

Copied Ethics
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IV

THE LAWYER'S OBLIGATIONS TO THE PUBLIC BY REASON OF THE SPECIAL PRIVILEGES ACCORDED HIM

By HIS ADMISSION TO THE BAR, the lawyer is granted the exclusive right: (1) to hold himself out as a lawyer; (2) as such to advise clients and to represent them as an advocate; (3) to appear for them in court proceedings.

In recognition of these exclusive privileges the lawyer is charged with certain obligations to the public: (1) to see to it that those admitted to the bar are properly qualified by character, ability, and training, and that those who thereafter prove unworthy of these privileges are deprived of them; (2) to see to it that able and upright judges are chosen and that any who prove manifestly unworthy or unfit are removed; (3) to represent without charge those unable to pay; (4) not to stir up litigation; (5) not to aid in the unauthorized practice of law.

DUTY TO POLICE THE BAR

One of the principal features resulting in just public criticism of the bar is the unwillingness of lawyers to expose the abuses of which they know that certain of their brethren are guilty, as well as the reluctance of judges to disbar, suspend, or even publicly reprimand such lawyers. Much of the public suspicion of lawyers is due to the realization that most of the abuses of which lawyers are guilty could

willing to do their full duty in this regard.¹

The first sentence of Canon 29 provides:

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession,² and should accept without hesitation employment against a member of the Bar who has wronged his client.³

The third sentence provides:

The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education.

One may question whether the latter provision of the Canon is phrased as positively as it should be. It is not only the lawyer's duty to see to it that none but fit candidates are admitted,⁴ but also that no lawyer is permitted to continue to practice who has proved himself untrustworthy to advise or represent clients or an unworthy member of an honorable profession.⁵

**DUTY TO FURTHER THE CHOICE OF ABLE AND UPRIGHT JUDGES
AND SEE TO THE REMOVAL OF THOSE MANIFESTLY UNWORTHY**

Canon 2 provides:

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

In its Opinion 189 the American Bar Association Committee said:

¹ As to the duty of bar associations to investigate known abuses without formal complaint, see A.B.A. Ops. 2, 3, and 147; also N.Y. City 721. Most grievance committees have no power to institute such investigations of their own motion. See *supra*, pp. 30-32.

² It is the duty of an employee of a dishonest lawyer to leave him and report to the bar association, N.Y. County 78. His duty to the profession is higher than that to his employer.

³ See A.B.A. Op. 144; N.Y. City 47, 91, 721, 811.

⁴ As to the duty to advise the character committees regarding an applicant see N.Y. City 94.

⁵ See *supra*, pp. 42-46.

Lawyers are better able than laymen to appraise accurately the qualifications of candidates for judicial office. It is proper that they should make that appraisal known to the voters in a proper and dignified manner. A lawyer may with propriety endorse a candidate for judicial office and seek like endorsement from other lawyers. But the lawyer who endorses a judicial candidate or seeks that endorsement from other lawyers should be actuated by a sincere belief in the superior qualifications of the candidate for judicial service and not by personal or selfish motives; and a lawyer should not use or attempt to use the power or prestige of the judicial office to secure such endorsement. On the other hand, the lawyer whose endorsement is sought, if he believes the candidate lacks the essential qualifications for the office or believes the opposing candidate is better qualified, should have the courage and moral stamina to refuse the request for endorsement.⁶

While lawyers may voluntarily contribute to the campaign fund of judges whose election they deem in the public interest, such contributions should in every case be reasonable and preferably be made to a campaign committee.⁷

The last two sentences of Canon 1 provide:

Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

While the Canon does not specifically refer to the duty of the bar to see to the removal of a corrupt judge, there is no doubt as to the existence of this duty, in order to maintain the confidence of the public in the administration of justice.

In the report of the Committee of Professional Ethics of the New York State Bar Association of January 23, 1948, Chairman Wherry said: "It is as much the duty of the bar to assist in the removal of unfit members of the judicial tribunal, as to assist in securing good judicial appointments."⁸

The difficulty in inducing a member of the bar to attack a corrupt judge lies in his natural fear of reprisals in case, through influence, political or otherwise, the lawyer's efforts prove unsuccessful. As Emerson said to Justice Holmes when the Justice was a student: "If you shoot at a king, you must kill him."

⁶ It is a lawyer's clear duty to oppose the candidacy of one whom he knows would be an unfit judge, App. A, 9.

⁷ A.B.A. Op. 226; see N.Y. County 304; and Judicial Canons 30 and 32.

⁸ On p. 8.

be eliminated of the bar & the courts are constantly alert

No attack or imputation of dishonesty should, of course, ever be made against a judge by a lawyer unless the judge's conduct is continued and flagrant and this is capable of demonstration by unassailable evidence. Where, however, such is the case, no fear or favor should deter the bar from proceeding.

When through age or otherwise, an able and upright judge becomes incompetent, it would seem to be the function of his colleagues on the bench, rather than the bar, to arrange that his disability does not lower the efficiency of the court.⁹

As to the relations of lawyers with judges, see Chapter V.

DUTY TO REPRESENT THE INDIGENT

From the earliest times¹⁰ it has been the practice, when persons accused of crime are indigent, for the court to appoint counsel to defend them. Lawyers have always regarded the acceptance and performance of such service as one of the obligations incident to their professional status and privileges.¹¹

Canon 4 provides: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

In many jurisdictions a statutory fee is paid by the county to the lawyer so assigned. The Chicago Committee has held that a lawyer appointed by the court may, with the court's approval, accept a fee (not suggested by him) from the relatives of his client;¹² or a voluntary gift; but he may not demand a fee, directly or indirectly.¹³

Where one appointed by the court to defend a supposed indigent prisoner finds, on consulting him, that he is not in fact indigent, the lawyer may not make a private employment contract for legal services with him in lieu of the fee to be paid by the county, but must require his client to advise the court of the true facts and abide the court's redetermination as to his indigency before he can make any

⁹ Justice Holmes exacted from his colleagues a promise to tell him when the time came; and they did.

¹⁰ Cohen, *History of the English Bar*, p. 119. In England a serjeant was bound to accept and, "if we were to assign one of them as counsel, and he were to refuse to act we should make bold to commit him to prison." Sharswood, *Professional Ethics*, p. 92 n., quoting Chief Justice Hale.

¹¹ See *Vise v. Hamilton County*, 19 Ill. 78 (1857).

¹² Op. 33, p. 74; and see N.Y. County 338; Mich. 127.

¹³ N.Y. City 587.

agreement. Any retainer paid by the prisoner or his relatives should be returned and they be free to employ other counsel.¹⁴

A duty similar to that of defending indigent criminals is recognized in civil cases to worthy persons unable to pay full compensation. An enormous amount of legal advice and service is continually being given by lawyers in this way. While not perhaps as extensive as that of doctors, much of that done by the latter, especially in hospitals, is necessary to maintain their privilege to use the facilities of the hospitals for private patients, as well as to improve their technique and to keep up with medical and surgical developments. Almost all of the charitable work done by lawyers involves practically no such indirect remuneration to them.

A lawyer may properly charge a well-to-do client for services in getting his son exempted from the draft, despite regulations requiring lawyers to serve free,¹⁵ but must advise that they can get such advice free.¹⁶ He may make a charge to a member of the armed forces, although it is usual and proper to perform such service for nothing.¹⁷

He may not refuse to take a murder appeal because the client cannot pay,¹⁸ or put off the entry of a divorce decree so long as to endanger it, because his client cannot pay his agreed fee.¹⁹

A lawyer may properly accept a weekly salary from a charitable organization to procure the necessary papers for indigent immigrants.²⁰

As to Legal Aid Bureaus, see Chapter VIII.

DUTY NOT TO STIR UP LITIGATION²¹

At common law stirring up litigation constituted the crime (punishable by fine and imprisonment) known as maintenance, which is aggravated in case the perpetrator is a lawyer, who, by reason of his special professional privileges, is precluded from instigating, promoting, or prolonging litigation for his own benefit.

Canon 28 provides:

¹⁴ Mich. 127.

¹⁵ N.Y. County 371. See also *infra*, p. 103, n. 18.

¹⁶ N.Y. City 436.

¹⁷ N.Y. City 593.

²¹ This subject is of course closely related to that of advertising, and solicitation which is discussed fully *infra*, pp. 265-73. As to champerty, barratry, and maintenance, see Thornton, *Attorneys*, chap. xviii, pp. 652-87.

¹⁸ N.Y. County 149.

¹⁹ App. A, 335.

²⁰ N.Y. City 494, N.Y. County 158.

to pay the trust officer, he does so at his peril; and similarly in the case of an agreement to pay 40 per cent to the estate of a deceased partner.

DISBARMENT

7. The Committee advised against the employment of a disbarred lawyer, even to do only office work and seeing no clients, "because of the practical difficulty of confining his activities to an area which does not include practice of law, and because such employment would show disrespect to the courts."
8. The practice in the American Bar Association has been not to accept the resignation of a member against whom charges are pending.

DUTY OF THE LAWYER TO THE PUBLIC

9. It is the duty of a lawyer to oppose an unfit candidate for a judge.

GENERAL DUTY OF UPRIGHT BEHAVIOR¹

10. He may not refuse to represent a bankrupt except on condition that the bankrupt pay the lawyer's clients in full.
11. The acceptance of a retainer to act as general counsel implies a purpose to observe the Canons and creates no obligation to violate them in order to further the interest of his client.
12. A lawyer employed by a convicted felon who has hidden jewelry may not make an agreement to accept part of the jewelry for his fee provided its whereabouts be disclosed to him, his purpose being not to keep the jewelry but to tell its whereabouts to the authorities. "It is not justifiable under any circumstances for a lawyer to double-cross a client who employs him."
14. A lawyer of a fugitive from justice may not properly advise him not to surrender because he believes that public hysteria would prevent his getting a fair trial.
15. The seller of a valuable machine, not paid for, endeavored to recover. It was attached to the real estate and under local law the mortgagee of the real estate had a right superior to that of the vendor. The mortgagee was not interested in the machine but connived with the vendee-mortgagor to squeeze out the vendor by asserting his superior right, the machine to be turned over to the vendee on payment by the latter of all the mortgagee's expenses, including counsel fees. The Committee advised the inquiring chairman of a local grievance committee that it was improper for the lawyers of the mortgagee and vendee to represent them in carrying out this scheme.
16. Where a lawyer who had drawn a will for a client when of undoubted mental capacity is asked to draw a new will for him when there is

¹ See also "Duty to Client, Fiduciary."

some slight doubt as to his capacity, he may do so, but should retain the old will; and he should turn over to the client's new and responsible lawyer a copy of a will he drew for such a one.

17. Where the insurance policy requires that the insured shall allow the insurer to defend, this is a consent under Canon 6.
18. Where a judgment was entered in connection with a tax deficiency passed upon by the Board of Tax Appeals, and by reason of a possibly erroneous application of the principles laid down, the commissioner had computed the deficiency too favorably to the lawyer's client, the lawyer is not censurable for failing to disclose his belief that a mistake of law had been made by the commissioner.
19. A lawyer may accept employment to endeavor to persuade a relative to change his will provided the lawyer's status be disclosed to the proposed testator.
20. A member of the bar is bound to disclose to other lawyers on a legislative committee an interest on his part in the subject being considered by the committee.
21. He may not close the mouth of an important witness to a murder. (See also 304.)

DUTY NOT TO ADVERTISE OR SOLICIT

Full v. Part-Time Positions

26. A lawyer may advertise his desire to acquire an interest in a firm or a full-time position on a salary basis with a business corporation.
27. A lawyer may not solicit a bank for the position of general counsel where this position is not a full-time one; but he may apply for a full-time position in the patent department of a corporation.

Immaterial That There Is No Statement That He Is a Lawyer

29. The fact that an advertisement for what is legal work does not state that the advertiser is a lawyer is no justification of it.

Bar Rosters, etc.

31. Law schools, fraternities, service clubs, and bar associations may publish rosters, registers, catalogs, or lists of their members, with their names, addresses, and occupations, which are not law lists, where no charge is made for listing and there is no suggestion that the names of lawyers are listed as probably available for professional employment, or to promote, solicit, or secure professional employment.
32. A lawyers' organization may circulate a list of its members among themselves.
34. A lawyer may advertise a placement bureau for lawyers.