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THE PROFESSIONAL CHALLENGE TO HOUSE COUNSEL

Some very pointed comments and exhortations are being spoken and written these days about a seeming decline among professional men of the sense of professional dignity and responsibility which used to be their mark of distinction.

The general tenor of this criticism is that lawyers, physicians, public servants, educators and even clergymen seem to be motivated primarily by the selfish and materialistic desire for more pay with less work, instead of by the professional and altruistic purpose of service to their fellow men.

The extent to which these charges are true is important, because it is obviously more difficult to swim up a waterfall than across a stream. And when "everybody's doing it," it takes heroic virtue rather than just ordinary fortitude to observe an ascetic attitude toward the almighty dollar.

There are probably no statistics tending to show whether the current feeling about a deterioration of professional standards is justified or not, for this is a problem that cannot readily be reduced to statistical analysis. It is a problem of omissions in the area of positive duties rather than of commissions in the area of negative precepts. It is reflected in failures to observe ideals, to respond to the "Thou shalt"s" of the profession, rather than in breaches of codes of conduct or canons of ethics, the "Thou shalt nots" of the profession and of the law. Criminal prosecutions and bar association charges can be added up and appraised and compared, by ten-year periods or by centuries. But failures to perform unselfish public service and deterioration of attitudes toward ideals can only be felt, they cannot be measured.

Under such a state of affairs, public opinion is one of the most important bases for satisfaction or warning. It may to some extent be unreliable and uninformed, but it cannot
safely be brushed off. In addition, since the remedy in any event depends upon an examination of conscience by each professional man, perhaps the accuracy of the public’s opinion can be checked and verified or modified to the necessary extent by the secret reflections of all of us.

If there is a tendency for the professions to be materialistic, it will not do for everybody to shrug his shoulders and blame it on “the times.”

For one thing, and in any event, the professional schools should do more than provide bread-and-butter knowledge. They should provide wisdom and inspiration, so as indeed to turn out men of heroic virtue.

Furthermore, the man who received his professional education and took his professional oath in the good old days must exercise the necessary degree of self-discipline to bring himself into line with the ancient ideals of his profession. If most professional men did just that, whether the problem was extensive or not would eventually not matter — it would be cured.

However, the difficulties of doing “just that” should not be minimized. The process requires first of all not a little reconsideration as to what the ideals of the profession are; then a conscientious comparison of one’s own attitudes and practices with the ideals; then a hard-headed appraisal of what specific things should and can be done to ensure at least personal compliance with the ideals; and finally, a firm determination to do those things and a courageous carry-through, come hell or high water.

A profession, according to the dictionary, is a declaration or public avowal of a faith or a conviction. When the term is applied specifically to occupations or employments, it is usually restricted to those whose “job content” in large part comprises elements of service above the purely manual or
material. Webster's New International Dictionary, for example, has this special definition of "profession":

The occupation, if not purely commercial, mechanical, agricultural, or the like, to which one devotes oneself; a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding, or advising others or of serving them in some art; as, the profession of arms, of teaching, of chemist. The three professions, or learned professions, is a name often used for the professions of theology, law, and medicine.

There are three points in this definition which are essential to a reconsideration of the ideals of a profession, any profession. A profession is (1) a public avowal, a dedication, (2) to a vocation, a calling, (3) to a life of service to other men.

The purpose of making a livelihood is not excluded from this idea. But it is incidental to the main theme. What is excluded is the purpose of taking up a profession because "there is more money in it." Service first — all things else in proper measure will be added thereto. That is the professional ideal, noble, austere.

The height to which Mr. John Q. Public would cynically raise his eyebrows upon reading the foregoing paragraph might provide an excellent measure of the regard he holds for the professions in these days.

In addition to the fundamental ideal thus stated, which is common to all professions, each of the learned professions from time immemorial has had its own particular set of ideals, its own guiding code. The medical profession commonly uses the Hypocratic oath as its guide. The theological profession presumably uses the life of Christ as its model. The lawyer might remember that he took an oath substantially as follows:

1. I will support the constitution of the United States and the constitution of the state of...;

1 Webster, New International Dictionary 1976 (2d ed. 1934).
2 Wis. Stat. § 256.29 (1951).
2. I will maintain the respect due to courts of justice and judicial officers;

3. I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;

4. I will employ, for the purpose 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;

5. 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;

6. 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;

7. 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.

Most general practitioners using this oath as a check list against which to examine their attitudes and actions would be able to rate themselves high on points 3, 4, 5 and 6. Points 1 and 2 might present more difficulty. If supporting the federal and state constitutions and maintaining the respect due to courts of justice and judicial officers means more than passive personal support and maintenance — if it means taking positive affirmative action to ensure such support and maintenance by citizens generally — then many lawyers might decide upon reflection that they were not doing all they should, as lawyers, in two important areas of public service. And point 7 might give many a busy lawyer some cause for uneasiness. In a word, the “Thou shalt nots” would present few difficulties. But the “Thou shalts” —

Before proceeding further and surmising what might be the reaction of house counsel to such an examination of conscience, it would be well to define “house counsel.” For the
purpose of this article, not every lawyer who might happen to be employed by a business concern will be considered to be house counsel. Many lawyers are employed as salesmen, accountants, clerks, purchasing agents, and even as executives and foundry laborers. Some of these men, such as tax accountants, administrators of Workmen's Compensation and the like, are to a large extent utilizing their legal knowledge and training in their present occupations, and may have been employed precisely because they are lawyers. Nevertheless, they are not employed as lawyers.

House counsel, therefore, will be taken to mean a lawyer (including a patent lawyer) employed as a lawyer in the legal department of a business concern.

It might be said parenthetically, to avoid possible misunderstanding, that the necessity of excluding other lawyer-employees from the definition of house counsel (and their professional problems from the scope of this article) does not imply that by entering the "not actively practicing" group they no longer have professional status. In taking the professional oath they have been baptized, so to speak, by the same waters and carry throughout all their endeavors the same indelible mark as the practicing lawyer. They will continue to enjoy the prerogatives of lawyers and should feel a corresponding responsibility and inspiration to render service of professional quality in their chosen field.

Indeed, it is difficult not to digress further and observe that it is unfortunate that common usage has restricted to a certain class of employments the idea of dedication to a calling to serve others. It would be far better had the ancient idea prevailed more generally, that every man is called by his Creator to perfect and utilize in the service of others the talents and aptitudes given him. The sense of vocation has been largely lost in these days, with a resulting loss to society and individual alike; for the "Number 1 Man" attitude too
obviously results not only in poorer quantity and quality of work, but also in the joyless performance of the work which is done.

However that may be, the sense of vocation must be kept alive where common usage still expects it to be found, in the professions, and particularly in the so-called learned professions, including law.

But to resume. If the progress of the general practitioner through the above examination of professional conscience might be difficult, that of house counsel might be even more so.

House counsel would very quickly realize that he is not as free to enter into public affairs as is the general practitioner. Because of that, he might be dismayed and discouraged at the thought that perhaps he had become more an employee than a lawyer, that in electing to serve one client he had become a second-class lawyer.

He would be further depressed in these dismal reflections by certain attitudes of many of his fellow lawyers in the outside world. There is ample evidence that the general practitioner harbors two questioning attitudes toward house counsel.

One is that house counsel deprives the general practitioner of work and, hence, income. It is not the work derived from the legal problems of house counsel’s employer, for this the general practitioner is willing to concede is proper. But work outside the scope of the employer’s legal problems (such as providing legal advice and service to the employer’s other employees, or even other clients, so as to be, in effect, in competition with the general practitioner in the latter’s proper field) arouses in some general practitioners a feeling of injustice and resentment.

This attitude might be dismissed as unjustified on the basis of the facts, so far as most house counsel are con-
cerned. But it cannot be dismissed as purely selfish and unworthy, because to the extent that house counsel does furnish "free" legal advice and services to fellow employees as an expected part of his services to his employer he is violating one of the canons of his profession.

There is another attitude toward house counsel which cannot be so easily dismissed on the basis of either fact or principle, namely, that house counsel lacks proper professional interest. Like the judge about whom it was said that he not only didn't know the law but wasn't even curious about it, so it is said that house counsel not only does not act like a professional man but does not even think he ought to. This is the basic professional challenge to house counsel.

It is the chief purpose of this article to discuss the facts and principles upon which this challenge is based; to determine, if possible, whether it is justified, and to suggest ways and means of correcting or overcoming any attitudes or practices of house counsel which might make the challenge warranted.

The crux of the problem is the fact that house counsel is an employee. He is not retained, he is hired. His relationship with his client is not temporary, it is intended to be permanent. He is not free to give particular advice or render particular service and then go his own way, because he remains closely attached to his client indefinitely both in the office and in his personal life. Few people associate a general...
practitioner with the character, policies, or activities of his clients, but many people are inclined to associate house counsel with the character, policies and activities of his employer.

Thus house counsel has no choice as to the legal matters which he handles. Every legal problem which develops from his employer’s activities is grist for his mill. He must handle it in a manner and upon a time schedule directed largely by his employer. He may find that he is called upon publicly to defend his employer from the results of what may appear to be an unwise policy which he has had no voice in determining; yet, because of his employer-employee relationship, he is frequently charged by outsiders with responsibility for the policy.

It is apparent that house counsel has two real problems. One is to justify his position to himself; the other is to justify it to others. House counsel, like everybody else, wishes to live not only in peace with himself but also with others, being jealous not only of his character but also of his reputation.

Can house counsel reconcile his status and duties as an employee with his obligations as a professional man? Can he serve his employer and at the same time observe the ideals and ethical code of his profession?

He can, but he has to do it under different conditions and in a different way than the general practitioner.

The conditions are well described in the opinion of the court in United States v. United Shoe Machinery Corp. The question for determination was whether certain written communications between the corporation and (1) outside counsel, and (2) house counsel were privileged and thus inadmissible in evidence (without waiver) in an antitrust prosecution. In deciding that both types of communications were privileged, the court stated:  

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6 Id. at 360.
On the record as it now stands, the apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege. . . . The type of service performed by house counsel is substantially like that performed by many members of the large urban law firms. The distinction is chiefly that the house counsel gives advice to one regular client, the outside counsel to several regular clients.

Concerning the "way" in which the modern corporation lawyer serves his clients (or client), the court said that the lawyers in question were: 7

. . . acting as attorneys giving legal advice. They were not acting as business advisors or officers of United, even though occasionally their recommendations had in addition to legal points some economic or policy or public relations aspect and hence were not unmixed opinions of law. The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political, and philosophical considerations.

Many of the differences in conditions are clearly superficial so far as house counsel's professional status is concerned. Thus the fact that house counsel must conform to the same schedule of hours as other office workers, whereas the general practitioner arrives at his office and leaves it when he pleases; that he must be on the job every working day except during a limited vacation period scheduled to suit the convenience of his employer and his fellow employees, whereas the general practitioner can more easily "take off" when he pleases; that he is on a monthly salary schedule which advances slowly, though steadily through the years, whereas the general practitioner cashes in immediately on the fruits of special ability and extra effort; that his office may be a remodeled record vault in a smoky and noisy

7 Id. at 359.
manufacturing zone instead of in a downtown air-conditioned office building; that he is subject to the same organization discipline as his secretary instead of being supreme in his own office; that the priority of his various assignments are directed by his employer rather than determined according to his own convenience or fancy; all of these may readily be dismissed as of no consequence in affecting house counsel's professional life. They may be considered as advantages or drawbacks of the position, to be enjoyed or suffered by the individual counsel depending upon his peculiar temperament as a human being, but they present no conflicts with the standards he should follow as a professional man.

Nevertheless, there are more serious factors to be considered. For example, the fact that house counsel is often given some administrative duties; that he is frequently a party to conferences on sales policies, financing plans, labor matters, pricing plans and the like — or, as is more frequently the case, that he is not included in such conferences but is assigned the duty of implementing the conference's policy decisions by drafting organizational instructions, or at a later date by serving as advocate or defender of those policies; that his employer assigns to him the task of advising or even assisting other employees with their legal problems; that his employer specifically or by implication insists that he not enter into public discussions of matters of current political, social, or economic concern for fear his personal views might be misconstrued as those of the employer (regardless of all possible prefaces, postscripts, headnotes and footnotes disavowing all such identification); all these are matters which should be examined more closely as to their bearing on house counsel as a professional man.

Upon such examination, it will be seen that these are merely negative drawbacks inherent in the position of house counsel. There is nothing unprofessional about advocating a policy (not immoral) the political, economic, or social wis-
dom of which is debatable. Nor is it unethical to defend in a proper manner a reprehensible action for which he is not responsible. Every lawyer is asked to perform such services and is professionally free and sometimes bound to do so. It is merely that it is unpleasant to be so closely identified with the policy or action as house counsel popularly is.

Neither is it unprofessional for house counsel to counsel fellow employees who have legal problems. But house counsel must be careful to conduct himself ethically in this area and may occasionally have the difficult diplomatic task of explaining to a zealous Industrial Relations Department that the company may not legally undertake to furnish "free" legal advice and services to employees. Counsel's activities in this area must be confined to assisting the fellow employee to recognize any legal problem that may be present in his case, to explain to him its scope and importance and to advise him to contact an outside lawyer if the need for detailed advice or services is indicated. Such hand-holding or wailing-wall function may be time consuming and exasperating but it is not improper.

Nor is the restriction of freedom of speech any more unjustified in the case of house counsel than in the case of a judge or a law professor. A law professor whose views on the issue of federal aid to education conflict with those of the Board of Trustees of the university cannot rightfully complain if he is ordered to keep his opinions to his wife and friends. If house counsel's views on the Missouri Valley Authority, publicly expressed, would irritate important customers of his employer, he might be annoyed at an edict to keep off the speaker's platform, but he could not complain that his professional rights or duties were unduly infringed.

So even these serious factors in the position of house counsel may be dismissed as not necessarily infringing upon the professional standards of house counsel, but to be accepted or rejected on purely personal grounds.
The positive side is left to be explored. If, today, it is the failure of professional men as a whole to make a worthwhile contribution to the common good that lies at the basis of the charge that they are not following the ideals of their profession, if these ideals in the cases of lawyers consist not merely in doing a good job of pushing claims or defending causes for fees but also in performing public service commensurate with each individual's professional training and status, then the manner in which house counsel can similarly "accentuate the positive" and render true professional service should be explored.

House counsel can and should avoid administrative work so far as possible. He should strive to keep his employer persuaded to leave the preparation and filing of tax returns with the accounting department, the negotiating of labor contracts and the handling of grievances with the shop management, and the handling of priorities and allocations with the inventory and production control men. His legal advice and services should be sought by the administrators of all such functions and he should not only respond to their specific requests but should keep the administrative personnel currently advised of new laws and court decisions affecting their operations.

For despite the fact that house counsel should not administrate policies, he is by the nature of his employment an integral part of the company's whole vast and complicated administrative setup. He and his legal associates are not only counsel to top executives, but a legal service agency to sales, engineering, credit and collection, advertising, production, purchasing, traffic, industrial relations and all the other varied departments that make up a business enterprise.

As the American Bar Association committee's report 8 puts it, house counsel not only briefs the law on the multitudinous

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8 See note 3 supra.
questions put to him by the company executives and the various department heads, but also works with them in putting his legal advice to work in ways which take into consideration over-all business and public relations policy as well as law. This recalls certain phrases in the *Shoe Machinery* case mentioned previously:

... advises his client upon not only what is permissible but also what is desirable ... more than predictor of legal consequences ... many relevant social, economic, political and philosophical considerations.

If house counsel would reflect upon and grasp the implications of that statement, he would have the touchstone to the solution of his professional problem.

Whether a business concern knows it or not, in employing a lawyer it has employed a man who is dedicated to bettering the lot of his fellow men in a very special way. He is a "law-er," first and foremost, and is supposed to know not only what the law is but also what the law should be.

He is in the special and enviable position of being able to counsel and assist his employer in the formulation of soundly ethical business policies and practices. He is stultifying himself and burying not only his own talents but the ideals of his profession if he devotes his brain power to figuring out and suggesting to his employer clever ways to perpetrate injustices "legally."

He is in a position to keep his employer, which might be a large corporation with far-flung interests and corresponding influence, advised of current trends in political and social thinking, and in that way to participate in molding the industrial relations and public relations policies and practices of that corporation along constructive lines, for the common good.

Business generally, and big business in particular, is coming to have a much greater awareness of its social responsi-
bilities. It realizes that sensitivity to public opinion and intelligent effort to respond to it is good business. House counsel's professional talents of objectivity and logical expression are invaluable to an employer who desires to make such a response. Counsel should be ever ready with sound suggestions for implementing this worthy desire.

Such suggestions need not be confined to the subject of internal company procedures and practices. Indeed, they should not be so confined, but should extend to the subject of laws, existing and proposed, in which the company should take an interest — not only those which might affect it directly, but also those which would affect, for better or for worse, the several economic, social and political communities of which the company is a part.

This kind of awareness and readiness will obviously be of at least indirect benefit to the general public. Hence the exercise by house counsel, in the special ways open to him alone, of those qualities which are peculiarly professional will benefit both his employer and the public.

That this positive ideal provides a valid theoretical resolution of the professional challenge to house counsel may be plain enough. But there are in many cases two impediments to its substantial realization. One is the fact that many house counsel have not prepared themselves to make significant contributions of a "political, economic, social, and philosophical" nature. Another is the fact that many house counsel are employed by concerns which are not presently aware of the advantages of utilizing house counsel in the ways indicated.

In the matter of personal preparation, the law colleges could do much by advocating that men preparing for positions as house counsel — and indeed for the legal profession generally — should come into the law college well grounded in politics, economics, sociology and philosophy. The advantages to any lawyer of such background education are so
obvious that it is astonishing that the law colleges did not establish such a requirement twenty years ago when the needs of our increasingly complicated economy began to be apparent.

Counsel who now find themselves without such an academic background can readily catch up by selective reading. As a matter of fact, constant reading in these extra-legal fields is required of every lawyer who wants to preserve the advantage of any academic training he may have had and to keep abreast of the times.

Another effective type of personal preparation is participation in outside activities. The churches, the fraternal orders, the organized public and private charities, the many business and civic associations, not to mention the bar associations, all these provide house counsel with not only a wide variety of opportunities for public service in themselves, but also broad experience, growth in wisdom, increasing facility of expression, and public recognition and trust. The acquisition of these assets is the surest way of creating a realization on the part of counsel's employer of counsel's special talents and potential value, within and outside the company, as a consultant and an advocate in the increasingly vital areas of worker relations, community relations and sound progressive social legislation.

In the meantime and at all times, house counsel should remember one important characteristic of his position and conduct himself accordingly. Although counsel legally has only one client, the business concern which employs him, practically he has many clients, all of the higher and lower executive and administrative employees of the company. His personal professional contacts are, therefore, as broad as those of an equally busy general practitioner. Though he may contact a lesser number of people in the course of the years, he contacts the same people oftener. His influence may not be as extensive as that of the general practitioner, but it is far
more intensive — in a word, it is far greater in a smaller area. This area, furthermore, is of more than ordinary importance to the professional ideal of achieving a just and orderly society under law, and incidentally a sorely needed respect for the law profession as a chief proponent and defender of such a society.

So much for what individual house counsel can do to recognize and obtain recognition of his proper professional status. An additional means of achieving this purpose might be suggested.

Many things that are beyond the ability of individuals to accomplish by themselves can be accomplished by associating with others. House counsel has much to give and much to gain by active participation in bar association work.

A given house counsel or general practitioner whose conception of bar association work is that most of it is window-dressing and incidental to the basic purpose of protecting the lawyer’s right to high fees will see no reason for any house counsel to belong to a bar association.

Nor will the advantage of house counsel’s belonging to a bar association be appreciated by a house counsel or a general practitioner whose concept of the purpose of the association is one step higher, where it is considered to be the organizing of programs for the presentation and discussion of bread-and-butter technical matters and new legal developments. For although many of house counsel’s technical problems are similar to those of the general practitioner, nevertheless, it is true that they are not as varied as those of the general practitioners, and would not of themselves induce many house counsel to join a bar association, or induce a bar association to interest itself in house counsel.

But a bar association has higher purposes than those just mentioned. Among the essential purposes of a bar association is precisely the furtherance of the ideals of the profession
with which this article is concerned. The bar association attempts to define these ideals and concretize them in the everyday lives of its members. It aims furthermore to advertise these ideals to the public and with all the resources at its command to advocate practices and to sponsor public services which will prove that these ideals are not dead letters.

House counsel should obviously join in these activities. Isolation from the main stream of professional life tends to result in a withering of professional sensibilities. General practitioners, who constitute the overwhelming majority of bar association members, should welcome and encourage the interest and services of house counsel. The very fact that house counsel are not general practitioners makes them a good sounding board against which the rest of the association can test proposals which may have a serious public relations aspect.

House counsel comprise a rather sizable group of actual or potential members of the national, state and many local bar associations. The American Bar Association has no House Counsel Section, and the same appears to be true of the majority of the state and local bar associations. It does seem that there is a sufficient identity of status and interest among house counsel to make it desirable and feasible for a house counsel section to be established in the national, state and some local bar associations.

Such a Section has recently been established by the Wisconsin State Bar Association. One of the matters to which the Section will give attention is that of defining and clarifying the professional position and obligations of a lawyer employed as such by a business concern. Thus there promises to be not only some soul-searching, but also a practical determination of the proper place and potentialities of house counsel as a professional man.
The results of the Section's deliberations, if adequately publicized, could be a valuable contribution toward providing house counsel, employers of house counsel, lawyers generally and the public with a better understanding of the proper functions of house counsel. Through this and similar activities of other bar associations, there might ultimately be created a climate for the optimum exercise by house counsel of the particular type of professional service which is his calling.

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