

PART III: BROTHERLY BEHAVIOUR

CHAPTER 9

PROFESSIONAL SOLIDARITY

We have seen above (page 20) how a profession regards itself as a brotherhood, and we turn now to examine in detail what this involves. The reasons for banding together are various; the degree to which solidarity is pursued is not always the same. Nevertheless the pattern is consistent: solidarity is maintained through the organisation of the professional institute, and by this also the autonomy of the profession is expressed and safeguarded.

The law is generous in according autonomous rights to the professions. It has decreed that it will normally be for a profession itself to decide its standards and its code of behaviour "and the mere fact that certain rules are laid down which are severely restrictive will not warrant attack upon them if in the interests of members and in the public interest such rules are reasonable". (1) These words were uttered in the 1968 case of *Dickson v. Pharmaceutical Society of Great Britain*. In this case Lord Wilberforce said of the charter of incorporation of the

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doubt that this

ter, as other *Pharmaceutical Society*: "I have no doubt that this charter, as other similar grants of corporate status and privileges to the members of a profession, ought to be construed so as to give to the members a wide degree of autonomy. Particularly is this so in relation to standards of professional conduct." (2)

In turn, the profession does its utmost to exact from its members conduct upholding its standards and tradition. "I will maintain", says the International Code of Medical Ethics, "by all the means in my power the honour and the noble traditions of the medical profession". (3) Each practitioner thus recognises his personal responsibility. Within the scope of his own practice he will be seen as the embodiment of his profession; in the eyes of the client his acts will be the profession's acts. We find, for example, dentists enjoined "to avoid, as far as possible, any word or action which might disturb the confidence of the patient in the dental profession". (4) Consulting engineers must order their conduct "so as to uphold the dignity, standing and reputation of the profession" (5). A chartered surveyor must not conduct himself in such a manner as would prejudice the reputation of his professional institution. (6) 121

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PROFESSIONAL ETHICS Architects are required to uphold and apply the R.I.B.A. conditions of engagement, since the Institute regard professional solidarity in maintaining fees as necessary to aid small firms in dealing with powerful clients. (7)

Though professional people may believe that "the principal influence to be cultivated is that of good fellowship" (8); though they hold, with the Bar Council, that everyone should have available to him within the profession "a body of colleagues and friends to whom he can turn for advice and support" (9), this does not override the paramount concern for the wellbeing of the profession itself. It is therefore the duty of a professional man to report to his institute a colleague who has been guilty of professional misconduct. "In

the view of the Council,” say the Law Society, “that is a professional obligation, unpleasant though it may be, which, in the general interests of us all, it is your duty to discharge, subject only to the prior interests of your client”. (10) Nor will the professional body tolerate lack of frankness to itself. It has been held on several occasions that to offer a false explanation to the Law Society on an allegation of misconduct itself amounts to a breach of the code. (iT)

It is remarkable, in view of this desire to maintain solidarity, that few if any professional institutes are able to compel practitioners to become members. This applies even where, as in the case of solicitors, unqualified persons are prohibited by law from exercising certain functions of the profession. Although since 1941 there has been statutory power to make membership of the Law Society compulsory for solicitors, this has not yet been exercised. Nevertheless solicitors who are in practice are compelled to hold a practising certificate for which a separate fee is charged. This applies equally to non-members of the Law Society, which regards it as being in the public interest that a solicitor should be subject to such control through the Law Society, his professional body, and that he should thus contribute to the provision of machinery for regulating the profession. (12)

Almost all rules embodied in the professional code of conduct are relevant to the duty to maintain the standing of the profession. We select for mention in this chapter rules which have a particular bearing on professional solidarity, but lack a wider application.

Much importance is attached to preserving the confidence of the public in the advice given by practitioners. This has its difficulties where, as in so many fields today, new discoveries and developments are constantly being made. The sound advice of today often becomes the culpably unsound, because superseded, advice of tomorrow. Even worse, there may be several opinions as to what is the sound advice of

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123 today. Not unnaturally, the professions prefer to see debates on such topics conducted out of earshot of the public. The doctors go so far as to lay down a specific rule: “Discussions in the lay press or in broadcasting on controversial points of medical science and treatment should be avoided by practitioners.” (13) The doctors also dislike anything which tends to induce the public to treat themselves, rather than seeking medical advice. Medical practitioners are therefore told that they should not have a direct association with any commercial enterprise engaged in the manufacture or sale of substances claimed to be of value in the prevention or treatment of disease and recommended in a way calculated to encourage self-diagnosis or self-medication. (14) This reinforces the prohibition imposed by law on advertising to the public remedies for diseases such as cancer, diabetes and epilepsy. (15)

Professional solidarity is endangered where one practitioner does any act calculated to injure a colleague. Such practices are therefore discouraged. The consulting engineers, for example, lay down that a member “shall not act as to injure or attempt to injure, whether directly or indirectly, the professional reputation, prospects or business of another member.” (16) This is not held to prevent the expression of technical opinion on behalf of a client before a tribunal or in a commission’s report. Nor of course does it prevent the lodging of an allegation of misconduct by a colleague with the professional institute.

The complaint is often made of professional people that, in pursuance of the honourable maxim “dog doesn’t eat dog”, they are most reluctant to give evidence against one another. This, it is said, often makes claims difficult to pursue. Conscious of this feeling, the Law Society has ruled that while it is commendable for a solicitor instructed to act against a colleague to give a prior informal communication of this to the colleague concerned, nevertheless the Council consider “in view of the feeling among certain sections of the public that solicitors are averse from taking proceedings against other solicitors”, that no unusual procedure should be adopted. (17)

A well known instance of a profession acting to rid itself of one who attacked his fellow-practitioners unmercifully was *Allinson v. General Council of Medical Education and Registration* in 1894. Allinson was a homeopathic practitioner, and advertised widely that patients should avoid the doctors, “who poisoned with

their drugs”, and come to him instead. The court upheld the view that to defame brother practitioners and deter their patients was infamous conduct in a professional respect, especially when done “to discredit and defame the medical professional generally”.

Sometimes professional solidarity is disturbed by the setting up of

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PROFESSIONAL ETHICS breakaway institutes, where the members of the parent body feel it is not catering adequately for their needs. Two examples within the legal field are the British Legal Association and the Bar Association for Commerce, Finance and Industry. The former was established by solicitors who felt that the statutory functions of the Law Society hindered it from adequately representing all the interests of solicitors, while the latter arose from the refusal of the Bar Council to concern itself with the interests of barristers not actually in practice before the courts. Professional Courtesy

The earliest known propounder of professional ethics was Hippocrates, whose precepts were laid down around 400 B.C. He forbade physicians to quarrel jealously, competing among themselves. Those who did so were acting less like reputable practitioners than like “people connected with the business of the market place”. (18) Medical practitioners have continued ever since to be concerned with standards of courtesy within the profession. A modern doctor “ought to behave to his colleagues as he would have them behave to him”. (19) He must display goodwill and recognise the other fellow’s point of view. (20) Solicitors are similarly enjoined, and are asked to display in relations with other members of the profession the maximum of frankness and good faith consistent with the overriding duty to the client. (21)

Examples of the courtesy expected are legion in the professional codes. An architect must not copy the design of another architect without his consent. (22) A dentist must not take advantage of information obtained during unsuccessful negotiations for a partnership. (23) There is a convention, but no rule, that a barrister must notify his opponent whose pleading he intends to strike out. (24) A solicitor should not communicate with the client of another solicitor without the latter’s consent, though an exception is permitted where the other solicitor has consistently failed to reply to letters. (25) A solicitor should not use a tape-recorder to record a conversation in which another solicitor is taking part without first warning him. (26) An estate agent should not publicly criticise a competitor. (27) A dentist should do nothing to entice an employee from a fellow-practitioner’s employment. (28)

As we shall see in more detail later, it is regarded as particularly heinous to seek to supplant a fellow-practitioner. Wherever a professional man is invited to act in a case where he has reason to believe a colleague was previously engaged it is his duty to notify the colleague. In some cases this goes beyond mere courtesy and serves to protect the public. Thus an accountant or auditor may be supplanted because he is

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125 unwilling to aid directors in pulling the wool over shareholders’ eyes. An enquiry by his successor will bring this fact to light. The dentists’ rule indicates the general approach: “When a dentist is consulted by a patient who normally attends another dentist, the reason for the consultation may be either to seek advice or treatment for some special condition, or to obtain advice or treatment owing to the usual practitioner, for some reason, being unable to give it. In the first case the patient’s regular practitioner should be consulted, and in the second case only such work as is immediately necessary should be undertaken, unless with the consent of the patient’s usual dentist. In either case no attempt should be made by the dentist consulted to secure for himself the permanent care of the patient, nor should a dental practitioner take the place of another during a course of treatment.” (29)

Doctors have always been sensitive on the subject of second opinions, and meticulous rules are laid down. The doctors concerned “shall confer together with the utmost forbearance, and no one of them shall prescribe, or even suggest, in the presence of the patient, or the patient’s attendants, any opinion as to what ought to be done, before the method of treatment has been determined by the consultation of himself and his

colleague". Arguments must not take place in the patient's presence: "If any difference of opinion should arise, the greatest moderation and forbearance shall be observed, and the fact of such difference of opinion shall be communicated to the patient or the attendants by the physician who was first in attendance, in order that it may distress the patient and his friends as little as possible." (30) Thus the Royal College of Physicians. The B.M.A. go into more detail, and even lay down the order in which the doctor in charge of the case and the attending consultant should enter and leave the patient's room! (31) The doctor in charge "should carefully avoid any remark disparaging the skill or judgment" of the consultant. (32) Similar rules apply to dentists: "It should be appreciated that there is room for genuine differences of professional opinion on the scope and type of treatment needed in many cases and nothing should be said or done by either practitioner to disturb the patient's confidence in the other." (33)

Professional courtesy is to be observed even at the cost of financial loss. A solicitor who employs another as an agent should personally discharge the agent's costs whether or not he receives payment from his client to enable him to do so. In Sir Thomas Lund's words this is

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PROFESSIONAL ETHICS part of "the close and friendly relationship which ought to exist between us as members of one profession". (34) Similarly Sir Thomas feels that as between solicitors one's word should be one's bond. It should not be necessary for a solicitor to have committed himself to writing: "Even if it may cost you personally something to live up to what you have said you will do or refrain from doing, you should live up to it." Thus if a colleague says on the telephone that a solicitor may have another seven days to deliver a defence it should be known with certainty that this can be relied on, "and that you will not have a judgment snapped against you". (35) The Helping Hand

The solidarity of a profession is demonstrated by the readiness with which professional people help one another, particularly those in distress. With Francis Bacon, the true professional man feels a deep sense of obligation to his profession and everyone in it: "I hold every man a debtor to his profession". (36) A duty is felt to help those entering it, as by training apprentices or articled clerks. To take proper pains with the training of a young entrant is time-consuming and unrewarding financially. Yet upon the loyal shouldering of this burden by the established practitioner depends the wellbeing of the profession and the handing on of its practices and traditions.

As between qualified practitioners, the tradition of mutual help is exemplified by a willingness to discuss problems and give advice on them. The Bar Council points out that to a practising barrister "the influence of the other members of chambers and of a circuit mess, and the advice which they can give, are invaluable (37). The chambers system has no counterpart in any other profession; the close ties it provides give great cohesiveness to the Bar. Willingness to help is not limited to professional matters, and senior members will not withhold the benefit of their worldly experience on any personal topic. A senior will not stand on his dignity with a junior: members of the Bar, from the newly-called to the loftiest Queen's Counsel, address one another by surname (or Christian name) alone. Use of 'Mr.' or other prefix is a breach of etiquette.

Within the professional field, services are usually provided to a colleague without charge. The B.M.A. desire that "every effort should be made to maintain the traditional practice of the medical profession whereby attendance by one doctor upon another or upon his dependants is without direct charge." (38) The Bar has a similar practice.

Most professions have accepted a duty to provide for members who through ill health or age have ceased to practise. Benevolent funds are

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127 established for this purpose and dependants also share in their benefits. The feeling of being part of a sympathetic brotherhood undoubtedly sustains private practitioners in what can be a lonely and precarious existence. The sense of solidarity, fostered by frequent meetings of colleagues, helps maintain the tone and

spirit of a profession. Nor are such meetings necessarily confined to strict matters of business. Professional people are usually gregarious and sociable. They form local branches and hold meetings and dinners. Such activities nourish the roots of the profession as well as the bodies and minds of its members. The professional man who takes no part in them is depriving himself and his colleagues of many benefits. Disputes Between Members

“Never”, said Hippocrates, “must a distinguished physician envy the others, for that might appear despicable.” (39) There have always been some professional people who, for one reason or another, have fallen out with their colleagues. It is a concern of the professions to minimise the effects of such internal disputes, and therefore to provide machinery for settling them. Few have express rules on the subject. The usual procedure, where the matter cannot be disposed of by completely informal discussions between the members concerned and the secretary of the institute, is for the president to appoint one or two senior members to hear both sides and give a ruling. Sometimes this is only done where the disputants have previously agreed to abide by the ruling and not take the matter to the courts if dissatisfied with it. To litigate is to invite publicity, and it can only weaken a profession if fraternal quarrels are conducted in the public gaze. Inter-Professional Solidarity

How far does fraternal feeling extend? It is strongest of course between members of a single society. Where, as in accountancy or surveying, there are several societies the feeling spreads, no doubt in somewhat weaker form, throughout the profession. There is usually a “pecking order” and members of a senior body may feel little kinship with what they regard as the lower reaches of the profession. Often there is obscurity about where the line is to be drawn. By a bye-law of the R.I.C.S. a chartered surveyor is forbidden to allow any person to participate in his remuneration “other than a member of his own profession”. The bye-laws throw no light on the meaning of this expression, but it certainly extends beyond R.I.C.S. members to what is known as the profession of the land generally. The bounds of this are left unstated, and there would be much argument if anyone sought to define them.

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When it comes to relationships between professions a sense of solidarity is often found, though jealousies and rivalries may exist also. The similarity in their methods and organisation gives members of the consultant professions a feeling of kinship, and this is even recognised in some of the codes. Thus the Dentists’ Code refers to “the general cordial relationship which should exist between the members of all professions”. (40) The position is affected by whether members of the different professions commonly work together. Barristers and solicitors do so very frequently, and are often collectively referred to as the legal profession. Close relations also exist between doctors and dentists, and again between architects, surveyors and engineers. Inter-professional consultations frequently take place between the governing bodies on matters of common concern, though as yet no formal structure exists (see page 234). There is as it were a comity between professions, which manifests itself for example in respect for each other’s rules of conduct. Thus, while there is no professional objection to a solicitor accepting a commission from an estate agent or surveyor in respect of business introduced to the latter (provided the client consents), the Law Society deprecates the practice on the ground that it is contrary to the rules of conduct of the bodies representing the other professions. (41) Comity is aided by demarcation rules, such as that preventing a chartered surveyor engaging in work “recognised as being properly that of a solicitor.” (42)

Comity between the professions does not prevent occasional sniping. Solicitors object to the statutory rule prohibiting a solicitor from acting as an advocate in the county court in a case where he is the agent of another solicitor. The rule operates to the advantage of barristers, and the Law Society have roundly declared it to be contrary to the public interest. (43) Similarly the surveyors object to the architects’ and accountants’ rules prohibiting connection with house agency. (44)

Where two professions are in the habit of working closely together rules are developed to govern their relations, and these illustrate the comity of the professions. Thus a solicitor who has briefed Counsel accepts

responsibility for the payment of brief fees whether or not the lay client pays up. Disputes between barristers and solicitors are not unknown however, and a tribunal exists for the purpose of settling them. This consists of a member of the Bar Council nominated by the Chairman and a member of the Council of the Law Society nominated by the President. This method of settlement was adopted at the suggestion of the Law Society and has been successfully used on many occasions. (45) Poaching of Clients

The biggest threat to the solidarity of a profession is the attempt

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129 to attract business by unfair means at the expense of one's colleagues. The attraction of business is felt to be most unfair and improper when it takes the form of deliberately poaching a practitioner's existing clients. This is regarded as a grave offence by all the consultant professions, and most codes contain express prohibitions. The most picturesque formulation is in the code of the Royal College of Physicians, which states that no member "shall officiously, or under colour of a benevolent purpose, offer medical aid to, or prescribe for, any patient whom he knows to be under the care of another legally qualified medical practitioner". (46) The international code of medical ethics states more succinctly: "A doctor must not entice patients from his colleagues." (47) The duty of an architect is equally plain: "Whether in private practice or salaried employment, he must not attempt to supplant another architect." (48) The consulting engineers go further and ban any intervention in engineering work by an engineer who knows the work has already been entrusted to another. Nor must an engineer review or take over work of another acting for the same client until he has either obtained the consent of the other or been notified by the client in writing that the connection of the other with the work has already been terminated. (49)

Nevertheless in all cases the professions are at pains to safeguard the right of the client to terminate the engagement whenever he thinks fit. No professional man worth his salt would wish to go on acting for a dissatisfied client against that client's will, and any attempt to bind a client to continue to retain a practitioner who had forfeited his confidence would be frowned upon by the professional institute.

Generally, it is not regarded as a sufficient answer to a charge of poaching to say that one was not aware the complainant had been retained. The B.M.A. lay down that a practitioner, in whatever form of practice, should take positive steps to satisfy himself that a patient who applies for treatment or advice is not already under the active care of another practitioner, before he accepts him. (50) This even applies in the field of estate agency, where touting for business is otherwise allowed — at least in the form of a letter individually addressed. Thus the R.I.C.S. bye-law laying down rules of conduct states that in work concerned with sales and lettings no member "shall, either directly or indirectly, orally or in writing, seek instructions for business which he knows, or with ordinary care could have ascertained, is in the hands of another agent". Even where there is no such knowledge or imputed knowledge by the estate agent a letter seeking instructions must contain what is known as the saving clause. This is "a definite intimation that if another agent has already been retained, instructions can only be

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PROFESSIONAL ETHICS accepted from, and as sub-agent to, that agent". Even a body so impatient of old-established professional rules as the National Association of Estate Agents lays down that where it is indicated by the client or otherwise that an agent has been appointed a sole agent a member must refuse to accept direct instructions, and can only act as sub-agent.

There are some situations which, by putting a practitioner in contact with the client of another, make it easy to poach. Special rules are laid down to deal with this. We have considered above some of the rules relating to cases where one practitioner is called in to give a second opinion. This was from the general viewpoint of professional courtesy. We may now briefly glance at rules directly concerned with poaching.

The chartered accountants have been worried about the problem of poaching in connection with firms specialising in management consultancy. This is traditionally a part of the accountant's function, but in

modern times relatively few firms have made it a specialised part of their service. In consequence ordinary firms of accountants may find themselves needing to take specialised advice from another firm of accountants accustomed to act as management consultants. Inevitably the latter are brought into contact with the client, and there is an obvious risk that the original firm will lose him to the newcomer. The Institute have therefore laid down a rule that a member who belongs to a firm which undertakes management consultancy work should not normally accept conventional accountancy work from any client introduced to him for management consultancy services by the client's own professional accountant. The rule is designed to encourage and facilitate access by clients to consultant services which their own accountant is not able to provide. Without the rule, say the Institute, there would be a natural hesitation on the part of the accountant to introduce a potential rival. (A prominent member of the Institute has however expressed the view that the fear is exaggerated.) (51) This is a special rule to meet a special case. Most professions have for general purposes a rule such as that applying to the dentists: "The dentist consulted should not attempt to secure for himself the care of the patient sent in consultation, nor should he treat the patient then or subsequently except with the consent of the dentist who referred the patient." (52)

Another situation where poaching might easily arise is when a practitioner who has been connected with a practice, whether as partner, employee or locum tenens, later sets up in practice on his own account. The partnership deed or other controlling document will often impose a legal obligation, subject to the laws governing restraint of trade. Apart from the legal aspect there is an ethical obligation on the practitioner not to damage the practice with which he was lately associated.

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131 The B.M.A. requires the written consent of the partners running the former practice before a doctor associated with it sets up on his own account within the same area. (53) Dentists have similar rules. In the words of a homely proverb, a man who transfers his practice must not "sell the cow and sup the milk".

A question may occasionally arise as to whether a patient or client of one practitioner has transferred himself to another. An approach may be perfectly permissible if made to one who is to be regarded as an existing client, but improper if the client has moved to another practitioner. For example a notice indicating change of ownership of a practice, or change of address, may legitimately be sent to existing patients but not to anyone else. The dentists deal with the matter by saying that a notice should not be sent to any patient of the practice who has not attended for treatment during the preceding three years. (54) It is presumably supposed that no one can go without dental treatment for any longer period, and therefore such a person must have acquired another dentist.

We have discussed in this chapter some of the more obvious rules and practices designed to preserve solidarity and harmony within a profession and among the professions generally. In the remaining chapters of this Part we examine in detail further rules dealing with the central feature of brotherly relations — the attraction of business. While the poaching of a colleague's client is obviously disruptive and unfraternal, ill-feeling is inevitably caused by any breach of accepted rules by which one practitioner steals a march on another. We turn first to the question of how, in the view of the professions, business ought to come.

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