LEGAL ETHICS

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A profession differs from a trade because the main object of a trade is profit while a profession, in Roscoe Pound's words is "a group of men pursuing a learned art as a common calling in the spirit of public service". A tradesman does not act on behalf of his customer, but the member of a profession does act on behalf of those whom he serves. This special relationship between lawyer and client or physician and patient is one of trust, calling for rules of conduct higher than those which the general law requires of the ordinary citizen. These rules may be called the ethics of the profession.

To explain "ethical conduct" it might help to describe "unethical conduct". The author of a recent American book on Legal Ethics, H. S. Drinker, says that unethical conduct, calling for disciplinary measures, comes under two headings (1) moral unfitness to advise and represent clients and (2) unworthiness to continue in the legal profession. This distinction seems helpful, though in some cases improper conduct may come under both headings.

In the legal profession, it is doubtful whether the ethical standards go back as far as the physician's oath of Hippocrates, but certainly in England they began to develop when attorneys and pleaders emerged in the reign of Edward I. The mediaeval attorney took an oath to truly and honestly demean himself in the practice of an attorney, and the sergeant at law swore that he would serve well the King's people, counsel them truly and not defer or delay their causes for his own profit.

Since this paper will deal specifically with professional ethics in Canada, it may help to mention the differences in the organization of the profession in the two countries. In Canada professions are controlled by the provinces and the typical statute creates a law society whose members alone have the right to practice law and who are both barristers and solicitors. They are officers of the court, which an English barrister is not, and disciplinary power rests in the benchers of the society. The union of the two branches renders inapplicable some of the English rules which deal with the relationship between barristers, solicitors and the public. Most discussions of English ethical standards deal with the ethics of advocacy, and the rules which appear from time to time in the Annual Practice are opinions of the General Council, save for those relating to the retainer of barristers, which were framed jointly by the two branches of the profession. A practitioner in Canada is subject to the rules governing both branches, but after making allowances for the differences in organization in the two countries, it is correct to say that the profession in Canada adopts the English standards. In each province however, some standards may be found in statutes as well as in judgments and in custom.

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Moreover there exists in Canada written canons of Ethics of the Canadian Bar Association, a voluntary but influential body. In 1919 the asociation decided to adopt Canons, based on those of the American Bar Association, and they were approved in 1920.

Some lawyers in Canada objected to the Canons on the ground that in England it has not been found necessary to codify the ethics of the profession, and also because there may be a danger that lawyers will treat them like a taxing statute that applies only where the individual comes within the letter of the law. The answer to this last objection is that the canons are not exhaustive, but "should be construed as a general guide and not as a denial of the existence of other duties". As for the first objection, the English rules already mentioned do constitute a partial codification, and in any case there are many differences between the two countries. In Canada there is no couterpart of the Inns of Court and instead of a small bar devoted exclusively to counsel work, there are ten provincial societies most of whose members (except in Quebec) are both barristers and solicitors, with divergent educational background, many of them living in scattered thinly populated areas and without the daily contact with the courts that an English barrister enjoys. It is hard to see how the formulation of the Canons could fail to be beneficial. It is true that so far as we have learned, the only law societies that officially adopted them were those of the western provinces. A short examination of the Canons will show however that subject to minor variations they conform to the high standards of the profession in England.

The Canadian canons are grouped under five headings — the lawyer's duty to the state, the court, his fellow lawyers, his client and himself. We do not propose to summarize the canons in order, but think it worthy of note that they are framed so as to emphasize the various duties of the lawyer, which of course put limits on each other duty. No lawyer should fall into the error of misinterpreting Lord Brougham's famous statement in Queen Caroline's case "that an advocate, by the sacred duty which he owes his client, knows in the discharge of that office, but one person in the world, that client, and no other." Lord Brougham did not mean that the advocate has no duty to the state, the court, or the profession, but rather that his duty to his client may require him to attack the character of other persons—in Queen Caroline's case, King George IV. However, one sometimes hears lawyers in conversation stress the obligation to the client as though this were the only duty the lawyer owes.

Coming now to the contents of the canons, we shall mention first those relating to criminal cases. The primary duty of the prosecutor "is not to convict, but to see that justice is done" and he should withhold no facts tending to prove either the guilt or innocence of the accused. There is no ground for saying that generally Canadian prosecutors do not observe the English tradition. The law reports disclose but a few instances in which the court has reproved Crown counsel for unfairness. The duty to withhold no relevant information has been laid down by the Privy Council, though in 1951 the Supreme Court of Canada held that there is no rigid rule that the Crown must call every person who ap-

pears to know something of the facts or to tender him for cross-examination. The Crown has a discretion with which the Court will not interfere unless it appears that the Crown exercised its discretion "from some oblique motive".

The canons prescribe the duty to act on behalf of an accused person when asked by the Court, and there are many instances in which this is done. However there is another canon which says that no lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. It may be pertinent to note that it is the general practice for the Crown to pay the fees of counsel for the accused in serious cases where he has no funds, and there has been a strong movement toward setting up machinery in the law societies to provide legal aid for needy persons though in most provinces where such provisions exist the aid is confined to civil cases.

In litigation generally the canons say that the lawyer's conduct should be characterized by candour and fairness, courtesy and respect to the court and courtesy to the witness. The obligation not to mislead the court was well put by the late Chief Justice Anglin in 1909. "The court has the right to rely upon him to assist it in ascertaining the truth. He should be most careful to state with strict accuracy the contents of a paper, the evidence of a witness, the admissions or the argument of his opponent. Knowingly to cite an overruled case or to refer to a repealed statute as still in force, would be unpardonable, and counsel cannot be too cautious not to make such mistakes unwittingly".

One specific problem that is of great interest as a matter of ethics, though it does not arise often, is this — is counsel obliged to cite adverse authority? Now if the proceedings are *ex parte* it seems clear that he is bound to do so; ordinarily however there is counsel on the other side and in nearly all cases he will have found the cases in his favour, or at least those that are binding or that originate in courts whose judgements have high persuasive authority. Assuming, however, that he has not, there is little discussion in Canada on the point but it seems clear from the English discussions such as those of Lord MacMillan and Mr. Justice Hilbery that although counsel is not obliged to argue the other side's case he should not knowingly remain silent if he knows of a binding decision that is or appears to be unfavourable. There may be more debate if the case is not binding, but if he is asked if there is authority on the point, he must give it.

The other question that laymen never cease to ask, How do you justify the defence of a guilty man? is not really hard to answer. The canons say that counsel should endeavour by all fair and honourable means to obtain for his client the benefit of every remedy and defence which is authorized by law, and also that it is his right to undertake the defence of a person accused of crime, regardless of his own personal opinion as to the guilt of the accused.

Laymen of course think that this is mere sophistry. Most of us in the profession are satisfied with the justification which Dr. Johnson gave almost two hundred years ago and with the statement of the General Council of the Bar in 1915 on the position of counsel where his client has confessed. In this case, the

1915 ruling says it is advisable to withdraw if the confession has been made before the advocate has undertaken the defence; but that if it is made during the proceedings, then counsel should proceed, his duty being to see that his client is convicted only upon proper evidence, though of course he should not attempt to set up a defence such as an alibi, or to blame another for the crime.

Other duties connected with trials are (1) not to offer evidence which the court should not admit (2) to treat adverse witnesses with fairness (3) not to express his personal belief on matters of fact in dispute and (4) not to testify in a case where he is counsel. No comment need be made on the first of these. As for the second, the Canadian canons do not expressly say that counsel should not ask questions affecting the witness's character merely to attack his credibility unless he has reasonable grounds for believing they are true. This is the English rule and as far as I know understood to be the rule in Canada. As for the third this is doubtless observed by experienced counsel though one sometimes hears counsel say "I think the evidence justifies a finding for the plaintiff" or "I believe my client innocent". As for the fourth, many cases arise in which the lawyer for a party withdraws as counsel where he knows beforehand that he will be needed as a witness.

The subject of fees is of course important. Indeed this is the one area in which the lawyer's interest conflicts with that of his client. The canons require him to charge neither less nor more than reasonable compensation, and where possible to adhere to established tariffs. He is recommended to avoid unseemly disputes over his fees. In England of course a barrister may not sue for his fee but I know of no such prohibition in Canada. The right of a client to tax his solicitor's account is of course a safeguard against exorbitant fees though the right is not really of help in small matters. Other important canons relating to fees remind him that he must not stir up litigation for the purpose of seeking a retainer, and that "he should not, except as by law expressly sanctioned, acquire by purchase or other any interest in the subject matter of the litigation". In England a barrister may not agree that fees shall be paid according to the event: such an agreement is champertous. However it appears that a solicitor, though he may not bargain for a percentage of the amount recovered, may act for a client on the understanding that his fee will be paid out of the amount recovered. In the United States agreements for fees based on the amount recovered came to be accepted when personal injury cases became common, for many claimants had no funds. In some Canadian provinces there are provisions in statute or rules of court permitting the solicitor to make a written agreement with his client that the fees shall be based on a percentage of the amount recovered, though in Ontario this is confined to non-contentious matters, and usually the agreement is subject to approval of the court. In at least one province, (Alberta) it is expressly stated that these agreements do not give validity to a purchase by the lawyer of an interest in the suit or to an agreement that he shall be paid only in the event of success.

Most of the other duties are traditional ones owed to the client—not to represent conflicting interests, to settle if possible, and to keep the client's secrets

and confidences. Lastly he is obliged to account promptly to his client for moneys received and to keep trust funds separate from his own. In some provinces there are elaborate rules to this end. To compensate clients for their loss where the solicitor has failed to account, some law societies have established an assurance fund from contributions made by the members.

The last canon we shall note is one which forbids the solicitation of business. Though permitting the use of ordinary simple business cards, it deprecates indirect advertising and self-laudation. There may be details which some solicitors include on letterhead, professional cards or "shingles" that would not be approved in England, but generally speaking all these media have been used with restraint and so far as I know the publication of notices indicating specialization is disapproved.

The actual ethical standards of the profession cannot, of course, be determined by reading its paper standards but only by knowing the extent to which they are observed.

Having completed our short review of the Canadian Canons, we will conclude this paper by a consideration of the question — how best to implant, maintain and strengthen the best traditions of the profession.

A start should be made with the student entering the law school. Almost everyone planning to enter the profession in Canada attends a law school after two, three or more years of University training. It may be impossible to appraise the character of applicants but tests of aptitude and interest and personal interviews may assist in making selections that will eliminate some who seem to show little promise.

Then, from the time the student enters law school, his instructors can teach him the history of the profession, encourage the reading of biographies of great lawyers and judges, discuss ethical problems as they arise from time to time, and have him study the canons of ethics. It may be too that a course on the subject might be offered as is done in some American schools: certainly the study of one of the good case books or J. G. Brinker's recent text would be profitable for though they are American they contain English material and as already stated the Canadian canons resemble the American. Many think that the best way to inculcate high standards is to drop the seeds incidentally but it seems reasonable to say that a deliberate and concentrated study of the subject, aided perhaps by special talks from judges and leaders of the bar, will inevitably give the student a greater awareness of the subject and of its importance than he would otherwise receive.

The next step in the training is the period under articles which in most provinces follows law school training though sometimes is contemporaneous with it. It is customary for the Law Society before approval of the articles to require a certificate of character but the writer knows of only one case where an applicant with the requisite educational qualifications was ever refused and that was on the ground that he was a Communist.

During the period of articles the student is of course under the tutelage of the practitioner with whom he is articled. One cannot deny the profound in-

fluence of a good principal, who really accepts his obligations as a preceptor of his student. Of course if the principal does not himself have exacting standards or does not take the trouble to teach the student or does not have the type of practice that gives the student wide experience, then the period of articles may be of little value; but in most instances this is not the case. The Law Societies could however remind the principal of his obligation to impress on the student our ethical standards.

Next comes the ceremony of admission. In most, if not all, provinces the candidate takes an oath before the presiding Supreme Court justice. In some, the oath is the same as the English solicitors' oath. In several, it is longer, and combines an oath of allegiance with a pledge that in itself is a short code of ethics. Frequently the presiding justice comments on the oath and emphasizes the responsibility and obligations that the new practitioner assumes. After his admission to practice the young lawyer will of course meet ethical problems from time to time; but if he is aware of his obligations and conscientiously addresses himself to the problem he is unlikely to go far astray.

As long as he is in practice he is of course subject to the disciplinary power of the Benchers of the provincial law society, and may be reprimanded, suspended or struck off the rolls. The wise exercise of this power is of the first importance. To adapt the words of Cockburn C.J., disciplinary bodies can properly say:

> We have a duty to perform to the suitors of the Court, and not only to the suitors of the Court but to the profession of the law, by taking care that those permitted to practice in it are persons on whose integrity and honour reliance can be placed.

In preparing this paper it has not been possible to make an examination into all the types of complaints that come before the disciplinary committees. Doubtless these include failing to account for funds, dilatory conduct or neglect in handling of estates, taking collusive divorce actions, and advertising. It is doubtful that there are many complaints for breaches of etiquette in court for the judiciary can doubtless deal effectively with these, if necessary by exercising the power to punish for contempt.

It would be unsafe however to judge the standard of the bar solely or mainly by the number of complaints. The objective should not be merely to keep out of reach of the disciplinary machinery, but should be much higher. A lawyer might go through life without ever being the subject of a complaint even though he is one who buys property from his client at an undervaluation knowing that he can make a profit, who draws his client's will with himself as beneficiary, who assists clients in illegal schemes, who misleads the court, and who never obliges his fellow lawyer.

It is not enough to say that the great majority do not act in this manner, for the public tends to judge the profession by its less worthy members. The principles which the profession in Canada inherits from the mother country will be secured only if every member of the legal profession remembers that he is in the fiduciary position, an officer of the court, and duty-bound to maintain respect for the law and for the courts, and to aid in the administration of justice.