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John M. Allison
Henry S. Drinker
William A. McRae Jr.
Giles J. Patterson
Donald K. Carroll

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THE DETERMINATION OF PROFESSIONAL FEES FROM THE ETHICAL VIEWPOINT—A PANEL DISCUSSION

Members of Panel: John M. Allison of the Tampa Bar, Henry S. Drinker of the Philadelphia Bar, William A. McRae, Jr., of the Bartow Bar, Giles J. Patterson of the Jacksonville Bar, and Donald K. Carroll of the Jacksonville Bar, Moderator. Questions raised from the floor are prefaced by “Q.”

Mr. Carroll: Does any member of the panel wish to say a few words on this subject before getting into questions from the audience?

Mr. Drinker: I have nothing very special to say except that I object to the overstatement of the fact that a lawyer is in the profession solely for the public service and that he does not care whether he gets paid for it or not. I think that is a lot of bunk. The lawyer is in the profession to make his living at the law, in a proper, honest way, and of course he is interested in getting compensation. On the other hand, he is interested in having his compensation fair, under the circumstances; and I think that the lawyer will find in the long run that it does not pay to overcharge clients but to keep them satisfied with his fees. I am happy to say that I have had more clients who wanted to pay me more than I charged than wanted to pay me less. I think it pays to be absolutely sure that they are satisfied. If you do not get paid what you think is right it does not matter, because you have the good will of your client.

Mr. McRae: Recently I received a letter—and I have received several like it in the past—in which the forwarding firm suggested that, as a fee basis, it should receive “the usual one third” and my firm would receive “the usual two thirds.” It was apparent from the letter that all the forwarding firm had done was to check a law list and send my firm the case. Of course I did not want to lose the case and I did not want to accept that provision. My answer to them was that I would fix my own fee and let them deal with the client in fixing theirs. I wonder how prevalent that practice continues to be at the present time?

Mr. Drinker: There is quite an idea in the world that there is a usual forwarding fee of one third whether you do any work or not.

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A canon was adopted in 1928 providing that on commercial collections there could be a forwarding fee. It was amended in 1937 to provide that there be no division of legal fees for services, which is proper except with another lawyer and which is based upon a division of service or responsibility. I doubt whether there is any known consideration for picking out a firm from a law list.

Mr. McRae: I have heard it argued that there is a great responsibility on a lawyer, in forwarding a case, to make certain that the lawyer to whom it is forwarded is a good lawyer, and that this is the service rendered to the client which justifies the forwarding fee.

Mr. Drinker: You have heard that from the forwarding lawyer, not from the one to whom it is forwarded.

Mr. McRae: Right.

Mr. Drinker: We all know about that. I do not think that the canon has been as strictly observed as it should be. I have had lawyers write to me and complain that they had not been paid the forwarding fee. Even though they were both willing to do so, the canon forbids it. As to whether it is the proper thing or not, I think there might be arguments on both sides; but on the whole I think the canon's policy is a good thing. It makes the law too much of a business if you are practicing the way you would as a broker. The lawyer is not supposed to get paid for anything but the legal services that he renders, and selling a man a client is not a legal service. I think it is beneath the dignity of the profession to take money for something that is not a legal service.

Q. You do not believe in five percenters, do you?

Mr. Drinker: No.

Q. Mr. Drinker, in the situation of the lawyer who has happened to obtain very considerable experience in some particular field of the law, so that he can accomplish his result with a great deal less time and effort than the next lawyer, do you think that factor should affect his fee by any degree?

Mr. Drinker: No. I have had people object to a fee because of the short time it took the lawyer, and I told them if you had a physician remove your appendix would you think you should pay the one more who took two hours than the one who could do it in three minutes?

Q. That reminds me of a story I heard about doctors. A very wealthy man in Detroit had a very good friend who was an eye surgeon. He hired him to perform an eye operation on his small son. The operation was successful, and it took about five minutes. In due
course he got a bill for about $1,500. The next time he saw the doctor at the golf course he said, "That's an awful lot of money for five minutes' work." The doctor smiled and said, "Maybe so, but I spoiled a peck of eyes learning how to do that job."

Mr. Patterson: I heard that very argument made in court. The lawyer claimed to be entitled to a fee larger than usual because he had had little experience along that line and hence had so much more work to do.

Q. Mr. Chairman, I would like to ask Mr. Patterson a question. The canon enumerates a number of factors to be taken into account in fixing the fee. From the ethical point of view, what is the dominant factor, the one entitled to carry the most weight in fixing the fee?

Mr. Patterson: Young lawyers ask that all the time. I will answer in a way you may not be expecting. The dominant factor with me is that it shall be satisfactory to my client. There are cases when you cannot do that, but only once in my life have I had any unpleasantness over a fee of any size.

Q. I do not believe that satisfaction of the client is one of the factors taken into account by the canon.

Mr. Patterson: I am not talking about the canon; I am talking about the practical answer to your question. I think, as Mr. Drinker said, that if the fee is measured by some accepted standard or is for routine services for which there is a fee schedule, the parties can usually arrive at a satisfactory fee. But that is not true of the more complicated and difficult services that a lawyer is called on to render. As to those there are no particular standards, and sometimes there exist wide differences in opinion as to reasonableness. I would not say that there is one element of value that is dominant; nor do I know how to separate the various elements that enter into determination of the fee. A lawyer who makes a charge that is unsatisfactory to his client is faced with one of two things: a dissatisfied client who will probably injure him in the future by criticism, or the necessity for litigation. One thing I think a lawyer should always do is to avoid such litigation. Nothing can injure him more quickly. Thus I come back to my original answer.

Mr. Drinker: Do you not think you might say you should never overcharge a client for the service rendered and the work done because he is wealthy, but you often undercharge him if he is unable to pay.
Q. What about a contingent fee in a divorce case?

Mr. Drinker: That is not forbidden by the canons.

Q. Is it not forbidden for a lawyer to represent a woman and take one third of what is awarded?

Mr. Drinker: Taking one third of the alimony is forbidden, but it is not forbidden to refrain from charging a fee if the divorce is not granted.

Q. I was thinking more about the settlement.

Mr. Drinker: It has been absolutely ruled that in litigation and in decision you cannot receive a percentage of the alimony.

Q. Mr. McRae, I will ask you this question. What is your opinion about lawyers' getting together and setting a minimum fee without regard to the work that is to be done in the particular cases?

Mr. McRae: A minimum fee schedule should be suggestive rather than binding. You certainly cannot go to a minimum fee schedule and justify a fee if you have done no work on a case. On the other hand, the services rendered might be substantially in excess of the amount set forth in the fee schedule. I think it should be no more than a guide and not a binding rule.

Q. The minimum schedule never stops at the top, but it always tries to get the lawyers to agree, in a gentlemen’s agreement, that they will never charge less than that, or if they do they will charge nothing at all.

Mr. McRae: I do not understand that to be the proper use of a minimum fee schedule. I think it is more suggestive of what the fee normally should be. For example, sometimes a lawyer's practice has been in a field different from the case that comes into his office, and he needs a guide as to what the customary charges are.

Mr. Drinker: It is supposed to be only suggestive. The canons forbid a compulsory minimum fee schedule, specifically in Canon 12. But there are a number of bar associations that have it as compulsory.

Mr. Patterson: I do not know of any reason why I cannot perform services without charge if I wish, regardless of a minimum fee fixed by an association.

Mr. Drinker: There is no reason.

Mr. Allison: I would like to suggest a somewhat different view. I feel that there has to be some sort of brake put on a lawyer who attempts to acquire the reputation of performing services for less than the ordinary and prevailing charge. I am inclined to think that a minimum fee schedule might serve a useful purpose.
Mr. Drinker: It was said in one of our districts that it was useful to have the bar indicate the usual and proper charge in that community for a particular service, so as to put a brake on lawyers who were trying to undercut the market and to build up their practice at the expense of other attorneys. In so far as it did this it was all right.

Mr. Allison: It was not binding?

Mr. Drinker: No. But if you have a minimum fee schedule the fellow cannot say he did not know what was the customary charge. If he continues to undercut, then his fellow lawyers will jump him on it.

Q. Mr. Drinker, I would like to say that the minimum fee serves its purpose in more than one way. The average layman has no idea of what the charge is on any case, and the average lawyer is about as far from knowing, and this keeps him from being too far off base. Yet you say it is really something that you cannot recommend.

Mr. Drinker: I think that is definitely true.

Q. I would like to ask a question that has arisen here in Florida more in the last few years than in prior years. There has been a discussion among the lawyers as to whether the practice should be established, as it is with doctors, of making a charge to anyone who comes in to consult you. The lawyers, in Florida at least, have never made that a practice, and of course clients do shop around. They come to your office; they stop you on the street; and they may never come back. If you think you have a sore throat and you go to a doctor and he looks down it and says, "Just gargle with salt water," you get a bill. I wonder if you have any thoughts on whether the bar, in determining the ethical fees from a professional standpoint, should give any thought to a fee for consultation?

Mr. Drinker: I do not know of any reason why they should not, and I think a number of them do. I think it should also apply to telephone conversations.

Mr. Patterson: I know of one lawyer who achieved most successful and satisfying results. When asked a legal question, say on a street corner, he would answer and add, "Now that is worth exactly what it cost you." It think that worked pretty well. You have to adjust the treatment to the individual. I will grant that.

Q. Mr. Drinker, what about this? A man has hired you to do a certain job that is contingent upon some other situation or some other individual and that is going to take time. He continues to
return to the office. You actually do no service at the times he comes to your office but he takes up your time. Is it unethical to hand him a bill and say, "All right, here is a bill for $200 for the times you have come into the office"?

Mr. Drinker: What was your contract in the first place?

Q. There was none.

Mr. Drinker: I do not know — if you can get away with it I would send him a bill. My dear old preceptor and the former senior partner of our firm, Samuel Dickson, was a wonderful old gentleman. There used to be a man, a crony of his, who came into his office every day and went back and sat with him in his office, and we did not know what he was doing. One time this fellow went into his office and stayed there for two hours; finally he came out and Mr. Dickson came with him and showed him to the elevator. My room was right on the way from the elevator back to Mr. Dickson's room. He came back chuckling, and he said, "Harry, he will never come back, thank God. I lent him $300."

Mr. Carroll: Mr. Drinker, on that note of fee in reverse I think we had better end this proceeding.