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The Causes of Popular Dissatisfaction with the Legal Profession

Edward D. Re

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THE CAUSES OF POPULAR DISSATISFACTION WITH THE LEGAL PROFESSION*

EDWARD D. RE**

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* © Copyright by Edward D. Re, 1994. This Article expands upon a Commencement address delivered at William Mitchell College of Law, St. Paul, Minnesota, January 12, 1991.

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INTRODUCTION

Whether as a lawyer, law professor, government official, or judge, I have been privileged to have spent a long life in the service of law and the administration of justice. Each role has added a new and valuable dimension. To have served as a United States judge for twenty-two years has been a unique and unparalleled experience. Due to the insights and observations gained from these experiences, one could not help but arrive at certain conclusions and value judgments. These observations and conclusions have confirmed deeply held views as to the importance of the law and the legal profession, as well as the valuable roles or functions of lawyers in society. Therefore, one would expect me to discuss some aspect of the law, the legal profession, and the administration of justice. There are many appropriate topics of current and lasting importance which deal with the law, lawyers, and the legal profession. This Article will deal with lawyers, their crucial role in the administration of justice, and how they are perceived in society.

I. THE ADMINISTRATION OF JUSTICE

The administration of justice currently faces monumental challenges. These challenges have been intensified and made more difficult by a growing dissatisfaction with the legal profession. The title of this Article might have been borrowed from Edmund Burke, who, in 1770, wrote *Thoughts on the Cause of the Present Discontent*.¹ Dissatisfaction with the administration of justice in general, and the legal profession in particular, is not new. It is as old as the law itself.² One would not bother to discuss the dissatisfaction with the legal profession, however, if the dissatisfaction were on the continuum of usual discontent or was an occasional complaint. Rather, to adopt the words of the great legal thinker, Dean Roscoe Pound, the dissatisfaction is "more than the normal amount,"³ and today, is both widespread and pervasive.⁴ Indeed, some believe that it has attained "crisis" proportions.⁵

¹ EDMUND BURKE, *THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENT* (1770).

² Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395 (1906).

³ *Id.* at 396.

⁴ See *infra* notes 10-11.

⁵ See *infra* notes 10-11.

All lawyers, law professors, and judges are familiar with Dean Pound's famous address delivered at the 1906 meeting of the American Bar Association in St. Paul, Minnesota.⁶ His words had a most beneficial and profound effect upon judicial reform in the United States.⁷ Indeed, Dean Pound's address has been described as "the spark that kindled the white flame of progress."⁸ It was Dean Pound's speech on *The Causes of Popular Dissatisfaction with the Administration of Justice* that inspired the title of this Article. The title of Dean Pound's seminal speech and its opening sentence that "dissatisfaction with the administration of justice is as old as the law" were, in turn, suggested by Lord Campbell in his *Lives of the Chief Justices*.⁹ The topic, therefore, is both old and new, and needs to be discussed with renewed vigor as dissatisfaction and cynicism threaten to mar, erode, or undermine the true historic role and contribution of lawyers in the administration of justice. The lawyer's role is especially crucial in a free and democratic society. Hence, this dissatisfaction must be discussed because so many lawyers and non-lawyers alike have noted the serious decline in lawyer professionalism and the lawyer's failure to adhere to the high ethical standards and civility that have made the law a respected and honorable profession.

The seriousness of the matter is revealed by a national poll illustrating that nine of ten parents would not want their child to become a lawyer, and that only five percent of those surveyed chose lawyers as the group of professionals deserving of most respect.¹⁰ Regardless of specific statistics or percentages, it is clear

⁶ Pound, *supra* note 2.

⁷ Pound, *supra* note 2, at 406; see Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1688 (1990) (referring to "sporting theory" in discussion about forum shopping); Note, *Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since Evans v. Jeff D.*, 102 HARV. L. REV. 1278, 1291 (1989) (referring to Pound's "sporting theory of justice" in discussion of judicial review of conditional attorney fee waivers); Bruce P. Brown, *Free Press, Privacy and Privilege: Protection of Researcher-Subject Communications*, 17 GA. L. REV. 1009, 1014 n.28 (1983) (referring to Pound's "sporting theory" in discussion of discovery under Federal Rules of Civil Procedure).

⁸ John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. Soc'y 176 (1937).

⁹ LORD JOHN CAMPBELL, *LIVES OF THE CHIEF JUSTICES* 119 (3d ed. 1899); see Howard T. Markey, *A Judicial Need for the 80's: Schooling in Judicial Ethics*, 66 NEB. L. REV. 417, 417 n.2 (1987).

¹⁰ See Daniel P. Sheehan, *Rich Lawyers: Where is Your Conscience*, NEWSDAY, May 17, 1988, at 62 (citing public opinion polls that rank lawyers near bottom on lists of trustworthy professionals); David A. Kaplan, *Take Heed Lawyers*, NAT'L L.J., Aug. 18, 1986, at S-2 (showing dissatisfaction with some aspects of federal judiciary).

that, in the area of "moral and ethical standards," lawyers receive very low ratings.¹¹ Indeed, at the 1991 meeting of the American Bar Association in Atlanta, Georgia, the A.B.A. Special Coordinating Committee on Professionalism, The Emory Center for Ethics in Public Policy and the Professions, and the Georgia Chief Justices' Commission of Professionalism conducted a Moot Court Program entitled "In the Court of Professionalism: The People vs. the Modern Lawyer, the Organized Bar, the Law Schools and the Judiciary." The attendees of the annual meeting were "summoned" to appear for "jury duty" to hear the allegations that each of the "defendants" had contributed to the decline of lawyer professionalism. The "plaintiffs" sought "equitable relief to reverse this trend." The named defendants were charged with having "willfully and negligently contributed to a decline in lawyer professionalism." The "modern lawyer" did so by "creating undue economic pressure through hourly billing practices and billable hour quotas"; the law schools by "failing to recruit and select students who have appropriate professional ideals, failing to devote sufficient curricula to professional responsibility issues, and failing to prepare students for practicing in other than large corporate general practice firms"; the organized bar by "failing to meet its obligation to provide equal access to justice through adequate distribution of legal services, thereby resulting in millions of poor and middle-class clients going unrepresented"; and the judiciary by "failing to vigorously and impartially enforce the rules of conduct in the courtroom, . . . provide good role models . . . [and] manage caseloads fairly and expeditiously."

Beyond mere belief, impression, and perception was the disturbing reality of a serious newspaper item entitled *Lawyers Face Rise in Claims of Corruption: Reports of Misconduct Increase in New York*.¹² The author indicates that these cases were not simply

¹¹ See Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 (noting that unfavorable impressions of lawyers held by 56% of those surveyed); Nancy E. Roman, *ABA Meeting Ponders Reasons Lawyers Are Held in Low Esteem*, WASH. TIMES, Aug. 12, 1993, at A4 (noting that Gallup poll reveals only 16% of Americans trust lawyers); Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (showing complaints against lawyers rose 33% between 1985 and 1988).

¹² See Richard Perez-Pena, *Lawyers Face Rise in Claims of Corruption*, N.Y. TIMES, Feb. 7, 1993, at 35; see also *N.Y. Panel Calls for Divorce Practice Reform*, NAT'L L.J., May 17, 1993, at 6 (special committee of appellate judges and lawyers proposing sweeping reforms of lawyers' conduct in matrimonial cases); Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A.

for “*legal ethical transgressions,*” but included “dishonest and tortious” conduct. The introductory paragraph reads: “Tempted by the economic expectations of the high-activity 1980’s but hindered by the sluggish reality of the 1990’s, more and more lawyers in New York State are stealing sums of money from their clients, according to officials who monitor lawyer’s misconduct.”¹³ The same article reports that not only has the number of complaints against lawyers “jumped,” but also that the number of disbarments has risen as has the number of resignations before their cases could be resolved.¹⁴

Critics of the legal profession also assert that bar associations, courts, and law enforcement agencies do not adequately police lawyer misconduct.¹⁵ It is often stated that when unprofessional and illegal conduct is discovered, and subsequently proven, the punishment imposed is inadequate to discipline and deter others.¹⁶ The effort here, however, is not to evaluate the existing machinery to punish professional infractions, but rather, to ascertain the causes for the state of low esteem of the profession.

It is painful to speak of serious dissatisfaction with lawyers and the present decline of professionalism, because lawyers are key participants in a profession that is historically and tradition-

L. Rev. 81, 97 (1991) (“In 1989, forty-one percent of the California Supreme Court opinions dealt with lawyer discipline cases.”); Curtis Taylor, *What To Do If Your Lawyer is Guilty*, NEWSDAY, May 23, 1993, at 3 (noting that “complaints against lawyers in the Bronx and Manhattan rose 16%” in 1992); Brian C. Mooney, *As More Clients Cry Thief, Lawyers Ponder Prevention*, BOSTON GLOBE, May 18, 1992, at 17 (between 1989 and 1990 number of defrauded clients nearly doubled in Massachusetts); Jack Ewing & Thomas D. Williams, *Lawyer Grievance Process Little Changed After Scandals, Debate; Scandals Have Little Effect on Legal Ethics Code*, HARTFORD COURANT, Nov. 3, 1991, at A1 (lawyer complaints in Connecticut increased by 14% in 1990).

¹³ Perez-Pena, *supra* note 12.

¹⁴ Perez-Pena, *supra* note 12.

¹⁵ See Nina Bernstein, *Crooked Lawyers Protected; Discipline slow, soft, secretive*, NEWSDAY, Jan. 21, 1992, at 4 (observing that public views lawyer discipline as “[t]oo slow, too secret, too soft and too self-regulated.”); *How D.C. Deals With Bad Lawyers*, WASH. POST, Mar. 15, 1992, at C8 (“A recurring complaint against lawyers is that they do a poor job of disciplining themselves.”); Mooney, *supra* note 12 (noting reforms in face of concern over public confidence in the Massachusetts bar’s ability to police itself).

¹⁶ See Andrew Blum, *The Dangers of Upholding Legal Ethics*, NAT’L L.J., Nov. 2, 1992, at 8 (imparting that lawyer fired for insisting firm comply with ethics reporting requirements); Bernstein, *supra* note 15 (stating that New York disciplinary system is overwhelmed with rising complaints and shrinking budgets for enforcement); Ewing, *supra* note 12 (Connecticut disciplinary system falls short of guidelines set by A.B.A.).

ally acknowledged to be honorable and noble.¹⁷ The term "profession" connotes a declaration or an avowal, such as a profession of faith. Beyond the intellectual challenge, the law offers countless opportunities for service, not only to clients but also to society. Indeed, idealistic and gifted students pursue the study of law because they regard the law as a *vocation*. The very word "vocation" holds special significance because it stems from "vocare," which means "to call." This is the basis for British colleagues who proudly assert that they are *called* to the bar. In this sense, the law is truly a vocation and a calling. Hence, the shared concern requires examination of the causes of the current dissatisfaction and consideration of solutions that will help restore an indispensable measure of respect and esteem.

II. THE CONTRIBUTION OF LAWYERS

In any discussion of the dissatisfaction with the legal profession, it is well to recall the observation of Justice Robert H. Jackson about lawyers. Justice Jackson stated that countless examples may be given of courageous lawyers who have promoted and supported causes and aspirations of people who were subjected to governmental abuse of power and whose rights would not have been vindicated without the aid of dedicated lawyers. Perhaps, one need also be reminded of the role of lawyers in the drafting of great charters of human liberty. One should not forget that of the fifty-six signers of the Declaration of Independence, thirty-three were lawyers, and that of the fifty-five members of the Constitutional Convention, thirty-four were lawyers.¹⁸ The Declaration of Independence has probably done more to advance the cause of human freedom than any other document since the Magna Carta.¹⁹

¹⁷ See *Mallard v. United States Dist. Court for the S.D.*, 490 U.S. 296, 311 (1989) (Kennedy, J., concurring) ("[B]ecause our duties go beyond what the law demands . . . ours remains a noble profession."); *United States v. Perlstein*, 120 F.2d 276, 285 (3d Cir. 1941) (Clark, J., dissenting) (stating that law is honorable and noble profession); Kendall B. Coffey and Thomas F. Nealon, *Non-Compete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105, 1111-12 (1992) ("The legal profession . . . has for centuries been regarded and adjudicated to be a great and noble profession.")

¹⁸ See generally CHARLES A. GOODRICH, *LIVES OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE* (1976).

¹⁹ See George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 634 (1992) (principles of equality first espoused in Magna Carta and later proclaimed in Declaration of Independence); Mat-

In pursuing great causes, the role of lawyers has been crucial, for it was their successful pleading that removed so many barriers to human freedom. This, in turn, gave a wider and fuller meaning to the ideals of human dignity and liberty enshrined in the Constitution of the United States. Notwithstanding such irrefutable historical data, so clear and overwhelming, it is nonetheless important to ascertain the reasons for the present low esteem of the legal profession in general and lawyers in particular.

III. CAUSES OF DISSATISFACTION

A. *The "Hired Gun" Approach to Litigation*

The abuses of the adversary system have been, and continue to be, major reasons for the present state of dissatisfaction with the legal profession. In his famous speech, Dean Pound spoke of obsolete procedure, procedural defects in the law, and abuses of the adversary system.²⁰ Although procedural defects have largely been eliminated or corrected,²¹ the abuses of the adversary system persist. Dean Pound described the adversary system as "the common law doctrine of contentious procedure which turns litigation into a game."²² He regarded the "American exaggerations of the common law contentious procedure" as a "potent source of irritation." He added that the "exaggerations" have led to a bullying of witnesses and sensational cross examinations, thus creating a general dislike and impairment of the administration of justice.²³ The "Sporting Theory of Justice,"²⁴ as he called it, not only irritates parties, witnesses, and jurors in particular cases, but also gives "the whole community a false notion of the purpose and end

thew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 WHITTIER L. REV. 17 (1992) (Magna Carta and Declaration of Independence both "milestones" in struggle for human freedom and dignity).

²⁰ See Pound, *supra* note 2, at 397-414 (discussing various "mechanical" problems with law and criticizing what *actually* happens in courts).

²¹ See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.1 (1985) (stating simplification of modern pleading requirements allows cases to be adjudicated on their merits rather than on technicalities).

²² Pound, *supra* note 2, at 404. Pound observes that our adversary system "leads counsel to forget that they are officers of the court." *Id.*

²³ Pound, *supra* note 2, at 404-05.

²⁴ Pound, *supra* note 2, at 404.

of law."²⁵ This Sporting Theory of Justice continues to exist and is still criticized.²⁶

In addition, one might also add the increasing incidence of uncollegial, uncivil, and discourteous behavior among lawyers. One court has stated that "Rambo tactics" have "brought disrepute upon attorneys and the legal system."²⁷ With such a negative portrayal, it is necessary to be reminded that the adversary system for the presentation of cases, as developed in the common law, was designed to *ascertain truth*.²⁸ Lawyers in that system are not only *advocates*, who have a duty to represent clients competently and zealously, but are also officers of the court, whose zeal is circumscribed by a professional responsibility founded upon rules of law and principles of professional ethics.²⁹ Much can be written, and

²⁵ Pound, *supra* note 2, at 406.

²⁶ See, e.g., *Schiavone v. Fortune*, 477 U.S. 21, 32 (1986) (Stevens, J., dissenting) (criticizing Court's opinion, Justice Stevens quotes from Pound and expresses hope that majority's decision is only isolated return to "sporting theory of justice"); *United States v. Young*, 470 U.S. 1, 26 n.4 (1985) (Brennan, J., concurring in part and dissenting in part) (stating that "sporting theory of justice" is remnant from time when "a lawsuit was a fight between two clans"); *Hickman v. Taylor* 329 U.S. 495, 500-01 (1947) (discovery under Federal Rules is designed to eliminate "Sporting Theory of Justice"); *Doherty v. United States Dept. of Justice, Immigration and Naturalization Serv.*, 908 F.2d 1108, 1122 (2d Cir. 1990) ("The 'sporting theory of justice' has no place in deportation proceedings."); *Twigg v. Norton Co.*, 894 F.2d 672, 675 (4th Cir. 1990) ("[B]road discovery practice . . . [is] the best answer yet devised for destroying surprise and maneuver as twin allies of the sporting theory of justice."); see also, Robert G. Bove, *Mapping the Boundaries of a Dispute*, 89 COLUM. L. REV. 1, 99 n.335 (1989) (criticizing "sporting theory" as litigation modeled on laissez-faire principles, and suggesting that one characteristic of game is attempt to force opposition to breach procedural rules in order to preserve grounds for reversal in event of unfavorable outcome).

²⁷ *McLeod, Alexander, Powel and Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990). For a thorough discussion of "Rambo litigation" and lack of civility among lawyers in the litigation process, see Kanner, *supra* note 12.

²⁸ *Darden v. Wainwright*, 477 U.S. 168, 194 (1986) (Blackmun, J., dissenting) ("[S]olemn purpose of endeavoring to ascertain the truth . . . is the sine qua non of a fair trial." (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965))); *Ortiz v. Duckworth*, 692 F. 2d 39, 41 (7th Cir. 1982) (jury instructed its primary purpose is to ascertain truth); *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (cross-examination is effective means to ascertain truth); *United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) ("Truth is the essential objective of our adversary system of justice."), *cert. denied*, 440 U.S. 920 (1979); *Jackson v. City of Vicksburg, Miss.*, 361 F.2d 473, 473 (5th Cir. 1966) (noting it is incumbent upon court to ascertain truth through evidentiary proceedings).

²⁹ See *McCoy v. Court of App.*, 486 U.S. 429, 438 (1988) ("[C]anons of professional ethics impose limits on permissible advocacy."); *United States v. Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981) ("The latitude allowed an attorney is not unlimited. He must represent his client within the bounds of the law."), *cert. denied*, 455 U.S. 938 (1982); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976) ("[L]awyers are officers of the court and . . . courts have the inherent authority to regulate their professional con-

many examples given, of the quasi-public role of lawyers as officers of the court.³⁰ An apt quotation is found in an address by Woodrow Wilson who, speaking as a lawyer, said: "Our duty is a much larger thing than the mere advice of private clients," and added that "[w]e are servants of society, officers of the courts of justice."³¹

This important role of lawyers as officers of the court should be stressed from the inception of the law student's legal studies. It should be an essential part of law school orientation and should continue throughout law school.

Law schools have taught the adversary system as the focus of the study of law. Learning cases and learning how to read a case are presented as the crucial lessons to be learned and the primary skills to be acquired. Hence, from the very start, law students are taught the adversary system and to regard winning cases as the goal and the sign of success. Introductory civil procedure and legal method courses instruct students that the courts only operate properly when there is a real dispute. Accordingly, these courses teach that, unless there promises to be a "case," usually viewed as a controversy marked by zealous arguments, the problem or issue is "non-justiciable" and cannot be presented to a court. These introductory lessons, reminiscent of the primitive trial by battle, have an important moral effect on law students. Students are conditioned to look for a debatable issue, anything that might yield a real dispute or a "zealous argument." Hence, students are not trained or taught to search for a just and equitable solution to legal problems or a common ground between con-

duct."); A.B.A. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, 140-41 (1992) [hereinafter ABA REPORT].

³⁰ See *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) (stating lawyer's duty as officer of court is to reveal client's plans to engage in perjury); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir.) (upholding sanctions imposed for abuse of discovery process since defense attorneys breached their duty as officers of court of complete candor and primary loyalty to court), *cert. denied*, 11 S. Ct. 181 (1993); *In re Solerwitz*, 848 F.2d 1573, 1577 (C.A.F.C. 1988) (suspending attorney for maintaining frivolous appeals in violation of duty as officer of court to promote administration of justice), *cert. denied*, 488 U.S. 1004 (1989); *Waters v. Kemp*, 845 F.2d 260, 263 (11th Cir. 1988) ("As an officer of the court, a lawyer has a fundamental duty to perform services pro bono for indigents when called upon by the court."); *Levine v. United States Dist. Ct. for the C.D.*, 764 F.2d 590, 595 (9th Cir. 1985) (noting that attorneys as officers of court have fiduciary duty not to engage in public debate that would adversely affect accused).

³¹ Woodrow Wilson, *The Lawyer and the Community*, 35 A.B.A. REP. 419, 421 (1910).

tending parties. Accordingly, the concentration on the adversary system accentuates or exaggerates differences that might have been accommodated or resolved by negotiation or conciliation. The result is often bitter and prolonged litigation. The litigation, as well as the judicial opinion that it produces, is the "case" that becomes the law student's main source of discussion and study.

Without professional, ethical, or moral restraints upon the role of the lawyer in the adversary system, there would still be validity in Dean Pound's characterization of the system as the Sporting Theory of Justice. In the vernacular, this has been called the "hired gun" approach,³² that is, the party who engages the most zealous and cunning lawyer is the one most likely to prevail. One commentator noted that "lawyers are hired guns; they know they are, their clients demand that they be, and the public sees them that way."³³ It is important to recall, however, that canons of ethics and professional responsibility have always set forth the outer boundaries of a lawyer's zeal in the effort to win cases. Canons and rules of professional responsibility specifically provide that "a lawyer should represent a client zealously *within the bounds of the law*."³⁴

B. Materialism and "Billable Hours"

Materialistic attitudes of lawyers have been a significant reason for the current state of dissatisfaction with the legal profession.³⁵ It would seem that the practice of law has become a war for

³² See Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 60-61 (1986). The lawyer-client relationship is often turned into one in which the attorney is the legal hired gun and the client is simply the impersonal vehicle bringing the case. Hence, lawyers are often viewed as amoral guns for hire by a large segment of society. *Id.*; Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 648 (1990). If lawyers are forced from their hired gun pedestal, they might be more likely to follow their moral instincts. *Id.*

³³ Robert F. Drinan, *Moral Architects or Selfish Schemers?*, 79 GEO. L.J. 389, 393 (1990) (quoting RICHARD L. ABEL, AMERICAN LAWYERS 247 (1989)); see Kanner, *supra* note 12, at 81 ("[D]eception, nastiness, intimidation and general lack of civility among lawyers are permeating the litigation process.").

³⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983) (emphasis added).

³⁵ See, e.g., John H. Kennedy, *Saying NO to the Lawyers; Judges Are Cutting Back Fees in One Bankruptcy Case after Another*, BOSTON GLOBE, Aug. 10, 1993, at 31 (detailing large fees earned by lawyers in bankruptcy proceedings).

legal business.³⁶ Materialism has become the predominant motivation of the search for cases and the initiation of litigation.³⁷ As a result, a popular belief has developed that lawyers aid and abet litigation and injustice.

Over the last thirty years or more, overhead costs for law firms have skyrocketed.³⁸ These costs reflect the increases in associates' salaries and the escalating costs of training, office space, equipment, libraries, and computers.³⁹ As a result, efficiency has become a priority while the mentoring and personalized training of new lawyers and associates has almost vanished.⁴⁰ Associates, therefore, are given superficial and inadequate training in order that they may be very "productive" more quickly.⁴¹

There is a growing feeling that the profession has become tilted toward the commercial, rather than the service, compo-

³⁶ See, e.g., Edward A. Adams, *Out of Towners Branches Expand*, N.Y. L.J., Oct. 4, 1989, at 1 ("New York attorneys have been forced into a multi-front war over legal business."); James Wilson, *Toward Better Recruiting: The Lessons of Layoffs and Associate Attrition*, TEX. LAW., July 29, 1991, at 20 (stating that there is heated competition for business among lawyers everywhere); Bob Rossi, *Bronson Nabs Southland Boutique*, THE RECORDER, June 24, 1992, at 1 (noting that interstate competition for legal business makes mergers necessary for law firms).

³⁷ See Laura Mansnerus, *Why Women are Leaving the Law*, WORKING WOMAN, Apr. 1993, at 64 (noting disillusionment with law profession for its lack of altruism and counter-productive practices); Paul D. Gutierrez, *Winning With a Small Team*, THE RECORDER, Mar. 11, 1992, at 8. Firms must use marketing plans, public relations programs, and advertising in order to maximize profits. *Id.*; Kenneth Jost, *Public Image of Lawyers: What Image Do We Deserve?*, A.B.A. J., Nov. 1988, at 46. Attorneys are no longer happy to work for low pay, and the public believes that lawyers are mainly interested in profit and not in serving the interests of justice. Dean Calbreath, *Burned Out and Disillusioned, Lawyers are Ready to Toss in Towel*, WASH. BUS. J., Jan. 30, 1989, § 1, at 5. Lawyers themselves believe that the profession is being adversely affected by the emphasis on commercialism. *Id.*

³⁸ See William E. Callanan, *An Information Officer Can Help Law Firms Use Their Know-How*, NAT'L L.J., Oct. 14, 1991, at 31. ("Law firms have spent billions of dollars during the last several years to purchase computers, streamline operations, improve client services and increase productivity and profitability."); Lisa Stansky, *Firm Finds Appeal In No Frills Practice*, RECORDER, June 12, 1992, at 1 (noting that overhead costs have made big firm practice impractical for some lawyers).

³⁹ Callanan, *supra* note 38.

⁴⁰ See Robert B. McKay, *The Road Not Traveled: Charting the Future for Law, Law Schools and Lawyers*, A.B.A. J., Nov. 1990, at 76 ("[H]igh overhead of law practice requires substantial increases in billable hours to justify mounting fees.").

⁴¹ Mary Hull, *Why Are Lawyers So Miserable?: The Profession's Malaise Prods Some in New Directions*, TEXAS LAWYER, Apr. 26, 1993, at 1 (failure to train associates adequately was significant complaint in 1990 A.B.A. Young Lawyers Division national survey); Stephanie B. Goldberg, *Bridging the Gap*, A.B.A. J., Sept. 1990, at 44; see *Shop Talk: Associates Survey 1988*, AM. LAW. 7, 39 (Oct. 1988) (citing lack of training as major complaint of associates surveyed).

ment.⁴² The advent and rise of "mega law firms," consisting of hundreds of lawyers, paralegals, and other personnel, have also contributed to the negative view of the profession. Some express the belief that these law firms exemplify the commercialization and greed that have infested the legal profession.⁴³ These critics assert that "mega law firms" give the impression that any case, no matter how abhorrent and devoid of merit, will be accepted for a price or fee.⁴⁴ Others, however, have suggested that "mega law firms" strengthen the profession by expanding services to clients and increasing profits, some of which are used to subsidize *pro bono* work.⁴⁵ Notwithstanding these differences of view, it would seem plausible that size alone may give the impression of an impersonal commercial enterprise where efficiency and economy of operation are the main goals to maximize profits.

As of 1991, first year associate salaries at New York City's twenty largest firms ranged from \$54,000 to \$86,000.⁴⁶ While associate salaries have increased dramatically throughout the past decade, a *New York Law Journal* survey indicates that, as of 1991, average compensation for associates at the twenty largest New York City firms has decreased.⁴⁷ This decrease may be attributed to, in part, the downturn in the national economy. Nevertheless, it is clear that the general public believes that attorneys are overpaid.⁴⁸

The perception of materialism is perhaps best reflected or manifested in the policy or practice of "billable hours." Quite apart from the perception of materialism by non-lawyers, the focus on billable hours has also contributed significantly in fostering materialistic attitudes among lawyers themselves, especially in

⁴² Gutierrez, *supra* note 37.

⁴³ See Peter M. Brown, *Has the Rise of Mega firms Endangered Professionalism? Yes: Greed is the Bottom Line*, A.B.A. J., Dec. 1989, at 38 (excerpted from Peter M. Brown, *Rascals* (1989)).

⁴⁴ See Kim Eisler, *Shark Tank: How the Top Partners of the Nation's Most Rapacious Law Firms Devoured Each Other*, 9 REGARDIES 82 (Aug. 1989).

⁴⁵ See Jack Kaufman & Bradford Hildebrandt, *Has the Rise of Mega firms Endangered Professionalism? No: Big Clients Need Big Firms*, A.B.A. J., Dec. 1989, at 38.

⁴⁶ Edward A. Adams, *Associate Salaries Dip at City's Largest Firms: Bonuses Become Discretionary, Pay Scales Frozen*, N.Y. L.J., at 1 (Mar. 4, 1991) (containing survey of associate salaries at Manhattan's twenty largest firms).

⁴⁷ *Id.*

⁴⁸ Pogrebin, *The Observer Poll: Lawyers Overpaid, Not So Honest*, N.Y. OBSERVER, Mar. 18, 1991, at 1 (telephone poll of 503 adult New York City residents).

the eighties and nineties.⁴⁹ Rather than focusing on teaching, training, and client service, senior lawyers felt forced to maximize their total billable hours.⁵⁰ Accordingly, accountability to the client was replaced by accountability to the law firm billing committee. As a result, the mandate of high billable hours, almost assuring that clients may be overcharged, has seriously eroded the faith and confidence that has traditionally existed between lawyer and client.

The number of billable hours which are required of associates in law firms⁵¹ is closely related to the perceived impropriety of what are regarded as "huge salaries." One firm, for example, requires an average annual billing of 2,000 hours.⁵² It can hardly be disputed that such a requirement serves as a temptation for associates to exaggerate the number of billable hours ethically and honestly chargeable to clients.⁵³ Senior associates also feel pressured to increase their billable hours, especially as they approach the time when partners are selected. Consequently, the concentration is on "billable hours," rather than teaching newer lawyers qualities of professionalism, such as service to clients and society.⁵⁴

⁴⁹ See Steven Brill, *Old Values Endure in Legal Profession*, CONN. L. TRIB., Mar. 4, 1991, at 24. Too much emphasis is placed on billable hours and other issues of productivity causing attorneys to become "narrow-gauged piece workers for . . . one-shot customers rather than *advisors* for longtime clients." *Id.*

⁵⁰ Roger Miner, *A Profession at Risk*, 21 TRIAL LAW. Q. 3, 13 (1991); see Kanner, *supra* note 12, at 98-99 n.81.

⁵¹ See Stephanie B. Goldberg, *The Ethics of Billing, A Roundtable*, A.B.A. J., Mar. 1991, at 56.

⁵² See NATIONAL ASSOCIATION FOR LAW PLACEMENT, DIRECTORY OF LEGAL EMPLOYERS 905 (1993) (Kelley Drye & Warren requires 2,000 hours of associates annually); see also *id.* at 864 (Baker & McKenzie 2100 hour annual billing minimum); *id.* at 950 (Thacher, Proffitt & Wood 2000 hours); *id.* at 933 (Reid & Priest 2000 hours); *id.* at 958 (Windels, Marx, Davies & Ives 2000 hours); *id.* at 911 (Latham & Watkins 1900 hours); *id.* at 929 (Pennie & Edmonds 1900 hours).

⁵³ See Goldberg, *supra* note 41. Due to the increasing demand for value placed on law firms by corporate clients, emphasis has been on increasing billable requirements through "staffing, overhead and automation." *Id.* Though experts agree that firms should adopt forceful measures to curtail "padding," they concede that the practice is widespread and the temptation to do so has yet to be eliminated. *Id.* at 57-58. Associates who feel pressured to bill up to 2,600 hours annually are constantly tempted to "adjust" their billable hours. See John Doe, *Billing: Is "Padding" Widespread? Yes: Associates Lack Guidance*, 76 A.B.A. J. 42 (Dec. 1990). But see Howard L. Mudrick, *Billing: Is "Padding" Widespread? No: Billing is Serious Business*, A.B.A. J., Dec. 1990, at 43 (viewing alternate forms of billing as advantageous to clients).

⁵⁴ See, e.g., Joel F. Henning, *Quality Assurance: Much More Than Minimizing Malpractice*, in THE QUALITY PURSUIT, ASSURING STANDARDS IN THE PRACTICE OF LAW

C. Commercialization, Advertising, and the Contingent Fee

High salaries of lawyers and billing practices exacerbate the growing feeling or belief that the practice of law is becoming, or has already become, more of a business or commercial activity rather than a profession, the purpose of which is to render service.⁵⁵ This belief has been fostered by the legalization and use of lawyer advertising. Indeed, much of the perceived commercialism of the legal profession has been directly attributed to attorney advertising.⁵⁶

It is not questioned that the public's need to know of the availability of legal services can be fulfilled, in part, through advertising.⁵⁷ Advertising can provide the public with useful, factual information about legal rights and services. It is also clear that certain types of advertising by lawyers create the risk of practices that are misleading or overreaching.⁵⁸ In addition to creating unwarranted

2, 4 (Robert M. Green ed., 1989). "The standard of excellence means working with each client [to] succeed in the client's arena—not the lawyer's . . . [E]xcellent legal service is not measured by lawyer standards but by client standards." *Id.*; Jeffrey L. Tolman, *Billing by the Hour Should Be Banned*, in BEYOND THE BILLABLE HOUR, AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS 73, 74 (Richard C. Reed ed., 1989) (noting that profession will "gain credibility . . . if we look at fairness [to clients] first and time expended later").

⁵⁵ See Jost, *supra* note 37, at 50 (referring to Chief Justice Rehnquist's complaint that "profit-maximization and billable hours" threaten to "drive out legal ethics, professional decorum, and public service").

⁵⁶ See Clay Hathorn, *Florida Restricts Lawyer Ads*, A.B.A. J., Mar. 1991, at 22. In order to advertise a personal injury practice, a Florida lawyer utilized a large billboard which flashed the slogan "immediate cash." *Id.* This advertising practice has led prospective jurors to indicate that they could not be completely fair. *Id.*; Paul Reideringer, *Lawyer Ads: Iowa Hits Dramatic Commercials*, A.B.A. J., Sept. 1986, at 78 (citing source from The Television Bureau of Advertising, which said that lawyers spent over \$38 million in 1985 advertising on television and almost \$11 million in first quarter of 1986); The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 463 (Fla. 1990) ("Such advertising can also adversely affect the public's confidence and trust in our judicial system.") [hereinafter Florida Bar Petition]. Rule 4-7.2 enumerates those regulations to which Florida lawyers must adhere when advertising their services. *Id.* at 461-65.

⁵⁷ See Peggy A. Ross, *The Barriers to Lawyer Advertising*, NAT'L. L.J., Dec. 16, 1985, at 14 (offering numerous approaches to advertising legal services, but admonishing that state regulatory climate should be investigated before embarking on any advertising campaign); AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, YELLOW PAGES LAWYER ADVERTISING: AN ANALYSIS OF EFFECTIVE ELEMENTS 1-2 (1992). See generally LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 11-42 (1980) (describing strategies and techniques for marketing legal services).

⁵⁸ See JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY OF LAWYERS 247 nn.c, d (1989).

expectations by persons untrained in the law, certain forms of advertising can also erode the public's confidence in the judicial system.⁵⁹ It is, therefore, not surprising to read that the potential for deception and confusion in advertising is great in the legal field.⁶⁰ Recognizing the potential for deception, as well as the probability of confusion, a number of states are considering imposing restrictions on lawyer advertising.⁶¹

Traditionally, lawyer advertising was not permitted and was regarded as not befitting the profession.⁶² This view seemed to change abruptly in 1977 with the Supreme Court's decision in *Bates v. State Bar*, in which the Court held that a state cannot prohibit attorneys from advertising.⁶³

⁵⁹ 571 So.2d at 463.

⁶⁰ *Id.* at 458.

⁶¹ Hathorn, *supra* note 56, at 22; see William Murchison, *Restrictions in Wolens Bill are Sensible*, TEX. LAW., May 17, 1993, at 13 (supporting Representative Steve Wolens' bill which would restrict content of solicitations and advertisements by lawyers); Andrew Houlding, *Bad Taste or Deception: Proposed Ad Restrictions Prompt 1st Amendment Tussle*, CONN. L. TRIB., June 8, 1992, at 3 (proposing regulations that allow single voice to be used on television or radio commercials); Joseph Calve, *CTLA is Tackling Tacky Legal Ads*, CONN. L. TRIB., Jan. 27, 1992 at 1; Rosalind Resnick, *State Tries to Rein in Legal Ads, Others Anxiously Eye Florida's New Rules*, NAT'L L.J., Jan. 21, 1991, at 1 (listing numerous states "considering adopting rules aimed at restricting lawyer advertising"); see also Allan Ashman, *Restricting Content of Lawyer Ads Upheld in Ohio*, A.B.A. J., Aug. 1984, at 152 (reporting on case upholding Constitutional validity of Ohio Code of Professional Responsibility section concerning advertising); Reidinger, *supra* note 56. See generally Florida Bar Petition, 571 So. 2d at 461-72.

⁶² See *Bates v. State Bar*, 433 U.S. 350, 368 (1977); AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS 74 (1967) (maintaining that solicitation and advertisement of professional employment "offend the traditions and lower the tone of our profession and are reprehensible"). Canon 27 of the CODE OF PROFESSIONAL ETHICS was amended in 1940 to allow publication of names, addresses, and brief biographical data in "approved law lists," provided such information was not misleading. *Id.* at 76.

⁶³ *Bates*, 433 U.S. at 384. In August 1983, the American Bar Association promulgated its MODEL CODE OF PROFESSIONAL RESPONSIBILITY which permitted limited lawyer advertising:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast . . . the following information in print media distributed or over television or radio broadcast . . . provided that the information disclosed . . . is presented in a dignified manner.

[Examples include name of lawyer or firm, fields of law in which the lawyer or firm practices, a statement that the lawyer or firm specializes in a particular field, teaching positions, etc.]

MODEL RULES OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1983), reprinted in STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS, STATUTES AND STANDARDS 321, 323-24 (1994) [hereinafter MODEL RULES].

Discussion of *Bates* often neglects to note that the only question answered by the Supreme Court was the "constitutional issue . . . whether the state [Arizona] may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services."⁶⁴ The Court expressly stated that "[w]e rule simply that the flow of such information may not be restrained . . . and that the present application of the disciplinary rule against appellants [was] violative of the First Amendment."⁶⁵ Although the Supreme Court devoted a portion of its opinion to "the adverse effect on professionalism," it did not agree with the "emphasis" that the State of Arizona placed on the adverse effects that "price advertising" would have on the legal profession. The Court explained:

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise and we would have reason to pause if we felt that our decision today would undercut that spirit. But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in self-deception. And rare is the client, moreover, even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge. In fact, the American Bar Association advises that an attorney should reach a "clear agreement with his client as to the basis of the fee charges to be made," and that this is to be done "[a]s soon as feasible after a lawyer has been employed." Code of Professional Responsibility EC 2-19 (1976). If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office.⁶⁶

The Supreme Court questioned "the assertion that advertising will diminish the attorney's reputation in the community."⁶⁷

⁶⁴ *Bates*, 433 U.S. at 384.

⁶⁵ *Id.*

⁶⁶ *Id.* at 368-69 (alteration in original) (citation omitted) (footnote omitted).

⁶⁷ *Id.* at 369.

The Supreme Court answered the diminished or adverse effect on reputation argument by stating:

Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community. Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.⁶⁸

The arguments that addressed the adverse effect of advertising upon lawyer professionalism were dismissed with the following words:

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.⁶⁹

It is good to be reminded that the "[e]arly lawyers in Great Britain viewed the law as a form of public service."⁷⁰ No canon or principle of law or ethics states that public service cannot be compensated, and no one questions the right of lawyers and public servants to receive just and reasonable compensation for their services. Furthermore, the question is not whether lawyers are "above" trade, but whether lawyers, as members of a profession, are exempt from the legal and ethical restraints that inhere in the profession. Hence, it must be emphasized that the Supreme Court

⁶⁸ *Id.* at 369-71 (footnotes omitted).

⁶⁹ *Id.* (citations omitted).

⁷⁰ *Id.*

in *Bates* simply upheld the constitutional challenge of lawyers who, in a *candid* advertisement in a daily newspaper of general circulation, stated that they "were offering 'legal services at very reasonable fees,'" and listed their fees for certain services.⁷¹

One of the consequences of the Supreme Court decision, popularly understood as upholding the lawyer's right to advertise, is that it has given the contingent fee a new and odious meaning.⁷² The contingent fee was originally intended to make competent counsel available to those who could not afford legal services.⁷³ Although prohibited in other systems of law,⁷⁴ making available legal services to those who would otherwise be deprived was regarded as a sufficient justification for the contingent fee in the United States.⁷⁵ Although regulated to prevent abuses, it has not been regarded antithetical or inimical to the legal profession.

Notwithstanding its noble animating purpose, the contingent fee is now viewed as giving a lawyer an interest in the actual accident, disaster, or transaction that precipitated the lawsuit and a stake in its outcome. The question immediately arises in the mind of the non-lawyer: Whether the lawyer's decision to sue is motivated by the possibility of personal financial gain rather than the interest of the client and the merits of the claim; hence, the belief that the courts are used not only for litigation of doubtful merit, but also for cases that are frivolous or vexatious.⁷⁶ Furthermore,

⁷¹ *Id.* at 354. The majority in *Bates* makes clear that not all forms of attorney advertising will be free from regulation; those that are potentially misleading or untruthful will be subject to restraint. *Id.* at 383.

⁷² MODEL RULES, *supra* note 63, at 383.

⁷³ See Leslie Spencer, *Are Contingency Fees Legal?*, FORBES, Feb. 19, 1990, at 130.

⁷⁴ Warren E. Burger, *A Dedication to Chief Judge Lawrence H. Cooke*, 53 FORDHAM L. REV. 2009, 2044 (1984).

⁷⁵ See Lawrence J. Siskind, *Continuing the Conversation on Civil Litigation Reform*, THE RECORDER, Apr. 14, 1992, at 6 (contrasting availability of automobiles in United States with unavailability of affordable legal services); see also *ABA Lawyers Hoping to Fix Tarnished Image*, UPI, Aug. 9, 1986, available in LEXIS, Nexis Library, Upistat File [hereinafter UPI]. Twenty-nine percent of those polled attribute fault for the litigation crisis to lawyers and insurance companies. *Id.*

⁷⁶ See Sharon Philips, *Law No Help for Non-Profit Groups*, UPI, June 24, 1986, available in LEXIS, Nexis Library, Upistat File (surmising that educating public about frivolous suits and excessive jury awards will improve prospects of obtaining liability insurance for non-profit organizations); *Property-Casualty Executives Speak Out*, 88 BEST'S REV. 12, 30 (1988) (discussing negative effect of frivolous suits on property and casualty industry); Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62 (suggesting that "absurd lawsuits" and an exaggerated notion of "First Amendment rights" might account for why public opinion polls put lawyers near "bottom of the barrel").

in view of the high cost of defending a lawsuit, a defendant may prefer to settle, regardless of merit. Hence, the contingent fee, originally intended to secure the rights of plaintiffs who could not afford legal services, has been transformed into a weapon to victimize defendants, be they individuals, business entities, or insurance companies.⁷⁷

In inducing or initiating litigation, the common law concepts of champerty⁷⁸ and maintenance⁷⁹ have become archaic and obsolete. Indeed, they are so completely forgotten that they are unknown to a modern generation of lawyers. It should be remembered that at common law, maintenance and champerty involved the purchasing of an interest in litigation.⁸⁰ The practice, which was believed to stir up quarrels and litigation, was deemed reprehensible and illegal. Indeed, maintenance and champerty were punished by severe fines or imprisonment.⁸¹ The abuse of bringing vexatious and frivolous suits has resulted in stronger rules that authorize the imposition of sanctions upon both lawyers and clients.⁸²

⁷⁷ See, e.g., *Lawyers' Contingent Fees Said To Be Excessive, Sometimes Running as High as \$20,000 an Hour*, PR NEWSWIRE, Aug. 16, 1991, available in LEXIS, Nexis Library, PR News File. Low risk cases often prompt those unable to afford an hourly rate to initiate lawsuits where the only obligation to pay is upon a successful settlement; it is asserted that failure to counsel a client on whether the contingency fee is in his best interest may be a breach of the attorney's fiduciary duty. *Id.*; see also Grant P. DuBois, *Modifying the Contingent Fee System*, A.B.A. J., Dec. 1985, at 36.

⁷⁸ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 372 (1986) ("[A] proceeding, illegal in many jurisdictions, by which a person not a party in a suit bargains to aid in or carry on its prosecution or defense by furnishing money or personal services in consideration of his receiving a share of the matter in suit.")

⁷⁹ *Id.* at 1362 ("[A]n officious or unlawful intermeddling in a cause between others by assisting either party with money or means with which to carry it on.")

⁸⁰ See Catherine Yang, *Psst! Wanna Buy a Lawsuit?*, FORBES, May 19, 1986, at 67.

⁸¹ EARL JOWITT, THE DICTIONARY OF ENGLISH LAW (1951).

⁸² See FED. R. CIV. P. 11. This rule reads, in pertinent part:

[T]he signature [on a pleading or motion] of an attorney constitutes a certification by the signer . . . that to the best of the signer's knowledge . . . [the document] is well grounded in fact and is warranted by existing law . . . and . . . is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

In addition, several states have responded by enacting anti-barratry laws. See, e.g., WIS. STAT. ANN. § 757.295 (West 1981) ("[N]o person may solicit legal matters or a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services."); WASH. REV. CODE ANN. § 9.12.010 (West 1988) ("Every person who shall bring on his own behalf, or instigate, incite or encourage another to bring, any false suit . . . in any court of this state . . . shall be guilty of a misdemeanor . . . and

The purpose here is neither to condemn nor to justify the relative merits of the contingent fee or the practices and abuses that may have resulted from its use. The present concern stems from the fact that the lawyer's monetary stake or financial interest in the litigation⁸³ appears to be antithetical to the lawyer's given objective—*independent advice primarily* for the benefit of the client. As a consequence, a further erosion of the public's faith in and respect for the professionalism of lawyers has occurred.

D. *Lawyer Explosion and the Media*

In 1991, there were over 750,000 lawyers in the United States⁸⁴—one for every 295 persons.⁸⁵ In contrast, the lawyer ratio in Japan is one for every 10,000 persons.⁸⁶ By the year 2000, it is projected that the United States will have approximately one million lawyers.⁸⁷ Some observers tend to explain the difference by noting the relative disuse of the formal legal system by the Japanese, and by the Japanese concept of justice that places a greater value on the importance of community. Critics of the legal profession cite the large number of lawyers as a primary cause of dissat-

. . . may, in addition thereto be disbarred from practicing law within this state.”); VA. CODE § 18.2-452 (1988) (“Any person, if an individual, who shall engage in barratry shall be guilty of a Class 1 misdemeanor; and if a corporation, may be fined not more than \$10,000.”); *see also* CAL. PENAL CODE § 158 (West 1988); GA. CODE ANN. §§ 9-9901 to 9-9902 (Harrison 1973); IDAHO CODE § 18-1001 (1987); ILL. ANN. STAT. ch. 705, para. 215-26 (Smith-Hurd 1992); MD. CODE ANN., BUS. OCC. & PROF. § 10-604 (1989); N.M. STAT. ANN. § 30-27-3 (Michie 1993); OKLA. STAT. ANN. tit. 22, § 551 (West 1992); 13 PA. CONS. STAT. ANN. § 5109 (1983); S.C. CODE ANN. § 16-17-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 22-12-1 (1988).

⁸³ *See* Spencer, *supra* note 73, at 47.

⁸⁴ *See* Morton M. Kondracke, *Judiciary's Temple on Hill: Call it the Quayle Building?*, ROLL CALL, Sept. 10, 1992. From 1960 to 1990 the number of lawyers in the United States has nearly tripled, from approximately 260,000 to its present figure. *Id.* From 1870 to 1970 “the number of lawyers per million citizens stayed constant . . . then more than doubled by 1988. *Id.*”

⁸⁵ *See* Siskind, *supra* note 75, at 6. The article also notes that England, “the birthplace of our legal system,” has one-third the United States’ attorney to citizen ratio, with 103 lawyers per 100,000 people. *Id.*; *see* BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s* 4 (1985). The lawyer to population ratio in 1980 is listed at 418/1 and projected to drop to 279/1 by 1995. *Id.*

⁸⁶ *See* Rosner, *Professionalism and Money in the Law*, N.Y. L.J. 26, 28 (Sept./Oct. 1991); Stan Darden, *Quayle Debates With ABA Head Over Legal Reform*, UPI, Aug. 13, 1991, available in LEXIS, Nexis Library, Omni File (“Does America really need 70 percent of the world’s lawyers, one for every 335 people, when the number in Japan is one for every 9,000?”); Siskind, *supra* note 75, at 6.

⁸⁷ William T. Braithwaite, *Hearts and Minds*, A.B.A. J., Sept. 1990, at 70.

isfaction with the legal profession.⁸⁸ Comedians state that, in the United States, there will soon be more lawyers than people.

Insofar as numbers might reflect the availability of lawyers and legal services, large numbers should be helpful in portraying a profession whose services are readily available to the public. Hence, numbers alone cannot be the problem. As an excellent example that numbers alone are not the problem, one may cite the "litigation explosion," manifesting itself in calendar congestion.⁸⁹ The large quantity of cases brought to the courts is not necessarily a negative factor. Indeed, it may be stated that by resorting to the courts, the public is manifesting confidence in the judicial system and the administration of justice. The problem, therefore, is not merely numbers, but lies in the *perception* that lawyers instigate litigation rather than promoting amicable solutions and fair and just settlements. As a result, lawyers are regarded as instigators of strife and not as peacemakers and problem solvers.

Any discussion of the respect enjoyed by the legal profession and how the public perceives lawyers requires a reference to the role of the media. The media has a significant effect on the way in which lawyers and the legal profession are perceived. In addition to newspapers and other publications, the media includes television and movies. News items have significantly affected the public's perception of lawyers. Whenever an attorney participates in criminal or unethical conduct, a newsworthy story is readily available.⁹⁰

⁸⁸ See UPI, *supra* note 75. Fifty-five percent of those surveyed said the United States has too many lawyers. *Id.*

⁸⁹ See Charles Wasilewski, *Tort Reform: Courting Public Opinion*, 87 *BEST'S REVIEW* 14 (June 1986) (noting that insurance industry criticizes "overzealous, greedy lawyers" who have caused "litigation explosion"); UPI, *supra* note 75. In the court of public opinion the lawyer's major culprit is the "litigation explosion". *Id.*; see 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1331 (1990) (attributing "litigation explosion" in part to "availability of the contingent fee"). The ability to initiate a lawsuit without paying money at the outset plays a major role in increasing the workload of an overburdened judiciary. *Id.* at 14. *But see* Alan Herbert, *Survey Eyes Litigation Explosion*, *N.Y. TIMES*, Jan. 2, 1986, at 10 (reporting one public opinion poll shows that most Americans do *not* believe that lawyers have caused litigation explosion).

⁹⁰ See Kathleen Day, *N.Y. Lawyer Charged in Insider Action; Leaks Allegedly Made on Takeovers*, *WASH. POST*, Aug. 10, 1990, at F1 (reporting charges filed against New York attorney for allegedly selling confidential information); Charles E. Anderson, *Recruitment Inquiry: Four Ohio Law Firms Investigated for Antitrust Violations*, *A.B.A. J.*, Dec. 1990, at 32 (stating that agreement to limit recruiting expenses could put firms in jeopardy of receiving fines up to \$10,000); Stephanie B. Goldberg, *Drawing the Line: When Is an Ex Coke Addict Fit to Practice Law?*, *A.B.A. J.*, Feb. 1990, at

Television has many programs which depict the practice of law, and emphasize the courtroom drama. Illustrative shows include: "Equal Justice," "L.A. Law," "Law and Order," "Matlock," and "Perry Mason." The motion picture industry has also produced many films about lawyers, such as "Presumed Innocent," "Class Action," "My Cousin Vinny," and "The Firm." Television shows and movies can have a positive effect on the public's perception of the profession. They can also have a serious, negative impact upon the image or perception of the legal profession, especially when drama prevails over accuracy.⁹¹

The belief that lawyers are almost necessarily dishonest also exists.⁹² In fact, the results of some public opinion polls indicated that the public has a negative view of lawyers and equates them with persons who should be most carefully watched.⁹³ This perception is confirmed by specific acts, actions, or conduct of some lawyers which cause the public to develop negative stereotypes. Examples include events such as Watergate, the savings and loan debacle, instances of sexual improprieties between lawyers and clients, and the congressional "check bouncing" scandal.⁹⁴ All of

49; Don J. DeBenedictis, *The Alliance: Did a Network of Small Southern California Law Firms Conspire to Defraud Insurance Companies to the Tune of \$200 Million?*, A.B.A. J., Dec. 1989, at 59.

⁹¹ See Rochelle Siegel, *Presumed Accurate: When the Law Goes to the Movies*, A.B.A. J., Aug. 1990, at 42. Movies and television shows often face difficulties when attempting to "portray the legal system accurately", due to (1) the time-consuming nature of case resolution; (2) the complexities of the substantive and procedural process; (3) often mundane issues addressed in law; and (4) the media's need to create action and suspense. *Id.* at 45-46; Catherine M. Spearnak, *Thanks to Message, Lawyers Forgive Film's Distortions*, L.A. TIMES, Mar. 9, 1989, Part 6 (Entertainment Desk), at 1 (noting that criminal defense attorneys agree "[e]ven the most entertaining courtroom dramas usually fail to accurately depict legal scenarios").

⁹² See J. Robert McClure, Jr., *On the Practice of Law—A. Lincoln*, A.B.A. J., Oct. 1990, at 98-99 (offering list of those qualities which Lincoln considered prerequisites for lawyers: "diligence, perseverance, preparedness, poise, peaceableness, morality, honesty and monetary fairness in one's work"); see also Drinan, *supra* note 33, at 389 ("No one will deny that the legal profession in America has engaged in its share of posturing, hypocrisy, self-serving ambiguities, and, especially in recent years, greed and avarice.").

⁹³ See Hugh Aynesworth, *Roofing Contractor Hits Legal Professor with 8-Page Tabloid*, THE WASH. TIMES, Dec. 26, 1990, at A6 (adding that even newspaper reporters fare better than attorneys in public opinion polls).

⁹⁴ See Drinan, *supra* note 33, at 396 (noting that Watergate scandal prompted American Law Institute to draft "comprehensive treatise on ethical norms for lawyers in America").

these criminal or scandalous events fortify the negative perception.⁹⁵

Unfortunately, however, both casual conversation and empirical data reveal that the reputation of the entire legal profession has already seriously suffered.⁹⁶ In order to counter this damaging, negative perception and help restore respect and confidence, it is important to ascertain to what degree negative perception is justified. How serious is the decline of professionalism, and how widespread is lawyer misconduct? Clearly, the activities or misdeeds of a relative few should not be attributed to all lawyers or to the entire profession.

E. Litigation Explosion

An additional factor that has contributed to the negative perception of lawyers is what has been termed the "litigation explosion."⁹⁷ In general terms, this implies that more and more people are resorting to the courts to resolve all sorts of disputes and grievances. Regardless of factual accuracy, it is believed that lawyers are the cause of the explosion.

The public perceives that lawyers file every conceivable type of case, regardless of merit. As a result, the quantity of cases filed with the courts has burdened court dockets and threatens the quality of justice.⁹⁸ Unfortunately, some cases, however frivolous, are pursued and presented because they are deemed to have vexation value. As indicated previously,⁹⁹ the bringing of frivolous or

⁹⁵ See, e.g., Mitchell Tropin & Phyllis Diamond, *Liability Concerns Prompt Law Firm Insider Trading Procedures*, 23 SEC. REG. & LAW REP. 288 (1991) (dealing with insider trading); Stephen Labaton, *Putting Lawyers Under Scrutiny*, N.Y. TIMES, Mar. 21, 1991, at D2 (dealing with role of lawyers in savings and loan scandal); Katherine Bishop, *Keeping Sex Out of the Law Office*, N.Y. TIMES, Mar. 15, 1991, at B16 (dealing with incidents of sexual relations between lawyers and clients and efforts to forbid certain types of relationships).

⁹⁶ See William Carlsen, *Lawyers Have More Than Image Problem*, S.F. CHRON., Aug. 28, 1993, at A2; Frances G. Taylor, *Add Ill Will of Public to Job-Stress List; What Do Lawyers, Used-Car Dealers, and Taxmen Have in Common?: No-Love List*, HARTFORD COURANT, Sept. 29, 1992, at D8; Dennis E. Hensley, *Why People Don't Like Lawyers and What You Can Do About It*, A.B.A. J., Oct. 1990, at 90.

⁹⁷ See generally *supra* note 44.

⁹⁸ See Edward D. Re, *The Lawyer as Counselor and Peacemaker*, 87 CASE & COM. 42 (1982); Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685 (1982). "By teaching lawyers how to advise, plan, conciliate and negotiate, two important social goals are achieved . . . lighten[ing] the burden of cases which is threatening to crush our judicial system; and . . . reduc[tion of] the economic and emotional toll which always accompanies litigation." *Id.* at 691.

⁹⁹ See *supra* note 65.

meritless cases has given added vigor to laws and rules of court that impose sanctions upon lawyers.

The negative effect of the "litigation explosion" has not only tarnished the reputation of the legal profession, but has also had a detrimental effect in other areas, such as the practice of medicine. Some doctors, for example, state that they are required to think of the possibility of being sued and "to put the interests of their lawyers above the interests of their patients." This phenomenon increases the cost and availability of health care. For instance, in some situations, doctors will order unnecessary tests for the sole purpose of "protecting" themselves in the event of a malpractice suit.¹⁰⁰ This practice by doctors and hospitals, which results from the "litigation explosion," also results in increased medical costs.

The constant threat of lawsuits has also increased the expense incurred in obtaining medical malpractice insurance. These costs are inevitably passed on to the patient. Partly as a result of the "litigation explosion," health care costs have increased to such a high level that health care is not available to all Americans.¹⁰¹ Finally, it is said that the large number of frivolous lawsuits has caused some doctors to completely abandon the practice of medicine.¹⁰² Indeed, some may recall the statement of former Vice President Dan Quayle that "the litigation explosion has . . . forced doctors to quit practicing in places where they're needed most."

On the general subject of the "litigation explosion," it must be stressed that if a dispute can neither be avoided nor settled and seems destined for litigation a final effort should nevertheless be made to ease the stress of trial and the burden of litigation.¹⁰³ The traditional form of lengthy pretrial procedures followed by a full trial should not be the only method considered for the resolution of

¹⁰⁰ See Roxanne B. Conlin, *Doctors' Liability Considered*, NAT'L. L.J., Aug. 2, 1993, at 23. *But see* Harvey F. Wachsman, *Ending New York's Malpractice Levy Will Cut Health Care Costs*, N.Y. TIMES, Jan. 12, 1993, at A20. The crisis in malpractice lawsuits is not universally conceded; for example, the president of the American Board of Liability Attorneys has written in a letter to the editor of the New York Times that "fewer than 10 percent of all malpractice incidents result in lawsuits." *Id.*

¹⁰¹ See Conlin, *supra* note 100, at 23.

¹⁰² See Martha Middleton, *The Medical Malpractice War: Doctors Angered by Jump in Lawsuits*, NAT'L L.J. Aug. 27, 1984, at 1 (noting that doctors abandoning "high-risk specialties" and practicing "costly 'defensive medicine'").

¹⁰³ See Dardan, *supra* note 86 (quoting vice-president Quayle stating: "Is it healthy for our economy to have 18 million new lawsuits traveling through the system annually? Is it right that people with disputes come up against staggering expense and delay? The answer is no.").

a dispute. The common law trial is often stressful, frustrating, time-consuming, and expensive. It is also frequently not rewarding for the client.¹⁰⁴ In an attempt to avoid these unfortunate effects or aspects of the traditional trial, the parties and their lawyers should explore alternative methods of dispute resolution.¹⁰⁵ Lawyers must understand that traditional litigation is not the only means of resolving disputes.¹⁰⁶ Even from the point of view of the prevailing party, a full trial is usually stressful and not always the best method of resolving a dispute. Furthermore, what the nominal winner has gained may not exceed the expense, anxiety, and frustration inherent in the trial.¹⁰⁷

Quite apart from lawyer conduct, the sheer volume of cases with which the courts must contend causes delay and reduces the efficacy of the courts as governmental agencies for the just resolution of disputes.¹⁰⁸ Nonetheless, regardless of lawyer culpability, the lawyer's reputation suffers when the clients perceive that

¹⁰⁴ Warren E. Burger, *Isn't There a Better Way?* A.B.A. J., Jan. 1982, at 274 (addressing issue of whether lawyers are fulfilling their traditional obligation of being "healers of human conflicts"). Justice Burger suggests that certain administrative processes, such as arbitration, workmen's compensation, and mediation may be preferable to the adversary system of resolving disputes. *Id.*

¹⁰⁵ *Id.* In his annual address to the A.B.A., Chief Justice Burger focused his remarks on arbitration as an alternative to litigation. It is suggested that lawyers are "naturally competitive" and therefore more apt to turn to litigation than arbitration or negotiation. There is some evidence that a new trend in legal education will lead to a greater awareness of the many nonjudicial approaches to fulfilling client needs; with court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes. *See id.*

¹⁰⁶ *See* Lawrence H. Cooke, *The Highways and Byways of Dispute Resolution*, 56 ST. JOHN'S L. REV. 611, 613 (1981). *See generally* Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 592 (1988). The author points out that the number of available alternatives for resolving disputes is "virtually infinite." *Id.* Prior to considering which alternatives may be feasible, the dispute itself must be evaluated and issues such as flexibility and time constraints should weigh heavily in determining the most appropriate procedure. *Id.* at 599-601.

¹⁰⁷ Burger, *supra* note 104, at 275. The stress stemming from litigation affects not only the parties to the action and the lawyers, but also lay and professional witnesses. *Id.*

¹⁰⁸ Edward D. Re, *The Administration of Justice and the Courts*, 28 SUFFOLK U. L. REV. 1, 1-12 (1984); *see* Barbara Rabinovitz, *State Judge, 3 Lawyers Eyed for U.S. Judgeships*, MASS. LAW. WKLY., Apr. 13, 1992, at 2 (arguing that more judges are needed for volume of cases already on docket and to improve efficiency of courts.); *see also* Len Strazewski, *Phoenix Courts Go High Tech*, CRAINS, July 27, 1992, at 15 (stating that Phoenix has been challenged by sheer volume of cases and increasing complexity of adjudication process); *State of the Judiciary*, N.Y. L.J., Dec. 4, 1989, at 52. As the volume of cases has increased, so has the difficulty encountered in administering justice fairly and effectively. *Id.*

there is an undue delay in proceeding to trial. Even apart from the delay preceding trial, the trial itself may appear to be prolonged and time-consuming. Of course, if the trial appears to be hurried due to calendar congestion, the litigants may conclude that the "disposition" of the case was the goal rather than a just and fair resolution of the dispute.¹⁰⁹

F. Lawyer Competence

The problem of lawyer competence is sufficiently important to warrant separate thorough treatment. Dissatisfaction because of lawyer incompetence may be regarded as a special problem that may require a unique solution. Incompetence may reflect either lack of knowledge of the law or lack of experience. The solution may be found in study, training, and experience.¹¹⁰ Inexperience usually requires association with experienced counsel who will assume responsibility for the rendering of competent services, be they the giving of advice or the prosecution or defense of a trial or appeal.

In the event of lack of knowledge or inexperience, the applicable ethical norm requires a candid acknowledgment of the particular shortcoming, and acquisition of an associate who can render the necessary competent legal services. Particularly in criminal cases, lawyers should not undertake to defend cases when there is any doubt that the attorney can defend competently.¹¹¹ Surely, no lawyer can risk being described as a violator of the Sixth Amend-

¹⁰⁹ Re, *supra* note 108, at 1-12; see Newman, *Rethinking Fairness: Perspectives On the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) ("Whether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.")

¹¹⁰ ABA REPORT, *supra* note 29, at 138-40.

¹¹¹ See Douglas Frantz, *Death Penalty Argument Shifts To Issue of Lawyers' Competence*, L.A. TIMES, June 25, 1991, at A5 (discussing incompetence of some court appointed attorneys in death penalty cases). See generally Bryant G. Garth, *Rethinking the Legal Professions' Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 640 (1983).

No one with any practical experience would deny the superficiality and shoddiness of much legal work, nor would anyone claim that the bar's institutions of quality control have provided effective means of self-regulation in the past. [A] lawyer's most fundamental ethical duty is 'competence' because the guarantee of competence is what justifies the professional monopoly.

Id. (footnote omitted).

ment to the Constitution which guarantees competent counsel to defendants.¹¹²

Chief Justice Burger has rendered valuable service in discussing lawyer competence. Indeed, in very thoughtful addresses, he not only highlighted the problem, but also made valuable suggestions for legal education, bar admission, lawyer certification, and lawyer specialization.¹¹³ That competence is a prerequisite for the practice of law has never been questioned. All canons or codes of professional responsibility have listed competence as the indispensable skill. Competence, of course, includes adequate preparation and care in the representation of clients. Whether due to lack of preparation or lack of time, lawyers who are overextended violate the duties owed to clients under all applicable codes of professional responsibility.

The most recent treatment of the requirement of competence is found in the *Statement of the American Bar Association: Task Force on Law Schools and the Profession* ("ABA Statement"). The *ABA Statement*, as in prior codes, specifically states that in order to effectively analyze and apply legal rules to a client's problems, "a lawyer should be familiar with the skills and concepts involved in identifying legal issues, formulating legal theories, elaborating and enhancing the theories, and evaluating and criticizing the theories."¹¹⁴

The *ABA Statement* also covers the lawyer's responsibilities pertaining to counseling, negotiation, litigation, and alternative dispute resolution. As to litigation, the *ABA Statement* also specifically treats knowledge of the fundamentals of litigation at the trial and appellate level, advocacy in the administrative and executive forums, and other dispute resolution forums.¹¹⁵ The wide

¹¹² David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973); Sallyanne Payton, *Essays On Legal Education: Is Thinking Like a Lawyer Enough?* 18 U. MICH. J.L. REF. 233, 234 (1985). The focal point of a legal education should be to instill in graduates the techniques of inquiry and reason in hopes of yielding lawyers who are "fast learners" and "persons to whom professional responsibility comes naturally and in whom sound judgment develops without strain." *Id.*

¹¹³ Burger, *supra* note 104, at 275.

¹¹⁴ ABA REPORT *supra* note 29, at 138-40. For a discussion of ethical considerations in the international practice of law, see R.E. Lutz, 16 FORDHAM L. REV. 16 (1992-93). See also American Law Institute—American Bar Association Committee On Continuing Professional Education, *Enhancing the Competence of Lawyers* 77 (1981); GEOFFREY C. HAZZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 455-56 (1985).

¹¹⁵ ABA REPORT, *supra* note 29, at 139.

coverage of the *ABA Statement* is encouraging and helpful because, traditionally, rules of professional responsibility have been oriented toward litigation, that is, the trial and appeal of cases.

It is important to note that the *ABA Statement* also covers ethical dilemmas. In that section, the *ABA Statement* treats familiarity with the nature and sources of ethical standards, the means by which ethical standards are enforced, and the processes for recognizing and resolving ethical dilemmas. Indeed, in Part II, entitled "Fundamental Values of the Profession," the *ABA Statement* covers "striving to promote justice, fairness and morality," and "striving to improve the profession." It is worthy of note that the *ABA Statement* contains the noble aspiration which exhorts lawyers to strive "to rid the profession of bias based on race, religion, ethnic origin, gender, sexual orientation, or disability, and to rectify the effects of these biases."¹¹⁶

This Article contains no extensive discussion of lawyer competence, but deals primarily with the perception and reputation of the legal profession, and matters that the new *ABA Statement* terms "Fundamental Values of the Profession."¹¹⁷ In the *ABA Statement*, under the section entitled "Striving to Promote Justice, Fairness and Morality,"¹¹⁸ it is comforting and reassuring to note the reference to Roscoe Pound's "primary purpose" of a profession, and a quotation from the Supreme Court case of *Schwartz v. Board of Bar Examiners*.¹¹⁹ The *ABA Statement* quotes Dean Pound in stating that the "primary purpose" of a profession is the "pursuit of the learned art in the spirit of public service."¹²⁰ From the Supreme Court case of *Schwartz*, the *ABA Statement* quotes the words that, in their dealings on behalf of a client, lawyers should embrace "those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, throughout the centuries, been compendiously described as 'moral character.'"¹²¹

¹¹⁶ *Id.* at 141; see Ted Schneyer, *Professional Discipline For Law Firms?*, 77 CORNELL L. REV. 1, 19 (1992) (stating importance of instilling professional discipline in larger firms).

¹¹⁷ *Id.* at 140.

¹¹⁸ *Id.*

¹¹⁹ 353 U.S. 232 (1957) (holding that mere membership in Communist Party does not justify denial of opportunity to practice law).

¹²⁰ ABA REPORT, *supra* note 29, at 140.

¹²¹ *Schwartz*, *supra* note 93, at 247, quoted in ABA REPORT, *supra* note 29 at 140.

Although clients and the public may not be able to readily evaluate lawyer competence, there is no difficulty in detecting and reacting unfavorably to ethical lapses, inadequate preparation, and overbilling. Equally destructive of lawyer confidence is a perceived lack of interest in the problem and anxiety of the client. In sum, it seems clear that the failures or shortcomings which cause dissatisfaction with the profession are factors which reflect an ethical and moral decline of professional standards and values.

IV. PROPOSED SOLUTIONS

A. *The Law as a Noble Profession*

This Article has revealed a number of causes for the present state of dissatisfaction with the legal profession. Commencing with the persistent abuses of the adversary system, materialistic attitudes manifested in unjustified billing practices, and the commercialization of the profession, sufficient causes have been identified to indicate the seriousness of the problem.

The ever-increasing number of lawyers, the explosion in the number of cases filed with the courts, and the bringing of frivolous suits have accelerated the erosion of the trust and confidence in lawyers. Even if lawyer competence were assumed, ethical lapses, scandals, and attitudes of self-interest have all led to a perceived lack of professionalism with the inevitable loss of respect and esteem. What suggestions or proposals may be made to help restore the trust and respect that are indispensable for the legal profession?

Since respect must be earned, it is fundamental that, to regain the trust and confidence of clients and the public, lawyers must demonstrate understanding and appreciation of the responsibilities of membership in a noble profession. Lawyers must be keenly aware that their status implies that they belong to a profession, the principal goal of which is to serve clients, as well as to administer justice.¹²² The key ideal of the profession is *service*, rather than maximization of profits and billable hours.¹²³ Stated

¹²² See ABA REPORT, *supra* note 29, at 140. Striving to promote justice and providing adequate legal services to those who can not afford them are fundamental values of the profession. *Id.*

¹²³ *Id.*

differently, lawyers must constantly remember that "public service is the primary purpose of the legal profession."¹²⁴

Although no one questions the right of just compensation for professional services rendered, lawyers must resist the temptation to make self-interest the primary, if not the sole, goal of the practice of law. In the words of Dean Pound, a profession is "no less a public service because it may incidentally be a means of livelihood."¹²⁵ Furthermore, it is sad to find it necessary to state that lawyers must understand that *honest dealing* is indispensable to reinstate the belief that lawyers are worthy of trust and confidence. By word and by deed, lawyers should conduct themselves as members of a noble profession dedicated to public service and the administration of justice. Public service, pro bono service, and a genuine concern for the interests and welfare of clients should distinguish the legal profession from business enterprises,¹²⁶ where profit is the sole or primary goal.

A rededication to professional standards is required to help change the present negative perception of lawyers and restore the public's confidence. As with public servants, all citizens may properly expect that lawyers will act zealously within the bounds of the law, and serve to secure the fundamental rights of the persons whom they have undertaken to serve to the best of their ability.¹²⁷

¹²⁴ Drinan, *supra* note 33, at 394 (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)); *see supra* note 86.

¹²⁵ ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

¹²⁶ Goldberg, *supra* note 41, at 44; *see ABA REPORT, supra* note 29, at 214 (positing that every lawyer, regardless of position or status, has obligation to find time to help disadvantaged); Daniel P. Sheehan, *Rich Lawyers: Where is Your Conscience?*, *NEWSDAY*, May 17, 1988, at 62. Attorneys have more opportunities for good deeds than members of any other profession. *Id.*; N. Lee Cooper, *Refocus the Spotlight Toward Public Service*, *N.Y. L.J.*, Aug. 18, 1986, at S12 (arguing that it is incumbent on legal profession to shift its emphasis from monetary gain to public interest representation).

¹²⁷ *See* Edward D. Re, *The Courts' Enforcement of the Rule of Law*, 62 *ST. JOHN'S L. REV.* 601, 616 (1988). The ABA has asserted:

The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.

CANONS OF PROFESSIONAL ETHICS Canon 15 (1908), *reprinted in* T. MORGAN & R. ROUNTON, 1988 *SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY* 383 (1988).

B. *The Adversary System and Adherence to Ethical Standards of Conduct*

If the administration of justice were viewed as a great human drama, lawyers and judges would be among the leading actors. Within the common law world, the adversary system will work well only when lawyers, its central participants, are fully aware of their professional responsibility to represent clients competently within the bounds of law and professional ethics.¹²⁸ Indeed, Justice Arthur T. Vanderbilt, distinguished law school dean and former president of the American Bar Association, has stated that “a judicial system in the long run can be no better than its bar.”¹²⁹ Stated differently, the adversary system “can only serve as an instrument of justice if counsel for both sides adhere to proper standards of professional responsibility and competence.”¹³⁰ It has been suggested that professional responsibility might be increased if lawyers were “forced from [their] hired gun pedestal [so that they] might [be more likely] to follow their moral instincts.”¹³¹

Codes of professional ethics and responsibility have traditionally been designed primarily for litigators. Beyond the litigation process, careful attention must be devoted to the many ethical problems and dilemmas that face lawyers in their roles as counselors and advisers. The promulgation of codes of professional responsibility by bar associations, however, will not suffice. Lawyers must manifest an awareness of their professional responsibilities and adhere to the standards of conduct reflected in the pertinent codes. The negative perception of lawyers will not dissipate unless each lawyer strictly complies with the ethical and professional standards of the profession.

Furthermore, professional standards and codes of conduct must be taken seriously—as must all other codes of law. These rules, necessary for the proper fulfillment of the mission of the profession, cannot be regarded as mere discretionary exhortations. Their effective enforcement will remind lawyers, clients,

¹²⁸ *Id.* at 688; Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 *FORDHAM L. REV.* 125 (1991) (projecting future issues in professional discipline).

¹²⁹ Edward D. Re, *The Partnership of Bench and Bar*, 16 *CATH. LAWYER* 194, 198 (1970) (quoting ARTHUR T. VANDERBILT, *CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 26 (1952)).

¹³⁰ *Id.* at 200.

¹³¹ Zacharias, *supra* note 32, at 648; Roger Cramton, *The Trouble With Lawyers (and Law Schools)*, 35 *J. LEGAL EDUC.* 359, 369 (1985) (referring to “mercenary image” of lawyers).

and society at large, that the law is still a profession with effective norms and standards of conduct.¹³²

C. *The Lawyer as Counselor: Settlement and Preventive Law*

The view is widely held that lawyers, who are taught to master the adversary system and who are trained primarily as advocates, too often tend "to view a dispute as a contest for advantage, not an opportunity for settlement."¹³³ Apart from the training received in the adversary system, it cannot be said that lawyers fully appreciate the various roles required of them in a modern society.¹³⁴ Indeed, not only the wider public,¹³⁵ but the lawyers themselves, usually discuss and extol their role as advocates, to the detriment of their role as counselors.

Beyond their role as trial and appellate advocates, lawyers have neglected other equally important roles in the practice of law, such as the settlement of disputes and the prevention of liti-

¹³² Referring to "Rambo litigation" tactics, it has been stated that "too many judges simply do not care enough, or for some reason are repelled by the concededly distasteful task of having to police their courtrooms." Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 *LOY. L.A. L. REV.* 81, 82 (1991) (footnote omitted).

¹³³ *Id.* Lawyers should be taught how to avoid litigation just as they are taught to conduct successful litigation. Settlement and negotiation should be prepared for and carried out with the same vigor as a litigated action. *Id.*

¹³⁴ Edward D. Re, *The Role of the Lawyer in Modern Society*, 30 *S. D. L. REV.* 501 (1985); see Edward D. Re, *The Lawyer as Counselor and The Prevention of Litigation*, 31 *CATH. U. L. REV.* 685, 691 (1982) ("A proper appreciation of a lawyer's role as a legal counselor must begin with a more complete understanding of the counseling function."); Glen Sato, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 *U.C.L.A. L. REV.* 507, 513 (1986). A lawyer as a mediator must perform a number of tasks, such as "evaluating whether the parties or a dispute are 'right' for mediation, taking responsibility for coordinating communication, focusing the parties on the discussion, providing relevant information, aiding in the development of problem-solving alternatives, scouting for potential grounds of agreement, and preparing the final agreement." *Id.* (footnote omitted).

¹³⁵ See Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 *HOFSTRA L. REV.* 311, 336 (1990). "The lawyer's roles as counselor, negotiator, drafter and intermediary . . . tended to be submerged in light of the lawyer's more dramatic role as advocate." *Id.* (footnote omitted); *In re Integration of Neb. State Bar Ass'n*, 275 *N.W.* 265, 268 (Neb. 1937). The court stated:

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.

Id.

gation.¹³⁶ The advice of lawyer Abraham Lincoln is worthy of quotation: "Discourage litigation . . . [p]ersuade your neighbors to compromise whenever you can . . . point out to them [that] the nominal winner is often a real loser—in fees, expenses and waste of time." It is noteworthy that Lincoln also stated: "Never stir up litigation . . . [a] worse man can never be found than one who does this."¹³⁷

To ameliorate and combat the abuses of the adversary system and the "litigation explosion," several responses are possible. First, lawyers must appreciate and expand their role as counselors. As counselors, lawyers can play a crucial role in avoiding controversy and litigation. Effective counseling minimizes the likelihood of conflict between parties by stabilizing relationships and promoting understanding and cooperation.¹³⁸ Lawyers as counselors, in the words of Chief Justice Burger, provide the "solvents and lubricants which reduce the frictions of our complex society."¹³⁹ In performing their role as counselors, lawyers serve as instruments of peace, and incidentally, reduce some of the burdens of the overcrowded judicial system.

If proper counseling cannot resolve the conflict, it may still be possible to avoid litigation. Before resorting to litigation, counsel should consider several methods of alternative dispute resolution.¹⁴⁰ The usual methods are arbitration, mediation, and concili-

¹³⁶ See Re, *supra* note 108, at 43; Eugene R. Gaetke, *Lawyers As Officers Of the Court*, 42 VAND. L. REV. 39, 68 (1989).

¹³⁷ McClure, Jr., *supra* note 92, at 98-99.

¹³⁸ See *infra* notes 116-120 and accompanying text.

¹³⁹ Warren E. Burger, *The Future of Legal Education*, 15 STUD. LAW. J. 18 (1970).

¹⁴⁰ See, e.g., Bygard G. Nilsson, *A Litigation Settling Experiment*, A.B.A. J., 1979, at 1818 (describing use of 'mini-trials', or settlement through hearings before advisor as technique for resolving complex lawsuits—the Century City Experiment); see Re, *supra* note 98, at 46; ABA STANDING COMM. ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION—AN ADR PRIMER (3d ed. 1989) [hereinafter ADR PRIMER]. "Alternative Dispute Resolution refers to a broad range of mechanisms and processes designed to assist parties in resolving differences. These alternative mechanisms are not intended to supplant court adjudication, but rather to supplement it." *Id.* at 1.

Lawyers have a significant and professional role in ADR proceedings . . .

There are three phases where a lawyer/advisor can participate: in the pre-ADR referral process (helping parties identify the most effective process for their particular dispute); during the ongoing ADR process (participating as an advocate); and in the review process after the parties have reached a tentative agreement (acting as educator, drafter of the agreement, investigator and drafter, and/or reviewer of the drafted agreement).

Id. at 5; see generally Lawrence H. Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611, 612 (1981) ("Just as byways divert the flow of traffic

ation.¹⁴¹ Chief Justice Burger has strongly advocated the expanded use of arbitration as an alternative method of dispute resolution.¹⁴² It has also been suggested that neighborhood justice

from the highways, secondary systems of dispute resolution should be used to reduce the demands placed upon the traditional court system.”)

¹⁴¹ See Cooke, *supra* note 106, at 623 (stating “[F]orums using conciliation, mediation, and arbitration present . . . appealing alternative[s]”); see also ADR PRIMER, *supra* note 140, at 3.

Arbitration typically occurs in two distinct forms: 1) a private, voluntary process where a neutral third party decisionmaker, usually with specialized subject expertise, is selected by the disputants and renders a decision that is binding; or 2) a compulsory, non-binding process . . . which must be resorted to in some jurisdictions prior to going to court. Each party has the opportunity to present proofs and arguments at the arbitration hearing [which is] less formal procedurally than court adjudication.

Id. at 1.

Mediation is usually a private, voluntary, informal process where a party-selected neutral assists disputants to reach a mutually acceptable agreement During the mediation there is a wide opportunity to present evidence and arguments and to explore the interests of the parties. The mediator is not empowered to render a decision. There are three basic types of mediation: 1) rights based, . . . [where] . . . the goal is to settle the dispute with attention to the identified legal rights of the parties; 2) interest based . . . with a focus on the interest or compelling issue of the dispute; and 3) therapeutic . . . focuses more on the problem solving skills of the parties involved.

Id. at 2.

Other ADR methods include negotiation (no third party facilitator); private judging (referral by judge to statutory authority whose judgment is binding); neutral fact finding (pursuant to Rule 706 of the Federal Rules of Evidence, neutral third party's finding are not binding, but may be used as evidence in court); an ombudsman (a third party appointed by an institution to investigate grievances by its constituents, clients, or employees which is voluntary and non-binding); a *mini-trial* (aimed at settlement, but valuable indicator of probable litigated resolution facilitating further settlement negotiations); Summary Jury Trial (the jury equivalent of a mini-trial); and Moderated Settlement Conferences (a forum for both sides to present their essential issues before a panel of impartial [lawyers] who render an advisory non-binding opinion for use in settlement negotiations). *Id.* at 2-5.

¹⁴² See Warren E. Burger, *Isn't There a Better Way?*, A.B.A. J., Mar. 1982, at 274 (advocating mediation, conciliation, and especially arbitration as alternative to litigation, emphasizing that parties can select arbiter, that arbitration is less formal, less expensive, and often better equipped to cope with complex issues); see also Warren E. Burger, *Article: American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Foreword*, 1989 DUKE L.J. 808 (“Abraham Lincoln had it right . . . [d]iscourage litigation.”); Warren E. Burger, *The Future of Legal Education*, 15 STUDENT L.J. 18 (1970); Warren E. Burger, *The Role of the Law School in the teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377 (1980).

centers¹⁴³ and lay magistrates be considered to settle minor disputes. Even in the more complex cases, litigation may still be avoided by the use of neutral advisors who are experts in the subject matter and the applicable law.¹⁴⁴

A role of the lawyer that will result in much goodwill and earned respect is that of counselor engaged in the practice of preventive law.¹⁴⁵ Preventive law has been defined as that "branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties."¹⁴⁶ Without resorting to litigation and working within the confines of the law office, the lawyer as counselor offers advice and assistance that is designed to help clients conduct their affairs in a manner that will avoid controversy and litigation.¹⁴⁷ The legal counselor seeks to avoid controversy and prevent litigation by offering the client the services of a thoughtful adviser, a careful planner, and a skilled negotiator.¹⁴⁸

The lawyer as counselor must predict for the client the legal consequences of contemplated action and evaluate the merits of

¹⁴³ See Cooke, *supra* note 106, at 624. A concept based on a German program using lawyers and judges on a voluntary basis to offer advice and mediate disputes. *Id.* n.70.

Operating through the efforts of local community members, these centers can divert from the courts a significant portion of the more commonly encountered community disputes. . . . These centers can offer a variety of services including conciliation, mediation, and decisionmaking. Because community mores are an integral part of this informal process, resolution of these types of disputes in this fashion may be the better font of justice.

Id. at 624-25.

¹⁴⁴ See, e.g., ADR PRIMER, *supra* note 140, at 3 (describing one particular method of alternative dispute resolution, neutral fact finding, as being "useful in resolving complex scientific, technical, sociological, business, or economic issues (e.g., patent infringement, securities cases, environmental disputes, utility rate-making cases) where the presentation of proof on issues is extremely difficult, expensive, and time consuming).

¹⁴⁵ See generally LOUIS BROWN, PREVENTIVE LAW (1950).

¹⁴⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1798 (1961).

¹⁴⁷ Louis M. Brown & Harold A. Brown, *What Counsels a Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U. L. REV. 453, 461 (stating one role of attorney as advisor is to advise client how to act to prevent assertion of claims against client).

¹⁴⁸ See Glenn R. Schmitt, *The Search For A Good Lawyer*, 61 NOTRE DAME L. REV. 877, 881 (1986). In some circumstances total acceptance of the client's wishes is not appropriate, and may be contrary to the lawyer's responsibility. *Id.*; cf. Brown & Brown, *supra* note 147, at 456-57 ("In this adversary process the advocate is a skilled technician, able to handle the intricacies of the legal system The client, in contrast, will usually be inexperienced in the field and unable to protect his own interests.").

alternative courses of conduct. The lawyer's skill in providing this information, advice, and service is not only important to the clients, but is also critical in the administration of justice and avoidance of litigation.¹⁴⁹ To quote the observation of Justice Jackson: "Law abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave."¹⁵⁰ Many examples may be given. If a building contractor wishes to assign the contract; if a tenant is considering subletting an apartment; or if a person is contemplating the disposition of real or personal property, the likelihood of litigation, in large measure, will depend on the nature and quality of the counseling provided by the lawyer.

It is a basic principle that when called upon for advice, the lawyer must give a professional opinion on the legal consequences of any contemplated act or conduct.¹⁵¹ The lawyer as a counselor, however, should not feel constrained to advise solely on the legal consequences of the act or conduct. To the extent possible and necessary, the counselor should inform the client of the practical

¹⁴⁹ See *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (stating that historically, not only does lawyer have duty to faithfully protect interests of his client, but is also bound to work for advancement of justice); see also Robert A. Kagan and Robert Eli Rosen, *Symposium on the Law Firm as a Social Institution: On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 409 ("A career in 'the law' involves not only helping clients make money but also furthering 'justice' or 'legality.'").

¹⁵⁰ *Hickman*, 329 U.S. at 515 n.117 (1947) (Jackson, J., concurring). The issue in *Hickman* concerned the extent to which attorneys must disclose information ascertained through discovery to opposing counsel. *Id.* The Supreme Court denied petitioner's request for full disclosure. *Id.* Justice Jackson's concurrence expressed concern with society's perception of the legal profession, had the Court allowed attorneys to be "stripped of their wits" and "demoraliz[ed]" by mandating full disclosure. *Id.* at 514-19; cf. *Brown & Brown*, *supra* note 147, at 462

In advising his client on a course of action, the attorney should be aware that future changes both in the law and in the client's situation may seriously affect present proposals. In order to render complete services to the client, the attorney practicing preventive law has at least two responsibilities regarding subsequent events. First, the attorney should advise the client of any facts that may arise which might be legally significant and which the client may not be capable of dealing with adequately. . . . Secondly, the attorney should, when possible, notify the client of any changes in the law upon which his advice was based and the effect of such changes.

Id.

¹⁵¹ See Kagan & Rosen, *supra* note 149, at 410 ("What is equally important is that [the lawyer's] advice is not limited to the 'letter' of the law. . . . Ethical and public policy elements are important components of legal precedent"); see also, *Brown & Brown*, *supra* note 147, at 461 (suggesting that beyond informing client of all relevant considerations, lawyer must look objectively at situation and advise client of possible consequences of each legal alternative as well as effect of extra-legal matters).

and social consequences as well.¹⁵² For example, the mere likelihood of litigation may sometimes be enough to deter a client from embarking upon an otherwise lawful course of conduct.¹⁵³

Fulfilling the client's wishes may require the drafting of one or more legal instruments. In wills, declarations of trust, leases, and contracts, the counselor actually creates the rules and stan-

¹⁵² See Kagan & Rosen, *supra* note 149, at 409-10.

The corporate lawyer . . . attends to standards that transcend his client's most immediate and narrow economic self-interest. In giving advice, he refers not only to specific rules of black-letter law, but also to general principles of equity, fair dealing, and public policy in dealing with inchoate or potential legal problems. By advising businesses about the legal risks, constraints, and requirements associated with proposed actions, the corporate lawyer plays a crucial role in pushing businesses toward socially responsible behavior.

Id.

The corporate lawyer may also serve a more generalized conscience of the [client]. More detached and independent than a [client's] subordinates, the lawyer can feel free to warn [clients] that even if proposed actions do not violate the law *per se*, they might nevertheless be ethically questionable or might lead to popular or political attacks, adverse reactions by customers or competitors, or intensified governmental scrutiny.

Id. "[T]he influential and independent counselor would advise against and work to defeat corporate plans or tactics that, even if not clearly illegal, strike him as ill advised or violative of inchoate, emerging norms of socially responsible business behavior." *Id.* at 418; see ABA REPORT, *supra* note 29, at 213. When making decisions it is proper for a lawyer to take into account issues of justice, fairness, and morality. *Id.* Attorneys may consider the effect of their actions not only on their client, but also on other individuals and society in general. *Id.*; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."). "Although the American Bar Association has adopted new Model Rules of Professional Responsibility, the moral authority or ethical force of this canon has not been altered." Edward D. Re, *The Role of the Lawyer in Modern Society*, 30 S.D. L. REV. 501, 504-05; MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) (mandating that lawyer exercise professional judgment and render candid advice not only pertaining to legal issues, but to other considerations such as relevant "moral, economic, social and political factors").

¹⁵³ See Burger, *supra* note 104, at 274-75.

Even when an acceptable result is finally achieved . . . that result is often drained of much of its value because of the time lapse, the expense, and the emotional stress inescapable in the litigation process . . . [T]he adversary process is expensive. It is time-consuming. It often leaves a trail of stress and frustration . . . We, as lawyers, know that litigation is not only stressful and frustrating but expensive and frequently unrewarding for litigants, [it disrupts lives, and takes business executives away from their creative paths].

Id. See generally Howard L. Meyer, *Can't Wait to Try Your Case? Think Twice!*, A.B.A. J., Jul. 1984, at 72-73 (comparing romanticization of courtroom and trials to children's view of glory of war).

dards of conduct which will govern lives.¹⁵⁴ By assuring that the rights and obligations of the interested parties are clearly stated and understood, the counselor can do much to achieve a trouble-free completion of the transaction or course of conduct.¹⁵⁵

Another aspect of preventive law is the process of settlement.¹⁵⁶ Settlement includes the resolution of existing disputes through negotiation, conciliation, and compromise.¹⁵⁷ The indispensable lubricant is cooperation. Whether disputes might have been avoided, they may, nevertheless, occur. Often, it is only after a dispute has arisen that a lawyer is consulted. Even then, the lawyer should attempt to resolve the legal problem by settlement.¹⁵⁸

When a problem occurs, lawyers should not immediately resort to the weapons of the advocate. A dispute should not be intensified and exacerbated by an attorney's *provocative* demand or claim letter which threatens litigation. Before writing or drafting any pleadings, the counselor should make every effort to resolve

¹⁵⁴ Cf. Kagan & Rosen, *supra* note 149, at 406 (suggesting lawyer "devises" strategies to carry out client's policies).

¹⁵⁵ *Id.* at 410 (by advising clients of strengths and weaknesses of their case and probabilities of losing pending or imminent lawsuits, lawyers can promote prompt and fair settlements that save client time and money they would have spent in litigation); see Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 691-92 (1982) ("It is the counselor's function to help clients make informed and rational choices among alternative courses of conduct.").

¹⁵⁶ See Re, *supra* note 134, at 509.

Indoctrinated in the adversary system, the lawyer, after having heard the facts and the legal problem, immediately begins legal maneuvers designed to gain advantage over the other party to the dispute. The dominant role that comes to mind is that of advocate. However, when a lawyer neglects or forgets the noble role of counselor, the client is badly served. Almost reflexively, without attempting conciliatory measures, a claim letter is dispatched. It commences with the ominous sentence: "Please be advised that I have been retained to bring appropriate legal proceedings." A claim letter can be devastating. It exacerbates the dispute with a person with whom the client may have had a perfectly amiable relation, and may shatter the possibility of a mutually agreeable remedy or settlement.

Id.

¹⁵⁷ In the other forms of Alternative Dispute Resolution, there is always some form of superior authority or control besides the conflicting parties; in 'settlement,' the control is basically left up to the parties themselves, therefore a willingness to compromise is more important than in any other form of ADR.

¹⁵⁸ See BLACK'S LAW DICTIONARY 1372 (6th ed. 1990). BLACK'S defines "settlement" as: "[A]n agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other; In legal parlance, implies meeting of minds of parties to transaction or controversy; an adjustment of differences or accounts; a coming to an agreement." *Id.*

the dispute through procedures not involving adversarial measures. Encouraging the expeditious and nonjudicial settlement of disputes benefits both the client and society as a whole.¹⁵⁹ In addition to reducing the stress, frustration, and expense which always accompany litigation, settlement eases the burden of the judicial system.¹⁶⁰

In counseling clients, lawyers should offer solutions which are the least costly and most likely to provide maximum satisfaction. It is noteworthy that the *Report of the A.B.A. Task Force on Law Schools and the Profession* ("Report") also addresses the lawyer's role as counselor.¹⁶¹ The Report lists a number of skills which are pertinent to a good counselor.¹⁶² The first requirement listed is "an understanding of the various ethical rules and professional values that shape . . . the counseling relationship."¹⁶³ The Report proceeds to explain that, in counseling clients, an attorney must consider the interests of justice and fairness.¹⁶⁴ In some situations, it may even be proper for an attorney to take action to safeguard the interests of the general public.¹⁶⁵ The Report also discusses the conflicting considerations which a lawyer encounters when counseling a client.¹⁶⁶ The overriding message of this section of the Report is that a good lawyer must be more than a pas-

¹⁵⁹ Re, *supra* note 134, at 510.

¹⁶⁰ Re, *supra* note 134, at 510. "It may be shown that because of the quantity of cases, the quality of justice dispensed by our courts has suffered and will continue to suffer. The litigation explosion has placed a special strain upon a judge's ability to render individualized justice in each particular case." *Id.*

¹⁶¹ ABA REPORT, *supra* note 29, at 176 (recognizing frequency with which lawyers must step into role of counselor). To perform this role effectively, the lawyer must be familiar with "the skills, concepts, and processes involved in establishing a proper counseling relationship with a client, gathering information relevant to the decision to be made by the client, analyzing the decision to be made by the client, counseling the client about the decision, and implementing the client's decision." *Id.*

¹⁶² ABA REPORT, *supra* note 29, at 176-78. Skills such as knowledge of legal ethics, an ability to maintain objectivity while being an advocate, an ability to perceive issues and alternative options for the client; also to be able to gather factual and legal information relevant to the decision to be made, to recognize the client's objectives, and be able to counsel the client in a way the client can understand, and the ability to implement the client's final decision. *Id.*

¹⁶³ ABA REPORT, *supra* note 29, at 177.

¹⁶⁴ ABA REPORT, *supra* note 29, at 177.

¹⁶⁵ ABA REPORT, *supra* note 29, at 177.

¹⁶⁶ ABA REPORT, *supra* note 29, at 177 (referring to lawyer's need to maintain objectivity despite role of partisan advocate for client, and appropriateness of lawyer counseling client about issues of which client had not thought).

sionate advocate for a specific client and must consider more than merely the specific case or issue presented.¹⁶⁷

In the role of counselor, whose goal is the prevention of litigation and the settlement of disputes, lawyers fulfill their classic role as healers and peacemakers rather than promoters of litigation and strife.

D. *The Role of the Law Schools*

Since the problem is serious and affects not only the entire profession but also the society which it serves, an effective solution is in the best interest of all segments of society. Beyond the efforts of lawyers, the organized bar, the judiciary, and the pertinent government agencies, no effective solution is possible without the cooperation of the law schools.

Lawyers are usually first introduced to the profession as students in law school. Notwithstanding prior efforts to inculcate ethical values, it is in law school that the lawyer first learns rules of law, the practice of law, and the ideal of law as a profession. All teachers, therefore, are potential role models¹⁶⁸ and have the opportunity to inculcate notions of fair dealing and professional conduct.

In addition to teaching principles of law, law schools must play a more active and sustained role in molding attitudes and inculcating values. Not only must law schools teach professional ethics more effectively, but law schools must also advance core professional values by teaching students their social responsibilities as lawyers.¹⁶⁹ In this vital role, ethics should be regarded as an integral part of legal education. Legal ethics and professional responsibility should not only be taught in a law school course, but should be an essential component or dimension of every course in the law school curriculum.

¹⁶⁷ ABA REPORT, *supra* note 29, at 177, 179-80.

¹⁶⁸ See Braithwaite, *supra* note 87, at 72.

As the example set by parents can affect their children, so the example set by law teachers, especially those in the first year, can affect students. The way teachers conduct themselves in the classroom is likely to have more impact on the way students come to believe a lawyer should behave than any of the other things that usually go on in law schools.

Id.

¹⁶⁹ See Richard C. Baldwin, *Rethinking Professionalism—And Then Living It!*, 41 EMORY L.J. 433, 444-45 (1992) (referring not only to *need* for law schools to recognize this responsibility, but *obligation* to do so).

This important function of the law school highlights the important role of the law professor. Law professors cannot simply teach legal principles and doctrines. The teaching of law, whether substantive or procedural, is only a part of the training for the profession of the law. Law professors must be mentors who also teach and inculcate professional responsibility and ethical values in all courses of the law school curriculum.

No one will disagree with the assertion that no single course can teach legal ethics and professional responsibility.¹⁷⁰ The temptations to which lawyers are subjected and the ethical questions that arise in the practice of law must also be treated in all law school courses.¹⁷¹ For instance, a course in real estate transactions will undoubtedly deal with situations in which money is placed in escrow with the attorney. At this juncture, the professor should point out and discuss the legal and ethical considerations, and the temptation that may arise in "borrowing" money from this fund for some personal purpose. Discussions of the professional and ethical aspects of the law and legal practice should take place in every course and begin the moment students enter law school. This instruction should not be delayed until the second or third year of law school when students are required to take a course in the subject.

The present teaching method usually used by schools tends to create a rift between professional responsibility and all other areas of law. This division is accentuated by the bar examination itself. Even bar examiners do not treat professional responsibility as an essential and integral part of legal training, and as an essential prerequisite for admission to the bar. Rather than incorporating professional responsibility into the substantive part of the bar examination, it is usually treated as a side issue.¹⁷²

In this crucial area of inculcating professional standards of ethics and responsibility, it has been suggested that schools have also contributed to a decline in lawyer professionalism by: (1) fail-

¹⁷⁰ See *Re, supra* note 108, at 9; Honorable Thomas R. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 252 (1975) (stating that many academicians have emphasized impossibility of "teaching" integrity and have even considered it "futile at best" and "counter-productive at worst").

¹⁷¹ *Re, supra* note 108, at 9-10 ("Surely it is possible, in each course, to find cases that lend themselves to a discussion of the ethical problems which confront the lawyer"; problems accentuating ethical limits of advocate's partisan efforts).

¹⁷² New York State Bar Exam, 1992 Schedule of Testing Dates (listing Multistate Professional Responsibility Examination ("MPRE") as separate exam from rest of Bar Examination).

ing to recruit and select students who have appropriate professional ideals; (2) failing to devote sufficient time and effort to professional responsibility issues; and (3) failing to prepare students for the practice of law in other than large corporate, general practice firms.

Some critics of law schools contend that legal education has little relevance or connection to the practice of law. Detractors charge that "far from leaving their ivory towers, legal academics have erected a skyline of them from which they spin out increasingly sophisticated forms of irrelevancy."¹⁷³ Obviously urging reform, one commentator noted:

We cannot expect seriously to engage students' hearts unless we engage their minds as well. Too much of law school as presently constituted encourages a survival instinct rather than a yearning for genuine education.¹⁷⁴

It has also been suggested that the law professor's lectern also serve as a pulpit. Its function is not only to teach principles and rules of law, but also professional ethics, social service, and professional responsibility.¹⁷⁵ Students ought to be taught the profession's ethical standards and ought to receive wise moral guidance from their teachers. This sentiment is echoed by the most recent *ABA Statement on professionalism*.¹⁷⁶

¹⁷³ David Margolick, *At the Bar: Conclave in Herringbone Ponders Lofty and Mundane in Legal Education's Muddled Mission*, N.Y. TIMES, Jan. 13, 1989, at B6. Margolick's article discussed a seminar/convention of law school professors as part of a "fledgling Law and Humanities movement," described in program notes as the subject of "personal and community wholeness, characterized by dialogue, the transaction of disciplinary languages, and the grasping together of scattered realities." *Id.*

¹⁷⁴ Braithwaite, *supra* note 87, at 73. The author discusses the tedious and boring methods through which most law classes are taught, and suggests an alternative to engage students' minds while teaching professional ethics: "Let the entire law school, faculty and students alike, devote one week a semester to the joint and communal study of a single serious text." *Id.*

¹⁷⁵ See Baldwin, *supra* note 169, at 445. "Whether they realize it or not, professors are not merely teachers of substance and skills; they are mentors in the process of professional training. They are the first professional role models students encounter. Professional values observed in law school will leave indelible marks on students' visions of the profession." *Id.*; see Re, *supra* note 108, at 7-8 ("Perhaps the law teacher's greatest source of influence is the attitude conveyed about the law and the legal profession.").

¹⁷⁶ ABA REPORT, *supra* note 29, at 330-36. Under the heading of "Task Force Recommendations," the A.B.A. includes: "Enhancing Professional Development During the Law School Years" and "Placing the Transition and Licensing Process in the Educational Continuum." *Id.* at 327. Both of these subsections mention numerous occasions when the "values" of the Profession should be taught to the students. *Id.* at 330-36.

The *Report* calls upon the ABA to evaluate the methods utilized by law schools in teaching professional values.¹⁷⁷ The *Report* recommends that the quality of "values instruction" be an important factor in the ABA's accreditation process.¹⁷⁸ The *Report* then demands that law schools do more than just teach professional values.¹⁷⁹ It states that there should be interaction between "core subjects" and professional values.¹⁸⁰ Next, the *Report* discusses more specific topics. It calls upon law schools to concentrate on the concepts underlying the values and emphasizes the need for students to perform lawyering tasks.¹⁸¹ Finally, and most important, the *Report* emphasizes that law schools must teach more than traditional legal subjects and indicates that "fundamental values" are as important an area of legal study as substantive law.¹⁸²

¹⁷⁷ ABA REPORT, *supra* note 29, at 330 (§§ 1, 5: emphasizing that school and faculty treat development of lawyers as common enterprise to impart skills and values required for competent practice of law).

¹⁷⁸ ABA REPORT, *supra* note 29, at 330. Section three states:

It is time for the Section of Legal Education and Admissions to the Bar to revisit generally the treatment of skills and values instruction in the accreditation process in recognition of the skills and values identified in the Statement of Fundamental Lawyering Skills and Professional Values as those with which a lawyer should be familiar before assuming ultimate responsibility for a client.

Id.

¹⁷⁹ ABA REPORT, *supra* note 29, at 330-31.

¹⁸⁰ ABA REPORT, *supra* note 29, at 330-31. Section four states: "In light of developments in skills instruction and the Task Force's Statement of Skills and Values, the interaction between core subject . . . and professional skills . . . should be clarified." *Id.*

¹⁸¹ ABA REPORT, *supra* note 29, at 331. Section six states:

To be effective, the teaching of lawyering skills and professional values should ordinarily have the following characteristics: 1) development of concepts and theories underlying the skills and values being taught; 2) opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation; and 3) reflective evaluation of the students' performance by a qualified assessor.

Id.

¹⁸² ABA REPORT, *supra* note 29, at 331. Section eight states:

Each law school should undertake a study to determine which of the skills and values described in the Task Force's Statement of Skills and Values are presently being taught in its curriculum and develop a coherent agenda of skills instruction not limited to the skills of 'legal analysis and reasoning,' 'legal research,' 'writing,' and 'litigation.'; sections nine and ten state that: course catalogs should describe the skills and values content of each course, and students should be informed of the Task Force's Statement of Skills and Values to know what will be expected of them.

Id.

These convictions and suggestions, of course, assume that law school faculties consist of teachers who, beyond being competent, are also familiar with the law as a profession, and in a word, qualified to teach both theory and practice. The blend of specialization on a particular law school faculty may differ among experts in substantive law, theory, procedure, and the practice of law. Nevertheless, all teachers must remember that they are training students to become members of a *profession* whose function is to render a variety of legal services to society.

In addition to being an expert in particular fields of law, the law professor must also know the social consequences of a lawyer's actions.¹⁸³ Regardless of the substantive course being taught, the law professor must understand and convey to students the practical function of law in society.¹⁸⁴ In sum, it must be recognized that the process of teaching law involves more than the study of cases, statutes, rules, and regulations.¹⁸⁵ More important, it also involves qualities of humaneness, civility, and respect for others. The role of law teachers transforms them from private persons to "quasi-public servants."¹⁸⁶ Law professors not only owe a duty to students, but more importantly, to all those individuals who one day may seek legal advice and legal assistance.

It is clear that training for the profession involves more than merely learning principles and rules of substantive law and procedure. Beyond a knowledge of legal principles, the legal training process requires the transmission of attitudes, values, and skills.

¹⁸³ See Re, *supra* note 108, at 8.

Although the law teacher cannot be a specialist in all phases of law and practice, he must be a competent attorney who knows the various roles or functions of the lawyer. Regardless of the course or courses taught, the subject should always be presented in proper perspective, and with an awareness of its social consequences.

Id.

¹⁸⁴ Re, *supra* note 98, at 89 (implying law professors should have familiarity with practical applications of subject taught and "must teach the students that the lawyer must be prepared to perform many functions in addition to the trial and appeal of cases"—"functions like investigat[ing] facts, interrogat[ing] witnesses, marshall[ing] and present[ing] evidence, conduct[ing] conferences, draft[ing] documents and briefs, and perform[ing] many other functions encompassed within the words 'practice of law'").

¹⁸⁵ Re, *supra* note 98, at 89.

¹⁸⁶ Re, *supra* note 98, at 89. The author refers to law professors as "quasi-public servants" based upon Justice Arthur T. Vanderbilt's definition of a "great lawyer" as being "one who does his part to improve his profession, the courts and the law; acts as an intelligent, unselfish leader of public opinion; and is prepared 'not necessarily to seek public office, but to answer the call for public service.'" *Id.*

The inculcation of values and skills was formerly accomplished by the apprentice system or clerkship method of training, which involved close association with a "master" who would "teach" or guide the student apprentice. The clerkship process required obedience to authority, for in large measure the apprentice learned by emulating the master. It is interesting to note that etymologically the word "master" is derived from the Latin word "magister," meaning teacher. Hence, from the beginning the notion was one of teaching by example. It also implied respect and obedience to authority, as well as faith in the integrity, ability, and skill of the master or mentor.

In 1950, his fifty-first year of teaching law, Dean Pound made some extraordinarily perceptive comments on law teachers and law teaching.¹⁸⁷ Dean Pound referred to a statement by Judge Simeon E. Baldwin, Governor and Chief Justice of Connecticut, and a founder of the American Bar Association, who had spoken "of the danger to the law in the full-time law teachers whom he saw multiplying and replacing the older apprentice-type law schools by the university law school of today."¹⁸⁸ After referring to the complete victory of the "university law school," and speaking as a law teacher, Dean Pound stated:

[W]e may flatter ourselves that it has been achieved not merely without danger to the law but with conspicuous profit to it. Yet I fear there may prove to be some basis of truth in Judge Baldwin's prophecy, now that preparation for the bar has been put completely in our hands, if we forget that we are training for a profession and bring up a generation with no conscious responsibility to the law and no deep conviction of the profession as a group . . . pursuing a learned art as a public service.¹⁸⁹

Dean Pound noted that, under the conditions of practice in the modern industrial society, the apprentice system of preparation for the bar ceased "to do the work of handing down effectively the tradition of a profession as distinct from a money-making calling."¹⁹⁰ Dean Pound concluded the thought by stating: "I fear we

¹⁸⁷ Roscoe Pound, *Some Comments on Law Teachers and Law Teaching*, 3 J. LEGAL ED. 519 (1951).

¹⁸⁸ *Id.* at 520 (referring to Judge Baldwin's quote, Pound emphasized changes for worse that he had noticed during his membership in legal profession).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

law teachers have not found, nor even tried very hard to find, how to do this part of the task which has devolved upon us."¹⁹¹

Surely, much has happened and genuine efforts have been made since Dean Pound's 1950 speech. It is nonetheless noteworthy that the problem and potential harm was foreseen as far back as the founding of the American Bar Association.

Since the responsibility for the training of lawyers has been assumed by law schools, the inculcation of values must also be the responsibility of law schools. It is the law school professor who is now the substitute for the mentor who was the role model who taught values by example by the manner in which the profession was practiced. Hence, since the function has been undertaken by the law school, law professors must assume the role and responsibility of inculcating professional values and ethical norms. It must also be noted that instruction in professional ethics, by word and by example, will also result in increased respect for the law itself.¹⁹²

In addition to teaching principles of substantive law, procedure, and professional responsibility, law schools should also train lawyers to be good counselors. Law schools should no longer focus principally on the role of lawyers as advocates, but should devote an equal amount of time and effort in teaching or inculcating skills in areas such as counseling, interviewing, negotiating, and the settling of disputes. There should no longer be any question whether these are proper or appropriate subjects of legal education. Law school training in these areas would promote higher professional standards, and a keener appreciation of the many roles of the lawyer in the practice of law.¹⁹³

CONCLUSION

As noted, the causes for the low esteem and popular dissatisfaction are many, and some are deeply rooted. Many of them find a common thread in the belief, however erroneous, that lawyers do

¹⁹¹ *Id.*

¹⁹² See Braithwaite, *supra* note 87, at 72-73 ("Thus law-teacher professionalism begins with an attitude of genuine respect for the law itself and for the opinions of those lawyers and judges with whom one disagrees.").

¹⁹³ See generally Don J. DeBenedictis, *Learning By Doing—The Clinical Skills Movement Comes of Age*, A.B.A. J., Sept. 1990, at 55 (describing movement in law school to get students involved with real life practice and representation of clients); Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 Nw. J. INT'L LAW & BUS. 64, 65 (1988).

not adhere to the standards of professional responsibility that have characterized the great lawyers of the past. Having placed financial gain above the ideals of public service, dedicated service to clients, and devotion to the administration of justice, lawyers have forfeited the respect and admiration enjoyed in past generations. Hence, it is clear that the dissatisfaction pertains essentially to the failure to adhere to professional standards, and the placing of financial gain above personal integrity and service to clients.

It may perhaps be overlooked that lawyers have many opportunities for good deeds and service to society. In order to help end the popular dissatisfaction with the legal profession, lawyers must become more altruistic and take advantage of the opportunities to reduce "the frictions of our complex society," thus serving as instruments of peace and justice.¹⁹⁴

Lawyers must be aware of their vital role in the administration of justice. In rendering services to clients and executing their wishes, lawyers must show respect for law and the courts and act fairly with all opposing parties. In summary, lawyers must earn and retain the confidence of the client and be candid with the courts and honest and fair with all parties, including adversaries. By adhering to fundamental precepts of honesty and integrity, the moral dimension of the entire profession will be improved. As a consequence, the entire human agency in the administration of justice, whether lawyers, law professors, judges, or legal administrators, will gain esteem and respect, trust and confidence.

EPILOGUE

Certain important events, subsequent to the completion of this presentation,¹⁹⁵ require an addendum that augurs well for the legal profession. After noting the negative results of a recent ABA survey of lawyers and a public opinion poll, former ABA

¹⁹⁴ See Sheehan, *supra* note 126, at 62.

¹⁹⁵ Andrea Sachs, *First, Kiss All the Lawyers*, TIME, Aug. 16, 1993, at 39. Summing up the recent wave of lawyer-bashing, Sachs writes, "While lawyers have always been targets because of their power and prosperity, this summer has brought a bumper crop of negative images. Audiences at Jurassic Park are roaring with approval as a Tyrannosaurus rex makes a meal of a lawyer sitting on a privy." See generally Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62 ("[T]he survey did suggest 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.").

President R. William Ide III vowed effective action to regain public trust and respect for the legal profession and the legal system.¹⁹⁶ Indeed, President Ide stated that the ABA, through a combination of reform initiatives and public education, is ready to meet the challenge of increasing the public's understanding of the role of lawyers, as well as the popular awareness of the public services and benefits that lawyers contribute to society.¹⁹⁷

One "client-relations initiative"¹⁹⁸ is intended to improve lawyers' treatment of clients,¹⁹⁹ and inform the public of what may be reasonably expected "from lawyers in the way of client services."²⁰⁰ Other areas of concern that will be addressed by the ABA include lawyer advertising,²⁰¹ recommending improvements to the justice system,²⁰² and strengthening the image of lawyers regard-

¹⁹⁶ R. William Ide III told the ABA House of Delegates, "What we need today is nothing short of a revolution in our administration of justice—a peaceful 'shot heard 'round' the legal world." Hank Grezlak, *New ABA President Seeks Overhaul of Justice System*, THE LEGAL INTELLIGENCER, Aug. 13, 1993, at 1; see Nancy E. Roman, *ABA Meeting Ponders Reasons Lawyers Are Held in Low Esteem*, WASH. TIMES, Aug. 12, 1993, at A4. Ide stated that "[W]e need to be seen acting once more as the servants not just of the court, but of the community—giving ourselves to the cause of reform and improving life around us." *Id.*

¹⁹⁷ R. William Ide III, *What the ABA Plans To Do*, A.B.A. J., Sept. 1993, at 65. Ide sees the findings of the negative opinion poll as a challenge to increase the public's understanding of the legal profession. *Id.*; *New ABA President Calls on Lawyers to Square Their Account With Public*, PR NEWswire, Aug. 11, 1993. Ide stated that the ABA would lead the effort to regain public trust and respect for the legal system. *Id.*

¹⁹⁸ The ABA's efforts have been given many labels, including 'communications developments' and 'campaign to remake the ABA's image.' See Saundra Torry, *A Million-Dollar Campaign to Love the Lawyers*, WASH. POST, May 24, 1993, at F7. Michael T. Scanlon, Jr., ABA Director of Publication Planning & Marketing, named a team of experts to respond to public questions in the popular media, originally naming them the "Strategic Media Alert/Response Team (SMART Squad)." *Id.* President Ide suggested that the ABA's efforts are "not a public relations campaign" but rather a 'communications' program. *Id.*

¹⁹⁹ See PR NEWswire, *supra* note 197. Ide stresses that lawyers must show clients they care, and notes that "It is the little things like failure to return calls and inaccessibility that drives clients crazy." *Id.*

²⁰⁰ *Id.*, *supra* note 197, at 65. Ide would like to see an improvement in some attorneys' 'deskside manner' and rapport with clients. *Id.*

²⁰¹ *Id.*, *supra* note 197, at 65. The ABA will work to ensure that advertisements for legal services convey truthful information, and are conducted in a dignified manner. *Id.* See Edward A. Adams, *New ABA President Sets Agenda for Year*, N.Y. L.J., Aug. 12, 1993, at 1. The ABA maintains that lawyers can advertise effectively without the "carnival hucksterism of some late night television ads." *Id.*

²⁰² *Id.*, *supra* note 197, at 65. The ABA plans a review of the justice system, to make it "more accountable, accessible, and satisfactory to the public." *Id.*; see Cris Carmody, *ABA President-To-Be Warmed Up, Ready to Step to the Line*, CHI. DAILY L. BULL., Feb. 6, 1992, at 1.

ing pro bono activities and community service.²⁰³ In addition, the ABA will examine "client concerns as they relate to the attorney grievance, ethics and disciplinary process."²⁰⁴

The ABA agenda included drafting suggestions for reform in the civil and criminal justice systems²⁰⁵ and a public conference on May 1, 1994, when those recommendations were revealed. Review of the "system," analysis of professional behavior, and the policing of legal advertising are specifically mentioned as priorities.²⁰⁶ The most concentrated effort, however, appears to be focused on improving the images of the ABA and the lawyer in the eyes of the American public.²⁰⁷ What has been viewed as a massive public relations initiative²⁰⁸ has led to the hiring of professionals who are experts at improving public perception.²⁰⁹

These recommendations and initiatives are certainly steps in the right direction, but more is required to erase the deficiencies which plague the practice of law.²¹⁰ What must be addressed is

²⁰³ See Edward A. Adams, *Image Problem of Attorneys Targeted by Major ABA Effort*, N.Y. L.J., Aug. 6, 1993, at 1. The ABA is considering testing various pro bono programs in a particular community and publicizing those efforts and their effectiveness. *Id.*; see also Hank Grezlak, *Law School Pro Bono Plan Called "Major Breakthrough,"* THE LEGAL INTELLIGENCER, Aug. 16, 1993, at 1. One major breakthrough is the pro bono internship resolution passed by the ABA, which calls on law schools to implement pro bono programs as part of their curriculum. *Id.*

²⁰⁴ *Id.*, *supra* note 197, at 65.

²⁰⁵ ABA President William Ide described the courts as "overburdened, underfunded, compartmentalized." Adams, *supra* note 201, at 1.

²⁰⁶ See *supra* notes 200-01 and accompanying text.

²⁰⁷ See Grezlak, *supra* note 196. Ide finds the source of public dissatisfaction stemming mainly from the shortcomings of the legal system and the failure of lawyers to explain the system's workings to the public. *Id.*

²⁰⁸ See *supra* note 198; *infra* note 210; see also Edward A. Adams, *Ide Takes Over at a Turning Point*, N.Y. L.J., Aug. 6, 1993, at 6. The ABA has commenced a massive effort to improve its public image. The goal is to show that it is not just an organization solely pursuing the interests of lawyers, but is intent on reforming the legal system and protecting the interests of the 'little guy.' *Id.* But see *New ABA Chief: Lawyers Don't Need PR Campaign*, ORLANDO SENTINEL, Aug. 12, 1993, at A14. Ide states that the ABA is "not in the public relations business," and does not need a public relations campaign to improve its image. *Id.*

²⁰⁹ See Adams, *supra* note 203. The budget of the ABA's restructured Communications Division has increased to \$1.9 million, about \$1 million larger than last year. *Id.* Michael Scanlon was hired at \$170,000 per year to take charge of the 163-person communications staff. *Id.* An estimated \$700,000 or so will be spent to purchase equipment which will be used to convey the ABA's message. *Id.*; see also Monica Bay, *Conventioners Get Dose of ABA-Speak*, N.J. L.J., Aug. 16, 1993, at 12. *Id.* The project increases the ABA's total communications budget to \$18 million out of a total annual operating fund of \$63 million. *Id.*

²¹⁰ See Torry, *supra* note 193, at F7. Jerome Shestack, member of the ABA Board of Governors, writes that the goal should be "to improve those matters which reflect

lawyer conduct and the manner in which lawyers conduct their practice, by emphasizing honesty, integrity, and professional responsibility.²¹¹ Hence, the burden or responsibility for improving the public perception of lawyers falls upon lawyers themselves by adherence to ethical standards,²¹² as well as upon legal educators, who must instill those standards in the legal education of lawyers.²¹³ Dissatisfaction with the legal profession can be diminished and removed by the positive professional behavior of the lawyers who are the members of the profession.²¹⁴

One must begin with the realization that the modern practice of law and the conduct of lawyers are the primary sources of public dissatisfaction.²¹⁵ The cause of the weakness and not the mere appearance or perception is what must be addressed. No one denies that whitewashing an old stone fence does not make it any stronger.²¹⁶ The public perception of the legal profession in America²¹⁷ is indeed in need of improvement,²¹⁸ but the reasons

poorly on the profession," such as high legal fees, poor judges, weak discipline, not enough pro bono, and the lagging legal system. *Id.*

²¹¹ See PROFESSIONAL ETHICS, BOOK II 20 (Sir Thomas Lund ed., International Bar Association 1970) ("The essential quality of any person who seeks to practice as a member of the legal profession is Integrity. Every lawyer must discharge his duties to his client, the Court, members of the public and his fellow members of the profession with honesty, candour and honour.").

²¹² See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) ("The legal profession's relative autonomy carries with it special responsibilities of self-government. . . . Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.").

²¹³ See generally Banks McDowell, ETHICAL CONDUCT AND THE PROFESSIONAL'S DILEMMA 173 (Quorum Books 1991). The author submits that each professional must have a disposition or desire to comply with ethical guidelines. *Id.* Hence, to instill and encourage that disposition is the responsibility of professional education and the leaders of the profession. *Id.*

²¹⁴ See Michael E. Neben, *Heard Any Good Jokes Lately?*, CHI. DAILY L. BULL., Jul. 23, 1993, at 6 ("[W]e can play a small role in reversing these attitudes situation-by-situation . . . Lawyer-bashing is a highly complex and destructive phenomenon. Lawyers, however, are in the best position to combat lawyer-bashing.").

²¹⁵ See generally Hengstler, *supra* note 195, at 65. The public expects that the legal profession should focus on "getting its own house in order." *Id.*

²¹⁶ This statement was made by Michael T. Scanlon, Jr. in reference to the ABA's recent efforts to bolster its image throughout the nation. "He insists that he has no plans to conduct a public relations campaign, but his description of what is in store sounds suspiciously like one." David Margolick, *At the Bar; Preferring More Red Ink to More Black Eyes, the Bar Association Hires an Image Maker*, N.Y. TIMES, Jan. 29, 1993, at B7.

²¹⁷ See Hengstler, *supra* note 195, at 60. In the 1992 ABA survey of lawyers, improving the standing of lawyers in the eyes of the public was ranked as one of the

underlying the public dissatisfaction stem from the conduct and behavior of the legal community itself.²¹⁹ Although an appreciation of the positive role of lawyers in our society²²⁰ and the proper functioning of the legal system²²¹ are essential, addressing the low public esteem of lawyers must begin with an assessment of lawyer behavior²²² and the training that they received in law school.²²³ An acknowledgement of the problem that faces lawyers and the profession, together with the firm commitment by the

highest priorities for the ABA. *Id.* Tougher ethical standards for client-relations complaints, not currently covered under the ethics code, was listed as the top priority by the public. *Id.* at 64. "The picture drawn from the survey shows a public perception of a profession that has become, at worst, contemptuous, and at best, indifferent, to the people it seeks to serve." *Id.* at 62. Peter D. Hart Research Associates conducted the nationwide telephone survey of 1,202 adults in January, 1993. *Id.* at 61. Participants were from all walks of life, every age group, occupation, race, religion, and income level. *Id.*; see Bill Rankin, *Nation's Lawyers Seeking to Polish Tarnished Image, ABA is Spending \$750,000 on Effort*, ATLANTA J. AND CONST., Aug. 9, 1993, at A4 (noting that in public opinion poll, lawyers are seen as greedy, dishonest, and insensitive).

²¹⁸ See Laura Duncan, *ABA Project Aims to Fix Justice System, Polish Lawyer Image*, CHI. DAILY L. BULL., Aug. 6, 1993, at 1 (noting that public places blame for legal system's problems on attorneys, and that ABA faces this public perception obstacle); *supra* note 195.

²¹⁹ See *Burger Laments the Shysters of the Bar*, LEGAL TIMES, May 3, 1993, at 10 ("The standing of the legal profession is at its lowest ebb in the history of our country due to the misconduct of a few judges and all too many lawyers in and out of the courtroom." (emphasis added)).

²²⁰ The ABA's recently appointed marketing professional, Michael T. Scanlon, Jr., states that lawyers are already doing more than the public realizes, saying "Our profession gives more donated services than any other profession." Sachs, *supra* note 195, at 39; see Rankin, *supra* note 217, at A4. "This year, metro lawyers are expected to donate \$370,000 to Atlanta Legal Aid, a non-profit organization that supports poor people with legal problems." *Id.*

²²¹ See R. William Ide III, *Rebuilding the Public's Trust*, A.B.A.J., Sept. 1993, at 8. "We must remember that it is the existence of and public confidence in the legal system that has kept our nation at peace with itself." *Id.* The legal profession, before improving and reforming the justice system, must face the "threshold problem of regaining the respect and trust of the people." *Id.*

²²² Common complaints regarding attorney misbehavior include overbilling, not returning clients' phone calls, and bringing frivolous suits which tie up the legal system and cost clients money. Grezlak, *supra* note 196, at 1.

²²³ See Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 97 (1991) ("[A]s experienced teachers know all too well, it is folly to suppose that what is taught is learned, particularly when the learning is not reinforced by real world experience."); Grezlak, *supra* note 203, at 1. ABA House Delegate Arline Lotman said, "There used to be that idea that what you don't learn in law school, you'll learn in practice. But a lot of law students don't get the opportunity to learn at their firm. We have to ensure that all law students are well-informed." *Id.*

ABA to take corrective action, are welcomed challenges to the lawyers of America.²²⁴

In view of the nature of some of the complaints about lawyers,²²⁵ it may very well be that better communication and understanding of what lawyers do will have a positive impact on both the reputation of lawyers and the practice of law.²²⁶ The major effort to remedy the reputation and perception problem, however, transcends image and must attack the core problems which brought about the loss of trust and confidence in lawyers and the profession.²²⁷ The initiatives that must be undertaken, therefore, must deal with attorney behavior and standards of professionalism that reflect the basic ideals of the legal profession, not only in theory but also in practice.

What has traditionally been described as a noble profession can be made noble again by revitalizing and strengthening its ethical foundations and values. Restoring honesty, integrity, and professional responsibility in the practice of law are the crucial elements if the effort to regain respect and confidence is to succeed. Public discussion and education are important steps in the necessary process of healing and improving. The real solution, however, if the effort is truly to succeed, is within the control of lawyers themselves. President Ide and the ABA are to be congratulated for the seriousness with which the new ABA initiatives are being undertaken. They are clearly in the public interest, for their success will benefit not only lawyers and the legal profession, but also society at large.

²²⁴ See *supra* notes 197-202 and accompanying text.

²²⁵ See *supra* note 222.

²²⁶ Michael Scanlon intends to show that lawyers are dealing with and solving people's problems on a daily basis, and not just arguing in a courtroom. Margolick, *supra* note 216, at B7.

²²⁷ See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). A lawyer is a representative, an advocate, and intermediary, and a public citizen, and should be prompt, competent, and diligent. *Id.* In addition to the professional responsibilities set forth in the Rules, a lawyer is also guided by "personal conscience and the approbation of professional peers." *Id.* A lawyer should always seek "to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service." *Id.* See generally Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Characters*, 68 *IND. L.J.* 647, *passim* (1993).