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ETHICS AND THE LAW*

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A legal profession, or some other comparable group, is essential in any society where human beings must rub shoulders, share boundaries, engage in commercial enterprises, and deal with each other daily on personal and business matters. Some advanced societies—Japan, for example—function with only a relatively tiny percentage of lawyers compared to the 600,000 we have in the United States. In their highest role, lawyers are—or should be—the healers of conflicts; they can facilitate the operation of our complex social and economic order, seeking always to avoid the ultimate confrontation of the courtroom trial with all its stress, tensions, and waste of time, energy, and money. In their highest role, lawyers should try to conciliate, mediate, and arbitrate.

We know, that for centuries, lawyers have not been well regarded, and if we are to rely on polls, the public still holds us in low esteem. The literature of the English-speaking world is replete with slurs on lawyers. Typical is the oft-quoted suggestion by one of Shakespeare's characters that the first step in creating a decent society is "to kill all the lawyers." Regrettably, the image is far from improving; indeed, it has become worse in recent times. In fairness to lawyers, much of the ill-feeling toward them arises because they are so often the most visible actors in many human conflicts; obviously, if all people lived by the Golden Rule there would be few, if any, lawyers to castigate. The increasingly bad image of the profession is not the work of only the borderline shysters and "ambulance chasers," but of a more diverse segment. What follows may be criticized as a "voice from the past" resisting change, but some changes in institutions built over centuries should be resisted.

The sad truth is becoming more and more apparent; our profession has seen a steady decline by casting aside established traditions and canons of professional ethics that evolved over centuries. The practicing legal profession is by no means a lone pariah. In the past two decades more instances of misconduct of members of the judiciary have surfaced than in any comparable prior period. We hear of greed and fraud in the stock exchanges, in the medical profession by ex-

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** Chief Justice, United States Supreme Court, 1969-1986. The editor gratefully acknowledges the author's inspiring contribution to this Symposium Issue.

ploitation of federal and state patient-care programs in banks and building and loan associations, in the production and distribution of shoddy or dangerous consumer goods; even religion is not exempt from exploitation by a few greedy promoters. One must resist a temptation to recall the corruption that led to the decline of Rome.

When we speak of the decline in "ethical" standards, we should not use the term "ethics" to mean only compliance with the Ten Commandments or other standards of common, basic morality. It is obviously unethical for a lawyer to cheat or steal from a client or to betray a client's interests. But a lawyer can avoid all such conduct and still fail to meet the standards of a true profession, standards calling for fearless advocacy within established canons of service.

The recent surge in lawyer advertising is one example. Currently, we see some television commercials by lawyers that would make a used-car salesman blush with shame. Other lawyer ads tout a "first conference free." Is this reminiscent of the fabled invitation, " 'Come into my parlor,' said the spider to the fly"?

Some lawyers engage in active, overt, blatant solicitation of clients; still others secure contingent fee contracts without always fairly and fully advising the client whether liability is really "contingent." That practice risks betrayal of the client's interests at the outset of the relationship. Few untrained persons can evaluate the value of a claim accurately. If the legal profession does not soon deal with this grave and growing problem, it is inviting statutory or judicial supervision of all contingent fee contracts—as long has been true of attorneys' fees involving claims of minors, for example.

The legal reality that under the First Amendment lawyers cannot be *prohibited* from advertising is not the answer. Some lawyers—happily a minority—take that as a "go" sign, a "hunting license," and do not seem to recognize that simply because the Constitution *permits* a given activity does not mean it is ethically appropriate for members of a profession to pursue it. In appearing before the ABA Committee on Professionalism two years ago, I was asked how the organized bar should advise the public. My response was, "Never, never, never engage the services of a lawyer *who finds it necessary* to advertise in order to secure clients."

It is a proud boast lawyers often make that our system derives from British law that has been tested and found good for centuries. There are similarities, indeed, but there are enormous differences in how our profession regulates itself. The British bar is a small band of advocates. Having observed many legal systems for 40 years, nowhere in the world have I seen more fearless, more vigorous, and more independent advocacy than that found in Britain's courts. The qualities of independence and courage of the British bar trace back to great figures in the law like Sir Edward Coke, who forfeited his position as Lord Chief Justice rather than yield to the King, and Sir Thomas More, who forfeited both his office and his head in the exercise of independence.

Yet the British barristers are probably the most rigidly regulated and disciplined lawyers in the world.

The tradition of independence of the British bar and the corollary of accountability for the exercise of that independence are reinforced by their system of training and the standards of the profession. That training is not simply focused on the theory and principles of legal analysis or skills of rhetoric, important as they are. At the core of their training is the inculcation of strict standards of ethics, civility, and decorum, as components of honorable professionalism. They do not assume that training in legal ethics and behavior can wait until the law student becomes a practitioner; it begins on the first day of the process. The aspiring barrister sits in the courts observing trials and hears lectures given by "readers," who are the leading barristers and judges, so that the study of ethics and professional behavior and demeanor permeates the entire educational experience. He does not learn about courtroom behavior from the "show biz" of TV.

When it is suggested that we apply some of the methods and procedures used in Britain, a few shrill voices cry that this will destroy the independence of the profession in its pursuit of justice. Nonsense; indeed, self-serving nonsense. Precisely because the adversary system is inherently contentious and pregnant with abrasive conflicts, the British profession long ago elected to regulate the clash of contending advocates. They insist that advocacy must be vigorous, but always within the framework of a system regulated by well-known rules of conduct. Far from impairing the quality of advocacy, their system enriches the force, skill, and clarity of that advocacy. Violations of standards occur rarely because the profession policies itself sternly, and members of the bar accept the necessity for rules to keep the conduct of a trial from returning to the ancient clash of trial by combat or something resembling a barroom brawl.

The British example manifests another aspect of professionalism: self-discipline. The regulation and discipline of the British barrister comes not from the coercive force of government—or of the judges—but from self-imposed standards established and enforced by the profession itself. A true profession is one that polices itself.

Another great tradition of our profession that is sometimes ignored is public service—"pro bono" service. Given the important role of lawyers in our society, they must at times represent some clients without charge or undertake representation that may damage their careers. One dissenting opinion in the Supreme Court noted: "The history of the legal profession is filled with accounts of lawyers who risked careers by asserting their independent status in opposition to popular emotions or governmental attitudes. John Adams did that in Boston to defend the soldiers accused in what in our folklore is known as the 'Boston Massacre.'" [*In re Griffiths*, 413 U.S. 717, 732-33 (1973).] When Adams agreed to represent one of the soldiers, he said, "If he thinks he cannot have a fair trial. . .without my assistance, without

hesitation he shall have it." He risked a professional and political future in the heated atmosphere surrounding that event.

Advocating a return to true professionalism in the law is not an effort to see that lawyers achieve an elite status in society. Indeed, if "status" is to be measured by the size of fees or net worth, the striving for an elitist status may actually detract from professionalism. Placing high financial returns ahead of service to clients and the public may tempt lawyers to ignore ethical obligations to their communities and their clients.

Although critical analysis of our institutions and professions has real value, we should also remember on the affirmative side the countless examples of courageous lawyers. Mr. Justice Jackson commented that in every vindication of the rights of individuals and in every advance in human liberty in history, the key figures were lawyers willing to risk their professional reputations—as Adams did—and their future in pursuit of an ideal of fundamental fairness.

In 1985, ABA President John Shepherd created a committee to study professionalism of the bar. Its report is an excellent "diagnosis"; it remains to be seen whether the legal profession will undertake the necessary "therapy." Perhaps a penetrating inquiry will lead us to conclude that our profession, with all its infirmities, is indeed sound. But if our profession, including judges, cannot stand up under such inquiry, the flaws may call for change. To make such inquiry is to do no more than to apply the techniques of the adversary system to self-examination.