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Public Responsibilities Of The Learned Professions

John W. Wade*

In treating the subject, Public Responsibilities of the Learned Professions, I do not expect to offer any startling new ideas. As Samuel Johnson expressed it, we need oftener to be reminded than to be informed. I shall probably repeat some cliches, but I hope you will listen to them and see if they do not have new meaning for you in this context. At the conclusion, I shall be happy if you feel like saying to yourself, "That's just about what I have thought all along, even if I haven't put it in express words."

Let me plan to take a few moments first to consider the nature of the learned professions before treating the responsibilities of their members under three separate subdivisions.

I

What do we mean when we speak of the learned professions? Ordinarily, we think we are referring to certain common callings of a traditionally dignified character. We think of law, medicine, the ministry and teaching. The concept of learned professions developed during the Middle Ages. It came in with the rise of the universities. They had a faculty of arts, and a faculty of theology, law and medicine. Teachers, church officials, lawyers, and physicians received prolonged formal training, and after they had completed this training they constituted a class apart. Since that time, there has been a consistent viewpoint that training is necessary to admission to a learned profession, and that the professions are based on an intellectual technique. Sometimes this training is prescribed by the state. The state licenses the admission to the particular learned professions — all, that is, except ministers, for reasons which are obvious. The control of the state, however, in large measure makes use of the facilities of universities and colleges. State licensing has come about gradually through standards set up by professional organizations.¹

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1. See, in general, Carr-Sanders and Wilson, *Professions*, in 12 ENCYC. SOC. SCI. 476 (1934).

This suggests a second attribute of the learned professions: organization. In the beginning these organizations or associations were like guilds. Now, they have a broader function. Lawyers and doctors, and to some extent, teachers, have through their associations set up codes of ethics — codes that are taught by precept and example and made effective by the discipline of an organized profession. To some extent these associations have engaged in protective activities. But this should be a secondary objective. The organizations exist primarily for the advancement of medicine, justice or teaching, not of the individual members, as in the case of trade unions.

The third attribute of a learned profession is that its numbers are dedicated to a spirit of public service. Gaining a livelihood is incidental. A professional man offers a certain service and he confers the same diligence and quality of service whether he is paid or not. The lawyer or doctor does not patent his discoveries or exploit them for his own personal use, but makes them known to the profession and to the public in general. He practices preventive medicine and law. He does not advertise or compete for customers. He does not seek to create a demand for his services in the fashion that the businessman does.

To summarize, I quote the definition of Dean Roscoe Pound. A profession is "a group of men pursuing a learned art . . . in the spirit of a public service."²

Now, in treating the public responsibilities of a member of the learned profession, I think we can consider his relationship (1) to his clientele, (2) to his profession, and (3) to the public in general.

II

First, we must consider the responsibilities owed to the clientele. The word clientele is a broad, general one. There are specific terms which are used in connection with each of the professions: lawyer-client, physician-patient, teacher-pupil, and minister-church member. Note that there is always a relationship. It is usually contractual, almost a status. The parties to this relationship are not dealing with each other at arm's length. There is a relationship of trust and confidence. This is not just a factual relationship; it is imposed as a matter of law, creating fiduciary obligations. To say this in Latin as members of the

2. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953); see STOREY, *PROFESSIONAL LEADERSHIP* 3-9 (1958).

learned profession at one time were inclined to do, *uberrima fides* is required. The professional man is not liable only for outright fraud; his position gives him an opportunity for domination and undue influence, and he is liable for the exercise of these in an improper fashion. He must be frank and open in his dealings with his client. He cannot have any interests of his own, cannot be in a position involving a conflict of interests. If he makes personal gain through any improper interest, he holds it in trust for the benefit of his client.

This involves active misconduct. What about the quality of his service? What professional competency, what standard of performance is required? Here I must talk more about doctors and lawyers; there are few, if any, actions against ministers or teachers for negligence. The doctors and lawyers hold themselves out as being qualified to practice law or medicine and they are held to that standard — to the exercise of the care, skill, and learning of the normal member of the profession. Note that this is not the average member, as that would mean literally that half of the members cannot attain the standard. The question as to whether there is a violation of this duty to use care is usually treated as one of fact for the jury to determine. But in the case of doctors, at least, the courts require expert testimony of other doctors. Here the doctors themselves set the standard of care and the jury cannot change it. This, incidentally, is not a practice followed in connection with any other profession or business. Actions for professional negligence — for malpractice, as they are sometimes called — may prove so damaging to the reputation of the defendant that the courts make an important exception in imposing liability. They hold that there is no liability for an “error of judgment.” On the other hand, the particular professional man must do his own best, and if he is a specialist and has unusual skill or learning he must make use of it.³

These are the legal responsibilities. Something more needs to be said here. Perhaps it is suggested by the phrase, “family doctor” or “family lawyer.” With the increasing pace of modern times, lack of time, and specialization, impersonality and business methods have set in. Practice becomes more like a business; the understanding and tact and sympathy and patience and considerateness which formerly existed are often missing. These

3. See ROADY AND ANDERSEN (EDS.), *PROFESSIONAL NEGLIGENCE* (1960), particularly the articles on doctors and lawyers, McCoird, *The Care Required of Medical Practitioners*, p. 13, and Wade, *The Attorney's Liability for Negligence*, p. 217. See also EDDY, *PROFESSIONAL NEGLIGENCE* (1955).

qualities, too, a doctor or lawyer owes to his patient or client. This is a part of the relationship which he must supply, and if he does not supply it, he may pay for it. Malpractice suits are increasing in frequency. They have created the most difficulty in California, and a detailed study by the Medical Association there has indicated that it is possible to pick with considerable accuracy the type of doctor (and, incidentally, the type of plaintiff) who is likely to be involved in a negligence suit. The typical doctor-defendant is the business-like type, impersonal, brisk, somewhat tactless, perhaps a little arrogant. If anything goes wrong in his treatment, his patient, then, is likely to decide that he was at fault.⁴ The implications of this should be clear without further elaboration.

It may appear strange that I have spoken in detail of the duties owed to private clients in discussing public responsibilities. The reason is aptly stated in the Report of the Joint Conference on Professional Responsibility. I quote the summarization:

“Private practice is a form of public service when it is conducted with an appreciation of, and a respect for, the larger framework of government of which it forms a part, including under the term government . . . voluntary forms of self-regulation. . . . This reflection should not induce a sense of complacency in the lawyer, nor lead him to disparage those forms of public service that fall outside the normal practice of law. On the contrary, a proper sense of the significance of his role as the representative of private clients will almost inevitably lead the lawyer into broader fields of public service.”⁵

III

Let me now speak of the responsibilities owed to the profession. All true professional men recognize that they owe a duty to their profession. It is their responsibility to seek to improve it. In my own profession, law, we recognize that there is a continuing duty to seek to improve the administration of justice, to better the procedural rules and the substantive rules, to find

4. See Silverman, *Medicine's Legal Nightmare*. SATURDAY EVENING POST, April 25, 1959, p. 38.

5. *Report of the Joint Conference on Professional Responsibility of the Association of American Law Schools and American Bar Association*, 44 A.B.A.J. 1159, 1162 (1958).

means to eliminate delay in court, to find better means of selecting judges, of improving the legislative process.

With the professions in general there is a duty to engage in research, to write articles and treatises. There is a duty to continue the education which was started in the university;⁶ the investment by the university and those who have supported it can be justified only if we continue our self-education on a level which compares favorably with our formal instruction. We have a particular duty to promote continuing professional education and to attend institutes and symposia, and not just those which are bread-and-butter ones, but also those which are more cultural in nature.

There is a duty to know and to comply with the codes of ethics and to realize the problems that are involved. There is the more difficult duty of seeking to enforce the ethical codes with other members of the profession. This is a responsibility we too often ignore and yet it is so important that it could be the sole topic of this talk and still justify the title.

Somewhat related here is the responsibility which arises when a client or a patient seeks to bring a negligence action against a lawyer or a doctor. Many of these actions may be unjustified, and a lawyer owes the duty to his own profession and his fellow profession of investigating carefully before taking the suit. But some are justified. A lawyer distinctly owes the duty to take a case if he concludes it is justified. And the doctor should be available to testify as a witness for a plaintiff. A so-called "conspiracy of silence" in some areas has done much to impair relations between the professions and the position of the professions in the public mind.

The professional man should be ready to provide services to the poor without insisting on a fee. We afford justice, health, education, and spiritual well-being to all of our people. None of these can be rationed, or made available only to those who can pay for them. We should also be ready to take the lead in making it possible for an impecunious youth to become a member of the profession. Scholarships for study are vitally needed.⁷

6. Cf. Gerhart, *The Lawyer as a Member of a Learned Profession*, 33 TEMPLE L.Q. 10 (1959).

7. On duty to the profession in general see Seymour, *Horizons for Young Lawyers Today*, 16 WASH. & LEE L. REV. 141 (1959); MALONE, *THE LAWYER AND HIS PROFESSIONAL RESPONSIBILITIES*, 17 WASH. & LEE L. REV. 191 (1960).

IV

Let me now consider the responsibilities owed to society, to the public in general. I can start this by stating an obvious truth. The members of the learned professions owe the duties which are common to those owed by citizens as a whole.

One of those duties is to vote. Who is better qualified than a member of the learned professions, but how many do vote? Do you vote regularly? Do you study the candidates and issues and make up your own mind? Or are you too busy?

Another is to pay taxes. There is nothing unusual about that. Yet the temptation to evade income taxes is particularly great with certain professional men who are paid in cash in small amounts. You appreciate the implication here and you know how often some of our members succumb to the temptation.

Another is jury service. Once again, who would be better qualified to serve? Do we members of the learned professions serve? No, instead we bring pressure to bear to pass laws giving us exemption from service.

Another is participation in community activities, such as the Community Chest, the Chamber of Commerce, service clubs, school boards, city councils and so forth. Here we show a better record, but even here the record can be improved. Many of us become engrossed in our practice — I almost said our business — and pay no attention to outside needs.

There is another responsibility, more or less peculiar to the members of the learned professions, or at least imposed upon them with greater force. This I should like to dwell upon at more length. It is the duty to supply intelligent, unselfish leadership⁸ to the forming of public opinion, and the determination of important issues. Democracy requires leaders, not in the authoritarian sense of having the power to command, but in the sense of being able to persuade others to follow.

De Tocqueville, in his remarkably prescient analysis of *Democracy in America* a century and a quarter ago, declared that lawyers and the influence they exerted were "the most powerful existing security against the excesses of democracy," supplying the sobriety and stability which every good society requires.⁹ He

8. The language is taken from Vanderbilt, *The Five Functions of the Lawyer*, 40 A.B.A.J. 31, 32 (1954).

9. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272, 272-80 (1945 ed.); see McCloy, *The Lawyer as a Citizen*, 32 CONN. B.J. 319, 326 (1958); Curtis, *The*

might accurately have broadened this to include the other three learned professions. De Tocqueville suggested that they were the aristocracy of the democracy.

The application here of the concept "noblesse oblige" is obvious. In the case of the original aristocracy, it was their authority which placed upon them the duty to wield it in the general interest, rather than solely in their own interest. In the case of a member of a learned profession, it is his ability, his training, and his talents which place on him an obligation to be conscientious. In a sense, we owe a fiduciary obligation to our society in general and to our governmental processes in particular. "Every one to whom much is given, of him will much be required; and of him to whom men commit much they will demand the more."¹⁰

As a committee from the American Medical Association put it, "Doctors, ignorant of history and the problems of society can (despite high professional skills) do more harm than other persons precisely because of their relations to their patients and the way they are regarded in the community." In other words, responsibility in the sense of the duty to perform well flows from responsibility in the sense of the actual power to make or influence decisions.¹¹

Or to use another quotation, approaching the matter from another angle, a professional man "is not entitled to take public opinion as a directive; he has rather an affirmative duty to help to mold public attitudes toward fair procedures and due process. It is only by this approach that we can arrest the tendency for practice to drift downward to the level of those who have the least understanding of the issues at stake."¹²

Finally, one more, "Our complex and far-flung democracy is a democracy of men who work. Unlike the democracies of the past, it has no leisure class which is its governing class. If its imperiled freedom is to survive, its keenest and most disciplined minds — and by and large this means its professional men — must devote their moral energies and intellectual powers to becoming leaders in solving its problems."¹³

Duty of the American Scholar, in 1 ORATIONS AND ADDRESSES OF GEORGE WILLIAM CURTIS 3, 8, 14 (1894).

10. Luke 12:48.

11. Quoted, with the comment, in STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY 29 (1959).

12. *Id.* at 19.

13. Smith, *The Education of Professional Students for Citizenship, in EDUCATION FOR PROFESSIONAL RESPONSIBILITY* 188 (1948).

These quotations have much of significance. I wish there were time to stop for a few moments of silence to let you contemplate their substance and their meaning to you.

If we as members of the learned professions do have a responsibility to afford leadership in forming public opinion — constructive leadership — there are certain duties which accompany that responsibility. These are duties which we cannot delegate because of our busy lives. They can, of course, be evaded, and unlike the duty to our clients, it is easy for us to evade them.

The first of these duties is to be thoroughly aware of particular issues at various governmental levels — to seek to learn the facts and factors involved in them in a careful, skeptical fashion. The second is to make wise decisions regarding these issues. What do the members of the learned professions do about these two duties? What do you do?

Do you take time to peruse regularly several news media? Have you sought to evaluate the accuracy of each particular medium, its leanings, its tendency to color?

Have you sought to identify your own prejudices and biases and to discount them as if they belonged to someone else when you reach a decision? Do you discount in the same way your own self-interests and those of your clients?

Are you open-minded, careful to consider both sides of an issue, and even after reaching a decision, are you still ready to reassess its validity? Let me remind you of Oliver Cromwell's statement to the Scots just before the battle of Dunbar. "I beseech ye in the bowels of Christ, bethink ye that ye may be mistaken." Judge Learned Hand, our greatest living judge, says that Cromwell's statement should be "written over the portals of every church, every school, and courthouse and . . . every legislative body in the United States."¹⁴

Do you let slogans substitute for real thought, especially if they are emotion-tinged? Let me illustrate what I mean. We in the learned professions have certain attributes which should be our virtues. We use our intelligence and learning and we try to render service. But there are two phrases which make some of us cringe in shame: "eggheads" and "do-gooders." Does ridicule of what we stand for make us ashamed of ourselves? Are we really ashamed of learning? Do we want to be do-no-gooders?

14. HAND, *THE SPIRIT OF LIBERTY* 174 (Vintage ed. 1959).

Or evildoers? Some other slogans: "socialized medicine"; it has a lot of meaning, but is often used as an epithet, a substitution for thought. Similarly, "states rights." Consider "demagoguery" or "brain-washing," spoken of any persuasive argument. Contrast "featherbedding" and "academic tenure."

Are you receptive to new ideas? This does not mean that you must adopt them; it does mean that you should entertain them when they are offered to your attention or find them through a spirit of inquiry, and then consider and evaluate them. A misoneist can never be a leader. Misonicism is a Greek derivative recently coming into wider use meaning hatred or intolerance to change or new ideas. A majority of the members of the learned professions are likely to be conservative in viewpoint. As De Tocqueville put it, they are the stabilizing influence in a democracy. But conservatism is not just standpatism, and constructive conservatism cannot be satisfied by allowing things to drift. It involves an accurate assessment of the true values of the past and a conscious adaptation to new situations and circumstances.

Do you resist the tendency toward conformity of thought and act which yearly becomes more and more overpowering? Do you give due consideration to the consequences of particular solutions to problems? Do you think of the means by which the solutions are to be accomplished and their effectiveness and ultimate consequences?

These are some of the factors to be taken into consideration in forming an opinion, and the duty of a professional man is to form an objective opinion on public issues, unharnessed by his own needs and those of his clientele and those of his profession, although they are all entitled to some weight.

This is half of the broad responsibility; the other half is to influence the opinions and actions of others. How to do it? There is no standard way. Some professional men will already be in positions of authority. Others should seek such positions — this responsibility should rest upon the conscience of many of us. Still others will be advisors to policy-makers or in a position to influence their action. And all of us can have some influence upon public opinion in general. We can also influence the reality of public discussion by assessing and questioning the accuracy of assertions made. Our training and experience have taught us to express ourselves well.¹⁵

15. See, generally, H. F. Stone, *The Public Influence of the Bar*, 48 HARV. L.

A democracy must have leaders in order to function. We have always regarded this as a truism, not needing proof. But recently, convincing proof has been given us. I wish there were time to describe in detail the findings of the psychologists who studied the methods of the Chinese Communists in handling American prisoners during the Korean War. Their so-called "brain-washing" did not involve physical torture, but simply the intellectual and emotional isolation of each individual through suspicion of others, to the end that there could be no leaders. As a result, morale and moral fiber completely disappeared.¹⁶ The consequences we have all heard about.

Democracy must therefore have leadership. If we in the learned professions do not supply it, others will, and that leadership is not likely to be as wise or as unselfish. If they do not supply it, our system may fail. Many democracies have failed. The system is by no means foolproof.

In summary, what is the public responsibility of the professional man? He has a responsibility to his clientele, to his profession, and to the public in general. It is through a recognition of each of these and the striving to respond to them that he has the opportunity to attain true self-fulfillment.¹⁷ Pride may be sinful in one sense, but in the different sense of taking pride in doing a job well or in fully meeting one's responsibilities, it is one of the greatest virtues. Therein lies the occasion for each of us to find what a member of the Texas Supreme Court called an "outlet for his soul."¹⁸

When does the professional man fully meet his responsibilities? Only when he has become a paragon as a professional man, as a human being, and as a citizen. This is a high goal and an unattainable one, but a lifetime goal is something one should always be striving for, not something he can attain and complacently relax. Who would want less here?

REV. 1 (1934-35). Curtis, *The Public Duty of Educated Men*, in 1 ORATIONS AND ADDRESSES OF GEORGE WILLIAM CURTIS 263, 280-82 (1894); Russell, *The Functions of a Teacher*, in KNOWLES (ED.), GENTLEMEN, SCHOLARS AND SCOUNDRELS 522 (1959).

16. See Thomis, *How Reds Brainwashed Korea GI's*, in Chicago Daily Tribune, April 23, 1960, pt. I, pp. 10-11.

17. Cf. WERTZ, TRAINING FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY in SYMPOSIUM ON THE ADVANCEMENT OF THE LEGAL PROFESSION (SECOND SESSION) 6 (Address at Dedication of Ohio State Law Building, 1960).

18. WILSON, "AN OUTLET FOR MY SOUL"—THE PRACTICE OF LAW (Address before State Junior Bar of Texas, 1953).