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## A Return of Professionalism

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## REMARKS

### A RETURN OF PROFESSIONALISM\*

*Paul J. Kelly, Jr.\*\**

DEAN Feerick, distinguished guests, fellow Fordham Law School graduates and friends. I am particularly pleased to have been asked to speak here today.

In considering the thought or thoughts that I would share with you today, I initially contemplated recalling the many contributions that we, "the legal profession," have made to our country and our society over the past 200 years. I assure you they are innumerable. Or perhaps it would be even more appropriate to spend just a few moments reviewing the many virtues of our profession and the need for this institution, which I would simply call "the law," but which all would agree makes our country great. Thirty minutes could easily be consumed with either of these topics. As I thought of who would be here today—lawyers, judges, law professors and perhaps law students—I recognized that you know at least as much as I do about the virtues of the law and the contributions of the legal profession to our society and many of you, I am certain, know far more.

In the time allotted I would like to spend a few moments looking at what is happening to our profession and what we might do to restore the profession to the status it deserves.

Can anyone dispute the fact that the law generally and lawyers in particular have in recent years been denigrated by the public, the press, and indeed by those within the profession itself? Attorneys are publicly announcing their dissatisfaction with their chosen profession. Lawyer jokes abound, and I would suggest that they are merely symptoms of a far greater and much deeper problem. We read of militia and vigilante groups being formed, prepared, I suppose, to take the law into their own hands at such time as this institution ceases, in their opinion, to be effective.

No doubt, the profession has changed. It seems to me that a general malaise has set in. "Experts"—and I place that word in quotes—have suggested that the *attitudes* we are encountering today are attributable to a wide variety of problems including contingent fees and joint and several liability. Other experts conclude that a lot of the problems confronting the profession could be exorcized by the elimination of pain and suffering as a compensable item of damage. Still

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others blame the problems on the fact that there are simply too many lawyers and too many laws. It is hard to dispute that the public's perception of attorneys, if not at an all time low, is pretty close to the lowest it has been, ranking perhaps just ahead of Congress.

For just a few moments, I would like to focus on professionalism and the perceived loss of that professionalism and perhaps how we can counter this attitude. At the outset let me suggest that professionalism does matter. It matters because it holds the system together and allows it to meet the challenges it must if we are to remain a free society, with liberty and justice for all.

I would suggest to you that many of the problems we are being confronted with today stem from a perception by the public that attorneys are becoming less professional and more commercial, less idealistic and more market-oriented, less interested in justice and more interested in winning at all costs. I am forced to reluctantly admit that in some cases this perception may be justified.

I would probably also agree, if pressed, that there are abuses that flow from the indiscriminate and perhaps unethical use of market-driven devices, as well as from the other problem areas highlighted by the "experts." However, it is too easy to identify these "symptoms" and leap to the conclusion that they are the main cause of the problems confronting our profession and then focus our energies on curing the symptoms. At least in medicine, that approach might very well result in the death of the patient.

I would suggest to you that even if all of the suggested reforms were, in fact, accomplished, similar problems, seemingly centered around fees, and inexplicable monetary awards, but really directed to "lawyers" in general and the loss of professionalism in particular, would continue to surface. This results, perhaps, because all can relate to money or the lack of it or to the apparent theft of it. Just as an example, in a recent issue of *U.S. News and World Report*, we find a report of an attorney billing sixty-two hours in a single day.<sup>1</sup> We are also told of an asbestos litigator billing the same twelve minutes to over three thousand clients.<sup>2</sup> And we are treated to a report of a lawyer billing his clients \$177,844.00 for the time spent in preparing the bill!<sup>3</sup> I would speculate that we have all heard similar anecdotes. While certainly egregious examples, I do not believe that the perceived loss of professionalism can be blamed on such isolated abuses, after all there will be thieves and cheats in every group. Nor do I think we can generalize and blame the loss of esteem that so many speak about on the "organized Bar's failure to maintain a written code of conduct."

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1. Stephen Budiansky et al., *How Lawyers Abuse the Law*, *U.S. News and World Report*, January 30, 1995, at 50.

2. *Id.*

3. *Id.*

I believe we have to place the blame where it belongs—on our own shoulders. We must refocus our energy at *us* and perhaps we will rediscover the truth of what many have said in the past—we cannot relegate the practice of law to mere trade status. We, the lawyers, judges, law professors, and yes, even law students, must not permit commercialism and financial incentives to overshadow the ideals of the past. As Oliver Wendell Holmes, the junior, so aptly pointed out “[the law] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”<sup>4</sup>

Think about that comment for a few moments—have we, to paraphrase a recent movie title, been shrinking the profession? We learn the uniform commercial code, we know the elements of a lot of different torts, we memorize all the rules of real property and of title examinations or due diligence requirements. We study and we can recite the pertinent provisions of the Revised Model Business Corporation Act or the Internal Revenue Code or the Amended Uniform Partnership Act. Oh, and along the way, most of us take one semester of jurisprudence, one semester of ethics and, of course, a bar review course. Was Justice Holmes correct when he suggested there is more to the practice than axioms and corollaries?

In 1953, Roscoe Pound described the practice of law as “[the pursuit of] a learned art . . . a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.”<sup>5</sup> I believe that we may have reversed the order of Dean Pound’s definition. While most will concede that our profession is very necessary—to remedy injustice, to ensure the smooth functioning of commerce and trade as well as to protect the fundamental rights of all people, regardless of race, religion, gender or economic status—we are also perceived as vultures rushing gleefully to the scene of any tragedy. As a result of the billboards, newspaper and T.V. ads, and indeed, I recently observed a banner proclaiming the expertise of a particular practitioner hanging over the bandstand in a bar, we are depicting ourselves as totally self-centered and mostly interested in pursuing the almighty dollar without apparent regard to the well-being of our client. We are blamed by all sides for the insurance crisis confronting employers, manufacturers, automobile drivers, and doctors.

Even judges are publicly denigrating the very lawyers who appear before them. The *Wall Street Journal* reported that a federal district judge suggested, and I hope it was in jest, that “I suppose counsel have a penumbral constitutional right to regard each other as schmucks, but

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4. Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown & Co. 1923) (1881).

5. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (1953).

I know of no principle that justifies the litigation pollution.”<sup>6</sup> This judge went on to note that he lamented the demise of dueling, stating that “dueling would be a good way to achieve ‘a salubrious reduction in the number of counsel to put up with.’”<sup>7</sup> In the same article, the director of the National Congress for Legal Reform noted “[t]he system is set up to make lawyers money.”<sup>8</sup> While he did not think dueling was necessarily the appropriate way to resolve disputes, he did suggest that “[w]e should take our dueling pistols and shoot our attorneys . . . a lot of times problems are created by attorneys, not solved by attorneys.”<sup>9</sup> It is troublesome that many feel this way. What is more troublesome is that often times those making such comments are in a position to do something constructive—and have apparently chosen to do nothing.

I see the problem as two pronged which, in itself, suggests at least a partial solution. First, the general criticism being leveled at the lawyer today is far too simplistic. It is based on a lack of understanding of what most lawyers do. Those few, and I am quite comfortable with that quantification, who attract the headline criticisms are not necessarily at fault, neither is the system. The profession must seek to educate and inform—after all it is not the lawyer who delivers a million dollar verdict for a hot cup of coffee—rather it is a jury of the same people who are often heard to mutter about “sharks” and shake their heads in disdain when the profession is mentioned. The Bar—plaintiff and defense firms as well as sole practitioners, corporate as well as PI lawyers—must refocus some of their energies from fighting each other over “tort reform” or trying to shift the blame and, like the medical profession, put together a program to educate the public as to what the real responsibility and duty of the profession is to itself, the client, and the public. This should not be too hard to do—after all, I think most people like their own lawyers—it is the other side’s lawyer who is obnoxious.

Second, and perhaps more importantly, I do not believe, that we, the profession, are tough enough on ourselves. The courts, the Bar, as well as our various professional organizations, seem to have forgotten that there is no “right” to practice law. It is a privilege to be licensed as an attorney and it seems to me that recognition of that fact also recognizes that certain restrictions can, and indeed must, be imposed in order to protect not only the public but the profession itself. Whether those restrictions go to ensure against dishonesty and incompetence, the regulation of fee arrangements or the imposition of reasonable restrictions on lawyer advertising can be the subject of much

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6. Grace Kang, *The Irate Judge Thinks 10 Paces is a Good Width for a Courtroom*, Wall St. J., Aug. 25, 1992, at B1.

7. *Id.*

8. *Id.*

9. *Id.*

discussion. At least with regard to lawyer solicitation and certain types of advertising, several empirical studies have confirmed what common sense tells us: If *you* act like a huckster, *you* will be perceived as a huckster.<sup>10</sup> Unfortunately, if *several* of our colleagues act like hucksters, we are *all* perceived in the same light.

While some will make fun of “civility codes” or attempts to bring a sense of professionalism back to the courtroom and to the practice, I would suggest that just such efforts are very necessary if we really expect the practice of law to regain the status it has enjoyed in the past.

Chief Justice Burger, twenty-five years ago, admonished that “lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice.”<sup>11</sup> We who are in the practice are in a better position, or for that matter, we are the only ones in a position to cure this problem. Again, if we do not follow the rules or if the rules are not enforced, or if we abolish the rules or if we fail to take the time to even learn the rules, this system cannot work.

The problems confronting our profession in 1998 have not just recently surfaced; and those problems will not just go away. Will these problems continue to plague us into the 21st century? As Yogi Berra said “Predictions are awfully hard to make—especially about the future.” I would, however, suggest in the words of an anonymous author that “a different world cannot be built by indifferent people.” To accomplish great things we must not only act, but also dream. We must not only plan but also believe. If the judges, law professors, leaders and members of the Bar do not really believe, nothing will change except for the worse. Justice Burger in the early 70’s predicted some of the problems being realized today when he observed that “[s]omeone must teach that good manners, disciplined behavior, and civility . . . are the lubricants that prevent lawsuits from turning into combat.”<sup>12</sup> That “someone” must be us. He also aptly noted that “when insolence and arrogance are confused with zealous advocacy, we are in . . . trouble.”<sup>13</sup> That “we” is also “us.” While the solutions to the problems which have been identified are complex, I believe, as a first step, that judges, especially trial judges, as well as the “senior” members of the Bar must be willing to assume or perhaps reassume the role of mentoring young lawyers. I do not think this means lectures from the bench; I do think it requires a somewhat closer relationship within the Bar and the Bar with the bench. I believe it is critical that those teaching the law have and be able to impart to their students values based on the ethics traditional to our civilization. And

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10. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2377-78 (1995).

11. Warren E. Burger, Remarks, *The Necessity for Civility*, Address Before the American Law Institute (May 18, 1971), in *Delivery of Justice* 172, 175 (1990).

12. *Id.* (emphasis added).

13. *Id.* (emphasis added).

those desiring entry into our profession should exhibit a willingness to study our civilization and those traditional ethics in addition to all the other requirements. I know we think "But we are so busy! We cannot find time to do that too." However, the practice of law as well as the practice of judging has got to consist of more than merely compiling good statistics. If the practice is to be more than a trade, if we want to once more be considered, in the true sense, a profession, we must take or make the time to do what is necessary. I would hope that practitioners, educators and Bar leaders, despite their quest for a twenty-four hundred hour billable year, would also take the time to ensure that their young associates, partners and students recognize that the practice of law involves more than putting dollars in the bank and is definitely more than "winning at any cost." I would hope that those called upon to represent the indigent, both in civil as well as criminal matters, would do so willingly, and would realize that tremendous satisfaction can be achieved merely by knowing that you have done a thankless job well.

I expect that with some periodic reminders, we in the legal profession who have perhaps lost sight of the goal, could return to our roots.

I believe that we can each find ways, be it through local or state bar associations or inns of court or the like, to rekindle the professionalism that the Bar was once noted for. I do not believe that any one group be it the ABA or the ATLA or the Defense Research Institute can accomplish this task or should even be expected to. It will take the individual effort of each of us in this room and each of us in this profession. And it will not be accomplished with one giant leap, but rather with many small steps.

I do look forward to the day when the public and the politicians and, even the lawyers, stop blaming the profession for the perceived ills afflicting our society and recognize the contribution that the American legal system and the American lawyers have made and continue to make not only to the American people but to the world at large. We must recognize, however, that it is our actions and our actions alone which have the most critical influence upon the image of the practice. Our willingness to work with each other and the courts, recognizing that there will always be two sides to every lawsuit, will in the short run, make it fun to be an attorney again, and in the long run will ensure that quality legal services will be available to all. Do you recall the oath that you subscribed to at the time you were admitted? I would suggest that very few of us recall those words, which while varying by jurisdiction, convey the same thought. We will represent our clients competently, zealously and without regard to personal gain—and we will do so while remembering we are, each of us, an officer of the court.

As Sam Walton said, "High expectations are the key to everything." My expectations for our Profession are high but I do not believe that

they are unreasonable. I trust that each of you have similar expectations and hope that you will take the time and expend the effort to ensure that those expectations come to fruition.



*Notes & Observations*