International Society of Barristers

Quarterly

Volume 33 Number 3

International Society of Barristers Quarterly

Volume 33 **July, 1998** **Number 3**

CONTENTS

International Society of Barristers Quarterly

Editorial Office

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

Volume 33
Issue Number 3
July, 1998

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.

International Society of Barristers

Officers 1998*

John G. Lancione, *Ohio*, President
Frank J. Brixius, *Minnesota*, First Vice-President
Myron J. Bromberg, *New Jersey*, Second Vice-President
Joe McLeod, *North Carolina*, Secretary-Treasurer

Board of Governors*

The Officers
and

1996-1999

Michael E. Hale
Arkansas

Gerald F. Richman
Florida

Mark P. Robinson, Jr.
California

Donald L. Schlapprizzi
Missouri

Harry E. Wrathall**
Nova Scotia

1997-2000

John P. Arness
District of Columbia

Daniel J. Kelly
California

Edward J. Matonich
Minnesota

Joseph K. Meusey
Nebraska

Robert F. Ritter
Missouri

1998-2001

John D. Liber
Ohio

Michael Nachwalter
Florida

Edward J. Nevin
California

Michael W. Perrin
Texas

Gene Mac Winburn
Georgia

Ex Officio 1998
Richard E. Day
Wyoming

Annual Meetings

1999: February 28-March 6, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii
2000: February 27-March 4, Four Seasons Resort Aviara, Carlsbad, California
2001: March 11-17, Four Seasons Resort Nevis, Nevis, West Indies

*Terms begin and end on last day of annual meetings.
**Elected 1998, to fill the unexpired term of Stanley J. Krist, desceased.

International Society of Barristers

Past Presidents

Craig Spangenberg, Cleveland, Ohio (1914-1998)	1966
Murray Sams, Jr., Miami, Florida	1967
Kelton S. Lynn, Rapid City, South Dakota (1916-1974)	1968
Arch K. Schoch, High Point, North Carolina (1909-1980)	1969
John H. Locke, Roanoke, Virginia	1970
William H. Erickson, Denver, Colorado	1971
Charles T. Hvass, Minneapolis, Minnesota	1971
Robert T. Cunningham, Mobile, Alabama	1972
William S. Frates, Miami, Florida (1917-1984)	1973
Philip G. Peters, Manchester, New Hampshire	1974
Richard R. Bostwick, Casper, Wyoming	1975
Carlton R. Reiter, Portland, Oregon (1920-1980)	1976
Douglas W. Hillman, Grand Rapids, Michigan	1977
Alex S. Keller, Denver, Colorado (1928-1996)	1978
Alex W. Newton, Birmingham, Alabama	1979
Stan Siegel, Aberdeen, South Dakota (1928-1996)	1980
William D. Flaskamp, Minneapolis, Minnesota	1981
Walter R. Byars, Montgomery, Alabama	1982
John J. Greer, Spencer, Iowa	1983
M. J. Bruckner, Lincoln, Nebraska	1984
Ray H. Pearson, Miami, Florida	1985
Joel M. Boyden, Grand Rapids, Michigan	1986
William T. Egan, Minneapolis, Minnesota	1987
Carleton R. Hoy, Sioux Falls, South Dakota	1988
Mark P. Robinson, Los Angeles, California	1989
Perry S. Bechtle, Philadelphia, Pennsylvania	1990
William J. McDaniel, Birmingham, Alabama	1991
Frederick H. Mayer, St. Louis, Missouri	1992
Tom Alexander, Houston, Texas	1993
Charles F. Blanchard, Raleigh, North Carolina	1994
Con M. Keating, Lincoln, Nebraska	1995
David L. Nixon, Manchester, New Hampshire	1996
Richard E. Day, Casper, Wyoming	1997

THE PAN AM LOCKERBIE DISASTER FROM THE PLAINTIFFS' PERSPECTIVE

Michel F. Baumeister*

On December 21, 1988, Pan Am Flight 103 lifted off from Heathrow Airport heading home for the holidays. It was the evening of the winter solstice, traditionally known as the darkest day of the year. Upon reaching its cruising altitude of 31,000 feet, at approximately 7:03 p.m., Pan Am Flight 103 exploded over Lockerbie, Scotland, killing all 259 passengers and crew on board as well as 11 residents in the quiet little Scottish village of Lockerbie. Pieces of the aircraft rained down over hundreds of square miles, with one trail extending 130 kilometers to the east coast of England. The wings and a large portion of the fuselage crashed into the center of Lockerbie, creating a fireball that towered thousands of feet high, and gouged a crater 140 feet long and 40 feet wide. Everything that lay in its path was consumed by fire and evaporated. The flight deck and forward portion of the Boeing 747, "Maid of the Seas," came to rest in Tundergarth Field, approximately three miles from the center of Lockerbie.

It is hard to imagine that the tenth anniversary of this tragic event has just passed, since its power and drama seem as fresh and raw today as ten years ago. In this short article I will outline some of the events that led us, the Pan Am Plaintiffs' Steering Committee, through the investigation, preparation, and ultimate trial of the case before Chief Judge Platt in the United States District Court for the Eastern District of New York during the summer of 1992.

Source of the Explosion

Immediately following news of the crash, the international community mobilized, and representatives from many criminal and aviation investigation agencies combined to begin what was later called the "largest international investigation" in aviation history. There were representatives from the FBI, Scotland Yard, Scottish police forces, the Royal Armament Research & Development Establishment, the Air Accidents Investigation Branch, and German police agencies. Together they conducted a painstakingly thorough investigation, including forensic evaluation of minute shreds of debris. It was almost immediately evident that an explosion had destroyed the aircraft.

* Baumeister & Samuels, New York, New York; Fellow, International Society of Barristers.

However, it took months and then years to determine where the bomb was located in the aircraft and how it got there.

The investigation proceeded in stages, and in the first stage, it was determined that Pan Am Flight 103 was destroyed by an "improvised explosive device" concealed in a Toshiba radio cassette player. This cassette player was placed inside a brown Samsonite suitcase in the second layer of bags loaded in the forward cargo container AVE 4041, located at position 14L of the Boeing 747. Pinpointing this location was instrumental in establishing that the bomb suitcase had to be an interline bag that was introduced into the Pan Am system at the airport in Frankfurt, West Germany.[1] An elaborate review of the computerized records generated by the Frankfurt Airport Authority, the most sophisticated baggage delivery system in the world, revealed that every piece of baggage passing through the system was accounted for. Through an examination of the precise time each bag was coded into the system and at which station, it was conclusively established that the bag containing the bomb was an interline transfer bag from Air Malta Flight 180. In Frankfurt, this bag was loaded aboard Pan Am Flight 103A, a feeder flight to London, for connection to Flight 103 at Heathrow. The bomb bag, from Air Malta, was an unaccompanied bag—that is, no passenger was travelling with this suitcase.

At trial, Pan Am called witnesses from Malta who ironically helped the plaintiffs establish the origin of the bomb bag. Air Malta's internal records revealed a discrepancy in the tally sheets concerning the number of bags loaded aboard Air Malta Flight 180, permitting the loading of an unaccompanied bag. Additionally, one of the two Libyans subsequently indicted for the bombing was the station manager for Libyan Arab Airlines at Malta. Testimony demonstrated that he had unlimited access to the area where bags for the flight were being loaded. Moreover, Libyan Airlines used the same baggage tickets as Air Malta, and on December 21, 1988, a Libyan Airlines flight to Tripoli was being processed simultaneously with Air Malta Flight 180—at the same time and at the same counter. Security procedures at this check-in counter were lax, and confusion concerning baggage handling was shown to be a common occurrence.

A central question for the trial was how this unaccompanied bomb bag was able to get through Pan Am's security system. During the eleven week trial, we were able to show that Pan Am violated several FAA regulations, including the essential Section XV.C.1.(a) of the Air Carrier Standard Security Program, or ACSSP, which required carriers at extraordinary security airports

[1] An interline bag is a bag that is transferred from one carrier to another. For example, if you stop in Chicago and change carriers on a flight from New York to Los Angeles, your bag would simply be transferred from Airline *A* to Airline *B* in Chicago to continue on its way to Los Angeles.

(which included both Frankfurt and London) to positively match bags to boarding passengers in order to identify unaccompanied bags. Once an unaccompanied bag was identified, it could be placed on board an aircraft only if it was physically searched.

The plaintiffs were able to show the jury tha t Pan Am was fully aware of all requirements contained in the ACSSP, as this publication was contained in, and made a part of, Pan Am's own security manual. Explicit in the ACSSP is the requirement that a carrier submit a written application to the FAA when seeking an exemption from any of the requirements contained therein. Any application for such an exemption required the FAA to provide a written response. Yet it was clearly established at trial that the positive matching process mandated by the ACSSP was abandoned by Pan Am, without written approval from the FAA, in February of 1987 at Heathrow and in July of 1987 at Frankfurt. Pan Am substituted a system termed "Administrative Match and Positive Passenger Control," which was inadequate because it did not match interline bags, generally considered to be the most serious security risk.

Detailed testimony revealed a deliberate decision by Pan Am, at its highest corporate level, to deviate from the positive match requirements of Section XV.C.1.(a) and substitute x-ray procedures to screen baggage, a decision driven solely by greed. Evidence indicated that on-time performance levels strongly influenced the airline's load factors, which in turn directly affected the organization's profit picture. The x-ray procedure was less costly for Pan Am as it required fewer employees, and it took less time to complete. However, once this procedure was in place, Pan Am was unable to ascertain whether unaccompanied bags were carried aboard its aircraft. Thus, management's decision to reduce delays which cut into on-time performance figures, even at the expense of required security procedures, exposed all of their passengers to grave danger.

OTHER SECURITY LAPSES

In May of 1986, Pan Am had instituted a sophisticated marketing campaign aimed at regaining the confidence of international travelers, shaken by news of mismanagement and threats of terrorism. Full page ads were run in the largest newspapers of major cities outlining the details of Pan Am's new state-of-the-art security system, entitled Alert, designed to make Pan Am the safest airline in the world. The ads promised "unrelenting thoroughness" in the implementation of security procedures. A surcharge of $5.00 per ticket would be levied to pay for the new, unparalleled security system.

Pretrial discovery revealed that the surcharges collected from the public were never segregated for use by the Alert program and instead were com-

mingled with general revenue, to bolster a failing airline. According to testimony at trial, these funds totalled $17,000,000 to $18,000,000 per year. Furthermore, the marketing plan was designed specifically to increase load factors during the critical summer travel period and was not taken seriously inside Pan Am corporate headquarters. The security procedures promised to the public were a sham. For example, the bomb-sniffing "guard" dogs paraded before the media were untrained animals obtained from a local shelter the night before the televised event, and Alert banners were placed around their necks for promotional purposes.

In September of 1986, responding to the prevalent threat of terrorist violence in Europe, Pan Am's management commissioned several Israeli security experts to review its security procedures in place at various international airports, including Frankfurt and London. The report these experts generated, known as the KPI report, concluded that under its existing systems, Pan Am was highly vulnerable to most forms of terrorist attack. Specific mention was made of the risk posed by unaccompanied bags, and the report criticized Pan Am's over-reliance on the use of x-ray for screening bags. It emphasized that positive match procedures, encompassing interline bags, were required to avoid a bomb attack. KPI advised Pan Am's management that only "good fortune" had prevented an "act of terrorism."

Documents produced and deposition testimony taken at various points during the discovery process disclosed the fact that the individual hired to run the Alert operation in Frankfurt had a criminal record. After the disaster at Lockerbie, Pan Am's internal investigation resulted in charges of embezzlement and fraud. This individual was also completely inept at hiring and training others to handle sensitive security practices and procedures. The hiring practices at Alert in Frankfurt were based on the personal bias and whim of this individual. The lack of training was highlighted when it became clear that the Ground Security Coordinator (GSC) for Pan Am Flight 103A on December 21, 1988, lacked the experience, training, and knowledge necessary for this extremely sensitive position. At the time the bag containing the bomb was being transported through the Frankfurt systems, this GSC believed that another Alert employee was monitoring Flight 103A and its baggage when, in fact, no one was performing these required functions. The screeners checking the passengers were similarly untrained. One screener admitted at deposition that she had not received any formal training for the position and was unaware of what a "selectee" was, despite the fact that her primary job function as a screener was to designate certain high risk passengers as selectees for additional security checks.

Little or no supervision was provided to employees responsible for operating and monitoring the x-ray equipment that Pan Am claimed was a

reasonable alternative to the positive match procedures. In particular, the Alert employee responsible for screening the thirteen interline bags that became the focus of the investigation was an elderly man with vision problems who was not wearing his glasses while screening the bags. He had held the position of x-ray screener for only a few weeks before December 21st; his prior position with Alert had been that of janitor.

Upon arriving in London, the bags from Flight 103A were simply placed into container AVE 4041 and loaded on board the Boeing 747. No security measures of any kind were applied. The GSC in London was out that day and a Passenger Service Agent (PSA) with no qualifications or security training, completely unaware of ACSSP requirements, was responsible for the flight. In an eerie premonition of what was to come, as the 747 was preparing to depart the gate, the PSA became aware that a passenger who had checked two bags had not boarded the aircraft. Under the rules of the ACSSP, the GSC was required to report the presence of these unaccompanied bags to the captain—but they were not reported. Sadly, had Pan Am exercised the required diligence and advised the captain of the presence of two unaccompanied bags at Heathrow, the plane would not have taken off and 270 lives would have been saved.

Also discovered during the pretrial phase was the fact that for at least six years prior to the bombing of Flight 103, Pan Am had been warned on numerous occasions of the possibility of terrorists placing bombs inside radios and other electronic devices. In 1982, a bomb exploded on a Pan Am flight from Tokyo to Honolulu. Shortly thereafter, a similar type of explosive device was discovered on one of their aircraft in Rio de Janeiro. In 1983, Pan Am was again the target of terrorist bombers when a device was concealed in an unaccompanied interline bag. Pan Am management knew, along with the rest of the industry, that in 1985, two radio bombs carried in unaccompanied interline bags were checked on one carrier and interlined to connect with two different Air India flights. One exploded, causing the deaths of 329 people, and the other detonated while in the transfer process at Tokyo Airport. As was the case with Flight 103, the suitcases containing the bombs had been x-rayed by airline personnel but had not been matched to a passenger. The Indian government issued a report stressing the limitations of x-ray screening practices and pointed out that improvised explosive devices concealed inside electronic devices may not be detected by x-ray.

In April 1988, Pan Am and all international air carriers were warned by the FAA of U.S. intelligence reports that Iran would instigate a terrorist attack against a U.S. target. To add to the tension during this period, in July of 1988, the U.S. destroyer Vincennes shot down an Iranian Airbus which the Iran government claimed contained innocent civilians. The FAA immediately issued a security bulletin warning of increased risk of a retaliatory strike against a U.S.

air carrier. On November 18, 1988, Pan Am was advised by an FAA security bulletin that a raid on a mid-east terrorist group by police in Neuss, Germany, had turned up a bomb concealed within a Toshiba radio cassette player. The FAA stressed the need for vigilance in security procedures, calling for the rigorous adherence to ACSSP regulations and citing the difficulty in uncovering the presence of such a bomb through the use of x-ray. Despite these explicit warnings, Pan Am still did not positively match interline bags; members of the Alert security staff were not informed of the warnings; those persons monitoring x-ray equipment were not even instructed to look out for radio cassette players as possible hosts for bombs.

There's more. On December 7, 1988, only two weeks before the Lockerbie disaster, Pan Am was issued Security Bulletin 88-22 advising that the U.S. embassy in Helsinki, Finland, had received a telephone warning stating that a Pan Am flight from Frankfurt to the U.S. would be the target of a terrorist bomb. This bulletin, which came to be known as the "Helsinki Warning," reiterated the FAA's earlier advice concerning the Toshiba bomb and once again emphasized the difficulty of detection by x-ray. Again, security personnel at Frankfurt, including Alert's Chief of Training, the individual responsible for disseminating such warnings to screening personnel, were not informed of the contents of the bulletin.

At no time did Pan Am formulate a response, increase its security staff, or change its procedures to meet the threats to the safety of its passengers. As final demonstration of the honesty and integrity of the Alert manager at Frankfurt, when presented with a copy of the Helsinki Warning he, in front of witnesses, backdated the warning on Alert's time stamping equipment to make it appear as though he had disseminated the warning earlier.

Not all Pan Am employees were so lacking. In March 1988, Pan Am's security directors in both Frankfurt and London wired messages to corporate headquarters in New York questioning the earlier decisions to eliminate the positive match and rely exclusively on x-ray to screen interline bags. The March 10, 1988, memo response from Pan Am's Corporate Security Director became an essential exhibit in the plaintiffs' prosecution of this action. In it, the Director incorrectly advised European personnel that Pan Am had received permission from the FAA to use x-ray as an alternative to searching passenger baggage. In a line that says a great deal about the concern of management for the safety of its passengers, the Director of Corporate Security stated, "In the event of a no show interline passenger and his bag is loaded in the belly [of the aircraft] we go!!!"

As late as October 1988, Pan Am's management was again made aware of the shortcomings in its security procedures resulting from cutbacks in its security operations. One of its security managers in Frankfurt wrote a memo to

New York requesting additional personnel to staff security positions. He outlined his apprehension that Pan Am's obsession with the bottom line was "jeopardizing the lives and safety of Pan Am's passengers."

In addition to deliberately violating the ACSSP, Pan Am repeatedly misled the FAA inspectors regarding the airline's compliance with and institution of mandated procedures. During inspections (for which the Frankfurt station manager had advance notice) some Alert employees would repeatedly move about the facility, changing hats at each position to make the FAA believe that each of the posts required to be filled were staffed by different people.

THE TRIAL

After producing fifty-eight witnesses, including three experts to testify in the area of airline security procedures—one of them a former director of safety for the International Air Transport Association and also a former Director of the FAA Office of Civil Aviation Security—the plaintiffs rested their case. The defendants did not call any aviation security experts. Instead, they sought to offer expert testimony concerning the nature of terrorist groups and their activities and to depict terrorist acts as virtually unstoppable. They also attempted to lay blame in the lap of the U.S. government by suggesting that the government did not offer air carriers sufficient assistance to help protect their passengers.

Interestingly, just a few days before the commencement of the trial, a cover article in *Time* magazine focused on the bogus theory that a "rogue bag" was placed aboard Flight 103A by a Turkish baggage handler at Frankfurt as part of a CIA or DEA undercover narcotics operation. We became concerned about the effect of this sudden and misleading pretrial publicity and moved to strike the jury panel. Judge Platt, fearing a lengthy delay, denied the motion and instead conducted extensive voir dire that eventually resulted in the elimination of most potential jurors. In addition, he prohibited the defendants from making reference to a "rogue bag" as a possible source of the bomb since this defense had not appeared in any pleadings and was not substantiated by any credible evidence.

In an effort to persuade the jury that the possibility of baggage tampering existed, Pan Am's counsel presented evidence to show that the large number of airline passes issued would permit access to numerous gates at both the Frankfurt and London airports. Several minor attempts were also made to suggest that the plaintiffs' evidence did not support contentions on how terrorists planted the bomb aboard Flight 103.

After carefully considering all of the evidence during several days of deliberation, on July 10, 1992, the jury concluded that Pan Am and Alert were

guilty of willful misconduct. The decision by top management to violate applicable sections of the ACSSP was deliberate and willful; cost-cutting that compromised the safety of Pan Am's passengers was deliberate and willful; and the deceptions of the FAA were deliberate and willful.

The verdict of willful misconduct and finding that said willful misconduct was a substantial factor in causing the Lockerbie disaster cleared the way for damage trials. Three representative trials were held in front of Chief Judge Platt and heard by many of the same jurors shortly thereafter. The three resultant damage verdicts as well as the liability verdict became the subject of the defendants' appeal to the Second Circuit Court of Appeals. On January 31, 1994, two judges filed the majority opinion affirming both the liability and damage verdicts. It was not until several weeks later, on February 18, 1994, that Judge Ellsworth Van Graafeiland issued his lone dissent. On February 28, 1994, the defendants petitioned the Second Circuit for a rehearing en banc. This request was ultimately withdrawn when the Second Circuit withdrew its January 31, 1994, decision on September 12, 1994, and issued a revised opinion on the issue of pecuniary losses. Shortly thereafter, Pan Am petitioned the United States Supreme Court for certiorari. On January 23, 1995, the Court gave ultimate vindication to the Lockerbie plaintiffs by refusing Pan Am's request and denying certiorari.

On another front, in November 1991 two suspected Libyan terrorists, Abdel Basset Ali Al Megrahii and Lamen Amin Khalifa Fhimah, were indicted and charged with planting the bomb on Flight 103. Libyan officials refused to turn these individuals over, and in April 1992 the U.S. and other Western European nations impounded $915,000,000 in Libyan assets and imposed economic sanctions in an effort to force Muammar Qaddafi to release the terrorists.

More than six years later, those economic sanctions remain in place and, despite protracted negotiations between Libyan authorities and the U.S. and United Kingdom governments, the issue of the situs of a criminal trial of the two suspected terrorists is still, at this time, unresolved. Recently, the Libyans indicated that they were receptive to having the two individuals tried in the Hague International Court of Justice, over the initial objections of both the U.S. and the U.K. nations. Today we appear no closer to an actual criminal trial of the suspected terrorists since Libya now objects to the possibility of the terrorists, if convicted, serving time in a U.S. or U.K. jail and, instead, insists that any period of incarceration for the individuals be served in the Netherlands.

The families remain steadfast in their efforts to see Pan Am and the terrorists finally and publicly held responsible for the bombing. In 1996, the families successfully spearheaded a drive in Congress to amend the Foreign Sov-

ereign Immunities Act,[2] to permit the families to bring civil lawsuits against state sponsors of terrorism designated under section 6(j) of the Export Administration Act of 1979.[3] Prior to the destruction of Pan Am Flight 103, Libya was so designated as a state sponsor of terrorism, providing a jurisdictional basis for the civil suits. Judge Thomas Platt was once again assigned these cases filed in the Eastern District of New York, and in February 1998 he denied Libya's motion to dismiss the claims. Oral argument was recently held in the Second Circuit concerning the constitutionality of this amendment and a decision is expected sometime in early 1999.

CONCLUSION

With over twenty-five years of experience in the field of aviation litigation, I can say unequivocally that the investigation, preparation, and trial of the air disaster at Lockerbie, Scotland, has been one of the most interesting and professionally challenging aviation cases I have encountered. It is my hope that the lessons learned from this tragedy will send a message to all international carriers that they can never be too vigilant in their security practices and procedures, and that the lives of their passengers must come before all other considerations.

---

[2] Codified in 28 U.S.C. §1605(a)(7).
[3] 50 U.S.C.App. §2405(j).

JUDICIAL INDEPENDENCE: LINCHPIN OF OUR CONSTITUTIONAL DEMOCRACY†

Douglas W. Hillman*

During the last presidential campaign, and in fact right up to the present time, we've seen an increase in harsh political attacks on the judiciary by both major political parties. I submit that unless curtailed, these attacks can do great damage to the independence of the judiciary and to the very structure of our government.

Last month, *The New York Times* reported that a group of House conservatives opposed to what they call "judicial activism" has urged impeachment of three federal judges with whose opinions they disagreed.[1] This rising tide of judge bashing, although not new, is more vitriolic, more determined, and thus more dangerous, because it threatens the very independence of the judiciary as an institution and, equally important, the public's confidence in it.

History and Role of Judicial Independence

The importance of an independent judiciary didn't just drop from the sky. As Chief Justice William Rehnquist recently observed, judicial independence is "one of the crown jewels of our system of justice."[2] In designing our system in the late 18th century, the founders drew upon the experience and philosophy of Greece, Rome, France, and Britain. The principle of an independent judiciary was a carefully considered response to the likely dangers posed by an overpowering government.

The United States model of government is based on a separation of powers. The separation of powers requires each branch of government to act as a check against possible overreaching by another branch. Thus, our judiciary is vested by our Constitution with the authority and independence to judge not only individual actions, but the legality of actions taken by the legislative and executive branches as well.[3]

---

† Reprinted, with permission, from 76 Michigan Bar Journal 1300 (1997).

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

[1] *See* Katharine Q. Seelye, *Conservatives in House Are Preparing an Impeachment List of Federal Judges*, N.Y. Times, Mar. 14, 1997.

[2] *See* Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. Times, Apr. 10, 1996, at A1.

[3] *See* Sandra Day O'Connor, *The Life of the Law: Principles of Logic and Experience from the United States*, 1996 Wis. L. Rev. 1, 2 (1996).

The principal language in the Constitution guaranteeing judicial independence—that is, that federal judges "shall hold their offices during good behavior"—was derived from the British Act of Settlement of 1701, which provided that a judge's commission "shall be made as long as he shall behave himself well."[4] As you will recall, one of the major grievances leading to the Revolutionary War was the Crown's refusal to provide Colonial judges with a lifetime tenure provided in the Settlement Act of 1701.[5] If the King disliked a Colonial judge's ruling, the judge was dismissed. Indeed, as most of us remember from our high school history classes, one of the principal grievances listed in the Declaration of Independence was that the King had "made judges dependent on his will alone for the tenure of their offices and the amount of payment of their salaries." Colonial judges, appointed by the English King, were looked upon by the founders as instruments of tyrannical authority.

The framers of our Constitution had a profound distrust of governmental authority. Our Constitution is intentionally designed to place limitations on the exercise of power in all branches of government. Under our constitutional government, with its separation of powers, it is the function of the judiciary to ensure that the legislative and executive branches, albeit well-intentioned, do not overstep their bounds.[6] Where called upon, it is up to the courts to declare their acts constitutional or unconstitutional as the case may be.

The founders of our country, that is, Hamilton, Jefferson, Monroe, John Marshall, and others, relied to a large extent upon Montesquieu, who, earlier in the century, was the first modern writer to recognize the judiciary as an independent branch of government. Departing from prior political theory, as well as from English practice, both of which treated the courts as a subordinate arm of the executive branch, Montesquieu differentiated among the legislative, administrative, and adjudicative functions of government—the threefold separation we are familiar with today. He argued, and the framers of the Constitution agreed, that the preservation of liberty depended on the three functions being kept separate and independent.

Thus, it is not surprising that when drafting Article III of the Constitution, the framers included provisions that guaranteed tenure during good behavior and prohibited reduction in judicial salaries. As a consequence, for over 200 years, the Constitution has guaranteed judicial independence. These princi-

---

[4] Act of Settlement, 12 & 13 Will. 2, ch. 2, § 3 (1700) (Eng.). *See also* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEM 151 (1973).

[5] *See* WINTON U. SOLBERG, THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 35 (2d ed. 1990).

[6] *See* Michael L. Piccarreta, *Independence of Judiciary Safeguards Democracy,* President's Message, State Bar of Arizona, 1997.

ples have withstood the test of time and the various strains that our own history has put upon them.

Over the years, we have assumed that no government official, not even the President, could control the actions of a federal judge. Because the President is responsible for nomination of judges to the bench, and thereby the composition of the courts, he undoubtedly has had a significant influence on the direction of the federal courts. However, because judges' salaries and positions are specifically protected by the Constitution, a judge, once appointed by the President and confirmed by the U.S. Senate, is beyond the reach of presidential influence. Thus, the executive power over the judiciary is both limited and brief, and presidents have sometimes bristled at the decisions made by judges whom they nominated.[7]

Admittedly, lifetime appointments are anti-democratic and inconsistent with our representative form of government. But protection from government retaliation is essential to insure that some independent entity within the government exists to see that government in its relations with its citizens does not exceed the constitutional bounds of its authority. Judges cannot perform their function with the necessary impartiality toward the government's position if the government has the ability to punish them. The Constitution after all consists of powers granted by the people to the government. But government has a way of increasing its power at the expense of its citizens, often in incremental steps. Consequently, it is crucial that one truly independent institution be able to curb that ever creeping enlargement of power.

The primary role of the federal courts is to protect the rights of individual citizens against encroachment by government, be it federal or state. For example, the federal court bears principal responsibility for the protection of unpopular minorities, such as ethnic or religious groups, in their relationships with the majorities. That role frequently, and sometimes unhappily, places the federal courts in the position of choosing between enforcing the terms of the Constitution and enforcing the democratic will of the majority as expressed in a particular statute passed by the United States Congress or by a state legislature.

In addition, in times past the federal courts have been forced into areas where the other co-equal branches have abandoned their responsibilities. For example, when our nation badly needed to eliminate the last vestiges of slavery embodied in segregation and Jim Crow laws, the executive and legislative branches seemed unwilling or unable to act. It fell to a few federal judges

---

[7] *See* Dwight D. Eisenhower, Attributed Remark, *quoted in* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 266 (3d ed. 1992) (suggesting that the major errors of his presidency were his nominations to the Supreme Court).

from the South to stand up to political pressures and emotional rhetoric designed to inspire hate. Their courageous decisions started our nation down a path of integration that has served to benefit the entire society.[8] Consider also that poll taxes, literacy tests, loyalty oaths, political gerrymandering, and lynchings would all have survived without an independent judiciary.

One cannot fail to observe that today emerging countries around the world want the same liberties as America, and it is our judicial branch in particular that they are now imitating and adopting as their model. It was my good fortune to have had the opportunity to explain our jury trial system to Russian judges and lawyers in Moscow several years ago. The new Russian Constitution now provides for jury trials in many major felony cases—a totally new concept in Russian jurisprudence.

CRITICISM VERSUS INTIMIDATION

In safeguarding the independence of the judiciary, of course, we must take care to distinguish fair and often harsh criticism of judges from intimidation. Fair criticism plays an important role in inspiring and improving the quality of our courts and is a central part of the established judicial process. Every appeal, every petition for rehearing, and every dissent is a criticism of a judicial decision; and judicial decisions regularly are reversed or overturned on the basis of such criticism.

In addition, some decisions unquestionably are wrongly decided. For example, the 1857 *Dred Scott* case, holding that African-Americans were unfit to associate with the white race;[9] *Plessy v. Ferguson*, holding that "if one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane";[10] and *McCleskey v. Kemp,* allowing Georgia to carry out executions despite recognizing significant racial disparities in the infliction of the death penalty,[11] have been, and of course should have been, severely criticized. Citizens regularly should question the correctness of judicial decisions. If a statute is held unconstitutional, citizens should ask and debate whether the Constitution should be amended. The flag burning decision is such an example.

Thus, responsible criticism is essential to the proper exercise of judicial function. In addition, no doubt should exist in anyone's mind that every citizen in the United States has a first amendment right to make irresponsible

---

[8] N. Lee Cooper, *Judges Are Not Fair Game,* A. B. A. J., Oct. 1996, at 6.
[9] Scott v. Sandford, 60 U.S. 393 (1857).
[10] 163 U.S. 537, 552 (1896).
[11] 481 U.S. 279 (1987).

criticism as well. The Constitution allows irresponsible criticism. But irresponsible criticism is quite different from the threat of retaliation by senators who hold the power of impeachment over the heads of judges.

Political criticism by elected officials comes as no surprise. After all, legislators and executives, elected by popular vote, to a large extent base their actions on pressure from special interest groups or public opinion polls, and courts are easy and popular targets. Judges, however, in deciding the matters before them, must be prepared to ignore such public pressure. Judges are expected to enforce the law no matter what! For example, the right to free speech should receive identical treatment before the courts, whether it is the speech of the radical right or the radical left. Likewise, our courts have guaranteed and will continue to guarantee the constitutional rights of all criminal defendants.

As Justice Jackson so eloquently put it:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, to free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[12]

As indicated, even harsh or irrational criticism of judges' opinions is fair game. However, prominent politicians today are criticizing judges for the purpose of intimidation, with the hope of obtaining certain results.

Today the favorite subject of judicial intimidation is crime. The American people are rightfully up in arms over ever-expanding serious crimes, drugs, spousal abuse, pornography, and the disintegration of the family. The root cause of crime in this century is beyond the scope of this paper. However, we need no reminding that America's history has been violent from the beginning. Our forceful expansion westward and almost total destruction of the Native American population is ample proof of that fact. And, as our society has become more rootless and mobile, as income and educational disparities have increased, and as family discipline has eroded, most crimes have steadily increased. These problems are augmented in a society overwhelmed by racial, ethnic, and class antagonisms.

But for presumably responsible politicians to put the blame for crime in America on the judiciary is ridiculous. Yet one continues to hear that judges are "soft on crime" or "coddle criminals." Consider that the federal judges now under attack as being soft on crime handle a mere one percent of all of

---

[12] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

the criminal cases in the United States, and that the rate of conviction in the federal courts is approximately 95%. As for "soft" judges, there were 196,000 Americans in prison in 1970. Today there are well over a million. Who do the critics think put them there?

I would remind these critics that the judges do not set police force budgets. We do not determine how many policemen are enough, or how or where they should be assigned. We do not determine national policy on how to keep drugs from coming across the borders, or devise social programs to educate minors on the evils of drugs. We are not part of a team with the police to catch criminals. We more closely resemble referees, whose role it is to make sure the police and courts have obeyed the rules and that defendants have gotten the fair trials that the Constitution guarantees them.

Yet bashing federal judges appears to be the current priority of conservatives in the House of Representatives. House Republican Whip Tom DeLay of Texas is leading the drive to impeach federal judges with whose opinions he disagrees.

Let's take a quick look at the flap over Judge Baer, who is currently at the top of Congressman DeLay's hit list. Baer, who sits on the U.S. District Court for the Southern District of New York, excluded as evidence 800 pounds of cocaine and heroin found in a search and seizure. Apparently, police observed four men dropping two duffle bags in the trunk of a woman's car in the predawn hours. When the men saw the police, they fled the scene. The police seized the duffle bags containing cocaine and heroin. The judge concluded the drugs were confiscated by the police after an unconstitutional search of an automobile without a warrant. He ruled that the men's behavior in fleeing was not necessarily suspicious because residents of the area had reason to regard the police as "corrupt, abusive and violent." The arrest occurred in an inner-city neighborhood largely populated by people of color and the flight from the police was said by the judge to be an expectable event that could not support an investigative stop.

The ruling touched off a frenzy of political recriminations, as both Republicans and Democrats rushed to condemn the judge for finding an illegal search which brought about the release of the defendants. Republicans on the Hill demanded that President Clinton ask the judge to resign. Speaker Newt Gingrich heightened the rhetoric, describing Judge Baer's ruling as "the perfect reason why we're losing our civilization."[13]

On March 21, the White House added its own criticism, and the campaign against Judge Baer became bipartisan. *The New York Times* reported that

---

[13] *See* Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299, 300 (1996) (quoting *Judge Baer Sees The Light*, Boston Globe, Apr. 6, 1996 (editorial)).

White House Press Secretary Michael McCurry "put a federal judge on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation."[14] Within a day or two, the President's counsel said that the President supports the independence of the federal judiciary, but at no time did the President disavow the McCurry threat. Presidential candidate and then-Senator Bob Dole promptly went a step further, stating that Baer should be impeached instead of reprimanded.

At this point, a group of four judges in the U.S. Court of Appeals for the Second Circuit took the highly unusual step of commenting on the debate. These judges offered a ringing defense of the trial judge's freedom to decide cases as he deems proper under the controlling law. The judges roundly denounced the political attacks on Judge Baer as "a grave disservice to the principle of an independent judiciary." I quote in part from their statement:

> The recent attacks on a trial judge have gone too far. They threaten to weaken the constitutional structure of this nation which has well served our citizens for more than 200 years.
>
> . . . .
>
> These attacks do a grave disservice to the principle of an independent judiciary and more significantly mislead the public as to the role of judges in a constitutional democracy.
>
> The framers of our constitution gave federal judges life tenure after nomination by the President and confirmation by the Senate. They did not provide for resignation or impeachment whenever a judge makes a decision with which elected officials disagree. Judges are called upon to make hundreds of decisions each year. These decisions are made after consideration of opposing contentions both of which are often based on reasonable interpretations of the laws of the United States and the Constitution. Most rulings are subject to appeal, as is the one that has occasioned these attacks.
>
> When a judge is threatened with a call for resignation or impeachment because of disagreement with a ruling, the entire process of orderly resolution of legal disputes is undermined. Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities.

The judge may well have made an erroneous ruling. It was certainly a close call. In any event, the government had a right to seek reconsideration (which it did) and the judge, in an unusual move, reheard the case and reversed it

---

[14] Mitchell, *Clinton Pressing Judge to Relent,* N.Y. Times, Mar. 22, 1996, at Al.

himself. Regardless of whether the judge was right or wrong, to call for his impeachment on the basis of a single ruling in a single case is ludicrous, particularly when that judge has a caseload of well over 400.

"JUDICIAL ACTIVISM"

Today, when a court holds an act of Congress unconstitutional, DeLay and his colleagues who oppose the court's ruling go into fits claiming the judge involved is an "activist" and should be impeached. But, as I have attempted to point out, the role of the court, as a check against the virtually unlimited authority of government, lies at the root of constitutional government. As the first three words in the Constitution—"We, The People"—make clear, it is the people, not the government, who are sovereign, and the Constitution is a reflection of their will. By exercising judicial review of a statute, the court isn't legislating or functioning as an "activist." Rather, the court is enforcing the will of the people as expressed in the Constitution over the desire of the government as expressed in the statute.

I ask you to consider what is really meant by "judicial activism." This is a phrase we hear almost daily, but which few stop to define or to apply with consistency. Senator Hatch says the Republican Senate will not confirm nomination to the federal bench of those individuals appointed by President Clinton who are "activists"—that is, individuals who presumably would make law rather than enforce the law.

Let me give you an example of how the label of "judicial activist"—usually leveled by conservatives against liberal interpretations of the Constitution—can be turned on its head. We have had in Michigan since 1913 legislation, early-on referred to as the Corrupt Practices Act, prohibiting "a corporation," including a nonprofit corporation, from making any "expenditure" in connection with an election campaign for state office.[15] The statute was enacted following a scandal in Pennsylvania, when it was discovered that an oil company had bribed practically every Pennsylvania state legislator. This law prohibiting corporate contributions was upheld as constitutional in 1916 by the Michigan Supreme Court.[16]

Several years ago, Richard Bandstra, then a Grand Rapids lawyer (now a highly competent Michigan Court of Appeals judge), was running for the Michigan legislature. The State Chamber of Commerce (a Michigan corporation) wanted legitimately and fairly to support him by running an advertisement in *The Grand Rapids Press*. At that time, it could not do so under exist-

---

[15] Michigan Campaign Finance Act, 176 Mich. Pub. Acts 388, Mich. Comp. Laws 169.201 *et seq.* (1979).
[16] People v. Gansley, 191 Mich. 357, 158 N.W. 195 (1916).

ing law. Consequently, the Chamber filed suit in an attempt to have the Michigan statute declared unconstitutional as an infringement on the Chamber's right to free speech under the first amendment.

As must be obvious, I did not choose the case. I didn't start it. It was filed in our clerk's office and assigned to me by a random draw. Once it was on my docket, I had no choice but to hear and decide the case.

I think it is fair to say that under the prevailing definition of "activist," the Chamber was urging me to be an "activist" judge when it (a conservative business-oriented body of 8,000 members) wanted me—in fact strongly urged me—to overturn the wishes of the majority of Michigan citizens, speaking through their state legislature, to declare unconstitutional a Michigan statute that had already been found to be constitutional by the Michigan Supreme Court. It is difficult to see how one could be more activist than that.

Yet, despite counsel's persuasive arguments, I refused the invitation to throw out the Michigan statute. After careful review, I concluded that the statute was constitutional and dismissed the case. The Chamber appealed to the Sixth Circuit Court of Appeals in Cincinnati. A panel of that court consisting of three conservative judges, two of whom were appointed by Republican presidents, promptly overruled me and declared the Michigan statute to be unconstitutional. On appeal to the United States Supreme Court, however, the Sixth Circuit was reversed, and I was upheld—the Supreme Court, in a 6 to 3 decision, held the Michigan statute to be constitutional.[17]

Now, I ask you: In that case, who were the "activist" judges that Senator Hatch and others are today railing against? None other than the three Sixth Circuit conservative judges who, disregarding the wishes of the majority of the residents of Michigan as well as the Michigan legislature, overturned a Michigan law that had been on our books for over seventy years, and which, incidentally, appeared to have been working satisfactorily. What could be more activist than that?

Yet, the majority of judges on that panel, as previously mentioned, were Republican-appointed (one by Nixon; one by Reagan), able, bright conservatives. No one would dream of urging their impeachment. They, in good faith and with honesty and integrity, believed that I was wrong and that it was their sworn duty and solemn responsibility under the Constitution to reverse me and to declare the Michigan Act unconstitutional. It turns out they were wrong, but should they be branded as "activists" and unfit to sit on the Court of Appeals? Absolutely not! Yet, in today's contentious atmosphere, I wonder, if this case were called to the attention of Dole, Hatch, and DeLay, would they

---

[17] Michigan Chamber of Commerce v. Austin, 643 F. Supp. 397 (W.D. Mich. 1986), *rev'd*, 856 F.2d 783 (6th Cir. 1988), *rev'd*, 494 U.S. 652 (1990).

not be required to admit that those fine judges, according to their definition, are in fact "activist judges," and, if their nominations were before the Senate today, would their confirmations be in jeopardy?

What can be done? I suggest the following:

Leading citizens, newspapers, bar associations, and anyone who has the ear of a governor or politician should caution them that when they call for impeachment of judges whose opinions they don't like, they are in fact attacking the very foundation of our democratic form of government. We must remind the public that judges abdicate their constitutional role if they first look to another branch of government to be told how to rule on important legal and social issues.

We must also explain why a judge who promises while campaigning to rule a certain way on a certain issue—before hearing and considering the precise facts and the controlling law—is not a judge, but a politician. And certainly the public must understand that judicial independence is not for the personal benefit of the judge, but rather for the protection of the people, whose rights only an independent judge can preserve.[18]

Judges must disqualify themselves where political pressures prevent them from being fair and impartial in a particular case. Judges themselves must at all times exercise restraint and decide just the narrow legal issues before them. Certainly they must not let their own social or economic biases influence their interpretation of settled legal principles. We must discourage public declarations of how judicial candidates would decide questions that might come before them should they be elected. Litigants must move for the disqualification of judges where political pressures or campaign promises raise questions about their impartiality. As Justice Stevens pointed out at an ABA meeting recently: "A campaign promise to be tough on crime or to enforce the death penalty is evidence of bias that should disqualify a candidate from sitting in criminal cases."

We should demand that our elected leaders, while freely criticizing the reasoning of any particular case, acknowledge the legitimacy of legal decisions as the law of the land. An example of that leadership was recently shown by President Nelson Mandela of South Africa. When the Constitutional Court of South Africa struck down the law delegating broad powers to his administration, President Mandela immediately and publicly announced that the court had spoken and its decision must be implemented.[19]

In sum, efforts to intimidate judges and thereby diminish the independence of the judiciary must not be permitted. A judge cannot and should not be ex-

---

[18] American Bar Association, Report of the Commission on Separation of Powers and Judicial Independence III.

[19] *See* Steven B. Bright, *Political Attacks on the Judiciary,* 80 JUDICATURE 165, 173 (1997).

pected to decide cases on the basis of public opinion or political influence.[20] Indeed, it is knuckling under by the judicial branch to the executive and legislative branches that presents the only real threat.

Criticizing the performance of the courts is justified and indeed necessary. Partisan attacks that undermine their independence are not, for without an independent judiciary, neither the rule of law nor liberty itself can long survive.[21]

---

[20] *See* Robert Destro, *Whom Do You Trust? Judicial Independence, The Power of the Purse and the Line Item Veto*, 44 FED. LAW. 26, 31 (1997).
[21] Herman Schwartz, *The Nation The Law: The War Against Judicial Independence*, L.A. Times, 1997.

A PERSPECTIVE ON CHANGE IN THE LITIGATION SYSTEM†

Daniel J. Meador*

Perspective implies the big picture, a view of the landscape from 35,000 feet. From that vantage point we can see an array of developments in civil litigation in the United States during the last third of this century, developments that have had a transforming effect. Earlier, there had been two watershed reforms. The first was the Field Code in 1848, a procedural reform that spread through many states in the nineteenth century and permeated practice in the federal courts through the Conformity Act. The second was the Federal Rules of Civil Procedure in 1938, a federal reform widely copied in the state courts. Under those 1938 rules, providing for a unitary, transaction-based civil action with broad party and claim joinder, litigation in the federal district courts—the focus of this Article—was relatively stable and untroubled for some three decades.

Then in the mid-1960s circumstances began to change, the country began to change, the world began to change, and those changes in turn have had a far-reaching impact on the litigation system. Also, in that decade the 1938 rules were significantly amended, setting the stage for some of the later changes. While there has been no one blockbusting event, no single reform of the magnitude of the 1938 rules, numerous interrelated developments since then have fundamentally altered American civil litigation, especially in the federal courts.

The most significant developments and resulting changes can be grouped under the ten headings set out below. Each of these changes has sparked lively debate along the way. Some have been quite controversial, and many battles and rear guard actions continue. My purpose here is to describe, not to take sides or evaluate. I do not address the far-reaching changes in the appellate realm, concentrating instead on the trial level.

---

†Reprinted, with permission, from 49 ALA. L. REV. 7 (1997).

*James Monroe Professor of Law Emeritus, University of Virginia. Dean, University of Alabama Law School, 1966-70; Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Department of Justice, 1977-79; Chair, ABA Standing Committee on Federal Judicial Improvements, 1987-90; Board of Directors, State Justice Institute, 1986-92. This article is a slightly expanded version of the keynote remarks delivered by the author at the ABA's CJRA Implementation Conference at the University of Alabama Law School, March 20, 1997. Appreciation is expressed to my colleagues, Professors Earl C. Dudley, Jr., Graham C. Lilly, and John C. McCoid, for commenting on a draft of the article.

1. *Volume of judicial business*

The most obvious development—and the one that underlies most of the others—is the growth in the number of cases. In 1966, 71,000 civil cases were filed in the federal district courts nationwide. (This and all other figures are rounded up or down.) In 1996 the number was 269,000. One need not decide whether this growth amounts to a "litigation explosion" to acknowledge that there is today nearly four times more civil business in the federal courts than there was thirty years ago.

The timely disposition of this business has been made more difficult by the increased burdens of the criminal docket. Criminal cases—48,000 prosecutions last year—impose special demands on the district courts because of the Speedy Trial Act and the sentencing guidelines.

2. *Nature of judicial business*

The nature of civil cases has changed in two ways. One is in the subject matter of the cases, the other is in their complexity.

As to subject matter, some of the large categories of cases filling the dockets today either were not there at all thirty years ago or were small fractions of judicial business. For example, in 1966 the Administrative Office's statistics did not even list product liability and environmental cases as separate categories of district court business (although there were some product liability cases under other headings). But in 1996, there were 27,500 personal injury product liability cases and over 1,000 environmental cases. Three decades ago there were 1,300 civil rights cases; last year there were 42,000. Over that same period, prisoner petitions grew from 8,500 to 68,000.

Complexity has increased both in party structure and in the issues presented. The most dramatic change in party structure has come with the blossoming of class actions. Entire governmental programs and agencies have been brought into court and the legality of their operations determined on behalf of hundreds or thousands of persons. Notable among these have been desegregation suits and attacks on prison systems, welfare programs, and mental institutions. In addition, mass tort or mass injury actions—discounted as unlikely and inappropriate in 1966 by the drafters of amended Rule 23—now involve hundreds and thousands and even millions of parties spread coast to coast.

As to issues, the complexities and decisional difficulties they thrust upon the courts have intensified as science, technology, and human understanding have advanced. Courts today confront issues of chemistry, physics, medicine, electronics, and engineering that were unknown thirty years ago, as well as highly complicated financial and commercial transactions and, not least, novel ethical and social questions. The growing use in litigation of other dis-

ciplines, such as economics and sociology, and of empirical research have added to the complexities, as have society's heightened mobility and the nationwide and global scope of human activity.

The difficulties of adjudicating such complex issues are compounded by the use of juries. Under the broad right to jury trial resulting from Supreme Court decisions interpreting the Seventh Amendment, juries, often composed of relatively uneducated persons, are called upon to deal with technically complicated evidence that can tax even the experts. A new science of juror selection has arisen, involving expensive research into the backgrounds of prospective jurors.

3. *Judicial personnel*

In both numbers and types, officials in the court system who engage in adjudicatory activity have proliferated. This is the inevitable result of the growth in business and in the complexity of that business. In 1966, there were 343 federal district judgeships. Today there are 648.

Three decades ago the position of magistrate judge did not exist. Today we have 416 full-time magistrate judges and 78 part-timers. These are federal trial judges (although Art. I, not Art. III), and they are now more numerous than district judges were when the position of magistrate was created. Their responsibilities have been constantly expanded. Their duties vary from one district to another, but they typically include scheduling pretrial proceedings in civil cases, monitoring discovery, deciding non-dispositive motions of many kinds, presiding over trials of misdemeanors, and, with consent of the parties, conducting trials in civil cases, just as district judges do.

In addition, we now have the bankruptcy courts, an entirely new set of courts with their own judges, attached to the district courts. There are now 326 bankruptcy judgeships. These trial judges exercise an authority vastly larger than that exercised by the old bankruptcy referees.

Considering district judges, magistrate judges, and bankruptcy judges, the federal judicial system now has a total of 1,390 full-time judicial officers performing adjudicatory functions at the trial level. This is more than four times the number of district judges thirty years earlier.

4. *Judicial case management*

The idea that judges should affirmatively manage the conduct of civil cases emerged in the early 1970s, fueled by the pressures of rising caseloads and concern about increasing expense and delay. It rested on two premises, which initially were unverified theories. One was that lawyers, left to their own devices under the traditional adversary process, could not be counted on to move cases along expeditiously. The other was that civil

actions did not all need or deserve to be treated procedurally the same, that litigation could be expedited through differentiated processes without loss of fairness. Case management, as a means of reducing cost and delay, became accepted gospel among many district judges, a development that sharply departed from the historical common-law judicial role. It tended to move the American trial courts, albeit unwittingly, toward the inquisitorial style of civil law countries.

The practices developed under this new managerial style were given an official imprimatur by the amendments to Rule 16 in 1983, which doubled the length of the rule. Managerial judging received an even more exalted blessing by the enactment of the Civil Justice Reform Act of 1990 (CJRA), in which Congress codified a wide array of managerial practices that judges had developed and that were already embodied in Rule 16. Federal judges now control the pre-trial process to a high degree, setting detailed schedules for the discovery process, the filing of motions, and the holding of pre-trial conferences. Many judges engage aggressively in settlement discussions with the parties' lawyers, attempting to dispose of cases without trial. Pre-trial proceedings now overwhelmingly dominate civil litigation. A trial, theoretically the main event toward which the proceedings are aimed, now occurs in well under ten percent of all cases.

5. *Procedural non-uniformity*

The establishment of a nationally uniform set of procedural rules for all district courts, a major objective of the 1938 rules, has been substantially eroded. Although there was no doubt always a measure of non-uniformity in the details of local practice (the "local legal culture"), uniformity began to break down more noticeably with the spread of increasingly detailed local rules in the district courts, no two sets of which were identical. Another breach in uniformity came with the amendments to Rule 16 in 1983, which permitted district courts to avoid the requirement of a scheduling order. Congress struck a body blow to uniformity in 1990 in the CJRA, which, in addition to codifying managerial judging, codified the concept of non-uniformity and legitimated a system of 94 different processes for litigating civil cases in the federal courts. Then the rules drafters themselves joined the non-uniformity bandwagon in their 1993 amendments, allowing districts to opt out of the newly adopted mandatory disclosure provision of Rule 26(a). Thus, the decade of the nineties has seen the chaotic end of any pretension of geographical procedural uniformity. Paul Carrington has gone so far as to say that the Eastern District of Texas has seceded from the system.

In addition to the erosion of geographical uniformity, there are significant departures from the concept of uniform, trans-substantive civil rules. Rule 81

specifies several such exceptions from the general rules. Judges now employ special procedures in complex cases, bolstered by the *Manual for Complex Litigation*. In 1995, Congress by statute created distinctive procedural requirements for securities litigation.

Non-uniformity among districts is only part of the non-uniformity that now besets the federal courts. Active managerial judging has meant that there is often little uniformity even within a single district. Each judge operates in accordance with his or her own style and notions of sound judicial administration. Because there is a vast amount of discretion available in the management of the pre-trial stage, there will be considerable variation among judges in how cases are processed.

6. *Congressional involvement*

Under the Rules Enabling Act, from the 1930s to the 1970s Congress was willing to let the judiciary have exclusive dominion over making and amending the Federal Rules of Civil Procedure. But that era ended in the early 1970s when Congress refused to acquiesce in the Federal Rules of Evidence, formulated through the judiciary's rule-making process, and instead itself enacted the evidence rules. Since then, Congress has not been reluctant to tinker with procedural rules. It has become clear that Congress is no longer willing to let the courts have free rein on matters of procedure. This shift of mood found its ultimate expression in the CJRA, going beyond ordinary procedural rules deep into details of case management.

7. *ADR*

The phrase "alternative dispute resolution" came upon the American legal scene in the 1970s. It reflected the view that some disputes could be resolved better or less expensively or more quickly by means other than adjudication in the courts. The idea quickly took on the dimensions of a movement, gaining in momentum and given congressional blessing through the CJRA and statutes on court-annexed arbitration.

While some nonjudicial procedures such as arbitration had been on the scene for many decades, there was not the array of alternatives we have today, and the concept did not have the broad connotation, the popularity, the semi-official status, and the coalescence as a movement that it has acquired over the last two decades. The panoply of "alternatives" now used in widely varying degrees in the federal courts includes arbitration, mediation, early neutral evaluation, and summary and mini-trials. The procedures range from formal to informal, from court-annexed to private, from binding to non-binding, from mandatory to voluntary.

8. *Technology*

Technological developments have altered the ways courts function, in addition to technology's effect on the complexities of litigated issues. Computers and word processors are now almost universal in the trial courts. Clerks' offices maintain records and manage dockets through computers. Trial judges have direct access to case data on computers, both on the bench and in chambers. Opinions and orders are now prepared on word processors. E-mail and fax, in addition to the telephone, provide instant communication among judges and other court personnel, and between lawyers and courts. Videotaping provides a means for presenting testimony of absent witnesses and of preserving a record of trial. Closed circuit television permits judicial proceedings to be conducted with participants in different locations. All of this means that courts can handle more business in less time than previously possible.

9. *Federal-state duplication*

Litigation in the state and federal courts today involves an ever-increasing amount of duplicating and overlapping business. While there has always been some duplication—diversity of citizenship cases being a notable example—its extent has grown substantially in the last third of this century. Congress has enacted numerous statutes creating rights of action for conduct already actionable in state courts under state law; under most of these statutes, the action can be brought in either state or federal court. Similarly, in the criminal field, Congress has enacted numerous statutes creating federal crimes for conduct already criminal under state law. The upshot is that federal and state courts are increasingly adjudicating the same issues and types of cases, sometimes simultaneously litigating cases arising out of the same transaction. This overlapping jurisdictional arrangement gives rise to wasteful litigation over the appropriate forum and results in duplicating use of judicial and administrative resources, all of which adds to expense and delay.

10. *Lawyers and law practice*

The changes here are obvious and striking. In sheer size, the profession has tripled—from 313,500 lawyers in 1966 to 946,500 today. Many law firms have become mega-firms, national and international in scope. Specialization has markedly advanced. With the relaxing of restrictions on advertising and solicitation, much of law practice has become commercialized, making law firms appear to be just another business. Canons of ethics have been converted into codes of professional responsibility. While the effect of all this on civil litigation may not be clear, it does seem clear that incentives to litigate and aggressiveness in litigating have magnified. Statutes of recent times that

provide for plaintiffs' recovery of attorneys' fees bring into the courts cases that otherwise would not be brought. Pressures on billable hours in order to meet huge overheads and to increase lawyers' incomes fuel litigation beyond what may be necessary. Word processors and photocopying machines facilitate the mass production of interrogatories, motions, and other papers. So-called Rambo lawyers have appeared on the scene, making litigation nastier and more protracted.

To sum up, the litigation world in which we live today is quite different from that of thirty years ago. The developments and changes sketched above have radically altered the American litigation landscape. They were not the product of an overall, well thought out, and coordinated plan; rather, they crept into the system as ad hoc responses to particular problems or were the unanticipated consequences of reform efforts. But what we see around us is not fixed terrain. Events and new circumstances continue to press upon the system. It may be that in this closing decade of the twentieth century we are coming to one of those times in the evolution of procedure where the system undergoes comprehensive and fundamental reworking, as it did in 1938. But I would not confidently predict it. As yet, there is little consensus as to many of the changes that have taken place or as to where we should go. A colleague of mine says that he who lives by the crystal ball is destined to eat crushed glass.

Although predictions are difficult, we can realistically make a few assumptions. We can assume, for example, that the volume of civil litigation will not substantially diminish, that the cases and the issues will not get less complex, and that the number of judicial personnel will not be reduced. Indeed, for planning purposes, it would be prudent to assume that volume, complexity, and personnel in the justice system will all grow. Moreover, technology will continue to advance in ways that can only be dimly imagined. Empirical research is here to stay and will likely become more important in devising procedural reforms.

Under these circumstances, and given all the changes of the last thirty years, we have a daunting task to make the dispute resolution system more "just, speedy, and inexpensive." By comparison, the task of the 1938 rule drafters seems easy. In the bench, the bar, and the academy we have the requisite intellectual muscle and procedural expertise to do whatever needs to be done. But the extent to which the job actually gets done will depend on the convergence of at least three elements: leadership, subordination of client-interest and self-interest, and a good faith willingness to compose views and work toward a consensus. The history of judicial reform efforts over the last couple of decades does not provide much basis for optimism. There seems to

be little incentive among lawyers, judges, and members of Congress to support significant measures that would really accomplish something constructive. But hope lives on, and I like to think that the ABA's convening of this conference, and the array of talent gathered here, are hopeful signs for the future of civil dispute resolution.

DIRECT AND CROSS: HAVE WE LOST THE WAY?†

Shelby Highsmith*

Effective witness examination requires communications skills, logical thinking, stage presence—some of the attributes that define the art of advocacy. Regretfully, during my six years on the federal bench, I have found such attributes to be the exception rather than the rule. Countless attorneys who have appeared in my courtroom are not trained to conduct a direct examination that is cogent and to the point. They are equally deficient in conducting artful cross-examinations. Are these lawyers in need of further training before venturing (or being allowed) into a courtroom? Was Supreme Court Justice Warren Burger correct in stating that "[w]e are more casual about qualifying the people we allow to act as advocates in the courtroom than we are about licensing electricians"?[1] After you hear a few stories, culled from actual experience, you be the judges.

As a preamble to my remarks, I wish to note that, from the time I was first invited to join the International Society of Barristers, I was impressed by the aims of the Society. I am quoting from Article IV of the Society's Articles of Incorporation,which sets forth the Society's purposes:

> 3. To encourage, by example and otherwise, the entry of younger lawyers into the specialty of advocacy.
>
> 4. To encourage the continuation of advocacy under the adversary system.
>
> 5. To assist advocates in the perfection of the techniques of advocacy.[2]

I am quite aware that today I stand in the presence of some giants of the specialty of legal advocacy. One particular member (whom I shall not name, for he is, indeed, a very modest "fellow") has been said to exercise the skill of a surgeon in his cross-examination of adverse witnesses, as well as in his voir dire of prospective jurors. Regarding the latter, I must confess that effective voir dire has also been sadly lacking in my courtroom.

---

† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 13, 1998.

* Judge, United States District Court, Southern District of Florida; Judicial Fellow, International Society of Barristers.

[1] B. Nash, A. Zullo & K. Zullo, Lawyers' Wit & Wisdom 51 (1995).

[2] 33 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 275 (1998).

SETTING THE STAGE: VOIR DIRE

When I first joined the federal bench, the practice of allowing counsel to conduct voir dire was a rare exception in the Southern District of Florida. Being one of the few judges who allowed and encouraged it, I soon became concerned and began to pay attention to the progressively increasing shortcomings of younger counsel appearing before me in both criminal and civil trials, who demonstrated little, if any, expertise in conducting voir dire. At first, I attributed the lack of proficiency to lack of practice. Enough time has passed; I now know better. It has become apparent that the majority of young attorneys conducting trials before me are not sufficiently qualified to participate in *any* phase of a trial, and, sad to say, this conclusion grows in strength with each passing day.

So, before talking about the problems I have observed regarding witness examination, I would like to share with you some observations about jury voir dire. In my view, the two go hand in hand: A lawyer who has difficulty examining witnesses will almost invariably exhibit the same shortcomings when interacting with potential jurors.

What is the purpose of voir dire? I'm sure that the members of this audience find such a question rhetorical, and rightly so. However, I suggest that one objective is to weed out prospective jurors who are predisposed against the system, its principles, and/or one's client. Would embarrassing a prospective juror by asking him or her an incomprehensible question further this goal? Or would asking such a question go a long way toward causing the entire panel to become predisposed against both lawyer and client? Let me give you an example taken from the transcript of a trial in my courtroom:

> The attorney: The judge has talked to you about the *history* of the development of one of the principles we hold sacred in our system of jurisprudence and, as a matter of fact, it is one of the constitutional guarantees *we* enjoy as one standing accused of a crime and that is *our* right to remain silent: *we* don't have to prove anything or offer evidence of any kind in *our* defense—the burden of proof remains with the government throughout the trial and we can just sit there [indicating] and say nothing. . . . [Attorney looks at panel list.] Mr. Albury [a member of the panel], what do you think about that? [Emphasis added.]

At this point, poor Mr. Albury, who obviously did not follow the attorney's convoluted exposition, fidgets about, looking decidedly uncomfortable, and blurts out, "I would have to wait and hear the evidence."

It was clear to me that Mr. Albury certainly did not appreciate being put on the spot. It was equally obvious that each of the other panel members breathed

a sigh of relief that his or her name was not Albury. What did the attorney accomplish with this question? I submit, nothing of benefit to his client. And nothing of benefit to himself as (in his words) "one who stands accused of a crime" along with his client and who has a "right to remain silent." Indeed, after this episode, his client might have wished him to exercise that very right—and remain silent! I respectfully suggest that those aspiring to become effective trial advocates must either "divine" or be taught that if members of the panel are "comfortable" with an attorney's voir dire "interrogation," they are more likely to be "comfortable" with his or her case presentation.

Speaking of voir dire, I am reminded of the story of a small-town prosecuting attorney, engaged in the process of jury selection in one of his first criminal cases. One of the members of the panel was an elderly woman who looked vaguely familiar. Identifying her from his list, he approached her and asked, "Mrs. Jones, do you know me?" She responded:

> Why, yes, I do know you, Mr. Williams. I've known you since you were a youngster; and, frankly, you've been a big disappointment to me. You lie, you cheat on your wife, you manipulate people and talk about them behind their backs. You think you're a rising big-shot and don't have the brains to realize you never will amount to anything more than a two-bit politician. Yes, I know you!

The lawyer was stunned but managed a weak smile, and not knowing what else to do, he pointed at the defense attorney and asked, "Mrs. Jones, do you know Mr. Bradley?" She replied:

> Why, yes, I do. I've known Mr. Bradley since he was a child. I used to babysit for his parents. He, too, has been a real disappointment. He's lazy, bigoted, and has a drinking problem. He's incapable of building a normal relationship with anyone and his law practice is one of the shoddiest in the community. Yes, I know him!

At this point, the judge rapped his gavel and summoned the attorneys to the bench. In a very quiet but menacing tone, he said, "If either of you asks Mrs. Jones if she knows *me*, you'll be in jail for contempt in less than five minutes."

THE MAIN EVENT: WITNESS EXAMINATION

If lawyers could present their cases merely by summarizing the evidence, much as they do in opening statements, witness examination would be a lost art. Come to think of it, in my courtroom, it *is* a lost art. Skillfully or not, lawyers are called upon to adduce trial evidence mainly through the mouths

of witnesses, and interrogation is an art form. As one who received his training from several of the "giants" of the profession, I am often embarrassed by what passes for interrogation nowadays. Therein, the title of my talk, "Direct and Cross: Have We Lost the Way?"

First, let me share with you my observations regarding direct examination, which is thought by some to be the less difficult of the pair. The following opening question was actually asked by a defense attorney of his own witness at a recent criminal trial held before me: "Mr. Leal, we have never spoken before; is that correct?" Answer: "No." Upon hearing this exchange, I first found it incredible that an attorney would put on the stand a witness whom he had not interviewed, particularly an imprisoned witness who was his client's former husband. Second, equally incredible was the attorney's failure to recognize that the witness had just disavowed his "suggested" assertion.

Would it not have been much more effective to ask the "direct" question, "Mr. Leal, have we ever spoken to each other?" The answer, as I later confirmed, would have been negative; the attorney in fact had never interviewed the witness! Instead, to the jury, it might have appeared that the attorney was trying to create the impression that there was no "collusion" and was rebuffed by the witness. This witness thereafter figuratively crucified his former wife—a predictable result of the attorney's violation of one of the cardinal rules of witness interrogation: Never ask a question of your witness unless you know in advance what the answer will be.

During cross-examinations, I have heard a plethora of compound, complex, convoluted, and ambiguous questions. In their efforts to discredit adverse witnesses, attorneys often discredit themselves by asking questions to which there can be no straightforward or coherent answers. Here's one that is typical of many I have heard:

> You were willing to do anything to avoid prison, including but not limited to bearing false witness against the defendant in order to reduce the amount of time you would spend in prison by virtue of a 5K1 or Rule 35 motion which you were hoping would be filed by the U.S. Attorney, which would allow the judge to reduce your sentence below the guidelines. Now tell me if that isn't correct?

Unfortunately, the assistant United States attorney was asleep at the switch and made no objection. After a very long pause, the witness asked that the question be repeated. At that point, I intervened and had a short session with counsel at sidebar.

This inability to ask a simple, straightforward question also surfaces during re-direct examination. Unbelievable as it may seem, here is an actual question

asked by an assistant United States attorney during his re-direct examination of a government witness. The case involved the finding of cocaine in some pieces of luggage brought to Miami aboard a flight from Santiago, Chile. The witness had testified about the airline's luggage records from that flight. By the way, before becoming a member of the United States Attorney's Office, the prosecutor had served as a law clerk to a justice of the United States Supreme Court. Here's the question, regarding an exhibit before the witness:

> Okay. I want to—I'm going to keep bouncing around here a little bit, please, if you will follow with me. I want to start with, you were asked questions about Government's Exhibit Number 7, and you were asked questions about, if I remember correctly, Thomas Fuge, I'm sorry, page 4 of, page 4 of Government's Exhibit Number 7, okay? If you will go several down the page, you will see a Thomas Fuge, and you were asked about his control number, I'm sorry, his luggage tag number?

At this point, the prosecutor paused and looked at the witness expectantly. It would appear to the observer that he had not yet completed his question and was simply making sure that the witness had followed along in the exhibit. However, the witness—who was obviously eager to please the prosecutor—launched into this equally incomprehensible explanation:

> Okay, this is actually, this has to do with the last phase in terms of the luggage process. This is already in the luggage loading area prior to the bag being boarded onto the aircraft.

Although the prosecutor and the witness appeared to have understood each other, the audience members, including the judge and jury, were at a total loss.

Lest you conclude from this vignette that the prosecutor is an incompetent practitioner who managed to "wing" his tenure at the Supreme Court, I must add that, in that same trial, his opening statement and closing argument were clear, perceptive, and articulate. My point is that, during the course of their training, our young lawyers are not being instructed in the art of witness interrogation. As I said before, from my perspective as a trial judge, witness interrogation is, indeed, becoming a lost art.

To complicate matters further, a witness's cultural background also plays a major role in witness interrogation. Time and again, I have had to interject when it became painfully obvious to everyone in the courtroom, with the apparent exception of the examining attorney, that counsel and witness were not communicating at the same level. South Florida, as you know, is a multicultural community. In addition to language barriers, which, hopefully, are adequately surmounted through the use of official court interpreters, there are cul-

tural traits that may impede an otherwise smooth-flowing direct examination.

First, counsel's propensity to ask compound, complex questions—a seeming pitfall with English speakers—creates even more acute problems for a witness who does not speak or understand the language. For example, a typical scenario involving a Spanish speaking witness is for the witness to interject at various stages of a prolonged question with the word "Correcto." To the witness, this means simply that he understands the question so far. The interpreter, therefore, translates the word "Correcto" as "O.K." Then, when the time comes to answer the question, if the witness again says "Correcto," the interpreter translates the word as "Correct," meaning that the witness agrees with the proposition contained in the question and is answering the question in the affirmative. To the listener, however, who heard the witness say the same word twice, the two different translations of the same word are confusing at best and may even be misleading. Yet, the fault does not lie with the interpreter. Rather, it lies with the interrogator who has made everyone's task more difficult by failing to ask simple questions.

Rhetorical questions present another stumbling block for non-English speakers, who take such questions literally. Once again, I am recounting an actual question and answer: "Now, Mr. Cardenas, you were not present when government exhibit 3 was removed in Miami, were you?" As the evidence had already established, Mr. Cardenas was not in Miami at the time in question, and he appeared confused. He did not seem to comprehend the interrogator's apparent intent that he simply corroborate the fact of his absence from Miami. Nor did he take the question as one laced with humor or sarcasm, given the august setting in which it was asked. And he didn't want to make himself or the interrogator look like a fool by stating the obvious, so he answered, "I don't understand."

Which brings to mind another cultural idiosyncracy I have observed. Some witnesses may find it difficult, if not impossible, to answer a question with a simple "yes" or "no." Indeed, the witness may never utter either one of those simple answers. Instead, the witness will launch into a prolonged explanation to justify himself or herself in the eyes of the judge and the jury. Bear with me while I set the stage to share with you a painfully obvious example. If you recall, earlier in my talk I told you about a defense witness who had been called without the defense attorney ever having interviewed him before trial. As I previously mentioned, the witness went on to "crucify" the defendant, his former wife. The witness had been charged with a crime committed in 1989 but had not been apprehended until 1996. The defense attorney asked: "So it's fair to say that between 1989 and 1996 you were out on the street, correct?" Answer: "Yes. But that doesn't mean that I did anything wrong. And I pled guilty to the crimes that I committed." Question: "Sir, that wasn't my question. My ques-

tion was simply to uncover the fact that between 1989 and 1996 you were on the street." Answer: "Yes, working out on the streets, like anybody else."

This tendency to expand and explain usually surfaces when the witness is being cross-examined. It is a normal human reaction for a person to explain and defend himself or herself when the person feels under attack. The case I'm recounting appears unusual. The witness is justifying himself on direct examination. Why? Cultural differences, compounded by the failure to interview and prepare the witness before trial. To put it mildly, the entire examination of that witness turned into a comedy of errors.

Many of the problems I have discussed are a result of inadequate training of new practitioners in the art of witness interrogation. However, I submit that the failure to compose clear and direct questions to be asked of witnesses is also reflective of a malady affecting every aspect of our increasingly computer-dependent profession. Among the multitude of written submissions that cross my desk, I invariably find evidence of failure to proofread or, what is worse, complete delegation of the task to a computer. In a recently received motion to suppress a defendant's post-arrest statements, for example, his attorney argued that the defendant was "psychologically understable" at the time of the arrest. Even a computer spelling-check program would have caught that one. But how about the pleading submitted by a prosecutor in a criminal case on behalf of "The Untied States"? Or the one submitted by one of our most prestigious law firms, where an address that should have read "Kane Concourse" appeared as "King Kong Course"? Or, the obviously dictated personal injury complaint about a defective power mower, reciting that plaintiff was injured by his "paramour"?

This poem, published in Ann Landers' column, says it best:

> I have a spelling checker.
> It came with my P.C.
> The checker marks *four* my *revue*
> Mistakes I cannot *sea*.
> I've run this poem *threw* it,
> I'm sure *your* pleased *too no*,
> *Its* letter perfect in *it's weigh*,
> My checker *tolled* me *sew*.

Getting back to witness examination, how about these reported questions: "Were you present when your picture was taken?" "How far apart were the vehicles at the time of the collision?" "So you were there until the time you left, is that true?"

Am I being too critical? Do I expect too much of the attorneys who practice before me? In a case before one of our state appellate courts, one of the errors

assigned was the prosecutor's analogy of defense counsel's argument to that of a "squid attempting to cloud the water." The court, in ruling that the remark was not improper, observed that "[a] prosecutor's jury argument need not rise to the level of the giants of our profession in order to be proper under the law."[3] I suppose the same could be said of less than artful witness examinations. In response, however, I respectfully submit that while failure to attempt to rise to the level of the giants of our profession may not constitute reversible error, it certainly lessens the stature of our calling.

CONCLUSION

Ours is (or was?) the loftiest of professions. On the one hand legal advocates address the most humble and modest of our society (jurors); on the other hand they address the intellectual superiors—the "nobility," if you will—of our government (judges and justices of our courts). In each instance, the advocate's task is to communicate, to convince, to persuade. How? Through the spoken word. How well are we communicating? Not well! The most eloquent final argument falls on deaf ears if the jurors are lost in a sea of confusion created by, to put it kindly, less than skillful interrogation of witnesses.

I will not conclude however on this despairing note. It has been my experience that jurors seem able to sort through the confusion engendered by the shortcomings I've described and validate, time and again, my faith in a system that ultimately depends on the common sense of the common man. Let me leave you, then, with the thoughts expressed in a letter written to me by the foreman of a jury who served in a prolonged criminal trial, a newspaperman by trade: "This is just a brief note following my experience in your courtroom as a member of a jury. The trial I was involved in lasted six weeks with another week of deliberations. I just wanted to thank you and your courtroom personnel for making it the best of circumstances." After expressing his gratitude to various members of my staff and indulging in some levity, he continued, "Seriously, I went into this (and through a great deal of the trial) thinking maybe a system of professional jurists would be a better method of justice. I exit it knowing our forefathers knew a lot more than me and now have an understanding of why we have the system we do."

I share with that juror—and, I hope, with you—this abiding faith in our legal system. I challenge each of you to do your part in the preservation of that system by assisting our younger attorneys in the perfection of the techniques of advocacy.

---

[3] Williams v. State, 441 So. 2d 1157, 1158-59 (Fla. Dist. Ct. App. 1983).

PROFESSIONALISM IN OUR "RUDE, CRUDE, AND LEWD" SOCIETY†

John D. Liber*

The most important actions taken in determining the quality of one's personal and professional life revolve around the virtues and values that one decides to embrace. Values are as important to life as breathing. Everything we do is largely determined by what we feel is good and right and true about life, about people and about our profession. As lawyers, we can and must return to the core values embodied in our oaths as officers of the court, and in the ideal of the true professional.

Many of the men and women who have preceded me with the high honor and responsibility of writing this page have, to one extent or another, addressed the decline of professionalism and civility among lawyers. The assault upon lawyers has reached epidemic proportions and is the result suggested by many of the corresponding declines in skills, ethics, and the conduct of lawyers. Many people feel that this once learned and respected profession is nothing more than a business, beset with the stresses and strains of the marketplace. Critics say that our profession is more commercial and crass, our values fragile and often suspect.

In my opinion, the question has become: How are we any different from anyone else? What about the doctors and the medical profession? What about the clergy? What about teachers, journalists, and politicians? Are we any different from any other aspect of society? In other words, is the "decline" nothing more than a societal response to how people relate to each other in life?

Recently, the president of one of our major, most highly respected eastern universities (the name has been omitted to protect my friends) spent an evening in one of the student dormitories. The residents had been told that the president was coming to talk with them on any issue they wanted to discuss. They had the opportunity to go one-on-one with the president, in an informal atmosphere, on any subject. Let your mind run with that for a minute. If you had that opportunity, what subject would you raise? The purpose of a university education? The desired effects of good teaching? His vision of a good society and how the university graduates are prepared to contribute to society? Actually, the president of this university left the dorm that evening with a list of four issues:

---

† Reprinted, with permission, from the President's Page of the CLEVELAND BAR JOURNAL, February 1998.
* Spangenberg, Shibley & Liber, Cleveland, Ohio; Fellow, International Society of Barristers.

1. The maid service in the dorm is lousy.

2. There are two broken toilet seats in the downstairs men's lavatory.

3. Can't something be done to get a janitor in the building on Sundays to clean up the mess that's left after the weekend parties?

4. Can [the university] do something to arrange for live music on campus every Saturday night where there is food and drink but where we can also dance?

I cite this example from the book *The Abandoned Generation*, by Willoman and Naylor, not to disparage students, but to illuminate that something is radically wrong. The authors contend that many among the current generation of university students have been virtually abandoned during their formative years prior to college. They cite the high levels of divorce among the students' parent generation, the impact of two careers upon family life, the effect of watching parents lose their jobs during this era of corporate downsizing, and the substitution of television for active parenting. In a recent article in *Newsweek* entitled "The Culture of Neglect," the author stated, "A generation has come to college quite fragile, not very secure about who it is, fearful of its lack of identity, and without confidence in the future." A highly respected member of the federal judiciary, a member of the Circuit Court of Appeals for the Fifth Circuit, summarized the problem on the basis of " . . . how can you teach something at the graduate school level that one should have learned on a mother's lap?"

When and how did a once-revered profession take on all the negative aspects of business? The public perception of a lawyer today has changed from wise counselor and impassioned advocate to the master of the deal. The 1996 Report of the Professionalism Committee of the American Bar Association Section of Legal Education and Admission to the Bar entitled "Teaching and Learning Professionalism" concludes that we have experienced a serious decline in professionalism in recent years. The report calls for significant changes in the ways the ideals of professionalism are passed along to those already in or entering the profession. It points out that we have surrendered the traditional notion of law as a profession in an ever-growing demand for financial reward. The number of attorneys who are determined to make a real difference in our society diminishes each year. Many new members of this profession no longer attempt to become giving members to a society which has bestowed many opportunities on each one of them.

Perhaps each of us should take a moment to reflect. Let us start by recalling exactly what we *do* profess as lawyers. Didn't we become lawyers to be part

of a learned and noble profession? The ABA report's definition of a lawyer, derived from Dean Roscoe Pound's formulation, is ". . . an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good."

The ABA report notes that public service is "the essence of Pound's definition of a profession, and 'justice and the public good' [are] both the object of that public service and the ideal to which lawyers ought therefore be dedicated."

The concept of professionalism is intended to embody the highest ideals and aspirations for all lawyers. We all have an important role to play in sustaining and promoting those ideals and aspirations.

We function in a changing and evolving society. Any efforts to combat a perceived decline in professionalism and a resulting lack of public respect for lawyers must take into account the changing environment. It is indeed significant that the perceived concern about a decline in professionalism takes place against a larger backdrop of declining respect for traditional values in society as a whole. We are, indeed, professionals in a "rude, crude, and lewd" society.

I firmly believe that exhortations to lawyers about professionalism, while important, are meaningful only when reinforced by the reality of the behavior of all those in positions of leadership or authority. We must expect lawyers to "learn by what we do, not just by what we say." In the report card of public opinion, we are rated more by what we do than what we say. Teaching by example is more powerful than any official, written policy statement. Preaching to the choir, as it were, is simply that—"preaching." When we turn outward in our conduct in a more unselfish example—common good—rather than concentrating only on ourselves and our pocketbooks, we make a difference.

Public service was at the very core of the founding of this [Bar] Association 125 years ago. That sense of responsibility to the broader community and spirit of public service have been the essence of this Association. Taking a stand for integrity in the courts epitomizes the best qualities of what we mean by "professionalism." This Association must provide support to its members, both personally and professionally. We work to improve conditions and promote collegiality among ourselves, both of which are basic to a sense of participating in a common calling. We can kindle and nurture a sense of pride in participating in the best of the shared values of the profession.

We offer each other an opportunity to work and convene together. We come to know and respect each other in the context of working together to improve our skills and knowledge, while at the same time, in many respects, serving the broader public interest. What better way is there to restore civility and a shared sense of pride in a common calling? While "role model" is an overused term, leadership teaches by what it does, not by what it says!

Pursuing professionalism is no sport for the short-winded. It requires constancy, commitment, and all the resources available within the organized bar. Changing rude, crude, and lewd behavior must begin, like most revolutions, from within. By being true to our professional values, we can help renew public confidence in our profession. At the very least, we can ensure our own self-respect.

BRINGING OUR CITIES BACK TO LIFE: A CASE STUDY†

Nancy M. Graham*

It seems strange for me to address a group of trial lawyers. I have not actively practiced law in almost seven years, although many of the lawyers on my staff will tell you otherwise. I will say this: My training as a lawyer has been critical to my success as a mayor. For one thing, I don't worry about being controversial; I feel that if you're not controversial, you're not really doing anything. You will notice other ways in which my legal training has helped as I talk about my experiences in bringing West Palm Beach back to life.

I have to warn you that I am a passionate believer that we can bring our cities back, and I have a strong bias about some of the things that we need to do if we're going to be successful. This is difficult to address adequately in the time allotted, but I do hope at least to convey a sense of why each of you should pay attention to what's going on around you in your city, and I hope that in some way you'll want to get involved and demand positive changes. To inspire you, I will share with you a little bit of the West Palm Beach story and what I've learned from it.

West Palm Beach, across a river from Palm Beach, was founded by Henry Flagler as a railroad stop and a service center for Palm Beach. The train would come to the railroad station, and people would get off and take a little car down what is now the main retail street, Clematis, to the dock where they would catch a ferry to Palm Beach. The people who worked in Palm Beach as servants lived in West Palm Beach. This was not an illustrious history.

Still, I was totally unprepared for what I walked into when I took office as the first elected "strong mayor" in the city's history. (Interestingly enough, our city government had been changed by a petition initiative.) I faced a hostile city commission who didn't want me and a city manager who carried over from the previous system. They controlled the budget—and the city was broke. That, at that time, was a well-disguised secret. A year and a half after I was elected, the charter was strengthened again by the voters, and I finally got to take over the budget, only to discover that we were facing a $9 million deficit and had $6,000 in our savings account.

---

† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 12, 1998. It was illustrated with numerous photographs, which are not published here.

* Mayor, West Palm Beach, Florida.

Reality set in very quickly after my deficit discovery, and I had to take some rather Draconian steps. We were almost at our tax millage cap, and our tax base was a disaster. Our assets were our beautiful waterfront and our downtown, which was on its last legs. Something had to happen, quickly, and I found that there was no road map to guide me. The general literature on things like urban planning was somewhat helpful, but there was nothing that brought all the information together to tell me how to make my city work.

What we did in West Palm Beach might not work in other communities because of differences in leadership and politics, but I think there are some general principles of business design and leadership which can be applied successfully in other places. First and foremost, we had to take some risk, some reasonable risk. Most elected officials at the local level are afraid to take risk because the voters are pretty unforgiving if you take a risk and it doesn't work; but I believe strongly that if you're not willing to take some risk, you're not going to go anywhere.

Along with being willing to take some risk myself, I had to convince a lot of different interests that we had to change the way we were doing things and develop a strategy. We didn't have one. The city government essentially had sat and waited for people to come to us; and if someone did come in to say, "I want to do something in downtown West Palm Beach," the city officials had said, "Thank you for showing up. Do whatever it is you want to do, whether it's good for our city or not."

To convince the city officials and other interested parties that we needed to develop a real strategy, I used these arguments: First, it made economic sense because our taxpayers had invested billions of dollars in our downtown over the years—in public infrastructure, water, sewer, sidewalks, parks—and it was not fiscally prudent to waste that. Second, it was critical for us to stay in touch with our past so that we could better understand what kind of city we were and where we needed to go. It is difficult to develop a city culture in Florida because so many residents consider their homes to be elsewhere. Also, because we are a relatively young state, our historically significant buildings are often torn down in the name of progress.

What I did was really no different than being a plaintiffs' trial lawyer. My client was facing business ruin and bankruptcy, and I had to convince the jury to invest more money rather than disinvest. My defendants were conventional wisdom, fear, disinvestment, and old attitudes. My problem was that I didn't have just one jury. I had a multitude of juries, all with different backgrounds and interests. I had the city employees and the unions, who proved to be one of the tougher juries. Because of the deficit, I had to lay off a lot of people, and those who remained didn't understand how we could have money to spend on capital improvements, or why they had to change the way they were

doing business. I had a city commission, whose members didn't want me there and saw their power being diminished. I had the banks and the bond rating agencies, and I had to convince them to lend us money and give us decent bond ratings. I had a very diverse electorate, which included the downtown property owners and residential owners. I also had the old political establishment, the ones who were used to making deals to get what they wanted, regardless of whether it was good for the city as a whole. So I had all these juries with widely varying interests that I had to convince.

As all of you do when you go to trial, I brought in the best expert witnesses I could find, the best consultants to help me prepare and argue my case. Of course, in many instances, so did the other side, and I had to argue even harder. Sometimes I had to pit one jury against another, which could be challenging. With the early consultants, we drew pictures for the juries. The first of these was a master plan for the downtown area, which was crucial because the primary criticism I heard from businesses asked to invest downtown was this: "There's no predictability. We don't want to come down here because you don't know what it's going to look like later."

Another step we had to take was to clear our minds and start with a clean slate. Toward that end, we got rid of a lot of our ordinances and codes that prohibited us from doing what we needed to do. Then we had to write a new law book.

Let me get a little more specific about what we did and how I used my legal skills in the process. West Palm Beach was a sleepy little town. For a long time, it has been a stepchild not only of Palm Beach across the river but also of Miami, eighty miles to the south; but we did have a number of great assets going for us. We had an incredible waterfront; we had a lot of great, old civic buildings; we had a lot of vacant land. We focused on those in developing the master plan. Then we got $16 million in bond money so that we could make some public infrastructure improvements.

Our downtown library and the wonderful area in front of it were a source of civic pride. There we have a "dancing" fountain, and we carefully chose the flowers, the tables and chairs, the benches, the trash cans, and everything that went into that important public space. It made a statement to the public, and now people flock there, especially for lunch on beautiful days.

An old building that was near the fountain on Clematis Street suffered for years from peeling paint and pigeons in the windows. Today it is beautiful, with a bookstore downstairs and thirty-two livable apartment units upstairs. They always have a waiting list for those apartments. Another old building on one of our main corners on Clematis Street now has a gym downstairs and offices and loft apartments upstairs.

Interestingly, as we worked on these old buildings, we discovered a lot of hidden beauty. It seems that in the '60s and '70s, the architects and engineers

found it easiest just to cover the buildings. We took off all of those facades and found beautiful brick underneath.

Similarly, there was an old movie theater that we really wanted to preserve, in order to keep the history and character of the city street, and yet modernize in order to bring theater back to the downtown area. We were able to restore it inside and turn it into a state-of-the-art theater while preserving and beautifying it externally.

In addition to renovating buildings and beautifying public spaces, we wanted to make the downtown area appear lively and fun. We were hindered by laws that prevented flags and banners from being on the street, so we changed those laws. We also developed special programs, such as "Clematis by Night" on Thursday evenings, to bring people back downtown.

Recognizing that many people wouldn't come down because of their fear of crime on the street, we made police presence highly visible so people would feel safe. We took another, less obvious step to increase safety and the willingness of families to come downtown, and here my law background helped me; I wasn't afraid to take some risk of getting sued because I could do some research beforehand and determine my odds of getting in trouble. We had a lot of problems with prostitutes hanging around downtown. I decided to look at that as an economic issue and concluded that we had to find a way to stop the demand. As we arrested the johns, I started publishing their names in the newspaper. (This got a lot of attention around the world.) I got sued as I thought I would, but we obtained rulings at both the state and federal levels that there that was no violation of anyone's constitutional rights; the names of those arrested were a matter of public record. You'd be surprised how much this slowed down the trade.

Now we have a lot of healthy, fun activity on the streets downtown. People bring their kids down, the parents spend money, the money stimulates more business development, and the cycle expands. In fact, it has become so popular with families that we had to hire a fountain guard in the summertime. A lot of people were worried that the kids were going to get into the fountain, fall and get hurt, and sue us. I really wasn't worried, and it's amazing—we haven't had one lawsuit or complaint, even though we know kids do get in and fall. (The emergency room personnel at the local hospital have told me that they have treated a lot of kids with skinned knees, but nobody complains.)

In another area, there was an old, dilapidated Holiday Inn that had been vacant for about ten years and had become a drug haven. The property was in litigation, so I said to our city attorney, "I want you to go to the foreclosure sale and bid $1,000." He said, "Mayor, we can't get that for $1,000, and it's got all these problems, asbestos and so forth." I said, "Trust me; go bid $1,000." He came back within a half hour and said, "We got it for $1,000!"

Then, to emphasize that we were doing things differently, we imploded that building at the stroke of midnight on New Year's Eve. In that space, we now have an amphitheater, which is a focal point for concerts and lots of events, and even for picnics. It's an incredibly fun place.

Another initiative involved changing the balance between pedestrians and automobiles in the downtown area. The way we've redone the streets to make them more pleasant has been well received. We also started a green market that is highly successful.

The green market illustrates another general lesson about the process of resurrecting our cities. When you want to make changes like these, you must be decisive, you can't always let everybody know what the concerns are, and you can't wait until you have all the answers. For twenty years the community had been talking about having a green market, and I decided we just had to do it. I lined up a young woman to help me put it together. She came to me about three weeks before it was supposed to open, after we had advertised it, and she said, "Mayor, we can't open this green market because we don't have enough vendors." I responded, "We have to open it because if we don't, we'll lose our credibility." So we went out and bought everything we needed, wholesale, and we got everybody we knew—friends, relatives, anybody we could—to work on Saturdays for two weeks to sell what we had bought. After two weeks, I had vendors lined up wanting to be there.

We faced another situation in which my legal background really helped me. Back in the 1960s the Carmelite nuns bought the last of the beautiful waterfront hotels in our area and operated a retirement home out of it. It didn't work very well for that purpose, and the nuns wanted to tear it down and replace it with a more efficient but ugly building. I wouldn't issue a demolition permit, so they sued me and said I cared more about old buildings than I did about old people. We negotiated and ultimately agreed on a beautiful design. Because I was not afraid of litigation, we got a beautiful building instead of an eyesore on our waterfront.

I'd like to turn now to the vacant land I mentioned earlier, because this will show you how far we have come in a few short years. We had about eighty acres sitting vacant at the edge of the downtown area, as a result of the failure of a private development project in the mid-1980s. This vacant land was next to a beautiful performing arts facility that opened shortly after I became mayor. Next to that, we had just finished the revitalization of a school of the arts that is really phenomenal, and nearby was a beautiful, historic church building. I realized that somehow we had to get ownership and control of that vacant land if we were going to be successful in revitalizing the city, and we needed to get it back on the tax rolls.

The difficulty was that if people found out that the city government wanted the land, the prices would go up; and because we operate in the sunshine, it is hard to keep plans like that quiet. In this instance, only three of us—the city attorney, the city administrator, and I—knew what was happening, and we were able to negotiate and acquire the land over a period of time. Again I used the help of some wonderful consultants. Then we put out an RFP and formed a partnership with a tremendous national developer. What's about to happen is the most exciting and progressive redevelopment project in Florida, called City Place.

This project includes a convention center, a hotel, major retailing, entertainment and office buildings, and 550 residential units. The historic church building becomes the focal point of the whole project and will house a performance facility. There will be a magnificent public square. The entertainment space will include 111,000 square feet of cinemas. There will be about ten restaurants, four of which are new to the Florida market. We will have a cultural exposition center and a children's museum.

Not only is the use of the space exciting, but the architecture is special. Each retail shop has been individually designed; each will be architecturally different and significant as though it were built over time. The primary emphasis is on street retailing. Over some shops there will be residential space, so we will have live-work units. The city is investing over $50 million in related public space improvements, including numerous fountains and the church plaza with an influence from classic Italian cities. Our hope is that the way we've designed it, it will become a destination. It will be like something you could see in Europe, and you won't have to pay thousands of dollars or travel thousands of miles to get there.

What I hope you get out of all this is the importance of design, the importance of paying attention to the space and all the things that make cities special. Along with that, you have to assure cleanliness and safety. It can be done, and it has to be done. We have to reinvest in our older cities because we have a lot at stake. And a lot to lose if we don't.

The jury is now coming in, in West Palm Beach, and I think the verdict is favorable, especially financially. Our initial public investment of $16 million has resulted in more than $750 million of private investment in the last four and a half years. I consider that a very good verdict.

Our cities and communities can be shaped by chance or by choice. We can continue to accept the kinds of communities we get, or we can argue our case and insist on getting the kinds of communities we want. If you do some of the things we have done in West Palm Beach, the results will happen much faster and will be much richer. The cities we save won't be the same as the cities that existed twenty or thirty years ago, but I believe there is a pent-up hunger for the civic, cultural, emotional, and commercial life and the sense of place that people can find only in cities.

FIVE SECRETS FOR A MAGICAL, MIRACULOUS WAY OF LIFE†

Pat Williams*

I have written a book called *Go for the Magic*, and I want to talk to you for a few minutes about that because it seems appropriate to your stay here in Orlando. The meat of that book is about an airplane ride that a man took over this very property thirty-seven years ago. A little private plane took off from a private airfield adjoining this property, gained some elevation, and began banking to the left. One of the passengers, a man from California, looked out and saw acres and acres of citrus trees, stretching as far as he could see. He thought to himself, "Right in the middle of all those trees, imagine a giant castle coming out of the ground where young people from all over the world could have the entertainment experience of a lifetime." Then the plane banked further to the left and flew over one of the many lakes in central Florida. The man looked down and saw an alligator sunning itself by the side of the lake and a blue heron standing on one leg in the shallow part of the water. He thought, "Around a lake just like that I can picture the nations of the world building monuments to their own countries, a kind of perpetual World's Fair that would help bring this whole world a little closer together." The plane flew on, over a marshy bog. Here the man thought, "There is the perfect spot for a working movie studio, Hollywood East, where people from all over the world could come and experience the fascinating world of movie production and films." It would have been a thrill, wouldn't it, to have been on the plane that day with Walt Disney. That plane ride was to change the face not only of Orlando and the state of Florida, but really our country and even the world.

The characteristic that most fascinates me about Walt Disney is the fact that he was a dreamer, maybe one of the great dreamers in the history of the world. A quotation attributed to him hangs at Epcot Center: "If you can dream it, you can do it." I believe that. I am convinced that nothing happens in any of our lives unless first we dream. As Michael Jordan said before the NBA playoffs a couple of years ago, "Dreams are what everything is about." Welcome to the city of dreams.

I arrived here twelve years ago with a dream to help create an NBA franchise from scratch. After twelve years with the '76ers, I needed a new adven-

---

† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 9, 1998.

* General Manager, Orlando Magic.

ture, a new challenge. As I worked to realize this basketball dream, something else interesting happened to me— I became "Disneyized." This is an insidious form of brainwashing that takes place when you stay here for any length of time. It just weaves its way into your brain patterns and your lifestyle.

First, I became fascinated with the life of Walt Disney. I read everything I could about the man and also spent time with senior Disney executives who had worked with him. As I talked with them and continued my reading, I made a very interesting discovery: Walt Disney had five secrets that allowed his dreams to become reality.

I spent eight or nine years researching these secrets, doing everything I could to investigate and develop them. The five secrets, I learned, were not unique to Walt Disney. He practiced them and they worked in his life, but they're equally applicable to every one of us as well. I became convinced that if we apply those five secrets on a daily basis, all of our dreams can come true also; and the end result was the book I referred to, *Go for the Magic*, about these five secrets.

DISNEY'S FIRST SECRET: "THINK TOMORROW"

When you get right down to it, we all have three blocks of time that we need to deal with in our lives. The first, of course, is yesterday, and the best advice I can give you about yesterday is to learn from it, benefit from your past, take advantage of all that occurred, but please don't live in the past. "The past should be a springboard, not a hammock."

The second block of time that we must deal with is today. Here's what I recommend for today: Live it to the fullest. Max out on it. Erma Bombeck put it this way: "Seize the moment. Remember all those women on the Titanic who waved off the dessert cart." Do you know who can teach you about living each day to the fullest? Your family dog. Let me tell you what you can learn from your dog. Never pass up the opportunity to go for a joy ride; allow the experience of fresh air and the wind in your face to be pure ecstasy. When loved ones come home, always run to greet them. When it's in your best interest, practice obedience. Let others know when they have invaded your territory. Take naps and stretch before rising. Run, romp, and play daily. Eat with gusto. Be loyal. Never pretend to be something you're not. If what you want lies buried, dig until you find it. When someone is having a bad day, be silent, sit close by, and nuzzle them gently. Thrive on attention and let people touch you. Avoid biting when a simple growl will do. On hot days drink lots of water and lie under a shady tree. When you're happy, dance around and wag your entire body. No matter how often you're scolded, don't sink into guilt and pout; run right back and make friends. Delight in the simple joy of a long walk. And when all else fails, beg.

The third block of time we have to deal with is tomorrow. Not long ago I spoke at a conference in New Orleans. The night before my speech, I slipped out of my hotel room and went into the French Quarter. That night on Bourbon Street I saw a lot of people living for the moment. They might have been living today to the fullest, but they were not acting on Disney's "think tomorrow" maxim! Walt Disney said, "Everything you do today must pay dividends tomorrow. Everything you do today is a investment to pay off tomorrow." And when you apply that to all the areas of your life, believe me, you go about your life differently. For example, if you look upon your business as an investment to pay dividends tomorrow, you're going to do business differently. If you are a parent and view each day with your children as an investment that will pay dividends tomorrow, you will parent in a different fashion.

There is another important point to be made here: The best investment you have today is you, and you don't ever have to apologize for what you invest in yourself. I say this particularly to women who are caught up in raising children and are pouring their lives into everybody else: Don't neglect *you*.

People ask me all the time, "Why do you run so much?" I've just finished running my eighth marathon. I also lift weights. Why? The answer is simple: I'm getting in shape for old age. I'm investing today so that when I'm eighty-four years old, I can wear out my grandchildren. Also, deep down, I would love to live to be a hundred. With that in mind, a few years ago I called George Burns to get some advice. When I asked him what I had to do to live to be a hundred, he said, "First of all, you've got to get to be ninety-nine. Then for one year be very careful." He added that all his financial advisers had been recommending that he invest in futures, and he responded, "Futures! I don't even buy green bananas anymore." Then I asked, "George, what is the greatest advantage of being a hundred?" He said, "Very little peer pressure."

THE SECOND SECRET: "FREE UP YOUR IMAGINATION"

With a freed-up imagination, there is absolutely no limit to where any of us can go or what we can accomplish. Most of us stop ourselves with a mindset that says, "So high and no more." Perhaps a fifth-grade classmate said, "What makes you think you can ever do that?" Or maybe your great-aunt said, "You'll never be able to accomplish that," when you were eight years old. We all hear such remarks, and we let these life-limiting thoughts take up residence in our minds.

Not long ago I talked to a man who had worked for Disney for forty years, and I asked him a question that had long been on my mind: "If Walt Disney came back to Orlando right now and saw everything that was going on, what would he think of it? Would he be surprised?" The man said, "Not at all. He

saw all of this in the airplane that day. He probably would tell us we're behind schedule." That's a freed-up imagination! I want to encourage you to set your imagination free, and I want you to encourage your children and your grandchildren and everyone you touch to free up their imaginations. Because Uncle Walt said so.

THE THIRD SECRET: "STRIVE FOR LASTING QUALITY"

The quality of the Disney operation is amazing, isn't it? I'm just awed by it. It sets the pace for central Florida. Everybody's got to stay on track or look bad by comparison.

So I have become fascinated with quality and have done a study about the keys to quality. I've made some interesting discoveries. (This will be another book.)

The first key, whether you're in the basketball business or the entertainment business or the legal business, is that you've got to work as a team. The day of the lone ranger is over.

Second, the customer is king or queen. That's why we're in business. We may think we're in business for ourselves, but, as the Disney people are constantly aware, whatever you do for the customer, you can't do enough.

Third, everybody on the team is responsible for quality. You can't point fingers or dump the responsibility or blame on somebody else.

Another important point about quality is this: If you love what you're doing, if you have great passion for what you do, you'll do quality work. Nothing works well without energy, without enthusiasm, without passion. Vince Lombardi said the difference between success and failure is energy. Referring to Michael Jordan, a great hero to many of us, a center on the Bulls said not long ago, "Michael is always up." He was right. On a Wednesday night in January in Sacramento Michael will be as "up" as in a finals game in June. That's a lesson to all of us.

Let me tell you one last thing I've learned about quality. You've got to pay attention to the little things. I've noticed that it's never the big stuff that gets gummed up; it's always the little details. In his autobiography published a couple of years ago, Colin Powell talked about his thirteen rules for living, and one of them was, "Always check the small things."

THE FOURTH SECRET: "STICK TO IT"

Walt Disney said, "You've got to have stick-to-it-ivity." (He was much like Howard Cosell; whenever he needed a new word, he'd just make it up.) Stick-to-it-ivity is Disneyese for hanging in there, for refusing to give up, for tenac-

ity, fortitude, perseverance. And it is clear that dreams never become reality without stick-to-it-ivity.

I heard Sally Jessy Raphael being interviewed not long ago. She was fired twenty-three times from different radio stations before she finally made it big. I will never forget her answer when she was asked about her talent. She said, "The only talent is perseverance." We all have that, or we *can* have that.

Do you realize that every person who has become famous came to a crossroad in their life when they could have quit, and had they quit we would never have heard of them? Prior to his tenth grade season, Michael Jordan was cut by his high school varsity basketball coach. Walt Disney was once fired by an advertising agency for his lack of drawing ability. In 1954 the man who ran the Grand Ole Opry said to young Elvis Presley, "You ain't goin' nowhere, son. You ought to go back to drivin' a truck." A film critic said of young Clint Eastwood, "You could hardly call him a bad actor since he's not even an actor." In 1933 a film director at MGM wrote a note about young Fred Astaire that said, "Can't act, slightly bald, can dance a little." Mark Victor Hansen and Jack Canfield had the idea that the American public would love to read a collection of warm, intimate, heart-rending stories, but thirty-three New York publishers disagreed and turned them down. So they published it themselves, and at last count the *Chicken Soup for the Soul* series had hit the fifteen million mark in sales.

THE FIFTH SECRET: "HAVE FUN"

Some of you will think this final secret is too simple or too silly. Have fun? I don't know why we have so much trouble with that, but it is probably the part of Disney's formula that seems most difficult. We seem to feel that we have to strap the uniform on every day, put on our serious faces, and grind our way through life. It shouldn't be that way. Thomas Edison said, "I never did a day's work in my life; it was all fun." When Theodore Roosevelt's rambunctious boys would leave his presence in the White House, he would say, "Have all the fun you can." On Billy Graham's seventy-fifth birthday, he said, "When my life is over, I want it to be remembered that I was fun to live with." *That's* the way it should be!

How can we have fun? I've thought a great deal about this. I've thought, researched, and investigated, and I have come to the conclusion that in fact it is neither very difficult nor complicated. Here's the trick. Just be yourself. I think that's it; I think that's the way to have all the fun you can.

Some of us, especially the men, might have to do a little destruction work first because we have built a lot of thick walls around ourselves and then dug moats around the walls. We have to rip the walls down and fill in the moats

before we can be ourselves. This involves taking a little risk because we fear that if we come out of all that protection and people don't like us, we will be destroyed. But I advise you to go for it, because if you do, you're going to have so much fun that you'll wish you had done it years ago.

Awhile back, when I was going to speak at another convention, I asked the driver who picked me up at the airport this question: "Who are the most memorable people you've ever had in your limousine?" He answered, "Oh, that's easy. Red Skelton and Jonathan Winters." I asked him why, and he said, "They were exactly the same in my limo as they were on television. No different. It's like they walked off the TV screen and got in my car. They were so natural, so real, it was amazing. I think that's why they had so much fun in their lives." This driver had it right. It was Jonathan Winters who said, "I couldn't wait for success so I went ahead without it." And Red Skelton said, "I don't hate my enemies. After all, I made them."

There is a woman who really has this concept nailed down, I think. I don't know her, but I was in her presence one evening. I'm talking about Barbara Bush, our former First Lady. She is so natural, so real, so down-to-earth, and I sense that she is having a ball. She tweaks the ex-President, and she even tweaks herself. I remember how she compared herself to her predecessor when she arrived at the White House in 1989. She said something like this: "Nancy Reagan adores her husband, I adore mine; she fights drugs, I fight illiteracy; she's a size three, so's my leg."

Have fun!

LEGAL LORE IX

TRIAL AND ERA†

Cathy Frye*

> ***Editor's note:*** *Joe H. Tonahill, of Jasper, Texas, now an Emeritus Fellow of the International Society of Barristers, is one of the Society's original Fellows and was a member of its first Board of Governors. Recently, the Beaumont newspaper,* The Enterprise*, published the following profile of Mr. Tonahill. We reprint it here, as another in a series of occasional articles about trial lawyers, for its glimpse into the life of a legendary Texas Barrister.*

Jasper—In the muggy summer of '46, Joe Tonahill was still settling into his recently established law practice. His partner was ex-college roommate Joe Fisher, and Tonahill was having a grand old time reliving old memories and making new friends. After months of drudgery at a government post in Washington, D.C., he was finally doing what he wanted to do.

He was, at last, a trial lawyer.

Then the undesirable case—with its equally undesirable client—landed on his doorstep. "I didn't want it," he recalls, describing the day the court appointed him to defend a woman accused of poisoning her stepson and a couple of husbands. Josephine Elveston wasn't exactly a sympathetic figure, Tonahill says wryly. Nor did it seem possible to come up with a plausible defense.

Ultimately, Josephine's trial and the extensive media coverage would give the young Tonahill his first national recognition as a talented trial lawyer. The next bout would come when he represented nightclub owner Jack Ruby, who shot Lee Harvey Oswald to death after President Kennedy's assassination.

But during that miserable, humid summer of 1946, Tonahill was unaware of the fame awaiting him in later years. Instead, he fretted over how to extract even a minute amount of pity from a jury for a woman who simply wasn't pitiable. So he set about garnering a little compassion for himself, hoping it would carry over to his client. If he could just manage to antagonize the judge enough so that he was sent to jail, Tonahill theorized, he might wheedle a bit of leniency from the stony-faced jurors. "I had to manufacture some sympa-

---

† Reprinted with permission from The Enterprise of Beaumont, Texas.

* Journalist, The Enterprise.

thy," he recalls with a roguish grin. "I was going to make them put handcuffs on me, face the jury and say, 'Now gentlemen of jury, it's up to you to see that this woman gets a fair trial.'"

It almost worked. By the time District Judge W.P. Adams had threatened for the 32nd time to find Tonahill in contempt, the brash attorney was convinced his ploy might pay off.

Then he glanced at the courtroom entrance. There stood his wife—his very pregnant wife—who by the warning glint in her eye indicated she wasn't about to condone her husband's antics. Tonahill promptly gave up that battle plan and instead set about questioning the medical examiner's report, arguing that there wasn't enough poison found in husband No. 2's body to have killed him.

Josephine initially faced the death penalty. Instead she ended up with a 30-year sentence and Tonahill got her out of prison after she served five years. Upon her release, she showed up at his office to apologize for being unable to repay him. "So I told her, 'I want you to go up to the judge's house, tell him you're out of the pen now and you want to cook for him.'" The judge wasn't amused. He promptly sent Josephine back to Tonahill's office, where she plaintively asked the attorney why he made her part of his joke. "I told her, 'I'm fully paid now,'" he recalls with a hearty laugh.

Tonahill, now 84, is an old-school trial lawyer, a looming, colorful figure in Texas lore. You simply don't see his kind anymore, his colleagues say. Except perhaps in old movies.

"When he went to court, he was almost bigger than the court," says long-time friend and colleague Buddy Low. "Without appearing to, he had control of the courtroom. When he said something, you just couldn't question it."

It's easy to imagine how Tonahill, with his massive frame and resonant voice, could commandeer a courtroom. He doesn't enter one very often these days, but still practices full time at his beloved Jasper office.

One can only speculate what his clients' first impressions are on entering that office, which could just as accurately be referred to as a museum. The lobby is filled with a court artist's sketches of Jack Ruby's trial, which were sent each night to Walter Cronkite so CBS could air them. The artist eventually gave 40 of the originals to Tonahill. A devoted University of Texas alum, Tonahill's inner sanctum is home to countless statues and photos of longhorn cattle and UT memorabilia. His furniture is upholstered in cowhide and the massive desk covered with photos and mementos of Texas' most revered historical figures.

If Tonahill didn't go to school with these well-known politicians, he met them in court, in Washington, D.C., or in the Navy. And once you befriend Tonahill, you're a friend for life, his colleagues say. "It's hard to know just how you met Joe Tonahill. He's just the kind of person you feel you've always known," Low jokes. That the affable Tonahill is a legend in Texas' legal cir-

cles only compounds itself, adds Houston attorney Nick Nichols. You know of him, therefore you know him, he explains. “Anyone who’s ever been in contact with him—in trial or at a social event—knows he’s met a great Texas lawyer. He’s respected by the bar and by the bench.”

The respect stems from the firm belief that Tonahill is a formidable opponent in the courtroom. He also is known for his adherence to a strict code of ethics. “Judges can have complete confidence in him,” says Senior District Judge O’Neal Bacon, whose courtroom was paced by Tonahill on many occasions. “He never misleads a judge. I just have a lot of admiration for him. And it’s always interesting to have him in the courtroom.” His friends say it’s interesting to have Joe Tonahill just about anywhere.

While well into his 80s, this giant of a man has an exuberance that belies his age. He is an animated storyteller, interrupted only by the periodic descent of his eyeglasses from their precarious perch on top of his silvered head. Each time the spectacles slide, Tonahill just pushes them back up his forehead, stubbornly refusing to remove them altogether. The patient, repeated gesture is indicative of the determination he shows when it comes to law. And to his clients. To this day, Tonahill steadfastly believes in the defense of his most famous client, Jack Ruby.

When California attorney Melvin Belli called in November 1963 to ask Tonahill if he would help represent the notorious nightclub owner, Tonahill was at first reluctant. The two attorneys were longtime friends who first met in 1949 at a seminar. “I said, ‘I’m not sure you and I want to get into this thing,’” Tonahill recalls saying. He was worried by theories that there had been some sort of Communist connection involving Ruby and Oswald. “Kennedy was sort of a hero to me too, you know.” But after the FBI released a statement that there was no such link, the lawyers felt confident about defending Ruby. And eventually, Tonahill came to sympathize with him. “He was a nothing from the ghetto in a horrible business trying awfully hard to be somebody,” he says.

Tonahill and Belli’s defense of Ruby was founded on the belief that the mentally unstable man also suffered from a mild form of epilepsy, which was triggered on the night of Oswald’s death by the media’s flashing camera bulbs. To bolster their case, they called in experts who testified that Ruby’s position when he shot Oswald supported the epilepsy theory. Tonahill points at a huge black-and-white photo of the shooting, which dominates the right wall of his office. Ruby used his middle finger to pull the trigger, he says, and the nightclub owner also gripped the gun in an awkward fashion. The epileptic shock was caused by the flashing lights surrounding Oswald, his attorneys argued, and he had several violent episodes in the past that also were attributed to his condition.

Ruby carried a gun because he was eccentric when it came to his finances and he frequently had a lot of cash on him, Tonahill says. On the night Oswald was shot, Ruby was drawn to the crowd surrounding the alleged killer out of curiosity. "But when the flashbulbs went off and he saw [Oswald's] sneer, he went for him," Tonahill says.

Despite his attorneys' compelling argument, Ruby was sentenced to life in prison. But in 1966, the Court of Criminal Appeals reversed the Dallas verdict, saying the trial should have been held elsewhere. In a concurring opinion, one judge expressed admiration for the way in which Tonahill handled Ruby's defense. "Through much stress and strain, misunderstanding among client and appellant's relatives, he has exemplified the highest standards of the legal profession . . .," the justice wrote. It is a compliment Tonahill still savors today.

Born on a dirt farm in Hughes Springs, he never thought of becoming an attorney until three years after graduating from high school. While working as a roughneck in the Texas oil fields, Tonahill was badly burned in an accident. He soon learned that a poor, ignorant teenager wasn't going to get the compensation he deserved from the oil company's high-powered attorneys. As the disheartened Tonahill was leaving the hospital, his father turned to him and said emphatically, "Boy, you're going to become a lawyer."

And he did.

Along the way, he met his wife of 56 years, Violett, at a cotillion on Washington's Dupont Circle. Despite her background as a U.S. congressman's daughter, Violett didn't mind giving up the glamour of D.C. for Jasper, Tonahill says.

Since starting his practice here, his old partner and college roommate, Joe Fisher, has stepped up to the bench in the U.S. district courts. But Tonahill was content to remain in Jasper at what is now Tonahill, Hile, Leister & Jacobellis, even after his wife's death 1 1/2 years ago.

Tonahill, who once worked in the Jefferson County District Attorney's Office, also has worked on a fair number of high-profile criminal cases. Jack Ruby's case was the most famous. Some cases, however, were equally bizarre. In the 1950s, for example, he represented a group of hunters who were shot by ranchers angered by the hunters' deer dogs that kept running across their land. The ranchers were so impressed by how Tonahill handled the hunters' case, they approached him about taking up their defense when they were indicted on charges of murdering a couple of the hunters, Tonahill says, laughing. He politely declined.

These days, he handles only the personal injury cases. But he intends to keep practicing law as long as his health allows, Tonahill says. "Quitting would be the hardest thing to do because getting to be a lawyer was the hardest thing to do," he jokes.

Those who know him best say it may have been difficult getting there, but once Tonahill began practicing, he made a lasting impression on the art of lawyering. And with him, it is most definitely an art, Nichols says. “As all the trial lawyers say, he is one hell of a lawyer.”