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Howard L. Oleck

*Cleveland Marshall College of Law*

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## Reforms Needed in Negligence Practice

Howard L. Oleck\*

**N**EGLIGENCE LAWYERS now often are classed with criminal lawyers, in public opinion, as the "black sheep" of the legal profession. In the minds of many average Americans, there is something vaguely disreputable about lawyers who specialize in plaintiffs' personal injury practice. Nor is defense practice deemed to be without blemish. That public opinion now is so well established, rightly or wrongly, that it no longer can be ignored.

This is a most serious matter, considering the fact that about 70% of all cases on court calendars today are tort claims. It is long past time that the Bench and Bar faced up to this ugly problem. If the public opinion is correct, a sweeping investigation and house cleaning must be launched. If it is incorrect, strong action must be undertaken in order to correct it. One thing is certain—the problem will soon reach dangerous proportions, for the legal profession and for the public, if it continues to be almost ignored.

A single illustration of the present public attitude should suffice to indicate its gravity. In the January 1957 issue of *Harper's Magazine* there appeared a feature article entitled "Damage Suits: A Primrose Path To Immorality."<sup>1</sup> Everyone knows that *Harper's* is an old, honorable, and cultivated publication, not a "scandal-sheet" by any means. It has a high standing throughout the nation.

One basic rule of magazine publishing is well known to every writer. That is this—magazines publish material that they believe will win public acceptance; they give the people what

\* Professor of Law, Cleveland-Marshall Law School; Member of the New York, Ohio, and Federal Bars; Author and Editor of books and lawyers' services on negligence, corporations, and other subjects; etc.

[*Editor's Note:* Extracts from this paper were presented by the author at the Belli Seminar concluding the NACCA Convention in New York City in July 1957. The stenographic record of the delivery of the address, complete with open discussion, will appear, together with the full text, in the forthcoming 1957 *Trial and Tort Trends* (Belli, ed.), soon to be published by Central Book Co., New York.

<sup>1</sup> Morton M. Hunt, *Damage Suits: A Primrose Path To Immorality*, 214 *Harper's Magazine* (1280) 67-70 (Jan. 1957). See also, Baskin, *Case of the Personal Injury Lawyer*, 13 (1957); Grace, *Ambulance-Chasers, Beware!*, 19 *Tex. B. J.* 583 (1956); Barnet, *Layman's Look at the Bench and Bar*, 27 *Okla. B. A. J.* 377 (1956); Lambert, *Principles, Persuasions, and Primrose Propaganda*, 19 *NACCA L. J.* 25 (1957).

the people believe or want to believe, almost every time. Most magazines are not out to  *mold*  public opinion and tastes, but rather to  *cater to*  public opinion and tastes. In other words, the editors of  *Harper's*  were fairly sure that the public would readily agree with the statements made in the article on damage suits.

The  *Harper's*  article's sub-title summed up the general premise of the whole piece, as follows:

"Suing somebody for damages is becoming a new—and peculiarly American—form of Big Business. It also is clogging up our courts, corrupting the jury system, and undermining our precious tradition of honesty and fair play."

It hardly is necessary to say more about this item. It went on in what amounted to a tirade of bitter accusations and condemnations against personal injury plaintiffs' lawyers generally, and obliquely against NACCA. Full of half-truths and startling non-sequiturs, it spun a hair-raising yarn of general corruption and evil.

I was so incensed at some unfair and misleading statements in this masterpiece that I wrote to John Fischer, the editor-in-chief of  *Harper's* . I offered to write a rebuttal guaranteed to demolish many statements in the article. Fischer answered that several readers had criticized the piece, but that a rebuttal would be futile as it would appear only months later. He asked instead that I write a "letter to the editor" rebuttal. This, I preferred not to do. But the implications of the incident should be clear to every negligence lawyer.

These implications fall into a number of major categories. Unpleasant as they are, it is necessary to look at them squarely, and then to do something about them. If the Bar does nothing about them for much longer, rest assured that others soon will do something about them—something perhaps not very pleasant for the lawyers who refuse to properly manage their own profession.

### Principal Criticisms of Tort Practice

In most criticisms of tort practice several particular accusations appear repeatedly. One is that plaintiffs' negligence practice is full of the pungent aroma of "ambulance chasing." This undoubtedly is the chief idea that makes personal injury practice somehow vaguely disreputable. It is an accusation often made by laymen, newspapers, some insurance companies and railroads, some Bar Associations, and some judges.

It is an ugly but inescapable fact that many people believe

that a big tort practice necessarily implies the use of touts, runners, and ambulance chasing. A corollary belief is that many minor accidents are puffed up into large claims based on inflated or even manufactured evidence. Some personal injury lawyers themselves spread such stories, in gossiping about competing attorneys. The newspapers, of course, eagerly feature every case of lawyers' misbehavior that they can find. It is good for circulation.

The worst part of this widespread belief is that it is partly true. You and I know, from our own personal experience, that "John Doe" does use touts and runners. Not most lawyers, of course—only "John Doe." We know that some insurance adjusters do have regular percentage arrangements for "handling a case right." We know that a few lawyers have a real income tax problem in reporting certain payments for services rendered in settling some cases. We know that some big defendants do try to coerce injured employees into *not* asserting their legal rights. And so on.

We know these things. But what do we usually do about them. The answer is: *Nothing*. We excuse our own inaction by arguing that we can't prove anything, of course. But isn't the real reason that we simply prefer not to get involved, most of the time! I well know that what I am saying here will win me much criticism and no benefits. But these things need to be said, bluntly and frankly. [Note: At the Belli Seminar, when some of these matters were bluntly stated, a furor arose, with a few in the audience denying any need for reform; but most of the lawyers present congratulating the writer for airing the problem.]

Without pausing to discuss each of them at this point, we can readily list the principal general criticisms of tort practice. We shall discuss them separately, below. The list itself is ominous:

- "Ambulance chasing";
- "Inflated claims";
- "Manufactured evidence";
- "Corruption and bribery";
- "Monopoly by a few offices";
- "Clogging the courts";
- "Abuse of the jury system";
- "Harassment of medical man";
- "Raising insurance rates";
- "Exorbitant fees";
- "Use of circus methods";

And, the catch-all charge—  
 "Destroying the ethics of the Bar and of the Nation."

Let's examine these charges, one by one.

### The Charge: "Ambulance Chasing"

So thoroughly has the rumor of "ambulance chasing" become associated with personal injury practice that in the minds of many people it is almost a synonym for such practice. In actuality the vast majority of tort lawyers would as soon commit murder as "chase" for cases. But you and I know that some few lawyers *are* guilty of ambulance chasing. They should be dealt with as any unethical practitioner is dealt with in any branch of law practice, of course. Far too many laymen, injured in an accident, are first bewildered and then filled with contempt when their phones begin to ring with calls from lawyers brazenly soliciting the case. I know of people who received actually dozens of such solicitation calls, after an accident.

Unhappily, some perfectly legitimate efforts to obtain cases are lumped together with "chasing." I mean, for example, the cultivating of labor union and association leaders, in the hope that they will recommend the lawyer to their members when a case arises. If this cultivation is honest and ethical, it is no more reprehensible than joining the Union League Club in order to seek corporation-executive clients.

All in all, the charge is a canard, as far as most tort lawyers are concerned. If good connections, that produce many clients, are unethical per se, we can criticize any branch of any profession on this ground—engineers who cultivate construction company executives, patent lawyers who cultivate engineers, physicians who cultivate workmen's compensation officials, and so on. Of course, though, splitting fees with laymen is really sheer bribery. So, some people say, is advancing money to clients, except in extraordinary cases.

Advancing money to clients is generally viewed as highly questionable—practically equivalent to maintenance. Attempts to justify this practice have been quite unconvincing, and have won only token support even among plaintiffs' lawyers.

Apparently some newspapers have spread the rumor of widespread "chasing." And so have some powerful railroad and insurance companies. The very recent case of *In re Heirich*<sup>2</sup> revealed the organized efforts of 21 railroads in an effort to destroy one lawyer. It revealed, too, the very questionable misleading of the grievance committee of a major Bar Association, to utilize

<sup>2</sup> *In re Heirich*, 140 N. E. 2d 825 (Ill., 1957).

its aid in this shabby enterprise. In passing, the Illinois court also mentioned similar past endeavors by insurance companies.

Nastiness begets nastiness. Take the interesting recent Cleveland case, where plaintiffs' lawyers and a defending railroad both covered themselves with shabby "glory." A leg-amputation case victim was receiving calls from lawyers all over the country. The railroad representatives meanwhile succeeded in selling the victim on settlement without counsel. Then they wired his living room and encouraged the claimant to accept further visits from lawyers. Then they recorded the conversations of the lawyers, in the hope of catching some compromising statements. I have this story from a Cleveland newspaper reporter who is a law student in my classes. An edifying lesson for a law student—isn't it!

The whole attitude of the public, of many courts, and of quite a few Bar Associations has been tinged with suspicion. In a recent California case, for example, it was said that bias against a lawyer because he is a personal injury specialist is not enough, *in itself*, to set aside a disciplinary order.<sup>3</sup> There, a State Bar Association had brought disciplinary proceedings against the lawyer. The court said that the lawyer would have to prove biased *action* against him, in order to obtain relief. The implication was shockingly clear—that it is somehow normal for Bar Associations to be *generally* biased against tort lawyers—that tort practice is, *per se*, somehow generally disreputable.

With all friendliness to the NACCA public relations man, I must say that NACCA has dismally failed in its public relations work on this score. This is no "one man" problem. It will take many men, much money, and much time to undo the scandalous defamation spread by many wealthy and powerful organizations and persons.

The public relations work of the Bar is almost pathetic when compared with that of the American Medical Association. Not long ago I heard that the A. M. A. is listed as among the top lobbies in Washington, D. C., in terms of money spent. It is certain that, relatively speaking, the money spent by the Bar on public relations is ridiculously small. Every profession and trade association today works hard at improving its public relations. Lawyers undoubtedly are near the bottom of the list in this respect.

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<sup>3</sup> Burns v. State Bar, 288 P. 2d 514 (Calif., 1955).

Here is a major task that NACCA and every tort lawyer must face—the task of improving the now-very-bad public relations of the tort Bar. The “splinter-organization” system of Bar Associations in itself is a serious handicap. Closer coordination of NACCA and Insurance Counsel Associations with other Bar Associations is a prerequisite to better public relations work. Personal “empire building” must become secondary to the welfare of the entire profession and of the public. All, of course, much easier to say than to do. But if it isn’t even *said*, it hardly is likely to be *done*.

### The Charge: “Inflated Claims”

Here, the critics are on solid ground. It is a fact that far too many complaints filed contain “telephone number” sums, far too often based on minor injuries. It is common practice to pick a number out of the air, preferably at least a five-figure number, for practically every claim.

Too often, claims are estimated more moderately only in order to file in a local court of limited monetary jurisdiction. This, usually, in order to obtain quicker trial than is possible in the calendar-clogged superior trial courts.

If a lawyer wants to properly protect his client, as he should, against possible future increases in the injury results, he should do so within reason. It is slovenly, as well as unprofessional, to exaggerate claims. Enough leeway for settlement-bargaining can be had without using wildly improbable estimates.

This oft-repeated accusation is seldom rebutted, because it so often is true. If tort lawyers will not use restraint in this respect, restraints surely will be imposed on them by the courts and legislatures.

As to this charge, the answer unhappily is: *Guilty*.

Some courts, notably those of New York, already have imposed restraints on exaggeration of claims, with calendar and pre-trial penalties. There will be more penalties, unless the tort lawyers impose reasonable restraints on themselves.

Incidentally, pre-trial lends itself also to “beating-down” tactics by insurance company counsel, partly because of this practice of inflating of claims. In a recent New York case one insurance company’s lawyers were castigated by the court for such

abuse of pre-trial in "beating-down" claims.<sup>4</sup> Some other defense lawyers, never so castigated, customarily use pre-trial and other means for "beating-down" claim amounts. But the root of the evil is the unbridled tendency to puff up claims—a tendency obvious in too many plaintiffs' lawyers.

Use of pre-trial promises to become more and more common and sweeping. The opportunities for exposing inflated claims are increasing rapidly. It is at least questionable, too, for plaintiffs' lawyers to invest thousands of dollars in building up a case.<sup>5</sup>

Will plaintiffs' lawyers heed the warnings? That remains to be seen.

### The Charge: "Manufactured Evidence"

As in every branch of practice, the possibility of "manufactured evidence" exists in tort practice. As in every branch of law practice, there are elaborate provisions for preventing and revealing false evidence. That is what the rules of evidence are for, and cross-examination, and other devices. There is no more reason to suspect false evidence in tort cases than in any other kinds of cases.

Apparently the charge of large scale "manufacturing" of evidence in negligence cases is without real foundation. Such evidence is more deadly to the one who uses it than to his opponent, ordinarily.

Part of the genesis of this unjust accusation lies in the complex medicolegal and scientific bases of much evidence in personal injury cases. Not truly understanding the evidence, hostile critics simply mutter "fraud" and vaguely hint at dark doings.

The charge of manufacturing of evidence, irritating and unjust as it is, is best ignored. To persistent critics, the obvious answer is: "Prove it. That's what courts are for—proof." *I.e.*, "Put up or shut up."

<sup>4</sup> *People v. Sacks*, 2 Misc. (N. Y.) 2d 201 (1956). But see, contra, for example, McNeal, "Whiplash"—Defense Counsel's View, 6 Clev.-Mar. L. R. 38, 45 (1957); digested in 2 Defense L. J. 413 (1957). And see, Lorry, Settlement of Personal Injury Claims, 1 Prac. Lawyer, 19 (1955); Weston, Appeasement of Tort Claimants, 6 Clev.-Mar. L. R. 58 (1957). A Page One headline in the Cleveland Plain Dealer on June 2, 1957 trumpeted "Insect Bite Brings Suit For \$400,000," in a suit brought by A. H. Dudnik in a leg-amputation case—typifying how newspapers treat such claims.

<sup>5</sup> As to pre-trial, see, Marks, Pre-Trial Motions, 136 N. Y. L. J. (21) 4 (July 31, 1956); Harmon, Summer Pre-Trials, *Ibid.*; Note, 2 NCS 7 (1956-7). As to over \$5000 spent preparing one plaintiff's case, see, Ashe, Behind the Scenes of a \$250,000 Verdict, 22 Okla. B. A. J. 62 (1951).



### **The Charge: "Corruption and Bribery"**

Some adjusters and claims agents *do* have "special arrangements" with some plaintiffs' lawyers for settlement of claims. These few people, and the few lawyers who cooperate with them in settling cases on a "payoff" basis, *are* corrupt. This is bribery. We all have heard (but few of us actually know) of these men, and of these "arrangements." There is much smoke around this charge. How much fire there is in the charge is a pure guess. .

In my own twenty years of experience I have never actually seen such a case of corruption and bribery. I have heard hearsay about several people—never any concrete evidence. I have also heard that some insurance company claims men are the main "hustlers" for their natural enemies—some plaintiffs' lawyers. They see the client first, and steer him to their collaborator.

If the charge is ever true, one thing seems plain—it damns the defense as well as the plaintiff's side. It takes two to pay a bribe. The one who sells his own company and client, moreover, is far worse than the one who "kicks back" part of a recovery that he obtains for a client.

Loose gossip, all too often on the part of lawyers, about other lawyers, is partly responsible for the rumors of bribery. The threat of libel or slander suits keeps such gossip vague and un-specific. But the harm it does is very specific indeed. It harms every lawyer, and especially every tort lawyer.

Until actual names are named and charges filed with the authorities, the best we can do is hope that the gossip is nothing more than gossip.

### **The Charge: "Monopoly By a Few Offices"**

True enough, we must admit. The big negligence offices *do* have most of the tort practice in every major city. Averbach, Baker, Belli, Berman, Gair, Halpern, Karlin, Kennett, Mozingo, Ross, Rucker, Sindell, Dudnik, Spangenberg, and their equivalent-colleagues, *do* handle a goodly portion of all the major cases.

But in one metropolitan center which I will not identify more exactly, three *defense* firms this year had pending cases totaling one-third of the entire pending court calendar. The precise case-total figures for these *defense* offices were, respectively, 1500, 600, and 350 cases each, or a total of 2450 cases, out of slightly more than 7000 tort actions pending in this city. In the same city, their plaintiffs' counterparts, called the "big three" of this city,

had respectively 575, 460, and 380 cases filed, or a total of 1415 cases. Monopoly, on a numerical basis, is worse among defense firms than among plaintiffs', here.

Judges in New York, Cleveland, and other cities recently have complained that there are "not enough lawyers" handling tort cases. They mean that the few top offices in each city handle most of the cases. As a man can only be in one place at one time, it does seem at first scrutiny that such "monopoly" may be partly responsible for the slowness of our court operation and the frequency of adjournments of cases.

Responsibility, however, must also be shared by defense firms. They are just as guilty in failing to provide enough trial lawyers as are plaintiffs' firms, to handle expeditiously their large court calendars. Moreover, an insured defendant should pick his own defense counsel, say some people, and not be forced to accept the insurer's choice.

First, as to the "wrongfulness" of these "monopolies"—surely it is not yet a crime, in these United States, to be successful and "big." Nobody is urging the breakup of White and Case or the Cravath firm because they handle much major corporation work. Nobody attacks the big Wall Street "law factories" because they monopolize most of the big reorganizations and securities cases. Certainly some defense firms monopolize some insurance companies' defense tort work, too.

Where a law office has so much work that it cannot handle the cases efficiently, however, that is another matter. That has happened in the offices of both plaintiffs' and defense lawyers. Usually this is because a successful trial lawyer naturally tends to want to try every important case himself. His mistake in this very human tendency does cause delay in the courts.

The solution to this problem is simple to say—not so easy to do. More trial lawyers—good ones—is the solution. But good trial lawyers do not grow on trees. They must be trained and seasoned.

Dave Sindell, of Cleveland, is a good example of wise, forward-looking lawyers in his method of solving the problem. Sindell, Sindell, Bourne and Disbro, one of the top tort practice offices in the midwest, began to build for the future several years ago. They founded tort and trial practice prizes at Cleveland-Marshall Law School. Today they take the top graduates into their office each year. There they train promising young trial men, starting them with minor cases and bringing them along to

bigger and bigger matters. In the past year or so Dave Sindell has added four or five first-class trial men to his firm's top echelon. The same thing is done with preparation men, appeal men, and so on. This is an exhilarating and most useful example of *enlightened self-interest*. It helps the firm, the young men, the courts, and the public. A. H. Dudnik and Craig Spangenberg, two other leading Cleveland lawyers, use similar training programs in their respective offices.

There is nothing wrong with sheer bigness, within reason—not according to the American philosophy. But there is an obligation that accompanies success—the obligation to make sure that power serves the community and does not harm it.

### **The Charge: "Clogging The Courts"**

This surely is one of the major criticisms of tort lawyers. The clogged, slow state of our superannuated court system almost always is blamed on the huge volume of tort actions. With over 70% of all cases in the courts being tort actions, the criticism seems to be valid—especially when we know that only 5% of cases in English courts are tort cases.

In part this serious criticism is justified, but only in part. There are other reasons for the clogged condition of our courts, none of them the fault of the negligence lawyers. With over 61 million motor vehicles in the United States today, is it any wonder that automobile accidents have multiplied? That is only one illustration of the tremendous mechanization of our society. Yet, industrialization and mechanization are not the major causes of the flood of personal injury cases, according to some recent surveys.

Some Bar Associations and some judges point accusingly at the tort lawyers, as court calendars fall years behind. Nobody accuses the Bar Associations or the judiciary of serious fault in this connection, though. Nobody points to the endless, dreary committee meetings that wind up with a cozy dinner and cocktails—and nothing accomplished. Nobody points to the judge who thinks of his job mainly as a decoration bestowed by an admiring community—and only secondarily as a grueling task of work.

Few people stop to think that population growth has far outstripped the old-fashioned court systems of most states. Few communities have enough judges or a truly modern system of courts and procedure. Patchwork is the rule.

While they flounder about in search of a solution, the committees and critics glare at the plaintiffs' lawyers and the calendars. They have tried various experiments, with various degrees of futility. The obvious answers—more judges and more courts, for a more complex and crowded era—are not easy or cheap enough solutions; not while we tax ourselves cruelly in order to build necessary defense forces, or to give billions away for building swimming pools for Arabian sheiks or tennis courts for motley maharajahs.

Senior Associate Judge Charles S. Desmond, of the New York Court of Appeals, urged use of attorneys as temporary judges, as one solution.<sup>6</sup> That idea has worked successfully in Massachusetts since 1938. A thunderous silence greeted his suggestion.

New York Supreme Court Justice Samuel H. Hofstadter proposed a "Lay Court" system, using lay experts—one jurist, one layman, and one physician.<sup>7</sup> This was offered as an alternative to the Columbia Plan, that would replace our court system with a Compensation System. The busy lecturer-judges, like Botein, Hofstadter and others, have proposed everything from abolition of juries to abolition of courts—in vain. All these plans seem to be suggestive of burning down the house in order to roast the pig. Oddly, the compensation system almost always seems to be urged only by representatives of big defendants.

Use of impartial medical panels is urged. In New York City a 50% cut in calendar congestion, through use of pre-trial, was so accomplished, it is reported.<sup>8</sup> Then others say that such panels serve only to produce three conflicting medical opinions instead of two, and more delay.<sup>9</sup>

Nobody complains of some defense lawyers, on a per diem fee basis, deliberately prolonging clear settlement cases in order to build up their fees.

New York's experiment with summer trials in 1956 achieved a one percent reduction in calendar congestion—hardly worth

<sup>6</sup> Temporary Court Proposed, CVI N. Y. Times, p. 33 (Nov. 15, 1956); 2 N. C. S. 51 (1956-7).

<sup>7</sup> Hofstadter, Alternative Proposal To The Compensation Plan, 42 Cornell L. Q. 59 (1956).

<sup>8</sup> Impartial Medical Testimony (Assn. of the Bar of the City of N. Y., Jan. 23, 1956). \$3.95/copy; and see, CV N. Y. Times, p. 33 (Jan. 24, 1956); 1 N. C. S. 91 (1956).

<sup>9</sup> Delman, Disapproval of Suggestion for a Medical Panel, 135 N. Y. L. J. (28) 4 (Feb. 9, 1956).

the perspiration involved.<sup>10</sup> One New York City Court judge found 97 cases not ready for trial, of 100 cases called.<sup>11</sup> In 1957 the time for filing for summer trials had to be extended, so poor was the response. Nobody seemed to like that idea, and New York's calendars continued to be the longest in the Nation.<sup>12</sup>

A permanent federal committee to study the problem was set up by the United States Attorney General's Conference on Court Congestion and Delay, in July of 1956.<sup>13</sup> Permanent committees added to temporary committees, for a permanent study?

We could go on and on. The problem continues, and the scowls at the tort lawyers continue. One result is the cutting of calendars by backing the cases into the lawyers' own offices by drastic measures. "Meat axe" methods have been used in the New York area, producing nice calendar reduction figures; but what results they produce on clients nobody knows.

Perhaps New York has found something valuable in its new "No-Pleadings"<sup>14</sup> and "Statement of Readiness" procedure.<sup>15</sup> At the end of April, 1957 a sharp reduction in calendar congestion *had* been achieved, credited primarily to these new procedures.

In May of 1957, Will Shafroth, Chief of the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, reported a cut from 5630 (1955) to 1800 (1956) cases on the federal calendar in the Federal District Court, Southern District of New York, under the new rules eliminating automatic calendaring. No case is calendared now, until it is ready for trial. Trial lawyers may dislike this system; but it seems to be spreading.

The whole picture and all the main suggestions were summarized in a Report of the New York State Temporary Commission on the Courts, in February of 1957.<sup>16</sup> The recommendations were as follows:

<sup>10</sup> Knowles, Summer Courts, CV N. Y. Times, p. 1 (Aug. 13, 1956); 2 N. C. S. 3 (1956-7). Same disinterest in 1957. Time To File For Summer Jury Trials Extended, 137 N. Y. L. J. (72) 1 (Apr. 15, 1957).

<sup>11</sup> *Ibid.*

<sup>12</sup> Calendar Longest in State Courts Throughout the Nation, 136 N. Y. L. J. (42) 4 (Aug. 29, 1956).

<sup>13</sup> Justice Delayed Is Justice Denied, 136 N. Y. L. J. (3) 4 (July 5, 1956).

<sup>14</sup> Official Ed., L. Rpts. & Sess. L., State of N. Y. (A. D.), (Nov. 21, 1956); and N. Y. Rules Civ. Proc., Rule 118.

<sup>15</sup> Reduction of Calendar Delay, 137 N. Y. L. J. (81) 4 (Apr. 26, 1957). And as to the federal practice, Corres., 137 N. Y. L. J. (86) 4 (May 3, 1957).

<sup>16</sup> N. Y. St. Temp. Comm. on Cts., 137 N. Y. L. J. (27) 4 (Feb. 7, 1957); 2 N. C. S. 98 (1957); and see, Conway, Congested Calendars—And Why, 6 Buffalo L. R. 1 (1956); Note, Methods to Combat Court Congestion and Delay Recommended, 40 J. Amer. Jud. Soc. 108 (1957).

1. More judges.
2. Use of pre-trial "Attorney-Masters."
3. Early pre-trial.
4. Comparative negligence rules.
5. Uniform fees and costs.
6. Restriction of hospital liens.
7. More lawyers handling negligence cases.

The Commission expressly rejected:

- a. Administrative, compensation-type boards.
- b. Restriction of jury trials.
- c. Trial referees or auditors.
- d. Interest on negligence claims.

Without laboring the point, it seems clear that most of the scowling at tort lawyers, as somehow responsible for calendar congestion, is quite unreasonable. They are no more responsible for it than are lawyers generally. If anything, they have fought sturdily to prevent a reckless destruction of the jury system and other hard-won protections of liberty. They, more than other lawyers, want the court congestion to be cleared. That congestion aids the defense far more than it benefits the plaintiff—and it rarely benefits the plaintiff. On the contrary, as all will agree—justice delayed is justice denied.

### **The Charge: "Abuse of the Jury System"**

While it is not clear just how tort lawyers "abuse" the jury system, this charge is often hurled at them. Presumably the "abuse" consists of preferring jury trials to non-jury trials. Some judges have muttered angrily at this preference, which seems to impugn at least the kindness of judges. Everyone knows that juries are often more generous in making awards than are judges alone.

Actually the root of the charge is that lawyers often, above all, primarily seek to get a serious injury case *to the jury*, in the hope that vivid injuries will outweigh less concrete liability premises. Morally, such a practice is quite questionable. The question of damages should not arise in a case unless and until the liability is established.

Defense lawyers are particularly bitter on this point, and justly so. It is infuriating to have a plaintiff's lawyer say: "Let's not discuss liability, because my client is injured and that's enough for me. My client was hurt, wasn't he!"<sup>17</sup>

<sup>17</sup> Weston, *Appeasement of Tort Claimants*, 6 Clev.-Mar. L. R. 58 (1957).

For many plaintiffs' lawyers, the drafting of a petition aims at only one major target—to make *some kind* of issue of fact; just enough to make sure that the pleading is not dismissed on the law, and *gets to the jury*. They are sure that, once the case gets to the jury, the odds are with them, no matter how tenuous the theory of liability may be. They aim for sympathy appeal—*bathos*—rather than sound law and justice.

Human as this purpose may be, it is fundamentally immoral, and destructive of the real purpose of law—objective justice.

Insofar as plaintiff's lawyers are guilty of this tactical technique as a regular practice, they *are* abusing the jury system. Ultimately they will cause enactment of such strict technical rules of pleading that they will curse their own folly. Meanwhile, they cast over their profession a pall of artificial, immoral sentimentality and false jury-appeal. It is an insidious, poisonously immoral approach, all the more deadly because it is so enticing and profitable. But it may lead to a revulsion that will penalize many legally valid claims.<sup>18</sup>

One kind of obvious reaction is the proposal to do away with juries entirely in negligence cases. Such prominent lecturer-judges as Chief Justice Peck of New York's Appellate Division, First Department, have made this suggestion. Fortunately, such men as Chief Justice Conway and Associate Justice Van Voorhis of New York's Court of Appeals opposed the suggestion, as did NACCA and many others.<sup>19</sup> For the time being this destructive proposal now seems to have been defeated. But it indicates the intensity of reaction that abuse of the jury system can inspire.

To a large extent this is a problem in personal ethics and morality. Its cure must be based on this fundamental characteristic. What can be done about it right now, I will not venture to guess.

### The Charge: "Harassment of Medical Men"

Bitter differences between the medical and the legal professions have had profoundly harmful effects. Such seemingly theoretical differences as that over the meaning of *causation*

<sup>18</sup> For an example of general lambasting of this and other charges, see, Botein, *Who Are The Accident Victims—The Parties, The Public or The Courts*, 12 *The Record*, 185 (Assn. of the Bar of the City of N. Y., Apr. 1957).

<sup>19</sup> Note, 2 *Plaintiff's Advocate* (2) 1-16 (N. Y. St. Assn. Pl. Tr. Lawyers, Feb. 1956); 1 *N. C. S.* (13) 104 (Apr. 1, 1956).

have produced angry disputes between physicians and lawyers.<sup>20</sup> It is quite clear that many doctors fear courts and lawyers.<sup>21</sup> And what one fears one usually dislikes. The sorry state of relations between the professions is causing growing concern to both.<sup>22</sup>

Harm resulting from the enmity of so influential a profession as medicine hardly can be afforded by the legal profession. The results of enmity of even a few doctors can be very serious. The pity of it is that such enmity usually grows out of misunderstanding. It is long past time that both professions took action to understand each other, and to cooperate for the public welfare.

Some few lawyers, such as Albert Averbach of New York and Samuel Gerber (M. D., LL. B.) of Cleveland, have done fine work in improving the relations between the professions.<sup>23</sup> At Cleveland-Marshall Law School we have had most gratifying results in our invitations to national medical leaders to join as Medical Advisory Editors on the law review organization. The Cleveland-Marshall Law Review now has a masthead showing the names of fourteen nationally famous doctors who are its Medical-Advisory Editors. The doctors have welcomed the chance to cooperate. The lawyers must do no less. Law-medicine centers, institutes, and publications must be supported and enlarged. They are very helpful.<sup>24</sup> Medicolegal codes of conduct, such as that adopted in New York this summer, are invaluable.

Malpractice suits, of course, are a major source of inter-profession bitterness. Doctors often view them as assaults by lawyers. Lawyers rail at doctors for refusing to testify against each other. Bitterness compounds bitterness.

The doctors are very understandably upset about the tide of malpractice suits. Lawyers surely would feel the same way if they were the targets. There has been a tenfold increase in

<sup>20</sup> Averbach, *Causation: A Medico-Legal Battlefield*, 6 *Clev.-Mar. L. R.* 209 (May, 1957).

<sup>21</sup> Sindell, *The Frightened Medical Witness*, 6 *Clev.-Mar. L. R.* 75 (Jan. 1957). The resentful fear is apparent in an odd physician's publication book review: *Iatros, Meet "The King of Torts,"* 3 *Med. News* (9) 5 (May 6, 1957).

<sup>22</sup> Kamman & Raudenbush, *Medicolegal Relations*, 38 *Minn. M.* (4) 228 (1955); Gilligan, *Medico-Legal Problems—The Physicians' and Lawyers' Viewpoints*, *Medicolegal Symposiums*, 64 (*Law Dept., A. M. A., Chicago* 10, Ill., 1955); 2 *N. C. S.* 30 (1956-7).

<sup>23</sup> Averbach, *supra*, n. 20; and see, Averbach, *Aids For Improvement of Doctor-Lawyer Relationship, in Case and Comment* (Nov.-Dec. 1956); digested from *Insur. L. J.* (Apr. 1956).

<sup>24</sup> See, Schroeder, *The Law-Medicine Center: Four Years Experience*, 28 *Cleveland B. A. J.* 19 (Dec., 1956); A. M. A. Head . . . , 3 *Med. News* (14) 4 (July 29, 1957).



medical malpractice suits in the last 25 years. Yet, malpractice was proved in only 5 percent of the cases. Meanwhile damage awards increased by 149 percent; and malpractice insurance premiums went up 850 percent in one year in one state, just for example.<sup>25</sup> By 1955 only six insurance companies were writing malpractice policies, where there used to be 100 companies doing so.<sup>26</sup> The anger of the doctors has been correspondingly increasing.<sup>27</sup>

In 1945 there was one malpractice suit per 71 physicians. In 1955 there was one suit per 25 physicians.<sup>28</sup> Medical malpractice insurance rates reached astronomical proportions in 1957.<sup>29</sup> No wonder the doctors are angry. Nor are they soothed when other doctors tell them that 60 percent of the cases stem from loose talk to patients by the doctors themselves.<sup>30</sup> And they seldom will admit that their own ignorance may be a cause, though it is recognized as a major cause by such medical authorities as Dr. Walter C. Alvarez.<sup>31</sup>

Doctors will not acknowledge that their own propaganda has boomeranged here. The A. M. A. and Hollywood have so glorified the "Men in White" that patients expect miracles from every M. D. Then the patient is furious when he finds that the "infallible physician" is only a human who can make mistakes. But surely a lawyer should not leap at every chance to crucify a physician for making a mistake.

The doctors wanted a "doctors' court for doctors," as a solution. They got one in Washington State, under the first Medical Disciplinary Act, adopted there in October of 1955.<sup>32</sup> Its results have been interesting—only two tax evasion suspensions in the

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<sup>25</sup> Iatros, *Malpractice—Its Prevention and Cure*, 2 *Med. News* (2) 5 (1956).

<sup>26</sup> Iatros, *Danger, Lawsuit Ahead*, 2 *Med. News* (10) 7 (1956).

<sup>27</sup> See, Regan, *Note, Med. Econ.* 203 (1955); Regan, *Note, Readers' Digest* (Jan. 1955); Regan, *Malpractice and the Physician*, 54 *Wis. M. J.* (1) 18 (1955); Regan, *Legal Aspects of Obstetrical Practice*, *Modern Med.* 182 (Aug. 1955). And see n. 28.

<sup>28</sup> Gilligan, *Medico-Legal Problems—The Physicians' and Lawyers' Viewpoints*, *Proceedings in Medicolegal Symposiums*, 64 (Law Dept., A. M. A., Chicago, Ill., 1955).

<sup>29</sup> Iatros, *Malpractice Insurance Crisis*, 3 *Med. News* (7) 5 (1957). And see, Morris, *Medical Malpractice—A Changing Picture*, 23 *Ins. Counsel J.* 23 (1956).

<sup>30</sup> Gilligan, *supra*, n. 28.

<sup>31</sup> Alvarez, *Refusal To Admit Ignorance*, in *Medical Roundup*, *Cleveland Plain Dealer*, 42 (Dec. 14, 1956).

<sup>32</sup> *Note*, 1 *Med. News* (4) 1 (Oct. 24, 1955).

first full year of operation of the "doctors' court" in Washington State.<sup>33</sup> A remarkably well behaved profession, when the doctors are their own judges! Very different from the harsh judgments of Bar Association Grievance Committees!

Physicians' fees for serving as expert witnesses are another source of trouble. Justice Isidore Wasservogel of New York City excoriated the doctors on this point. Perhaps he was right, but how often do the doctors try to criticize legal fees? A 1955 medicolegal conference in New York City said the medical experts' fees were too high. It recommended the schedule followed in Richmond County, New York: \$10 fee for pre-trial; \$50 in lower courts up to \$2000 damages; \$100 in intermediate courts up to \$6000 damages; and \$150 in superior courts with over \$6000 damages.<sup>34</sup> Would it not be wiser to fix fees by agreement between professions than by one-sided pressure?

Impartial panels of medical experts, so enthusiastically favored by doctors, are strongly opposed by many lawyers—another source of friction. The indefatigable lecturer-judge Botein of New York, says they have been a great success.<sup>35</sup> Presiding Justice David W. Peck, of New York's Appellate Division, favors them too.<sup>36</sup> They have been tried, with success, in Maryland (Baltimore), Minnesota, New York, and elsewhere.<sup>37</sup> Such trial leaders as Melvin M. Belli have spoken favorably of them.<sup>38</sup> The writers of uniform codes favor them.<sup>39</sup> Yet many lawyers bitterly oppose them. Is this simply evidence of stubborn conservatism? Or do these lawyers thus reveal a fundamental hostility to medical men?

If lawyers will reach out even for chiropractors, in attempts to use them as general medical experts, as they sometimes do<sup>40</sup>,

<sup>33</sup> *Iatros, Doctors' Court For Doctors*, 2 *Med. News* (2) 5 (Nov. 5, 1956). But before smiling, remember that attorneys' malpractice is much harder for a plaintiff to prove. See, Gardner, *Attorneys' Malpractice*, 6 *Clev.-Mar. L. R.* 264 (1957).

<sup>34</sup> Note, 1 *Med. News* (2) 1 (Sept. 26, 1955).

<sup>35</sup> News Item, *CV N. Y. Times* (Dec. 4, 1955); Botein, *Impartial Medical Testimony*, 135 *N. Y. L. J.* (21) 4 (Jan. 31, 1956).

<sup>36</sup> Peck, *A Successful New Plan: Impartial Medical Testimony*, 42 *A. B. A. J.*, 931 (Oct. 1956).

<sup>37</sup> Anderson, *Unbiased Medical Expert Testimony—An Actuality*, *Proceedings in Medicolegal Symposiums*, 102 (*Law Dept., A. M. A., Chicago* 10, Ill., 1955); Peck, *supra*, n. 36; Peck, *Impartial Medical Testimony*, 136 *N. Y. L. J.* (59) 4 (Sept. 24, 1956); Goldstein, *Medical Expert Testimony*, *Proceedings* (above stated) p. 51; 2 *N. C. S.* 19 (1956-7).

<sup>38</sup> Belli, *Modern Trials*, Sec. 59 (1) (1954).

<sup>39</sup> *Model Expert Test. Act*, 9 *Unif. L. Anno., Misc. Acts*, 429-439.

<sup>40</sup> *Fries v. Goldsby*, 80 *N. W.* 2d 171 (Nebr., 1957).

their opposition to impartial medical experts rings a little hollowly. Lawyers need and want the cooperation of doctors, and must meet the doctors at least half-way, if they expect cooperation.

Certainly the growing hostility between the professions is both unseemly and dangerous. Moreover, it promises to become worse unless both sides try to correct the situation. As it stands, there is some justification in the charge that the legal profession deliberately gives the doctors a bad time. Even a little justification for such a charge is intolerable.

### The Charge: "Raising Insurance Rates"

This accusation naturally is most usually voiced by the insurance companies and their counsel.<sup>41</sup> It has been answered so often and discussed so often that it will be merely mentioned here.<sup>42</sup> The charge itself is so full of self-serving purposes, on

<sup>41</sup> See, for example, Pierson, *The Defense Attorney and Basic Defense Tactics*, Sec. 4 (1956); Notes, 1 *Defense L. J.* 6-14 (1957); Weston, *Appeasement of Tort Claimants*, 6 *Clev.-Mar. L. R.* 58 (1957).

<sup>42</sup> See, for example, Belli, *Ready For The Plaintiff*, 9, 40 (1956). A recent study series of articles conducted by Reporter Aaron Jacobson for the *Cleveland News* reported (in May, 1957) the subjoined interesting insurance statistics for the Cleveland (Cuyahoga County) Ohio area: (Jacobson is a law student in my Torts class at Cleveland-Marshall Law School, as well as a full-time newspaperman assigned to courts and law news and feature work.) Compare these figures with the Times report of multi-billion insurance premium rises, and draw your own conclusions.

"In 1933 ----- insurance companies paid \$5,638,000 in personal injury claims arising from auto accidents in Ohio.

"For the year 1955, the insurers reported paying \$39,968,000—an increase of 700 per cent! (These are the losses reported to the Ohio Department of Insurance.)

"Cuyahoga County's share of this bundle last year is placed at \$8,500,000.

"Add \$600,000 paid out by the Cleveland Transit System.

"Add \$700,000 from the railroads. Their 1956 payments include another \$700,000 paid out in cases handled by Cleveland lawyers in other Ohio areas.

"Add \$1,000,000 paid to claimants through general liability insurance for injuries other than vehicular.

"The total thus far neighbors on \$11,000,000, but the figure is incomplete.

"There are trucking lines which are self-insurers.

"There are those claims paid by individuals or firms not carrying insurance, or which are not fully covered by insurance.

"Experts on the paying end of personal injury work estimate that \$15,000,000—as a conservative figure—were paid to injured claimants or in death claims during 1956. This is the Cuyahoga County figure.

"Nor does it include the \$5,000,000 spent here by insurance companies in satisfying property damage claims.

"----- The Cost of living index for 1932 in the Cleveland area was 55.8. At the beginning of 1957, it was 120 -----.

"----- Vehicular accidents occurring in the city of Cleveland rose from 11,401 in 1934 to 36,180 in 1955, or 217 per cent.

"----- For 1934, 4,089 suffered injuries, as compared to the 5,584 in 1955. ----- The increase is only 36 per cent.

both sides, that it requires intensive study and statistics inappropriate here. It may suffice just to point out, as did the New York Times on May 5, 1957, that annual premiums on accident insurance now run over 3 billion dollars a year. Twenty years ago they were \$161 million. Clearly there has been a vast increase—in insurance company revenues, as well as in rates.

### The Charge: "Exorbitant Fees"

Few charges against plaintiffs' tort lawyers are more often repeated than this one. Even among lawyers today, negligence practice often is viewed as the "rich" field of practice. But contingent fees of 50 percent do raise the hackles of most observers—especially of laymen. A fifty-fifty split has a bad sound for most people, no matter how hard the lawyer had to work to recover for his client. It simply *sounds* like too much, if nothing else. Fundamentally, a lawyer should work for an adequate fee, of course, but not as a *partner* of the client. *That*—partnership in the claim—is the implication of a fifty-fifty fee arrangement.

There has been a growing current of criticism of the high percentage of lawyers' contingent fees in negligence. The view of the courts as to this was clearly stated in the Official Fee Schedules adopted by New York's First Department, effective January 1, 1957.<sup>43</sup> As amended,<sup>44</sup> that schedule in effect abolished the 50 percent contingent fee, for most purposes.<sup>45</sup> It set up a more

(Continued from preceding page)

"----- Some 90 per cent of car owners now carry -----  
liability insurance -----"

"----- 40 per cent were estimated to have carried similar insurance  
in the 1930's.

"----- Coverage popularly carried 20 or 25 years ago was  
\$5,000 for single injury or death, and \$10,000 for two or more injured or  
killed.

"Today, the popular coverage, according to insurance company representatives, is \$20,000—\$40,000, and \$50,000—\$100,000. Many persons of average means have extended their coverages to \$100,000—\$300,000.

"In addition, commercial and industrial firms commonly carry one—and—three—million dollar liability coverages on their executives and employes who drive, and a general liability protection."

<sup>43</sup> Special Rules of App. Div., Supr. Ct., State of N. Y., First Jud. Dept., Rule 4; see, 136 N. Y. L. J. (62) 1 (Sept. 27, 1956). 50% on first \$1000; 40% on next \$2000; 35% on next \$22,000; 20% (changed to 25%) on next \$25,000; etc.

<sup>44</sup> App. Div., First Dept., N. Y., Amendment of Rules Regulating Contingent Fees, 136 N. Y. L. J. 1 (Dec. 27, 1956). Adding an alternative sliding scale, and removing the charging of expenses against the lawyer's fee.

<sup>45</sup> New York Court Adopts Contingent Fee Schedule, 40 J. Amer. Jud. Soc., 86 (Oct.-Dec., 1956).

modest schedule, more compatible with public opinion. An immediate attempt by a group of lawyers to overturn the new court rule was defeated on technical grounds.<sup>46</sup> And the newspapers' reports of that defeat contained more than a hint of gleeful satisfaction with the discomfiture of the lawyers. But on June 14th, a single justice (Stevens) overturned the rules, as unconstitutional, on the applications of Harry Gair and Emile Zola Berman. Litigation to the Court of Appeals surely will follow. This looks like a Pyrrhic victory.<sup>47</sup>

It is a sad commentary on plaintiffs' lawyers that it took court-rules action to attempt to cut negligence case contingent fees down to more reasonable levels. They should be glad that even more drastic action was not employed.

Quantum meruit always is the best general measure of what a lawyers' fee should be.<sup>48</sup> Certainly it is not sound to work on a "what the traffic will bear" basis.

### The Charge: "Use of Circus Methods"

*Demonstrative evidence* is what is meant by "circus methods," ordinarily. This charge has the flavor of sour grapes, in most cases. It is a charge made almost entirely by defeated defense lawyers. In any event, we can safely leave to the judges the control of attorneys who overstep the bounds of good taste and proper trial practices.<sup>49</sup> It is not improper for an advocate to be an advocate. Yet, use of gruesome sideshow devices to inflame juries of course cannot be tolerated, and is condemned by the courts.<sup>50</sup>

Some few attorneys are natural born "hams" who so love the spotlight and sensationalism that they sometimes do go too far. But to sweepingly accuse all plaintiffs' tort lawyers of this

<sup>46</sup> Lawyers Lose Fee Bid, N. Y. Times, p. 45 (Jan. 31, 1957).

<sup>47</sup> Ibid.; and Jurist Overrides Appellate Court, N. Y. Times, p. 19 (June 15, 1957). For a detailed discussion of court views of the subject see Wojcik v. Miller Bakeries Corp., 2 N. Y. 2d 631 (1957), rev'g 2 A. D. 2d 705.

<sup>48</sup> Inman v. Gonzales, 80 S. 2d 914 (La. App., 1956). Breach of contract damages, for improper dismissal, Berry v. Nichols, 298 S. W. 2d 40 (Ark., 1957).

<sup>49</sup> See, for example (exhibition of body burns): Magnolia Petroleum Co. v. Angelly, 306 P. 2d 309 (Okla., 1957); Belli, Modern Trials (1954).

<sup>50</sup> Wetherbee v. Elgin, J. & E. R. Co., 191 F. 2d 302 (C. A. 7, 1951); Hall v. Chicago & N. W. Ry. Co., 349 Ill. App. 175, 110 N. E. 2d 654 (1953).

is simply wrong. The gentle art of judge or opponent baiting belongs to no one group of lawyers.<sup>51</sup>

Defense lawyers, of course, long have said that "circus methods" are what have led to much of the success of plaintiffs' lawyers in recent years. They complain bitterly that NACCA's campaign for "more adequate" awards actually has resulted in excessive and oppressive verdicts.<sup>52</sup>

That plaintiffs' tort lawyers should be thus generally accused of legal bad manners is itself disturbing. It does perhaps indicate a lack of wise personal public relations in some cases.

The duty of personal injury lawyers, like any other lawyers, to follow a high standard of personal dignity, always offers a hard problem. Just for example, take the problem of publicity. It is understandable that legitimate publicity often should be desired. But the interests of the entire profession and of the public always are superior to the personal interests and ambitions of any attorney. For all lawyers the regulatory rules of the Bar Associations must be uniformly enforced, with justice, but also with firmness. Publicity seeking may be understandable, but it is fraught with explosive possibilities for discredit to the profession. It is simply not safe to allow it to be governed only by the private conscience of each individual. New York State Bar Association Canon 20, for example, bars press releases or statements about pending cases, in quite sweeping terms.

Yet, attention to good professional public relations is a private as well as a profession-wide duty. For example, in writing an article for a professional journal or other publication, elementary decency requires that good taste always shall be used. Otherwise the whole profession may be to some extent demeaned by the bad taste of one man. It is just as easy, for example, to say that your opponent is "wrong" as to say that he is "stupid." It is more gentlemanly to say that a defense lawyer is "seeking favorable evidence" than that he is "wolfishly sniffing for angles"; that he "smiles" rather than that he "leers." Even a sharp attack on an opponent's theories never should degenerate

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<sup>51</sup> See, Botein, *The Gentle Art of Judge-Baiting*, 137 N. Y. L. J. (26) 4 (Feb. 6, 1957).

<sup>52</sup> See, Pierson, *The Defense Attorney and Basic Defense Tactics*, 5 (1956); Pierson, 1 *Defense L. J.* 276 (1957); Hobson, *NACCA—As Viewed by Defense Counsel*, 20 *Ky. S. B. J.* 170 (1956); But, see, Belli, *Ready For The Plaintiff*, 7 (1956); Belli, *The Adequate Award*, 39 *Calif. L. R.* 1 (1951); and, Lambert, *NACCA—Rumor and Reflection* (reprinted from *Harv. Law Record*) in, 18 *NACCA L. J.* 25 (Nov. 1956).

into an attack on him personally. Ironically, too, the ultimate effect of such tactics usually is that the discourtesy boomerangs.

*Noblesse oblige* is a motto that particularly should be followed by the most successful lawyers, but its principle applies equally to any member of any distinguished group. And surely we all want the members of the legal profession to continue to be such a group.

Use of dramatic, powerfully persuasive methods is not, *per se*, wrong. Its effectiveness has been made very clear by such men as Belli. Drama, however, should not be confused with sensationalism; and sensationalism is not a valid substitute for drama.

### **The Catch-All Charge: "Destroying the Ethics of the Bar and of the Nation"**

All of the charges mentioned above, and some others, sometimes are lumped together in one catch-all charge. The article in *Harper's*, mentioned at the beginning of this discussion, was of that kind. It darkly warned of destruction of national morality by personal injury lawyers. Nor did its vagueness and errors take the harm out of it, as far as public opinion is concerned.

A general charge invites a general answer. All in all, the charge is not valid. But, as we have seen, it unhappily does have *some* elements of validity in it.

That partial confession and avoidance is enough to shame the profession. The answer should be able to be a flat, categorical denial. Until the answer of the Tort Bar to such charges is a complete rebuttal of any and all such charges, that answer is insufficient.