CHAPTER 4

HUMANITY: A PERSONAL RELATIONSHIP

The basic proposition advanced in Chapter 1 of this book (page 15), at least so far as it deals with services provided to individuals, obviously calls for a close personal relationship between the practi- tioner and his client. This is self-evident in the case of medicine and other services concerned with bodily health. It is also pretty obvious in fields closely concerning the property and rights of individuals, such as that of the family solicitor. In matters like this the citizen needs to be able to go to an adviser whom he knows personally and who knows him, particularly if he is one of those out of the ordinary clients whom Reginald Hine, a country solicitor, described as "the fantastical, hysterical, unreasonable, half-certifiable sons and daughters of iniquity or obliquity who climbed the stairs and asked for one's advice". (1)

Any client will prefer to consult one whose outlook is symnpathetic to his own and with whom he gets on as a person. The ideal consultant is a man or woman with a liking for people and a desire to understand them. Imagination, tact and sympathy are important characteristics, and the ability to create confidence is very necessary. With a client in trouble of some sort, the practitioner should be a person who actually or apparently enters into his client's problems and gives his client the feeling that here is a champion who will represent him fully and faith- fully in any adversity. The value attached to the quality of sympathy is illustrated by the old Punch joke of the enquirer who asked what sort of doctor the new man was and received the reply, "Oh well, I don't know much about his ability; but he's got a very good bedside manner!" Much fun has been poked at the bedside manner, but it remains an attribute greatly appreciated when found and sadly missed when absent. All the efficiency and competence in the world will not suffice to meet human distress if humanity and sympathy are lacking, and as Hine says the ideal relationship with clients is "not a mere bowing acquaintance, but a pleasant and jocular friendship". (2)

This does not involve treating serious matters with flippancy or departing from that "kind of solemnity" which Dr Johnson required in the manners of a professional man. It was Lord Hewart who said that a 58 HUMANITY:

A PERSONAL RELATIONSHIP 59 judge should try to look as wise as he is paid to look, and the same goes for other professional men — and women too. The human touch must not be lacking however. A well-known chartemed surveyor recorded that he often brought home a point by vivid metaphor: "For example, if advising a client not to sell at present land likely to be valuable for development in the future . . . one might say to him 'I think you will agree that it is always a mistake to pick an apple before it is ripe'. Again, if advising a client, who bought as a speculation, to sell (on a rising market), it may be well to say to him that 'a tree never grows up to the sky'." (3) A recent survey has shown the value of a humane approach in dentistry. Many people, it seems, are deterred from regular visits to the dentist by fear; and gentleness is the quality in a dentist most esteemed. (3a)

The intensely personal relationship between the professional consul- tant and his client has led professional institutes to take note of factors which might otherwise be regarded as the concern only of the individual practitioner. The Hippocratic oath, formulated in the fifth century B.C., included the sentence: "With purity and with holiness I will pass my life and practise my art." (4) The Hippocratic corpus went into considerable detail about the appearance and character of the physician. He should have a worthy appearance, and look healthy and well-nourished. He must look to the cleanliness of his person; he must wear decent clothes and use perfumes with harmless smells, since it was held that physicians who are not tidy in their own persons cannot look after others well. As to his character: "Let his character be that of a

noble man; as such let him restrain himself in the face of everything that is high-principled and philanthropic; for a hasty and busy life avails one nothing except when it can be. used usefully." (5)

The Hippocratic corpus did not neglect the bedside manner: "The physician must have a certain degree of sociability, for a morose dis- position is inaccessible both to those who are well and those who are sick. He must respect himself as much as possible; he must neither allow much of the body to be exposed to view, nor must he have much con- versation with the uninitiated, but only what is necessary." (6)

Professional institutions today show the same concern for this aspect of their members' attributes. In their submissions to the Monopolies Commission in 1968, the Royal Institution of Chartered Surveyors and kindred societies said:

"We believe that all professions involve a vocation, a sense of dedica- tion and a willingness to accept a measure of self-discipline as well as the ability to reflect deeply and sympathetically on the problems referred to them by clients. These qualities of mind and spirit are not called for

 in the same degree in commerce or industry, where forcefulness, ambition and enterprise (and sometimes even ruthlessness) may be valuable assets from the point of view of the national economy as well as the individual. It follows that it is the function, and indeed the duty, of a professional body to seek to establish in the profession it represents conditions which will attract to the ranks of that profession the right type of recruit." (7) Elsewhere in this submission, the point is made that professional rules of conduct are designed to raise and maintain a number of qualities, including personal service "and last, but not least, good manners". (8) A reference to good manners is also made in a well- known attempt to define professional attributes made by a former President of the Institution of Electrical Engineers. This mentions a standard of conduct "based on courtesy, honour and ethics, which guides the practitioner in his relations with clients, colleagues and the public". (9)

The idea that a client will not repose confidence in a practitioner whom he does not respect as a person has led to the adoption of rules to preserve the "dignity" of the professions. It is fashionable to sneer at these, but the need for them is felt very strongly by most professional people. One of the reasons used to justify restrictions on the carrying on of trades or businesses by practising barristers is that there are a number of these which it would not be in conformity with the dignity of the Bar for a practising barrister to carry on. (10) It is the express duty of a barrister "at all times to uphold the dignity and high standing of his profession, and his own dignity and high standing as a member of it". (11) A solicitor must not engage in a business unless it is "an honourable one that does not detract from his status as a solicitor". This is construed widely and has been held to permit business as a building contractor, a theatre manager or even a coal merchant, but not a bookmaker. It is permissible to hold elocution classes for articled clerks "provided they are not held at the Law Society's Hall"! (12) The Institute of Chartered Accountants regards it as undesirable for a member to engage in any activity which is disreputable, undignified or likely to lower the standing of the profession in public esteem. An example of such an activity, given by the Institute, is for a practising member to hold a moneylender's licence. (13) Also incompatible with the dignity of the profession is carrying on a retail shop from the address from which a member practises. "A member whose wife ran a shop would not be allowed to practise in a room behind the shop particularly if the entrance to the office were through the shop. Nor regrettably would you be allowed to put up your plate outside a public house." (14) The Declaration of Geneva binds the doctor to practise his profession "with conscience and dignity". (15)

That this reasonable and proper desire to engage the confidence of the client may shade into a less laudable wish to increase the social status of the professional man's work, and therefore of himself, cannot be denied. Many criticisms have been levelled at this tendency. Reader quotes a nineteenth century opinion that it would be better if the idea of gentility could be divorced from professional occupations. (16) Can- Saunders and Wilson point out that throughout the eighteenth century the professions were regarded first

and foremost as gentlemen's occupa- tions. "Though they might not offer large material rewards, they do provide a safe niche in the social hierarchy." (17) This attitude has persisted and many members of professions or near-professions have openly sought to raise their status, first by forming professional associa- tions and later by seeking Royal Charters for them. It is undoubtedly a criticism of the professions today that their less enlightened members form one of the last strongholds of the old disdain of "trade". There are chartered surveyors, for instance, who look down on those of their number who practice estate agency or, far worse, mere house agency. Such activities are commonly regarded as not really professional — even when carried on by persons who have had the same long and arduous training as purely consultant surveyors. This attitude is indeed difficult to justify since all the skills acquired in such training may well be brought into play in the proper carrying out of the functions of an estate agent. It is the touch of the market that offends, however, and it is difficult to acquit those holding this attitude of the taint of hypoc- risy. Indeed there are professional surveyors who, while also practising as estate agents and indeed making most of their income in that way, do so through separate firms acquired for the purpose and prefer that the fact shall not be known, or at least remarked upon, by their professional brethen. The Ideal of Service

Without countenancing false dignity and unworthy striving for posi- tion, it is necessary to defend any practice which promotes the con- fidence of the client. One old-fashioned virtue which is perhaps on the wane is the "tradition of service". In a presidential address celebrated among chartered surveyors, this was expressed in the following words: "The finest tradition of any calling is a readiness to serve. The spirit of a great profession is the spirit of service . . . It is a spirit which derives, T suggest, from an interest not in things but in people — which alone begets understanding." (18) It goes without saying that "readiness to serve" involves assiduous attention to the client's needs and prompt

 dispatch of his business. It calls for personal attendance wherever needed, as in court proceedings. It is the duty of a solicitor to attend throughout a court hearing, even though his client is represented by Counsel. If it is impracticable for him to attend personally he must send a capable deputy. (20)

The estate agents' ideal of service was expressed as follows by the R.I.C.S.:

"The services of a professional estate agent are devoted to the best interests of the public as represented from time to time by the client who retains him, and this involves him in a fiduciary relationship with that client. The best interests of that client must be served in preference to the interests of any members of the public (provided that the latter are treated openly and fairly) and always in preference to any private interest of the estate agent, such as a quick sale to make sure of com- mission when some patience would have achieved a better result for the client." (21) This concept is also seen in the B.M.A. statement that "it is the long-standing tradition in the medical profession that the render- ing of professional services is not dependent upon payment of a fee". (22) In the days before the National Health Service many poor patients were grateful to the general practitioner who was ready with everything except his bill, and indeed lived up to the Declaration of Geneva's statements that "I solemnly pledge myself to consecrate my life to the service of humanity" and "The health of my patient will be my first consideration". (23)

The Bar Council submission to the Monopolies Commission mentions the professional man's duty often to give advice which is contrary to his own financial interests, and says that it is inherent in the profession of a barrister that he should hold himself out as ready to serve any client and to give equal attention to every client. (24) This is known as the "cab-rank" rule and, in the words of the submission, "serves to ensure that no client, however notorious or unpopular with government or public he may be and whatever may be the odium which will be suffered by the person who appears for him, will fail to find a spokes- man". (25) The rule was established in 1792 when Erskine was deprived of his office as Attorney-General to the Prince of Wales for defending Tom Paine in the prosecution for publishing Paine's Rights of Man. Erskine said in a famous speech: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end." (26)

The Bar Council maintains that the “cab-rank” rule operates in no other profession, but it is to be hoped this is not so. The position HUMANITY:

A PERSONAL RELATIONSHIP 63 probably is that, since we are fortunately still blessed with a plentiful supply of private consultants, it is always possible for a person rejected by one to find another who will take on his case. This means that instances of a person being refused professional assistance by every practitioner he goes to just do not arise. The nearest approach nowadays is perhaps where the patient of a National Health Service practitioner is asked to transfer to some other doctor’s list and finds difficulty in doing so. The B.M.A. regards it as essential to safeguard the free choice of doctor by the patient. (27) While most professional institutions would probably frown on a member who declined to act for a person except for some weighty reason, it would probably be unreasonable to deny in the last resort the right to turn away a would- be client. Barristers are in a special position, since they have no direct dealings with those they represent — except in rare cases, such as the dock brief, where no solicitor intervenes between the barrister and his lay client.

A striking instance of willingness to serve beyond the call of duty, coupled with a humane approach, is afforded by Reginald Hine, when arguing the claims of the family solicitor to act as executor, rather than the bank or public trustee: “ . . . what you need is not a cold, correct official, an impeccable machine, but a human being, even if he be a fallible mortal, someone who has been the repository of the family secrets, the trusted adviser and friend”. Hine recounts how as executor he has done many things not strictly required by law — even on one occasion completing an unfinished manuscript in the style of the de- ceased author and then publishing it in the latter’s name. (28) Another solicitor demonstrated his humanity by personally injecting a female client in the thigh to calm her before a divorce case. His zeal was rewarded by a three-year suspension. (29)

The tradition of service which leads the true professional consultant to place the interests of his client before his own, and to give of his utmost without regard to material reward, is a most precious concept. While difficult to create, and of slow growth, it is all too easy to dissipate. It needs to be taught to young entrants, if not explicitly at least by contact with practitioners imbued with its spirit. From the nature of things it flourishes more in private offices than in salaried employment, and is a telling reason why no one should be given the hallmark of a professional consultant unless his training has included a spell in private practice. The Consultant as alter ego

A further aspect of the need for services of the kind we are discussing

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PROFESSIONAL ETHICS to be rendered on a “person to person” basis lies in the fact that very often the practitioner is acting as the alter ego of his client. The most complete example of this is of course the solicitor acting under a general power of attorney, which gives him the power in law to do any act which his client could himself have done. Less complete examples arise in many fields. Litigants and accused persons are represented by counsel; a property owner threatened with compulsory acquisition is represented by a chartered surveyor; a taxpayer seeking to cut down his assessment is represented by an accountant; a developer wishing to persuade a planning committee is represented by an architect; and so on. In every case where an individual appears to argue or defend himself through the medium of another he is to a greater or lesser extent identified with his representative, and naturally desires that represent- ative to be in no way inferior to himself. This identification is strikingly illustrated by the old mannerism of the barrister who, in explaining his case to the judge, would often say not “my client is an elderly lady and she has suffered much . . . “but “I am an elderly lady, my Lord, and I have suffered much . . . “ It is perhaps symptomatic that this con- struction is seldom heard today. Partnerships

The stress we have laid upon the need for a personal relationship between the practitioner and his client might seem to indicate that ideally the practitioner should be entirely a freelance, acting alone. There are many practical considerations, however, which render it de- sirable in most cases for the practitioner to be

associated with colleagues in the same profession, and the usual machinery for achieving this is the partnership. The Bar prohibits partnership, and the Royal College of Physicians prohibits it except where the College gives permission, which it occasionally does. (30) Other professional bodies place no obstacles in the way of partnership.

Partnership is recognised by law as a distinct type of business organi- sation with certain characteristic qualities. These include the following: every partner is entitled and bound to take part in the conduct of the practice, unless otherwise agreed; every partner is liable for the debts of the partnership to the whole extent of his private property; as between the partners, each partner is bound to contribute to the debts of the partnership in proportion to his share of the profits; as regards third persons, the act of every partner, within the ordinary scope of the business, binds his co-partners, whether they had sanctioned it or not; the relation between the partners being personal, no one of them can put a stranger in his place without the consent of the others. (31) 65 HUMANITY:

A PERSONAL RELATIONSHIP Sometimes a "partner" takes a salary instead of a share of the profits. He may then in law be no more than an employee, though if his name appears on the firm's writing paper he will be taken to be held out as a full partner and liable as such. (32) It is possible to create a limited partnership in which, although there must be one or more partners re- sponsible for all the liabilities, there may be other partners whose liability is restricted to a fixed sum. (33) In theory a partnership comes to an end whenever there is a change in the partners, though in practice a partnership firm can be continued indefinitely. In this it resembles a body corporate, though differing from it in confining the "equity" or ownership of the partnership assets (including goodwill) to the partners themselves, rather than to shareholders who may have no concern in the management of the enterprise.

The reasons which justify the carrying on of a practice in partnership rather than individually are numerous. They have to be weighed against the intensity of the personal relationship with the client, which of course varies according to the nature of the services in question. The following are among the more important reasons for setting up a partnership; and are equally reasons against sole practice:

1. If a practitioner is absent through illness or other cause, the client's affairs can be dealt with by one of the partners whci, because of the continuous exchange of information which goes on within a partner- ship, may well already know something of the affairs of the client. The Law Society point out that great difficulties arise where a solicitor practising on his own has made no arrangements for another solicitor to look after his affairs in an emergency — to maintain office records, to conduct client's affairs and to see that Law Society regulations are complied with. The locum tenens is of course well known in other fields as well, notably medicine. He is usually inferior to a partner in the estimation of clients because he is unfamiliar and inevitably lacks the authority, because the responsibility, of a full partner. That these difficulties can be at least partially overcome is demonstrated by the Bar, which prohibits partnerships. The arrangement under which half a dozen or so barristers share office accommodation in one set of chambers, with common clerking and secretarial facilities, gives some of the advantages of a partnership. If one member of the chambers is un- able to take a case, as frequently happens because of the unpredictability of court proceedings, it is the normal practice for another member of the chambers to act instead. So firmly entrenched is this system that it is a positive rule that a barrister must not practise unless he is a member of professional chambers or the pupil of such a member. (34)

2.

It is difficult for a single practitioner to make full economic use

 of the clerical and secretarial services he needs. A solicitor who spends a day in the County Court, for example, may well leave his secretary under-employed. The more principals there are in a firm the easier it is to rationalise the working time of ancillary staff. Here again we find that

professions where partnership is not allowed get round this difficulty. The Harley Street consultant operates from premises where there is one receptionist dealing with perhaps half a dozen separate practices.

3. A firm with several partners can provide a more specialised service. N.A.H. Stacey has noted the increasing specialisation in accoun- tancy from the beginning of this century, individual partners specialis- ing in bankruptcies, liquidations, formation of companies, or account- ing for certain trades. (35) This factor tends to be more important in the "general practice" type of firm. The medical profession is of course organised on the basis that the patient first takes his case to a general practitioner who, thxough his knowledge of consultancy services, is able to direct the patient to the appropriate specialist consultant either via a hospital or straight to the consulting rooms.

4.

A professional man with very great skill or experience can spread his talents more widely by operating with the aid of junior partners or assistants. This particularly happens in the field of architec- ture, where a leading architect may see a client once only, sketch a few rough drawings showing his basic solution to the client's problem, and leave the rest to junior members of the firm. This illustrates an important principle of the organisation of work, namely that those with rare talent should not waste any of their time doing work which less gifted or experienced persons can undertake.

5.

A lone practitioner cannot accumulate savings in the form of goodwill, and the practice lacks continuity in record-keeping, the accumulation of experience among ancillary staff, and the increased authority that comes with a long-familiar firm name. The problem of capital formation and 'transfer is by no means satisfactorily solved by the partnership formula, as appears below, but it is considerably better than with the sole practitioner. The continuity of the firm following the death of a partner is indicated by Hine: "The lawyer is dead; long live the law. But in a sense the lawyer does not die. Clients will come flocking into his office as of old, feeling somehow that his friendly spirit is still there. His room may be taken by another, but his mantle will have been taken too. The partner will bear the same impressed stamp of office personality. The advice given will be the advice he would have given." (36) Continuity, and emphasis on personal service, are illustrated by the family nature of many firms. F.M.L. Thompson, HUMANITY:

A PERSONAL RELATIONSHIP 67 the historian of the chartered surveyors' profession, comments: "The hereditary, or dynastic, principle is as readily ascertainable in surveying as it is in other professions such as medicine or the law. The atmosphere of being brought up in a professional family is a strong inducement to some at least of the sons to follow in father's footsteps; the profession being in the main run as small, family, practices, there is family loyalty and pride on hand to see that a son takes over the business." Thompson adds that the dependence of firms on clients' goodwill gives a son taking over the firm a flying start. (37)

6. Finally, there is the position of new entrants to the profession. It is difficult for the sole practitioner to give adequate tuition to pupils while at the same time carrying on a practice single-handed. To be sure this is done at the Bar, but only with the aid of the "chambers" system. Furthermore newcomers find it very much more difficult to become established if they have to stand entirely on their own feet from the beginning rather than entering a firm as junior partners. In the latter case they can take their share of the work brought to the firm by the connection of the more senior partners, and clients are usually quite satisfied with this arrangement. It is different where the youngster has no connection with the practitioner whom he is assisting. The tendency then is for his work to be passed to the client as the work of the senior practitioner, after the latter has put the finishing touches to it. This is the old system of "devilling" at the Bar, which has often led to a struggling newcomer losing the help he would have gained from a well-written opinion if the professional client had known its real origin.

The strict rule of the Bar that no practice in the least degree re- sembling partnership is permissible has often been criticised. It was investigated by a special committee of the Bar Council in 1959—61 and by

another such committee in 1968—69. The committees con- cluded that there should be no change in the rule. They felt that the institution of partnerships at the Bar would be wholly incompatible with the traditional conception of barristers as individual practitioners enjoying an independent and individual status. They found there was no real demand for partnerships and no case in their favour had been made out. The present system, they felt, had been shown by experience to foster the strength and independence of the Bar while affording a satisfactory service to the public. In justifying this rule to the Mon- opolies Commission, the Bar Council contended that a partnership was a restriction on competition, "since a man cannot compete with his partners". Whereas under the present system members in the same chambers could appear on opposite sides in a case, this would F

 obviously be impracticable if they belonged to one partnership. In some specialist fields, and at local Bars in provincial towns, there are a very small number of practitioners and partnerships might cause difficulty. The Bar Council shared the view that partnership would tend to blur the individual responsibility of the barrister, and make it more difficult for him to exercise an independent judgement. "Barristers are in fact individual performers, and the legal basis on which they work should correspond with this fact." (38) With the confidence that could only be shown by an economist, Professor D.S. Lees says that there is no case for the Bar's rule against partnerships, and that its relaxation "could not but lead to the growth of more efficient legal units". (39) Evidence for this assertion is not provided.

One problem of professional partnerships is likely to become increasingly pressing, especially as the removal of the limitation of twenty on the number of partners in 1967, and the economic con- siderations which brought this about, are likely to lead to very large firms in future. This is the difficulty arising from the inability of most young entrants to partnerships to provide capital, coupled with the need of retiring partners, or the families of deceased partners, to with- draw their capital. While the working capital needed by a professional partnership is not large, it is nevertheless an appreciable amount. It is tending to grow with the increase in data-processing equipment and the sophistication of office machinery. With some professions, e.g. aerial surveys, the capital equipment required may be very large indeed. One solution is the creation of a service company as a separate entity from, but controlled by, the partnership. This can be financed as an ordinary trading company, with some of its capital provided by persons outside the profession, and looking for its profits to a rental return on equip- ment used by the partnership (see page 103). The service company does not of course meet the problem of capital such as goodwill, which may be a large element in the value of a firm. The main reason underlying these difficulties is the rule that no person other than a member of the profession may partake of the profits of the profession. While this rule, which is discussed in a later chapter, remains in force there seems little prospect of a solution to the problem of capital provi- sion and withdrawal.

A profession not troubled by the problem of goodwill capital is the Bar. Since they can only practise as individuals barristers do not accum- ulate goodwill as transmissible capital. By a quirk of tax law they were until 1968 partly compensated for this in not being taxed on "post-cessation receipts," i.e. those paid to them after retirement. This concession was rather meanly abolished in the 1968 Finance Act. HUMANITY:

A PERSONAL RELATIONSHIP 69 Incorporation

If it is accepted that professional services of the kind we are discussing are best rendered in a personal relationship between the practitioner and his client, it follows that the practitioner should operate as an individual (whether alone or in partnership) and not a body corporate. Although corporations act of course by means of individuals, the legal relationship is with an entity which is a legal fiction. While a corporation can be organised so that its relationship with outsiders is hardly different in practice from that of a partnership and, as the joint stock banks have shown, can still retain the human touch, the essence of incorporation is to substitute the impersonal for the personal. Diffusion of responsibility within a corporate body may make personal accountability for breaches of professional ethics diffi- cult: "a corporation cannot blush". Nevertheless these are not the main reasons why incorporation has been frowned on by professional bodies; the reason usually given is connected with limitation of liability. Most cor'porations are companies

incorporated under the Companies Act with limited liability. They are disapproved of ostensibly for this attribute, rather than their corporate status. It is convenient, there- fore, to deal with the whole question of incorporation as part of a discussion of limitation of liability, which will be found in Chapter 7.