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# Ethics Forbid Disclosures of Judicial Malfeasance

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# "Ethics" Forbid Disclosures of Judicial Malfeasance

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Since 1924 the Supreme Court of Colorado has recommended the Code of Ethics as adopted by the American Bar Association in 1908. The first canon concludes with these two sentences:

> "Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the *proper authorities.* In such cases, *but not otherwise,* such charges should be encouraged and the person making them should be *protected.*"

This means that a lawyer will not be "protected" but may be disbarred for criticism if the "serious complaint" is made known to the people, they not being the "proper authorities," and the disclosure will be deemed, according to the authorities, not a lesser but an aggravated misconduct if the facts are truthfully alleged in the grievances or comment. So construed, the code is consistent with what the courts themselves have said and done. At the beginning they were influenced by, and conformed to, the old law of libel, under which truth was not a justification for language imputing malfeasance to public officials. "The doctrine * * * came from the court of Star Chamber."[1] When it became recognized as part of the common law, it was defended on the theory "that truth may be as dangerous to society as falsehood, when exhibited in a way calculated to disturb the public tranquility, or to excite to a breach of the peace."[1] Consequently most of our "colonial courts, like the courts of England, were willing tools in the hands of the executive to crush all criticism of the government."[2]

When courts usurped the power to punish as for contempt any adverse comment on their conduct tending to create popular disapproval of what had been officially done, they appropriated and applied the same doctrine, and so in contempt cases the rule was, and still is, that "it is entirely immaterial whether the matter published is true or false."[3] That was logical, for if courts needed protection against charges of malfeasance, true ones would be more harmful than the false. The next step was to apply the same rule in disbarment proceedings, so that there, too, evi-

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[1]People v. Croswell, 3 Johnson's Cases (N. Y.) 326, 3 Wheeler's Crim. R. 330 (1804).

[2]Mr. Justice H. P. Burke, *Uncle Sam's Business,* 30 Colo. Bar Assn. Rep. 120, 126 (1927).

[3]People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912 (1905).

dence of the truth would be excluded, where the proceedings were based on a lawyer's criticism of a judge. Publications which would be constructive contempt if made by a layman, were proof of "misconduct" if made by a lawyer,[4] and it was enough to constitute "misconduct" if the irritated judge saw fit to brand the comment as such.[5]

Courts did not, and could not, publicly admit that truth is no defense in disbarments for comment, for to do so would also admit that it is possible for judges to be as bad as charged by the respondent. Accordingly it became convenient to "find" that the critic's charges were "false." But in at least one case[6] it was frankly declared that if serious charges were "established" they would be attended with "the gravest results," meaning that to expose one arbitrary judge would create public distrust of all others. The opinion would permit, but did not encourage, the making of complaints "in the manner provided by law," that is, an appeal to the legislature to exercise its power of impeachment.

An opinion of the Supreme Court of Ohio makes it clear that what is meant by "the proper authorities," as used in our code of ethics, to whom alone may the lawyer disclose his "complaint," especially of an appellate judge, are the legislators who have the power to remove judges by impeachment. After quoting the first canon of our ethics, the court said:[7]

> "If the judges who were attacked in these circulars were believed by the respondent to be guilty as he charges and insinuates, it was his privilege and duty to do what he could to have them impeached, so that they might be deposed from office, when found guilty."

In defending that theory of duty, the Supreme Court of Arkansas said that in an impeachment trial the conduct of the judge "may undergo a full investigation."[8] but gave no assurance that a trial could be obtained. In the Ohio case the lawyer's criticisms related to conduct during terms that were then about to expire, and if he had gone to the next legislature he would have been confronted with the authorities holding "that an officer cannot be removed from office for an act committed during a prior term."[9]

Rarely, if ever, is there a judicial offense bad enough to justify impeachment, but frequently it deserves such criticism as could be, arbi-

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[4]State v. McClaugherty, 33 W. Va. 250, 10 S. E. 407 (1889).
[5]See opinion of trial court in Austin's Case, 5 Rawle (Pa.) 191, 200 (1835).
[6]*In re* Murray, 58 Hun 604, 11 N. Y. S. 336 (1890) quoted, *In re* Knight, 34 N. Y. S. (2d) 810, 814 (1942).
[7]*In re* Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909).
[8]State v. Morrill, 16 Ark. 384, 403 (1855).
[9]Note, Ann. Cas. 1916B 708.

trarily, held "contemptuous" and a cause for disbarment. If in any case "grievances" were submitted to a legislature, the charges would likely be ignored or ridiculed, and if considered at all, dismissed in pretended conformity to the judge-made law that even before an impeaching body "serious" charges should not be "entertained for a moment, except upon the most impressive evidence at least."[10] Evidence would not likely be "impressive" to legislators politically affiliated with the judge.

While a clergyman,[11] an editor,[12] a labor leader,[13] or any other citizen who is not a member of the bar can freely give information and opinion on the demerits of a judge, and defend himself against a "scandalous, scurrilous, and defamatory" court opinion,[14] the professional code of ethics denies the same right to the attorney, a citizen better informed. To enforce that code, courts have disbarred lawyers for arguments used in opposing judicial candidates for re-election. The judges professed that they "thoroughly considered the authorities,"[15] and followed them, but the "authorities" were no more imperative there than in the recent contempt cases which reject them.

The Code of Ethics formulated and adopted by the American Bar Association was based on the 1887 code of the Alabama Bar Association,[16] but the latter code did not contain the last two sentences of what is now our first canon. Instead it provided, in substance, that "attorneys should, as a rule, refrain from published criticism of judicial conduct." That was also the provision of the code published by the Colorado Bar Association in 1899.

The American Bar Association's committee on ethics in 1907 recommended that Chief Justice Sharswood's *Professional Ethics* be reprinted, as it later was, as a volume of the American Bar Association Reports, but the association and its committee thereafter went contrary to Sharswood's doctrine on the right to criticize the conduct of *elective* judges. When that great Chief Justice of the Supreme Court of Pennsylvania had occasion to speak officially on that subject, he did not attempt to muzzle the bar by any language resembling our first canon of ethics, but after referring to the fact that at the time of some earlier decisions on misconduct the judges were appointed for life, declared that since "the

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[10]*In re* Murray, *supra* note 6.

[11]Lauder v. Jones, 13 N. D. 535, 101 N. W. 907 (suggesting absence of any proceeding against the clergyman who wrote the affidavit involved).

[12]Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 894 (1935).

[13]Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. ed. 192 (1941).

[14]Nadeau v. Texas Co., 104 Mont. 558, 69 P. (2d) 593 (1937), showing the possibility of such opinions.

[15]*In re* Humphrey, 174 Cal. 290, 163 Pac. 60 (1917), following *In re* Thatcher, *supra* note 7.

[16]31 A. B. A. Rep. (1907).

case is altered * * * it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship."[17] Now that laymen may freely speak, it is timely to note that the Chief Justice also said:

> "No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar."

One disbarring court[18] in refusing to follow Chief Justice Sharswood's opinion declared that his holding was compelled by a clause in the Pennsylvania bill of rights relating to prosecutions for libel, but that cannot be true because the reasoning and the result was obviously based on the fact that the people elect the judges. Mr. Justice Steele of the Supreme Court of Colorado, and Mr. Justice Field of the United States Supreme Court, saw and quoted with approval[19] what had been said by Chief Justice Sharswood on the right and duty of a lawyer to give information and opinion to people who would hear, instead of appealing solely to a deaf and indifferent legislature. In a recent Tennessee case,[20] the Sharswood opinion was again approved, and as if repudiating the two muzzling sentences in the first canon of our ethics, the court quoted all of that canon *except* such sentences.

The Colorado Bar Association's canon No. 2 discouraged "published criticism" by those "who have been of counsel" in the cases involved, but only such counsel know the facts, and if silenced, others lack the information upon which to speak. Yet, then as now, if informed counsel assail improper judicial acts, they are in danger of being, in published disbarring opinions, perpetually libeled as libelers peeved by losing in a litigious gamble.

The first canon of our ethics, requiring that complaints be made, if at all, only to impeaching "authorities," silences not only the attorney knowing the grievances of a litigant but also the man who in self-defense intends to write a candid autobiography, "confident in his own soul that he had done no wrong."[21]

If continued disbarment for conviction of a statutory offense would cause "a lesser Burns * * * to conceive a greater line than 'Man's inhumanity to man'",[22] a suspension for justifiable comment would prove

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[17]*Ex parte* Steinman, 95 Pa. St. 220 (1880).

[18]State v. McClaugherty, *supra* note 4.

[19]People v. News-Times Pub. Co., *supra* note 3; *Ex parte* Wall, 107 U. S. 265, 309, 2 S. Ct. 569, 27 L. ed. 552 (1882).

[20]*In re* Hickey, 149 Tenn. 344, 258 S. W. 417 (1924).

[21]See Hilliard, J., in People v. Lindsey, 93 Colo. 41, 23 P. (2d) 118 (1933).

[22]Hilliard, J., in People v. Laska, 109 Colo. 389, 126 P. (2d) 500 (1942).

its verity. Only Shelley, another poet, dared to denounce Lord Ellenborough for his oppression of Daniel Isaac Eaton. The ethical bar was silent, as it was when Lord Hale condemned "witches" to death.

For a long time it was criminal libel to tell the truth about a tyrannical executive, but constitutions came to make the truth a defense in prosecutions for libel.[23] If truth about a corrupt judge was told by a layman, it was contempt; if told by a lawyer it was not only contempt but also "misconduct" which was punished by disbarment. In 1882 Mr. Justice Field wrote:[24]

> "The power to punish for contempt * * * was formerly so often abused for the purpose of gratifying personal dislikes, as to cause general complaint, and lead to legislation defining the power and designating the cases in which it might be exercised."

But the power to punish comment as "misconduct" remains,[25] reminding that Mr. Justice Field also said:[24]

> "Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar."

Free speech for the citizen outside the bar, with respect to judicial conduct, is upheld by the highest court of the land,[26] and by many state courts.[27] But "ethics" still withhold that liberty from the lawyer, and to conform, he must remain the same silenced serf as his precursor was. In 1835 nearly all the lawyers of a county were disbarred for writing that "the public confidence seems to be withdrawn * * * from the court."[28] Mr. Justice Field also wrote:[29]

> "Under our institutions arbitrary power over another's lawful pursuits * * * is odious wherever exhibited, and nowhere does it appear more so than when exercised by a judicial officer toward a member of the bar practicing before him."

It may be that gangsters have ethics requiring machine gun assassination of any member who disrespectfully reveals the conduct of the Little Caesar whose "judicial discretion" permitted the membership, but they do not publish that code nor offer it as proof that theirs is an "honorable profession."

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[23]Note, 21 L. R. A. 509.
[24]*Ex parte* Wall, 107 U. S. 265, 302, 2 S. Ct. 569, 27 L. ed. 552 (1882).
[25]State v. McClaugherty, *supra* note 4.
[26]Bridges v. California, *supra* note 13.
[27]Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 894 (1935).
[28]Austin's Case, 5 Rawle (Pa.) 192 (1835).
[29]*Supra* note 24.