RESPECT IS THE ANSWER, ISN'T IT?

by Peter C. John

For all of you past Deans you never warned me how often your mind returns to the upcoming Dean's address for the full year since the appointment as Dean. You also failed to warn me of the size of the file you create during the year with potential wisdom to impart to your peers. Every time you read something, the question becomes 'Will this add to the Dean's address?"

For you future Deans, it is, nonetheless, a rewarding experience since it compels you to focus on what is important to you, and what you believe is important to our profession.

As a result, I believe it is important to continue the subjects discussed in those excellent Dean's addresses by Bob Josefsberg on civility, Ron Krist on the public and political assault on the jury system, and Bob Parks' address on the duties compelled by our professional oaths but with a different theme. Hence my title - "Respect Is the Answer, Isn't It?" Maybe it should be "Respect and Trust are the Answers, Aren't They?"

So you will understand my convictions and my mind set, let me read to you a quote from an unusual source-a letter written by Robert E. Lee, to his son when he left for college:

> You must be frank with the world. Frankness is the child of honesty and courage. Say just what you mean to do on every occasion and take it for granted you mean to do right ... Never do anything wrong to make a friend or keep one; the man who requires you to do so is clearly purchased at a sacrifice. Above all, do not appear to others what you are not.

With that frankness in mind, let me just say it. We are a major contributor to the decline in respect and trust of trial lawyers by the well publicized actions of some, but mainly by the inaction of our best, brightest and most successful. Some of our brethren have begun efforts to right the ship as I will discuss later, but we need many more to contribute. It seems to me we have an obligation to leave the system better than we found it, and we are not doing so.

Critical to continued success and improvement of the jury system is maintaining the presses, the public's and the litigant's respect for the system. Increase in disapproval ratings for lawyers does more than hurt our feelings and makes us the butt of jokes: far worse, it breeds disrespect of and contempt for our system of justice. I am not naive enough to think our profession will ever gain the respect we would like it to have, but a 70% - 80% disapproval rate and declining, scars not only us, but most importantly, the system. The "System's" requirement that lawyers be partisan and vigorous advocates makes us easy targets for approbation. Partisan lawyers are necessary to protect against government overreaching and corruption, oppression of the economically weak by the economically strong, and importantly, to allow companies and individuals to pursue or defend against claims for compensation for damages caused by others in a fair forum. Because we are the most partisan profession in our country, there is no way to totally overcome criticism, justified or not. Part of the problem is the publics', and many commentators', lack of awareness of how totally partisan our system of justice requires us to be, and thus the criticism for what they believe is a lack of balance in our words and deeds.

The English lawyer, philosopher H. L. A. Hart wrote:

> The general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality. This is something to be respected in the vicissitudes of social life when burdens or benefits fail to be distributed; it is also something to be restored when it is disturbed. Hence justice is traditionally thought of as maintaining or restoring a *balance or proportion* ..."

The public expects this balance of justice but views our role as counterproductive to that goal in many cases. They don't really understand that we attain that balance by being the most partisan profession on the planet.

We are educated to be partisan
We are trained to be partisan
We think in partisan terms

We speak in partisan terms
We act in partisan terms

Our system works because we have partisan advocates providing fuel for each side of a controversy, but we still have not properly educated the public to the necessity for that type of advocacy.

Unfortunately, an additional problem is that this type of necessary partisan advocacy, previously done with dignity, respect, and hopefully trust within our Code of Ethical Conduct, has changed to personal attacks on each other, our clients, the judges and the court system itself. Little wonder when we don't respect each other, others don't respect us. Little wonder people question the fairness of the System itself when we challenge its fairness.

Let me be more specific. We all know too many lawyers who, as a matter of course, always view their counterpart in litigation as devious, dishonest, obnoxious and even unethical. A judge in Cook County categorized them into (1) the bloodfeud lawyers and (2) the paranoid lawyers. We all know lawyers who are in one or both of those categories. They disbelieve every opponent, whether there is any basis for it or not. Worse yet, they tell their clients their view and it spreads geometrically. Again, little wonder people lose respect for us generally. Maybe some lawyers view their opponents that way to get their juices flowing, but I say find another way. This has to stop before we destroy the system.

The public will never totally appreciate our role as trial lawyers because, as we know, there is almost always a dissatisfied party at the end of litigation. Many times both are dissatisfied, and worse, they usually have had to pay us something for reaching the dissatisfied result. Even given those problems there are things we can do in my judgment to stem the decline in respect for us and the system. First, we better start becoming more bipartisan on the issues which fundamentally affect our system, and educate the public and the press, or we will continue the respect slide.

Let me read to you -what *The Chicago Tribune* wrote on February 13, 1999 on the front page about the participants in the Clinton impeachment, <u>almost all lawyers:</u>

> A profile in courage, it was not. No Republican stood tall to say that the case against President Clinton was not the stuff of impeachment when it would have mattered, before the outcome was so clear. None criticized the Republican prosecutors or Independent Counsel Kenneth Starr. No Democrat took the bold step of saying that Clinton should be removed, the polls be damned. No member of Clinton's cabinet resigned in protest. "Impartial justice," apparently, wears a partisan robe. The only politicians who came through the historic trial with their reputations enhanced were the ones who wrote the Constitution more than 210 years ago.

What this press article tells me is the press does not understand the adversarial judicial process. The impeachment of Clinton was a trial, and lawyers' roles involved were advocates trying to reach a just result. What this article also tells me was the press remembered other lawyers in past years who did stand up with courage for their principles, for their word, and for the values of our profession. Maybe the Tribune was remembering the lawyers in the Nixon era: What a difference in the 25 years between those participants in the Clinton administration and those in the Nixon administration.

Remember Attorney General Elliot Richardson who committed to Archibald Cox and the Senate that Cox would only be discharged due to extraordinary improprieties On October 20, 1973 after President Nixon insisted Richardson fire Cox for his continued efforts to obtain the Watergate tapes, Richardson resigned rather than break his word. So did William Ruckelshouse, the Deputy Attorney General.

Where are our legal heroes of courage to the press and public today who are defending the values of the system as we know it?

As Senator Bill Bradley said yesterday, we do not predict or foresee major changes 20 years hence very well in the country, but when they occur, we must deal with the new reality. The new reality today is not a positive one for our jury trial system and its participants--us.

The great problem we face as trial lawyers in this society is to create a balance between criticism and respect for what we do and what we accomplish as trial lawyers. Currently there is great criticism and negativism and little in the public sector to counterbalance it. Only the exceptions are focused upon. We. must work to make sure the exceptions don't swallow the system by our silence.

A recent editorial in the *Chicago Tribune* stated as follows:

> The Mississippi lawyers, members of 13 firms, argued they made "unique and substantial contributions to society" by being the first to bring a case under the novel theory that the state was due compensation from the cigarette companies for the Medicaid costs of treating sick smokers.
>
> Big Tobacco's pockets are deep indeed and the bright-eyed lawyers spotted it early on. Anyone who believes these law firms agreed to help the states sue the cigarette companies because they wanted to protect children from the evils of smoking is inhaling something a lot stronger than nicotine.
>
> This is far from the end of it. Still to be arbitrated are the lawyers' fees stemming from the $206 billion settlement that covered the rest of the states.
>
> To liken this spectacle of lawyers gorging on their tobacco jackpot to pigs feeding at a trough is to do a disservice to the pork family. After all, the pigs are just doing what comes naturally.
>
> But wait. Come to think of it, so are these lawyers. That doesn't, however, lessen the outrage.

This was the lead editorial and indicts us all. I for one Am tired of the one-sided focus.

Nowhere was there any unified public accolade for the trial lawyers who started the tobacco cases against great odds at great personal expense and caused, solely by their efforts, billions of dollars to be contributed to the health care of those whose illnesses were caused by smoking cigarettes. Nowhere was the contingent fee system, its great benefits defended and explained as an integral and necessary part of the jury system to give everyone access to the Courts. The only focus of this editorial and most others today is the perceived self-interest of trial lawyers.

Where is the balance? Who is telling the other side of ach story? Our problem is we are mostly advocates amongst ourselves. The bar associations talk to each other; we write articles addressed to each other; we give. each other lectures like this one. Unfortunately, we need to be advocates to audiences outside ourselves. We need advocates for the system who are outside the realm of our self-interest. We need judges to champion the role of trial lawyers in our system as we should champion judges. We need respected heros to the public to speak out for the jury system. We need citizen groups, who obtain the benefits of what we accomplish, to speak out. If we continue to only talk to ourselves, we will worsen the current situation.

The core question is what can we do as lawyers to stem the tide of rising disrespect and distrust for lawyers and the jury system. There are many positive advances already being made today which have little publicity both in our profession and in the public sector. We not only need to, we must change that deficiency to increase the public respect and trust for lawyers and the jury trial system.

A. <u>We need to educate the public why lawyers must be partisan for the system to function.</u>

Our system is based on adversarial principles. It is why it works better than any other system created by man. As John Milton said:

> 'Whosoever knew truth put to the worse in a free and open encounter."

Most of the public still does not understand this principle We know our system doesn't work if there isn't this balanced advocacy. We need to explain that in terms the public can understand. When we see a negative article in the press, call the editors or write a letter to the editors to explain why we appear so one-sided. You of all have the stature to be recognized and published.

B. <u>We need to promote to the public the value of Jury service so more people are involved and understand its benefits.</u>

For years we helped our friends and clients avoid jury duty because it meant sitting two weeks in a courthouse - many times without ever sitting on a jury. Shame on us! In many jurisdictions the entire jury service system has dramatically changed from those days where those with connections could avoid jury duty and then demean or criticize other jurors' decisions.

There are many jurisdictions now, Illinois included, who have a new system called the one day, one jury rule. Under this rule a juror comes for jury duty on a designated day. If on that day they are chosen to serve on a jury, they serve. If they are not chosen that day, their service is ended until the next time. Under this one day, one jury system no one sits in a jury pool room more than a day. This is absolutely a positive step in correcting the public's view of the value of "trial by jury."

This system works in Illinois because no one is exempt from service-judges, attorneys-no one. We no longer can get anyone excused who is able. The best we can do is a new short date for jury service. Ultimately everyone is called and everyone serves. This system should be implemented everywhere feasible.

Last year, two misguided lawyers selected me as a juror in a four day trial. Fascinating experience. I will tell you one thing, there are a number of things as a trial lawyer I won't do in a court room again having watched the effect on jurors when I served as a juror.

Since I have been asked in the past, I will tell you briefly about my experience. At the end of trial, my fellow jurors selected me as foreman. I declined. I asked if I could observe the process of foreman selection, and would contribute my thoughts and deliberate after everyone else did. They agreed, and selected a foreman in a few minutes. Then each individually, one by one, gave their views. At the end, I gave my thoughts. Of course, they agreed with me and did the right thing.

The overall benefit of the one day, one jury system is that more people from all walks of life in the community are serving on juries and learn to respect the process rather than criticize it from afar.

C. <u>We need to continue to improve the experience.</u>

An important adjunct to jury service is the ability for jurors to understand their role in a particular case they are chosen to judge. Think about what we ask jurors to do in most jurisdictions:

- Jurors are selected with no background in the area of the case they are to hear and if they have any background they are probably excluded.
- We present evidence to them for days or weeks without telling them how to use or evaluate the evidence until the end of the trial.
- Then we give them jury instructions with many legal terms many of us even find unclear or incomplete.
- On that background we ask juries to decide the case.

Some states have already changed this approach. More need to.

For instance, in Illinois, following some states who have already addressed the challenge, we now allow judges to read the cautionary and guidance instructions before evidence is presented as well as after. Doesn't it make more sense to have jurors know before they hear the evidence the following:

<u>Illinois Civil Pattern Jury Instructions</u>
<u>1.01 Preliminary Cautionary Instructions</u>

[1] The law regarding this case is contained in the instructions I will give to you. You must consider the Court's instructions as a whole, not picking out some instructions and disregarding others.

[2] It is your duty to resolve this case by determining the facts and following the law given in the instructions. Your verdict must not be based upon speculation, prejudice, or sympathy. [Each party, whether a <u>i.e., corporation, partnership, etc.</u>) or an individual, should receive your same fair consideration.]

[3] You will decide what facts have been proven. Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses and of exhibits admitted by the court. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life in evaluating what you see and hear during trial.

[4] You are the only judges of the credibility of the witnesses. You will decide the weight to be given to the testimony of each of them. In evaluating the credibility of a witness you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act concerning an issue import to the case.

[5] An opening statement is what an attorney expects the evidence will be. A closing argument is given at the conclusion of the case and is a summary of what an attorney contends the evidence has shown. If any statement or argument of an attorney is not supported by the law or the evidence you should disregard that statement.

This change in Illinois was a bipartisan proposal recommended by the Supreme Court Committee on Civil Jury

Instructions consisting of both plaintiff and defendant trial lawyers such as Tom Demetrio and myself. It was favored by most judges as a positive development.

D. <u>We need to continue to promote, no insist, on civility in and out of the Court room.</u>

There are also some positive developments in the area of civility in our profession since we heard Bob Josefsberg's Dean's address two years ago. He will tell you these advances are due to his speech alone. The truth is many in our profession are at least focusing on civility at a peer level. Every legal association meeting I have attended in the past four years had a lecture on the need for a change in the way we approach litigation and treat each other in the process. Numerous articles have been and are currently being written by our Associations, lawyers, judges and others on the issue. Codes of civility exist in most jurisdictions. Hopefully this concentration will filter down to our younger brethren, many of whom seem to think lack of civility is a way to success. It isn't.

There are a couple of practical suggestions on this subject. One is to send your opponent the Code of Civility when you answer a complaint so he knows you ascribe to its standards. Ask him to do the same. I am told some members of the California bar are adopting this approach before the wars start.

Another practical suggestion is a frank approach to your opponent at the start. Let me read you something I saw on an airplane last year. It gave me an idea. It was a short story that dealt with a father-son relationship, and the following is a letter the adult son found on his pillow from his father:

> Henri - I don't know which it is, that we are too different or we are too similar, but I fear that we will fail as father and son. We have fought and argued for too long, and so I suggest a truce. What I offer are two things: a promise that I will never lie to you, and a promise that I will never be unfair to you. In return, I only ask one thingthat you trust me. I won't ask for your love, and I won't even ask that you like me, but in those days or years that you hate me, if you trust me, we will never lose each other.

The first part of this quote reminds me of most of our relationships in litigation today where there seem to be little trust at, all. As a result of reading this piece, I tried something new. I had a new major case with a lawyer others had told me not to trust. Whether their concern was just perceived or real, I really did not know.

My response was to call my opponent, introduce myself, and say "You can trust me in this case. If I say I will do something, I will. If I cannot or will not, I will also tell you. If you have a problem with someone in my firm, call me first" Then I asked: "Can I trust you?" Silence. After a pause to evaluate whether to distrust my motives, the lawyer said "Yes, you can trust me" We have had no trust problems since. A psychologist can probably explain why this worked so well so far, but it has. If one of my associates was out of line from his point of view, I got a call and vice versa. We worked it out instead of starting the usual expensive and counter-productive war. None of our client's rights were compromised. We still give each other no quarter in the case, but we trust each other's word. The truce just saved expense, aggravation, and unnecessary delay for the clients. It worked. Try it!

E. We need to find a way to remove base politics from the selection of state and federal judges.

We all know politics plays a major role in the slating of judges who are elected, the appointments in Missouri Plan states, and the Federal Court appointments. Then we wonder why the public doesn't perceive the judges as independent.

In our federal judge selection process in Illinois, our two senators appoint a diverse blue ribbon bi-partisan panel to screen candidates and make recommendations for each vacancy. Our senators committed to select only from those recommended by the committee and they did. There was extremely positive response from the media due to this process and the result has been excellent appointments.

Most Illinois State Court judges are elected. At the State Bar level, an alliance of ten bar associations have developed bi-partisan efforts to recommend judges for election based only on merit. The results are broadly disseminated to the public before the election. The public then knows we care as a group about merit and the announced criteria are the judges' qualifications, not who sponsored him or her politically.

Illinois Associate Judges are appointed (about 40% of our judges). Our Chief Judge, Donald O'Connell, and the ten presiding judges of the Circuit court of Cook County as a committee, interview every applicant for Associate Judge. Then the Committee recommends twice the number to fill open slots. The Illinois Supreme Court then selects only from those recommendations.

We all should promote these bipartisan efforts to encourage the selection of the best judiciary we can seat in every jurisdiction. Those in some states know the result of totally partisan support for litmus test judges.

F. Our brethren in other organizations have started some very positive public outreach strategies to teach their communities about the concept of trial by jury, and the importance of jury service.

Our own Ron Rouda began a program through ABOTA called the "Justice by the People ABOTA developed a teaching guide to teach the jury system to grade school children. The teaching guide describes the reason for the system, the value of the system and the actual processes that lead to a jury result. The last time I talked to Ron, he indicated that ABOTA had distributed some 2,000 guides to schools around the country.

Last week while preparing my final thoughts for this address, I noticed in the newspaper that Phillip Anderson, president of the American Bar Association spent a morning outside Chicago explaining the jury system and the appeals process to a 7th grade class and responding to questions asked by the students about the system. There was a prominent one-half page article with photographs dealing with his presentation. We need more of this kind of endeavor to advance our cause for the jury system. We need more lawyers to volunteer in this effort. If you don't have time to do it, send someone else.

Some of you are aware that the International Academy Board Members have been attending since 1994, a Round Table in Washington, D.C., consisting of the major law associations in this country. Those in attendance are the following bipartisan groups ATLA; IADC; ABA; DRI, ABOTA, ARLAC, FICC and the International Academy of Trial Lawyers. The purpose of the Round Table is to publish a White Paper concerning points of agreement with respect to the necessary role of juries in the Civil Justice System. That final product should be out this fall and it strongly defends the system and makes bipartisan recommendations for innovations that will better the system, rather than diminish it.

The Round Table also has draft recommendations to publicize the system for better public understanding, including the following:

- Press conferences with leaders of all branches of government pronouncing Jury Service Appreciation Week;
- Public service advertising campaigns using newspapers, television, mass transit, public buildings, libraries, grocery stores, court houses, and schools;
- Targeted media outreach using informal radio and television interviews with trial judges, other court personnel, attorneys, and citizens with positive experience with the system;
- Targeted educational outreach to high school government, speech, U.S. history, or civic classes through which judges explain the role of the jury in the judicial process; and citizens describe these roles and perspectives.

- The development of educational videos that put student audiences in the role of a simulated jury, hearing evidence and jury instructions and deciding cases.

Some of these activities are already occurring, but we need more to help turn the tide. You all are definitely in a position to do so to regain the public's respect and trust so men like Attorney Steve Jones from Enid, Oklahoma who accepted the court's appointment to defend Timothy McVeigh at great personal risk, are given the praise they deserve for their service to the system of justice.

I will try to end on a positive note, since it is my nature. This videotape is one of my heros who the public learned to respect not only for his skill as an advocate, but for his courage under the circumstances. Joe Welsh took on Joe McCarthy in 1953 in one of the greatest examples of brilliant and effective advocacy which helped save our democratic institution.

Shame on us if we don't do more to serve the most important institution for our democracy. The right to trial by jury.