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Lewis F. Powell Jr.

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Lewis F. Powell, Jr.
House of Delegates
August 11, 1964
New York City

NEED FOR RE-EVALUATION OF
CANONS OF ETHICS

The Board of Governors, upon my recommendation, has proposed the creation of a new Special Committee on Evaluation of the Professional Canons of Ethics. I urge the House to create such Committee.

The new Committee would be charged with studying and reporting upon the adequacy and effectiveness of the present Canons of Professional Ethics, including their observance and enforcement. It would be authorized to make such recommendations for changes therein as may be deemed appropriate to encourage and

maintain a high level of ethical standards by our profession.

The original 32 Canons were adopted in 1908, upon recommendation of an ABA Committee appointed in 1905. In 1928, Canons 33 through 45 were adopted. Canon 46 was added in 1933, and Canon 47 in 1937. The need for a general re-evaluation and perhaps revision of the Canons has often been suggested.* But except for certain amendments, the Canons have remained essentially in their original form.

As early as 1934 Chief Justice Harlan Fiske Stone commented on the Canons as follows:

*The ABF, upon request of the ABA Board, made a study of the need for revision in 1955-58 and by a divided vote concluded that a broad revision was needed.

"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 interest committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his client, to his professional brethren and to the public . . . Our Canons of Ethics for the most part are generalizations designed for an earlier age. . . ."*

The recent events in Dallas have stimulated a new and intense interest in the Canons - particularly those designed to prevent prejudicial publicity and assure fair trial.** But

*Stone, The Public Influence of the Bar, 48 Harvard L. Rev. 1, 10 (1934).

**Recommendations have been made to the House at this meeting to make the Canons more explicit in this respect. See recommendations by Ethics Committee (Canon 5) and Bill of Rights Committee.

the need for a critical re-examination is far broader than may be indicated by those dramatic events.

Many aspects of the practice of law have changed drastically since 1908. An ABF study committee has said these changes "make unreliable (many) of the assumptions upon which the original Canons were based.* There have been striking environmental changes in government, federal and state relationships, urbanization, and in social, business and economic conditions e to mention only a few. All of these, including new laws, have caused major evolutions in the practice of law.

As remarkably flexible and useful as the Canons have proved to be, they

*Report, Special Committee of ABF, June 30, 1958, p. 10.

need to be re-examined as guidelines for the practicing lawyer. They also should be re-examined particularly in view of the increasing recognition of the public responsibilities of the profession.

The Canons have been described as an articulate expression of the "conscience of the profession in the 19th and 20th Centuries."¹ We must be sure that they now conform to the conscience of the bar in the mid and late 20th Century.

Obviously related to the contents of the Canons is their enforcement.

¹Hurat, The growth of American Law: The Lawmakers, 329-330 (1950).

There is growing dissatisfaction among lawyers with the adequacy of the discipline maintained by our profession.

The Missouri survey concluded that "a majority of lawyers are convinced that the public image of the profession is affected by the policing procedure of the Canons of Ethics and that policing is not adequately enforced."* This survey also indicated that some 27% of Missouri lawyers think that perhaps half of their fellow lawyers fail to live up to the Canons. Although the same lines, a study in New York City concluded that more than 20% of the city's lawyers "persistently

*Lawyers Practice Manual (Missouri Bar-Prentice Hall Survey) published by Prentice Hall editorial staff, p. 16 (1964).

breached Canons of Professional Ethics."*

A compilation of disciplinary action for the seven-year period ending with 1962 indicated an average of only 68 disbarments per year. The number suspended was not significantly greater. Dean Blythe Stason, with typical restraint, commented that in a country of some 285,000 lawyers "the number subjected to discipline is remarkably small".**

In somewhat the same vein Professor Jerre Williams, addressing the Association of American Law Schools last winter, is quoted as saying: "The

*Time Magazine, January 10, 1964.

**Stason, Disbarments & Disciplinary Action, 49 ABA Journal 270 (March 1963.)

best way to attain better ethics in the law profession is to have a few good disbarments."*

Whether this be true or not, I think most lawyers would agree from their own experience that there is a tendency on the part of many grievance committees and courts to manifest a spirit of marked lenience in grievance cases. While no one wants punitive action, it must be remembered that the bar has the privilege of disciplining itself - to a greater extent than other professions or callings. This imposes a higher responsibility and one which the bar must discharge with greater fidelity.

*Time, January 10, 1964.

The new Committee to re-examine the Canons of Ethics will not deal directly with disciplinary procedure and action. But there is an obvious relationship between the contents of the Canons and the observance and enforcement thereof. The Committee will, therefore, carefully evaluate the extent to which departures from high ethical standards and lapses in the strict enforcement thereof, are related to the content of the Canons.

Appropriate revisions of or additions to the Canons - where found to be necessary - could contribute significantly to more effective grievance procedure as well as to increasing the level of voluntary compliance.

For centuries lawyers have prided themselves on ethical standards which we have thought were the highest - self proclaimed and self enforced. One may suspect that this pride has produced a measure of complacency. It is abundantly clear that the time has come for critical self evaluation and for appropriate action.

Now, in conclusion just a word about plans for implementing this project - if authorized by the House. It is recognized that its importance and scope will require both time and considerable assistance. The Committee may well require more than one year for its work. The American Bar Founda-

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tion has indicated a deep interest,
and research assistance will - I am
sure - be tendered generously. And
the House may have confidence that
the leadership of the new Committee
will be of the highest order - as our
respected and distinguished Chairman,
Edward L. Wright, has agreed to chair
the Committee.