Advocacy at the Crossroads

By Don M. Jackson

The charge given to the dean of the academy under article V, sec. III of the by-laws is as follows:

"The Dean of the Academy shall correlate matters of law and procedure to enhance the influence, prestige and importance of advocacy, and he shall address the annual convention on the result of his research..."

It is on the basis of such a charge that I address you at this time, directing my remarks and observations to those matters of law and procedure which recently either have been developing or recommended, and which appear to portend a profound pressure for changes in our system of advocacy, and its influence upon society.

As we enter the decade of the 1980's, our profession as advocates stands at the crossroads. We are assailed on all sides by charges that our time-tested and finely developed trial procedures and methods are out-moded and unwieldy. Our long established and successful system of trial by jury in civil actions has been challenged as an unnecessary burden and imposition upon society, totally disregarding the hazards, the potential inequities and the loss of substantial personal protection which would be involved in any alternative solution. The critics also challenge our society as being the most litigious nation of people in the history of mankind, conveying by such criticism the suggestion that, to be litigious, is to be abnormal. Such a challenge completely overlooks and ignores the fundamental truth-that if we have become litigious, it is only because we have developed a system of judicial resolution of disputes which has so guaranteed and protected the interests of society that it is recognized, accepted and resorted to by our citizens as their preferred method of asserting and protecting their personal and property rights. Can anyone in his right mind, who has dispassionately analyzed the situation, reach any contrary conclusion? I submit that they cannot. Our system of advocacy has worked. It has worked so well that the public more and more has turned to it, rather than to arbitration, administrative hearings, or similar devices and alternatives.

The interesting and perplexing aspect of the present situation ties in the fact that we find ourselves assailed and besieged because our system has been so successful in fulfilling both the needs and desires of the public. Yet, it was only within the last two months that no one less than the Chief Justice of the United States said that, unless we lawyers do something about the delay in our courts, the public will do it for us.

Since each of us here assembled knows by experience that the adversary system as we have developed and refined it, is the greatest method for providing the greatest protection to the largest number of people in our country, we must carefully examine 9 the reason for such challenges, and determine what action we can, and should, take to stem the tide. Unless we do so, we can rest assured that changes will occur with accelerating rapidity, changes which in most respects may well not be in the public interest.

Many of these criticisms have been caused by public ignorance, or lack of accurate information. Thus, for example, in a recent syndicated newspaper column, a member of the public, corresponding with the columnist said, and I quote:

"Laws that once were designed to protect us have been turned inside out. Today, nobody is safe from law-suit-happy lawyers or ambulance chasers who will take any case on a contingency basis; 'If I lose it costs you nothing. If I win, you pay me one half or one-third of whatever I can get.'"

"Decisions handed down by screwy judges and nutty juries are scandalous, if not crazy. Recently a court in Washington, D.C., instructed a minister to pay $60,000-00 because he allegedly called a woman parishioner 'an old devil.' The woman is appealing the case to a higher court. She wants $800,000.00."

"I am, 67 years old and can never remember a time when things were so bollixed up. Laws once protected people. Today, one must protect himself against the laws and the lawyers.''

The columnist responded as follows:

"Your letter makes some valid points. The legal system in this country is long overdue for some serious overhauling..."

Comments like these from lay members of the public are disturbing, and cannot be ignored. They reflect a growing concern by the public that our system of advocacy is due for an overhaul. Unfortunately, we, the advocates, have not responded adequately to these and similar criticisms, both within and without the profession. Unless the trial bar, with the assistance of knowledgeable and able members of the bench and laymen, can change the course and power of the growing onslaught, we might well see the end of our present system of civil litigation.

Much of the current attack has arisen because of the unprecedented growth of civil litigation in the past quarter century, not only in volume, but in complexity. As I indicated, we have become the most litigious society in all history, and, with the advent of pre-paid legal service plans, it is only reasonable to assume that pressures, either for increased litigation, or for some alternative methods of dispute resolution, will mount. As of this time there are an estimated 700 to 800 pre-paid legal service plans in existence in this country, covering at least 2,000,000 families, and they are rapidly increasing.

Yet, this is only one of the factors involved. Many of us can recall that period of time in which the trial of a law suit took place without any discovery, with the possible exception of a deposition of the opposing party. There were no rules of procedure permitting such currently commonplace matters as interrogatories, request for admissions genuineness of documents, or even the identity of witnesses. In fact, it was not uncommon at the time when some of us began the trial of cases, for counsel to have no advance knowledge about either the existence, the identity, or the anticipated testimony of witnesses called by opposing parties, until they took the stand and testified. Cross-examination was necessarily a finely honed, challenging, spontaneous, and frequently disastrous experience. This was particularly true with reference to expert witnesses, with doctors, accountants, economists or otherwise, none of whose testimony could be anticipated, much less discovered. Trials, as a result, were shorter, less complicated, and , more importantly, less precise in their results. The so called "Jumbo Verdict," so common in today's litigation, was unknown. Many matters were settled by thorough but friendly negotiations between attorneys, who had practiced in the same community, who were closely associated, and whose professional relationship was exemplary. Verdicts were modest, and such matters as court congestion and trial delays were generally unknown. If a trial took more than a week, it was an extraordinary occurrence. Economists and actuaries were unknown, principally because no data was discoverable upon which to base their testimony. Complex, multi-district in and protracted litigation, such as we have come to know increasing numbers, since the electrical cases, likewise were unknown, basically because it was only with the advent of rules of unlimited discovery that such litigation as the huge anti-trust treble damage cases: The massive product liability actions, or the multiple aircraft accident cases became possible. Then, and only then, could the plaintiff class look into, comb through the files of class action corporate defendants, and extract therefrom the thousands of documents essential to the successful preparation and prosecution of such massive actions.

The inevitable results of the development of the complex litigation of today have been many and varied. First and foremost, they added a new dimension both to the length and the complexity of trials, with protracted and extensive discovery producing unprecedented amounts of paper work, making even indexing difficult, much less presentation and use. It created unheard of delays and expense in trial preparation. Secondly, they brought into the courts all over the country a new mobile group of attorneys, the specialists in these kinds of cases, who move from jurisdiction to jurisdiction and coast to coast. Thirdly, they developed sophisticated and complicated economic, sociological, actuarial and other expert testimony, calculated to lay the foundation for ever-increasing judgments. Fourth, rather than trials consuming mere days of court and litigant time, these actions began to take from several weeks to several months to try, and, in at least one recent case, years. Trials likewise were begun only after many months of discovery, reams of deposition testimony, mounds of paper work, and numerous pretrial conferences. Often there were so many counsel on each side of the table that it has been necessary to designate liaison counsel for each group of litigants, so as to be able efficiently to communicate between the parties and with the trial judge. Litigation costs to the parties have increased to a shockingly high figure in many cases, so much so that, in many of the complex cases, all parties except the very largest corporations usually are compelled to settle simply as a matter of economics, even where they have meritorious claims or defenses.

Yet, essentially our rules of evidence and our general courtroom procedures have remained unchanged for centuries, in spite of greatly expanded discovery and rules, and manuals designed for handling complex cases. judge Joseph F. Weis, Jr. of the Third Circuit recently wrote that: "A Roman lawyer from the 1st Century B.C. initially would feel at ease with the procedures followed in today's courtroom. A barrister of Blackstone's era observing a modern day trial in an American courtroom would find himself in a familiar setting."[1]

While you may believe that this is an overstatement of the situation, nevertheless it calls for sober thought and reflection. It is undeniable that change comes slowly to lawyers and the legal profession, and particularly to advocacy.

We can take justifiable pride in the fact that, in spite of the prophets of doom, both the bench and the bar successfully have accommodated to the massive class actions of recent years. Yet it has only been that - an accommodation - not a permanent, nor a substantive change of a system long cherished and observed.

This should not be interpreted to mean that there is either the need, or the desire, to make wide-sweeping changes in our judicial system in the name of reform. Nor should such substantive changes be undertaken, unless and until we are satisfied that reform is necessary. Yet we are being subjected to increasing pressures and attacks to make immediate and drastic changes in our system, even to the extent of abandoning some of the essential safeguards.

Typical of such proposals is the increasingly suggested use of arbitration in which disputes, with or without the consent of the parties, would be relegated to an administrative system in which the decision of one to three non-lawyer arbiters, following hearings in which even the most rudimentary rules of evidence could well be ignored, would determine individual rights and remedies. Anyone who has ever tried cases before administrative bodies or arbitrators will instantly recognize what disastrous results this kind of an alternative could produce.

A variation upon this theme is the so-called "mandatory non-binding arbitration" proposal which has been tried on an experimental basis in some federal district courts, and which has been the subject of legislation introduced in Congress. While this proposal has encountered considerable opposition, especially from Senator Howell Heflin of the Senate Judiciary Committee both on constitutional and policy grounds, nevertheless it is being urged by the Department of Justice and others. The latest statement of a representative of the Department of justice was made by Assistant Attorney General Maurice Rosenberg, who heads the Office for Improvements in the Administration of justice, and who has said:

"...I would see putting arbitration ahead of the jury trial right as merely establishing a different procedure and a different technique and not infringing the substance of the right."

"Senator Heflin would allow arbitration only on a consent basis, but one of the things we find is that if you say to litigants, and particularly to their lawyers, 'You may do this if you are willing to,' they don't avail themselves of the opportunity."

"Any time a lawyer is confronted with a choice, the lawyer will tend to stay with the standard traditional process rather that opt for something different. The lawyer is anxious to avoid any unexpected, bizarre or disastrous result on the principle of taking the known evil rather than an unknown danger."[2]

I submit that such a proposal for arbitration even though "mandatory and non-binding" can neither save judicial time nor reduce litigant expense. It is extremely doubtful that any substantial differences of the parties would be finally determined by such a proceeding; that either or both parties would proceed to a judicial review; that it would do nothing but add an additional layer of fruitless litigation, thereby adding both expense and delay. Such proposals already have been officially opposed by the American Bar Association, but that opposition has not caused their demise. In fact, positions such as that taken by Professor Rosenberg have been increasing. Yet, until this time, I know of no official opposing position which has been taken by the Academy, or other organizations of experienced advocates. I am satisfied that those here would concur with Senator Heflin's criticism of arbitration on both constitutional and policy grounds; that putting an obstacle in the way of a jury trial might infringe the 7th Amendment; that an arbitration program lacks essential elements of a justice system, namely, a court, a judge and a trier of fact, both of whom take an oath, whereas arbitrators are under no such compulsion. Unless we are alert to oppose this kind of legislation, both nationally and locally, it would appear highly probable that we will find it imposed upon our clients, even without their consent.

Another drastic, and in my judgment unwarranted, proposal is the complete abolition of diversity jurisdiction of the federal courts. Two fundamental arguments have been advanced in support of this recommendation. The first is that local prejudice, which was the basis for diversity jurisdiction, long since has disappeared in our complex, fluid and mobile society, so that its protection no longer is needed. Second, it is contended that the elimination of diversity jurisdiction would relieve the federal district courts of a large percentage of their civil caseload, estimates being as high as 35 % of their civil case docket. I submit to you that both these arguments are without sound, logical support. As to the first, any experienced trial lawyer, who has ever tried cases in rural courts or even in certain metropolitan areas, is well aware of the ever present hazard to a party who is a stranger to that community, when opposing a local resident in the courtroom. The inborn and subconscious prejudice for one's own friends and neighbors makes a fair and impartial trial virtually impossible. In such circumstances, resort to the federal court by the non-resident party, particularly when that court usually sits in a metropolitan setting, or can better mitigate the local situation, is mandatory if justice is to be done.

The second reason has become increasingly insignificant since the passage of the omnibus federal judgeship bill and the appointment of almost 150 new federal district judges. Certainly, this increase in judicial manpower should put the federal district courts in a position adequately to handle the entire civil business, as well as the criminal cases in all districts. That system has traditionally handled removed, or originally filed, diversity cases with no history of substantial imposition upon, or complaint by, its judiciary members. Only the Speedy Trial Act and the various acts of Congress providing for priority handling of miscellaneous civil matters have caused what had threatened to become a serious problem with the federal courts, a problem which, as noted, now has been eased, if not eliminated. Certainly, the interests of the public, as litigants, and the protection of their personal and property rights, transcends any consideration of the convenience of the courts.

Additionally, the increase in the caseloads of the several state court systems as a result of the elimination of federal diversity jurisdiction cannot be cannot be underestimated. Many of these courts already are lacking sufficient judicial manpower, and they lack the cohesive ability peculiar to Congress and the single federal judicial system to bring about anything resembling the judicial manpower increase created by Congress in a single enactment. Yet, the proponents of the abolishment of diversity refuse to recognize that the abolishment would create a problem for state courts. A gain Assistant Attorney General Rosenberg, speaking at the time of the same interview, said:[3]

"The total number of diversity cases runs over 30,000. They represent about 20% or more of the civil business of the federal courts. If they were all removed -all of them -to the state courts, they would fall into systems which in the aggregate have on the order of 8 to 10 million general jurisdiction cases. They would not make anything like a dent; they would be almost *de minimis.* The argument is made that they would fall heavily upon busy courts, but my impression is that studies have been made to see whether that is so, and my recollection is that they have shown that there would not be any serious overloading of already busy state courts. Thus, on the question of relative workload, the state courts are ever so much more appropriately suited to absorb these cases."

What the foregoing statement completely overlooks is that legislative bodies, both federal and state, have been imposing increasing burdens upon our courts, as more and more legislation carries with it prescribed judicial procedures, or review of other actions. The public itself is looking increasingly to the courts for resolution of many new forms of disputes, resulting from our increasingly industrialized and socialized society, living in an increasingly crowded series of large metropolitan areas, producing new concepts of social, sexual and racial rights and duties. As our society becomes increasingly congested, the environmental impact of accelerated need for housing, sources of energy, such as nuclear power, conservation of resources, and many related matters, all have been thrust upon our judicial system by the public. People turn to the courts for resolution of this vast number of new problems, and expect the courts to fashion novel and broad solutions to them. The modern American judge, because of the ease of access to the courts, and these new types of actions, is no longer merely an instrument in a system of applying established principles of law to the facts of a given case. Instead, he has to attempt to create and implement solutions for such diverse problems as equal educational facilities for all racial groups; the busing of students to achieve such equality; a myriad of such matters historically considered as legislative, rather than judicial in nature.

Thus, our judiciary has increasingly been forced to take on more and more areas of social responsibility. This has caused an erosion of the purely judicial functions of our court, as we have known them, a process which promises to continue and expand, unless we, as advocates, can prevail upon executive and legislative branches of government at all levels to reverse this process, and to assume their proper roles in formulation of social change. It was primarily because of the failure of these branches to carry out their constitutional functions that our courts were forced to enter into these areas.

The process must be reversed. Our courts must be restored to their traditionally judicial functions. Otherwise, we face the risk of ultimately seeing the courts become social arbiters, while legal problems and disputes are relegated to some other form of resolution.

I do not mean to suggest that we should press for the elimination from our courts that increasing body of cases involving individual rights, because the protection and enforcement of those rights is the very cornerstone of our constitutional guarantees. It was an inevitable result of our growing urban society, with all the pressures of living together in a time of shrinking space to individuals and resulting encroachment on the rights of others. As short a time as 50 years ago, our situation was such that, if we did not like our neighbor we could move, and our problems were resolved. Not so today, when we no longer have the capacity to resolve our problems in this fashion. Such human concerns as race, sex and age discrimination will continue to be with us on a growing basis, and must be considered as a fundamental problem, both for the judiciary and for the Bar.

However, at the same time, we must not allow ourselves to lose sight of the other individual rights which have traditionally relied upon our judicial system for their protection and enforcement. As to these, 200 years of experience have made it abundantly clear that the adversary system remains the best method to achieve just and equitable resolution of disputes involving these rights. As Justice Walter V. Schaefer of the Supreme Court of Illinois said at The National Conference on the Causes of Popular Dissatisfaction with the Administration of justice, which was convened in St. Paul, Minnesota, in April, 1976:[4]

"The assigned question, whether the adversary system is operating in optimal fashion, immediately prompts another: What is the purpose of the adversary system? The fundamental purpose of that system, as I see it, is the ascertainment of the truth with respect most frequently, to an event which took place in the past. All aspects of the adversary system must be measured, in my opinion, against that objective. There are other peripheral considerations, but the ultimate question is whether the adversary system, as we know it today, is doing the best that it can do to determine the truth with respect to litigated controversies."

Judge Schaefer, having thus stated his premise, proceeded to the conclusion that the use of juries in civil trials today is as outmoded as prehistoric mammals, and his treatise includes such comments as the following:

"The disenchantment of these professional groups [doctors, architects and engineers] stems from the feeling that their cases involve technical questions which are beyond the competence of a lay jury. This feeling has considerable basis. The long interruption in a juror's everyday life, and the minimal compensation, provide great incentive to avoid jury service, an incentive encouraged by the statutory provisions for exemption and excuse from jury service which tend to eliminate from the jury those who are best qualified to serve on it. The feeling also reflects a concern that a jury's award of damages tends to include a large ingredient of sympathy for the injured plaintiff, and a contingent fee for his attorney."

These comments were made by a justice of the highest court of one of our largest, and most litigious states! These are the members of the judiciary to whom we as lawyers look to uphold the adversary system, not to destroy it. Small wonder that members of the public have begun to question the validity of our jury system, in view of comments like these.

Yet, I am willing to wager that no one in this room, given his choice, would prefer to waive a jury and try the case in which his client's rights are involved to a single judge, instead of a jury of his client's peers. Why? Because each of us, citing chapter and verse, can describe the horrors which have befallen unsuspecting clients and counsel in those cases tried to a prejudiced judge. And woe unto the client and counsel who fall into that web. For, as all experienced trial counsel well know, when ever a single judge as the trier of fact, reaches an erroneous decision on the facts, there is absolutely no relief available in an appellate court. It is only where the single judge errs as a matter of law that his decision will be reviewed upon appeal, Contrast this with a jury trial, where both the trial judge and the appellate court have both the opportunity, and the right, to review both factual and legal questions.

One particular case which is a good example of this situation is one in which the plaintiff was the regional manager of a large corporation suing a nationally known manufacturer of chemical products, including weed killers. The plaintiff sustained a complete respiratory arrest, which all knowledgeable experts agreed was caused by the absorption of the product he was using. Because of his corporate position, as opposed to a large corporate defendant, a decision was made to waive a jury, and try the case to a judge, It was not until long after the case had been tried and lost, when, under the undisputed evidence it should have been won, that plaintiffs counsel inadvertently learned that a totally unrelated medical experience of the judge's wife with respiratory arrest had so prejudiced the judge that he found for the defendant. There was absolutely no remedy available to the plaintiff, because the question was one of fact, not of law. How many times such an experience has been repeated can be only surmised.

Yet, those who propose to abandon the use of jurors in civil cases, urge that trials to the court would result in a substantial saving of time, considering the necessity of assembling a jury panel, impaneling the jury through voire dire, and the necessity of a continuous, unbroken trial by a jury as opposed to a trial proceeding at the convenience of the court, the parties and the witnesses. They also contend that many of the complex cases of the present era involve questions which are so technical as to be beyond the ability of the average juror even to follow or to comprehend; that service on a jury in a protracted case involves such a demand upon the time of the individual jurors that only the least qualified are willing to serve; that justice is thereby thwarted, rather than promoted. Such were the comments of the Chief Justice of the United States as recently as the mid-year meeting of the American Bar Association in Chicago on February 3, 1980.

Is this true? Review your own experience with juries, whether representing plaintiffs or defendants. Would you not rather take your chances and rest your client's fate in the hands of his Deets, whether six or twelve, rather than in one judge? Yet, unless we are constantly alert and vigilant, those who propose the abolition of the jury system will achieve their objective, and we shall find ourselves faced with the demise of the jury system as we have known it. Again, let me quote from Justice Schaefer's comments at the St. Paul conference:

"The easy way is to go on as we are, tolerating in many jurisdictions the revolting spectacle of lawyers engaged in efforts to indoctrinate jurors in the course of the voire dire examination, and assuming that jurors follow the instructions of the court, even though we know better. '(A)ll experience hath shown' says the Declaration of Independence, 'that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.' The jury is an accustomed form, but the time is ripe to consider whether that form, valuable as it may be in criminal cases, has not outlived its usefulness in the world in which we live today."

Regardless of what we as trial lawyers may believe about the preservation of our jury system, comments such as these from respected members of the judiciary unquestionably will have an impact, not only upon the lay public, but also upon many members of the legal profession who are not engaged in trial practice, as well as students and professors of law. The reaction within the profession itself is aggravated by the fact the majority of today's law professors have had no exposure to private practice, particularly the trial of cases. How can these people, who have never been exposed to the experiences of advocacy be expected to instill in the fledgling law student any enthusiasm or interest to enter into the trial area of practice? In fact, it has been reliably reported that, in some of the larger law schools, increasing stress has been placed upon urging students to avoid trial practice, and turn to administrative procedures. Little wonder the graduates of these law schools have demonstrated a diminishing interest in our traditional trial system. This ever-expanding group of neophyte lawyers can hardly be expected to understand, much less to oppose, these proposals being advanced to change our judicial system. Proposals frequently have come before the American Bar Association House of Delegates asking American Bar Association support for such changes as abolition of diversity jurisdiction, or mandatory arbitration. Because of the intervention and persuasion by trial lawyer members of the House, most of these proposals have been defeated, up until the present. However, unless all advocates, individually and as members of this Academy, the American College of Trial Lawyers, the International Society of Barristers, the Association of Trial Lawyers of America, and similar organizations, speak out whenever and wherever possible in favor of the preservation of our system of advocacy, changes such as those which I have mentioned slowly but surely will occur, until we see our judicial system a mere shell of its present self.

I do not mean to suggest that we, as advocates, should be opposed to any change which would represent an improvement, and which particularly would assist in reversing the recent trend of increasing cost of litigation, or in making access to our courts more readily available to larger middle-class segments of our society. On the contrary, we must take the lead in resolving such problems as these in the public interest. But proposals for change merely for the sake of change must be resisted vigorously and with constant vigilance. We must anticipate that, as current proposals and additions thereto are repeatedly discussed, presented and promoted, they will gain increased credibility and acceptance, unless we can mount correspondingly increased credibility and acceptance of reasoned and logical opposition where necessary and appropriate.

Again, I repeat and stress what Assistant Attorney General Rosenburg said in the interview to which I previously have referred:

"Any time a lawyer is confronted with a choice, the lawyer will tend to stay with the standard traditional process rather than opt for something different. A lawyer is anxious to avoid any unexpected, bizarre or disastrous result on the principle to taking the known evil rather than an unknown danger."

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We must honestly confess that this is a true and correct statement. Trial lawyers do tend to stay with those procedures which are known, tested and tried. Likewise, we tend to stay with our traditional systems of charging of fees, either on a contingent basis, a fixed hourly charge, or a combination of the two. In this era of the huge, complex and protracted litigation, is the traditional hourly charge a system which is appropriate and fair? Some of our critics have charged that it is because of our strict adherence to this system that costs of litigation have become increasingly excessive.

Again, as Assistant Attorney General Rosenberg proposed, it may be time that we look into the question of "whether there are other basic modes for compensating lawyers than on a strict hour and fraction of an hour basis. If we can come up with some ideas that are fair and palatable and effective, we may be able to do something about cutting fees in the mammoth case down to size."

Obviously, this is a most challenging and provocative subject, one which calls for the best consideration and effort on the part of all of us, as advocates. We must realize, as an alternative, that we are quickly approaching the point where we may be pricing litigation out of the marketplace; that, unless we arrive at a suitable, equitable and livable arrangement for alternative charging of fees in massive litigation, the public may force upon us alternatives for resolution of disputes which are totally unacceptable, and which are not in the public interest.

I earlier have said that we should not oppose change, where indicated and necessary. We must anticipate and be prepared for some substantial changes in the coming decade. In the time when many of us here assembled have practiced, and certainly within the lifetimes of all of us, profound changes have taken place in the methods of practice. We had no Xerox or other types of copying machines. Secretaries made copies manually. We had no word processing equipment, automatic typewriters, para-legals or other legal assistants. All this has already changed, and we now find ourselves buried in mountains of paperwork, thousands of documents extracted through discovery, computerized data not only for the retrieval of information constituting evidence, but for such varied tasks as billing clients, advising the partners concerning the status of the business of the law firm, and producing and printing out the latest decisions. But all this appears to be just the beginning of a trend, which probably will come to a fruition in the 1980's, and which should have a profound impact upon both the form and substance of the practice of law.

We know that all our courts, state and federal, are far too crowded with litigation of all kinds. This is merely an inevitable result of the increasing pressures of a growing population, superimposed upon a society which long has been recognized as quick to resort to courts to resolve disputes. It will not be either adequate or acceptable for trial lawyers and their organized specialty groups to tolerate this situation as the nature of the beast." We are going to be forced to accept reforms, because the public is going to demand them. And, since the courts do not belong to the judges or to the lawyers, the public will force change upon us- change that will produce more expeditious handling of cases at reduced costs. The trial bar can render its greatest service to society by assisting in needed changes and by taking the lead in advocating reform which trial lawyers recognize as necessary. Who else is in a better position than trial lawyers to make such a determination?

It would be presumptuous for me to forecast with any degree of accuracy what direction these reforms may take. We do, however, have certain already cl ear road signs indicating where we may be heading. As an example, medical malpractice cases have increasingly been channeled into administrative fact-finding board hearings, either as an alternative, or as a condition precedent to litigation. In only a few states have these requirements been held unconstitutional. There is a move afoot to force the resolution of product liability cases into non-adversary proceedings, with the rules governing those structured along lines of traditional workers' compensation statutes. A commission has been appointed by the president of the American Bar Association, composed of both lawyers and laymen, with the assigned task of reviewing the entire field of tort law, and recommending changes and improvements. What an opportunity this affords this academy and other organized groups of trial lawyers for constructive input, for the benefit of society. We must be alert to these opportunities, and must be willing and in a position to bring our training and our expertise and experience to bear upon the investigation and its ultimate recommendation.

The same thing applies to procedural and technological developments and improvements. Video depositions have developed and have been approved during the last decade, as techniques have been refined. As litigation costs continue to increase, and they surely will, we can expect further refinement and development of such methods, even to the possible end of having entire trials presented to a jury by means of video tape. Certainly, the until now experimental use of telephone pretrial conferences, with neither the judge nor any counsel leaving his office, appears destined for widespread implementation. Computers will unquestionably play a vastly larger part in litigation in the future than in the past.

Whether we want it or not, change is coming. As advocates, we truly stand at the crossroads. In our present situation, we have the opportunity to move forward with constructive suggestions for changes, which will ease the increasing cost burdens of litigation and, at the same time, will preserve our adversary system. Trial lawyers are innovative of necessity, and, if we recognize and accept the fact that change is coming, we can take the lead. Thus, for example, we most certainly must come to grips with the troublesome problems of abuses of discovery, with examples of which each of us is intimately acquainted. Either the trial lawyers take the lead in suggesting constructive changes and improvements in this area, or we inevitably will be faced with changes which may not be in the best interests of justice. For we must not let what long has been an esteemed profession

become no more than a craftsman's trade. And again, I stress that we must take the lead to preserve our jury system. In that connection I cannot improve upon the admonition of Senator Howell Heflin in his addresstto the annual convention of the Virginia Trial Lawyers Association:

"...Let us conduct our professional lives, our personal lives, and our professional organizations in such a manner as to bring credit upon our profession. Let us also take positive steps to see that the voices of the legal profession are present and heard in legislative bodies. Finally, let us be vigilant to insure that we preserve the image improving system of trial by jury."[5]

In conclusion, I would like to leave with you the most eloquent tribute to our special branch of the practice of law - the pursuit of justice - by quoting from Daniel Webster, who said:

"Justice is the great interest of man on Earth. It is the ligament which holds civilized beings and civilized nations together wherever her temple stands and so long is duly honored, there is a foundation for social security, general happiness, and as it the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name and fame, and character, with that which is and must be as durable as the frame of human society."[6]

FOOTNOTES

1. "Future Law- Lawyers Encounter The 21st Century," Bureau of National Affairs, 1979.

2. "The Third Branch," Vol. 12, No. 1, January, 1980.

3. Ibid

4. Reported at 70 FRD 79, *el seq.*

5. *International Society of Barristers' Quarterly*, Vol. 14, No. 2, April, 1979.

6. *Remarks upon the death of Mr Justice Story, Before Suffolk Bar, Boston*, September 12, 1845