International Society of Barristers

Quarterly

Volume 31 Number 4

International Society of Barristers Quarterly

Volume 31 **October, 1996** **Number 4**

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International Society of Barristers Quarterly

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Volume 31
Issue Number 4
October, 1996

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. Periodicals 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.

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THE SETTLEMENT BLACK BOX†

Geoffrey C. Hazard, Jr.*

The proposed settlements in major asbestos class action proceedings have inspired intensive questioning of the lawyer's role in the negotiation of settlements. The essential question is whether more effective controls can be imposed on lawyers negotiating settlements for claimants, particularly personal injury claimants, without infringing on the client's right to confidentiality or impairing the client's bargaining position. Additional complexities arise when a class is involved, because the class members ordinarily cannot participate or consent in the same way as clients who are individually represented. Requiring the lawyer to make a confidential record of the negotiations, for example, could have some beneficial effects. Regardless of any such procedural changes, however, it seems inescapable that an irreducible measure of trust, under the rubric of "professional judgment," must continue to repose in the lawyer. This means that negotiating settlements, a key function in our calling, is effectively beyond regulation. That in turn should remind us that our calling is indeed a profession—that we as lawyers above all must be trustworthy.

Asbestos cases bring forward the question of lawyers' role in settlement in a specially imperative way. As is well known, there are tens of thousands of asbestos cases now pending in courts throughout the country. Other ten thousands of asbestos cases have already been resolved, the overwhelming proportion of them by settlement rather than by adjudication. With the aging of the worker population that was exposed to asbestos and asbestos products, the future will likely bring yet more ten thousands of asbestos cases.

There is a special imperative to achieve settlement of these cases. The "asbestos cases" are often thought to constitute a single category and therefore to be appropriate for a common disposition. The cases all involve similar origin and causation, a limited number of repeat defendants, a limited number of plaintiffs' lawyers who have received the cases by common pathways, a limited number of defense lawyers who have received the cases by other common pathways, common background facts relevant to liability, common injury etiology, and common problems of insurance coverage. As the litigation has burgeoned, the claims have fallen into statistical categories whereby otherwise idiosyncratic personal injuries may be directly compared with each other in

† Max M. Shapiro Memorial Lecture, Boston University School of Law. Reprinted, with permission, from 75 BOSTON UNIV. L. REV. 1257 (1995), forum of original publication.

* Trustee Professor of Law, University of Pennsylvania; Director, American Law Institute.

evaluations for settlement. Claims processing has become specialized to the point where all the lawyers, judges, and other professionals know each other. The sheer number of cases with these similarities makes the asbestos cases distinctly visible in court calendars, unlike automobile and products liability cases, for example, which continue to be regarded as separate and unique.

The inevitable result of these categorical imperatives is endeavors to settle the cases *en masse*. The procedure employed is a settlement class suit. A settlement class suit is a proceeding brought after negotiations between plaintiffs' representatives and the defense have concluded, in which the purpose and effect of the suit is not litigation but a binding, judicially approved contract that will govern all future cases.[1] The result is called a "global settlement," signifying that it covers all claims by all defined claimants against all defined defendants. For society, the court system, and the involved professionals, a global settlement makes obvious sense. Global settlement on anything like reasonable terms would also benefit the victims. At minimum, settlement would mitigate the scandalously high transaction costs entailed in litigating the asbestos cases—something like two-thirds or three-quarters of the dollars going for purposes other than to compensate the victims.[2] Indeed, visitors from foreign countries would consider that even the thought of litigating these cases is grotesque proof of American misguided faith in litigation as a remedy for social ills.

Nevertheless, there are serious questions about these proposed settlements. Objections in court have been made in the name of future claimants whose rights are governed by the settlement agreements. These objections have been voiced by plaintiffs' lawyers who have represented asbestos claimants over the years but who are not themselves participants in the settlements. Cynics think that one motivation for objections by these lawyers is the prospect of losing a rich income flow from the asbestos cases—literally millions of dollars a year in so-called contingent fees that will continue to flow as long as the play goes on. But academics of standing have also voiced objections.

These objections are threefold. First, some argue that personal injury cases cannot be settled justly, or at least settled justly by the bunch. Others argue that the settlements actually reached are unfair as defined in Rule 23 of the Federal Rules of Civil Procedure, governing class actions. That is, the terms are so far outside the range of reasonableness that they cannot properly enjoy

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[1] *See, e.g.*, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 334-36 (E.D. Pa. 1994) (presenting a historical overview of how settlement class suits developed as a partial answer to the asbestos litigation crisis, and discussing the court's approval of the proffered Stipulation of Settlement in the case at hand), *vacated*, 1996 WL 242442, at *22 (3d Cir. May 10, 1996).

[2] *See* JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 38-39 (Rand Publications Series No. R-3042-ICJ, 1983) (noting that parties expended $770 million in legal fees to recover only $236 million in compensation for asbestos plaintiffs).

the blessing of court approval. Finally, others claim that lawyers representing the plaintiffs in these cases violate standards of ethics in negotiating these settlements. I will address all three objections.

I. THE JUST SETTLEMENT OF PERSONAL INJURY CLAIMS

The notion that parties cannot justly settle personal injury claims is absurd, unless one takes the position that parties lack the capacity to contract concerning their own interests. My colleague, Professor Owen Fiss, appears to have come close to embracing this premise.[3] It is apparently his view that the justness, certitude, and rectitude of judicial decision, at least in cases involving civil rights, form the basis for ordering the future that we should prefer to a compact resulting from party negotiation. It seems to me that this view presupposes that judges as a group have a sense of justice that Professor Fiss would find congenial—for example, the sense with which Justice Brennan was endowed. We should call to mind, however, that not all judges are Justice Brennan, not even those who have reached the Supreme Court. If Judge Learned Hand was correct in "dread[ing] a lawsuit beyond almost anything else short of sickness and death,"[4] then settlement has compelling relative attractions. In any event, personal injury cases are in fact regularly settled as a matter of course, and it is difficult to see why asbestos cases or any other class of cases should be categorically excluded from this form of dispute resolution.

II. SETTLEMENTS AND THE RULE 23 STANDARD

The second objection to the global asbestos settlements is that their terms are not fair under the standards required by Rule 23 for approval of a class action settlement. The question, of course, is "fair as compared to what?" Professor Eric Green of this [Boston University] law school was appointed guardian ad litem for the class in the *Ahearn* litigation, another large-scale asbestos settlement class suit.[5] The court charged Professor Green with the duty of assessing the fairness of the settlement in that case under the Rule 23 standard. His report speaks to the issue of Rule 23 fairness with more authority than I can invoke.[6] In any event, as I understand the law, the legal standard of fairness under Rule 23 is

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[3] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority. . . . Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

[4] Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter* (Nov. 17, 1921), in LECTURES ON LEGAL TOPICS 87, at 105 (1926) [reprinted in 31 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 309 (1996)].

[5] *See* Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995).

[6] Report of the Guardian Ad Litem, Eric D. Green, *Ahearn* (No. 6:93cv526) (submitted Feb. 9, 1995).

more exacting than the legal standard of unfairness from which one could infer that counsel representing a client has been inadequate in the representation.

A. The Law of Rule 23 Settlements

There are many statements of the law governing Rule 23 settlements. The generally accepted formulation is both conclusory and redundant: The settlement must be "fair, adequate and reasonable."[7] Some courts have developed a more elaborate formulation, seeking to specify independent "factors" for judges to weigh in application. Thus, in *Parker v. Anderson*[8] the court said:

> In evaluating settlement proposals, six factors should be considered: (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members.[9]

I will not stop to dissect these factors. I only observe that they either reiterate the concept of "fair, adequate, and reasonable" or identify evidentiary elements from which one might conclude that a settlement met that standard, or refer to secondary sources that might evidence whether the standard has been met. One may also observe that the factors do not reference the negotiation technique employed, except to exclude fraud or collusion, which in any event would vitiate a contract of settlement. The factors also do not reference the relationship between initial settlement proposals and final proposed terms, nor should they. If courts established initial offers as an obligatory reference point, negotiators would simply make extravagant formal proposals as a preliminary step to more serious discussions. Finally, the factors do not reference the amount of the settlement as such. This of course is appropriate. As nearly everyone recognizes, when a judge is deciding whether to approve a settlement, the amount of the settlement is the question and not the answer. Hence, we are back to "fair, adequate, and reasonable."

B. The Rule 23 Standard Relative to Other Settlement Standards

An alternative approach to understanding the law governing Rule 23 settlements is to compare the Rule 23 standard with the legal standards that govern when an individual claimant seeks to set aside a settlement contract or to avoid a settlement contained in a judgment dismissing the individual's claim.

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[7] *E.g.*, *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 207 (5th Cir. 1981) (citing Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)).
[8] 667 F.2d 1204 (5th Cir. Unit A), *cert. denied*, 459 U.S. 828 (1982).
[9] *Id*. at 1209 (citing Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1213-19 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)).

A claimant seeking to avoid a settlement, and thereby open the claim to de novo consideration against the alleged wrongdoer, typically must attack the contract of release in which the settlement is embodied. Here, the law of rescission for fraud or mistake provides the standard for setting aside the settlement.[10] "Fraud or mistake" in this context, however, ordinarily refers to fraud practiced or mistake induced by the opposing party. Accordingly, to set aside a claimant's settlement contract with an opposing party on the ground of inadequate representation by the claimant's *own* lawyer requires proof not only that the representation was inadequate, but also that the opposing party was legally complicit in that dereliction. Proof that will satisfy a court of such a conspiracy will be rare, and properly so. If the standard of proof were not high, all settlements would be in jeopardy of a change of heart by claimants who had agreed to settle but then later thought better of it.

More typically, particularly for claims of substantial amount, a settlement is documented in a judgment dismissing the client's claim rather than simply in a settlement contract. The procedural mechanism for avoiding such a settlement is a motion under Rule 60(b) of the Federal Rules of Civil Procedure, or the counterpart under state practice, to set aside the judgment.[11] In this context the general standard is again fraud or mistake, and again refers to fraud or mistake caused by the opposing party.[12]

The problem addressed here, however, is the standard that applies when the client complains, not against the opposing party for fraud or mistake, but against his own lawyer for inadequacy of representation. The law is inhospitable to contentions that the complaining party was ill-served by his lawyer. The decisions under Rule 60(b), governing relief from judgments, indeed appear to have become even less hospitable in recent years. The point can be made through a sample of judicial language in cases where the client was innocent but his lawyer made a serious blunder.

Thus in *Partee v. Metropolitan School District*,[13] the lawyer represented a teacher in claims under 42 U.S.C. §§ 1981 and 1983, alleging racial discrimination and violation of First Amendment rights. The lawyer had virtually

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[10] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 162(l) (1981) (defining fraudulent misrepresentation as a person's intent to make a false or factually unsupported statement in order to induce agreement); Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 362 (1952) (discussing the common law definition of fraudulent misrepresentation and finding a release of rights void when signed in reliance on deliberately false, material information about its contents).

[11] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 78 (1982) (stating the procedural rule for relief from judgment is by motion in the court that rendered the judgment).

[12] FED. R. CIV. P. 60(b)(3) ("On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."). *See generally* Mary K. Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41 (1978).

[13] 954 F.2d 454 (7th Cir. 1992).

stipulated the plaintiff out of court by withdrawing a claim for personal liability against the school superintendent while failing to allege that the superintendent had acted pursuant to school district policy.[14] The stipulation left the client with no claim on which relief could be granted. But the court nevertheless denied the client, who had retained new counsel, an opportunity to present a restated claim:

> [I]t was not excusable neglect for [plaintiff's] experienced counsel to have misunderstood the distinction between "personal capacity" and "official capacity."[15]

In *Taylor v. Texgas Corp.*,[16] the defendant employer sought to set aside a judgment that in effect paid compensation to an employee who was already receiving a company pension for the very disability that was the foundation of the suit. The defendant employer had failed to notice, and its attorney had failed to inquire about, the fact that defendant's own pension department was already paying the disability pension to the employee.[17] The appeals court held that the trial court's grant of a motion for relief was inappropriate:

> Given that [the employee] rightfully could have assumed that counsel for [the employer] was aware that [the employer] was sending [the employee] pension payments, [the employee's] conduct does not rise to the level of fraud.[18]

Then again, in *Lepkowski v. United States Department of Treasury*,[19] the court gave plaintiff no chance to pursue his claim against the Treasury Department when his lawyer consistently, and with at least reckless disregard of his obligations as an advocate, failed to file papers opposing the Government's motion to dismiss and then, with equal persistence and reckless disregard, failed to explain or justify that failure.[20] Said the court:

> It was well within the bounds of the court's permissible discretion to find that [plaintiff's] counsel had not even attempted to demonstrate that his dilatory failings were the product not of mere neglect but, rather, excusable neglect, for which his client should not be penalized.[21]

And, as a last example, in *Nemaizer v. Baker*[22] the court refused to relieve a plaintiff from his attorney's blunder in stipulating to a dismissal of a federal action "with prejudice" when it was contemplated that plaintiff would then

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[14] *Id.* at 455.
[15] *Id.* at 458.
[16] 831 F.2d 255 (11th Cir. 1987).
[17] *Id.* at 257.
[18] *Id.* at 260.
[19] 804 F.2d 1310 (D.C. Cir. 1986).
[20] *Id.* at 1312-13 (chronicling this attorney's inaction).
[21] *Id.* at 1313.
[22] 793 F.2d 58 (2d Cir. 1986).

bring a suit on a different legal theory.[23] The court, holding that "with prejudice" precludes all subsequent litigation upon the same cause of action, said:

> [W]e have consistently declined to relieve a client . . . of the "burdens of a final judgment . . . due to the mistake or omission of his attorney. . . ." This is because a person who selects counsel cannot thereafter avoid the consequences of the agent's acts or omissions.[24]

Thus, courts have severely constrained the remedies for setting aside a settlement on the ground of inadequate representation.[25] I have stated my understanding that the Rule 23 fairness standard is more exacting than the common law standard governing these inadequate representation claims. It follows that an attack on a settlement in a Rule 23 class suit has greater scope and possibility. However, I now wish to explore an essential difficulty inherent in all of these remedies. This is the problem of proving that there was a causal relationship between the lawyer's alleged deficiency in conducting the settlement negotiations and the resultant injury to the claimant—in other words, the problem of proving that the client would have obtained a better deal if the lawyer had been more effective.

C. Limits to the Rational Assessment of Settlements

The focal point of concern about the settlement process is whether the lawyer has adequately and vigorously represented the client. The lawyer in settlement discussions is in essence a negotiating representative. The key question is whether there is some objective way of measuring the performance of a negotiating agent. By this I mean some way of comparing the outcome achieved by the negotiator with some external standard, as distinct from eval-

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[23] *Id.* at 60.

[24] *Id.* at 62 (internal citations omitted).

[25] A final remedy potentially available to a claimant, that of legal malpractice, has narrow scope as applied to negotiation of a settlement. The decisions in which plaintiff has survived a motion to dismiss have involved situations in which the essence of the grievance is the failure to investigate facts that would form the basis for negotiation, not failure in the actual negotiation process. For example, two leading cases involve failure on the part of a lawyer in divorce negotiations to use reasonable diligence to ascertain the extent of the marital property. Grayson v. Wofsey, 646 A.2d 195 (Conn. 1994); Malfabon v. Garcia, 898 P.2d 107 (Nev. 1995). The extent of marital property is of course the very framework of divorce negotiations. So also, failure to transmit to the client a settlement offer that later proves more generous than a later settlement offer, or a judgment suffered at trial, is a violation of an ethical obligation and a basis of virtually per se civil liability. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 1 (1995) ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable."). Put differently, assuming that the lawyer can show exercise of reasonable diligence in gathering the materials that formed the basis of the negotiation and that the settlement was not outside the limits embraced by plausible professional judgment, the client cannot establish the causal connection required for a malpractice remedy. For a further discussion of negotiation malpractice, see Chief Judge Posner's analysis in Nicolet Instrument Corp. v. Lindquist & Vennum, 34 F.3d 453, 455 (7th Cir. 1994) (noting the difficulty of proving causation in such cases, as one cannot label negotiation results as "wrong" or "right").

uating it in terms of the negotiator's sincerity, commitment of time, or other measure of "input" into the negotiations. Unfortunately, there are severe intrinsic limits to establishing any such standard.

1. The Inherent Conflict Between Client and Lawyer. First, one must recognize that there is an irreducible divergence of interest, if not a legal conflict of interest, between client and lawyer. This conflict exists both in class suits and in litigation where there is a client who has directly employed the lawyer. Judge Henry Friendly explained the essence of the divergence years ago in an analysis that is difficult to improve upon. In *Saylor v. Lindsley*,[26] Chief Judge Friendly wrote:

> There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. . . . The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. . . . The risks in proceeding to trial vary even more essentially. For the plaintiff, a defendant's judgment may mean simply the defeat of an expectation. . . . [F]or his lawyer it can mean the loss of years of costly effort by himself and his staff. [27]

I explore this conflict in the context of class suits more fully below.[28] I only mention the divergence of interest between client and lawyer here for an analytic reason. At least with respect to major claims, claimants almost always have counsel, because they recognize that ordinarily they will do better with counsel than without. Claimants are thus compelled to entrust negotiation to representatives whose interests diverge in some respects from their own. The claimant cannot know whether a particular settlement figure is really in his interest or merely in the interest of his lawyer. Nor can the court. Nor, indeed, will the lawyer himself be able to make the distinction in a way that is both honest and precise. Thus, the divergence between client interest and lawyer interest is a variable to which a court usually cannot assign a weight in comparing actual settlement outcome with a standard of "fair, adequate, and reasonable." For this reason, it is an inherent limitation on the law's ability to monitor the lawyer's fidelity and competence.

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[26] 456 F.2d 896 (2d Cir. 1972).

[27] *Id.* at 900-01; *see also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-84 (1986) (discussing principal-agent issues in the context of class and derivative actions); Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 391-94 (1988) (testing Coffee's analysis of the private attorney general against empirical data gathered from federal class action suits in the Northern District of California).

[28] *See infra* Part III.

2. Indeterminacy Concerning the Relative Efficacy of Different Negotiation Techniques. A further set of difficulties derives from the near absence of any solid empirical evidence concerning the relative effectiveness of various methods of negotiation process and technique in the settlement of legal claims. In professional lore we understand differences among "hardball," "stonewall," "conciliation," and so forth, yet we do not know when or how one approach works better than another. The most careful evaluation of negotiation techniques is apparently that of Herbert Kritzer.[29] The substance of Professor Kritzer's findings is that there is no demonstrable relationship between technique of settlement negotiation and outcome of negotiation. When it comes to negotiating settlement of legal claims, we have a rich store of professional lore on how it should be done but very little evidence about the effects of various procedures under various circumstances.[30]

3. No "Objective" Criteria of Settlement Fairness. There is a more fundamental difficulty in evaluating the fairness of a settlement, a difficulty existing independent of the unavoidable conflict of interest between lawyer and client, independent of negotiation technique, and indeed independent of whether the attorney conducted the negotiations on behalf of his client with perfect competence and fidelity. The essence of this difficulty is that the objective value of a settlement is indicative of unfairness in a settlement only in outrageously bad settlements.

Understanding this point requires an understanding of the economics and dynamics of the negotiation of a settlement contract. A settlement is a contract negotiated under unusually constrained conditions. The economist's concept of "free market" does not apply to settlements. There is no "market freedom" because, by definition, the parties to settlement negotiations face the immediate alternative of going to trial if they exit the negotiations.[31] Moreover, there is no shared reference point as to the value of the claim, such as "reasonable market price." Litigation claims have no market in the understood sense of that term. The very object of the negotiations is to arrive at a payment that will substitute for one that might have been arrived at had market conditions actually existed.

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[29] *See generally* HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION (1991); HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990). *See also* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109 (1994) (hypothesizing that psychological processes—including how litigants perceive, understand, and respond to settlement—-create barriers that preclude settlement in some cases).

[30] *See* Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 299 (1994) (reviewing HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION (1991) and HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990)) (noting that in spite of criticism of Kritzer's work, his work provides the "best information yet" about negotiation).

[31] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5, at 523 (3rd ed. 1986) ("Settlement negotiations are a classic example of bilateral monopoly.")

With this limitation in mind, we understand that parties can arrive at a settlement only if there is an area in which plaintiff will be better off by settling for less than he might wish and defendant will be better off by settling for more than he might wish. If there is no such area of mutual advantage in a case, the case does not settle. Correlatively, as every trial lawyer knows, a case can be settled only if there is such an area of benefit.[32]

As a prefatory matter, it is well to remember that the existence of an area of mutual advantage itself depends on judgment calls rather than a definite calculus. The lower boundary of an area of mutual advantage is the amount a plaintiff's lawyer and client in fact are willing seriously to think about accepting. Thus, do those on plaintiff's side consider the case worth "at least" $100,000, or is the minimum figure only $50,000? The upper boundary of an area of mutual advantage is the amount that a defendant and its counsel in fact are willing seriously to think about paying. Is the maximum "at most" $175,000, or could it be $250,000? Thus, the area of mutual advantage is itself more or less indeterminable. However, experienced lawyers form judgments that can converge. The settlement area emerges when the boundaries come to be in discussable proximity. When the boundaries do not come into proximity, a case goes to trial. Except in unusual cases, the area of possible settlement is fairly broad. That is, the settlement area consists of a wide band of different prices at which it will benefit both parties to settle. This settlement area is known in economics as the "cooperative surplus."

The key point for present purposes is that there is no inherently rational basis on which to divide the cooperative surplus. Thus, for example, if it is rational for both parties to settle anywhere between $100,000 and $175,000, there is no rational basis for allocating the $75,000 difference between them.[33] *Any* division of the cooperative surplus would meet a standard of "fair, adequate, and reasonable."

This in turn means that there would be no rational basis for criticizing a plaintiff, conducting his own negotiations, who settled for $100,001, nor for criticizing a defendant who settled for $174,999. It also follows that there would be no rational basis for criticizing a lawyer representing either the plaintiff or the defendant for arriving at either figure. Thus, any settlement figure within this area of "cooperative surplus" could not be rationally criticized as being outside the bounds of reasonable professional judgment. Put differently, a settlement could be criticized as falling outside the bounds of professional judgment only if it is one that no sensible lawyer, acting honestly, could have recommended.

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[32] It was apparently Melvin Belli who originally set forth this concept of a zone of settlement in personal injury claims. *See* 1 MELVIN M. BELLI, MODERN TRIALS § 109, at 748 (1954).

[33] *See* Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 LAW & SOC. INQUIRY 487, 496 (1994) (book review) ("Rational choice offers no theory of the particular proportions in which voluntary traders will divide a cooperative surplus. . . .").

It is also the case that the larger the costs of litigation, the greater the indeterminacy of settlement possibilities. The "cooperative surplus" between parties is essentially equivalent to the transaction costs the parties would incur by continuing the litigation of their dispute, plus the "price of avoiding" the risk of an adverse determination. The latter is something like the insurance premium on a unique risk—the kind Lloyds of London handles, or used to handle. Accordingly, when litigation costs and outcome risks are high, the zone of settlement is correspondingly larger. And when the zone of settlement is relatively large, there is a larger zone in which it is not possible to make rational criticism of the terms of a settlement. In the asbestos cases, for example, the transaction costs are approximately two-thirds or three-quarters of the parties' expenditures for litigation. The range of reasonable settlement is correspondingly large.

There are still further subsidiary difficulties. Available evidence indicates certain irrationalities in people's determinations of a fair bargain. Most people are risk averse, preferring a certain resolution to an uncertain opportunity. As expressed in folklore, a bird in the hand is worth two in the bush. People also tend to undervalue long-term transactions compared to transactions where there is a near-term payoff.[34] A professional negotiator can moderate these irrational predispositions by undertaking persuasion of his client based on his more extensive experience. However, in the lawyer-client relationship the client legally has the final say in settlement.[35] That being so, there are limits to the influence that a professional negotiator can bring to bear. There are corresponding limits on the rationality of criticism of the outcomes realized through a professional negotiator. And this means that there are limits to rational second-guessing of a settlement that a lawyer has recommended to a client.

Thus, although class suit settlements can be attacked on the grounds that they do not meet Rule 23's gestalt "fair, adequate, and reasonable" standard, one would be severely constrained in trying to show that a settlement was not in fact fair under that standard. The difficulty of making such a showing reinforces the importance of lawyer self-regulation in the area of settlement negotiation.

III. THE ETHICS OF CLASS SUIT SETTLEMENT NEGOTIATIONS

The third objection to global settlements is that plaintiffs' attorneys violate standards of ethics in negotiating these settlements. I discuss these considerations by first addressing ethical issues that arise in the settlement of multiparty litigation in general, and then focus on the ethics of the settlement class suit itself.

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[34] *See id*. at 513-15 (reviewing anomalous results of various intertemporal choice experiments).

[35] *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.").

A. Multiparty Litigation

In cases having multiple claimants, whether class suits or simply the product of multiple joinder, the interests of the members of the claimant group in relation to settlement are likely to differ. Consider the simple case of a single attorney representing three claimants: a wife driving the family car, the husband who is the car's legal owner, and a passenger—a child—in the back seat. All are injured in an accident with a defendant. Each claimant's interest in the prospect of settlement typically will be different. These differences will include their respective legal bases of liability and vulnerability to potential defenses, measures of damages, and aversion to risk of losing the case if it should go to trial.

Thus, the wife as driver is subject to a defense or mitigation for contributory fault. That fault may or may not be imputed to the husband-owner under applicable law. It will not be imputed to the child. A statute of limitations defense would certainly operate differently as to the child in any event. It is unlikely that the claimants will have suffered the same character and severity of injuries—medical and rehabilitation expenses, lost earnings, and pain and suffering—or have the same possibility of receiving punitive damages. The risks of trial usually will affect them very differently, for example, if the child must look to settlement for long term care while the parents look to it as something of a windfall for pain and suffering.

However, a defendant typically will settle only if the settlement package includes all of the claims. A chief benefit of settlement from a defendant's viewpoint is being spared the cost of defense and the risk of a high adverse verdict. These costs and risks pro tanto remain open if the entire case is not settled. Accordingly, the conflicting interests of the claimants must be resolved if there is to be a settlement.

Under the prevailing rules of professional ethics, the plaintiff's lawyer may mediate these conflicts and arrive at a settlement package, without being subject to a conflict of interest, if he explains to all the claimants the basis of the settlement as a whole and their individual share in it.[36] However, this can require some diplomacy and more. The complexity of the negotiation among the claimants will be greater when they do not have the tie of being in the same household. Additional complexities arise if there is more than one lawyer involved in representation of the claimants, for each lawyer's fee will depend on the award allocated to his client. There are cases where a plaintiff's lawyer has conceded a share of the fee in order to get all the claimants into line. In any

[36] *Id.* Rule 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.").

event, the negotiation is covered by the veil of the attorney-client privilege and hence ordinarily is beyond the purview of the court.

Perhaps it does not require repeating that there is no obvious basis on which to allocate among multiple claimants the "cooperative surplus" of settlement that goes to them as a group. That is, the indeterminacy of fairness of a settlement as between a defendant and a plaintiff is compounded by the indeterminacy of the fairness of the allocation of the cooperative surplus among the plaintiffs. The question of fairness will become an open issue, however, only if a claimant becomes so unhappy as to protest.

Additional complexities are introduced when, as is often the situation in a "big" case, there are multiple defendants and multiple sources of insurance coverage. Only by coincidence could two or more defendants have the same exposure in terms of the rules governing their liability, their financial resources at risk, and their insurance coverage. In some situations the case against one defendant can involve exposure to "bet the ranch" liability, with a corresponding effect on the risk of going to trial. For these reasons the interests of multiple defendants in a specific level of settlement normally diverge. The same applies to the insurers who are usually in the background. The insurers typically will have different monetary limits, different coverages and exclusions, and different stratifications in their reinsurance.

These differences of situation result in different interests in sharing the burden of a settlement that, in its aggregate terms, all would agree is within the range of fairness. There will be a bargaining struggle among those called upon to pay, similar to that among multiple claimants. Because separate defendants usually have independent representation, arriving at agreement requires concurrence not only of the clients but also among their lawyers. All of these complications are usually involved in trying to settle a multiparty suit.

B. Class Suit Complications

The class suit presents further difficulties, in addition of course to all of the foregoing ones. The additional complexities in class suits result from the anomalous position of the plaintiff "client" and of the lawyers for the class.

The plaintiff in a class suit is nominally a set of people who undertake to act for others in prosecution, and possibly settlement, of claims owned by the absentees. Thus, the class representatives do not speak only for themselves but also are fiduciaries who speak for others, with the constraints that a fiduciary obligation imposes on their freedom of decision. In the typical class suit, moreover, the representatives have no preexisting relationship with the other class members, resulting in a distance that puts additional strain on their fiduciary responsibility. The class representatives are therefore required to reach a settlement that will meet the standard of fairness on behalf of people they do

not know, whose interests are inevitably divergent in various degrees, in negotiations with defendants who themselves usually have divergent interests.

The position of class counsel is also different from that of counsel who has been retained in the conventional manner. Counsel for a plaintiff class is usually the architect of the suit itself.[37] That is, plaintiff's counsel will have been the author of the legal theory of the suit, the definition of the class, the designation of the plaintiff representatives, and the strategies to be pursued. Plaintiff's counsel typically will also be the producer and financial backer of the enterprise.[38] The strength of the case, and its potential for eliciting a settlement, will therefore be primarily a product of the labors of class counsel. Whatever might be said about the rights of class counsel according to the legal theory of class suit representation, in economic terms counsel has very legitimate interests in the settlement proceeds.[39]

Viewed realistically, therefore, plaintiff's counsel has an interest in a potential settlement that is substantially distinct from the interests of the class itself. As such, he is an additional and important claimant to the cooperative surplus in a settlement, notwithstanding that in formal legal terms his position is merely auxiliary to that of the class. The presence of this third-party claimant introduces an independent variable in appraising the fairness of settlement for the members of the class. By the same token, it is a variable in the negotiation of how much and from whom a settlement fund might be constituted.

On top of all of these complications is uncertainty as to whether the suit is or is not a class suit. The key issue is whether the court certifies the suit as a class suit. Whether a suit becomes a class suit, or merely involves the permissive joinder of several individual claimants, usually determines whether or not the case is "big." If the proceeding is a class suit—that is, if the court certifies it as such—defendants can face massive liability. If the court does not certify the proceeding as a class suit, the case reduces itself essentially to a few claims, some of them of modest amount. However, a suit purporting to be on behalf of a class does not become such until the trial court holds it to be so, and even then it is vulnerable to dissolution on appeal or through collateral attack. This uncertainly hovers over the process of settlement. Does the case involve $100 to $175 for each of the named plaintiffs, or does it involve similar amounts for hundreds or thousands of claimants? The size of the cooperative

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[37] *See* Coffee, *supra* note 27, at 681 ("In some areas of contemporary litigation, the pattern is typically one of the lawyer finding the client, rather than vice versa.").

[38] *See id*. at 683 ("[U]nless the client is willing to invest in the action by bearing litigation expenses, the attorney will still make the critical investment decisions, thereby reversing the normal roles of principal and agent.").

[39] *See id*. at 683-84 ("[O]ne better understands the behavior of the plaintiff's attorney in class and derivative actions if one views him not as an agent, but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions.").

surplus—as a practical matter, whether there is any such surplus—turns on this issue. The claims of the class members on the average may be much larger, as in the asbestos cases—$5000 to as much as $500,000. This "spread" between upper and lower limits of justifiable settlement is correspondingly larger in dollar terms.

There are powerful restraints against making a firm judicial determination of whether the suit is a class proceeding or not. The Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*[40] radically discouraged such determinations prior to full-scale discovery. A defendant typically does not want the case certified as a class suit unless it is fairly confident of victory on the merits or has the terms of a settlement firmly in hand. The uncertainty about certification is a bargaining chip, but for whom is usually unclear.

It is the confluence of these factors that has begotten the "settlement class suit." A settlement class suit permits the defendants' and plaintiffs' counsel to determine the size of the controversy through a bargaining process, and by the same process to resolve the controversy. Determining the size of the case and reaching resolution by settlement are interdependent, and unavoidably so. The bargain determines the size of the "pot," the shares of the pot to be awarded the claimants, or a formula for determining their shares; the shares of the burden to be imposed on the defendants and their insurers or a formula for that determination; and the share to be given to plaintiffs' counsel as the "third man," so to speak.

Whether the result is "fair, just, and equitable" is a question whose answer can be clear only in clear cases,[41] no matter what words are used to define the inquiry.

CONCLUSION

It may well be that settlements of many litigation claims are imprudent in the sense that a different outcome might have been realized. It may well be that many settlements conducted by lawyers are the result of ineffectual or self-interested negotiation by the lawyers. The point holds not only against lawyers for claimants who got too little but against lawyers for defendants who paid too much. The legal remedies for such failures are, however, very limited. In essence, the dissatisfied client has to prove that his lawyer was

[40] 417 U.S. 156, 177-78 (1976) (holding that a preliminary hearing on the merits of a suit to determine whether it may be brought as a class action is not permitted under FED. R. CIV. P. 23).

[41] For such a case, *see In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818-19 (3rd Cir. 1995) (finding a class settlement not "fair, reasonable, or adequate" because of valuation problems and "lingering safety concerns," but leaving open the possibility of approving a settlement on a more well-developed record), *cert. denied*, 116 S. Ct. 88 (1995).

guilty of fraud.[42] The settlement process is therefore a black box, structurally impervious to enlightened scrutinization from without.

This conclusion is surely unsettling in a culture committed to the idea that every legal wrong should have a remedy, a culture that also is not inclined to be sparing of lawyers. Yet the conclusion seems inescapable. If this is true, then the burden of moral responsibility in conducting settlement negotiations must be recognized as correspondingly heavier.

[42] This analysis suggests that the outcome, although not the analysis, in Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346 (Pa.), *cert denied*, 502 U.S. 867 (1991), may make more sense than first appears. In that case, the Supreme Court of Pennsylvania held that a dissatisfied plaintiff cannot sue his attorneys after a settlement to which the plaintiff agreed unless the plaintiff can show that his attorney fraudulently induced him to settle the original action. *Id.* at 1348.

THE ROLE OF CHARACTER IN THE DEVELOPMENT OF THE LAW

Joel M. Boyden*

Editor's note: Olivet College, a small liberal arts school in Michigan, recently emphasized its commitment to the teaching of social responsibility by making community service a prerequisite to graduation and taking it into account in the awarding of scholarships. Joel Boyden, a past president of the Barristers, was invited to address the Olivet students and faculty on the ethical and community responsibilities of the law and lawyers. Because his remarks are of general interest, we here publish an edited version of his presentation.

The current administration and faculty of Olivet College, building on the school's 150-year-old commitment to the teaching of social responsibility, articulated a new academic vision, one which uniquely tie bars an excellent traditional liberal arts education with the development of a strong sense of social responsibility. That is a bold and exciting concept in collegiate circles. Moreover, it furthers ends which are desperately needed in our present day society. The important combination of intellectual process and social sensibility is one which is too little emphasized and too seldom taught, especially in tandem with our proud national tradition of individual rights and freedoms. Clearly, the lack of a concurrent emphasis on the individual and collective responsibilities that must be wedded to individual rights is a serious deficiency in our society. The imbalance, if not corrected, will ultimately and negatively affect the basic character of the law which verifies and governs our personal and collective conduct.

The Responsibilities of Rights and Freedoms and the Role of Lawyers

Individual rights and freedoms unquestionably are of paramount importance under our system, but those rights and freedoms cannot (or should not) be exercised without an awareness and observation of accompanying responsibilities. The balancing of the two often conflicting forces is what in large measure defines the true character and genius of our legal system. Otherwise, individuals who insist on exercising unrestricted personal rights end up dictating unacceptable consequences to the majority. Such a situation was never intended by either our founding fathers or those guiding the evolution of the principles subsequently developed by our society. That individual freedoms

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should fail to entail correlative responsibilities is simply not in keeping with our society's wishes and desires. Yet, the important principle of combining individual and/or social responsibility with rights and freedoms has, in large measure, suffered some serious setbacks during the feverish activism that has marked this fast closing century.

Some of the best insights into the juxtaposition of law and social responsibility are found through an examination of the ethics of responsibility, the ethics which provide the essential fulcrum for the actions of the guardians of the law whose duty it is to protect the interests of the individuals governed by the law. In our system the guardians of the law are, of course, lawyers. Thus, the basic character of the lawyers will inevitably shape the character of the law. The lawyer's sworn responsibility is to be a fighter for the rights of individuals. But the rights of individuals are governed—sometimes restricted—by the rights of the majority as expressed in laws of consensus to which the lawyer is also pledged by solemn oath.

The success of the judgments lawyers are thus ethically forced to make regarding their competing responsibilities is reflected in our nation's unparalleled personal rights and freedoms. Never in all of history has such respect for the individual been codified and aggressively championed by lawyers.

In a political system dependent on law for rules and authority, laws proliferate. As laws proliferate, so do lawyers. As complex and messy as all of that can get to be, alternatives to the rule of law are singularly less attractive.

Some critical observers have pointed out that we have a higher ratio of lawyers to nonlawyers than any other country in the world. That's true. But I think it is no coincidence that we also enjoy personal freedoms and rights far in excess of those ever enjoyed by others in the world. The one fact is productive of the other. It is a situation dictated by our national character trait of concern for individual rights and responsibilities and the ideal of resolving disputes in a peaceable, rule-of-law manner. Better more lawyers and peaceful resolution than more police and more soldiers overseeing physically confrontational disputes where might would tend to make right.

Why then is it so fashionable to criticize and make jokes about lawyers, essentially casting the profession as a bunch of sharks preying upon the citizenry as the populace swims through its day-to-day ocean of activity? Frankly, that lawyer stereotype is a bum rap. The essential character of the vast majority of U.S. lawyers, as they deal with their responsibilities, their ethics, and often their devotion to unpopular causes, demands of themselves that they do everything possible to maintain an even playing field for all Americans, regardless of the economic might and power of their antagonists. Lawyers do that! They have done it proudly for centuries. Lawyers are willing to sacrifice and take substantial risks for the sake of that principle. That is the lawyer's proud tradition.

Examples: The majority of those who, at great personal jeopardy, signed the U.S. Declaration of Independence were lawyers. Virtually every significant safeguard we enjoy, by way of elimination of dangerous products and practices, has been accomplished through the commitment, skill, and often selfless efforts of lawyers who were willing to go out on a limb to enforce the rights of others. Such examples illustrate an important character component of both our law and the lawyers who work to support its principles.

Are mistakes sometimes made by lawyers acting within the system? Sure. Are results in our legal system sometimes inappropriately skewed or even patently ridiculous? Of course! But, in the vast majority of instances, our legal system, based on the proposition of equal justice for all, works. It works precisely because lawyers strive to articulate for a jury the rights of individuals and the ethical and moral responsibilities which accompany or even limit those rights. The lawyer delivers that message in ways that allow a jury, representing a cross-section of our citizens, to arrive at reasonable allocations of punishment or damages for those who fail to meet their responsibilities.

The law's defining of rights and accompanying responsibilities is integral to the life of our society. We are, after all, heirs to the cherished traditions of a legal system that honors constitutional processes, rule by law, equal justice under the law, and the independence of bench and bar. In every sense our future depends upon the preservation of those principles. It depends, too, on the legal profession's ability to spearhead a peaceful adaptation to new realities and changing modalities while continuing to balance rights versus responsibilities.

A CODE OF ETHICAL CONDUCT

Speaking simplistically, law exists to give focus to our common societal desire to lead an ethical and moral life. Laws are passed in furtherance of that basic goal. Laws represent an expression of the rules which society believes are essential to the pursuit of an ethical course. The application of those rules—in the form of laws—falls in very large part to the lawyer and the lawyer's ethical values.

There is a specific body of ethics which governs the responsibilities of the legal profession and in large measure defines its character. It also, in some portion, defines the character of the law.

No profession offers more opportunities than the practice of law to make ethical judgments or, for that matter, misjudgments. Ethical behavior is not simply a matter of theory to a lawyer but of daily consequence. The lawyer's role is largely that of a fiduciary, obligating the lawyer to place others' interests ahead of the lawyer's own. The temptations of self-interest may, at times, place heavy demands on a lawyer's fiduciary resolve.

Personally, I could not conceive, when I began my career as a lawyer, that I would be required to examine, so closely and so often, my own professional conduct in order to ensure that it comported with both my own and my profession's principles. Nor am I so self-righteous as to conclude that I have always been successful in matching conduct to conscience. But I will tell you that each instance when I have failed has left an indelible scar on my memory bank which goes a long way in preventing me from repeating the mistake. On the positive side, where, against heavy odds, the fulfillment of my responsibilities has succeeded in righting wrongs for a client, I have gained a feeling of accomplishment and satisfaction which, for me, would be impossible to duplicate in any other field of human endeavor.

Virtually every organized profession has some form of rules of professional conduct. However, none of the others are as extensive or as idealistic as the rules devised by lawyers for themselves. Ethical codes of other professions often do not attempt to define the terms on which the profession may be practiced but, rather, simply legitimize interfraternal judgments concerning whether unprofessional conduct has occurred. Legal ethics embody a different concept altogether and serve as a "window to the soul" of the basic character of the legal profession.

Even after hearkening back to my own undergraduate days and philosophy courses, I must confess that I am not altogether certain what is encompassed by the term "ethics." Indeed, defining ethics proved elusive centuries ago even to such a great mind as Aristotle's, and, so far as I can tell, there has not been any discernible improvement or agreement in all the analyses of the concept since then. It was Aristotle who suggested that ethics consist of a rational approach to the problems arising from the interaction of the self with the normative environment. Therefore, the classical ethical decision to be made is, to borrow a liturgical phrase, what is "meet and right" to do, as measured by its impact on yourself and others.

Continuing down that path, we can see that "meet and right" means actions which are fitting, sensible, prudent, and, probably, generally acceptable under the circumstances. Ethics, seriously taken, do not mandate mindless self-sacrifice, let alone some form of superhuman heroics. Rather, ethics represent a demand for well-thought-out principles to be applied in tough situational dilemmas as a guide to "doing what's right." There is no way to prescribe automatically what is right in any particular circumstance.

There are a couple of fundamental difficulties with applying those Aristotelian ethical considerations, even as thus broadly defined, to the legal profession. One significant problem peculiar to legal ethics is that a lawyer is a legal technician in every sense of the word, not a philosopher. Lawyers identify, analyze, and take action. Philosophers consider, discuss, and hypothe-

size. It has always been clear that things technical and things philosophical, such as ethics, do not blend well!

The difficulty becomes more evident when one realizes that a lawyer's professional function often consists of providing counsel about how a client may escape or mitigate certain incidents of the law's obligations. The lawyer as a counselor begins with the premise that the law's obligations are real, but he or she is bound to advise a client on the extent to which the law's demands are mere formalities, or even less.

Another problem with applying traditional guidelines of ethics to the practice of law is one common to most service professions, which is that the choice of action is not merely personal to the lawyer. Instead, there is a client to consider. Pure philosophical ethics require treating all other persons on an equal footing, but legal ethics give priority to one "other," who is the individual client. In general, that requires initial subordination of everyone else's interests to that of the client.

Indeed, the central problem in establishing distinct parameters for legal ethics can be described as the tension between the client's preferred position and the position of equality that everyone else is accorded under the general principles of morality and legality. That conflict of principles is a key to understanding the whole process of law and promulgation of laws.

Development of the Code of Ethics

The first recorded American discussions of the professional responsibility of lawyers reflect disagreement on a particular, basic ethical concept. Indeed, dispute over that principle served very early to identify a difference which still troubles lawyers. The schism is notable and worth discussion.

One early author stated, "My client's conscience, and my own, are distinct entities; and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent I may do so." But one Judge Sharswood, in contrast, wrote, "[T]he lawyer who refuses his or her professional assistance because in the lawyer's judgment the case is unjust and indefensible, usurps the function of both judge and jury." It was the Sharswood position which over the years won the debate, so that the lawyer's chief duty is to preserve the client's rights, whatever the lawyer's personal judgment as to merit. This understanding is the foundation of many concepts of the law's administration.

The position of the lawyer as a nonjudgmental advocate for the client's rights was incorporated into the first code of ethics, adopted in 1887.[1] The

[1] Alabama Bar Association Code of Ethics (1887).

principles have remained remarkably similar in concept, over more than 100 years, and now are reflected in the current rules of professional conduct adopted throughout the states.

By 1969, the code of ethics for lawyers had evolved into nine "canons" of general propositions and a compilation of disciplinary rules to outline more specific prohibitions.[2] A 1983 codification is the one now generally in effect.[3] It was and is intended to supply a more detailed legal framework for the ethical practice of law, and it has impinged substantially on the daily routine of the lawyer's practice.

The rules of conduct are enforced by professional lawyer organizations formed, over the years,[4] to better effectuate the dual and sometimes conflicting objectives of safeguarding and improving the administration of justice on the one hand and of furthering lawyers' social and economic interests on the other. Experience had taught that those matters could not satisfactorily be left to individual lawyer conscience or vaguely articulated "traditions of the profession." It became necessary to resolve debated issues authoritatively so that both lawyers and citizens dealing with lawyers might have a common understanding of what constitutes expected and permissible behavior by lawyers in performance of their duties.

Legal ethics, therefore, is properly seen as a matter of positive law of the same character as laws governing a regulated business. While the requirements of such a positive law are not the only normative considerations by which the lawyer might guide his conduct, they are the minimum standards in that a lawyer should, in all events, comply with them. The code thus provides substantial insight into the character and practice of the law.

The essential thrust of the code is found in disciplinary rules—rules of conduct whose violation is held to be a proper basis for sanctions up to and in-

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[2] A.B.A. Model Code of Professional Responsibility (1969).

[3] A.B.A. Model Rules of Professional Conduct (1983).

[4] It is an interesting historical footnote that some of the early organizational efforts by lawyers tended to so limit competition that the public reacted by pressing state legislatures to deny licensing powers to the organized bar for years. In fact, during the height of Jacksonian democracy, more than a century and a half ago, general public aversion to lawyers was so strong that some states abolished all standards for admission to the practice of law and sought to suppress or eliminate the legal profession in its entirety. Clearly, lawyers have never been an object of public adulation and affection!

At present, each state sets its own licensing requirements, and the bar association and courts of each state regulate its lawyers. Generally, the legislatures of the states will not—and cannot, constitutionally—attempt to govern the professional conduct of the lawyers, beyond establishing the licensing requirements. That is because of the doctrine of separation of powers; lawyers, as officers of the court, are considered to be part of the judicial branch of government. That is the chief reason why lawyers are self-regulating with respect to ethics, discipline, and other matters. It is the highest court in each state which retains primary supervisory power over lawyers, including the authority to adopt or approve the code of conduct for lawyers.

The code of professional conduct is akin to specific legislation by the high court of the state defining the rules of the practice of law.

cluding disbarment. According to the code, if a lawyer's conduct violates one of the disciplinary rules, it is unethical as a matter of law, even if it might be right or justified when considered in terms of a more general concept of ethics.

The Core Principle

If one is searching for the central core of legal ethics and character, the search probably can be narrowed to a singular focus: the lawyer's relationship to the client. The unifying ethical theme is fidelity to the client's interest. The code thus includes express obligations to preserve the client's confidences, to exercise professional judgment in behalf of the client, and to represent the client competently and zealously. It is fair to say that such client-centered representation is the center of the code's performance ideal.

That same ideal can be related to much more general values, both in the profession and in society at large, through the link between the profession's concern for protecting the client's interest and society's generalized concern for protecting individual rights. This connection is underscored in the opening paragraph of the preamble to the Code of Professional Conduct:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for the law is destroyed, and rational self-government is impossible.

The code's concern with individualism has well-established ethical foundations in our society at large. By aggressively promoting this tradition, the legal profession reflects its commitment to preserving control in the individual as against the state.[5]

Consider, for example, the societal values inherent in the first amendment. There is no constitutional command that more emphatically emphasizes our society's value of individualism than the free speech guarantees of the first

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[5] Even though it is the lawyer's duty to carefully and loyally protect a client's rights, the means used to achieve that end are not unlimited. The lawyer's fundamental role is to serve ethically in the administration of justice; a lawyer's basic integrity and the external pressures of the moment will undoubtedly exert influence on his professional behavior in any given situation. Professionalism does not negate all exercise of personal moral judgment. That, too, is an essential and unique characteristic of the practice of law. For example, if an attorney commits acts reflecting negatively on his or her own moral character, whether or not in the course of professional practice, that attorney is subject to professional discipline. The rationale is that a lawyer must demonstrate exemplary moral character in dealing with professional duties in order to be deemed fit to practice law.

Moreover, the fact that the moral adjustment may vary with changing times or roles or circumstances is desirable, if sometimes difficult. It is no more difficult than performing differently, but with equal morality, the roles of mother and daughter, father and son, lover, and friend.

amendment; free speech is of value only in a society that is concerned with the individual's ideas. In this sense, freedom to speak, especially on matters of politics, reflects a commitment to the procedural protections of access to political forums, to be assured through the legal system.

Since lawyers and the legal profession are the custodians and enforcers of rights protected by the first amendment, the legal adversary system is the primary vehicle for the protection of those rights. Indeed, it is arguable that without the adversary system, our basic rights would be in grave jeopardy.

RECAPITULATION

Simplistically, the main goal of lawyers is to make the law work. Law and lawyers are essential elements of all organized free societies. The nature of the law and the lawyer's practice in fact tend to mirror the character of a nation's people and values.

Nearly two hundred years ago, the brilliant French social observer, Alexis de Toqueville, recognized that high regard and respect for the rule of law and the central role of lawyers characterized our early government and society to a greater degree than they had any other earlier or contemporary nation. In our nation's history and tradition, lawyers have been expected to play key roles in effectuating the purposes of law, such as the establishment of justice, the accommodation of maximum freedom with essential peace and order, the satisfaction of human wants and desires, the settlement and prevention of disputes, and the development of other methods of ordering human conduct in accordance with the perceived goals and character of our society. Indeed, the law and its ethical foundation have led the way to a national moral consensus on such matters as the desegregation of the races and recognition of other civil rights, the allocation of political power among the people, among the states, and between the states and the federal government, and certain basic issues regarding the creation of life and its termination.

The willingness of the people to accept this major role of law in our society is not based on complete agreement with the results reached; and it certainly is not based on popular admiration for the lawyers and judges involved. It arises out of a national trait of respect for due process of law and the ethics which have guided the legal profession in its zealous protection of due process principles. The lawyer is bound by oath to serve as the guardian of due process.

Some might greet this next comment with great cynicism, but it is true. The vast majority of people who are lawyers tend to be idealists. That, too, is part of our profession's character. As a result, there is a conscious and sincere striving by most lawyers to perform on the highest ethical plane. It is true that there are bad apples in our barrel, just as there are in any profession. But the

fact is that American lawyers have codified a higher standard of ethical behavior than that adopted by any other profession in the world. It has not only been codified but is, in the main, adhered to by the vast majority of practicing lawyers throughout the United States. A strong disciplinary system enforces it. That, also, gives our law and legal system not only character but strength of character. It is no mere coincidence that we, as a nation, enjoy the highest standard of living with the highest level of personal rights and freedoms of any society or civilization which has ever existed on the face of this planet.

In the final analysis, it is our nation's people whose will and values create and establish the character of our laws. Our society's moral and ethical judgments provide the soul of our laws. After that, it is the soul, character, dedication, and commitment of our lawyers which guard the rights of the people as created by those laws, enforce those freedoms, and direct the meeting of the accompanying responsibilities.

It is my contention, one that I believe is borne out by the conduct of the legal profession through the years, that insistence by lawyers on the highest of ethical standards has played a critical part in both the achievement and the retention of the freedoms we rightly cherish so highly as a nation.

I am proud of our profession. Down through recorded history, the opening salvo of any attack on the life and liberty of a population has been to restrict and eradicate the lawyers' ability to fight with unfettered independence for the rights of their clients. Those are the actions which have marked the beginning of despotism for centuries of human conduct.

So, when next you hear one of the inevitable lawyer-bashing jokes, remember that the lawyers of the United States are the faithful guardians of a system of law dictated by the nation's people. Don't let the humor of such jokes inure you to the attempts of others to diminish or demean the role of the lawyer as a champion of all who need championing. For with such diminution will inevitably come a proportionate shrinkage of our proud traditions of individual rights and equal justice for all. That cannot be allowed to happen!

WHAT DO LAWYER JOKES TELL US ABOUT LAWYERS AND LAWYERING?†

Roger C. Cramton*

Lawyer jokes are all the rage. Perhaps they have something to tell us about our identity as lawyers. I will weave my remarks here around several oft-repeated jokes. What do lawyer jokes—and current scholarship about the profession—tell us about lawyers and lawyering?

Perceptions about Lawyers

Q: What's the difference between a dead lawyer in the road and a dead skunk?
A: There are skid marks by the skunk.

Today's lawyer-bashing stories tell us that the public perception of lawyers is at a low ebb. The disrepute of lawyers is an ancient story; we are all familiar with the quotations from Plato, Jesus, Shakespeare, Montaigne, Swift, and Dickens. But in the past favorable images of the lawyer as hero, champion, or helper have offset unfavorable images of the lawyer as shyster, trickster, or hired gun. Today the latter images are more common, judged by popular culture, survey results, and the increased frequency and intensity with which law students report, and are bothered by, the hostility toward lawyers expressed by relatives, friends, and casual acquaintances.

Social survey data tell us that lawyers are less favorably viewed than most other professionals: teachers have an 84 percent approval rate; doctors, 71 percent (they used to be at the top of list); and lawyers, 40 percent, ranking ahead of stockbrokers and politicians, both 24 percent. When asked for details, Americans state that lawyers lack care and compassion, have poor ethical standards, and are greedy. Americans who have had the most contact with lawyers and the legal system (e.g., businesspeople and those who have served on a jury) have a less favorable view of lawyers and the legal system than those who have had no contact with lawyers and whose education is limited.

The good news (at least for lawyers) is that surveys report that clients were fairly satisfied with the services they got from lawyers (although clients complain that the services were too expensive). Clients view lawyers as highly competent problem solvers. Lawyers, the public has learned, generally are intelligent, articulate, and ambitious people. Competence—the capacity to do

† Reprinted, with permission, from Cornell Law Forum (July 1996).
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decent work—is less of an issue than economic, social, and institutional factors that lead to unavailability of representation to some, underrepresentation of many, and overrepresentation of others.

A CARING PROFESSION?

> *Two balloonists are floating over the countryside in a hot-air balloon on a summer's day. Storm clouds move in, and the balloon is blown off course. When there is a gap in the clouds and a town appears below, the balloonists lower the balloon, and one of them shouts to a man on the street below: "Where are we? . . . Where are we?" "You're in a balloon." The balloonists look at each other, and one says: "That man is a lawyer. His answer was entirely correct but revealed absolutely nothing."*

Lawyers like the balloon story because it celebrates the craft, skill, and gamesmanship of lawyering: doing the job for a client without giving anything away to the opposition. Most lawyers are left-brainers who think of themselves as rational problem solvers. They don't like emotion, personal involvement, therapy, or other touchy-feely stuff.

The Felstiner-Sarat study of lawyer-client interactions in divorce cases, recently published in book form, is revealing.[1] Although lawyers behave in an adversarial fashion in negotiations with opposing parties, they put even greater effort into selling settlement to their clients. The interaction of lawyer and client "occurs against a background of mutual suspicion, if not antagonism." Clients, frustrated by their lawyers' unresponsiveness to the moral and emotional aspects of their cases, "worry that their lawyers will be inattentive and disloyal."[2] Lawyers, on the other hand, view their clients as emotional, demanding, and having unreasonable expectations. Lawyers emphasize the financial, not the emotional or moral, aspects of a dispute; they ignore their clients' feelings and urge them to pay attention to the financial bottom line. Divorce lawyers also trash the legal system and its rules; they present themselves not as participants in a rational and fair dispute resolution process but as inside dopesters who can manipulate a legal system that they describe as erratic and idiosyncratic. The implicit message is that clients, because they cannot have that inside knowledge of the system's vagaries, must depend on their lawyers.

Law is not a "helping" profession in the way that nursing or ministering is. Law attracts bright, aggressive, and ambitious people who are more interested in power and order than in people as people. Lawyers don't specialize

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[1] WILLIAM L. FELSTINER & AUSTIN SARAT, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (1995).

[2] Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 47 (1991).

in love and affection but bring rationality, skill, craft, and detachment to a client's transaction or problem.

PARTISANSHIP AND CLIENT FRAUD

Q: Why did the research scientist substitute lawyers for rats in his laboratory experiments?
A: Lawyers breed more rapidly, they are less likely to become emotionally involved, and there are some things that rats just won't do.

That joke about lawyers echoes themes found in the survey data. Put aside the rapid breeding of lawyers and their lack of emotional involvement. The first raises interesting questions of the demand for and supply of legal services, which I don't have time for here. The second, emotional uninvolvement, we have already touched on. So if we cut to the chase, the principal point of the laboratory rat story is that a lawyer will do anything for a client.

In one sense that assertion is clearly wrong. The vast majority of lawyers are probably as honest as the population generally and perhaps even more cautious about getting into trouble.

However, the profession's view of the lawyer's role in an adversarial system does lead to problems of overrepresentation and excessive zeal that properly concern the public. My friend and coauthor Susan Koniak has written several wonderful articles exploring the discrepancy between the value system of the organized bar and that of the state, as expressed in legislative enactments and court decisions.[3] (When I speak here of the "bar" and of "the profession," I am referring to the dominant position of major professional organizations, especially the American Bar Association; the legal profession is not monolithic and does not speak with a single voice.)

The dominant professional view has a normative structure that gives highest priority to loyalty to clients and abhors betrayal of clients. The result is that the client-protective aspect of loyalty overrides the moral claims of third persons of protection from ongoing or prospective harm likely to result from the client's conduct. The profession's view is not limited to situations in which a lawyer is acting in the artificial theater of the courtroom but is extended to out-of-court representation in negotiations that lack some or all of the protections of contested litigation: a procedural framework, a neutral arbiter, and lawyers representing opposing interests.

When a lawyer discovers that a client is engaged in wrongdoing in which the lawyer's services are involved, the dominant professional ethic generally forbids disclosure of confidential information that would prevent or rectify

[3] *See, e.g.*, Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

harm to third persons. In a pinch, the lawyer may be required to withdraw, but withdrawal is a last resort and should be done silently, if possible.

The ABA struggled with that issue in 1983 and again in 1991. The Model Rules of Professional Conduct permit, but do not require, a lawyer to disclose information when the lawyer reasonably believes that disclosure is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Note that the client's prospective act must be a crime and that only life and bodily integrity, if imminently threatened, merit protection. Under Model Rule 1.6(b), information generally may not be revealed to prevent the client from defrauding third persons, even when the lawyer's services are being used to carry out the fraud. Silent withdrawal is ordinarily the only option, unless the reputational or economic interests of the lawyer are involved; that is, the lawyer may disclose confidential information in self-defense or to collect a fee.

In short, the profession permits disclosure to prevent an event about which lawyers have no expertise and that occurs very rarely (a client's state of mind in threatening a criminal assault on another). Simultaneously, the rule prohibits a lawyer from disclosing events that occur much more frequently and involve a type of harm about which lawyers, as facilitators of transactions, have special knowledge and responsibility (economic loss flowing from client misrepresentation in transactions). Although a lawyer may not disclose confidential client information to prevent or rectify economic harm to third persons, such information may be disclosed in self-defense or to collect a fee.

The ABA position on disclosure of client fraud is a self-inflicted wound that is at variance with general morality as well as the law of civil and criminal complicity. Happily, the refusal of a majority of state high courts to adopt the restrictive disclosure provisions of Model Rule 1.6(b) has limited the social harm. Judicial expansion of civil liability of lawyers who have remained silent while a client defrauded third persons also illuminates the gap between the profession's norms and those of the legal and moral order. I hope the American Law Institute, in the proposed Restatement of the Law Governing Lawyers, will take a strong position on this issue that will undermine and eventually replace the profession's self-centered and immoral position.

AN UNPRODUCTIVE AND PARASITIC ACTIVITY?

Q: How can we solve the trade deficit with Japan?
A: For each Japanese auto imported to the United States, we export one American lawyer to Japan.

That lawyer joke raises important social issues. It suggests that the practice of law is a parasitic activity that imposes substantial costs on the American

economy without producing comparable benefits. In Japan, the saying goes, engineers make the pie larger, while lawyers only help divide it up. Ergo, we are a less productive society than others because the transaction costs of lawyering are so heavy in the United States.

An important distinction needs to be made between dispute resolution and private ordering. Private ordering is as productive an activity as any in society. When lawyers help a new business venture get started, facilitate transactions, and arrange for the intergenerational transfer of wealth, they—like engineers and entrepreneurs—are helping create opportunities, satisfactions, and wealth. Moreover, transactional work is what most lawyers do most of the time. Over 75 percent of lawyering consists of transactional assistance, mostly for private clients, and only 25 percent or less involves litigation-related activities.

Dispute resolution, on the other hand, is a high-cost, backward-looking affair: Nonrecurring past events have caused harm, and participants are quarreling about who was responsible. Dispute resolution generally is a zero-sum game. Each participant has an incentive to spend more in the effort to win than is socially or individually desirable. Lawyer use of abusive litigation tactics as a strategic tool is a serious problem, especially in cases that involve high stakes. Prohibiting strategic use of litigation is in everyone's interest, because such tactics result in no public benefits.

Game theorists argue persuasively that expenditures on contested litigation are a form of the "prisoners' dilemma." Each litigant knows that the quality and extent of lawyering affects the outcome of legal proceedings, and each has an incentive to increase expenditures to increase the likelihood of a favorable result. If both sides have adequate resources and the stakes are large, each will spend more and be tempted to engage in questionable or improper strategic moves: witness preparation that distorts testimony and facilitates perjury, delaying tactics, harassment of the opposing party with unnecessary discovery and pretrial motions, concealment of adverse evidence by disingenuous or misleading responses to discovery requests, and other efforts to hide, reshape, or distort the truth.

The situation is a classic prisoners' dilemma in which rational behavior by each participant (increasing expenditures in order to win a case) produces unfortunate results both for the litigants and for society. The expenditures on litigation sharply diminish the benefits of winning and multiply the burdens of losing. Because the parties' tactics and expenditures tend to cancel each other out, case outcomes remain much the same as they would be if each spent less. As in the prisoners' dilemma, the litigants are worse off than if they had agreed to cooperate with one another to limit strategic tactics. All of us also lose; public and private resources that might be devoted to more productive uses are wasted on excessive litigation expenditures that probably produce less

truthful outcomes. The only group benefiting from the arrangement is the lawyers engaged in high-stakes litigation—a "winner-take-all" market that results in the astronomic earnings of the most successful litigators.[4] One is reminded of the apocryphal lawyer's prayer: "Dear Lord, let there be strife among the people, so that your loyal servant may prosper."

Effective control of abusive litigation tactics requires the application of prompt and severe judicial sanctions in proceedings. Professional culture does not currently oppose excessive zeal; in fact, it often celebrates it. And alternative remedies such as professional discipline and civil liability are usually unavailable.

LITIGIOUSNESS AND FRIVOLOUS SUITS

Q: How many lawyers does it take to change a light bulb?
A: Three. One to climb the ladder and unscrew the bulb, one to shake the ladder, and one to sue the ladder company.

The fairly explicit message of that and many other lawyer jokes is that lawyers are litigious and bring too many frivolous lawsuits.

The American psyche is schizophrenic about law and lawsuits.[5] We want rights to be enforced, but we don't like the people who do it. We would prefer it if they worked out their problems quietly without the fuss of a lawsuit. The problem is that vexing grievances can't be worked out quietly when one party has the money or has the advantage of the status quo.

And what about frivolous suits? We keep reading stories about wacky cases that are brought and sometimes won: a $1 million award to a Philadelphia woman whose physician deprived her of her psychic powers by giving her a CAT scan and another woman who recovered against a manufacturer for the loss of her poodle; she had put him in a microwave oven to dry him off after a shampoo.

Those and other stories either are apocryphal or omit essential facts. Here's a true report: A Wisconsin teenager sued another teenage boy for kicking him lightly on the shin across the school aisle; the kick resulted in serious injuries because of the peculiar nature of the boy's shin. The lawsuit produced four trials and three trips to the Wisconsin Supreme Court. The *Waukesha Freeman* complained about increased litigiousness: "Under the old regime when a man stubbed his toe on the sidewalk and got a barked shin and a general shaking

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[4] *See generally* PHILLIP J. COOK & ROBERT H. FRANK, THE WINNER-TAKE-ALL SOCIETY: HOW MORE AND MORE AMERICANS COMPETE FOR EVER FEWER AND BIGGER PRIZES (1995).

[5] For discussion of the tension between access to justice and concerns about litigiousness, *see* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 533, 533-38 (1994), citing the literature on the subject.

up, he simply lamented his bad luck and doctored himself back to health as quickly as possible. Now he brings suit against the city or village in which the accident happened, and generally succeeds in obtaining a greater or less sum. So when his neighbor speaks slightingly of him or his daughter loses her beau or his child gets hurt in play." The date: 1892, more than a hundred years ago; the case: *Vosburg v. Putney*, generally used in first-year torts courses to introduce the intent element of battery.[6]

Nostalgia for a golden age that never was is an enduring trait. America has always been an active, turbulent country in which law and litigation have played a large role. Careful historical studies tell us that litigation rates are no higher today than in many periods in America's past. Yet today, in a nation of strangers in which neighborhoods, churches, and face-to-face communities play a much smaller role, law is even more important as the vehicle of social cohesion and ordering.

Any meaningful talk about frivolous lawsuits has to take into account two fundamental realities. First, the standard of what is frivolous is constantly changing. In 1976 an eminent legal authority stated that it was "legal pollution" for high schoolers to go to court over issues relating to athletic participation. But from today's vantage point, another view is possible. Athletics are terribly important in American life; the opportunity for girls to have athletic opportunities is not an unimportant concern. The result is that school superintendents, legislatures, and courts have been forced to deal with the issue. Can we say the issue was frivolous? The same question arises in many areas as a result of the mutability (instability?) of American law.

Second, lawyers, especially those who are earning their living by contingent-fee arrangements, have little incentive (absent other conditions) to file or pursue truly frivolous matters. A lawyer who gets paid only when a lawsuit is successful will go bankrupt spending time on a stream of losers. The economics of lawyering requires plaintiffs' lawyers, out of self-interest, to be gatekeepers to the courts. The problem is really the other way around: Lawyers will not take a product liability case unless very substantial damages are involved (perhaps at least $250,000), and they will not handle a fender bender unless there are damages of several thousand dollars. A careful and recent medical malpractice study (based on records in a sample of New York hospitals) concluded that less than a fourth of malpractice incidents were actually pursued by injured patients.

Even when all that is said, however, we have a social problem involving claims, defenses, and assertions that are lacking in merit but made only for strategic purposes. As indicated earlier, judicial sanctions in the proceeding offer the best hope of deterring such conduct.

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[6] *See* Zigurds L. Zile, Vosburg v. Putney*: A Centennial Story*, 1992 WIS. L. REV, 877, 921.

TOO MUCH LAW, TOO LITTLE JUSTICE?

In an L.A. Law episode, a friend jokingly asked Arnie Becker, "How are things in the justice biz?" Arnie, prepared by the initiation rites of law school and a number of years in the legal trenches, had a trenchant response: "Friend, you've got it wrong. We're not in the justice business. We're in the law business."

There is a sad truth to that statement. The Yankee from Olympus, Oliver Wendell Holmes, Jr., distinguished sharply between law and morality. Law, according to Holmes, was best viewed by the law student from the perspective of the bad man who wanted to know whether a particular conduct would get him into trouble with officials. Law, Holmes said, was a prediction of how legal officials would behave, that is, whether and how the coercive force of the state, applied by courts with the assistance of lawyers, would be invoked in a particular situation. Clients hired lawyers to give them advice that involved those predictions. Today such predictions involve not only the terms of the law but also the likelihood of its enforcement and the likely outcomes if it is enforced.

In that view, law has very little to do with justice, a much more controversial and uncertain concept. As Dean Anthony Kronman of Yale argues in a recent book on the virtues of lawyering, justice is such a controversial and intractable subject that the good lawyer is characterized by a public-spirited search for "political fraternity."[7] Not only can law sometimes be opposed to justice, but sadly the workaday lawyer often seems little interested in larger issues of commutative or distributive justice. After all, students prepare for the profession in aptly named "law" schools, not "justice" schools.

SOCIAL CONTRADICTIONS ABOUT LAW AND LAWYERS

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

Carl Sandburg's negative reflection on lawyers, when viewed against the backdrop of lawyers portrayed in fiction as champions of the lowly and oppressed, brings me back to where I began: social contradictions about law and lawyers.[8]

Social surveys reveal that to the public the most negative aspects of lawyers, other than that they are "too interested in money" (who isn't?), are that they

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[7] ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 107-08 (1993).
[8] This part of my paper draws heavily on Robert C. Post, *Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987).

"manipulate the legal system without any concern for right or wrong" and "file too many unnecessary lawsuits." Yet when asked about the most positive aspects of lawyers, the response is that their "first priority is to their clients" and that "they know how to cut through bureaucratic red tape." In other words, lawyers are applauded for following their clients' wishes and attempting to shape the rules to satisfy those wishes, and they are at the same time condemned for using the legal system to satisfy their clients' desires rather than upholding the right and denouncing the wrong. Lawyers, it seems, can't win.

Popular attitudes toward law and lawyers are profoundly contradictory. Those contradictions, Robert Post of Berkeley has argued, are fault lines that reflect deep internal dissonance in our culture's social and moral vision. Novels, movies, and TV shows portray lawyers, and the law itself, in deeply contradictory images. In one a lawyer is the mouthpiece of evil interests; in another a lawyer is the defender of the weak and oppressed against a corrupt prosecutor or an oppressive institution. White hats and black hats abound. We have too much law, it is said, but too little justice.

One problem is that all law, when pushed, becomes technical, complex, and ambiguous. Read tax regulations or review the instructions given to the jury in the recent O. J. Simpson case (or any other extended trial). As the old adage has it, "A coach and four may be driven through any act of Parliament." Lawyers, by exploring the uncertainties of law, ascertaining its legal limits, and exercising ingenuity in assisting their clients to escape through its loopholes, deal in a strict and dubious legality. Lawyers break a different kind of law, the law associated with ultimate justice, with our values as a community, with the kind of civilization that our noblest aspirations want to create. Hicks's famous painting of the lion lying down with the lamb is a metaphor for some of our deepest longings for harmony and community, but it does not portray the realities of the marketplace, the voting booth, or the courtroom.

Popular culture wants to view law as the overarching principles of a just and harmonious society. Lawyers' law, on the other hand, is technical and artificial. Popular morality views the lawyer's craft-oriented and client-oriented perspective as an abandonment of the lawyer's duty to justice.

But the popular view is simplistic; it fails to recognize the unpleasant reality that our society is not tidily ordered by a spontaneous, coherent system of values. Ours is a wildly pluralistic culture—and getting more pluralistic all the time—in which individuals and groups struggle to achieve recognition for the legitimacy of their private perspectives. Consider the cultural warfare over "family values," gay and lesbian rights (in the military and outside it), abortion, and assisted suicide. Lawyers have no answer to those normative conflicts; they speak for the specific and particular sides of those and other struggles.

To the public, lawyers are a constant and irritating reminder that we are neither a peaceable kingdom of harmony and order nor a land of undiluted individual autonomy; we are somewhere in the confused and uncertain terrain between. It is not surprising that lawyers, as the bearers of that bleak winter's tale, are disliked for the bad news they bring. Lawyers are the dark reflection of our society's internal dissonance and division.

And yet: Lawyers are the essential actors in transforming this bubbling social conflict into peaceful change—change that embodies a moral and social vision refashioned into flawed but workable institutions. Out of the contentious rhetoric of lawyers and legal institutions, a language that articulates and gives meaning to justice is renewed and recreated. Lawyers are a hardheaded and unlovable breed, but they are survivors, and society needs them.

I DIDN'T DO WINDOWS

Or, How a 63-Year-Old Lawyer Took a Ride on the Information Highway and Changed His Life Forever†

Stanhope S. Browne*

WARNING: This essay is meant to be read only by persons age 60 or older. Persons younger than 60 will find it pointless at best and, more probably, rather silly. From the dawn of the computer age during my youth until the events described in this essay, I held the firm belief that I would never have to learn to use a computer. I would happily tell anyone who inquired that I was of the last generation of lawyers who would never touch a PC. I was content ("smug," said my wife) in that view, in spite of the increasing scorn with which it was greeted.

Occasionally someone would say things that would cause me to waver. As a result, a few years ago I signed up for a training session in my law firm. Aimed at secretaries, it was a well-conceived course in word-processing, an effort to wean people from typewriters to PCs. Being of the hunt-and-peck (a/k/a peek-and-poke) school of typing, and not good even at that, I quickly sank to the position of class dunce. I will not dwell on my academic career, but never before had I been last in my class! The attempt was a psychological catastrophe, and I quit after the first session, fortified with more reasons why I should not enter the computer age.

Then, in the beginning of my sixty-fourth year, a confluence of four events changed everything:

1. The stack of e-mail printouts from my secretary, in addition to the other paper on my desk, was beginning to drive me crazy. I was ready to grasp at anything that even whispered that the flood of paper could be reduced.

2. My law practice depends in part on forms—wills, trust deeds, and the like. When I began my practice, my firm had form books, reasonable in bulk, which rarely changed. Then they began to get thicker and thicker, and to change more frequently. Bulletins would indicate changes in wording; failure to include the changes in my supply of forms could result in instant malpractice. It was difficult to take the time to find which forms in the stacks needed the notations of change. I was made aware of the fact that all current forms were readily

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available, with automatic updates, on something called M Drive (which I had thought was a street in a town that was not very imaginative in street naming).

3. 1 visited my daughter, who lives in California. Her job is in the District of Columbia. How could that be? "Would you like to take a ride on the information superhighway?" asked this least technical-minded member of my family. "Yes," I said with some fear. *Tap, tap, tap*. There on her laptop (which I had thought was something one used at buffet suppers) appeared her files inside the Beltway, 3,000 miles away. She paged through some new memos her colleagues had addressed to her. *Tap, tap, tap*. She sent a few replies and issued a few requests to her staff. "Now," she said, "how about this morning's news?" *Tap, tap, tap*. The *New York Times* appeared on her screen. We read the headlines, and browsed in an article or two. I was amazed—at my daughter, at the marvels of PCs and modems and on-line services, and at myself. I was genuinely intrigued. This was not my firm's word-processing class. This was how the world was going to conduct itself, and I was not a part of that world. Would I have boasted, had I been 63 years old in 1920, that I was of the last generation that would not have to learn to drive a car? I hope not.

4. At a meeting with two of my colleagues to plan a departmental retreat, we decided to devote a full session to the use of computers in everyday practice. How could I help plan a session on a subject I knew nothing about? Panic! I walked back in the direction of my office with one of my partners. I knew her to be a relatively recent convert to PCs. "Help me," I said. "Show me how you use your PC. Show me e-mail, M Drive, the works. Make me a believer!" She was up to the task.

An hour later I ran up to the desk of the person who allocates hardware to order a PC. "What kind do you have now?" I was asked. "I do not have one," I said. Her expression showed amazement at meeting one of those fossilized partners who were practicing law as it was done in the Middle Ages. She said that I would have a computer in about two weeks.

As I was waiting for the PC to arrive, a new concern arose. I remembered why I never learned to play bridge. In the summer before I went away to college, my parents decided that I should learn bridge. My father was a college professor, and a professor of philosophy at that. He believed in getting down to fundamentals, in defining terms and in logical progression. He said that I should start by learning the object of the game, the definitions, and the rules. My mother was intuitive and superb at relationships. She wanted instead to deal out the cards, tell me to pick them up, and start playing with very close guidance. I agreed with my father. My mother was the one who had the time to teach me. A total impasse resulted from this dispute as to pedagogical method, and thus I never learned bridge (which may be a good thing, but that is another subject).

I remembered the bridge impasse and the word-processing class. I suspected that my firm's technology establishment was prepared to offer me all sorts of superb hands-on training. I also suspected that its members would not be able to fathom the incredible depth of my ignorance about computers and that we would soon be staring at each other across a wide chasm of noncommunication. Also, I knew that I would never have learned to drive a car if I had not learned at least the rudiments of how an internal combustion engine worked, and what actually happened when one stepped on a brake pedal. I needed some preliminary education.

The solution was obvious. I went to a bookstore. But my first perusal of the computer section was disheartening. It was a vast array of very thick manuals for different PC programs. I would never find the time to learn by working through such volumes. Then I spotted my salvation: *The Complete Idiot's Guide to PCs*. How apt a title for my situation! This book started at the very beginning, assumed nothing, and was very clear. It was also fun to read. I had found a way to learn the fundamentals and the vocabulary in the privacy of my own home.

After reading a few chapters, and still before my PC arrived, I found myself one day in the door of my office asking my secretary whether something had been saved to the C Drive. Four astonished secretarial heads turned in my direction. What had happened to PC–ignoramus Browne? The PC arrived. One of the firm's instructors gave me my first—and so far only—lesson. A colleague loaned me her personal information manager (PIM) manual. My secretary explained some things. I plunged in.

I would now, some months later, like to turn a bit more serious and give my observations for the benefit of those of my generation who may be considering a similar leap:

First, and most important, I am absolutely delighted with my PC and what it and I can do together. Fear bred of ignorance has been replaced by enthusiasm bred of familiarity.

Second, learning to do useful things has been surprisingly easy. Looking at manuals, asking my secretary, calling (not that often) my firm's Help Desk, and simply playing around all make the learning process easy. I had falsely assumed that learning to use a computer was like learning to drive a car or play a piano or ski, in that a great deal had to be mastered before the useful or pleasant part could begin. I found, to the contrary, that mastering a PC was like learning to enjoy good wine. One can get started by sipping a few unpretentious whites, then move step by step through more complex whites to reds to the summits of Bordeaux and Burgundy. With PCs and with wine, each step brings its own usefulness or pleasure; capability or enjoyment comes immediately in easy, small increments.

Third, I soon learned to keep little pages of instruction notes whenever anyone took me through the steps of a task that I would not quickly memorize by immediate and constant repetition. Having such a self-made instruction book is better than constantly searching through manuals.

Fourth, the e-mail problem was solved. No more stacks of e-mail paper. No more ignominy of having to send e-mail in my secretary's name instead of my own. And then I began to realize the truth of something an article in *The American Lawyer* had pointed out. E-mail may subtly change—and for the better—the way we practice law, especially in a big and increasingly compartmentalized office.

There is a great deal of knowledge and experience in a large firm. Departmental meetings, authorities files, corresponding attorney lists, and the like can circulate that ever-expanding knowledge and experience only in limited ways. The old days of strolling down the main corridor of a one-floor office and chatting with a colleague or two are gone forever. E-mail provides a vastly more efficient tool for tapping the brains of one's colleagues. For many firms, their size may become a growing asset that is increasingly inaccessible, except for e-mail.

Fifth, a word about word-processing. In my prior life I dictated most things, although I usually wrote out by hand in first draft very precisely worded or intricately organized documents. I now compose such documents on the PC (and here I note that I am using a PC program that teaches touch typing). Not only does that process greatly shorten secretarial turnaround time, but I discovered to my surprise that the composition process is markedly improved; seeing the words in type as one writes gives one a much better sense of the final impact of the effort.

I purposefully have not learned all the intricacies of word-processing (in part because of my memories of that earlier class). My secretary can do the fancy stuff—the paragraphing, underlining, etc. I may pick up these skills as I go along. Then again, I may not.

Finally, I have found great satisfaction in (1) learning a completely new skill and related body of knowledge at my advanced age and (2) finding myself no longer apart from that activity which may well define our age.

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