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EDUCATION FOR PROFESSIONAL RESPONSIBILITY AND THE CATHOLIC LAW SCHOOL*

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I

When I was a law student, quite a few years ago, my law school had no course directed toward the development of a sense of professional responsibility in its students. We had a thirty class hour course in Jurisprudence and, shortly before graduation, were exposed to five lectures based upon the Canons of Professional Ethics of the American Bar Association. This, our common sense, the sum of our pre-legal education and experience, and our legal education itself was assumed to prepare us adequately to resist unethical temptations and to meet responsibly the problems of one of man's most ancient and difficult callings, the practice of law.

This sketchy preparation was not unique. Very few law schools offered more and several offered nothing at all. The normal curriculum was the case method of study, accidentally centered upon those courses which appeared with the greatest frequency in state bar examinations. Little attention was given to the so called perspective courses, *e.g.*, International Law, Comparative Law, Jurisprudence, Legal Profession, on the one hand and the "skill" courses, *e.g.*, drafting, trial preparation, practice court, counselling, on the other. The first were usually elective and the second too few and ordinarily taught in a singularly uninspired manner by practicing non-teachers; a situation even more shocking than having law taught by teaching non-practitioners.

It can only be by the operation of Divine Mercy that this system did produce a very large number of ethical, professionally responsible lawyers. All too often, however, the best product was an accomplished craftsman, ethically numb and totally unaware that he was a member of a profession and that, as such, he was bound to certain obligations. The worst product is one we have all seen, a slick, skilled legal mechanic, without conscience and ever ready to take any advantage, fair or unfair. Usually, he justifies his conduct as a requirement of client loyalty. It is he who has created the unflattering popular image of the lawyer as a shyster who bends the law to save guilty clients. Besides being an insult to the rest of us, this image may also account, in part, for the fact that

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our American law schools are not attracting a fair share of the best college students in competition with the sciences and medicine. The good students are going elsewhere.

In the years since my legal education began, particularly in the last several years, the law schools (encouraged by some lawyers) have developed an almost painful awareness of their shortcomings in professional responsibility education. They now have engaged in a great common resolve to redress this terrible wrong. During roughly the same period, practicing lawyers (encouraged by some legal educators) have continued their shrill, although occasional, insistence on more skills and craft training in the law schools. There are elements of inconsistency in the two approaches based upon the limited time available for a legal education.

My purpose is briefly to explore this seeming inconsistency. I hope to show also that the Catholic law school has a special role in modern legal education.

II

Professional responsibility is first a recognition that the practice of law is essentially a public calling. In every act he performs, the lawyer has two obligations, two duties. He is responsible to his client. This is a private obligation. He is also, and equally, responsible to the community, the state and the nation. This is a public obligation. Very frequently, perhaps usually, his public duty is adequately met by the discharge of his private duty. To put it another way, the obligation to the public interest is fulfilled by carrying out a specific task for a particular client honorably and well. Frequently, however, public interest requires action which does not coincide with a private task. It is then that the responsible lawyer assists in legal aid work, serves on bar association committees, supports "good government" groups and does myriad other things which his education and skill obligate him to do as a matter of professional honor. Professional responsibility may even call for participation in political activity and in government service in extreme situations.

It must be obvious that in both private and public obligations, the lawyer's professional responsibility transcends mere legal ethics. In the terms of our reference, it may even be possible for a lawyer to be ethical but professionally irresponsible in the sense that he looks upon his calling as imposing no greater obligations than a craft or a trade.

Let me clarify this by illustrations drawn from private law practice.

In a discussion of trial technique before a bar association group, Mr. A included in his description of technique such matters as deliberate harassment of the judge by groundless objections made in the presence of the jury; quickly uttered questions and comment of an improper or inadmissible nature, followed by profuse apologies to the court, again in the presence of the jury; and various petty discourtesies which it seems

unnecessary to spell out here. Mr. A pointed out, in the manner of one explaining Blackstone, that these tactics, when skillfully carried out, often provoked the judge to an outburst of temper which favorably disposed the jury toward A's cause. Mr. A was severely taken to task by one of his audience who pointed out that the members of the host bar association were able to distinguish between technique and trickery.

Is Mr. A's "technique" professionally responsible conduct? Obviously, in the measure in which it is known, it adversely affects the public image of the lawyer and, more seriously perhaps, it makes a very strong impression on law students to whose attention such matters inevitably come. Young people admire success uncritically. Their knowledge is superficial and their experience is slight. For this reason, they tend to applaud an advocate's trick as well as an advocate's skill and to equate trickery with technique. Does a lawyer's professional responsibility extend to a forbearance from conduct which will have a harmful effect on fledglings in the profession? Please note that this sort of unprofessional conduct probably does not involve a violation of ethics in the usually accepted sense of that term.

Some time ago, I discussed the practice of law with two young lawyers, one the product of a Catholic law school, the other of a non-sectarian law school. I suggested to them that a lawyer who used a dishonest defense—specifically, perjured testimony—in order to secure the acquittal of his client, committed a breach of professional ethics and was professionally irresponsible as well. They both indignantly rejected my suggestion stoutly maintaining that "anything goes" in the defense of a client. Perhaps they were conditioned by a law review article of some ten years ago asserting that the lawyer had a duty to tell an occasional lie for his client and sometimes to refuse to disclose facts to the court in his client's defense.[1] In effect, this article said that a man can be too honest, too upright to be a really good lawyer.[2] Conversely, a thoroughly honest man cannot be a very effective lawyer. I reject this sort of thinking completely, but I submit it for your consideration as a not infrequent state of affairs. Does this meet your concept of legal ethics? Of professional responsibility?

Let me pose a somewhat closer question. My field is administrative law and as you know it is sometimes said that this is the only area of law in which the questions and problems remain the same, but the answers are constantly changed. This is a gross calumny, but it is true that our procedures tend to be ambiguous and our processes amorphous.

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[1] Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 6-13 (1951); reprinted, TRUMBULL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY. (Prentice-Hall, Inc. 1957), 201, 204-210.

[2] Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952).

This shifting operational climate creates great opportunities for continuances and other delays. I remember an attorney who boasted that his dilatory tactics before a federal commission—always pursued in the guise of protecting public interest—saved his clients one million dollars per trial day. This was quite literally true since he represented an association composed of virtually all the manufacturers of the commodity involved. This man would have been astonished had his conduct been described as unethical or irresponsible. You can all give similar examples of abuse (misuse?) of legal process from your own observations. They occur in court as well as before commissions. Can this be a mark of lack of professional responsibility when used to protect a client at the expense of the public interest? This is a difficult question. All questions in the area of legal ethics and professional responsibility are prickly and hard to handle.

I submit that the heart of our problem is the undue emphasis which the legal profession has always placed on client loyalty. We have overstressed loyalty to the client and understressed loyalty to the law. At the risk of carrying coals to Newcastle, I am going to point to some fundamental concepts applicable to all of us.

The California State Bar Act contains one section dealing with the *duty* of an attorney and it states that; (a) an attorney must support the Constitution and the laws of the United States and of this State; (b) he must maintain the respect due to the courts of justice and judicial officers; (c) he must counsel or maintain such actions only as appear to him legal or just, save the defense of a person charged with a public offense. The next subsection is particularly strong medicine. It holds that an attorney has the duty to employ "for the purpose of maintaining the causes confided to him means only as are consistent with truth and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."[3]

It seems clear that the State Bar Act contemplates support of the law before support of the client. The Rules of Professional Conduct approved by the California Supreme Court are silent on this point,[4] but they do commend the Canons of Ethics of the American Bar Association[5] to the members of the State Bar with respect to matters not specified in the Rules.

Canon five holds that in the defense of criminals "the lawyer is bound by all fair and honorable means to present every defense that the

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[3] California State Bar Act, section 6068 (a-d). This and all other references to the California State Bar Act, the Rules of Professional Conduct and the Canons of Professional Ethics of the American Bar Association are taken from a pamphlet published by the State Bar of California and amended to November 1, 1960. This will avoid a proliferation of uninformative footnotes.

[4] The Rules are silent on many points. They have been described as the "thou-shalt-nots" of the legal profession, *i.e.*, the minimum requirements.

[5] As contained in the pamphlet referred to *supra* note 3, beginning at p. 39.

law of the land permits. . . " Canon fifteen is entitled "How Far a Lawyer May Go in Supporting a Client's Cause." It begins by reciting that nothing is more harmful to our profession than *"the false claim,* often set up by the unscrupulous in defense of questionable transactions, *that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."* The lawyer owes entire devotion to his client to the end that nothing be taken or withheld from him save by the rules of law legally applied. In court, the client is entitled to the benefit of every remedy and defense authorized by the law of the land.

> But it is steadfastly to be borne in mind that *the great trust of the lawyer is to be performed within, and not without the bounds of the law.* The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. (Canon 15, emphasis supplied).

The twenty-second canon enjoins upon us candor and fairness in dealing with witnesses, with the court and with each other. Canon thirty-two admonishes us that, in the last analysis, our duty calls for loyalty to the law whose ministers we are and respect for the judicial office which we are bound to uphold.

Two things are immediately apparent. First, the Canons of Professional Ethics of the American Bar Association cover matters I have included under professional responsibility as well as ethics in the classical sense. These Canons were adopted in 1908,[6] so education for professional responsibility is making a rather late start. Second, statutory law and the canons join in placing real strictures on client loyalty. The lawyer's first loyalty is to the law and his first duty is to support and maintain the law and the courts.

It is sometimes said that the language of the Act and of the Canons is ambiguous.[7] I do not find it so and I reject the notion that words such as law, respect, justice, truth, honorable and fair, or artifice, false and disloyalty are words that a lawyer cannot understand and that they represent concepts he cannot appreciate.

III

In the present state of our profession, all law schools must single-mindedly direct their efforts to education for professional responsibility. We cannot afford to do otherwise! It seems impractical, however, to extend the law school curriculum beyond the present three years, and it is clearly impossible to drop the traditional core courses such as Contracts, Torts and the other cherished oldsters. The inflexibility of time

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[7] This complaint is often heard from lawyers, law professors and law students.

[6] *Supra* note 3 at 39, footnote. The first thirty-two canons and the recommended oath were adopted by the American Bar Association on August 27, 1908.

dictates that something must go, and in this Hobson's choice, the law schools must drop, or at least not expand the teaching of skills.

The simple reason for this selection is that skills training can be acquired from bar association educational programs and professional responsibility education cannot be. Education for professional responsibility can only be administered through a lengthy indoctrination pervading the entire fabric of academic legal education. The excellent California Continuing Legal Education of the Bar Program has proven the feasibility of skills teaching after law school education. Law schools and the organized bar both must recognize that the law schools cannot do an *efficient* job of educating a man in *all* the skills of law practice. The organized bar must assume part of the task.

American law schools then should concentrate on the traditional curriculum, buttressed with those subjects and techniques necessary to develop a high sense of professional responsibility in our law graduates. As the Report of the 1959 Conference on Legal Education put it, the law schools must place greater emphasis on the theory of law and less emphasis on its minutiae.[8] Incidentally, the Conference recognized that the organized bar could best provide the practical instruction necessary to bridge the gap between law school and law practice.[9]

What role should Catholic law schools play in this scheme of legal education? Certainly, they too must bring all their resources to bear on transmitting to their students a solid grounding in the demands that professional responsibility will make upon them after graduation.

A few minutes ago reference was made to client loyalty and loyalty to the law. It is to this aspect of professional responsibility education that our schools can make their greatest contribution. We can define loyalty to the law by emphasizing that the law must be founded in natural justice and good morals. This is the special facility possessed by the Catholic law school.

The Adviser to the Section on Legal Education of the American Bar Association has been an astute participant-observer of legal education in the United States for more than a quarter of a century. He has, on occasion, made some pithy comment about Church-related schools. The last such occasion was at a Catholic law school, and there, Dr. Hervey had this to say:

> Some years ago I expressed the thought that the Church-related law schools of America should be different from secular institutions—that such schools . . . . should consciously synthesize

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For a learned discussion of the same situation in Texas practice, see, Sutton, *Guidelines to Professional Responsibility*, 39 TEXAS L. REV. 391, 408-415 (1961).

[8] "The Law Schools Look Ahead," 1959 Conference on Legal Education (Ann Arbor, Michigan) p. 1.

[9] *Id.* at 5.

> the Christian precepts with knowledge of the law and with professional responsibility.[10]

Dr. Hervey points out that law school catalogues disclose little or no difference between the programs in our various law schools whether Church-related, public related or independent. He rejects the assertion that time limitations and bar examination requirements prevent the Church-related schools from pursuing a different educational program than other law schools. He states, quite accurately, that every teacher in every law school can infuse Christian precepts into every law school course.[11] Dr. Hervey is not a Catholic, but if we introduce "Natural Law" and "good morals" at appropriate points in his thesis, we will find little to quarrel with therein. If we took care to analyse all of our courses in terms of Natural Law and good morals, we would have an excellent basis for a strong program of education for professional responsibility.

By the very nature of things, Catholic legal education is in the hands of laymen. Some of these people are Catholic, others are not. Catholic or non-Catholic, lay persons tend to feel disqualified the moment reference is made to Natural Law and to morals. They tend to feel that these are matters for the clergy rather than the lawyer and they are, of course, partly right. But, if we lose these gifted people because of this feeling, Catholic legal education will suffer a mortal blow. We, all of us, laymen and clergy, teachers and practitioners, must join in convincing our lay teachers that they need not become theologians and moralists in order to teach in Catholic law schools. They must be made to realize this.

We ask only that they approach the legal problems presented in their courses from the Natural Law standpoint. Beyond this, they need only display a willingness to call upon the members of our theology and philosophy departments. We do not utilize the talents of the able people in these departments nearly enough and it would be good pedagogy, as well as good sense, to bring this inter-disciplinary approach to bear upon education for professional responsibility. Catholic law schools are in a particularly fine position to relate professional responsibility to the law of God as well as to the law of man. This is our unique contribution and we should make haste to fulfill it.

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[10] Hervey, *The Time is at Hand When - Some Personal Observations*, p. 1; reprint of an address at St. Mary's University Law School, San Antonio, Texas, May 11, 1961.

[11] *Id.* at 2.