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A Profession at Risk

Roger J. Miner '56

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Joint Bar Association Meeting
Fulton, Montgomery, Saratoga and Schenectady Counties
Chaucer's Restaurant
Clifton Park, New York
January 17, 1991
6:00 P.M.

"A Profession at Risk"

I.

As I begin my 35th year at the bar, I find myself more deeply concerned about the condition of the legal profession than I have been at any time in the past. It seems to me that the number and variety of serious problems facing the bar are more overwhelming than ever before. Besieged by these problems, the ability of the profession to play its accustomed role in American society has been eroded. We are members of what has become, in many ways, a profession at risk. I remain optimistic, however, about the future of the calling I have loved for all these years. I continue to believe that there is no problem that cannot be solved by lawyers working in association with each other. It is therefore my sincere hope that the concerns I am about to share with you this evening will merit your attention and consideration.

II.

The various branches of the legal profession perform their work through the media of written and oral communication. The bar is constrained to communicate with many diverse audiences. Despite the obvious need for clarity of expression, the deterioration of the communication abilities of lawyers has reached crisis proportions. This criticism applies to lawyers of

all kinds -- litigators, adjudicators, legislators and educators, as well as counselors. Poor communication is near the top of the list of complaints made by clients about their lawyers. More and more, irreparable breakdowns are occurring in the attorney-client relationship, occasioned by the neglect of lawyers to impart necessary information to clients in an effective manner.

The convoluted writing styles apparent in many judicial opinions, administrative agency decisions and statutory enactments have served to muddy up the law itself. As an appellate judge, I can attest to the worsening of brief writing and oral argument. Legal academic writing is well-nigh incomprehensible. The case reports are rife with tales of the disastrous effects the expressive deficiencies of lawyers have had upon clients as well as upon lawyers themselves. Defective communication of legal advice to clients has been generating lawsuits in ever-increasing numbers.

Words, written and spoken, have been the tools of the legal profession from the very beginning. Yet, the present-day inarticulateness of the bar has made it necessary for law firms to hire public relations counsel to speak to the public for them and to deal with the press on their behalf. It is now not uncommon for these media advisers and image makers to be full-time law firm employees. There was a time when some people would refer to a lawyer as a "mouthpiece." How surprised they would be to hear a mouthpiece speak through another mouthpiece! One must wonder if the time is far off when an attorney will counsel

clients through the medium of a "communicator." Communication failure in the trial lawyer-to-witness context is best illustrated by the following examples of courtroom drama taken directly from trial transcripts:

Q. Now, Mrs. Johnson, how was your first marriage terminated?

A. By death.

Q. And by whose death was it terminated?

Q. What is your name?

A. Ernestine McDowell.

Q. And what is your marital status?

A. Fair.

Q. What happened then?

A. He told me, he says, "I have to kill you because you can identify me."

Q. Did he kill you?

A. No.

Q. Are you married?

A. No, I am divorced.

Q. What did your husband do before you divorced him?

A. A lot of things that I didn't know about.

Q. At the time you first saw Dr. McCarthy, had you ever seen him prior to that time?

Q. Now I am going to show you what has been marked as plaintiff's Exhibit No. 2 and ask if you recognize the picture.

A. John Fletcher.

Q. That's you?

A. Yes, sir.

Q. And you were present when the picture was taken, right?

Q. Mr. Jones, is your appearance this morning pursuant to a subpoena which was served upon you?

A. No. This is how I dress when I go to work.

Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?

A. Oral.

Q. How old are you?

A. Oral.

Q. As you were driving your car just before the accident, where was your right foot located?

A. It was located at the end of my right leg!

Q. Do you have any sort of medical disability?

A. Legally blind.

Q. Does that create substantial problems with your eyesight as far as seeing things?

Q. Are you qualified to give a urine sample?

A. Yes, I have been since early childhood.

EXPERT WITNESS

Q. What is the meaning of sperm being present?

A. It indicates intercourse.

Q. Male sperm?

A. That is the only kind I know.

The legal profession must confront its communication crisis and recognize the need to clarify, edify and simplify in all forms of legal expression.

III.

I am concerned about outside interference with the attorney-client relationship, and I am seriously concerned about the erosion of the attorney-client privilege. In a recent decision relating to the privilege as applied to confidential information passed to an accountant assisting attorneys in a joint criminal defense, I wrote the following: "Narrowly defined, riddled with exceptions, and subject to continuing criticism, the rule affording confidentiality to communications between attorney and client endures as the oldest rule of privilege known to the common law." That sentence was not necessary to the opinion. It was designed to point out to the reader, as I point out to you

this evening, that an important cornerstone of the legal profession is crumbling. Our court held not too long ago that an attorney must reveal to a grand jury the names of those who paid him to represent his client. Currently on appeal is a case involving the applicability to lawyers of a 1984 federal statute requiring all persons to report to the IRS the names of those who pay for services with cash in excess of \$10,000. It is no secret that there are those who think that the whole concept of a special privilege for communications between attorney and client is an anachronism (whatever that means) and should be abolished.

The new Professional Disciplinary Rules, adopted by the New York Appellate Divisions, include some new and disturbing language with respect to client confidences. They provide that such confidences may be revealed "to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information." First of all, isn't this language a fine illustration of the communication crisis! In any event, what is the "extent implicit" in withdrawing a representation? What is "materially inaccurate information?" Does the phrase refer only to information furnished by a client? Who decides when confidences may be revealed under this provision? Under what circumstances can a lawyer be forced to

disclose confidences under this confusing standard? I suggest that the bar may have let this one slip by without adequate consideration of its consequences.

Some of you may be acquainted with the federal statute that allows the government to restrain property before trial pending a trial determination of forfeiture in certain criminal cases. The statute has made it impossible for many defendants to retain counsel out of available assets. The Supreme Court held in 1989 that this was not a Sixth Amendment violation. But just because a law is constitutional does not mean that it is good policy or that it does not eat away at the relationship between attorney and client. It seems to me that there is less trust and confidence flowing from client to attorney today largely because of the interposition of the government between attorney and client and because of the successful arguments of those who see no purpose in maintaining the privilege of confidentiality.

IV.

And that brings me to another hazard that requires your vigilance -- the imposition of requirements upon lawyers by those who have no idea of the problems confronting lawyers in their practices. An example is the proposal for mandatory pro bono work, a concept unknown to any other profession. One of the finest traditions of the bar is the performance of legal services without fee for those unable to afford the services. Most lawyers perform more pro bono work by mistake than any mandatory

program would require. Many problems attend the notion of mandatory pro bono. How many hours should be required? What happens when those hours are concluded and the matter assigned remains uncompleted? Should lawyers perform service in matters with which they have no familiarity? What about lawyers employed by government? What about payment by lawyers in lieu of pro bono services? How shall such a vast program be administered? Who will make the decisions on assignments?

Another mandatory program in the works for lawyers is continuing legal education. The practice of law is an ongoing program of self-instruction and education. Many lawyers undertake courses in a more structured environment also. Each member of the bar uses his or her own judgment as to what is required in the way of continuing legal education. This too is a part of the independence of the bar. Is mandatory continuing legal education really necessary? It does not seem to have accomplished much in other states that have implemented it. People show up and put their time in because it is required, not because it is necessary or desirable. Mandatory programs eat away at the independence of the bar and serve notice that lawyers cannot regulate themselves. And who are those who press for the mandatory programs? They are judges, law professors and mega-firm partners -- the very people who have little knowledge or contact with the workaday world of real lawyers. My father, who practiced law for sixty years until his death a few years ago,

reminded me weekly about clients, overhead, stupid judges and the increasing regulation of the legal profession. My brother and his wife, who practice together in Hudson, have taken over the job of reminding me about how little judges can relate to the problems of practicing lawyers.

V.

The legal profession also is at risk for lack of collegiality. It seems to me that the duties lawyers owe to one another -- honesty, fair dealing, cooperation and civility -- have been much neglected in recent years. All too many lawyers condone and utilize practices involving the neglect of their duties to colleagues. These tactics are variously described as "hard ball," "scorched earth," "take no prisoners," and "giving no quarter." They are practiced by lawyers who are pleased to compare themselves to Rambo and Attila the Hun. They call themselves "Bombers." I call them legal terrorists and barbarians of the bar. Examples of their disgraceful courtroom behavior can be found in the reported cases.

In one of my own decisions, I was constrained to take notice of a prosecutor who addressed defense counsel at one point as "you sleaze," and another as "you hypocritical S.O.B." The same prosecutor objected to the questions of his colleague as "nonsense" and, according to the record, accused him of being "so unlearned in the law." In a District of Columbia Court of Appeals decision, there is a description of a courtroom dispute

in which one lawyer made ad hominem attacks on the ethnicity and educational background of his colleague. There are reported decisions of lawyers using vile and abusive language to other lawyers and of assaults perpetrated by one lawyer upon another. In one reported incident involving such an assault, the judge and his law clerk tried to separate the fighting barristers and the judge was injured in the scuffle. I consider that to be a really serious matter. Clients, the legal system, and society at large are ill-served by a profession that cannot maintain minimum standards of decency within its own ranks.

The exercise of professional judgment in granting extensions of time or adjournments is not the province of the client. Non-cooperation in these matters is counterproductive and ultimately disserves the client as well as the legal system. I believe that judges should deal harshly with those who refuse to grant professional courtesies and thereby cause their colleagues to apply to the courts for the relief that could have been afforded so easily. As I recall my trial court days, the lack of cooperation most frequently occurs during depositions. A recent newspaper article described a deposition where an attorney interrupted a witness while ranting, raving, screaming and munching on a sandwich; it was said that the other lawyer made faces, rattled papers, waved his hands and cursed. There is just too much of this kind of conduct, and it is inexcusable.

VI.

There has been an increasing dissatisfaction with careers in the law, and this too places the profession at risk. A recent survey conducted by the American Bar Association shows that lawyers are less fulfilled, more fatigued, more stressed, more caught up in office politics, more likely to be in unhappy marriages and more likely to drink excessively than ever before. According to the survey, these problems are present in firms of all sizes and affect lawyers in all positions, from junior associate to senior partner. Interestingly enough, the survey shows that intellectual challenges, rather than money, continue to drive the choice of a legal career. However, a deterioration in the workplace and the inability of lawyers to have more time for themselves and their families are out-balancing the positive factors that make law practice enjoyable.

More disturbing is the fact that women, now about fifty per cent of all law graduates, are much more dissatisfied than men in the profession. Almost twice as many women as men in the survey reported dissatisfaction. More women than men reported that they are not respected and treated as professional colleagues by their superiors; that they are not adequately compensated for their work; that advancement is not determined by the quality of their work; that political intrigue and backbiting abound in the work environment; that the office atmosphere is not warm or personal; that there is insufficient time for themselves; and that their

tasks are not sufficiently challenging.

Men and women are leaving the profession in ever-increasing numbers as the malaise among lawyers continues to grow. Those who remain dissatisfied but continue to practice cannot be as effective as they would be if they enjoyed what they are doing. Dissatisfaction at the bar imperils lawyers as well as those whom they serve.

VII.

I think that the treatment of young lawyers in the modern mega-firm generally is a disgrace. The young men and women who start out eagerly in these firms, seeking challenges, full of youthful energy, are soon discouraged. I find that these new members of the bar are becoming dissatisfied with the profession at an alarming rate. Consider the mega-firm treatment of a young lawyer. The best and the brightest law graduates are hired directly from law school or from a judicial clerkship. In the largest firms, they are paid a salary that ranges between \$60,000 and \$90,000 as starters. Some of my clerks have received sign-up bonuses of up to \$10,000, just like baseball players. Everyone knows that the new lawyers are not ready for prime time and certainly are not ready to bill clients large amounts of money for their expertise. Yet their time is charged out to clients from the very beginning in amounts sufficient to cover their salaries and make a profit for the firm.

The new mega-firm associate is required to bill 2,000 to

2,300 hours each year in order to justify his or her existence. The work given to these people is often stupefyingly dull, sometimes consisting of "due diligence" examinations or other work that could be done by a paralegal but instead is done by an associate in order to increase the billings. By and large, these people are left to their own devices in deciding what hours they should bill, but they must always bear in mind that they are profit centers for the firm. They are given little instruction on what they should do, but their superiors are intolerant of mistakes. Instruction takes time, and the time of partners and senior associates simply is too valuable to use up in this manner. Although all these firms boast about their mentor systems, mentoring by senior partners generally is a fiction, and law firm education is acquired on a catch-as-catch can basis. Often there is a lecture or some formalized teaching in a large law firm, but the old days of carrying a partner's briefcase to court are lost in the modern era of the bottom line.

Aside from the lack of training and the absence of intellectual challenge, many of the young lawyers hired by mega-firms now face the prospect of an uncertain future. The recent downturn in the business of Wall Street law firms has brought about some early layoffs of young associates, many of whom took the job in the first place in order to make the payments on their large educational loans and would have preferred to work elsewhere but for the money. Many of the firms that have fired

young associates dishonestly claim that the young lawyers did not measure up to their standards, when in fact it is just a matter of economics. In another day, everybody from the top partner on down would take a little less compensation in order to avoid the need to fire young talent. Becoming a partner at a major law firm always has been difficult, but at least there was the prospect of some long-term employment before the fateful day of separation.

I think that smaller law firms generally deal more fairly with new lawyers. Unfortunately, they are unable to provide anywhere near the financial rewards. What they can provide, however, is important guidance, hands-on experience, client contact, pleasant working conditions, certain employment, ethical training and a love of the law. Even in the smaller firms and in the government law offices, however, the tradition of mentoring is not as strong as it was, and this is most detrimental to the profession. The callous attitude toward young lawyers all too prevalent today is best summed up in a colloquy that actually occurred between a former clerk of mine and the senior partner of the 1,000-member law firm where he was employed. After working 14-hour days, seven days a week, for many months, my former clerk told the partner he was quitting. The partner said: "You have done good work for us. Can we persuade you to stay? Would you like more money?" The young lawyer said: "I would like a life." The partner replied: "We don't give anybody a life."

VIII.

Closely related to the treatment of young lawyers as a source of concern to me is the status of their formal legal education. I think that relations between law professors and the practicing bar should be much closer. It seems to me that there is a widening gulf between those who practice the law and those who teach it. The courses in law school are becoming more and more esoteric. I recently read about a law professor who was much in demand by the law schools because of his expertise in Icelandic Medieval dispute resolution. I do not deprecate the important work of legal scholars. I say only that those who teach lawyers should impart some of the basic legal doctrine, rather than advancing personal agendas or limiting their teaching to fields that are important to them but not to the students.

This past summer I had as an intern a young man who had just completed his first year at a major law school. He was abysmally ignorant of such matters as basic legal research, elementary contract law and simple civil procedure. He had such first year courses as legal philosophy and "the administrative state." He was taught the philosophy of law before he was taught any principles of law. I asked him if he had studied property law during his first year. He said that he did have a property course but that the professor was most interested in the Takings Clause of the Constitution and spent most of the semester on that topic. This young student was very bright -- he had an excellent

undergraduate record and a high LSAT score. The problem was that he was not learning law in law school! I think that it would be well for lawyers to maintain close ties with the law schools and to assist in the development of curriculum. Adjunct teaching, participation in alumni matters and bar association contact with law professors is essential to the future of the profession. I fear that many law professors just don't like law or the legal profession and see themselves as engaged in some type of liberal arts endeavor. We must reclaim the heart and soul of the profession -- the law schools -- to eliminate a dangerous risk -- the risk of inadequately educated lawyers.

IX.

High on the scale of items that place the profession at risk is the economics of the profession. Competitive pressures, the cost of overhead, and a declining economy all are taking their toll. Many people are constrained to leave the practice of law because they simply cannot support themselves and their families on their professional earnings. We all know that the layman's perception of all lawyers as enormously wealthy always has been wrong. The best that we ever hoped for was a comfortable living and the opportunity for service and intellectual challenge. Today, largely because of the expansion of the profession, there is an ever-increasing capacity to meet the demand for legal services.

Unfortunately, many lawyers enter the profession without any

sort of knowledge of the basic economic requirements of private law practice. They overestimate their revenues and underestimate their expenses. They hang on longer than they should, and the results often are disastrous. One disaster is the theft of clients' funds, which has reached a new high. Restitution from the New York Clients' Protection Fund increased from \$1.9 million dollars in 1987 to \$4.5 million dollars in 1990, and the Fund does not make full reimbursement. Perhaps a course in legal economics could replace Hegelian philosophy in the law school curriculum!

X.

Just as the gulf between practicing lawyers and law professors is widening, I perceive that misunderstanding between judges and lawyers also is growing. This is most unfortunate, because we are all in this together. The problem is that some of my colleagues just don't understand or care to understand the problems lawyers face. I think that the job of judge is much easier than the job of lawyer. Maybe that is why so many lawyers want to be judges. When I became a judge, my father asked me how it felt to have no clients. To him, being a lawyer without clients was the best of all possible worlds.

Far too many judges see it as their job to dispose of as many cases as possible. This causes problems of many types for lawyers. The newly found power of judges to sanction lawyers for delay and frivolous lawyering also has caused unnecessary

friction. Lawyers should not hesitate to criticize the courts and the individual judges (in a respectful manner, of course). I once wrote an article pressing the argument that lawyers have an ethical duty to criticize the courts. I think that it is also the duty of lawyers to become actively involved in the identification and selection of those they consider qualified for the bench. Not every lawyer is temperamentally suited for, or interested in, serving as a judge. But it is necessary for everyone at the bar to participate in the process if we are to avoid the misunderstandings between bench and bar that imperil the profession.

XI.

I think that some recent revisions of the ethical standards presents some hazards that need to be addressed. The District of Columbia Bar Association recently adopted a rule permitting non-lawyer partners in law firms. Here in New York, the use of testimonials in the television advertising of legal services recently has been approved. We are increasingly faced with the problem of monitoring false and deceptive advertising on a massive scale.

The newly adopted Professional Disciplinary Rules require lawyers to report to disciplinary authorities non-confidential information that raises a "substantial question" as to another lawyer's trustworthiness. How are we to define "substantial question?" The new rule also allows withdrawal from

representation of a client when it is discovered that the lawyer's services have been used to perpetrate a fraud, even if the withdrawal is prejudicial to the client. Lawyers also are enjoined by the new rules from making statements to the media when they know that there is a "substantial likelihood" that such statements will materially prejudice the judicial proceeding. It is beyond me how lawyers can permit themselves to be governed by Professional Rules of Conduct that are so open-ended and unrefined.

XII.

I have identified a considerable number of problems that I think confront us as a profession. I believe that those problems are deep enough and broad enough to allow us to say that we are a profession at risk. Nevertheless, it lies within the ability of each of us, acting together, to remedy each and every one of the hazards I have identified. We must do so in the interest of preserving the practice of law as an independent, self-regulated profession supervised by the courts of which the lawyers are officers. And we must do so because the continuation of our free society and the preservation of the rule of law depend upon a strong, vigorous and vital legal profession.

Thank you.