

The Trial Lawyer and Lawyering: Personal Values and Perceptions

By Foster D. Arnett

Mr President, Gentlemen and Ladies, Friends:

ARTICLE V, SECTION III of the BY-LAWS of the International Academy of Trial Lawyers defines my responsibilities on this occasion. it tells us that the Dean of the Academy shall address the annual meeting "... to enhance the influence, prestige and importance of advocacy..." These instructions are no more specific.

In responding to this charge, I have reviewed some of the Addresses delivered by my distinguished predecessors. Each Dean Emeritus has handled his assignment differently. Some have delivered scholarly and erudite remarks; others have been humorous and anecdotal in contributing to the legend and lore of the trial lawyer; still others have applied a searching, thoughtful, and incisive intellectual analysis to our craft and to the adversarial process. What then can I possibly say on this occasion which may be useful and might discharge, in some small measure, my responsibilities? I proceed upon the predicate that I know to whom I will be speaking; I know the quality of the outstanding lawyers in this audience and it would be arrogant and inappropriate for me to intrude upon eternity in delivering my remarks. I shan't purport to be profound but, hopefully, some of my impressions and perceptions may have some merit and value by sharing with you certain matters of mind and heart which I hold in respect to that lofty craft, that marvelous institution - The Trial Bar.

The Bench -verbally and in writing - continues to express its concern about a perceived change in the quality of the Trial Bar. World class scholars have published learned papers in law reviews and treatises and journals to comment upon the adversarial justice system as they understand it. Outstanding trial practitioners speak and write about legal professionalism (and the lack thereof) and how different things were "then" as opposed to how they are "now." The media (print and electronic) have addressed the subject ad infinitum, ad nauseam and without surcease. The public at large has reacted by writing critically in op-ed pages and by making legal malpractice litigation a new growth industry. Opinion surveys have often suggested that the public ranks lawyers on an approximate level of respect and confidence with which the people regard used car salesmen.

The Courts and Organized Bars about the country have created and staffed state disciplinary boards to ensure legal competence and care and character, and to enforce standards to deter personal and professional misconduct by lawyers. The ABA JOURNAL, speaking for the national Bar, has recently inquired of us, "What image do we (the lawyer) deserve... and have we earned it?" The academic equivalent of the ABA, the American Bar Foundation, has conducted demographic research in response to the burgeoning explosion (or "implosion") of the number of U.S. lawyers from approximately 221,000 in 1951 for a population of approximately 154,000,000 people, to approximately 805,000 lawyers next year for a population of approximately 250,000,000 people. Thus, the U.S. population over the past 39 years has increased approximately 62% while the lawyer population has increased approximately 263%. In 1951, we had one lawyer for every 695 citizens. In 1990, we will have one lawyer for every 310 Americans.

The old historic "Canons of Professional Ethics" were replaced by the "Code of Professional Responsibility" and later replaced by the "Model Rules of Professional Conduct." indeed, and as an illustrative example of professional and public concerns, recently the Dallas Bar Association has adopted "Guidelines of Professional Courtesy" and its "Lawyer's Creed" and the Cleveland Bar Association has published its "A Lawyer's Creed of Professionalism," which was in turn adopted by the TIPS Section of the ABA. And, as we know, many other Bars have been addressing these professional responsibility issues, i.e., the ABA Center for Professional Responsibility and, among others, the states of Rhode Island, Kentucky, Maryland, Virginia, Florida, Louisiana and Minnesota. Tragically and unfairly, I think, a major part of perceived professional transgressions is focused upon the Trial Bar rather than the Bar at large.

It is my personal and professional opinion that the profession is at a watershed and the remarks earlier made at this Annual Meeting by Past Presidents Beckham and Decof and by our brother Stewart, and others, seem to confirm that assessment. At the risk of being characterized as apocalyptic, it is my sense of the matter that we trial lawyers, singularly and collectively, had better get with it and correct these alleged abuses while there is still time to do so. I earnestly feel that we have the obligation, responsibility and duty to put the record aright and to take a leadership role in an essential crusade to clean our nest. To the extent we fail to take action we are putting the profession - and particularly its trial practice arm - at great risk I foresee that alternative dispute resolution modalities and administrative law innovations and decreasing access to jury trials and similar "initiatives" will continue to erode precious rights of the people whom we, as trial lawyers, are charged with protecting; and

that this great Republic will continue to sustain irreparable losses of awesomely important rights which were conceived and generated by our forefathers who gave to our care "the greatest document ever devised by the mind of man."

If I am correct in my view of the matter, and if my rhetorical questions have merit, what should or must we do to salvage the immensely valuable system of which you and I are servants, beneficiaries and stewards? Why has this plight settled upon us? Why is the trial Bar considered by many to be a pariah and an avaricious and venal aberration of our judicial system? Why do I (and, perhaps, a majority of you) suffer these concerns? What can we do to prevent our profession, and specifically our advocacy skills, from being lost in a bottomless chasm? If true, how did the legal profession lose its innocence? If true, how and why did our profession begin to manifest its dark image? How is it that the Bar, a national treasure, has become a target of opportunity? And, who or what institution(s) should take a leadership role in arresting the slide of our profession into what might be characterized as a devastating abyss?

It is my earnest opinion, particularly insofar as the trial branch of the profession is concerned, that our four great elite trial practice organizations, the International Academy of Trial Lawyers, the American College of Trial Lawyers, the International Society of Barristers, and the American Board of Trial Advocates, should join together and assume an ever so important leadership role and make a cheerful and dedicated commitment to address these perceptions and problems and to respond affirmatively and appropriately. As a matter of fact, these four great prestigious organizations may be the last, best hope for the judicial system as we know it; certainly, these four associations are really the only components of the Trial Bar which are constituted exclusively by Fellows and Advocates who have been *invited* to join and each of these organizations shares common goals. Those four trial lawyer organizations are perceived to be constituted of the elite practitioners of the Advocacy Bar and represent, without discrimination, the outstanding members of the Trial Bar without regard to whether they are "plaintiffs' lawyers" or "defendants' lawyers." Peopled as they are with expert and skilled trial and appellate advocates, we possess an abundance of the tools and skills peculiarly suited to use appropriate scalpels of our art which are necessary to achieve ultimate success in this mission. Accordingly, each of these highly respected associations is in a particularly effective posture in this matter to serve the public, the judicial system and the members of the Bar at large.

I think we need to revisit our roots and to rethink who we are and what we are about. I believe that we must regenerate within ourselves a renaissance of spirit and excellence *and* appreciation for the fact that the legal profession is the "proudest of the great learned professions and the poorest of trades." I think that the first step we should take is to motivate and dominate our minds and hearts and souls with a recognition and appreciation of the great privilege we enjoy as officers of the Courts who are specially sworn and commissioned to serve the judicial system and public. I believe that we disserve all our constituencies - the public, the judicial system and the Bar - to the extent that our energies and efforts are dollar-driven as opposed to being inspired to render high-minded, quality professional service to our esteemed profession *and* thus to clients who invest us almost literally with their lives, their fortunes and, in some instances, with their sacred honor.

I am bemused by the fact that many emerging members of the Bar, whose total life history has been encompassed by the sanctuaries of womb and home *and* the academic envelope, commence their first real income-producing jobs (the practice of law) by receiving starting salaries equal to or in excess of the remuneration earned by distinguished professors who taught them in law school. What an irony it is that some of our neophyte colleagues commence the practice of law at wages in excess of compensation earned by prominent jurists whom they have just served as law clerks.

I am appalled by the minimum billable hours imperative and the impersonality which seems to characterize more and more the relationships between lawyer and client. I strongly believe we should work diligently together to make quality legal services accessible to the public. The contingent fee concept, properly applied, can address that need but I am intolerant of instances where that kind of fee arrangement is abused and overused. To the extent that the contingent fee is excessive in terms of benefits to the client and in cases where it serves as a device to encourage litigation of a minuscule or frivolous nature, it disservices the system and the profession. I am also impatient with corporate, commercial and entrepreneurial clients who know the price of everything and the value of nothing. I deeply regret that there appears to be a significant erosion in the historic lawyer-client *and* lawyer-to-lawyer relationships of mutual respect and confidence with an accompanying decrease in public appreciation of the extremely important role that a trial lawyer can and should play in the lives and affairs of this great nation. I am distraught and dismayed that the classic ambience and professional self-esteem that used to characterize the profession seem today to be less elegant than once was the case. In this context, and perhaps because of these value mutations, I repeat: shared loyalties between attorney and client have been significantly diminished.

I deplore the diminished interest by the Bar in commitment to public service. I am reminded of the truly great and talented lawyers who gave of their gifts and time with splendid ability and great character and profound wisdom during the founding of this nation some 200 years ago. Yet, who among us can name as many as five truly fine lawyers who presently occupy the

marbled halls of The Congress of the United States? How many of us are contributing to public service to the extent that we should contribute to public service? Certainly I am not, and I strongly suspect that many of us are not, fulfilling that professional opportunity and that obligation.

Apropos this comment, just on Monday of this week USA TODAY covered the ABA-Mid-Year Meeting in Denver. After talking with lawyers attending that meeting, that newspaper reported that approximately one-third of the interviewees were thinking about leaving the practice of law and 80% said "a negative public view" of lawyers is the major cause of dissatisfaction. One young West Coast lawyer observed that "Higher salaries have forced many lawyers to work more and do less public service work" and another opined that in California, "The most popular sport is lawyer bashing." Yet another senior lawyer observed that "Most lawyers are intelligent enough to understand that to just turn themselves into machines for the pursuit of money is not what they became lawyers to do." This story in this national publication suggests that practitioners "out there" are not terribly happy with the present state of the profession in this country.

Have things really changed and changed to the extent that I imply? You'd better believe they *have* changed! The mega law firm has emerged as a new and important institution within our profession. But *quaere*: How can such a law firm - or any such financially driven organization possibly afford to represent a continuum of little old ladies in tennis shoes in landlord-tenant controversies when the newest associate in that firm is earning \$65,000 or \$75,000 a year and is expected to generate a substantial *minimum* number of *billable* hours? How can small firms and the solo practitioner afford economically to undertake a very sophisticated, involved and extended legal controversy on behalf of the *average person or small* business enterprise when the costs of litigation have so enormously increased and when the cost of utilizing current technology and simply keeping the firm door open is so immensely expensive?

The changing dynamics of the Bar were dramatically illustrated in the fall of 1988 when, to everyone's surprise, applications for law school admissions greatly increased, particularly at the great national law schools. This phenomenon substantially increases the responsibility - and the *opportunity* - of the Bar to provide guidance and direction to the neophytes who will shape the direction and dreams and destiny of the profession into the 21st Century. In short, I argue that this Academy should constitute a resonant model of professional responsibility for the nascent lawyers *and* for the bar as a whole.

My reflections upon the state of the legal profession "then" and now" reveal two trends which I find particularly troubling: The diminution of Honor and Integrity as non -negotiable values for the profession and the significant erosion of collegiality and congeniality and cordiality and comradery and civility (and yes, Friendship!) amongst the various elements of the practicing Bar, the federal and state Benches, the teaching Bar and that new full employment entity which we call house counsel or the corporate Bar.

The second trend to which I refer concerns the marked erosion in the civility and collegiality and courtesy which should characterize our dealings, one with the other. At the risk of overemphasizing the point, it is my feeling that the spirit of friendship that pervades and characterizes the Academy, the College, the Barristers, and ABOTA has especially set apart those organizations from other less discrete and discriminating increments of the Bar; it is especially that quality which makes these four great honorary institutions so special for me. To the extent that our other colleagues - and particularly our younger brethren - do not understand how important collegiality and comradery are to the enrichment and enhancement of the profession, to that extent they are the poorer and the legal profession's opportunity for societal contributions is wounded and diminished.

In my view, and surely there can be no dispute about this, it is the lawyer's inherent and unqualified duty to represent vigorously and zealously his clients, but there is no room whatever for the indulgence of psychopathic or sociopathic philosophies and personalities within the profession; there is no place whatever in our noble profession for rudeness, discourtesy, and "cheap shots." In my judgment, there is simply no place in the trial lawyer's lexicon for "sharking" and "take no prisoners" and "hard ball"... in the worst definitional sense of that last pejorative phrase. Those words and phrases involve demon devices and are inconsistent with how our system is intended to work and how our learned craft is intended to function.

One can be an extraordinarily effective advocate (and perhaps a far better advocate as the beloved, late "Mr. Francis" Hare reminded us) if his or her professional and personal manner and demeanor conform with the traditional grace and style of the profession. It is inconsistent with the noble character of our profession to suffer rascals gladly. With respect to their reptilian spoilation of good professional manners, I think that we ought to drain the swamp of those overly aggressive people. To the extent that we do not, as a profession, address such matters, to that extent we are aborting and abandoning our dreams. In part, the 1980 amendment to 28 U.S.C. § 1927 and the more recent amendments to Rule 11 of the Federal Rules of Civil

Procedure were an attempted judicial response to abuses within the adversarial system. Now, many of us consider those judicial and legislative reactions to be medicines worse than the maladies they are intended to cure.

As to the first of my major concerns, Honor: As one of our greatest and most beloved colleagues - our brother Spangenberg - recently reminded us, it is absolutely necessary and essential that a lawyer's representation or word be "good as gold." Early on in my practice, I had the great privilege and opportunity to practice with and against some of the giants of the Trial Bar. The influence of those great lawyers shaped, structured and contributed enormously to my professional growth. Through the years I have been blessed with the advantage of practicing with and against a significant number of other great lawyers. Although those extraordinary lawyers varied significantly in their strengths and weaknesses, they all shared *one* value in common, HONOR- I quickly teamed which lawyers I could deal with on that basis and which lawyers might put me and my client at peril. The point is that Goliaths of the Bar were without exception honorable people. At the risk of being semi-facitious, if those elegant practitioners told me that water flows uphill and that the sun rises in the west, I would accept that because I would *know* that they simply wouldn't tell me that if they didn't know it to be true. Similarly, I have practiced before some very great jurists (and my share of depraved and unworthy ones). Then, as now, those finer jurists as paragons of integrity -would accept without qualification reputable counsels' representations; of fact and law. This phenomenon is of inestimable value to clients but counsel should constantly be mindful of that fragile virtue: it takes years to earn a reputation for credibility with our practicing and juristic colleagues and that reputation can be destroyed in a moment.

I say to you from the heart that you and I, and others like us, should feel compelled to articulate and celebrate the seminal Honor and Integrity of our historic profession and -when confronted with attitudes and actions which besmirch our noble calling-we should respond appropriately and reaffirm the admonition that "to stand silent when we should protest makes cowards of us all."

Admittedly, the Supreme Court of the United States has made our assignment much more difficult because of its series of opinions which have - out of naivety and under Constitutional pretexts - failed to take offense at certain "marketing" practices devised by a minority of our profession. Certainly, The Court has not with a clarion voice rearticulated that ours is an *especially different* kind of profession and not a mere trade and that the ethics of our profession are not the ethics of the marketplace.

Nonetheless, insofar as I am personally concerned, the composite Bar has tolerated the intolerable when it has not *consistently* held accountable creatures of the profession who have deviated from high standards of professional conduct and who have demeaned and compromised and soiled the image of an institution we revere. Of all the characteristics of a fine lawyer - intellect, professional competence, experience, industry, credibility, judgment honor and integrity, etc. -two values cannot and must never be compromised or quantified: Honor and Integrity.

So, assuming for the purpose of this question that my comments have some merit, what do we do about this matter? For one, I think that we ought to revisit our old ethical and professional standards and compare and contrast them with the techniques and practices and values and perceptions of the present time. To the extent that the quality of our professional growth and contributions has improved, let's retain that enchancement; to the extent that our value system has deteriorated and retrograded, let's take that into account and address our responsibility to do something about it. Specifically, what do I suggest, together, that we do?

1. To reread our professional literature, including the Constitution and Bylaws of this great organization, and to commit ourselves to their teachings.
2. To reread the Code of Trial Conduct of the College and to recommit ourselves to its teachings.
3. To *senstitize* our individual capacity for indignation with respect to members of our profession who deviate and depart from the substance and sense of the standards and values we believe in and by which we live.
4. Importantly, to serve as individual and composite exemplars to our brothers and sisters in the profession and demonstrate how a lawyer can and should act both in an individual and in a representative capacity. We should so conduct ourselves that our colleagues will perceive us to be followers of the highest order of decency and honor and gentlemanly and ladylike conduct so that our colleagues at large will be inspired to emulate that "Code" as a model for professional conduct.
5. To make a conscious effort to reach out and touch the incoming and younger members of the Bar. We should engage in dialogues with them and extend our support and resources to them - and to typify for that generation and for generations to

follow what lawyers ought to try to be. I argue that the focus of our dialogues with our young colleagues should emphasize accountability and responsibility as counterweights to the "rights" so many of us insist upon these days. We should listen again to the sage advice of courtly justice Stewart when he observed that just because someone has the right to do something doesn't necessarily mean that it's the right thing to do.

6. To take an objective and in-depth inventory of how our profession has changed through the years - for better, and for worse - and to rededicate ourselves *individually* to the highest ideals of the profession and particularly to our craft not only for the benefit of our people at large, but also for the enrichment of a national treasure-our proud and historic profession which we strive to serve as paladins.

It has been my very great privilege and honor to have served as Dean for this year past. In this fellowship of the Academy, I have grown to know and increasingly respect some of our great modern day Ciceros, Demosthenes, Websters and Lincolns. My spirit has been warmed and uplifted by a rich relationship with some of the finest wordsmiths of our profession. I have renewed and reinvigorated my pride in the noble and worthy calling to which we have dedicated our lives. I have developed an exciting sense of appreciation for the contributions made to this country by you, some of the great aristocrats of the profession. I have supped with you from a chalice brimming with honor, integrity and highly honed competence and commitment which, together, we share and seek to replenish. To the extent that we can continue to contribute to high-minded ideals and to adherence by all lawyers to such lofty goals, we, as a venerable academy, can try to pay back a bit of what our remarkable and gifted predecessors have created and handed off to us... for just a little while ... as a challenge and as a responsibility. For me and my Jean, we know that we are vastly better for having known and loved you and this great order of trial lawyers.

I close by emphasizing these deeply held personal views and by submitting that it is our bounden obligation to dedicate ourselves anew to the profession by encouraging affirmative support by all members of Bench and Bar to the exciting sense and spirit of our professional commitment. This renewed and rededicated purpose can serve as a torch to be handed on to those who will inevitably replace us.

At the entrance to one of our very great law schools is engraved a message of illumination and inspiration which should grace our daily prayers:

That those alone may be servants of the law who labor with learning, courage and devotion to preserve liberty and promote justice

Thank you and God bless you.