A Typical Legal Ethics Seminar— A Panel Discussion

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A TYPICAL LEGAL ETHICS SEMINAR —
A PANEL DISCUSSION

This panel typifies the legal ethics seminar as conducted by the College of Law at the University of Florida. The panel was opened by statements from Henry A. Fenn, Dean of the College of Law, J. Lance Lazonby of the Gainesville Bar, and William A. McRae of the Bartow Bar. The other members of the panel were students then enrolled in the course in legal ethics.

Mr. McRae: At the outset, I think that it might be helpful for us briefly to review the background of the seminar as a means of conveying to students an understanding of their moral responsibility as members of our profession and some of the standards which should guide us.

This is our fourth year of integration. Before integration of The Florida Bar, the problem of grievances was handled by the circuit grievance committees. In some circuits that system worked satisfactorily, but in many it did not. For that reason and a great many others, the bar had been exerting its efforts toward an integrated program, which we were finally able to effect through the Supreme Court of Florida.

After integration the problem of discipline was placed, as it should be, squarely on the shoulders of the organized bar. The first impression that the Board of Governors received was an unexpected realization that there was a widespread lack of awareness of moral standards and professional responsibilities on the part of members of the bar. We were even more surprised to find that this was particularly true with young lawyers who in many instances had gone to law schools of high standing. It gave us great concern, and we wanted to do something about it. I shall give but one illustration and without the use of names. The young lawyer involved had been out of school for two or three years and was enjoying a successful practice. His success was, however, attributable to the fact that he had devised a very effective and remunerative contract for the handling of damage suits. For convenience he had the contract mimeographed and, for even greater convenience, always carried copies with him in his pocket, in order to be prepared, so he said, for the handling of cases that came his way. Immediately upon being retained, he would visit the

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client at the hospital and make it known that his services were available for other unfortunate persons who were hospitalized. When he was asked about this practice, he replied blandly that it seemed to him only good business that it should be handled that way.

After realizing the lack of appreciation of professional standards, the next question was what could be done about it? That was the really difficult problem. As Judge Clark spoke this morning, I recalled my own experience as a teacher in this law school of the subject of legal ethics. Like Judge Clark, I was the youngest member of the faculty by fifteen years. I taught legal ethics, and it was a most unsatisfactory experience. I had the feeling that instead of conveying to the student some idea of the dignity of the legal profession I was simply laying down ground rules which, if he followed, would enable him to avoid trouble. Some students took the course because it was easy; and I suppose it was.

We tried another technique during those years—inviting distinguished lawyers and judges to address the students on the subject of legal ethics. With a few exceptions most of those speeches fell flat, simply because they amounted to hardly more than the utterance of platitudes. Consequently, the students who were listening were inclined to ignore most of what was being said. We realized that this was surely not the solution of the problem. When we of the organized bar and the Board of Governors insisted that the problem was one that had to be solved, many lawyers and professors replied that one simply cannot change the moral outlook or standards of a person as soon as he enters upon the study of law.

From my own experience as a student and as a professor of law, I submit that this approach is wholly erroneous. It is my conviction that, overwhelmingly, students who enter our law colleges sincerely desire to observe the standards of the profession. They wish most devoutly some day to gain the respect of their fellow lawyers and the public. In reality, therefore, we are not dealing with the problem of trying to reshape the moral outlook of the student but rather the problem of orienting the student to a proper understanding of the traditions of the legal profession.

We next considered the problem of devising a plan for working with the law school. We need not describe that plan as it was finally worked out. We are going to attempt, in an unrehearsed round-table discussion, to bring to you the idea that we believe is working successfully in this law college.
Dean Fenn: In formulating our instruction in legal ethics we had as our objective the creation in our students of an awareness of the ethical problems that arise in practice and an interest in the many facets of professional responsibility that make the practice of law a profession rather than a business. To create this awareness, we felt that two things were essential: informality and realism. We wanted informality in order to obtain a frank discussion—we knew from past experience in other schools and in this school that we would not accomplish our objectives if we used the regular case method of instruction.

Throughout this Institute, emphasis has been placed upon the unreality of the older courses in ethics. We wanted realism because instruction in legal ethics in law schools is peculiarly susceptible to the charge of “ivory towerism”—the instructor can afford to be entirely ethical, since he is not earning his living in practice, but the attorney realizes that in some things the practical must be mingled with the ideal. Regardless of the truth or falsity of this statement, if the students believe it the course is ruined.

We sought informality by holding the classes as a seminar at my home in the evenings, out of the law school classroom atmosphere. We substituted weekly papers for an examination in order to relieve the students from the idea that they were trying to get answers—that they had to stand an examination on this subject. We eliminated competitive grading; we announced that all students would get a “B” in the course, provided they turned in the weekly papers and showed an interest in and an understanding of the materials.

We sought realism in two ways—first, by our choice of teaching materials, and, second, by asking The Florida Bar to furnish us two visiting attorneys for each session of the seminar, to participate in the discussion and to present the views of the practicing profession on the problems being considered.

We felt that the choice of materials was very important. Court opinions in disciplinary proceedings have an aura of taking away a man’s livelihood. They frequently split hairs to avoid doing this. While we are enthusiastic about splitting hairs in terms of statutory construction and turning out students who can do so, it seems to me very unfortunate to treat the Canons of Ethics as problems of statutory construction—how close can you get and still comply? On the other hand, the opinions of the American Bar Association committee represent the day-to-day concern of the practicing attorney with ethical problems. The question confronting the practicing attorney is: Is it
ethical for me to do this; is it proper for me to do this; rather than the question that I think most attorneys rarely consider — if I do this, will I be disbarred, or will I be suspended?

We supply the visiting attorneys with copies of the materials to be discussed for the evening and ask them to come prepared in two respects: (1) to discuss the extent to which the opinions represent the prevailing practice and thought of the profession in Florida; and (2) to relate any personal experiences they have had that illustrate any of the problems under discussion. We have found that to some extent the opinions are not representative, and we feel that the student should know what the prevailing practices are and the extent to which they may not meet the standards of the American Bar Association. By asking the attorneys to illustrate problems from their personal experiences we hope to get the students to realize that these are everyday incidents and not isolated instances sent to the American Bar Association from some area far removed from Florida.

We plan no formal progression through the materials; we go as far as we can in the time that we have, and I feel that every minute is profitably spent. The students have read the materials before coming to the discussion, and they are required to read them again in connection with the preparation of their papers.

We hold seven sessions of the seminar. The student reads the canons at least twice, and many of them are reread several times as they come up in connection with problems discussed. We consider the problems raised by 83 opinions of the Committee of the American Bar Association and four court cases.

The seminar begun last spring has just completed its first year. During that time fifty of our third-year students have completed the course. To what extent we have approached our objective of creating student awareness of and interest in the problems of legal ethics can, I think, best be judged by the professional associates of these men since graduation — the lawyers and the judges. I have asked several of them. It is perhaps too early to tell what effect this program is having; nevertheless, we think we know something about it. Mr. Lazonby has had an opportunity of knowing many of these students while they were in law school and also to observe them in action in the courts and in the offices since graduation. He is going to give his observations as to what he sees as the results of this program to date, and then we will move into the demonstration portion of the program.

_Mr. Lazonby:_ There are so many intangible results that flow from
this undertaking that you have just heard discussed by Mr. McRae and Dean Fenn that an accurate appraisal of results at this stage of its development is hardly possible. In the due course of time results not now apparent will become self-evident. These results, however, have already been observed: (1) a change in the attitude of many of the law students toward the subject of legal ethics; (2) benefits derived by participating members of the bar.

During the exploratory phase to which Mr. McRae referred and before this program was initiated, Dean Fenn, Mr. McRae, and I met with selected leaders from among the law students, including the President of the John Marshall Bar Association, the presidents of the legal fraternities, and others, in order to obtain student reaction to a legal ethics program. To say the least, it was a deflating experience. It was quite obvious that the majority of those present felt that we had come "tongue in cheek," on a subject that was double standard and to which, in practice, nothing more than lip service was given.

I can best exemplify the change in thinking and attitude that has since come about by telling you of the case of one student who was present at that meeting and who later became a member of the first class conducted by Dean Fenn. He was one of those who expressed himself that night as being at a loss to understand the problems that were bothering us, and it was evident that he considered our concern to be simulated. After completion of the course, he drafted and turned into the Dean a completely unsolicited summary of the course, from which I quote as follows:

"First, let me say that the course is the most enjoyable one that I have had the privilege to attend since entering law school. I commend it to all students and recommend that it be continued as long as the pocketbook of the Dean and the endurance of the visiting attorneys can hold out.

"What has been accomplished:

"First, it has made the student realize that the members of the bar and the faculty of the University of Florida Law School are so interested in ethics that they are willing to sacrifice their own time and money toward its advancement.

"Secondly, it has made us cognizant of the many problems of ethics existing in the State of Florida today and the many borderline questions with which we will be confronted. It has given us what the case book and the instructors could not, first-hand answers as to what the actual procedure and practice
are in Florida today. It gave us the opportunity to ask the questions we wondered about all through law school, and gave us answers rather than long haired opinions.

“In closing, I would like to say that ethics to me is largely a question of morals but not wholly so, as I see nothing immoral about many things the canons forbid. If legal ethics can show the prospective attorney the right road, show him what his fellow attorney-to-be is doing and instill in him a trust of his brother attorney, it will have done its part. If, in return, the beginning attorney will enter the field in a spirit of fair play, follow the Golden Rule, let his conscience be his guide and then double it, we will soon have the most respected profession in the state.”

Something of the same spirit that is indicated by that letter has unquestionably permeated the thinking of the students, because they now apparently realize that the program is presented in all sincerity, as evidenced by a completely different attitude at the initial meeting of each legal ethics class, before the presentation of the subject matter of the class. I chance to be the practicing lawyer who has had the privilege of meeting with the first group of each class since the initiation of this program. I mention this only because I believe that it has given me some basis on which to make these observations.

Now, as to resulting benefits to participating lawyers. Those members of the bar who have participated in these seminars, and I see many of them in the room, will be quick to tell you that they have benefited greatly from this experience. Long forgotten, or perhaps never-read, canons have been studied; and thought has been stimulated on many practical problems that need attention and determination by the bench and the bar in the interests of the profession and of the public. The impact of this thinking may not yet be altogether apparent, but perhaps some evidence of it is indicated by the interest in this Institute. So it seems to me that results of the seminars on legal ethics initiated in this law school, conducted by Dean Fenn and participated in by representative members of The Florida Bar, have now transcended the classroom. The program is making, and I feel sure it will continue to make, an incalculable contribution not only to the students here but also to the profession and to the public. And, lastly, it should be pointed out that this Institute on Legal Ethics, an innovation in legal institutes, is largely the result of the interest aroused in the bar by the legal ethics seminars.
At this point the entire panel was assembled for the discussion that follows.

Dean Fenn: Gentlemen, we will start with a discussion of the attorney's obligation to the court and to other attorneys. In the next section we will take up his obligations to his clients, and in subsequent meetings, to the other parties in the proceedings, to the public in general, and then the question of advertising, and, ultimately, that fascinating question of fees and charges.

Now, following our practice of trying to keep this as informal as possible, I am not going to do more than say, what are the questions that interest you?

Student: I would like to refer to Opinion 146, which propounds a question to the ethics body concerning the duty of a lawyer appearing in the case to advise the court of a decision adverse to his client's case. How does that compare with the historical concept of advocacy of the attorney?

Mr. McRae: Well, you know, even in adversary proceedings the lawyer has a duty of fairness and candor to the court of which he must never lose sight. The question then is whether or not adverse opinions or adverse decisions ought to be cited. If they are not cited the court cannot be fully informed, and it is a fundamental duty of the lawyer to make certain that the court is fully informed. That does not mean that one must argue the case for the opposing counsel. But I do believe that it would be disingenuous and wrong to conceal from the court an authority, if you know it exists, and thereby lead the court into error.

Mr. Lazonby: I think that is quite right. More of a problem is presented, however, than might be indicated by this academic discussion. I have a rule that from my standpoint I think is sound. It is that I should never permit a judge that is sitting on a case in which I am engaged to be led into error without warning, but the application of the rule is not always so simple.

To what extent you make disclosure of adverse authorities will be dependent somewhat on the circumstances. It will depend somewhat on the attitude of the judge and that of the opposing counsel, but I feel that the decision should be made in conjunction with the basic obligation of the attorney—a trust relationship, based on the duty to the court, the duty to the client, and the duty to the public, ir-
respective of the adversary aspect of litigation. I do believe that when you reach rock bottom, even though you may feel that the judge is arbitrary or ill advised, or even if you reach the conclusion—which of course I never have—that the judge is absolutely stupid, you must never go below the minimum of giving him the opportunity of correcting his ruling.

Mr. McRae: To return to the question, let me ask you what would you do if the undisclosed case were against you? Would you cite that case?

Mr. Lazonby: Yes, I would.

Mr. McRae: Would you let it stop there? I do not think I would. I would do everything I could to distinguish it.

Mr. Lazonby: No. I would say in answer to that from my viewpoint, if you will permit me to discuss it, that I would certainly cite the cases in point against my contention, and then I would do everything in my power to distinguish the rule of those adversary cases.

Student: Mr. Lazonby, how do you feel about the situation in which a decision in another state is adverse to a decision in this state?

Mr. Lazonby: I would say that unless an examination of the statutory law, or something else, indicated that this case was squarely in point, I would be under no duty to cite that case to the court before which I was making my contention. If, however, I had examined the predicate, on the basis and the background of the decision, and it was in point, and it ruled my case, as difficult as it might be I would present it.

Student: I did not think any out-of-state decision was binding in Florida. Are they not used merely as persuasive authority?

Mr. Lazonby: Yes, but if you have a workmen's compensation case, a case that involves construction of a statute adopted from another state, then an out-of-state decision in point has weight.

Student: Mr. Lazonby, if you knew of an unpublished decision of another circuit court in Florida, would you feel that you should make that known to the court?

Mr. Lazonby: I very definitely would not. In the first place, we have all sorts of circuit judges, as we have all sorts of lawyers; and decisions of other circuit judges are not decisive. I would like to point out, however, that there are many times when I think it is helpful to the presiding judge, particularly on matters of procedure, in interpreting the rules which it seems are changed every few years, to learn how the point involved has been resolved by another circuit judge. If you think it is helpful to the judge, then I think it is all...
right; but if it is damaging, then that is one reservation that I prefer to keep.

*Student:* By the same analogy, though, it would be the decision of the court, and it might be useful to the present court.

*Mr. Lazonby:* I may be mistaken, but I somehow have the feeling that the decisive decisions in this state are only those that are rendered by the Supreme Court of Florida, or by the various federal courts having jurisdiction of cases in which they interpret the laws of this state— at least that has been my approach.

*Student:* Would you cite a case in Florida that supports you, even if you regard the reasons for the holding as being wrong?

*Mr. McRae:* I would cite such a case without any hesitation, on the basis that the judge reached the right goal by the wrong road. I would then, if called on, attempt to supply the right reasoning to support the conclusion reached in the case.

*Student:* I would like to ask a question that is on a slightly different point, and that is the relationship between attorneys and judges. I note that Canon 3 states that any marked attention or unusual hospitality between a lawyer and a judge is subject to misconstruction. I was wondering, in the light of that, what change in social relationship is necessary or advisable between attorneys and a fellow attorney who recently has been elevated to the bench—that is, can they go on playing golf, eating lunch together, and so forth?

*Mr. McRae:* It seems to me that the proper criteria would be to continue what has been a normal relationship. If you had not been playing golf with a judge previously, I would not suddenly ask him to join my foursome. That would be unbecoming. I think it is fundamentally a matter of good judgment and good taste. I certainly do not think it proper for you to court the friendship of a judge by favors or straining the social relationship beyond what is normal.

*Student:* Then if you normally play golf with him every Sunday, and you have a case being tried before him, is it all right to play as usual?

*Mr. McRae:* In an instance like that, I think I would find occasion to be in my office preparing the case. It would expose you to criticism if you played golf over the weekend while the trial was in progress. I would not do it.

*Mr. Lazonby:* As I understand his question, you are answering it as an attorney. That question was put from the standpoint of the judge.
Student: That is correct.

Mr. Lazonby: I have ideas on that. I think that, until a judge who is newly appointed has demonstrated and established his reputation with the bar as being the sort of judge that is objective, impartial, and unimpeachable, he had better be very careful. I think he would do well to get into that ivory tower until the bar gains confidence in him. The older members of the bar know that some individuals who are your close friends can change no end when they attain judicial office.

Mr. McRae: I do not think we are in disagreement on that. I think it is a matter of the lawyer's using good common sense and good taste in what should be done.

Mr. Lazonby: We have all kinds of characters that practice law in this state. Some of them come from the big cities and some from the country circuits. In the little counties, if a lawyer spends all his visible time at recreation and social affairs with the local circuit judge, human nature being what it is, there is going to be some misconception of the relationship. I say that, from the standpoint of the bar and the obligations of the lawyer, it is his duty to do nothing that could possibly cause such a misconception or embarrass the court, regardless of whether the judge is his friend.

Not only do I think the duty of the lawyer is to see that he does not place the judge in a position from which misconception of relations would follow, but I think that obligation is as deep as any other that the members of the bar have towards the court.

Student: Suppose in the course of a relationship between an attorney and a judge one asks the other a question about a case that the attorney has pending before the judge — what would be ethical conduct in that situation?

Mr. Lazonby: I think that it is the obligation of the judge when an attorney in the absence of the other counsel attempts, directly or indirectly, to discuss a case that is pending, to bring him to heel. I think it is the obligation of the counsel, in the event that the court should make inquiries about anything in connection with a case that he has pending before that judge, to advise the judge that he cannot discuss the case with him unless adversary counsel is present. That happens more often than you may think. After judges begin working on a case they often have questions that the record does not answer; they desire additional information. There is no attempt to discuss the case with counsel for influential purposes. They want to know an
answer, and you happen to be in chambers that morning, and the judge says—"John, a point I did not get from the record—what about this?" He is only trying to fill in the facts, but it is still improper in the absence of adversary counsel.

Mr. McRae: Yes, it is still improper. He does not mean it that way. Judges normally do not make inquiries improperly, but it is surprising how often they do. They are merely interested in the case they are trying to decide.

Mr. Lazonby: I think it is an absolute duty on a member of the bar to tell the judge, even if it offends him, that you cannot discuss the case unless your adversary is present. One of the greatest condemnations that the bar has of certain elements of the bench in this state today is the fact that these discussions do go on without the presence of adversary counsel.

Mr. McRae: My feeling on that point is as strong as yours. Of course the lawyer has control of the problem of initiating the discussion, but it places him in a very awkward spot indeed when the judge, in chambers, or on the street, or on some social occasion, asks a question about a pending case. If the lawyer understands that it is absolutely unprofessional to make an overture of that kind, then it is certainly a step in the right direction. I know of no practice more contemptible than for a lawyer to go to a judge and discuss with that judge, or to attempt to discuss with him, a pending case when the adversary counsel is not present.

Mr. Lazonby: I concur.

Student: Mr. McRae, I would like to know your conclusion on Opinion 109, which seems to apply to Canon 23, prohibiting the attorney from discussing anything privately with the jurors. It seems that this would be a wonderful way for a young attorney to determine in what manner he has made mistakes in a trial. I would like to know if the Florida Ethics Committee would concur with that opinion.

Mr. McRae: That is a very difficult question, and I say it is difficult because you have a very clear-cut opinion of the distinguished committee of the American Bar condemning that practice without exception. Unless I mistake the practice in Florida at the present day, there are a good many reputable lawyers, when the case is over and the jury is dismissed, who will go to the jury for the purpose of determining what was effective and what was not. They will ask the jury, "Was this piece of evidence important in your mind? What was the feeling of the jury about the way the proof was submitted?" Un-
less I am mistaken, I believe a good many lawyers of standing do that. At the same time, it seems to me that very definitely there are certain bars and certain limitations that must be recognized. In other words, the deliberations of the jury are confidential in the sense that it would be improper for you to ask them how they voted. That would be taking it too far. It would be improper to go further than to try to determine whether or not you conducted your case properly and where you failed to do so.

Mr. Lazonby: I want to make an observation in defense of the committee. Mr. McRae and I have discussed this, and I am taking advantage of him to the degree that I did not tell him that I had re-examined that opinion and that I am not so sure that the opinion is not sound. It turns on how certain members of the jury stood on certain questions, and the committee indicates it turns on inquiries as to what took place in the jury room. I agree with everything that Mr. McRae has said. I do not see a thing wrong in interrogating a juryman, after a trial is over, for the benefit of your own experience. I do not mind saying that many things that I learned the hard way were learned only because a juryman gave me his adverse reactions to my presentation during a trial. But I do not think you should ask him anything more than some specific question that bears on your presentation.

I think that is all right because that is learning psychological reactions, and the practice of law is a lot more than the presentation of facts. Every trial lawyer has a certain amount of ham in him. If he is going to be a jury lawyer he has to learn what it takes to get himself across, and one way to learn is to ask the jury how they reacted to him — not upon what they deliberated.

Dean Fenn: We have tried to give you a cross-section of a seminar in thirty minutes, and you can imagine what goes on for the better part of three hours. You can see why the instructor loves it — all he does is to sit quietly by and let the attorneys take the case. I think, from the demonstration, you can also see why the attorneys love it. We have judges as guests visiting from time to time, and they have expressed their opinions as freely as the attorneys.