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THE DISCIPLINING OF ATTORNEYS IN VIRGINIA

"Disciplining of attorneys" suggests immediately the Canons of Professional Ethics. It is very difficult to find a satisfactory definition of ethics as applied to the legal profession. The obligations of the lawyer have been classified¹ as coming from four sources: (1) statutes, (2) the common law decisions, (3) the canons, and (4) the usages, customs and practices of the bar.

It has been said that the earliest provision of law regulating the professional conduct of lawyers was the statute, the First of Westminster, Chapter 29, in 1279, providing that "if any Serjeant, Pleader or other, do any manner of Deceit or Collusion in any King's Court or consent in deceit of the Court or beguile the Court or the Party and thereof be attainted, he shall be imprisoned for a year and a day and from thenceforth shall not be heard to plead (conter) in (that) court for any man."²

The first formal code, called "Rules for Governing the Conduct of Attorneys", was that approved by the Alabama Bar Association in 1887.³ The American Bar Association adopted the Code of Professional Ethics in 1908.⁴ According to a recent survey,⁵ only four states (Maine, Massachusetts, South Carolina and Minnesota) have never adopted any canons of professional ethics. Apparently the American Bar Association Canons are recognized as providing the standards for the practicing attorney in these four states.

In an early Virginia case,⁶ the court held that, independent of statutory authority, all courts of record in Virginia have inherent power to suspend or cancel the license of an attorney. The following Virginia statute sets forth the inherent power of the court: "Any court before which an attorney has qualified, on proof being made that he has been convicted of a felony or of any malpractice, or of any corrupt unprofessional conduct, shall revoke his license to practice therein or suspend the same for such time as the court may prescribe."⁷

In the Virginia case of *Legal Club v. Light*,⁸ the Supreme Court of Appeals held that the General Assembly, far from undertaking to deprive the court of its inherent power in disbarment cases, had expressly recognized it. The court held that this statute⁹ was not unconstitutional as attempting to delegate legislative powers.

1. Henry S. Drinker, *Legal Ethics*, p. 22 (Columbia University Press, 1953).
2. 30 Law Q. Rev. 479 (1914).
3. 118 Ala. xxiii (1899), pursuant to Act of Feb. 2, 1899 (Acts 1898-99 p. 87).
4. 33 A.B.A. Rep. 55-86, 567 (1908).
5. Orie L. Phillips and Philbrick McCoy, *Conduct of Judges and Lawyers*; p. 16 (Parker and Company, 1952).
6. *Ex parte Fisher*, 6 Leigh (33 Va.) 619 (1835).
7. Virginia Code of 1950, §54-73.
8. 137 Va. 249, 119 S.E. 55 (1923).
9. *Op. cit.*

In the case of *Norfolk Bar Association v. Drewry*,¹⁰ a petition was filed to disbar or discipline an attorney after the Act of March 10, 1932¹¹ had been passed but before it had taken effect. The court held that a proceeding to disbar or discipline an attorney is in no sense a criminal proceeding and that in no constitutional sense was the statute *ex post facto* in its operation. The court further said, "The power to investigate alleged past misdeeds should be sustained whenever it is possible to do so. To this extent liberality of construction is the rule, but reasonable strictness of proof is necessary before guilt should be held to have been established—not proof beyond a reasonable doubt, but clear proof."¹²

The Virginia Code gives to the Supreme Court of Appeals powers as follows:

The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations: (a) Defining the practice of law, (b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics, (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.¹³

Pursuant to the above authority, the Supreme Court of Appeals in 1938 adopted the Canons of Professional Ethics and the Canons of Judicial Ethics as a standard of professional conduct to be a part of the Rules for the Integration of the Virginia State Bar.¹⁴

The powers of the Virginia State Bar are exercised by a Council composed of forty members in addition to the president, vice-president and immediate past president, as *ex officio* members, if not already regular members, elected or appointed as follows: one active member from each of the thirty-four judicial circuits, elected for a term of three years by the members of the Bar of each circuit, and six members appointed by the Supreme Court of Appeals from the active members of the Bar of the state at large.¹⁵

The Council of the Virginia State Bar appoints an Investigating Committee of at least five but not more than seven active members in each congressional district of the state, who are resi-

10. 161 Va. 833, 172 S.E. 282 (1934).

11. Acts of Assembly 1932, p. 139.

12. 161 Va. 833, 843, 172 S.E. 282, 286 (1934).

13. Virginia Code of 1950, §54-48.

14. 171 Va. xvii (1938).

15. Rules for Integration of the Bar, as amended, IV §5, 194 Va. clxix (1953).

dents of their respective districts and serve at the pleasure of the Council.¹⁶ The Committee makes preliminary investigations of complaints of unprofessional conduct. The function of the Committee is comparable to that of a grand jury. It has no power to suspend, reprimand, or disbar an attorney; it is merely a fact-finding board.

If the Committee feels that a justified complaint has been made, it is required by the Rules¹⁷ of the Supreme Court of Appeals to proceed in substance in the following manner:

a. The complaint is reduced to writing, and an investigation is made. The accused member is served a copy of the complaint, either personally or by registered mail. The accused is notified in like manner of the time and place of hearing, which is not less than ten days after the giving of the notice.

b. The Committee may dismiss the complaint and notify the complainant, the secretary of the Bar, and the accused member.

c. If the Committee finds that some form of disciplinary action should be taken, it will file a report of the proceedings before the Committee, with a verified complaint, in the clerk's office of the court which has jurisdiction in the premises and also file a copy with the secretary of the Virginia State Bar. Further proceedings on this complaint are taken in accordance with the statute.¹⁸

d. The Committee has the power to summon and examine witnesses under oath administered by any member of the Committee and to compel their attendance and the production of books, papers, letters and other documents material to the inquiry.

e. The summons is issued under the hand of any member of the Committee, and has the force of a subpoena issued by a court of competent jurisdiction.

f. Any witness or other person who fails to appear, to be sworn, to testify, or to produce documents demanded, is liable to a rule or an attachment upon application to the judge of any circuit or corporation court within the congressional district in which the investigation is being conducted, as in cases of contempt.

g. The accused has the right to have subpoenas issued on his behalf and to be represented by counsel.

16. Rules for Integration of the Bar, as amended, IV §13, 194 Va. clxxiv (1953).

17. *Ibid.*

18. Virginia Code of 1950, §54-74.

h. The Committee has the authority to investigate unauthorized practices conducted prior to the adoption of the Rules for the Integration of the Bar.

i. The Committee is authorized to investigate improper conduct on the part of judicial officers of the Commonwealth.

After the Committee has filed its verified complaint in the clerk's office of the court having jurisdiction in the premises, the court acts as authorized by the following statute:

If the Supreme Court of Appeals, or any court of record of this State observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended.¹⁹

After the issuance of a rule against an attorney, the court acts as provided by the following Code provision:

. . . the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Appeals, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule . . .²⁰

The constitutionality of this section was upheld in the case of *Campbell v. Third District Committee of Virginia State Bar*.²¹ The court held that it was evident from the provisions of the statute that the General Assembly merely intended to create a new tribunal with general jurisdiction to hear and determine disbarment proceedings and did not intend to delegate to the tribunal any legislative powers. The accused further contended that the statute, if not held unconstitutional as such a delegation, should be declared invalid as too vague and uncertain in its terms. It was argued that the statute should define the terms "malpractice," "dishonest," "unworthy," "corrupt," and "unprofessional". The

19. Virginia Code of 1950, §54-74(1).

20. Virginia Code of 1950, §54-74(2).

21. 179 Va. 244, 18 S.E.2d 883 (1942).

court relied on the California case of *People v. Merchants' Protective Corporation*,²² in which the phrase "practicing law" was said to have a sufficiently definite meaning throughout this country to be given a place in both constitutional and statutory law without further definition.

The Code gives either the complainant or the defendant an appeal, as a matter of right, from the judgment of the three-judge court to the Supreme Court of Appeals by petition based upon a transcript of the record, made up and certified as in actions at law.²³

In *Old v. Commonwealth*,²⁴ the defendant contested the judgment of the three-judge court which suspended his right to practice law for a period of two years, contending that the judgment was excessive and too severe. As treasurer of an organization, he had collected certain funds and had not accounted for them to the owners. Justice Buchanan, in delivering the opinion affirming the judgment, said, "The evidence presented warranted the conclusion that more than negligence and delay was involved; that the explanation offered was not convincing; that a purpose to conceal had been shown; and that the conduct complained of was not accounted for on a theory of mere neglect."²⁵

An attorney who has been disbarred in Virginia may apply to the Governor for reinstatement. The Governor may effect reinstatement upon the recommendation of the Supreme Court of Appeals, provided that at the time of application for such relief there is no other adequate remedy for obtaining it at law.²⁶ There were four reinstatements of attorneys for the period between the integration of the Bar in 1938 and April 15, 1954.²⁷ The offenses for which the disciplinary action was taken are as follows:

- a. Convicted of embezzlement—license revoked (reinstatement data not available).
- b. Withheld client's funds—license revoked in 1940; reinstated in 1950.
- c. Improper use of client's funds—license surrendered in 1944; reinstated in 1951.
- d. Conviction in a federal court of a felony—license suspended twelve years; reinstated in 1954.

22. 189 Cal. 331, 209 P. 363 (1939).

23. Virginia Code of 1950, §54-74(5).

24. 193 Va. 152, 67 S.E.2d 921 (1951).

25. *Id.* at 155, 67 S.E.2d 921, 923.

26. Virginia Code of 1950, §2-45.

27. Report of the Secretary-Treasurer of the Virginia State Bar, April 15, 1954.

CONCLUSION

The first sentence of Canon 1 is as follows: "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." The lawyer's duty extends to the public as a whole, to his client, and to other lawyers, but the attorney's main duty is in the exercise of the right conferred upon him to act as an officer of the court in the administration of justice. The court, by reason of the necessary and inherent power vested in it to control the conduct of its own affairs, and to maintain its own dignity, has a summary jurisdiction to deal with the alleged misconduct of an attorney.

The Investigating Committee has no power to disbar or inflict punishment of any kind. It is the opinion of some attorneys that the Committee should be given power to reprimand for at least first offenses and perhaps be authorized to place an attorney on probation for minor offenses. However, it would seem that there is much less chance of an unjustified determination of misconduct by first letting the Committee investigate, leaving the final decision to the three-judge court. Prejudice may, of course, appear in the Committee investigation, but its findings are not conclusive.

Mr. R. E. Booker, Secretary of the Virginia State Bar has the following to say about the disciplinary proceedings against an attorney, "One reason that disciplinary functions of the Bar have worked so well is because the District Committees have taken their job seriously and have performed their duty impartially."²⁸

Canon 11 reads in part as follows: ". . . Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him." The Code²⁹ sets forth the following provision as to the liability of the attorney to the client: "Every attorney at law shall be liable to his client for any damage sustained by him by the neglect of his duty as such attorney. If any attorney received money for his client and fail to pay the same on demand, it may be recovered from him by warrant, or by suit, or motion, according to the amount, and damages in lieu of interest, not ex-

28. Personal interview on April 15, 1954.

29. Virginia Code of 1950, §54-46.

ceeding fifteen per centum per annum until paid, may be awarded against him.”

In spite of Canon 11 and the Code, 56% of the disciplinary proceedings in Virginia, since the integration of the Bar in 1938, were concerned with misappropriation of clients' funds. The other proceedings may be classified as follows: neglect, 14%; conviction of felony, 16%; divorce actions, 12%; and solicitation, 2%. As the clients' funds are undoubtedly usually used with the intention to pay them back, there is probably no better illustration of the old adage that “the road to hell is paved with good intentions”. The man who does not take the first drink will not wind up a drunkard; and the lawyer who never for a moment uses for his own purposes a dollar belonging to a client will never find himself disbarred or in the penitentiary as an embezzler.

In *Thomas v. Turner's Adm'r.*,³⁰ Judge Lewis said: “. . . All dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded on public policy, and operates independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise.”³¹ To the young attorney this statement should serve as notice that the courts are keeping a watchful eye upon the fiduciary relations between attorney and client.

While many volumes have been written on the revision of the Canons of Professional Ethics, declaring them to be too general in their scope and too uncertain and vague in their definitions, it is the writer's opinion that, in view of the disciplinary actions taken in this state since the integration of the Bar, the misconduct would not have been checked by an improvement in the wording of the Canons. There is no doubt that the Canons, as standards of professional conduct, should be reviewed from time to time and revised to keep them in accordance with our changing economic and social conditions. However, certain ethical codes and the sense of right and wrong become a part of the attorney long before he becomes

30. 87 Va. 1, 12 S.E. 149 (1890).

31. *Id.* at 12, 12 S.E. 149, 153.

a member of the Bar, and only through the continued use of these early-learned and developed standards will the administration of justice be assured proper guidance.

David Oscar Williams, Jr.

DISCIPLINARY PROCEEDINGS OF VIRGINIA STATE BAR*
January 1, 1939 — April 15, 1954

Basis of Charge		Discipline
1939	1. Withholding client's funds collected on delinquent accounts.....	License revoked
	2. Unable to make settlement in a fiduciary matter.....	License revoked
	3. Failure to prosecute a divorce action after receiving fee.....	Reprimanded
1940	1. Defaulted in administration of an estate.....	License revoked
	2. Defaulted in administration of an estate.....	License revoked
	3. Withheld client's funds.....	Suspended 2 years
	4. Withheld client's funds.....	License revoked
	5. Withheld client's funds.....	Suspended 2 years
	6. Obtained divorces for non-residents.....	(Surrendered license)
1941	1. Obtained divorces for non-residents.....	Suspended 10 years
	2. Withholding client's funds.....	Suspended 2 years
	3. Improper administration of an estate.....	(Surrendered license)
	4. Obtained divorces for non-residents.....	(Surrendered license)
1942	1. Gave clients bogus divorce decrees.....	License revoked
	2. Embossment of funds placed to close real estate loan.....	License revoked
	3. Improper handling of Special Commission funds.....	(Surrendered license)
	4. Borrowing trust funds and not securing same.....	Suspended 1 year
	5. Withholding client's funds.....	Suspended 1 year
	6. Withholding client's funds.....	Suspended 3 months
	7. Failure to prosecute suit when paid to do so.....	Reprimanded
	8. Misapplied trust funds.....	Suspended 1 year
1943	1. Failed to pay over client's funds when ordered by court.....	Suspended 7 years
	2. Failed to pay over trust fund.....	Suspended 18 months
1944	1. Forging a notary's name to a deed.....	License revoked
	2. Withholding client's funds.....	Suspended 6 months
	3. Withholding client's funds.....	(Surrendered license)
1945	1. Failure to remit client's funds.....	License revoked
	2. Cashing check, using proceeds not authorized.....	(Surrendered license)
	3. Gross neglect.....	Reprimand
1946	1. Operating a gambling house.....	Reprimand
	2. Neglecting client's case.....	Dismissed proceeding
1947	1. Withholding funds from client and fraudulent certification.....	(Surrendered license)
	2. Neglecting client, alleging influence with a Government board.....	Suspended 6 months
	3. Failure to make final accounting as administrator.....	Reprimand
1948	1. Improper handling of trust funds.....	(Surrendered license)
	2. Conviction in federal court of fraud in making up tax returns.....	License revoked
	3. Withholding client's funds.....	License revoked
	4. Proceeding with a divorce suit not authorized by client.....	Suspended 1 year
	5. Refusing to settle a fiduciary account.....	Reprimand
1949	None	
1950	1. Conviction of a felony in a federal court; attempting to influence a petit juror.....	Suspended 12 years
	2. Improper handling and failure to pay over to client certain trust funds.....	Suspended 2 years
1951	1. Using trust funds.....	Suspended 2 years
1952	1. Conviction of a felony.....	(Surrendered license)
1953	1. Neglect of client.....	(Surrendered license)
	2. Cashed joint account by forging client's name.....	License revoked
	3. Solicitation.....	Suspended 18 months
	4. General neglect.....	(Surrendered license)
	5. Conviction of a felony—larceny and embossment.....	License revoked
1954	1. General neglect of client.....	Reprimanded
	2. Fraudulent certification.....	Suspended 1 year

* Report of the Secretary-Treasurer of the Va. State Bar, April 15, 1954.