"The District Attorney"

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My purpose in the suggestions which I shall offer in this paper will have to do more particularly with the work and duty of the District Attorney, and the administration of the affairs of his office—some of the suggestions will perhaps apply to the general practitioner.

Within a few weeks many of the young men to whom these remarks are offered will have taken final leave of their Alma Mater, the state bar examination, and will be admitted to practice the profession of the law within the State of Wisconsin. It may be that now some of the members of the Class of 1921 have their minds fixed upon a definite location within the state, and possibly arrangements made to secure the appointment to the office of District Attorney to some county within the state. If, perchance, such an unexpected and happy outlook is not forthcoming at this time, surely there are some members of the class who have already made some preliminary arrangements or suggestions to enter the campaign for the election to the office in 1922. Whichever it may be it is quite certain that within a very short time some of the class will be holding the position within the state.

The office of District Attorney in this state is a constitutional office; is elective; term two years; and the minimum salary $1000; the jurisdiction, the county in which elected. The duties are prescribed by statute, and stated generally, to prosecute for crimes and offenses; to represent the county in all civil litigation, and as legal adviser to the county board: The qualification, twenty-one years of age, an elector of the state, and he must be an attorney at law. While the constitution and the statutes of the state do not prescribe the latter requirement, yet the Supreme Court of this state in the case of State vs Russell, 83 Wis. 330 have held that the name of the office implies that the District Attorney be an attorney at law.

I have always watched with a great deal of interest the young attorney starting in practice. He frequently locates in a city other than his home town. However, I think this fact quite immaterial, the custom seems to be the same. After the attorney hangs out his shingle he for the first time begins to
feel that he has an opportunity to carry out the dreams of his young manhood. Perhaps through high school and later in college he is continually thinking out the arguments he is to make in his first case. Finally the first case comes to him! He has confidence; he feels he will surely win it and finds he has acquitted himself with credit to himself, the public in general, and to his client. He will be surprised to learn and know, wherever he may locate, how extremely interested people generally are in a young lawyer. Somehow I think that a young man taking up the legal profession has one advantage over young men in any other profession, and it is this: his acquaintances, and some people with whom he has no acquaintance, will become interested in him; they will take their own legal matters to him for his advice and attention; they will advise their friends to do likewise, and they will become active supporters in his behalf and for his success. They will watch and talk of his first case; if possible they will be present in court to see him try his first case, and to hear his argument, and they will be quite as anxious as to the result of the trial as he in himself, and while I presume that young men taking up the other professions have in a degree the support and good wishes of their acquaintances and the public, yet it has occurred to me that the interest is never quite so keen in or the support quite so marked of young men taking up other professions than the law. These same acquaintances or admirers in their enthusiasm for the young lawyer's success will very promptly begin to suggest that Mr. So-and-So would make a very likely candidate for District Attorney; he is a young man and he should have an opportunity; so the arrangements are made and the preliminary steps taken to launch the campaign in behalf of the young attorney for the election to the office of District Attorney. He is elected, qualifies, and the work begins.

Having assumed the office, let me impress upon you at the beginning, that you hold the office at the will of the people; it is the people who have given you their support and elective franchise, and the people will extend to you their support and confidence so long as you faithfully and successfully perform the duties of the office. If you receive an overwhelming majority of the votes cast at your election do not conclude nor feel that you are the only man in the county who can fulfill the duties of the office. There were men who filled the office
before you were elected, and there are others who will fill it after you are retired. During your incumbency of the office it should be your aim to serve the people honestly, fearlessly and impartially as well as courteously. The law recognizes no distinction in persons on account of wealth, social position or political affiliations. "All men are equal before the law."

In your work as District Attorney people will come to your office to consult you with reference to violations of the law, which will include family quarrels, neighborhood quarrels, and upon matters concerning the more serious offenses. In some instances the District Attorneys have become obsessed with their own importance to a degree where they give very little attention to the complaints of minor offenses and are discourteous to many of the people, especially the poor, who have legitimate business with the District Attorney. This should not be. On the contrary, the District Attorney should always have in mind that he is the people's attorney and that every citizen, high or low in the social scale, has a lawful right to go to his office and occupy a portion of his time with his complaint or complaints against persons who he claims have violated the laws of the state, and that he has the right to receive courteous treatment and his complaint serious consideration at the hands of the District Attorney. For the District Attorney to give less is a failure to perform his duties as such officer.

When complaint is made, the District Attorney should if advisable, call in the witnesses and examine them, and if satisfied the complaint has merit, prepare his complaint and warrant, proceed to the magistrate with his client, have the complaint signed and sworn to before the magistrate, the warrant issued and delivered to the officer. It is the practice of some District Attorney when complaint is made to them, without the examination of the witnesses or an examination of the complaining witness as to the real facts, to immediately direct the complainant to go to a magistrate and make complaint for a stated offense, thus relieving himself of the task of preparing the complaint and warrant, passing it on to the magistrate. This is not good practice. The District Attorney should always feel certain that a valid complaint has been made and a valid warrant issued. It is expecting too much to ask a man who has never received any legal training to know or understand just what the complaint and warrant should con-
tain. In doing this work himself the District Attorney avoids the possibility of having his case dismissed, defendant released upon a habeas corpus writ, or compelled to ask the court to permit an amendment to the complaint and warrant upon the trial. There is the further consideration which should always be kept in mind, the saving of expense to the people. Should the complaint be dismissed the county must pay these expenses and a new start must again be had in the same case, when a few minutes’ work in the preparation of the complaint and warrant in the first instance would have saved this unnecessary expense and consequent delay in bringing the party accused before the bar of justice. Should the crime involved be a felony the District Attorney should by all means prepare the complaint and warrant for the offense charged, and upon the preliminary hearing testimony on the part of the state should always be taken except in exceptional cases, and the better practice requires the state to put in all of its evidence. This serves a twofold purpose; should the defendant waive his preliminary examination and the state fail to offer any evidence to sustain the complaint before the magistrate, the District Attorney can file no information in the circuit court covering any offense other than that offense stated in the complaint and warrant, when if testimony is taken on the examination the District Attorney is then permitted to file an information charging any offense shown to have been committed by the evidence taken on the preliminary examination, which is very frequently done. Again it frequently happens that witnesses to an offense between the time of the preliminary examination and the time of the trial in circuit court die or leave the state. Should this occur and the dead or absent witnesses have been cross-examined at the preliminary examination by defendant or his counsel, the testimony so taken may be read in evidence on the trial in circuit court under and by virtue of the provisions of section 4141a. When this situation arises in the trial of criminal cases it may become very important that the testimony of the dead or absent witnesses be received upon the trial. As the Term time arrives it becomes necessary to prepare each case for trial; the first step is always to see that the proper return has been made and filed, either on appeal or upon examination. The next step is an examination of the record and a determination made as to what offense shall be charged in the information. If the
accused has a record of prior convictions this should be as-certained before the filing of the information and prior con-victions alleged therein under Sections 4736-4738m inclusive of the Wisconsin statutes. The informations in each case should be prepared and placed in the files prior to the opening of court. On the first day of the Term it is the general practice in the circuit courts to have all prisoners arraigned and the District Attorney required to announce at what time he will be ready to take up the trial of the criminal cases. While the Supreme Court of this state have quite recently held that failure to arraign a prisoner before proceeding to trial does not constitute reversible error, see Hack vs State, 141 Wis. 346, yet notwithstanding this decision it continues to be the general practice in all courts to arraign the prisoners before putting them upon their trial.

In preparing a criminal case for trial the District Attorney should first examine the law with reference to the offense charged and learn just what proofs are required under the law to sustain a conviction. Each offense under the law has separate and distinct elements and the proof should be such as to sustain each element of the offense charged. To illustrate: In burglary we have the unlawful breaking and entering, and the other elements which classify the offense with reference to the degree of punishment; if the offense is the burglarizing of a dwelling house the elements which bring the offense within this class; if it is burglarizing of a ware-house the elements which bring it within this class; if the offense be larceny, the ownership, possession and value become material. I find that few District Attorneys really analyze the situation and marshal their proof so as to cover the different elements of the offense charged. Of course the court always looks out for this but it is not the court's duty to furnish the proof,—that duty devolves upon the District Attorney and by a close and careful examination of the statutes and an examination of the proof it is not difficult to make out the case, but unless the District Attorney understands the elements of the offense and has them clearly in mind upon the trial he may fail in his proof upon one of the material elements of the offense. Should this happen then it is up to the court to offer a suggestion and call for further proof, which would be a humiliating situation for the District Attorney to face.
The first step in the trial, after the arraignment, is the selection of the jury. Under our present practice twenty jurors are called in the box and the examination of these jurors proceeds upon the voir dire. I think in most instances valuable time of the court is taken up with this examination. We have the statutory questions and it is proper to supplement these questions with the residence and profession of the respective jurors and then such questions as in the judgment of the District Attorney have a bearing upon the issues in the particular case. When these facts are brought out, the District Attorney is in a position to know by virtue of his personal acquaintance and observation which juror or jurors to strike. You will find so many attorneys in this examination repeating the same questions calling for the same answers, while if the attorney had been paying strict attention to the first examination he would have this knowledge and it would be then unnecessary to have the juror repeat it. In all criminal cases except murder, the state and the defendant have each four strikes, which reduces the number twenty in the box to twelve. As a rule jurors are honest and mean to respond to the calls of their oath. I have never seen any direct benefit to the state or a defendant accomplished by a long drawn out searching examination of the jurors on the voir dire. Having completed the selection of the jury the District Attorney should promptly step forward and make a clear, open, frank statement of the facts as he expects to prove them. Have the facts well in hand; state your dates accurately and the facts positively. Do not resort to the loose practice of being compelled to fumble over a mass of papers in the record during the presentation of your case, for the jury, court and bystanders will conclude that you have not prepared your case well enough to state the facts off hand.

The venue of the offense must be laid in the trial of every criminal action, and it is good practice for the District Attorney to prove the venue at the first opportunity after the opening of the trial because it is surprising to see how often this important fact in the trial of every criminal case is omitted, even with the caution exercised by the court.

Then there is the examination of witnesses in the preparation for the trial. The trying of a lawsuit is very similar to the building of a house, and when the facts are properly marshaled and the witnesses called, a story is unfolded and
told so that when the case is completed, you have a symmetrical whole, and the story told so plainly and perfectly that the most careless observer will thoroughly understand the theory, claim and proof of the state. No attorney should ever place a witness upon the witness stand unless he has first gone over the story of the witness with him. For a beginner the better practice is to write out in longhand the story of each witness as given him by the witness; after the story of the witness has been heard he should be questioned and cross questioned so that there can be no doubt but that the District Attorney has the witness’s full story and that nothing remains untold. There is a practice allowed in some courts of attorneys asking witnesses if they have not talked the case over with Mr. So-and-So, the attorney for the other side, before coming into court. It seems strange, but it is a fact that nine witnesses out of ten will answer this question in the negative, notwithstanding the fact that they may have talked the case over fully with the attorney who has called them immediately before coming into court, and the attorney who is successful in getting this negative answer will eventually get the witness to admit that he has talked the case over with the attorney and hope in this manner to affect the credibility of the witness with the jury for having made this contradictory statement. Of course the witness did not mean to testify falsely, but the witness seems to conclude that this question means that his story has been made up and agreed to between the witness and the adverse counsel, and he of course denies what he assumes to be this fact; however, in late years the practice of resorting to this mode of examination is becoming obsolete, and in the trial of cases nowadays one meets with it only once in a while, but in order to save the witness from this embarrassing situation it is well, when going over the story of the witness with him, to inform him that this question may be put to him and if it is explain to him fully what the meaning of the question is.

When you call a witness to the stand for direct examination exhaust him completely before you turn him over to adverse counsel for examination. In order that you may do this you must know in advance every fact to which the witness can testify and you must have it in mind or in your notes during the course of the direct examination; otherwise, after the witness has left the stand and taken his seat, possibly one or
more witnesses sworn and examined, it will occur to you that you have omitted to prove some important fact within the knowledge of the witness and you will then be forced to ask the indulgence of the court to recall this witness so you may prove this fact. If the court permits you to do so, this will entitle your adversary to further cross examine the witness, at least upon this point, and nine chances out of ten when he gets a witness back on the stand again he will ask the indulgence of the court for the privilege of further cross examination on one or more other points; should this happen with every witness or the major number of witnesses sworn on the trial it is apparent what a jumbled up mess you would have at the conclusion of the trial. This privilege of recalling a witness may not only be indulged in as stated above but counsel after dismissing the witness after cross examination may ask the indulgence of the court for the privilege of further cross examination on some point he has overlooked. Should he do this, then the court would be required to extend the same courtesy to you for further re-direct examination. This is a slovenly practice in the examination of witnesses. Many courts do not permit it. It is a useless waste of time. The story of the witness is disconnected and does not have the same effect as a straightforward, clean-cut complete story. The witness is not to blame but counsel who resort to this practice are, and the court who permits it even more so than the counsel. Good trial lawyers will not do this; it is only the indifferent, loose practitioners who do; but the men who do are vastly in the majority.

In the trial of every lawsuit there are basic facts which you will desire to make more prominent than others. These facts should be brought out by the witnesses in proper order but detail surrounding the basic facts should not be overlooked in the trial of a criminal case. Many times it is minute detailed facts recited by the witness which give coloring to the case and reflect the truth.

The arrangement of facts in the preparation of the case for trial is of the utmost importance, because it is from the arrangement of facts as testified to by the witnesses you ask the jury to draw the conclusion of guilt, and with the details arranged in proper order so as to dovetail with the basic facts your case is given a symmetry of appearance which carries conviction to the minds of the jury.
In order to secure a conviction in a criminal case, the state always has the laboring oar; at the outset, the defendant is clothed with the presumption of innocence; his guilt must be established beyond a reasonable doubt. In addition to these two safeguards of his liberty there goes with them the common sympathy of nature. It is surprising to know how reluctant juries are to convict men of criminal offenses, unless the offense charged is of such a revolting character as to call forth the condemnation of the act by the public. Juries seem inclined to sympathize with the unfortunate, and manifest their sympathy by finding him not guilty in some instances where he should be convicted. Attention is called to this situation so that there may be fully impressed upon you the necessity and importance of having your case both as to the law and facts well prepared because you start out in the trial of the case with these handicaps. Much success in the trial of criminal cases on the part of the state is due to the strong presentation of the cases by the District Attorney; his personality and skill in handling the case; his argument should be clear, forcible and to the point, as you will find that as a rule men charged with crime come into court with good lawyers, and their lawyers will see to it that every point and advantage which the law affords a man charged with crime is given their client. I personally know of three instances where the defendants were represented by incompetent counsel, where the state failed to convict, in my judgment solely for this reason:—When the jury find that the defendant is not represented by competent counsel they appear to take it upon themselves to see to it that no advantage is taken of the defendant because of this fact and their sympathy is enlisted on behalf of the defendant. Should this situation ever happen to you, let your attitude toward the defendant be such as to convey to the jury the conviction that you mean to be eminently fair and do not seek any advantage over him because of the incompetency of his counsel. This may prevent a disagreement of the jury or a possible acquittal and miscarriage of justice.

The District Attorney is a quasi judicial officer and such position clothes him with much power. There will be times when he will be appealed to by men of power, of wealth, of political influence to use his office as an instrument in their behalf to accomplish an unlawful or unjust purpose; there will
be other times when these same forces will be at work to obstruct, to harrass or delay the prosecution of individuals. To these influences the District Attorney must stand aloof and unyielding, for it is his duty to perform the work of his office uninfluenced by any cause or force whatsoever, and when his attention is called to the infraction or violation of any law, it becomes his imperative duty to immediately institute a prosecution of the alleged offender. It is not for him to mitigate or condone the offense. If there is any mitigation that fact should be called to the attention of the court and the court will consider it in passing sentence, should the offender be convicted. The District Attorney who is alert, active, fearless and impartial is the man who succeeds, and unless these qualities are possessed by the District Attorney he will not succeed.

Some District Attorneys hesitate to institute prosecutions and express as their reason that the people are not in favor of enforcing the particular law in question and when called upon to prosecute, offer this statement as a reason for their failure to proceed. It is not for the District Attorney to sense the public sentiment. The law is on the statute books; it had been violated; and his duty is to institute a prosecution and secure convictions if the alleged offenders were guilty. There can be no halfway spirit about a prosecution. When the commission of the alleged offense is called to the District Attorney's attention he should make a thorough investigation, and if he is not satisfied that the offense has been committed it is his duty to so state and decline to prosecute; if, on the other hand, after making such investigation he is satisfied of the guilt of the alleged offender, then he should leave no stone unturned until he has brought the alleged offender to trial and secured a conviction. The outcome of many trials depends largely upon the attitude, earnestness, enthusiasm and the perseverance displayed by the District Attorney in the trial of the case. Upon conviction the matter of punishment is one entirely within the power of the court, but it is proper for the District Attorney to state to the court before sentence is passed a history of the case and of the defendant and anything which will assist the court in passing the proper sentence.
Much has been said and written about the art of cross examination. Many attorneys plunge into the cross examination of a witness without any apparent purpose or definite object to be accomplished and their idea of a successful cross examination seems to be that to ask many questions of a witness on cross examination makes it a successful one. The mere statement of this fact condemns it. A cross examination as a rule should be thorough, direct and to the point; the attorney should have a definite purpose in mind when he asks each question; he should pursue the task carefully, cautiously, leading the witness along and up to the point where he expects to accomplish his end. Should he fail the first time he may conclude to lead the witness along a circuitous route to the same point again. Having failed the first time with the second attempt he may be successful. Having accomplished his purpose on this point he should immediately proceed to the second. If failure or success attends him, proceed to the third, and so on. It is seldom necessary to have witnesses recite the same story they have told on direct examination. In doing this nothing is accomplished, no benefit is gained, the witness will make his story stronger the second time than he has the first, and nine times out of ten he will gratuitously add an important statement of fact which the attorney who called him has forgotten or overlooked, thereby making his statement much more impressive and stronger than he did on direct examination. I do not mean to be understood, however, that a witness should never be required to restate his story as told on direct examination, because the very recital of the story may show its infirmity, but whether the witness should be required to do this must be determined by the cross examiner with a definite purpose and hope of reward in view, but when this is necessary it is the exception to the general rule. The witness on cross examination should be attacked from a different angle from that which he assumes the cross examiner will approach him, and when he discovers this, if his story is told on direct examination in the main is untruthful, he will find it necessary to recast the facts in his mind, and thus will expose unwittingly the false statements, if any, he has made. It is not fair, however, to assume that the only purpose of cross examination is to elicit the truth. This, of course, is the primary purpose but many times from an honest and truth-
ful witness the cross examiner in a successful examination may bring out facts which will materially strengthen his own side of the case and where a witness shows an inclination to be fair, the better policy is to give him to understand at the outset that you are not his enemy but his friend and that your only purpose is an endeavor to bring out the truth. When he is convinced this is your purpose he will often give information which may be quite as valuable to the cross examiner’s side of the case as to the case of the party who called him. As a rule the cross examination should be short and directed to the particular point sought to be cleared up. Never ask a foolish question nor an immaterial question on cross examination; only ask such questions as will bring out some fact material to the issues. It is almost an every-day occurrence in the trial of cases in court to see some lawyer, in a loose, careless method of cross examination, bring out some fact which reinforces and strengthens the witness' testimony in chief. This could be avoided by care and caution in framing and asking questions with a definite and set purpose in mind. When you have accomplished your purpose in cross examination, stop.

A short time ago this situation arose in the trial of a civil action: One of the attorneys claimed to be an old experienced practitioner; in proving his case he asked very few questions of each witness; when witnesses were turned over to him for cross examination he waved his hand and said "No cross examination." When the testimony was in, in addressing the jury, he stated that after forty years of practice in the courts he was convinced that a cross examination of the adverse party’s witnesses was futile and called the jury’s attention to the fact that he had not cross-examined the adverse party's witnesses in the case on trial and had not done so because of the knowledge he had obtained in forty years of practice. The result was that the case was not tried out, and had the attorney given more attention to bringing out the facts in his case with his own witnesses and filling in the facts he failed to prove by them by a successful cross examination of the witnesses for the adverse party, he would have made out a much stronger and better case. This case was tried on his part by only bringing out the naked bare basic facts, without the little details which become so important in throwing light upon material facts and circumstances out of which
the cause of action arose so that the jury might get a full and complete understanding of the whole situation. It is needless to say that an attorney should never become angry or lose his temper when conducting a direct or cross examination. To do so is a confession of weakness and often creates an unfavorable impression on the jury. The lawyer who stands before the witness and assumes a menacing and threatening attitude toward the witness by using a loud tone of voice or shaking his finger in the face of the witness or using abusive or insulting language to the witness, should not be tolerated by the court for an instant. However, you find only once in a while, attorneys who attempt to follow this line of practice. Some judges require attorneys in conducting the examination of a witness and throughout the trial of a case to retain their seats and only permit them to approach the witness when they desire to show him some document or exhibit and when this purpose is accomplished they are required to immediately take their seats. So if an attorney is accustomed to the practice above stated, the fact of his retaining his seat partially disarms him from following out fully the practice above stated, and if perchance an attempt is made to badger the witness by a rising voice, or insulting or abusive language, a reprimand from the court will always put an end to such conduct. The attorney should always be courteous and a gentleman toward the witness; it is the only conduct that succeeds, and wins the praise and approval of the public, the jury, the witness, and the court.

**PREPARATION FOR TRIAL**

Promptness in the preparation and trial of criminal cases counts for much in the work of the District Attorney. In recent years the courts and attorneys have been severely criticised by the public in general for what is termed the “court’s delay.” I think much of the criticism upon attorneys and courts in disposing of business is well merited. The courts can do much to speed up the trial of cases and insist upon their final disposition and perhaps they are primarily responsible in a large measure for the delays. It is a common thing for certain attorneys prior to the opening day of court or later to mutually agree to continue cases over the term without any reasonable excuse or cause but merely to suit their own convenience because of indolence or inattention to busi-
ness and notify the court that case number so and so has been continued over the term. If the courts permit this it will be repeated at succeeding terms so that in counties where they have only two or three terms of court a year a case may be continued in this way for from one to three years, sometimes longer, unless the court demands an explanation and insists that the case be tried and disposed of.

It is the duty of the court to watch each case on the calendar and where it is announced that the case is to be continued for the term to request of counsel engaged to state the reason for the continuance. Very often it is necessary that cases be continued over the term on account of the absence of witnesses or the inability of counsel to properly prepare the case for trial at the ensuing term. When this appears, it is of course the duty of the court to announce the continuance. After a judge has been on the bench for a time in his own circuit he learns to know the attorneys and is usually able to determine for himself without much investigation whether it is necessary to continue a case or not. It must be remembered that litigants go into court to have their rights determined and it is the duty of counsel to see to it that the necessary preparation is made, the case tried and judgment entered with all possible speed. This saves expense to your clients, it gives them confidence in the courts and respect for the law. I do not wish to be misunderstood in my criticism of some attorneys in being responsible for the law's delay. I think the majority of attorneys realize the sacred trust imposed in them in handling their clients' business and cheerfully respond and pursue the purpose of the litigation with all possible vigilance and perspicacity to bring the litigation to a final end, but nevertheless there is a class of attorneys who are loath to pursue the work with that high appreciation of the obligation which the attorney owes to his client. In the trial of criminal cases you will find many times that the defendant is seeking delay, expecting of course to profit thereby in the death or absence of witnesses, a change in the office of District Attorney or the idea that the general indignation which has stirred the community by reason of the character of the offense committed will be lulled into quietude and will be more leniently dealt with. It is the duty of the District Attorney to bring the alleged criminal to trial with all possible speed—first, because the accused, if he so desires, may demand his constitutional
right which guarantees to him a speedy trial; if, on the other hand, he does not desire a speedy trial, the state does, and to continue from term to term criminal cases shows a failure of duty on the part of the District Attorney which shakes the confidence of the public in his ability and his appreciation of the responsibility of his office. The public by reason of the delay will assign some ulterior motive to the District Attorney for the cause of such delays and ultimately the effect is to create in the minds of the public a lack of respect for the law, because it is the law and the prompt punishment for its violation which instills in many people their respect for the law.

So when the calendar is called at the opening of the term the District Attorney in the case should promptly announce "Ready for Trial" and have his witnesses ready to proceed at the appointed time in each case.

The office of District Attorney should spur every lawyer to put forth his best efforts and especially the young man just starting out upon his professional career. It furnishes him with the opportunity to show his ability, to gain experience in the trial of important cases and to convince the public of his ability as a lawyer and a man. Many of our great lawyers in this country have won fame and renown in the opportunities afforded them in this office as young men in the practice of their profession, and in reviewing the work of the great lawyers of today and the great public men who control the affairs of this country, we find many who received their first training in public life as District Attorneys, and by hard work, perseverance and a strict adherence to the ethics of their profession have won for themselves a crown of success.