

Problems Illustrative of the Responsibilities of Members of the Legal Profession

Fifth Printing, 1970



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by

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Let them have hope, and virtue,
and let them believe in mankind
and its future,
for there is good as well as evil,
and the man who tries to work
for the good,
believing in its eventual victory,
while he may suffer setback
and even disaster,
will never know defeat.
The only deadly sin I know is cynicism.

Henry L. Stimson Secretary of State, 1929-33

From Secretary Stimson's "Afterword" in "On Active Service in Peace and War" by Stimson and Bundy, p. 672 (1947)

PREFACE

The University of Texas Law School Foundation has provided financial assistance by means of a grant from the Francis Graham Coates Research Fund, established in honor of Mr. Francis Graham Coates, senior partner in the Houston law firm of Baker, Botts, Shepherd & Coates. Income from the Francis Graham Coates Fund has been made available to provide financing for the basic costs of publication of this fifth revised edition, in order that this text can continue to be of educational value to those students and educators interested in the "problem approach" to the study of their responsibilities to the legal profession.

Tom Sealy President The University of Texas Law School Foundation

FOREWORD

Actually, this is the fifth printing of these materials; beginning with 1965, four prior editions have been distributed without charge and have been used in 39 law schools. However, that supply has been exhausted and the program of CLEPR, the previous sponsor, has shifted from teaching materials to clinical legal services. Fortunately, assistance has been forthcoming from the Law School Foundation of the University of Texas. This time, however, a charge is being made, but only in an amount estimated as sufficient for reimbursement of cost of production and distribution. It is hoped that this printing will be adequate for the needs of the next three years. By that time it is expected that a larger book, developed from the present paper-back, will have become available. This is being prepared by the undersigned together with Professor William W. Gibson, Jr., both of the University of Texas, under contract with the West Publishing Company.

The present volume is essentially the same as that of 1968. There are, however, certain significant additions. The most substantial is a new chapter of 15 Problems on the practice of what has come to be called "poverty law." This is now Chapter 14, "A Lawyer Among the Poor." Further, one Problem has been added on a lawyer's advice in an adoption case, another on his conduct in a "political" or "disruptive trial," four on various aspects of judicial responsibilities (in Chapter 9) and one on financing of attorney's fees. At the very end of the book there now appears the language of a carving on the tombstone of an eminent lawyer. For this I am indebted to Mr. Whitney North Seymour of New York.

It has proved impracticable to edit the numbers of the now replaced A.B.A. Canons by cross-references to the new Code of Professional Responsibility, nor, regrettably, has time permitted the preparation and inclusion of a cross-reference table. For those wishing copies of the Code itself, it is understood that these may be obtained in quantity and without charge from the American Bar Center in Chicago, 1155 East 60th Street.

In earlier Forewords gratitude has been expressed to various lawyers and law teachers for suggestions of topics for inclusion in

this book. These will not be repeated. Mention should be made, however, of further help received in connection with this latest printing. Professor Donald Weckstein of the University of Connecticut has been indefatigable in his helpful comments and most perceptive and ingenious in his discovery of typographical errors. Barbara Kazen Friday, Director of the Community Legal Services Program in Austin, has been a constant source of assistance in connection with the new Chapter, "A Lawyer Among the Poor"; in fact, she provided the factual material for several of those Problems from her own experience. Moreover, five students, in their capacity of what is here known as "quizmasters," have given valuable research aid-David Richeson, John Watson, Roger Greenberg, Mollie Washburn and James Herrmann-to each of whom warm thanks is given. Further, I would like to acknowledge once again that perennial source of inspiration and encouragement, Elliott E. Cheatham, the great dean and leader of all teachers in this challenging field of education, who has been my constant friend and guide over all these many years.

Finally, much appreciation is due the University of Texas Law School Foundation for its assistance in defraying the cost of this fifth printing. Gratitude has already been expressed in earlier editions for the vital aid provided by CLEPR over the past five years. This is warmly and gratefully reaffirmed today.

Robert E. Mathews Austin, Texas August, 1970

FOREWORD TO ORIGINAL EDITION

While it's quite true that this book is an experiment, that doesn't mean that it's not been tried out at all. No, these problems, or many of them, were first used at Ohio State several years ago. Each year they suffered both editing and supplementation in coverage. In 1964 they were used in a course in the Legal Profession at Harvard and last spring, still further edited, they were used again at Texas. Now for the first time they have emerged from mimeographed form into what I am told is "IBM," a way station on the road to print.

For this first public appearance I'm grateful to the Council on Education in Professional Responsibility and in particular, to its Director, Howard Sacks. It was at his invitation that I have once more examined these materials and it has been under his insistent time schedule that I have worked enough of these 113 problems into passable shape, adequate I hope for this initial presentation.

But a reader may well inquire: why crowd the already excellent market with another book on professional ethics? After all, there's Trumbull, Pirsig, with his excellent new edition, and that great pioneer, Cheatham, now on the point of issuing his third; then too there's Countryman whose final volume with its new approach, is bound to make a valuable contribution of its own.

However, these are all case-books, or so predominantly such as to deserve the title. What this is, is a "problem-book," and the like of it has never ventured forth before,—not, that is, into general availability. As of now, at least, there's not a case, not an opinion, in it,—merely references, citations. It's made up of a series of factual situations, often similar to what we are used to in our examination questions. In each a lawyer has faced, or is about to face, an alternative, a decision concerning his own behavior as a lawyer or as a citizen. In each the values between which he must choose require a choice that is based upon what we call an ethical consideration. In each the law student is faced with the query: did he choose the wiser, the more honorable alternative? Or, where a choice is yet to be made what should that decision be?

In the classroom problems such as these can be used just as one would use the decisions of courts or bar committees; one may call on a student to state what the alternatives are, what the decision, the choice, should be, and what are the values at stake that prompt his

approval of one course of conduct rather than another. With no disparagement of the excellent case-books presently available, my experience has been that they are less successful in arousing and holding student interest and in stimulating classroom discussion, than are these concrete factual situations. That, of course, is important in any teaching material, but in a course in the Legal Profession, ordinarily taken by second and third year students already surfeited by the reading and stating of cases, there is a need for freshness of approach that has long plagued us among upper classmen. That alone however, would not distinguish this from other subjects similarly late in the curriculum. What does distinguish it, though, is that here there is a special need for capturing student interest. There's no denying that in the teaching of, or about, ethics there is a troublesome pedagogical problem, rarely faced elsewhere, -the problem of student attitudes. For reasons that need not be suggested here, many of us who have long been concerned about this subject matter have sensed a greater proportion of indifference, occasionally even of hostility, than is normal in our other classes. To the extent that this impression is well founded, it means that to capture student interest is not only harder in this field, but more important. Problems, or so I have found, are more effective devices to meet this psychological impediment than the more conventional case-method.

It is true too that factual situations can be constructed in areas of conduct where no case material is available. We are able, most fortunately, to assume that our students will rarely be exposed to the more gross misconducts that reach the committees and the courts, or if they are, that their responses can already be predicted with some assurance. But opinions of courts relate to the marginal and extra-marginal conduct of lawyers, the "pathology" perhaps; most of our students will never be found so far off the reservation. True, what happens in extreme case gives warning of the presence of values that should play their part within the reservation as well; and these too must be covered by problems in a book such as this. But choices between two courses of action, either sufficiently approved never to be brought before a bar committee, can be brought out by factual episodes that invite choices as to which of the two is preferable and why. Nor can opinions of courts or committees reach questions of whether a responsibility exists to assume leadership in one's community, whether professionally by way of law reform, or as a citizen by way of arousing and organizing group action. Problems, however, as I have tried to indicate in some that follow, can be devised to invite discussion of whether these are, or are not, matters where lawyers have a special responsibility.

But with this array of materials, much remains yet to be done. I should be less than candid, were I to create the impression that what I have put together here is either adequate in factual coverage or in

choice of incident or form of presentation. All is still in tentative form, parts of it more nearly adequate than other parts. The pressure to prepare this collection for trial publication has necessitated the ommission of much that is yet to be dealt with. Thus, there should be a chapter on the nature of the vicarious relation,-representation and imputation. Then too, there should be problems illustrative of the place of a lawyer in juvenile cases and in situations involving mental health, areas of special responsibility that are at last receiving some measure of attention in a few of our law schools. Of at least equal importance is that area relating to the opportunities and duties of the bar to provide legal services for those who lack the funds to pay for them. This is the area where both our governmental agencies, our social agencies and our bar associations are at last beginning to work cooperatively. As of this present publication, all that it has been possible to include is a note under a chapter heading "The Public Responsibilities of the Lawyer." Finally, whether it would be appropriate, or indeed possible, to raise the question of the part played by a lawyer's religious or philosophical convictions, is a matter worthy, too, of careful consideration as time permits.

But in reading, or in teaching, these problems I would hope that the teacher and student, will judge them in terms of two frames of reference: primarily, whether the use of problems is a helpful device to present the ethical issue involved in such a course as this; secondarily, whether these particular problems are adequate in the subject matter they deal with, -is the coverage as presently found here plus that which is contemplated, sufficient to introduce the student to illustrative samples of essentially all the types of ethical issues he is likely to face in his practice, -and too whether, in such subject matter as seems appropriate, they adequately present the issues that are intended to be brought out. If, in reading this booklet, some of you will take the time to send me thoughtful comments, criticisms and suggestions, these will be invaluable in helping frame an approach to the vitally important question we teachers have been facing ever since Prof. Cheatham's landmark contribution back in 1938.

A final word should be added. As presently presented, these problems are followed merely by citations of useful and I hope, relevant sources for clues and suggestions of solutions to the alternatives posed in the preceding problem. But student access to these references, especially in a large class, is always difficult, often too burdensome even to attempt. This is a shortcoming that it is hoped will be soon met. These problems, after one more final scrutiny and editing, will be published in permanent form by the West Publishing Company. When this occurs there will be two added features. One will be the inclusion of more foreign references, especially those from the Canadian Provinces. The other will be the substitution, for some of

the present references, of excerpts from them. Thus will each student be provided with a miniature source book of his own from which he may more readily discover the clues which he will need.

What then we shall have may well be classified by the cumbersome term, a "problem-case-book," but as for me, devotee that I am, it will continue to be just a "problem-book."

Robert E. Mathews Princeton, July 1965

Suggested Bibliography

The single most frequently referred to volume is "Selected Readings on the Legal Profession" (1962) completed under the chairmanship of Prof. Bradway, and cited throughout this book merely as "Selected Readings." Also, among the references under each Problem will often be found citations to the American Bar Association's "Canons" and "Opinions," together with opinions of state bar association committees. The Canons are obtainable in quantity from the American Bar Association at the American Bar Center in Chicago; the A.B.A. opinions are contained in a separate volume published by that Association; those of two New York Associations are published in "Opinions on Professional Ethics" under the auspices of the Cromwell Foundation (1958). Opinions of committees of other bar associations can only be obtained by individual application. What is occasionally called the "Joint Statement" is the "Report of the Joint Conference on Professional Responsibility" drafted by a joint committee of the Association of American Law Schools and the American Bar Association. It is published in 44 A.B.A.J. 1159(1958), excerpts will be found in the "Selected Readings," and it is also obtainable in leaflet form from the Council on Legal Education for Professional Responsibility of the American Bar Center.

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