THE CANADIAN BAR REVIEW

VOL. XXXV MARCH 1957 NO. 3

PROBLEMS OF LEGAL ETHICS

The panel discussion here reproduced took place in Toronto on February 3rd, 1956, during the annual mid-winter meeting of the Ontario Section of the Canadian Bar Association. The exchange of views on that occasion was followed with close attention by an audience of many hundreds. Because of the importance of the subject and the wide interest expressed in the opinions of the distinguished panel, it had been hoped to offer readers before now an edited version of the discussion, but for various reasons that has been impossible. Mr. Edson L. Haines, Q.C., whose contribution to such occasions in the past is well known, again acted as moderator, and the members of the panel were John D. Arnup, Q.C., John J. Robinette, Q.C., and Joseph Sedgwick, Q.C., all of Toronto.

THE CHAIRMAN: Ladies and gentlemen, ethical rules cannot easily be codified. One can suggest certain guiding principles, but difficulties often arise in the application of the principles to flesh and blood problems in the courtroom and the lawyer's office. Simple questions of ethics do not worry the lawyer, the black and white ones, "Thou shalt not steal", and so on. The answers to those are easy. The difficult questions are the ones that, in infinite variety, involve shades of grey. These are the ones that cause us trouble.

The printed programme you have gives the questions the panel are to discuss this afternoon. We have chosen the questions to illustrate the three main categories of a lawyer's duties: first, the duty he owes to his client; second, the duty he owes to the court; and, third, the duty he owes to the state. Sometimes, in a given situation, those duties conflict.

The panel is here to assist you in deciding the kind of ethical

questions that face every lawyer at one time or another. It is an eminent panel, and the men on it are of wide experience, but they appear with great diffidence. No one of them is prepared to assert that he is right on any given point. During our preliminary discussions we have not always agreed among ourselves, and we shall not agree this afternoon. If you have discussed any of the questions among yourselves already, you will understand what I mean. Our principal object is not to give you categorical answers but to stimulate your own attention to an important subject.

A secondary object is to further a cause that has been close to my heart for a long time. As you may know, the American Bar Association maintains a permanent panel on legal ethics. A lawyer may submit an ethical problem to the panel in confidence. If the answer seems to be of general interest, it is edited to remove any possibility of its being related to individuals and it is published as the opinion of the panel for the guidance of the profession. In this way a body of case law, as it were, is built up on legal ethics. It occurred to me that today we might perhaps sow the seed of a similar permanent panel in Ontario, which would be of great use to us. After all, an ethical rule has its source in the best opinion, the experience, of our fellow practitioners on some particular question of professional conduct. Why should we not record that opinion?

The members of the panel are all well known to you and I am not going to delay the proceedings by introducing them in the ordinary way. Mr. Joseph Sedgwick is the chairman, and Mr. John Arnup the vice-chairman, of the Discipline Committee of the Law Society of Upper Canada. If any of you have occasion to meet them in their official capacities, I hope it will be only as counsel! As for Mr. Robinette, he has an unusual distinction. In the long history of the Law Society of Upper Canada, he is the only man whose status as a bencher has had to be decided by the courts. You will remember the decision. After the courts had decided that he was not a bencher, Convocation unanimously re-elected him at its next meeting. So, if any of you has any doubts, Mr. Robinette is a bencher of the Law Society of Upper Canada! Ladies and gentlemen, your panel. [Applause]

At the outset, I should like to put a question that is not on the printed programme. Several of our members have suggested in the last few days that we should discuss it and, since it seems to be of interest just now, we might begin with it. Here it is:

A lawyer, who is a member of a municipal council, is asked

by a client to act on his behalf in connection with the client's application to the council, or one of its committees, for a licence or other privilege. Is it proper for the lawyer to act?

MR. SEDGWICK: In my view, Mr. Chairman, he should not act. His duty as an alderman is a duty to all the citizens of Toronto. As a lawyer his duty is first of all to his client. Almost inevitably these two duties would conflict in the circumstances contemplated by the question.

THE CHAIRMAN: Suppose the client goes to the lawyer, who is also an alderman or councillor, and says that his business is not contentious—it is merely a matter of securing a licence or something of the sort—and will the lawyer help him fill out a form and give him some advice. Is that all right?

MR. ARNUP: It is not a question of whether the matter is contentious or not. The question is one of conflict between interests the municipality may have and interests the client may have. If that conflict exists, the lawyer ought not to put himself in the position where it can be said of him that he has acted for conflicting interests.

MR. ROBINETTE: I would hardly dare to disagree with the Discipline Committee! As a matter of fact, in this case, I heartily agree with them. If there is a possibility of a conflict of duties, as there must be in almost every case of this kind, then the work must not be undertaken.

THE CHAIRMAN: Is it not true that in every case there would be a conflict of duties or, if you want, a conflict of interests? Why should the lawyer put himself in the position of having to explain his conduct?

MR. ROBINETTE: I think that is correct.

MR. SEDGWICK: I agree.

MR. ARNUP: I agree.

THE CHAIRMAN: Now let us move to the first question on the programme:

QUESTION 1

Should a lawyer talk to his own witness during an adjournment while the witness is still under cross-examination?

MR. ARNUP: Mr. Chairman, if the purpose of this question is to determine whether Mr. Robinette and I have changed our minds since we were asked a similar question at Windsor three

years ago, the answer is a resounding "No".[1] I think the importance of the question is not in the answer but in the fact that it has to be asked at all. We all know that there are some lawyers, and some clients, who apparently are not familiar with the principle that it is improper to talk to your witness while he is under cross-examination.

In case it may be helpful, may I tell you what I have done on occasion? The rule is violated more frequently, I think, at a noon-hour recess than at the mid-morning break. If I am cross-examining a witness when the court is about to rise at noon, I have occasionally remarked, "My Lord, I don't say this for the benefit of my friend, who of course knows the principle, but for the benefit of the witness and his friends: it is quite improper for anybody to discuss this case with the witness during the noon hour. Your lordship will no doubt point this rule out to the witness." His lordship usually looks a little startled at first, and then he turns to the witness and says, "In no circumstances may you discuss this case with anyone during the noon recess". I wish I could say that it always works.

THE CHAIRMAN: Thank you, Mr. Arnup. Does the same rule apply before the cross-examination has begun, while the witness is still being examined in chief?

MR. SEDGWICK: I think not. Then you have as much right to discuss the case with your client as you had the night before.

THE CHAIRMAN: Are you all of that view?

MR. ARNUP: I agree.

MR. ROBINETTE: I think so.

THE CHAIRMAN:

QUESTION 2

Is it proper for a lawyer, after settling a damage action, to ask his client to sign a release for a given sum "and costs", without specifying the amount of the costs?

MR. SEDGWICK: My view is that a solicitor owes to his client full and complete disclosure. He should tell the client precisely what the case has been settled for, the amount the client is to get and the amount the solicitor is to get.

THE CHAIRMAN: As a matter of practice, should not the costs always be specified in the release?

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[1] See Problems in Litigation (1956), 31 Can. Bar Rev. 503, at p. 526.

MR. SEDGWICK: I think so myself, but I'm afraid it isn't always done.

THE CHAIRMAN: Do you recommend the practice?

MR. SEDGWICK: I do.

MR. ROBINETTE: I do not think it is so much a matter of the form of the release as it is of the client knowing the actual amount received. Once the client is informed of the amount the solicitor has received for costs, the solicitor's duty is satisfied. But the client must be told.

THE CHAIRMAN: If a dispute arose later, the fact that the amount was stated in the release would indicate that he had been told, would it not?

MR. ROBINETTE: It is certainly the best practice.

MR. ARNUP: The fundamental question we are discussing comes up sometimes where no release is involved at all. It arises frequently in connection with motions for the interpretation of wills, where costs are allowed out of the estate and where, for reasons peculiar to the case, the solicitor thinks, quite rightly, that he is entitled to a solicitor and client fee. Sometimes the client never knows how much his lawyer received from the estate and that, of course, is quite wrong. In all cases the client is entitled to know precisely what the lawyer is getting from all sources.

THE CHAIRMAN: We'll go on to the third question, which has three parts, and deal with the first part first:

QUESTION 3

Is it proper for a solicitor to have an arrangement with a firm of real-estate agents under which all work referred to the solicitor by the agents will be done at a flat rate lower than the tariff rate? Would your answer be different if the solicitor knows that the firm of real-estate agents habitually tries to send purchasers to him?

MR. ROBINETTE: You may think, Mr. Chairman, that I am answering this question obtusely, but I propose to do so by laying down certain principles that seem to me basic and then trying to apply them to the question.

First of all, it is clear that a lawyer must not himself solicit business and, equally, that he must not request or knowingly permit another person to solicit business for him. Secondly, it is clearly unethical for a lawyer to share his fee with someone who

is not a lawyer, that is, to compensate an outsider for bringing him business.

Those two principles are relevant to the question, but at the same time the question refers to the tariff rate, and you ask yourself whether, in the County of York where there is a suggested tariff for real-estate transactions, it is unethical to charge less than the tariff. I do not think it is. I mean by that, I do not think that charging less than such a tariff—a suggested tariff—raises any ethical problems unless the lawyer is charging so low a fee that he cannot afford to render adequate service to his client. If he is doing that, then it becomes an ethical problem. The mere failure to follow such a tariff, though it may be stupid in the long run, is not unethical *per se*.

To apply my two principles, I should say in answer to the first part of the question—Is it proper for a solicitor to have an arrangement with a firm of real-estate agents under which all work referred to the solicitor by the agents will be done at a flat rate lower than the tariff rate?—that it is not necessarily unethical, having regard to the type of tariff we have in the County of York. But when we come to the second part of the question—Would your answer be different if the solicitor knows that the firm of real-estate agents habitually tries to send purchasers to him?—that I think is unethical, because it runs foul of the principle that a lawyer must not knowingly permit another to solicit business for him.

THE CHAIRMAN: Thank you, Mr. Robinette. Mr. Arnup, would you care to add anything?

MR. ARNUP: Every time I have to follow Mr. Robinette on the same side, I run into difficulties. When he is finished there is little left to say. All I can add is that there has been so much discussion of this problem that the Discipline Committee, as most of the audience will recall, found it necessary to issue a public notice not many months ago on it.[2] The third and fourth paragraphs of the notice read:

> In the opinion of the Discipline Committee, any arrangement between a solicitor and a real estate broker which involves the real estate broker making a practice of suggesting to the purchaser that the services of the solicitor be retained is a form of solicitation constituting unprofessional conduct.
>
> Any arrangement whereby a solicitor permits a real estate agent or any other unauthorized person to share in the fees which are charged to a client is a breach of The Solicitors Act and constitutes unprofessional conduct.

[2] See [1955[O.W.N. viii.

To pause here and paraphrase these paragraphs, the third one says, "Soliciting business is wrong, no matter how eminent your runner", and the fourth, even more briefly, "No kick-backs". The fifth and concluding paragraph of the notice reads that "Any transaction which in substance infringes the above principles, even though indirectly, is nevertheless in breach of them and constitutes conduct unbecoming a solicitor". The chairman of the Discipline Committee will explain that one for you.

THE CHAIRMAN: Thank you, Mr. Arnup. The second part of the third question is as follows:

> *A lending institution is prepared to lend money to a builder who is building a large number of houses in a new subdivision. The builder will borrow from that institution only if the legal work is done by a specified firm of solicitors. The solicitor knows what is going on. Is this proper?*

MR. ARNUP: This situation would seem to come within the ambit of Mr. Robinette's original statement of principles. On the facts as stated, it would appear to me that the builder is acting as a kind of runner for the solicitor. He is indirectly soliciting business for the solicitor to the solicitor's knowledge, and that is wrong.

THE CHAIRMAN: Mr. Sedgwick, have you any comment?

MR. SEDGWICK: Mr. Chairman, in my ignorance of how people operate in the real-estate business, I should have thought that there is very little wrong with it. It seems to me, as the question is framed, that the builder who wishes to borrow money is merely saying to the lending institution, "I want my own solicitor to look after my own work". I shouldn't have thought that there is anything wrong with the practice.

THE CHAIRMAN: The third part of the question, gentlemen of the panel, reads:

> *A solicitor acts for a builder who is building a new subdivision. The sub-divider refers purchasers to the solicitor, telling them that they will save money by having the same lawyer as all the others on the street. The solicitor does not charge the builder for the work he does for him, or only a nominal amount. Is this arrangement proper?*

MR. ROBINETTE: I am clearly of opinion that it is improper. As I said earlier, it is objectionable for a solicitor to pay an outsider for bringing him business, and it seems to me that it is equally objectionable for a solicitor to devote his time to a client's affairs at a reduced fee for the purpose of obtaining other business. In

effect, the lawyer in the question is paying the sub-divider by not charging enough for his legal services. I think it is quite wrong.

THE CHAIRMAN: The other gentlemen of the panel?

MR. SEDGWICK: Yes.

MR. ARNUP: Yes.

THE CHAIRMAN: The next question:

QUESTION 4

A client owes his lawyer untaxed fees and disbursements. The lawyer has in his hands moneys belonging to the client from another transaction. May the lawyer, without the consent of the client, apply the moneys to the payment of his fees and disbursements? Would your answer differ if the fees had been taxed?

Mr. Sedgwick?

MR. SEDGWICK: As to the first part of the question, I think the moneys are trust moneys and should be held for the client in the solicitor's trust account until there is some finding, some judicial finding, that they belong to the solicitor; or, alternatively, until the client consents to their transfer.

As to the last part of the question, I think the fact that the fees had been taxed would make a considerable difference. Once the solicitor has taxed his bill, and there has been no appeal from the taxing, then to the extent of the taxed costs the money in the solicitor's hands becomes his and he will be justified in transferring it to his own account.

MR. ARNUP: I should like to ask Mr. Sedgwick how quickly he would pay over the money if the client asked for it before the fees had been taxed?

MR. SEDGWICK: Well, one might act a little deliberately! It would depend on how long it takes you to get an appointment with a taxing officer.

THE CHAIRMAN:

QUESTION 5

A taxicab carrying a passenger collides with a truck, injuring the taxi driver and the passenger. Both the driver of the taxi and the passenger consult the same solicitor, A, *who agrees to act for them. On investigation it appears that the taxi driver may be partly at fault, and that he ought to be a defendant*

along with the truck driver in any action brought by the passenger. May A *now refuse to represent the taxi driver and proceed on behalf of the passenger against the drivers of the taxi and the truck?*

MR. ARNUP: I wish all your questions were as easy as that. The answer is clearly no.

MR. SEDGWICK: I agree with Mr. Arnup.

MR. ROBINETTE: I agree that you cannot represent either the driver or the passenger. You cannot keep them both because of the possibility of a conflict of duties. You cannot keep one and give up the other because the one you give up has confided in you.

THE CHAIRMAN: The next question reads as follows:

QUESTION 6

A *agrees to represent* C *in (a) a civil case, or (b) a criminal case, and receives a sum on account of his fees. As the trial approaches,* C *is unable to raise the balance of the fees. May* A *retire from the case? It is apparent that* C *will not be represented if* A *refuses to continue.*

MR. SEDGWICK: Taking (b), the criminal case, I think that if you have agreed to act in a criminal case you must go on when the case is called for trial; and more fool you if you haven't protected yourself for your fees in advance. I am not sure that my answer applies with equal force in a civil case.

THE CHAIRMAN: Mr. Arnup, what do you think?

MR. ARNUP: In so far as a civil case is concerned, I take the view, assuming the client is able to pay and has been told what the fee is to be, that if he does not pay it you are entitled to retire from the case. There are two or three qualifications however. First, I think you must tell him a reasonable time before the trial that you are retiring, so that he can get other counsel. Secondly, you have an obligation to the court and should take the appropriate steps to get off the record, because by your appearance you have undertaken to act for the man. Finally, where the client has paid part but not all of the agreed fee, you are under an obligation to return forthwith the unearned portion. But I do not regard a lawyer as obliged to continue to act for a client down to trial where he thinks the client can pay the agreed fee and the client refuses.

THE CHAIRMAN: The situations we have in mind usually arise just before trial. I can imagine a case where the client promises and promises. He is trying to raise the money and then two or three days before the trial he says, "Mr. Arnup, I just can't raise that fee". You haven't time to get off the record and he hasn't time, or money, to get another lawyer. What do you do?

MR. ARNUP: You are just trying to make things difficult. Let me say at once that I would not leave a client in the lurch. But I would do everything I could to avoid the situation you have so graphically described.

THE CHAIRMAN: Mr. Robinette, take this case. Let us say that you have told a client that the fee will be, for example, five thousand dollars—

MR. ROBINETTE: I have no such clients.

MR. SEDGWICK: He means he charges *more.*

THE CHAIRMAN: Well, we'll take a lower figure of one thousand dollars. Suppose you've told the client that the fee will be one thousand dollars. You estimate that the preliminary hearing will cost about two hundred dollars and the trial about eight hundred. You take the preliminary hearing and he has paid five hundred dollars, but he can't pay the balance. What do you do?

MR. ROBINETTE: I am inclined to agree with Mr. Sedgwick that in a criminal case you just can't let a client down. I think it is the practice of our bar—there are exceptions, but in practice an accused in a criminal case is very rarely left in the lurch because he can't raise the stipulated fee.

A criminal counsel is quite entitled to be firm, though, and say that unless he receives his fee in good time before the trial he will not go on. But I think Mr. Arnup puts it on the proper basis—you must give reasonable notice to your client that you are not going to act for him, so that he will have ample time to retain another counsel, will not be embarrassed in his defence, and so that the work of the courts will not be disrupted. If you have not done that, I think you are under a duty to the court to appear.

THE CHAIRMAN: Thank you. Now the next question.

QUESTION 7

P, *an American citizen injured in an automobile accident in Ontario, retains* A, *an American attorney, to collect damages from an Ontario resident on a contingent retainer, under which* A *is to receive thirty per cent of any sum recovered.* A

wishes to instruct you and offers to share his contingent fee with you. Should you accept? If not, what is recommended?

MR. ROBINETTE: It is quite clear that you cannot share his contingent fee with him, because then you, an Ontario lawyer, would be taking a fee on a contingency, which is unethical. The American attorney is probably from a state that permits contingency fees and is quite entitled to do it. Though you cannot agree with him to share his contingent fee, you can of course undertake to look after the case and to charge the proper taxed costs, on a solicitor and client basis.

You may wonder what to do with the money when you collect it. Possibly it has been paid to you in your name. You have notice of the assignment to the American attorney, who after all is an agent of the client and has an interest in the award. I think the safe thing to do in these circumstances is to forward the proceeds by cheque payable jointly to the attorney and the client.

THE CHAIRMAN: What do you do if the cheque is made out to the client alone?

MR. ROBINETTE: In that case I think I would send it to the attorney. After all, you have notice of assignment, which presumably is valid in his state.

THE CHAIRMAN: The assignment is illegal here.

MR. ROBINETTE: But perfectly legal there.

MR. ARNUP: I agree with Mr. Robinette.

MR. SEDGWICK: I agree.

THE CHAIRMAN:

QUESTION 8

There is grave doubt about the validity of certain legacies in a will. If the legatees establish their claims, they will be entitled to $180,000, but they have no funds to defray the costs of protracted litigation. Is it proper for a lawyer to enter into an agreement under which a substantial fee is payable if he is successful and only disbursements if he fails?

MR. SEDGWICK: I don't know what is meant by the word "substantial" in this question. Certainly a solicitor is not entitled to share in the result of litigation, but he is perfectly entitled, in my view, to say to the client: "I think you have a good case, you can't afford to pay me, I will go ahead without a retaining fee; and of course, if I succeed and there is money available, you will then

pay me my taxable costs". I think he may well say that. He is even at liberty to speculate the disbursements of the case if he cares to.

THE CHAIRMAN: May he agree on a fixed fee of, say, forty-five thousand dollars?

MR. SEDGWICK: I think not. Then he would be sharing in the proceeds of litigation and the agreement would be champertous.

MR. ARNUP: The thing that puzzles me is why, when this situation actually arises, I always find that Mr. Robinette has the executor's brief and I the legatees'.

THE CHAIRMAN: Mr. Robinette, would you care to comment?

MR. ROBINETTE: My only comment would be on the question and not on Mr. Arnup's last observation: I think what Mr. Sedgwick says is correct.

THE CHAIRMAN: The next question may raise some pretty far-reaching issues:

QUESTION 9

Is it proper for a lawyer to advise a client, in reply to a request for his advice, that in his opinion it would be better for the client to pay a fine prescribed by a certain penal statute than to obey its directions?

We are not considering those cases where there is a bona-fide intention to test the validity of the statute.

MR. ARNUP: Mr. Chairman, perhaps because lawyers are trained to go to the authorities, some of us on the panel tried to see if we could find anything in the books on this subject. For my part I re-read the Canons of Legal Ethics adopted by the Canadian Bar Association in 1920 and recently re-published — which I pause to say merits reading by every solicitor about once a year — and I found in canon 1(1) this statement of a lawyer's duty to the state:

> He owes a duty to the State to maintain its integrity and its law and not to aid, counsel, or assist any man to act in any way contrary to those laws.

Personally I do not hold the view that that statement is to be applied in its broadest sense to all situations. I think, perhaps wrongly, that it is confined to laws of the state which define, if you will, public morality, and I refuse to believe that every municipality in Ontario is entitled through its council to legislate upon questions of public morality. If the statute involved can fairly be said to be legislation on public moral conduct, a lawyer has no

right to advise his client to ignore it, but I do not extend that to certain kinds of municipal by-laws.

THE CHAIRMAN: Generally speaking, you would not advise that the Criminal Code, for example, should be ignored, but you might if a municipal by-law, or perhaps even a provincial statute, were in question?

MR. ARNUP: I don't disagree.

THE CHAIRMAN: Would the other members of the panel care to add anything?

MR. SEDGWICK: I agree with Mr. Arnup. I think the statement in the Canons of Legal Ethics is a little too broad. It is wide enough to cover such misdemeanours as parking too long in a restricted area. I would have no hesitation in saying to a client with whom I am engaged, "Just ignore the parking regulations and let's finish what we're doing".

THE CHAIRMAN:

QUESTION 10

Has a lawyer a duty to disclose that his client is insured?

MR. ROBINETTE: Do you mean that if a client of yours is suing a client of mine, you might ask me if my client is insured?

THE CHAIRMAN: Yes.

MR. ROBINETTE: If that strange situation should occur, I would say, "It is none of your business", because I don't think it is. On the other hand, if I know my client is insured, I must not lie to you or suggest, by innuendo or otherwise, that he is not. I must not do anything to mislead you as to the fact of the insurance or as to the limits of his policy. But I think I am entitled to say to you, "Edson, old boy, it is none of your business".

THE CHAIRMAN: Let me think out loud for a moment about the question of limits. Suppose I am proceeding on the assumption that your client is not insured, when in fact he is. I am giving serious consideration to accepting, say, $2,500 if it is offered, because that is about all I could hope to collect from him personally anyway. Are you entitled to remain silent?

MR. ROBINETTE: That depends. If I thought that you were just trying to find out from me whether he is insured at all, I might be a little hesitant—but I think you are right. If a solicitor knows that another solicitor is proceeding on some mistaken assumption of fact, within the knowledge of the first solicitor, it is his duty to correct him, I would go that far.

THE CHAIRMAN: Let me take another phase of the same problem. Suppose, for example, that your client is insured to the statutory limit—that is, five, ten and one—and I believe that he is insured for twenty-five, fifty and five. What do you say when I come along and ask, "What is the coverage; I have a very serious claim, which may be worth $150,000"? What do you say now?

MR. ROBINETTE: I really think I am entitled to say to you, "My client is insured, but I am not going to tell you for how much". I do not know why I should tell you more. I must not mislead you, but my silence is not misleading you.

THE CHAIRMAN: Would you not by your silence be telling me in effect that the policy is for more than five, ten and one—

MR. ROBINETTE: You might guess that after I had kept you on a string for a while.

THE CHAIRMAN: —because has it not been your experience that whenever the claim is very large, and the policy limits are standard, the first thing the other lawyer says is, "I have only $5,000 to lose"?

MR. ROBINETTE: Yes.

MR. ARNUP: I can tell you that if Mr. Robinette is ever as coy as that with me he is going to get a notice of trial as fast as a student can run over to his office. I wouldn't fiddle about like that.

MR. SEDGWICK: I don't think there is anything more to be said. You are not entitled to deceive another lawyer either expressly or by innuendo, but you are under no obligation to tell him everything you know.

THE CHAIRMAN: We'll pass on to the next question:

QUESTION 11

Many years ago A *was convicted of a crime and served his sentence. Since then he has not been in trouble, has built up a small business and is conducting himself as a respectable member of the community. Is it proper for a lawyer to cross-examine* A *on his previous conviction when he appears as a witness in (a) a civil trial, (b) a criminal trial?*

MR. SEDGWICK: The question as framed, Mr. Haines, has given me, and the other members of the panel, considerable difficulty, because it is not possible to answer it with a simple yes or no. It depends on the circumstances, on the kind of evidence he had already given, but ordinarily, if he had been behaving himself for years, my inclination would be not to ask him about his old conviction.

On the other hand, let us suppose that the witness in the course of his evidence had abused my client, or given evidence I couldn't believe, while putting his own good character in issue. In those circumstances I think that, either in a civil or criminal case, I should be quite justified in asking him about his own record.

But I shouldn't like to give a flat yes or no answer to the question as framed. The question is, "Is it proper for a lawyer to cross-examine [the witness] on his previous conviction?" Yes, it is proper, in the sense of being within his legal rights, but whether it is fair for him to do so is a different question, and I don't think one can give a categorical answer.

THE CHAIRMAN: Let us take an automobile case, where the witness has been convicted previously of theft. What would you do in that case?

MR. SEDGWICK: You mean the case of a man with a record who is involved in an automobile accident?

THE CHAIRMAN: No, a witness is called to court to give evidence in a damage action arising out of an automobile accident. Your client doesn't like him because his evidence is unfavourable. The client hears of this old conviction of the witness for theft and he says, "Here, Mr. Sedgwick, you attack him with that".

MR. SEDGWICK: I should be very reluctant to do so.

MR. ARNUP: I wouldn't do it myself.

MR. SEDGWICK: I won't go so far as to say I wouldn't do it in any circumstances.

THE CHAIRMAN: Would the fact that the question arose in a criminal case change your attitude?

MR. SEDGWICK: This also is a matter of individual judgment. A lawyer must not act unfairly to a witness, but it may well happen that, in the interests of the client you are defending, it is essential to destroy the testimony of a particular witness. Then it may be necessary to do the cruel thing. The answer depends on the conscience of the individual lawyer in the particular case. All depends on the circumstances, on your own sense of propriety, on the weighing of your client's interests against the possible injury to the witness.

THE CHAIRMAN: What do you think of the English rule under which the Crown is prohibited from examining the accused on his previous record unless the accused has first placed his own good character in issue or attacked the character of a Crown witness?

MR. SEDGWICK: I have always thought it a very sound rule, and I have said so on many occasions.

THE CHAIRMAN:

QUESTION 12

Is there any impropriety in a lawyer permitting his name to appear on a client's stationery as the client's solicitor, or in stating on his own stationery that he is solicitor for a particular client?

MR. ARNUP: As to the first part of the question—permitting a client to state on his stationery that you are his solicitor—that, in my view, is a clear case of advertising and as such is unethical, improper and should not be tolerated.

But whether a lawyer should state on his own stationery that he is solicitor for a particular client is, in my opinion, not an ethical problem. It is a problem of good or bad taste. Particularly in some communities, the information may be of value to persons who wish to ascertain the reputation, good or bad, of particular solicitors: the ordinary law lists may not cover the locality. It is essentially, in my view, a question of good or bad taste, and we are not here to express opinions on taste.

THE CHAIRMAN: Would you not think it advertising if a lawyer were to insert a professional card in the local newspaper, stating that he is an associate in the *XYZ* Company, a large corporation in the community? Wouldn't that be unethical?

MR. ARNUP: That is another question.

THE CHAIRMAN: What is the difference between mentioning one's connections in a newspaper and on one's letterhead?

MR. ARNUP: A lawyer does not broadcast his letterhead like a handbill.

MR. SEDGWICK: It has been done.

THE CHAIRMAN: Let us take the case of the newspaper for a moment, Mr. Arnup.

MR. ARNUP: To put the information in a legal card appearing in a newspaper is going too far. It is improper.

THE CHAIRMAN: Would you care to add anything, Mr. Sedgwick?

MR. SEDGWICK: I don't think so. I agree in the main. What a lawyer puts on his letterhead is a question of taste, and I think, with Mr. Arnup, may partly be a question of geography. In medium sized places it is at times useful to know that a lawyer

acts, for instance, for one of our larger banking institutions. On the other hand, I think it improper to say so in the daily press, though for the moment I can't say just what the distinction is, except that the newspaper circulates to everyone who has five cents to buy it, whereas a lawyer's letterhead goes only to his correspondents.

THE CHAIRMAN: Including clients he hopes to secure or influence.

MR. SEDGWICK: You don't write to clients you *hope* to secure; you write to the ones you have.

THE CHAIRMAN: You are writing with that advertising on your letterhead, not only to clients who have retained you, but to others in the community. I fail to see the distinction. Mr. Robinette, what do you think?

MR. ROBINETTE: I think we have to consider custom and practice. In this province many reputable lawyers and legal firms, particularly in the county towns, use letterheads referring to the fact that they act for a particular bank or a particular township. The practice seems to be quite common. I cannot convince myself that by itself it is a very serious matter. It has been done for years and I do not think much harm results.

THE CHAIRMAN: Let us turn, then, from ethics to the matter of taste. Suppose the lawyer protests one or two notes a month for a local bank, or has a retainer of twenty-five dollars a year from a township. Would it be good taste for him to put on his letterhead, "Solicitor for the *X* Bank" or "Solicitor for the *Y* Township"?

MR. ROBINETTE: I don't know.

MR. SEDGWICK: What is wrong with it? If he protests two notes a month, it is because that is all the business the bank has.

MR. ROBINETTE: He is the solicitor for the bank.

MR. SEDGWICK: No doubt he would be glad to protest twenty.

THE CHAIRMAN: Here is the next question:

QUESTION 13

A young solicitor opens a new office on the main street of a medium sized town. There is another solicitor in the same block, who has been there for some years, and shortly after the new solicitor arrives the oldtimer orders a new sign about six-feet wide, which he hangs over the street. The young solicitor asks your advice. Should he get a similar sign, or a bigger one?

What do you think of that, Mr. Robinette?

MR. ROBINETTE: It is a question of some delicacy. I think I would tell him not to get a bigger one.

MR. SEDGWICK: I would certainly tell him not to get a bigger one. Personally I think the use of signs as a form of advertising is to be deprecated. If a direction sign is necessary in the community, so that people can find their way to a particular solicitor's office, that is one thing. When you use a sign for the purpose of advertising, you put yourself in the same class as merchants, and, after all, lawyers are not supposed to advertise. When a lawyer puts up a sign six-feet wide he is advertising.

THE CHAIRMAN: You would tell the young lawyer to keep his sign smaller than a breadbox?

MR. SEDGWICK: Yes.

MR. ARNUP: No comment.

THE CHAIRMAN:

QUESTION 14

A is solicitor for a trade union or co-operative society. Is it improper for him to permit the executive of the union or the society to solicit legal work on his behalf among its members?

MR. ARNUP: There can be no doubt that it is quite wrong.

MR. SEDGWICK: I agree.

MR. ROBINETTE: It is wrong. He is knowingly permitting someone to solicit business for him.

THE CHAIRMAN:

QUESTION 15

After issue and service of the writ, but before appearance, the defendant visits the plaintiff's lawyer for the purpose of discussing a compromise. During the discussion the defendant makes certain vital admissions that he would have been unlikely to make had he been represented by a lawyer. What is the obligation of the plaintiff's lawyer as to (a) warning the defendant before talking to him, (b) testifying to the conversation at trial?

MR. SEDGWICK: I think one should say to a defendant in that situation, "Look, I am the lawyer for the other side and you had better not talk to me. Get a lawyer of your own and have him speak to me if he cares to, but it isn't advisable for you to do so."

THE CHAIRMAN: What if he says, "No, Mr. Sedgwick, I don't just want to talk; I want to settle this as quickly as I can", and he insists on continuing?

MR. SEDGWICK: Then I would talk to him.

THE CHAIRMAN: Now you have had your talk, and he has made some vital admissions. When your client hears of it, he says, "Splendid, I didn't know about that, let's get on with the trial, and you, Mr. Sedgwick, you can give evidence about that conversation".

MR. SEDGWICK: Not me. I wouldn't give evidence about the conversation. I should feel that, while I had not been *his* lawyer, he had talked to me as a lawyer and was reposing some measure of trust in me. Unless compelled to do so, I would not give evidence.

THE CHAIRMAN: Suppose you are subpoenaed as a witness, what would you say when you get into the box?

MR. SEDGWICK: I would leave it to the judge to decide. I would tell him generally what had occurred and ask him whether I should give evidence or not.

THE CHAIRMAN: Mr. Arnup, does not the question of privileged communication enter here? Are not discussions over a possible compromise *per se* privileged?

MR. ARNUP: I have never understood that they are *per se* privileged. They may in certain circumstances be regarded as being without prejudice. Personally I should regard a discussion with a lay defendant as being without prejudice just as if the solicitor had been present.

If my client decided to dismiss me and subpoena me to give evidence as to what the defendant had said to me, I would do as Mr. Sedgwick says he would do: I would object to giving evidence. But the responsibility of deciding finally whether the conversation was without prejudice rests with the judge, and if he told me to answer, I should have to answer—but I would resist pretty strenuously.

THE CHAIRMAN: Would you say that you considered the conversation without prejudice?

MR. ARNUP: I certainly would. I would say that, so far as I am concerned, the discussion was without prejudice, but if you think that in the circumstances it was not, then of course I am obliged to answer.

THE CHAIRMAN: We'll continue now with

QUESTION 16

When a lawyer considers it in the best interest of his client, is there any impropriety in serving on the opposite party, as well as his solicitor, any notice or other process that ordinarily would be served on the other solicitor alone?

MR. ARNUP: I come back to the Canons of Legal Ethics. In canon 4, on the lawyer's duty to his fellow lawyer, in paragraph (3) is the following sentence, "He should never in any way communicate upon the subject in controversy, or attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except through such lawyer". Once again, at the risk of finding myself in a minority, I do not accept that statement in its widest sense. Occasionally, and fortunately the occasions are rare, you do have a case where you are satisfied that the other solicitor is not communicating to his client all the facts he should be communicating to him. Personally I hold the view that in those cases, provided every communication is in writing and is made concurrently—not a day later, but immediately—to the solicitor as well, in those circumstances you are justified in communicating directly with the client.

THE CHAIRMAN: You might write a letter to the solicitor, mark it at the bottom, "Copy to Mr. So-and-so", and send a copy to the client?

MR. ARNUP: Yes.

THE CHAIRMAN: Would anyone care to add anything?

MR. ROBINETTE: I agree with Mr. Arnup.

THE CHAIRMAN:

QUESTION 17

A lawyer is consulted by a client who is the executor and chief beneficiary under a will. The client discloses the existence of a later will, in which the testator left the estate to other persons, but the client says that in his opinion the testator lacked testamentary capacity when he made this will. The lawyer advises the client that he must disclose both wills. The client refuses, goes to another lawyer and, without disclosing the later will, instructs him to probate the earlier one. What should the first lawyer do?

MR. ROBINETTE: This is one of the more difficult questions, but, having given it some thought, I think one must approach it

in this way. First of all, we start with the proposition that every lawyer is under a duty to his client to keep the client's affairs confidential, but this is subject to the limitation that the client's privilege is not to be used for the purpose of perpetrating or facilitating the perpetration of a fraud.

Now if the question means that to the first lawyer's knowledge the client has made application for probate of the earlier will, swearing that it is the last will and saying nothing about the later will—if the lawyer knows that the client has misled the court, or attempted to mislead the court, lied to the court—in these circumstances I think the obligation of the solicitor to keep silent disappears and is converted into a positive obligation, as an officer of the court, to inform the court of the facts as he knows them, so that the perjury will not be given effect to.

MR. ARNUP: Mr. Chairman, this is a notable occasion: this fellow has changed his mind since last night.

MR. ROBINETTE: Oh no. You are thinking of one of the other questions. Don't you agree with me?

MR. ARNUP: Certainly I agree with you, this afternoon, but not last evening. I would find some way as soon as possible, I'm quite sure, to get into the other lawyer's hands the information in my possession. Apart altogether from the perjury in swearing the earlier will to be the last will, a kind of fraud is being perpetrated here. I would try to find some way to bring the true facts to light.

MR. SEDGWICK: The question has been bothering me, and I think it bothered Mr. Arnup last night, but he has changed his mind a little since then too. There had been no application for probate when the client saw the first lawyer. He brought in the will he had decided to probate and then he mentioned that there had been another will, but he said he thought the later will had been made without testamentary capacity. I certainly would not act for him. I would do as the lawyer in the question did: I would advise him that he must disclose both wills and, if he did not take my advice, I would tell him I couldn't act. But I don't think I am free to tell the court, or tell anyone, of the confidential communication he made to me. I may be wrong, but that is my opinion.

MR. ROBINETTE: Even you have changed your mind. But undoubtedly it is a difficult question. If you are sure of your facts and it gets to the stage where you know the court is being deceived, I think it is your duty, as an officer of the court, to reveal what you know.

THE CHAIRMAN:

QUESTION 18

A trial judge discharges the jury in a second trial of the accused, when one of their number discloses an anonymous telephone call in which he was offered money if he found the accused not guilty. Is it proper for the Crown attorney to inform the press that in the first trial, which ended in a disagreement, the Crown had evidence of jury tampering?

MR. SEDGWICK: I think I can answer the question very simply by saying that it would be quite improper for the Crown attorney to make any such disclosure.

MR. ROBINETTE: I agree.

MR. ARNUP: It is quite improper for a lawyer to seek out the press to give an interview about any case, civil or criminal. The situation is a little different if while a trial is going on a reporter comes to you and says, "I can't understand what this case is all about; would you explain it to me again?" Provided you explain the situation fairly, I can't see any harm in it. But the giving of interviews, disclosing the theory you propose to advance about a case that has yet to be tried, I think is to be deprecated.

THE CHAIRMAN: The next question is along the same lines:

QUESTION 19

(*a*) *In a criminal case is it proper for the Crown or defence counsel to give interviews to the press disclosing the evidence they propose to call or the theory of the prosecution or defence?*

MR. ROBINETTE: My answer is going to be very definite because I feel most strongly about this subject. There is a tendency in Ontario at the present time to try serious criminal cases in the newspapers before they are tried in the courts. In my opinion it is the duty of the bar to prevent this so far as it can. It is quite improper for Crown counsel, or police officers, or defence counsel to get their theory of the case broadcast in the newspapers before the trial, so as to influence the minds of potential jurymen. This is becoming a very serious problem in the province. We have the duty to ensure that criminal cases are tried by judges and juries in the courts, free from any preconceived impressions gained from the press. I do not think any member of the bar should use the newspapers to put across his side of the case. [Applause]

THE CHAIRMAN: Thank you, Mr. Robinette. Now the second part of the question:

(b) Is the situation any different in a civil case?

MR. ROBINETTE: There is no difference.

MR. SEDGWICK: There is no difference in essence, but there may be a difference of degree. In a civil case the consequences for society are not so serious. However, I agree with what Mr. Robinette has said. It is bad business to give interviews about cases, civil or criminal, in which you have a part. I also agree with Mr. Arnup that frequently you have to explain to the gentlemen of the press what actually happened in court if they are not to give a very garbled report of it.

THE CHAIRMAN:

QUESTION 20

H consults a lawyer, instructing him to sue H's wife for divorce because of her adultery with X. X is a responsible family man, well regarded in the community, and the only evidence is the wife's admission, which she is unlikely to repeat on discovery. Being named as a co-respondent will be disastrous to X's reputation. What should the lawyer do?

MR. ARNUP: I have puzzled over this question for a long time. I would try to satisfy myself in every way I could that my client had a reasonable case, keeping in mind always that my function is not to decide the case—I am an advocate, not a judge—and if I come to the conclusion that he had a reasonable case I would take it, regardless of who got hurt in the process. On the other hand, if my investigation indicated that it was not a case in which he had even a reasonable prospect of success, and it was clear that in the process a reputable man was going to be ruined, I would tell the husband to get another lawyer.

MR. SEDGWICK: I have spent as many sleepless nights as Mr. Arnup worrying about this question—precisely as many—and I have reached the same conclusion. On the facts as stated, it looks a little like a piece of blackmail, and without much more ado I should be inclined to tell the client to get some other lawyer, if he could find one.

THE CHAIRMAN:

QUESTION 21

A client, who is on bail while awaiting trial on a criminal charge, tells his lawyer that he is going to skip bail. The lawyer

advises him not to, but the client goes ahead with his plan anyway. What duty does the lawyer owe the court to give information of his client's intention? To inform the bondsman?

MR. SEDGWICK: Much as a lawyer would regret having a client skip bail and thus probably deprive him of a fee, I am afraid that the information is confidential and the lawyer has no right to disclose it, either to the court or the bondsman.

THE CHAIRMAN: Now assume that a client does not appear in court when called and that the lawyer knows where he is hiding or has information that may lead to his apprehension. Should he disclose the information to the court?

MR. SEDGWICK: Does the word "disclose" mean "volunteer"?

THE CHAIRMAN: Interpret it any way you like.

MR. SEDGWICK: Interpreting it as "volunteer", my answer would be the same. I don't think the lawyer has any right to volunteer information of that kind, which is given him by the client in confidence.

THE CHAIRMAN: Perhaps the lawyer has arranged the bail. He knows the bondsman, and the bondsman comes to him and says, "Good Heavens, where is he?"

MR. SEDGWICK: The answer to that is that he shouldn't arrange bail. He should let the client make the arrangements himself.

THE CHAIRMAN: Be that as it may, suppose the bondsman came to you with a hard-luck story about his property being in jeopardy and begged you to tell him where the man was. How would you deal with him?

MR. SEDGWICK: I would tell the bondsman that people who put up bail take a calculated risk and if, having taken it, the risk turns out badly, they cannot complain. His position isn't much improved by finding the accused, because if the accused did not appear when his case was called I suppose the bail is estreated anyway.

THE CHAIRMAN: How do you answer the bondsman's question, "Do you know where he is?"

MR. SEDGWICK: I would merely say that I can give him no information.

MR. ROBINETTE: I think the answer to all this may depend on the person you are acting for. Let us be realistic. If you were acting, Mr. Chairman, for Al Capone, knowing the mob he had around him, would you tell anyone where Al Capone is? On the other hand, if you were acting for Caspar Milquetoast and his

friends, you might, but I do not think so. I agree with Mr. Sedgwick.

THE CHAIRMAN: Suppose a detective comes to you and asks the direct question: "Do you know where the accused is? He was last seen leaving your office the day he disappeared." What do you tell the detective?

MR. ROBINETTE: Do I have to tell a police officer anything? I do not know that I have to in those circumstances. I don't think I have to.

THE CHAIRMAN: What do you think, Mr. Arnup?

MR. ARNUP: I have no opinion. This is out of my field. I'm just enjoying myself.

THE CHAIRMAN: Let us pass to the next question:

QUESTION 22

Is it proper for a lawyer to act for both sides in a real-estate transaction?

MR. ARNUP: The only reason why it may be improper to act for both sides in any transaction is that you should always avoid the possibility of having to represent conflicting interests. It is astonishing how often in a real-estate deal it turns out that there are conflicting interests. I am not prepared to say that it is improper, unethical, to represent both sides in such a case, but I *am* prepared to say, from what I have seen during the last two or three years in the courts, that it is very unwise. The lawyer who continues habitually to act for both sides in a real-estate transaction is sooner or later going to regret it. However, in my view, it is not unethical.

THE CHAIRMAN: I can understand that in a small town the situation may be different, but take a city like Hamilton, where there are many lawyers. Do you think that a lawyer in Hamilton should ever act for both sides?

MR. ARNUP: I certainly do not.

MR. ROBINETTE: I agree. It is good for counsel because it usually leads to some very interesting litigation, but it is the old story of the possibility of conflict between the duty to one client and the duty to the other.

THE CHAIRMAN: Mr. Sedgwick, have you an opinion?

MR. SEDGWICK: I agree with my friends, but I really know very little about the matter.

THE CHAIRMAN:

QUESTION 23

A lawyer is negotiating a compromise with the claimant's lawyer. The claim is about to be barred under the Statute of Limitations and there is reason to believe that the claimant's lawyer has overlooked the fact. What should the first lawyer do? Would your answer be different if the lawyer were negotiating with the claimant personally?

MR. ROBINETTE: Having regard to the type of profession we are—each of us owing a duty one to the other—I would certainly tell the other lawyer if I thought he was about to let time run out, and I think the obligation would be even stronger if I were negotiating with the claimant personally, though perhaps for somewhat different reasons.

MR. SEDGWICK: It is now my turn to read from the Canons of Legal Ethics. Canon 4(4) says:

> He [that is, the lawyer] should avoid all sharp practice and he should take no paltry advantage when his opponent has made a slip or overlooked some technical matter. No client has a right to demand that his counsel shall be illiberal or that he shall do anything repugnant to his own sense of honour and propriety.

I agree.

MR. ARNUP: I agree.

THE CHAIRMAN: I am going to direct the next question, number 24, to you particularly, Mr. Sedgwick, and I am going to pause after each clause for an answer:

QUESTION 24

Is it proper for a lawyer to practise law and at the same time carry on business as one of the following: (a) an insurance agent?

MR. SEDGWICK: I don't think there can be any objection. In the smaller places many lawyers do some insurance business and in doing so they perform a useful service for their clients.

THE CHAIRMAN: *(b) a real-estate agent?*

MR. SEDGWICK: My answer would be much the same. I don't think lawyers often act as real-estate agents in the larger centers, but sometimes they do in smaller places.

THE CHAIRMAN: *(c) a business broker?*

MR. SEDGWICK: I think the business broker is in much the same position as the insurance agent and the real-estate agent.

THE CHAIRMAN: *(d) an insurance adjuster?*

MR. SEDGWICK: I may differ from my friends on the panel about this, but I really do not think that a lawyer should also act as an insurance adjuster.

THE CHAIRMAN: Let me poll the panel. Mr. Arnup?

MR. ARNUP: I think a lawyer runs the risk of being accused of soliciting business if he tries to act as an adjuster. There is no statutory prohibition against combining the two functions, I believe, but I think it unwise.

MR. ROBINETTE: I agree. It is a dangerous practice not only for the reason suggested by Mr. Arnup but because an insurance adjuster after all is trying to make the best settlement he can with the other side: if the adjuster who is also a solicitor is dealing with a layman, without the intervention of another solicitor, there is a danger that the layman may misunderstand the situation. A lawyer should not get himself into a position where he appears to be taking advantage of a layman.

THE CHAIRMAN: Thank you. Mr. Sedgwick, back to you: (*e*) *an accountant?*

MR. SEDGWICK: If a man is qualified both as a solicitor and an accountant, I can see no objection to his carrying on both professions. To do so is unusual in our jurisdiction, but quite common in some states of the Union to the south of us, certainly in the state of New York.

THE CHAIRMAN: (*f*) *a merchant?*

MR. SEDGWICK: As to this, it is specifically forbidden by section 29 of the Solicitors Act to practise in any court in Ontario while engaged in the business of a merchant. And the prohibition continues for a year after the lawyer has ceased to be a merchant.

THE CHAIRMAN: In the cases where it is proper to act in two capacities, is the lawyer bound by the ethics of his profession while he is conducting his other affairs? I'll poll the panel. Mr. Arnup?

MR. ARNUP: Certainly he is. He cannot say, "I have ceased now to be a lawyer and put on my real-estate hat". He is always bound by the ethics of his profession.

MR. SEDGWICK: Mr. Arnup stole my metaphor of the hat, but I agree with him.

MR. ROBINETTE: There can hardly be any doubt about it. I have nothing I can usefully add.

THE CHAIRMAN:

QUESTION 25

An infant is injured in an automobile accident and the insurance

adjuster for the responsible motorist makes a settlement with the infant's parents on condition that the settlement is approved by the court in a friendly action. The adjuster takes the parents and the child to a local lawyer and asks him to bring the necessary action, present the matter to the court, after notice to the Official Guardian, and obtain judgment approving the settlement. Agreement is reached on the lawyer's fees. Should the lawyer disclose to the court that his clients came to him on the recommendation of the insurance adjuster?

What do you think about this, Mr. Arnup?

MR. ARNUP: This question was obviously phrased to invite an affirmative answer. Just to be contrary, but also because I believe it, my answer is no. Why should he?

Not infrequently I am recommended as counsel by somebody with an adverse interest in the same litigation. My obligation is to do the very best I can for my client and I expect the court to assume that that is what I am doing. Why should I stand up in court and say, "You should take what I am about to say to you with a grain of salt because I am here on the recommendation of the insurance adjuster"? So far as I am concerned, the court is going to take me as it finds me and I am not obliged to tell how I got there.

THE CHAIRMAN: In New York, Mr. Arnup, the lawyer is obliged to make the disclosure. What do you think of their rule?

MR. ARNUP: Conditions may be different down there; but I see no necessity for it here.

MR. SEDGWICK: At first blush, I was inclined to think that one should disclose the fact, but after listening to Mr. Arnup's eloquence last evening, and again today, I agree with him.

MR. ROBINETTE: He was even better today.

MR. SEDGWICK: A little more convincing.

THE CHAIRMAN:

QUESTION 26

A solicitor brings his client to see you in connection with an action in which the client is the defendant. You conduct the proceedings as counsel and are successful. About a year later the client comes to you on an entirely different matter (contentious or non-contentious, it does not matter) and asks you to handle it. He says he does not wish to return to his former solicitor. What do you tell him?

MR. ROBINETTE: That has not happened to me very often, but

I think what you would do is telephone the solicitor from whom you had received the original business and tell him what had occurred. Speaking for myself, I should much prefer to lose the client than have a solicitor who had sent me business think I was trying to steal clients from him.

THE CHAIRMAN: Mr. Sedgwick, what do you think?

MR. SEDGWICK: I have had the problem arise a number of times and I have done much as Mr. Robinette suggests I should do. In the first place, I tell the client that I would prefer that he go back to the solicitor who sent him to me. If the client still insists, I notify the solicitor. Sometimes the solicitor says, "I didn't want him anyway; you can have him".

THE CHAIRMAN: What do you think, Mr. Arnup?

MR. ARNUP: I agree with Mr. Robinette, today as last night.

THE CHAIRMAN: The next question is

QUESTION 27

A solicitor brings you a brief and asks you to conduct the proceedings without further reference to him. When the proceedings are at an end, he asks you what allowance you propose to make him on the work you have done. What is your answer?

MR. ARNUP: I say to him, "Remember what I told you when you first came in". I make a practice of asking a solicitor who brings me a brief: "Am I running this litigation, or are you going to stay in and take some part in it?" If I am to run it, I say to him at the beginning: "I will render a bill to the client, perhaps through you, and if you have any charges, you will render your own bill. If you are going to stay in the litigation and do some work, I will protect you for your account." But if anybody comes to me, especially at the conclusion of a case, and asks for a kickback, even if it is dignified by the name of referral fee, he is looking at the wrong lawyer.

MR. ROBINETTE: I agree with Mr. Arnup. In fact, I go a little farther. I think, and it has been so held, that it is unethical to split a counsel fee. In other words, it is unethical for a lawyer who has been retained as a barrister to split his fee with the solicitor. The reason is that it is the solicitor's duty to advise the client as to the best counsel for the particular case and to negotiate a reasonable counsel fee. If the solicitor knows he will get a portion of the fee from some counsel and not from others, there is an immediate

conflict between duty and interest. He is going to be thinking of his own pocket rather than selecting the counsel who in his honest judgment is the best for the case. Incidentally, this matter was commented upon by the Supreme Court of Canada in a little known case from Nova Scotia, *Knock* v. *Owen* (1904), 35 S.C.R. 168. I want to take just a minute to read what Mr. Justice Killam said at page 177:

> It is a well known practice, as between solicitors in different places, that a rebate, usually of one half, is made upon charges for services performed by one on behalf of the other,

and he points out that this is not objectionable because, among other reasons, a solicitor's charge is usually on a tariff basis, but he adds:

> Counsel fees are for personal services. . . . The client is interested in having the intervention of a solicitor to advise in selecting the counsel and in settling the fee. If the solicitor is to have the advantage of every reduction upon the fee as first charged the interests of the client will have little protection.

Not only is the practice referred to in the question unethical, but the Supreme Court of Canada has indicated that it is illegal.

THE CHAIRMAN: Mr. Arnup, coming back to you for a moment, let us suppose this lawyer says to you: "Mr. Arnup, you are an expert at drawing pleadings and the conduct of litigation. You go ahead and conduct the proceedings in your own name. But I know this client very well and if you want to talk with him about any problem, I will be glad to sit in with you and, if you like, be present at the trial, but I won't put on a gown." What do you do?

MR. ARNUP: Where two lawyers are associated in a case in this way I think both are entitled to be paid a fair fee for what they do. The point I was trying to make is that I refuse to split the fee *I* have earned with a lawyer who merely sent me the client and has done no work since.

THE CHAIRMAN: So if you are satisfied that the other lawyer has rendered service you will protect him?

MR. ARNUP: Certainly.

MR. ROBINETTE: Do you not think the client is entitled to know how the fee is being divided?

MR. ARNUP: That is why I said that even if the solicitor has worked on the case I will send my bill separately, leaving him to send his. I do not like the practice of sending a bill for, say, one thousand dollars, of which you have allowed three hundred

dollars for the solicitor, which you return to the solicitor without the client's knowledge. I think that is wrong.

MR. ROBINETTE: I agree.

THE CHAIRMAN: We are approaching the end:

QUESTION 28

To what extent may a solicitor charge less than the tariff fees for steady clients or in order to secure business?

MR. SEDGWICK: If a solicitor is doing a lot of work for one client, I suppose he is at liberty to say, "The tariff is so much, but I will give you ten or twenty per cent off". I don't think there is anything unethical about that.

THE CHAIRMAN: If a lawyer is moving into a community for the first time, is it unethical for him to make a habit of rendering bills, say, twenty-five per cent below the local tariff?

MR. SEDGWICK: I suppose there is nothing *unethical* about it. He can charge less than the tariff or, if he can get it, more than the tariff.

THE CHAIRMAN:

QUESTION 29

In the course of a trial you learn that the other side is going to be in difficulties unless they can subpoena one of your witnesses and get from him evidence vital to their case. You have not yet decided whether or not you are going to call him. Your client suggests that you send the witness on a "little trip". Is there anything wrong with this?

MR. ROBINETTE: There is nothing wrong with the client suggesting it, if that is what the question means. But it is certainly wrong for you to fall in with the suggestion. To do that would be contempt of court, as cases in England have held. You would be interfering with the course of justice.

THE CHAIRMAN: And now the last question:

QUESTION 30

It is generally understood that when you are arguing a point you are obliged to draw to the court's attention, not only the cases in your favour, but also the cases against you of which

you know.[3] *But suppose you have become aware of an entire point that has never been raised by anyone and that may prove troublesome to your case. Are you under any obligation to raise a point hitherto raised by no one?*

MR. ARNUP: Mr. Chairman, I have never thought so. There is of course an obligation, which is occasionally breached but is a very real obligation, not only to refrain from actively misleading the court, but to tell the court of cases you know about on an issue before the court, even though they are against you. But this situation usually arises where you are the second speaker—you are defending at trial or appearing for the respondent on appeal —and I don't see that you are required to tell the other side how to conduct its case by raising an entirely new point.

MR. ROBINETTE: I agree. We practise under the adversary system of the administration of justice, and I agree that you do not have to tell the other side how to put its case.

MR. SEDGWICK: It is bad enough for a court of appeal to raise questions that were not raised below. There is no obligation on counsel to raise points for the benefit of his opponent.

Rôle de l'avocat

A l'œuvre imparfaite du Juge nous collaborons en lui proposant des vérités contradictoires entre lesquelles il devra choisir, guidé par les règles du Droit, c'est-à-dire par un ensemble de prescriptions incertaines et mouvantes. Tel est notre rôle difficile, à peine moins difficile que celui du Juge puisqu'il nous appartient de choisir avant lui les vérités plausibles qui pourront entraîner son adhésion.

Du choix de ces vérités, notre tradition nous laisse libres, comme le Juge est libre. Mais elle nous rappelle constamment que nous participons à l'œuvre de la justice, œuvre humaine, mais la plus haute, la plus inquiétante, la plus périlleuse, puisqu'elle pèse l'homme lui-même pour le condamner ou pour l'absoudre. Comment pourrions-nous remplir cette tâche si nous étions impurs? Comment serions-nous purs si nous laissions prévaloir notre intérêt personnel sur l'intérêt de la vérité? (Extrait de "Méditation sur la profession d'avocat", par P. Sire, bâtonnier de l'ordre des Avocats du Barreau de Bordeaux, J.C.P. 1957, 1, 1348)

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[3] See Problems in Litigation (1953), 31 Can. Bar Rev. 503, at pp. 506-508.