



Volume 61 | Issue 1

Article 3

December 1958

Lawyers' Obligations to the Courts

Byron O. House
Supreme Court of Illinois

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Courts Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Byron O. House, *Lawyers' Obligations to the Courts*, 61 W. Va. L. Rev. (1958).
Available at: <https://researchrepository.wvu.edu/wvlr/vol61/iss1/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

LAWYERS' OBLIGATIONS TO THE COURTS

BYRON O. HOUSE*

THIS paper will concern itself largely with the duty of lawyers to the courts. It is written from the viewpoint of a country lawyer suddenly catapulted from almost thirty years of practice to his state's court of last resort via eight months on the trial bench. These vantage points have afforded an opportunity to observe the lawyer's duty to the courts in various perspectives. With due respect to the learned scholars who have written on the subject, this small contribution is launched.

In stating generally the duty of the advocate, I believe the oft-quoted words written in the case of *The Queen v. O'Connell*¹ more than one hundred years ago are truly appropriate:

"[H]e is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law—he will not willfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual, and *retained* and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual *retainer* on behalf of truth and justice; and there is no Crown or other license which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

The Honorable Charles E. Clark has stated that the subject of legal ethics is a paradox from both its simplicity and its difficulty. As he puts it, "everybody knows—or at least thinks he knows—the difference between right and wrong, between honesty and dishonesty."²

If this be true, then what is the purpose of the Canons of Ethics, one asks. Mr. Robert T. McCracken in discussing their purpose stated:

"Much of the intendment of the Canons has to do with the eternal verities, with the fundamentals of right or wrong conduct

* Justice of the Supreme Court of Illinois, Springfield, Illinois.

¹ 7 Ir. Law Rep. 261, 313 (1844).

² Clark, *The Lawyer's Duties to the Courts*, 7 U. FLA. L. REV. 404 (1954).

LAWYERS' OBLIGATIONS TO THE COURTS 23

of the members of an ancient and honorable profession. These fundamentals have not changed in the past half century. Let us hope that they never will. The Canons did not create them; they only reflect them. For lawyers of experience and the right instincts, no Canons are required. As a guide for the young, and even, in rare instances, for those of mature years, they are most useful."³

Indeed there would be few, if any, breaches of ethics if all lawyers could develop an instinct for truth and justice under all circumstances. Let us look then at what the lawyer's duty to the courts is and how we can aid in helping develop in the lawyer the instinct to fulfill this duty.

When considering the eternal truths of our profession, and the duty an attorney has to the courts, we think immediately of his duty to maintain a respectful attitude toward them. And so it is that the very first of the Canons of Professional Ethics deals with this question.

The courts in a society such as ours have the function of administering justice. They theoretically never make a mistake in dispensing ideal justice and for this reason the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. This abstraction that administers ideal justice demands respect, and society commands that every citizen respect it. An abstraction cannot however render decrees or judgments, and therefore, our society places a man or men on the bench to represent it. The man should be marked by gentleness and purity of character, acuteness and suppleness of mind, and by his learning, his moderation, and his sympathetic understanding of his time.⁴ But, alas, he is, nevertheless human and fallible, and for this reason is sometimes criticized as are all men. Be this as it may, every citizen, and especially the lawyer, has a duty to maintain a respectful attitude toward that which the judge represents though not necessarily the judge as a man.

The distinction was stated many years ago in this manner:

"Fidelity to the court requires outward respect in words and actions. The oath, as it has been said, undoubtedly looks to

³ McCracken, *The Canons of Ethics: Some Observations on Reappraisal*, 43 A.B.A.J. 1098, 1100 (1957).

⁴ So Judge Learned Hand described the ideal as embodied in Justice Cardozo. See a review of "*The Nature of the Judicial Process*", in *JURISPRUDENCE IN ACTION* (1953).

nothing like allegiance to the person of the judge; unless in those cases where his person is so inseparable from his office, that an insult to the one is an indignity to the other. In matters collateral to official duty, the judge is on a level with the members of the bar, as he is with his fellow citizens; his title to distinction and respect resting on no other foundation than his virtues and qualities as a man."⁵

There is one over-powering reason, among others, why a respectful attitude to the judge be especially impressed upon the lawyer. The layman who only occasionally enters the courtroom as a juror, witness or party looks to the lawyer, who is in constant attendance on the courts, as his example. Disrespect by the lawyer breeds disrespect by the layman.

Respect for the court does not mean that the lawyer before a ruling is finally made or a decision finally rendered, is not entitled to vigorously protest against that which he deems erroneous.

"In order that the decisions of the courts may give satisfaction to the parties and at the same time command public respect and acceptance, they must proceed upon full arguments on both sides. For it has long been proved that the most effectual and only practicable method of arriving at the rights of a dispute is by critical debate in the presence of an impartial third party, where every statement and argument on either side is submitted to the keenest scrutiny and attack. Where every step of the way to judgment has been tested and contested, the chance of error in the ultimate decision is reduced to a minimum. The better the case is presented on each side, and the keener and more skillful the debate before him, the more likely is it that the judge will reach a just and sound judgment. That is why it has been said that a strong Bar makes a strong Bench."⁶

Thus, the lawyer should and must vigorously argue his case at the proper time and in the proper place since he is an essential element in the administration of justice, but he should do so with a respectful attitude. This responsibility, in turn, carries with it a corresponding duty. The duty of which I speak is covered by Canon 22 dealing with candor and fairness to the court. As Mr. Justice Anglin stated it:

"It is impossible to exaggerate the importance of being absolutely fair with the court. Candor and frankness should char-

⁵ SHARSWOOD, *LEGAL ETHICS* 61 (1884).

⁶ *The Ethics of Advocacy*, in *JURISPRUDENCE IN ACTION* 310.

LAWYERS' OBLIGATIONS TO THE COURTS 25

acterize the conduct of the barrister at every stage of his case. The court has the right to rely upon him to assist it in ascertaining the truth. *Veritas est justitiae mater*. 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."⁷

All authorities are in agreement that the lawyer has a duty not to mislead the court by misquoting or misciting, but they are not in agreement as to whether he has failed in his duty to the court by an act of omission. For example, let us suppose that an attorney has discovered a case holding against him on the very point he is arguing, but neither his opponent nor the court is aware of it. Does the attorney have a duty to bring the case to the court's attention although it may prove fatal to his client's cause which he may otherwise win; or should we adhere to the theory that it is an adversary proceeding to the point where the attorney should remain silent knowing that the judge is likely to render a judgment contrary to the law which is binding upon him?

An able lawyer who often appears in our court handles the problem in this manner: he immediately draws the court's attention to the adverse precedent, come what may, and does his best to differentiate it, or to persuade the court not to follow it. Although this course has not always proved successful to him in the immediate case his over-all success is excellent and has gained for him the confidence of the courts and the respect of his colleagues.

As Mr. Drinker points out, counsel's duty in this case turns on the degree to which the old idea that litigation is a game between the lawyers has been supplanted by the more modern view that the lawyer is a minister of justice.⁸ I am of the opinion that the court is entitled to rely on a lawyer's not misleading it by any act of omission as well as commission in dealing with relevant facts. There should be no question about the attorney's duty in this respect. As to the law applicable to the case, the question becomes more complicated. The judge is presumed to know the law, and, in addition, the applicable law, which, unlike a matter of fact, is not always capable of being

⁷ Anglin, *Relations of Bench and Bar*, 29 CAN. L.T. 7 (1909).

⁸ DRINKER, *LEGAL ETHICS* 76 (1953).

precisely ascertained. While I do not espouse the idea that an attorney has a duty to argue his opponent's case, I lean to the modern view that he has a duty to see that the court is familiarized with all cases that are clearly relevant before it when proceeding to judgment.⁹

It has often been said that delayed justice is tantamount to a denial of justice. The truth of this statement is being impressed on the public daily as cases pile up on court calendars and dockets fall further and further behind. The answer often given to the complaints of the public is that more judges are needed or that the judicial system should be remodeled. It is not within the scope of this paper to discuss judicial reform, but it seems obvious that if all lawyers adhered to their duty not to employ dilatory tactics, our court dockets would be much less congested.

"The law offers innumerable opportunities and means for delay, many of which it is not only the right but the duty of the lawyer to employ for the benefit of his client; others where it is not. The point at which he should draw the line is a question which each lawyer must decide for himself under the admonition of Canon 29 to '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.'"¹⁰

While a lawyer has the right to vigorously present his case, he should do so with reasonable brevity. Unnecessarily prolonging examination of witnesses, bickering over objections, and continuation of argument after the point has been made is vexatious to the court, adds to calendar congestion and indicates a lack of courtesy and consideration to counsel waiting to be heard on cases further along on the docket. Arguments, both before the trial court and on appeal, should be to the point. When completed, they should not be "re-hashed", otherwise they merely tend to confuse. Insistence upon taking every second, and more, of time allotted often causes an argument to lose much of its persuasiveness.¹¹

Whether the lawyer is delaying the cause in the interest of justice or for his financial gain or for malice is a matter left largely to

⁹ See AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 588-89 (1957).

¹⁰ DRINKER, LEGAL ETHICS 83.

¹¹ See Canon 21.

LAWYERS' OBLIGATIONS TO THE COURTS 27

his own conscience, subject, of course, to normal supervision of the court. The duty not to employ dilatory tactics, like many others, is often unenforceable except through the lawyer's own conscience and professional pride. Has it not been said, and proved throughout the ages, that civilization is measured by the extent of obedience to the unenforceable? The lawyer who is not obedient to the unenforceable rules of conduct tends to bring discredit upon himself and his profession.

It should be noted that the bar and courts have taken steps by statutes and court rules to thwart the innumerable opportunities and means of delay. Many states by statute or rule require specific averments and admissions and provide for pretrial conferences, interrogatories and the like in an endeavor to curtail those lawyers bent on battling out the pleadings and blocking the reaching of an issue.

The Illinois courts, with the able assistance and excellent cooperation of the Illinois state and Chicago bar associations have been making an intensive study of the problem of delay and consequent calendar congestion. Reports of the committees on uniform circuit court rules, state-wide court and jury room facilities, uniform jury instructions and limitation of *voir dire* examination were recently presented at the fifth annual Illinois judicial conference. The first tangible result was the adoption of a rule¹² by the supreme court limiting *voir dire* examination of jurors by attorneys with the view of lessening the time consumed in empaneling juries. Other measures to eliminate delays are receiving further study and some undoubtedly will be adopted. But rules alone will not close all avenues to delay. In the final analysis it is up to the lawyers to recognize their duty not to employ dilatory tactics, to the end that congestion be eliminated or at least substantially reduced.

As noted earlier, an essential element in the administration of justice is an impartial third party. This impartial third party may be the judge or the judge and jury. It is the duty of the lawyer in the furtherance of justice to conduct himself in such a manner that the judge and jury will remain impartial.

Canon 3 deals with the personal relations between lawyers and judges. It properly states that there should be no private communi-

¹² Illinois Supreme Court Rule 24-1, adopted September 17, 1958.

cation or argument to the judge concerning the merits of a pending case. Such conduct obviously strikes at the heart of the administration of justice, as we know it, for it does away with the adversary proceeding and tends to make the judge a partial rather than an impartial third party. A few jurists advocate no contact between lawyers and judges outside the courtroom. To ascribe something sinister in a friendship of lawyer and judge, particularly one of long standing, is unfair to both. After all, judges are still lawyers, despite their robes and, in my opinion, those who mingle with other lawyers socially and through bar association and similar activities are richer by the experience. A note of warning to the lawyer may be in order. My own observations have indicated that a judge has an unconscious tendency "to lean over backwards" when passing upon a contested matter in which a close friend is one of the advocates. The lawyer should not take this amiss since it is only a natural tendency. As to conduct which tends to gain from a judge special personal consideration or favor, the matter is again largely left to the conscience and professional pride of the lawyer. It would seem that this duty has been usually safely so left.

The relation between the lawyer and the juror is dealt with in Canon 23, which provides that "all attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional." To further insure that the jury remain impartial it has long been considered entirely improper for an attorney or his client to privately converse with the jurors both before and during the trial. It has been said: "The wrong [conversing with a juror] is aggravated when the taint of personal interest mingles with it, as when committed by a party to the cause, but appears in the worst form when it is the act of attorneys or counsel who are the sworn officers of the court, whose duty it is to act as guardians of the fountains of justice. . . ."¹³

A duty, not specifically included in the Canons, but which should nevertheless be adhered to, is that imposed upon the lawyer to be adequately prepared. He owes this duty to his client as well as to the court. The amount of preparation that a lawyer puts into a case seems to be left solely to his conscience and professional pride since I know of no disciplinary action ever taken against a lawyer for failure to be prepared. Ignorance in action is a dangerous thing, and

¹³ SHARSWOOD, *LEGAL ETHICS* 68-69.

LAWYERS' OBLIGATIONS TO THE COURTS 29

the lawyer who is inadequately prepared has not only failed in his duty to the court but has failed his client.

In addition to the duties the lawyer has to the courts heretofore discussed, there are many others such as his duty not to alter court records or abuse legal process, and the like, which are obvious. But those commented on serve to illustrate that the lawyer faces many difficult problems of conduct. One might ask how it is possible for the lawyer to conduct his practice properly when there are so many difficulties. The Right Honorable Lord McMillan gave this answer to the question: "The truth is that so settled are the traditions of honour and fair dealing which the Bar observes and such is the atmosphere which long observance of these traditions has created, that those who have absorbed these traditions and live in that atmosphere acquire unconsciously a sense of what is due to their calling and are scarcely aware of the code of honour which daily guides them, so much has it become their second nature."¹⁴

I am happy to say that the conduct of the vast majority of lawyers is guided by that instinct or second nature for truth and justice. There are those few, however, who by their conduct bring disrespect, not only upon themselves, but upon the whole profession. The bar and the courts have, through disciplinary proceedings and fear thereof, prevailed upon some of these few to change their ways. At times it is found necessary to deprive them of their privilege to practice. These efforts undoubtedly will be continued. Needless to say, however, even though the diseased fragment of the bar is located and cured it leaves its scar.

While this article generally deals with the lawyer's duty to the courts, much of what has been said applies with equal force to the lawyer's duties to the public, his clients and other lawyers. So, in presenting the views following, which look to an improvement in the bar of the future, the improvement of the attitude of the lawyer to the courts will be only incidental to the over-all betterment.

By making a closer scrutiny of the character of future lawyers and stepping up their ethical training, much good can be accomplished. To borrow a term from the jargon of the mechanic, we should institute a thorough program of "preventive maintenance" to complement the program of improvement of the present bar. The

¹⁴ *The Ethics of Advocacy*, in JURISPRUDENCE IN ACTION 328.

elimination of those who are found to be unfit before they begin the study of law and the inculcation of ethical principles in students throughout their study of the law should considerably reduce the necessity for disciplinary action after admission.

About thirty percent of the states, notably Pennsylvania since 1800 and Ohio since 1900, require registration prior to or shortly after the beginning of law study, and most of them make a character study at the time of registration and another after completion of law study before admission. New York, New Jersey, Michigan, California and a few other states require fingerprinting of applicants.

There is much to be said in favor of the prior registration and character examination plan. Where study by a character and fitness committee, or similar body, finds an applicant clearly unfit, much time, money and effort would be saved by eliminating him before his years of law study commence. In other instances where the applicant is a borderline case, an annual study could be made to determine the degree of his rehabilitation. In a survey report on the subject, Mr. John G. Jackson of the New York bar concluded:

"The most effective procedures require (1) registration when the study of law is begun; (2) the appointment by the registrar of a preceptor to guide, instruct, and advise him during his student years; (3) some period of law clerkship (by analogy to the internship of a medical student); (4) proof of good moral character and fitness both when the applicant registers as a law student and again when he applies to take the bar examination, from sources as disinterested as possible, using, if necessary, the services of the National Conference of Bar Examiners; (5) investigation when necessary by the Examining Committee or its appointee; (6) a personal appearance by the applicant before the Committee or a member; (7) a final review and approval of the applicant's entire record by the Committee before he may take the bar examinations."¹⁵

The adoption of the foregoing procedures by all jurisdictions, and the setting up of a central office to clear the exchange of information between states, would undoubtedly go far toward the improvement of the future bar.¹⁶ Furthermore, it seems that fingerprinting

¹⁵ Jackson, *Character Requirements for Admission to the Bar*, 20 *FORN. L. REV.* 305 (1951).

¹⁶ For a thorough treatment of this subject see Sprecher and Weiss, Report to the [Illinois] Character and Fitness Committee on Registration of Law Students and Fingerprinting (1956, unpublished).

LAWYERS' OBLIGATIONS TO THE COURTS 31

would prove helpful. Applicants should not object since our armed services and federal agencies and many private enterprises require persons in whom great trust and confidence are to be reposed to submit to fingerprinting. Certainly trust and confidence of the highest degree are extended when a man is licensed to practice law.

The next step in a preventive maintenance program lies with the law schools. Years ago the student of the law, for the most part, gained the sense of professional standards to which he should adhere from the attorney in whose office he worked as a clerk. For better or for worse, the student emulated the conduct of the attorney under whom he was studying. In time, the law schools were given the sole responsibility for educating the candidate for the bar. This responsibility, in turn, carries with it the responsibility of inculcating in the student the duties and obligations which will devolve upon him as a lawyer. The law student should be informed of the characteristics of the ethical lawyer and urged to begin acquiring such characteristics from the moment he is introduced to the study of law in a concentrated effort to inculcate in him the professional standards to which he should adhere.

The new law student upon learning of the Canons of Professional Ethics will normally assume that if he obeys all of the canons he will automatically be an ethical lawyer. I believe that this student is safe in assuming that this course will prevent him from being the target of any disciplinary proceeding but it will not necessarily make him an ethical lawyer. Thus, I believe that acquainting the student with the canons is only a beginning since his knowledge of ethical standards should be broader than this. The instruction should encompass the history and traditions of the profession and the responsibilities of the lawyer in his various relationships.

It is also my belief that ethics should not be taught as an isolated course of instruction like torts or contracts, but should be taught in every course every day. It would seem that teaching ethics in this manner gives a better perspective and greater emphasis since questions of ethics are involved in every phase of the legal process.

Each professor should teach ethics *every day* as a part of every course. In the course of constitutional law, for example, the student will learn of the rights our constitutions afford a person accused of a crime. If the professor, while teaching on this phase of the course,

has instilled in his students a high regard for these rights, those who may later be prosecuting attorneys, will be less likely to infringe the constitutional rights of the accused.

The lawyer has the Canons of Professional Ethics to consult before he acts. However, one who has not developed the second nature for truth and justice tries too often to come within the letter of the canons and does not come within their spirit and, consequently, the purpose of the canons as set out in their preamble is for naught. The language of Mr. Drinker on this question is most appropriate:

“. . . [A] man is not an ethical lawyer merely because he obeys the Canons of Professional Ethics and the Ten Commandments and refrains from doing things for which he can be disciplined by a court or censured by an ethics committee. He is an ethical lawyer only when his conduct goes beyond the dictates of such rules. The Preamble to the Canons of Ethics states that a lawyer must behave so that he will never be ashamed of himself and so that what he does will commend itself to the best people. He is thus commanded to do something more than merely adhere to the Canons and the Ten Commandments.”¹⁷

Much could be said on the subject of the courts' duties to the lawyers but that is not within the scope of this article. I need only say that we judges owe the reciprocal duty of respect, restraint, tolerance and understanding toward the lawyer and his problems.

¹⁷ Drinker, *The Ethical Lawyer*, 7 U. FLA. L. REV. 375 (1954).