

International Society of Barristers Quarterly

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TOBACCO ON TRIAL †

Marc Z. Edell*

Ten years ago, I had just completed the trial of *Cipollone v. Liggett*, and received an invitation from the Iowa Trial Lawyers Association to speak about the case at their annual meeting. I arrived at the session without having received a copy of the program. The director welcomed me and told me I would be the second speaker. I sat down and the first speaker walked to the lectern—a man about seven feet tall, in a ten-gallon hat and a buckskin jacket with fringes. I may be a New Jersey lawyer, but even I knew who he was—Gerry Spence. Spence told the audience how he conveys to the jury the fear that he carries with him into the courtroom—the fear that he’s going to let his client down, that he’s going to forget a fact, that he’s going to miss something critical on cross-examination—and that, through no fault of the client’s, he’s going to lose his client’s case. Spence finished his speech and received a standing ovation from 450 people!

I was then introduced as the next speaker—this unknown guy from New Jersey—and I stepped forward. As I am sure you know, it has not always been fashionable to sue tobacco companies. When I looked out over the audience before me, I was sure I saw arms cross, jaws set, and brows furrow. I took a deep breath and said: “Before I start today, I want to ask you a couple of questions. First, how many of you believe people who smoke all their lives should be able to sue a tobacco company and recover damages?” A brave dozen—out of 450—raised their hands. The next question I asked was: “How many of you are thinking about bringing a lawsuit on behalf of somebody who smoked cigarettes and is now sick (for example, with cancer or emphysema) or representing the estate of somebody who has died?” Two lawyers raised their hands. At that point I shook my head and said, “What the hell does Gerry Spence know about fear? I’m not even going to ask you what you think about short Jewish lawyers from the East Coast.”

Before I go any further, I feel compelled to give a warning: I have been involved in cigarette litigation in its various forms for fifteen years, so some of what I say today may be clouded by my personal experience; but let me assure you that it is based on the facts that I have discovered (despite the her-

† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 13, 1998. A substantial part of Mr. Edell’s presentation included visual projections of documents not reproduced here; but the essence of the documents is clear from the text.

* Edell & Associates, Morristown, New Jersey; Fellow, International Society of Barristers.

culean efforts of the tobacco industry to hide them from the public) and the facts I have come to know to be true during the course of these past fifteen years. It also comes from the privilege of having represented people like Rose Cipollone and her husband, who, instead of using all their courage and energies to fight the ravages of cancer, used their courage and energies to fight on behalf of themselves and others in a different forum, a forum totally alien to them but all too familiar to the tobacco giants: the Courtroom.

I watched your faces when Michel Baumeister talked to you about the tragedy of Pan Am 103, and of the 300 people who needlessly died in that plane crash.¹ And I watched your faces as we discussed the Oklahoma City bombing and the more than 150 lives lost in that tragedy.² Your faces showed compassion and sympathy in mirror images of those awful tragedies. But it also brought to my mind the fact that while those events were gruesome beyond imagination, most of us can scarcely relate to the tragedy of tobacco because the casualties are far too large in number and have been tolerated for far too long. Four hundred thousand Americans die every year from cigarette-related disease. What does that mean? That means that every day, 365 days a year, there are deaths equal to nearly four Pan Am 103 tragedies or seven Oklahoma City bombings. And these deaths result from a product that is targeted to ensure repetition of such tragedies over and over again by replacing the people who die with new smokers—our children.

Enough rhetoric. I now will give you the facts. Each day over the last couple of months, the newspapers have carried articles on how the tobacco industry is seeking to resolve its myriad problems in the judicial system (e.g., federal investigations, state attorney general actions, private class actions). They are looking to buy their peace for several billions of dollars. While such a sum sounds staggering at first blush, it is a cheap price for an industry that routinely spends close to that amount yearly on advertising and legal fees. Tobacco industry representatives are now pleading the fifth amendment instead of testifying for fear of perjuring themselves. We hear new revelations about incriminating documents every day.

Some fifteen years ago, that was not the case. I do not take the credit for the change. Many went before me; many came with me; and many have come and will come after me. We all fill our places in the mosaic. But fifteen years ago, if you told somebody, “I have a great idea—let’s sue tobacco companies on behalf of somebody who has developed cigarette-related disease,” you were immediately dismissed. People attributed your comments either to a brain disorder

¹ Baumeister, *The Pam Am Lockerbie Disaster from the Plaintiffs’ Perspective*, 33 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 373 (1998).

² *The Oklahoma City Bombing Cases*, 33 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 325 (1998).

or to a lack of information and experience. It was viewed as “a fool’s errand.”

After conceiving this “fool’s errand,” I had to figure out how to sell it to my then partners, one of whom is our program chairman, Myron Bromberg. I did what Mike had taught me to do: I jumped in and fully explored the facts. I ran Nexis and Lexis searches. I read everything I could find on the subject. Then, fully armed, I sat down with Mike and said to him, “I have this idea: Product liability law in New Jersey embodies the concept of risk utility [if the product’s risk outweighs the product’s benefits, the product is defective, and warnings will not cure the defect]. What do you think? Cigarettes. Good idea?” I had caught his interest and went on: “Just think. If a corporation tried to put a product on the market today and said to the federal government, ‘I have a great product—it’s going to be addictive, we’re going to target kids, it’s going to kill 400,000 people every year, and they’re going to die long, painful deaths,’ what do you think the government would do?”

Mike thought my idea had potential. Risk utility—tobacco would never pass that test. I continued, “Mike, I’ve discovered that the reason these cases have not gone forward is because there was never any discovery taken. I figure we can wrap this case up in two years, three years max. Jurisdiction is in federal court without question. No interlocutory appeals. Budget? Budget’s going to be a big number—\$100,000.” “Well,” said Mike, “it sounds like you have thought this through.”

How accurate were my prognostications? Jurisdiction: completely wrong. Six interlocutory appeals and two successful mandamus writs. In addition, we had two petitions for certiorari to the United State Supreme Court, one of which was accepted and argued twice. We had ten years of litigation, 200 days of depositions, 125 pretrial motions with oral argument on every one. We had twelve experts, and the defendants had twenty-eight. All of that culminated in an “abbreviated” trial of four-and-a-half months.

I would like to show you some of the materials that we discovered during the course of the litigation, and the information that we marshaled to explain why people continue to smoke. You must understand that, when we walked into the courtroom as plaintiffs in February of 1988, we were in truth the defendants. We weren’t the innocent victims; we were the culpable party. We had to explain to the jury why it was that with all the available information out there, our client continued to smoke. I offer to you today some documents that I believe answer that question and also underscore the tobacco industry’s position on a variety of issues. You can draw your own conclusions as to who is the culpable party.

Cigarettes are basically a product of the 1900s. They really didn’t exist in significant measure before this century. By 1930 people had begun to use cigarettes regularly. At the same time, people began to wonder whether cigarette

smoking might be hazardous to health. The tobacco industry addressed such “concerns” by using healthy, attractive people and physicians to endorse their products. Here’s an example of a Lucky Strike advertisement: It depicts a lovely young woman enjoying a Lucky Strike cigarette, and the text message reads: “Less irritating than other products. Your throat protection against irritation—against cough.” Here is another example from the same time period depicting a man and a woman taking a moonlight stroll and smoke, with this accompanying message: “Do you inhale? What’s there to be afraid of? 20,679 physicians say Luckies are safer.” By the use of such advertising, the tobacco industry created a false sense of safety for its customers, an indispensable element to the success of the tobacco industry.

As we know now, smokers develop a physical dependence, as well as a psychological one, on cigarettes. When they try to break that “habit,” they have an overwhelming craving for the product. Combine such cravings with information offered by “physicians” suggesting that smoking isn’t quite as bad as we hear, and the psychological phenomenon called “cognitive dissonance” prevails. People want to grasp onto anything that will let them continue to smoke or continue any habit that is painful to break. The manipulative advertisements gave people the very crutch on which to lean in order to justify the continued use of cigarettes.

This moves us into the 1940s. In the 1940s, Camel cigarettes arrived on the scene. Camel offered advertisements to ease the growing concerns over the health effects of cigarette smoking. For example, Camel advertisements showed physicians consulting with their patients, including even children, and boasting that “more doctors smoke Camels than any other cigarettes.” In addition to using physicians in its advertisements, Camel employed well-known athletes to advise the public that smoking does not “cut your wind.”

Perhaps even more shocking is the fact that similar Philip Morris ads regularly appeared in the *Journal of the American Medical Association* (“*JAMA*”). One of the Philip Morris cigarette ads appearing in *JAMA* solicited questions from physicians, to whom Philip Morris would gladly provide information about its products and how they were less irritating. Other *JAMA* advertisements portrayed the family physician (you can’t get more wholesome than that) endorsing cigarette smoking and allaying fears about throat irritation. In *Cipollone*, we asked representatives of the American Medical Association why, given all the information concerning health risks related to cigarette smoking that was available at the time, the AMA did nothing about it. In response we found out that tobacco advertising was the greatest source of income for *JAMA* and the AMA, and that the editor of *JAMA*, Dr. Morris Fishbein, was a paid consultant for Lorillard. Dr. Fishbein was indisputably one of the most powerful physicians in the history of the AMA.

In the early 1950s, Dr. Ernst Wynder published several articles that linked cancer to cigarette smoking. One such article reported the findings of an epidemiological study showing a higher incidence of lung cancer in smokers. Another article reported the results of the famous “mouse painting studies,” which showed that when mice were painted with smoke condensate they developed tumors. Liggett & Meyers responded aggressively to such articles with advertisements that looked as if they were “officially sponsored by the government” and claimed, “Nose, throat, accessory organs not adversely affected by smoking Chesterfields.” Leaving no stone unturned, we found Dr. Walter Carol, the expert upon whose research Liggett & Meyers based such definitive statements. (Dr. Carol was retained by Arthur D. Little & Company (“ADL”), the company responsible for conducting Liggett & Meyers’ research.) During oral depositions in *Cipollone*, I asked him, “Doctor, obviously you’re a specialist in cancer. What are your credentials?” He said, “Mr. Edell, I have no credentials in cancer.” “What about nose, throat, and accessory organs—any specialty there?” “No.” Then Dr. Carol was asked: “Would it be fair to say that your research confirmed that nose, throat, and accessory organs of people who smoked Chesterfield cigarettes were not adversely affected?” Again Dr. Carol responded with a resounding “no.”

In other words, in the 1950s, as people were beginning to become more concerned about the potential health hazards associated with cigarette smoking, Liggett & Meyers told the public, “Don’t worry, smoke our product, it’s safe.” Probably the most egregious example of such deceptive advertising was a 1952 full page ad for Chesterfield cigarettes in which one-third of the page was occupied by bold red lettering saying “Play Safe—Smoke Chesterfield.” With the spread of television, such messages began to reach into American homes in ever greater numbers. In one television ad airing in the late 1950s, the Chesterfield representative stated:

Now, Chesterfield is the first cigarette to present this scientific evidence on the effects of smoking. A medical specialist is making bimonthly examinations of a group of people from various walks of life. Forty-five percent of this group has smoked Chesterfields for an average of over ten years. After eight months, the medical specialist reports that he observed no adverse effects on the nose, throat, and sinuses of the group from smoking Chesterfields. I’d say that means real mildness. Either way you like them—regular or king size—you’ll find premium quality Chesterfields much milder.

At or about this time, the tobacco industry introduced “filters” to assuage the fears created by the dissemination of health risk information. Advertisements for Kent and other filtered cigarettes led people to believe that “filters” were the cure to their concerns and removed all the “bad stuff” that could po-

tentially harm them. Little did the public realize that studies revealed that in many instances filtered cigarettes were actually higher in tar and nicotine than nonfiltered cigarettes. Lorillard even went so far as to advertise Kent, a well-known filtered cigarette, as the cigarette endorsed by the AMA.

My client, Rose Cipollone, smoked True cigarettes, a Lorillard brand. Rose told me she switched to True because “the filter looked so effective.” I took the deposition of the scientific director for Lorillard because I wanted to find out how they constructed this extraordinary device that could filter out the harmful carcinogenic materials. He said that he didn’t have anything to do with the development of the filter, and that I should speak with somebody in marketing. I went over to the marketing department of Lorillard, where I was told, in deposition, that “the filter was the creation of the marketing department, but we had a hell of a time working the filter around our design in order to filter out anything.” So the “miracle filter,” which the company led people to believe eliminated the health risks associated with cigarettes, was not designed by scientists for the purpose of filtering out carcinogens but rather was a sales device created by the marketing department for the sole purpose of selling more of the deadly product.

In 1954, for the first time the American public began to receive from the lay press information about the health risks associated with cigarette smoking. This led to what can be characterized as “the unification” of the tobacco industry against the common enemy—the truth—and industry-wide action to undermine such widespread “talk” of health risks to smokers. The tobacco industry launched a nationwide print media campaign known as the “Frank Statement to Cigarette Smokers,” stating that the industry accepted responsibility for the health and welfare of their customers, and that they were taking the health allegations very seriously. The public was told that all of the tobacco companies were coming together to form an organization called the Tobacco Industry Research Committee—later to become the Council for Tobacco Research—dedicated to finding out whether cigarette smoking was really harmful to human health. This ad campaign appeared in virtually every newspaper in the country, and the tobacco industry continued with this charade for several years.

This course was pursued even though individual companies had been advised of the health hazards. As mentioned earlier, Liggett & Meyers hired the Massachusetts consulting firm ADL to see whether there was anything in their product that was potentially harmful. ADL issued a confidential memorandum reporting that there were cancer-causing substances, cancer-promoting substances, and poisonous substances in the product. We took the deposition of one of the scientific directors of Liggett & Meyers and asked him about the ADL studies and related matters. He testified that Liggett knew in

the late 1950s and early 1960s that cigarette smoking caused cancer. He also testified that they had developed a safer cigarette, but he wasn't allowed to publish information about it because of the lawyers, and Liggett never marketed that cigarette because of threats from Phillip Morris that if Liggett did so, the company would be "clobbered."

This headline appeared on the front page of the *National Inquirer* in 1967: "Most Medical Experts Say Cigarette-Cancer Link is Bunk." Congress investigated and learned that the public relations counsel to the Tobacco Institute had employed the author of the article, one Stanley Frank, to write the story at issue.

While the AMA is now embarrassed, to say the least, at its passive indifference to the tobacco crisis in the 1950s and '60s, the strong bond between the tobacco industry and the AMA was indisputably evidenced by a memorandum dated September 3, 1971, which memorialized a meeting between the public relations adviser to the Tobacco Institute and the public relations counsel for the AMA. The memorandum reflects that before the Surgeon General's report was released in 1964, the tobacco industry realized that the report would be extraordinarily damning to its products. The tobacco interests went to their friends at the AMA and said, in effect, "We know you don't do any research, but we need to buy ourselves some time. We're going to give you ten million dollars, and we want you to invest that ten million in conducting research that's going to answer the question whether cigarette smoking is or is not hazardous to people who smoke." Not surprisingly, the AMA did not strongly endorse the Surgeon General's report.

Of course, however, there came a time in the early 1970s when the AMA could no longer maintain its deal with the devil. The September 1971 memorandum is evidence of the demise of this relationship. During *Cipollone*, I conducted oral depositions of various AMA representatives, and each expressed embarrassment about the AMA's earlier conduct and abysmal record on the issue of tobacco. Since that time, the AMA has come out strongly against the tobacco industry. Unfortunately, this delayed response was a lot too little, a lot too late.

In 1972 there was a memorandum from Dr. Alexander Spears, research director at Lorillard, to Curtis Judge, then Lorillard's CEO. Judge had asked Spears for an evaluation of the research on which they had been spending millions of dollars, and whether it really was directed toward resolving the smoking and health issue. Dr. Spears canvassed all of the industry-funded research, including the research conducted through grants to the Council for Tobacco Research, and prepared the 1972 memorandum outlining his conclusions. In that memorandum Dr. Spears stated:

Historically the joint industry-funded smoking and health research programs had not been selected against specific scientific goals, but rather for such purposes as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings. In general, these programs have provided some buffer to public political attacks on the industry, as well as background for litigation strategy.

In the *Cipollone* companion case (*Haines v. Liggett & Meyers*), we sought to obtain further damaging information from the tobacco industry by challenging the all too frequent refusals to produce documents on the basis of the attorney-client privilege. We argued that since the tobacco industry had brought attorneys into meetings for the sole purpose of protecting what occurred at the meetings, and such meetings were predominantly dedicated to developing strategies to defraud the American public, the attorney-client privilege could not be used to shield the documents from discovery. Judge H. Lee Sarokin, of the United States District Court for the District of New Jersey, agreed and found that the privilege yielded under what has now come to be known as the “crime/fraud exception.” In his written opinion, Judge Sarokin made reference to the contents of a Phillip Morris document describing the Council for Tobacco Research as follows:

CTR began as an organization called the Tobacco Industry Research Committee. It was set up as an industry shield in 1954. CTR has helped out legal counsel by giving advice and technical information needed in court trials and it has been a spokesman for industry at congressional hearings. The money spent on CTR provides a base for introduction of witnesses.

Perhaps the most damning evidence came from a 1978 memorandum prepared by the research director of Phillip Morris concerning a meeting of the Council for Tobacco Research. During that meeting, the participants were trying to determine the true role of the Council and questioned whether the Council was really just a public relations/litigation tool used to attack scientific evidence damning their product. A document that came out of the meeting instructed those responsible for the allocation of the Council’s research funds to avoid the following subjects: (1) developing any new test for carcinogenicity (if they did, they couldn’t attack the animal studies anymore); (2) attempting to relate human disease to smoking (if you don’t research whether cigarette smoking causes disease in human beings, you are never going to determine that it does); and (3) conducting experiments which require large doses of carcinogens to show additive effects (if they did, it might show that cigarettes in conjunction with asbestos, for example, could be really bad for you).

This has been only a glimpse of the tortuous path of private litigation against the tobacco industry. I hope it has given you some understanding of its challenges and rewards. Obviously, much more could be said, and you already know the outcome. We have come a long way. I do not offer any profound lessons. All I can say is that it has been a privilege to be a link in the continuum of the cigarette litigation.

THE SPIRIT AND CHALLENGE OF UNITED STATES CITIZENSHIP†

Douglas W. Hillman*

First, I would like to convey to all the new citizens how pleased my colleagues and I are to greet and congratulate you on your newly acquired citizenship.

United States citizenship is a glorious possession. It represents the dreams and the struggles of men and women for centuries. Our charter of human liberty—the Bill of Rights—was obtained at a very high price. Voice in our government, freedom in our worship, and freedom of speech did not come into being by accident. They were achieved only after generations of struggle, suffering, and sacrifice. One should never forget that the Constitution and the first ten amendments to it were drafted by refugees and sons of refugees, by men with bitter memories of European oppression and hardship.

You have come into this great nation voluntarily, seeking something that we have to give. But there are some things we cannot give. We cannot exempt you from work; no one is exempt from work anywhere in the world. We cannot exempt you from the strife and heartbreaking burden of the struggles of the day; those are common to mankind everywhere. We cannot exempt you from the loads that you must carry. But those loads can be lightened by the spirit in which they are carried—the spirit of hope, the spirit of liberty, the spirit of justice.

One of my favorite stories about immigrants to this country is told by Mario Cuomo, former governor of New York, himself the son of immigrants. Recently he constructed an imaginary dialogue between an immigration official at Ellis Island and his mother, Immaculata, when she arrived in this country at age twenty-five. He imagines the official saying, “You have no money, no skills, no friends, no job. Your husband is a ditch digger. What do you expect of this country with the little you have brought us?” And she replies, “Oh, not much; just this one thing: Before I die, I’d like one of my sons to be governor of the state of New York.”

Since the earliest days, philosophers have dreamed of a country where the minds and spirits of men and women would be free; where there would be no

† Periodically, Judge Douglas Hillman presides over naturalization ceremonies for new citizens in Michigan. This is his address to them on one such occasion, in 1998. *Ed.*

* Senior United States Judge, Western District of Michigan; Judicial Fellow and Past President, International Society of Barristers.

limits to inquiry; where men and women would be free to explore the unknown and to challenge the most deeply rooted beliefs and principles. Our first amendment was a bold effort to make this dream a reality—to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss, and dispute. The framers knew, better perhaps than we do today, the risks they were taking. They knew that free speech could be the impetus for change and even revolution. But they also knew that free speech is always the deadliest enemy of tyranny, and they believed that the ultimate happiness and security of a nation lie in its ability to explore, to change, to grow, and ceaselessly to adapt itself to new knowledge, born of inquiry free of any kind of governmental control over the minds and spirits of its people. Loyalty comes from love of good government, not fear of a bad one.

As you take the oath of allegiance, America does not ask that you cease to love and respect the countries from which you have come; but America does ask that you give her your undivided allegiance. In return, America bestows upon you the mantle of citizenship with all the rights and privileges that go with it.

Our country is great because it is a land which recognizes and respects the right of people to differ. We are rich, not so much for our natural resources, although we have those in abundance, but we are wealthy because we have accumulated the best of the cultures and traditions of all the lands of the earth. We are a people of different social and economic levels, of different ideological and religious backgrounds.

Don't be alarmed at the sharp political divisions over our domestic policies. I urge you to take in stride the bitter disputes between the political parties over the budget, welfare reform, Medicare, and other domestic matters. Be not concerned over the absence of unanimity on what is or should have been our wisest course in the Israeli/Palestinian conflict, in the Balkans, Haiti, or the Persian Gulf. It is this great diversity—an absence of sameness, the right to debate openly—which is one of our great qualities and traditions. In the long run, we have acquired strength and unanimity through our diversity.

The oath you have just taken to protect and preserve the Constitution is not an undertaking only on your part. It establishes a mutual agreement. It creates a mutual responsibility between you and our nation. Just as you will protect, preserve, and defend the Constitution, the Constitution in turn will protect, preserve, and defend you. It guarantees that you will receive equal justice under law, equal opportunity to exercise the great freedoms available to men and women alike, to worship in your own manner or not to worship, and to think and express yourselves freely.

Unfortunately, as with most things in life, there is a down side to this story. Despite our constitutional guarantees, all is not well in our land. We

have too many people living below the poverty level; our cities are dangerous and crime-ridden; our educational system is in disarray; disabled and needy children have been cut unnecessarily from the federal assistance rolls; our society in many ways remains highly racist; our health care is a national disgrace; and a hateful anti-immigrant sentiment currently abounds in segments of our society.

It seems to me we often are better at running from our problems than facing up to them. We flee to the suburbs to avoid urban problems. We tend to shun those who are physically, socially, and economically different from us. We seem too often unable to accept minorities into the mainstream of American life.

Yet, I submit, this nation needs the rejuvenation that waves of new Americans bring. Latins, Vietnamese, and West Indians, to name just a few, are the new Irish, Dutch, Italians, and Poles of my generation. We must guard against slipping into the self-satisfied view that we are good enough as we are, and no more need apply. We must stand together to oppose with all our might those so-called patriots who in fact are terrorists who blow up our buildings, those who firebomb stores owned by peoples of a different culture, those who maliciously attack fellow Americans because they have a different color skin, and those who cowardly attack innocent foreign visitors.

I remind you that becoming an American is about much more than fast food, rock music, TVs, credit cards, fax machines, and cell phones. Rather, it is about democratic values and choosing our own leaders. It is about hard work, self-reliance, and strong family ties. It is about volunteering our time and money to help the poor and the illiterate. It is about encouraging and supporting our educational and cultural institutions. It is about being role models to our children, colleagues, and friends. It is about choosing our own way of life and supporting, if we wish, the religious and fraternal organizations that we may join. It is about traveling around the country without restrictions, for pleasure and for learning. It is about knowing the Constitution and what it stands for. It is about voting on election day. It is about knowing that wrongs can be righted through our courts.

As I am sure you have discovered, democracy is untidy. Yet, for all its excesses, America is a glorious and wonderful place to live. And with your enthusiasm, dreams, and vitality, our nation will continue to grow and mature and provide an even better home for our children and grandchildren.

History records that on May 19, 1790, the skies over Hartford, Connecticut, turned from blue and sunny to black and stormy with such speed and dramatic force that the people believed the end of the world was at hand. The Connecticut House of Representatives was in session at the time. Some of its members dropped to their knees in prayer, as others clamored for adjourn-

ment. The speaker of the house, a Colonel Davenport, rose to his feet and restored order with these words: "The day of judgment is either approaching or it is not. If it is not, there is no cause for adjournment. If it is, I choose to be found doing my duty. I wish, therefore, that candles be brought."

Today is judgment day for the United States Constitution. Tomorrow as well will be judgment day for the United States Constitution. Every day in which an American stands trial before a jury, every day in which an American is arrested or his home or property searched, every day in which a voice is raised, every day in which a vote is cast or counted, every day in which a newspaper is printed or read, every day in which a lawyer is asked to defend an unpopular person or an unpopular cause is judgment day for the United States Constitution. We can cringe and shrink before the storm, or we can light candles. Let us light candles.

You have just become citizens of the United States of America. It is the longest enduring society of free people governing themselves without benefit of kings or dictators. As such, it is the marvel and the mystery of the world, and I welcome you as citizens of that America. As of today, you are equal citizens entitled to the same rights and privileges and subject to the same obligations as Americans whose parents and grandparents and great-grandparents were born in this land.

I conclude with this thought: The preservation of our government depends upon us, each of us as individual citizens; the responsibility is ours. We must be vigilant to the end, "that Government of the people, by the people, for the people, shall not perish from the earth."

THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH: THE DEPOSITION READER

John E. Simonett*

ACTORS/ACTRESSES available to read depositions at trial. Professional, dynamic speakers, turn droning deposition testimony into an effective tool at trial. References available

Advertisement in Bar Journal

The phone call couldn't have come at a worse time. He said he was seriously ill, that his doctor said he couldn't travel. So we went to Plan B. We would read his deposition to the jury.

"A communicator. What we need, George, is a communicator." It was early evening, and we were in the office getting ready for trial the next morning. As he spoke, Matty—otherwise known as Frank "Matlock" Monson—tapped his pencil on the table, adding starch to each syllable of "communicator." "I say we have Gerry read the depo."

"But Gerry's a woman," I said.

"So?"

"Well, our expert is a man."

"Listen," said Matty, "I don't expect Gerry to be somebody she isn't. All I want is someone who can get across to the jury what our expert says in his deposition. Gerry can do that."

"But Gerry is a new associate, just out of law school, not a professor of engineering. We need an authority figure."

"Who then? The judge's law clerk?"

"How about me?"

Matty shook his head. "Your problem, George, is you can't read a depo, whether it's the questions or the answers, without adding an obvious advocate's spin." Apparently Matty had not forgotten the times I'd read our witnesses' deposition testimony, and opposing counsel had objected to my voice inflections and body language as "without foundation."

"But what's wrong with reading with expression?"

"Nothing," said Matty, "but you're too much. For example, let's look at page 86 of our deposition where I ask the professor if the design defect

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caused the accident, and he replies, 'I think so.' Now, the answer 'I think so' can be read a number of different ways, from a tentative hypothesis to firm conviction. There is a fine line between being quietly confident and being gloriously triumphant. And you, George—I'm sorry to say this, George—you can't resist crossing the line."

Maybe there was some truth in what Matty said. But how should a deposition be read? On page 115, the professor loses his temper during cross-examination. Should the reader smooth this over or vent a little ire? On page 133, the transcript indicates that the witness pauses before answering. Actually, it was an ungodly long pause. How should the pause be interpreted? Or should the reader skip it? If I'm the reader, what is my professional duty of candor?

The more Matty and I thought about it, the more we wondered about whether the reader's role in presenting a deposition was to play a part or simply to read. For example, in reading the answer, "I think so," should the reader look up from the transcript and make eye contact with the jurors, as Matty maintained? "Shows sincerity," said Matty. Jurors consider a witness's demeanor in judging credibility; but here the person in the witness box is not the witness, is not sworn, and is not subject to cross-examination.

"What do the rules say?" asked Matty.

"That's just it," I replied, "there's nothing in the rules about how a deposition should be read or, for that matter, who can read it. Arguably, the reader is like an interpreter, and Rule 604 states that an interpreter is to make a true translation."

"Well, if you want a true translation, we should have taken a video deposition of the professor."

Matty had a point. Video gives the jurors the witness's image and voice. But even here, isn't there an element of artificiality that colors a true translation? A picture is not a real, live person, as the Sixth Circuit has held in ruling that a video deposition in a criminal case failed to satisfy the confrontation clause. Sometimes, too, a video deposition does not live up to expectations. A year ago we used a video of a medical expert, who apparently thought he was posing for a driver's license photo. Moreover, he read from his notes, showing signs of life only when pushing his slipping eyeglasses back uphill. A jury may forgive a dull witness but never dull TV.

"Matty, I've got an idea. There's been an ad running in the local bar journal—'dynamic, professional actors and actresses available to read depositions.' Why don't we . . .?"

"I don't *want* somebody who is dynamic." Matty was beginning to sound frustrated. "Actors do not convey belief so much as seek to suspend disbelief,

and while I can't explain the distinction, it seems to me there is a subtle difference that jurors sense."

"Well, that leaves Gerry out," I said. "She played the role of Emily in *Our Town* when she was in high school."

Matty ignored me. "Maybe we're overanalyzing the problem, if it is a problem. Jurors are smart. They recognize and resent manipulation. Before the depo is read, the court or counsel will—and should—identify the reader for the jurors, and that should take care of it. And I'll concede that an actor or actress is accustomed to reading and speaking before an audience and can do it without the self-consciousness that is so distracting."

Matty's pencil began tapping again. Decision time had arrived. "Gerry is personable and fair-minded and has a strong, clear voice. She will be her own person—a capable young woman reading what a distinguished professor of engineering has to say on matters of importance in the case. The jurors will know this and, consequently, will concentrate on what the professor—not Gerry—is saying. Which is what we want." The pencil stopped. "We go with Gerry."

"Okay," I said, "but what about the mature authority figure?"

"That'll be me in summation," said Frank "Matlock" Monson.

DEJÀ VU AT THE TOWER OF BABEL

Perry S. Bechtle*

Editor's Note: Twenty years ago, Perry Bechtle spoke to the St. Thomas More Society of Philadelphia on the subject of professional responsibility. At that time, Mr. Bechtle was general counsel to an accident insurance company. His remarks, here published for the first time, are a reminder that our concerns about the lawyer's role are by no means merely a product of the moment.

The advertised subject that I am to address, according to the announcement sent to members and friends of the St. Thomas More Society, is “The Disciplinary Pitfalls of Unethical Practice.” According to the letter of invitation, I have approximately twenty minutes in which to discuss this subject, which creates a problem for me because I can discuss it in about two minutes flat. The disciplinary pitfalls of unethical practice are these: If you get caught, you can be censured, suspended, disbarred—even sent to jail in some cases. A collateral pitfall is emotional in nature and involves the lawyer who engages in unethical practice but does not get caught; the hazard there is that he will worry himself to death.

Having said all that, I think I have exhausted the subject assigned to me. Rather than give up the opportunity to consume my full twenty minutes, however, I would like to turn to an ancillary problem, which I think is not as clearly recognized and yet is much more relevant to the average practicing lawyer than the consequences of unethical practice.

If I had to give a title to this other subject, I would call it “The Tower of Babel.” This might seem obscure, but it should become clearer as I speak. In my view, the most serious problem the lawyer faces today is the lack of public confidence and the public's increasing skepticism concerning the role of the lawyer in society. Many if not most lawyers feel they are acting within the bounds of ethical propriety if they don't steal from their clients or others, don't lie to the court, and don't commit felonies. The public, however, expects lawyers to live up to a much higher standard, which, in my opinion, either is not recognized or is largely ignored by the bar. If I remember correctly, the play (or was it the movie?) *Front Page* contained a line stating that “a profession is a business involving service to the public.” It is my feeling that the

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public does not believe the legal profession fulfills that definition but rather feels that our legal institutions operate to serve the interests of lawyers and judges.

If you have any doubt about this, all you need do is read some recent publications such as the article by Ralph Nader entitled “Don’t Pay Those High Legal Bills,” in the *New York Times Magazine* of November 20, 1977, or the piece in the April 10, 1978, issue of *Time Magazine* headed “Those xx**@ @ Lawyers.” If that is not enough, you might read the article in the March 13, 1978, issue of *Fortune* entitled “Change Comes to the Wall Street Law Firms.” While that last article is not openly critical of lawyers, many lay people would find the reported factual data concerning income levels and fees shocking. If you care to go further, you should read *Crisis at the Bar*, a recent book by Jethro K. Liebermann, in which he critically analyzes some of our sacred traditions. Curiously enough, Mr. Liebermann’s book was reviewed in the *New York Times* on April 9 by Philip M. Stern, author of *The Oppenheimer Case: Security on Trial*, who is now working on another book about lawyers and the high cost of legal services.

While any one of these articles might be lightly cast aside as the work of a crank, it is awfully difficult to ignore them all as representing isolated pockets of discontent. Viewed in a proper light, these writings mirror the public image of the bar, I believe. It is almost as profitable to write a book or an article about the bar’s disservice to the public as it is to write a book about Watergate. The reason is that the members of the public consume it because they agree with it. It used to be popular to take potshots at doctors, and I have always felt that the so-called malpractice crisis was a symptom of public indignation. The public resented the high incomes and haughty attitudes of doctors, so when something went wrong people let off steam by telling the doctor off, or at least attempting to, in a courtroom. I believe that lawyers now enjoy the unenviable public image that was once reserved for doctors, except that I think our condition is worse, because no matter how much doctors earned or how high-handed they acted, the public always felt that in the long run the medical profession acted in the public interest. I have serious doubt that the public feels the same way about lawyers.

A little more than a year ago, after twenty-five years as a trial lawyer, I became an executive of an insurance company, acting in a legal capacity. As a result of this change, I now spend most of my time with nonlawyers, whereas before I spent most of my time with lawyers. I can tell you from personal experience that the layman’s view of the legal profession—of lawyer’s ethics and their ways of doing things—is far different than ours. Indeed, as the spy who came in from the cold, I have more insight today than I had a year and a half ago concerning the image of the bar, and it scares me as a lawyer.

Much of the dissatisfaction involves the high cost of legal services, a subject with which I am intimately familiar, both as a lawyer and as a client. The fact is that legal services are costly—for most Americans, prohibitively so. If you want any proof of this, all you have to do is to ask yourself whether you could afford yourself if you were a client needing your services as a lawyer. If you are honest with yourself, the answer probably will be no. I am certain that if I or one of my children got involved in serious trouble and required the services of able defense counsel, I would have to take a second mortgage on my house to pay for the services. If we can't afford legal services, how can other people such as mailmen, factory workers, and office workers possibly do so? It seems to me that except in contingent fee cases, only the very poor who are able to obtain free legal services and the very wealthy get the benefit of our sometimes questionable talents.

While legal fees are perhaps the greatest source of discontent, or at least a major source, they are by no means the only source. The lay public is distrustful of our procedures and the way in which we manage to make more and more work for lawyers while relegating the parties to the position of incidental beneficiaries. It is true that much of the lawyer's work is created by the proliferation of laws and regulations from our various layers of government—laws and regulations that probably are necessary to manage our complex society. It is also true that what I have said does not apply to all lawyers. Nevertheless, when you hear and read various critiques, including the charge by the Chief Justice of the United States Supreme Court that half of the lawyers who appear in the trial courts are incompetent, you must conclude that the profession is in serious trouble indeed.

It is my belief that the root cause of that trouble is that when we talk about ethics, we are not speaking the same language as the general public—in other words, we are at the Tower of Babel. The public expects a greater degree of diligence and responsiveness than our notion of ethics requires. The public is simply not satisfied with our notions of propriety, and I think that if we are honest with ourselves, we aren't either. I am not suggesting that as individuals we are unethical, or that we act improperly. I am suggesting that it is high time that lawyers, as a profession, pay more heed to the public unrest and ask ourselves whether we should be thinking and responding in the language of the public, rather than in the language of lawyers. I, for one, strongly urge this course of action.

For those of you who feel that I am unusually cynical because my present role has made me more client than lawyer, I point out that I did not write the articles I mentioned. Beyond this, I perceive myself first and foremost as a lawyer, who happens to be involved, at the moment, in industry.

Lastly, for those of you who may feel that what I have said is aspirational in nature but of no concrete value, I offer the following concrete suggestions:

1. We should look at ourselves as individuals and ask ourselves whether the services we render are reasonably necessary and within the limitations of our client's ability to pay.

2. We should respond to the needs and desires of our clients in terms that they understand, in the sense that if our services are going to require intricate legal procedures, we should have the ability and the patience to describe to our clients in lay terms what we are doing and why we are doing it.

3. To the extent possible, we should conduct our business in an efficient manner and not ask our clients to pay for our inefficiencies at the rate of \$50 an hour and up.

4. We should diligently pursue our employment in a manner that will terminate the client's need for our services at the earliest possible moment. Delay in the law has come to be a way of life for most lawyers, particularly those involved in the litigation process. I am not at all convinced that all of the delays are necessary. We have come to expect them, and our clients have come to resent them.

5. In cases where delay is inevitable, we should communicate effectively and meaningfully with our clients on a regular basis. It will reduce apprehension and resentment.

6. Lawyers, individually and as a group, should devote a significant amount of their time and intellectual energy to public service, particularly in the area of developing ways to deliver competent legal services at a reasonable cost to that large segment of the public now without realistic access to such services. As an aside, I personally think that legal advertising could go a long way toward achieving this.

7. Lastly and perhaps most importantly, I think that we, as lawyers, should note and pay heed to the public criticism and respond in a meaningful manner, rather than view such criticism as an unjustifiable attack upon a sacred citadel. Some criticism is unwarranted but a good deal of it is justified and is suspect only because we choose to look upon it from our own point of view. As part of this effort, we should reexamine our ethical notions to see if they are in conformity with the needs of the public that we claim to serve.

**“IT REALLY DON’T MATTER IF THERE AIN’T ANY
CRITTERS IN YOUR BED”:
MUSINGS OF A RECOVERING POLITICIAN†**

Michael J. Sullivan*

Let me give you a little background to explain the title of my talk. In 1986, I went through a mid-life crisis, from having taken too many depositions, and Jane, my wife, decided that maybe politics would be better than fast cars and women. I ran for governor, with no prior political experience, and got the job. I served eight years as governor of Wyoming, and I can tell you it was eight years of challenge, learning, and delight. My twenty-two years’ experience in trial practice before I went into government was tremendously helpful. As a trial lawyer, you learn all about adaptability, creativity, flexibility, and rejection, all perfect tutelage for being governor. You also understand the importance of reputation and ethics and integrity.

When I left office in January of 1995, we took a six-month break. During that time we took a driving trip around the United States. We traveled for seventy days, drove 10,000 miles, and visited twenty-nine states. We did all of this without any advance plans or reservations.

We gained many insights and impressions on that trip. One of the strongest was of what I refer to as the homogenization of America. A person traveling across this country never has to be in fear if he or she doesn’t want to be, because if you’re on an interstate highway and get off at any exit, it’s precisely the same as any other exit. One of the disappointments was seeing all the abandoned barns; there were more abandoned barns than there were Hardee’s restaurants.

Toward the end of our trip, we were in Georgia and headed west for home. We were in a hurry, but we stopped late one night in Chattanooga, Tennessee, which, by the way, has done a remarkable job of renewing the city. We arrived at about 10:30 and found a nice, large hotel in the downtown area where I thought we ought to stay, but Jane said, “Look, we’re only going to be here for a few hours. Let’s take the cheaper place.” We did, so we paid the cheaper price for very little sleep. The next morning for breakfast, we went to the Chattanooga Choo-Choo, which used to be the train depot but has been turned into a Holiday Inn. It is a beautiful place, with high, vaulted ceilings and marble

† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 13, 1998. Mr. Sullivan’s presentation also included maps, graphs, and photographs, which are not included here.

* Now United States Ambassador to Ireland, Mr. Sullivan is a former governor of Wyoming.

everywhere. Our young southern waitress asked, “Where are you from?” We said, “We’re from Wyoming.” I don’t think she had ever seen anyone from Wyoming before; her eyes glazed over. (Those of us from Wyoming are used to that kind of response.) Then she said, “What are you doing?” We responded, “We’re just traveling around the country,” and we started a little conversation. In the course of the conversation, Jane felt she needed to apologize by saying, “We didn’t stay here. We stayed in the cheap place, but we’re eating in the really nice place.” The young woman thought for a minute and said, with great insight, “Well, you know, I guess it don’t matter if there ain’t any critters in your bed.” I thought for a minute and then said, “Jane, write that down. That is the most profound statement we’ve heard on this entire trip.”

My service as governor and the perspective gained on the trip made me acutely aware of the differences in issues between the East and the West. For the most part, of course, the issues aren’t different. The Wyoming budget is smaller than most and crime is low, but the governmental problems are essentially the same—except for the difference between the West and the East.

I want to share with you some thoughts about why those differences may exist, in the hope that this will give you some insight into why it is that westerners become so passionate about certain issues, such as wolves and water and wide-open spaces, and why we take an even more antagonistic attitude toward Washington than most citizens of this country do. It came home to me one day when I saw a land-form map of the United States. At about the 100th meridian, running through the western side of Nebraska, North Dakota, and South Dakota, you leave the plains and hit the mountains. Major rivers such as the Yellowstone, the Platte, the Snake, and the Colorado drain through those mountains. Wyoming sits at the headwaters of four major river drainages.

A high percentage of western land is public: In Nevada, 82.9% of the land is held by the public; in Wyoming it’s 48.9%; in Idaho it’s 61.6%. That is much higher public ownership than in the East, and it reflects history. The East was settled, and then somebody decided that we ought to move people west, but before people took up all the lands in the West, the federal government enclosed the homesteads and retained the federal lands. Some of those are national parks and some are Indian reservations, but most of them are national forests and federal lands operated by the Bureau of Land Management—millions of acres west of the 100th meridian.

There is a third important point about the land west of the 100th meridian but east of the coast. That land is also the driest part of our country. The lack of precipitation makes for a lot of deserts in that area—and focuses attention on the use of water in the West. In these dry states, only a little water goes to people. Far more is used for irrigation.

You can readily understand how the water scarcity could give rise to disputes and legal issues. People in the areas where the rivers start have a tendency to think that they ought to be entitled to at least some of the water in the rivers, but those downriver think they ought to be entitled to it as well. In the Platte River drainage that moves from Wyoming through Nebraska and ultimately to the Mississippi, we currently have a water fight. The lawsuit started two years before I was elected governor as a result of the application of the Endangered Species Act. The piping plover and the interior tern and the sandhill crane all use the Platte River as a part of their trip across this country, and they need water. Nebraska doesn’t want to give up any of the water it is using, and Wyoming doesn’t want to give up any of the water it received in 1940 when the water allocation in the Platte River was established—but somebody has to give up water for the endangered species. Thus far, Wyoming has spent \$12 million trying to resolve that lawsuit. Similar problems, at least as to allocation, are going to arise with respect to the Colorado River.

If you study population growth in this country, you will see that an area of substantial growth is this same region I have been discussing. That kind of growth creates additional demands on water and additional demands on open space; and the established ranchers and farmers, many of whom have scratched out a living for many years, feel threatened. Because the growth is occurring primarily in the big cities, we have a clash of cultures as well as issues concerning water, endangered species, and the use of public lands.

I hope that this brief discussion has provided some perspective on the West, and some recognition that the extent of the public land holdings leaves little room for private growth even though there seems to be so much space. These in turn may give you some understanding of why westerners become so passionate when wolves, water, and wide-open spaces are discussed.

Let me close by relating a story that seems to me to reflect this clash between East and West. This is a story about a proposal by the Pope a century or so ago to remove all Jews from the Vatican area. That, naturally, caused a lot of consternation in the Jewish community, so the Pope said, “All right, we’ll make this democratic. We’ll have a religious debate; I’ll debate with one of the Jewish elders. If I win, the Jews go. If the Jewish elder wins the debate, they stay.” The Jewish community chose an elder, and on the appointed day, the Pope and the elder sat down across the table from each other. The elder said, “I want to add one additional condition. This is a debate that should take place with no talking.” The Pope thought he had the upper hand in any debate, so he agreed to the condition. The Pope then started the debate by holding up three fingers. The elder looked back at him and held up one finger. The Pope shook his head and thought for a minute and made a sweeping gesture. The elder pointed firmly toward the ground. The Pope was obviously perplexed,

and he reached down and took out a chalice and wafer and held them up. The elder, startled, looked back and took out an apple. At that, the Pope hung his head and said, "I quit. You win." And they parted.

The Cardinals gathered around the Pope and said, "What happened?" He said, "I held up three fingers to signify the Trinity, and he held up one finger to signify one God over all of us. I signaled that God is all around us, and he said, 'God is right here with us as we speak.' I held up the chalice and wafer to reflect that our sins are absolved, and he held up an apple to reflect original sin. He had an answer for everything. What could I do?" The Jews gathered around their elder, congratulated him, and asked what had happened. The elder said, "He held up three fingers to signify that we had three days to get out of here, and I said, 'Not one of us is going to leave.' The Pope responded by saying, 'You've got to get out of here,' and I said, 'We're staying right here.' Then he pulled out his lunch and I pulled out my apple."

Whether it's lawyers or politicians, or West and East, sometimes we don't really hear each other.

THE U.S. CHAMBER'S ATTACK ON TRIAL LAWYERS†

Edmund M. Brady, Jr.*

Protecting the U.S. Constitution, and especially the Bill of Rights, can't be done without paying a price. We are the protectors of the Constitution. In the process, our image sometimes gets wounded. Sometimes, those wounds are intentionally and unfairly inflicted.

By now, lawyers are getting used to being used as punching bags for people with a political agenda. We can be easy targets. In fulfilling our professional obligations, we sometimes advocate unpopular positions, represent unpopular causes, and are advocates for those whom society would prefer to lock up forever.

The latest special interest to use lawyers as a punching bag is the U.S. Chamber of Commerce, a well-financed advocate for corporate America. The Chamber has revealed its policy priorities for the next year. On top of the list is "stopping excessive litigation." It proposes to do that, in part, by "limiting excessive attorneys fees." It also attacks lawyers for clogging court dockets with "frivolous" lawsuits. The Chamber has created a new subsidiary, the deceptively named "U.S. Chamber Institute for Legal Reform," to coordinate its efforts.

The Chamber's anti-lawyer campaign is a thinly disguised attack on the individual's right of access to the justice system. The campaign, funded in large part by tobacco and insurance special interests, pits individual rights against corporate profits.

The Chamber is using a handful of horror stories to launch an all-out attack on the right of injured people to sue those who should be held responsible. It's like judging every player in the NBA based on the behavior of Dennis Rodman.

Some of the statements attributed to the president of the U.S. Chamber of Commerce and other architects of this effort disturb me deeply:

- "I want to give the trial lawyers and ambulance chasers migraine headaches." (Chamber President Thomas Donohue, *Newsday*, 1/4/98);
- "We are going to evaluate the judges, we are going to show these trial lawyers to the American people, and we are going to make it more difficult for them to screw up the American system." (Donohue, Lakeland, Florida, *The Ledger*, 1/28/98);
- "Help the U.S. Chamber Take On the Trial Lawyers" (Lead banner on

†Reprinted, with permission, from 77 MICHIGAN BAR JOURNAL 380 (1998). This article appeared as a "President's Page" during Mr. Brady's term as president of the State Bar of Michigan.

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the U.S. Chamber web page, soliciting Chamber members to send in their stories on how their businesses were “affected by lawsuit abuse”);

- “Attacking trial lawyers is admittedly a cheap applause line . . . , but it works. It’s almost impossible to go too far when it comes to demonizing lawyers.” (Frank Luntz, from his *Language of the 21st Century* briefing book written for U.S. House Republicans); and
- “Unlike most complex issues, the problems in our civil justice system come with a ready-made villain: the lawyer. Few classes of Americans are more reviled by the general public than attorneys, and you should tap into people’s anger and frustration with practitioners of the law.” (*Ibid.*)

The Luntz strategy is a direct attack on our professionalism, our integrity, and our profession. He urges his readers to “make the lawyer your villain by contrasting him with the ‘little guy,’ the innocent, hard-working American who[m] he takes to the cleaners. Describe the plight of the poor accident victim exploited by the ambulance-chasers and the charlatans—individuals who live off the misfortunes of others.”

He concludes by urging readers to ridicule attorneys. “Take a lesson from Rush Limbaugh and P. J. O’Rourke by making fun of the trial lawyers and the radical consumer advocates, the Ralph Naders and Alan Dershowitzes of the world . . . [M]ake fun of [trial lawyers] mercilessly, and they will not know how to respond. They truly are one group in American society that you can attack with near impunity.”

The U.S. Chamber’s claim that it is fighting “frivolous” lawsuits is truly ironic. The examples that it cites are all cases in which a jury of average citizens (as well as the trial judge and appellate judges) listened to all the evidence and determined that the case was not frivolous. In other words, the plaintiff won and the dues-paying Chamber member lost.

The Chamber’s one-paragraph description of the legendary McDonald’s coffee case, for example, leaves out the facts that show that it was a serious case of corporate negligence. It forgets to mention that the coffee served to the plaintiff was intentionally kept at a dangerously hot 185 degrees (plus or minus five degrees), well above the maximum safe temperature of 140 degrees. The jury of 12 nonlawyers and the judge agreed that McDonald’s was negligent. The judge, in fact, called the company’s conduct reckless, callous, and willful. Despite the fact that the elderly victim sustained severe burns over six percent of her body, was hospitalized for eight days, and required painful skin grafts in her treatment, the Chamber calls the case “frivolous.”

The jury awarded the victim \$2.86 million, including \$2.7 million in punitive damages. The judge reduced the punitive damages to \$480,000. Subsequent to remittitur, the parties entered a post-verdict settlement. More importantly, McDonald’s apparently started serving coffee at cooler, less dangerous temperatures. That’s not “frivolous.” That’s justice.

What is frivolous is a lawsuit that has no merit and is almost always thrown out of court immediately. In Michigan, truly frivolous lawsuits are already prohibited. An attorney who files a frivolous lawsuit can lose his license (Rule 3.1, Rules of Professional Conduct). All it takes to begin the process is for someone to file a complaint with the discipline system. In addition, trial judges in Michigan have the power to require the plaintiff in a frivolous lawsuit to pay legal costs for the defendant (a reform the Chamber says it wants enacted). The judge may also assess punitive damages. In federal cases, the sanctions can be very severe.

The U.S. Chamber has also attacked the contingency fee system, recognizing that many people would be unable to seek their day in court if contingency fees were eliminated. Regrettably, they'll be aided by what I see as the unconscionable contingency fees being sought by law firms involved in the tobacco class-action suits. I recognize the great risks that they took in pursuing the tobacco companies. However, I think it is wrong for any of them to seek fees in the hundreds-of-millions of dollars, regardless of the contingency agreements made when the cases were initiated. These firms are only playing into the hands of our opposition.

The U.S. Chamber's campaign isn't about "reform" that will protect the public. It's designed to benefit a few special interests at the expense of the individual. The Chamber wants to limit individual rights, and tie your hands as a lawyer, in order to fatten the profits of some of their corporate members. The fact that the Chamber's campaign is funded in large part by the insurance and tobacco industries raises serious questions about their real agenda. Does anyone really believe that the insurance companies and cigarette manufacturers are looking out for your best interests?

The State Bar of Michigan is a member of the Michigan State Chamber of Commerce. I have written a letter to the Chamber's president, vigorously protesting the distortions of the U.S. Chamber's initiative. In my letter, I point out that many lawyers are members (and often leaders) of their local chambers. It is difficult to be a member of an association that actively denigrates and attacks your livelihood. I express the hope in my letter that we won't reach the point in Michigan where lawyers can no longer, in good conscience, be members and leaders of the local or state Chamber of Commerce.

A Chamber of Commerce can serve to unite a community for the economic benefit of all. It would be a tragedy for the Chamber to become a force of division rather than unity. The cynical anti-lawyer campaign of the U.S. Chamber, unfortunately, will bring about serious division. Join me in making your views known to your local Chamber of Commerce, and to the state Chamber of Commerce.

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