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Association of American
Law Schools
Chicago, Illinois
December 28, 1964
Lewis F. Powell, Jr.

LEGAL EDUCATION FOR PROFESSIONAL
RESPONSIBILITY

Responsible leaders of the bar/ have long been interested/ in the content and quality of legal education. The future of the profession depends on this. It is therefore perhaps understandable - if not entirely forgivable - that the practicing bar should so frequently volunteer opinions and advice/ to our brothers in the teaching branch.

I am not exactly a volunteer, as ~~I would rather have remained in Virginia~~ *was not eager to leave* during Christmas week. Yet, I did

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welcome President Ritchie's invitation. As he knows, I have had a personal interest in legal education for many years and almost joined your ranks. I greatly respect and admire what the law schools have accomplished in educating for professional competency.

I will address myself this afternoon to one area in which you are on the threshold of even greater accomplishment. This is the changing concept of legal education, with its increased emphasis on professional responsibility. I do not suggest that I can shed any new light for this enlightened audience. But the subject has special appeal to me, and I would like to share my thoughts with you.

*First, let us take
a hurried look*

First, let us take a hurried look at the development of legal education. The history of attitudes in this country/ towards training for the bar/ is a fascinating one. Prior to the Revolution, no formal education of lawyers was available in America. In several of the colonies, notably Virginia and South Carolina, the more ambitious young men studied in the English Inns of Court. Indeed, it is reported that in the decade before the Revolution, there were more than 100 Americans studying law in England.*

But even the American

*Pound, The Lawyer from Antiquity to Modern Times, p. 157. Twenty-five of the signers of the Declaration of Independence were lawyers and so were 31 of the 55 members of the Constitutional Convention, p. 178.

But, even the American who "read law" in the office of a practitioner at home, was likely to have had ^{considerable} ~~a college~~ education. Indeed, the bar of the colonies, in the generation of the Revolution, was, for the most part, well educated generally, and well qualified to practice law ^{— either} as a result of English training / or law office apprenticeship. ¶ The leadership which brought success in the Revolution / and the genius which produced our form of government / came, in major part, from the brilliant bar of the colonies.

The first formal provision for the teaching of law in America was at William and Mary in 1779, when a professorship

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of "law and police" was established and George Wythe was appointed to this chair. No other professor of law in the history of our country has produced more distinguished pupils than those who studied under Wythe. These included John Marshall, James Monroe, Henry Clay, Edmund Randolph, Spencer Roane, John Breckenridge, Philip Pendleton Barbour and many others who played key roles in the development of the new republic. Wythe's most famous pupil was Thomas Jefferson, who served a long and fruitful apprenticeship in Wythe's law office.

This bar, during and immediately following the Revolution, had a remarkable sense of public duty and professional responsibility.

responsibility. It also enjoyed the respect and confidence of the informed public.

But the story of much of the 19th Century is different. During the first half of that century/there was a loss of prestige and influence by lawyers/and a notable breaking down of the requirements for ^{their} ~~the~~ education and professional training, ~~of lawyers.~~ ¶ In the year 1800, fourteen of the nineteen states (or organized territories) prescribed some standards of education or training for admission to the bar. In 1860, just prior to the Civil War, only nine⁹ of the then 39 American jurisdictions/imposed any requirements for admission to the *practice of law.*

practice of law. The prevailing view was that expressed by the following provision from the Constitution of Indiana:

"Every person/ of good moral character/ who is a voter/ is entitled to practice law in any of the courts of this state."*

At least this had the virtue of simplicity. It eliminated the necessity for law schools, apprenticeships or bar examinations of any kind. The practice of law was deemed to be a "natural right" which every citizen could enjoy. There was obviously little concern for the

*Article VII, Sec. 21, Indiana Constitution of 1850. See Pound, supra, p. 226

rights, natural or otherwise,

rights, natural or otherwise, of those whom these unlettered "lawyers" presumed to represent.

The public attitude which produced this deprofessionalizing of lawyers was characteristic of the political philosophy of the first half of the 19th Century. The public was suspicious of "monopolies" and of "privileged classes". The influences of Jacksonian democracy were strong and undiscriminating. While perhaps beneficial in other respects, this philosophy produced what Dean Pound has called an "era of decadence" for the legal profession, ^{This} ~~which~~ adversely

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affected the administration of justice throughout the country.*

A change in attitude became discernable after the Civil War, and this gained momentum with the formation of bar organizations and an increasing number of law schools. The first resolution adopted at the first meeting of the American Bar Association in 1878 related to the need for higher standards of admission to the practice of law.

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Indeed, the first formal Section of the ABA was that of Legal Education and Admissions to the Bar, established in 1893. This Association (of American Law Schools) was formed seven years later in 1900.

The renaissance of legal education was well underway by the nineteen-twenties. Under the leadership of Elihu Root, the American Bar Association in 1921 went on record as favoring significantly higher standards for admission to the bar, including three years of full time study in law school or its equivalent.* The

following year,

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following year (1922), at a national conference in Washington of all elements of the profession, the standards were approved/and steps taken to implement them. This was a notable milestone, and resulted in the inspection/and accrediting of law schools/and the establishment of standards of legal education/on the basis of which ^{law schools} ~~the right~~ *are accredited.* ~~of accreditation would be determined.*~~

In the intervening years since the twenties, standards both for the accrediting of ~~law~~ schools/and admission to the bar/have been raised significantly. Striking improvement has been made in

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*The quality of
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the quality ~~and depth~~ of legal education. Increasing attention has also been directed to pre-law school education, with a growing realization that a broad cultural background, rooted in the classics and liberal arts, is preferable to pre-law school emphasis on the "bread and butter" commerce and business type of courses.

Another major development, largely since World War II, has been the recognition by the legal profession that post-admission, continuing legal education is almost as essential as formal law school training.* The bars of some 27 states

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now employ administrators who are responsible for ~~regularly~~ ^{conducting} ~~organized~~ ^{conducting} continuing legal education ~~training~~ of ~~lawyers~~.

It can now fairly be said, in the mid-1960's, that we have come "full circle" since the prevailing view of a century ago. The practice of law today is no longer the natural right of any citizen - unless he is willing and able successfully to subject himself to one of the most exacting of all professional educational programs. Indeed, there are many who think, as I do, that the American law school has no equal in any other country in the training for

*professional
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professional competency.

And it hardly need be said that the competency of practicing lawyers is distinctly a matter of public concern. The private practice of law is a form of public service. The American system of freedom under law depends uniquely upon both the integrity and competency of lawyers and judges. This is as true in the successful functioning of our free enterprise system as it is in the preservation of individual liberties guaranteed by the Bill of Rights.

It is generally recognized that the lawyer is essential to the administration of justice under our adversary

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system in the courts. It is equally true, although not so widely recognized, that in America the lawyer is often "the one indispensable adviser of every responsible policy maker", whether in government or business. * In view of this key role, it is obvious that the training of a lawyer merely to a high level of professional competency is not enough. There must also be ^{a genuine} ~~an~~ understanding of a lawyer's professional responsibility and a willingness/faithfully to discharge this responsibility.

*Stone, Legal Education and Public Responsibility, published by Association of American Law Schools (1959), p. 20. This book reports on a notable conference on this subject held at the University of Colorado in 1956.

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Within the last decade, both the law schools /and the organized bar/ have given a great deal of thought /as to how best to produce the broadly educated lawyers who will be concerned /less with the making of money /than with discharging their professional responsibilities.*

One of the difficulties has been defining, for purposes of education, the scope of professional responsibility. As the very concept of ~~professional responsibility~~ has been an evolving one, it is not surprising that agreement

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Some of the generally recognized areas of a lawyer's responsibility may be summarized as follows:

^{Just}
1st. Responsibilities in the actual practice - to the client, the opposing lawyer, and the judge.

2nd. Responsibilities in the areas closely related to the actual practice itself, such as the administration of justice, selection and tenure of judges, judicial reform in both procedural and substantive law, and

*Countryman & Herwitz, Implementation of Education for Professional Responsibility, paper prepared for Second Arden House Conference (December 1963), p. 5.

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responsibilities

the assuring of representation of all persons, including the impoverished and the unpopular.

3rd. Responsibilities to the legal profession through active participation in the work of the organized bar.

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you will forgive me for saying that membership in the ABA - the only national org. of our prof.

4th. Responsibilities to render some public service, whether it be part time, temporary or permanent service;

and whether it be on governmental boards or commissions, or in the legislative or executive branches of government.

5th. Responsibilities where the law itself must expand to meet the dramatic changes of our age. These should include, for example, efforts to

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extend international law/and to meet the need for new legal concepts - such as ^{the} law of outer space.

6th. Responsibilities to provide leadership generally at the community level /such as service on educational and charitable boards/and leadership in creating a restrained and informed public opinion.*

*The foregoing summary of professional responsibilities follows largely the Report of the 1958 Arden House Conference, supra, p. 18. Generally similar (although differing in considerable detail) was the statement of the lawyer's professional responsibility in the 1958 Report of the Joint Conference on Professional Responsibility by the Association of American Law Schools and the American Bar Association, 44 ABAJ 1159 (1958); also printed in Report of Arden House Conference, supra, pp. 185-204. See also Report on Second Arden House Conference, p. 31 et seq.

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mental responsibility of lawyers/-
implicit in those just summarized -/is
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tion of the United States/and maintain
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cludes, of course, the overriding duty
of every lawyer - in the discharge both
of his private and public responsibilities
- to uphold and defend/our judicial
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law/and its processes.

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difficult it is /to think of including them in a law school curriculum, or in courses of continuing legal education. Obviously, the full sweep of these responsibilities /and all of their ramifications /could not possibly be taught. A lawyer's consciousness /and understanding /of many of these /derive, naturally and properly, from his own sense of duty /and a recognition of his privileged position in society.

It is also quite true that in every law school, incidentally and often unconsciously, there is an instilling of professional responsibility ~~in students~~ /
^{normal} in the [^]teaching of the ~~normal~~ substantive and procedural courses. There is a great opportunity here for the teacher, /who

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himself has a deep sense of the responsibilities of the legal profession, / to impart this to his pupils - by precept / as well as by exposition. This technique has ~~sometimes~~ been called the "pervasive method" of teaching ethics and professional responsibility. It will always remain one of the most efficacious methods.

Most law schools now have specific courses on legal ethics, although in far too many schools / this remains an elective *subject.*

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*A report by the Committee of the Association of American Law Schools on Education for Professional Responsibility, filed at the annual meeting of that Association in Dec. 1958, disclosed that only 64 out of the 110 then accredited law schools offered a course directed primarily to "professional ethics and responsibility." Malone, supra, 45 ABAJ 1083. But see study of American Bar Foundation, showing marked improvement by 1962-63, infra.

There is a need, which your Association ~~has been a leader in~~ ^{recognizes,} ~~recognizing,~~ for broader courses dealing specifically with the professional responsibilities of a lawyer. Happily, the need for such courses is gaining increased recognition ~~in our law schools~~ ~~and~~ in the profession generally. Views continue to differ/as to whether there should be a separate course on the legal profession itself (as many schools now have)/or whether the traditional ethics course should be expanded to include professional responsibility.*

*In 1960 the National Council of Legal Clinics was formed as a joint project of the American Bar Association, the Association of American Law Schools and the National Legal Aid and Defender Association to improve education on legal ethics and professional responsibility. With an \$800,000 grant from the Ford Foundation, this Council is working now on an experimental program with some 15 law schools.

a survey

A survey by the American Bar Foundation of law school instruction for the ~~school~~ year 1962-63 indicated that 77% of the approved law schools offered some formal training in professional responsibility, and in most of these schools the course is required for graduation.* Although these are often combined courses on ethics and responsibility and the emphasis and quality necessarily vary considerably, it is distinctly encouraging to observe this trend in American legal education.

The ABA

*See Legal Ethics and Professional Responsibility, published by the American Bar Foundation (1963), p. 11. See also Legal Ethics & Professional Responsibility, supra, 1963, p. 3. See also Countryman & Herwitz, supra, p. 2.

The ABA has recently initiated a thorough review of the adequacy and effectiveness of the present Canons of Professional Ethics. As remarkably flexible and useful as the Canons have proved to be, the time has come to reconsider them/in light of striking changes in the practice of law/and role of lawyers/since the Canons were adopted in 1908. They also require re-examination in view of the increasing recognition of the professional responsibilities of the bar.

But the Canons are not an end in themselves. Their purpose is to encourage/and help maintain/a level of ethical conduct appropriate for a

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learned profession. In view of the nature and responsibilities of the legal profession, its ethical and moral standards must in fact measure up to our highest ideals.*

The instilling of this level of moral and ethical awareness must commence as early as possible. Indeed, there are some who think that the teaching of ethical principles at the law school level is useless/because, by that time, the prior training and

environment
*Judge George Sharswood, in his famous treatise on Professional Ethics, said: "There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public." Sharswood, Professional Ethics, 1854, p. 168-169.

environment of the student/have pre-determined his character and attitudes. But happily this degree of pessimism has been rejected by a great majority of our law schools. In my view, the importance of serious and scholarly treatment of legal ethics ~~in the law schools~~ can hardly be over emphasized.

The ethical standards of our profession can also be improved by stricter admission policies - both by the law schools/and by the authorities who admit to the bar. It seems to me that the law schools themselves, in the proper discharge of their own ~~public~~ responsibilities, must give

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increasingly careful attention to the moral and character qualifications of applicants. The obvious difficulties in making evaluations in this delicate area should not preclude a conscious effort to eliminate applicants whose records suggest the absence of the character qualifications so essential to being a lawyer.

Perhaps I have said enough to indicate my own conviction that professional responsibility, in the broadest sense - which includes ethics - is of equal importance to professional competency. The one without the other is not merely incomplete - it may indeed be dangerous to society.

*The Association
of Bar Law
Schools*

The Association of American Law Schools has demonstrated thoughtful concern in this area. In commending you for this, / I also assure you of the continued and warm support of the American Bar Association - a support based upon the conviction that the strength of our profession depends / in major part / upon the basic unity of its three great branches - those who practice, / those who judge / and those who teach the law.

24/167 12/21/64

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But even the American who "read law" in the office of a practitioner at home, was likely to have had a college education. Indeed, the bar of the colonies in the generation of the Revolution was for the most part well educated generally, and well qualified to practice law as a result of English training or law office apprenticeship. The leadership which brought success in the Revolution and the genius which produced our form of government came, in major part, from the brilliant bar of the colonies.

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Some of the generally recognized areas of a lawyer's responsibility may be summarized as follows:

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A broader and indeed more fundamental responsibility of lawyers - implicit in those just summarized - is found in the first stated object of the American Bar Association, namely: the duty to "uphold and defend the Constitution of the United States and maintain representative government."** This includes, of course, the overriding duty of every lawyer - in the discharge both of his private and public responsibilities - to

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**ABA Constitution Article I.

uphold and defend our judicial institutions and to promote respect for the law and its processes.

The mere listing or categorizing of these responsibilities indicates how difficult it is to think of including them in a law school curriculum, or in courses of continuing legal education. Obviously, the full sweep of these responsibilities and all of their ramifications could not possibly be taught. A lawyer's consciousness and understanding of many of these derive, naturally and properly, from his own sense of duty and a recognition of his privileged position in society.

It is also quite true that in every law school, incidentally and often unconsciously, there is an instilling of professional responsibility in students in the teaching of the normal substantive and procedural courses. There is a great opportunity here for the teacher, who himself has a deep sense of the responsibilities of the legal profession, to impart this to his pupils - by precept as well as by exposition. This

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The instilling of this level of moral and ethical awareness must commence as early as possible.

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character qualifications so essential to being a lawyer.

Perhaps I have said enough to indicate my own conviction that professional responsibility, in the broadest sense - which includes ethics - is of equal importance to professional competency. The one without the other is not merely incomplete - it may indeed be dangerous to society.

The Association of American Law Schools has demonstrated a thoughtful concern in this area. In commending you for this, I also assure you of the continued and warm support of the American Bar Association - a support based upon the conviction that the strength of our profession depends in major part upon the basic unity of its three great branches - those who practice, those who judge, and those who teach the law.