

Boston University Law Review

VOLUME I

OCTOBER, 1921

NUMBER 4

LEGAL ETHICS¹

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II.

My fellow-students of the law: In this morning's lecture, I attempted to show, first the necessity for the profession of the law, and the impossibility of maintaining such a profession unless its members are paid for their services; and, second, that such a system, when conducted under ethical rules, some of which I summarily stated, contributes most effectively to the cause of justice and equity. I would like now to consider the Code of Legal Ethics more at length, under some eight different heads.

First, the proper restrictions upon the lawyer in building up a practice.

Second, The considerations that may properly influence him in accepting or rejecting clients who seek his advice or services in court.

Third, His duty toward his client both in and out of court.

Fourth, His proper conduct toward opposing counsel and to adverse parties, both in and out of court.

Fifth, His duty generally to his fellow-members of the Bar.

Sixth, His duty to the judge both off and on the Bench, and the judge's duty to him.

Seventh, The lawyer's special duty toward society and the State.

First. The duty of a lawyer and the restrictions upon him in building up a Practice.

The first canon of Legal Ethics, declared by the American Bar Association, is an injunction against a lawyer's advertising for

¹A stenographic report of a lecture delivered before the Boston University Law School, 3 P.M., May 9, 1921, being the second of a series of lectures on Legal Ethics. Former President Taft (now Chief Justice of the United States) was Kent Professor of Law, Yale College; Professor of Constitutional Law, Yale Law School; and Lecturer, Boston University Law School.—ED.

business, directly or indirectly. The circulation of an ordinary simple business card, announcing that one is engaged in the practice of the law alone, or in association with others, with one's business address, is not improper, but anything beyond this is to be deprecated. When you make a change of your business relations or address, you are entitled to advise the hungry public that you have made such a change, so they can gratify their earnest desire. But anything beyond this is hardly professional. Now, it naturally seems hard to a young man who has devoted a number of years to his academic and professional education, and perhaps has earned his way to the Bar by the hardest, that he should not have an opportunity by honest advertising to bring to the attention of the public his commendable desire to assist his fellowmen in a professional way. I am not prepared to say that by *a priori* argument anything immoral or inherently improper in advertising can be shown. In business, advertisement is one of the legitimate methods of securing trade. The great amount of money spent in advertising is hard to credit. It makes it certain that "it pays to advertise." Why, then, should not men engaged as lawyers or as doctors do this? Well, in the first place, the traditions of both professions are against it. In this day and generation when we are prone to reject everything of the past and assume that our ancestors knew little, perhaps this is not a strong argument. But traditions are often valuable. The fact that they have lasted is an indication that they have been prized by a succession of generations. If advertising were indulged in by the profession, it would lead to a great increase in the expenses of the lawyer. It would introduce competition in the matter of solicitation of business. Think of what attractive pictures of relief could be offered in the public prints to those whose hearts are moved by domestic difficulties, if advertising of professional service were general. There have been cases where lawyers were disbarred because of their advertising in divorce cases. A man in Denver once put on his card: "Special attention given to divorce proceedings. Divorces secured, good in any state, and all done very quietly." The court held that that was inviting domestic difficulty, that it was promising something that a lawyer had no right to promise, because the proceedings in divorce are proceedings in court, likely to be public, and if the divorce were secured without notice, it was quite sure not to be good in other states. Advertising would have the tendency to encourage litigation, and to the stirring up of unnecessary law suits. This is a real evil that should be avoided. Advertising business encourages the sale of goods. It is in the interest of the

public to have trade as lively and active as possible. It is not in the interest of the public, however, to increase law suits. They burden the courts and the public.

How, then, is a man to gain a practice? He should first look about to see if he can not find a subordinate place, with small pay, in a law office having an active business through which he may increase his acquaintance, and pick up a knowledge of how to do things in the profession that only actual experience can give to the lawyer. He has to learn them only once, but he has to learn them. His failure to familiarize himself with them at once, is apt to subject him to humiliation in dealing with lawyers who have not anything like his real legal attainments, and yet who with a considerable familiarity with routine details, can confound him. Now, my boys and girls, you must get experience; you must rejoice in every opportunity to go into the justice of the peace courts. I remember in my own early practice the bitter humiliation I suffered before a J. P. for lack of knowing the customs and rules of that court of the people. It was bitter, but it helped. Menial work in the practice is trying to well prepared graduates of a law school. They will be made to run errands to the clerk's office, to the sheriff's office, to the Land Record office and to the Probate Records, to search for judgments, liens, deeds, mortgages, and wills. It helps to go and copy a deed or record, and you should do that with proper self-restraint, even if you think that the energy of a man of your ability to help the court and the cause of justice, should not be so wasted. My friends, there is no career that you can follow and be successful, that will not involve you in drudgery. The great artist, painter, musician, writer, speaker, teacher, physician, I don't care what his field, if he is to succeed, must go through what at the time seems drudgery and mere routine. You will be made to carry the papers of the members of the firm about to try causes, and will sit silent through trials and absorb familiarity with procedure in court. All this will infringe upon the dignity of one who in a law school magazine, or in a moot court has criticized severely the judgments of the highest courts of the land, because they have not followed proper principles in their decisions. This is a graduate course he cannot take in the law school.

I want to say, however, that you can hardly realize the extent of the benefit that you are deriving now from having come to the Bar at this period, after the law schools have developed to their present degree of effectiveness. In my day in most law schools, the course under the system then adopted was two years and the examinations were so easy that a man who had experience in passing

examinations in academic courses, could sit down and digest all the text books in four weeks and pass a creditable examination. He cannot do that now. He has got to work if he goes through a good law school. He must pass a thorough examination for the Bar. The improvement made in legal education in that respect is most substantial and gratifying.

After a time of preliminary work, you will, if you are lucky, be what is called upon to perform an office known in England as that of a devil. The English Attorney-General always has a devil. He always has large parliamentary duties, and he must have somebody close to him whom he trusts, of ability to study his cases for him, and to study and suggest the line of arguments that can be urged, so the Chief may make the selection. All the leading and busy members of the Bar must have some such young men, and if you can come into such a relation to an active practitioner it is a great opportunity and should be seized. Mr. Justice Gray of the United States Supreme Court always sought to secure from the Harvard Law School the best man of his year to look up and verify authorities cited and aid in the work of revising opinions and proof. They called him Gray's annual.

If a young lawyer can not make satisfactory arrangements in an office where the business is enough to give him such experience, then he must open an office for himself. One can not be unmindful of the very discouraging period of two or more years during which a young lawyer may have no client darken his door. However artistic and beautiful his sign may be, it may not attract the attention of any one. But these years of forced leisure are valuable years. When a lawyer shall have built up a practice, he will look back to that period as an opportunity improved or wasted as on the one hand he may have devoted it to the further study and preparation for his profession, and to familiarizing himself with the local features of the practice or as on the other hand, he may have merely dawdled through the period, leading a listless and useless life waiting for something to turn up. If you would understand the value that such a period of leisure gives one between his admission to the Bar and the building up of a practice, I commend you to a letter written by Chancellor Kent, describing the work he did during that period.

But how will practice come? No one can tell exactly, but if one holds on, it will certainly come. A young lawyer in his social relations, in the lodges or clubs he may have joined, in his boarding house, in his church and in other ways, will make acquaintances, and ultimately the chances which come to everybody will come to

him. Small business it will be at first. Then it will enlarge itself in ways that even the young lawyer's lively imagination can not enable him to anticipate. His hands will be full before he knows it; and this, without any advertising except that which comes from discharging well the duty that is at hand and from impressing his clients, however few at first, with his attention, his straightforwardness, his real knowledge of their cases, and his activity in promoting their legitimate interests.

The rule against advertising is vindicated by the character of the men who do advertise, and who are led to engage in a solicitation which is not only unprofessional but usually verges upon the immoral stirring up of litigation. The term "ambulance chaser" has come to be an accepted description of a very deplorable element in our profession. The scheming on the part of such members of the Bar to bring them clients through the intercession of agents and touters is most demoralizing to the lawyer and does not make for justice. I remember telling, when I addressed this school several years ago, the story that my friend Mr. St. George Tucker of Virginia told me. He was in Boston for a conference with Mr. Moorfield Storey, one of the leaders of the Boston Bar. In returning from Mr. Storey's office to his hotel, he was struck by a street car. He was not injured, but as he said, he was "sort of shuck up like." He went to his hotel and went to bed and thought he needed a doctor. He sent for his friend Storey to recommend one. After Mr. Storey and the doctor had gone, a lawyer's card was brought to him. The card contained the announcement that he gave special attention to damage cases. Although Mr. Tucker was shaken up, his love of humor was still strong, and he directed that the owner of the card be shown to his room. When the visitor appeared he explained that he had heard of the accident and was anxious to know how Mr. Tucker was. Tucker was able to give a groan and say he was hit by a street car. The lawyer broke out into denunciations of public utility corporations and their brutal negligence. He said, "I have had much experience and success in this line of the profession and would be glad to represent you in a damage suit against the company." Mr. Tucker replied, "I am afraid I cannot employ you, I have just seen Moorfield Storey." "My God," said the visitor, "did Storey beat me to it?"

Another practice that is quite demeaning, but which is not infrequently resorted to, is the sensational exploitation of professional services of a lawyer through his solicitation of reporters who have to do with the printing of local and general news, to give him what is called colloquially a "write-up." The sensational features of a

case may lead to the publication of its details without any initial suggestion of counsel. All that the non-advertising lawyer can do then is to state the case as it is, without attempt to enlarge his part in it. The trying of cases in the newspapers is a very common thing, but it is a bad thing, and does not promote justice. The statements are rarely accurate. They really do injustice to one side or to the other. The unjust features are sometimes introduced, I am sorry to say, at the instance of counsel, who hopes in this way, not only to advertise himself but also to strengthen his client's cause in court and affect the administration of justice. In so far as these abuses are due to the sensation-hunting tendency of the press, our profession can not be criticized, but they find ready coöperation in the advertising lawyer. Men who resort to this may seem in the beginning to gain advantage over their fellows, but it is very remarkable how traits of that character impress themselves first upon the profession and then upon the public, so that lawyers of this kind are finally put in the category where they belong.

Second. The considerations that may properly influence a lawyer in accepting or rejecting clients who seek his advice or services in court.

After a lawyer has reached a point in his practice where it takes all his time, he may wish to make a selection of the kind of business he will take, or exercise a choice as to the character of his clients. In the United States, there is no absolute obligation on the part of a lawyer to take any civil business. It is different in England. There the barristers are limited, and one must have an excuse if he would decline business; he must accept the retainer unless a reason is recognized by the court for his doing otherwise. There, a few years ago in England, was a very noted case, which led to a lively discussion of what was the duty of the Barrister to accept a retainer under conflicting obligations.

Sir Rufus Isaacs, then Attorney General and afterwards Lord Chief Justice and now Earl Reading and Governor General of India, retained Sir Edward Carson and F. E. Smith, King's counsel, to bring a libel suit against a newspaper which had charged him with corrupt motives in purchasing shares of stock in the Marconi Company and further with having misrepresented the facts on the floor of Parliament. The attitude of Sir Rufus had become a political issue in Parliament. Mr. Lloyd George's connection with the transaction was also a subject of controversy. Carson and Smith were members of Parliament and in the opposition.

They accepted the retainers and secured a retraction and payment of damages. The question raised was whether they should have accepted the retainer, when as members of the Parliament in the opposition their constituents might have insisted that they should keep themselves free to act against the Government on the issue when raised. The consensus of opinion seemed to sustain the King's counsel in holding their duty as barristers to require them to accept the retainers.

In the United States, the rule is different. A lawyer has a right to decline employment. He may prefer civil litigation. He may prefer patent litigation. He may prefer admiralty litigation. He may wish to cut down general practice and not accept employment that will carry him into court, or he may insist on doing a court business and eschew an office business. In the exercise of such a choice declination of a retainer is quite within professional propriety as understood in this country, and he is not obliged to state the reason why he declines.

There are some cases which a lawyer must decline to take. If he has any interest in the controversy which he is consulted about, it is his immediate duty to disclose it and to suggest that other counsel be retained. A lawyer cannot be too particular in bringing to the attention of his proposed client at once any circumstance that will make his advocacy of his client's cause less effective than the client may suppose it may be. If the adverse party in the proposed or existing suit has been the lawyer's client in the past, he should advise his intending client of this fact, and if his relation to the adverse party has been such that it has possessed him of knowledge giving him an advantage in the conduct of the proposed new suit against his former client, he should decline the employment.

In criminal causes in this country, the right and duty of a lawyer to decline employment are not the same as in civil causes. In those jurisdictions where it is permissible to employ private prosecutors to assist the counsel for the state or the commonwealth, no lawyer of any moral standing at all would accept employment to prosecute a man whom from his examination of the evidence he believes to be innocent. That goes without saying. It is quite different, however, where a lawyer is employed to defend one charged with crime. The defendant is entitled to insist that his conviction shall be brought about in a lawful manner; that the proof shall be sufficient to convince the jury beyond reasonable doubt, on evidence admissible under the rules of law. Therefore, a lawyer may accept employment and defend a man he knows to

be guilty, but he must confine his activity to seeing to it that the man has a fair trial. He is not justified in rising and assuring the jury of the innocence of his client. Nor may he do this indirectly by acts intended to convey to them the same thing. Indeed he should not do so even if he believes his client innocent. He should, under all circumstances, avoid testifying, and should only argue. He may contend before the jury that the case made is not sufficient to convict his client. He must object to the introduction of improper evidence. He has the right to point out evident inaccuracies, or, if the case justifies, the perjury of witnesses. He has the right to argue with all the force of advocacy possible, the defects in the case made for the State. If he thinks his knowledge of the guilt of his client may interfere with his usefulness as counsel, this is a reason why he should retire from the case.

There have been some leading cases on this subject; one is the case of *Corvoisier*. He was a valet of a gentleman and was indicted for murder of his master. Phillips, a prominent barrister, accepted his retainer. In the midst of the trial the defendant called Phillips to him and in the presence of his associate counsel told him he was guilty, but that he wished Phillips to continue his defense. The case was half over, and witnesses for the Crown had been examined. Phillips then went to Baron Parke who was on the Bench with the Chief Justice, but was not engaged in the cause, and asked him his advice. Baron Parke told him that he thought it was his duty to continue, that he would embarrass the case if he left, and most reluctantly he went on. The man was convicted and hung. But afterwards, an enemy of Phillips, who was editing a law magazine, charged him with having said to the jury after this occurred that he believed in the innocence of his client and with having by cross-examination and argument sought to cast suspicion of the crime on innocent maids who were witnesses for the Crown. After years, Phillips spoke. Then he cited the record in the newspapers, to show that he had not assured the jury in his argument of his belief in the innocence of his client; that he had cross-examined the maids before he was advised as to his client's guilt, and that in argument he did not reflect on them or suggest their complicity in the crime. Phillips made it clear that his course had been right. The discussion established the right and duty of counsel at the English Bar to defend a man of whose guilt he has been advised.

Rufus Choate's course in respect to the famous Webster case, illustrates a phase of this question. Professor Webster was being

tried for the murder of Dr. Parkman. The charge for the Commonwealth was that Dr. Parkman was killed by Professor Webster in his office and that the body was disposed of in various ways. The defense sought to show innocence by evidence that Dr. Parkman had been seen on Boston streets after he had visited Professor Webster. It is to be inferred from Mr. Choate's reference to the matter in later years that he was asked to defend Professor Webster, and that he declined because he would not attempt such a defense. Choate's theory was that the only defense in that case was what was said to have been Webster's confession afterwards; that Parkman had come to press him for a debt, and impugned Webster's honesty in evading its payment. Webster in his anger hit him on the head with a piece of wood, and killed him without intending to do so. Had such a defence been set up, Webster would probably have escaped with a verdict of manslaughter; but with the denial of the killing at all, the elaborate means taken to conceal the crime were taken by the jury to indicate a prior deliberate purpose to murder. Mr. Choate had a right to decline employment on this ground. A lawyer is not obliged to undertake the defense of one charged with crime without compensation, and he may decline in absence of assured compensation. When, however, the court assigns him to defend a man, who has no means to employ counsel, and he has no reasonable excuse for declining the employment, this designation is sufficient to require him to render the service without a fee. His obligation to other clients, the fact that he never takes up criminal cases, and other circumstances may justify him in asking the court to excuse him; but if the court does not excuse him after he has submitted his reasons, then it is his professional duty, without compensation, if the state provides none, to undertake the defense.

In the defense of indigent persons, you can try your apprentice hand. If you have the opportunity, you ought to seize it. There is nothing quite so good for trial practice as the experience you get in criminal cases; it fixes in your mind the importance of facts as distinguished from theories of law, because by proof of a fact, you may make a great many rules of law entirely inapplicable. I had a year of practice as Assistant Prosecuting Attorney, and it did me more good so far as practice is concerned, than any other experience. You are trained in the niceties of the law of evidence. The court gives you no time in which to prepare an argument; you must go to the jury as the evidence closes. You find yourself in court. One can note the advantage that the man who has had

experience in criminal law, has in the conception of the value of evidence, in his method of effective presentation and in his discussion of it before the jury.

A vicious practice at the bar has been the acceptance of employment to lobby bills through legislatures in the interest of some particular client, and to hang about legislatures, button-holing members and bringing to bear all kinds of influences upon legislatures, for the purpose. Pursuit of this employment often leads to bribery and corrupt methods that do not need condemnation, for it goes without saying. But even when bribery and unlawful crimes are not resorted to, a personal solicitation of legislators and political wire-pulling are a most demoralizing business, and ought to be regarded as unprofessional. A very wide distinction must be made between this kind of practice, and that of appearing before legislative committees and making a legal argument pointing out the rights and interests of one's client and those of the Public, and how they may be promoted or prejudiced, by the legislation urged. This may be just as legitimate as any other kind of practice. In England they have what they call a Parliamentary Bar, and a regular parliamentary practice, and lawyers who engage in them have just as honorable positions as any in the profession. Upon what are called private bills, that is charters for particular companies, and the like, they have committee hearings in which all sides are represented by counsel, and it is really a judicial inquiry. Briefs are prepared and arguments are made just as before judges. In this country, where there is less formality, the practice to make arguments before committees may easily slip into what is really lobbying, and care must be taken to keep the distinction clear. In every case where a lawyer appears before a legislative committee, he should explain, or ought to be made to explain to the committee whom he represents. He should make it clear that he is engaged in a professional employment. Those whom he addresses and would convince should be given opportunity to weigh what he says in the light of these circumstances. A man who appears before a legislative committee as a disinterested citizen, when in fact he has a fee in his pocket for some special interest, or one who appears for a nominal client while his real client is another person, is guilty of deceit and unprofessional conduct. When you establish a relation to a client, never conceal that relation. It is your affirmative duty to make it known to everybody whose conduct you are attempting to influence, either as a judge, as a legislator, or as a public official of any kind. If the client desires you to act without revealing his

identity and your relation to him, it is a most excellent reason why you should decline the employment.

And now with respect to the selection of clients. Your freedom of choice I have already affirmed. How far ought you to allow the personality of the client to influence you in declining to enter his service? This is not an ethical question which can be categorically answered. The man who comes to you may be a man of bad character who is seeking your employment because you are a man of good character, in order to help him along in his cause. His shady reputation should make you careful and suspicious of his case, and bring you more easily to the conclusion that his case is an inequitable one, and is not brought for a just purpose. Still he may have a good case, and he ought not to be denied the opportunity to have it presented by reputable counsel. If you think, however, that he is merely trying to bolster up with your good reputation a poor or a weak case, and by your presence in the case to avoid the bad effect of his bad reputation, you would be justified, and I would think you would be wise, in declining the employment.

In your acceptance of employment, you should have regard to the matter of compensation, so as to assure yourself that you will receive a reasonable pay for the hard work you expect to do. If a client throws himself upon your mercy, says that he is poor, that he has a good cause, and you are convinced that he has, it is a question for yourself whether you will decline to take his case or not. Every member of the profession must expect to do some free work. He must make his contribution to charity, and philanthropy in that way, if in no other. Doctors do it, most lawyers do it, and ought to continue to do it. And while you should not allow your charitable instincts to overcome your sense of obligation to your wife and your children and yourself to make a livelihood out of your profession, you may very well expect to devote a reasonable percentage of your time to work for nothing in the interest of what you regard as justice. It is a question for your own decision and your own conscience, and men will differ in this as they do in other matters of personal sacrifice and generosity.

There are cases in which you should be insistent that you be paid, and those are the libel cases. The client will rush into your office and show you an article and ask you to bring suit for damages at once. Now the first thing to do after you have heard the story is to say that if it is untrue he has a case, and then to advise him as to what the retainer fee will be. Make it substantial, and you will find ordinarily that his courage oozes out.

You may decline any employment, but after you have accepted, then your obligation begins and then you have no right to cut it off without good reason. You must be justified. If you have not been paid, and your request for payment is denied, or if there is something in the conduct of the client that is grossly improper, you can quit the case. He may discharge you at any time, without reason or excuse. He cannot deprive you of compensation for services already rendered to him.

There is not the slightest reason why you should not accept employment in a case from a corporation. Such clients usually have large interests and of course they seek the best lawyers to advise them and to represent them in court. This is to be expected. But the question, if you are successful at the Bar, that you will have to answer, is whether you wish to identify yourself completely with corporations. Are you willing to acquire a reputation for a certain slant of mind in the way you look at political questions, at the issues between labor and capital, and at class questions, that occupy the public mind today? Many large corporations are in constant litigation—must be so in the nature of things—and they find it greatly in their interest to employ lawyers regularly and exclusively. Such exclusive employment leads to a lawyer's becoming nothing more than an officer of the corporation as closely identified with it as if he were the President, the Secretary, or the Treasurer.

The whole tendency of the last twenty-five years in the profession of the law, as in all society, has been toward commercialism. Lawyers are not to blame any more than all society and all the people. We have been engaged in material development, in increasing production, in reducing its cost and in these ways helping society. Corporate managers have sought corporate profit, corporate power over business and corporate political control, in order to retain that profit. Able lawyers have yielded to the inducement of large salaries and embraced exclusively the cause of corporations. I have known many of them, and have the highest opinion of their character and of their wish to do right. There are those of them who have retained clearness of vision and have not allowed their personal and social views to be affected by this business association. Many of them would make admirable judges if called to the Bench and be entirely impartial between corporate interests and poorer litigants. Nevertheless, such association has a tendency with men of ordinary mould to make them nothing but corporate instruments looking at issues in court and out of court, in politics, and in social matters, from

the standpoint of concentrated wealth. They think that the interests of society require the protection of corporate interests to a degree which is not shared by disinterested men looking fairly at the question. At least this is the general impression. Corporate abuses have made necessary public utility statutes, the interstate commerce law, and the anti-trust laws of nation and state. In the outset the laws proved to be ineffective, and they were subjected to ridicule. The acts were amended. After a while, with the amendments which the people forced, the statutes became a more serious matter. Counsel for the corporations appeared first to fight the original passage of the law, then to fight its amendments, and finally to defeat prosecutions under the amended laws. Popular suspicion arose that corporation lawyers had become the advisers in attempts to do things close to the line of illegality for the purpose of achieving the purpose that the statutes were passed to prevent. The business methods which these statutes made illegal had been in times past regarded as keen and shrewd a generation ago. Their evasion or violation did not appear to be really in the category of crime, and juries when they came to consider the proof of such violations of law were not at first disposed to find verdicts that would put the offenders behind the bars. But the public were impatient and have been prone to classify the counsel with the offending corporations. Leaders of the Bar have made a real personal sacrifice in thus giving their whole exclusive service to corporations, and what is more important, the interest of the general public has suffered by their withdrawal from the general practice. They have impaired the legitimate influence to which their standing and ability, for many of them are eminent in these respects, would otherwise entitle them. They deprive the community of the possibility of their service in high public office. They make the task much more difficult of the President and Governors in selecting members of the Bench and other high places. This is a real public loss.

I am not advising that any lawyer shall decline a retainer of a corporation in respect to a particular controversy that may arise in or out of court. Corporations are nothing but legal entities composed of individuals. Their stockholders include many people who are not rich, and whether they are rich or not, they are just as much entitled to defense of their rights as any other litigants. What I am deprecating is the exclusive employment of leading lawyers and their identification with corporations. I appreciate the attraction there is in substantial salaries for life and the relief there is in avoiding the annoyance and worry and

tedium of the building up and retaining a practice. I venture to think, however, that if you were to look into the minds of many of the great lawyers who have consented to lose their identity in the business and interests of corporations, they would admit that if the choice were given to them again, they would prefer to stand independent as members of the profession, doing service to everyone who comes, acting in each case as it arises on one side or the other and not being regarded in the community as any company's man.

When a lawyer attempts to advise how the spirit of the statutes can be violated and the penalties evaded, he is approaching the line and blurring out the distinction between professional advice and participation in an offense against the law. Neither the client nor the lawyer in such case can plead the privilege of lawyer and client to justify a refusal to testify as to the advice given. The only ground for avoiding the obligation to testify in such a case would be that it might criminate the witness.

In suits for false imprisonments or malicious prosecution or trespass, a lawyer will be liable to the person unlawfully injured, if he took any part in the proceeding complained of, other than merely suing out the process. If he directs the Sheriff, to do that which constitutes the tort, he can be sued with his client. If he knowingly brings a malicious suit, he is a party, and is liable.

A field in which the greatest care should be taken by counsel not to become *participes criminis* is when a lawyer is called in to advise and assist in the disposition of the assets of a failing debtor. Debtors often wish to prefer members of their family or friends who are creditors, or if they are not real creditors, to give them the appearance of being so, in order to justify an appropriation of the assets in secret trust for the use of the debtor himself. A client often does not tell his lawyer explicitly just what the facts are or what his purpose is. He says enough to make the lawyer suspect the facts and understand his purpose without making a clear confession. It is easy for the lawyer to be complacent in such cases, and ease his conscience by putting the responsibility on the client, which he has no right to do. A shrewd, dishonest lawyer can suggest to his client methods for accomplishing his inequitable and unjust purpose without being caught in it. The distinctions upon which legality of assignments and preferences turn are often nice, and are dependent upon the intention of the debtor. The defrauded creditors have to depend upon circumstances which may raise suspicion, but which it is difficult to mass together in such a way as to overcome the direct testimony of the

debtor and his preferred creditors, as to the honest intention of the participants. It is in instances like this that lawyers show the difference in their mettle. One will help his client in every way, the other will be strong and decline to have anything to do with such an arrangement. The skill, unscrupulousness and smoothness of a lawyer in working out such schemes, by which most of the creditors are defeated and the debtor and his friends are saved what assets there are, lead to his further employment. He will not infrequently earn large fees, and accumulate wealth, but then he will be without that which he would give everything to have—the respect of his associates and neighbors. When your client, a failing debtor, lays before you a situation, you should advise him to distribute his property equally. Honest men fail and have to distribute their estates. If the law gives a debtor a right to prefer those who are near and dear to him and who have real debts, you may properly advise him how this can be legally done; but if you find him disposed to secure to himself or to his family the benefit of that which he ought in law and equity to distribute in part payment of just debts he owes, cut yourself clear from him. Of course under the Federal bankruptcy law, such preferences are impossible. But we often have had no bankruptcy law. It may be repealed again, and under state laws, preferences are often possible.

There was a tradition that a highwayman went into a court of equity in England and filed a bill against his partner in crime. He set out a number of joint transactions and dealings in which they made large profit and he asked a decree for a disclosure as to how much had been made and to recover his share.

Mr. Justice Holmes, referring to the story, discredited it. Since that time, however, authentic record of the case and the pleadings has been found. The case was dismissed, and both the plaintiff and defendant were subsequently hung. The dismissal of course was based on the equitable principle that where one who seeks relief in equity has unclean hands it leaves him where it finds him. There is, however, an exception to that rule, which shows how sacred the law holds the relation of attorney to client to be. Where a client in an attempt to defraud creditors conveyed property to his lawyer to hold it in secret trust in order to avoid creditors, the Court of Appeals of New York held that the lawyer could not escape the trust obligation to re-transfer the property to his client because of the fraudulent intent in the original transfer.

Another question will arise when you are called in to make a will. You may conclude that the mind of the testator is so weak

that you doubt his disposing capacity. What are you to do? In England, a solicitor was called by the daughter of the testatrix. He declined to prepare the will without seeing the mother. The case came before the Bar council, and the refusal of the solicitor was held justified. Warren in his history of the American Bar says, that in such a case if the instructions for the will show it to be a just will he would draw it, and if bad he would assume that the incapacity of the testator was such that he must decline to draw it.

How are precedents as to legal ethics made? The best are decisions of courts in disbarment proceedings. But there are others. Bar Associations formulate codes of professional ethics sufficiently detailed to be helpful. Bar Associations have committees to hear grievances against members of the Bar. These committees hear and decide whether complainants state a case for discipline and disbarment or other proceedings. These rulings form precedents. Members of the Bar are permitted to ask opinions of this committee on ethical questions arising in their own practice. The questions and answers are printed, and form precedents.¹

(To be continued)

¹End of the second lecture.—ED.