turned out to be good advice”. Fales also studied under two giants in the profession, Professors Walter Gelhorn and Herbert Wechsler who “taught him ... to think in broad constitutional terms”.

⁸ Subsequent mentors of Fales at White & Case included legendary attorneys Roger Blough, Chester Bordeau, Col. Joseph Hartfield, Thomas Kiernan, Maurice McLoughlin and Orison Marden, who is the only attorney to have served as president of the Association of the Bar of the City of New York, the New York State Bar Association and the American Bar Association. Fales’ discussion of his relationship with these mentors demonstrates how important it is for young lawyers to develop strong personal relationships with their supervising attorneys.

During the next 36 years, Fales argued to conclusion more than half of the hundreds of cases assigned to him. He never “found a case too nutty to defend” (p. 53).⁹ These “in the zone” (p. 4)¹⁰ trials included antitrust and bankruptcy cases, tax cases against the United States Internal Revenue Service,¹¹ aircraft cases (pp. 100-123),¹² product liability cases (pp. 123-144), stockholder suits (pp. 144-161), and dozens of cases for the Legal Aid Society (pp. 20-24). Later in his career Fales served as a Special Master for the Supreme Court of New York,

⁹ Unlike most corporate trial lawyers, Fales argued criminal assault cases, a case against a bar and grill which allegedly overcharged customers, and a suit by the failed promoter of a specious attempt to play fast and loose with the rules of amateur golf. See also S. Jones, “A Lawyer’s Ethical Duty to Represent the Unpopular Client” (Spring 1998) 1:1 *Chapman L. Rev.* 105. Steven Jones, the court appointed lead attorney for Timothy McVeigh, describes the lawyer’s duty under the canons of ethics, the model rules and the code of professional responsibility to represent unpopular clients. This is a position that Fales championed throughout his career as a trial lawyer and bar association leader (p. 25-26).

¹⁰ Fales describes “in the zone” as follows: “You simultaneously engage in formulating questions, listening to each word of the answer, watching the reaction of each separate juror, storing that information away for summation, keeping an eye on your adversary and anticipating objections to your questions, continuously, monitoring the judge, and listening to your associate who is whispering what may or may not be good suggestions.”

¹¹ Fales’ discussion of the US Steel tax case is a textbook study of how important integrity and simplicity are for a trial lawyer. The US Steel tax case, as it was called, was the biggest case Fales had handled up to that point in his career. Fales’ use of preparation and innovative technology resulted in a victory for his client.

The United States Internal Revenue Service went after US Steel for back taxes. Faced with a series of complicated tax variables, Fales was able to use the experiences he gained from his antitrust cases to develop a key strategy to obtain testimony of US Steel customers. This led to the development of a formula for annualizing production figures and ultimately to a computer program to do the annualizing of the figures and to apply the formula. Fales was ahead of his time in this approach. The US Steel discussion is also useful reading with respect to Fales’ advice on the art of cross-examination.

¹² In this trial, Fales’ adversary was the dean of class action lawyers in the securities area, Abraham Pomerantz. Twice during the trial Fales caught Pomerantz in outright distortion of the facts and reflected years later, “[a]t a trial, whatever philosophers may say about the closeness to reality of the picture reflected in a trial transcript, lies can be and are exposed and often hurt the liar in fatal ways (p. 112).”

Appellate Division for the First Department and as Chairperson of the Appellate Division's Disciplinary Committee (pp. 197-98).¹³

While Hal and Kak raised five children on their farm in Gladstone, New Jersey, Hal commuted daily four hours round-trip to the White & Case offices in lower Manhattan. He found the time to serve as president of the New York State Bar Association, president of the Pierpont Morgan Library, Chairman of St. Barnabas Hospital in the Bronx, a member of the Chief Judge of New York's Task Force on Women and the Courts, a tireless worker for the National Center for State Courts and the Fund for Modern Courts, and as a volunteer counsel for the Women's Prison Association.

II. *FALES AND PROFESSIONAL RESPONSIBILITY*

Fales' public speaking about professional responsibility began in late 1980 at the third Orison Marden Lecture at the Association of the Bar of the City of New York. Fales began his remarks by stating, "[t]he subject of Professional Responsibility is ... a field of action more than of study. Only those engaged in the practice of law with real live clients experience its exquisite dilemmas" (p. 185).¹⁴

¹³ The Departmental Disciplinary Committee of the Supreme Court of New York, Appellate Division First Department determines whether to sanction, censure or disbar lawyers who have violated ethical prohibitions. As chair of the Committee, Fales had to review matters to be forwarded to the court with recommendations for discipline and matters being recommended by the staff for prosecution before the panels. Every one of these matters raised serious questions involving the livelihood of exceptionally well-educated human beings. Fales devoted an enormous amount of time to this service and earned the respect and gratitude of the New York bench and bar.

¹⁴ In 1969, the American Bar Association promulgated the ABA Model Code of Professional Responsibility ("Model Code") as a model for the various states to follow in adopting their own sets of legal ethics rules. This Model Code was accepted by most states and adopted almost in full by New York. In 1977, the ABA began work on the ABA Model Rules of Professional Conduct ("Model Rules"). The Model Rules were designed to replace the Model Code. After serious and extensive debate and a long process of compromise and amendment, a final version of the Model Rules was adopted by the ABA House of Delegates in 1983. Fales participated actively in this debate and was one of the leading opponents of those

III. *EARLY ETHICAL DILEMMAS*

The first of many ethical dilemmas recounted by Hal Fales occurred while he was representing McGraw-Hill before Judge Wyatt. The general counsel for McGraw-Hill sat with Fales at the defence table and participated in the two week trial. During a recess, the corporate counsel went over to a group of the jurors and started a conversation. Fales immediately admonished his client's counsel: "... please don't fraternize with the jury. We're not supposed to" (p. 3). Fales admits this was not an act of legal ethics or courage but that "[i]t just happened, as it had before" (p. 3). Here Fales reminds us that although the traditional ethic of the American lawyer is to give entire devotion to the interest of the client,¹⁵ there are times when a lawyer's instincts require him to intervene when a client may be acting improperly.¹⁶ Fales instructed the McGraw-Hill counsel to sit behind the bar in the spectator's seats for the rest of the trial.

A second ethical dilemma occurred when Fales was again representing McGraw-Hill. While riding in a taxicab with two adversary attorneys, one of them said, "Hal, I got a client who is trying unsuccessfully to renew a mortgage with the Bank for Savings" (Fales' father was chairman of that bank), "and Hal, you can be the lawyer and get the whole fee for handling the matter if you can get the mortgage" (p. 31). In effect, Fales was being encouraged to persuade his father to have the Bank for Savings make a loan that it had previously refused, to advance Fales' career. Fales refused the offer but worried about

who sought to dilute the confidentiality rules of the Model Code. See below, White & Case's Greatest Crisis.

¹⁵ M. Freedman, "The Ethical Danger of Civility and Professionalism" (Spring 1998) 6:1 N. Y. State Bar Assoc. J. 17.

¹⁶ M. Freedman, "Our Constitutional Adversary System" (Spring 1998) 1:1 Chapman L. Rev. 56. Professor Freedman concludes, "[t]he Supreme Court has therefore recognized that the Civil jury is 'so fundamental and sacred that it should be jealously guarded' by the courts". As an officer of the court, Fales instinctively acted to prevent his client from conversing with jurors.

sounding like an ethical prig. Again, Fales' action reminds the reader that one's personal sense of good ethics is important.¹⁷

A third ethical dilemma for Fales occurred when he and another lawyer had to make a difficult decision about representing a subsidiary owned by two of White & Case's corporate clients in a criminal matter brought by the United States Department of Justice. Fales was representing officers of the subsidiary and parent, which required him to determine whom he could properly represent. The Government moved to disqualify Fales on the grounds that there was a conflict of interest. Fales resisted and the trial judge wrote an opinion disqualifying him from representing one of the witnesses. This experience taught Fales that "conflicts issues are always serious, and the better lawyer you are, the sooner you feel the pinch" (p. 80). Similarly, he learned that a conflict of interest can sometimes mean a lawyer will lose several clients for all purposes. "Indeed ... in situations where conflict might arise, it must be obvious that the lawyer can represent the interests of both clients and each must consent after full disclosure" (p. 70).¹⁸

A fourth ethical dilemma confronted Fales while he was still an associate with White & Case. A corporate officer of one of the firm's clients implied that he would destroy a document that could be used

¹⁷ T.D. Morgan, "Conflicts of Interest and The New Forms of Professional Association" (March 1998) 39:2 S. Tex. L. Rev. 215. Professor Morgan describes four conflicts of interest against which to test the new lawyer relationships. One is the situation in which a lawyer's own interest may conflict with the interests of the client. This is precisely the dilemma Fales faced: he could earn legal fees but would implicitly be in debt to his adversary in a pending matter.

¹⁸ Here Fales neglects to explain that even if there were disclosure to and consent by the clients, the circumstances, when fully disclosed, may indicate an impermissible actual conflict. Thus, where the lawyer represents parties whose interests conflict as to the particular subject matter, the likelihood of prejudice to one party may be so great that misconduct will be found despite disclosure and consent. See *Matter of Kelly* (1968), 23 N.Y.(2d) 368 at 378, 296 N.Y.S.(2d) 937. Similarly, in addition to the full disclosure and client consent required by DR 5-1-5(C), the Code of Professional Responsibility permits multiple client representation if, and only if, "it is obvious that the interests of each client can be adequately represented". Here, Fales insufficiently recognizes the importance of the "if, and only if" glosses that the cases have put on the conjunctive "and it must be obvious".

against the corporation. Fales took one of the carbons of this document to his home in Gladstone and placed it in a bottom drawer of a desk in his living room. He stated, "I felt that if I saved that copy, then I could keep White & Case from ever being accused of complicity in the destruction of a document" (p. 187). Here, Fales reminds the reader that a younger associate sometimes has ethical responsibilities independent from those of her/his supervising attorney.¹⁹ He implies that young lawyers cannot excuse their unethical behaviour on the grounds that they were only following orders given to them by a supervisory lawyer.²⁰

IV. *WHITE & CASE'S GREATEST CRISIS*

In 1976, Fales became chairman of the White & Case Management Committee. In this capacity he led his firm against the United States Securities and Exchange Commission ("SEC").²¹

NSM developed a very successful business in the late 1960s using students to sell all sorts of products on campus, from life insurance to sweatshirts and class rings. NSM had been represented by Covington and Burling, a premier Washington, D.C. law firm. NSM left Covington and Burling for White & Case. However, White & Case never asked NSM for permission to ask Covington and Burling why they ceased to represent NSM.

In 1969, NSM commenced negotiations for the acquisition of an Illinois insurance company. As was customary in those days, the medium of exchange was not debt or cash, but stock of the acquiring company. The closing was set, yet unknown to the White & Case partner handling the matter, massive fraud permeated every aspect of NSM's finances. NSM had "cooked their books".

¹⁹ R.R. Keating, "The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm" (March 1998) 39:2 S. Tex. L. Rev. 279.

²⁰ *Ibid.* at 292.

²¹ *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978) 163-174.

Although NSM's accounting firm refused to deliver a comfort letter necessary for the closing, the White & Case partner persuaded them to dictate by telephone a letter that was satisfactory to the sellers at the closing. When the fraud became apparent, the SEC wanted to know why the accounting firm had no knowledge of it. The SEC summoned the White & Case partner, who had represented NSM, to Washington, D.C. The partner refused to answer questions about specific conversations with representatives of NSM that had taken place without any outsiders present and where relevant information had been given to counsel. White & Case relied on attorney-client privilege. The SEC lawyers were angry and insisted that a fraud had been committed, constituting a crime that had continued until the facts became known. Thus, they viewed NSM as a criminal client who was continuing in a crime and therefore, NSM had no privilege to protect. White & Case responded that while the SEC could attempt to convince a court that there was no attorney-client privilege, until the client waived the privilege or the court ordered otherwise, the firm was duty-bound to decline to answer questions pertaining to privileged information. The SEC assumed White & Case had something to hide and later filed a complaint against White & Case and the partner who had represented NSM.

The ethical issues in this case included whether the White & Case partner had a duty to prevent the closing (as the SEC contended), to withdraw from the representation of NSM or to notify the SEC of the fraud.²² Fales argued that by complying with the SEC's position, as set forth in their complaint, White & Case would have violated their professional responsibility to NSM and would have subjected NSM to possible liability for failure to complete the closing in the face of the insurance company seller's decision to close. As chairman of his firm's Management Committee, Fales went to Washington, D.C. to engage in settlement discussions with the SEC. He was instructed to determine whether his partner and White & Case could seek an honourable settlement or should continue the fight. Here Fales teaches the reader

²² M. Freedman, "The Life-Saving Exception to Confidentiality: Restating Law Without The Was, The Will Be or The Ought to Be" (1996) 29:4 *Loy. L. Rev.* 1631 and K.W. Tate, "The Hypothetical as a Tool for Teaching the Lawyer's Duty on Confidentiality" (1996) 29:4 *Loy. L. Rev.* 1659.

about the ethics of negotiations. Any agreement he made with the SEC was subject to approval by his 60 or so partners.

When the SEC agreement was brought to his firm for approval, Fales stated, "I was in favour of standing trial on the slippery slope and prevailing on the merits of the case. I said that as [his partner's] champion we should fight on till the stars appear and not yield or pronounce the work "craven" (p. 172). Here Fales reminds the reader of the daring words of Lord Brougham who spoke in defence of Queen Caroline before the House of Lords which for years have been a beacon to the bar and a battleground:

I once before took leave to remind your lordships ... that an advocate ... knows in the discharge of that office but one person in the world. That client and none other. To save that client by all expedient means ... is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other (p.186).²³

Fales was outvoted by his partners and the NSM case was settled on terms very favourable to the partner and to the firm. Fales later reiterated his strong position in favour of lawyer-client confidentiality when he spoke against a proposed dilution of this privilege as a delegate of the American Bar Association at the Association's 1983 Convention in New Orleans. During the debate on confidentiality, he spoke several times and argued that one could, if necessary, "resign with a bang" (p. 193) but under no circumstances use client confidences "to show which way the fox ran" (p. 193). Fales' advocacy was arguably responsible for the ABA House of Delegates' rejection of the proposed rule to dilute confidentiality.

²³ This position has been subject to recent criticism. See W.H. Simon, *The Practice of Justice*, (Boston: Harvard University Press, 1998). The touchstone of Professor Simon's critique is his observation that "moral anxiety" is rampant in the legal profession.

V. UNFITNESS TO PRACTICE LAW

Several times in his autobiography Fales refers to alcoholism and the fitness to practice law (pp. 54, 56, 74, 128, 129, 160, and 198).²⁴ He implies that on at least one occasion in his career his consumption of alcohol diminished his capacity to perform as a lawyer. This is a courageous admission from one of the nation's pre-eminent attorneys. His willingness to confront his problem and to seek professional assistance serves as an inspiration to anyone who has dealt with substance abuse. In a curiously subtle but convincing manner Fales counsels his readers to recognize the symptoms of substance abuse and to take remedial action.

VI. WOMEN AND THE LAW

In 1984 the Chief Judge of New York appointed Fales as a member of the New York Task Force on Women in the Courts where he "played skunk at the picnic to insure that all assumptions were backed by surveys or evidence" (p. 196). The Task Force, after almost two years of work, produced a lengthy report which was featured on the front page of the *New York Times*.²⁵ The report concluded that gender bias against women litigants, attorneys, and court employees was a pervasive problem with grave consequences. The report stated, "[w]omen are often denied equal justice, equal treatment, and equal opportunity".²⁶ The report urged the bench and bar to engage in intensive self-examination and, on the public's resolve, to demand a justice system

²⁴ See also S. Daicoff, "Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism" (June 1997) 46:5 *Am. U. L. Rev.* 1337 at 1382. Professor Daicoff reminds the reader of a 1994 report of the American Association of Law Schools which demonstrates that law students depend increasingly on alcohol as they progress through law school. The report notes that third year law students used more alcohol than first and second year students and they used it to relieve stress or tension. The report concludes that this type of substance abuse could lead to more severe abuse and problems once those students become practicing attorneys.

²⁵ *New York Times*, (20 April 1986) 1, col. 1.

²⁶ Report reprinted in (1986-1987) XV:1 *Fordham Urb. L. J.* 17.

more fully committed to fairness and equality.²⁷ Immediately after the Task Force report was issued, Fales began service on the New York State Bar Association's Committee on Women in the Law. He led a floor fight in the House of Delegates against matrimonial lawyers to implement changes that would benefit women. He also served as volunteer counsel for the Women's Prison Association (p. 196).

CONCLUSION

Haliburton Fales' autobiography *Trying Cases: A Life in the Law* is a "... candid narrative of the lawyer's place in the professional world ..." and "... leaves the reader with some new perspectives and more understanding of the work of trial lawyers at the bar".²⁸ It is a great read for lawyers of all ages. It is a particularly useful read for law students and younger lawyers who contemplate a career "trying cases". Fales' real life experiences, wonderful sense of humour, sensitivity to the strengths and weaknesses of others, as well as his willingness to engage in serious self reflection,²⁹ qualify his book as one of the best twentieth century autobiographies by an American trial lawyer.

²⁷ *Ibid.*

²⁸ B. Kostelanetz, Book Review of *Trying Cases: A Life in the Law*, H. Fales II (1998) N. Y. L. J. at p. 2, col. 3, book review of the Fales autobiography by eminent New York City trial attorney Boris Kostelanetz.

²⁹ C. Goforth, "Reflections on What Lawyers Should Reflect On" (March 1998) 39:2 S. Tex. L. Rev. 585.