Vanderbilt Law Review

Volume 12
Issue 3 *Issue 3 - Symposium on Professional Negligence*

Article 10

6-1959

Canons 28 and 29 -- An Appraisal

Henry S. Drinker

CANONS 28 AND 29—AN APPRAISAL

HENRY S. DRINKER*

How far should Canons 28 and 29 of the ABA's Canons of Ethics deter a lawyer from taking or participating in proceedings against a fellow-lawyer in a matter involving the propriety of his professional conduct, by reason of the fact that such proceedings may injure such lawyer's professional reputation.

The Canons do not clearly or fully cover this problem.

Canon 29 is as follows:

> Canon 29. Upholding the Honor of the Profession
>
> Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. 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. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

This Canon is reasonably clear but of limited application.

"Fear" in the first sentence I think means apprehension of harm which may happen to the discloser as a result of the disclosure and not of what may happen to the other lawyer. The first clause of the first sentence covers only conduct which is "corrupt or dishonest" and apparently not that which is the result merely of ignorance, carelessness or stupidity. Its last clause, requiring the lawyer unhesitatingly to accept employment against a lawyer who has "wronged his client," apparently would require the lawyer, before accepting a case against another lawyer, to satisfy himself that the other has in fact wronged his client. Despite the words "without hesitation" this would seem to me to contemplate that, with his client's permission, he should call on the lawyer, state the situation to him frankly, and give him an opportunity to explain it and to justify himself. Should the client not be willing for him to do this, I think he may properly decline to take the case. By means of such interview and of a further investigation of facts therein disclosed, it should, in most cases, be possible for the lawyer to make up his mind whether the other has "wronged his client" by "corrupt or dishonest conduct." Unless he is reasonably satisfied

* Member, Drinker, Biddle and Reath, Philadelphia, Pennsylvania. For further discussion of ethical problems involved in malpractice litigation, see Curran, *Professional Negligence—Some General Comments, supra* p. 535 at 542.

that such is the case I do not think that the Canon requires the lawyer to go on with the case if he does not wish to do so.

The attitude of a lawyer asked to proceed against another lawyer may properly be influenced by their prior personal relations,—whether the other is a comparative stranger, or is a frequent colleague or an intimate friend; also, whether the question arises in a large community, where his declining to participate would not seriously preclude the plaintiff from procuring adequate legal service; also, whether the particular service required is one which any other equally competent lawyer could perform just as well. The essential consideration is that the client's interest and the administration of justice will not materially suffer because he does not take the case. If it obviously would he may not properly decline it merely because he is loath to proceed against a fellow member of the bar.

The second sentence of Canon 29 requires counsel in a case in which perjury has been committed to bring this to the knowledge of the prosecuting authorities, even, I believe, though such would seriously reflect on another lawyer in the case. Before doing this, however, he should be clear that perjury has in fact been committed, should discuss the matter with his client, and should tell any lawyer apparently responsible for the perjury what he proposes to do, and hear his side of the matter. His further procedure might depend on the disclosures in this interview but should not be influenced by his reluctance to injure a fellow-lawyer.

The third sentence, requiring the lawyer to guard the Bar against the admission of those unfit morally or unqualified by education, coupled with the last sentence requiring him to strive "at all times" to uphold the honor and maintain the dignity of the profession and to improve the law and its administration, obviously require him to cooperate in removing, at least from active practice, any whose continuance in practice would normally impair this.

A lawyer retained to prosecute a claim for damages against another lawyer has a peculiar obligation to do his best to bring about a proper settlement and if he thinks well of defendant's character, reputation and past practice, he can properly urge this in his favor, without, of course, giving his client ground for belief that he is favoring defendant because a member of the bar.

Canon 28, entitled "Stirring up Litigation, Directly or through Agents," after enumerating certain well known forms of soliciting professional employment, characterized as "disreputable," provides:

> A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any

> practitioner immediately to inform thereof, to the end that the offender may be disbarred.

The use of the word "disbarred" in this provision would seem to indicate that the improper practices thus referred to were so serious as to warrant disbarment, which is not invoked for minor offences or for mere negligence. I believe that "knowledge" contemplates exclusive or at least peculiar knowledge, and that the provisions would not require the giving of unsolicited information as to notorious practices, although it would be the duty of every lawyer to cooperate fully with any bar committee charged with the investigation of such practices.

While the provision of Canon 28 covers primarily only the solicitation of litigation and the deliberate promotion thereof, it impliedly requires a lawyer to disclose any equally improper practices on the part of other lawyers of which he has peculiar knowledge.

The affirmative duty of disclosure thus imposed on the lawyer may well involve a greater embarrassment to him than that of merely deciding when to accept a disagreeable case. Implanted in every one, since childhood, is the conviction that it is ignoble to tell tales on one's associates, and it is this which must be weighed against the specific duty of disclosure imposed by the last sentence of Canon 28 and the first of Canon 29, which duty cannot be avoided on the ground that the other's professional reputation may be injured thereby.

A related question arises where a lawyer is asked to testify as an expert witness as, for example, to the reasonableness of counsel fees, or as to the amount of damage resulting from defendant's professional delinquencies. Except, perhaps, at the request of a judge, I see no reason why a lawyer should give expert testimony if he wishes not to do so, unless perhaps in the rare case where it is apparent that he is so peculiarly expert or informed in the particular matter that the lawyer requesting him to testify will be under a serious handicap without him.

The solution of these problems related to participating in litigation against a fellow lawyer depends in each case to a great extent on the accompanying circumstances. Professional courtesy should not be distorted or overemphasized merely to avoid a disagreeable or unremunerative assignment. On the other hand, a lawyer need not accept such a retainer because of a quixotic notion of his obligation to the bar where there is no cogent reason for his particular participation. While close cases can, of course, be imagined, it is believed that a lawyer with poise sufficient to prevent undue influence by his prejudices can in any actual case readily arrive at a correct solution.