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# LEGAL ETHICS

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ON PROFESSIONAL ETHICS AND GRIEVANCES  
OF THE AMERICAN BAR ASSOCIATION

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the ground of the divorce, or connivance in inducing defendant to commit acts constituting such ground is obviously improper.

Cooperation with the other side in facilitating proof of acts theretofore committed without such connivance is not necessarily so, but where involving a money payment will be viewed with suspicion and should be fully disclosed to the court.

The mere fact that the more affluent of the parties agrees to make a payment to the other on account of counsel fees and other expenses and a lump sum or allowance is not improper where this is likewise disclosed to the Court.

As to the lawyer's duty not to advise or sanction his client's misrepresentation of her bona fide domicile in obtaining a "quickie" divorce in another state, see *supra*, page 80.

#### LAWYERS RETIRED FROM JUDICIAL OR PUBLIC POSITIONS

Canon 36, analogous and supplementary to Canon 6, the decisions under which also apply to cases under Canon 36,<sup>11</sup> provides:

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

The consent or request of the public authority is not a justification.<sup>12</sup>

The phrase "in connection with any matter" in the second paragraph of Canon 36 was not, of course, intended to preclude the legal adviser of a government department or agent or a judge from thereafter, on his resignation, taking cases involving any questions of law in connection with which he had been engaged.<sup>13</sup> The purpose of the first provision is to preclude a judge from thereafter participating in litigation the merits of which he has passed on when a judge and thus taking advantage of the prestige which this would give to his present opinion and argument;<sup>14</sup> also that the public employee's

<sup>11</sup> See A.B.A. Op. 37 (an extreme case, see dissenting opinion), 39, 49, 71, 72, 104, 128, 134, 135, 136, and 192.

The English Ordinance of 1280 forbade a judge to try a case if he had been in it while at the bar: Cohen, 30 Law Quart. Rev. 475 (1914).

<sup>12</sup> N.Y. City 715; see also *supra*, p. 120 n. 17.

<sup>13</sup> See *Smith v. Ry Co.*, 60 Iowa 515 (1883); also App. A, 288.

<sup>14</sup> The principle applied in those Opinions (16, 30, 34, 77, 118 & 134) is that an

Canon 37

action, or the judge's decision might otherwise be influenced or be thought to have been influenced, by the hope of later being employed privately to uphold or to upset what he had done or decided.<sup>15</sup> He should avoid even the appearance of evil.<sup>16</sup> In the second paragraph the words "any matter" apparently mean "any controversy" or "involving the same facts" <sup>17</sup> as they more clearly do in the first paragraph.<sup>18</sup> The duty of one while in public office to refrain from representing persons involved in matters within the scope of his duties is not specifically covered by Canon 36, but obviously comes within its spirit.<sup>19</sup> Such cases are covered by Canon 6 (conflicting interest) and Canon 11 (fiduciary relation).

One who has passed, as Master, on matters concerning the validity of a patent, may not thereafter accept a retainer from any party to the controversy in connection with the litigation involving it.<sup>20</sup>

One who, as justice of the peace, found a man guilty of assault on his wife, may not represent her in a divorce action against him.<sup>21</sup> Nor may he represent one in connection, civil or criminal, with an offense as to which he has issued a warrant.<sup>22</sup> The Michigan Committee has held that a justice of the peace who performed a marriage ceremony in connection with which it was his duty to make investigation as to the status of the parties may not appear for one of them as plaintiff pro confesso in a divorce action.<sup>23</sup>

The Canon does not apply to a referee where his prior connection with the matter was in a purely ministerial capacity, he making no investigation and exercising no judicial functions.<sup>24</sup>

#### DUTY NOT TO DISCLOSE CONFIDENTIAL COMMUNICATIONS

*Canon 37. Confidences of a Client.*<sup>25</sup> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept em-

attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." A.B.A. Op. 192.

As to the use by lawyers, professionally, of their political influence, see 35 Law Notes 103 (1931).

<sup>15</sup> See A.B.A. Op. 37 at pp. 124 and 125.

<sup>16</sup> A.B.A. Op. 49; N.Y. City 759.

<sup>17</sup> See A.B.A. Op. 26, p. 106.

<sup>18</sup> The provision covers, however, the whole case or proceeding, and not merely some isolated part of it. Mich. 38.

<sup>19</sup> See Mich. 137; A.B.A. Op. 110.

<sup>20</sup> N.Y. City 759; see, however, N.Y. City 79.

<sup>21</sup> Mich. 81.

<sup>22</sup> Mich. 95. Cf. Mo. 38 and 66.

<sup>23</sup> Mich. 78.

<sup>24</sup> N.Y. County 226.

\* <sup>25</sup> The Canon, as adopted in 1928, was amended in 1937 by inserting the first sentence;

knowledge of her repeated statements to him directly negating the son's claim.<sup>33</sup> Here as the lawyer for the deceased he owed it to her to protect her good name, and as trustee of the fund he was obliged to see that it went to the rightful owners.

When a lawyer-client testifies in a disciplinary proceeding as to the advice given him by another lawyer, the latter is free to testify as to what advice he actually gave. By testifying the client waived the privilege.<sup>34</sup>

Where a client introduced a woman to his lawyer for legal advice and service, who later indicated her intention to marry such client, the lawyer is bound to advise her of various prior sexual offenses on the client's part.<sup>35</sup>

The duty is not owed to one who procured advice from misrepresenting his identity;<sup>36</sup> or where the information was obtained by the lawyer in a capacity other than legal adviser.<sup>37</sup>

A communication must be regarded as confidential where it possibly is so, although it is not entirely clear that the relations exist.<sup>38</sup> The mere fact that advice is given without charge therefor does not nullify the privilege,<sup>39</sup> nor does the fact that the lawyer does not take the case.<sup>40</sup>

"An attorney cannot destroy his client's privilege by his construction or conclusion that his client was acting as agent for another. The governing intention to determine the character in which a client speaks is a client's intent, not the attorney's construction, especially in case of conflict between them. The confidential character of com-

<sup>33</sup> N.Y. City 236. The Committee here said: "In the opinion of the Committee the lawyer should not attempt to deprive any person [here the rightful heirs] rightfully entitled by law; his fiduciary relations continue, and he should not attempt by any concealment to defeat the operation of law."

<sup>34</sup> Texas 9.

<sup>35</sup> N.Y. County 270. His introducing her would apparently waive the confidence. He should retire from further employment by her. See as to this case, *supra*, p. 95 n. 10.

<sup>36</sup> Mich. 116.

<sup>37</sup> App. A, 309; N.Y. County 154 (as member of Draft Board).

<sup>38</sup> See Mich. 118, and cf. N.Y. City 308. As to a communication to a law student, not yet admitted but made to him as legal adviser, see cases cited by Costigan, *Case Book*, p. 142. The New York County Committee held it improper for a lawyer who, prior to his admission to the bar, had been a clerk for a lawyer, to defend a client against whom his employer acquired a claim for fees earned while the clerk was in the lawyer's office. N.Y. County 11. In *Murray v. Lizotte*, 31 R.I. 509 (1910), a lawyer was suspended for a year for engaging an investigator whom he knew had previously been employed by the other side.

<sup>39</sup> A.B.A. Op. 216.

<sup>40</sup> N.Y. City 671; see articles in n. 1, p. 506 of *Arant's Case Book*.

munications is not to be determined by an attorney's conclusion that the representation of one client is dominant and the matter of real importance and that of the other subordinate. The obligations of confidences may not be limited by comparisons of degrees of importance."<sup>41</sup>

The duty is not released by non-payment of the lawyer's fees, except insofar as the lawyer's testimony may be clearly necessary to establish his right thereto.<sup>42</sup>

The rule applies only where the communications by the client were made under circumstances clearly indicating that they were intended to be confidential.<sup>43</sup> Thus, the rule does not apply where the communication was made in the presence of the other party to the case;<sup>44</sup> nor where it was not made to the lawyer in the capacity of a legal adviser.<sup>45</sup>

Where the communication was made in the presence of a third party, if such party was present as a witness,<sup>46</sup> the rule does not apply,<sup>47</sup> but it would apply if the third party was present in such capacity as to be identified with the client; for example, where the mother<sup>48</sup> or a friend<sup>49</sup> of the client accompanied the client to the lawyer, seeking his advice.

The privilege is not nullified by the fact that the circumstances to be disclosed are part of a public record,<sup>50</sup> or that there are other available sources for such information,<sup>1</sup> or by the fact that the lawyer received the same information from other sources.<sup>2</sup>

Where the question involves the production of documents, it is not the document that is privileged. "It is merely the possession of the attorney that is protected."<sup>3</sup>

A bankrupt lawyer must advise his assignees of the nature and extent of the services rendered to each client whose account is as-

<sup>41</sup> N.Y. City 603.

<sup>42</sup> A.B.A. Op. 250, p. 501; and see N.Y. City 108.

<sup>43</sup> Wigmore, *Evidence*, secs. 2311-16.

<sup>44</sup> *Doheny v. Lacy*, 168 N.Y. 213, 223 (1901); *Ver Bryck v. Luby*, 67 Cal. App.2d 842, 844 (1945).

<sup>45</sup> Mich. 116.

<sup>46</sup> *Mitchell v. Towne*, 31 Cal. App.2d, 259, 265 (1939).

<sup>47</sup> *Doheny v. Lacy*, 168 N.Y. 213, 223 (1901).

<sup>48</sup> *Bowers v. State of Ohio*, 29 Ohio St. 542, 546 (1876).

<sup>49</sup> N.Y. City 420, "even though, because of the presence of a third person, it may not be a so-called privileged communication." But see *Packer v. Rapoport*, 88 N.Y.S.2d 118, 119 (1949); *In re Boone*, 82F. 944 (1897).

<sup>50</sup> Mich. 45; and see N.Y. City 839, B-138, B-147; App. A, 293.

<sup>1</sup> N.Y. County 401; N.Y. City B-138; and cf. N.Y. County 157.

<sup>2</sup> N.Y. County 157; N.Y. City 749.

<sup>3</sup> *Shiras, J.*, in *Liggett v. Glenn*, 51 Fed. 381, 396 (1892).

ployment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

The rule of this Canon, that confidential communications by or on behalf of a client may not be disclosed without his consent, has long been a rule of the common law,<sup>26</sup> and is in many jurisdictions the subject of statute. As such, its application is usually a question of law rather than of ethics.<sup>27</sup> It is therefore deemed superfluous here to do more than refer to the decisions of the various ethics committees on the rule and the qualifications thereof.

#### *Purpose of the Rule*

The purpose of the rule was thus stated by Judge Taft:

I have recently heard an arraignment of our present judicial system in the trial of causes by a prominent, able and experienced member of the Boston Bar. . . . He feels that the procedure now in vogue authorizes and in fact requires counsel to withhold facts from the court which would help the cause of justice if they were brought out by his own statement. To remedy this he suggests that all counsel should be compelled to disclose any

by inserting "or may involve" on line 4, and by inserting "as may be necessary" in the last sentence.

John H. Wigmore thus states the rule (*Evidence* [3d ed.], secs. 2290-2329): "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."

See also A.B.A. Op. 259, and authorities cited.

As to certain confusion of thought in the Committee decisions between Canons 6 and 37 see *supra*, pp. 104, 109, 115.

In an address before the American Law Institute in 1932, Judge Samuel Seabury, as a result of his investigation of graft in New York City, recommended that the privilege be made inapplicable to public officials or political organizations or their leaders in relation to public concessions, public contracts or favors: 18 A.B.A. Jour. 371, 372 (1932).

<sup>26</sup> A.B.A. Op. 150; Holdsworth, *History of English Law*, VI, 433. Thornton says (*Attorneys*, sec. 94) that it was first applied in 1577 in *Berd v. Lovelace*, Cary, 62. It was contained, however, in the London Ordinance of 1280: *supra*, p. 15.

<sup>27</sup> A.B.A. Op. 247; Chicago 27, p. 60.

facts communicated to them by their clients which would require a decision of the case against the clients. . . . To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure. . . . The useful function of lawyers is not only to conduct litigation, but to avoid it, where possible, by advising settlement or withholding suit. Thus, any rule that interfered with the complete disclosure of the client's inmost thoughts on the issue he presents would seriously obstruct the peace that is gained for society by the compromises which the counsel is able to advise.<sup>28</sup>

#### *Scope of the Rule*

Of the Canon the American Bar Association Committee said in Opinion 250:

We think the language of the canon wherein it states specific applications of the general rule and of exceptions thereto is not intended to be all inclusive; rather that it was the purpose to state with particularity important applications and exceptions, and that it was not intended to exclude other well-recognized exceptions.

A lawyer representing a corporation may and should disclose to its directors defalcations by the manager which the lawyer learned about in connection with his representation of the corporation.<sup>29</sup>

"Since the privilege is for the protection of the client's interest, he may waive the privilege during his lifetime, and, after his death, his personal representative or heirs may waive the privilege."<sup>30</sup>

When a client becomes mentally incompetent, his lawyer may use confidential communications in having him committed;<sup>31</sup> and may use them to prevent the looting of his deceased client's estate.<sup>32</sup> Similarly, a lawyer who holds property in trust for a client, recently deceased, which will be claimed by a boy (brought up by the client but not adopted) as an illegitimate son, should advise the heirs of his

<sup>28</sup> W. H. Taft, *Ethics in Service* (1915), pp. 31-32. See also *Greenough v. Gaskell*, 1 Myl. & K. 98, 103 (1833).

In A.B.A. Op. 91 the Committee said: "The reason for the rule lies in the fact that it is essential to the administration of justice that there should be perfect freedom of consultation by client with attorney without any apprehension of a compelled disclosure by the attorney to the detriment of the client." See also A.B.A. Op. 23.

<sup>29</sup> A.B.A. Op. 202.

<sup>30</sup> A.B.A. Op. 91; see also N.Y. City 947.

<sup>31</sup> N.Y. County 88. As to testamentary matters as privileged, see 14 Ann. Cas. (1909) 601 n.; 22 Ann. Cas. 1912 A 839 n.; 41 Ann. Cas. 1916 C 1073 n.

<sup>32</sup> N.Y. City B-167.

signed, and cooperate in collecting them. Such information is not covered by the privilege.<sup>4</sup>

### *Application of the Rule*

A lawyer may not disclose his client's funds<sup>5</sup> or his whereabouts<sup>6</sup> to the client's creditors, or to a public officer,<sup>7</sup> or, after the client retains another lawyer, disclose to the court the mala fides of the residence of one consulting him as to a divorce,<sup>8</sup> or statements by his client, a wife, as to the prior commission of a crime by her husband.<sup>9</sup> Nor may he disclose the name of his client, the finder of a watch, even where he is arrested for refusing to do so.<sup>10</sup> Nor may one who represents a corporation from time to time disclose to it the fact, communicated to him in confidence by a friend and client, employed by it, that he had embezzled its funds.<sup>11</sup>

A retired solicitor who has drawn a will for one who becomes of unsound mind may not, at the request of the testator's friends, turn the will over to the solicitor handling the family affairs;<sup>12</sup> nor may a lawyer disclose the provisions of a will which he drew for a testator not yet dead.<sup>13</sup>

Where a lawyer, on the instructions of his client and his injunction of secrecy, drew an alteration to his client's will appointing the lawyer's father as executor in place of a solicitor who had hitherto acted for him, he was bound not to disclose this to the other solicitor.<sup>14</sup>

A prosecutor may not use a phonograph record of confidential communications between the defendant in custody and his lawyer.<sup>15</sup>

Because a lawyer referred a client to another lawyer does not justify the first lawyer in advising the second of property of the client, in

<sup>4</sup> A.B.A. Op. 154; N.Y. City 480.

<sup>5</sup> A.B.A. Op. 163, or to one client the funds of another who owes the first; N.Y. City 98; see also App. A. 310.

<sup>6</sup> N.Y. City 107, 108.

<sup>7</sup> N.Y. City 241; N.Y. County 70. See, however, *infra*, p. 137 n. 21.

<sup>8</sup> A.B.A. Op. 268.

<sup>9</sup> A.B.A. Op. 274.

<sup>10</sup> California Committee Q 24, 3 Cal. State Bar Jour. (April, 1929), p. 216; Costigan's Case Book, p. 147.

<sup>11</sup> Cleveland Committee, 25 Ohio Law Reporter 569; but see A.B.A. Op. 202.

<sup>12</sup> Op. of Council of the Law Society, *Law, Practice and Usage of the Legal Profession* (1923), p. 311.

<sup>13</sup> Mich. 53.

<sup>14</sup> Op. of Council of the Law Society, *Law, Practice and Usage of the Legal Profession* (1923), p. 312, 1172 (July 14, 1884) (He should have asked the testator to have someone else know about it.)

<sup>15</sup> A.B.A. Op. 150.

violation of Canon 37, when the client refuses to pay the lawyer's just fees.<sup>16</sup>

The purchase of another lawyer's practice and good will is likely to involve a violation of Canon 37.<sup>17</sup>

Where when representing several participants in an accident a lawyer obtains from one of them information which, by a subsequent decision, may serve to make others of those represented liable, he should retire entirely from the case.<sup>18</sup>

### *When Disclosure Is Proper* ✓

Although Canon 37 contains no specific exception covering communications where disclosure to the authorities is essential to the public safety, such is necessarily implied. Accordingly, where a lawyer has confidential information from a foreign government with which the United States is at war, he should reveal to the proper authority the fact that he has received it, and abide the latter's decision;<sup>19</sup> and he may tell of subversive activities by his client, the common defense transcending Canon 37.<sup>20</sup>

A lawyer may disclose the whereabouts of a client jumping bail.<sup>21</sup> The lawyer for an administrative body may reveal gross abuses by it after having advised the highest officials and refusal by them to act, the lawyer thus invoking public opinion to remedy the situation.<sup>22</sup>

He may advise the Industrial Commission of the nature and extent of injuries to the plaintiff in a case conducted by him, the plaintiff having falsely testified as to them.<sup>23</sup>

A disclosure of confidential information may be made where necessary to prevent a contemplated crime,<sup>24</sup> or fraud.<sup>25</sup>

Canon 29 is subject to Canon 37.<sup>26</sup> Where a fraud is possible but

<sup>16</sup> N.Y. City 682-G.

<sup>17</sup> A.B.A. Op. 266; Chicago 32, p. 72.

<sup>18</sup> N.Y. City 122. Cf. Mo. 29.

<sup>19</sup> N.Y. County 167, 168.

<sup>20</sup> Mich. 71; and cf. N.Y. City 484, Cleveland 6/23/45, and Mich. 88.

<sup>21</sup> A.B.A. Op. 155, and see 156; but see Op. 23, and N.Y. County 70; also *supra*, p. 136 n. 7.

<sup>22</sup> Chicago 27, pp. 59-60.

<sup>23</sup> A.B.A. Op. 155, 202; N.Y. County 13; "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." Cardozo, J., in *Clark v. U.S.*, 289 U.S. 1, 15 (1933). See Hicks, Case Book, p. 339.

<sup>24</sup> N.Y. County 84; see also Mich. 22 and 59; see also N.Y. City 484 (bankrupt concealing asset); but see N.Y. City 945.

<sup>25</sup> The State Bar of California recommended a detailed rule to the Supreme Court, which the court did not adopt. See 16 Cal. L. Rev. 487, 494-95, (1928).

<sup>26</sup> N.Y. County 253, and see N.Y. County 190.

not clear, the lawyer should withdraw.<sup>27</sup> A lawyer should inform the surrogate of the proposed concealment by his client-executor of an existing grandchild from whom his client proposes to abstract the estate;<sup>28</sup> but he may not tell his client's husband of her plan to cut him out of her will as to property in her name but the result of their joint labors.<sup>29</sup> However, one holding a former will of a wife who had agreed to a mutual disposition of property belonging to her and her deceased husband was held bound to disclose this when she tried to avoid her obligation.<sup>30</sup>

A lawyer may not inform the collector of a failure by his client to disclose income,<sup>31</sup> or of his client's address;<sup>32</sup> or reveal to the authorities that his client paid for a promise of preferential treatment after induction.<sup>33</sup>

The exception in the second paragraph of the Canon relative to the announced intention of his client to commit a crime includes a fraud on others but not a crime or fraud which has been completed.<sup>34</sup> The lawyer may make such disclosures as are necessary to protect himself against false accusations,<sup>35</sup> or to protect his rights, including reasonable compensation,<sup>36</sup> but may not in order to avoid being sent to jail by the judge.<sup>37</sup> He may not use confidential information as to his client's funds to enable him to collect his fee,<sup>38</sup> but may use information not obtained from the client,<sup>39</sup> and in suing one client for a fee, may use non-confidential information obtained from another client.<sup>40</sup>

Where a lawyer's client has aided in the prosecution of charges against him, the lawyer may reveal such confidences as are material to the proceeding.<sup>41</sup>

The privilege is not binding where the client either conspires with

<sup>27</sup> N.Y. County 259.

<sup>28</sup> N.Y. City B-107, and see N.Y. City 70 and 945; N.Y. County 84.

<sup>29</sup> N.Y. County 190.

<sup>30</sup> N.Y. City 128.

<sup>31</sup> Cleveland F. and see Mich. 88.

<sup>32</sup> Mich. 88.

<sup>33</sup> N.Y. County 169.

<sup>34</sup> A.B.A. Op. 202; N.Y. County 253; but see Mich. 22.

<sup>35</sup> A.B.A. Op. 202; p. 408; N.Y. County 218.

<sup>36</sup> A.B.A. Op. 250; in N.Y. City 179, however, that Committee pertinently said as the basis for its decision: "It would certainly offend the sense of propriety if an attorney who was retained in a matter which from its nature was highly confidential, should, in an action for the recovery of his fees, give publicity to the very facts which he was employed to suppress."

<sup>37</sup> App. A, 372.

<sup>38</sup> N.Y. County 44.

<sup>39</sup> N.Y. County 196.

<sup>40</sup> Wash. 1.

<sup>41</sup> A.B.A. Op. 19.

the lawyer or deceives him,<sup>42</sup> or falsely accuses him,<sup>43</sup> but is not forfeited merely by the client's acting in bad faith to his own creditors.<sup>44</sup> One defamed by a former client whom he is suing for slander may, in order to protect his good name, advise other clients in the same trade of the true facts.<sup>45</sup>

Before making a permissible disclosure he should, if possible, notify his client of his intention to do so and give him reasonable opportunity himself to disclose the information or to show that the lawyer's information is incorrect or irrelevant.<sup>46</sup>

It has been held that damages may be collected by one injured by a gross breach of a lawyer's duty not to divulge confidential communications.<sup>47</sup>

#### EXTENT OF DUTY TO ACCEPT PROFESSIONAL EMPLOYMENT

Canon 31 provides: "No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment."

Except where assigned by the court to defend those who cannot afford to pay counsel,<sup>48</sup> the lawyer may choose his own cases and for any reason or without a reason may decline any employment which he does not fancy. Such is not the case, however, with regard to the barrister in England who, in the absence of special circumstances, is apparently bound to accept any brief in the courts in which he professes to practice, at a proper professional fee.<sup>49</sup>

A lawyer should not presume to undertake professional employment for which he is not reasonably competent but should recommend or at least associate a specialist.<sup>50</sup>

<sup>42</sup> Stephen, J., in *Queen v. Cox*, 14 Q.B.D. 153, 168 (1884).

<sup>43</sup> N.Y. County 218.

<sup>44</sup> N.Y. City 108.

<sup>45</sup> N.Y. County 319; N.Y. City 336.

<sup>46</sup> N.Y. City 481.

<sup>47</sup> *Taylor v. Blacklow*, 3 Bing. N.C. 235 (1836).

<sup>48</sup> See *supra*, p. 62. For a general statement as to the duty to one whom the lawyer believes guilty, see N.Y. City 253.

<sup>49</sup> Statement of the General Council (1933), p. 2610; see also E. S. Cox-Sinclair, "The Right to Retain an Advocate," 29 *Law Mag. & Rev.* 406 (1904).

A not wholly convincing reason suggested for the English rule by Judge Baldwin ("The New American Code of Legal Ethics," 8 *Col. l. Rev.* 541, 544-45 [1908]) is that barristers are employed only by solicitors, who presumably have satisfied themselves that each case is a proper one.

<sup>50</sup> Warvelle, *Legal Ethics*, p. 151; A.B.A. Op. 248.

HARASSMENT OF OPPONENT<sup>22</sup>

The first sentence of Canon 30 is as follows: "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong."

He may not bring suit in a distant county merely in order to harass the debtor.<sup>23</sup>

COMPLIANCE WITH AGREEMENTS AND UNDERSTANDINGS MADE  
IN THE COURSE OF CONDUCTING THE CASE

Where in order to gain an advantage for his client the lawyer agrees to see to it that a creditor<sup>24</sup> or a witness<sup>25</sup> is paid out of the proceeds of a recovery, the lawyer may not, on the client's insistence, remit the full amount of the recovery to the client without making such payment.

## DUTY ON DISCOVERY OF FRAUD OR IMPOSITION IN HIS CASE

Canon 41 provides as follows:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

He may not permit a client to be reimbursed, as per agreement, a counsel fee greater than was actually paid.<sup>26</sup>

Where a lawyer learns that in a settlement supervised by him which called for a conveyance by his client free of encumbrances, the client deliberately concealed an unpaid purchase money mortgage, the lawyer must advise the other party thereof despite the protest of his client and his new lawyer; Canon 37 does not modify Canon 41 in this regard.<sup>27</sup>

When he learns that his client, an executor holding a will naming others as beneficiaries, proposes to conceal the will and appropriate

<sup>22</sup> See also *supra*, p. 80 n. 10 and pp. 87, 147-48.

<sup>23</sup> N.Y. City 72; see also *Dishaw v. Wadleigh*, 15 App. Div. 205 (N.Y., 1897).

<sup>24</sup> N.Y. County 321; and cf. N.Y. City 54.

<sup>25</sup> Chicago 9, p. 19; see also N.Y. City 313.

<sup>26</sup> N.Y. County 303.

<sup>27</sup> Mich. 59, and cf. N.Y. County 215.

the property, the lawyer should advise the heirs and perhaps the prosecuting attorney.<sup>28</sup>

However, the mere fact that a client, plaintiff in an accident suit on a good cause of action, has falsely claimed a second accident at a later date and different place, does not necessarily require the lawyer to refuse to bring the first suit if satisfied that the fraud has been unsuccessful or abandoned, and that he can maintain the proper relations with the client and the court.<sup>29</sup>

When he learns that a client purchasing mortgages at a discount has been receiving from the title company, by a false representation, an allowance on account of fees in excess of those actually paid, the lawyer should endeavor to dissuade the client, and if this fails, to refuse longer to serve him.<sup>30</sup>

A lawyer who, in an accident case, made, with the client's approval, an agreement with the examining doctor witness, that he be paid a specified amount in the event of recovery, is professionally reprehensible in making settlement without providing for the doctor's fee.<sup>31</sup>

Where a lawyer employed a court reporter as a necessary part of the presentation of his client's case, the lawyer may not remit the funds collected to the client, on the latter's demand, without paying the reporter.<sup>32</sup>

A lawyer learning that a state administrative body which he had represented has committed and permitted grave violations of the law may, after notice to the highest appropriate public officials and refusal by them to take any action, and resignation by the lawyer, properly make public the facts and invoke the pressure of public opinion to remedy the abuses.<sup>33</sup>

The lawyer for a husband and wife should, despite her objection, advise his relatives, after his death, of an agreement made by her for their benefit.<sup>34</sup>

As to the impropriety of advising a client to communicate directly with the other side represented by a lawyer, see *infra*, page 201.

<sup>28</sup> N.Y. County 84; see also N.Y. City 274.

In *Matter of Hardenbrook*, 135 App. Div. 634 (1909) (affirmed 199 N.Y. 539 [1910]) the lawyer who insisted on the truth of his client's testimony when he knew it to be false was disbarred.

<sup>29</sup> N.Y. County 301.

<sup>30</sup> N.Y. County 303.

<sup>31</sup> Chicago 9, p. 19; see also N.Y. City 313.

<sup>32</sup> N.Y. County 321; cf. N.Y. City 54.

<sup>33</sup> N.Y. County 339.

<sup>34</sup> N.Y. City B-60.