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STUDY OF THE CANONS OF PROFESSIONAL ETHICS

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FOR A NUMBER OF YEARS many interested lawyers have expressed the opinion that the Canons of Professional Ethics of the American Bar Association need revision in four principal particulars: (1) there are important areas involving the conduct of lawyers which are either partially covered or totally omitted; (2) many Canons which are sound in substance have been awkwardly or deficiently stated; (3) practical sanctions for violations are virtually non-existent; and (4) changing conditions in an urbanized society require new statements of professional responsibility.

The impact of these views, coupled with his personal beliefs, led Lewis F. Powell, Jr., while President of the American Bar Association, to request the creation of a Special Committee for the Evaluation of Ethical Standards which would examine the current Canons and make recommendations for changes. The House of Delegates unanimously granted his request and on August 14, 1964, he appointed a committee representing a cross-section of the bar, professionally and geographically. All the members were from different states. Two were former judges, two were law teachers, and eight were general practitioners.

The sole commission of the Committee is to examine the Canons of Professional Ethics. In a technical sense the Committee has nothing directly to do with the Canons of Judicial Ethics, however, any study of professional responsibility of lawyers necessarily requires frequent examination of Canons of judicial responsibility.

The original thirty-two Canons of Professional Ethics were prepared by a committee of the American Bar Association appointed in 1905. The original draft was based largely on the Code of Ethics adopted by the Alabama State Bar Association in 1887, and at the 1908 meeting of the American Bar Association the Canons were approved as drafted, with one exception.

The thought of studying the Canons of Professional Ethics with a view towards possible revision is not a new one. In 1937, a special committee of the American Bar Association investigated the subject

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and recommended amendments to several Canons, but nothing came of this effort. As recently as 1954, the American Bar Foundation appointed a group of distinguished lawyers and judges under the Chairmanship of Judge Philbrick McCoy to study the Canons. They concluded that a general revision of the Canons was needed, but no action was taken from the date of their report until the appointment of the present Special Committee for the Evaluation of Ethical Standards.

The Committee has gone forward actively in its work and is now meeting at frequent intervals. It has no power to restate or enlarge the Canons of Ethics. Its duty and its directive is to investigate and to submit recommendations to the House of Delegates of the American Bar Association, which alone possesses the power of promulgation.

The very nature of the work of the Committee precludes it from acting on a piecemeal basis or from making premature and tentative announcements of possible action. The Committee is unanimous in its belief that a creative job with a delicate balance between its respective parts can best be accomplished without fragmentary looks and consideration of isolated parts. The work can be much more effective if there is brought forth a complete tentative draft for submission to the bench, the bar and the public for study and criticism. Following which, any suggestions submitted to the Committee can be seriously reviewed and a final draft can be submitted to the House of Delegates. It is impossible for the Committee to predict precisely when the first tentative draft will be available for distribution, but the date will probably be sometime in early 1967.

Great encouragement has been given to the Committee by spontaneous expressions of interest, not only from members of the bench and bar, but also from the general public. All agree that the time is at hand for a deep and substantial look at the Canons. Quite apart from the volume of mail already received, the Committee also takes heart from the words of Mr. Justice Harlan Fiske Stone's famous address, *The Public Influence of the Bar:*

> In the new order which has been forced upon us, we cannot expect the Bar to function as it did in other days and under other conditions. Before it can function at all as the guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era. However undesirable the practices condemned, they do not profoundly affect the social order outside our own group. We must not permit our attention to the relatively inconsequential to divert us from preparing to set appropriate standards for those who design the legal patterns for business practices of far more consequence to society than any with which our grievance committees have been preoccupied. Aside from the procedure of formulating new methods or discipline and new specifications of condemned practices, we must give more thoughtful consideration to squaring our own ethical conceptions with the traditional ethics and ideals of the community at large.

The most casual observer is aware of the great changes in the practice of law in the past fifty years. Some of those changes require additions to the Canons and still

others make unreliable a number of assumptions upon which certain Canons appear to have been based. Changes in the work of judges and lawyers are a reflection of the drastic changes in many aspects of our society and economy. In the past half century we have seen the development of a predominantly urban, complex industrial economy in which business and labor are closely related and mutually dependent. Changes brought about by these developments, by scientific advances, by two world wars, and by the coincident increase in the taxing and regulatory activities of government at all levels, have strongly affected the work lawyers do for individuals, corporations, labor unions and trade associations.

Significant changes have also been made in the organization, education and self discipline of the profession. This trend is illustrated by the development of unified state bars and the formation of national associations of lawyers in specialized fields. There have been wide changes in the requirements for admission to the bar and in legal education. The enforcement of professional standards has become a matter of particular interest to the bar.

It is interesting to observe that in 1905, when the committee to draft the present Canons of Professional Ethics was appointed, the American Bar Association had 1,718 members, and that by 1950, it had only 42,121 members. Today the American Bar Association has nearly 120,000 members out of the approximately 200,000 lawyers actively engaged in some aspect of the law.

The present Canons of Professional Ethics have been adopted, with some variations, by all of the states and by a number of national legal associations in specialized fields. Some associations have drawn heavily upon them in framing their own codes, and the excellent Code of Trial Conduct of the American College of Trial Lawyers is an example. While the opinions of the Committee of Professional Ethics of the American Bar Association have been published and given fairly wide distribution with resulting value to the bar, they certainly are not conclusive as to the adequacy of the present Canons. Because the opinions are necessarily interpretations of the existing Canons, they tend to support the Canons and are critical of them only in the most unusual case.

In order to determine whether the present Canons of Professional Ethics are adequate to meet the requirements of modern law practice, it is necessary to keep in mind the purposes which the Canons are expected to serve. We must also be able to recognize the problems which confront the modern practitioner and, on careful analysis of those problems, consider whether the Canons afford an adequate guide for their solution.

A code of professional responsibility for lawyers should serve a two-fold purpose. First, the code (or Canons) should be fully stated to aid the lawyer in his search for appreciation and understanding of the ethics, high principles and dedicated aspirations of the legal profession. In this sense it is truly a moral code, addressed primarily to the lawyer's conscience. Secondly, it should be a statement of the commonly accepted minimum standards of professional responsibility, in which sense it is a binding legal code enforceable by disciplinary action of the courts. While no code or set of rules can be framed which will particularize all of the principles underlying the professional reponsibilities of the lawyer, it is possible to state fundamental ethical principles with sanctions for their

violations.

Over and beyond the great changes in the practice of law and society generally which have taken place in the twentieth century, certain legal decisions and federal legislation dictate intensive studies of certain existing Canons. *NAACP v. Button,*[1] *Brotherhood of Railroad Trainmen v. Virginia,*[2] and the Economic Opportunity Act of 1964[3] are examples. *NAACP v. Button,* a five-to-four decision, held that a state, under its power to regulate the legal profession and improper solicitation of legal business, could not restrict the NAACP in its activities of advising a person that his legal rights may have been infringed and to refer him to staff attorneys paid by the NAACP. *Brotherhood of Railroad Trainmen v. Virginia,* a six-to-two decision, held that a union could lawfully maintain and carry out its plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. The Economic Opportunity Act of 1964, as implemented by the Office of Economic Opportunity, will bring about the establishment of some type of neighborhood legal office staffed by salaried government lawyers.

[1] 371 U.S. 415 (1963).

[2] 377 U.S. 1 (1964).

[3] 78 Stat. 508 (1964).

Looking at *NAACP v. Button, Brotherhood of Railroad Trainmen v. Virginia,* and the Economic Opportunity Act of 1964, a number of questions immediately come to mind under the existing Canons. For example: problems of advertising and solicitation under Canon 27; problems of barratry under Canon 28; problems of intermediaries under Canon 35 in conjunction with advertising and solicitation under Canon 27; problems of privilege under Canon 37 where disclosures are frequently made jointly to a lawyer and a layman, such as a social worker or nurse; and problems under Canon 47 with respect to laymen advising persons on legal rights.

The foregoing do not constitute all or even a substantial number of the questions under consideration by the Special Committee for the Evaluation of Ethical Standards. They are merely illustrative.

Truth and morality are unchanging, but the settings in which lawyers practice and in which courts function are constantly undergoing transition. The members of the Committee are neither omniscient nor possessed of the power of prophecy. All they can do is their conscientious best to update and express as clearly as possible a code of professional responsibility for lawyers in the light of conditions as they exist in the latter part of the twentieth century.