Volume 29 Number 2

International Society of Barristers Quarterly

Volume 29 **April, 1994** **Number 2**

CONTENTS

International Society of Barristers Quarterly

Editorial Office

University of Michigan Law School
Ann Arbor, Michigan 48109-1215
Telephone: (313) 763-0165
Fax: (313) 764-8309

Volume 29
Issue Number 2
April, 1994

The INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY (USPS 0074-970) (ISSN 0020-8752) is published quarterly by the International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104-4238. Second-class postage is paid at Ann Arbor and additional mailing offices. Subscription rate: $10 per year. Back issues and volumes available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1911. POSTMASTER: Send address changes to the International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104-4238.

STATEMENT OF OWNERSHIP, MANAGEMENT, AND CIRCULATION
(PS Form 3526)

1. Title of publication: *International Society of Barristers Quarterly*
2. Publication no. 074-970
3. Date of filing: September 29, 1994
4. Frequency of issues: Quarterly
5. Number of issues published annually: Four
6. Annual subscription price: $10.00
7. Mailing address of known office of publication: 3586 East Huron River Drive, Ann Arbor, MI 48104
8. Mailing address of headquarters or general business office of the publisher: International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104
9. Names and addresses of publisher, editor, and managing editor:
   Publisher: International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104
   Editor: John W. Reed, University of Michigan Law School, Ann Arbor, MI 48109-1215
   Managing editor: John W. Reed, University of Michigan Law School, Ann Arbor, MI 48109-1215
10. Owner: International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104, a nonprofit corporation.
11. Known bondholders, mortgagees, and other security holders owning or holding one percent or more of total amount of bonds, mortgages, or other securities: None
12. The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes have not changed during preceding 12 months.

* * *

15. Extent and nature of circulation:

		Average no. copies each issue during preceding 12 months	*Actual no. copies of single issue published nearest to filing date*
A.	Total no. copies printed (net press run)	959	945
B.	Paid circulation		
	1. Sales through dealers and carriers, street vendors, and counter sales	0	0
	2. Mail subscriptions	47	45
C.	Total paid circulation	47	45
D.	Free distribution by mail	766	770
E.	Free distribution outside the mail	0	0
F.	Total free distribution	766	770
G.	Total distribution (sum of c and f)	813	815
H.	Copies not distributed		
	1. Office use, leftovers, spoiled	146	130
	2. Returns from news agents	0	0
I.	Total (sum of g, h(1), and h(2))	959	945
J.	Percent paid circulation	5.8	5.5

* * *

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

John W. Reed, *Editor*

International Society of Barristers

Officers 1994

Charles F. Blanchard, *North Carolina*, President
Con M. Keating, *Nebraska,* First Vice-President
David L. Nixon, *New Hampshire*, Second Vice-President
Richard E. Day, *Wyoming*, Secretary-Treasurer

Board of Governors*

The Officers
and
1992-1995

John T. Crowder
Alabama

Stanley G. DeLaHunt
Minnesota

John G. Lancione
Ohio

Joe McLeod
North Carolina

Henry J. Price
Indiana

1993-1996

Frank J. Brixius
Minnesota

Michael E. Hale
Arkansas

Stanley J. Krist
Texas

Gerald F. Richman
Florida

Mark P. Robinson, Jr.
California

1994-1997

John P. Arness
District of Columbia

Myron J. Bromberg
New Jersey

Daniel J. Kelly
California

Joseph K. Meusey
Nebraska

Robert F. Ritter
Missouri

Ex Officio 1994
Tom Alexander
Texas

Annual Meetings

1995: March 5-11, Hyatt Dorado Beach, Dorado, Puerto Rico
1996: February 18-24, Four Seasons Resort, Wailea, Maui, Hawaii
1997: March 2-8, The Westin La Paloma, Tucson, Arizona

*Terms begin and end on last day of annual meetings.

International Society of Barristers

Past Presidents

Craig Spangenberg, Cleveland, Ohio	1966
Murray Sams, Jr., Miami, Florida	1967
Kelton S. Lynn, Rapid City, South Dakota (1916-1974)	1968
Arch K. Schoch, High Point, North Carolina (1909-1980)	1969
John H. Locke, Roanoke, Virginia	1970
William H. Erickson, Denver, Colorado	1971
Charles T. Hvass, Minneapolis, Minnesota	1971
Robert T. Cunningham, Mobile, Alabama	1972
William S. Frates, Miami, Florida (1917-1984)	1973
Philip G. Peters, Manchester, New Hampshire	1974
Richard R. Bostwick, Casper, Wyoming	1975
Carlton R. Reiter, Portland, Oregon (1920-1980)	1976
Douglas W. Hillman, Grand Rapids, Michigan	1977
Alex S. Keller, Denver, Colorado	1978
Alex W. Newton, Birmingham, Alabama	1979
Stan Siegel, Aberdeen, South Dakota	1980
William D. Flaskamp, Minneapolis, Minnesota	1981
Walter R. Byars, Montgomery, Alabama	1982
John J. Greer, Spencer, Iowa	1983
M. J. Bruckner, Lincoln, Nebraska	1984
Ray H. Pearson, Miami, Florida	1985
Joel M. Boyden, Grand Rapids, Michigan	1986
William T. Egan, Minneapolis, Minnesota	1987
Carleton R. Hoy, Sioux Falls, South Dakota	1988
Mark P. Robinson, Los Angeles, California	1989
Perry S. Bechtle, Philadelphia, Pennsylvania	1990
William J. McDaniel, Birmingham, Alabama	1991
Frederick H. Mayer, St. Louis, Missouri	1992
Tom Alexander, Houston, Texas	1993

REFLECTIONS ON THE "TRAGEDY AT WACO"†

Dick DeGuerin*

The stand-off between federal authorities and the Branch Davidians near Waco, Texas, started on February 28, 1993, when the Alcohol, Tobacco, and Firearms division of the Treasury Department—an agency that I have known and hated for most of the years of my criminal practice—attacked a group of what you and I probably would call religious nuts. They were peaceful people who had moved to the countryside near Waco to practice their strange brand of religion and were not bothering anybody. The ATF raid resulted in the deaths of four ATF agents and six Branch Davidians, the wounding of more people on both sides, and a stand-off that lasted for fifty-one days. The FBI, pushing the ATF out of the way, took over after the raid and, in effect, created a compound; and there was peace for fifty-one days.

Like a number of criminal lawyers, I saw the situation as a tremendous challenge and as more or less a dream case for a defense lawyer; knowing the history of the ATF and its agents' propensity to use excessive force and abuse authority, I knew that a defensible case could be made for those who survived, if anyone survived. I thought there was a real risk that no one would survive because, after all, the ATF wanted revenge for the deaths of their agents. Even though the FBI was in charge, other FBI stand-offs have ended in tragedy, such as the one in Idaho where the Randy Weaver family was decimated by FBI snipers. So I saw a real challenge—but I also saw lawyers swarming to the scene, and I knew that the attention of the world was going to be on what happened in Waco and on lawyers' conduct. I hoped it was an opportunity to let the world know what lawyers really are and what lawyers really do.

More particularly, I hoped the public would learn something about the heavy responsibility that we who represent people accused of crime have. The situation presented an opportunity to do our duty, and in the process to represent someone perceived as a demon. It is our special responsibility to represent the unpopular client and to do so with dignity and integrity.

---

† Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 15, 1994.

* DeGuerin & Dickson, Houston, Texas; Fellow, International Society of Barristers.

LEGAL MANEUVERING AFTER THE RAID

Soon after the raid, a group of lawyers formed a defense committee to be available to represent those who needed representation when the stand-off was over, and it looked as if every able-bodied adult who called himself a Branch Davidian was going to be prosecuted for something. I was asked to join the committee on the third or fourth day of the stand-off. I said I would, but only if I were asked by someone who had a true interest, and I would represent David Koresh only if David Koresh asked me to do so. I didn't want to volunteer and look like an ambulance chaser. David Koresh's mother, who had lived at the Branch Davidian home and originally was from Houston, then called me to ask for help. That was not unusual; criminal lawyers often are contacted first by a member of the family. Knowing that now I had the credentials—his mother's request for help—I asked her to meet me in Waco the next day.

We met, and at ten o'clock that night, I quietly took her to the FBI command post. All the news people had gone—their daily press feeding had already taken place—so I knew that there would be no attention. I didn't want to draw attention because I wanted the FBI to see that I was there seriously and not simply to get my name in the newspaper. At the FBI command post, we were met by the first wave of lower echelon agents, and they brought down a supervisor, but I was not allowed to see the person in charge. I talked to him by phone, and he said, "Send us a letter." Thanks to the fax machine, I sent them a letter within an hour. I think that surprised them, but still I got no response.

The next day, I didn't go out there quietly and I didn't go at night. David Koresh's mother and I went to the FBI checkpoint at noon, and the press was there. My purpose was to show the FBI that I was serious, that I had the authority of Koresh's mother to represent him, and that I wasn't going to go away. The FBI again turned me down, so I went directly to federal court and did what a lawyer is supposed to do—I filed something in court. I filed a writ of habeas corpus, asking simply for access to my client.

The judge initially tried to ignore me, and when I tried to serve the U.S. Attorney's office, they locked the front door. But eventually they did have to answer, and surprisingly the judge denied habeas corpus on four different grounds. First, he said that habeas corpus didn't apply prior to conviction. That was wrong; the writ is not reserved solely for post-conviction remedies. His second ground was that my representation of David Koresh was speculative. As I have already said, however, in most cases, the first call the lawyer gets is from someone close to the defendant, not the defendant himself, who is in custody and incommunicado. The third ground was that Koresh wasn't in custody. Well, he was surrounded by about a hundred FBI agents and at least ten tanks. In effect, they had created Mount Carmel Federal Penitentiary. The

fourth ground, somewhat more troublesome, was that David Koresh was not entitled to a lawyer while he was in the process of committing a crime. I think we had the stronger position on that also because there is a fine but important line between advice on how to commit a crime and advice to stop and surrender, which is the advice a lawyer should and does give quite often. Believing we had a good case, I set out to appeal on an emergency basis.

CONVERSATIONS WITH DAVID KORESH

The FBI then mooted my appeal by calling and agreeing to put me in contact with my client. From my office, on a Sunday evening twenty-eight days into the stand-off, my wife and I talked with David Koresh on the telephone. At that point, the only information available to the public had been filtered through the FBI. They had kept Koresh incommunicado except for one radio broadcast in which he had expounded on the significance of the seven seals in the book of Revelation and talked very little about his situation. I, as a member of the public, had been ready to accept the theory that Koresh was a nut who was keeping his people by hypnosis or some other terrible means. What I heard in my telephone conversation was a rational, reasonable, factual person who was angry that his home had been attacked by federal agents who had given his people no chance to deal with the alleged problems on a peaceful basis. He was angry that one of the first acts of the agents, when they approached the building to serve a search warrant, had been to kill all the dogs they saw. He was angry because six of his church members had been killed in the initial shooting. He was angry because they were being held under siege. But he was also logical enough to know that his position was untenable, and he wanted help. He told me that he had been asking for legal assistance from the beginning. (The FBI had told me earlier that they would not put me in touch with Koresh because he hadn't asked for a lawyer yet.)

The next day I went to Waco, and the FBI agents said, "If everything goes all right in our next telephone conversation, we'll let you talk to him face to face, but we can't let you go in because you might become a hostage." I responded, "What value am I as a hostage? What FBI agent would pay ransom to get me back?" They seemed to see the logic in that, so they changed their argument. "Well, you're in danger. They might kill you. They might harm you. They've got all sorts of fire power in there—automatic weapons, antitank guns, and so forth—and we think you're in danger." I said, "No, I don't think I am, at least not from them. I am their link to the outside. I am the first person to talk to them who doesn't want to kill them. I am their ray of hope, and I don't believe I'm in any danger from them." (I did think I might be in danger from a trigger-happy lower echelon ATF or FBI agent on the outside. And sure enough, during the

trial in San Antonio recently, when all of the photographs taken by the ATF and the FBI were turned over to the defense, there was a photograph of me walking up to the compound with the cross-hairs on my head taken by an FBI sniper.) Still, they told me, "You can only go up to the front porch, stop at the fence, and shout your advice to your client." I said, "No, I want to have confidential communications with my client." They relented a little and said, "You can go to the front door and sit at the door, but don't go inside." Feeling that that was as far as I could get that particular day, I agreed. They frisked me, put me in a tank and took me to a point about one hundred yards from the front door, let down the back ramp that was facing away and was protected by the front of the tank, frisked me again, and said, "Good luck, you're on your own."

As I walked the last hundred yards to the front door of the Branch Davidian home, I was amazed by what I saw and heard. There had been all those Tibetan chants and dying rabbits and Nancy Sinatra played over the loudspeakers in a futile attempt to drive them crazy, but they cut them off for me to make my visit. And what I heard instead was birds singing and dogs barking (the few dogs that were left), and it was actually a beautiful sight. I knocked on the door and was greeted by Steve Schneider and Wayne Martin. Wayne Martin, by the way, was a Harvard Law graduate who became a Branch Davidian. Then David Koresh came to the door and I shook his hand and began to talk to him. We sat there and talked about the facts, as a lawyer and client are supposed to do.

The FBI wanted information from me, and I was adamant that I would not report on what I saw or what my client told me. I didn't want to be put in the position of being a negotiator, and I would not reveal anything I learned. In Texas, we have a very strong attorney-client privilege. It protects not only what the client tells you but also all the knowledge that you gain by reason of representation of the client.

The next day, they let me go inside, and I ultimately spent a total of four days inside the Branch Davidian home. I went into every room, looked at the damage that had been done, and talked to the people who had been there and who had participated in the original firefight. I saw for myself the bullet holes, and there were bullet holes in every room, including upstairs where the women and children lived. Every window was shot out. If you look at the videotapes of the ATF, you can see that the agents fired indiscriminately at the windows; they shot everywhere they could. I saw bullet holes in the ceilings that could have been put there only by gunfire from helicopters. The ATF agents deny to this day that there was gunfire from the helicopters, but I saw the bullet holes in the ceilings on the top floor, and I know what an incoming round looks like because I've been hunting since I was ten years old. You can imagine what that means. The people in the helicopters could see only a roof, and they shot indiscriminately into the roof. It was a war.

In my investigation, I found out that eight months before the ATF made their raid, they had been invited by David Koresh to enter the Branch Davidian home to examine the weapons. The ATF had turned down the invitation. I found out, by talking to a gun dealer who had a business arrangement with David Koresh, that most of the guns were bought for resale, and the Branch Davidians made significant money from the sales. I found out that David Koresh went into the community on a daily basis and easily could have been arrested peacefully, alone, away from a building in which there were a hundred thirty men, women, and children. I found out, by talking to experts in SWAT tactics, that it is a basic tenet that you cannot use SWAT tactics against a building having fifty or more rooms in which there are at least a hundred noncombatants and children because that is a potential hostage situation. Children are always considered hostages. I found out that the ATF's use of SWAT tactics was motivated at least in part by political considerations. The ATF director had been subpoenaed to testify before the House Appropriations Committee about his budget, and that budget included a large appropriation for a secret SWAT team that had not yet been used.

I did what a lawyer is supposed to do. I interviewed the witnesses, looked at the scene, found out what had happened and what problems would be facing us. Beyond that, I gave advice to my client and to the other Branch Davidians about what they were facing. I did not negotiate, with either my client or the FBI. In order to report as accurately as I could to my client, I did ask the FBI what was going to happen when the stand-off ended, and I did find out from the sheriff where they would be kept, and I did talk to the Texas Rangers about their role. I also made it clear that no ATF agent would have anything whatsoever to do with the arrest of the Branch Davidians or with the investigation of the murders of the agents or with the investigation of the scene. That wasn't a negotiating point, that wasn't a condition; it was a given.

And so, I did what lawyers are supposed to do, and I hope I did it with dignity and integrity, because I wanted it to reflect well on you and me. I knew that the world was watching. I knew that lawyer bashing is popular nowadays, and I thought that this was not only an opportunity for me to represent a client in a highly visible case and to do so well, but also an opportunity to let the world know that although lawyers have no greater duty than the duty to the client, we also have a duty to the general public and to the profession—a duty to represent, honestly and with integrity, not only the insurance companies that have the money, not only the corporations that can pay on a monthy basis, but also the downtrodden, the poor, the people who, as in this case, are portrayed as demons by the FBI and the authorities and thus the media. I saw it as an opportunity to show that under our system even such a demonized person is entitled to honest, earnest representation.

WHY DID IT END AS IT DID?

It was not to be that I would represent David Koresh in court. People have asked me time and again, "Why didn't he just come out? Why did they stay there so long? And why did he burn those people up?" Let me address those one at a time.

I don't want to sound maudlin, but part of Texas history is the story of the Alamo. In brief, for those of you who don't know about the Alamo, this is the story: Some rebels occupied a church in San Antonio, Texas; the government surrounded them and wanted them to come out but they wouldn't; they all died. That parallel might be a little too strong for some of you, but David Koresh and his followers did not trust the people who had attacked them on February 28. They did not trust the government. I think that if the FBI had waited, they eventually would have come out peacefully. By the way, the gas that was "inserted" into the Branch Davidian home on April 19 was not ordinary tear gas but a type of gas that has been banned by international treaty because it is too awful to use on our enemies.

As to why David Koresh "burned those people up," there is substantial question whether David Koresh or his followers started the fire deliberately, or whether the fire was started accidentally, as I believe and as I believe the evidence overwhelmingly shows. The only evidence that the fire was deliberately set is in an arson report by a team of so-called independent investigators. I learned that the head of the independent investigators, who claimed to be a Houston fire department arson expert, was actually an ATF agent who was married to an ATF secretary, the same woman who typed the original search warrant at Waco. He tried at first to deny his connection to the ATF.

At any rate, no matter who started the fire, it seems clear enough that it would not have started if the tanks and tear gas hadn't started rolling on April 19. There was serious disagreement within the FBI about what to do, but the macho, "we've got to do something" mentality prevailed. If the tanks and tear gas hadn't pushed the Branch Davidians to the brink of extinction, they would not have jumped off or fallen off.

The position I take is not popular. I've gotten a lot of hate mail, and people have asked me why I talk about it. People also have asked if my information isn't privileged. It is privileged information, but I believe that the privilege is determined by what the client wants, and I believe that David Koresh would have wanted me to reveal what I learned and what I saw and what he told me. I intend to continue to speak out when I have the opportunity to do so because I think it is a responsibility that I hold and that I owe to my client.

IT'S ABOUT YOUR MOTHER'S COMBAT BOOTS: RACE, GOOD MANNERS, AND FREE SPEECH†

Kurt M. Luedtke*

I'm always amazed at the things I will do for a plane ticket. I am about to comment on race in America to one hundred people that I don't know. I am from Detroit and should know better. What I have to say seems mild enough to me, but I am aware that if there were reporters in the room or if I were a political candidate or corporate executive, I would keep my mouth shut. In a way, perhaps that's what this talk is about.

A Generation of Progress

In preparation for this, I watched *Eyes on the Prize*, the PBS documentary on the civil rights struggle in America in the early 1960s, and I commend it to you. It is a powerful portrait of a time in America when black people could not sit at a lunch counter, could not use many forms of public accommodation, could not drink from certain water fountains, could not live in a place of their choosing, could not marry legally outside their race in many states, could not vote in any meaningful way, or at least could not do so without facing substantial discouragement, could not live with white people. There is a moral gravity to the film—as there was, I suppose, to the struggle—that makes it clear that the struggle was going to be successful; the cause was so just that it could not be lost. What struck me in particular, having been away from it for a long time, was how articulate so many of the people were, in contrast to the shrillness and shallowness we hear so often today. I don't mean just Martin Luther King but Thurgood Marshall and Ralph Abernathy and John Lewis and Stokely Carmichael. We were blessed with powerful oratory.

It also was startling to me, even though I knew what had happened, how long a road we have traveled in just one generation. In about thirty years, so much has changed. Every activity that I just mentioned is now legally available without regard to race, and in many situations there are criminal penalties for interfering with the exercise of those rights. We have laid out, legally,

---

† Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 18, 1994.

* Pulitzer Prize- and Oscar-winning journalist and screenwriter; formerly Executive Editor, Detroit Free Press.

a new agenda for society. In only those thirty years we corrected nearly three hundred years of our society's behavior. We did that and actually went further. We said, "Not only will we not allow the individual instances of discrimination, we will take a look at patterns in employment and other areas, and if we find that blacks or minorities are underrepresented, we will move to correct that." Then we did a quite extraordinary thing. We decided that, to atone for discrimination and make up for racial bias, we would act affirmatively to single out and reward by race all manner of people from college students to contractors and policemen. We would make available scholarships to be used only by black students. We would draw voting districts to ensure that certain districts, such as the twelfth in North Carolina (165 miles long along a freeway), would elect black representatives.

America did more than I would have expected us to have done, and we did it at substantial cost. Now, in the name of curing racial discrimination, we regularly discriminate by race in many arenas. Some of the situations are funny. At one time, my wife was with the Detroit Symphony Orchestra. The black community wanted to know why there weren't more black musicians in the orchestra, and the orchestra officials had to explain how symphony auditions were conducted: Applicants for the open chair in the second violin section, for instance, auditioned behind a curtain so that no one could see them. They were even asked to remove their shoes so they would not make any noise as they walked to the chair to play. No one knew whether the applicants were white or black, male or female.

Some of the situations are not so funny. Imagine that a high school student with a 3.5 grade point average and SAT scores of 1200 is applying to the University of California at Berkeley. It is a virtual certainty that if that person is black, he or she will be admitted. If that person is white or Asian, the chances of admission are about five percent.

Whether it is wise for us to be attacking racial discrimination by discriminating by race is, ultimately, a matter of social philosophy. One can understand the argument for it and still be troubled by the obvious inequities that result. Nevertheless, that is where we are.

I came away from the PBS documentary thinking about how far we have come and feeling quite proud of America and what it stands for. While we obviously are not free of racial discrimination, we should not measure a society by the aberrations but by the behavior that the society will reward and the behavior that it will punish. We determine that by looking at the society's laws, its practice of justice. When that test is used, it seems to me, anyone who wants to contend that America has not repented of its past or wants to argue that we wish to be a racially discriminatory or racist society is simply full of it. That's just flat not true.

THE NEW BATTLE

Although the documentary made me feel proud of the progress we have made, I asked myself, "Well, how are we doing? How are we feeling about this terrific accomplishment that has been made?" The answer is, "Not so hot." Part of my feeling, I am sure, is because I am from Detroit. One study of Detroit says that the metropolitan area is the most segregated in the country and more segregated than it was in 1960. According to another study, the Detroit metropolitan area is the most racially polarized in the country and becoming more so. The city now has a population of less than a million, down from two million four. If you fly low over the city, you will be startled unless you were in World War II; you will see thirty-five percent of the land vacant, unused, generating no taxes. That is what was left behind when the white people —those that could—left Detroit after 1960. White people believe that they fled the city because they were afraid of black crime and had to move to a safe place. Black people believe that white people left because they are racists and did not want to live with black people.

We have made great progress in the area of defining specific behaviors and determining which are permissible and which we will punish. The civil rights struggle in that sense is over; it has been won. Today we are fighting a different battle. I think it is at the root of the problem that remains. We are now fighting, or some people are fighting, what they call racism. America is, they say, a racist society and will forever be so.

The difficulty, of course, is that racism has no one definition. No one knows quite what it means, but it seems not to be tied to any overt act. There is not necessarily specific behavior that we can look at objectively and say "That is racist, that clearly is not." Racism seems to be in the eye of the beholder. Often, a member of a minority who needs an explanation for why something has not gone the way that he or she wished alleges racism, and members of the majority quite sincerely cannot perceive any basis for the allegation.

A new book by a black journalist describes blacks who are successful and how deeply angry they are.[1] One section profiles a law professor, and I thought it would be appropriate to read it to you:

> Anita Allen, a full professor at Georgetown University Law Center, is haunted by a sense that her life has been too easy. With her Ph.D. in philosophy from the University of Michigan and her law degree from Harvard, she can match credentials with academia's best and brightest. Yet she knows that in some important respects her race has given her an edge—and a burden.
>
> When going for her Ph.D. in the 1970s, she was admitted to several top

[1] E. COSE, THE RAGE OF A PRIVILEGED CLASS (1993). The front cover carries this subtitle: "Why are middle-class blacks angry? Why should America care?"

schools, even though her Graduate Record Exam scores placed her closer to the eightieth percentile than to the ninety-eighthth. And after she decided on Michigan, the Ford Foundation gave her a full fellowship, even though some of her white counterparts had to struggle to make ends meet. After receiving her doctorate, while many of her classmates were striving unsuccessfully to line up coveted interviews, she got more than her share and was hired by Carnegie Mellon University. Not that the offer was undeserved; she did, after all, graduate in the top 10 percent of her class. And not that the academic environment was always supportive. At one point, as a doctoral candidate and teaching fellow, she was confronted by a young white man who demanded to know, "What gives you the right to teach this class?" She assumed a similar challenge would not have been made had she been male and white. Indeed, the man who recruited her for Carnegie Mellon told her, in effect, that she would not have been hired had she been white. "I'm not sure you have the power we're looking for," she recalls him saying, in assessing her intellectual ability and drive.

She shrugged off the slight and threw herself into her work; but despite her popularity as a philosophy professor, she soon found herself experiencing "a sense of irrelevance." Law school, she decided, might be a ticket to "more meaningful work."

Like her graduate school exams, her law school boards were less than stellar, but she nonetheless won acceptance to Harvard. The law school curriculum was more difficult than her course work at Michigan, and her academic struggle was compounded by a sense of being subjected to heightened scrutiny, by what she calls "the pressure of being a black person under the microscope." The pressure became so intense that she suffered depression and migraine headaches, and her physician put her on antiseizure drugs.

Away from school, the race-related tension did not abate. On her first day as a summer associate at a Wall Street firm, she was asked to write a memo explaining why private clubs had a constitutional right to exclude women and minorities. When she expressed her disapproval of discrimination, the partner dismissed her objection as irrelevant, telling her he was not interested in "sociological considerations."

Despite the initial discomfort, she did well that summer, and after receiving her law doctorate, waltzed into a job with the tony white-shoe firm of Cravath, Swaine and Moore. Here, as at Carnegie Mellon, she was bluntly informed that she had not been hired for her intellectual firepower. The partner who offered her the position told her she had the worst grades he had ever seen but that she made up for this deficiency with her poise and articulateness.

"I've been a very lucky person," she says, without irony. She got a good education, thanks in large part to affirmative action, and she has been helped at many points along the way, perhaps more than her white counterparts. Not that she got something for nothing. She has always worked extremely hard, habitually showing up at work around seven in the morning and staying until late at night.

Moreover, she has faced heartache and hurdles at every step. When she and another lawyer at Cravath, Swaine were meeting with an important client, for instance, her colleague announced he had to leave early, but paused long

> enough to reassure the client about her abilities. She was hurt that he felt it necessary to do that—enough so that years later the incident stands out in her mind. She is unsure whether the gesture was a comment on her race, her gender, her youthfulness, or all three, but she attributed it to race. "Just a feeling I had," she says. . . .
>
> As a Georgetown law professor, she again absorbed racial blows. After addressing the American Association of University Professors on the issue of "discriminatory harassment on campuses," she found herself talking to a middle-aged white man who explained that she should not take offense at being called a jungle bunny because "you are cute and so are bunnies." On another occasion, a white scholar said she reminded him of his family's former maid. . . .
>
> After her fourth year at Georgetown, she was awarded tenure by a unanimous vote, strictly on the merits of her case, she believes. She estimates that she had produced the second highest number of publications of any member of the faculty, and as her colleagues were well aware, she was being pursued by law schools at Stanford, Michigan, Berkeley, and elsewhere. Eventually even Harvard came calling, and she accepted the invitation of Dean Robert Clark to be a visiting professor during the 1990-91 academic year.
>
> . . . Allen arrived shortly after Derrick Bell, renowned scholar and Harvard Law [School] . . . black faculty member, announced that he was taking a leave of absence in protest, and would neither accept his $120,000 salary nor return to the school until a black woman was hired for the permanent faculty. Bell's ultimatum became a big story in the press and threw much of the Harvard community into turmoil.
>
> Allen tried to concentrate on her work. After her stint was done, she returned to Georgetown, hopeful that she had performed well enough to be tapped for a permanent post. Instead, she got a call from a supporter at Harvard who suggested that her candidacy should probably be tabled until the political situation calmed down. It was. Shortly thereafter, she heard that Harvard had made offers to four white males.
>
> "Not getting that job offer was the first time I had gone for something and I didn't get it," she says. . . . "I've had a lot of pain in my life over what might seem to some [to be] very small things."[2]

There, I think, is the dilemma. Terrific opportunities have been offered to this young professor but when she failed to get one thing she wanted, she concluded that racism was the reason. That is a very human response, but it came, as did so many of the stories in this book, from a person who did not seem to understand that for most of us many things do not go well. The top of the pyramid is small, and there are all sorts of reasons we do not get what we want—bad luck, office politics, even lack of ability or experience. Yet, when you are a member of a minority group and are persuaded that this is a racist

---

[2] *Id.* at 20-24.

society, you naturally do what I must say I would do in the circumstances, which is to blame your difficulties on a circumstance beyond your control.

This racism war, I think, is wrong-headed and will get us nowhere. I personally plan to give it up. I hope that the society will do so soon, as well, but I am not very optimistic about that. The reason I am not optimistic (and, unfortunately, I cannot find a way to pussyfoot around this) is because of the significant, growing, almost inexplicable problem of black crime. Black crime is troubling because it is growing at such an extraordinary rate at a time when so much seems to have been won, and we do not know much about the causes. Yet in Detroit, where we invented carjackings, where we used to be "Murder City" and probably would still be if we were using accurate population statistics, white people simply don't talk publicly about black crime. We talk about it among ourselves. We go through a series of questions that revolve around how brave we are and how willing we are to risk injury in the name of a political goal. Are we willing to go downtown to dinner? Are we willing to live in the city? But we do not talk race-to-race about the problem of black crime. This is a time of substantial accomplishment, a time when people are writing books about the new black middle class, yet black crime grows and we do not seem to know very much about it. And since we are not allowed to discuss it, the chances that the races will learn together what might be responsible for the phenomenon seem to be pretty small.

ONE POSSIBLE EXPLANATION

I am no anthropologist (many anthropologists aren't either), but I think something is going on out there that ties a number of things together, and crime may be one of them. Man is a tribal animal. We come together in little groups and, over a period of generations, create cultures. That is how we live. If you remember that only in the last few hundred years have the tribes been able to move around and bump into one another, you realize how powerful the tribal ties are. If you had been asked three or four years ago to name, somewhere in the world, a national unit that had cultures as diverse and as multiple as the United States, and you thought about it carefully, you would have said the Soviet Union, which of course would have been correct, and, yes, Yugoslavia, which also would have been correct. But look at what has happened since then, once those political entities were destroyed; see how quickly the reversion to things tribal took place and watch what happens when the tribes go at each other. These are powerful bonds indeed.

Recently, we have seen new surveys of minority attitudes, and one striking finding is that, however much the minorities in America dislike us white folks, the minorities don't like the other minorities much either. The Hispanics are

unhappy with the blacks, the blacks don't like the Hispanics, and both the blacks and the Hispanics dislike the Asians—and on it goes. I think what may be happening in black society is that the people who were forced first to create a slave culture and then a post-slave-but-not-really-free culture are now creating a politically-free-but-still-and-for-the-foreseeable-future-a-minority culture. If you listen to the music ("let's shoot the cops—let's hate whitey"), if you think about how the labels have changed from "colored" or "Negro" to the more neutral "black" ("at least this will unify us and it does talk about what color we are") to the now correct "African-American," you can sense a people searching for a culture. One does not try to create a culture by admiring and adopting or emulating another culture. One does it by having a thing of one's own and by rejecting that which is not of one's own.

Can it be, I wonder, that young adolescent black males—empowered by the incredible traffic in guns, enticed by the money to be made in drugs, insisting that "I'm not white, I don't want to be white, I want to sit in college with my black friends, I don't want to live in an integrated neighborhood"—are creating and enjoying the fear that white people like me have of them? Is a willingness to be armed, to shoot, to do jail time becoming a part of the post-civil rights black culture? I don't know; we don't know; and talking about it is virtually forbidden. But I believe that until we somehow address the problem of black crime, we will get nowhere.

Black people complain that white people look at a black male and can't tell whether they are seeing a black man or a black criminal. This they think is unfair, and one can understand the complaint. The problem is that it is a reasonably close call. If the person is a black male between eighteen and twenty-five years of age, the chances are about one in four that he is a black criminal—someone who is now in contact with the law, someone who has committed a crime and is waiting to be tried for it, or someone who has been convicted of a crime. It is well and good to talk about civil rights, but one of the most primitive rights we have is the right to be safe in one's home and safe on the streets. When you realize that one in four young black men may be the kind of person that will hurt you, it is difficult not to turn to the larger black society and ask, "Why do you countenance this behavior? Why aren't you deploring this in the same way that we would deplore it if we weren't afraid to speak? Why are you seemingly so silent on this issue when you yourselves are victims of these people?"

At this point, I should be speaking optimistically and urging some particular behavior on you or saying something that suggests that brighter days are ahead. Unfortunately, I don't feel that way. I think it will take at least another generation's worth of exploration and discovery before it is determined whether we are going to resume a move toward racial integration, with people

living together without regard to skin color, or instead shift toward a multicultural America in which distinct cultures will try to live in tandem with one with another. I cannot predict which way we will go. There is only one constant that I am sure is not going to change any time soon. Black people constitute about twelve percent of the American population and they will stay at about twelve to thirteen percent. Thus, black people are going to remain a minority, and they and we will have to deal with that basic fact.

THE IMPORTANCE OF TALKING

America, I think, has two specific characteristics that separate it from the rest of the world, two characteristics that I consider related. No other political entity in the world is as polyglot, diverse, and multicultural as we are, and no other political society prizes and upholds the right to free speech as we do. The first amendment came into being as a protest against the king and government, but over the years and the decades and the generations it has taken on a different function. In a diverse, polyglot, multicultural country, free speech in its many forms—dialogue, conversation, the expression of opinion, even criticism, even hate speech—had to go on if the society was not to disintegrate into enclaves that would make real political equality impossible.

In view of this, I regret and am embarrassed and angered by the silence that has now taken over the white majority—a silence that comes, I suppose, from fear of being labeled racist or not wanting the hassle.

There is really a lot, I think, that the races have to talk about. How long, for example, should affirmative action last? In what form? In yesterday's paper there was a piece from a black poet named Nikki Giovanni, who has written a book called *Racism 101* about academia. *Racism 101* contains a survival guide for black kids, and this is her advice: (1) Go to class, even if you don't feel like it. (2) Meet your professors. (3) Do assignments on time. (4) Don't defeat yourself.[3] When I read this I think, "My God, we will turn aside white kids to put you in a college chair. We will give you federal money, money from my taxes, for which only black students are eligible. We will do all that, and Nikki Giovanni has to tell you that it's a good idea to go to class?"

I don't know what that means, but I don't need to talk to white people about it. I need to talk to Nikki Giovanni or some black people about it, to say "How in God's name can this advice be palatable? What are we supposed to make of this?" I have made a private vow that, whenever possible, I am going to say what I think in the few mixed race conversations in which I participate. I've

---

[3] N. GIOVANNI, RACISM 101, at 103-04 (1994).

decided that I am going to do what I can to help the conversation resume, to restart a dialogue. Parts of it will be painful. There will be times when I will be shouted down and times when I will offend people. But I think it is important to do it anyway. It occurs to me that lawyers, as people who are responsible for articulating what the society stands for and what it won't tolerate, may have a special responsibility for helping us renew conversations that might raise tensions but will ultimately lead us toward greater understanding.

CHALLENGES FOR LEGAL EDUCATION†

Kristine Strachan*

It is not a happy time to be the dean of an American law school. The average shelf life for deans right now is less than four years. The dangers to our schools' financial stability have never been as large as they are right now, and we have never faced as many demanding, conflicting constituencies. Thus the shortness of our tenure. I would like to outline some of the major challenges facing legal education, in the hope that I can give you a broader perspective on some of the changes that have occurred in the past few years and the possible consequences for law schools.

Between 1981 and 1991 the consumer price index went up approximately 47%. Over that same period the average tuition at the 101 private law schools, where 65% of all law students are, went up about 160%, from $5,000 to an average of $13,000 per year. The 75 public law schools boosted resident tuition about 175% over that same period, from $1,300 to $3,600 per year, and that figure doesn't include the increasing substantial surcharges that the public schools are imposing upon professional school students. My prediction is that this trend of increasing tuition is going to continue for the next decade but at a more moderate rate. We think that the average tuition at a private law school will be approximately $25,000 by the year 2000. To the cost of tuition must be added the living expenses of law students for nine months, and those range from $10,000 to $15,000 per year, depending on geographical location. At USD, for example, our students are budgeted at about $30,000 per year for tuition and living expenses, which adds up to $90,000 to $100,000 for the full three years of law school.

The cost of legal education then, has gotten to be thrilling, and the question is how law students—approximately 45,000 new ones each year—can afford it. They have been living to an astounding extent on borrowed funds. Approximately eighty percent of the nation's full-time law students borrow an average of $40,000 over three years. At private schools such as USD, the amount is higher; our students graduate with an average of $50,000 in law school debt. Roughly, this means that half to two-thirds of the average operating budget of

---

† Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 17, 1994.

* Dean and Professor, University of San Diego School of Law. The author is grateful to Dean John R. Kramer, of Tulane Law School, for some of the background information herein. *See Maintaining Quality in a Period of Recession*, 6 OCCASIONAL PAPERS (A.B.A.) 55 (1993).

a law school is supported by our students' willingness to borrow substantial sums of money. In turn, this means that law schools are highly leveraged institutions, and that is risky business.

Sustaining our precarious position depends to a great extent on our students' perception of what awaits them in the way of jobs upon graduation. It is my perception that lawyering in the 1990s does not look nearly as lucrative as it looked in the 1970s or 1980s. The practicing bar may have come to grips with the radical transformation in law practice and marketplace economics that has occurred in the last ten years, but law schools have not yet done so. Why not? Because we haven't had to. We are not only living on borrowed money; we are living on borrowed time.

What do we know about the brave new world of legal employment that faces these 45,000 law school graduates each year? It might be interesting for you to know how little we know about the job market and how little we can accurately predict about it. For example, did you know that neither the ABA nor anyone else knows exactly how many lawyers there are out there? The ABA talks about 780,000 lawyers, but the truth is that no one really knows. You cannot just add state bar memberships because that won't account for duplication. I would be counted, for example, three times—in New York, California, and Utah—and I practice in none of those states. There also is no way accurately to separate the active from the inactive members, and most state bars have no idea how many on their membership rolls are dead, physically, intellectually, or economically.

Given this lack of basic market information, you can imagine how far away we are from accurately predicting the number of new openings available to graduates who have passed a bar exam and actually want to practice law. What we do know is largely impressionistic. Information from the National Association of Law Placement indicates about a ten percent drop in placement rates over the past five years, but the rate still averages eighty percent for each graduating class of each law school. That seems pretty good, but it could be a misleading figure. It doesn't take into account the number of third-, fourth-, fifth-year associates who have been laid off or fired. It doesn't take into account the number of graduates who work part-time because they can't find full-time jobs, the number of people who report on surveys that they are employed full-time but have only occasional legal work and actually make their living by selling ties, or the five to ten percent of recent grads who simply disappear from our records every year. In short, there is a lot of guessing going on about what the job market is for the 45,000 new lawyers that we pump out each year. Our best guess is that the legal marketplace has significantly contracted and will continue to downsize or at least expand insufficiently to absorb all the new lawyers.

Have applicants to law schools figured this out? No. Applications have been off a little in the past two years, but that is in comparison with record highs in the 1980s. Demand for legal education has not slipped appreciably yet and probably won't. Why? The irrepressible optimism of bright people with nothing better to do with themselves. Each one of our applicants believes that he or she can succeed though others may fail. In addition, there is little else many of these students can do after college that offers a better prospect of a satisfying career and a decent wage. Some of the loans allow for deferral for as long as three years for unemployment and carry repayment terms of as long as thirty-six years, so the entering law students don't perceive the debt as burdensome. And, in fact, the debt is manageable—*if* the student gets a good job right after graduation and keeps it, *if* interest rates on the loans don't rise appreciably, and *if* the student can significantly retrench his or her expectations about new cars and homes. This year, however, the rate of graduates temporarily postponing loan repayment is reported to be about twenty-three percent. If that turns into a default rate, it will mean big problems for law schools.

There is an even more immediate problem, and that has to do with the identities of the lenders. Right now, about twenty-seven percent of the total national law school debt is supported by the federal government and another sixteen percent by the states, for a total of forty-three percent, and the rest is private. So legal education is an almost half-socialized enterprise. President Clinton, thanks to Senator Simon, is about to transform the structure of law school lending by cutting out private lending middlemen altogether and forcing direct lending between law schools and law students. Our students would benefit significantly if this resulted in a reduction in interest rates, but the achievement of that goal is problematic. My guess is that substantial administrative costs will be imposed on law schools, and direct lending could dry up the private loan market on which most private law schools now depend.

Are there ways out? It has been suggested that we reduce the number of law students we pump out every year. Given the way public and private universities fund their law schools, this is not likely to happen voluntarily. It would mean a substantial cut in our revenues, one we certainly would not do unilaterally, and if we did it in concert, that would provide a full employment opportunity for antitrust lawyers. Might it happen involuntarily? Will it be forced on us by a drastic decline in applications to law schools? Right now we have a lot of slack. There are about 90,000 applicants for 45,000 entering spots. When applications dropped precipitously in the early 1980s, very few law schools downsized or closed. They just lowered their credential requirements and admitted the same number of students.

Could we reduce the cost of legal education so the students wouldn't have to borrow so much money? Probably not significantly. Legal education oper-

ates within the academic tenure system. The lion's share of my budget is in faculty salaries and benefits, and tenure means never having to say good-bye (and certainly never having to say you're sorry!). This works against any serious effort or ability to reduce costs. Moreover, the pressures now coming from the practicing bar will push costs even higher. The report of the MacCrate Task Force on Law Schools and the Profession advises law schools to expand their practical skills curriculum voluntarily, or expansion will be imposed upon them from outside by the state bar associations. This would almost guarantee the fall of our house of cards. At my own law school, which is a large one, the clinical programs already are extensive, and we are able to provide only about one-fourth of each class with adequate skills education.

The low student-faculty ratio required for quality clinical education, by state bar rules or local court practice rules or conscientious faculty, means that we must have one faculty member for each group of eight to twelve students in a clinical course. That translates to a cost per student of around $200 a credit hour. Compare that to a standard course where the cost per credit hour is about $25. How many of your firms could survive a 700% increase in operating costs? If we actually tried to move from turning out a lot of raw, unpolished diamonds to producing marginally competent beginning practitioners (God forbid!), we would go broke. If MacCrate is imposed upon us, we are far more likely to balance the books with the only possible alternative open to us—cost-free externships all over the United States, Europe, and the Pacific rim, which would mean twelve hours of credit at full tuition without serious faculty supervision or exams. What an improvement in the quality of legal education that would be! My law school will enlist in the MacCrate movement when and if those who would impose it on us contribute funds to help us do it right.

What is the good side of all this? I want to end on a positive note because I am a true believer in the inherent value of legal education. That is why I love my job (although I like to gripe occasionally about faculty who want to get paid more and more for teaching less and less, about law students who don't seem to understand that "no" is a complete sentence, and about state bar associations who want to tell us how to run our law schools). The availability of all these loans for law students has substantially increased access for minority students and single mothers, and the increased number of lawyers has had at least two positive consequences: More law-trained persons are performing tasks that can benefit greatly from that training but historically have not had it—such as jobs in the welfare bureaucracy and claims adjusters in the insurance industry—and more legal services are available to underserved populations. On the whole, I would rather be a law school dean than anything else, even though it often is like standing in a cemetery: There are lots of people underneath you, but no one is listening.

NECESSITY IS THE MOTHER OF STRANGE BEDFELLOWS†

James K. Robinson*

My original title was "Legal Education and the Profession—A Transitional Perspective." It was a bit ponderous but sounded appropriately academic. I planned to explore the gap, or the perception of a gap, between legal education and the profession, and to do so from my new vantage point as a law school dean after twenty-five years as a trial lawyer. Then I learned about some of the other titles. My friend, Kurt Luedtke, had titled his remarks "It's About Your Mother's Combat Boots." John Reed's title was "They're Playing A Tango." I knew I was in trouble. I needed a more interesting speech, or at least a more entertaining title.

In the end, I took the easy way out; I settled for an entertaining title. I wish I could claim the credit for the wonderful mixed metaphor, but our previous speaker, my friend Dean Strachan, was present when I first heard the expression at the 1994 midyear meeting of law school deans. It immediately struck a responsive chord and resonated with the remarks John Reed had made last September at a reception welcoming me as the new dean of Wayne State University Law School. John had said:

> Only one who has spent most of his life in the law school world can fully understand what courage it takes for a faculty to recommend the appointment of a dean who has not come up through the ranks as a regular academician. With good reason, faculty members believe that practicing lawyers do not understand academic life—appointments and promotions, faculty governance and politics, the true purposes and depths of serious scholarship. And even when an outstanding candidate comes along, there is the further barrier of image—what will the other schools think of us? What will happen to our reputation and standing from this unorthodox move? And so it is extraordinarily rare for a school to turn to a practitioner for its dean.[1]

Thus the "strange bedfellows" portion of my title. What "necessity," then, mothered such "bedfellows"? There were two: First, law schools these days

---

†Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 17, 1994.

* Dean and Professor, Wayne State University Law School; Fellow, International Society of Barristers.

[1] J. Reed, Remarks at Reception Honoring James K. Robinson, Dean, Wayne State University Law School (Sept. 9, 1993).

are encountering difficulty finding and keeping deans. Second, I was restless for a new challenge, one I hoped would be consistent with my reasons for wanting to become a lawyer in the first place.

LAW SCHOOLS' DIFFICULTIES RETAINING DEANS

In the 1950s and before, law school deans reigned for twenty to thirty years. Erwin Griswold was dean at Harvard Law School for twenty-two years. When I attended law school in the '60s, my dean had served for thirty years. With rare exception, those days are gone, probably forever. Today, the average tenure of a dean is 3.2 years. This year a record forty-two dean searches are underway at the 176 ABA-approved law schools. A recent *National Law Journal* article carrying the headline "Burnout Hits Law School Deans" reported: "Legal education officials are becoming concerned about the record-setting burnout rate among deans of the nation's law schools, which is claiming one in four deans this year and shrinking the average dean's shelf-life."[2]

Last Friday the "At the Bar" section of the *New York Times* carried the caption: "Wouldn't anyone want to be a law school dean?" Its answer: "Not really, as some current searches confirm." The article noted: "Once, finding a dean was fairly straightforward. For one thing, the job was relatively undemanding: When he was dean at Columbia Law School, Harlan Fiske Stone spent his afternoons working at a Wall Street law firm. And homogeneous faculties had little difficulty finding consensus candidates."[3]

Why the current difficulties? In a 1987 article entitled "Why Deans Quit," Paul Carrington, the former dean at Duke, discussed the increasing complexities of the modern deanship and observed that "the rewards of the job are for many too meager in relation to the burdens."[4] Last week's *New York Times* article reported that Chicago and Michigan law schools, while usually finding their deans inside, "risked dangling deanships before outsiders, who ultimately decided that the prestige was just not worth the pain."[5] The *National Law Journal* article on burnout rates of law school deans made the point that "many deans feel that running a school takes them farther away from the reason they got into academia."[6]

Since more and more academics seem to feel this way, yet someone still needs to try to run the schools, a non-traditional window of opportunity was opened to me. It coincided with my readiness for a new challenge. Much as I

---

[2] Myers, *Burnout Hits Law School Deans, Who Quit at Record-Setting Rate*, Nat'l L. J., Feb. 7, 1994, at 4, col. 2.
[3] Margolick, *At the Bar*, N.Y. Times, Mar. 11, 1994, at B18, col. 1.
[4] Carrington, *Afterword: Why Deans Quit*, 1987 DUKE L.J. 342.
[5] Margolick, *supra* note 3.
[6] Myers, *supra* note 2.

might like to think that I could have been chosen to be a dean even in a less complex time for law deanships, I have no doubt that the unorthodox choice of a trial lawyer as dean was motivated, at least in part, by the academy's current difficulty in attracting and retaining deans.

A NEW PERSONAL CHALLENGE

So much for the law school's "necessity." What about mine? I was finishing my first twenty-five years as a lawyer, and I was about to turn fifty. Did I simply fall victim to a mid-life, "grass is greener" syndrome? To the lure of the contemplative academic life over the rat race of billable hours, business development, and the increasing lack of civility in litigation? Well, perhaps, but, it could have been worse! My favorite contemporary philosopher is Dave Barry. Dave described the typical male mid-life crisis in these terms:

> There is virtually no end to the humiliating activities . . . a man will engage in while in the throes of a midlife crisis. He will destroy a successful practice as a certified public accountant to pursue a career in Roller Derby. He will start wearing enormous pleated pants and designer fragrances ("Ralph Lauren's Musque de Stud Hombre: For the Man Who Wants a Woman Who Wants a Man Who Smells Vaguely Like a Horse"). He will encase his pale, porky body in tank tops and a "pouch" style swimsuit the size of a gum wrapper. He will buy a boat shaped like a marital aid. He will abandon his attractive and intelligent wife to live with a 19-year-old aerobics instructor who once spent an *entire summer* reading a single *Glamour* magazine article entitled "Ten Tips for Terrific Toenails."[7]

My wife Marti is happy that I settled for becoming a dean—and for acquiring this outrageously expensive Western belt buckle here at The Phoenician.

Many of my friends in practice tell me they envy my new academic life. When I try to tell them I'm working harder than ever, they don't believe me. Did I realize what I was getting myself into? Well, yes and no. I had a pretty good idea. I talked at length with my friend and predecessor as dean, John Reed, about the job. I had attended the school (I am the first Wayne State Law School graduate to serve as its dean), and I had taught as an adjunct faculty member of the school for over a decade. My former firm hired many of the school's graduates. I was active in alumni affairs. I knew the school and its faculty well. There is no doubt, however, that today, after eight months on the job, I have a much deeper appreciation for the complex role of the modern law school dean. If the dean's job was ever a "soft chair," it isn't these

---

[7] D. BARRY, DAVE BARRY TURNS 40, at 75-76 (1990).

days. There are days when I have a far better appreciation of how Huckleberry Finn must have felt after Tom Sawyer talked him into whitewashing Aunt Polly's fence.

The American Association of Law Schools has just published a law deanship manual. The manual includes what it calls an "incomplete list" of the 24 different roles which must be undertaken by a successful dean. They are: "administrator, advocate, ambassador, arbitrator, budget officer, counselor, diplomat, director, envoy, fund raiser, intellectual, intercessor, judge, liaison, mediator, mentor, negotiator, ombudsperson, planner, public relations officer, public servant, representative, university official, and visionary leader."[8] It was, as you might expect, "visionary leader" that I mostly had in mind when I accepted the post. Visionary leadership, however, is not the role most law faculties have in mind for their deans. Clark Kerr, while presiding over the rapid growth of the University of California, is reported to have wisecracked that a university is "a series of individual faculty entrepreneurs held together by a common grievance over parking." It doubtless is no mere accident of the alphabet that "visionary leader" places last on the list of the dean's roles. My associate dean is fond of referring to our joint attempts at "visionary leadership" as "attempting to herd cats."

I was a little surprised that "teacher" was not on the list of the dean's roles. Nevertheless, I enjoy teaching and so I added it to my list by teaching evidence. This is certainly one of my most enjoyable duties at the law school.

I have not yet concluded, as Dean Carrington did, that the benefits of deaning are substantially outweighed by the burdens. (Note my use of the balancing test enshrined in Rule 403 of the Federal Rules of Evidence.) I find myself more in agreement with former University of Maryland Law School Dean Michael Kelly. Dean Kelly responded to Dean Carrington's article with another article entitled "Why Deans Stay." Dean Kelly said, "If you are temperamentally comfortable with chaos, enjoy the long-term intellectual challenge of guiding a law school into a different relationship with a changing profession and the larger community, then deaning is the best job going, one that offers rare opportunities for creativity and fulfillment."[9] This formulation sounds a lot like the introduction to the old television program "Mission Impossible."

Serving as a law school dean certainly was not one of my lifetime ambitions. So how did I get here? One of the problems with practicing law is that it doesn't leave much time to think. During 1990-91, it was my privilege to serve as president of the State Bar of Michigan. I had an opportunity to step

---

8 AALS, LAW DEANSHIP MANUAL 4 (1993).
9 Kelly, *Afterword: Why Deans Stay*, 51 MD. L. REV. 483, 496 (1992).

out of the trenches for a time and to reflect on the challenging issues facing the legal profession today. Yale Law Professor and ALI Director Geoffrey Hazard, writing about "The Future of Ethics" in 1991, got it right when he said:

> Dissatisfaction with lawyers is a chronic grievance, and inspires periodic calls for reform. Nevertheless, the contemporary problems of the American legal profession seem to run deeper than in the past. There are more lawyers today, both proportionately and absolutely, than at any other time in recent history. There is much greater public consciousness of lawyers' work, which is now the subject of regular coverage in newspapers, magazines, and television serials. Yet the public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society.[10]

Philosopher Barry once again captured the thought. Dave wrote about all the things a typical lawyer hates about being a lawyer; but, Dave said: "Mostly he hates the way every time he tells people what he does for a living, they react as though he had said: 'Nazi medical researcher.'"

I decided I wanted to figure out a way to become a greater part of the solution to the daunting problems facing our profession. I was fortunate. I had a mentor whose example led me to believe in the possibility of addressing the difficult issues facing our profession today as a law school dean. For forty-eight years, this law professor and former dean has inspired his fellow law teachers, lawyers, and judges to understand our responsibility to promote the profession's highest level of skill, accomplishment, and principle. My mentor, of course, is our friend, John Reed, who has been so important to this organization for so many years. It is a great honor and responsibility for me to attempt to follow in his footsteps.

THE DEBATE BETWEEN LEGAL EDUCATION AND THE PROFESSION

It is an exciting time to be involved in legal education. In 1992, Judge Harry Edwards of the Court of Appeals for the District of Columbia, a former law professor at Michigan, published an article in the *Michigan Law Review* titled: "The Growing Disjunction Between Legal Education and the Legal Profession." Judge Edwards said:

> I fear that our law schools and law firms are moving in opposite directions. . . . While the schools are moving toward pure theory, the firms are moving to-

---

[10] Hazard, *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1239-40 (1991) (footnotes omitted).
[11] Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

> ward pure commerce, and the middle ground—ethical practice—has been deserted by both. This disjunction calls into question our status as an honorable profession.[11]

Judge Edwards' article stimulated a great deal of heated discussion in the faculty lounges of America's law schools. Much of the academy responded defensively. In its August, 1993, issue, the *Michigan Law Review* published a symposium on legal education in which most of the eighteen law professors who responded took exception to what Judge Richard Posner of the Seventh Circuit called "Judge Edwards' double-barreled blast at legal education and the practice of law."[12]

This controversy even found its way into our own *Barristers Quarterly*. A recent issue contains an article by Cornell law professor, Roger Cramton, entitled "Partners in Crime: Law Schools and the Legal Profession." Professor Cramton agrees that legal education is in trouble—but, he says:

> Only to the extent that the profession itself is in trouble. We are partners in crime, facing many of the same problems but unable to resolve them. . . . Neither legal education nor the organized bar seems to know where it is going, but each resists change, seeks to protect its turf and income, and blames the problems of the legal system on the other.[13]

Two general themes run through this debate. One involves the role of law schools and the profession in constructing competence. The other involves the need to instill and foster professional values.

In 1992, the American Bar Association's Task Force on Law Schools and the Profession produced an important report on "Legal Education and Professional Development." The report is commonly referred to as the MacCrate Report after its chair, Robert MacCrate of New York. It wisely advises: "Legal educators and practicing lawyers should stop viewing themselves as separated by a gap and recognize that they are engaged in a common enterprise—the education and professional development of the members of a great profession."[14] The report urges law schools and the profession to address the need to help lawyers develop the skills, competencies, and values needed in practice. The MacCrate task force also issued a helpful statement of fundamental lawyering skills and professional values. The skills include problem solving,

---

[12] Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993).
[13] Cramton, *Partners in Crime: Law Schools and the Legal Profession*, 28 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 346, 354 (1993).
[14] ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3 (1992).
[15] *Id*. at 138-140.

legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.[15]

The law school establishment has responded with understandable alarm over the potential costs of the clinical legal education model envisioned by much of the MacCrate report. The dean of Vanderbilt Law School, John Costonis, writing in the *Journal of Legal Education*, said:

> The Task Force's vision is noble . . . [b]ut . . . this vision cannot be achieved absent a society, a profession, and universities' central administrations that are willing to pay the price of such training. None has chosen to do so, and the law schools and their students cannot possibly do so by themselves. The problem, in short, is predominantly economic, not pedagogical. Exhortation alone will not solve it.[16]

In addition to cost, another major concern of law school is turf—a concern that the recommendations will find their way into the accreditation process and undermine the ability of law schools to determine their own curricula.

At the mid-year meeting of the ABA in Kansas City, the House of Delegates adopted a resolution urging law schools to implement many of the recommendations of the MacCrate report. This resolution was adopted over the strong objections of the American Association of Law Schools and the ABA's own section of legal education. An alternative resolution advanced by the legal education establishment was defeated. One dean, in a *U.S. Law Week* account, accused the proponents of the ABA resolution of "uninformed law school bashing."[17]

We are still in the early stages of an important and much needed debate. The ABA resolution directed the section of legal education to report to the House of Delegates "as to the manner in which skills and values instruction should be integrated in the accreditation process." These are "fighting words" for most law faculties. The stakes in this fight are very high, not only for law schools but for the future of our profession.

THE DEEPER ISSUE

Dean Anthony Kronman of Yale, has written a new book about the crisis in

---

[16] Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 196-97 (1993).
[17] 62 U.S. LAW WEEK 2500 (1994).
[18] A. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).
[19] *Id*. at 2.
[20] *Id*. at 1.

the American legal profession.[18] He describes the crisis as one of morale—a "product of growing doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up."[19] His message is that the profession "now stands in danger of losing its soul."[20]

While the issue of improving lawyering skills is important, I believe there is an even more pressing need to address the subject of failing professional values. In the current realities of law practice, too many of our colleagues at the bar lack an inspiring professional ideal that permits them to believe that the practice of law is a worthy, lifelong endeavor with value in its own right, not just for its economic rewards. We need to change this.

When one pauses to reflect on the sea changes in law practice over the past twenty-five years, it is tempting to abandon hope for the profession's future. Many scholars and bar leaders are depressingly pessimistic about reviving professional values or constructing worthy new ones. I am confident, however, that those of us in the International Society of Barristers are not ready to give up on our profession's future. The founding purposes of our society include taking the steps "necessary for the protection of the rights of citizens, the independence of the judiciary, and the stature of the Bar."[21]

In closing, let me mention just a few of the initiatives I am pursuing in my new role as a dean to address the important issues of lawyer competency and professional values. We are reviewing our curriculum to assure that our offerings are responsive to the demonstrated need to do a better job of teaching fundamental lawyering skills. We are expanding our courses in trial advocacy, pretrial advocacy, appellate advocacy, negotiation, and alternative dispute resolution.

We are also making efforts to bring the real world into the law school. Judge John Feikens of the United States District Court for the Eastern District of Michigan recently held motion hearings at the law school on a civil motion and a criminal motion. Our students were provided summaries of the issues to be argued, and the judge and the lawyers answered the students' questions after the arguments. The court's written opinions were distributed after decision. Next month, the Michigan Court of Appeals will hold arguments at the school. We intend to make these events a regular part of our legal writing program.

Professor John Dolan of our faculty is developing a new commercial clinical course, in conjunction with experienced senior practitioners who will be assisted by younger lawyers in their firms. The students will work on traditional commercial activities such as the sale of a small business, and will explore strategy, negotiation, structuring, and drafting of documents. If this

---

[21] International Society of Barristers Articles of Incorporation, art. IV, para. 11.

model works, as we believe it will, it will provide a pattern for use in many other fields. This approach (using law professors and experienced practitioners) has real promise for involving more members of the profession in legal education, and it will benefit not only our law students but also the young lawyers who will be working with senior lawyers on this project. We hope it will help firms in discharging their own in-house training and mentoring responsibilities to their younger lawyers.

I am in the process of developing a new course for next year called "Introduction to Lawyering." This course will be designed to inform law students about the legal profession, its origins, development, and current challenges. It will discuss the fundamental skills and professional values important to a successful and rewarding professional career. Leading practitioners and judges will be invited to share their insights into the full range of career options and challenges available in private practice, government service, in-house corporate work, the judiciary, law teaching, and public interest law. The course will also explore the responsibilities and opportunities lawyers have to provide service to the bar and the public, and to render pro bono legal services to those unable to afford a lawyer. As part of this effort, we will provide each student with the student edition of the MacCrate report, which contains an overview of the profession for which students must prepare as well as a vision of the skills and values new lawyers should seek to acquire.

In September, we will hold a forum on excellence in the law. This program was made possible through a gift in honor of Eugene Driker, one of our school's most distinguished graduates. The forum will explore the important issue of failing values of the legal profession. Dean Kronman will discuss the issues raised in his book, and George Bushnell, president of the ABA, and Chief Judge Gilbert Merritt of the United States Court of Appeals for the Sixth Circuit will participate.

I am convinced that the broad-based involvement of lawyers, judges, and law teachers will be essential if we are to make real progress in addressing the serious challenges facing our profession. None of us can solve these daunting problems individually. Each of us, however, has an obligation to do our part. I hope the current constructive debate about legal education and the profession will help us rekindle the professional pride of lawyers in the nobility of our calling and its value to society. If your law school dean is trying to make these kinds of things happen, I urge you to lend your help. If your school is not moving constructively in this direction, perhaps you should urge your dean to do so and offer to help. The future of our profession may well depend upon it!

LIMITED DISCOVERY AND THE USE OF ALTERNATIVE PROCEDURES FOR DISPUTE RESOLUTION†

William H. Erickson*

INTRODUCTION

The spiraling cost of litigation makes the adversarial system an impractical and expensive means for the timely resolution of disputes.[1] Horror stories abound about the cost of discovery, legal fees, and delays incident to the trial and appeal of a contested case.[2] Discovery abuse is often singled out as the leading contributor to the escalating cost of litigation. Former Vice President Dan Quayle, as Chair of the President's Council on Competitiveness, asserted that discovery was one of the main culprits destroying America's competitive edge and furthering the decline of our nation's legal culture.[3]

As a result of past failures for reform,[4] amendments to both the federal and state rules of civil procedure have been proposed. On December 1, 1993, the proposed amendments to the Federal Rules of Civil Procedure became effective.[5] The most controversial change involves the amendments to Rule 26 of the Federal Rules of Civil Procedure. Many commentators believe these

---

† This article, reprinted with permission from 71 DENVER U.L. REV. 303 (1994), was the basis for Justice Erickson's address delivered at the annual convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 17, 1994.

* Justice, Colorado Supreme Court; Fellow (President, 1971), International Society of Barristers.

1 Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989).

2 *See* Jane Birnbaum & Morton D. Sosland, *Guilty! Too Many Lawyers and Too Much Litigation. Here's a Better Way*, BUS. WK., Apr. 13, 1992, at 60, 61 (noting that law firms grossed more than $100 billion in collected legal fees in 1991, with one major company alone spending over $100 million a year in legal services and liability insurance); *see also* Julie Johnson & Ratu Kamlani, *Do We Have Too Many Lawyers?*, TIME, Aug. 26, 1991, at 54 (generally supporting the August 13, 1991, remarks by former Vice President, Dan Quayle at the American Bar Association meeting in Atlanta, Ga.).

3 *See generally* former Vice President Dan Quayle, Prepared Remarks by the Vice President to the Annual Meeting of the American Bar Association ("A.B.A.") in Atlanta, Ga. (Aug. 13, 1991) (transcript on file with the A.B.A.) [hereinafter Quayle Remarks]; THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3, 4 (1991) [hereinafter CIVIL JUSTICE REFORM] (noting that discovery accounts for over 80% of the cost of a typical lawsuit and is often used as a weapon with staggering costs to the responding party); ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, A.B.A., ATTACKING LITIGATION COSTS AND DELAY 7 (1984) [hereinafter ACTION COMMISSION] (noting excessive delays prior to trial are often the result of expensive discovery which is "excessive in relation to the magnitude of the case"); WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS, A.B.A., A.B.A. BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM xiii to xv (1992) [hereinafter ABA BLUEPRINT] (responding to former Vice President Quayle's demand for reform).

4 S*ee infra* notes 9–10 and accompanying text.

5 S*ee infra* pt. II.

amendments will lead to an increase in discovery abuse, thereby further increasing the cost of litigation. In contrast, however, the amendments to Rule 26 may also work a beneficial effect by increasing the use of alternative methods of dispute resolution (ADR).

Part I of this Article provides a general description of past efforts to reform the legal system in both federal and state courts. Part II briefly discusses the amendments to the Federal Rules of Civil Procedure regarding discovery techniques, followed by a discussion focusing specifically on the amendments to Rule 26. Part III first discusses the potential adverse effects of Rule 26, then concludes by illustrating how the amendments to Rule 26 will, instead, likely increase the beneficial use of ADR.

I. BACKGROUND

Dean Roscoe Pound, in 1906, delivered his classic address, "The Causes of Popular Dissatisfaction with the Administration of Justice," at the American Bar Association meeting in St. Paul, Minnesota. He highlighted the archaic nature of court proceedings, the uncertainty and expense of trial, and the "injustice" of basing decisions on procedural technicalities rather than the merits of the case.[6]

Since Dean Pound sounded his clarion call for change, major improvements to the adversarial system of litigation have been made.[7] In 1976, Chief Justice Warren Burger convened the Pound Conference[8] in St. Paul, Minnesota, to again consider Pound's complaints and to prepare a blueprint for future improvements in the administration of justice.[9] Many of the leading lawyers, judges, and professors attended the conference to consider abuse of discovery, simplified pleadings, alternative means for dispute resolution, and a number of other complaints. Following the conference, Griffin Bell was appointed to chair a committee to study means to implement the recommendations.[10]

---

[6] Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the A.B.A. Convention in St. Paul, Minn. (Aug. 26, 1906), *reprinted in* 35 F.R.D.. 273 (1964).

[7] *See, e.g.,* William H. Erickson, *Responses of the American Bar Association*, 64 A.B.A. J. 48 (1978) (response of the organized bar to the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, also known as the "Pound Conference;" holding the view that significant efforts towards Pound's goals had been accomplished in the preceding 70 years).

[8] *See supra* note 6. The Chief Justice's key-note address and many other addresses from the Pound Conference are reprinted in 70 F.R.D. 79 (1976).

[9] William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1978).

[10] A.B.A., *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976); *see also* Griffin B. Bell, *The Pound Conference Follow-Up: A Response from the United States Department of Justice*, 76 F.R.D. 320 (1978).

Unfortunately, however, procedures for securing timely, reasonably priced resolution of civil disputes have not been developed and implemented.[11]

Efforts have been made to develop procedures that would limit discovery, simplify and abbreviate pleadings, and shorten the time and methods for resolving contested issues in a trial.[12] The A.B.A. Action Commission[13] to Reduce Court Costs and Delay (Action Commission) proposed a number of procedures to improve and reduce the cost of resolving civil disputes. Several states have implemented many of the Action Commission's recommendations. Despite the success of a number of the Action Commission's recommendations, however, many of the suggested procedures for reducing delay and making litigation more economical remain dormant at the federal level.

An experiment conducted in Ohio to reduce delay and expense, for example, centered on the use of videotaped presentations of the testimony of all witnesses. The procedure called for a trial judge to rule on objections and edit the videotape in the presence of counsel. Once edited, the videotape would then be presented to the jury without interruption, resulting in a significant reduction in the time required to try the case. Doctors were particularly pleased by the elimination of court appearances and the ability to testify as expert witnesses with a minimum loss of time from their practice.[14]

Another recommendation of the Action Commission that has been successfully implemented is telephone conferencing. Telephone conferencing eliminates the need for attorneys to appear in court for settings, to resolve motions, and to dispose of other routine matters.[15] Colorado, Florida, New Jersey, and California have successfully implemented telephone conferencing procedures.

Colorado, as an alternative to the wide-open discovery procedures initially established by the Federal Rules of Civil Procedure in 1938,[16] and Colorado's counterpart,[17] imposed restrictions under Colorado Rules of Civil Procedure (C.R.C.P.) 26.1 in an attempt to limit and simplify discovery.[18] C.R.C.P. 26.1

---

[11] S*ee generally* ACTION COMMISSION, *supra* note 3, at 7–44. Similarly, the A.B.A. responded to Vice President Quayle's concerns with a blueprint for improving the civil justice system. *See* ABA BLUEPRINT, *supra* note 3; Quayle Remarks, *supra* note 3. Like the other attempts, however, the A.B.A. BLUEPRINT did not come to fruition.

[12] For a discussion of various ADR procedures and the federal courts, *see* Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991). Several efforts to establish ADR procedures in state courts are highlighted in IN SEARCH OF PROPER BALANCE, NATIONAL SYMPOSIUM ON CIVIL JUSTICE ISSUES 21 (Insurance Information Institute & Fordham University School of Law eds., 1986). *See generally* THE INSTITUTE FOR CIVIL JUSTICE, 1992–93 ANNUAL REPORT (1993).

[13] *See supra* note 3.

[14] *See* Irving Kosky, *Videotape In Ohio*, 59 JUDICATURE 231, 235–36 (1975); Thomas J. Murray, Jr., *Videotaped Depositions: The Ohio Experience*, 61 JUDICATURE 258, 261 (1978); Laurence B. Stone, *Use of Videotape in the Legal Profession*, 45 OHIO B. 1213, 1216 (1972).

[15] *See* ACTION COMMISSION, *supra* note 3, at 45.

[16] FED. R. CIV. P. 26 to 37 [hereinafter F.R.C.P.].

[17] COLO. R. CIV. P. 26 to 37 [hereinafter C.R.C.P.].

[18] The full text of C.R.C.P. 26.1 appears *infra* in Appendix A.

restricts the number of depositions that may be taken, limits written interrogatories, and imposes a continuing duty to disclose information necessary to keep the information provided in the discovery process current. C.R.C.P. 26.1 also places restrictions on requests for admissions and on the time to complete discovery. C.R.C.P. 26.1 originally provided that the procedures would be followed only if approved by all parties to the litigation, and as a result, was rarely used. The Colorado discovery rule has been more widely used since the enactment of an amendment to C.R.C.P. 26.1, which permits a court, in its discretion, to impose the statutory discovery limitations in Rule 26.1.[19]

II. THE AMENDMENTS TO FEDERAL RULE 26[20]

The recently enacted amendments to the Federal Rules of Civil Procedure, as well as similar proposals presently under consideration in various states, will materially alter discovery practice.[21] Unfortunately, the new amendments to federal and state discovery rules may increase, rather than reduce, discovery abuse and the cost of litigation.[22] The most controversial modification to the federal discovery procedure is the amendments to Rule 26[23] (which is substantially similar to Colorado's proposed Rule 26[24]).

The format of the amendments to Rule 26 requires parties to meet and provide a discovery schedule that would require full disclosure. The amendments add a new component to civil litigation—automatic disclosure. The amendments also impose a continuing duty on both parties to supplement disclosures when new information relating to the previous disclosures becomes available. Additionally, the amendments include the right to obtain sanctions and protective orders.

---

[19] C.R.C.P. 26.1 (1990 & Supp. 1993).

[20] Under the Enabling Act, the rulemaking power for the Federal Rules of Civil Procedure resides in the Supreme Court. The drafting chores are assigned under the Enabling Act to the Judicial Conference, which recommends the proposed rules to the Supreme Court. The rules, if approved, are then sent to Congress, by May 1 of a given year and become effective on December 1 of the same year, unless modified by Congress.

Justice White, in approving the proposed amendments, suggested that the rule-making power exercised pursuant to the Enabling Act be placed exclusively in the Judicial Conference and said:

> If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid. [Quoting Black and Douglas, JJ., 374 U.S. 865, 869 (1963). Ed.]

61 U.S.L.W. 4391 (Apr. 27, 1993).

[21] *See generally* Symposium, *Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993).

[22] *See* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 41–46 (1992); John C. Koski, *Mandatory Disclosure*, A.B.A. J., Feb. 1994, at 85.

[23] Proposed F.R.C.P. 26 appears *infra* in Appendix B.

[24] Proposed C.R.C.P. 26 appears in 22 COLO. LAW. 2165, 2173–76 (1993).

The amendments, however, lack definitive standards for what is and what is not subject to the rule of automatic disclosure.[25] The text employs non-specific language such as "discoverable information relevant to disputed facts alleged with particularity."[26] Opponents fear the changes will increase the number of motions for protective orders and sanctions, and, in turn, increase cost to litigants.[27] Prior to the amendments to Rule 26, the phrase, "relevant to the subject matter," had been broadly interpreted to permit discovery if an inquiry may lead to the discovery of admissible evidence. Broad interpretation of this phrase, in fact, has precipitated many of the complaints relating to the abuse and excessive cost of discovery.[28]

A. Criticism of the Amendments to Rule 26

The automatic disclosure requirements of the amendments to Rule 26 have prompted a firestorm of criticism.[29] The Reporter for the Advisory Committee acknowledged the then proposed amendments to Rule 26 brought protest from both the plaintiff and defense bars.[30] Many lawyers believe the new automatic disclosure requirements will trigger a flood of motions for sanctions and protective orders that will inundate the trial courts.

Some justices of the Supreme Court also criticized the changes. Previously, with the exception of Justices Black and Douglas,[31] Supreme Court dissents to proposed rule changes have been rare.[32] Unusually, however, due to the sweeping changes suggested by the Judicial Conference, Justices Scalia, Thomas, and Souter registered strong dissents to the approval of the proposed changes to the Rules.[33] The dissents criticized the extent of the changes

---

[25] *See* Bell et al., *supra* note 22, at 41.
[26] *See infra* Appendix B, Rules 26(a)(1)(A)–(B); 61 U.S.L.W. 4372 (Apr. 27, 1993) (Proposed F.R.C.P. Rules 26(a)(1)(A)–(B)).
[27] Bell et al., *supra* note 22, at 41–46.
[28] *See, e.g.*, John P. Frank, *The Rules of Civil Procedure—Agenda For Reform,* 137 U. PA. L. REV. 1883, 1891 (1989); Geoffrey C. Hazard Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989) (discussing two primary criticisms of the Federal Rules: (1) overly broad and intrusive scope; and (2) indiscriminate "trans-substantive" scope). For a discussion of state civil procedure discovery abuse as viewed by attorneys in five different geographic areas, see Susan Keilitz et al., *Attorneys' Views of Civil Discovery*, JUDGES' J., Spring 1993, at 2.
[29] *See, e.g., Federal Rule 26 Amendments: Wrong Medicine for Discovery Problems*, 58 DEF. COUNSEL J. 454, 454–55 (1991) (The proposed discovery system will "disrupt . . . the existing balance among counsel, . . . lead to overdisclosure, . . . new disputes regarding disclosure, . . . [and] the prediscovery disclosure requirement would tend to undermine the adversary system."); *see also* Richard B. Schmitt, *Lawyers Unite Against Plan to Speed Suits*, WALL ST. J., June 8, 1993, at B1 (The proposed changes to the Federal Rules "have become a rallying point for the normally fragmented bar."). *But cf.* Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 265–67 (1992) (discussing proposed Rule 26 controversies but supporting reform).
[30] Bell et al., *supra* note 22, at 28–29 n.107 (citing the Reporter's Summary May 20, 1992).
[31] Justices Black and Douglas believed the Supreme Court should not be a mere conduit for submitting the rules to Congress, but should pass upon the merits of the proposed rules. *See* 61 U.S.L.W. 4390, 4391 (Apr. 27, 1993).
[32] Amendments to the F.R.C.P., 61 U.S.L.W. 4390, 4391 (Apr. 27, 1993).
[33] *Id.* at 4392 (Scalia, J., dissenting).

proposed[34] and seriously questioned whether current federal court rule-making procedure is working as well as in the past. Specifically, Judge Scalia concluded that automatic disclosure would not replace current discovery methods, but instead would add a new layer of discovery.[35] Such a system, he asserted, would only further frustrate attempts at reducing litigation costs and delay.[36]

Justice Scalia argued that frustration will emanate from two distinct effects of the proposed Rule 26.[37] Primarily, he viewed the broad language directing exchange of "relevant" facts as an invitation to further litigation concerning just what is "relevant," and whether the opposing side has adequately disclosed the required information. In his view, this unnecessary variable will prompt additional and costly litigation with no benefit to the litigants.[38] In addition, Justice Scalia's concern extended to how, during the course of litigation, the determination of whether the opposing side has fulfilled its continuing obligation to supplement the initial disclosure will be made.[39]

Justice Scalia also suggested that the requirement to provide damaging information to the opposing side "does not fit comfortably within the American judicial system."[40] Justice Scalia pointed out that the adversarial nature of resolving contested issues in a trial does not square with a rule mandating that an attorney use his professional skill to assist an adversary's case preparation.[41] He emphasized that the proposed Rules drew almost universal criticism from the legal profession.[42] Despite the concerns of the dissenting Justices, a majority of the Court concurred in transmission of the proposed amendments to Congress.[43]

On November 3, 1993, the United States House of Representatives passed the Civil Rules Amendments Act of 1993, which, among other provisions, deleted the mandatory disclosure provisions in the amendments to Rule 26.[44] The House's rationale for deleting the proposed changes to Rule 26, was similar to that expressed by Justice Scalia and legal practitioners—i.e., that mandatory disclosure is an "anathema to the adversarial process," "will compromise the attorney-client privilege," and the standard, "pleaded with particularity," is too vague and will increase, rather than decrease, discovery

---

[34] Richard B. Schmitt, *High Court Alters Way of Disclosing Pretrial Data*, WALL ST. J., Apr. 23, 1993, at B2.
[35] 61 U.S.L.W. at 4393 (Scalia, J., dissenting).
[36] *Id.*
[37] *Id.*
[38] *Id.* Specifically, Justice Scalia criticized the expected increase in the volume of discovery and the inevitable increase in the production of irrelevant documents.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] 61 U.S.L.W. at 4390–4392.
[44] H.R. 2814, 103rd Cong., 1st Sess. (1993).

burdens.[45] Additionally, Congress felt that, prior to making such a substantive change in the Rules, it should wait until the period of local experimentation mandated under the Civil Justice Reform Act of 1990[46] was complete.[47] After voting to suspend the rules and pass the bill, the House sent the bill to the Senate. The Senate, however, adjourned for the holiday without acting on the bill and on December 1, 1993, the amendments to the Federal Rules of Civil Procedure became effective.[48]

III. POTENTIAL EFFECT OF THE AMENDMENT TO RULE 26

Beyond the scope of continuous automatic disclosure is a much more philosophical debate. Our legal system is based on an adversarial model. An attorney is charged with the duty to vigorously pursue every available lawful avenue for his or her client.[49] Automatic disclosure threatens the legitimacy of the attorney-client relationship. Under the amendment, each side must disclose information that supports, contradicts, or reduces its claims.[50] The duty to disclose information detrimental to his client's case cannot be easily reconciled with an attorney's duty of loyalty.[51] A more practical result [rule] would require the litigants to disclose all evidence that will be entered to support a claim or defense.[52]

This concern, however, may miss the point and illustrate the problem the amendments to Rule 26 seek to address. As my counterpart, Justice Zlaket of the Arizona Supreme Court, succinctly stated in responding to similar arguments:

---

[45] 139 CONG. REC. H8745–46 (daily ed. Nov. 3, 1993) (statement of Rep. Hughes).

[46] 28 U.S.C. §§ 471–82 (Supp. IV 1992). The Act requires each United States District Court to develop a plan to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. §§ 471–72. Further, the Reform Act requires the Judicial Conference of the United States to prepare a comprehensive report on all plans enacted pursuant to § 472(d) and report to back to Congress four years after the Reform Act went into effect—by December 31, 1995.

[47] 139 CONG. REC. H8475 (statement of Rep. Moorhead).

[48] 62 U.S.L.W. 1977 (Nov. 30, 1993).

[49] *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1 to 1.4, 1.6, 2.1, 3.1 to 3.4 (1992) *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 to 7-39 *and* DR 7-101 to DR 7-110 (1980) (subtle differences with respect to zealous representation balanced with duties of a lawyer to his or her client, the tribunal and third parties).

[50] *Cf.* 61 U.S.L.W. at 4372 (publication of proposed F.R.C.P. 26(a)(1)(B)).

[51] Bell et al., *supra* note 22, at 46–48; *see also supra* note 44 and accompanying text.

[52] For an even more radical proposal, see William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?,* 74 JUDICATURE 178, 181 (1991), advocating that disclosure replace discovery with only court-ordered discovery allowed; but see Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 160–65 (1992), which criticizes Schwarzer's proposal. *See also* Bell et al., *supra* note 22, at 46–48 (illustrating how the proposed automatic disclosure requirement opposes adversarial norms). *See generally* Richard P. Holme, *Proposed Amendments to the Federal Civil Rules: The Sirens of Revolution*, 21 COLO. LAW. 923 (1992) (informative discussion of the potential effects of proposed Rule 26 on current litigation techniques).

> [N]owhere in American Jurisprudence does the role of advocate encompass delay, obstruction, obfuscation, evasion, destruction, or other such conduct under the guise of sound legal maneuvering or client representation. Those who complain that the new rules change the traditional role of the advocate apparently have forgotten their obligations as officers of the court.[53]

Although automatic disclosure will make relevant information surrounding the dispute readily available to both parties, nothing in the amendments restricts an attorney's ability to argue and present the disclosed information in the light most favorable to his client. Further, if the statistics compiled in Arizona indicate the actual effect the amendments to Rule 26 will have at the federal level, fears that another layer of discovery has been added, as well as additional delay, are unfounded.

Arizona, prior to adopting amendments to its Rules of Civil Procedure, conducted an experiment, beginning on January 2, 1991 and ending on July 1, 1992, to determine the actual effect the amendments would have.[54] The experiment consisted of two groups. The first group tried cases using the then proposed rules, the second using the old.[55] Based on this study, Arizona found that, in all but the most complex of cases, parties subject to the proposed rules took fewer depositions, and made fewer requests for answers to interrogatories, admissions of facts, and requests for the production of documents.[56] Cases subject to the proposed rules completed discovery in a shorter period of time and filed one-third the amount of discovery motions filed in cases not subject to the proposed rules.[57] Further, judges using the proposed rules agreed fewer discovery disputes occurred and noted many attorneys were on "top of the case" earlier under the proposed rules.[58] Finally, the attorneys involved in the experimental program, in general, viewed the program as a success, finding they needed less time to complete discovery, that the quality of information received during discovery did not decrease, and that significantly fewer discovery abuses occurred under the proposed rules.[59] Whether the same results will be achieved under the new Federal Rules remains to be seen.

---

[53] Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1, 12 (1993). Justice Zlaket chaired the Arizona Committee to Study Civil Litigation Abuse, Cost, and Delay. As a result of the Committee's work, on July 1, 1992, amendments, proposed by the Committee, to the Arizona Rules of Civil Procedure became effective on a state wide basis. *Id.* at 3. These amendments included changes to Arizona's discovery rules, which are substantially similar to the federal amendments to Rule 26. *See* ARIZ. R. CIV. P. 26.1 (Supp. 1993).

[54] Hon. Robert D. Myers, *Mad Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 13, 18 (1993). At the time this article was written, statistics were still being gathered. The results documented *infra* should, therefore, be viewed cautiously.

[55] *Id.*

[56] *Id.* at 20–21.

[57] *Id.*

[58] *Id.* at 21.

[59] *Id.* at 23–25.

Regardless of the results, however, the amendments should increase the use of ADR.

A. Increase in the Use of ADR

With the amendments to Rule 26 now effective, mediation, summary trials, arbitration, and a number of other ADR procedures may take on a new lustre. Once the core facts are disclosed, and the parties to the dispute have a clear understanding of their adversary's case, the possibilities for resolving liability and damages conflicts outside of the courtroom multiply.

Under the Colorado Rules of Professional Conduct, lawyers are required to comply with Rule 2.1, which compels attorneys to advise their clients about the availability of ADR.[60] Today, mediation, settlement conferences, summary trials, arbitration, and other alternatives to litigation are playing important roles in the resolution of conflict, with reduced cost to litigants.[61]

1. Why ADR Methods Are Used

Automatic disclosure rules will increase the opportunities to employ ADR.[62] Because automatic disclosure compels the exchange of all information relating to the claims or the defenses interposed in the pleadings, disclosure will increase the incentive to settle because the strength, weakness, and value of every case will be known.

A number of methods have been developed to effect early and fair settlement of disputed claims.[63] The many forms of ADR provide broad flexibility in arriving at the most advantageous procedure, and often result, for the parties. The dispute resolution technique may be easily tailored to fit a particular case. Lawyers weigh the merits of each ADR technique and balance the advantage, disadvantage, and cost before making a recommendation to the client; however, every claim is not entitled to the same treatment. Claims involving less

---

[60] Rule 2.1 provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or reach the legal objective sought.

COLORADO RULES OF PROFESSIONAL CONDUCT Rule 2.1 (West 1993). The A.B.A. MODEL CODE OF PROFESSIONAL CONDUCT does not have a comparable requirement.

[61] *See generally* John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV., Jan.–Feb. 1990, at 166 (discussing five common ADR techniques); Mary-Alice Coleman, *Implementation of California's Dispute Resolution Programs Act: A State-Local Government Partnership*, 16 PEPP. L. REV. S75 (1989) (discussing the California Dispute Resolution Programs Act which facilitates out-of-court community ADR programs throughout the state).

[62] For a study of similar disclosure rules and their effects on ADR, see Edwin B. Wainscott & Douglas W. Holly, *Zlaket Rules and Alternative Dispute Resolution*, 25 ARIZ. ST. L.J. 195 (1993).

[63] *See generally* AMERICAN COLLEGE OF TRIAL LAWYERS, HANDBOOK ON ALTERNATIVES FOR DISPUTE RESOLUTION (July 24, 1991).

than $10,000, and minor claims for damages obviously are not entitled to the same procedural formalities as multi-million dollar antitrust, contract, or tort actions involving substantial questions as to both liability and damages.[64]

All disputed claims have a value. The resolution of disputes depends upon the use of known facts to evaluate the validity and merits of a claim. Many litigants are slow to recognize the merits of an opponent's claim until all the facts are known. When the immutable facts point to substantial liability and damages, a settlement is not hard to reach. If the facts fall short of establishing liability and damages, the value of a claim to the complaining party is diminished to reflect a more realistic value. If there is no liability, the cost of a lengthy trial can force the dismissal of the complaint. A brief review of some of the most common forms of ADR demonstrate how automatic disclosure may avoid extended litigation.

B. Common Forms of ADR

1. Mediation

Mediation utilizes a neutral and impartial third party to facilitate communication and resolution of disputed issues.[65] A mediator can point out weaknesses in the claims made by the parties without using discovery as a tool.[66] The mediator analyzes problems of proof, liability, and damages so that disputed factual and legal issues are fairly considered and discussed. *Voluntary* disclosure is the key to successful mediation, and after the parties agree on the facts, the mediator, or mediators, are able to assist the parties in reaching a compromise and settlement. Settlement occurs when both sides take off their rose-colored glasses and recognize the potential costs and risks associated with a trial. Automatic disclosure should eliminate the risk of information being hidden until trial and should obviate [expose] the strengths and weaknesses of every case.

2. Settlement Conferences

Settlement conferences are also widely used as an alternative to litigation and involve procedures that are similar to mediation. Usually, either a judge who will not preside at trial, or a neutral third party, will hear both sides of the case, advise the parties on the law relating to their claim, and assist in the negotiation of a settlement.[67] In mediation, a mediator facilitates dialogue be-

---

[64] *See* Hazard, *supra* note 28, at 2244–45 (discussing the problematic nature of a single set of civil procedure rules to handle a variety of dissimilar claims).

[65] ALTERNATIVE DISPUTE RESOLUTION COMMITTEE, COLORADO BAR ASSOCIATION, MANUAL ON ALTERNATIVE DISPUTE RESOLUTION 6 (1992) [hereinafter MANUAL ON ADR].

[66] The mediation process involves voluntary disclosure by the parties, in a private and confidential meeting. *See id.* at 6.

[67] *See id.* at 7.

tween the parties, while in a settlement conference the neutral third party actually evaluates the disputants' claims.[68] Settlement conferences are most effective when opposing parties have strong feelings about the facts of the case, but are willing to listen to a neutral third party's view of the law that will be applied to the facts.[69] As noted above, because automatic disclosure should facilitate the discovery of the relevant facts, disputants will have a greater incentive to seek a neutral, third party evaluation of their claims and defenses.

3. Summary Jury Trials

Summary trials provide another alternative to a full-blown jury trial. While summary trials are now widely used, automatic disclosure will augment the use of this ADR technique. In a summary trial, a judge, or a judge and a jury, hear counsel present the client's case, and both the factual and legal bases for recovery. Opposing counsel then outlines the factual and legal arguments that support a defense verdict for limited damages.[70] The availability of all of the facts is essential to a summary trial. If automatic disclosure is mandated, a summary trial may provide a vehicle for either settlement or final determination of the issues. Sometimes the parties stipulate that a summary trial will not be binding. Such a stipulation, however, does not limit the use of the procedure because the losing party is compelled to recognize that the same result may be waiting at the end of expensive and time-consuming litigation. Experience has demonstrated that a non-binding summary trial may precipitate a settlement.

4. Arbitration

Automatic disclosure may also bring about more arbitration as a feasible and more inexpensive means of resolving disputed claims. The arbitrator, or arbitrators, hear evidence and testimony and determine the disputed issues in either a binding or non-binding decision.[71] Generally, arbitration is regulated by statute or contract and includes limited discovery,[72] which will not be required with automatic disclosure.[73] The American Arbitration Association continues to refine the arbitration process and to expand the alternatives available for dispute resolution.

---

[68] *Id.*
[69] *Id.*
[70] *See id.* at 10; *see also* W. Frank Newton & David G. Swenson, *Adjudication by Privately Compensated Judges in Texas*, 36 BAYLOR L. REV. 813, 820–840 (1984) (discussing Texas statute authorizing "Special Judge Trials").
[71] *See* MANUAL ON ADR, *supra* note 65, at 12.
[72] *Id.* Many securities dealers, for example, provide for arbitration contracts with their clients.
[73] *See* C.R.C.P. 26.1.

C. Forums Developed to Promote ADR

As a result of the expanded use of arbitration, mediation, and other ADR procedures, many new organizations have been formed to render dispute resolution services. Judicial Arbitration & Mediation Services Co. ("JAMS") of Orange County, California, provides private dispute resolution services in a number of states. Endispute of Washington, D.C., also provides similar ADR services in several jurisdictions. In Colorado, the Judicial Arbiter Group ("JAG") continues its enviable reputation for success in providing rent-a-judge services. Judicate, Inc., of Lake Success, New York, also offers ADR services on a broad scale. Pursuant to the above, an adequate infrastructure presently exists to facilitate the increased use of ADR techniques, should the need arise.

Many of the private dispute resolution or rent-a-judge services employ retired or former judges, and attribute their success to the quality of the judges that handle the resolution of disputes. These ADR services offer a wide variety of alternatives to litigation, emphasizing that the private resolution of disputes occurs without delay and is therefore faster than litigation. Private dispute resolution is often less expensive than litigation, taking place without the road blocks normally associated with a contested trial and overburdened and crowded court dockets. Because ADR services are generally better, faster, and cheaper, private dispute resolution services will most likely continue to expand in use and availability.[74]

CONCLUSION

Mediation, summary trials, and arbitration all have unique advantages and disadvantages depending on the posture of the case. Industries recognize the high costs and risks of litigation. It is therefore reasonable to anticipate that these alternatives to litigation will grow more important, and more frequently used in the future.[75] The automatic disclosure requirements of Rule 26 may appear to have the potential for increasing litigation costs. However, if the end result of automatic disclosure is to reduce contested trials by fostering alternatives to litigation, the ultimate goal of reducing the cost of litigation may be achieved.

---

[74] *See* Judith M. Filner & Margaret Shaw, *Update: Development of Dispute Resolution in State Courts*, FORUM, Summer/Fall 1993, at 36.

[75] *See* Richard Phalon, *Privatizing Justice*, FORBES, Dec. 7, 1992, at 126. *See generally* Steve Kaufman, *See You Out of Court*, NATION'S BUS., June 1992, at 58 (overview of ADR techniques and a sampling of existing ADR services).

APPENDIX A

COLORADO RULES OF CIVIL PROCEDURE
(C.R.S. Repl. vol. 7A, 1990 & Supp. 1993)

RULE 26.1. SPECIAL PROVISIONS REGARDING LIMITED AND SIMPLIFIED DISCOVERY

(a) REQUEST FOR LIMITED AND SIMPLIFIED DISCOVERY. A party may at any time file a written request that discovery in the case be governed by this Rule 26.1. Such request may be endorsed upon a pleading of the party. Any party opposing such request shall in his responsive pleading, if one is required, or within thirty (30) days after service of such request upon such party if no further responsive pleading is required, file a written response setting forth the reasons why the provisions of this Rule 26.1 should not apply. If no party opposes such request, the provisions of this Rule 26.1 shall govern discovery in the case. If opposition to the request is filed, the matter shall be determined by the court within thirty (30) days after demand for such determination is made to the court by any party.

(b) ORDER FOR LIMITED AND SIMPLIFIED DISCOVERY. The court may at any time, in the interest of justice, *sua sponte* enter a written order that discovery in the case shall be governed by this Rule 26.1. Any party objecting to such order shall, within thirty (30) days after service of a copy thereof upon such party, file a motion stating the reasons why the provisions of this Rule 26.1 should not apply. The matter shall be determined by the court within thirty (30) days after the filing of such motion or, if more than one party objects, within thirty (30) days after the filing of the last such motion.

(c) DETERMINATION. The court shall determine whether in the interest of justice discovery should be limited and simplified in accordance with this Rule 26.1. The factors to be considered by the trial court in determining whether to order limited and simplified discovery shall include, but shall not be limited to, the following:

(1) Whether the factual and legal issues involved in the case lend themselves to the limited and simplified discovery provided for in this Rule 26.1.

(2) The extent and expense of discovery anticipated in the case.

(3) The amount in controversy.

(4) The number of parties and their alignment with respect to the underlying claims and defenses.

(5) Whether any party would be prejudiced in the trial of the case by application of or failure to apply this Rule 26.1.

(d) DISCOVERY PROCEDURES UNDER THIS RULE 26.1. When the provisions of this Rule 26.1 govern, the parties shall thereafter be limited to the following methods of discovery, unless the order for limited and simplified discovery is subsequently modified or rescinded by order of court for good cause shown:

(1) A party may take the depositions of each opposing party and two other persons. The manner of proceeding by way of deposition and the use thereof shall otherwise be governed by Rules 26, 28, 29, 30, 31, 32, and 45.

(2) A party may serve one set of written interrogatories upon each adverse party. The scope and manner of proceeding by way of interrogatories and the use thereof shall otherwise be governed by Rules 26 and 33, except that the number of interrogatories to any one party shall not exceed thirty (30), each of which shall consist of a single question.

(3) When there is in controversy the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, an adverse party may obtain a mental or physical examination of that party or person upon reasonable written notice to such party or person. Otherwise, the provisions of Rule 35 shall apply to such examinations.

(4) Inspection and copying of documents or tangible things and entry, inspection or testing of land or property shall be accomplished pursuant to Rule 34.

(5) A party may serve upon each adverse party one set of requests for admissions which shall not exceed twenty (20) in number, each of which shall consist of a single request. The scope and manner of proceeding by way of requests for admissions and the use thereof shall otherwise be governed by Rule 36.

(6) All discovery governed by this Rule 26.1(c) shall be completed no later than thirty (30) days before trial.

(e) CONTINUING DUTY TO DISCLOSE. Every party is under a continuing duty to timely supplement or amend responses pursuant to Rule 26(e).

(f) PRE-TRIAL DISCLOSURE; AUTHENTICITY; AND BINDING EFFECT. Each party shall comply with the provisions of C.R.C.P. 16.

(g) DEPOSITION OF UNAVAILABLE WITNESS. A party may take the testimony of any person by deposition upon stipulation, or upon court order if the court determines that there is a reasonable likelihood that the person will be unavailable at trial as a witness and that the testimony of such person is necessary to a claim or defense of any party. Such order may be made only on motion for good cause shown and upon notice to the person to be deposed and to all parties.

(h) SANCTIONS. If any party fails to comply with the provisions of this Rule 26.1 in an action governed by it, the court may impose sanctions upon such party pursuant to Rule 37.

APPENDIX B

FEDERAL RULES OF CIVIL PROCEDURE

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

(a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER.

(1) INITIAL DISCLOSURES. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) DISCLOSURE OF EXPERT TESTIMONY:

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) PRETRIAL DISCLOSURES. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those

which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) FORM OF DISCLOSURES; FILING. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) METHODS TO DISCOVER ADDITIONAL MATTER. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) LIMITATIONS. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative-

tive or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(4) TRIAL PREPARATION: EXPERTS.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION MATERIALS. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown,

the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) TIMING AND SEQUENCE OF DISCOVERY. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) SUPPLEMENTATION OF DISCLOSURES AND RESPONSES. A party who has made a disclosure under subdivision (a) or responded to a request for discov-

ery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) MEETING OF PARTIES; PLANNING FOR DISCOVERY. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared

in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) SIGNING OF DISCLOSURES, DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after the reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

MENTAL HEALTH—IS IT ATTAINABLE IN THE '90s?†

Thomas Mugford*

I have provided mental health services to law professionals for many years. One of my first cases involved Alcohol, Tobacco, and Firearms agents and their wives, and other early cases involved Secret Service agents. As a young therapist, I was impressed by these people who were so dedicated, so loyal, so hard-working; but the wives and children of these agents were not impressed. There were high rates of divorce, high rates of alcoholism, and high rates of stress among these individuals. Gradually, I saw more and more families of law professionals, including attorneys. Typically, the spouses would come in first and then make an effort to get their husbands into treatment. Currently, we see a large array of law professionals. Business is getting better and better in the '90s as stress and pressure on those who serve, as you all do, increase.

You have been told many times, of course, what characteristics you all share; and so I shall not say much about what high-pressured, high-energy, type A, competitive, aggressive people you are. You have heard enough of that. In the brief time we have, I want to focus instead on what you need to do to manage stress or be protected from stress, if that's possible in the '90s. This presentation will not be filled with a lot of instructions on what you can do symptomatically. Symptomatic relief from stress will not greatly help you improve your life or health over the long run. What will really help law professionals is a change of attitude. And I'll get to that in just a few minutes.

THE LEARNING PROCESS

I have been pleased to see that some of your professional journals now routinely include good articles on stress prevention and alcohol and drug abuse. In my opinion, however, most of these articles ignore one important aspect of stress prevention, which is that it is very difficult to learn. If you have tried and failed at it, or if you have gone to stress reduction workshops and come away unsatisfied, or if you have found that what you learned didn't stick with you, don't give up. Your previous failure does not mean you cannot do it; it just means this is a difficult skill to learn. As law professionals, you should never underestimate your ability to change. You all have high levels of success in your careers, and there is no reason why you cannot learn these new personal skills.

---

† Extracts from an address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 14, 1994.

* Psychotherapist, Riverbend Counseling Center, Concord, New Hampshire.

Stress management begins, therefore, with a re-education of the self. The new thinking that you need has to be based on sound reasoning, of course, and on good psychological information, certainly; but, most importantly, it has to be based on a commitment that you *are* going to learn how to do it. No one is born with this information, any more than you were born with law educations. You had to earn your degrees and then practice for years to get where you are. Your ability to manage stress in the '90s, I believe, will take no less serious an effort. The learning process will not take as much time, but you will need the dedication and the seriousness of commitment that you brought to your educations and practices, and you will need to continue applying what you learn the rest of your life.

UNDERSTANDING AND RECOGNIZING STRESS

To understand how to protect yourself from stress, you need to understand what stress is. The definition is simple. Stress is your body's physical response to internal and external pressures. It is fundamentally a physical experience, although there can also be psychological or mental aspects such as racing thoughts, a tendency to ruminate, a tendency to obsess, or a tendency to worry. At some point, stress will cause physical problems. Research has shown that if you experience intense stress for about two years—which is not unusual in the lives of law professionals and police officers and firefighters, for example—you enter a high-risk category for serious physical illness. Stress, by the way, can be positive or negative; and positive stresses such as the birth of a child or a job promotion seem to create as many physical problems as more negative stressors.

Most people have in their bodies a site, which probably is genetically predetermined, that is much like a smoke alarm system. It goes off if you're under pressure. These genetically predetermined sites can be obvious things such as peptic ulcers or chronic headaches; they can be simple things such as skin rashes; they can be complicated and difficult problems such as alcohol abuse. Some people—and this applies particularly, I believe, to law professionals, who tend to be high-energy, high-intensity, high-performance people—do not have these smoke alarm or site systems inside their bodies; and when they don't, it's a big problem because these people do not receive a clear message that something is wrong or that they are overstressed.

Interestingly, women tend to have more smoke alarms or site alarms that warn them of stress than men do. A related fact is that women see doctors routinely. Almost every woman I have talked to in almost twenty-five years of mental health practice could identify a doctor she had seen in the last six months. Only twenty-five percent of men can even name their doctor. Most

men don't have physicians. That comes from a tendency of men in our culture to play hurt. Most men we see in our clinic have been playing hurt for months and months and months before they enter therapy. Women, on the other hand, refuse to play hurt for very long. There are dramatic statistical differences, therefore, in the numbers of men and women who come into psychotherapy. Women come in two and three times more often than men, all over the country.

Instead of seeking help, men respond to problems with denial. If you give a man a problem, the first thing he'll do is try to tell himself that it is not there. Or he might try to tell himself that he can overcome it; he'll get up earlier in the morning, he'll fight harder, he'll plan more, he'll obsess more, he'll work out, he'll do whatever it takes to overcome the stressor. The longer he fights, by his reasoning, the better his chances of overcoming the problem.

Denial, as I'm sure some of you know from undergraduate studies, is a basic psychological defense mechanism, and there is nothing wrong with it, in moderation. It does set the stage, however, for a lot of stress-induced disorders, particularly in males. What you have to do is get inside your own mind and ask yourself how much denial exists in your life—about your marital problems, about your sexual problems, about your problems with your kids, problems with your practice, problems perhaps with your own conduct, problems with your physical health. How much denial exists inside you? You might use a ten-point scale, with one indicating little or no denial and ten indicating a lot of denial, and ask yourself where you fit on that ten-point scale. Unless you have a low number, you should reexamine yourself and ask yourself if you can't be a little more open to admitting that you are overstressed.

Denial is not exclusively male, and it comes from a lot of sources. It is in the culture. As successful, professional Americans, we're not supposed to admit to many weaknesses or faults. We're meant to be strong, we're meant to be strong-willed, and we're meant to persevere. We were asked to work very hard at an early age. To have a competitive attitude means that one mustn't stop and think about denial too much. We must be willing to play hurt. There is always pressure to perform from our partners, from our friends, from our families, and from inside us; and all of that feeds denial. Only when you're out of denial can you be fully committed to helping yourself. Therapists work sometimes for weeks to get to that critical point with patients. When you are out of denial, when you are able to admit to yourself that you have a problem and must deal with it, the real psychotherapeutic work can begin.

There is one other important point that I want to emphasize regarding the smoke alarm or the site concept, a point that might help some people overcome denial. Acknowledging your smoke alarm is not a sign of weakness. So many patients who come into therapy with major stress related illnesses think that they have failed. That is wrong. It is not a failure to get an ulcer, it is not

a failure to develop an addiction, it is not a failure to have high cholesterol or a bypass. It is not a sign of weakness, and it is not your fault. It is simply what your body does in response to stress.

THE IMPORTANCE OF DIAGNOSIS

The next key step in stress protection, beyond recognizing stress symptoms and overcoming denial, is learning to be diagnostic. It sounds simple but, again, it is a difficult skill to learn. All of you are trained to be diagnostic in determining what your clients' problems are and how to resolve them, as I am trained in my field. However, we seldom apply those skills to ourselves. For example, depression is by far the most common problem that leads people to therapists all over America, but they do not come in saying, "I am depressed." They usually are experiencing their problems, or their lives in general, as a confusing jumble that doesn't make much sense. The therapist's job is to get the person mentally organized so that he or she can understand what the real problem is. The therapist does that, very simply, by providing a diagnosis. The diagnosis gives the patient a focus for thoughts and actions; the diagnosis leads us to a solution.

How do you diagnose yourself? You don't do it by sitting down and trying to think through everything that's wrong with you. You have to talk. As most of you know, psychotherapy or counselling is a conversation-intensive experience, and there is a good reason for that. Talking about yourself frees up your subconscious, and it also adds another important dynamic—it organizes the way you think. In therapy we get people to talk and talk and talk until they find their own solutions.

To diagnose yourself you have to learn to ask yourself and others the right questions. I can't give you all the instruction I'd like to in this brief presentation—it takes about ten therapy sessions with trial attorneys to instruct them in all the right questions to ask of themselves and their spouses and their children and their law partners, so they can begin to diagnose their own stresses—but I can give you a few tips. If you are anxious or depressed, ask yourself why. That sounds simple, I know, but so many people don't stop and ask themselves how they feel and why. When you get up in the morning or on the way home at night, ask yourself how depressed you are, how anxious you are, how stressed out you are. Use ten-point scales, if those help you. We recommend that some patients use a type of wellness scale each day or each week; they ask themselves how well they did at just taking care of themselves, in terms of nutrition, exercise, sleep, and so on.

These techniques sound almost too simple, but their simplicity is important. They pull people back from how complex and intense and analytical and pro-

fessional they tend to be in their work and force them to be very simplistic and direct in talking to themselves. In my experience, law professionals have a lot of difficulty doing this, but it is worth the effort because these simple techniques can be your best allies in taking taking care of yourselves.

HOW VULNERABLE ARE YOU TO STRESS?

[This test was developed by psychologists Lyle H. Miller and Alma Dell Smith at Boston University Medical Center. Score each item from 1 (almost always) to 5 (never), according to how much of the time each statement applies to you.]

1. ____ I eat at least one hot balanced meal a day.
2. ____ I get seven to eight hours sleep at least four nights a week.
3. ____ I give and receive affection regularly.
4. ____ I have at least one relative within 50 miles on whom I can rely.
5. ____ I exercise to the point of perspiration at least twice a week.
6. ____ I smoke less than half a pack of cigarettes a day.
7. ____ I take fewer than five alcoholic drinks a week.
8. ____ I am the appropriate weight for my height.
9. ____ I have an income adequate to meet my expenses.
10. ____ I get strength from my spiritual beliefs.
11. ____ I regularly attend club or social activities.
12. ____ I have a network of friends and acquaintances.
13. ____ I have one or more friends to confide in about personal matters.
14. ____ I am in good health (including eyesight, hearing, teeth).
15. ____ I am able to speak openly about my feelings when angry or worried.
16. ____ I have regular conversations with the people I live with about domestic problems, e.g., chores, money, and daily living issues.
17. ____ I do something for fun at least once a week.
18. ____ I am able to organize my time effectively.
19. ____ I drink fewer than three cups of coffee (or tea or cola drinks) a day.
20. ____ I take quiet time for myself during the day.

____ *Total*

To get your score, add up the figures and subtract 20. Any number over 30 indicates a vulnerability to stress. You are seriously vulnerable if your score is between 50 and 75, and extremely vulnerable if it is over 75.

GUIDELINES FOR BURNOUT PREVENTION AND RECOVERY
(contrasted with the prevailing view at Firm X)

1. *Stop denying*. Listen to the wisdom of your body. Begin to freely admit the stresses and pressures which have manifested themselves physically, mentally, or emotionally.
   The Firm's view: Work until the physical pain forces you into unconsciousness.

2. *Avoid isolation*. Don't do everything alone! Develop or renew intimacies with friends and loved ones. Closeness not only brings new insights, but also is anathema to agitation and depression.
   The Firm's view: Shut your office door and lock it from the inside so no one will distract you. They are just trying to hurt your productivity.

3. *Change your circumstances*. If your job, your relationships, a situation, or a person is dragging you under, try to alter your circumstances, or if necessary, leave.
   The Firm's view: If you feel something is dragging you down, suppress these thoughts. This is a weakness. Drink more coffee.

4. *Diminish intensity in your life*. Pinpoint those areas or aspects which summon up the most concentrated intensity and work toward alleviating that pressure.
   The Firm's view: Increase intensity. Maximum intensity = maximum productivity. If you find yourself relaxed and with your mind wandering, you are probably having a detrimental effect on the firm's profits.

5. *Stop overnurturing*. If you routinely take on other people's problems, then learn to gracefully disengage. Try to get some nurturing for yourself.
   The Firm's view: Always attempt to do everything. You are responsible for all of it. Perhaps you have not thoroughly read your job description?

6. *Learn to say "no."* You will help diminish intensity by speaking up for yourself. This means refusing additional requests or demands on your time or emotions.
   The Firm's view: Never say "no" to anything! It shows weakness and diminishes the firm's income. Never put off until tomorrow what you can do at midnight.

7. *Begin to back off and detach*. Learn to delegate, not only at work but also at home and with friends. In this instance, detachment means rescuing yourself from yourself.

The Firm's view: Delegating is a sign of weakness. Let someone else delegate. Review item 5.

8. *Reassess your values*. Try to sort out the meaningful values from the temporary and fleeting, the essential from the nonessential. You will conserve energy and time, and begin to feel more centered.
   The Firm's view: Stop thinking about your own problems. This is selfish. Your values can be changed only by official announcements at partnership meetings. Until that time, if someone calls you and questions your priorities, tell them that you are unable to comment and give them the number for the managing partner. It will be taken care of.

9. *Learn to face yourself*. Try to take life in moderation. You only have limited energy available. Ascertain what is desired and needed in your life, then begin to balance work with love, pleasure, and relaxation.
   The Firm's view: A balanced life is a myth perpetuated by our competitors. Do not be fooled: the only things that matter are Work and Productivity.

10. *Take care of your body*. Eat balanced meals, avoid rigid diets, get plenty of sleep, keep doctor's appointments. Take care of yourself nutritionally.
    The Firm's view: Your body serves your mind, and your mind serves the firm. Push the mind and the body will follow. Drink Mountain Dew. (It's cheap.)

11. *Diminish worry and anxiety*. Try to keep superstitious worrying to a minimum—it changes nothing. You will have a better grip on your situation if you spend less time worrying and more time taking care of your real needs.
    The Firm's view: If you are not worrying about work, you must not be very committed to it. Stop worrying, because we will find someone to replace you who will be happy to worry about your work.

12. *Keep your sense of humor*. Begin to bring joy and happiness into your life. Very few people suffer burnout when they are having fun.
    The Firm's view: So, you think your work is funny? We can discuss this with you on Friday. At 7:00 P.M.