

The Litigation Explosion and the Trial Lawyer's Changing Role

By David K. Watkiss

Throughout the past year we have seen a widely reported volume of increasing concern and discontent with our judicial system, our adversary process, the pervasive role of lawyers in society, the level of performance and accountability of the legal profession, and the perception that lawyers' economic self-interests conflict with their clients' and the public's interest in prompt, efficient and economical dispute resolution. Recently proposed rules encouraging courts to police the actions of trial lawyers in an effort to make them less contentious and more responsible pose serious implications for our litigation process. Within our own ranks, a well-publicized controversy was generated by a re-examination of the ethical dilemmas of lawyers in discharging their professional responsibilities to both clients and society.

Condemnation of our legal system and the ethics of lawyers has a long, venerable tradition, and trial lawyers have never been particularly liked or even generally respected. However, the broad endorsement of the current complaints and demands for reform bring into question the continued viability of our present form of civil litigation and warrant our attention in this year's Dean's Address.

The following are a few examples of the recent extensive public coverage of our legal problems. "Unclogging the Courts-The Chief Justice Speaks Out," was the title of a wide-ranging interview with Chief justice Burger about the backlogs in our courts and the inadequacies of lawyers in U.S. *News and World Report*. An article by a Harvard Law Professor called, "Our Lawyer-Ridden Society," appeared in *The Washington Post*. A *Chicago Tribune* editorial cartoon showed a bar association speaker announcing, "The Chief justice has predicted that our legal system will crumble under the weight of too much litigation," then asking how the legal profession should respond to this challenge, to which the assembled lawyers roared, "Sue the old buzzard!" A lead editorial in the *Salt Lake Tribune* under the heading, "Lasting Court Relief Requires All-Out Modernization Effort," advocated taking control of legal affairs from lawyers and courts because they are philosophically incapable of fashioning the changes needed for our justice system to keep up with our fast-changing times. The *Wall Street Journal* followed up one article entitled, "The Litigious Society" with another under the lead, "Kill all the Lawyers? Maybe There's an Alternative." James Reston, under the heading, "Crisis in the Courts," reported in the *New York Times* on a speech by the Chief justice wherein he predicted that the American system of justice may literally break down before the end of this century. "See You in Court, Our Suing Society" was a cover article in U.S. *News and World Report*; and the year ended with a feature article in *Life* magazine's special issue on 1982, entitled, "The Year the Country went to Court."

While headlines about burgeoning litigation should be good news to trial lawyers, the finer print below spelled trouble. This ominous media focus was stimulated by Chief justice Burger early in 1982 in his annual report on the state of the judiciary entitled, "Isn't There a Better Way?" The Chief justice reported a litigation explosion which has resulted in federal civil case filings now increasing nearly six times as fast as the population and federal appellate filings growing sixteen times as fast. Comparable state court figures were twice as fast for civil filings and eight times as fast for appellate filings. The causes-according to the Chief justice-are that Americans, because of a growing insecurity and the decline of church, family and neighborhood unity, are seeking judicial relief from personal distresses and anxieties, and remedies for personal wrongs once considered the responsibility of other institutions and not legal entitlements; and that lawyers are failing to fulfill their obligation to serve as healers of human conflicts and to provide mechanisms for resolving disputes in the shortest possible time with the least possible expense and stress on the participants.

In this annual report, the Chief Justice emphasized that this litigation explosion required the American business and legal community to shape new tools for dispute resolution both because the traditional litigation process had become too cumbersome, expensive and contentious, and because neither the federal or state court systems were capable of handling the burdens being placed on them. The Chief justice encouraged moving a number of cases from the judicial system to administrative processes like those used for workers' compensation, or to mediation, conciliation and binding arbitration. The Chief justice suggested some form of administrative process for personal injury and property damage cases, probate, and domestic and child custody disputes; and urged binding arbitration, particularly for large, complex, commercial disputes, criticizing judges and lawyers for wrongly resisting arbitration.

The Chief Justice has also encouraged the abolition of diversity jurisdiction, a reduction in the use of jury trials, and the adoption of a system assessing fees as well as costs against losing parties and even against losing parties' attorneys who burden the courts with frivolous cases. He has stated that we now have too many lawyers while enforcement of ethical standards is virtually non-existent. He has asserted that pervasive in our legal system are lawyers who strive mightily to win using every

tactic available. He has suggested that training the lawyer as a vigorous adversary to function in the courtroom is outdated and that training is now required in non-judicial dispute resolution. Some of these comments of the Chief justice have been challenged. A number of them, however, have received substantial consideration and support-even among lawyers.

The growing number of proponents of non-judicial dispute resolution claim that society must develop ways of reducing adversary trials, the anachronistic confrontation of lawyers as gladiators, and the dollars, talent and energy wasted in preparing and conducting trials. They want to redirect and moderate adversarial skills into a less rule-ridden and more cost-effective system. They contend that trial practice is inherently inefficient and that discriminating use of alternatives will increase the productivity and social utility of lawyers.

When the observation is made that expanding litigation is, in fact, a vote of confidence in our present litigation system, critics answer that no one can responsibly claim that our system is fair, efficient, cost-effective, or filling society's needs. They contend that our adversary process stimulates manipulative advocacy and costly retaliatory excesses; that our fault system denies compensation to many and delays it to all. They question whether we can afford the proliferation of overly contentious lawyers and all the due process that we have given ourselves. In their view, our present litigation system is a destructive force undermining our economy and creating social disharmony. In short, we are accused of having "too many lawyers, too much litigation and too little justice."

This growing discontent reflects a frustration with our apparent inability to continue to function, with time-encrusted systems and procedures that worked for a less centralized, more self-sufficient population, with simpler problems, a greater tolerance for injury or injustice, and fewer lawyers. A disturbing reflection of this frustration is the growing threat of major cutbacks in public support for many of our law schools-not because of bad economic times, but because of a perception of a lawyer glut fortified by a distaste for lawyers' activities.

Much of this discontent and clamor for change is based on oversimplifications or misunderstandings of the problems addressed and the realities of practicing law. It is clear, however, that there is a developing public perception that our justice system is not working and that the failure is principally the fault of lawyers.

There is little persuasive evidence that the increasing number of cases is the result of a less responsible and more litigious society abetted by a much more self-serving and contentious bar. The most obvious explanation- that this is an understandable result of a complex, urbanized society with expanding concepts of individual rights and increasing federal and state involvement-is largely ignored. Overlooked also is the possibility that this voluminous litigation is a reflection of our political equality and public accountability and may be the price as well as the measure of our freedom. Nonetheless, the system does have serious problems-problems that the trial bar must address.

We must admit to a rapid expansion in the number of lawyers during the past 25 years and a great increase in litigation in the past 15 years. The number of lawyers in America today is growing twice as fast as the population as a whole. From 1960 to the present, lawyers doubled in number and our total is now some 600,000 or approximately 1 lawyer for every 400 inhabitants. This is three times as many lawyers per capita as England and twenty times as many as Japan.

Along with the rapid growth in our numbers, there have been some dramatic changes in the structure of the legal profession. When I graduated from law school in 1949, 60 percent of all lawyers practiced alone. There has been a marked shift from the individual lawyer or small firm practice to practice in large firms so that now only 30 percent are solo practitioners. Firms of over 100 and 200 lawyers are common in our larger cities and firms of over 50 lawyers can be found even in many of our smaller cities. These large institutions often employ three times as many support personnel as lawyers and must be operated as big businesses with lawyers seen and seeing themselves more as economic units than as members of a learned profession.

The operations of the big law firms are very expensive and have little place for the relatively small economic problems of ordinary people. It is difficult to justify much billable time of even a junior associate on small matters when the starting salary of new associates in larger cities exceeds \$40,000 a year. As a result, big firms can only afford to represent corporations or persons capable of paying substantial hourly rates or to handle cases with large fee potentials. The economics of these firms encourage ample staffing of cases, excessive motion and discovery practice and tend to make cases more complex and drawn out than they need to be.

Our changing law practice and increased numbers have also led to much more specialization. Even among litigators, specialization within a particular area-malpractice, product liability, securities, antitrust-and for only one side has generally

become the rule. Given the growing complexity of the law, some specialization may be required. However, the combination of specialization and expanding numbers has fragmented and polarized the legal profession. We have in large measure lost our sense of belonging to a community of professionals with common bonds and perspectives. This, in turn, has diminished communication, cooperation and trust among lawyers, made internal discipline more difficult and made it much harder for the profession to reach a consensus on common ethical standards and needed reforms.

While the size and structure of the profession has been growing and changing, the number of lawsuits has been multiplying even more dramatically. To many who believe that the ability to enforce individual rights is fundamental to a free society, this indicates a need for more courts and judges. However, even though the ratio of lawyers to judges is higher in America than anywhere and we have proportionately fewer judges than any other western civilization, the reformers claim that more judges is not the answer. Rather they say that we must discourage lawsuits and limit court litigation to only serious disputes that cannot effectively be resolved elsewhere, blaming much of the mounting case load on an undisciplined public abetted by misguided or unscrupulous lawyers.

There is a particularly strong protective movement to limit the number of federal judges and insure their exclusive professional identity even if this requires abolishing diversity jurisdiction. The litigation growth in federal courts has been proportionately several times that in the state courts, due not only to the increasing volume of civil rights, environmental, securities, antitrust and other federal question litigation, but also to the rapid growth of large, complex, civil litigation. These big cases are usually filed in or removed to federal court if diversity is present in the belief that they can be better handled there. As a result, the view of a recent "litigation explosion" may be a distorted one, principally applicable to federal courts.

State courts in major metropolitan areas have chronic court congestion, but other state courts are generally not overburdened with long backlogs of cases. Many of us forget that most cases in our state courts involve potential recoveries of less than \$ 10, 000. In fact, over two-thirds of the nation's lawsuits are handled in state courts of limited or specialized jurisdiction where, despite a high case volume, they are heard fairly promptly with few pending more than a year. In this litigation, lawyers spend little time on discovery or procedural problems, there is limited formal adversarial adjudication and much negotiating and mediating, resulting in the cost effective settlement of over 90 percent of these matters.

Of greater concern in most of our state civil courts than any litigation explosion is the fact that the poor and even the middle class may find it impossible to resolve their serious disputes because of unaffordably high legal costs. We have yet to recognize a right to counsel in civil cases even for our poorest citizens. Legal aid, which has been their principal source of help, is in ever-lessening supply. The ironic result is that while there is much concern about a litigation explosion, a large segment of our citizenry has limited access to justice and the protection of the law, except when they have a good damage claim that will provide a contingent fee or the rare claim for which the law provides a fee award.

This serious but less publicized problem was addressed in Time magazine's last 1982 edition where an article entitled, "The Return of Unequal Justice?" described the hard times of poverty lawyers resulting from deep budget trimmings by the Reagan Administration. The article made the point that while there are some efforts to fill the growing legal services gap by voluntary programs provided by law associations and large law firms, such efforts cannot hope to replace a publicly supported legal services program. At the same time, proposals to require every lawyer to donate a mandatory number of hours to pro bono work as a professional obligation have met with strong opposition.

There are some developments in the handling of ordinary disputes and the problems of individuals that are noteworthy. Neighborhood justice centers have proliferated in our larger urban areas over the last five years. Today there are nearly 200 various efforts to find a better solution to people's problems outside the traditional legal structure. These centers reflect the growing recognition that some disputes may be more effectively resolved without litigation and that what is needed are accessible forums where problems will be taken care of in the best way possible. How profoundly the legal profession may be affected by these new approaches is unknown, but sponsoring bar associations believe that the best interests of the bar and society require that the profession take the lead in their development.

Although we recognize that adversarial litigation isn't the best answer for all disputes and that we must look for appropriate new approaches, we must question the calls to remove certain cases from the courts, such as personal injury cases. Some of the reasons given for such removal are that personal injury cases make up the greatest volume of our litigation, that they are usually tried to juries which take 40 percent more time than non-jury trials, and that our fault system together with unpredictable and sometimes irresponsible juries makes for uneven and inequitable justice.

While personal injury cases constitute a large volume of our litigation, their removal from the courts is not supportable on the basis that they cannot be efficiently processed or are particularly costly or difficult for the courts to handle. These cases, which generally present relatively simple issues and usually involve limited discovery, are more suitable for our adversary system, if fairly and effectively handled, than many other types of civil cases in our courts. The small percentage that are not settled can usually be quickly tried before juries that have little difficulty understanding the evidence and deciding the issues.

Even the product liability or malpractice cases, although often more complex and time-consuming than other personal injury cases, can be efficiently processed provided that they are handled by responsible lawyers. Such responsibility is encouraged in these cases both because plaintiff's counsel is on a contingent fee that restricts his trial preparation principally to essentials and because defense counsel is restrained by a knowledgeable, cost-conscious insurance claims department.

The argument that the fault system is no longer acceptable for the handling of personal injury cases and that these cases should be processed administratively like workers' compensation cases in order to provide prompt and predictable relief is another subject for another day. Suffice it to say that while there may be persuasive arguments for removing the fault issue in certain categories of cases in order to provide for a more prompt and equivalent disposition of victims' claims, the proof is yet to be presented that a select class of administrators will provide the kind of justice and compensation to which our society, as represented by our juries, believes an injured person is entitled. The relatively small percentage of these cases that are actually tried does not seem to warrant a new administrative process, while many other cases, less suitable for adversarial adjudication, are left in the courts.

Before any procrustean actions are taken—such as terminating personal injury litigation or abolishing diversity jurisdiction—other less drastic means of improving our court system should be carefully considered—for example, the suggestion that we adopt a system assessing legal fees against losing parties. The encouragement of fair and timely offers of settlement could significantly facilitate the processing of all types of civil litigation. To this end, a number of successful variations of expedited dispute processing are now being tried in some of our heavily populated court jurisdictions. Various forms of delegated decision making are utilizing simplified procedures with quasi-judicial officers and a summary trial or a rotating panel of lawyers for specially selected cases. These devices are not diversions from the court, like binding arbitration, because they are only used to promote possible settlement. After expedited decisions by an officer or panel, either party can still insist on a trial, but if they do so they are required to make formal offers of judgment. The party that fares better in the trial result than the rejected offer is entitled to all attorneys' fees and costs incurred subsequent to the rejection of the offer.

There are other offer-of-judgment devices that could be used to encourage and speed settlements. Under Federal Rule 68 and many counterpart state rules, if a defendant makes a formal offer of judgment and the judgment that the plaintiff obtains thereafter is not as favorable as the offer, the defendant is entitled to post-offer costs. However, because Rule 68 has been interpreted not to include attorneys' fees, it is rarely used. If attorneys' fees as well as costs were included under Rule 68, an early and responsible offer of judgment could avoid exaggerated claims and extended gamesmanship. In England, where fees are awarded to the prevailing party and where they have the "payment into court" device, it is regularly used and is quite effective in terminating litigation.

Consideration should also be given to encouraging more and earlier settlements by modifying the traditional American rule that each side is responsible for their own legal fees absent a contract provision, a statute providing for fees, or exceptional circumstances such as bad faith litigation. It is increasingly common in private suits to enforce important public policies, such as in federal civil rights and wage and hour cases, to provide by statute that the prevailing party may obtain a fee award. A case can be made for the adoption in all civil actions of a rule awarding fees to prevailing plaintiffs. That, together with prejudgment interest, as advocated in last year's Dean's Address, would finally provide full compensation.

The present American rule undercompensates plaintiffs and does not make them whole. At the same time, defendants who make reasonable settlement offers should be able to affect their liability for their own and their opponent's post-offer legal fees, as well as costs, and should have the right to be reimbursed if they must pay legal fees to resist unnecessary litigation. We should give plaintiffs their fees on prevailing. Defendants should get their post-offer fees with offer of judgment decisions in their favor, and they should get all their fees when the claims against them are determined to be quite clearly frivolous. This proposed method of awarding fees could stimulate fair and earlier offers from both sides and have a positive impact on the litigation explosion.

Much of the specific criticism about litigation abuses by lawyers comes from federal judges and law professors and principally applies to the growing number of difficult and complex cases found mostly in our federal courts. There is a far greater danger of abuse of the adversarial process in large, complex litigation than in an ordinary case. Without the discipline of economic

restraints and readily established goals and strategy, excessive discovery and motion practice often result, generating irritation and resentment, and in turn more retaliatory discovery and motion practice. Then, after substituting continuous discovery for thoughtful analysis and losing sight of the issues and interests of the client, the adversary process degenerates into a contentious fight without professional civility or rational control. Large law firms and large corporations involved in large cases seem to be the prime culprits or victims of this loss of direction. However, this does not mean that the abuses only come from the defense. The very large fee potential in these cases for plaintiffs' counsel attracts some of the slickest and most uninhibited gameplayers and hired guns of the trial bar and provides a strong temptation to dissemble, overstate and mislead.

Because these large economic disputes can generate very substantial fees, lawyers are often viewed as having demonstrated little initiative in cutting litigation costs or facilitating settlement. Settlement of these cases too often comes at or near trial after extensive, costly discovery and numerous court appearances frequently aimed at establishing primacy on peripheral issues. This is not just the result of profit-seeking by lawyers. Contentious clients or clients seeking competitive advantage that appears available by lengthy and costly litigation bring much of this on themselves. Whatever the reason, however, the result of these extended, expensive lawsuits is an undue burden on the courts and an adverse reflection on the bar and our judicial system.

The inadequacy of currently available sanctions and protective orders is magnified in a complex case. Effective control of the discovery process requires inordinate amounts of judicial time and effort unless lawyers display restraint, cooperation and professional responsibility. Unfortunately, because a significant number of lawyers handling these difficult cases have not acted in a responsible manner, Federal Rule 37(g) has recently been adopted authorizing the court to require a party who fails to participate "in good faith" in the framing of a discovery plan to pay reasonable expenses for such failure.

The adoption of Rule 37(g) appears to be only the beginning of an effort by the courts to curb adversarial excesses. Proposed amendments to Federal Rules 11, 16 and 26 call for increased involvement of district judges in all pretrial phases of litigation and would mandate sanctions against attorneys who file pleadings, motions, or discovery requests or responses "for any improper purpose." Examples of improper purposes spelled out in the amendment are harassment, unnecessary delay and needless increase in the costs of litigation. These amendments now awaiting Supreme Court approval, require the trial court to become involved early in the discovery process and apply sanctions for discovery abuses. Even more significant, they encourage the court to manage the litigation from the start in order to avoid protraction, to facilitate settlement, and to consider extra-judicial procedures to resolve the dispute.

There is no question that complex cases need a great deal of court involvement and attention, but requiring the trial judge to manage the litigation as these Rules contemplate seems to accept the proposition that trial lawyers cannot be expected to be self-policing and responsibly avoid improper litigation tactics. We cannot accept this proposition if we wish to maintain our standing as a profession. There is serious question whether court management can work effectively without counsel's full cooperation in much of the major litigation that causes our problems. Most judges do not have or will not take the considerable amount of time needed to manage the difficult and challenging case. Nevertheless, the rule changes are understandable because a greater effort is urgently needed to achieve better, more responsible trials to lessen the even greater burdens on our appellate courts. The growth in our appellate caseload is several times that in the trial courts because of increasing dissatisfaction with trial proceedings and results. If the trial has been corrupted or error-filled, new trials must be granted which further clog the system.

Some of the more competent and responsible federal judges have for some time exercised significant control of the big case throughout the pretrial procedures and even during the trial. But they have recognized the need for professional responsibility by the contesting lawyers and insist on their civility and cooperation. A few even encourage counsel to work together and with the court to insure the selection of a jury that can understand the issues and the evidence. While counsel don't have to agree on the jury selection, they are asked to agree on the exclusion of the obviously unacceptable jurors.

Trial lawyers know that the selection of a competent jury is particularly critical in a complex case, for the jury system only really works in cases that the jury can understand. If our jury selection and trial processes make it impossible for a jury to understand the facts of a case or to apply the law properly to those facts, due process requires that the jury trial be replaced by a better method of finding the truth and rendering justice. The critical question is can a jury discern the issues and determine the controlling facts in a protracted and complex lawsuit.

Because of the importance in having a competent and responsible jury in protracted, complex trials, counsel are particularly anxious in these cases to conduct a searching voir dire examination of the panel. However, many courts will not permit this in the belief that lawyers seek to improperly influence and manipulate the prospective jurors rather than select a fair and

impartial jury. Additional concerns about jury selection and the continued validity of the jury process have recently arisen by the growing use in large cases of jury research, which utilizes the basic assumption that human behavior is patterned and predictable.

The *New York Times* recently featured a lengthy article on this developing application of the psychological sciences to jury selection. Its practitioners, sociologists, psychiatrists, market researchers and others, use public opinion surveys, in-depth interviews, computer analyses correlating jurors' backgrounds and attitudes and laboratory simulations of impending trials to help lawyers select jurors likely to favor their side, exclude those likely to be hostile, and identify people who make decisions for emotional rather than logical reasons. The practitioners in this new use of behavior science view jurors not as free, moral agents able to assess impartially where the truth lies, but as organisms whose emotional and mental processes are determined by "predictor variables" such as social status, education, age, sex, personal traits, ethnic origin and religion. Lawyers, of course, have tried for many years to guess how some of these factors influence jurors. Yet, some observers believe that this new behavioral science approach raises serious questions concerning freedom of choice, the nature of reasoning and the capability of carefully selected juries to truly dispense justice.

Even though these scientific attempts to predict juror behavior are not claimed to be certain, their use is perceived by some as a powerful assault on the concept of trial by jury. If jurors are indeed creatures whose behavior is more or less predictably determined by social and psychological forces and not independent moral persons our fundamental belief in the rationality and responsibility of individuals that justifies trial by jury may no longer be valid.

The scientific pretesting of a case in a mock trial setting with a shadow jury matched as closely as possible to the real jury that the jury researchers feel is likely to be impaneled is considered even more important than jury selection. The researchers structure a simulated trial before a "focus group" to discuss issues and express views. With these experiments the facts and issues are identified which are most likely to be understood by the jury and fit the jurors' psychological needs. The lawyers then go to court with their case structured in the manner most likely to convince the type of jurors they are most likely to wind up with.

The same *New York Times* article claimed that any honest lawyer will admit that he doesn't want an impartial jury, but one that is going to find for his client; and it reported that lawyers who have used jury research acknowledged that it did indeed help them get juries inclined to favor their clients. These methods of scientific jury selection, while apparently legal, at least pose an ethical question for they clearly use expensive scientific techniques not equally available to all parties to aid in obtaining a biased jury.

There is a danger that as this method of jury selection and trial preparation becomes more prevalent, it may result in restrictions on the use of jury trials. Those parties who could afford such services may well conclude that another method of dispute resolution less subject to extraneous influences would be more desirable. Other parties who can't afford the services and courts committed to a search for truth and equal justice may seek to curtail jury trials if such methods are only available to one side.

Dissatisfaction among many corporate clients with jury trials and the traditional adversary means of resolving disputes is spurring new approaches in areas of non-litigation dispute resolution techniques. Many corporations are seeking ways not only to reduce the costs and delays of litigation, but to also achieve more responsible outcomes than they believe occur with unsophisticated or unsympathetic juries. Pressure from these clients will require lawyers to find other more flexible and expeditious forms of dispute resolution. The alleged goal is to reduce the enormous social and economic costs of legal conflict while preserving the rights of all parties.

Binding arbitration, the alternative favored by the Chief Justice, has yet to generate strong support with corporations even with their disenchantment with jury trials. However, this is because of concerns about the objectivity and competence of the arbitrators who must be utilized to decide the dispute. This uncertainty has led to a new approach called rent-a-judge, which provides fast, private, efficient and final adjudication by a mutually satisfactory judge. A number of states now permit private judges to resolve disputes with binding decisions subject to a regular appeal, and retired judges and lawyers are founding companies to offer private judging services. This dispute mechanism is being increasingly utilized by experienced trial lawyers because it provides flexible rules and procedures, a mutually convenient schedule and a speedy decision from a well-qualified judge chosen by the litigants.

There is also growing enthusiasm in the corporate world for so-called mini-trials as another form of private dispute processing. Here parties try to be cooperative rather than aggressively adversarial at least to the extent of each party's willingness to discuss the dispute openly and in good faith. The mini-trial utilizes an informal and abbreviated presentation of each side's "best case" for representatives of the parties with settlement authority. It is non-binding, private, and inadmissible. A neutral third party observer may be present to advise if desired on how the case might be resolved if it went to trial. A mini-trial is really nothing more than a carefully structured settlement process which has been effectively used by some responsible lawyers for years.

Many of the criticisms of our trial system and demands for alternative dispute mechanisms stem from a perception of contentious excesses in the adversary system and a lack of high ethical standards by many lawyers. There appears to be a widespread view that the legal profession and the courts are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage. All of the alternative dispute resolution processes attempt to translate the dispute into a problem that can be dealt with on its own terms, openly, simply and cooperatively and thereby avoid the cost and delay of our traditional adversarial process.

Dean Roscoe Pound's famous address, "Causes of Popular Dissatisfaction with the Administration of justice," warned in 1906 about the potential source of irritation that exists in the American exaggeration of contentious common law procedure calling it, "The Sporting Theory of justice." Chief Justice Burger often has addressed this subject with comments implying that unethical excesses in the guise of zealous advocacy are more the rule with American trial lawyers than the exception.

The Chief justice in 1976 at the Pound Revisited National Conference, after paraphrasing Dean Pound's comments about the sporting theory of justice being so rooted in our profession that we take it for granted as a fundamental legal tenet, went on to say that lawyers-instead of searching for truth and justice-often tend to seek private advantage, forgetting they are officers of the court with a monopoly on legal services that mandates duties to the public as well as to their clients. This critical statement of the Chief Justice regarding a lawyer's duty to the public as well as to his client anticipated the deep conflict that developed this past year in the legal profession as a result of the proposed Model Rules of Professional Conduct, prepared by the ABA Kutak Commission.

The emphasis of the Commission on the lawyer's responsibility to society as well as to his commitment to the client's cause brought a storm of protest from trial lawyers which, in turn, fostered some derisive comments on lawyers' uncertain ethics. A *Newsday* special report under the heading, "System Saturated with Unethical Lawyers," began with these comments: "At the recent mid-year conference of the American Bar Association in San Francisco, 12,000 lawyers wrangled for days over a proposed revision of the ABA's 'Code of Ethics.' Many laymen may be surprised that lawyers have a code of ethics, but they do-one designed for Eighteenth Century law practice-when most lawyers worked on their own or in small firms, when legal fees were modest, and when honesty was more in fashion."

The sharp dispute on lawyers ethics arose because many trial lawyers believed that the new Model Rules would fundamentally change the role of the lawyer in American society. They reject the concept that lawyers have a general duty to do good for society that may override their specific duty to serve their clients. They contend that serving clients is the basic reason for being a lawyer and any exceptions to absolute loyalty to clients must be minimal and strictly construed. Large numbers of the trial bar specifically complained that the proposed change of the lawyer's role from a "zealous advocate" to only a "diligent spokesman" for his client's interest would be detrimental to the adversary system of dispute resolution.

At their mid-winter meeting in New Orleans a few weeks ago, the ABA House of Delegates again addressed the controversial Commission proposals. The press widely reported their action in amending the proposed ethics code in order to maintain an almost unqualified confidentiality to clients even when the client is using the attorney in continuing criminal conspiracies unless it is in connection with crimes "likely to result in imminent death or substantial bodily harm." The extensive and almost exclusive media focus on this difficult and controversial issue of confidentiality added to the public suspicion about lawyers' apparent lack of public responsibility and concern for society's interests and, unfortunately, obscured the meritorious efforts of the Model Rules and the Delegates to make more coherent and definite our professional standards.

We have not heard the last of the dispute over this or the other contested proposals of the Model Rules because they bring into sharp focus the perceived conflict between the responsibility of the lawyer to pursue a client's cause zealously and the need to maintain good faith with society's legitimate concerns with justice. That perceived conflict simply cannot be dismissed with invocations about traditional roles, for today the social consequences of a trial lawyer's actions are too pervasive. Much litigation now impacts not only the parties before the court but the public as well. judicial decisions often formulate broad social policies or can have extensive economic and political impacts. The delivery and the cost of our goods and services, both

public and private, can be and are significantly affected by litigation involving civil rights, product liability, and other consumer-related claims, and by growing trends such as large punitive damage demands and awards.

In addition, the need to conserve an invaluable social resource—the time of our courts—has become imperative, requiring the good faith cooperation of all lawyers as officers of the court. Thus, it seems we have progressed into an era where lawyers have a clear responsibility to consider and protect where possible the interests of society as well as the interests of their clients. Admittedly such concerns about society may be in conflict with a total commitment to a client's cause, the historic role of lawyers in our common law system. However, if we are to retain and preserve this historic role we must be able to convince an increasingly skeptical society that it remains necessary and in the public interest today.

American lawyers have enjoyed the greatest freedom and independence of any lawyers in the world and as a result have played a very influential role in shaping our society. The question is, is this freedom now being abused in dispute resolution, and is there a growing public perception of trial lawyers as that portrayed by James Mason in the recent motion picture, "The Verdict." If this perception exists, it is important for us to correct it by conducting ourselves in such a way that we can convince any objective investigator that the trial bar takes only civil cases of merit, and while they pursue them as "zealous advocates," their efforts are performed honorably and in good faith and with cooperation and courtesy toward the court and other counsel.

Anyone who believes this type of professional conduct to be contrary to our role as zealous advocates in our adversary system is wrong. American law derives from the English common law, which emphasized Anglo-Saxon notions of decency and fair play. England has worked out ways to control any damaging excesses or unnecessary gamesmanship. While they have vigorous advocacy, they maintain strict regulation of their barristers' conduct. Admittedly, this is much more difficult to do in our land where we do not have a select, concentrated and highly disciplined group of barristers with traditions developed over hundreds of years.

While our problem of maintaining high standards of professionalism and restraining unduly contentious or self-serving lawyers is much greater, it must be done or our right to self-discipline will be taken from us. Further, we risk having much of the litigation that is appropriate and proper for the courts removed to less satisfactory methods of resolution, and having trial counsel's handling of the litigation that remains policed by tight, but ineffective court controls.

It should be obvious that deception, harassment, delaying tactics or any unduly contentious gamesmanship is unacceptable and not an inherent part of the adversary process. We can't deny that litigation is tainted by efforts to achieve victory at all costs and by attempts to thwart a fair and expeditious trial. We have little trouble condemning the zealous advocacy of the defense in the medical malpractice action portrayed in, "The Verdict". However, most trial lawyers do not engage in such blatant activities and face ethical problems where the lines of propriety are more finely drawn.

While all legal organizations are, according to their charters, founded to assure the highest standards of both professional competence and ethical conduct, there has been much more emphasis on technical competence than on ethical conduct. We are continually receiving flyers advertising a seminar or program on trial techniques and dynamics, psychological concepts and persuasive skills, or effective verbal and nonverbal communication that influences juries and wins cases. Just this week, for example, we could have attended a seminar at Lake Tahoe featuring, "Drama in the Court room: The Many Roles of the Advocate," with lectures on the advocate as producer, director and actor by a producer, director and drama coach. An added attraction was a lecture by a preacher on "Persuasive Techniques from the Pulpit." This seems somehow removed from the concept that a trial is a truth-finding process. If lawyers see themselves as actors playing roles in trials which they also produce and direct like plays and constantly emphasize the importance of persuasive techniques, are we surprised if the public sees us as mountebanks?

A lawyer would have great difficulty finding any similarly definitive instruction on professional ethics. This is understandable. We have trouble agreeing amongst ourselves on ethical conduct; and instruction on the need for integrity, civility, responsibility and good faith would not draw much of a crowd. Yet, we all know that a breakdown in our adherence to ethical rules and standards and courteous respect for courts and other counsel can result in serious damage to the public's confidence in our system.

These difficult issues concerning our professional values and performance require the involvement and careful consideration of all of us if we are to preserve our cherished and necessary role in a free society as un intimidated independent trial counsel. We must actively support the attempts being made to identify with greater clarity what is now responsible and appropriate, and what is not, in the representation of a client's cause.

We all know the ethical concept that a proper functioning of the adversary system depends upon the cooperation between lawyers and courts in utilizing procedures preserving the impartiality of the court and making the judicial process as prompt and just as possible, consistent with our obligation to represent our clients zealously within the framework of the law. Our challenge in this critical period of discontent and self-analysis is to understand and redefine what this means in specific terms and circumstances and make it an actual, workable reality before it is too late.

This is the particular responsibility of the members of this Academy and all other trial lawyers who practice hard but straight and continue to believe in the merits of our present system.

No one should close an address to friends on such a portentous; note, particularly to trial lawyers with their natural skepticism for asserted truths. Admittedly, these are controversial and difficult issues for which many of us have had little interest and even less time. Certainly we could respond to the critics with the argument that they overstate the problems and that the public's view of courts and lawyers isn't much different today than it has always been, citing Shakespeare's, "The first thing we do, let's kill all the lawyers," Dickens' description of the meaningless judicial system that played interminably with *Jarndyce v. Jarndyce*, and Ambrose Bierce's definition of a lawsuit- "A machine which you go into as a pig and come out as a But, I respectfully submit that we should curb such adversarial instinct and together make the effort to realistically address our professional problems and responsibilities before others, much less qualified, do it for us.