

Louisiana Law Review

Volume 17 | Number 3

Golden Anniversary Celebration of the Law School

April 1957

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Repository Citation

M. T. Van Hecke, *Education for Professional Responsibility*, 17 La. L. Rev. (1957)

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Education for Professional Responsibility

M. T. Van Hecke

I am proud to tender the congratulations of the Association of American Law Schools to the Louisiana State University Law School upon your achievements over the last fifty years. Your sister schools honor you particularly for contributions unique in legal education: the preservation of the civil law heritage of Louisiana, while adjusting it to the needs of today's economy, and the creative, systematic lawmaking of the Louisiana Law Institute. May the years ahead witness the continued development of your dedicated service to the law and the life of America.

As we begin to think of Education for Professional Responsibility, let us turn to the words of Harlan Fiske Stone, uttered in 1934 at the University of Michigan, in an address on "The Public Influence of the Bar":¹ "[W]e cannot expect the Bar to function as it did in other days and under other conditions. Before it can function at all as the guardian of public interests committed to its care, there must be appraisal and comprehension of the new conditions and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. . . .

"From the beginning the law schools have steadily raised their intellectual standards. . . . But there is grave danger to the public if this proficiency be directed wholly to private ends without thought of the social consequences, and 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. . . . 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."

No less disturbing is the criticism of Willard Hurst of the University of Wisconsin, in his discerning book of 1950 on "The

1. 48 HARV. L. REV. 1, 10, 13-14.

Growth of American Law":² "In any case the concept of a profession has included the recognition of obligations owed to the society, above and beyond the personal advancement of its practitioners. . . . Yet the stated ethical principles of the legal profession lacked breadth and penetration; particularly were they inadequate before the challenge of the urban, industrial United States that grew after 1870. . . .

"Sharswood's little book, *The Canons of Professional Ethics*, adopted by the American Bar Association in 1908, and the principal additions to the Canons in 1928, authoritatively spoke the articulate conscience of the profession in the nineteenth and early twentieth centuries. In emphasis, in relative detail, in the proportionate attention given to various topics, they expressed a conscience which at its best was directed to the honorable relations between individuals, and which took little concern for the lawyer's role in his community. They paid relatively brief, and very general, respects to the lawyer's obligation to maintain 'the law.' They reserved their most full and specific directions for the guidance of the lawyer in his relation to his client, and to his fellow lawyers. . . .

"Their next most striking emphasis was the overwhelming extent to which they focused on situations arising out of litigation. Most of the problems they envisaged directly related to the conduct of a lawsuit, or to steps likely to lead to suit. Litigation held a decreasing . . . position in lawyers' business, compared with matters of office counselling and compared with lawyers' relations to legislative, executive and administrative bodies. Despite this shift in the direction of law practice, the formal thinking of the profession about its ethical problems clung to the early nineteenth-century stereotype of the lawyer as advocate. It had little to say — and that in the most uninformative generalities — about the main currents of law practice as these took direction after 1870."

When we look at the picture of Education for Professional Responsibility today, we find that, despite a considerable number of courses and seminars on Legal Ethics and the Legal Profession, Dean Harno felt compelled to say, in his 1953 report on "Legal Education in the United States,"³ that "the question as to how the law schools are to deal with the subject of legal ethics

2. Pages 329-31.

3. Pages 194-95.

and the inculcation of professional standards and ideals in their students is still in a fluid and unsolved state." And Father Tinnelly, of St. John's University, in an appreciative review⁴ of a new edition of the outstanding casebook on "The Legal Profession," sadly remarked in September of this year: "In justice to Professor Cheatham, it must be pointed out that with few exceptions, American law schools and law teachers have not yet come to grips with the problem which is basic to training for professional responsibility."

Nevertheless, there are three current developments that give cause for hope.

One is the undertaking by the American Bar Foundation of a revision of the Canons of Ethics. This was initiated last May, upon the recommendation of a committee headed by Judge Philbrick McCoy of Los Angeles, who with Judge Orrie L. Phillips of Denver wrote the 1952 report on the "Conduct of Lawyers and Judges." "The goal of the study," said the Committee report,⁵ "would be a statement of the standards for lawyers and judges under present conditions of practice . . . in attaining the long range purpose, the Bar should meet the objections of such critics as Hurst and Stone." Accordingly, the study will deal with the ethical problems created by the growth of new fields of practice and by new developments in established fields, brought on by the changes in our economy during the last fifty years. These are outlined in the Committee report as follows:

"During this period there has taken place the development of a predominantly urban, complex industrial economy with closely related, mutually dependent business units and labor unions. Changes brought about by these developments, scientific advances, two world wars and the coincident increase in the taxing and regulative activity of local, state and federal governments strongly affect the work lawyers do for individual and corporate clients, labor unions and trade associations.

"Several of the important branches of modern law practice, such as taxation, transportation law, regulation of business, security transactions, workmen's compensation, administrative law and labor law, have appeared on the scene since 1908, and come to their full growth after 1928 — the times at which most of the Canons were adopted.

4. 9 J. LEGAL ED. 140, 143.

5. Release of July, 1956.

"Generally speaking, the growth in complexity of our economy has had the tendency to develop in addition to the trial lawyer, the office lawyer who works as a member of a highly organized firm or in the legal department of a corporation or government agency.

"The shift in activity of a large segment of the Bar from advocacy to counselling and business planning is one of the trends which has been widely commented upon. A companion trend, also widely noted, is the development of specialization in the profession. . . .

"Many new types of tribunals have been created which depend largely upon the work of the lawyer as advocate. The growth and development of administrative agencies has occurred during this period, giving rise to a continuing debate over the proper role of the lawyer in the administrative process. Similarly, arbitration hearings and collective bargaining negotiations present lawyers with new tribunals to which they have adapted themselves. And with the voluminous increase of statutory law and government regulation, advocacy before legislative bodies has become a more important phase of lawyers' work."

It is in these areas that the American Bar Foundation regards the present Canons of Legal Ethics as inadequate and as requiring new standards of professional responsibility.

A second cause for hope is the Joint Conference on Professional Responsibility, established in 1952 by the American Bar Association and the Association of American Law Schools, under the direction of Lon Fuller of Harvard Law School. The conferees started out with a program for introducing more about professional responsibility into legal education. After some discussion of the problems involved in that undertaking, they arrived at the conclusion that they could only tackle the problem of teaching professional responsibility after they had clarified their own minds as to what professional responsibility implies — they could not *teach* it until they knew what it *was*. Hence they decided that they would start with a Statement of Professional Responsibility. This Statement is now in a fourth revised draft. It is hoped that it can be finally revised and adopted by the Joint Conference this winter, so that it can be published simultaneously in the Journal of Legal Education and the American Bar Association Journal, during 1957. A brief summary of some of the

major emphases in the Statement, as presently developed, might perhaps read as follows:

The lawyer's role as an advocate in open court is not a regrettable necessity, it is a service indispensable to the administration of justice. The presentation of a case from two competing points of view lends a perspective essential for a wise disposition. More important, partisan advocacy in behalf of the interested parties is essential to the integrity of an adjudicative process if it is to be carried on by disinterested tribunals. If the deciding tribunal were itself compelled to develop the facts and the arguments, it would tend to defend the results of its investigations and to resist criticisms of them. Thus, partisan advocacy is a form of public service when it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts, and obfuscates.

The lawyer's role as counsellor is quite different from his role as advocate. Corresponding to this difference in the function performed, there is a difference in the appropriate standards of professional responsibility. A partisan attempt to resolve all doubts in one direction becomes inappropriate when the lawyer acts as counsellor. The reasons that justify and even require partisan advocacy in the trial of a cause do not license the lawyer to participate as advisor in conduct that is illegal or improper. Moreover, as advisor, the lawyer must preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do. By reminding him of its long-run costs, the lawyer as counsellor often deters his client from a course of action technically permissible under existing law, but in conflict with its underlying spirit and purpose.

As mediator, negotiator, or draftsman among opposing interests, the lawyer frequently functions as the architect of the framework of collaborative effort. Thus, in forming corporations, associations, partnerships, clubs and churches, long-term commercial contracts and collective bargaining contracts, and leases and estate plans, the lawyer serves as the creator of a private government for the regulation of the parties' own relations. It is important that the framework of collaboration thus designed operate in such a way that disputes will not arise, or if they do, that they be handled internally, as by arbitration. Here again,

the good lawyer does not serve merely as a conduit for his client's desires, but as objective engineer, effectively devising arrangements that will put in workable order the tangled affairs of men. He advances the public interest when he facilitates the processes of voluntary self government; he works against the public interest when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger program in which he is engaged.

It is as a guardian of due process that the lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. It is the lawyer's duty to preserve the integrity of those fundamental processes of government upon which the successful functioning of our society depends. Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding cooperation in the maintenance of these fundamental processes. It is the lawyer's duty to preserve and advance this indispensable cooperation by keeping alive the willingness to engage in it and by imparting the understanding that will give it direction and effectiveness. This is a duty that attaches to his private practice as well as to his relation with the public. He has an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process. It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, and what a ruinous cost is incurred when its requirements are disregarded.

From the point of view of legal education, perhaps the most significant of the three current developments that give cause for hope is the project of the Special Committee of the Association of American Law Schools on Education for Professional Responsibility, under the leadership of Robert E. Mathews, of Ohio State University. Beginning as a proposal in his presidential address to the Association in 1951 at Denver, this became an Association committee project in 1955 for the training of law students in the understanding and application of the values basic to a free society.

Last August, with the assistance of the Ford Foundation, the Committee held an eight-day conference at the University of Colorado on the curricular and pedagogical factors implicit in this problem. More than a score of people participated, includ-

ing Elliott Cheatham of Columbia, Lon Fuller of Harvard, Edward C. King of Colorado, Frank Newman of California, Julius Stone of Sydney, Australia, Father Tinnelly of St. Johns, Jerre Williams of Texas, William Jameson of Billings, Montana, a former President of the American Bar Association; Peter Holme of the Denver Bar, a member of the ABA Council on Legal Education; and John Hervey of Oklahoma, the Adviser to the Council.

The principal items on the agenda were: The values basic to a free society; the function of the legal profession in respect to their protection; and the relation of legal education to these values and to this function, including training processes.

A verbatim transcript of the proceedings was made and a book based thereon will be published next year. This will be a distillation of the imaginative, critical, and exploratory discussions at the conference, arranged by topics. Meanwhile, the Committee will report to the Association in December, in part, as follows:

“Space permits only the briefest summation here of the views expressed: The lawyer was thought of as the ‘trustee of the integrity of the forms of social order,’ with the function of creating, administering and strengthening them. His consequent responsibility should be grounded in a coherent ethical system, and it is both the opportunity and burden of legal education to provide this system and to communicate a perception of the values on which it rests. Three emphases emerged as to the scope and curricular application of this responsibility: (1) on the lawyer’s place in law reform, particularly the legislative process, (2) on an understanding of the importance of human dignity and personality in society and of the responsiveness of institutions to this basic value, (3) on the responsible handling of the daily activities of lawyers in the practice of law and the far-reaching implications of their conduct in the apparently ‘small’ matters of professional routine. Whichever emphasis is preferred, the law schools have the obligation to educate in professional effectiveness, social usefulness and individual completeness.

“As to mode of educational approach, there was general accord that thoughtful indirection is more effective than directness, and that a proper desire to plan and develop special courses, with concentrated emphasis upon specific values, must not foreclose a planned introduction of ethical considerations into conventional

courses, — a method that one participant happily described as the 'pervasive' approach. A large variety of illustrative subject matter suitable for both approaches was explored: the conventional course in legal profession (ethics), jurisprudence, equity, practice courses, legal aid, negotiation, readings in biography and history, the practical study (preferably interdisciplinary) of community problems, and the introduction of materials calculated to bring out the obligation and significance of the lawyer's active participation in community life, including a function as purveyor of values basic to American democracy. There was general agreement that any of these approaches must be directed toward education of lawyers for times that might be thought of as 'normal' as contrasted with times of crisis when the choice of conduct is emotionally dramatized. Moreover, it was agreed that all approaches to the methods for development of a sense of public responsibility must as yet be tentative and experimental only.

"We believe it of importance that competent faculty members who are desirous of exploring or adapting new methods of approach to these tasks be invited and encouraged to engage in a period of active experimentation, choosing for this purpose such emphasis and method as seem to them most promising and appropriate. Our discussions lead us to expect that these experiments will embrace activities within the law school and also in various forms of contact with the problems of practitioners and with legislative, administrative, judicial and other public problems, with the object of fostering a moving sense of participation in efforts to solve these problems."

Through such experimentation and growth it is hoped that the law schools may enable their students to become aware of the moral issues involving the public interest and to perceive the values vital to the community in their own conduct as lawyers. Perhaps then, after the American Bar Foundation has invigorated the Canons of Ethics and after the Joint Conference has made dynamic the implications of professional responsibility, the law schools may accept the challenge of Chief Justice Stone.