

MATERIALS ON THE
LAWYER'S
PROFESSIONAL RESPONSIBILITY

By

WILLIAM M. TRUMBULL

PROFESSOR OF LAW
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

LITTLE, BROWN AND COMPANY

Boston

Toronto

COPYRIGHT, ©, 1957, BY LITTLE, BROWN AND COMPANY (INC.)

ALL RIGHTS RESERVED, INCLUDING THE RIGHT

TO REPRODUCE THIS BOOK OR PORTIONS

THEREOF IN ANY FORM

LIBRARY OF CONGRESS CATALOG CARD NO. 53-13205

PRINTED IN THE UNITED STATES OF AMERICA

FOREWORD

THE SPIRIT OF THE LEGAL PROFESSION

. . . That spirit which delivered the law from mystery and superstition and established the Twelve Tables in the public Forum, which wrested its administration from the pontifical caste and gave it to public officers, which broke the rigidity of formulary practice and superimposed the jurisdiction of equity on the strict letter of the law, which rescued the rule of reason from Anglo-Saxon customs and substituted the judgment of twelve honest men for the chance of ordeal, the right of conscience for the might of battle, which divorced the courts from the king's person and substituted due process for the king's prerogative, which established a new government upon a written constitution which gave security to justice against power—the spirit which has done these things and has taught men generally to understand the virtue and the value of the law, if we trust it, still will prove sufficient for our every exigency.¹

You shall doe noe Falsehood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lord Chiefe Baron or other his Brethren that it may be reformed you shall Delay noe man for Lucre Gaine or Malice you shall increase noe Fee but you shall be contented with the old Fee accustomed. And further you shall use your selfe in the Office of Attorney in the said office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God.²

The duties of advocates to their clients are general and particular.

The general consist in three things—secrecy, diligence, and fidelity.

¹ From Wilkin, *The Spirit of the Legal Profession*, pp. 165–6. Copyright 1938 by Yale University Press. Reprinted by permission.

² The oath of attorneys from the Red Book of the Exchequer (C. 1246). Reprinted from Benton, *The Lawyers Official Oath and Office* (1909), p. 28.

1. For secrecy: advocates are a kind of confessors, and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, sub sigillo, and he ought not to discover them to his client's prejudice; nor will the law compel him to it.

2. For diligence: much is required in an advocate in receiving instructions, not only by breviate, but by looking into the books themselves, in perusing deeds, in drawing conveyances and pleas, in studying the points in law, and in giving a constant and careful attendance and endeavor in his clients' causes.

3. For fidelity: it is accounted vinculum societatis. The name of unfaithfulness is hateful in all; and more in advocates than others, whom the client trusts with his livelihood, without which his life is irksome; and the unfaithfulness or fraud of the one is the ruin of the other. . . .³

This living spirit of the profession, which limits, yet uplifts it as a livelihood, has been customarily known by the vague term Legal Ethics. There is much more to it than rules of Ethics. There is a whole atmosphere of life's behavior. What is signified is all the learning about the traditions of behavior that mark off and emphasize the legal profession as a guild of public officers.⁴

The scope of our inquiry into the professional responsibility of the lawyer includes his role in developing the political conscience of society and shaping the institutions through which that conscience is given effect; his functions as an officer in the administration of justice; his fiduciary duties to his clients; his relationship to other lawyers; and the significance of his membership in the corporate or collective body known as the Bar.

The purpose of our inquiry is to explore the means of realizing in harmonious balance all four types of satisfactions—intellectual adventure, spiritual inspiration, civic recognition, and material compensation—available to the lawyer as a reward for his service, toil, and self-restraining exercise of responsibility.

The premise of our inquiry is that refinement of the sense of responsibility, sometimes called conscience, is the product of experience, insight, and understanding. The readings that follow extend vicariously our own

³ From the address of Lord Commissioner Whitelocke to new serjeants-at-law, when they appeared at the Chancery Bar to take the degree November 18, 1648. Reprinted from Whitelocke, *Memorials of the English Affairs* (1682), p. 349.

⁴ From Wigmore's Introduction to Carter, *Ethics of the Legal Profession*, p. xxiv. Copyright 1915 by Northwestern University Press. Reprinted by permission.

limited experience and fertilize that insight which it should be the aim of the more practical character of class discussions to nourish and cultivate. Maturity of understanding is the ever-distant goal toward which we strive throughout life's duration.

WILLIAM M. TRUMBULL

MATERIALS ON THE
LAWYER'S
PROFESSIONAL RESPONSIBILITY

TABLE OF CONTENTS

	PAGE
CHAPTER 1	
<i>THE SCOPE OF THE RESPONSIBILITY</i>	1
ABA Recommended Oath of Admission ..	1
ABA Canons of Professional Ethics: Canons 1, 2, 29, 32, and 26	2-3
Wigmore, "The Spark that Kindled the White Flame of Progress"	4
Pound, "The Causes of Popular Dissatis- faction with the Administration of Justice"	9
CHAPTER 2	
<i>THE "RIGHT" TO PRACTICE LAW</i>	26
<i>Rudolph Schware v. Board of Bar Exami- ners of the State of New Mexico</i> ...	26
<i>People v. Goodman</i>	35
ABA Canons 35, 40, and 47	41-42
<i>In re Bercu</i>	42
<i>Agran v. Shapiro et al.</i>	50
CHAPTER 3	
<i>THE POWER OF DISCIPLINE</i>	62
ABA Model Rules of Court	62
<i>In re Roth</i>	71
Annual Report of the Committee on In- quiry of the Chicago Bar Association	73
Annual Report of the Committee on	

CHAPTER 3 (*Continued*):

	PAGE
Grievances of the Chicago Bar Association	78
<i>Emanuel v. Cooper</i>	79
<i>In re Estate of Kelly</i>	81

CHAPTER 4

<i>ORGANIZATION OF THE BAR</i>	86
Blaustein and Porter, "Organization of the Legal Profession"	86

CHAPTER 5

<i>MEMBERSHIP AND ACTIVITIES</i> ..	121
Brand, "Bar Organization and Judicial Administration"	121
<i>Petition of Florida State Bar Association</i>	131
<i>In re Integration of the Bar</i>	139
Chicago Bar Association Schedule of Dates of Committee Reports	144
Annual Report of Legislative Committee	145
Annual Report of Committee on Candidates	146

CHAPTER 6

<i>FIDUCIARY RELATIONSHIP TO CLIENT</i>	149
ABA Canons 6, 36, and 37	149-150
<i>United States v. Standard Oil Company (New Jersey) et al.</i>	150
ABA Canons 8, 10, 42, 11, and 38	164-167
Opinion 288 of ABA Committee on Professional Ethics	165
<i>Oil, Inc. v. Martin</i>	167
Chicago Bar Association Canon 49	172

CONTENTS

xi

CHAPTER 7

LIMITATIONS ON DUTY TO CLIENT

PAGE

173

ABA Canons 15, 16, and 41	173-174
Opinion 287 of ABA Committee on Professional Ethics and Grievances	174
ABA Canon 22	183
<i>In re Greenberg</i>	183
ABA Canons 3, 23, 18, 9, 39, and 19	187-189
Opinion 220 of ABA Committee on Professional Ethics	189
ABA Canon 20	196
Report of Committee of Association of the Bar	196

CHAPTER 8

SPECIAL PROBLEMS OF ADVOCACY

201

Curtis, "The Ethics of Advocacy"	201
<i>In re Backes</i>	219

CHAPTER 9

FREEDOM TO SERVE OR NOT TO SERVE

224

ABA Canons 31, 30, 4, and 5	224-225
Resolutions of ABA House of Delegates	226
Winters, "Legal Service for All"	226
ABA Canons 7 and 44	241-242

CHAPTER 10

THE PRACTICE OF CRIMINAL LAW

243

<i>In re Disbarment Proceedings</i>	243
Bradford, "Ethical Problems in Prosecution and Defense of Criminals"	248
ABA Canon 5	265

CHAPTER 11

	PAGE
<i>PROFESSIONAL FEES</i>	267
ABA Canons 12, 13, and 14	267-268
Harter, "Factors to be Considered in Determining the Amount of a Lawyer's Fee"	268
<i>Schwartz et al. v. Broadcast Music, Inc., et al.</i>	281
<i>Goldberg v. Perlmutter</i>	283
ABA Canon 34	286
<i>Schectman v. Wolfson, et al.</i>	287
Chicago Bar Association Canon 48	289

CHAPTER 12

<i>PRACTICE IN THE FIELD OF TAXATION</i>	291
Darrell, "Responsibilities of the Lawyer in Tax Practice"	291

CHAPTER 13

<i>SOLICITATION AND ADVERTISING</i>	313
ABA Canons 27, 28, and 43	313-314
<i>Cupp et al. v. Chicago R. I. & P. R. Co.</i> ..	315
Report of Chicago Bar Association Committee	316
ABA Canons 45, 46, and 33	321-322
Chicago Bar Association Canon 27A	322
Opinion 179 of ABA Committee on Professional Ethics	323

CHAPTER 14

<i>RELATIONS WITH OTHER LAWYERS, CLIENTS, AND THE PUBLIC</i>	327
ABA Canons 17, 21, 24, and 25	327-328

CONTENTS

xiii

CHAPTER 14 (*Continued*):

PAGE

Brown, "The Role of the Lawyer in Labor Relations"	328
The Florida Bar, "You and Your Client"	335
Report of Public Relations Committee of Minnesota State Bar Association ...	339

CHAPTER 15

<i>THE FUTURE OF THE PROFESSION</i>	347
-------------------------------------	-----

Statement of Committee on Reappraisal of ABA Canons	347
Griswold, "The Legal Profession"	355
Green, "My Philosophy of Law"	367

APPENDIX A

<i>ABA CANONS OF PROFESSIONAL ETHICS</i>	373
--	-----

APPENDIX B

<i>ABA CANONS OF JUDICIAL ETHICS</i>	388
--------------------------------------	-----

TABLE OF CASES	401
----------------	-----

INDEX	405
-------	-----

Chapter 1

THE SCOPE OF THE RESPONSIBILITY

AMERICAN BAR ASSOCIATION RECOMMENDED OATH OF ADMISSION

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other States of the Union—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We recommend this form of oath for adoption by the proper authorities in all the States and Territories.

AMERICAN BAR ASSOCIATION CANONS
OF PROFESSIONAL ETHICS

PREAMBLE

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

CANON 1. THE DUTY OF THE LAWYER TO THE COURTS

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. 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.

CANON 2. THE SELECTION OF JUDGES

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.

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.

CANON 32. THE LAWYER'S DUTY IN ITS LAST ANALYSIS

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interest of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

CANON 26. PROFESSIONAL ADVOCACY OTHER THAN
BEFORE COURTS

A lawyer openly, and in his true character, may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

Notes

1. The medieval antecedents of the oath of admission recommended by the American Bar Association are traced in Benton, *The Lawyer's Official Oath and Office* (1909). The forms of oath prescribed by statute or by rule of court in the respective jurisdictions in the United States are set forth in Brand, *Bar Associations, Attorneys and Judges* (1956).

2. The principal American antecedents of the Canons of Professional Ethics, adopted by the American Bar Association in 1908, were David Hoffman's "Fifty Resolutions in Regard to Professional Deportment," which first appeared in 1834 and are reprinted in Drinker, *Legal Ethics* (1953), Appendix E; Sharswood, *An Essay on Professional Ethics* (1854); and the Code of Ethics adopted by the Alabama State Bar Association in 1887, reprinted in Drinker, *op. cit.*, Appendix F.

3. A typical judicial pronouncement on the status and effect of the canons (where not enacted into law or promulgated by rule of court) is the following statement in *People ex rel Chicago Bar Association v. McCallum*, 341 Ill. 578, 590, 173 N.E. 827, 831 (1930):

The American and the State Bar Associations are not legislative tribunals, and their canons of ethics are not of binding obligation and are not enforced as such by the courts, although they constitute a safe guide for professional conduct in the cases to which they apply, and an attorney may be disciplined by this court for not observing them.

4. Committees on professional ethics of all the principal bar associations render opinions from time to time construing the canons and applying them to actual or hypothetical situations. Unfortunately, most of these opinions have not been published, but two volumes which are readily available and which should be examined are American Bar Association, *Opinions of the Committee on Professional Ethics and Grievances* (1947); and *Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers' Association* (1956).

ROSCOE POUND'S ST. PAUL ADDRESS OF 1906

THE SPARK THAT KINDLED THE WHITE FLAME OF PROGRESS
BY JOHN H. WIGMORE

20 *J. Am. Jud. Soc.* 176 (1937).

Just thirty years ago last August was struck the spark that kindled the white flame of high endeavor, now spreading through the entire legal

profession and radiating the spirit of resolute progress in the administration of justice.

Until that spark was struck, the profession was a complacent, self-satisfied, genial fellowship of individual lawyers—unalive to the shortcomings of our justice, unthinking of the urgent demands of the impending future, unconscious of their potential opportunities, unaware of their collective duty and destiny.

Where and when was that spark struck? And by whom?

There comes to my mind, just at this moment of retrospection, a classical verse of the great dramatist Calderon, in his play *The Physician* (Act 1; Scene 3):

A little spark may start a mighty blaze;
A gentle breeze a stormy gale may raise.
A little cloud may bring a flood's downpour,
A distant flash may end in thunder's roar.
Thus, starting as only spark, breeze, cloud, or flash,
They end as fire, and flood, and tempest's crash.

There can be no doubt about the where and when of *this* spark. I remember it as if it were of yesterday. I recall the incident, and I recall our feelings about it at the time.

It was a pleasant summer evening in St. Paul, and the date was August 29, 1906. The twenty-ninth annual meeting of the American Bar Association had convened in the Capitol building of St. Paul. At 10:30 in the morning the clans of the respectable Bar had assembled for a business meeting, and had later taken a recess until 8 in the evening. At the evening session there were to be two addresses—the first by “Mr. Roscoe Pound, of Lincoln, Nebraska,” and the second by John J. Jenkins, (later federal judge) of Wisconsin. Some 370 members (out of the total 5400) were registered for the convention, and almost all of them (with many of their ladies) were present in the spacious auditorium of the Capitol.

The title of the address was “The Causes of Popular Dissatisfaction with the Administration of Justice.”

Now you must understand that the typical Bar Association address of that period was a sober, solid, exposition of some sober, static subject—“American Institutions and Law,” “The Civil Law and Codification,” “Alexander Hamilton,” “The Alaska Boundary Case,” and so on. And the speaker was by tradition a lawyer of national eminence—John Dillon, Hampton Carson, James Woolworth, Jacob Dickinson—whose name and repute alone was sufficient attraction. And the members attended as a matter of duty and respect, to be cheered by the speaker's well-turned eulogium on our institutions or by his smooth exposition of a familiar principle of law.

But now it was something different. The speaker was a youngish