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# PERCEPTIONS OF THE LEGAL PROFESSION

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# COMMENTARY

## PERCEPTIONS OF THE LEGAL PROFESSION

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The media's view of the legal profession is illustrated by several incidents. In a recent episode of a popular network television series, one medical resident told another, "I need to find a decent lawyer." The reply was, "That's a contradiction in terms." The next week, my fourteen-year-old daughter and I were doing a newspaper "Jumble," a quiz in which the reader must unscramble words and figure out how to fit circled letters into new words in response to a clue. The clue was: "What a lawyer sometimes helps you get." We unscrambled the words, and figured out that the answer was: "What's coming to *him*." These are telltale signs that lawyers, and our ethics, are fair game as the butt of cynical and unflattering jokes and remarks.

What's new about that? After all, Shakespeare and Dickens reviled lawyers in some of their great works. Is the perception of the profession different today than it was for the last several generations of graduating lawyers?

I think so. The *National Law Journal* conducted a poll and reported the results in its August 18, 1986 issue. When asked, "For which of the following professionals do you have the most respect?" the highest number of respondents, thirty percent, said clergy, twenty-eight percent said doctors, and nineteen percent most respected teachers. Only five percent responded that lawyers were the professionals for whom they had the most respect. When asked, "Which of the following professions would you recommend to a son or daughter?" only twelve percent, or about one in ten respondents, said the law. This was one-third as many as would recommend business, and one-half of the number who would recommend medicine. Amazingly, when asked, "Which of the following groups has played the largest

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1. Judge, United States Court of Appeals for the Third Circuit. This commentary is taken from a Commencement Address delivered at Western New England College School of Law on May 17, 1987.

role in protecting the individual rights of U.S. citizens?" only eleven percent answered lawyers, and only another eleven percent answered judges. In contrast, forty-two percent said citizens' groups, and twenty-three percent, more than the number that selected judges and lawyers combined, said journalists.<sup>2</sup>

We need not rely solely on one source. A Gallup Poll in July of 1983 found that the public rated funeral directors as having higher ethical standards than lawyers.<sup>3</sup>

Because of concern about the public's perception of lawyers, the American Bar Association found it necessary to establish a special Commission on Professionalism. The Commission's Report, dated August, 1986, referred to its own survey that showed that only six percent of corporate users of legal services rated "all or most" lawyers deserving to be called "professionals," and that sixty-eight percent said professionalism among lawyers had decreased over time.<sup>4</sup> The same survey revealed that fifty-five percent of the state and federal judges questioned noted a decline in lawyer professionalism.<sup>5</sup> In light of these studies, I think we can conclude that there is valid reason for lawyers to be concerned about their image.

One factor responsible for the poor image is the general impression that lawyers make too much money, however "too much" is defined. The wide publicity given to starting salaries in New York law firms has led to the belief that all lawyers earn six figure incomes. In fact, the average income of lawyers throughout the country in 1984 was less than \$50,000.00.<sup>6</sup> And even the famous, or infamous, \$65,000.00 starting salary on Wall Street, when divided by the not uncommon 2,500 hours billed annually, only amounts to twenty-six dollars an hour. My plumber charges more. I am not suggesting that there is not a gross disparity in income in this country—but that is a societal problem, for which lawyers are bearing too much of the heat.

In article after article, writers have commented that the public now tends to regard the law as a trade rather than a profession.<sup>7</sup> They point to a statement in *Bates v. State Bar of Arizona*,<sup>8</sup> the case in which

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2. *What America Really Thinks About Lawyers*, 8 Nat'l L.J., Aug. 18, 1986, at S-3.

3. *Honesty and Ethical Standards-Overview*, GALLUP OPINION INDEX 4 (1983).

4. A.B.A. COMMISSION ON PROFESSIONALISM: REPORT TO THE HOUSE OF DELEGATES 5 (1986).

5. *Id.*

6. *Id.* at 14.

7. See, e.g., Rifkind, *Professionalism Under Siege*, B. LEADER, Sept.-Oct. 1985, at 13; Abrams, *The Lawyer's Dreadful Image—And What We Can Do About It*, 47 TEX. B.J. 567, 568-69 (1984).

8. 433 U.S. 350 (1977).

the United States Supreme Court held that lawyer advertising is protected by the first amendment. In *Bates*, the majority stated that "the belief that lawyers are somehow 'above' trade has become an anachronism . . . ."<sup>9</sup> Justice Powell, in dissent, prophesied that the decision would "effect profound changes in the practice of law, viewed for centuries as a learned profession."<sup>10</sup>

Is it lawyer advertising that is responsible for demeaning the perception of the profession? I hardly think so. There really has not been a deluge of advertisements since *Bates*. According to an ABA survey, only ten percent of the nation's lawyers advertised in January, 1984.<sup>11</sup> Even though the number rose sharply to seventeen percent by October, 1985,<sup>12</sup> three-quarters of the lawyers' advertising in that month was in the yellow pages of the telephone directories,<sup>13</sup> hardly an inappropriate place to advertise or a place likely to affect the public viewpoint. In addition, during the first quarter of 1986, lawyers spent only eleven million dollars on television advertisements.<sup>14</sup> That does not appear to be excessive.

Some courts have controlled lawyer advertising strictly. False and deceptive advertising is patently prohibited.<sup>15</sup> Although the ABA declined to develop guidelines on the subject of dignity in lawyer advertising,<sup>16</sup> certain state courts have not hesitated to exercise their supervisory powers over lawyers. The Iowa Supreme Court distinguishes print advertisements from those in the electronic media, and has imposed strict limitations on lawyers' television advertisements.<sup>17</sup> Toward the end of 1984, the New Jersey Supreme Court adopted a new lawyer advertising rule that requires all advertising to be predominantly informational.<sup>18</sup> The court defined this as advertising that predominantly communicated factual information rationally related to the need for selection of an attorney.<sup>19</sup>

Although detractors of the profession single out lawyer advertis-

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9. *Id.* at 371-72.

10. *Id.* at 389 (Powell, J., dissenting).

11. Reskin, *Law Poll: Lawyer Advertising is on the Rise*, A.B.A. J., Apr. 1, 1986, at 44.

12. *Id.*

13. *Id.* at 45.

14. Reidinger, *Lawyer Ads*, A.B.A. J., Sept. 1, 1986, at 78.

15. *Zauderer v. Disciplinary Counsel*, 471 U.S. 626, 628 (1985).

16. *ABA Commission on Advertising Rejects Dignity Guidelines Idea*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Jan. 7, 1987, at 495.

17. *Committee on Professional Ethics and Conduct v. Humphrey*, 377 N.W.2d 643, 646-47 (Iowa 1985).

18. *See In re Felmeister*, 95 N.J. 431, 471 A.2d 775 (1984).

19. *Id.* at 436-37, 471 A.2d at 777-78.

ing for particular disdain, and some advertisements may be in poor taste, I think that advertisements generally cannot be held responsible for lawyers' tarnished image. Moreover, it must not be forgotten that the right of professionals to advertise stems from a broad construction of the most cherished of all rights, the right to free speech, and lawyers should be as vigilant in protecting this right for their colleagues as they are in preserving it for others.

On the other hand, it is important to distinguish between advertisements, a protected form of speech, and certain forms of solicitation which have received extensive media publicity. The Supreme Court has protected solicitation in the form of newspaper advertisements targeted at an audience of potential plaintiffs,<sup>20</sup> but has prohibited in-person solicitation.<sup>21</sup>

I can think of nothing that has caused more damage to the public image of lawyers than the actions and statements of a few members of the bar who have run to mass disasters to sign up plaintiffs like vultures on the African plain descending on an injured animal. They have gathered at airplane accidents, train derailments, Bhopal—above all Bhopal—and they thereby have contributed substantially, I believe, to a loss of stature and respect for lawyers in the public view. Even the Board of Governors of the Association of Trial Lawyers of America approved a resolution in early 1986 condemning attorneys who solicit clients by going uninvited to disaster scenes.<sup>22</sup> Of course, the derelictions are not one-sided. Attorneys of insurers or defendants who contact injured parties to gain an advantage or to discourage them from picking counsel of their choice are equally responsible.

The real question to the members of the legal profession is whether they are going to do any more than wring their hands every time another sordid incident is reported. The disciplinary committees are unlikely to act promptly and firmly unless there is widespread lawyer support for discipline. If lawyers persist in the club-like attitude that protects their members, even when they openly deviate from accepted and reasonable ethical norms, then lawyers can well expect a continued slide downward in public perception.

The legal profession's public image also is tarnished by the charge that lawyers bear much of the blame for the so-called insurance crisis.

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20. *Zauderer v. Disciplinary Counsel*, 471 U.S. 626 (1985).

21. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); see also MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3 comment (1984); *In re Amendment to S.J.C. Rule 3:07*, 398 Mass. 73, 495 N.E.2d 282 (1986).

22. *Advertising and Solicitation*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Feb. 19, 1986, at 38.

The ABA Journal reported that a manufacturer had its product liability insurance rate increased three-hundred percent even though it had been in business for seventy-five years without a product liability suit.<sup>23</sup> The same article told of an engineer who started a company in 1980 to manufacture hand and foot controls for the handicapped which went out of business when it was told, five years later, that it was uninsurable, even though it never had been sued.<sup>24</sup>

We all have been subjected to the charges and countercharges. The insurance industry paints a picture of corporate America saddled with massive liability verdicts by juries which impose damages indiscriminately on deep-pocket defendants. We hear that doctors are unable to afford their increased malpractice insurance premiums, and that half of the obstetrics and gynecology doctors will no longer deliver babies, all because the legal profession has set itself against the medical profession and against the insurance-buying public.<sup>25</sup>

For its part, the plaintiffs' tort bar produces statistics to show that the insurance industry has brought its hard times upon itself. It points to underpricing of insurance premiums during times of high interest rates, bad underwriting practices, negligent drafting of insurance policies in the environmental law area, and pressures exerted by foreign reinsurers on American primary insurers.<sup>26</sup> The result of these charges and countercharges has been considerable public confusion, and a tendency to hold lawyers responsible because they are a highly visible target.

In response to a "rapidly expanding crisis in the liability insurance industry," the Attorney General of the United States established the Tort Policy Working Group in 1985.<sup>27</sup> This group was an inter-agency task force made up of representatives from ten federal agencies and the White House, charged to explore the crisis in insurance availability and affordability. It placed the responsibility for the lack of available and affordable insurance on tort law.<sup>28</sup> It recommended a return to a fault-based standard for liability, a stricter view of what are credible scientific and medical evidence and opinions, the elimination of joint and several liability, a limit of non-economic damages (pain

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23. Goldberg, *Manufacturers Take Cover*, A.B.A. J., July 1, 1986, at 52.

24. *Id.* at 52-53.

25. See, e.g., Browning, *Doctors and Lawyers Face Off*, A.B.A. J., July 1, 1986, at 38.

26. See Goldberg, *Mismanagement May Be the Cause of the Insurance Crisis*, BUS. WK., Mar. 10, 1986, at 88, reprinted in A.B.A. J., May 1, 1986, at 102.

27. See *Insurance Crisis: Reagan Targets Tort Law*, A.B.A. J., June 1, 1986, at 19.

28. Tort Policy Working Group, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 1, 29-52 (Office of the Attorney General of the United States, 1986).

and suffering) to \$100,000.00, a requirement for structured settlements, the reduction of awards by collateral sources of compensation, and sharply reduced lawyer contingency fees ranging in percentage from twenty-five percent for the first \$100,000.00 of recovery down to ten percent for amounts recovered over \$300,000.00.<sup>29</sup> Some or all of those proposals are pending in Congress, and some states already have enacted legislation implementing many of these suggestions.

Have lawyers failed the public with respect to tort law? Perhaps, but if so, I suggest that it is not because of the kinds of defects in substantive tort law itself, as addressed by the Tort Policy Working Group. The Institute for Civil Justice of the RAND Corporation conducted the leading studies on this topic. After studying all civil jury trials in Cook County, Illinois, and San Francisco, California, from 1960 to 1979, it reported that in both jurisdictions the median jury award for personal injury cases was modest, less than \$20,000.00, and in the typical case, which involved only slight bodily injury, the award remained roughly the same after inflation over the entire twenty-year period.<sup>30</sup> However, during that period the awards doubled and trebled in cases involving serious injuries, and markedly increased in certain types of lawsuits, such as medical malpractice, defective products, and street hazard cases, regardless of the seriousness of the injuries.<sup>31</sup> The studies do not give any reason for the growing number of exceptionally high awards in these kinds of cases, which drove up the statistical *average* for jury awards. I suggest that since substantive tort law is in essence a risk-shifting mechanism, high jury verdicts in these cases probably are attributable to juries' belief that some industries and some professions have been lax in imposing safeguards for the public benefit. I am not averse to some of the changes suggested in the substantive tort law, but I think that they tend to mask what is a more serious problem with our tort liability system.

The problem is illustrated by another study, also conducted by the Institute for Civil Justice. It reported that the expenditure nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985 was between twenty-nine and thirty-six billion dollars.<sup>32</sup> This includes "compensation paid to plaintiffs, legal fees and related expenses for both plaintiffs and defendants, insurance company

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29. *Id.* at 4.

30. See D. HENSLER, SUMMARY OF RESEARCH RESULTS ON THE TORT LIABILITY SYSTEM 2 (RAND Corp., Institute for Civil Justice No. P-7210-ICJ, 1986).

31. *Id.*

32. J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION vi (RAND Corp., Institute for Civil Justice No. R-3391-ICJ, 1986).

claims-processing costs for claims in suit, the value of litigants' time spent, and the costs of operating the court system for these cases."<sup>33</sup> The most important finding of that study is startling. Of the twenty-nine to thirty-six billion dollar total national expenditure, plaintiffs, after deducting litigation costs, only received fourteen to sixteen billion dollars as their net compensation.<sup>34</sup> To deliver this fourteen to sixteen billion dollar net, the tort litigation system expended eleven to thirteen billion dollars in combined defendants' and plaintiffs' legal fees and expenses.<sup>35</sup> In other words, the net amount that plaintiffs received was fifty-six percent of all the money paid in compensation, legal fees and related expenses.<sup>36</sup> If we add the value of the time spent by the litigants to the costs, the plaintiffs' net compensation sinks to forty-six percent of the total expenditure.<sup>37</sup> I suggest that it is unacceptable from a societal standpoint to have transactional costs, which are primarily attorneys' fees and costs (both plaintiffs' and defendants'), that are almost equal to the amount received by the injured parties.

Here again there is a challenge to lawyers, and this time it is one that directly affects their financial self-interest. Only if lawyers are willing to accept the responsibility of devising a better system, one that delivers just compensation to an injured party with substantially lower transactional costs, will they begin to merit a return in public confidence that law is a profession.

What is the difference between a trade and a profession? Professor Morgan of Emory University has suggested that a professional is one who practices intellectual skills that "result from an extended period of training," whose services are generally "beyond assessment by [the] typical client," and whose "concerns transcend the problems of particular individuals."<sup>38</sup> In terms of the lawyer, a professional is one who recognizes that he or she belongs to a tradition of delivering service to

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33. *Id.* at vi-vii.

34. *Id.* at ix.

35. *Id.* at x. Plaintiffs spent \$6 to \$8 billion on legal fees and expenses, and \$1 billion in the value of time spent in the litigation. *Id.* at viii, 42-43. Defendants spent \$4.7 to \$5.7 billion on legal fees and expenses, \$0.8 billion for insurance company costs of processing claims in suit, and about \$2.5 to \$3.5 billion as the value of defendants' non-lawyer time and other expenses. *Id.* at vii-viii, 62-63.

36. *Id.* at x.

37. *Id.*

38. Morgan, *The Fall and Rise of Professionalism*, 19 U. RICH. L. REV. 451, 451 (1985); see also McKay, *Law, Lawyers, and the Public Interest*, 55 U. CIN. L. REV. 351 (1986).



the community at large as an obligation that goes before and beyond individual self-interest.

When lawyers were marching arm-in-arm with the civil rights activists in Mississippi and opening storefront offices in poor and lower middle class neighborhoods of the cities, there was little talk about their declining public image. They performed the services, and their image took care of itself. President Johnson said in 1967, "There is no group which, I believe, has become or is becoming more socially conscious and more understanding of their obligations than the members of the Bar."<sup>39</sup> We cannot return to 1967, but today there are ample opportunities for public service that are available wherever one stands in the political spectrum. There are youth groups that need counseling, senior citizens who need assistance, environmental problems that must be tackled, and school boards and non-profit groups throughout the country that could use the services of volunteer lawyers.

Above all, it seems to me that lawyers have an obligation to the public to get the legal system in order. They must take the lead in law reform even if there is an economic disincentive to do so. They must undertake to insure that only lawyers who are competent continue to practice law. They must not shirk the awkward and unrewarding task of disciplining errant members of the bar. They must take the forefront in establishing a legal system that delivers prompt, courteous, and affordable service with judges who are honest, capable, and independent.

One of my favorite aphorisms for judges is, "Not only must justice be done, but it must be seen that justice is done." I would paraphrase it for lawyers as, "If you act in the public interest, it will be seen that you act in the public interest." And then, there will no longer be any problem with the public perception of the legal profession. That is the challenge that I throw out to you, the bright, idealistic, enthusiastic class of 1987.

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39. Johnson, *Lawyers and the Public*, 53 A.B.A. J. 605, 606 (1967).