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Roger J. Miner
U.S. Circuit Judge

The Fault Is In Ourselves
New York State Bar Association
Section on Commercial and Federal Litigation
Otesaga Hotel, Cooperstown, New York
May 7, 1995

I greatly admire the work of the Commercial and Federal Litigation Section. I well remember its formative years and was happy to participate in some of its earliest programs. When I was Chairman of the State/Federal Judicial Council in 1991, the Section and the Council co-sponsored a program entitled "Federal Habeas Review of New York Convictions: Relieving The Tensions." It was a very productive session for the federal and state judges present as well as for the members of the bar who attended. My good friend Michael Cooper was Chairman of the Section at that time. I am happy to count as my friends all the past Section Chairmen: The indefatigable Bob Haig, the founding chairman who got things started in 1989, and who is to receive well-deserved recognition tonight for his service to the profession; Shira Scheindlin, now a colleague on the federal bench; Harry Truehart, who has shown the world that there is great legal talent in upstate New York; and Kevin Castel, a fine litigator, who has a wonderful family with whom my wife and I became acquainted long before this Section existed.

We in the federal judiciary pay close attention to the work of the Section. Its reports are timely and informative. Although we do not necessarily agree with all the Section's recommendations, we find the reports well-researched and provocative. Over the years, my attention has been drawn in particular to the reports on our

Second Circuit fraud pleading requirement; on judicial immunity; on the pattern of racketeering element of RICO liability; on the changes in the federal discovery rules; and on the creation of an international criminal court. Of particular current interest to the New York bar is the proposal for the creation of a Commercial Division of the New York Supreme Court, a proposal that has met with widespread enthusiasm.

This has indeed been a busy Section, and its growth has been phenomenal. In 1993, Harry Truehart announced at the annual meeting of the Association that the membership exceeded 1,500 attorneys and that 39 standing committees were at work. I have no doubt that there have been additional members since that time, and I know that the committees continue to be productive. This is all a tribute to the officers and members of the Section who have contributed so much to the success of your endeavours.

The programs presented by the Continuing Legal Education Committee of the Section have been of inestimable value to the practicing bar. I know that these programs make our lives as judges easier by assuring the competence of those who appear before us. I am particularly pleased to note the presentation of programs in federal civil practice, in bankruptcy, in alternate dispute resolution, in handling depositions, and, of course, in my special area of interest, federal criminal practice. I would be remiss if I did not acknowledge the value of the Section's publication of the Individual Federal Judges' Rules. I would also be remiss if I did not tell you that, as one with special responsibility for rules

within the Second Circuit, I am taking a hard look at the Individual Judges' Rules, having been inspired to do so by a recent article in the St. John's Law Review. I would appreciate your input on this subject.

As members of the Commercial and Federal Litigation Section, you advance your knowledge of the litigation process and of the way the courts work. Your program at this meeting includes panel discussions by state and federal trial judges, who will provide you with valuable insights into the operation of their courts as well as their expectations of the bar. The program also includes what promises to be an excellent session on opening statements in commercial cases. Through this program and others like it, you acquire the skills to serve your clients in an ethical way, to serve the courts of which you are officers, and to help each other improve professional standards and competence.

There is no need for me to preach to the converted, for you and each of you are highly competent, ethical practitioners, with a high sense of duty to the courts in which you practice and to the communities in which you serve. Your presence here is proof of that. Many of you hold offices or are active in civic, charitable, social and religious organizations. You have volunteered to provide pro bono representation to indigent clients. You are a credit to the bar and to the community as individuals.

But as a profession, collectively, you are seen by the public in a far different light. And that is because there are not enough of you thinking and speaking about the profession as a collective

enterprise. We who wear the black robe are deficient in this respect as well. The bench and bar in the United States today are doing just as well for the citizens of the nation, and even better, than they have ever done before. Individual rights are zealously protected, the great constitutional protections are safeguarded, pro bono representation is greatly increased, pro se litigants are assisted in our courts, legal services are in more abundant supply, diversity in the bench and bar continues to increase, and the bar generally is more competent. And yet the image of the bar is constantly declining. Why is this so? I suggest that it is because you and I do not devote enough time and effort to the task of speaking for the profession, for all of us, collectively.

And there is no question that respect for the legal profession rapidly is becoming a thing of the past. In my nearly 40 years at the bar, I have never seen popular dissatisfaction with the profession at such a high level. I just cannot believe that a recent ABA survey "suggest[ed] a disturbing pattern that the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower an individual's opinion of them." This is disturbing because, in the past, personal contact with lawyers always led to the enhancement of the reputation of the profession. Why is the public reputation of the legal profession so poor at a time when its accomplishments are at an all-time high? The Bard has given us our answer: "The fault, dear [brothers and sisters] is not in our stars, [b]ut in ourselves."

One of our faults lies in our failure to speak out on behalf of the profession when it is within our power to do so. Is our self-esteem so low that we cannot respond when those horrible jokes about lawyers are bandied about? I, for one, do not put up with it any more. I recently attended a cocktail party at which a number of lawyers were present. The lawyers laughed politely at some anti-lawyer jokes until the story-teller got to the one where the question is: "What do you call a thousand lawyers chained together at the bottom of the sea?" And the answer is: "A good beginning." No one laughed at that one, and I addressed the story-teller as follows: "I am a lawyer; my father was a lawyer; my brother and sister-in-law are lawyers; I have a son who is a lawyer, and my best friends are lawyers. I consider your story stupid, mindless and unfunny." I took the opportunity, while I had the floor, to review the accomplishments of the legal profession, and I lectured so long that I think that the story-teller never will tell any more legal jokes just to avoid such a lecture. Speaking out is something we all can do. By not reacting to belittling remarks of the kind that caused me to explode at that party, we encourage disdain for our profession, and the profession suffers. The fault is in ourselves.

At a wedding reception a while back, I was seated with a small group of very successful business people. Their conversations got around to the high cost of medical services, which one person attributed to the high cost of medical malpractice insurance. All then agreed that it was the greedy lawyers and their medical

malpractice suits that ultimately were responsible for the problem. I could hold my fire no longer, and I spoke to those assembled of the Harvard study that indicated that only one in ten of those physicians who could be sued are sued. I spoke of the failure of the authorities to discipline incompetent physicians and of bad hospitals and incompetent health care workers. I spoke of the 80,000 patients who are said to be killed in hospitals each year because of bad care. I noted that less than one percent of the total national health care bill is the result of malpractice claims. My remarks ended in a discussion of the business practices of malpractice insurance companies, how they assess premiums and how they sometimes make bad investments. I finally invoked this response from one of those present: "You know, the Judge may be right." I am only sorry that I have not spoken out more often in this way. Bob McCrate once introduced me as the judge who speaks his mind. I should speak more as a representative of the profession and so should we all. The fault is in ourselves.

"The first thing we do, let's kill all the lawyers." Every member of the legal profession knows that line from Henry VI by heart. And we all know that the statement was in furtherance of a conspiracy to impose a tyrannical regime. Without an independent bar, as we all know, tyrants flourish. And so we must ever be vigilant, not so much for the profession as for our fellow citizens, to see that our constitutional democracy prevails. I once started to write a piece that I entitled "Bashing Lawyers, Trashing Rights." I intend to complete that article some day, but

I think that the title pretty much conveys what I want to say: the forces that have the goal of eliminating existing rights must begin with an attack on those who enforce those rights.

Lawyers, they say, are responsible for the explosion in tort litigation, unconscionable verdicts in products liability cases, unreasonable punitive damages awards and general trickery in the litigation process. The result, they say, is the need to make it more difficult to recover damages in product liability cases, to cap attorneys' fees, to cap punitive damages, to enact a national statutes of limitations, to restrict medical malpractice actions and to impose all costs and attorneys' fees on losing parties in the manner of the English rule.

A few years ago, the political figure then serving as Vice-President of the United States made a statement to the effect that American business was being decimated by all those product liability lawsuits, that there were too many lawyers in the USA and that, according to numbers and percentages, the United States was the most litigious nation on earth. When I challenged these unsubstantiated rantings in a speech at the Association of the Bar, my response was reported in an article in the ABA Journal entitled "In Defense of Lawyers: Conservative Judge Challenges Quayle's Statistics." I suppose that if the term "conservative" refers to one interested in conserving the rights and privileges that American citizens have long enjoyed, I am willing to accept the label. The point, however, was not whether the challenge came from a conservative, liberal or moderate (which I would much prefer

being called), but that it came from a lawyer in defense of the profession. Again, I was only sorry that I had not spoken out sooner.

We should become familiar with the real statistics. A recent piece in the National Law Journal shows that tort filings have remained steady since 1986, that 2.9% of all tort suits and 6.9% of medical malpractice cases went to verdict, that defendants won 74% of all medical malpractice verdicts and that products liability and medical malpractice make up only a small percentage of all tort cases completed: three out of every four are auto and premises liability cases. So much for the allegations of sky-rocketing numbers and out-of-control juries. Have you explained that to your fellow citizens? The fault is in ourselves.

How we speak about and represent the profession is in large part a function of how we speak about and treat each other. It make no sense to me that lawyers sometimes speak derogatorily about each other in terms of the areas in which they practice: "He is a divorce lawyer; she is a negligence lawyer; they handle compensation cases." Each and every area of practice is worthy of respect, and each and every lawyer who practices in an ethical and competent way is worthy of respect. When we do not respect each other and show that respect to the public, it is not surprising that the public feels the way it does about us. When we are not civil to each other, the profession suffers. I note that this Section has reported on the "rising level of incivility in litigation practice" and has proposed guidelines designed to

promote courteous conduct that have been accepted by the House of Delegates. Some years ago, I wrote an article urging that incivility of the type that impedes litigation is worthy of disciplinary action. The fault is in ourselves.

And speaking of disciplinary matters, the time is long overdue for aggressive action to root out from our midst those who would defile the profession. Our reluctance to do this is, to my mind, the singular most important cause of popular dissatisfaction with the legal profession. It is time to establish a single state-wide agency to deal with attorney discipline. It is time to pursue the incompetents among us, those who over-charge, those who are non-responsive to the needs of their clients, those who deal dishonestly with their colleagues, and those whose conduct impairs the efficient functioning of the courts. It is not enough to pursue only those who steal money, and there are too many of those. I note with regret that the Lawyer's Fund has in the past year returned to clients who have been cheated by lawyers the sum of 7.5 million dollars, the most it has ever disbursed. We are told that the Fund is rapidly running out of money. The profession has high standards that must be enforced, and we are all to blame for not doing more. The fault is in ourselves.

Just two weeks ago, the New York Law Journal reported a New York County Lawyers' Ethics Opinion that came in response to an inquiry as to whether a lawyer has an obligation to report the misconduct of his former partner relating to the mishandling of legal matters. The former partner avoided court appearances,

failed to account to clients for disbursements and expenses and deposited firm funds into a personal account. It appeared that he may have been unfit to practice due to mental incapacity. Did the inquiring attorney really need an ethics committee opinion? Don't we all know that we must report that type of conduct? And what of that associate who sued for breach of contract after he was fired because he insisted that his firm report the professional misconduct of another associate. Did we need the New York Court of Appeals to explain right and wrong in that case?

We all really do know that we must report the misconduct of our colleagues if we possess non-confidential knowledge that raises a substantial question of their honesty, trustworthiness or fitness. Of course, we must have actual knowledge or believe clearly that there has been a violation. But how many of us take the time or trouble to report obvious misconduct? I include in the number of those who are delinquent in this respect those lawyers who serve on the state and federal bench. We do see some conduct that may be characterized as dishonest or untrustworthy. And we see more incompetence than we like to tell about. Some of the briefs and oral arguments presented to my Court should bring disciplinary sanctions upon the perpetrators, so poorly are the clients served by these incompetent advocates. At our conferences following oral argument, we remark from time to time upon the poor quality of representation in some of the cases, but we seldom do anything about it. It is not enough to say that every profession has rotten apples. It is our obligation - yours and mine - to

clean the barrel. Until we do, or until some agency outside the courts takes over the job for us, the reputation of the profession will rightfully suffer. The fault is in ourselves.

I note that the New York State Bar Association Task Force on the Profession, chaired by a former president of the Association, recently filed its report with the House of Delegates. As I understand it, the Task Force "examined the legal profession and possible ways in which lawyers could better deliver legal services, improve client relations, and enhance public perception of the profession." According to the State Bar News, when the report and recommendations of the Task Force were presented to the House of Delegates, one member "objected to language in the report that indicated that lawyers are partially responsible for the perception the public has about the profession." The member said: "We don't want to release a report with the imprimatur of the state bar association that seems like an exercise in self-flagellation." Was he kidding or what? Lawyers and judges are 99% responsible for public perception about the legal profession as well as the civil and criminal justice systems. I note that certain recommendations of the Task Force pertaining to attorney-client relations and the leadership responsibilities of the Association were passed "without adopting the underlying report language." I think that the language was much too mild. The fault is in ourselves.

Ours is a helping profession. When we decline the call for help by our fellow citizens, we fail the profession. On April 14 of this year, my birthday, there appeared in the New York Law

Journal a letter to the editor under the title "A Client's Plea." It was the long, sad story of a woman whose cause was neglected by successive attorneys. The letter described the woman's quest to recover the child support and property awarded to her in a divorce judgment. Among those who neglected her cause was the attorney by whom she had been employed. Her letter ended as follows:

My nerves are short, my finances get worse with each passing day. I am not looking for an attorney to represent me for free; I am more than willing to pay for the services of an attorney who will follow his or her words with actions. Please is there an attorney out there who can help me?

I wonder if there was anyone among us who answered this fervent plea for help. I wonder if anyone among us volunteered to assist for the sake of this helping profession. I wonder whether anyone among us has undertaken to restore this person's confidence in all of us. The fault is in ourselves.

And what about all this resistance to the proposal to make disciplinary proceedings open to the public once probable cause has been found. Resistance to the proposal hardly inspires public confidence in the profession. We must drive out of the profession those who will not comply with the rules that assure the public that we are worthy of their confidence. Last month, there appeared before a panel over which I presided a lawyer who had been suspended in New York for overcharging a client through means that included taking promissory notes and confessions of judgment. He was in federal court, he said, to vindicate his constitutional right of contract and to urge that only a jury could decide whether his contractual claim for fees was a valid one. I believe the

attorney was a single practitioner, but, as we know, large firms as well as small can overcharge, and appropriate discipline should be imposed for this pernicious practice. Inflated hours and expense accounts are hardly unknown among certain elements of the bar. In the immortal words of Pogo Possum, "we have met the enemy and he is us." Pogo merely was re-stating Shakespeare.

And that brings me to the fault we share in legal education. I note that this Section issued a fine report back in 1991 taking the law schools to task for their failure to teach pre-trial litigation skills. But it goes much further than that. Law schools are not very good at teaching litigation skills of any kind, trial or appellate. As a matter of fact, they are no longer very good at teaching law. Some of the professors are not very much interested in the law or the legal profession, perceiving themselves more as sociologists, psychologists, philosophers, literati and so forth. Those who do deign to teach a little law are interested only in certain issues, mostly constitutional.

I once had a summer law clerk who had just completed a course in property at a nationally known law school. I asked him what he had learned about the law of property, and he said: "The professor was interested in the takings clause, and we spent most of our time on that." One of my applicants for a clerkship had a high recommendation from a professor who taught him "Medieval Icelandic Dispute Resolution." This year, I had an applicant who had high praise from the professor who taught him "Perspectives on Legal Thought." I sit on a law school board of trustees, and I teach as

an adjunct professor. I teach because it seems to me that only the adjuncts actually teach law. After talking to my Dean about this situation, I have concluded that there are two tracks in academia -- one in which the academics teach and write for the benefit of each other, and the other in which they teach and write for the benefit of students and the profession. It seems to me that the latter are losing out.

Just the other day, there was a scary article about the law school community in the New York Times. The article had to do with the annual rankings of law schools throughout the nation as prepared by U.S. News and World Report. Apparently, the rankings are based partly on an honor system with regard to certain statistical information related to job placement, starting salaries for graduates, bar pass rates and the like. According to the Times article, some law schools furnished phony data in an effort to make themselves look better in the rankings. I quote from the article: "The principal justification law school administrators give for inflating their numbers is a generalized belief that everyone does it." We must see to it that law schools teach law, as well as litigation skills and techniques, and we must see to it that they are honest in their dealings with their students and the public. They need to weed out the incompetent and dishonest, as must we all, if the profession is to survive.

The fault, my brothers and sisters, is not in our stars but in ourselves.