Lawyers under fire

By Kenneth F.Howie

In 1987, our colleague and now President, Aaron Podhurst began his address with the statements: "I am a lucky man. I like what I do. I am proud to be a lawyer."

I concur with Aaron wholeheartedly, as I am certain you do. But four years later, it is my unenviable lot to report that nobody else is proud of us.

Lawyers in the 1990's are under attack as never before. The role as society's whipping boy is something lawyers have come to accept. Taking it out on lawyers is not a new thing. We all know that. But our critics today are more vocal, and in many instances, more malevolent in their denigration of our profession. I quote:

> *"Lawyers certainly deserve all the criticism they can get. Those are universally held feelings by everyone who has ever dealt with the legal establishment Everyone ought to take every opportunity to blast lawyers. It's so easy to bash lawyers."*

As you may well remember, those comments came from none other than White House Press Secretary Marlin Fitzwater. The statements made the national news because of the high profile of the source. But like it or not, there is some truth to Fitzwater's statements. Those feelings *are* broadly held. And we, who so often spend our fives defending others, do little or nothing to defend ourselves.

Fitzwater's is an attitude that the legal profession must confront on an almost daily basis. The mistrust by the public, the notion that lawyers are little better than the unscrupulous shysters portrayed in the Perils of Pauline movies, and belief that the legal profession is more interested in the pursuit of financial gain that in the pursuit of justice are practically the norm; those attitudes have never been the exception.

We can see the evidence everywhere. One American magazine recently rated lawyers in the company of used car salesmen and investment bankers as the most untrustworthy professionals. And one California company has introduced Gummy Lawyers - a candy in the shape of a shark. Not a flattering picture.

It seems today, perhaps more than ever, the legal profession is under attack from all sides. Unfortunately, in many respects we have to accept the lion's share of the blame. It is the fault of the legal profession itself that it has not done enough to bridge the gap between the perception of an elitist, self-serving profession and the reality that *we* know exists. The result of this continuing perception is that there has been a steadily deteriorating loss of public trust and of public confidence, not only in the legal profession but also in the legal system as a whole. I think you will agree that our hides are tough enough to withstand the arrows directed at us personally or even to our profession. But the threat to our system of justice is a dangerous and sinister assault on the very foundation of our system of democracy.

In the United States, Canada and in many other parts of the world, growing misconception is continually fed by media reports of such things as unconscionable settlements for what often appear to be insignificant or pointless legal claims and lawyers are cast squarely in the role of scapegoat.

In malpractice suits, for example, the failure of the physician to provide proper medical treatment is usually relegated to the end of the media report, if at all. The fact that the lawyer has proved the case and won a significant judgment or settlement for the client is seen as somehow gouging the system. And the medical profession has been extremely successful in its own public relations efforts, shrewdly convincing the public that the root of the skyrocketing medical costs and the occasional inability of physicians to perform their duties competently mysteriously lies directly at the feet of the legal profession. They have turned the issues of medical professional accountability, medical malpractice and rising medical fees inside out to the point where if a physician removes a spleen instead of an appendix, it is somehow our fault; if the cost of a blood test rises by 300 percent, it's because of the settlements the doctors or their insurers have to pay to lawyers. And make no mistake, that is "paid to the lawyers" not to the victims.

Another contributor to this perception is that in many other parts of the world, access to competent legal representation is, in many cases, limited to the wealthy few, and indeed, given the rising costs of legal representation in North America, that situation is on the rise here as well.

Many of us who attended the Mexico City annual meeting were treated to the incredible reality that in that city, the lawyers available to serve the public could hardly handle one tenth of the legal work. Nine tenths of population absolutely could not obtain access to legal services. This is a situation repeated in many countries in the world.

In North America, we are often told that there are too many lawyers. To our critics, I assume one lawyer is too many. But the fact remains that even here and despite our best efforts, sound legal representation is often inaccessible, particularly because of financial restrictions.

Before I come across as being the most vocal critic of the legal profession, I want to say that in many ways, I believe the legal profession is stuck between a rock and a hard place. We are expected to provide representation for the world, but if we attempt to defend ourselves, we become the suspects.

Certainly it is time for the legal profession to stand up and make the world take notice of, and listen to the realities that we know exist within our profession. It is time lawyers, themselves, work to humanize and to demystify the legal profession and to lay to rest - or at least quiet the critics. Inactivity on our part will only foster greater contempt for the profession, in general, and for the legal system as a whole.

In short, it's time to blow our own horn.

We have failed to blow our own horn by ensuring that the public is not aware of what is really going on in the legal profession. We have failed to communicate the strides our profession has made on its own to deal with matters such as accountability, discipline, professional standards, compensation and errors and omissions. We have failed to make clear to the public and to the media the issues that we are facing and the steps we are taking to address those issues. We have failed to respond effectively to the unfavourable media reports that bombard our profession.

As you may remember, Mr. Fitzwater's comments were made last February and because they were reported at the time of our 1990 annual meeting, the executive met and a written response to his statement was immediately prepared. But as a glaring example of how we are failing to get our message across, I'm not certain what ultimately happened to the text of our position. I know that the media is far less interested in the defense position of the legal profession than it is in the unfounded ramblings of a White House Press Secretary, but we have to accept at least part of the guilt for not forcing the media to stand up and take notice.

I would like to take a few minutes to blow our own horn. I want to share with you some of the efforts that we are making in the Province of Ontario to try to counter these kinds of attacks and to take our message to the public.

In Ontario, we found that the legal profession, on its own, was incapable of personally funding a uniform and universal access to legal services to those who could not afford it; so a partnership was formed between the legal profession and government to create the availability of legal services in Ontario on a universal basis.

In 1991, the cost of legal aid in Ontario in terms of payments to lawyers, will be more than $208 million, funded in large part by the provincial government, although the provincial legal profession under writes all of the administrative costs, approximately $ 11 million each year, and 50% of the interest earned in lawyers trust accounts, pay about half of the $208 million. In return for the professions' contribution, the profession is permitted to run, totally, the legal aid system, a situation which our profession believes is preferable to any form of government control or operation.

Legal aid rates, for those who are interested, range in the area of $80 per hour; every citizen in Ontario who cannot afford to pay is entitled to legal aid in all criminal matters. In civil matters, the entitlement also exists in all instances. After a brief review, the legal aid system decides if the issue is worth litigating. A generous means test determines either total or partial entitlement in both civil and criminal cases.

It's a system that works as well as any partnership with government can. And while, as in most initiatives on the part of our profession, the Law Society probably doesn't receive the credit it deserves for the contributions the profession makes to legal aid, we believe it is an essential human right to have access to competent legal counsel, a right which we defend vigorously. Each citizen has the right to choose any lawyer he or she wishes, and up until now, we had no trouble finding large numbers of competent lawyers willing and able to do the very large volume of legal aid work.

In Ontario, we want to extend the legal aid system even further if we can. We see it as an enormous challenge for the Law Society to develop plans to bring legal services to particular groups like immigrant, native populations and to distant or isolated groups and individuals.

We have also attempted to expand our public legal services to include provision of clinics which can offer a wide range of services that involve minor matters such as landlord and tenant disputes, minor family matters, immigration problems and help in obtaining access to social assistance programs. We have also initiated a Dial-A-Law program, a 1-800 telephone number which the public can access from anywhere in the province free of charge to obtain information on simple legal matters such as how to find a lawyer, or how to deal with wills, real estate transactions, civil claims, landlord/tenant disputes and many others.

I believe that the legal profession in all jurisdictions will be judged by the quality and the capacity of legal services it can provide to those who are unable to afford it.

And in the area of provision of services, I believe the legal community has to accept a great deal of responsibility for the rise of paralegal services. In Ontario at least, the growth of paralegals can be directly attributed to the high costs of professional legal services for minor matters. Let's face it - paralegals are here to stay. Initially, the profession's attitude was to ensure the monopoly enjoyed by the profession by prosecuting paralegals for undertaking legal work of any kind. That simply was not the answer.

The truth of the matter is that the rise of paralegals and their contributions to the legal system came about because lawyers ultimately were incapable of providing services to the public at prices the public should, or could, afford.

But we do have to face the problems associated with the transfer to paralegals of significant amount of legal work not provided by lawyers (or not provided at all). That has posed a problem both for the public, because of our basic belief that everyone has the right to competent legal representation, and for the profession, because of its duty to ensure that high standards are maintained.

The rise was, and is, inevitable, and in the final analysis, it is probably a good thing in that it addresses a gap in our provision of legal services. The most important message that we have to get across is the fact that this is a self-governing profession, which imposes an obligation that demands great self-discipline and responsibility to the public. We have other self-governing professions, doctors, dentists, and others, and with the legal profession leading the way, we have taken strides to open our disciplinary hearings to the public.

For too long, the legal professional in Ontario, and I suspect elsewhere, permitted its proceeding to hide behind the cloak of secrecy. That, of course, fostered the assumption that fair and equitable recourse to justice for complaints against lawyers within Ontario was unavailable to the public. We were perceived, as is the medical profession, as an elitist Old Boys' club, protecting ourselves from accusations, and sweeping indiscretions by our members under the carpet. That may have been true many years ago; it is not the case today.

We are not required by law to conduct our disciplinary hearings in public. However, we have chosen to become more public, to let the public in on our decisions and the reasons for those decisions. In the last two or three years, we in Ontario have forced ourselves to throw open our doors to the public.

We also believe that we are morally obligated to make certain that the public is directly involved in the decision making process in order to communicate a clear and unbiased message: Not all complaints by the public are justified; and many lawyers are not above reproach.

We have accomplished this by involving directly high-profile citizens in the process with the appointment of lay persons, who comprise 10 percent of the governing disciplinary body, and by allowing the public to attend disciplinary hearings. We have recently imposed upon ourselves the obligation of giving written reasons in every case where a complaint is *not* laid.

We believe these are fundamental requirements if we are ever going to convince the public that the legal profession is conducting itself in a reasonable and accountable manner. And that lay participation should extend to all legal governing bodies, and not simply be seen as a token measure of appeasement. I believe that this must be the root of our efforts to improve public perceptions and to remove the outdated and shrouded practice of making decisions behind closed doors.

Openness and accountability are perhaps the hallmarks of the latter half of this century. Governments in North America, and in particular, once-secret regimes throughout the world, are learning only too well the dire consequences of clandestine and covert actions. Communication today is virtually instantaneous. We only have to look at the coverage of the Middle East war to realize that. And professional associations who naively hope to continue to shield their members behind closed doors should know that the public will not tolerate such conduct much longer.

Openness of discipline procedures and hearings is one matter; equally significant is the area of compensation of the victims of lawyers. The more highly developed and responsive the disciplinary procedure is, the more responsible the legal profession must be to ensure fair compensation to its victims. The legal profession must respond swiftly and openly to the question of compensation in order to maintain not only a perception of fairness but also one of competence and speed.

In Ontario, the Law Society of Upper Canada recently set up a $100,000 annual fund for a pilot project that allows the complaints tribunal to settle legitimate claims against our members by clients who have complaints which are either very small or are not worthy of formal disciplinary or large compensation procedures. In this way, small, legitimate claims are dealt with on the spot.

In respect of errors and omissions, the profession must accept the responsibility to respond quickly and efficiently to compensate the public for the errors and omissions of all lawyers, without reference to the willingness or capacity of the negligent lawyers to respond. That responsibility, because of its nature, cannot be voluntary. It must be imposed by the governing bodies of each jurisdiction.

Nor is it sufficient to provide token coverage with respect to losses suffered by citizens because of lawyers. In Ontario, it is the aim of the Law Society of Upper Canada to reach the stage where lawyers are provided unlimited coverage with respect to errors and omissions and unlimited payment of claims to those who have been defrauded or embezzled.

Over a period of 10 years in Ontario, we have gradually raised the compulsory errors and omissions coverage from $50,000 to the sum of $1 million per incident. We know that responsible lawyers provide their clients with protection in excess of the compulsory coverage.

Higher coverage requirements not only provide the public with a sense of security, they also provide the Law Society with the impetus to raise the level of education and competence among members to avoid having to deal with claims in the first place. It is amazing how the size of compensation and errors and omissions coverages galvanizes the Law Society into action in terms of continuing legal education, spot audits and response to complaints. It seems that the higher the coverages get, the stronger the response to control claims. The compensation fund for fraud, embezzlement and theft in Ontario, fully paid for by the profession, now provides $ 100,000 coverage per claimant and $1 million per lawyer per incident.

The core problem we face as professionals is to rationalize the limits within which paralegals can practice. In Ontario, we are attempting to develop standards and limits. We are assuming a proactive position in the matter of paralegals and we are advising the government (at its request) with respect to minimum standards of training and qualification required for the licensing of paralegals, as well as delineating clearly the confines of the legal services they will be permitted to provide.

The main challenge that government and the profession face is to ensure standards, training, accountability in terms of discipline and in terms of financial responsibility, errors and omissions and compensation on the part of paralegals. At this point, the province is wrestling with a system that would be operated either by the Law Society or by government, or a combination of both, to ensure the proper place for paralegals within the system of justice.

Education and standards, of course, are not only a concern with respect to paralegals. They must pervade the whole profession. We have to provide the public with the assurance that those who are called to the Bar are sufficiently trained and continue, long after called to the Bar, to remain competent. The public must have confidence that practising lawyers are, at the very least, not a danger to the clients who retain them.

In Ontario, all the formal legal education within the province is provided by the law schools operated by six major universities, requiring full-time, three year attendance, usually after at least a degree at the Bachelor level. The Law Society of Upper Canada does not attempt to control curricula, although it does maintain committees which work closely with the law schools to assist and advise with respect to curricula.

The history in Ontario has been to insist that all candidates for admission to the Bar after law school must article for at least one year under a rigidly controlled system operated by the Law Society in order to ensure that a high standard of training is available to all qualifying students Of law.

The Society requires students, after articling for a year, to attend a full time Bar Admission course which lasts approximately six months and is designed to provide practical training. The course is staffed by the profession and a full-time faculty, and is run by the Law Society.

In many ways, legal education in Ontario involves a series of checks and balances. Legal education in and of itself is not sufficient criteria for admission to the bar. The period of training under the Society provides for a compulsory review of every candidate for admission to the Bar to assure that candidates are appropriate for admission in terms of character, integrity, professional conduct and qualifications.

The profession's primary role is to ensure that those who are provided with the privilege of the rights of practising law meet basic, minimum and uniform standards.

Any discussion of the public perception of the legal profession would be remiss if it did not examine the question of fees and services.

The most important contributor to the perception that lawyers overcharge, in my opinion, has been the excesses allegedly occurring with respect to contingency fees.

Contingency fees exist in every jurisdiction in North America except one, and that is Ontario. The history behind that is perhaps as much because of historical conservatism as any other factor. That is coupled with a feeling among many lawyers that contingency fees were both improper because of the interest the lawyer had in the outcome of the claim, and because the fees generated, particularly in the United States, were perceived to be too high.

In Ontario, that is changing. The Law Society of Upper Canada has finally recognized a place for contingency fees as a means of permitting access to justice particularly for the middle class where such access really was unavailable in many types of cases because of the prohibition in Ontario against lawyers taking cases on a contingency basis. In introducing them, though, it is fair to say that the Canadian experience is to charge percentage contingency fees that are, and hopefully will be, considerably lower than in the United States.

This is not to suggest that the American system should be changed, but rather to suggest that the perception in Canada is that higher contingency fees only add to the real cost of legal services. And, to a degree, in Canada that would be unacceptable.

I also want to comment briefly on the discrepancy of remuneration within the legal system. On average, the defence lawyers in this Academy, in every way as competent and brilliant and hard working as any plaintiff lawyer, routinely earn as little as 25 percent of what is earned by their plaintiff peers. Whether that is justified or whether it indicates something is wrong with the system, I am not in position to answer. I simply bring it up to point it out and to suggest that as a profession, it is a matter we should seriously address.

In the final analysis, ladies and gentlemen, we must conclude that we have been sorely wanting in communicating our message to the public. We have failed to blow our own horns, and we are paying the price for that every day.

I have outlined some of the positive programs we have put into place in Ontario and I know that many other jurisdictions have initiated equally, or more admirable schemes. We have succeeded in bringing the law to the people, in opening up the legal profession to public scrutiny and in trying to ensure a high degree of honesty, integrity, competence and accountability in our profession.

The problem is that we're about the only ones who know it.

What the legal profession obviously needs is a proactive, responsive public relations effort which would be available to reply immediately to criticisms such as those levelled by Secretary Fitzwater and others, as well as concentrated efforts to anticipate negative or unfavourable reactions to situations that arise in the legal community. We as a profession, have been terribly slow to grasp the public relations and communications opportunities before us and to see those communications efforts through to a positive end.

This is more than simply a self-serving exercise in public relations or an effort just to have the public think more kindly toward the legal profession. It is, in fact, an imperative response to attacks which threaten the very foundation of our profession and our democratic system of justice.

It is vital in a true democracy that the legal profession be considered by the public to be a strong, impartial advocate in an ongoing endeavour to continually maintain an objective system of justice. The fact that the legal profession is such, but is in no way perceived to be, is a threat to the very democratic principles in which we believe.

The profession is failing in its duty to the public in declining to respond to the misperceptions. And the profession will fail in its fundamental duty if it simply limits itself to such things as appropriate self-policing and the provision of standards. It must also deal with unfavourable perceptions that exist as well as to respond quickly to legitimate complaints and the changes that need to be made within the profession.

We must first determine exactly what the irritants are between the public and the profession and deal with those points at which the two collide. The majority of our efforts, to date, have dealt with internal matters and to that extent, I suppose is is fair to say we have left ourselves open to accusations of navel gazing. Our efforts in the future must focus on external irritants and the resolution of conflicts which prejudice our public identity.

Governing bodies of the profession, themselves, generally have done less than the Bar Associations, organizations such as the various colleges and this illustrious Academy, with respect to the public relations efforts on behalf of the profession.

While I cant speak for any jurisdiction but my own, my opinion is that governing bodies should be taking a leadership role in educating and informing the public with respect to what our profession is doing and what it is *really* about.

For those of us who have been around long enough to know, there is no question that any comparison between the legal profession today and what is was 40 years ago is impossible.

We have done so much more, we have advanced so far from what we used to be. The impetus remains there to do more in all areas of responsibility to the public. As it is, however, we can only take comfort in the fact that we know it is improving I am strongly of the view that these advances, and the impetus to continue, exist in all jurisdictions with which I am even vaguely familiar.

I ask you, is there any reason to think that the impetus must stop? I can't think of any. The public's capacity to demand higher and higher professional standards certainly hasn't diminished. And God help us if that changes. In the end it lies in the hands of the lawyers to improve the perception, to raise the image of our profession and, of course, to continue to strive to improve standards and ethics.

My message today is not all bad news. But it is a challenge to do even better, to concentrate our efforts on communication, on two-way dialogue with the public media and on raising the profile of the legal profession to the high level it so rightly deserves.

After all, I think that we would all agree that the more the profession can do to develop a solid image and to instill a high level of confidence in the judicial system, the better and stronger our nations will be.