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THE LAWYER
AND HIS PROFESSIONAL RESPONSIBILITIES*

By Ross L. Malone†

"A profession to be worthy of the name must inculcate in its members a strong sense of the special obligations that attach to their calling....

"The legal profession has its traditional standards of conduct, its codified Canons of Ethics. The lawyer must know and respect these rules established for the conduct of his professional life. At the same time he must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility."

The words are not mine. They were spoken in concert by the American Bar Association and the Association of American Law Schools in the statement prepared by a joint conference group representing the two associations. It is entitled "Professional Responsibility: A Statement" and was approved and adopted last year by the sponsoring organizations.

"The Conference to whose work these pages are devoted was, perhaps, the most significant effort thus far toward solution to a

*This is the twelfth annual John Randolph Tucker Lecture, delivered at the School of Law, Washington and Lee University, on April 15-16, 1960. A few minor editorial changes have been made in adapting the lecture for publication.


central problem in modern legal education—that of communicating to law students a sense of their public responsibilities."

So opens the report of the "Conference on the Education of Lawyers for Their Public Responsibility" published six months ago by the Association of American Law Schools.

"A practicing lawyer has an obligation to continue his education throughout his professional life. This education not only must increase his professional competence but also better qualify him to meet his professional responsibilities to his clients and to the public."

The voice is that of the organized Bar of the United States speaking through the leaders of state and local bar associations assembled in the National Conference on the Continuing Education of the Bar at Arden House in December, 1958.

Why this sudden interest in the public responsibilities attendant upon membership in the legal profession? Have not these responsibilities existed since the profession was first granted an exclusive franchise in the courts? The ethical standards of conduct which form the nucleus of professional responsibility have been recognized for centuries and were codified in the Canons of Professional Ethics more than 50 years ago. Why then this "crescendo of hortatory material," to use Professor Robert Matthews' expression?

No doubt many factors have contributed to it. I suggest, however, that the major factor is that the legal profession in the United States—as a profession—has finally become of age; that it is viewing itself for the first time through adult eyes. No longer is its primary concern the "How do I look?" of adolescence. Today its concern is "How am I performing?" That question is not being directed solely to performance in terms of competence, and equal inquiry is being made as to the discharge of obligations too often taken for granted in the past—those which we encompass in the term "professional responsibility." However, the first evidence of this new maturity of the profession was in relation to professional competence. It occurred after World War II, when the profession began to examine the performance of its members in terms of competence, and concluded for the first time that it could not maintain its professional competence at an acceptable level if legal education as such ended when a law student

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was admitted to the Bar. Yet there was no post-admission legal education of any consequence available to the profession. Having recognized the need, the legal profession moved to meet it, and there resulted a nationwide program of continuing legal education spearheaded by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, and implemented by state and local bar associations and law schools throughout the country.

Today the legal profession is providing further evidence of its newly gained maturity by a searching examination of its performance in the discharge of its responsibilities to the public—its professional responsibilities.

It is apparent from the "crescendo of hortatory material," to which Professor Matthews referred, that we are not satisfied with what we are finding in our self-examination and that we now have turned our attention to supplying the deficiencies which are apparent. Thus, after considering the present state of continuing legal education in the United States, the conferees at Arden House concluded:

"Programs for continuing education thus far have placed a major emphasis on professional competence and have not always given to professional responsibility the attention it should have. In the future these programs must also emphasize the professional responsibilities of the lawyer. They must help the lawyer fulfill a wide range of professional responsibilities: to the courts, to the administration of justice, to law reform, to the law-making process, to his profession, and to the public."

It is against this background of current interest and activity relating to the professional responsibilities of lawyers that I would like to discuss "The Lawyer and His Professional Responsibilities." I shall consider first "The Recognition and Appreciation of His Responsibilities," primarily from the point of view of the education of the lawyer to recognize and appreciate his professional responsibilities. This will be followed by "The Discharge of His Responsibilities," in which I will discuss some problem areas for the practitioner and the part that the individual practitioner, the profession and the organized Bar must play in the discharge of certain of these responsibilities.

THE RECOGNITION AND APPRECIATION OF HIS RESPONSIBILITIES

"I DO SOLEMNLY SWEAR:
"I will support the Constitution of the United States and

the Constitution of the State [in which I am being admitted to practice law].

"I will maintain the respect due to Courts of Justice and judicial officers;

"I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purposes of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

"I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD."6

During this year some ten thousand successful applicants for admission to the practice of law will willingly, gladly, and without mental reservation assume the obligations set out in the Oath of Admission to the Bar. Some thirty thousand more young people are in attendance at the law schools of the United States this year—all with a single objective that they will have the opportunity to assume the obligations of that oath upon completion of their education. None is deterred by the knowledge that the penalty for wilful violation of that oath is disbarment and disgrace. None will hesitate because of lack of knowledge of the obligation which he is assuming or doubt of his ability to carry it out.

The lawyer's Oath of Admission to the Bar is a magnificent and inspiring statement of the minimum standard of personal performance acceptable to the society which is giving him the benefit of an exclusive franchise and to the profession into which he is being received. As a member of the Board of Bar Examiners in my native State of New Mexico for more than ten years, I have had occasion to hear that oath repeated by successful applicants for admission on more occasions than the average member of our profession. I never

6A.B.A. Oath of Admission, as quoted in Brand, Bar Associations, Attorneys and Judges 865 (1956).
hear it without my heart beating faster, stimulated by the high ideals which it comprises and by pride in the profession which assumes and discharges those high obligations.

While the requirement of an oath is not the distinguishing characteristic of a profession, it traditionally has been required of one entering any of the professions which society has recognized as among the learned professions—the ministry, law and medicine. Other vocations, seeking professional status in the modern day, have adopted the administering of an oath as one means of increasing the prestige of their calling and of elevating the standard of performance of its members.

Obviously it is difficult to compare the standards of professions which have nothing in common as to either functions or objectives. The only basis of such a comparison would seem to be the moral demands made upon a member of the profession and the standard of conduct required of a member as compared to that expected of members of society generally.

Judged on that basis, I suggest that the obligation assumed on entry into the legal profession is higher than that assumed on entry into any other profession. It presupposes a better developed moral awareness, and in day to day practice presents more occasions requiring resort to conscience in arriving at a decision than any other. Whether advising a client, preparing for trial, or conducting the trial of a case, moral problems are presented almost hourly and must be resolved without regard to the success of the cause for which the lawyer is held responsible or his individual self interest.

We are told that the oath of lawyers dates back to 1275.² It resulted from enactment of the first Statute of Westminster, by which lawyers were originally recognized as an existing order. The oath was required of serjeants-at-law and the King's serjeant-at-law. The first express statutory requirement of an oath was a 1402 law which in part provided that by reason of "sundry damages and mischiefs that have ensued before this time to divers persons of the realm by a great number of attornies, ignorant and not learned in the law, as they were wont to be before this time.... That all attornies shall be examined by the justices, and by their discretions their names put in the roll, and they that be good and virtuous, and of good fame, shall be received and sworn well and truly to serve their offices."³

³Id. at 9.
The need for the Canons of Professional Ethics to supplement the oath is described by one observer in these words: 9

"At first an oath was deemed all-sufficient. It is a sad commentary upon the profession itself that it took a century before the American Bar as a whole came to the consciousness of the fact that it must in addition to such oath, erect standards or canons of ethics; that it must publish those standards to the community at large, so that men could know, not only what they could expect of lawyers, but what lawyers were expecting of one another and what the courts could require of them."

The first formulation of a code of ethics for lawyers in the United States occurred in Alabama in 1887, when the Alabama Bar Association adopted its "Rules for Governing the Conduct of Attorneys." 10

The need for action at a national level was first recognized by Henry St. George Tucker. 11 In his address as President of the American Bar Association at the Annual Meeting in 1905, President Tucker directed attention to public statements recently made by then President Theodore Roosevelt which questioned the ethical conduct of certain members of the profession. He concluded that the charges "focus upon us, willingly or unwillingly, as an Association, the inquiry not only whether the charge be true, but also the broader inquiry whether the ethics of our profession rise to the high standard which its position of influence in the country demands."

At the conclusion of the Presidential Address, the Chairman of the Executive Committee of the Association rose, addressed the chair, and said: 12

"Mr. President, in view of some very interesting and instructive sentences uttered by the President of this Association in his admirable address... I desire to offer the following resolution:

RESOLVED, That a committee of five be appointed, of which the retiring President shall be chairman, to report at the next meeting of this Association upon the advisability and practicability of the adoption of a code of professional ethics by this Association."

The committee functioned effectively and in 1906 reported that in its opinion the adoption of a code of professional ethics by the

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9 Id. at 8.
10 Id. at 11.
12 Id. at 131.
American Bar Association was both advisable and practicable.13 Two years later, the Canons of Professional Ethics proposed by the committee were adopted with what one one would consider a minimum of discussion.14 Unfortunately, Henry St. George Tucker, who had served throughout as chairman of the committee, was “unavoidably detained” and the report was presented by a committee member, who reported that the committee had received and considered more than 1,000 letters in response to a request for comments and suggestions on its original draft which had been sent to all members of the Association.15

Today, canons which substantially conform to those of the American Bar Association have been adopted by all 27 of the Integrated Bar states. Of the voluntary bar association states, all but four states have adopted the Canons either by action of the Association or of the Supreme Court. As to the remaining four, it is considered that the Canons are applicable rules of conduct either on the basis of usage or statements of the court in disciplinary cases.16

As a result of the self-searching to which I have referred, it is not surprising that legal education should be the first vehicle for possible improvement to which the profession would turn. We look to the law school to convert a college student who has never been exposed to the law into a successful applicant for admission to the Bar in three years. Admittedly, we make great demands upon the law schools when we do so. But more than the development of legal competence is required to make a lawyer. As important as that aspect of his education is, it is secondary to the importance of graduating students who have a clear understanding of the ethical standards which must govern their professional conduct and a desire, not only to conform to these standards, but also to contribute to the discharge of those special responsibilities which, as lawyers, we owe to the public.

Henry St. George Tucker, in the presidential address to which I have referred, expressed much the same thought in these words:17

“We are forced to the conclusion, however important it may be to the country that our lawyers should be learned in the law, that this great desideratum is nothing compared with the demand that the lawyer be saturated with principles of genuine honesty . . . .

17Id. at 56.
"This is one of the many questions to be considered in the education of the lawyer, and like all other questions which affect morality and ethics, can best be accomplished in the very beginning of the study of law, when character is unformed and 'like clay in the hands of the potter.'"

That there exists disagreement, confusion and even opposition within the law schools to undertaking education for professional responsibility has been recognized by all who have examined the situation. In the final analysis, however, it seems to stem principally from the inability of the teaching profession to develop any course of study or means of instruction which educators themselves feel to be reasonably adequate for the purpose. Fortunately, however, there are a great many law teachers who recognize the need and are unwilling to sit idly by, dismissing the subject with the remark that, "You cannot teach ethics" or "I cannot make students honest and that is all that ethics and professional responsibility really are." The names of Robert E. Matthews of Ohio State University, Elliott E. Cheatham formerly of Columbia University, Lon Fuller of Harvard, Dean Gray Thoron of Cornell, Dean Edward King of Colorado and others come immediately to mind as leaders in the vitally important effort to find the solution for this problem.

Of the present situation, Mr. Cheatham has observed: 18
"There is wide variation in what is being done and equally wide disagreement on what should be done. Many schools have no courses directed to the matter. In the schools which do have such courses, the courses vary in spirit and in objective, in method and content, in length and place in the curriculum. There is, however, almost complete agreement that attention should be given to professional standards and obligations in other courses—an attention which seems to vary from the casual to a consistent effort."

In his Foreword to "Legal Education and Public Responsibility," Professor Matthews, the reporter of the Boulder Conference on Education of Lawyers for their Public Responsibilities, said: 19
"That the law schools provide the environment where this professional awareness (of public responsibility) can first be communicated is obvious. Moreover, it is almost as obvious that after graduation the opportunities for such education are meager indeed. What is not so obvious, however, and what is also perhaps the most baffling unsolved problem in legal education, is how to do it."

Perhaps the most serious indictment of the law schools' attitude toward finding a solution for this problem came from a committee of the Association of American Law Schools itself, which reported in 1951:

"The casual disaffirmance by some schools of the practicability of doing more toward the development of professional responsibility in their students is in itself a symptom of professional irresponsibility. That some schools give no, or at best, a cavalier acceptance to that responsibility creates a need for the Association of American Law Schools recognition that there is something amiss in the system and that something affirmative should be done to rectify the error...."

To the credit of the Association, it can be said that something has been done by it. The joint conference statement on Professional Responsibility and the Boulder Conference to which I have referred resulted in large part from activity stimulated by that report. These accomplishments are primarily attributable to a small group within the Association who are determined that the law schools themselves shall find the solution for this problem. Unfortunately, so far there has not been impressive evidence of a decrease in the condition that the committee referred to as a symptom of "professional irresponsibility."

I entitled this article "The Recognition and Appreciation of His Responsibilities," and insofar as the newly admitted lawyer is concerned, there is one source, and one source only, from which he can gain the knowledge and motivation required for the recognition and appreciation of his professional responsibilities—it is the law school. If it fails him, it has betrayed both the student and the profession.

What is required to afford a student a reasonable opportunity to recognize and appreciate these responsibilities upon his admission to the Bar? I suggest the following as a minimum:

1. A clear understanding of the fact that in entering the practice of law he is, as an officer of the court and a public servant, undertaking the practice of a learned profession, and is not starting in a business, the principal objective of which is the making of money.

2. Familiarity with the standards of conduct to which he is required to conform by his oath of admission and the Canons of Professional Ethics. This requires some understanding of ethical problems as they can be expected to arise in actual practice, as

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20Ass'n Am. Law Schools, Report of Committee on Cooperation With Bench and Bar, Annual Meeting 1951, Program & Reports 58.
distinguished from mere familiarity with the text of the oath and canons.

3. Knowledge of the history and great traditions of the legal profession with particular emphasis upon the careers of members of the profession who individually have made outstanding contributions to the proud history of our profession.

4. An understanding of the place of the profession in society and an appreciation of the opportunity thereby afforded members of the profession for unselfish public service at all levels of civic and governmental activity.

5. Knowledge of the organization and functioning of the organized Bar, and realization that as a member of a learned profession he owes an obligation to the profession to assist in the discharge of its corporate obligations to society through participation in the organized activity of the Bar.

It does not seem to me that these are unrealistic objectives or that they are impossible of achievement in legal education. True, we never shall achieve a perfect means of accomplishing them, but neither will we make any progress in that direction unless and until we are willing to recognize the void that exists in this area of education in many law schools today. We must then resolutely undertake—on a profession-wide basis—to have included in the curriculum of all accredited law schools instruction in professional responsibility under the direction of faculty members having assigned responsibility for the course. Anything less, to me at least, seems to be doing only lip service to one of the most important aspects of legal education.

The fact that admittedly no method of instruction for professional responsibility has been developed which is generally acceptable to legal educators does not mean that none can be found. It only indicates that so far we have not attached sufficient importance to finding it.

In the words of Chief Justice Stone, spoken in the light of his great career as a legal educator:

"We may well pause to consider whether the professional school has done well to neglect so completely the inculcation of some knowledge of the social responsibility which rests upon a public profession. I do not refer to the teaching of professional ethics. I have no thought that men are made moral by the mere formulation of rules of conduct. It is not beyond the power of institutions which have so successfully mastered the art of penetrating all the intricacies of legal doctrine to impart a truer understanding of the functions of those who are to be its servants."

Until we have done so, there is reason to wonder whether legal edu-

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cation, or the legal profession itself, has recognized, or fully appreciates one of the foremost of its professional responsibilities.

I should like to conclude my discussion of this subject by referring again to the Presidential Address of Henry St. George Tucker to the American Bar Association in 1905. Having discussed the vital importance of the education of lawyers in morality and ethics, President Tucker offered a significant suggestion as to the means of accomplishing that highly desirable objective. He said: 23

"I make bold to venture another suggestion for the same purpose, that the system, known as the honor system, be speedily adopted in every law school in America.... Can a man be trusted to meet the temptation of professional life, without a watcher or a spotter, who is impliedly told by the presence of such, during the progress of his education that such an officer is needed to insure unaided returns upon examinations?... and surely it is far better that those who are incapable of appreciating the high position of trust and confidence that the lawyer must occupy to the public should at the beginning of life be excluded from the profession rather than be allowed, through a long life, to plunder and despise confiding clients."

The practice of law, in many respects, constitutes living under an honor system. What better preparation than that the student do so during his education for practice? Mr. Tucker's proposal is so logical and sound that it is surprising that it has not been universally accepted, and I should like to renew the proposal as a highly desirable and immediately available means of improving education for professional responsibility in the law schools of the United States today.

THE DISCHARGE OF HIS RESPONSIBILITIES

"To meet the highest demands of professional responsibility the lawyer must not only have a clear understanding of his duties, but must also possess the resolution necessary to carry into effect what his intellect tells him ought to be done."

Again the words are those of the joint Statement on Professional Responsibility of the American Bar Association and the Association of American Law Schools. 23 They underscore our realization that no matter how well the law schools may ultimately succeed in educating law students for professional responsibility, the actual per-

formance of individual members of the practicing profession will be the measure of the public benefit which will result.

It is implicit in this statement that given knowledge and a clear understanding of his obligations as a lawyer, the extent of his discharge of them will be up to the lawyer and his own conscience, independent of the desires or interests of his client, public opinion or any other outside influence. In the area of professional responsibility especially, the lawyer's independence must be absolute. He is not the "agent for litigation" of his client. He is an independent professional man who, under no circumstances, may be required by his client to do anything repugnant to his own sense of honor and propriety. In the words of the Canons, "He must obey his own conscience and not that of his client." 24

When a lawyer surrenders this independence, he has squandered his birthright and forfeited his professional status. The pressures tending to force him to do so are sometimes great. In spite of the fact that he is engaged in a profession and not a business, he is in competition for clients with his brothers at the Bar, each of whom would be glad to undertake representation of any good client with whom he parted company.

When a client, whatever his motives, makes demands upon his lawyer which conflict with the profession's standards of conduct, or the conscience of the lawyer, the time has come when it will be determined whether the lawyer in fact possesses "the resolution necessary to carry into effect what his intellect tells him ought to be done." 25 Of course, he will point out to his client the impropriety of his request. Of course, he will seek to explain to his client the considerations which prohibit the proposed action. But failing to obtain agreement on the part of the client, he will make perfectly clear his refusal to accede to the request, even though it means the loss of the client.

The likelihood is great that in the course of your practice you will be faced by this situation. It may well be that the action proposed is not likely to become known to anyone else, or perhaps it can be rationalized on the basis that it will not really hurt anyone. Your decision, however, will determine whether or not you are worthy of the profession which has accepted you. What your decision will be depends on factors, only part of which are within the control of either your law

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school or the legal profession. I am firmly convinced, however, that if you have a clear understanding of the responsibilities which you assume on entry into the profession and the pride in your profession which comes from knowledge of its great traditions and ideals, the likelihood is great that your decision will be the right one, and one which you will never regret.

Chief Judge George Sharswood of the Supreme Court of Pennsylvania, whose Essay on Professional Ethics is reflected in many portions of the Canons, described the temptations to which a lawyer may be subject in these words:26

"There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity, in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth at the very outset of his career, needs often the precedence and self-denial as well as the moral courage, which belong commonly to riper years. High moral principle is the only safe guide, the only torch to light his way amidst darkness and obstruction."

I agree fully with Judge Sharswood's statement that high moral principle is the only safe guide for the young lawyer, or any lawyer, but I can offer a companion guide which may be somewhat easier to apply. It is, "If you would not want it announced at the next meeting of your local bar association, do not do it!"

The temptations to which Judge Sharswood referred relate to action known to be in violation of the standards of conduct to which our profession adheres. Unfortunately, however, there are a surprising number of disciplinary cases involving young lawyers that result from ignorance of what is required of them. One of the most frequent offenses of this type is the commingling of funds belonging to a client in an account with the attorney's personal funds. I am constantly amazed at the number of young lawyers who have never heard of an attorney's trust account and who have no knowledge whatever of Canon 11 prohibiting the commingling or use of a client's money or property without his knowledge and consent.

A situation in which there is a clear prohibition of action is not the source of difficulty to the average practitioner, however. Rather, it is in the areas in which there is no clear line of demarkation that difficult problems arise.

The line between reviewing a witness's testimony in preparation for trial—a necessary and entirely proper activity—and putting words in

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the witness's mouth is frequently a difficult one to draw. The perfectly natural desire of the advocate to obtain the greatest possible benefit from the testimony of a friendly witness, when coupled with the desire of the witness to "help the cause," poses a problem requiring restraint and resort to conscience in the preparation of almost every trial.

It has been said that the legal profession is the only earthly pursuit in which a man is required to maintain conflicting loyalties. The loyalty of the attorney to his client and his cause must be unswerving. In the words of the Canons:27

"The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability in his belief.

"No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty.""

Yet, at the same time, the lawyer is an officer of the court. The highest loyalty of the lawyer, first and always, must be to the court. If at any time performance of his obligation to his client comes into conflict with his duty as an officer of the court, the interest of the client must be secondary.

This situation also can become difficult when the judge, who is the personification of the court, makes demands upon counsel which, if met, will be detrimental to the client's case. If the counsel feels that the demands of the court are improper and that his duty to his client requires that he question them, which happens more often than you might think, the conflicting loyalties inherent in his position pose serious problems. Their seriousness is in no sense mitigated by the fact that normally the lawyer's decision as to the course he will pursue in such a situation must be made almost instantaneously.

Yet, in spite of the fact that problems of this type arise occasionally in a lawyer's practice, the profession has demonstrated that it can maintain the diverse loyalties required by its unique position in society and reconcile them in day to day practice for the public good. William Howard Taft, who later became Chief Justice of the United States, emphasized the importance of the reconciliation required of the profession in this area of professional responsibility when he said:28

"[T]he profession of law, if it serves its high purpose, if it vindicates its existence, requires from those who have assumed its obligations a double allegiance, a duty toward one's client and a

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28Taft, Ethics of the Law (Hubbard Lectures, 1914).
duty toward the court which, reconciled as they can be and are in fact reconciled in practice, make for justice. . . . It is the compliance with these limitations (imposed upon advocacy) by the standards of the profession that is the true reconciliation of the primary duty of fidelity to the client, with the constant and ever present duty, that the lawyer has as a part of the administration of justice, owing to the minister of justice in the person of the judge."

Conflicts of interest frequently pose problems affecting the discharge of a lawyer’s professional responsibility. Early recognition of a situation in which there is a potential conflict of interest insofar as counsel is concerned often is extremely difficult. Canon 6 defines such a conflict as being a situation in which, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. A situation of that kind is readily identifiable after the conflict develops, but the ordinary case is one in which you are representing two clients whose interests appear identical. All is peace and light as between the two parties until, just as you get to a crucial place in your preparation for trial, the two parties divide on a question affecting both, and you have a conflict of interest situation with which to deal. Having undertaken the representation of both with the consent of each, you have complied with the Canons, but you may find yourself under the necessity of withdrawing entirely from the case because you have received confidential information from both. Obviously, this is a situation as to which a lawyer must be constantly vigilant. Even the most remote possibility of such a conflict should prevent a lawyer from accepting employment from two parties interested in a single transaction or controversy, or from permitting opposing parties in a contract or transaction to feel that he is looking after the interest of both. The divided loyalty to court and client poses enough difficulties without further subdividing the loyalty to the client.

There is one conflict of interest situation involving the legal profession which currently is presenting problems in far too many localities. Involving as it does the professional responsibility of members of the legal profession, it should be, and is, a source of concern to the entire profession. It involves the lawyer who is elected to his state legislature.

In performing that service, inevitably at a substantial personal sacrifice, the lawyer is rendering a public service for which he is peculiarly well qualified. As a member of the legislature he can contribute to law reform, a special responsibility of the legal profession,
more effectively than in any other public capacity. He is to be highly commended for this discharge of professional responsibility. But he is to be commended only so long as he discharges that responsibility in the public interest. True, the question of where the public interest lies is one on which there are always differences of opinion among legislators, as among citizens; but it is the lawyer’s determination of that question, made as an independent professional man specially qualified in this field, which the public seeks and is entitled to have.

Inevitably, however, the legislature is going to consider proposed legislation affecting clients represented by the lawyer-legislator. Some of them will be regular clients of his office. He may have accepted an annual retainer from others. While accepting a retainer in no sense involves a surrender of independence of either thought or action on the part of a lawyer, it is not realistic to say that he has the same freedom of choice on matters affecting the client that would exist in the absence of such an arrangement. Regardless of the subjective effect upon him and his vote as a legislator, it is certain that the public would never believe—nor could it be expected to believe—that his vote would not be affected by his relationship with his client. A lawyer voting as a legislator on matters affecting the interests of a retained client invites justified criticism, if not distrust, not only of the lawyer but of the legal profession itself. In this situation it seems quite clear that the lawyer-legislator should abstain from voting on the measures affecting his client and publicly state his reason for so doing.

When the legislation involves a regular client of the legislator, it is my view that unless the relationship is the substantial equivalent of a retainer, the legislator is not disqualified from voting but owes to his brother legislators and the public a disclosure of the relationship at the time the matter is under consideration.

I regret to say that the view I have expressed is not concurred in by all lawyer-legislators, and that the resulting problems are questions of public concern in a number of states. In some it has resulted in the introduction of legislation seeking to end the abuse. I am glad to be able to say that in at least one state the legislation was prepared and sponsored by the state bar association. Certainly in this situation the legal profession as a whole suffers far more from the loss of confidence on the part of the public than do the individuals responsible. It, therefore, is not only appropriate, but necessary, that the organized Bar should take the lead in finding a solution for the problem.

The position of the profession on the question is clearly indicated by an opinion of the Committee on Professional Ethics of the American Bar Association filed last year. The question submitted was:
"May a law firm accept employment to appear before legislative committees while a member of the firm is serving in the legislature, if a full disclosure is made of the representation involved and of the fact that a member is a legislator, and if the member serving in the legislature does not share in any fees received for the service?"

The committee unanimously answered the question in the negative,\textsuperscript{29} predicated its opinion on the fact that the legislator-public relationship and attorney-client relationship are inherently antagonistic in this situation, and that no question of consent could be involved, as the public is concerned and it cannot consent.

The problem which we have been considering seems to me to be one of the most serious facing the profession today in the professional responsibility area. Where it has arisen, the impact upon public confidence in the profession has been most unfortunate. Because the nuances of the problem pose delicate questions of ethics and conscience peculiar to the legal profession, press and editorial writers have tended to magnify it.

I would not want to close my discussion of the problem involving the lawyer-legislator without recognizing the fact that the standard I have suggested for lawyers is higher than that required of other legislators. True, the merchant in the legislature does not abstain from voting on a proposed increase in the sales tax; the wholesaler does not abstain on fair trade legislation; nor does the doctor abstain when legislation governing naturopaths is under consideration. The difference, of course, is that the lawyer is not protecting his personal interest, but rather the interest of one who, so far as the public is concerned, has purchased his protection. In our society, based upon the sanctity and protection of the individual, we accept self-protection as the first law of nature and extend the law of nature to include the laws of man if they adversely affect the individual involved.

Over and above that consideration, however, the obligation of the lawyer is clear without regard to what the standards of conduct of other legislators may be. Early in this article I referred to the fact that the obligation assumed by a lawyer on entering the profession required a higher standard of conduct than that of any other profession. Implicit in that is the fact that it is higher than the standards of the public generally. That other members of the legislature are not required to conform to standards comparable to those which I have sug-

\textsuperscript{29}A.B.A. Committee on Professional Ethics, Opinion No. 296, 45 A.B.A.J. 1272 (1959).
gested for the lawyer-legislator is "irrelevant, immaterial and incompetent."

The Statement on Professional Responsibility epitomizes this situation when it says:30

"Special fiduciary obligations are also incumbent on the lawyer who becomes a representative in the Legislative Branch of government, especially where he continues his private practice after assuming public office. Such a lawyer must be able to envisage the moral disaster that may result from a confusion of his role as legislator and his role as the representative of private clients. The fact that one in his position is sometimes faced with delicate issues difficult of resolution should not cause the lawyer to forget that a failure to face honestly and courageously the moral issues presented by his position may forfeit his integrity both as lawyer and as legislator and pervert the very meaning of representative government."

This discussion could be extended indefinitely were we to consider all aspects of the practice of law which give rise to daily problems of conscience in the discharge of the professional responsibilities of the practicing lawyer. Both the number and the character of such problems support my premise that the legal profession presupposes a greater moral awareness and involves more problems of conscience than any other.

In finding a solution consonant with his obligation, the Canons of Professional Ethics and the Oath of Admission offer ever present assistance. Perhaps the best testimonial in this regard is the fact that various specialties are preparing their own codes of conduct emphasizing the portions of the canons particularly applicable to them. Examples of this trend are the Code of Trial Conduct adopted by the American College of Trial Lawyers,31 and the proposed Code of Military Trial Conduct for Military Lawyers.32 In the preamble of each the statement is made that the intent is not "to supplant the Canons of Professional Ethics but to supplement and stress certain standards of conduct contained in the Canons."

There is another important aspect of professional responsibility which frequently presents difficulty in its discharge to both the practitioner and the profession itself. It is the obligation of the profession

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to provide the benefit of counsel to all persons charged with crime, regardless of how unpopular they or their cause may be, or how heinous the crimes with which they are charged.

Interestingly enough, it is a problem which does not exist in England, where, since the prosecution of Tom Paine in 1792, a barrister has been obligated to accept a brief on behalf of any client who wishes to retain him to appear before any court in which the barrister holds himself out to practice.

The oath which we take on admission to the Bar commits us never to reject for any personal consideration the cause of the defenseless or oppressed. It is not conditioned that he who is defenseless must be innocent in our opinion or must be an individual of whose views or conduct we approve.

The discharge of this responsibility may be one of the most difficult tests of his "resolution" with which a lawyer can be faced. In times of great public clamor or hysteria, it is the person who is most unpopular and with whom we are least in sympathy in whose behalf this duty must be performed. Certainly, however, we have in John Adams' defense of the British soldiers tried for the Boston massacre an inspiring example of the discharge of this high professional duty under conditions more difficult than any which we may be called upon to undergo.

Unfortunately, the public generally has never understood the obligation of the Bar to provide counsel for all defendants, including the most unpopular ones. Almost invariably a large segment of the public ascribes to the counsel defending such person either sympathy for him in the crime which he apparently has committed or approval of his views if they are the basis for the public animosity. That this situation exists is the responsibility of the legal profession itself to a very large extent. We have failed to educate the public as to the considerations which require that counsel be available to every person charged with crime, if our system of the administration of justice and our very form of government itself are to survive. Because that is true, the lawyer performing that service, whether the defendant is charged with a Smith Act prosecution or has been indicted for a horrible murder which has aroused a community, is performing one of the highest duties of the legal profession. He is entitled to the appreciation and public support of all members of the profession.

Because of the public misunderstanding which frequently attends such representation and the resultant damage that the lawyer performing this high professional responsibility will suffer in his com-
munity or his practice, it has become customary for counsel in such cases to be assigned either by the court or the Bar association. It is sought thereby to emphasize to the public that the defense counsel is acting solely in the discharge of a professional duty. Experience has demonstrated that in spite of this practice, public opinion frequently penalizes the lawyer in that situation. There are few subjects related to the law as to which the public is in greater need of education—education which must be provided by the legal profession.

The action of the Bar of a number of major cities of the United States in providing counsel for defendants in Smith Act cases in recent years has been a source of pride to the legal profession and an exemplary discharge of this vital professional responsibility. As the country passes from an era of anti-communist hysteria to an apparent era of anti-integration hysteria, new problems are developing which undoubtedly will test once more the resolution of the Bar in the discharge of this professional responsibility.

The position and the obligation of the Bar of the United States were clearly stated in a resolution adopted by the House of Delegates of the American Bar Association in 1953 which “RESOLVED.”\(^\text{33}\)

\textbf{1. That the American Bar Association reaffirms the principles that the right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid, even to the most unpopular defendants, involves public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the legal profession, any client without being penalized by having imputed to him his client's reputation, views or character.}

\textbf{2. That the Association will support any lawyer against criticism or attack in connection with such representation, when, in its judgment, he has behaved in accordance with the standards of the Bar.}

\textbf{3. That the Association will continue to educate the profession and the public on the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause.”}

In my discussion of the professional responsibilities of lawyers, I have referred principally to obligations relating to ethical concepts and conduct. But these are not the only obligations which we encompass in that term. They are the most obvious and most elemental of those responsibilities. On another occasion I have suggested that the scope of a lawyer's professional responsibilities begins with compliance with the obligations of the oath and canons and extends to the performance

\textsuperscript{33} A.B.A. Rep. 133 (1953).
in a spirit of public service of all functions affecting the public interest for which lawyers are especially qualified by their training and experience. A representative of another profession has shortened the definition considerably to, "Professional responsibility means doing a good job in the public interest." To a marked degree, the "crescendo of hortatory material" has emphasized the public aspects of professional responsibility and the contributions to society which the lawyer is prepared to make.

When we examine the performance of lawyers in the cities, towns and villages of the United States, we are led to conclude that their record in the discharge of the public aspects of professional responsibility is outstanding. From the school boards, city councils and United Fund Drives of our communities to the state legislatures and the Congress of the United States, the percentage of lawyers in positions of public responsibility far exceeds any other group in society.

Two of the educators who have devoted the most thought to the professional responsibilities of lawyers equate the aspect which we are now discussing to public leadership by members of the Bar. One of three duties assigned to the lawyer by society which is recognized by Cheatham is "leadership in the orderly running and development of society." Matthews states categorically, "Leadership is an integral function of membership in the legal profession. It is as much a part of being a lawyer as is appearance in court, office consultation and representation in negotiation."

A distinguished political scientist, in an analysis of the political behavior of this country, finds the lawyer as "the one indispensable adviser of every responsible policy maker of our society," whom he describes both in and out of government as "in an unassailable strategic position to influence, if not create, policy...." He concludes that "for better or worse, our decision-makers and our lawyers are bound together in relation of dependence or identity."

Finally, I have read in a study to evaluate the importance of the groups which influence American thought and fix American thought

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36Cheatham, The Lawyer's Role and Surroundings, 25 Rocky Mt. L. Rev. 405 (1953).
patterns that lawyers have a factor of fifty-seven as against seventeen for the next nearest group in society.\(^9\)

When contemporary society in the United States entrusts public leadership to a single profession to such a great extent; when its confidence in individual members of the profession is demonstrated by permitting them to influence both public and private policy to the degree described by Lasswell; when public thought and opinion reflects the impact of that profession's leadership to an extent three times greater than any other; and when that profession is the custodian of the keystone of our governmental arch—our judicial system, is not that profession in a fiduciary relationship to the public? And if such a relationship does in fact exist, are there not special duties owed by the profession which apply only to this profession as a fiduciary?

I believe that the answer to both questions must be in the affirmative; that the fiduciary duties which arise from the relationship of the legal profession to society in this country are unique, and that the discharge of the professional responsibilities of the profession constitutes the performance of these fiduciary duties.

If that is true, education for professional responsibility becomes the *sine qua non* of legal education and the extent of the recognition, appreciation and discharge of his professional responsibilities becomes a primary standard by which the career of every lawyer is to be judged.