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# TULSA LAW JOURNAL

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## A SICK PROFESSION?

JUDGE WARREN E. BURGER\*

Montaigne said, long ago, that an advocate is sometimes well advised to state his final proposition first. My final proposition can be roughly stated as follows: (1) the legal profession as a whole has a very poor standing; (2) there are many causes for this; some of them are the incompetence, misconduct, bad manners and lack of training of a great many lawyers who appear in the courts; and (3) there is something we can and ought to do about this as the English bar and bench did a century ago.

I find no pleasure in saying to you that the majority of lawyers who appear in court are so poorly trained that they are not properly performing their job, and that their manners, professional performance and ethics offend a great many people. Those who do not accept these harsh premises will not accept the proposal I intend to make.

We are all familiar with the gibes and taunts which have been directed at lawyers for centuries. Literature is filled with them. You remember that Samuel Johnson, himself a lawyer, was the author of the quip, "I do not wish to speak ill of any man behind his back, but the fact is he is an attorney." But I need not go back into ancient history to make this point because many surveys of the public opinion testers often make the same point. In one recent poll the Louis Harris organization made a survey of which occupational groups stood highest in the esteem of the public.

\*Judge of the United States Court of Appeals, Washington, D.C. Judge Burger's remarks were made at the Winter Convention of the American College of Trial Lawyers, Hollywood Beach, Florida, on April 11, 1967. Printed with the permission of the American College of Trial Lawyers.

Doctors were the highest, followed by clergymen, educators and judges, but lawyers did not get into the top fourteen categories.

There is no single cause for what, in Madison Avenue terms, would be called the "bad image" of the legal profession. The total image is a stream into which many things are poured. The deportment and misconduct of some members of the bar pollute this stream and their bad manners contribute to the bad performance. Since this is a meeting of trial lawyers, I will talk primarily of the contribution to our bad image which is made by lawyers who appear in court. Some of these fellows, of course, should not be called trial lawyers. I think you will agree there is a difference between a trial lawyer and a lawyer who appears in court.

I hasten to say that a large part of the generally bad image of lawyers is partly a reflection of the misconduct of the fellow we call the "office lawyer." The title lawyers and real estate lawyers who engage in miscellaneous chicaneries to bilk home-owners are, of course, a large factor; and, with the enormous expansion in the building, buying and selling of homes, thousands of Americans have been mistreated by this group and are properly resentful. The family or probate lawyer who "borrows" from trust funds or gouges his clients, is another. There are others. But my concern today is with the lawyer *in the courtroom*. Most of his professional performance is done in a goldfish bowl where everything can be observed.

From more than twenty years of active practice, only part of which was in the courtroom, and from more than ten years on the bench, I think I have gained a fairly reasonable and representative view of what goes on in courtrooms. When I first reached some tentative conclusions some years ago, my appraisal of courtroom performance was so low that I began to check it with lawyers and judges in various parts of the country to see whether I had misjudged. From time to time, for example, in meetings with judges,

I would ask what proportion of the cases tried before them were properly presented. The highest figure ever stated was twenty-five percent; the lowest was ten percent. From that general and sweeping proposition, I began to probe for the specific reasons why trial judges—the best available observers—took such a dim view of the performance of lawyers in the courts. The answers covered the entire range of the acts performed in the courtroom.

On the most favorable view expressed, seventy-five percent of the lawyers appearing in the courtroom were deficient by reason of poor preparation, inability to frame questions properly, lack of ability to conduct a proper cross-examination, lack of ability to present expert testimony, lack of ability in the handling and presentation of documents and letters, lack of ability to frame objections adequately, lack of basic analytic ability in the framing of issues and lack of ability to make an adequate argument to a jury. Also very high on the list of deficiencies was the lack of an understanding of basic courtroom manners and etiquette, and a seeming unawareness of many of the fundamental ethics of the profession. Most top level members of the trial bar—all of you, I am sure—had an apprenticeship or internship, however informal, under the guidance of experienced trial lawyers. We need not worry about you. Our problem is caused by the lawyers who occasionally and casually try a case but have never had proper training in the fundamentals. These are the men who take five days to do what you would do in one day. These are the men who make trial judges cringe and sigh when they walk into the courtroom; the trial judge knows how such lawyers can convert the trial process into a shamble.

The first and larger part of the defect is lack of adaptability and lack of adequate technical and practical training. The second category has to do with manners and ethics. Some of the studies made in recent years in the effort to understand the jury function give strong support to the observations of

judges and lawyers. The things jurors seem to find offensive are the bad manners of lawyers who abuse witnesses, lawyers who snarl at each other across the counsel table, lawyers who are discourteous or slovenly in their communications with the judge and the jury. The jury surveys confirm a fact well known, I am sure, to every one of you—that the bad manners of a trial lawyer almost invariably count against his case. This is a proposition not recognized or not accepted by a substantial number of lawyers who think they impress clients—and perhaps prospective clients—by being known as the “gutsy lawyer.” We will come back to him later.

A businessman, who served on a jury recently, took the trouble to write an article on his observation. He said:

The most important persons in the courtroom to the jurymen are the attorneys who participate in the trial. . . . The attorney is always on the spot. He is the focus of attention, his appearance, manners, logic, and what he puts value upon are the factors that bring jurymen to conclusions.<sup>1</sup>

He mentioned the bad manners, the bullying and strutting of lawyers, the belittling and confusing of witnesses, and of this he said:

Later, in the jury room the entire group expresses disapproval of the attorney's methods. Though not on trial, the attorney was tried by the jury, a verdict reached, and his client suffered from his behavior.<sup>2</sup>

Anyone who has spent even a part of his years in the courtroom knows that good manners, courtesy and etiquette are more than a matter of form. They are the lubricant which helps prevent a trial from deteriorating into a brawl. It is somewhat like the art of diplomacy in relations between nations. A British statesman once said that if all the secret records of history were opened we would find that tact,

<sup>1</sup> Brown, *A Jurymen's View*, 72 CASE & COMM., Jan.-Feb., 1967 at 44.

<sup>2</sup> *Id.*

politeness and patient courtesy had prevented more wars than the generals ever won.

I suspect that once you reflect on this subject, what I have said about the quality of performance in the trial courts comes as no great surprise to you even if you disagree on the percentages. Most of you have seen more of this than I have. But all of this, taken together, is what has accounted for the lament in dozens of articles and speeches *on the decline of the trial bar*.

One hundred years ago, 150 years ago, or 175 years ago, the trial lawyer was the elite of our clan, as the barrister is in England today. Most of the lawyers who were great figures among the founding fathers of our country were trial lawyers, litigation men. In that time, of course, this is what a lawyer was thought to be—a man who tried law suits.

It is unimportant just when the decline of the trial bar began, but we know that by the beginning of the twentieth century the great economic expansion of this country had made the office lawyers—the bank lawyer, the stock and bond lawyer, the title lawyer, the business lawyer—more and more important; and finally what is loosely called the “corporation lawyer” displaced the trial lawyer as the dominant figure in the profession. A generation after the beginning of this century the advent of the New Deal drew thousands and thousands of lawyers into new forms of practice. We saw the rise of administrative lawyers, with experts in subspecialties of labor law, federal communications law, federal power law, natural gas law, SEC law, air law, and government contracts law. And now in the last decade we have such rarefied subspecialties as aerospace law.

Even the wonderfully destructive capacity of fast and unsafe automobiles and high-speed highways did no more than slow down what is called *the decline of the trial bar*. Today, approximately three-fourths of all the litigation flows from the automobile.

However, these things I have recited cannot explain *the decline of the trial bar*. None of these factors can account for the ineptness, the bungling, the malpractice, if you will, or the bad manners and bad ethics which can be observed every day in courthouses all over this country. Probably the only relevance of the background I have been discussing is that during the eighteenth and early nineteenth centuries the greatest opportunities in the law were to be found in the courtroom; therefore, the greater number of able men were attracted to the courts. Whereas, the changes of the nineteenth and twentieth centuries have attracted the greater number of able men to the constantly growing lucrative opportunities in practice outside the courtroom.

Apart from the new opportunities in other fields in the last one hundred years which drained many able minds out of the courtrooms, a very basic change took place in legal education. And, perhaps, here is the meat of the coconut. The education which preceded admission to practice shifted in the past one hundred years from the law office to the law school. The impact of this change was greater on the trial bar than other branches of practice. The law school graduate under this new system had an apprenticeship of sorts if he went into a law firm and became an office lawyer. But the old system where every law office student was likely to carry the books to court for his sponsor or proctor, interview witnesses, organize evidence and sit in the courtroom is no longer a part of the basic legal education. This has been true for about three generations of lawyers. You are superior trial lawyers in spite of the system of legal education and because you are among the few who experienced a true "internship."

Today, the specialists in trial work are a small proportion of the profession and the number of young men you can train in the art is necessarily limited unless such training is formalized in some way under a planned program. One experienced trial lawyer must be able to work with several

law students for a sustained period if any progress is to be made. Even if we as lawyers were competent to do the total job of legal education (which we are not), the number of new lawyers needed in this country cannot possibly be supplied except by the formal methods of the law schools with trained professional teachers. Moreover, the modern law schools do a superb job in teaching *law* as distinguished from practice which is so much concerned with gathering, analyzing marshalling, interpreting and presenting *facts*. I submit two propositions: first, that a lawyer who does not have some experience in litigation is not a whole lawyer; and second, that the processes of litigation cannot be learned in the law schools and cannot be taught by professors. The latter is no more their "cup of tea" than teaching is for practitioners.

I do not know how many full-time trial lawyers would be needed to handle all the litigation in courts of general jurisdiction in this country, assuming they devoted their full time to trial work. England, with about one-fourth of our population, manages to do quite well with two thousand professional barristers, who, as you know, are the only lawyers who can appear in courts of general jurisdiction, admiralty and divorce courts. We cannot today make a comparative analysis of British and American litigation (even if I were competent to make that analysis), but I have spent considerable time in British courts and I know, as those of you who have watched their progress know, that it is a far more efficient mechanism because only highly trained professionals are admitted in the ranks of the barristers. I believe the vastly greater efficiency of the British barrister (and I must add the greater efficiency of the British judge) enables them to try cases in much less time than we do it in this country. With the delays growing in American courts, this is an enormously important factor.

I do not suggest for one minute that the best British barristers are better than the best American trial lawyers. Not at all! The foremost trial men in this country are as good as the top level in England. But below the upper level,



the picture in this country is a dismal one indeed. The performance below the top fifteen to twenty-five percent in this country is not only poor in terms of those who must watch it and those who must stand or fall on the performance, but it is also wasteful. Indeed, much of it borders on malpractice. Even when the "occasional trial lawyer" gets a tolerable result for his client, he is likely to take five days to try a case which a competent professional could try in one day. In those five days he has preempted the courtroom and the time of jurors, witnesses and a host of others.

Having expressed these critical views about the substandard performances of the majority of lawyers who appear in courts, it is only fair that I make some comment about the performance of judges. The trial judge can do relatively little about bad preparation, inept examination of witnesses, or general incompetence of lawyers, but he can do a great deal about the bad manners and bad ethics of the fringe of the legal profession who sometimes make the trial look like a saloon brawl. I regret to say that too few trial judges exercise proper control of their own courtrooms to enforce minimum standards of etiquette, deportment, and ethics. But the infirmities and short-comings of judges is not my subject and I will leave this parenthetical observance as a *mea culpa* of the judiciary.

Anyone who reads can see another facet of the conduct of the trial lawyer which offends the public and helps pollute the stream. This is the "gutsy" lawyer—the publicity seeker who tries his case in the press and on television and who blusters and struts and parades his wares. I need not name them; you know them as well as I do. Some are defense lawyers whose conduct nauseates every decent lawyer in the land; some are prosecutors whose conduct offends the very essence of justice; some are pettifoggers who try civil cases as though they are vaudeville shows. In any well-run system, with courts and the legal profession meeting their responsibilities, a whole cluster of these offenders would be disbarred. Our friends of the bar of England and other countries look

on in baffled wonderment and attribute what they see to the fact that we are still a raw, wild, undisciplined, frontier nation. In England, for example, the recent conduct of certain American prosecutors would be dealt with swiftly and with fatal results for those gentlemen. By the same process, some of the swaggering bully-boys of the defense fraternity would be forced to seek new employment.

But it was not always a happy picture in England. W. Blake Odgers said:

Of all the mighty changes that have taken place in the nineteenth century, the greatest change has been in the tone of the administration of both the civil and the criminal law. The manners of our law courts have marvelously improved. Formerly judges browbeat the prisoners, jeered at their efforts to defend themselves, and censured juries who honestly did their duty. Formerly, too, counsel bullied the witnesses and perverted what they said. Now the attitude and temper of Her Majesty's judges towards parties, witnesses, and prisoners alike has wholly changed, and the Bar too behave like gentlemen. Of course if a witness is deliberately trying to conceal the truth, he must be severely cross-examined; but an honest and innocent witness is now always treated with courtesy by counsel on both sides. The moral tone of the Bar is wholly different from what it was . . . . This is due partly to the improved education of the Bar; partly no doubt to the influence of an omnipresent press; but still more to Her Majesty's judges. If counsel for the prosecution presses the case too vehemently against a prisoner; if counsel cross-examining in a civil case pries unnecessarily into the private corner of the witness; a word, or even a look, from the presiding judge will at once check such indiscretion.<sup>3</sup>

Our problem is not simply to see this evil blight on the legal profession and its terrible impact on the administration of justice, but to try to do something positive about it.

<sup>3</sup> W. ODGERS, *A CENTURY OF LAW REFORM* 41-42 (1901).

I do have a proposal to lay before you. There is very little in it that is new. What I propose is somewhat like what we see in a patent case when someone gathers a lot of old art together and tries to get a patent on his new and useful combination. I present simply a new combination of old art.

We have written and talked for years of a restricted and specialized trial bar along the lines of the English barrister. We have written and talked of apprentice programs patterned on medical internship concepts. We have talked of trying to get law schools to treat more of the practice aspects of the law, and indeed at some schools, including Harvard, this is making some headway. Georgetown Law School has an experimental graduate trial internship program and even the undergraduates are being drawn into the arena. These are all important developments, but they are not adequate. The demand for competent trial lawyers will not wait on small measures.

It is futile to think that the two hundred law schools, more or less, will change rapidly or as comprehensively as the urgent needs require. A radically new and carefully prepared pilot program should be tried out in several law schools for at least three years with the most direct and active participation of the best trial lawyers available.

For years in my contacts with law schools and recent law graduates, especially those seeking clerkships with our court, I have heard these young men bewail the "wasted third year" of law school. I am satisfied that at least one-half and perhaps even all of the third year could be put to better use than is now the case. Beyond that, if I am correct that no man can be a really "whole lawyer" if he has had no exposure to litigation, the best use for a large part of that third year would be to make every student devote at least six months of daily work with an active trial lawyer under the general supervision of the law school and the coordinated efforts of trial lawyers and judges. At the very least, part of

the third year should be made available on an elective basis for those students who want to learn about litigation.

I suggest that the law schools devote the first two and one-half years to the tasks they now do superlatively—teaching students to think and reason within the framework of the substantive law and the basic mechanics of procedure. On this score the modern law professor turns out products far superior to those of a generation ago and far superior to the old system of “reading law” in a lawyer’s office. We should do nothing to diminish the quality control method of modern law schools in this area.

For the third year, I would have the law school and the trial bar collaborate. The professor is trained and skilled in organizing materials and teaching, but he cannot teach the art of advocacy at the trial court level. On this, as in England with its training of barristers and as was done in America for a long time, the best, if not the only, way to learn to try a law suit is to watch a skilled professional do it and to work with and under his direction in the process, preparation, and trial of cases in the courtroom.

It would not be necessary to remove the student totally from the law school control or supervision. Indeed, trained law teachers should work closely with such a program as this and should help plan it from the outset. I do not have a blueprint for this, but it seems to me that certain of the elements stand out rather clearly.

Any pilot program must begin in a setting which has essential raw materials such as the following:

1. A fairly large metropolitan area where you have a good law school faculty and a good trial bar.
2. The trial bar and the law school faculty must possess the imagination and flexibility to try something new and the professional dedication to carry it out.
3. A joint committee of faculty, trial lawyers and, perhaps, judges would supervise the program.

4. A sound method of selection of lawyers and assignment of students would be needed.

5. Standards would be needed to make sure the student was exposed to creative trial preparation and observation and to prevent his exploitation as an "office boy."

6. An agreed method of credits must be developed to translate the work of the student into a form for evaluation.

7. With the limited number of truly professional trial lawyers available, each one would need to take three students at a time from September to February and three from February to July.

These are merely a few bones of the skeleton. The next step would be for an organization like the American College of Trial Lawyers, for example, to create a committee to study the whole subject in a joint enterprise with progressive law teachers who want to develop better lawyers.

Why should you, busy men that you are, take on this burden which will take much time, effort and money?

The answer lies, first, in the fact that ours is a somewhat sick profession and we alone can be the healers; and, second, it lies in the very nature of a profession. We know that, historically, professions have differed from other honorable pursuits such as that of the grocer, the bricklayer and the carpenter, in that, a profession lays claim at least to placing public duty ahead of private gain. A profession is expected to enforce high standards of conduct, to share discoveries and learning freely, and to teach young members of the calling.

It is as the trustees of great traditions and ideals and as guardians of a great profession that we have a common duty to assume the burden of programs such as I have now tendered to you. If you, the resourceful, imaginative and articulate members of our craft do not take steps to improve the administration of justice, the task will not get done.

I leave it with you.