Some Applications of the Rules of Legal Ethics

Rome G. Brown
SOME APPLICATIONS OF THE RULES OF LEGAL ETHICS

By Rome G. Brown*

There is very much current discussion on the subject of Legal Ethics. It is a subject as old as the institution of courts or of the profession of the law. Many phases of this subject have been discussed and illustrated by precedents. Such treatises and discussions have become a voluminous part of the literature of the law.

There are, however, certain phases of the subject as to which there persist much misunderstanding and even dispute, and in respect of which certain practices, even by some prominent attorneys, are so frequent as to threaten to cast reflection upon the entire profession.

I shall assume that the commonly discussed rules of legal ethics and their applications are well understood and recognized, and shall only emphasize the existence and application of certain rules as to which practice too often fails to conform with principle and which have not been adequately treated in previous discussions.

I shall refer only to the ethics of the practicing lawyer. Another branch of legal ethics would be the ethical standards of the Bench, as to which no formal canons yet exist to emphasize the various duties of judges in and out of court to the lawyer, to liti-

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gants and to judges of the same or other courts. Such ethical codes for the judges should be formulated,—but not alone by the judges themselves. The practicing members of the bar could make valuable suggestions promotive of courtesy and efficiency by the Bench and of the elevation of its standards, and, therefore, promotive of the administration of justice. This work already has been undertaken by the judicial section of the American Bar Association.

Rules of legal ethics are only the general rules of conduct as applied to the practitioner of the science of the law, the practitioner who has relations, peculiar to his profession, with his client, with his fellow practitioners, and with the courts of which he is an officer duly bound to promote the administration of justice.

THE PROGRESSIVE DEVELOPMENT OF LEGAL ETHICS

Rules of ethics, by which the distinctions of "ought,"— to do or not to do,—are established, change with all the changing conditions of civilization and environment and vary under varying laws and customs. As applied to the practice of the law, these changes in the rules of conduct have been increasing and growing more complex as the position of the lawyer and at the same time the standards set for his conduct have been elevated from those of comparative outlawry to those of a representative of the highest recognized profession.

It was not until 1836 that the law of England permitted an advocate to plead the cause of one accused of felony. Until well into the eighteenth century lawyers had little or no recognition either in the social or political institutions of the American Colonies. In Massachusetts it was not until 1663 that an attorney was permitted to sit in the general court, and it was a long time after that before he was allowed to receive any fee or compensation for his professional services. With the passing of some of the crude prohibitions of earlier times and with the evolution of the law itself, and of its study and practice, into a science, there has emerged that body of learned experts and practitioners who com-

1"Ethics of the Legal Profession", by Orrin N. Carter, Judge of Illinois Supreme Court, p. 17. Judge Carter’s treatise is a most comprehensive brief of legal ethics, with full references. (In the following notes this book will be cited as “Carter”).

2"Ethics in Service" by Wm. H. Taft, pp. 13-14. This book by Chief Justice Taft contains his Page lecture series given at Yale in 1914 and his first two chapters treat particularly of the ethics of the legal profession. (In the following notes this book will be cited as “Taft”).
prise the bar of modern times, with certain recognized duties and responsibilities expressed either by statute law or by formulated codes applying to the conduct of the members of the bar and to their practice.

**THE "COMMON LAW" OF LEGAL ETHICS**

It is impossible to formulate, either for the present or for the future conduct of lawyers, a definite code precisely applicable to every instance of professional conduct. Therefore, no formulas, written or unwritten, no statute nor any canons of the profession can comprise all that is necessarily a part of the code of legal ethics. As with general ethics, written codes can only partly express the principles and spirit of rules of conduct, so, in applying legal ethics in particular instances, we must draw upon both the written and the unwritten law, seeking precedents where available, and deciding each problem with due regard, not only for the written law or canon of conduct, but also for its spirit and its reasons and also for precedents and their basic principles and the analogies and conclusions therefrom reasonably to be drawn. In short, as the unwritten or common law of English and American jurisprudence is the light and guide for the application of the law in the defining of legal rights and duties, so there is, in respect of the conduct of lawyers in particular instances, a common law of legal ethics, so to speak, in the light of which all formulated statutes and codes should be construed and applied.

Of course, a particular statute or court decision touching upon the subject of the conduct of lawyers creates a rule by precedent which remains paramount until modified or reversed. But what are generally understood as "codes of legal ethics" are in the nature of common-consent rules laid down by members of the profession without statutory authority. They may be partly or fully incorporated in the more authoritative form of statute law or of court decisions, thereby adding weight to the consensus-opinion of the profession itself. The authority of precedent is further added by the cases passed upon by committees of bar associations or by disciplinary boards, such as the committee of the New York County Lawyers' Association. Then there are the

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*Canons of Ethics of the American Bar Association—Introduction. These canons were adopted by the American Bar Association in 1908 and are printed annually in the Reports of the Association. (In the following notes these Canons will be cited as "Canons A. B. A.").*
opinions of the profession on various phases of the subject which are published from time to time in treatises and in legal periodicals. All these are developments of the common law of legal ethics. But neither statute, code, precedent, nor opinion should narrow or obscure the broadest vision of the real spirit and purpose which are the sources and foundation of that common law.¹

Canons Not to be Narrowly Construed

The lawyer is too much inclined to read a rule of ethics in the same attitude of mind in which a judge of the old English courts was wont to read one kind of "plea in abatement" which, by the rules of Chitty, must express "certainty to a certain extent in every particular,"—that is, it must expressly allege every fact possibly vital to the contention and must expressly deny every fact possibly fatal to the plea. Such search for technical loopholes involves a smothering of conscience, to which alone appeal properly lies, and ignores the real precepts and sources of rules of conduct. Circumstances often make the rules of legal ethics prohibitory of actions which in themselves are neither unlawful nor immoral, just as statutory law makes unlawful, not only acts which are in themselves immoral, as larceny, criminal assault or murder, but sometimes also an act,—malum prohibitum,—in itself involving no element of immorality, such as restrictions on the parking or driving of automobiles or the plucking of even a wild rose growing upon certain city property. So, narrowly viewed, an unethical act of a lawyer may in itself not be immoral while from a broader view, taking into consideration all the circumstances of the lawyer's peculiar duties and responsibilities, his confidences and advantages, his action may in fact be grossly unethical. No unlawful or immoral act by a lawyer can be ethical, but the common distinctions of unlawfulness or of immorality can not suffice to define as ethical or unethical every act of a lawyer in his professional practice.

"Cases on Legal Ethics", by George P. Costigan, Jr. This book is one of the West Publishing Company's Case Book Series, edited by Professor William R. Vance of the Yale Law School. It contains court decisions and also many decisions of the New York County Lawyers' Association on questions of legal ethics. It also includes the American Bar Association Canons and the Canons of the Boston Bar Association and the classic Fifty Resolutions of David Hoffman, which latter have not been surpassed as a codification of the ethics of the practicing lawyer. Mr. Costigan also presents extensive quotations from treatises on legal ethics and from discussions of various phases of the subject which have been contributed by leading members of the legal profession to the various law reviews and other legal publications. (In the following notes this book will be cited as "Costigan").
APPLICATIONS OF LEGAL ETHICS

In the light of the foregoing suggestions, let us consider some concrete examples of the application of the code of legal ethics in actual practice.

SAFEGUARDING RIGHTS OF DEFENSE AND APPEAL

A lawyer is not only privileged but is bound by every principle of legal ethics to use all reasonable endeavor to safeguard every person charged with crime in the latter’s right of defense and appeal and to prevent a conviction except through the orderly procedure provided by law. It is unethical for a lawyer to solicit clients, whether in civil or criminal cases, but it is not immoral. Such solicitation becomes even criminal if made with the intent of extortion or of treating the client otherwise than with utmost good faith. It is only in exceptional cases that a lawyer is bound to furnish his services either in civil or criminal proceedings. It is, however, with reference to such exceptions, where he is bound, that the greatest misconception of a lawyer’s privileges and duties is often shown. He is at all times an “officer” of the court and as such has, under some circumstances, not only the privilege of being heard, but the duty to make himself heard; and to him in his capacity as “amicus curiae” the ears of the court are always open for suggestions of aid to the court in performing its primary function, the administration of justice.

Only extreme exigencies should excuse him from using his best efforts and skill in any instance where his services may prevent any wrong to the poor or the oppressed. His very oath demands his interference against such wrong. While he must not allow himself to be the instrument of wrong-doing, much less the instigator, he must not shrink from his duty of safeguarding to any person charged with crime the right of a speedy and orderly trial and that conviction, shall be only by due process of law. Such privilege and duty are imposed independently of the prospects of compensation and whatever be the knowledge or belief of the lawyer as to the guilt or innocence of the accused. This duty arises, not to protect a guilty person from conviction, but to safeguard him in his right of not being deprived of life, liberty or property except by due process of law.⁴

⁴See 4, 5 and 15, Canons A. B. A. This duty, which has become part of the established code of legal ethics in the jurisprudence of every English-speaking people, is stated by Blackstone in the following words: “Let the circumstances against the persons be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those
The venerable Luther Martin, leader of the American Bar of his time, defended Aaron Burr, when charged with treason, and prevented a conviction, not because Burr was innocent, but because the terms of the federal constitution defining the evidence of treason had not been met. Martin performed the lawyer's duty to safeguard the accused in the right of defense and in the right to be convicted only "according to those rules and forms which the wisdom of the legislatures has established as the best protection and security of the subject." During the Civil War one Milligan was tried and convicted of traitorous and disloyal practices against the defense of such distinguished lawyers as David Dudley Field and James A. Garfield. Having undertaken such a defense, whether voluntarily or by appointment, it is the lawyer's duty to see it through, using all legitimate and honorable means for preventing conviction. The duty of the lawyer extends to the obligation of defense whenever appointed by the court for that purpose. Thus Guiteau, the slayer of President Garfield, and Czolgosz, the murderer of President McKinley, were protected in their right of defense by eminent and honorable members of the bar.

AN ILLUSTRIOUS EXAMPLE OF FIDELITY TO DUTY

Steadfastness in the observance of his ethical rights and duties will always bring honor to a lawyer within the ranks of his own profession and among all appreciative laymen. At the same time fearless refusal to swerve from a proper course may bring upon him the obloquy of those who are not able, or who do not wish, to understand. Calumny and personal spite may make a martyr of one to whom fair and intelligent judgment would give honor. The ideal lawyer must be able to defy unjust criticism and to disdain its resulting disadvantages. He must possess certain of the qualities of which heroes are made.

The rights of defense and appeal are too often misunderstood. The existence and extent of those rights are too often confounded
with the fact or the degree of the guilt of the accused. Such misconceptions, I am confident, are the source of certain criticisms of General Samuel T. Ansell in connection with his defense of the famous slacker, Bergdoll. Of Bergdoll's guilt there has never been any reasonable doubt. Nevertheless, when apprehended and brought to the bar of justice, he had his right of orderly defense and appeal, including the right to be brought to trial on proper charges and in such court as the law of his case required. Ansell was then in private practice in Washington. He had shown himself the ablest expert in military law in the country. He had been for years legal adviser of the War Department and, during the later years of the World War, Acting Judge Advocate General of the United States. While in the War Department, he had experienced the militaristic tendencies of his associates and superiors to ignore the orderly methods of trial by court martial which were prescribed by law, and frequently to execute sentences of long imprisonment, or even of death, upon soldiers in training camps or at the front, as punishment sometimes for offenses which in civil life would scarcely have been dignified as misdemeanors; and this, too, without having the sentence reviewed by the Judge Advocate General at Washington, as expressly required by court-martial statutes. As to these and other abuses of the court-martial system as administered; he had sought to bring about remedies. But his attempts only brought upon him the personal enmity of his associates in the War Department. He then resigned and carried on his fight for justice to the enlisted men through his appeals as a private citizen and lawyer to the American Bar Association and to the Congress. He succeeded, but only against the most vicious opposition from the militaristic clique in the War Department and from its coadjutors both inside and outside the Congress.

These hostile influences brought about the charge against Ansell of conniving for the escape of Bergdoll from Governor's Island, and a Congressional investigating committee report criticising Ansell's entire conduct in connection with the Bergdoll case including his action in having undertaken, as a lawyer in private practice, the defense of Bergdoll. Ansell had raised the point as to the proper forum for the trial, which, with other points, went to the question of Bergdoll's rights under due process of law. The Bergdoll case, moreover, had its very beginning subsequent to Ansell's retirement from public office to private practice.
Without reward or hope of reward, except the satisfaction of their lawyer's conscience in complying with their duty to promote justice, a number of American lawyers, including many of great eminence, have carefully studied the records of the proceedings in the congressional investigation referred to and have reported their conclusion that the record clearly exculpates Ansell from the charge of any misconduct in any phase of the Bergdoll case. Indeed, the record shows that Ansell urged on the War Department safeguards against the possible escape of Bergdoll which were entirely ignored, not only by the heads of departments but by the army guard which was detailed to conduct Bergdoll during his temporary absence from Governor's Island.

This Ansell incident is here pertinent as a conspicuous example of the effects of partisan propaganda of criticism and prejudice against the motives and acts of a lawyer in respect not only of his duty as official legal adviser to remedy unjust and unlawful practices in his department but also in respect of his observance as a private practitioner of his rights and duties in criminal cases. Just because Ansell would not view the disclosures of abuses as a greater stigma than their perpetuation, he became the object of the unrelenting enmity of a powerful clique whose tendencies are towards a reign of tyranny and absolutism and against an orderly administration of justice. He will emerge from it all as an heroic figure in the profession of the law, an illustrious example of fearless adherence to the highest principles of legal ethics.¹

THE LAWYER AS FIDUCIARY AND TRUSTEE

It is too often assumed that employment of a lawyer, whether by retainer or otherwise, involves a shrinking of his personal ideals of honor or a submergence of his own conscience in that of his client. In the accomplishment of the objects which the client has in view, the lawyer is not a mere agent or employe, much less a tool. The usefulness and loyalty of the lawyer are too often measured by the degree of his subservience to the client's wishes and plans. Such a view degrades the legal profession. I am not referring to the bald cases of connivance and participation with the client in furthering illegal or immoral purposes. Such commissions or undertakings by the lawyer are prohibited by every

¹See Lawyer and Banker, issues of Sept.-Oct. and of Nov.-Dec. 1921; also The Nation of Nov. 9, 1921.
written and unwritten code of legal ethics. Neither have I here in mind merely the lawyer's right and duty to control, without dictation from his client, certain details of the proceedings in litigated cases.

It is not only the right and privilege, but it is the professional and personal duty of the lawyer, to be judicial in the formulation of his conclusions with reference to his client's business and, above all, to use his utmost endeavor, even to the extent of shrinking or even losing his standing with his client, to keep his client from doing injustice.

The lawyer's function is in the nature of that of a fiduciary or trustee, and he is answerable as such, not only to the particular person standing in direct relation to him of client, but answerable also to all those, whether it be the public or individuals, to whom the client himself owes an accounting. This is particularly true in instances where the client himself occupies a representative position, as when he is the officer or manager for the interests of another or of several others through appointment,—for example, when he is a corporation officer or an executor of an estate or a trustee of property or of moneys for either present or prospective beneficiaries. In such cases the lawyer and his conscience, as guardians of a trust, are answerable not merely to the client in person but to the client as trustee. The fiduciary capacity of the lawyer, with all its accompanying duties and responsibilities, runs side by side with that of his trustee-client and through and unto

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16, Canons A. B. A.; Taft, pp. 24, 27-28; Carter, p. 51; Costigan, P. 424

24 Carter, p. 52; 24 Canons A. B. A.

Hoffman's Resolutions XIV (Costigan, p. 557) says:

"My client's conscience and my own are distinct entities; and though my vocation may sometimes justify my maintaining as facts and principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go."

As stated by Judge Carter, (p. 51):

"It seems to be a popular belief that by the ethics of the profession the lawyer owes a duty to no one except his client. This is not, and never has been the professional standard. By his official oath the lawyer is expressly bound to honesty and fidelity to the court as well as to his client... He is no man's man. He is not knowingly to urge an unjust cause nor contribute to the prejudice or gratification of his client."

The same duty is emphasized by Judge Taft (pp. 24-28):

"There are limitations upon the duty of counsel to their clients. There are also limitations upon a lawyer's action which he cannot violate without a breach of his duty to the court, of which he is an officer, and to the public interest in the maintenance of the proper administration of justice... He must obey his own conscience and not that of his client."
the end of every transaction which affects the interests of the ultimate beneficiaries. Much more is this the case when the lawyer in question has been the attorney for the maker of the will or other writings creating the trust and has drawn such writings with the full knowledge of the real intent and purpose of their maker.

Because of these fiduciary capacities and duties, the lawyer must insist, and sometimes even dictate, that the client shall perform fully and honorably all his obligations. His duty persists beyond the point of spirited controversies or even of irreconcilable differences with his client. He must not at the first instance of divergence hold up his hands in despair or sever his professional relations in defiance. Sometimes a client, ordinarily fair, becomes subject to a selfish or other ulterior motive or influence or even to an honest obsession of error which may pervert his mental processes and seem to stultify his conscience. Then is just the time when the lawyer should stick, and with a persistence, too, that may involve temporarily some sacrifice of his personal or professional pride. But he should persist in his efforts to accomplish in the end his greater duty and responsibility of bringing his client to a right state of mind and to a right view of the facts and of the conclusions upon the points in conflict. The issue may be one involving the jeopardy of large financial interests of the client or it may be one only incidentally and in a small degree affecting the client's finances, but at the same time involving the question of great prejudice or injustice to a beneficiary of a trust or other third party. It is the lawyer's duty to keep the client from putting a black mark on his business record and never to yield, nor to permit his client to yield, to the purpose or intent of following a course of persecution or oppression or of any form of fraud or of injustice. In such instances a lawyer should treat his client as a doctor would treat a patient stricken temporarily with bodily or mental weakness. He must not yield his judgment or conscience to the control or dictation of error. Neither must he, by withdrawing, try to avoid responsibility by leaving the client free to injure himself or others. He must never falter in the full performance of his duty as fiduciary or trustee. He should be patient and tactful, but he should never surrender on a square issue of good faith, even though the favor of his client be forever jeopardized.

These phases of applied legal ethics could never be solved by
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reference to reported cases. They arise from the confidential conflicts between the lawyer and his client. In private practice they are a part only of the esoteric experience of the profession. In public service, however, there has recently been disclosed a notable illustration.

LANSING, THE LAWYER, AND THE PEACE CONFERENCE

While President Wilson, in organizing the Peace Commission representing the United States at the World's Peace Conference, and in insisting upon heading it in person and in his actions and procedure at that Conference, kept technically within his constitutional powers as President of the United States, nevertheless, his attitude both at the Conference and afterwards toward Robert Lansing, the legal advisor of the Commission, and certain criticisms against Lansing, which have appeared in the press, seem to show lack of appreciation of certain ethical rules governing the relations between lawyer and client.

At that Conference the United States Commissioners, including Mr. Wilson as President of the United States and as head and spokesman of the Commission, were acting only in a representative capacity. They were for the time being fiduciaries or trustees of the interests of the United States and of the whole people of the United States in the work of accomplishing a World's Peace. In the negotiations in which they participated there was no function of greater scope or importance than that which pertained to the legal phases of the questions involved. There was never an instance where the exigencies of the occasion required greater confidence and cooperation between lawyer and client or demanded, both in negotiations and in the drafting of notes, propositions and articles, a higher degree of legal skill, knowledge and foresight. Lansing was not there as the personal attorney of Mr. Wilson, nor merely as attorney for the President of the United States. Neither was he there merely as attorney for the Commission. His duties as a lawyer included those of a lawyer for trustees, of whom he himself was one, and extended to a conscientious protection of the interests of the beneficiaries for whose interests alone those trustees were bound to act. He was answerable, not merely to Mr. Wilson, nor to the President, nor to the Commission. He was answerable to the whole United States and it was his right and duty to advise for or against action with full knowledge of all the
facts, and for that purpose to receive all information obtainable which might relate to the interests of his country or affect his conclusion upon the issues as they arose. His duties and his responsibilities and his right to participate in all the confidential information and negotiations were imposed by all ethical standards of conduct between lawyer and client.

In the interests of his client and of its managing representatives at the time, he owed the professional duty of insisting that he should have the opportunity of considering all the facts and circumstances, in order that he might give advice, in this instance to his client's representative, the President, and give that advice intelligently according to his conscience and not by direction.

All these privileges were denied him. He was not informed of the negotiations as they proceeded. In many instances he was not even consulted on most important points of the law of his country and of international law, in both of which he alone, of all the Commissioners, was an expert. He was not permitted to exercise the functions for which he was appointed nor for which his position and experience qualified him. He detected that his client, through the President as its representative, was falling into errors which threatened to jeopardize not only the interests of the United States but also the great cause for the accomplishment of which his client was struggling, the Peace of the World. The relations between him and Mr. Wilson became strained. So it must be whenever a client, or his representative in charge, blindly and obstinately tends to rush into error and injustice against the protests of his lawyer, or when he acts in violation of the duty of the client to disclose to his lawyer, and disregards the right of the lawyer to know from his client, all the facts in the fullest confidence. Moreover, Lansing was also Secretary of State, the executive whose function is to receive and transmit all communications between this country and foreign nations.

Lansing, the man, might have been justified in following his first impulses to resign. But this was unthinkable to Lansing, the lawyer. He shrank his personal pride, swallowed the slights and criticisms of his fellow Commissioner, and continued, as far as possible under the circumstances, to fulfill his duty of preventing his client from becoming the means either of jeopardizing the accomplishment of the great cause which was the goal or of injustice in the methods of accomplishment. Neither did he sulk at the end.
He attached his official signature to the Treaty, though worded against his judgment and advice, feeling that it was the best that, with Mr. Wilson's permission, could be accomplished at that time to make this country a party to a world compact for peace.

Faithful to his official and professional duties, Lansing kept secret what he regarded to be the erratic and dangerous methods and actions of President Wilson during the Conference and afterwards, until the latter's public attack upon Lansing's conduct and loyalty, as a pretext for discharge, terminated all obligations upon Lansing of professional confidences and not only justified but compelled his publication of the facts in self-defense.

That the wisdom of his judgment or that the unwisdom of the President's judgment was or was not demonstrated by subsequent events, does not affect the questions here involved. Neither is it pertinent here to argue criticism of Mr. Wilson's proposals in connection with the Conference or of his later treatment of Lansing. The point here is, that the President, in his attitude toward Lansing, failed to recognize the reciprocal duties and responsibilities existing between lawyer and client. On the other hand, Mr. Lansing, from the time before he started for Paris and up to his forced retirement from the Cabinet, and including his personal report to his client, the people of the United States, has proved himself to be one of the highest type of the legal profession. He showed fullest ethical appreciation of the duties and responsibilities of the lawyer under the most trying circumstances.  

DUTIES TO FELLOW LAWYERS

The rule that a lawyer shall not solicit business, either by direct advertising or otherwise, is not alone for the protection of other lawyers or of clients nor merely an aesthetic rule to preserve the dignity of the profession. To comply with the full spirit as well as with the letter of ethical codes, the lawyer must carefully consider all the conditions of the employment which he is asked to undertake and especially whether a would-be client is himself in position to solicit his aid. His duty to his profession and to fellow practitioners, as well as to clients in general, may make it improper not only to solicit business but also to accept a commission for active or advisory aid. A law firm or a lawyer who is general coun-

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2. Carter, p. 659; 27 Canons A. B. A.
sel and attorney in a particular matter or who constitutes the legal
department of his client's business, is entitled to direct all legal
matters within the scope of his employment. The lawyer in charge
should generally acquiesce in his client's desire to procure additional
assistance either for litigation or for advice, but no other lawyer,
without full conference with the lawyer in charge, or without
his express consent, should undertake any service, either with or
without compensation, which pertains to the legal business of such
client. Moreover, such consent should not be construed beyond
the limits for which it is expressly given. For a lawyer to exceed
the scope of his commission is a wrong not only to the lawyer in
charge, but to the client. It is an inexcusable breach of profes-
sional ethics. And all the more so if accompanied with secret
intrigue to accomplish results against what is known to be the wish
and judgment of the lawyer in charge.

The too common practice of some self-touting lawyers of the
larger cities to insinuate themselves into employment in matters
in charge of lawyers of other communities is unethical. This is
sometimes attempted through subtle or direct disparagement of
the lawyer in charge or by sly ingratiation with his client. In-
deed, in some cases, resort is had to a propaganda of calumnia-
tion of a lawyer to his client and friends, both before and after the
fact, in order to create doubt or distrust and thereby facilitate
the encroachments planned and also to fore-guard or build up a
pretended justification against criticism by those who hold in es-
teeem the victim of the offending lawyer. Meanwhile, before his
intended victim and the latter's friends he hides his horns and
teeth behind a mask of hypocritical friendliness in the manner of
the confidence man; and finally strikes without warning. All at-
ttempts by a lawyer to "edge in" on another lawyer's case or prac-
tice, as well as all attempts to discredit the lawyer in charge to
his clients or to his friends, or to the opposing parties or their
lawyers, violate all rules of personal honor and all rules of pro-
fessional decency. They are not only unethical, but despicable.
The fact that some client of the offending lawyer wishes or de-
mands the results intended only aggravates the offense, for, as
shown above, unethical conduct cannot be excused because it is
committed at the behest of, or to appease, a client. I have known
of a lawyer not only assuming but actually stating that he was
acting as "general counsel" for certain interests, for which in fact
another lawyer had for years been and still was the general counsel in charge of all legal matters; and that, too, although the pseudo-general counsel was still appearing as representing certain other clients who had been at variance with the interests referred to.

Sometimes a lawyer of disrepute at his own bar and in his own community, who at home is shunned as unscrupulous or feared as dangerous, appears temporarily in another community where his home reputation is not known and there poses as a Choate or as a Taft, or, perhaps as an expert in business and in the law, although distrusted at home either as a business man or as a lawyer. There are instances of a lawyer posing as having been instrumental in bringing to a judge his judicial position and claiming that he has a “pull,” for the purpose of getting the privilege of appearing on briefs and displacing the lawyer in charge so far as leadership of the case is concerned. Such tactics are not only a reflection on the judge in question, but a most unethical method of getting business, involving not only soliciting employment, but also a snatching away of the laurels belonging to another lawyer who had the case well in hand. Such substitutions or displacements are often very prejudicial to the client. But discovery sometimes comes too late. To such predatory practitioners codes of ethics are but Belgic strips whose sanctity may be invoked for selfish defense but to be ignored as mere scraps of—nothing—and violated both in letter and spirit for every vandal invasion or for selfish offense. The duty of courtesy to fellow attorneys is not one of form but of substance.

The opposing lawyer in a dispute, whether litigated or under negotiation, should deal with the opposite side only through the recognized lawyer for that side. He must not negotiate or consult with the other lawyer’s client, or with any person, lawyer or otherwise, assuming to represent such client, except with the express and clear understanding and consent of the lawyer in charge.

These are rules involving more than mere questions of courtesy. They are to protect the interests of all clients and to safeguard lawyers in their right and duty to see that their clients are properly advised against error and against injustice. No honorable lawyer would view any breach of these rules otherwise than as most prejudicial and dishonorable."

*Carter, p. 61; II and XLIII, Hoffman’s Resolutions (Costigan p. 556, 567).*
OTHER APPLICATIONS OF ETHICAL RULES

Illustrations of the application of the canons of legal ethics could be continued without end, but even such treatment would be useless, as the canons themselves would be useless, unless read in the light of the underlying spirit and purpose of the formulated rule, without due regard for which no practitioner can govern his actions rightly, either in a particular instance or generally. It may be helpful, however, to emphasize certain instances which are sometimes considered doubtful or even controverted.

A lawyer should present to the court his client's side of the case, both as to the facts and as to the law. Opposing counsel will do the same for their client. The court will listen to both sides, weigh the evidence and the arguments as to the law in the light of its own knowledge and experience, and decide all issues. The lawyer has the right to demand of his client the fullest disclosure of all facts, but in the utmost confidence as between lawyer and client. Such confidences must never be betrayed. The lawyer must not allow himself to be the instrument of deceit, wrong or oppression by his client, but where the issues of fact or of law are fairly doubtful, it is his duty and privilege to present that view which is most favorable to his client. He must be fair to the courts and must not deceive them, but this does not mean that he shall furnish to the court information which has been received as part of his confidences with his client.

The lawyer must not act in conflict with the interests of his client. When, however, he is in charge of a matter, it is his privilege and duty to investigate on his own initiative and to consider all viewpoints and to act and advise in such a way that, at the same time that he protects his client's interest, he prevents anybody from suffering injustice from himself or from his client. The lawyer's conscience should always be awake and active. He can never excuse himself on the ground of lack of conscience in his client.

The direct and indirect fiduciary duties of a lawyer, already re-

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"Costigan, p. 40; Taft, p. 24-5.
"On this point, too often assumed to be doubtful, Judge Taft (pp. 31-32) writes emphatically:
"To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure."
ferred to above, make him, within the scope of his employment, a trustee of his client's business and confidences. Therefore, his knowledge of his client's affairs must never be used either directly or indirectly to the disadvantage of his client, or for his own advantage or for that of others. He may have business dealings with his client, but in respect thereof his duties as trustee continue and he must act only with the fullest frankness and after making sure that his client is fully informed of every fact pertinent to the transaction which he himself knows or even suspects. Moneys collected for his client should be paid over immediately and if payment is delayed should not be commingled with his own funds. He should not accept or retain as his own any perquisites, bonuses, rebates or profits coming to him through his client's business, except with his client's full knowledge and consent. His expense charges to his client should never exceed his actual disbursements, even when abnormally low, as when traveling on an excursion rate or on a pass or when he obtains lodging or meals free or at below regular rates. Advertising rebates, allowed by some publishers for legal advertising, do not belong to the lawyer but to his client.

In his charges for services, the lawyer should at all times be fair,—but he should be fair not only to his client but also to himself. He should use his utmost endeavor to satisfy his client and be willing to sacrifice wherever necessary to avoid a dispute. But not so without limit. He has a moral and legal right to the fair worth of his services and, where there has been an agreement for compensation upon the strength of which he has worked and sacrificed, he is morally and legally entitled to compel his client to pay in full. No lawyer should shrink from preventing unjust exactions by a client whether it be from himself or from others.

**Lawyers and Newspapers**

However unethical for the lawyer to advertise, there are no ethics of the business of publishing which should make a publisher hesitate to insert in his advertising columns a card or even more extensive bids by a lawyer for business. But both the

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6 Carter, pp. 49-50.
7 Costigan, pp. 484-519.
8 Costigan, pp. 484-5; 12 and 14 Canons A. B. A.
publisher and the lawyer fall far short of the ethical standards which each should maintain when they or either of them permit litigated cases, civil or criminal, to be discussed in the public press on their merits, at least before verdict or judgment has been rendered. Such methods are a breach of the lawyer's duty to his clients and to the courts and to the public. They are a breach by the newspapers of their duty to the courts and to the public. The instigating of prejudice to litigants by inciting in a community a bias of popular opinion in respect of cases in court, tends to undue influence not only upon juries but upon the courts themselves and is perversive of the proper administration of justice. Not that a fair report of the proceedings at a public trial should not be published. What should be avoided is discussion of the merits or of facts extraneous to the record of the official trial. Attorneys in both civil and criminal cases, and especially public prosecutors, are often flagrant violators of the rules of ethics, decency and public policy in this regard. They are thereby imped ing the due administration of justice and, therefore, breaching the duty of the lawyer and of the press.

There has grown up in some parts of the West, including Minnesota, a practice by the newspapers of having the witnesses who are called before a grand jury interviewed, either as to what they expect to testify or as to what they have testified before the grand jury, and then to publish from day to day, while the grand jury is in session, the details or purport of such interviews, and even to publish interviews with the grand jurors themselves concerning their proceedings and deliberations. The statutes governing the grand jury system contemplate, for reasons of great public policy, that the testimony before a grand jury shall be confidential and that the jury's deliberations and votes shall be known only to themselves, and for that purpose the presence, when a vote is taken, of any person other than a jury member,—even that of the prosecuting attorney himself,—invalidates the indictment. The jury members are sworn to secrecy, and, as to the witnesses examined, the law intends that even their names should not be disclosed unless and until returned on an indictment. I have advised newspaper clients that such publications constitute contempt of court, but the courts hesitate to take such drastic action, even to protect themselves and their orderly administration."

APPLICATIONS OF LEGAL ETHICS

Los Angeles newspapers, with the connivance of certain lawyers, sent reporters to spy upon the jury in the recent Burch murder trial after the jury had been locked in their rooms to reach a verdict. The reports published from day to day of the gestures, the arguments, remarks and conversations, as well as of the successive votes and their results, were such that the jury might better have reached their verdict in open session on the stage of a theatre to which the public had free admittance.

These vicious practices could not be continued if either the lawyers concerned or the newspapers observed their duties to the courts and to the public.39

AN ENLIGHTENED CONSCIENCE THE SAFEGUARD

There is no sure remedy for the tendency of some lawyers to read into the canons of legal ethics things which are inconsistent with or directly repugnant to their real spirit and purpose. Much more hopeless is the reform of those lawyers, always with us,—but we trust in decreasing numbers,—who ignore or defy both the terms and spirit of any ethical code. Canons of legal ethics cannot be applied by the searching of their mere terms or by running over an index of their contents. The code of legal ethics is much more comprehensive than anything which has ever been written. At the most it can only reflect the composite conscience of the profession. It should be read only as an appeal to the conscience of the lawyer,—not to the undeveloped conscience of a limited vision, but to an enlightened conscience, the conscience developed by education and by long and careful training. It is an appeal to those whose learning and experience qualify them to feel and to apply high ideals of conduct. It is effective only in the degree that the conscience and learning of the lawyer are effective. But learning must be the basis, for, without learning as a source and guide, conscience cannot work out to applications which are intelligently consistent.

The solution, then, seems most promising through an elevation of the standards of learning required of the members of the bar. The constitution of Indiana compels the lawyer's franchise to be granted to any citizen who can make a prima facie and ex parte showing of good moral character. In some instances law-school admittance requirements are of the lowest grades of educa-

39Carter, p. 71; Costigan, p. 166; 20 Canons A. B. A.
tion. There are law schools where a college A. B. degree is a prerequisite for admission. If a law-school certificate is to entitle a law student to take his examinations for admission to the bar, it should be accepted only from a law school requiring for a law degree at least a three years law course and not less than a two years academic course in a college or university of high standing. Uniform statutes for admittance to the bar should be passed by the several states confirming these educational requirements. While the rule of courtesy permitting a non-resident attorney to participate in a particular trial should be continued, he should not be allowed to move into another state and be there admitted to practice except upon complying with all the conditions required of local lawyers.

Such is the recommendation of the recent American Bar Conference at Washington and urged by Mr. Elihu Root as a means of preventing criminal and all unethical practices "under the protection of a shingle."

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51American Bar Association Journal of March, 1922.