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### Legal Ethics in Action

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judges, both in the State and Federal Courts, have caused . . . much comment among members of the Bar by reason of the wholly unwarranted and unjudicial attitude assumed by these judges toward lawyers trying cases before them." Under the cloak of their privilege, the report continues, "they indulge in fits of temper and malicious attempts to humiliate attorneys before their clients." There is no way through which such abuses can be restrained, excepting that which the committee employs. It frankly places the facts before the tribunal of public opinion. Publicity is the bar's recourse. In resorting to it the committee has introduced a novel and effective method to check unjudicial conduct on the part of judges. The remarks by Judge Atwell were ill-chosen and abusive. They were particularly out of place in this case since they were made after the trial had been concluded and the verdict rendered. Such conduct deserves criticism. The committee has handled the case well. Its report is noteworthy for the courage it exhibits and the example it sets.

ALBERT J. HARNO.

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## LEGAL ETHICS IN ACTION

### I

Some lawyers, particularly those who assume to be the most virile members of the profession, have adopted an attitude of scorn with reference to legal ethics unless there is involved a violation of the criminal code. Several recent decisions by the United States Supreme Court and other courts should make it clear that the subject is not one merely academic in its nature. It also appears to be clear that our Supreme Court under the leadership of Mr. Chief Justice Taft is standing for the very highest standards of professional integrity. It is believed that no profession can be worthy of that name unless it has a code of ethics more refined than that which actuates the conduct of the average person in the community at large. Juries, absent well organized systems to control them as in English and federal courts, in the long run may be taken to represent average standards. Their conclusions are frequently shocking to members of the legal profession. However much courts may err it is hardly to be denied that they rise above the standards of the jury. Upon the general subject there is a very scholarly and noteworthy opinion by Cardozo, C. J., in *People ex rel. v. Culkin* 248 N. Y. 465.

In 1922 the United States Supreme Court in *Newton v. Consolidated Gas Co.*, 259 U. S. 101, reviewed the action of the district court of the southern district of New York which had awarded to Abraham S. Gilbert, a member of the New York bar, the sum of \$118,000 for services rendered by him as master in eight causes which occupied 282 days of his time. The Supreme Court admitted that compensation for a master should be liberal and, generally, that greater compensation should be allowed a master than that paid to judicial officers. In the particular instance the allowance was considered grossly excessive and the compensation was reduced to \$49,250.

On November 21, 1927, as reported in 275 U. S. 499, an order was addressed to Mr. Gilbert requiring him to make written report to the Supreme Court of the fees which had been paid to him for his services as master, and whether he had returned any portion of such fees. In the event that he had not repaid the excess, he was required to show cause why he should not be disbarred or otherwise dealt with.

Mr. Gilbert made his report on January 16, 1928. It then appeared (276 U. S. 6) that he had received from several gas companies, which were involved in the litigation in which he acted as master, the total sum of \$118,000. This sum apparently was paid shortly after the fees were allowed by the district court. He never returned any of the sum allowed and he justified his conduct by stating that no one of the gas companies had ever questioned the amount or asked for a return of any portion thereof. It also appeared that in December, 1923, he had brought an action in the supreme court of New York and had obtained a declaratory judgment that the Consolidated Gas Company (one of the companies involved in the litigation) had no valid claim against him for the return of any part of the \$57,500 which it had paid.

The Supreme Court of the United States disapproved very strongly of Mr. Gilbert's conduct and stated that it was his imperative duty immediately to return the excess together with six per cent interest from May 15, 1922, the date of the announcement of the previous opinion. The court also stated that Gilbert's conduct was not "upright and according to law" within the fair intendment of the oath which he took at the time he became a member of the bar of the Supreme Court of the United States.

On February 20, 1928, Mr. Gilbert presented himself before the Supreme Court and demonstrated that he had returned the excess, together with interest for a period of over five years, the total

sum returned being \$92,744.32. Also, he had paid income taxes for one year on the sum of \$118,000, the sum allowed by the district court. The Supreme Court then determined that Mr. Gilbert had not sufficiently purged himself and again condemned his conduct. Accordingly he was suspended from his rights and privileges as a member of the bar of the Supreme Court for six months and he was taxed with the costs of the proceeding. The essence of Mr. Gilbert's offense according to the court was that he relied upon the tolerance of the litigant companies which were successful in the litigation and therefore apparently well satisfied not to move for a compliance with the decision of the Supreme Court which ordered a reduction in the fees that had been allowed. In its opinion (276 U. S. 294) the court also stated: "We were desirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance."

It is not believed that it is stating the situation too strongly to affirm that allowances made to masters, referees, and similar officials frequently have been excessive and perhaps some of them have been scandalous. The Supreme Court of the United States is to be congratulated for having set forth a new point of view. It has had and will continue to have its effect. Avariciousness is not one of the ideals of the profession.

In *First Trust and Savings Bank v. St. Louis Coke and Iron Co.*, 29 Fed. (2d) 506, decided November 28, 1928, the circuit court of appeals for the seventh circuit considered an allowance which had been made to a master by the district court for the southern division of the southern district of Illinois. The master's services extended over a period of a little less than two years. He had given services for sixty full days and on fifty-four additional days he had been employed a part of the time each day in the particular litigation. For this he was allowed a fee of \$16,500. The circuit court of appeals, citing the *Gilbert* case, stated that "we cannot be generous with other people's money." Accordingly, the allowance was reduced to the "liberal" sum of \$7,500.

## II

During the October term of 1927, the Supreme Court of the United States decided *Harkin v. Brundage*, 276 U. S. 36. This case concerned the tangled affairs of the Daniel Boone Woolen Mills Corporation, which had its main business in Illinois.

In the city of Chicago on the 14th of February, 1925, Harry Horwitz, a stockholder, filed a bill on behalf of himself and other stockholders in the superior court of Cook County. The bill in effect asked for the appointment of a receiver to take possession of the property of the woolen mills. Application for receivership was set for February 16th. At that time a Mr. Cowan, associated with the law firm of Barrett & Barrett of Chicago, appeared for the woolen mills corporation and asked for a continuance. He stated in court that the rights of the complainant would not be affected in any way by the continuance. Mr. Gesas appearing for the complainant agreed to the continuance with that understanding. Accordingly, the superior court continued the matter until the following Saturday morning, February 21st.

After securing this delay Mr. Cowan had a conference with those in control of the woolen mills at the time. With a view of arranging for a receivership in the federal court in preference to a receivership in the state court, another stockholder, Mr. Grand, who lived in St. Louis, was summoned to a conference with Mr. Cowan at the latter's request. Mr. Grand suggested that a law firm of which Messrs. Stern and Johnson were members should be selected to represent those in control of the company. It was decided to file a creditors' bill. The list of creditors of the company was examined and one Philipson, the agent of a creditor, was selected, partially because he was a personal friend of Mr. Stern. Philipson was induced to secure the consent of his company to the proposition of turning its claim over to Mr. Stern. Thus it was that those in control of the company were able to appear before the federal district court in Chicago on the 19th of February and ask for a receiver. The woolen mills entered its appearance, filed its answer admitting the averments of the bill, and consented to the appointment of a receiver. The district court appointed Edward J. Brundage to that position.

Despite this piece of sharp practice by Mr. Cowan, the superior court of Cook county proceeded on the theory that it had jurisdiction of the matter and in the course of time entered an order appointing the Union Bank and Harkin as receivers. On March 13th the latter filed a motion in the federal district court charging that the district court was without jurisdiction and prayed for an order upon Brundage to turn over the property to them. The district court refused to do this and held that it had jurisdiction. The matter was appealed to the circuit court of appeals which reluctantly affirmed the decree (13 F. [2d] 617). However, that court

through Judge Evan A. Evans condemned the conduct of Mr. Cowan in no uncertain language. The court stated:

"It is happily not a frequent occurrence that an attorney for a debtor seeks the creditor and urges him to bring suit against his client, or turns over his client's list of creditors to an attorney soliciting business, to say nothing of the violated pledge to the judge and opposing counsel. Moreover, good faith required this counsel to have advised the federal district court of the pendency of the state court proceedings."

The court also said "that the code of professional ethics was entirely ignored and forgotten" and condemned the institution of "friendly receiverships."

The United States Supreme Court, in the opinion above referred to, reversed the decrees of the circuit court of appeals and of the district court. However, the court did not disagree with the lower courts in holding that there was no conflict of jurisdiction between the state court and the federal court. It differed "radically" from the trial court as to the effect of the conduct of Mr. Cowan. It found a way to vindicate the good faith that was due to the state court and refused to accede to the suggestion of the district court that the limit of judicial action was for the state court to proceed for contempt against the lawyer who did not keep faith with it.

After condemning in very positive terms unseemly rivalry between courts in the appointment of receivers and the desire to control the patronage resulting therefrom, it held that the district court had been a victim of a fraud. After becoming aware of this situation the district court should have denied those who were guilty of fraud further use of its jurisdiction until the state court had an opportunity to determine the matter to its own satisfaction.

By the time the case had got to the Supreme Court of the United States the federal district court and its receiver had at least partially administered upon the property and had issued receiver's certificates. Despite this embarrassment the Supreme Court ordered the district court to surrender the property to the state court receivers upon conditions that would protect the certificates. Then the Supreme Court added this significant paragraph: "The federal court should, before surrender, fix and pay the compensation due to its officers for the work done by them and, in doing so, should take care to fix the compensation within limits which are plainly reasonable." The implications of this remark seem obvious.

## III

Abuses in receiverships are not infrequently discussed and admitted. Abuses in bankruptcy practice have been thought in some instances to have become a very serious problem. The United States Supreme Court, since Mr. Chief Justice Taft was appointed, has attempted to remedy the condition by certain rules of court. Before these changes were made, Mr. Samuel Untermyer of New York was employed by nearly all of the creditors of one Thompson. A receivership was secured but this action was set aside by the Supreme Court of Pennsylvania. Thereafter Untermyer retained the law firm of Weil & Thorpe of Pittsburgh, Pennsylvania, to institute bankruptcy proceedings against Thompson. It was agreed that for their services in this matter Weil & Thorpe should receive \$5,000.

In due course trustees were chosen and without any special authorization Weil & Thorpe were selected as counsel for the trustees despite a rule of the district court of the western district of Pennsylvania which provided: "Unless specially authorized by the court . . . trustees in bankruptcy shall not retain as their attorney, the attorney of the . . . petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor. . . ."

The estate of Thompson was a very large one. The administration of it extended over a considerable period of time and allowances were made from time to time to the attorneys for the trustees. In this way Weil & Thorpe were paid the total sum of \$144,059 by the latter part of the year 1920.

Before all of this work had been accomplished and the fees had been paid, it was realized that \$5,000 would not be adequate compensation for Mr. Weil. So Mr. Untermyer made an agreement with Mr. Weil that he would supervise the administration of the estate and Weil & Thorpe would continue their services with the understanding that at the proper time Untermyer would determine what was fair compensation for Weil & Thorpe. The latter agreed to accept Mr. Untermyer's determination and pay over the balance of the fees to Untermyer, who apparently was acting as a member of the firm of Guggenheim, Untermyer & Marshall. Mr. Weil denied that such an agreement was made, but the referee found this question of fact in favor of Mr. Untermyer.

On November 15, 1920, Untermyer determined that Weil & Thorpe should have sixty per cent of the fees and that he, Untermyer, should have forty per cent. Weil & Thorpe were notified of this decision but refused to pay any of the fees over to Mr. Untermyer. Accordingly, Mr. Untermyer sued for his part of the fees, assigning his claim to one Neary. The district court entered a judgment for Neary in the sum of \$57,064, with interest from November 15, 1920. This judgment was affirmed by the circuit court of appeals for the second circuit in an opinion written by Manton, J., and concurred in by Swan and Learned Hand, JJ. (22 F. [2d] 893).

The Supreme Court of the United States through Mr. Chief Justice Taft, in *Weil v. Neary*, 49 Sup. Ct. Rep. 144, reversed the judgment. The court concluded that the contract set up by Untermyer "is in violation of public policy and professional ethics." It also stated: "Such a transaction between counsel calls for judicial condemnation." The court condemned the arrangement for three reasons. (1) It violated the rule of the district court. (2) The provision that Untermyer was to supervise and direct Weil in the rendition of his services was said to be in direct conflict with the professional and official duty of Weil as an officer of the bankruptcy court and as counsel for the trustees. (3) The provision in the contract by which Untermyer was to determine how the fees were to be divided was improper as an arrangement that would have an improper tendency to increase fees beyond the proper amount and would also take from the court the judicial function of determining how much an officer of the court is to be paid for services rendered.

An interesting feature of the case was that Mr. Weil appeared before the Supreme Court and announced that he would be content with any disposition the court desired to make of the sum in dispute provided it was not appropriated to the satisfaction of the contract in question, the making of which he denied. The Supreme Court not having the bankruptcy litigation before it did not feel authorized to make any disposition of the sum but did reverse the judgment and order a dismissal of the suit "leaving Weil to take such steps as may be appropriate to enable the bankruptcy court to pass the funds in controversy to the creditors."

This legal spanking, administered to one of the best known of New York lawyers, has a significance that it is difficult to overestimate. It would be difficult for even a cynically minded person to find any thing wrong with the even handed justice admin-

istered by the present occupants of the United States Supreme Court. Legal ethics are not made to suit the convenience of the most influential members of the bar.

#### IV

It seems to be difficult for some attorneys to recognize that they owe a professional duty to appellate courts not to harass them with frivolous litigation. In *Slaker v. O'Connor*, 49 Sup. Ct. Rep. 158, an appeal to the United States Supreme Court from the circuit court of appeals for the eighth circuit was dismissed because the appellant had obtained the appeal without any authority of law. "Thereby," said the court, "he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them." Accordingly damages of \$150 payable to the appellees, together with the costs, were taxed against the appellant.

In *Roe v. State of Kansas*, 49 Sup. Ct. Rep. 160, the court decided that there was no substance in a writ of error which was dismissed and a penalty of \$200 payable to the defendants in error was assessed against the plaintiff in error.

A notice in a local newspaper that such and such an attorney has reached a high stage in his professional life and has appeared before the United States Supreme Court is perhaps a legitimate ambition. However, it behooves all men not to be overly ambitious. It will be something of an anti-climax if a subsequent issue of the same local paper informs its readers that the attorney has caused his client to be assessed a penalty on account of the former's foolish conduct in wasting the time of the Supreme Court of the United States.

In *Hester v. O'Dara*, 272 Pac. 1057, decided December 21, 1928, the Supreme Court of California imposed a penalty of \$100 "upon the appellant for taking and prosecuting a frivolous appeal."

KENNETH C. SEARS.