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Editorial Office

University of Michigan Law School
Ann Arbor, Michigan 48109-1215
Telephone: (734) 763-0165
Fax: (734) 764-8309
E-mail: reedj@umich.edu

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17. I certify that the statements made by me above are correct and complete.

John W. Reed, *Editor*

BEHIND THE SMOKESCREEN: INSIDE *THE INSIDER*†

Jeffrey S. Wigand*

Thank you for giving me this opportunity to speak to you about the inner workings of the tobacco industry and why I decided to break ranks. I speak through the prism of an insider who spent more than four years as a senior executive in the industry. It is an honor to be able to share with you my thoughts on this incredible journey that has spanned more than ten remarkable years.

But before I take you through this journey, I want to make very clear that I am able to be here today only because of the tremendous courage of many people. I carry a debt of gratitude that I will never be able to repay. Without their unwavering support and belief in the truth and me, this journey would not have been possible. Nor would it have this ending. In 1993, the idea of making a movie about this journey of so many would have been ludicrous. Then, survival, not success, was the order of the day. I owe this change in fortune to my own daughters, to the 153 students whom I was teaching each day at Du Pont Manual High School, and to the lawyers who risked their reputations, assets, and their own personal safety for the search for the truth and justice. It is impossible to thank all those who made this journey possible, both young and old, seen or behind the scenes.

I thank Jack Liber and Joe McLeod for the opportunity to be here today. I hope that at the end of my presentation, you will see why it is important for each of you to participate in the eradication of this vector of death that takes prematurely the lives of over four million people in the world each year, a number that will grow to over ten million a year within the next three decades unless we reshape how this industry does business and how it targets our children. Tobacco addicts three thousand of our children in America every day. The toll tobacco takes on human life and the collateral misery and effects on families, friends, society, and government exceed the cumulative toll of wars, AIDS, homicides, fires, and suicides.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 8, 2002.

*Smoke-free Kids, Inc., Charleston, North Carolina; subject of the moving picture *The Insider* (1999).

PERSONAL EXPERIENCE IN THE INDUSTRY

This all began for me in 1988, when I was approached by Bill Lodenbach, a former human relations senior executive of the Brown & Williamson Tobacco Corporation (B&W). At that time, Lodenbach was retired and acting as an executive recruiter for the Louisville, Kentucky-based recruiting firm of Heinman and Company, which represented B&W in the search to fill the position of Vice President, Research and Development. Also based in Louisville, B&W is the third-largest tobacco company in the United States and is part of the world's second-largest tobacco concern, BAT Industries PLC (formerly British-American Tobacco Company), based in London, England. I was recruited to B&W after twenty-five years of senior management experience in the healthcare industry with companies such as Pfizer, Merck, and Johnson & Johnson. I was steeped in a mindset of using science to search for the truth, to make products better, to improve the quality of life, and to save lives.

After over six months of interviews with senior management executives at B&W, BATUS (BAT's U.S. holding company), and BAT itself, I believed that I would be able to use my expertise to develop a "safer cigarette." I wanted to change a product that kills when used as intended and addicts as no other drug does. The lure of this opportunity, coupled with a substantial increase in salary and the ability to relocate my family—my wife and two young daughters, one two years old and one two months old—from the New York City area to Louisville, where my wife's father and my daughters' grandparents resided, met both professional and personal goals.

I arrived at B&W in December of 1988 and began work on the development of an engineered tobacco product, code-named Airbus, that had less "biological activity"—industry-speak for a nicotine-delivery device that causes less disease (less lung cancer, emphysema, chronic obstructive pulmonary disease, or heart disease) for those who were already addicted or who as adults chose a highly risky behavior after making a competent decision based on the full disclosure of the facts about the risks of tobacco use. I want to take you through some of my experiences and observations during four years and three months as B&W's Vice President, Research and Development, and what I learned after I left the company precipitously in March of 1993. What I share with you is the absolute truth. I have chosen only a few of my many observations and experiences to highlight the behavior of this company and what I see as its total disregard for public safety in putting profits and sales over health concerns and truth.

My first experience shortly after joining the company, part of my corporate orientation, was to be sent to a Kansas City law firm. This was my first en-

counter with how involved the lawyers were in the manipulation of the science of smoking and health. I spent three days being asked to believe that the numerous U.S. Surgeon General's reports were all based on flawed science and that the conclusions of Sir Richard Doll, the late Dr. Oscar Auerbach, and many others were just plain wrong. This was the first time I had ever had lawyers interpret science for me.

I understood why this was happening. For decades, the industry has survived on two basic tenets: first, that there are no proven clinical data to support the beliefs about the relationships between tobacco use and health problems; and second, that nicotine is not addictive. The first is the causal hypothesis that deals not only with the general issue of smoking and health but also with the "light tar lie." "Light" and "Ultra Light" cigarettes carry the moniker of "Light," meaning or implying less risk due to less tar. The second, regarding the addictive quality of nicotine, relates to free choice. If nicotine's addictive quality were admitted, using tobacco would no longer be a free choice.

I returned to my corporate headquarters after this part of my orientation confused but not deterred from developing a safer product.

In September of 1989, I was part of a Research Policy Group (RPG) meeting held in Vancouver, British Columbia, where all the senior managers of research and development from BAT and BAT-affiliated companies had gathered to develop strategic research priorities and programs. For four and a half days, we discussed how to make a safer product using existing technology, how to test this product, how to use contemporary pharmaceutical molecular-modeling techniques to minimize nicotine's addictive capacity as well as its harmful effect on cardiovascular function, how to use genetic engineering to boost the tobacco cultivar's nicotine content (Y-1 tobacco has two or three times the nicotine content of any other tobacco in the world), how to expand our research on fire-safe cigarettes and environmental tobacco smoke (ETS), and so forth. We clearly articulated the internal mantra: "We are in the nicotine-delivery business, and tar is the negative baggage." In other words, nicotine is addictive and pharmacologically active, and there could be a product that was safer but never safe.

This extensive meeting generated over twelve pages of detailed notes memorializing the scientific discussions and a follow-up action program to achieve the strategic goal—a biologically safer tobacco product, a fire-safe cigarette, and so forth. When these minutes of the Vancouver meeting reached the senior executives of the company, they were quite distressed, for we had articulated the antithesis of the external mantra, which was: "Nicotine is there for taste and is not addictive; tobacco products can be made safer in many ways, from less biologically active to fire-safe."

What transpired next I was unprepared for, even after twenty-five years of senior management experience. The president and chief operating officer of the company, Thomas Sandefur, with the agreement of and in conjunction with the chief executive officer/chairman and the general counsel, ordered an attorney, an assistant general counsel, to rewrite the minutes so that there would not be a document within the company records that would either refute the public scientific position or be at odds with the company's decades-old deliberate obfuscation relating to nicotine's addictive nature and smoking-and-health issues. The assistant general counsel had not attended the RPG meeting but he vetted the minutes from twelve pages to two and a half pages by including only the follow-up program and removing any reference to what actually happened.

What followed next was at least as egregious if not more alarming. The controversial minutes reached the highest level of BAT, the chairman Sir Patrick Sheehy. As a result, all the scientists and the respective attorneys from each member BAT company—the same RPG members who attended the Vancouver gathering—were ordered to a meeting in New York City, where we were informed that the system of document generation, retention, and scientific communication was to be profoundly changed. From that day on, a lawyer would be involved in every sequence of scientific communication and research. (That would help to prevent negative information from being put into writing and also provide a basis for claiming attorney-client privilege.) A system of sequestering and vetting controversial documents generated by any of the operating companies was ordered. In addition, all safer-cigarette work was terminated and all further work on that project was transferred overseas, along with the documents, because U.S. discovery process does not go after overseas documents. Why were these things done? What was wrong with a safer-cigarette project? If there were a "safer" tobacco product, all other products, by implication, would be unsafe.

At that point I was in a quandary as to what I should do. I had a wife, two young children, one of whom had a medical issue requiring extensive medical coverage, a mortgage, a car, a $300,000-a-year salary, all the amenities of a successful executive. I was also keenly aware by then of how the industry intimidated defectors, paying legions of lawyers to attack their credibility in an effort to stop their behavior. I wanted no part of that. I wanted to protect my family and engineer a return to the healthcare industry—for I realized I had made a major error in my career.

While waiting for an opportunity to make a move, I found myself turning to investigate health issues relating to the use of tobacco products, including the role played by additives and cigarette design in nicotine delivery, marketing to adolescents, and premature death caused by tobacco products. I also

observed how the industry used science to generate controversy rather than to search for the truth. There was extensive lawyer involvement and control at all levels of science. And the internal mantras continued: "We are in the nicotine-delivery business, and tar is the negative baggage," and "If we hook 'em young, we hook 'em for life."

The more I learned, the more difficulty I had looking in the mirror. I wondered how I would explain to my two young children why I worked for the tobacco industry. Still, I did my best not to rock the boat until August of 1992, when I received a draft copy of a National Toxicology Program report exposing one of the additives used by the company as carcinogenic. The industry nurtures the belief that a tobacco product is a natural product, grown in the ground and wrapped in paper. This is far from the truth. It is a carefully controlled and engineered product—from the fields to the consumer. Tobacco products are laced with over 599 intentionally added chemicals that are put into the tobacco and waste tobacco-derived materials in order to ameliorate the harshness generated when a bioorganic material burns. The additives mask the acridity of nicotine as well as the irritation of smoke and facilitate the efficient delivery of an addictive substance. In addition, there are significant nonintentional additives that result from the agriculture process, from curing, and from the fact that tobacco is not a pasteurized product. The burning of this bioorganic material, tobacco, generates over 5,000 toxic chemical pyrolysis compounds. These combustion chemicals are so toxic you cannot bury them in solid-waste disposal areas.

Some of the additives are licorice, chocolate, honey, butterfat, glycerol, and propylene glycol. These are chemicals we find in everyday use, chemicals that are in some applications intended to be ingested or topically applied to the skin—but never to be burned or chemically decomposed and inhaled through the respiratory tract. Inhaling allows toxic and addictive nicotine to go directly into the blood stream and into organ systems unaltered by the body's natural detoxification processes. The industry likes to boast that all the additives intentionally utilized are approved by the Food and Drug Administration (FDA) and are regarded as substances "Generally Recognized As Safe" (GRAS). They are not safe at all when they are burned at temperatures in excess of 600˚C; they turn into highly toxic substances or form highly toxic compounds through pyrolytic synthesis. One such compound is acrolein, which comes from burning the glycerol that is added to tobacco to extract nicotine and generate humectant properties. Acrolein is a tumorogenic substance and is a strong cilia-static agent that damages the lungs' natural ability to purge particulate matter inhaled. In fact, a 1997 American Cancer Society study demonstrated that many of the additives used to manufacture a cigarette generate a more toxic tar when burned than tobacco itself does.

One of the additives that the industry has used is a substance called coumarin, a sweetening additive isolated from tonka beans (not to be confused with coumadin, a pharmaceutical anticlotting agent). The industry has a long history of using coumarin as an ameliorant in all of its tobacco products. In the mid-1980s, coumarin was shown to be hepatotoxic in dogs and to mask foul odors. As a result, the FDA took coumarin off its GRAS list. Subsequently, the industry was forced to expunge it from all of its cigarette products, and, concomitantly, the industry was required to report to the U.S. Department of Health and Human Services all of the additives it used in the production of cigarettes. Additives used in other products, namely moist snuff, chewing tobacco, and pipe tobacco, were not included in this reporting requirement. B&W continued to use coumarin in its pipe tobacco, in direct conflict with its own additives-use policy. Incidentally, other pipe tobacco manufacturers had removed coumarin from their products.

As I said a few minutes ago, it was in August of 1992 that I learned that coumarin was reported by the National Toxicology Program to be a lung-specific carcinogen when tested in laboratory mice and rats, the same testing protocol used to assess the toxicity of frequently used chemical substances that have human-exposure considerations. This new scientific information imposed an immediate duty of care. Again, I went to my supervisor, Mr. Sandefur. I had been to Mr. Sandefur many times before on issues of duty of care, public health and safety, and other management issues such as forcing product developers to smoke tainted cigarettes. We had had many conflicts since the cancellation of the safer-cigarette project and the deliberate vetting of scientific documents. For example, I had gone to him when I was perplexed about the way the Y-1 germplasm was being exported. B&W had to grow the Y-1 tobacco (the tobacco with the high nicotine level) in an area that did not have the U.S. auction system in place. I learned that the Y-1 germplasm had been removed from the country in a rather strange way—namely, by taking the seed out in an empty cigarette package. I went to Mr. Sandefur to ask about that, and he told me not to concern myself with it, to take care of research and development. It was not until 1994 that I discovered that exporting the germplasm of a plant was illegal.

When I went to Mr. Sandefur in the fall of 1992 with the report about coumarin testing as a carcinogen, he instructed me to go back to the laboratory and find a substitute. He told me he was not going to allow coumarin to be taken out of pipe tobacco because its removal would affect the taste of the pipe and therefore negatively affect sales and profits. Coumarin was not removed from the pipe tobacco formulation even though there was substantial new scientific information that it could put the pipe tobacco user at an incremental health risk. This final issue caused me to be fired in March of 1993,

when Mr. Sandefur became the new chief executive officer. At the time I left the company, coumarin was still used in the formulation of Sir Walter Raleigh pipe tobacco.

EVENTS AFTER MY TERMINATION

When I was terminated in March of 1993, all I wanted was to forget four years and three months of a bad mistake and go back to the healthcare industry where I belonged. What I wanted from B&W was fulfillment of termination provisions stipulated in my employment contract: salary continuation, continued healthcare benefits for my family and especially my daughter, retirement benefits, and so forth. The company did not want to honor its agreement; it wanted to reduce the terms and conditions of my employment contract. As a result, I sought legal counsel in the state of Kentucky—but to no avail; I could not find a lawyer in Kentucky who was willing to take on the tobacco companies and sue them on my behalf for breach of contract. In June of 1993, a negotiated severance package with two years' salary continuation and the all-important health coverage for my daughter was executed. The company also agreed to remove other restrictions; I could work for another tobacco company if I chose to do so, for example, and there would be no severance salary offset for early employment.

In September of 1993, the company sued me in a Kentucky court for allegedly violating my severance agreement by telling another employee my annual salary. With the filing of the lawsuit, they immediately interrupted my severance pay and health coverage. However, they offered to drop the lawsuit and reinstate what I had already contracted for if I signed a new, more Draconian secrecy agreement, one that would prevent me from ever discussing with anyone, without B&W's direct legal involvement, anything I knew about the internal workings of the company unless a legal instrument required me to discuss and/or testify to what I knew, learned, or observed while in the employ of the company. This offer coincided with the first of two U.S. Department of Justice civil investigative demands, a kind of federal subpoena, on fire-safe cigarettes, which I received in December of 1993.

I signed the newly extorted agreement; the lawsuit was dropped; and my previously negotiated healthcare and severance package was reinstated, but with the addition of an onerous confidentiality agreement.

At about this time a process began that led ultimately to my breaking ranks publicly with the tobacco industry—the development of a relationship with CBS *60 Minutes* producer Lowell Bergman. Mr. Bergman had received, from an anonymous source, a set of confidential, internal tobacco industry documents belonging to Philip Morris, the world's largest producer of tobacco

products. These documents related to the research and development of a reduced ignition propensity for a traditional cigarette product, which had started in the 1950s and had culminated in the statistically significant consumer product testing of a product with reduced ignition propensity in June of 1986 (before I joined B&W). I served as a technical consultant to CBS *60 Minutes* for the program that dealt with these documents, a program called "Up in Smoke" that aired in April of 1994. The Philip Morris documents described a natural incendiary product that had a reduced fire-generating capacity, tested the same as their leading brand, had no incremental toxicity, and had smoke chemistry similar to that of the leading brand. However, Philip Morris chose not to market the product because there were no regulatory requirements to do so even though a reduced ignition propensity had the potential of saving 1,200 to 1,500 lives attributed to fires started by cigarettes. Philip Morris had named the cigarette "Hamlet"—"to burn or not to burn."

What was personally disconcerting about this *60 Minutes* program was that as a B&W executive, I had sat across from Philip Morris representatives during allowed joint venture meetings of the principal tobacco industry scientists and lawyers and had heard those representatives assert repeatedly that the development of a reduced-ignition-propensity cigarette was an impossibility. They insisted that the responsibility for reducing fires rested with clothing manufacturers, rug manufacturers, and other such manufacturers. In fact, Philip Morris deliberately attempted to undermine and to generate controversy over the efforts of others outside the industry, especially the National Institute of Standards and Technology, while possessing the actual technology to reduce the incendiary nature of a burning cigarette. My knowledge of this company's earlier duplicity bothered me considerably as the *60 Minutes* investigative reporting progressed through its final phases.

In February of 1994, while we were working on the *60 Minutes* program, the commissioner of the FDA, Dr. David Kessler, began the process of establishing regulatory authority over nicotine (and therefore over tobacco products) as an addictive substance. In addition, the U.S. Congress initiated its inquiry into tobacco issues under the leadership of California Congressman Henry Waxman, working with Congressmen Mike Synar and Ron Wyden. As they developed their information-gathering process, they contacted me to see if I was willing to help Congress in its investigation. While I was willing to be of assistance, I informed them that I had a very onerous secrecy agreement and that I could not help unless I was served with a legal instrument, a congressional subpoena.

Because my agreement with B&W was so restrictive and because I needed to protect my family from the loss of severance salary and health benefits, I reported to B&W that I had been contacted by the U.S. Congress regarding

my knowledge of tobacco chemistry, cigarette design, and so forth. What followed changed the course of all future actions and as a practical matter changed my family. My two young daughters were threatened with physical harm if I should cooperate with anyone regarding the internal workings of B&W. I immediately made the connection between my report to B&W about the congressional inquiry and the threats against my daughters. I went to the local office of the Federal Bureau of Investigation. A "trap and trace" was installed on my phone line and two threats made by phone were isolated. From that day forward I never told B&W about my activities or any of my contacts relative to tobacco matters. As a practical matter, it did not matter where the threats originated; they changed our environment permanently.

In April of 1994, the seven chief executive officers of the major U.S. tobacco companies, including my former boss Mr. Sandefur, appeared before the U.S. Congress. Under oath, they stated that nicotine was not addictive and that it was there for taste and that smoking was no more dangerous to your health than eating Twinkies. As that indelible image replayed itself in my mind, I realized that by my silence I was no different from the men on my television screen. I then chose to do something very different with my knowledge about tobacco chemistry, additives, genetically engineered tobacco, impact boosting with ammonia-based additives, smoke chemistry—the keys to understanding tobacco products and the tobacco industry. I began to share my knowledge with the FDA. I did it with the agreement that I would have a completely anonymous relationship. I would travel to the FDA offices in Rockville, Maryland, under assumed names and pass through unmarked entrances. My code name in the FDA was Research, something right out of a James Bond novel. The FDA realized the threat its investigation presented to the tobacco industry.

After I began working with the FDA, I became involved in Philip Morris's ten billion dollar libel suit, filed in March of 1994, against ABC News for broadcasting in the *Day One* newsmagazine the statement that nicotine was addictive and that Philip Morris spiked nicotine in its tobacco products to maintain the delivery of addictive nicotine. As ABC's non-testifying technical expert, I reviewed the highest level of secret internal documents from Philip Morris. The lawsuit was settled in August of 1995, with ABC's unusual apology to Philip Morris, just a month after Walt Disney Co. announced it had struck a $25 billion deal to buy ABC/Capital Cities. Not since NBC apologized to General Motors Corporation for a 1992 program that featured a staged truck explosion had an American television network backed down in such a public way in the face of a corporate lawsuit. It was the first time Big Tobacco had extracted such a denial from a major media outlet. I am sure that the evidence would have ultimately convinced a jury that *Day One* was accu-

rate and that the libel suit was baseless and without merit. This foreshadowed what was to happen just three months later; just as Westinghouse Electric Corporation was clinching a deal to buy CBS, Big Tobacco got *60 Minutes* to back off broadcasting Mike Wallace's interview with me.

It was in the summer of 1995 that I decided I had to share with the American public what I knew about the internal workings of my former employer. A professor of cardiology at the University of California at San Francisco, Dr. Stanton Glantz, contacted me. Dr. Glantz was the recipient of tobacco documents smuggled out of B&W by Merrell Williams, a paralegal assigned to work on coding B&W documents at the same time I was there. These documents are the subject of seven *Journal of the American Medical Association* articles and a book, *The Cigarette Papers*. Dr. Glantz shared these 1950-through-1980s documents with me in the process of writing the manuscripts. The documents mirrored my experiences at B&W from 1989 through 1993 and allowed me to see data I never saw while at B&W. This was the final and culminating step in my journey to an epiphany: I would reveal the truth about the tobacco industry—its disregard for public health and safety, its use of additives to boost nicotine's addictiveness, and its lawyers' obfuscation of the truth and their intimate involvement in science and document destruction. I felt a higher obligation to public health and safety and to the truth than to an onerous agreement that was intended to keep the truth hidden through intimidation and extortion.

On August 5, 1995, I elected to be interviewed by Mike Wallace for a *60 Minutes* program. I needed to set my moral compass back on a true heading. I did the interview with the full cooperation of my family, and they actively participated in the interview. However, I did not do the interview without some caveats: I would maintain custody and control of the taped interview until such time as I had competent legal representation and had my house in order; and CBS would arrange for physical security once the show had aired. I knew full well that I would need a good lawyer, and I wanted to make sure my children were not harmed in any way. The agreement with CBS was memorialized in a written document.

In the early fall of 1995, many things were happening at CBS: Westinghouse had tendered an offer to buy CBS; Lawrence Tisch and his brother Robert were principal owners of CBS via Loews Corporation, which also owns Lorillard Tobacco Company; Lawrence Tisch's son Andrew, the chairman of Lorillard, was among the seven CEOs who had testified in front of Congress in April of 1994 (testimony being investigated for perjury by the U.S. Department of Justice); and, to make things more dicey, B&W and Lorillard were negotiating a $100 million tobacco product acquisition. Most significantly with respect to my situation, the lawyers at CBS were assessing the

airing of my interview with Mike Wallace and the legal principle of "tortious interference." Somehow B&W had learned of the interview and had threatened CBS with a lawsuit for billions in damages based on tortious interference if it aired the interview. Such a suit would reflect negatively on the balance sheet of CBS during the acquisition. As a result, CBS management and its legal department canned the program and thus succumbed to this second intimidation of the free press by the tobacco industry. CBS aired instead a muted edition of the original program.

In October, someone within CBS who had access to the transcript of the interview leaked the complete interview to the New York media. Bedlam hit Louisville when the story hit the streets. I was sued again for theft of trade secrets and violation of my confidentiality agreement, and restrained from discussing tobacco. CBS, through Mr. Bergman, provided us with round-the-clock physical security by former secret service agents. They lived with us, checked and opened the daily mail, started the car in the morning, followed me to the high school where I was teaching chemistry, biology, physical sciences, and Japanese, checked my classroom, escorted my two daughters everywhere they went, and so forth. Ultimately, the school was forced to place a security guard at my classroom door due to the recurrent daily threats. This was not a fun time.

Shortly before this, I fortunately had been afforded access to an excellent attorney from Mississippi by the name of Dickie Scruggs. He offered his legal services to me pro bono, and after meeting him, I accepted his generosity. Mr. Scruggs was affluent in both resources and heart, and he was committed to protecting me in my search for the truth. The timing could not have been better.

In November, I was served my second subpoena by the U.S. Department of Justice regarding fire-safe cigarettes. I also was served by the state of Mississippi for their civil suit against the tobacco industry to recover healthcare costs from decades of treating adult smokers who were sick as a result of becoming addicted to tobacco as children—the first action against the tobacco industry by a state. I traveled to Mississippi after school and stayed at Mr. Scruggs's home so that I would be in a secure environment before the depositions. The attorney general of the state of Mississippi, Mike Moore, was also staying there. Dickie's home had to be swept for electronic eavesdropping devices before we stayed there, and armed Mississippi State Police patrolled it all night. It was not the idyllic welcome to Mississippi I had learned to expect.

The next morning the U.S. Department of Justice deposition went flawlessly, and the deposition in the state's civil action was to follow in the afternoon. However, during the morning deposition, B&W went to two separate courts. It went to the Mississippi Supreme Court, attempting to block the civil

deposition in the afternoon. The Mississippi Supreme Court allowed the deposition to go forward but ordered it "sealed." Concurrently, B&W went to the Kentucky Supreme Court and obtained a contempt order against me should I testify in the afternoon's action.

When I finished the morning deposition, I returned to Mr. Scruggs's home for lunch and a breather, only to be told by Dickie, attorney general Moore, and attorney Ron Motley, whom I had just met the day before, that if I went forward with the civil deposition in the afternoon I would face going to jail for contempt, in Kentucky. Mr. Motley was going to conduct the afternoon's deposition proceedings. They all told me that this was a big decision and that they would stay with me no matter which decision I made. I needed time to think. I did not want to go to jail in Kentucky for telling the truth under oath, for testifying to the same information I had provided CBS voluntarily in August. I wandered the lawn in front of Dickie's home, searching my mind and heart for the right thing to do. After reflecting on the issues, I decided to go forward, for I had already paid the price, and if I did not go forward then, I would most likely never get the opportunity to do it again because B&W would tie me up in court for an eternity. I went forward and have never looked back since that day.

The deposition in the chancery court house was pure pandemonium. The tobacco industry lawyers were as abundant as sand on the beach and adamant in their efforts to use threats and constant verbal interruptions to prevent the proceeding from going forward. This deposition is a document worth reading, if you have not done so. Mr. Motley took charge of the courtroom and succeeded in getting the right information into the record under oath. I think it was the first time the overpowering tobacco industry lawyers found their match.

After the deposition, which was sealed in accordance with the earlier Mississippi Supreme Court order, I returned to Kentucky. Mike Moore and the Department of Justice had arranged to have me met by U.S. Marshals. I did not go to jail that night; I went home and then went to teach school the next day.

January of 1996 was the beginning of the turning point in many parts of this tobacco war. The sealed deposition from Mississippi found its way to the *Wall Street Journal*. Under the threat of a lawsuit by B&W, that paper not only published the full deposition on the front page but also loaded it up on the Internet. The movers and shakers at B&W were beside themselves. Their threat had not worked again! B&W then spent millions on a smear campaign involving private investigators, a publicist, and large law firms. But that did not succeed in discrediting me in the court of public opinion because the *Wall Street Journal* refused to print their story without confirming the validity of the accusations. The local paper in Louisville, on the other hand, published the B&W-orchestrated smear without investigating any of the allegations.

And, to add more fuel to the fire, someone managed to put a live bullet in my mailbox with another threat directed at my daughters.

The month culminated with a divorce notification from my wife of ten years on the exact date of our tenth wedding anniversary. Not much more could happen. It was not what I expected, and it was the greatest disappointment of this whole journey.

B&W's lawsuit against me finally ended on June 20, 1997, when thirty-nine states' attorneys general concluded a $368 billion settlement with the industry. B&W had continuously refused to drop the lawsuit but reluctantly did so at the eleventh hour when the thirty-nine attorneys general threatened to walk out and continue the individual lawsuits in each state. (Even then, it was only when the head of BAT agreed to drop it that the suit stopped.) Since that date, I have been free to speak my mind as to how the industry steals our children at an early age and how the industry knowingly markets a product that kills when used as intended.

CURRENT SITUATION AND A CALL TO ACTION

Today in the U.S.A. we have three purportedly biologically safer cigarette products, one from each of the big three tobacco merchants, Philip Morris, B&W, and R.J. Reynolds. There is one fire-safe cigarette, from Philip Morris. The industry is spending more for advertising and promotion than it has ever spent, now a massive $8.24 billion a year. As always, the target is our children, for if tobacco does not get them before the age of nineteen, its likelihood of getting them at all is slim. So the industry uses sophisticated science to produce a toxic, addictive product and couples that science with sophisticated, multibillion dollar advertising and promotions designed to capture our youth and lure them into an addiction that robs them of their health in their productive adult years.

The industry recognizes that the tide is changing in North America, which has caused a marketing shift to the rest of the world. This industry needs to be destabilized through higher prices and restrictions on advertising coupled with effective counter-advertising aimed at setting the record straight. Smoking is not glamorous, sexy, or cool, and it is not the appropriate choice for weight-conscious female teens. Sporting events and tobacco are completely incompatible. Every cigarette smoked takes eleven minutes off the smoker's life, and the resulting disabilities and forms of death are horrible. A great deal of my focus these days is on getting the message out to our youth.

I want to use this opportunity today to ask you for some help in four areas. First, a few minutes ago I mentioned the $368 billion settlement reached on June 20, 1997. That settlement never became effective because Congress

never approved it, and in November of 1998 a new settlement in the amount of $246 billion was reached. Funds from that settlement have been paid out or made available to the states and the District of Columbia—and I have to tell you that only five states in the entire country have used the money in what I view as the right way. (The five states are Arizona, California, Massachusetts, Minnesota, and Mississippi.) I view that money as a fund for our children, the very people targeted by the tobacco industry. The settlement fund should be used to reach our young people and arm them with knowledge so that the tobacco industry cannot dupe them into addiction.

Mississippi's program is an excellent example. Spending twenty-two million dollars in a year, Mississippi achieved an eighteen percent reduction in tobacco use among middle school and high school children. What have the states other than the five I mentioned done with the settlement funds? They either haven't tapped into them or have used them for other projects. I enlist your support in asking your state governments not to use the tobacco settlement for roads, bridges, jails, or tax rebates but instead to invest at least twenty percent of it in programs to keep our children tobacco free. This will pay tremendous dividends in increasing their future productivity and decreasing future healthcare costs; each dollar spent on prevention saves three dollars in later excess healthcare costs. Beyond the prevention programs, at least a major part of the settlement funds not invested in our children should go toward healthcare expenses of current smokers; we spend more than ninety billion dollars a year treating sick smokers in this country.

There is a second area where you can help. Early in 2000 the United States Supreme Court found that the FDA had "exhaustively documented" that tobacco products are dangerous and cause great pain and suffering, but the FDA could not regulate them because Congress had not given the FDA the authority to do so.[1] The Court all but begged Congress to give the FDA that authority. Congress has not yet responded. I ask that each of you contact your representatives in the House and the Senate to tell them that tobacco should be regulated.

Third, as I have emphasized, this is an enormous and critical problem for our youth, especially for girls and those of color. I urge all of you to become involved in your local communities with whatever organizations are working to reach our children on this vital issue and organizations that are working for smoke-free environments. International organizations that work to educate children overseas deserve our support too.

Finally, my experiences impressed upon me the need for an injection of a therapeutic dose of ethics and morals into all of the professions, especially

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[1]Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

business and law. The members of this organization, as leaders in the legal profession who undoubtedly also have significant contacts with big business, could be instrumental in administering this injection.

In all of these areas, please do not hold back out of the all-too-common feeling that what you do will not really matter. As I have learned (the hard way), each one of us can make a difference.

TWENTY-FOUR YEARS OF SPOUSAL ABUSE— VICTIM ADVOCATE, PROSECUTOR, PROFESSOR†

Sarah M. Buel*

I am here to talk about domestic violence, which I know about from many perspectives. A hero of mine, Lieutenant Mark Wynn of the Nashville police department, refuses to call this problem domestic violence; he calls it domestic terrorism. He has been part of S.W.A.T. teams and has gone all over the world to fight international terrorism, but he says that the worst, the most vicious and insidious terrorism he has ever seen is perpetrated within family relationships and that we in the legal community are in an optimal position to do something about it. Many domestic violence victims turn to the legal system for help, too often with poor results. The primary reason for that is that we do not have the training to know what to do about it; we didn't get such training in law school, and we generally don't get it in continuing legal education programs. Part of my vision is that we in the legal community will take some responsibility for integrating these issues into our practices, or pro bono work, or bar association work. I'll talk a little bit more about that later.

My Long Journey into Law

I knew that I wanted to be a lawyer when I was about twelve. I had watched my mother raising seven children by herself, really struggling, working two jobs, one as a telephone operator and also cleaning houses. Because my mother is truly the sweetest, kindest person you could ever meet, people were constantly taking advantage of her, and it made me crazy. She had a hard time speaking up and sticking up for herself, and I decided that I wanted to learn how to speak up for people who couldn't do that for themselves. The only model I saw was Perry Mason, so he became my hero. But this was the late 1950s, and my grandmother told me that women couldn't be lawyers. She said, "Women can be Della Street—you can be the secretary—but you can't be Perry." I thought that was all right; Della got in on a lot of the action.

Years later, when it became clear that I would have to leave my marriage after trying *everything* to keep it together, I tried to get a job as a legal sec-

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*Clinical Professor and Co-Director, Domestic Violence Clinic, University of Texas School of Law.

retary, but nobody would hire me because my typing was so bad. One reason was this: When I was in the seventh grade, the school authorities told me I was not smart enough to be in the college track, so they put me in the secretarial track. (I am sure they looked at my family and decided that nobody in that family of dropouts and alcoholics had any hope of achieving anything, so they should not use one of those college slots for me.) I was so demoralized that I could not do well in the secretarial studies. I have to tell you that one of the first things I did when I graduated with honors from Harvard Law School in 1990 was to send my junior high school a copy of my transcript, and I told them not to judge twelve-year-old children and tell them what they could not do. I had realized that their negative assessment when I was in seventh grade was part of why it took me until I was thirty-four years old to get that script out of my mind and feel able to tackle law school. It is interesting how often an early experience such as mine resurfaces, and the adult has to combat the notion that he or she is not smart enough to do something, a pervasive sense that "somebody else knows more," instead of relying on one's own inner strength. Helping others overcome early experiences and find their inner strengths is a gift we can give others when we're willing to share our own stories.

Fortunately for me, at the time of my divorce, there was still a safety net of welfare. I am not proud of the fact that I had to go on welfare, but there were simply no other options. The scariest moments for me were not those when I had a gun to my head; they were the times when I got to the third night in a row of feeding the kids macaroni and ketchup and realized we were out of macaroni, and even if I applied for emergency food stamps, I could not get them for three days. At those times, I realized I was capable of committing a crime to feed my children.

I was desperate, but (again fortunately) from growing up in New York City and being in those gross subways in the summer, I realized I could never be a prostitute because I just would not be able to handle strange people touching me; and from having two older step-brothers who did time for drug offenses, I was determined not to get into that venture. The one safe thing I knew I could do, because I had done it with my mother, was to clean houses. You see, when you are trying to figure out how to feed your kids and you do not know what the resources in your community are and you cannot even attempt to collect child support from somebody who makes it clear that you will pay with your life if you pursue that option, you have to consider all of the possibilities and patch together whatever you can.

It was my still further good fortune that, in 1977, there existed the CETA program, the Comprehensive Employment and Training Act. And lest you think that some of the Great Society programs went for nought, I am an ex-

ample of how useful they could be. The CETA program got me off welfare, got me a job with legal aid, and paid my salary for a year with the agreement that legal aid would then hire me for a year after that. That turned out to be one of the greatest gifts I have ever received.

I give legal aid a lot of credit. When they hired me as a victim advocate, all I had was a high school diploma. Many other people with far more impressive credentials applied for the job. But I made the argument that I had been a victim; no matter what qualifications the other applicants had, nobody would understand the clients or fight for them as much as I would. And the people at legal aid were willing to give me that chance.

From them I learned that you had to have a college degree before you could go to law school. That was a devastating blow to me at the time. Somehow, I also had the misimpression that you had to know Latin in order to go to law school, so I got a lot of Latin books and discovered that Latin was hard to learn. I thought, "I'm in court a fair amount and I see many attorneys who just don't seem that bright. How did they learn this?" I suppose I shouldn't say that, but I certainly thought it. I must also say, though, that having known so many less-than-bright attorneys was a great confidence builder several years later when I was studying for the bar exam. I had to wonder how some of the attorneys had made it through kindergarten, never mind law school and the bar exam. I knew that if they had done it, I could do it. It did kind of motivate me.

Happily, I found out that there was night school for college, so I went seven years at night. When I was near the end and about to graduate, my boss said, "I'll write you a letter of recommendation. Where would you like to go?" I said, "I guess I'd like to go to Harvard. I hear they have a lot of money." He said, "Now, Sarah, that's not how they pick who gets to go. You are not from the right family, you were a juvenile delinquent, you got kicked out of eight different high schools, you've been on welfare, you want to do this domestic violence stuff, you're a single mom. I have to be honest with you; Harvard will not even look at your application." And I thought, "You're underestimating me a little bit here because there's one thing I know how to do: I know how to pray." And I did pray and focused clearly on this goal. At one point I started driving by Harvard Law School, where I would roll down the window and yell as loudly as I could, "You're going to let me in." Then I got a little braver and started walking around inside. I noticed that they had a lot of different colored lockers and decided that I wanted an orange locker (because my son loved the Syracuse Orangemen at the time). The most amazing thing happened: They let me in and gave me a full scholarship. But when they assigned me an orange locker, I realized I needed to be more careful about what I prayed for or envisioned, because I just might get it.

Then I became terrified and thought, "I must be the dumbest person in this whole school. They're going to figure out that they let in the wrong Sarah Buel and kick me out, so I'd better just lie low." But the court kept calling, and the shelter, and the prosecutor's office, asking me to come back for just one more victim. So I decided to put an ad in the student newspaper and to start an advocacy project even if only two or three other people wanted to join me. Seventy-eight students showed up for the first meeting; by the end of the year we had two hundred fifteen students—thirty per cent of them men, I am proud to say. It is still the largest student organization at Harvard Law School, and it spread to all five of the other law schools in the greater Boston area and to two of the medical schools, Boston University School of Medicine and Harvard Medical School.

At the two medical schools, we get to address every single first-year student and all the faculty in the fall and then return in the spring to address all the third-year medical students before they go out on their clinical rotations. My job is two-fold with them: first, to scare them about liability and talk about meeting the standard of care to avoid being sued; second, to give them clear parameters of what their intervention should be. (We don't want to tell them we will sue them if they fail to do the right things, without telling them the right things to do.) Intervention involves universal screening and a number of other steps that are pretty simple once we outline them. If any of you are counsel to physicians or hospitals, we can provide you with techniques to help your clients protect themselves as well as do a much better job in assisting their patients.

We first got into the medical schools and hospitals in the greater Boston area because of an *L.A. Law* episode. In the episode a battered woman kept going to her physician, but her physician and her husband were good buddies, so the physician kept just bandaging her up and sending her home. He never gave her any resource information or safety planning. Eventually the husband murdered the wife, and her family sued the doctor and also the hospital, as the deep pocket. Fortunately, the victim's family won. The next morning lawyers from several of Boston's largest law firms, representing a number of the hospitals in the area, called to ask, "Could you teach us something about domestic violence and what we ought to be doing?" This was one time I was thankful for the power of Hollywood; we had been begging for ages to get into the hospitals and medical schools. For some people the ethical considerations are enough to spur them to action when they see the gut-wrenching battered patients, but others need to have the specter of liability hanging over their heads before they pay attention.

I'm probably one of the few people who loved law school. If my poor classmates complained about how much homework there was, I responded,

"Then leave. Do you know how many people want your spot, how incredibly fortunate you are to be here? I could kiss the floor every single day that I'm here. I don't care if it's the middle of exams, I don't care what class they're making me take, this is a gift. This means that for the rest of our lives, we can pretty much do what we want. This is the opening of options, or at least the illusion of options, which is also a great gift." It amazes me what people on the outside think about Harvard Law School. People who couldn't have been bothered with anything I had to say before I went to Harvard suddenly thought I was brilliant and that what I was saying must be deep and intellectual. Once you master some of the lingo, then you're really in, and that's part of what the school teaches—how to talk the language. An incredible change in my life has been being able to use that law degree as a vehicle to get people to listen and to help them open their minds.

So I had a wonderful time in law school. We started the battered women's advocacy project, we started a women in prison project, we started a children and family rights project, I got to do the legal aid bureau twenty hours a week and a clinical placement in the prosecutor's office, and I worked with battered women in prison. You might be thinking that there is a little bit of a conflict in there, but I didn't do it all at the same time. I believe that students need well-rounded experiences as they go through law school. I hope that many of you will be willing to serve as faculty or mentors or at least as occasional guides when students are learning how to take those advocacy roles. We need experienced trial attorneys assisting in giving students input and also providing realistic feedback. Some of the attorneys who sat in on my program, I must say, were not very helpful. One attorney told me I was not going to be a good trial attorney because I didn't know how to yell at the witnesses, and I needed to learn to act much more aggressive. I tried to explain to him that that would be disingenuous and probably would come across as anger, which might alienate the jury, but he would not listen. The best teachers or mentors are those who recognize that we each have our own style and should approach trials in a way that fits that individual style.

I need to tell you I almost didn't get to go to law school. At the last minute Harvard said they did not have enough money. Then Eileen MacNamara, a reporter at the *Boston Globe,* with whom I had been doing a lot of work on court reform, insisted on paying my rent for my first year of law school. I said, "Eileen, I can't let you do that. You're a new mom, I don't think your husband's going to be excited about this." She said, "I have to do it, and I'll tell you why. I grew up dirt poor. My parents had come over on a boat from Ireland and hadn't gone past the eighth grade. When I told them I wanted to be a journalist, they laughed at me. They said, 'We're not the people who go to college. There's no way you can go.' But I had a high school English

teacher who wouldn't let go of me, and when she found out I wanted to be a journalist, she kept pushing me and made me apply to Columbia. I got in, but at the last minute they didn't have enough money, so I thought I was not going to be able to go. Then they called and said they had found the money. I didn't learn until I was graduating that my high school English teacher had paid the hundred dollars a month difference all four years—sometimes taking out loans to do it. When I tried to pay her back, she wouldn't let me. She said, 'No, you do this for somebody else, we'll just keep passing it on.' I feel bad; it's been five or six years, and I haven't done this for anybody else. I've got to pass it along." So she paid my rent those first nine months of law school; I stayed in law school and became a prosecutor in Boston when I finished.

EXPERIENCES SINCE LAW SCHOOL

After I got out of law school, I continued to work on the cases of eight battered women who were in prison for defending their lives. We had carefully analyzed their cases while I was in law school and decided that they clearly had acted in self-defense and should not be in prison. None of them had prior records, and they were doing time because of ineffective assistance of counsel. They were all poor, half of them women of color, and we knew we could do something about it, especially once we had our law degrees. We made a documentary, *Defending Our Lives,* which ultimately won a 1992 Academy Award for best short documentary. That was really exciting. But when we were working on the documentary, my boss at the time did not think that was what a prosecutor ought to be doing. He said, "Your job is to put people in prison, not try to get them out." I tried to explain to him that a prosecutor's job is to insure that justice is served, not just to put people in jail; and justice is not served by jailing those who have been betrayed by the criminal justice system at every turn until they had to take matters into their own hands and defend their lives. I also tried to explain that I answer to a higher calling, that some of us believe that it is not who pays our salary that we have to answer to and make peace with at the end of the day. It worked for a while to say it was easier to get his forgiveness than his permission, but eventually that one didn't go over so well.

On the same day that the parole board told us they would release two of these women if they had jobs and a place to live, my boss told me I no longer had a job because I had continued to work on the documentary. I realized God had a reason for getting me fired. The women that the parole board was willing to release had no money or family with any money, so the women thought they were going to have to stay in prison; but when I got fired, I got my $20,000 retirement account, and I knew that I had to give it to the shelter to hire the women as advocates and set them up in an apartment. People kept

telling me, "You can't give away every dime you have in the world. That's as much as you make in a year." They had missed the fact that one of the greatest joys in life is giving away your money, and the way it works is that the more you give away, the more comes to you. I cannot believe what they pay me to teach at the University of Texas, and I love what I'm doing. I have a great time. I now have about thirteen young women that I'm putting through school, helping them in various ways. My husband thought that once we paid off my law school loans, we were going to be sitting pretty; but my feeling is that that's just more money we can use to help somebody else get through school, get off welfare, change their life. It is so exciting. There is nothing else I could spend that money on that would give me as much joy as watching lives transformed—not only the lives of these victims but their children as well. And for many of them it doesn't take much. They might need $120 for school books, or $60 a month to pay for childcare so they can go to night school. We can fill in that void in their lives and there isn't anybody else who can do it. They can't go to welfare and get just enough for books, and these people don't have families who are able to help, as so many of us do. We are so extraordinarily blessed.

I never thought I would leave trial practice, but the University of Texas Law School offered to let me start a domestic violence clinic, and I figured that would allow me to increase exponentially the numbers of victims helped because each student could handle several cases. We also would be teaching the students about these issues, and they would take that knowledge with them when they went out into the community as practitioners and judges and legislators. This would spread the knowledge so that we get out of that position where victims coming into the court system are treated poorly because of our ignorance.

Recently I've been working with an incredible family, a young woman who is in her early thirties and has four children of her own; and her sixteen-year-old daughter just had a baby. We were representing the woman in getting a protective order and figuring out how to make her safe when her landlord, who is elderly, decided he needed to retire and had to sell the house she was renting. He said he would be willing to sell it to her for $60,000 even though it was worth about $80,000, because he really liked the family and understood that she was struggling. We tried to find a mortgage company that would let me cosign, but none of them would do that; I guess you have to live in the house or be a family member to cosign. The only thing we could come up with was a mortgage company that would lend her $35,000. I racked my brain to figure out how we could get the remaining $25,000, but I could not think of a way. So I prayed and prayed about it, and the very next morning I received a credit card with three blank checks and an offer saying I had such good

credit that I could write a check up to $25,000. Clearly, that was what I was meant to do. My husband was in Phoenix on business at the time, so I called him to say, "I just have to do this." He said, "No, there must be something else we can do. You can't put $25,000 on a credit card." But I answered, "Look, it's only 1.9 percent interest until February." This was in October. He responded, "Yeah, but what are we going to do in February when it goes to 18.9?" "Something else will happen. We'll just keep praying that the right thing will happen. We get these offers all the time; I'll transfer it to other credit cards, and we can keep doing this." After a few heated discussions, I ended up writing that check. The landlord gave us a deadline, and I made out the check to Alamo Title. My husband and I did go into couples counseling because this has been very stressful for him. I now have the $25,000 divided between two credit cards, and I am trying to pay them off; but I am also trying to interest some bar association in "adopting" this woman. She wants to be a lawyer more than anything in the world, so I figured we could start some kind of "adopt a future lawyer" program and help her.

Some people have a hard time understanding the concept that what you give away isn't just what's extra or easy for you, it is what the other person needs. That is something I learned from my mother, who had nothing her whole life. She is a Holocaust survivor, an Austrian Jew, and my father is an Italian Catholic. There was a big war when they got married; neither family was happy. But that is why I bring food to every meeting, and why I'm good with judges and juries. I use guilt well. It's sometimes very helpful to fall back on your heritage and the techniques that shaped your childhood.

I am explaining to you my concept of giving because I want us to broaden our notion of what it means to be a good lawyer, of what we mean when we say, "I'm really proud to be a lawyer, I'm proud to be a trial attorney." I am proud and happy to have that knowledge because it enables me to reach out into my community and draw out the people who can really help us. My colleagues at the law school probably dread my approach half the time because I'm always asking them for small donations. "Do you have just ten bucks? This little kid's father smashed his bike before he left home, and we just have to get him a new bike. That's the only thing he wants." They are so well trained now that they will come to me if I have not gone to them. "Sarah, you haven't asked for any money for a while. Is there anything you need? There must be something somebody needs and we can make sure that they get it."

INITIATIVES IN DOMESTIC VIOLENCE LAW

When I talk about institutionalizing the ethical practice of domestic violence law, I need to run quickly through four areas. The first is law schools.

We need to look carefully at how we can integrate domestic violence into the curricula. We can start with the current curricula. For example, I teach first-year torts, and my students have the pleasure of studying domestic violence cases as soon as we start the semester. What could be a more classic intentional tort than a domestic violence assault? A number of my students say, "We've talked to our friends, and they're not studying this in their torts class." I respond that that is their loss because on the Texas bar exam in July of 1998, one of only six essay questions was on domestic violence. I understand that some of the bar review courses were sued because students felt they were not adequately prepared; at no time in their law school career or during the bar preparation course did they hear one word about domestic violence. I was delighted; that was exactly what it took to get students interested. After that, I got call after call from students at other schools asking if they could visit for a semester and take my class. We couldn't allow that because we were turning away too many of our own students—law students and students from the school of social work. (How can the school of social work *not* have a class on domestic violence? The social work students are willing to come over and study the legal aspects of it, just to learn something.)

The torts course is not the only appropriate place to teach about domestic violence; there are aspects relevant to corporate law and labor law classes. (I also note that lawyers can educate their clients in this area. The Mintz, Levin law firm in Boston has been a wonderful model; through their labor department, they teach their clients, both big and small employers, about their legal obligations and their potential liability if they fail to intervene appropriately with victims or offenders in the workplace.) We also want to make sure that the law schools offer specialized courses. I have taught a course on domestic violence and the law since 1991, beginning at Harvard Law School, and every semester it is so oversubscribed that I have to cut off enrollment. The first time I taught the class, the students were all women. I told them they had to bring their boyfriends, brothers, fathers, any men they could round up, because the men needed to understand that we were not there bashing men; rather, we were trying to figure out how to stop family violence, and we needed the involvement of men to do that. We needed their voices, their participation, their visibility in the community fighting against domestic violence. Every semester since then, a third to half the students in each class have been men, and they have helped us make some real changes in the community.

Another aspect of my domestic violence course that I consider important is that I don't give an exam; the students have to write a paper or take on a project in the community, in lieu of an exam. The projects done by the students have been extraordinary, a real testament to their ability to rise to the

occasion. Two students are currently working with five business school students in developing a social entrepreneurship program for a local shelter that is having grave financial difficulties, as are many shelters across the country. The students are going to set up a for-profit business for the shelter. We're looking at a catering company, a house cleaning company, a number of different options that the business school students clearly know all about; and our law students are investigating all of the tax implications and other issues that arise when you have a for-profit company attached to a nonprofit entity. It's a wonderful partnership, and it is fueling enormous interest in our community.

Some students have worked on briefs to get women out of prison who were wrongly jailed for defending themselves. One of our third-year students who is also on the law review wrote an extraordinary brief for a battered woman who had been sentenced to ninety-nine years in prison for failing to protect her daughter. She was away at work when her husband killed their five-year-old daughter, and the court said that she was somehow responsible for failing to protect her daughter. The killer got ninety-nine years, and so did the mother! After serving fourteen years she got out in January because of our student's extraordinary brief. And if you know anything about Texas, you know how hard it is to get our board of pardons and parole to let anybody out for anything, so the student clearly did a remarkable job in articulating the injustice in that case.

Another extremely important role for law schools to play is in the development of clinics. Through the clinics, students are able to fully represent abuse victims. This transforms the students' lives, but probably more importantly, it transforms the lives of the victims in the community, many of whom have no other options.

One of the actions I would ask of you is that you write or call your alma maters and tell them that you're not going to write any more large checks until they set up some of these courses and clinics at your law schools. As I mentioned, it helps tremendously when bar exams include questions on domestic violence, so if you have any contacts within your bar examiners' offices, we would appreciate your influencing them in any way that's ethical to put such questions on the exams.

Another project initiated by students in my course leads me into a second institution that needs to become more active in domestic violence issues: the state bars. We developed a partnership with our state bar's appellate section to work on cases of abuse victims who are in prison for defending their lives. Most of those appellate attorneys are in our larger law firms, and they say this is the most exciting work they get to do; it gets them fired up, and they want to keep working on these cases. They cannot believe the stories of the victims

who have ended up in prison largely because of the arrogance or ignorance of their attorneys. Because attorneys are the problem and the cause of their incarceration, bar associations and attorneys ought to be about the business of getting them freed.

Also, many of our states now have advanced certification programs, and domestic violence programs should be included in those. There are implications in virtually every area of practice. I have already mentioned corporate and labor law. There certainly also are mediation and bankruptcy issues, and innocent spouse issues in tax law, to give just a few more examples. I have had the honor of serving on the American Bar Association's Commission on Domestic Violence since its inception in 1995, and we have put out a manual, a handbook for lawyers, on the impact of domestic violence on your practice. It walks through about fifty different areas of practice and outlines the relevant applications in each area.

A third player that needs to be involved here is any institution that conducts continuing legal education courses. As I have indicated, domestic violence is relevant to many areas of practice, and most of us did not get any instruction on domestic violence in law school. It is vital that CLE courses begin to get this information to practicing lawyers.

Finally, attorneys can be especially effective participants in community education. For example, in Travis County, we thought we were doing a good job for the children affected by domestic violence. (Many children get hurt and even murdered in connection with domestic violence.). We had a children's advocacy center, and we had counseling for them at the shelter. But then we went out into our community, as lawyers and judges, and asked the children what else we could and should be doing. We learned that they needed help with safety in their own homes. We responded to that need in several ways. In one project, through the ABA and working with our school of social work, we developed kits (in bunny bags) to teach children how to be safe in their homes. Each kit includes a coloring book that essentially walks children through a safety plan.

Education of police officers is another vital task we can undertake. Officers need to know not only how to handle the adults involved but also how to reach and help any children on the premises. I give every police officer that I work with my home telephone number. That might seem insane, but I've done it for twenty-four years, and they've never used it inappropriately—and I want them to know that they have someone to call if they are facing a domestic violence situation at four in the morning and they're not sure what they ought to be doing.

One officer called me and said, "Sarah, I went on this case and it changed my life. When we got to the house, we had to call for an ambulance because

the woman had been stabbed and was out cold. We secured the crime scene and got mom out to the hospital. But you trained us to go look for kids and make sure that there aren't any left behind in the house, just as firefighters do. We heard some muffled crying from a back bedroom so we went back to the closet and did just as you told us to do. I knocked on the door and said, 'I'm an officer, I'm here to protect you. I'm going to count to five, and then I'll open the door.' When I opened the door, a little six-year-old boy had a loaded .357 trained on me. He said, 'If you were my daddy, I would have shot you.' He then said, 'When the fighting starts, we come in here where it's safe.' He had with him his four-year-old sister who couldn't stop crying, and their six-week-old baby sister. That baby never cried and never slept the entire four hours I was with them at the home and the hospital. The nurses said that's called hyper-vigilance, but how do they develop that at six weeks old? What really broke my heart is that when we got to the hospital, this little boy couldn't stop being the parent. He followed the nurses around, asking for cookies for his four-year-old sister and insisting that they give him the baby's bottle because he was sure the nurses wouldn't know how to do it right. 'You have to test drops on your wrist to make sure it's not too hot.' When the nurses tried to get him to go to bed at two in the morning, he said, 'No, you have to take me to my mother because when she gets beat up real bad like this, she doesn't wake up for a long time and I have to help her.' How does it come to this, that our little children have taken on the role of parenting?"

We have all kinds of brochures on various issues I have discussed here, so if you want more information about any of this, please feel free to contact me. I hope you are so fired up that you can't wait to get home and talk to your local bar association and your law school, and do all you can to make sure this becomes an issue we are all addressing. And I hope we remember the words of one of my favorite singers, Patti LaBelle: "When you've been blessed, pass it on."

HOW TO CHOOSE AND MANAGE LITIGATORS—NOT!†

Myron J. Bromberg*

Much has been written on how outside trial lawyers should behave when working with inside counsel, lawyers employed by the company embroiled in litigation. However, little has been said about the other side of the coin—the hiring of outside trial counsel by the corporation's legal department and how best to work with outside counsel.

Choosing a lawyer to represent a company in litigation is a highly non-scientific endeavor. Even after forty-odd years at the trial bar, I can offer little novel advice as to how best to make the choice. Searches to determine qualifications, reputation, and the specific qualities that make a trial lawyer the right one for a particular task are traditionally made by considering trial lawyers who have represented the client in the past, contacting others who may have employed such individuals for similar types of litigation, reviewing published articles and reported cases, and consulting the rosters of selective professional organizations. A personal interview is certainly helpful.

It is, however, much easier to provide a list of the opposite sort—methods that greatly increase the chances of making the wrong choice. In this article I shall attempt to provide such a list, as well as a list of errors commonly committed by in-house counsel and others hiring trial lawyers in directing and managing litigation once outside counsel is chosen. The commentary below is directed to those inside legal departments that make the litigation management decisions. I should say at the outset, of course, that no client of my firm has ever committed any of the sins enumerated hereafter.

How Not To Choose Outside Counsel

1. Get a "Big" Firm.

There are excellent litigators in all sizes of law firms—small, medium, and large—as well as among solo practitioners. Nonetheless, some inside

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*Porzio, Bromberg & Newman, Morristown, New Jersey, Fellow and former President, International Society of Barristers. The original printing of this article carried the following note: "Mr. Bromberg has hired and managed other lawyers as national coordinating counsel and has been 'managed' in numerous other litigations."

lawyers, many who have come out of large, big city firms, feel that large size assures quality or success. It most assuredly does not. Although some complex litigation requires that several lawyers be assigned to a case, most firms doing litigation have, or can and will hire, sufficient staff to properly handle the case.

The fact that a large firm has five strong litigating partners does not mean that the five will work on your case. In fact, this scenario is highly unlikely. Forty litigation associates in a firm is no assurance that more than one or two will be permitted to work on the matter you give the firm. Although you should be comfortable that adequate staffing will be assigned to your matter, the mere fact of firm size is a poor criterion for choosing outside counsel.

2. They Did a Fine Job for Us on a Real Estate Closing.

The fact that a firm has displayed special abilities in one field does not mean that it is the right firm to handle a different type of matter. A lawyer who does a great job in trying an antitrust matter may lack the skills needed for a product liability case. The fields of courtroom battle are strewn with the bodies of fine litigators who ventured into areas that were foreign to them.

This is not to say that learning new substantive law is beyond the ability of most good legal minds, but specific skills and techniques are important in many types of trials. Hiring a "silk stocking" firm to handle a "banana peel" matter—or vice versa—can be disastrous. You must determine the litigator's experience in the field.

A lawyer who has tried all of his or her cases before a judge alone may be wholly unequipped to deal with the demands of a jury trial. Likewise, the lawyer who plays well in Chicago or New York may be totally out of his or her element in Pocatello or Tuscaloosa. I always remember the advice a Charleston, South Carolina, lawyer gave me when I asked if he thought I would be well received in rural Barnwell in that state. He replied, "Mike (pronounced Mock), even ah get local counsel when ah go to Barnwell!"

3. He Was a Great Guy at Groton.

The "Old School Tie" may be important when considering applicants for your social club, but it's a highly dangerous criterion for choosing trial counsel. The mere fact that a lawyer was president of your high school fraternity, or consistently won all chug-a-lug contests at college, is of little assurance that he will handle your lawsuit with equal ability or style. That is not to say that such relationships do not make dealings more comfortable; but they shouldn't be a primary reason for hiring a particular lawyer.

4. His Hourly Rates Are So Reasonable!

My mother, a woman of infinite wisdom, often said, "Cheap is expensive."

Few people look for the cheapest cardiac surgeon to perform their open heart surgery. A similar approach is appropriate when picking the person who will handle an important lawsuit. Don't for a moment believe that "lawyers are fungible"—and certainly don't believe it of trial lawyers.

There usually is a correlation between quality representation and expense. Trial lawyers with a track record of success are able to charge more for their services, while the bargain basement lawyers often have unimpressive records in the courtroom.

Further, the bottom line of the bill reflects both the rate and the hours. The time spent on a matter is the result of a great number of factors, including the speed at which lawyers work, time recording practices, which lawyer performs a task, and, perhaps most importantly, the lawyer's efficiency and ingenuity.

5. He Was Terrific in the Beauty Contest.

Considering and interviewing a few lawyers and firms before choosing the one for your case is not only reasonable, it is wise.

Some believe that a smooth, glossy presentation by a law firm will somehow assure the prospective client that this is the firm most capable of handling the case. These staged shows, complete with slides, graphics, videotapes of courtroom performance, and other modern marketing tools, divert attention from the basic question of just how well the lawyer will be able to handle this particular lawsuit.

Firms that put together such shows tell you what you want to hear. The lawyers sent to perform are sometimes the best looking, most persuasive salesmen, but not the best lawyers. Other firms send the best lawyers, who may not be especially good salesmen. Which type are you more likely to choose? Beauty contests are best left to Atlantic City!

6. I Don't Know Much About the Lawyer, But It's a Fine Firm.

Hire the lawyer, not the firm! Firms don't try cases, lawyers do. No matter how impressive the firm's record, it may assign one of its second-rank attorneys to your matter.

7. But They're Not in New York (or Los Angeles, or Chicago).

Not all of the best lawyers in the country practice in big cities. In fact, in my experience, a great number of them don't! If the best person for your case is in Tallahassee or Topeka, hire her.

(MIS)MANAGEMENT OF LITIGATION ASSIGNED TO OUTSIDE COUNSEL

Even if you (the client's legal department) choose the right lawyer to represent you, you can create serious obstacles to reaching your desired result by making his or her task more difficult, or even impossible. The following is a partial list of techniques helpful in achieving mismanagement.

1. Micromanage.

Although inside counsel have an important role to play in litigation referred to outside attorneys, that role is not to micromanage the litigation. In fact, if it is necessary to do this, you have chosen the wrong trial lawyer. Decisions as to order and type of discovery, who signs interrogatories, which witnesses should be offered on behalf of the client company, which lawyer working on the case should handle a particular task, and how the trial should be conducted require years of experience on the battle line. To hire an experienced, high-priced lawyer to represent you and then substitute your decisions for his or hers is counterproductive. The legal department has, of course, the right to consult and offer input on all of these subjects, and must assure that positions taken in the litigation are consistent with corporate positions in other litigation and with corporate policy. However, retained counsel should ordinarily have the responsibility to make the final decision, subject to such consultation.

There is nothing more chilling for a first-class trial lawyer than to have inside counsel announce, "I'm a hands-on person." This invariably presages a poor relationship. Only one person can steer a ship, cook a broth, or direct the defense of a lawsuit. Of course, that person may need some help and advice as to cooking the broth or plotting the course (or understanding clearly the client's overall goals), but cook or plot it he must.

Likewise, it is a serious error for inside counsel to overrule the trial lawyer in regard to relationships with adverse counsel or with the court. A "direction" to outside counsel to seek Rule 11 sanctions in a situation where success is unlikely, enmity will be created, and the court annoyed is, at best, foolish. One would hope that you have hired a trial lawyer who knows the territory, knows the judge, and knows his adversary. To preempt his or her judgment in this area is reckless.

The choice of company representatives to sign answers to interrogatories, appear as "designated" witnesses at depositions, or testify at trial is another area where consultation, but not domination, is appropriate for inside counsel. What surer way to create problems than to make the wrong choices? The same applies to the choice of expert witnesses. Again, these choices should ultimately be made by the lawyer who will be trying the case, the person who will be on the firing line at all stages of the litigation.

2. Create a Wall Between Outside Counsel and Company Personnel.

It is often appropriate to ask outside counsel to arrange all contacts with the client's employees through inside counsel, in order to avoid undue disturbance of daily operations. If this is your company's policy, you must act promptly and effectively in setting up the contacts that your outside lawyer requests. Far too often, a requirement that all contacts be through the legal department becomes a serious hindrance to the trial lawyer's ability to garner facts and make judgments, due to inside counsel's failure to promptly facilitate contacts. Inside attorneys are well advised to give trial counsel comfortable access to company personnel. It is also wise to make sure that employees understand that the person meeting with them is a friend, and that a high level of cooperation and candor is appropriate.

In product liability litigation, it is not unusual for the "creators" of the product to feel that anyone raising questions about the result of their genius is subversive. Such folks don't differentiate between plaintiffs' lawyers and lawyers representing their own employer. Inside lawyers have a difficult, but important, role to play in countering this attitude and reassuring the employee that the information being requested will be used for the good of the company in its litigation.

3. Don't Respond to Phone Calls or Letters from Outside Counsel.

The most common complaint clients have with lawyers is their failure to return phone calls. Every seminar presented for lawyers on how to improve relations with clients headlines this fact. Unfortunately, it is not only lawyers in private practice that suffer from this fault. There is nothing more frustrating for outside counsel than an inability to obtain a reply from the legal department as to facts, discovery, or settlement authority.

The in-house counsel who is "out-of-pocket" due to attendance at a trial in Omaha, illness, vacation, or otherwise, and fails to advise outside counsel of his or her unavailability and to make arrangements for a knowledgeable alternative contact, is just as maddening as the outside counsel who does the same.

4. Insist on Meaningless Changes in Writing Style.

The relationship between inside and outside counsel is not improved by either proving his or her superiority as a grammar prig.

Many lawyers with large firms have considerable (and sometimes oppressive) training in legal writing before "going inside." Unfortunately, that often leads to insistence on changes in briefs and the like that are of no significance in advancing the client's cause. These minor stylistic revisions drive outside counsel daffy, especially when demanded at 4:00 PM on the day a brief must

be filed by 5:00 PM. This is expensive for the client, annoying to outside counsel, and generally counterproductive.

5. Dump Problems on Outside Counsel at the Last Minute and After Long Delays.

Some people love to create emergencies. For example, complaints that must be answered in twenty days have been known to sit on a desk in the legal department for nineteen days before being sent to outside counsel (usually by fax, late in the afternoon). This is obviously inconsiderate and expensive for the client. "Rush jobs" are invariably more expensive, requiring unplanned overtime, and often produce a less desirable work product.

Likewise, company lawyers who are sent work product for review and then return it with proposed changes just before the item must be filed and served make outside counsel prematurely gray. Worse than that, it brings back memories of the lawyer's experience as an associate, with a partner who had a similar lack of concern for those working under him.

6. Throw More Lawyers at the Problem.

At times of stress, some legal departments respond by hiring additional law firms, apparently finding safety in numbers. Trial lawyers, persons of not little ego, rarely react well to this maneuver. They have enough problems working with the lawyers in their own firms. Although there are situations where such a move is justified, great caution is counseled, lest one find oneself either changing horses in midstream, or, if the first horse remains on the team, working with a dispirited animal who tends to stop pulling.

7. Fight Over Every Legal Bill.

In this era of "consumerism," clients have been encouraged to dispute all bills for services. This does not improve the relationship between in-house counsel and its outside trial lawyer. Hire a firm that subscribes to ethical billing practices and keep your billing complaints to a minimum.

The application of "billing guidelines" and billing audits has likewise been a source of friction between clients and outside counsel. The danger with billing guidelines is that they are usually unilateral, and rarely negotiated. Thus, they invariably contain counterproductive requirements, such as the refusal to pay for time devoted to intra-office conferences at which the firm's lawyers assigned to the case effectively discuss and decide matters of law and tactics. What could be more damaging to a firm's effort than to be told that the lawyers handling the case shouldn't discuss it with each other? Auditors, who are often seen by law firms as professional chiselers, are rarely in a position to make judgments as to the propriety of various items in the legal effort, and create great mistrust and antagonism.

Of course, the client has the right to discuss any legal charge it finds out of line, but such discussions should be exceptional, not routine.

8. Ignore Your Lawyer's Settlement Recommendations.

In most litigation, the outside trial lawyer's voice should speak loudly in affecting the company's decision as to whether to settle and for how much.

An experienced trial lawyer has seen many verdicts and judgments. He or she knows the strengths and weaknesses of the case, knows his adversary's abilities, and knows the proclivities of judges and juries in the area. Inside counsel probably is less knowledgeable as to at least some of these items. Why then do clients and their in-house lawyers often disregard the settlement recommendations of outside counsel?

There are a few good reasons to do so. First, this is a reasonable course if you now realize that you have chosen the wrong trial counsel in terms of ability or willingness to "go to the mat." Unfortunately, some who call themselves trial lawyers lack the intestinal fortitude to go through a trial to completion. If you feel that is the situation, but that the lawyer can win the case nevertheless, you are justified in rejecting his advice to settle. Second, if there is an overriding company principle or policy that makes settlement unwise, you should, of course, follow it. However, it would be wise to explain your reasoning to outside counsel, so that you are not seen as acting irrationally.

9. Blame the Trial Lawyer for the Bad Result.

Trial lawyers do lose cases as a result of bad lawyering. They also lose cases because the case wasn't winnable, the trier of fact and/or of law was unfair, witnesses created unforeseeable problems, or the client didn't follow their advice to settle. Litigation is not an exact science.

Don't expect a great relationship with the trial lawyer in the next case if you have made him the whipping boy in the last one. Great lawyers do lose cases on occasion.

10. Take Sole Credit for the Good Result.

This is the obverse of the previous sin. Although your management of the case on the part of the company may have been brilliant, don't ignore the lawyer who was "in the pits."

11. Never Praise Your Trial Lawyers.

It is a natural human attribute to work harder for those who appreciate our efforts. Too many inside counsel, as many employers, are adept at criticism, but rarely offer praise.

Trial lawyers need love. Their egos are legendary but fragile. One of the surest ways to obtain top future performance from a trial lawyer is to pat him or her on the head—and pay the bill promptly.

IT NEVER ENDS†

John W. Reed*

You and I come to these annual gatherings of the Barristers for the purpose, in part, of thinking seriously about our profession and about how we fit into it, about how it changes us and about how we might be able to change it. For a significant number of you, this is your first time. Others of us have been doing this for twenty years and longer. And at some level this practice has reminded us, time and again, of the ideals with which we entered this noble profession. As an annual exercise it has been good for us and good for the profession and good for the public we serve.

And for a number of years now, you have invited me (I'm tempted to say "directed" me) to conclude the convention program with reflections on the state of the profession—reflections offered from the perspective of (now) sixty years at the bar, fifty-six of them as an academic, but as an academic with relationships with scores of trial lawyers and judges. I am pleased to accede to your requests, but it's hard to create new variations on the theme. You of course recall the Hollywood actress marrying for the sixth time who said, "I know what to do, but how do I make it interesting?" And as for my longevity, I would simply note that age doesn't always bring wisdom. Sometimes age comes alone.

I do know people are paying attention. Last year I reported to you some of the distressing things we all see in our profession. That list—along with some encouraging words, I hasten to say—was published not only in the Barristers *Quarterly*[1] but also in the *Bulletin* of the American College.[2] I received more letters in response to those remarks than I have received for any other speech I've ever made. Almost without exception the writers were saying "Amen" to my list of developments that have diminished our professionalism, but almost no one bought into my assertion that by believing in the ideal, we had a chance to attain higher standards of professionalism. As lawyers, they seem to be in a valley of despair, or, as John Bunyan would put it, a slough of despond.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 8, 2002.

*Thomas M. Cooley Professor of Law Emeritus, University of Michigan; Academic Fellow, Editor, and Administrative Secretary, International Society of Barristers.

[1]*Believing Is Seeing*, 36 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 441 (2001).

[2]*Believing Is Seeing* (var.), THE BULLETIN, Fall 2001, at 12.

They are speaking, of course, in a time of national angst, a time of depression of the national spirit. That depression affects every one of us and touches every aspect of our lives, and it almost surely intensifies the dissatisfactions we have with the state of our profession.

Think with me about our corporate life just two or three years ago. How did we see the world a couple of years ago? Most of us—at least most of us in North America—felt like Olympic gold medalists. If we cast the contest in terms of what Franklin Roosevelt called "the four essential freedoms," we felt like winners. FDR's four freedoms were freedom of speech, freedom of worship, freedom from want, and freedom from fear. And we had largely won all four.

In the United States and, I believe, in Canada, we had long enjoyed civil liberties that are the envy of the whole world, except for those theocratic societies where religion wears the mask of government. In large measure we possessed the first two freedoms: freedom of speech and freedom of worship. We had won the Cold War; and, aside from brush fires in far away countries with unpronounceable names, we saw a world largely at peace. We were more annoyed than threatened by civil strife in the Balkans and the Middle East. We not only had won the Cold War; we believed we had won another kind of battle—the battle for a stable economy, a stable prosperity. Budget surpluses were lined up out to the horizon, as far as the eye could see. New forms of business flourished—what we called the New Economy—and a soaring stock market inflated individual net worth and the wealth of pension plans. With diplomatic peace and sustained economic prosperity, we had largely achieved the third and fourth Rooseveltian freedoms: freedom from fear and freedom from want.

We were on a mountain top. As a people, we were on a high.

Then, as always throughout history, the bubble burst. Our sense of *physical* security was shattered by the suicide missions of September 11 and by the anthrax spores that appeared so mysteriously. Coming through airports as we travelled here, we were made aware of the possibility of further terrorist mischief, and we all have a vaguely-defined dread of biological and chemical and even nuclear attacks. And our national response to all this includes limitation or suspension of some of our cherished liberties and freedoms. We have lowered the threshold for arrest and detention. We have broadened the right of search and seizure. We have limited the right to counsel and, on occasion, denied privacy of attorney-client communications. The phrase "out-of-court" settlement has taken on a whole new meaning since September 11, when our security-conscious government began reducing access to the courts for terrorism suspects and victims alike. Those are among the things the government has done, and we are inevitably reminded of Benjamin Franklin's dictum that

"those who would give up essential liberty to purchase a little temporary safety deserve neither and lose both."

But it is not only the government that has responded in this way; the general populace seems content with that erosion of personal liberties in the interest of public safety and is willing to devalue some freedoms on its own. In December, at the commencement ceremony at California State University at Sacramento, the commencement speaker, Janis Heaphy, publisher of the *Sacramento Bee,* raised a number of questions about the government's response to terrorism. When Ms. Heaphy urged that citizens safeguard their right to be free from unlawful detainment and their rights to free speech and a fair trial, she was loudly booed. When she wondered what would happen if racial profiling became routine, the audience cheered. Her speech was halted as the university's president urged the crowd to be civil. Ms. Heaphy tried to finish, and as she argued that "the Constitution makes it our right to challenge government policies," a rhythmic clapping and further heckling forced her off the stage.[3]

In short, the shattering of our sense of physical security has inflicted collateral damage on our civil liberties.

Our *economic* security, with which we were so recently comfortable, has been cast into doubt by what is now defined officially as a recession. That should have come as no surprise. We kept hearing that we were enjoying the longest period without a recession in our history, but only the most naive really believed that we had learned how to abolish business cycles. Those few were like Lucy Van Pelt discussing ups and downs with Charlie Brown in the *Peanuts* cartoon. She raises her fist in the air and says, "I don't want any downs; I only want ups." But, predictable or not, the context of the decline has made it more unsettling, a context consisting of the global uncertainties created by September 11 and also by a certain loss of trust created by the Enron-type revelations.[4]

I could go on and on relating the ways in which we feel we no longer are on the gold medal podium. We have had to come down from the mountain top. We're down rather than up.

Yet, as tragic and as discomfiting as these developments are, you and I are obligated to put them into historical perspective. I do not for a moment mean to downplay the seriousness of September 11 and Enron and economic turmoil. As a consequence of those phenomena, thousands have died, companies have gone bankrupt, employees have lost jobs and pensions. More globally, great stress has entered our relations with the other peoples in this world. And

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[3]New York Times, Dec. 21, 2001.

[4]I suggest that the conflict-of-interest travails of Enron's accountants and lawyers are a major caution to the supporters of multidisciplinary practice for law firms.

we now know, better than before, that there are millions upon millions of men and women and children on this planet who do not love us.

But a time of disturbance and doubt and tragedy and turmoil is not unique. The mechanisms are new, but the motivations are not: greed, hatred, fanaticism. Over the course of recorded history, mankind, individually and collectively, has climbed, repeatedly, persistently, toward the top of the mountain, only to be knocked down again and again—by war, famine, disease, human miscalculation, and by human evil. But each time, we get up and climb again, intending to go at least as high as we did last time and hoping—indeed expecting—to reach even higher ground. We don't have to go back through millennia to see that. Our own modern history is replete with examples: the Civil War, the 20th century wars, the Great Depression, to name a few. And individuals responded heroically to all of these setbacks:

- The tragedy of the Civil war began the long march toward an integrated society.
- World War I sowed the seeds of our entry into the world community.
- The Great Depression gave birth to a system of governmental support for social services, especially for the neediest among us.
- World War II exposed the utter evil of genocide, and it was followed by the Marshall Plan, an astounding display of generosity to a defeated foe.

Individuals exhibit the same resiliency, climbing back toward the top after having been knocked down:

- Cripple a man, and you have a Sir Walter Scott.
- Lock him in a prison cell, and you have a John Bunyan.
- Bury him in the snows of Valley Forge, and you have a George Washington.
- Raise him in abject poverty, and you have an Abraham Lincoln.
- Strike him down with polio, and he becomes Franklin Roosevelt.
- Burn him so severely that the doctors say he'll never walk again, and you have a Glenn Cunningham, who set the world's one mile record in 1934.
- Deafen him, and you have a Ludwig von Beethoven.
- Have her born black in a society filled with racial discrimination, and you have a Marian Anderson.
- Call him "retarded" and write him off as uneducable, and you have an Albert Einstein.[5]

You get the point. There is a magnificent resilience in humankind. Though knocked down, we have a great drive to climb back toward the top. We learn

[5]The source of this familiar list is unknown.

how to celebrate life without papering over the grief and yearning that can lead to wisdom.

Do you remember the Greek myth of Sisyphus? For some very complicated reasons involving Esopus and Jupiter and Pluto and Mercury, among others, Sisyphus was condemned for eternity to push a large stone up a hill; every time the stone reached the top, it would roll back down again, forcing Sisyphus to roll it up again and—one would suppose—to face endless disappointment along with labor and physical pain. That story, for me, always seemed to epitomize bleakness. What could be worse than to strive for a goal, only to have it snatched away and have to start over, again and again and again?

But recently I came across a brief essay on Sisyphus by Albert Camus, the French moralist, in which he argues for a much less bleak interpretation of the myth. He reminds us that there is no sun without shadow and that it is essential to know the night in order to appreciate the day. He argues, moreover, that the struggle toward the heights is itself enough to fill a man's heart, and he concludes by saying that one must imagine Sisyphus happy. He knew his goal and he worked toward it unceasingly. Victory is sweet, but sweeter still is the honest, committed effort toward a worthy goal.

There are layers of thought in Camus's reflections on the Sisyphus myth that I scarcely understand. But myths are made for the imagination to breathe life into them, and some truths emerge from the legend. How could Sisyphus have been happy, as Camus claims?

- He was happy because he was wholly committed to his task.
- He was happy because his time at the foot of the hill made more glorious the journey to the top. There is no "up" without its polar opposite, "down."
- He was happy because the struggle toward the heights is, as Camus puts it, enough to fill a man's heart, even if final victory be denied him.

This is a hard truth for everyone, but especially for lawyers, many of whom share Vince Lombardi's belief: "Winning is not everything. It's the only thing." And Sisyphus seems not to have won, if by winning we mean placing the rock on the top, permanently.

But winning and losing have to be defined. Long years ago, a friend said to me, "I would rather lose in a cause that must ultimately prevail than win in a cause that must ultimately fail." Many of us, when we were in high school, read *The Song of Roland,* a heroic medieval chronicle of the death of Roland, the faithful nephew of Charlemagne.[6] Loyal to his uncle and to the Frankish

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[6]I am indebted to my colleague Francis A. Allen, former dean of the University of Michigan Law School, for his elegant commentary on the contemporary relevance of *The Song of Roland,* from which I have drawn some of these thoughts and words. *See* Allen, *On Winning and Losing,* LAW QUADRANGLE NOTES, Fall 1976, at 9.

cause, Roland died in battle with the Saracens because he bravely—though unwisely—delayed too long his call for help from Charlemagne, who was nearby.

Like Sisyphus, Roland looks like a loser—the ultimate loser, because he is slain. But Roland was true to his charge, and *The Song of Roland* "asserts that there can be no victory without fidelity to one's code of right and wrong. [But] What is perhaps more striking, there can be no failure when that fidelity has been maintained."[7]

In a loose parallel to the Sisyphus myth, *The Song of Roland* adds "one final ingredient to our understanding of the nature of winning."[8] After Charlemagne avenges the death of Roland by slaying the Saracens, the angel Gabriel directs Charlemagne to lift the siege of yet another city. The poem then comes to a stunning conclusion:

> "God," said the King: "My life is hard indeed!"
> Tears filled his eyes, he tore his snowy beard.

Charlemagne "faces in sudden awareness the agonizing fact that there is no final victory. However great the triumph, it is ephemeral. Without further struggle it withers and dies. As long as one is truly alive and functioning, the battle goes forward. One may be able at times to choose his battleground, but he may not escape the battle."[9] The stone must be pushed up the hill again. The victory is not final.

The fight for democracy never ends. The fight for liberty never ends. The fight for freedom never ends. The fight for justice never ends. Nor does the fight for the jury, for the adversary system, for an independent judiciary. The fight for all of these ideals—it never ends. Victory appears within grasp; like Sisyphus, we near the top of the hill. And then we are knocked back down by famine, pestilence, or sword, by hatred, by selfishness, by what theologians might call sin, by disasters of every conceivable kind. And we learn from Sisyphus and Roland and Charlemagne that true victory consists of fidelity to one's code of right and wrong, that there is no true failure when that fidelity has been maintained, and that victory is transient—without further struggle it withers and dies.

Through the centuries, men and women have struggled to make of this a better world. They have toiled up the hill toward new utopias, never quite getting there. The stone of progress seems always to roll back down the hill. Then, as in the myth, we put our shoulders to the stone and push it up the hill again. As tragic and unsettling as the recent events are, they are within the

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[7] *Id.* at 10.
[8] *Id.*
[9] *Id.*

human pattern of up-the-hill-and-down-the-hill-and-up-the-hill-again. Finding ourselves back down the hill, we simply start again and work toward pushing the stone higher this time. The valley we are in is not where we are to stay. In the words of the 19th century cleric Sydney Smith, "Nothing is so stupid as to take the actual for the possible."

The Sisyphian struggle for liberty and justice never ends. And you and I have enlisted for the duration.

BILLING, OUR PROFESSION'S NOT SO HIDDEN SHAME†

Alan G. Greer*

Every year lawyers and law firms all over our country repeat the same ritual. We take brand new law graduates and teach them what they never learned in law school. And, whether we realize it or not, in doing so we set the tone for the rest of their legal careers.

One of the very first of these lessons is the keeping of time so that their work can be billed to our clients. We tell these new lawyers-to-be that the principal thing they have to sell is their time. And, oh by the way, if they expect to be successful attorneys in this firm they had better bill those clients at least, say 2000, or 2300, or even 2500 hours each and every year of their future law practices. As the icing on the cake, we add that if they exceed these requirements there will be a nice bonus in it for them as well.

As a result, we predetermine the outcome. Instead of these young lawyers faithfully recording the actual time they have worked on client matters—be it a total of 1500 or even 1800 hours in their first year of trying to learn the craft of lawyering—they will have almost inevitably written down on their time sheets the requisite 2000 to 2500 hours.

Why do they stretch their billable hours? Because we have, in not so subtle ways, let them know that if they don't, they and their high paid associate positions are gone. We have confronted them with a moral and ethical dilemma in their young lives that most of them can resolve only by buckling under our pressure.

As their very first lesson in the practice of law, we, their mentors and teachers-in-the-law, have taught them how to cheat the same clients that we have taken an oath to faithfully serve. By doing so we set in motion a process of diminishing ethical and moral values in our new lawyers that seems to have no end.

Our new associates perceive that we have condoned the practice of cutting corners and padding time in order to meet our own self-created financial needs. Thus begins a downward spiral of declining professionalism that allows more and more lawyers to mentally justify to themselves less and less ethical conduct in the name of their own personal wants—be they financial or emotional.

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*Richman, Greer, Weil, Brumbaugh, Mirabito & Christensen, Miami, Florida; Fellow, International Society of Barristers.

As you read this I can hear many of you grinding your teeth and muttering, "But they can put in that many hours. It only takes 50 hours a week 50 weeks a year to do it. That's just 8.33 billable hours a day six days a week. No sweat. Besides, everyone bills this way so why shouldn't we."

That, however, is the thinking of a snowflake. No snowflake feels responsible when the avalanche it is riding wipes out everything in its path. Well, for us lawyers, what is in our paths are our clients and what we are wiping out is their confidence in us, in our professionalism, and in the justice system itself.

So let's go back to those 50-hour weeks with their 8.33 billable hour days. If we are honest with ourselves and our young associates we have to admit that it is almost impossible to do that each and every day, six days a week, 50 weeks a year. People have to eat lunch, go to the bathroom, deal with staff problems, read inner-office memos, answer non-billable phone calls, get their teeth fixed and their hair cut, plus do a thousand other things that cut into that time week in and week out, not to mention the needs of their family lives.

And what's worse is that by predetermining how much time has to be used up to meet their billing requirements we teach our lawyers to expand the work they do on any given project so that those 8.33 hours are filled and billed without regard to the fact that the same job could be more efficiently done in less time if the lawyers were not focused on their time sheet totals.

No matter, you respond. The clients will take our word on how much time was needed for each task. Because for them it's like shooting craps over the phone when we hold the dice. If we say double sixes turned up on the roll when it was really snake eyes, how are they to know.

But we know the truth and so do our young lawyers. The recorded hours become like gas in a vacuum. They expand to fill the allotted volume of time. And whether we admit it or not, each time we pad those numbers it diminishes us in our own minds and hearts. We give up little bits of our professional pride and honor until they all but disappear, leaving only a hollow shell of professionalism we hide behind like a mask.

What we have done is to intentionally set out to dull our associates' consciences in the same way ours have become dulled. Because, you see, the only thing that hurts when the money is rolling in and everything else feels great is our conscience.

A friend of mine whom I will call Sarah recently recounted a story to me with a shake of her head. She was co-counseling a case with a much larger firm from out of town. The client had decided that the case work would be equally divided between the two firms. About six months into the matter she got a call from her lead co-counsel who, after hemming and hawing, said, "Sarah, I've seen your bills to our client. You have got to get them up. You're making us look bad."

There were no questions about how Sarah's firm could do the same amount of work so much more efficiently. Instead there was just the conscience-dulling suggestion to bill more hours so the lead firm wouldn't have to reduce theirs.

This little tale seems to define one of the central ethical dilemmas of the modern practice of law. When professionalism comes up against profit, it is profit that wins more often than not.

Let us not put our young associates and ourselves in the ethical position of Watergate defendant Jeb Magruder, himself a relatively young lawyer when he said, "I know what I have done, and Your Honor knows what I have done. Somewhere between my ambition and my ideals, I lost my ethical compass."

Instead let us heed the thoughts of Mark Twain. "Morals [and ethics] are an acquirement like music, like a foreign language, like piety, poker or paralysis. No one is born with them."

So let's try harder to teach our young lawyers positive lessons. Our need for wealth should not be their first priority. Instead of teaching them how to predetermine billing outcomes to the financial detriment of our clients, let's focus both them and ourselves on doing each task as efficiently as possible. Let the total amount of the time consumed be judged by that standard.

Let's also forsake the practice of setting associate bonuses based on the amount of gross time they have charged our clients. Instead we should predicate them on how much they have accomplished as lawyers without respect to the billable hours involved.

There is an old saying that each of us has to live with ourselves so we should see to it that we always have good company. Let's try to keep our own consciences sharp and alive. In doing so, keep in mind that it is far easier to prevent bad habits than to break those already acquired. Let's not force our young lawyers into the same bad habits we older lawyers struggle against.

And don't forget the words of Oscar Wilde, "No man is rich enough to buy back his past."