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The Decline of Professionalism

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REMARKS

THE DECLINE OF PROFESSIONALISM*

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THE first time I came to Fordham University to deliver the Sonnett Lecture, more than twenty years ago, I spoke about the developing " 'crisis' in the availability of adequate legal services" and, in particular, about the need for skilled courtroom advocacy.[1] That need, while still acute today, has been overtaken by a more fundamental and more urgent problem facing the legal profession. The bedrock of our profession from Blackstone's day has been *the professional ideal*: the lawyer as an officer of the court, compelled as such to maintain a standard of conduct that rises above the standard we would expect from a tradesman engaged in what many now call "the business of law." The law is not and never has been a "business." But we are well on the way to making it less than a profession.

A serious decline in professionalism in any of the learned professions is inevitably injurious to the society in which they function. In order to evaluate the seriousness of such a decline, we must examine the setting in which that decline occurs. We must ask whether it is isolated and peculiar to one profession, or whether there is also a decline in other professions and other human activities.

I see disturbing evidence that there has been a broad decline in professionalism over the past twenty to twenty-five years, not only in the three so-called "learned professions"—the clergy, medicine, and the law—but in many other important activities. For example, those who serve in the "money markets"—including "Wall Street," banks, and savings and loan institutions—have inflicted severe damage on the public. Some have called this period a "Greed Era." The decline of professionalism, especially in the law, has taken on epidemic proportions. I do not make such a statement lightly. John J. Yanas, President of the New York State Bar Association, recently stated:

> Greed and avarice seem to permeate every facet of life in this country and the practice of law has not proven to be immune.[2]

He then went on to state:

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1. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 227 (1973).

2. John J. Yanas, *The President's Message*, N.Y. St. B.J., May 1990, at 3.

> Within our profession we now condone advertising and solicitation of clients, activities that were formerly unethical and unprofessional. Our young lawyers are judged by their billable hours . . . . One wonders whether we will continue to move away from our established traditions and canons of professional ethics.[3]

Two books sharply critical of lawyers have been published recently—*The Betrayed Profession* by Sol Linowitz[4] and *The Lost Lawyer* by Anthony Kronman.[5] I commend them to your attention.

The legal profession has indeed moved away from long established traditions and canons of professional ethics. In 1970, a report from an American Bar Association committee, chaired by my late colleague Justice Tom Clark, found that disciplinary action by bar associations in response to professional misconduct by lawyers was "practically nonexistent."[6] As a result of the marked increase in attorney misconduct and the failure of the organized Bar to discipline violations, the standing of the legal profession is perhaps at its lowest ebb in this century—*and perhaps at its lowest in history.* Anyone who scans the writings of lawyers and judges on this subject and looks at the outrageous advertising of lawyers on television, on billboards, and in print will find abundant reason for this low standing.

Some—but I believe this to be a relatively small fraction of the legal profession—brush off this evaluation as a manifestation of the "historic contempt" for lawyers. "Lawyer bashing" they call it, and they support their position by quoting out of context the Shakespeare character who said: "The first thing we do, let's kill all the lawyers."[7] Of course, because the legal profession deals with contention and conflict, it cannot achieve the kind of benign acceptance accorded one's family physician or favorite clergyman or Sunday School teacher. Recently, however, anyone who makes a credible case for legal reform is likely to be charged with "lawyer bashing." I do not intend to bash lawyers today. There are a vast number of competent, ethical lawyers practicing law. But the organized Bar's failure to maintain high standards of ethics and professionalism certainly warrants criticism. "Bar association bashing" would be a more accurate description of what I have engaged in, because I have previously and will again tonight explain how the organized Bar's failure to set and maintain high ethical standards for the legal profession has caused much of the decline in professionalism among lawyers and the corresponding decline in the public esteem of lawyers.

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3. *Id.*

4. Sol M. Linowitz & Martin Mayer, The Betrayed Profession: Lawyering at the End of the Twentieth Century (1994).

5. Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

6. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 1 (1970).

7. William Shakespeare, The Second Part of King Henry the Sixth act 4, sc. 2.

The "established traditions" of the law referred to by John Yanas began to emerge at least 600 years ago in England when legal advocacy began to emerge as a profession. Even in England, the profession has had its ups and downs since that time; its present level of esteem there crystallized only in the past 200 or 300 years to produce in England what is, at once, the most vigorous and yet the most strictly regulated Bar in the world. Regarding the English legal profession, the historian Professor Odgers wrote nearly a century ago that:

> 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 toward parties, witnesses, and prisoners alike has wholly changed, and the [members of the] Bar too behave like gentlemen. . . . The moral tone of the Bar is wholly different from what it was .... [T]hey remember that it is their duty to assist the Court in eliciting the truth. 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 concerns of the witness; a word, or even a look, from the presiding judge will at once check such indiscretion.[8]

Remember that Odgers wrote about the English legal profession of a hundred years ago.

Of course, England's problems with respect to the legal profession are less complex than ours. We have fifty states and the District of Columbia, Puerto Rico, and the Virgin Islands, each charged with the admission, regulation, and discipline of its Bar. In England, the Four Inns of Court in London govern the profession of the Barristers—the "trial lawyers"—and that category consists of about 5,000 men and women for the entire country. The Solicitors—whom we would call "office lawyers"—are similarly limited and strictly self-regulated. Changes are in progress even there, but they are not directly related to our subject.

What are the factors that explain or account for the low public esteem of our profession? I will confine my discussion to the three examples of unethical conduct in the legal profession that disturb me the most.

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8. W. Blake Odgers, *Changes in the Common Law and in the Law of Persons, in the Legal Profession and in Legal Education, in* A Century of Law Reform 1, 41-42 (Roy M. Mersky & J. Myron Jacobstein eds., 1901).

I

In recent years we have seen a gradual increase in the number of lawyers "trying their cases"—and I put that phrase in quotation marks—"trying their cases" on the courthouse steps to newspaper and television reporters. When defense lawyers did this in criminal cases, it was not too great a cause for alarm; if they received any media attention, people shrugged and figured, "That is what defense lawyers are paid to do." But in recent years, when prosecutors joined in this activity, it has become a different matter. When prosecutors speak, it is the *State*—the government, the people—speaking, and the public naturally listens. What is the purpose of engaging in such conduct—over and beyond the ego trip the lawyer enjoys from the publicity? Sometimes it is to influence public opinion and perhaps the views of jurors not yet selected. This inevitably complicates the process of jury selection and is, in my view, a plain violation of a lawyer's duty as an officer of the court. Judges ought to put a stop to this, and because they have not, judges must share the blame for it.

No prosecutor—including the Attorney General of the United States, an Assistant United States Attorney, a State Attorney General, an Assistant District Attorney, or especially that new creature of the law, the "Special Prosecutor"—should ever, except in the most unusual circumstances, make out-of-court statements about a pending investigation or a pending case. And we cannot blame the media for reporting what they see and hear on the courthouse steps. That is what a free press is for. I would have thought that by now the media's focus on this phenomenon would have stimulated the organized Bar to act. But it has not. Of course, we have in recent times seen glaring examples of lawyers trying their cases in the media.

Some judges, but all too few, have moved on this subject. Recently, the *New York Times* reported that United States District Judge Kevin Duffy of New York had issued strict orders—to the prosecution, to the defense attorneys, and to all law enforcement officials involved in the massive case involving the explosion at the World Trade Center—to make no trial-related statements to reporters.[9] Judge Duffy announced that he would impose fines beginning at $200 for each violation of his order and that later violations would be mathematically squared so that the second violation would be subject to a $40,000 fine and the third to a fine of $1.6 billion! "The next time I pick up a paper and see a quotation from any of you, you best be prepared to pay some money,"[10] Judge Duffy told prosecutors and defense attorneys. Although the order was overturned on appeal, Judge Duffy's effort to

9. Mary B.W. Tabor, *As Trial Is Set In Explosion, Hunt Widens; A Gag Order Is Issued Covering Trial Figures*, N.Y. Times, Apr. 2, 1993, at B1.

10. *Id.*

control out-of-court statements by attorneys should be commended.[11] As Judge Duffy explained, the judiciary should be interested in keeping the trial *in court*. "The trial [and] the evidence," he said, "belong in the courtroom, nowhere else."[12]

II

Next in my Bill of Particulars is the so-called "Rambo Lawyer," whose idea of counsel's function may have been influenced by the clownish performances seen on television programs. Here the judges are also in control—or at least they should be. When even a few judges tolerate the Rambo Lawyer's misconduct, the administration of justice suffers, and it leads to repetition of that conduct by other lawyers. Lawyers should not act like "hired guns." Civility is imperative in the courtroom: it is an essential element of the fair administration of justice. If we as a profession tolerate such an attitude among some of our practitioners, we cannot expect greater respect from the public.

Lawyers, as officers of the court, should be problem-solvers, harmonizers, and peacemakers—the healers, not the promoters, of conflict. In the words of Abraham Lincoln: "As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough."[13] Here we see the necessity for civility.

III

Finally, something that is possibly even worse in its long-range impact than courtroom misconduct—because most courtroom misconduct does not reach the public—is the outrageous breach of professional conduct we see in the huckster advertising of some attorneys. Perhaps "huckster" is not strong enough a word. "Shyster" is more appropriate, but I find on consulting the dictionary that even "shyster" is not strong enough. Tonight I will settle for "huckster-shyster" advertising.

We in the legal profession have no ancient oath or creed like the Hippocratic Oath governing the medical profession, but we have long accepted the idea that certain conduct is prohibited—for example, our rules against champerty and maintenance. But assuming for the moment that the Constitution *permits* a lawyer to finance a client's lawsuit, surely professional standards prohibit it. Similarly, even if we read the First Amendment to permit a lawyer literally to stand on the corner of a busy street, handing out cards like a political candidate—

11. The defendants challenged Judge Duffy's order, claiming that it prevented them from responding to government leaks to the news media. Regardless of what has happened in that case, such charges would lack credibility had not out-of-court statements and leaks by both sides become so common.

12. *Id.*

13. Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), *in* The Life and Writings of Abraham Lincoln 327-28 (Phillip Van Doren Stern ed., 1940).

along with a booklet or brochure telling how good he is—we may still ask if such conduct is conceivably compatible with the ethical standards of one of the three great learned professions.

Of course, this shyster element of the Bar—even if it is a small fraction of our profession—will argue that "The Supreme Court has said advertising is OK." One would expect that answer from shyster lawyers inclined to do anything and everything to secure clients. We see today, however, that the organized Bar, especially the American Bar Association, has—sadly—taken the same view. Yet the Supreme Court's decision in *Bates v. State Bar of Arizona*,[14] on which these lawyers and the ABA rely, tells us only that the Constitution *allows* commercial advertising by lawyers—and by implication other kinds of client solicitation. But the Court's holding that lawyer advertising is protected by the First Amendment in no sense inhibits the legal profession from clearly stating that such advertising is unprofessional. Indeed, if the idea of a profession means anything, it means that a profession must adhere to standards that are above the minimum commands of the law. For centuries that is what has marked the difference between a profession and a trade.

Lawyers, like doctors, must be more than just skilled technicians. Not too many years ago, Roscoe Pound observed that if lawyers are to be an educational and professional elite, they should not stoop to common commercialization.[15] Strict regulation of all lawyer conduct is imperative to protect the public. Since the *Bates* case, the Supreme Court has acknowledged that "the absence of any standardization in the [legal] 'product' renders advertising for professional services especially susceptible to abuses."[16]

We in the law must never forget that the legal profession has a monopoly on the practice of law. It is an article of faith in America that monopolies must be strictly regulated to protect the public interest. We should emulate the British Bar with its self-regulation before legislatures apply the cudgel to lawyers.

Unfortunately, the shyster conduct in solicitation and advertising is no longer limited to the "ambulance chasers." Today we see television ads, yellow pages ads, and (believe it or not) ads on billboards forty feet wide and fifteen feet high, touting a lawyer or law firm reaching out for clients. With such ads, lawyers usually emphasize that the "First Conference Is Free." Doesn't this have the ring of "Come into my parlor, said the spider to the fly?"

It is sheer nonsense to say that the public needs lawyer advertising for people to have effective access to the judicial system. Finding a competent, affordable attorney may sometimes be a difficult task in a

14. 433 U.S. 350, 363 (1977).
15. Roscoe Pound, The Lawyer from Antiquity to Modern Times 12 n.3 (1953).
16. *In re* R.M.J., 455 U.S. 191, 202 (1982).

large metropolitan area, and there is no question that people need a lawyer to ensure access to justice. But that task can be accomplished through a greater emphasis on pro bono work and especially through lawyer referral services provided by local bar associations. Many local bar associations have long placed periodic ads in local newspapers inviting the public to call their Lawyer Referral Service, which will provide the names of three or four lawyers qualified for the particular need described by the caller. And in fact, advertising is of little help to those looking for a lawyer. Recent consumer surveys have found that on average only one out of ten people who hire a lawyer find that lawyer through advertising.[17] With greater development of referral services, it would be absurd to claim that advertising is necessary.

Nor is it a justification to assert that there is a long history of advertising. One nationally advertised firm—apparently sensing that its television commercials would strike the public as huckster-shyster advertising—mentioned in its commercials that Abraham Lincoln advertised. Today's slick advertising campaigns bear no resemblance—absolutely none—to what Lincoln did. Even professional cards are in some sense advertising, but they have long been acceptable, provided that they were used in a professional manner. Similarly, in many rural communities, there is a long history of inserting one's professional card or an announcement of a partnership in a local newspaper. But virtually every other form of advertising was resoundingly condemned.[18] A court in the late nineteenth century held: "The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares."[19]

What has our profession done about the disgraceful problem of huckster-shyster advertising? It would be bad enough if the answer were "practically nothing." But the answer is worse—worse because, in an apparent effort to accommodate certain elements of the Bar, the American Bar Association—which ought to define the standards—has instead compromised our professional integrity. Of course, the ABA has no authority to admit lawyers to the practice of law or to discipline them for misconduct, but it has a duty to prescribe professional standards in keeping with centuries of experience, not a standard that says a lawyer can do anything the law allows. With its 400,000 or more members, the ABA is one of the most powerful pro-

17. ABA Comm'n on Advertising, Yellow Pages Lawyer Advertising: An Analysis of Effective Elements 13 (1992) (citing ABA Consortium on Legal Services and the Public, Two Nationwide Surveys: 1989 Pilot Assessment of the Unmet Legal Needs of the Poor and of the Public Generally; F. Magid, Attitudes and Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys (1987); Report of Findings: Nevada Lawyers' Advertising Survey, Litigation Technologies (Feb. 1990)).

18. *See* Gleason L. Archer, Ethical Obligations of the Lawyer 238-48 (Fred B. Rothman & Co. 1981) (1910); Geo. W. Warvelle, Essays in Legal Ethics §§ 90-99 (2d ed. 1920).

19. People v. MacCabe, 32 P. 280, 280 (Colo. 1893).

fessional associations in the world, and as such it has heavy public responsibilities. I raise the question whether it has properly met those responsibilities in formulating the "professional standard" set out in its recent Model Rules of Professional Conduct. We find this in the Rules:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.[20]

Can this combination of words honestly be called "*professional* standards?" These alleged professional standards make no real distinction between what is *legal* and what is *professional.*

Worse still is the ABA's Model Creed of Professionalism. Purportedly an attempt to set aspirational goals for lawyers, it does nothing of the kind. In regard to advertising it states:

> I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising.[21]

Does this provide any guidance to lawyers? It requires only that the lawyer think about—in the Creed's words, "be mindful" of—what he or she is doing before doing it, and the emphasis is on image rather than on ethical conduct.

Several years ago, I was invited to appear before an ABA committee considering standards for lawyer advertising. I was asked what I thought the ABA should tell the public regarding advertising by lawyers. My answer was that what we should say adds up to this:

> "Never, *never, never* engage the services of a lawyer who *finds it necessary* to advertise in order to get clients."

If the ABA were to ask me today what should be done about all this, I would respond that the whole subject of professional standards needs another look, focusing on lawyers, especially prosecutors, trying their cases on courthouse steps; on the matter of Rambo-type conduct in the courtroom; and on the sickening practice of huckster-shyster advertising. We must remember that if lawyers are to continue to

20. Model Rules of Professional Conduct Rule 7.1 (1983).
21. Laws. Man. on Prof. Conduct (ABA/BNA) No. 67, at 01:403 (Aug. 31, 1988).

claim status as a *profession*, we must proclaim and enforce standards that are compatible with those of a profession.

Now we must acknowledge that some members of the judiciary have not set a high standard of professional conduct. Judicial misconduct in recent years is most disturbing. From 1789 through 1980, six members of the federal judiciary—Article III judges—were either removed from office or resigned following impeachment for serious misconduct.[22] In just the past fifteen years, however, five Article III judges have been indicted and four have been convicted of serious felonies. Three of these have been impeached and removed from office.[23] As for the other two, one has resigned rather than face impeachment,[24] and one has not reached the end of the appellate process.[25] A footnote on this subject is important: in many cases the fact of conviction on impeachment did not lead to disbarment by the relevant state supreme court. Ponder this: Article III judges, removed from office by the two Houses of Congress for grave criminal conduct, are allowed by the states to return to the practice of law.

* * * * *

I have been a member of the Bar for more than sixty years, with twenty-three of them in active practice and more than thirty-one years

22. District Judge John Pickering of New Hampshire was impeached by the House of Representatives and convicted (removed) by the Senate in 1804; District Judge West H. Humphreys of Tennessee was impeached and convicted in 1862 after deserting his post to aid the Confederacy; Circuit Judge Robert W. Archbald of Pennsylvania was impeached and convicted in 1913; and Judge Halsted L. Ritter of the District of Florida was impeached and convicted in 1936. District Judges Mark W. Delahay of Kansas and George W. English of Illinois were impeached in 1873 and 1926, respectively; each resigned before he could be tried by the Senate. Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials (1992).

23. Judge Harry E. Claiborne of the District of Nevada was indicted in 1983 for tax evasion, convicted in 1984, and impeached and removed in 1986; Judge Alcee L. Hastings of the Southern District of Florida (who now sits in the House of Representatives as a Democrat from Florida) was indicted in 1981 for bribery and related offenses and acquitted in 1983, but he was nevertheless impeached and removed in 1989; and Chief Judge Walter L. Nixon, Jr. of the Southern District of Mississippi was convicted in 1986 of lying to a grand jury and was impeached and removed in 1989. *Id.*

24. Judge Robert Collins of the Eastern District of Louisiana was convicted in 1981 of receiving and soliciting bribes; he resigned from office in 1993. United States v. Collins, 972 F.2d 1385 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993); Judges of the United States District Courts, 821 F. Supp. vii, xiii (1993).

25. Judge Robert Aguilar of the Northern District of California was convicted in 1990 of illegally disclosing a wiretap and endeavoring to obstruct justice. The Supreme Court recently granted certiorari to review the Ninth Circuit's judgment overturning those convictions. United States v. Aguilar, 115 S. Ct. 571 (1994), *granting cert. to* 21 F.3d 1475, 1487 (9th Cir. 1994) (en banc).

Because of this lag between criminal conviction and impeachment, federal judges collect their judicial salaries while in prison. Legislation has been introduced in Congress to avoid this problem by suspending the pay of any judge convicted of a felony, but even if it is enacted, such legislation would be subject to constitutional challenge. In any event, the need for such legislation is a telling indication of the decline in professionalism within the legal profession.

as an Article III judge. I am proud of my profession and the historic role attorneys have played as officers of the courts and as servants of the public in the administration of justice and democratic government. From the very beginning of our nation more than 200 years ago, lawyers have been relied on by their fellow citizens, and we should remember that thirty-one of the fifty-five delegates who met in Philadelphia and drafted the greatest charter of government ever written were lawyers. Historically, lawyers have been public leaders, not merely advocates for clients. Would our profession measure up today to the lawyers among the Founding Fathers?

It is not merely the right but the duty of members of the Bar to challenge the failure of the leadership of the organized Bar to set high standards and the failure of local bar associations to enforce the same high standards. You, as Students of Law, have an especially heavy burden in this regard. This is a heavy legacy that we pass on to you. We hope that you will live up to it.