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ARTICLES

LAWYERING ASKEW: EXCESSES IN THE PURSUIT OF FEES AND JUSTICE

KENNETH LASSON*

The world has its fling at lawyers sometimes, but . . . of all secular professions this has the highest standards.
—Oliver Wendell Holmes

So who're the bad guys?
—Jay Leno

(commenting on attorneys killing attorneys in The Firm)

Lawyer-bashing in America has long been a national pastime, having somehow escaped the palliative of political correctness that has greatly diminished other scurrilous pursuits like Jewish-American-Princess-baiting and Polish-joking.

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1 Oliver Wendell Holmes, Address at the Suffolk Bar Association Dinner (Feb. 5, 1885), in The Occasional Speeches of Justice Oliver Wendell Holmes 20 (Mark D. Howe ed., 1962).

2 Christopher Reed, Did You Hear the One About the Lawyer . . ., Gazette (Montreal), July 10, 1993, at A16.

3 That lawyers have been taboo-free targets of group defamation for many years is evidenced by the number of past and present books, cartoons, and comedians pillorying them in the popular culture. See, e.g., as far back as Marshall Brown, Wit and Humor of Bench and Bar (Chicago, T.H. Flood & Co. 1899); see also Bill Berger & Ricardo Martinez, What To Do With a Dead Lawyer (1988); Jess M. Brallier, Lawyers and Other Reptiles (1992); Cameron Harvey, Legal Wit and Whimsy: An Anthology of Legal Humor (1988); Poetic Justice: The Funniest, Meanest Things Ever Said About Lawyers (Jonathan Roth & Andrew Roth eds., 1988); Trials & Tribulations: Appealing Legal Humor (Daniel R. White ed., 1989).
Much of the profession’s negative image can be ascribed to the sheer number of people hanging out their shingles as attorneys at law—just about as many per capita as there are inmates currently serving time in all the state prisons.\(^4\) Lawyers are likewise chastised for the hard-sell hucksterism of their advertising, the exponential growth of their caseloads, and the endless upward spiral of their fee scales. No doubt such perceptions, largely incontrovertible to begin with, are reinforced by the nature of the adversarial process itself, especially as it is practiced in the United States. And perceptions being reality, it can well be argued that much of the criticism leveled at the bar is richly deserved.

Thus it’s little wonder that so many of the spectators—laymen and lackeys alike—are so quick to quote Shakespeare: “The first thing we do, let’s kill all the lawyers!”\(^5\) Read in proper context, however, that oft-quoted line from *The Second Part of King Henry the Sixth* is in fact part of a colloquy between two ne’er-do-wells plotting to overthrow the government; clearly implicit for Shakespeare was that, without law (and lawyers), there would be anarchy.\(^6\) Indeed denigrating the integrity of the legal profession has itself become a glib excess.\(^7\)

Even children join in the fun. In Nassau County, New York, a seventh-grader in a school comedy show delighted his classmates with a joke about high-priced lawyers, but his teacher would not allow another student to tell a Polish joke—because “people would be offended.” Marilyn Goldstein, *A Funny Bone of Contention*, *Newsday*, June 26, 1989, at 6.


\(^5\) William Shakespeare, *The Second Part of King Henry the Sixth* act 4, sc. 2.


\(^7\) This Article may be no exception. Recognizing that lawyer-bashing is as easy as shooting fish in a barrel, I confided to a colleague that I didn’t want to overlook that lawyers serve useful purposes, too. His response: “So do prostitutes.”

We are in good company. Mark Twain, H.L. Mencken, and Will Rogers are among the many benign curmudgeons who have taken their swipes over the years. Twain viewed lawyers as schemers, “gettin’ ready to prove that a man’s heirs ain’t got any right to his property.” Mark Twain, *A Thomas Jefferson Snodgrass Letter*, *Iowa J. Hist. & Pol.*, July 1929, at 441, reprinted in *Mark Twain at Your Fingertips* 231 (Caroline Thomas Harnsberger ed., 1948). Mencken surmised that “[i]f all lawyers were hanged tomorrow, and their bones sold to a mah jong factory, we’d all be freer and safer, and our taxes would be reduced by almost a half.” H.L. Mencken, *Breathing Space*, *Evening Sun* (Baltimore), Aug. 4, 1924, reprinted in *The Gist of Mencken* 449 (Mayo DuBasky ed., 1990). Rogers may have never met a man he
The average American today is hard-put to acknowledge the conscientious attorney who may serve useful, important, or necessary purposes. To the contrary, the public seems to see lawyers as inherently less ethical than doctors, plumbers, or bureaucrats—and attributes to them a failure of compassion and morality that is probably more a trait of their profession than of their individual character or upbringing.

Is it possible to be both a good lawyer and, as the American Bar Association’s Model Rules of Professional Conduct ("Model Rules") require, a "public citizen having special responsibility for the quality of justice"?8

The traditional bar’s-eye view of the attorney’s role is that of a professional advocate, devoted and authorized (if not required) to represent clients “zealously within the bounds of the law.”9 But suppose the lawyer’s duty to a client runs counter to the common good? Is such advocacy compatible with the simple principle of seeking justice?

According to one view, attorneys who play their roles properly, as advocates giving wise and faithful counsel, are useful and necessary to a civilized society.10

Others suggest that lawyers are little more than prostitutes quick to compromise principles for a fee.11 Such hyperbole is ratcheted up a notch by critics who insist that the profession should be able to, but doesn’t, draw a clear moral line between right and wrong—that, just as it is not difficult to distinguish between the impulses of an avenger and a hitman, nor between the motives of a lover and a whore,12 neither should it be hard to take principled positions in the everyday practice of law.

12 Id. at 582 (supplying these images).
Despite the best efforts of the older, established bar to resurrect its once-noble image by promulgating new regulations—mandatory continuing legal education, peer review, specialty certification, and high-profile pro bono services—the world of lawyering has now been largely demystified. Worse, best-selling novels and popular motion pictures have validated the public’s perception of practitioners as venal, corrupt, and unscrupulous. The lusty and materialistic angle-merchants of L.A. Law have replaced yesteryear’s low-keyed Perry Mason and high-minded Atticus Finch of To Kill A Mockingbird.

The public has long since ceased viewing the old guard as vested gentlemen of wise counsel, and the new breed of lawyers—often seen as little more than latter-day ambulance-chasers, hired guns who delay and threaten, scruple-free mouthpieces who manipulate the system to their advantage, or at best self-deceivers whose zeal to win convinces them that their clients are always in the right—invites visceral disdain.

This negative image is nourished by lawyers themselves who, having won the protection of the First Amendment to advertise, loudly trumpet their services on television and radio.

Not all the notoriety, however, is self-generated. Much of it is created and fueled by excessive media attention. The most glaring recent example has been the saturation coverage of the O.J. Simpson murder trial; although lawyers for both sides may be doing an excellent job within accepted professional bounds, they’ve all been placed under a white-hot media spotlight that seems never to be turned off. The attorney’s legal strategies and arguments over the admissibility of evidence and the selection of jurors, which are legitimate and necessary parts of our system of justice, serve instead to underscore public suspicions about the process—especially when the information is conveyed out of context.

By way of stark contrast, the British system provides far greater protection of the lawyers involved by imposing much more stringent restraints on media coverage of litigation in progress.

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14 See Steven D. Stark, Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes, 49 U. Miami L. Rev. 229, 277 (1987) (“Though the attorneys of L.A. Law care about their clients, they care about themselves and their ensemble even more.”).

15 David A. Kaplan, What America Really Thinks About Lawyers, Nat’l L.J., Aug. 18, 1986, at S-2, S-3 (reporting that 22% of those surveyed felt that the most negative aspect of lawyers is that they unscrupulously manipulate the legal system).

16 See infra notes 103-18 and accompanying text.


18 See, e.g., Judges Are Not Perfect, They Are Human, Bus. Times (London), Nov. 17, 1994, at 17 (noting that the “official reason” for the ban is the fear that judges will be swayed by excessive publicity).
Nevertheless, despite the pervasive and intense hostility many people direct at the profession, their feelings are often ambivalent and sometimes contradictory. A recent survey by the American Bar Association found the public to be almost evenly split: Almost half said that lawyers are no more ethical than auto mechanics—which may be more a commentary about mechanics, or ethics, than it is about lawyers. Another poll found that the primary reasons people disapprove of lawyers is that they "are too interested in money," they "manipulate the legal system without any concern for right or wrong," and they "file too many unnecessary lawsuits." The same survey, however, found that the public respected lawyers primarily because their "first priority is to their clients" and they "know how to cut through bureaucratic red tape." In other words, the profession is applauded and condemned for virtually the same reasons.

Practitioners themselves—especially younger ones—increasingly feel a lack of self-esteem and occupational satisfaction. Others seek to substantiate their virtue by hanging onto the tails of those actually doing noble work. The majority of lawyers, however, manage to deny that they are held in such low regard by paying little heed to the valid reasons behind the perception. They seldom see themselves the way others often

19 Overall, 40% of those surveyed expressed positive feelings about lawyers, 34% expressed negative feelings, and 26% were neutral or unsure. Gary A. Hengstler, Vox Populi, A.B.A. J., Sept. 1993, at 61-62. The experiences of having served on a jury or having been sued strongly tended to predict negative feelings toward lawyers. The survey also found that women, minorities, and the poor have a more favorable opinion of the legal profession than do better-educated, upper-middle-class people, and that those who think of lawyers in a criminal-justice setting are more likely to have favorable feelings towards them than those are who get most of their information from television. Id. at 61-64.

20 Kaplan, supra note 15, at S-3. Such an interest in money, ability to manipulate the system, and desire to cut through red tape, of course, may not distinguish lawyers very much from doctors or businessmen. See James Podgers, Public: 'Shyster' OK—If He's on Your Side, 67 A.B.A. J. 695-96 (1981) (analyzing public-forum discussions on the legal profession).

21 Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass, 75 Cal. L. Rev. 379, 386 (1987) ("Lawyers . . . bestride the following cultural contradiction: we both want and in some respects have a universal, common culture, and we simultaneously want that culture to be malleable and responsive to the particular and often incompatible interests of individual groups and citizens.").

22 See Strossen, supra note 7, at 2134-35 (noting the results of American Bar Association surveys).

Such feelings may also account for the high number of exceptionally qualified law-school graduates—many with Ph.D's and other impressive advanced degrees—who now apply for teaching positions instead of higher-paying jobs in law firms. More than one senior law professor—the author included—thanks his lucky stars he got in when the gettin' was less competitive.

23 Interview with Peter Schuck, Deputy Dean, Yale Law School (Aug. 12, 1993).
do: needless middlemen who create complicated solutions to common legal problems, who often get in the way of amicable settlements to everyday disputes, and who monopolize matters that can be more cheaply done by others.24

Lawyers like to say that the law is a jealous mistress, and that solving legal problems is an open-ended process. Perhaps that's why they are so expensive, well out of the price range of many who need them most. Indeed, despite the overabundance of lawyers, it's still hard to find one who will handle a low-paying case.25

This mercenary instinct is nurtured in law school, where students are immersed much more heavily in the technicalities of corporations, securities, creditors' rights, and commercial transactions than in consumer law, tenants' and debtors' rights, or alternative dispute resolution.26

The bar currently finds itself confronted not only with a jaundiced image, but with new turf challenges. There is a great deal more competition for a limited amount of work. Paralegals do a lot of legwork that was once reserved for junior associates. Various lay organizations vie for the right to provide services that a few years earlier were restricted to members of the bar.

To make things worse, the adversarial process usually results in one party emerging victorious—and the other depressed or angry. In the United States, winning is a virtue, at virtually any cost.27 In some cases, particularly divorce proceedings, even the winning parties often view their lawyers as nasty characters. Often that is precisely why they hired them.28

What should be an overriding concern for fairness, justice, and equality has been tarnished by greed, complacency, and self-righteousness. None of this need be. Lawyers who are too aggressive in the pursuit of either fees or justice do disservice to the public, and ultimately to themselves.

24 For example, the probate of wills does not often need an attorney's expertise; in Great Britain the process is generally handled by others. Similarly, the settlement of real estate transactions usually requires no more knowledge than that already possessed by licensed realtors. Ralph Nader, Introduction to Kenneth Lasson, Representing Yourself: What You Can Do Without a Lawyer at xi, xii (1983); see also Richard L. Abel, American Lawyers 164 (1989) (noting that a segment of the public feels that lawyers needlessly complicate client problems).

25 Until the Supreme Court ruled in the mid-1970s that minimum-fee schedules and regulations against competitive advertising were illegal, the consumer was even more a victim of the legal establishment's self-regulated monopoly. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 780-93 (1975). See infra notes 103-18 and accompanying text for a discussion of the easing of restraints on lawyer advertising.

26 Nader, supra note 24, at xii.

27 See Benjamin Sells, For Lawyers Winning Is the Final Proof of Rightness, Ill. Legal Times, May 1994, at 7 (arguing that lawyers lose sight of moral considerations because of their fixation on winning).

28 See Podgers, supra note 20, at 695 (discussing public ideas about the qualities of a good lawyer).
This Article is thus intended not only to examine the degree to which the public's negative perception of lawyers may be justified—that is, to measure both images and realities—but also to suggest realistic ways through which both image and reality can be substantially improved.

I. HARVESTING THE AMERICAN DREAM: PERCEPTIONS AND REALITIES

To be a priest... in the temple of justice, to serve at her altar and aid in her administration, to maintain and defend those inalienable rights of life, liberty, and property upon which the safety of society depends, to succor the oppressed and to defend the innocent, to maintain constitutional rights against all violations,... to rescue the scapegoat and restore him to his proper place in the world—all this seemed to me to furnish a field worthy of any man's ambition.

—Joseph Choate

The sad thing about lawyers is not that so many of them are stupid, but that so many of them are intelligent. The craft is a great devourer of good men; it... has few rewards for a man of genuine ambition, with a yearning to leave his mark upon his time. How many American lawyers are remembered, as lawyers?

—H.L. Mencken

The power and prestige of the legal profession has varied widely throughout American history. "Dissatisfaction with the administration of justice," said Roscoe Pound in 1906, "is as old as the law." The seventeenth-century colonists had almost a biblical distrust of lawyers, feeling that advocacy for a fee would inevitably corrupt justice. By the time of the First Continental Congress, however, lawyers had come to be viewed as the champions of popular justice and the guardians of individual rights and liberties.

29 Joseph Choate, Speech at a Dinner Given in His Honor by the Bench and Bar of England (Apr. 14, 1905), in ARGUMENTS AND ADDRESSES OF JOSEPH HODGES CHOATE 1107, 1109 (Frederich C. Hicks ed., 1926).

30 H.L. Mencken, Editorial, 13 AM. MERCURY 35, 35 (1928). More from Mencken: "Why... are lawyers, in essence, such obscure men? Why do their undoubted talents yield so poor a harvest of immortality? The answer, it seems to me... is their professional aim and function [is] not to get at the truth, but simply to carry on combats between ancient rules." Id. at 36.


33 Two colonies went so far as to outlaw the pleading of cases for compensation. Rosiny, supra note 31, at 42.
Perceptions changed following the Civil War. As the great industrial barons built their fortunes, so too did their legal counsel increase their own wealth and prestige. Financial gain seemed to have become a primary goal. 34

By the turn of the century, American attorneys had begun to group themselves into bar associations—many of them bent on limiting entry into their ranks. 35 The first canons of ethics, 36 promulgated during this period, were devoted to suppressing competition among lawyers. 37 Another recurring theme was the negative effect that waves of immigrants had on the profession’s “gentlemanly ideals.” 38

But to many newly arrived refugees there could be no higher calling nor greater ambition than to see their children become attorneys. For them this was the best and brightest path down the road to the American dream. 39

Somewhere along the way the dream lost its romance—perhaps because the profession has become all too accessible. Nowadays the most commonly felt sentiment about lawyers almost goes without saying: There are too many of them.

A. Barristers by the Barrelful

As for lawyers, a class of men whose trade it is to manipulate cases and multiply quibbles, they wouldn't have them in the country.

—Thomas More
(describing Utopia) 40

Spilling over the Top

That we do not live in a Utopian society is often blamed entirely upon our excess of lawyers. From 1860 to 1970, the rate of growth among practitioners in the United States roughly mirrored that of the general popu-

34 See id.; see also JULIUS H. COHEN, THE LAW: BUSINESS OR PROFESSION? 106 (1916) (noting that the legal profession became commercialized after the Civil War); JOHN R. DOS PASSOS, THE AMERICAN LAWYER 25 (1907) (viewing the Civil War as the point at which the practice of law changed from a profession to a business).
35 Rosiny, supra note 31, at 42-43.
37 Rosiny, supra note 31, at 42-43.
39 Rosiny, supra note 31, at 43.
lation. In the last twenty-something years, however, the profession has multiplied like rabbits—more than doubling in size, to around 850,000—so that now the ratio of lawyers to the general population is more than twice its historical average. American law schools produce some 40,000 new lawyers a year. The United States has nearly three times as many lawyers per capita as any other advanced industrial society—including England, our closest jurisprudential counterpart.

Moreover, to put it bluntly, they need the work.

A variety of explanations has been offered as to why we’re faced with the current barrelful of barristers. Some note that the post-World War II baby boom produced a vast pool of college graduates, at around the same time that a rise in demand for legal services triggered higher salaries for starting lawyers. Others argue that the number of persons seeking admission to law school increased by more than fifty percent as traditional social barriers for women came tumbling down. Still others point

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41 ABEL, supra note 24, at 280.
43 ABEL, supra note 24, at 280 (providing population-per-lawyer ratios). Some communities pack lawyers in like sardines: Washington, D.C. alone has more than the whole of Japan; California, one for every 234 residents. Reed, supra note 2, at A16. The comparison with Japan, however, may be illusory. See infra notes 50-53 and accompanying text.

Whether the legal community can handle this many law graduates does not seem to be a consideration for law schools, which often argue that they are providing a good graduate education to all who qualify for it. No law school guarantees post-graduate employment; many have changed the name of their “placement office” to the less certain “career counseling service.”

The number of students enrolled in law schools has likewise grown slightly with the expansion of class sizes and the higher number of accredited institutions. The increase has also corresponded with a downward shift in the average age of lawyers and a rapid rise in the number of female students. ABEL, supra note 24, at 109-10. From 1950 to 1967, only 3-5% of law students were women; by 1980, however, that figure was up to more than 30%; at present, half of all law students are women. Id. at 285. On a lesser scale, the number of minority law students increased from 4% to 10% between 1970 and 1986. Id. at 288.

45 Marc Galanter, Adjudication, Litigation, and Related Phenomena, in LAW AND THE SOCIAL SCIENCES 166 (Leon Lipson & Stanton Wheeler eds., 1986) (comparing the number of judges and lawyers in selected countries). These numbers, however, may be misleading. For instance, many of the figures cited by Galanter are now almost twenty years old. In addition, the definition of a lawyer varies greatly from country to country. Richard H. Sander & E. Douglas Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 L. & Soc. INQ. 431, 433 n.3 (1989) (questioning the significance of Galanter’s data).
46 See Sander & Williams, supra note 45, at 464 (discussing reasons for the increase in lawyers).
to the glamorization of lawyers conjured up by television programs like *L.A. Law*.

Nevertheless, statistics about the lawyer population often lend themselves more to lies than realities. In a speech he gave to the American Bar Association in 1991, former Vice President Dan Quayle asked plaintively, "Does America really need 70 percent of the world's lawyers?" That assertion, subsequently repeated by President George Bush, the media, and many others, had no apparent basis in fact. If "all the world's lawyers" include judges, government attorneys, and in-house corporate counsel, then American lawyers account for anywhere between twenty-five and thirty-five percent of the global supply. To assert otherwise "suggests a monstrous deviation from the rest of the world and portrays lawyers as a kind of cancerous excrescence on American society."

Besides its Agnewesque hyperbole and numerical inaccuracy, Quayle's seventy percent figure did not calculate the "world's lawyers" meaningfully. The legal professions in other countries are not easily comparable. Critics are quick to note that Japan, for example, maintains a thriving economy with a much smaller number of lawyers per capita. But that's like comparing kumquats to walnuts. Japan is a homogeneous nation regulated by universally accepted social customs, while America's much more diverse society requires regulation by rule of law. Moreover, while the Japanese excel at using different management methods—such as promoting cooperation among their citizens—the common-law tradition of the United States is particularly conducive to organizing our economic and social relations.

The inadequacy of a numerical comparison becomes even more clear when contrasting what lawyers do in each country. American attorneys have completed law school, have been admitted to the bar, and practice a wide variety of law-related tasks; many of them seldom appear in court. Their counterparts in Japan are called "bengoshi"—lawyers whose work centers around court appearances. In Japan, only a small percentage of those who study law achieve the status of bengoshi because of a strict examination policy. Nevertheless, law remains one of the most popular undergraduate majors; in fact Japan has a greater absolute number of law students than the United States, even though its population is roughly

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49 Marc Galanter, *Pick a Number*, Am. Law., Apr. 1992, at 82, 82-84 (discussing the validity of Quayle's 70% figure).


51 *Id.* at 279-80.
The many who are not certified as bengoshi end up doing work similar to that of the average American non-courtroom lawyer.

Comparing the American way of lawyering with that of the English is more appropriate. There are more than 70,000 solicitors (non-litigators) in England and Wales, and some 7000 barristers (courtroom lawyers). Proportionate to the population, that's less than half of the number of American lawyers.

Litigiousness

The large number of lawyers and their hunger for work have contributed to the rise of outlandish lawsuits—such as the one brought in 1990 by a San Francisco mugger against a taxi driver who had caught him, pinned him against a wall, and broken his leg. In the pursuit of "justice," the plaintiff's lawyer may have forgotten that his client was a thug; so, apparently, did the jury, which awarded him $24,595.

The public is even more outraged by the growing number of lawyers who themselves drum up litigation, from the so-called "parachuting practitioners," personal-injury lawyers who fly in the day after a disaster seeking to sell their representation to grieving survivors, to those who use even more novel approaches to the old ambulance-chasing routine.

Even members of the profession itself—from Supreme Court Justices to solo practitioners—bemoan the fact that the United States is by far the most litigious country in the world. Little wonder, given that the very

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52 Id. (citing Masanobu Kato, The Role of Law and Lawyers in Japan and the United States, 1987 B.Y.U. L. Rev. 637, 661 (presenting data that revealed that as of 1984, there were 159,000 law students in Japan versus 120,000 law students in the United States)).

53 Id.

54 See CAREERS AND OCCUPATIONAL INFORMATION CENTER, OCCUPATIONS '94 299-302 (British government publication). Currently, the lawyer-to-population ratio in the United States is 1:306, almost double that in 1951. See Bureau of Labor Statistics, supra note 4, at 280.


56 Burnele V. Powell, The Problem of the Parachuting Practitioner, 1992 U. ILL. L. Rev. 105, 106-109 (providing examples of such behavior by lawyers); see also James D. Gordon III, How Not to Succeed in Law School, 100 Yale L.J. 1679, 1704 n.34 (1991) ("The principal difference between a lawyer and a vulture is that the vulture doesn't take off its wingtips at night."). For a discussion of solicitation and advertising, see infra notes 103-18 and accompanying text.
nature of American law and the training of American attorneys encourages the presumption that grievances can best be redressed by going to court. Even so, lawsuits were regarded as a last resort until the 1960s, at least according to Olson, supra note 17, at 1-11 (1991) (noting the changing attitudes towards litigation).

And many American lawyers are so intensely competitive that they do not speak with one another during litigation. Moreover, the surge in lawsuits has not merely affected the image of lawyers; it has caused social harm. Frivolous lawsuits not only delay the adjudication of meritorious cases, but also harm those who are wrongly sued.

British lawyers, by contrast, are much less openly adversarial than their American counterparts. They move easily between representing plaintiffs and defendants, and are more at ease among themselves as well. Barristers for both sides often have lunch together with the presiding judges—and this, during the course of trials. "[A]dversaries . . . in law," wrote Shakespeare, "[s]trive mightily, but eat and drink as friends." Although American lawyers may come to believe in their clients' causes, more often they view themselves merely as hired guns. The British system, which requires the losing party to pay the winner's costs, tends to discourage this perception and reality.

Upon their admission to the bar, American lawyers are told that they are now "officers of the court" and as such must vow to pursue justice. After that time, however, it quickly becomes each man for himself, with all the spoils to the victor.

But American litigiousness cannot be blamed solely on overly aggressive members of the bar.

Perhaps the most prolific single litigant in the country is the Reverend Clovis Carl Green, who has filed close to 700 separate actions, mostly concerning the activities of the church he founded, but also including suits arising from his confinement in various prisons. Green calls his

57 Even so, lawsuits were regarded as a last resort until the 1960s, at least according to Olson, supra note 17, at 1-11 (1991) (noting the changing attitudes towards litigation).

58 Telephone Interview with Judge John Fader, Circuit Court of Maryland (Oct. 31, 1994); see also Andrew Houlding, Defanged ADR Wins over Trial Bar, CONN. L. TRIB., Aug. 12, 1991, at 1, 14 (reporting on an ADR program designed to bring lawyers together in settlement conferences before a judge).


60 William Shakespeare, The Taming of the Shrew act 1, sc. 2.

61 See Dauer & Leff, supra note 11, at 581.


63 In re Green, 669 F.2d 779, 781 (D.C. Cir. 1981) (noting that Green had filed between 600 and 700 complaints in a decade).

ministry the "Human Awareness Universal Life Church," at least one court has concluded that, for all practical purposes, Green is the "church." One of its aims is to encourage inmates to file more lawsuits. Besides those Green has initiated on his own behalf, he has made a career of filing actions for other inmates as their "jailhouse lawyer."

Most courts have found Green's legal actions to be frivolous, irresponsible, unmeritorious, and in some cases malicious. In addition, he has been deceptive about his finances in an effort to proceed in forma pauperis—that is, without having to pay ordinary filing fees—and has intimidated court personnel.

In their frustration with his excesses, courts have resorted to extraordinary remedies: restricting Green's right to claim in forma pauperis status, prohibiting him from filing mandamus actions to attack United States District Court proceedings, enjoining him from filing suits on behalf of other inmates, and convicting him of criminal contempt for violating that injunction.

For sheer cunning and sophistication, however, the prize for litigiousness might go to Anthony R. Martin-Trigona, who between 1970 and 1983 had initiated at least 250 suits on his own behalf. Martin-Trigona graduated from the University of Illinois College of Law in 1970 and passed the Illinois Bar examination. The state bar's Committee on Character and Fitness required him to undergo a psychiatric examination, and, when he refused to do so, voted against recommending his admission to the bar. The Supreme Court of Illinois upheld the Committee's refusal to certify Martin-Trigona.

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65 In Re Green, 669 F.2d at 781.
66 Green v. Camper, 477 F. Supp. 758, 770 n.6 (W.D. Mo. 1979) (noting that Green is the only one who can speak for the "church" or prepare litigation for it).
67 Id. at 770.
68 Arnold, 512 F. Supp. at 651.
69 Id. at 651-52.
70 Id. at 652. One judge, driven to distraction, speculated as to the good Reverend's true motives:

In view of the stated aims of his "church," one is entitled to wonder whether Green believes that each writ filed brings him that much closer to heaven. Perhaps the simple answer is that, like Loki in [Norse mythology], Green considers it his lot in life to taunt, trouble and harass the courts of this land, both state and federal.

Id. (footnotes omitted).
72 In re Martin-Trigona, 302 N.E.2d 68, 74 (Ill. 1973) ("While it is not challenged that he may possess the requisite academic qualifications to practice law, the record overwhelmingly establishes that he lacks the qualities of responsibility, candor, fairness, self-restraint, objectivity and respect for the judicial system which are necessary adjuncts to the orderly administration of justice."). cert. denied, 417 U.S. 909 (1974).
Unfortunately, failure to gain admission to the bar did not limit Martin-Trigona from entering the nation's courtrooms. To the contrary, he has litigated with great energy and passion, bringing actions in bankruptcy, civil rights, environmental law, and housing discrimination.\textsuperscript{73}

Because the courts exist to preserve the rights of litigants, the wheels of justice move very slowly when the system itself is abused. It took a full ten years before the courts could catch up with Martin-Trigona's excesses in the name of the law. Finally, in 1983, the United States District Court for the District of Connecticut entered an Order of Permanent Injunction that imposed sweeping restrictions on Martin-Trigona's filing of actions in either state or federal courts.\textsuperscript{74}

Martin-Trigona's final gambit was to circumvent even this injunction by filing lawsuits in his mother's name, a last gasp that to date has proven unsuccessful\textsuperscript{75}—except insofar as it may have nurtured the idea that some licensed lawyers might stoop to such tactics.

\textsuperscript{73} \textit{In re} Martin-Trigona, 573 F. Supp. at 1247-48 (chronicling Martin-Trigona's litigation).

\textsuperscript{74} \textit{In re} Martin-Trigona, 573 F. Supp. at 1261-1269. The court of appeals vacated the part of the district court order that prohibited Martin-Trigona from filing any lawsuits in state court without first obtaining permission, but it affirmed and broadened the remainder of the order. The court instructed the district court to fashion an injunction that would prohibit “Martin-Trigona from bringing new actions in any tribunal without leave from the district court against persons who have encountered him in any capacity in litigation in the District of Connecticut or in this court.” The court of appeals further noted the district court's responsibility for “periodic revision of the injunction to keep pace with Martin-Trigona's imaginative pursuit of new methods of harassment.” \textit{Martin-Trigona}, 737 F.2d at 1262-63 (2d Cir. 1984).

\textsuperscript{75} Martin-Trigona v. Shaw, 986 F.2d 1384, 1388 (11th Cir. 1993) (finding that a complaint filed by Martin-Trigona's mother violated the permanent injunction); Martin-Trigona v. Gellis & Melinger, 830 F.2d 367 (D.C. Cir. 1987) (dismissing Martin-Trigona's mother's lawsuit for failure to comply with an order to show cause why her
Although it’s hard to say what comes first—the lawyers or the litigation—it is uncontroversible that we are the most litigious society in the world. By 1980 some five million lawsuits were being filed annually in the state courts. One reason the courts are overburdened is that Americans so readily seek out their lawyers at the merest whisper of an insult or injury. In turn, lawyers all too quickly assert that remedies for personal wrongs once redressed outside of court are now legal entitlements.

The urge to sue has also encouraged the diminution of ancestral values like individual self-reliance and caveat emptor (“let the buyer beware”). In this respect the court system has become a marketplace of class actions. Moreover, courts are now expected to fill the void created by the decline of traditional social bonds such as church, family, and neighborliness.

The major areas of increased litigation are products liability, medical malpractice, and environmental issues. In 1978, the federal government’s Interagency Task Force on Product Liability documented that no fewer than 84,000 product liability suits are filed each year. The first million-dollar personal injury verdict, handed down in 1962, showed that these suits could be exceedingly lucrative. By the mid-1970s the million-dollar verdict was a regular occurrence; awarded once a week somewhere around the country, it had become a baseline figure.

Of course, product liability suits can have a salutary effect as well. For example, after Bombardier-MLW Limited, a snowmobile maker, began to stress safety-consciousness to its employees, the number of suits against the company dropped by eighty percent and its insurance premiums, which had soared from $10,000 in 1970 to $600,000 in 1973, decreased to $150,000.

Rising numbers of medical malpractice suits are an especially visible reflection of American litigiousness. By 1983, sixteen malpractice claims were filed for every hundred physicians, more than three times the complaint should not be dismissed for her son’s failure to obey the permanent injunction).

76 Lieberman, supra note 59, at 5. The federal courts were receiving nearly 170,000 suits. Id.


78 Lieberman, supra note 59, at 34.

79 In 1978, the Remington Arms Company paid a $6.8 million settlement to a Houston attorney who had become paralyzed for life after one of the company’s rifles misfired. In the same year, a teenager won a $125 million jury verdict after he was severely burned in the crash of a Pinto. Subsequently, a judge reduced the verdict to $6.5 million. Id.

80 Id. at 64 (arguing that products liability litigation will diminish only if businesses emphasize safety more).
number less than a decade earlier.\textsuperscript{81} Medical malpractice premiums increased dramatically during the 1970s.\textsuperscript{82} Between 1965 to 1975, insurance rates rose tenfold for surgeons and fivefold for nonsurgeons.\textsuperscript{83} By 1985, the average physician was paying $17,000 annually for insurance.\textsuperscript{84}

Understandably, some doctors blame the increase in malpractice insurance premiums on ambulance-chasing lawyers pressing frivolous claims. Likewise, few doctors readily countenance that malpractice cases are won only after a jury has been persuaded of the physician's or hospital's negligence, and that many meritorious claims are never even brought.\textsuperscript{85}

Environmental disputes are also a major cause of increased litigation. The Wall Street Journal bemoaned that environmental litigation brought by the Natural Resources Defense Council ("NRDC") has delayed the development of an effective energy program.\textsuperscript{86} Lawsuits filed under the Mineral Leasing Act held up the construction of the Alaska pipeline for nearly four years. Legal actions initiated in 1963 against the Consolidated Edison Company to prevent the electric utility from building a nuclear power plant by the Hudson River were not settled until late 1980.\textsuperscript{87} Environmental litigants have endless opportunities to delay projects, because environmental issues tend to be complex and the applicable legal standards are often ambiguous.

Nevertheless, there are reasons why a litigious society does not have to be viewed negatively. America was created largely to ensure that its citizens enjoy individual rights and liberties. And there is a connection between personal freedom and responsible litigation.\textsuperscript{88}

Furthermore, despite the claims of politicians, it is not clear that Amer-

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\item \textsuperscript{81} Joel Brinkley, AMA Study Finds Big Rise in Claims for Malpractice, N.Y. Times, Jan. 17, 1985, at A1.
\item \textsuperscript{82} See, e.g., John Guinther, The Malpractitioners 18 (1978) (citing the example of a New York City Hospital that paid a mere $40,000 for liability insurance in 1974 and shelled out $558,000 the next year).
\item \textsuperscript{83} Id. at 19.
\item \textsuperscript{84} Medical Insurance: High Costs in New York, N.Y. Times, Oct. 13, 1985, at 69. The annual premium for neurosurgeons in New York was $44,401, for orthopedic surgeons, $37,643, and for obstetricians, $32,261. The figures were even higher for doctors practicing high-risk specialties. Betsy A. Rosen, Note, The 1985 Medical Malpractice Reform Act: The New York Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform, 52 Brook. L. Rev. 135, 142 n.40 (1986).
\item \textsuperscript{85} See Thomas B. Metzloff, Understanding the Malpractice Wars, 106 Harv. L. Rev. 1169, 1173 (reviewing Paul C. Weiler, Medical Malpractice on Trial (1991)); see also Paul C. Weiler et al., A Measure of Malpractice 6 (1993).
\item \textsuperscript{86} Public Interest Law, Wall St. J., Dec. 17, 1979, at A24; Lieberman, supra note 59, at 95.
\item \textsuperscript{87} Lieberman, supra note 59, at 96.
\item \textsuperscript{88} See George A. Googasian, Northern Exposure, 71 Mich. B.J. 1126, 1126 (1992) (arguing that American lawyering has positive effects).
\end{itemize}
ican litigiousness is running amok. Former Vice President Dan Quayle claimed that the legal system costs the country an estimated $300 billion a year.\textsuperscript{89} It is doubtful that Quayle could substantiate that claim as anything more than fuel to stoke a campaign speech.\textsuperscript{90} Similarly, the Bush Administration's assertion that escalating product liability litigation imposes a competitive disadvantage on American business is without foundation.\textsuperscript{91}

In reality, the world of product liability actually shrunk during the 1980s. Aside from asbestos cases, product liability filings in the federal courts fell by thirty-six percent from 1985 to 1991.\textsuperscript{92} In addition, plaintiffs have been increasingly unsuccessful at trial. The number of punitive damage awards has fallen sharply in non-asbestos product liability cases.\textsuperscript{93} This decline in product liability litigation contradicts claims of American litigiousness.

Indeed, although we remain the most litigious society in the world, Americans file fewer suits per capita now than they did in the colonial era.\textsuperscript{94} Although the view of some observers that there has never really been a litigation explosion is not supported by the case dockets, it is true that few disputes actually end up in court; most are settled beforehand.\textsuperscript{95}

\textit{Solicitation and Advertising}

In 1987, shortly after the crash of a Northwest Airlines jet in Detroit, a man posing as a Catholic priest appeared on the scene to console families of the victims. He embraced crying mothers and grieving fathers, offering words of comfort and solace and of God's reward in the hereafter. Then he passed out the business card of a Florida attorney, whom he repeatedly urged the families to call.\textsuperscript{96}

Such mercenary exploits are dwarfed by the so-called parachuting practitioners noted earlier, like those who rushed overseas to solicit potential

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\item \textsuperscript{89} Galanter, \textit{supra} note 49, at 84.
\item \textsuperscript{90} Quayle apparently borrowed the figure from a release by the Council on Competitiveness, which he then chaired. The release took the figure from \textit{Forbes}, which in turn borrowed it from 'liability guru' Peter Huber, who basically made it up. \textit{Id.}
\item \textsuperscript{91} \textit{Id.} (criticizing the Bush Administration's view).
\item \textsuperscript{92} \textit{Id.} In addition, the General Accounting Office reported that the number of claims per $100,000 in product-liability premiums dropped 48% from 1984 to 1988. \textit{Id.}
\item \textsuperscript{93} \textit{Id.} at 84-85.
\item \textsuperscript{94} Googasian, \textit{supra} note 88, at 1126-27.
\item \textsuperscript{95} Richard E. Miller & Austin Sarat, \textit{Grievances, Claims and Disputes: Assessing the Adversary Culture}, 15 \textit{Law \\& Soc'y Rev.} 525, 543 (1980-81) (noting that only 11.2% of disputants take their disputes to court).
\end{itemize}
clients in the aftermath of the tragic release of poison gas at the Union Carbide plant in Bhopal, India.\footnote{Eric S. Roth, Confronting Solicitation of Mass Disaster Victims, 2 Geo. J. Legal Ethics 967, 972 (1989) ("[I]n an attempt to retain clients and in their zeal [the lawyers] brought shame and discredit to the American bar.")}

The public sees little more than lawyerly sleaze in the everyday practice by people like Magdy F. Anis, Esq., whose pursuit of fees makes the stereotypical ambulance-chaser look almost noble in comparison. In December, 1988, a terrorist's bomb ended Pan American Flight 103 in a gruesome explosion over Lockerbie, Scotland.\footnote{In re Anis, 599 A.2d 1265, 1267 (N.J.), cert. denied, 112 S. Ct. 2303 (1992).} Within hours of the time that one of the bodies was identified, Anis had written to the victim's father, extending his "deepest sympathy," informing him that he had a cause of action against Pan Am, urging him to retain Anis's firm, and offering him a below-market contingency fee.

The father did what many other potential clients contemplate, but for various reasons never do: He filed a complaint with the New Jersey Office of Attorney Ethics, which in turn referred the letter to the Committee on Attorney Advertising. Anis was charged with violating Model Rule 7.3(b)(1) by soliciting a prospective client whose "physical, emotional, or mental state was such that . . . [he] could not exercise reasonable judgment in employing a lawyer." He was also charged with violating Rule 7.1(a) by "sending a letter that was misleading and contained material misrepresentations."\footnote{Id. at 1268.}

In this case, the profession was successful in disciplining one of its own. The court acknowledged that "within the hours and days following a tragic disaster, families would be particularly weak and vulnerable."\footnote{Id. at 1270.} "We have no doubt," it added, "that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath its common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."\footnote{Id. at 1270. The court also found that Anis had engaged in misleading advertising by falsely implying, among other things, that he was experienced in litigating aircraft accidents and concluded that Anis's solicitation of such vulnerable clients and his misrepresentation warranted a public reprimand. Id. at 1272.}

Such zealous avarice brings little but shame and discredit to the American bar. Occasionally, it engenders enough revulsion to prompt calls for reform.\footnote{Roth, supra note 97, at 980-86 (discussing suggestions for reform of attorney solicitation rules).}
The most common complaint about advertising is that it has an adverse effect on the profession's image.103

Until recently, the issues surrounding advertisements by lawyers were limited to silly nitpicking, such as whether boldface listings in the telephone book were violations of professional ethics.104 In Bates v. State Bar,105 however, the Court held that a state could not constitutionally prohibit truthful advertising in newspapers about the availability and cost of routine legal services.106 The Court rejected the various arguments raised against advertising—its adverse effect on professionalism, its inherently misleading nature, its negative effect on the justice system, its undesirable economic implications, its impact on the quality of service, and the difficulties of enforcement.107

From the time Bates was decided, the number of lawyers who advertise has increased dramatically and their radio and television campaigns have become more aggressive. Marketing to “target audiences” has become ever more sophisticated. For example, because people with marital problems have difficulty sleeping, they are a particularly vulnerable group for ads screened late at night.108 Lawyers now market themselves like department stores or used-car salesmen—essentially businesspersons trying to sell their wares. Worse, lawyers’ ads increasingly target personal matters involving deep-seated emotions, in which the potential client most needs a friend and counselor.109 In addition, many attorneys’ advertisements may be inherently deceptive—even according to narrow legal definitions of the word. According to the Model Rules, a communication is either false or misleading if it “is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate [ethical rules] or other law.”110

Targeted mail solicitation is another questionable form of legal advertising. For example, a lawyer may scan arrest logs at a police station or foreclosure notices in a newspaper, and send out blind form letters saying, “You need a lawyer, [and] you need me because I do most of my work in this field . . . .”111 In 1988, the Supreme Court held that a state

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103 See Michael Franck, Revisiting the Lawyer Advertising Controversy, 71 Mich. B.J. 1004, 1005 (1992) (attributing the erosion in the public’s perception of law as a profession to advertising).


106 Id. at 384.

107 Id. at 368-79.

108 Franck, supra note 103, at 1005.


111 See Paul McEnroe, Lawyer Advertising: Making Fools of Ourselves?, 49
cannot completely “prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.”\textsuperscript{112}

That holding was tested four years later in \textit{Anis}, in which the New Jersey Supreme Court held that it was impermissible to send a letter to a victim’s father only hours after his son’s body had been identified.\textsuperscript{113} Although the court left it to a state committee to decide on a reasonable waiting period, it imposed an interim waiting period of two weeks “after such a disaster occurs and loss becomes known.”\textsuperscript{114}

Less than a year later, however, a federal district court held that Florida’s thirty-day ban on direct mail solicitation targeted at disaster victims was unconstitutional.\textsuperscript{115} The advertising restrictions must be narrowly tailored, said the court, to advance the substantial state interest in protecting recipients from misleading information.\textsuperscript{116} As long as the advertisements are truthful and the recipients are physically and emotionally able to exercise reasonable judgment in employing a lawyer, then the consumer should not be kept from the available “truthful and relevant information [that] can make a positive contribution to consumers in need of such legal services.”\textsuperscript{117}

Furthermore, the Supreme Court has held that “[t]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.”\textsuperscript{118}

B. Rotten Apples

\textit{There is a vague popular belief that lawyers are necessarily dishonest. . . . [I]f in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.}

—Abraham Lincoln\textsuperscript{119}

\textsuperscript{112} Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 468 (1988).
\textsuperscript{114} Id. at 1271.
\textsuperscript{115} McHenry v. Florida Bar, 808 F. Supp. 1543, 1548 (M.D. Fla. 1992) (holding that the 30-day ban violated the First, Fifth, and Fourteenth Amendments), aff’d, 21 F.3d 1038 (11th Cir.), cert. granted, 115 S. Ct. 42 (1994).
\textsuperscript{116} Id. at 1547.
\textsuperscript{117} Id. at 1548.
The number of formal grievances lodged against lawyers has increased significantly in the last few years. In Maryland, for example, the number of "docketed complaints"—those indicating a prima facie case of misconduct—increased dramatically, by some twenty-five percent, in the early 1990s. In California, the state bar's lawyer discipline system consumes seventy-five percent of its annual budget.

As a result, the public is left to ponder: Why do lawyers have so much trouble following the law?

Dishonesty

Abraham Lincoln would have been bewildered by the convoluted ethics of modern lawyers, not to mention their inventive fee-inflating schemes and complex litigation tactics. In 1990, a New York lawyer who had appropriated some seven million dollars from his clients, wrote to several of his former colleagues explaining that he had flown away to Sierra Leone because he had an inoperable brain tumor, and that he had used fifteen million dollars of their money to feed the poor. When he reappeared—healthy—in New York a year later, he was convicted of fourteen criminal charges including grand larceny, possession of a forged instrument, and possession of stolen property.

For plain and simple dishonesty, however, the case of Orlin R. Anson, Esq., is hard to beat. Shortly after Inez Hayes's husband died in 1981, she retained Anson to help her with her affairs. Hayes was dependent on other people for assistance because of her physical and mental condition. In June 1982, Anson asked Hayes to transfer about $21,000 from

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120 The most prevalent types of misconduct that ultimately cause disbarment or lesser sanctions involve omissive conduct such as general neglect, failure to communicate with clients, failure to file, and failure to appear. A smaller number of lawyers are punished for misrepresentation, commingling, conversion, and commission of felonies. These offenses, along with failure to cooperate with a disciplinary agency, recordkeeping violations, and failure to protect the interest of a client, account for some 75% of disbarments and resignations while under investigation, 60% of suspensions, and 90% of public reprimands. Stephen G. Bené, Note, Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions, 43 STAN. L. REV. 907, 909-10 (1991).


122 Michael J. Hall, Gotcha, CAL. LAW., Aug. 1992, at 44, 44 (noting that the lawyer discipline machinery costs more than $40 million a year). As of 1992, California's lawyer discipline apparatus employed 55 prosecutors, a 113-employee investigations division, a staff of 75 to screen preliminary complaints, and nine judges. In 1991, the bar prosecuted 1,345 cases and disciplined 564 lawyers. Id.


124 In Re Anson, 730 P.2d 1228, 1231 (Or. 1986).

125 Id. Hayes's long-time neighbors, Charles and Edith Lacey, drove her to the
her bank to his personal account, which he proceeded to deplete. Hayes’s beneficiaries sued Anson, who alleged that the money was a gift. The court disagreed, and disbarred Anson.\textsuperscript{126}

It should go without saying that the most serious grievance lodged against lawyers is that they are fundamentally dishonest, even capable of stealing. Indeed, the profession itself has long been concerned with the proper handling of clients’ funds. The American Bar Association’s Model Code of Professional Responsibility (“Model Code”) provides that lawyers must deposit client funds, other than advances for costs and expenses, in identifiable bank accounts in the state in which the lawyer’s office is situated, and that the funds not be commingled with those of the lawyer or his firm.\textsuperscript{127}

Ethical Consideration 9-5 of the Code suggests that the “[s]eparation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety . . . .”\textsuperscript{128} Nevertheless, the rules against commingling are those most commonly breached, and appear to be the most frequent bases for disciplinary action.\textsuperscript{129}

store and wrote her checks because of her poor eyesight. In addition, according to the Laceys, Hayes’s mental capacity began to decline in the fall of 1981. Thereafter, on occasion she would suffer from hallucinations. By 1986, Hayes was essentially incompetent. \textit{Id.} at 1232.

\textsuperscript{126} \textit{Id.} at 1231-34.

\textsuperscript{127} \textbf{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 9-102(A) (1992). The Model Code provides exceptions for

(1) [f]unds reasonably sufficient to pay bank charges[; and]

(2) [f]unds belonging in part to a client and in part presently or potentially to the lawyer or law firm . . . but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Furthermore, the Model Code requires that lawyers

(1) [p]romptly notify a client of the receipt of his funds, securities, or other properties[;]

(2) [i]dentify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable[;]

(3) [m]aintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them[; and]

(4) [p]romptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

\textit{Id.} DR 9-102(B).

\textsuperscript{128} \textit{Id.} EC 9-5.

\textsuperscript{129} \textit{See, e.g., In re Rubi, 652 P.2d 1014, 1016-17 (Ariz. 1982)} (suspending an attorney for one year for failing to place client funds in a bank account, commingling funds, and conversion).
Courts have repeatedly rejected the defense that the attorney kept adequate funds as cash or in a safe deposit box to cover the amount of commingled client funds.\textsuperscript{130} They have further held that an attorney's good faith or ignorance of the rules against commingling are not valid excuses, although the lack of a dishonest intent can mitigate the punishment.\textsuperscript{131} Finally, misappropriating client funds generally results in disbarment, although mitigating circumstances may allow the attorney to incur a lesser sanction, such as a suspension or public reprimand.\textsuperscript{132}

\textit{Lack of Diligence}

Stephen M. Zang, Esq., is another good illustration of the kind of lawyer that brings the profession into widespread disrepute.\textsuperscript{133}

In September 1982, Roberta Malley hired Zang to represent her in a claim for injuries she suffered in an automobile accident.\textsuperscript{134} She did not want to discuss settlements, however, until she had completed extensive medical treatments for her injuries. Nevertheless, Zang negotiated a $12,000 settlement with the responsible party's insurance company while Malley was still under active medical care. She declined the settlement and discharged Zang, who promptly demanded $4000 for legal services and threatened to place a lien on the case. The court concluded that Zang "acted without competence or zeal by failing to heed Malley's desire to postpone settlement discussions, and by negotiating a settlement without her authority" and thus violated Model Code Disciplinary Rules 6-101 and 7-101.\textsuperscript{135}

Another complaint against Zang involved his representation of Billy Boyle, who was injured in 1983 in an automobile accident. Zang solicited Boyle via a paid "investigator," and signed him to a retainer agreement without meeting his client in person. During the next two years, Zang ignored Boyle's many telephone calls and letters until Boyle threatened to file a complaint with the state bar. A few days before the statute of limitations on Boyle's claims elapsed, he hurriedly authorized Zang to settle with three insurance companies for $99,000. But Zang negotiated a

\begin{footnotesize}
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\item[130] State v. Aldrich, 237 N.W.2d 689, 690-91 (Wis. 1976) (suspending an attorney for six months for commingling funds even though the attorney at all times had sufficient cash to repay the client).
\item[131] \textit{In re} Cheronis, 502 N.E.2d 722, 727 (Ill. 1986) (arguing that commingling funds presents a substantial risk to a client regardless of whether an attorney has a dishonest motive).
\item[133] \textit{In re} Zang, 803 P.2d 419 (Ariz. 1990).
\item[134] \textit{Id.} at 421.
\item[135] \textit{Id.} at 422. Roberta Malley hired other counsel and settled her claim for $25,000 in 1985. \textit{Id.} at 421.
\end{enumerate}
\end{footnotesize}
settlement for only $76,000. The Supreme Court of Arizona held that Zang had violated Model Code Disciplinary Rules 6-101(A)(2) and (3), and 7-101(A)(3) because of his incompetence and failure to represent Boyle zealously.136

Courts have generally found that an attorney who neglects the affairs of a client warrants disciplinary action of some kind, even in the absence of deceitful conduct.137 The case for punishment is stronger when the charge is accompanied by willfulness, deceit, or gross negligence: Such findings warrant disbarment, suspension, or censure.138 Lawyers, however, can escape punishment for mistakes in judgment or ignorance of the law.139 There are also a number of aggravating and mitigating circumstances that can affect an attorney's punishment.140

Fee-Gouging

Dishonesty and lack of diligence are egregious transgressions, but the most visible of lawyerly sins is fee-gouging. An attorney must set a “reasonable” fee and clearly communicate its basis at the beginning of the relationship with the client.141 This ethical obligation is often ignored. Abraham Paul Korotki, Esq., for example, represented five Baltimore City firefighters who were injured by an exploding metal yard box. Korotki claimed no less than seventy-five percent of the gross amount recovered in the firefighters’ claim for workers’ compensation, charging two clients $471,424 in fees out of a total recovery of $628,566. The customary contingent fee in personal injury cases is anywhere from 33 1/3 to 40%. The firefighters’ complaint about Korotki’s fee evolved into a disci-

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136 Id. at 422.
137 Debra T. Landis, Annotation, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client’s Affairs in Criminal Matters as Ground for Disciplinary Action—Modern Cases, 96 A.L.R.2d 823, 828 (1964) (stating that an attorney’s neglect of client interests is a ground for disciplinary action).
138 Id. at 835-39.
139 Id. at 828 (noting that courts disagree as to whether such conduct warrants punishment).
140 Aggravating circumstances include: ignoring the client’s request for information or for a settlement; making false representations to the client; thwarting or impeding an investigation; a prior history of misconduct; and the client suffering a loss. Id. at 843-55. Mitigating circumstances include: the personal misfortunes of an attorney; inexperience; old age; good character; lack of prior record; absence of fraudulent intent; admission of neglect; return of an unearned fee; and willingness to reimburse the client for any loss suffered. Id. at 855-59.
141 Model Rules of Professional Conduct Rule 1.5(a), (b) (1992); Model Code of Professional Responsibility DR 2-106 (1980). The Model Code adds that “[a] lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client.” Id. EC 2-17.
plenary action, which resulted in a finding that the fee arrangement was clearly excessive. The Court of Appeals of Maryland suspended Korotki for eighteen months from the practice of law.¹⁴²

Fee-gouging takes place, perhaps on an even larger scale, with big law firms—inherently conservative institutions that often manufacture unnecessary paperwork and put obstacles in front of as many transactions as they facilitate.¹⁴³ Elihu Root's sage comment rings true, that "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."¹⁴⁴

For example, two months after filing bankruptcy petitions on behalf of a client, lawyers at Stroock & Stroock & Lavan ("SSL")—a large firm with offices in New York, Washington, D.C., Miami, and Los Angeles—filed an application with the court for attorneys' fees ($94,853) and reimbursement for expenses ($16,662).¹⁴⁵ A committee of unsecured creditors objected to paying SSL any amount, arguing that the charges were grossly excessive, and that SSL's lawyers repeatedly duplicated their efforts.¹⁴⁶ The court found that:

More than one attorney did work which easily could have been done by one attorney, and on numerous occasions two or more attorneys participated in the same meeting or phone call. Every minute of each attorney's time . . . was billed at from $100.00 per hour to $270.00 per hour . . . . [T]he application is replete with telephone conferences . . . resulting in as many as four time clocks running simultaneously against the debtors' account. The legal fees generated with 19 different attorneys billing from time to time throughout the two-month period averaged more than $2,000 per normal work week.¹⁴⁷

The court then ordered an across-the-board reduction of the claimed fees and expenses. The judge concluded by stating that in his thirty-six years as a lawyer and judge specializing in bankruptcy, "this is one of the most blatant examples of attempted fee gouging" he had ever observed.¹⁴⁸

Some people feel that contingency fees themselves are excessive. One judge suggests that plaintiffs' attorneys ask themselves three questions prior to taking a case on a contingency basis: "1. Is there a genuine and substantial question on liability, or is the only real question the amount of

¹⁴³ See MARTIN MAYER, THE LAWYERS 307 (1966) ("'It is a very common thing . . . for attorneys to spend a great deal of time finding out the answers to questions which are not involved.'" (quoting Arthur A. Ballantine)).
¹⁴⁴ PHILIP C. JESSUP, ELIHU ROOT 133 (1938).
¹⁴⁶ Id. at 863.
¹⁴⁷ Id. at 863-64.
¹⁴⁸ Id. at 866.
damages? 2. Is the case likely to be settled or tried to verdict? 3. Is the amount of the recovery likely to be small or large...?"149

The Manhattan Institute, a non-partisan research and education organization whose mission is to encourage sound public policy, suggests the following guidelines:

(1) Contingency fees may not be charged against settlement offers made prior to plaintiffs' retention of counsel.

(2) All defendants are given an opportunity to make settlement offers covered by the proposal, but no later than 60 days from the receipt of a demand for settlement from plaintiffs' counsel. If the offer is accepted by the plaintiff, counsel fees are limited to hourly rate charges and are capped at 10% of the first $100,000 of the offer and 5% of any greater amounts.

(3) Demands for settlement submitted by plaintiffs' counsel are required to include basic, routinely discoverable information designed to assist defendants in evaluating plaintiff's claims. In turn, to assist plaintiffs in evaluating defendants' offers, discoverable material "in the...[defendant's] possession concerning the alleged injury upon which [the defendant] relied in making his offer of settlement" must be made available to plaintiffs for a settlement offer to be effective.

(4) When plaintiffs reject defendants' early offers, contingency fees may only be charged against net recoveries in excess of such offers.

(5) If no offer is made within the 60 day period, contingency fee contracts are unaffected by the proposal.150

In addition to unethical contingency-fee arrangements, deceptive billing practices abound. Two such indefensible schemes are double or multiple billing of fees and costs, and charging costs as fees. An example of double-billing is when a lawyer spends time in court on behalf of several different clients and then charges each client for the whole period. The lawyer should bill the time spent in court equally among the clients or based on the actual time spent on each client's case, whichever is more reasonable under the circumstances.

It is likewise improper for a lawyer to bill a present client for research done on behalf of a prior one. The ethical attorney charges only for the time spent retrieving the research, even if it took hours to produce the work product for a previous client. Similarly, a lawyer who does comput-

149 John F. Grady, Some Ethical Questions About Percentage Fees, Litigation, Summer 1976, at 20, 26 (observing that contingency or "percentage" fees pay attorneys based on the severity of their clients' injuries rather than on the reasonable value of their services).

erized research may not bill the client for the time that manual library research would have taken.

Honesty in billing also requires that an attorney properly distinguish between costs and fees on a statement. Costs include out-of-pocket expenses on behalf of a client, but not ordinary offices expenses or overhead. Fees should only consist of time spent by lawyers; work performed by law clerks or paralegals should be charged as costs, not as lawyer time.151

Sexual Misconduct

Another lawyer story currently making the rounds explains why one bar association's ethics committee decided to prohibit sex between attorneys and clients: "They didn't want the clients to be double-billed for essentially the same service."152

Unfortunately, reality often exceeds fiction. In 1991, an Illinois appeals court reversed a trial court's summary judgment in favor of Albert B. Friedman, Esq., in a fee dispute brought by a female client who alleged that he had charged her for time spent having sex.153 This particular instance of double-billing did not prevent the Illinois Supreme Court from appointing Friedman to its Committee on Character and Fitness.154

Not all stories of attorney sexual misconduct are funny. In 1988, a New Hampshire woman sought a lawyer to represent her in a divorce from her husband. She retained James D. Otis, Esq., to represent her, after finding him in the yellow pages. Because she had little money, Otis agreed to take her case at no charge in exchange for her secretarial services.

Soon after the woman started working for Otis, another female secretary left. At that time, Otis began harassing her verbally. At least twice a week, he locked the front door of his office and made overt sexual

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154 Sherman, supra note 153, at 2. The chairwoman of the committee, however, stated that the appointment was made prior to the appeals court's decision. One skeptic has asked, "If Mr. Friedman had engaged in group sexual activity, would he have billed several clients for the same time period?" Erik M. Jensen, A Day in the Life of S. Breckinridge Tushingham, 69 DENV. U. L. REV. 231, 239 n.28 (1992).

The famous scene from L.A. Law in which Arnie and his secretary Roxanne fall through the floor into a partner's office below while locked in a carnal embrace is rumored to have been based on an actual event at one of Houston's largest law firms. Saundra Torry, Rookies Reveal the Inside Scoop on Elite Law Firms, WASH. POST, Nov. 8, 1993, at F7.
advances, which escalated to a physical assault. The client nevertheless continued working for Otis because of her financial condition, and because she thought she needed him for the final hearing on her divorce and child custody case.

But she finally did quit her job, hired a new lawyer, and filed a motion in which she included allegations about Otis's conduct. The Supreme Court Committee on Professional Conduct filed a petition with the Supreme Court of New Hampshire requesting Otis's disbarment. Because of the publicity surrounding the case, five other former female clients, all but one of whom had been involved in divorce proceedings, came forward with stories of similar harassment. Otis argued that a head injury had caused his behavior, but the Supreme Court found that his conduct warranted disbarment.

One of the first malpractice verdicts ever handed down against a lawyer because of a sexually abusive relationship with a client occurred in a similar case. A jury awarded Maria Del Rosario Vallinoto $25,000 in compensatory damages and $200,000 in punitive damages after she testified that her lawyer, Edward DiSandro, Esq., had forced her to have sex with him. The jury also found DiSandro and his law firm liable for malpractice.

Unfortunately, Otis and DiSandro are not as rare the birds as the profession would like to claim.

Sexual misconduct between lawyers and clients is a ripening area of disciplinary proceedings. The American Bar Association's Standing Committee on Ethics and Professional Responsibility waited until 1992 before it issued a formal opinion concluding that these relationships "can seriously harm ... [clients'] interests and should be avoided."

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156 Id. at 1201-02.
157 Id. at 1203-04. The Court added, "The purpose of lawyer discipline is not to punish the attorney, but to maintain appropriate standards of professional conduct for the protection of the public and the maintenance of the public confidence in the bar." Id. at 1204 (quoting Bourdon's Case, 565 A.2d 1052 (N.H. 1989)). The quotation originally appeared in State v. Merski, 437 A.2d 710, 714 (N.H. 1981), cert. denied, 455 U.S. 943 (1982).
159 Presser, supra note 158, at 24.
160 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992) (discussing sexual relations with clients); see Julie Gannon Shoop, California Law Bars Most Lawyer-Client Sex, TRIAL, Dec. 1992, at 89, 90. For a survey of recent efforts at reform, see Margit Livingston, When Libido Subverts Credo: Regulation of
nia was the first state to act in this area, passing a bill that provides for discipline if a lawyer does any of the following:

1. Expressly or impliedly condition the performance of legal services . . . upon the client's willingness to engage in sexual relations with the attorney.
2. Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.
3. Continue representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently . . . or if the sexual relations would, or would be likely to, damage or prejudice the client's case.\(^\text{161}\)

In Oregon, the Supreme Court amended the state code of professional responsibility to create an across-the-board prohibition on attorney-client sexual relations.\(^{162}\)

**Drug and Alcohol Abuse**

In 1987, Jeffrey Shuminer, Esq., failed on several occasions to inform his clients that he settled their cases.\(^{163}\) In one such situation, Shuminer received a settlement, deposited the money in his office operating account, and issued a check from that account to himself for the purchase of a Jaguar automobile. When the Florida bar initiated disciplinary proceedings against him, he offered mitigating evidence via a doctor who testified that Shuminer's addictions were the cause of his unethical conduct and that he had an excellent prognosis for recovery.\(^{164}\) The Supreme Court of Florida disbarred him anyway.\(^{165}\)

Although the rate of substance abuse in the general population is ten percent, some estimates place the rate of substance abuse among attorn-

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\(^{161}\) CAL. BUS. & PROF. CODE § 6106.9(a) (West Supp. 1994). The statute provides exceptions for attorneys who had sexual relations with a client before the legal representation began, or for lawyers representing their spouses or equivalent domestic partners. \textit{Id.} § 6106.9(b) (West Supp. 1994). Under the new law the state bar must keep statistics on the number of complaints of sexual misconduct, and must submit a report to the legislature by January 1, 1996. 1992 Cal. Stat. 740 § 2.

\(^{162}\) Livingston, \textit{supra} note 160, at 42-44.

\(^{163}\) Florida Bar v. Shuminer, 567 So.2d 430, 431 (Fla. 1990) (per curiam).

\(^{164}\) \textit{Id.} at 432.

\(^{165}\) \textit{Id.} at 433. The referee for the case had recommended an 18-month suspension from law practice because of the mitigating factors. The disbarment, however, was for only five years, commencing from the time two years earlier when Shuminer voluntarily ceased practicing law. The court chose to disbar him, rather than suspend him, because he failed to demonstrate that his addictions impaired him to a point that outweighed the seriousness of his offenses. \textit{Id.} at 432.
neys at somewhere between fifteen and twenty percent. The substance abuse problem is closely related to attorney misconduct. Between forty and sixty percent of all professional discipline cases originate with some kind of substance abuse. The bar has responded with substance abuse programs.

Lawyers who are convicted of drug-related criminal offenses receive severe sanctions. Disbarments have ensued when attorneys are convicted of possession with intent to distribute cocaine. In disbarment proceedings for drug-related offenses, however, courts often accept evidence of rehabilitation as a mitigating circumstance.

C. Scraping the Bottom

He saw a Lawyer killing a Viper
On a dunghill hard by his own stable
And the Devil smiled, for it put him in mind
Of Cain and his brother, Abel.

—S.T. Coleridge

Ideally, sanctions and ethical rules would prevent lawyers from using the judicial system to harass their opponents or delay litigation. Unfortunately, both solo practitioners and established firms continue to abuse the system.


167 Lindgren, supra note 166, at 22. In Georgia, the link is much higher. Problems with alcohol or drugs reportedly led to 80% of the discipline cases involving the misuse of funds and 65% of the cases involving legal malpractice. Id. In Texas, however, substance abuse reportedly led to only 15% to 20% of all disciplinary proceedings. Joanne Pitulla, Abusers Anonymous, A.B.A. J., June 1992, at 108, 108.

168 Pitulla, supra note 167, at 108. In Oregon, malpractice claims dropped against lawyers who participated in such a program and maintained one year of abstinence from alcohol or drugs. Id.

169 Melvin Hirshman, A Rocky Road, Md. B.J., May/June 1990, at 42 (providing examples from 20 states of disciplinary proceedings brought against attorneys who possessed or sold drugs).

170 E.g., In re Mendes, 598 A.2d 168, 168 (D.C. Ct. App. 1991) (per curiam) (finding that the crime of possession of cocaine with intent to distribute warranted disbarment).

171 See In re Rivkind, 791 P.2d 1037, 1043 (Ariz. 1990) (holding that participation in a rehabilitation program mitigates the attorney's punishment). But see In re Scott, 802 P.2d 985, 992 (Cal. 1991) (holding that a judge's strenuous rehabilitation did not mitigate his disbarment because of felony convictions).

Frivolous Litigation

Frivolous claims are those that lack serious merit, including actions that are filed to harass or delay. It is unethical for an attorney to accept a case in which it is obvious that a client wishes to bring an action merely for the purpose of harassing another person. Lawyers are likewise prohibited from bringing claims that are not supported by existing law, except when accompanied by a good-faith argument to change the law. Although attorneys are required to be zealous advocates on behalf of their clients, they are also officers of the court and must therefore remain within the bounds of the law.

Lawyers who bring frivolous pleadings are subject to discipline. The Colorado Supreme Court suspended an attorney for six months, for example, after he argued in three separate cases before the United States Tax Court that "wages are not income" subject to taxation. The court noted that this argument has been considered meritless for many decades.

The range of punishment is not limited to suspension. One attorney was disbarred for filing thirty frivolous claims and fifteen groundless appeals, including lawsuits on behalf of all U.S. trees to have the in forma pauperis forms used in federal district courts declared unconstitutional; to make law schools award him degrees nunc pro tunc; against several

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173 See Neitzke v. Williams, 490 U.S. 319, 325 (1989) (stating that a complaint is frivolous if it lacks an arguable basis in either fact or law); Anders v. California, 386 U.S. 738, 744 (1967) (finding that an appeal is frivolous if any of the legal points are not arguable on their merits); see also BLACK'S LAW DICTIONARY 668 (6th ed. 1990) (defining frivolous to mean "of little weight or importance"). A frivolous action is a "groundless lawsuit with little prospect of success; often brought to embarrass or annoy the defendant." Id.


175 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109 (1980) ("A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to ... [b]ring a legal action ... merely for the purpose of harassing or maliciously injuring any person."); see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1992) ("[A] lawyer shall not represent a client ... if the representation will result in violation of the rules of professional conduct . . . ."). Not only is the lawyer subject to discipline, but the client may be hit with a large jury verdict. See David Conn, Calif. Jury Slams Maryland Casualty, THE SUN (Baltimore), Nov. 3, 1994, at 1A (reporting that a jury awarded $58 million in punitive damages against an insurance company that allegedly delayed and harassed a claimant to avoid paying proceeds).


177 Id. EC 7-1.

178 People v. Hartman, 744 P.2d 482, 483 (Colo. 1987) (en banc) (expanding a suspension that the United States Tax Court had imposed).

179 Latin meaning "now for then"—an order used by courts for correcting the record. BLACK'S LAW DICTIONARY (6th ed. 1990).
persons alleging that they breached the United States' Treaty of Friendship with Pakistan; and a claim with the Pollution Control Board against an individual, alleging pollution of the mind and contamination of the air with character assassination.\footnote{In re Jafree, 444 N.E.2d 143, 148, 150 (Ill. 1983) (per curiam). In deciding to disbar Jafree rather than just suspend him, the court noted that his legal career was characterized by "the filing of frivolous lawsuits and scurrilous charges" and added that his "unprofessionalism is an abuse of the privilege to practice law and clearly tends to bring the judicial system and legal profession into disrepute." Id. at 149-150; see also Florida Bar v. Richardson, 591 So.2d 908, 911 (Fla. 1991) (per curiam) (suspending an attorney for 60 days for asserting a frivolous and malicious claim).

Unfortunately, judges themselves are sometimes culpable—and not only for permitting frivolous lawsuits to proceed. Take the Honorable Richard Neely, a judge on the Supreme Court of West Virginia.\footnote{As a number of people in West Virginia might say, "Take Judge Neely, please!" In 1985 he was forced to step down as chief justice of his court after he fired his secretary for refusing to babysit for his son. He was quoted as saying that his staff is hired "to do the chicken crap, while I grind out the work." That same year a litigant charged him with making animal sounds from the bench. Gerald Baker, 'America's Dumbest Judge' Argues for Tort Reform, N.J. L.J., Feb. 7, 1994, at 16, 29 (letter to the editor).

But some claims that appear to be frivolous may in fact have some legitimate basis for redress. For example, the case of a student in Pennsylvania who claimed that his college had caused him to suffer from post-traumatic stress disorder by giving him a bad roommate takes on a different light when viewed in the context of a contract dispute. The college had promised to match students with compatible roommates; here, the roommate proved to be a "party animal," not the quiet type the plaintiff had requested and, moreover, had also assaulted the plaintiff and stolen from him.\footnote{The purpose of the hearings was to provide CALA the opportunity to present evidence supporting proposed legislation designed to make it more difficult for citizens to recover compensatory damages for injuries sustained in accidents. Id.}

Similarly, the recent story about a woman who sued McDonald's for serving coffee that was too hot and burned her when it spilled appeared to be just another example of litigation run amok. But when all the facts}
are taken into consideration—that she was a frail eighty-one year old, that she was one of some 700 similarly burned victims over a ten-year period whose claims had been settled for close to a half-million dollars, and that the restaurant refused to address the burn danger—neither the lawsuit nor the $2.9 million jury award it generated seem so farfetched.184

Abuse of Process and Malicious Prosecution

Attorneys have likewise been disciplined for trying to delay the legal process. For example, a court found that a lawyer who had filed nine petitions for review in immigration cases—none of which raised any substantial issues, but all of which caused automatic stays in deportation—had conducted his affairs in a way “unbecoming a member of the bar.”185

Many lawyers, however, engage in dilatory practices with impunity.186 For example, an attorney for the R.J. Reynolds Tobacco Company was able to win dismissal by burying his opponent in paper. In a confidential memo he crowed about his successful strategy:

The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive to plaintiffs’ lawyers, particularly sole [practitioners]. . . . To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’ money, but by making that other son of a bitch spend all his.187

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Lawyers who manipulate the system on their own behalf are especially difficult to reign in. One such epic schemer was Arthur Kane, Esq., a California lawyer who was ordered to pay his ex-wife $100 per month in

184 Abraham Fuchsberg, The Hot Coffee Case, JEWISH PRESS, Sept. 30, 1994, at 55 (arguing that newspaper headlines misleadingly made it appear that the lawsuit was frivolous); see also S. Reed Morgan, Verdict Against McDonald’s Is Fully Justified, NAT’L L.J., Oct. 24, 1994, at A20 (letter to the editor).
185 In re Bithoney, 486 F.2d 319, 325 (1st Cir. 1973). Although six of the petitions had been filed after the lawyer was given specific warnings concerning the impropriety of such conduct, the court here was nevertheless exceedingly deferential: It recognized that merely because it found the attorney’s arguments frivolous was not necessarily a cause for discipline, because of the danger that such action might inhibit lawyers from advocating their clients’ cases vigorously. Nevertheless, it reasoned, there must be limits to frivolous claims that are not only a waste of time for the courts and the opposing party, but also—as here, with the immigration laws—may confer an unmerited benefit upon those who may not deserve it. Id. at 322.
child support. In 1978, when Kane’s arrearage exceeded $1,800, his former spouse sued to recover the unpaid money and to increase the monthly payment; the court ordered Kane to pay $250 per month beginning in June 1979. Soon after the initial payment was due, Kane filed motions for a stay of execution of the judgment and a new trial. After both motions were denied, he filed a notice of appeal and a motion to stay execution with the appeals court; that motion was also rejected.

Later, the lawyer received a contempt citation for failure to pay child support. During a recess in the contempt hearing, Kane disappeared. The trial judge issued a bench warrant for his arrest, but he avoided the sheriff’s service. Three months later, when Kane finally appeared before another court, the judge found him in willfull contempt and sentenced him to ninety days in jail. As a result, the Supreme Court of Colorado publicly censured him. When the hearing on the original contempt citation finally took place, the district court judge sentenced Kane to an indefinite jail term for failure to pay child support. But the court stayed the order until February 1980, at which time he would have to report to jail if he had not paid $450 in back child support payments. Kane filed a motion for a stay of the execution of the court’s order. The court denied the stay, but the lawyer finally paid the $450.

Kane next filed a motion for a new trial regarding the finding of contempt. Denied. He initiated a second appeal. Again, denied. Kane then attempted to disqualify the trial judge. This took up another six months of the court’s time. He also filed motions to continue the proceedings and to suspend and reduce child support payments.

When the case finally commenced, the trial court again found Kane in contempt for failure to pay child support, and sentenced him to ninety days in jail, and again he failed to surrender to the sheriff. The trial court issued a writ of commitment, to which Kane responded by filing another appeal which was denied.

In a new twist to the sorry saga, two years after the proceedings began Kane filed a bankruptcy petition.

Finally, the Colorado Supreme Court found that all of Kane’s legal actions were “for the sole purpose of achieving a stay of the trial court’s orders and not as a good-faith effort for extension or modification or

189 People v. Kane, 655 P.2d 390, 391 (Colo. 1982) (en banc) (chronicling Kane’s motions to delay paying child support).
190 People v. Kane, 638 P.2d 253, 254 (Colo. 1981) (en banc) (finding that Kane’s behavior in hearings regarding the non-payment of child support warranted public censure).
191 Id. (holding that Kane had violated Disciplinary Rules 1-102(A)(5) and 7-106(A) of the Model Code of Professional Responsibility).
192 Kane, 655 P.2d at 391. The court reduced Kane’s child support payments back to $100 per month. Id. at 392.
reversal of existing law...[,] that his conduct resulted in unnecessary and excessive expenditure of judicial resources...[,] and that the appeals were frivolous and taken solely for the purpose of delay, and as such interfered with the administration of justice." All of these findings together warranted Kane's suspension from the practice of law for three years—the same length of time that Kane had spent trying to avoid making payments.

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In federal court, the judge or opposing counsel may bring a Rule 11 motion against an attorney who uses dilatory or abusive tactics, including the filing of frivolous claims or defenses or the use of pleading to harass or delay. The range of sanctions under Rule 11 varies from case to case. A court may assess fines, expenses, and attorneys' fees against an offending lawyer, firm, or party and may also strike pleadings or allegations. Other sanctions include "issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs...[and] referring the matter to disciplinary authorities." In one instance, a court even required a law firm to distribute a copy of its opinion finding that two of the firm's attorneys had violated Rule 11. Finally, courts may resort to injunctions to deter vexatious filings.

Lawyers who file frivolous or dilatory claims in federal courts may also

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193 Id. at 393.

194 Id. The court also ordered Kane to pay $537.83 in court costs. Id.


196 FED. R. CIV. P. 11 & advisory committee's note; see also Chu by Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985) (holding that it was appropriate to impose reasonable attorney's fees against an attorney who violated Rule 11); Edwards v. Marsh, 644 F. Supp. 1564, 1573 (E.D. Mich. 1986) (imposing Rule 11 fines because the trial "involved considerable time at the expense of taxpayers" and "[s]uch needless drain on the public coffers should not be taken lightly").


198 FED. R. CIV. P. 11 advisory committee's note.

199 Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522-23 (N.D. Cal. 1984) (holding that attorneys violated Rule 11 when they made a groundless argument), aff'd, 790 F.2d 1421 (9th Cir. 1986).

200 Ferguson v. MBank Houston, N.A., 808 F.2d 358 (5th Cir. 1986) (holding that the district court acted within its discretion by ordering an injunction where monetary sanctions were ineffective).
run afoul of 28 U.S.C. § 1927, a federal law with new teeth.\footnote{201} The majority of courts require bad faith or intentional misconduct to invoke § 1927.\footnote{202} Furthermore, Rule 38 of the Federal Rules of Appellate Procedure authorizes damages and costs to the appellee when a court of appeals determines that an appeal is frivolous.\footnote{203} Federal appeals courts may also impose sanctions under § 1927.\footnote{204}

Similarly, businesses that seek to stifle competition by burying their opponents in paper run the risk of violating the federal antitrust laws.\footnote{205}

An action for malicious prosecution alleges that the defendant previously brought, with malice aforethought and without probable cause, a civil or criminal action, or other legal proceeding against the plaintiff.\footnote{206} Private attorneys are not immune from liability for malicious prosecu-

\footnote{201} 28 U.S.C. § 1927 (1988) ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."). Until 1980, penalties under § 1927 were limited to certain enumerated costs.\footnote{202} See Roadway Express, Inc. v. Piper, 447 U.S. 752, 757-61 (1980) (defining the term "costs" to exclude attorney's fees). Congress subsequently amended § 1927 to provide for the recovery of attorney's fees and expenses. Antitrust Procedural Improvements Act of 1980, § 3, Pub. L. No. 96-349, 94 Stat. 1154, 1156.


\footnote{203} Fed. R. App. P. 38 ("If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."). Similarly, an appeals court may award the prevailing party damages and costs. 28 U.S.C. § 1912 (1988).

\footnote{204} S & D Cal. Fruit Exch. v. Gurino, 783 F.2d 345, 346-47 (2d Cir. 1986) (per curiam) (holding that an attorney violated § 1927 when he failed to inform either opposing counsel or the Court of Appeals that the case had been settled before submission of the appeal for decision). Courts generally invoke § 1927, rather than § 1912, to sanction attorneys for frivolous appeals. Robert J. Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845, 868 (describing sanctions available for frivolous appeals).

\footnote{205} California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) (holding that bringing legal proceedings to harass competitors may violate the antitrust laws and that the First Amendment does not immunize such conduct); Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 896-97 (2d Cir. 1981) (same).

Probable cause to institute an action exists if an attorney "reasonably believes in the existence of the facts upon which the claim is based, and . . . correctly or reasonably believes that under those facts the claim may be valid under the applicable law . . . ."\(^{208}\)

II. Fighting For Law and Justice: Apologies and Rebuttals

*Apologists for the profession contend that lawyers are as honest as other men, but this is not very encouraging.*

—Ferdinand Lundberg\(^{209}\)

The current President of the American Bar Association, George E. Bushnell Jr., asks that all lawyers be willing to take tough and often unpopular or controversial stands, in order to protect the Constitution. "[They] must be reminded that it is not always popular to do what is right, but that it is the obligation of the bar to attempt to do what is right."\(^{210}\)

The ABA's call for lawyers to take the lead in reforming the justice system comes at a time when people are questioning whether there is a need for so many lawyers. During the past three decades, however, the extraordinary increase in the number of lawyers has coincided with a substantial growth in the amount of legal services consumed. Moreover, other countries are beginning to resemble the United States in their dependence on law and lawyers.\(^{211}\)

A. Why Lawyers Are Necessary

*[A]cute, inquisitive, dexterous, prompt in attack, ready in defence, [and] full of resources . . . . They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze.*

—Edmund Burke\(^{212}\)

\(^{207}\) Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1372 (10th Cir. 1991), cert. denied, 112 S. Ct. 1160 (1992) (holding that attorneys employed by private persons are not protected by an absolute privilege against claims for malicious prosecution); Restatement (Second) of Torts § 674 cmt. d. (stating that an attorney who acts without probable cause and with an improper purpose is subject to liability); Wax, *supra* note 206, at 259.

\(^{208}\) Restatement (Second) of Torts § 675.

\(^{209}\) The Quotable Lawyer 193 (David S. Shrager & Elizabeth Frost eds., 1986).

\(^{210}\) George E. Bushnell Jr., Lawyers Should Lead Justice System Reform, NAT'L L.J., Aug. 8, 1994, at C1, C18 (arguing that the bar must take an active role in solving social problems).

\(^{211}\) Clark, *supra* note 50, at 276 (noting that the growth in lawyers and legal services has outstripped the growth of the population and economy).

\(^{212}\) Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), in 2 The Works of the Right Honorable Edmund Burke 125 (Boston, Little, Brown, rev. ed. 1865).
Social, political, and economic changes have created an insatiable demand for lawyers. For example, Eastern Europe and the former Soviet Union need lawyers to help create legal institutions to support their developing democratic market economies.\textsuperscript{213}

In addition, there is a direct correlation between the increased volume of business transactions today and the heightened demand for legal services. Exports and imports rose from 10.5\% of Gross Domestic Product in 1960 to 23.3\% in 1985.\textsuperscript{214} Legal work relating to international trade and finance has skyrocketed. Concurrently, demographic changes that have increased the diversity of American society have created new tensions.\textsuperscript{215} Conflicts within colleges and universities over regulating offensive speech, political correctness debates, and agitation for greater diversity on faculties are now commonplace. Americans naturally turn to law and lawyers for the resolution of such disputes.\textsuperscript{216}

Likewise, economic prosperity has spawned a flurry of new social legislation; the more people satisfy their basic needs, the more they demand improvements in other areas that affect their standard of living. Lawyers, consequently, are in greater demand. For example, regulatory initiatives in the areas of health and safety, the environment, and pension security closely followed the boom years of the 1950s and 1960s.\textsuperscript{217}

Lawyers are also in greater demand by virtue of the increase in large and complex organizations. When private individuals deal with one another, it is more effective, not to mention more cost-efficient, for them to transact business over a handshake rather than under a formal contract. When large institutions deal with another, however, the stakes are frequently so high that it makes economic sense to reduce the costs of possible disputes and misunderstandings by turning to lawyers.\textsuperscript{218} But such benefits are often overlooked, now that lawyers have become the "scapegoats for many of the nation's ills from crowded courtrooms, to high insurance, to falling behind in world trade."\textsuperscript{219}

\textsuperscript{213} Clark, \textit{supra} note 50, at 277.
\textsuperscript{214} \textit{Id.} at 288.
\textsuperscript{215} \textit{Id.} at 290-91. Recently, the birth and immigration rates of minority groups have surpassed that of the majority white population. Also, the role of women in society has changed dramatically, especially in the workplace. \textit{Id.} at 290.
\textsuperscript{216} \textit{Id.} at 291.
\textsuperscript{217} \textit{Id.} at 291-93.
\textsuperscript{218} \textit{Id.} at 295.
B. *Good Causes*

To my clients I will be faithful; and in their causes, zealous and industrious . . . . I shall never close my ear or heart, because my client's means are low. Those who have none, and who have just causes . . . shall receive a due portion of my services cheerfully given.

—David Hoffman

Although public-interest law is perhaps the profession's noblest pursuit, there are very few lawyers who engage in it. Perhaps this is because, as one law professor put it, in "suing scumsucking corporations that poison huge numbers of innocent people . . . . [public interest lawyers] earn less than what the law firms on the other side pay their pencil sharpeners." Typically, those who benefit most from public interest lawyering are people who have historically been underrepresented in the legal process. Individuals in this group "include not only the poor and the disadvantaged but ordinary citizens who, because they cannot afford lawyers to represent them, have lacked access to courts, administrative agencies, and other forums in which basic policy decisions affecting their interests are made."

Despite the small number of lawyers who specialize in public interest work, pro bono attorneys have had a significant impact on the political system. They help to ensure that government works for everyone by voicing the views of citizens who would otherwise be unheard, and that federal agencies implement statutes the way Congress intended. Their efforts have had a particularly striking effect in the area of health care.

For example, in 1962 Congress enacted a law requiring the Food and Drug Administration ("FDA") to remove all ineffective drugs from the market. Rather than removing an ineffective drug, however, the FDA would typically grant the manufacturer an extension to supplement the drug's effectiveness record—all the while allowing the drug to stay on the market. A public interest firm, the Center for Law and Social Policy, filed suit to compel the FDA to implement the statute. By virtue of its

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220 David Hoffman, 2 A Course of Legal Study (2d ed. 1836), reprinted in Thomas L. Shaffer, American Legal Ethics 65 (1985). Hoffman (1784-1854), a lawyer from Baltimore, is considered the father of American legal ethics. Id. at 59.


223 Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 3 (1976) ("Public interest law is the name that has been given to efforts to provide legal representation to interests that historically have been unrepresented and underrepresented in the legal process.").

224 Rogovin, *supra* note 221, at 100.
pressure, a federal court finally ordered the FDA to remove all ineffective drugs from the market immediately—ten years after Congress passed the law.\(^{225}\)

Another noteworthy success of public interest lawyers involved the 1967 Child Health Act, which ordered states to provide preventive health care to roughly thirteen million poor children by way of periodic screening, diagnostic services, and Medicaid treatment programs.\(^{226}\) The Department of Health, Education, and Welfare ("HEW") failed to issue regulations directing the states to offer the new services. The Children's Defense Fund, another public interest organization, forced an out-of-court settlement with HEW in which the agency finally agreed to issue regulations. The Fund and the National Health Law Program then assisted legal service attorneys in filing lawsuits to force states to set up screening programs for children. As a result, millions of children received screening and follow-up care for health problems that would have otherwise remained undetected.\(^{227}\)

Unfortunately, although lawyers have a professional mandate to provide legal services to the poor,\(^{228}\) the people who need attorneys are seldom adequately represented. Legal services lawyers represent only six percent of indigents needing assistance; the private bar represents less than one percent of those in need.\(^{229}\) In recent years, the federal government has made the problem worse, by reducing public funding for legal services.\(^{230}\) Despite frequent bar association encouragement to do pro bono work, most private attorneys provide little or no service without pay.\(^{231}\)

\(^{225}\) American Pub. Health Ass'n v. Veneman, 349 F. Supp. 1311, 1315-17 (D.D.C. 1972) (holding that the FDA's statutory mandate required it to remove a drug from the market once it determined that the drug was ineffective, and setting a deadline for the FDA to complete its evaluation of drugs for effectiveness).

\(^{226}\) Rogovin, supra note 221, at 102.

\(^{227}\) Id. at 102.

\(^{228}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1992) ("A lawyer should render public interest legal service.").

\(^{229}\) Brooksley Born, Serving the Poor, A.B.A. J., Mar. 1988, at 144, 144 (describing bar association pro bono efforts); see also Benjamin L. Cardin & Robert J. Rhudy, Expanding Pro Bono Legal Assistance in Civil Cases to Maryland's Poor, 49 Md. L. REV. 1, 5-6 (1990) (describing findings that Maryland's legal services programs were able to provide assistance in less than 20% of cases of legal need); Esther F. Lardent, Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question, 49 Md. L. REV. 78, 86 n.22 (1990) (citing studies indicating that up to 85% of the legal needs of low income persons are unmet).

\(^{230}\) Cardin & Rhudy, supra note 229, at 4-5 (noting a 40% per capita decrease, adjusted for inflation, in federal funding to the Legal Services Corporation).

\(^{231}\) See Deborah Graham, Mandatory Pro Bono: The Shape of Things to Come?, A.B.A. J., Dec. 1, 1987, at 62, 63 (noting that just 15.1% of the nation's attorneys participate in formal pro bono programs); Joel F. Handler et al., The Public Interest
But by working in the public interest, lawyers can both benefit those most in need and enhance the reputation of the profession.\textsuperscript{232} Community boards and public commissions have always sought lawyers according to their training and background.\textsuperscript{233} Moreover, lawyers are well-suited for such service—and often, once they become involved, enjoy doing it. Although a number of law firms permit their partners and associates to spend a portion of their time on non-billable pro bono work—and the ABA encourages it\textsuperscript{234}—many lawyers choose on their own to do so because it offers a refreshing change of pace to their sometimes dull and uninspiring work environments.

Some firms exceed the goals set by bar associations. In Philadelphia, for example, a number of the most prominent firms formed the “Philadelphia Fellowship,” which allows the firms’ newly hired lawyers to defer their employment for a full year while working with a public interest firm. During that period the firms pay half their starting salary, and the remainder when they return to private practice.\textsuperscript{235}

In New York, a committee was established to improve the availability of legal services because of the “disproportionate growth in the number of lawyers engaged in the practice of law in relation to the number of people who are denied effective access to the civil justice system in this state because of a lack of means.” \textsuperscript{236} The Committee reported that landlords file over 400,000 new proceedings in the New York City Housing Court, producing nearly 30,000 eviction orders against tenants. Approximately eighty to ninety percent of landlords are represented by

\textit{Activities of Private Practice Lawyers}, 61 A.B.A. J. 1388, 1389 (1975) (describing the results of a survey of lawyers and public interest work).

\textsuperscript{232} Strossen, supra note 7, at 2123 (arguing that by doing pro bono work, lawyers help themselves and the public).

\textsuperscript{233} See Melody H. Cooper, \textit{Public Service and Partnership: What’s the Connection?}, 55 Tex. B.J. 1165, 1165 (1992) (“[Lawyers’] unique training and experience enables [them] to be of great service to community boards and commissions.”).

\textsuperscript{234} \textit{Model Rules of Professional Conduct} Rule 6.1 (1992). The rule adds that:

A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

\textit{Id.}


attorneys in such proceedings, whereas only ten to fifteen percent of the tenants have lawyers to counsel them. Not surprisingly, the overwhelming majority of evictions involved unrepresented tenants—while in cases handled by pro bono attorneys, no evictions occurred.237

The Committee concluded that the failure to provide legal services hurts the public as a whole as well as the poor. Denying a poor family legal representation in an eviction proceeding makes it more likely that the family will lose its home;238 it will then cost society much more to undo the consequences of homelessness.239 The Committee’s report added that:

Denying poor persons the ability to obtain divorces . . . or denying them the ability to obtain protective orders [or] parental custody or child support because they cannot afford a lawyer will result in more domestic violence, more broken homes, more abused children and higher cost for public education and child care. Denying poor persons access to federal social security disability benefits will require the state to foot a higher portion of the bill in home relief.240

The Committee recognized that the failure to provide legal services to the poor undermined the legitimacy of the legal profession, and recommended that the state require all its lawyers to provide a minimum of forty hours of pro bono service each year.241 Despite such a modest goal, no state has yet adopted such a plan.242

C. Good Lawyers

Q: What's the difference between a lawyer and a catfish?
A: One is a garbage-eating bottom-dweller; the other is a fish.

—current lawyer joke

[N]ot all lawyers are piranhas.

—David Meyers, Esq.243

Although good moral character is a prerequisite for admission to any

237 Id. at 773.
238 Id. at 773-74 (noting that over 25% of families in New York City shelters cited eviction as the cause of their homelessness).
239 Id. at 774.
240 Id. at 774-75.
241 Id. at 768-70 (proposing a plan for mandatory public interest work).
the multiplicity of circumstances that arise in everyday practice affords great temptations for lawyers to deviate from the straight and narrow. For this reason bar examiners are supposed to investigate closely the moral character of each candidate for admission to practice. That they fail to do so is axiomatic, although perhaps understandable given the huge number of candidates appearing annually.

Conversely, we too seldom hear about the good characters. One of them is David Meyers, a Jesuit priest who gives his legal services to those most in need such as Salvadoran and Haitian political-asylum seekers and the poor of the Guadalupe and Phoenix areas. In 1992, having been recognized by the Arizona Bar Foundation recognized Meyers as Arizona's Lawyer of the Year, Meyers remarked:

[O]ur calling is a profession of service . . . very similar to that of a doctor or priest . . . .

. . . . I charge my clients what they make per hour, plus . . . . 10 percent for "the office." The fact that I have a law degree does not make me any better than my neighbor who mows grass for $4.35 an hour. I charge him $4.80 per hour . . . .

. . . . Be a great lawyer, at a reasonable price. Be accessible to those who really need us. Then we will not need a public relations agency to change the image of our profession.

To be sure, not too many lawyers are—or can afford to be—like Meyers, but his admonition to "[b]e a great lawyer, at a reasonable price" is one that more would do well to follow.

The best place to start is in law school, some of whose extracurricular programs amply reflect the high moral conscience of lawyers like David Meyers. Several years ago two students at the University of Baltimore School of Law started a group called "Project Hunger," whose principal activity is to feed the poor. Law students collect food from concession stands at Orioles Park at Camden Yards and distribute it to homeless centers; on Sundays, when state and city-run centers are shut down, the students make and deliver sandwiches. UB's Project Hunger also helps poor people seek gainful employment, and its Domestic Violence Advocacy Project counsels and shelters battered women.

Indeed the good work of lawyers often goes unnoticed, except by members of the profession itself who might happen to read an in-house bar journal. For example, few practitioners outside the City of Brotherly Love are familiar with the atypical career goals of Suzanne Turner, an

244 R.P. Davis, Annotation, Good Moral Character of Applicant as Requisite for Admission to Bar, 64 A.L.R.2d 301, 304 (1959).
245 In re Board of Law Examiners, Examination of 1926, 210 N.W. 710, 711 (1926).
246 Meyers, supra note 243, at 9.
associate at Philadelphia's Ballard Spahr Andrews & Ingersoll. Ms. Turner negotiated terms of her employment contract so that she could spend thirty percent of her time coordinating the firm's pro bono work—and still be on the partnership track. One of her first achievements was to persuade senior partners that pro bono work should be counted toward billable hours credited. In 1989, Ballard's associates and partners averaged but ten hours a year doing pro bono work; by 1992 they were each doing triple that amount.

Ballard takes in about eight new cases a month, from declarations of personal bankruptcy to representing the City of Philadelphia in labor negotiations. Firm paralegals answer a police misconduct hotline run by a public interest group. Turner herself handles cases involving special education and law for the disabled, and serves on the boards of the Volunteers for the Indigent Program and the Education Law Center. She says she hopes Ballard is setting an example for other firms that may want to do more pro bono work, but don't know how—or fear such activity may hurt their bottom line. Ballard's chairman, Peter Mattoon, takes a pragmatic approach: "If you make everybody's life more interesting and enjoyable [by letting them do more pro bono work], they will work harder." 247

One of the first large firms to do good in a substantial way was Baltimore's prestigious Piper & Marbury, which opened a neighborhood branch office in late 1969. It was not in just any neighborhood, but in a dilapidated, overcrowded, crime-ridden ghetto—far from the handsome executive suites where the firm has conducted a well-heeled corporate and commercial practice for the better part of a century. 248

At the time, Piper & Marbury vetoed other alternatives for public-service involvement in favor of a separate and distinct neighborhood branch because it recognized the community's well-founded skepticism of the private bar. Its ghetto office represented a commitment to provide the poor and disadvantaged with high-quality legal services at little or no charge. 249

At first the Baltimore bar was reluctant to endorse Piper's efforts, charging instead that the firm had violated canons of professional ethics

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248 See KENNETH LASSON, PROUDLY WE HAIL 146 (1975).
249 Id. Piper's neighborhood office was eventually closed in preference of the firm's enhanced participation in the clinical legal programs of the University of Maryland School of Law, which it continues to assist both financially and with counsel. Telephone Interview with Francis B. Burch, Jr., Chairman, Piper & Marbury (Nov. 21, 1994).
pertaining to advertising and solicitation. Subsequently the ethics committee backed off, and now Piper continues to lead the way in Baltimore’s pro bono legal services.250

A group of Sacramento lawyers is also doing little-known good deeds. Even though the lawyers do pro bono for the homeless, conduct clinics on unlawful eviction notices, and monitor landlords suspected of abusing state-subsidized housing programs, they get relatively little attention from a news media intent on bashing lawyers.251

III. TAKING STOCK AND MAKING THE BEST CASE: FACTS AND STRATEGIES

[He did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney.]

—Samuel Johnson252

Throughout the ages everyone from the King of France to Frasier Crane—the talk-show psychiatrist on television’s current hit sitcom—seems to have had something negative to say about lawyers. King Louis XII likened the way lawyers use law to shoemakers using leather: “rubbing it, pressing it, and stretching it . . . all to the end of making it fit their purposes.”253 Frasier bemoans to his brother Niles: “God I hate lawyers.” Niles, also a shrink, responds: “Me, too. But they make wonderful patients. They have excellent health insurance and they never get better.”254 The established bar is neither ignorant of nor unconcerned about the low esteem in which the profession is held.

A. Surveying the Images

[There was a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid.]

—Jonathan Swift255

Over the years various surveys have sought to measure how the Ameri-

250 LASSON, supra note 248, at 148. Piper & Marbury has a bonus-incentive program for its partners and associates, under which monetary awards are limited to those who do a specified amount of pro bono work. Telephone Interview with Francis B. Burch, Jr., supra note 249.
253 POETIC JUSTICE, supra note 3, at 38.
can public feels about its lawyers. Mentioned earlier was the poll that suggested a schizophrenic view applauding and condemning the profession for virtually the same reasons: People disapprove of lawyers because they manipulate the system without regard for right or wrong, but admire them because their first priority is to their clients. 256

At least the last three Presidents of the American Bar Association have tried to be candid in recognizing the profession's severe image problems. The current ABA leader, George E. Bushnell Jr., declares that "[t]he organized bar must return to its traditional role in society and accept the responsibility of leadership." He proposes that the bar set an agenda for discussing the most important issues of the day, suggesting that lawyers must speak out and convince Americans that "as the justice system goes, so goes America." 257

Fine words, but so what?
The comprehensive 1993 ABA survey likewise yielded mixed results as to the public's opinion about lawyers and the American legal system. 258 Among the survey's more interesting, if not surprising findings:

- African-Americans, Hispanics, the poor, and women have a more favorable opinion of the legal profession than better-educated, upper-middle-class people. 259
- Those who see lawyers in a criminal justice setting are more likely to have favorable feelings towards them. 260
- Respondents who claimed to get most of their information from television had a more favorable view of lawyers than those who received their information from newspapers. 261

On the negative side, only seventeen percent of those who volunteered comments about lawyers believed the profession provides a needed service, while only eight percent believed lawyers protect people and their rights. 262 As noted earlier, almost half of those surveyed said that law-

256 See supra notes 20-21 and accompanying text.
257 Bushnell, supra note 210, at C18.
258 Gary A. Hengstler, supra note 19, at 61-62 (reporting the results of an ABA survey on the public's perception of lawyers).
259 Id. at 61-62. A combined 56% of African-Americans and Hispanics viewed lawyers favorably, whereas only 19% held an unfavorable opinion. Nearly two-thirds of the survey participants who had retained a lawyer during the past decade said they were satisfied with that lawyer's performance and 43% said that they were "very satisfied." Id. at 61.
260 Id. at 64 (noting that some members of the public believe lawyers protect them from dangerous criminals through prosecution).
261 Id. at 61.
262 Id. Survey participants also responded that the following behavior would improve the perception of lawyers: providing pro bono services, 43%; prosecuting criminals, 39%; helping draw agreements, 33%; protecting those discriminated
yers are no more ethical than auto mechanics, well more than half felt lawyers make too much money and that greed motivates them to advertise, and the majority of Americans feel lawyers are less caring and compassionate than were their forbears.

Perhaps the primary significance of the survey is its implication that the public's negative image of the profession may reflect its dissatisfaction with incontrovertible real-life aspects of the profession itself, rather than with anything lawyers can realistically change.

B. Changing the Perceptions

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

—Carl Sandburg

"It is certainly true," conceded R. William Ide III, the previous President of the American Bar Association, "that perceptions don't always reflect reality, but any lawyer who has ever argued a case in front of a jury will tell you that perceptions, fair or unfair, must be acknowledged, understood and acted upon." Much of the public's negative views against, 33%; promoting mediation, 32%; keeping order in society, 20%; and defending the average person, 17%. Id. at 62-63. This may simply be a result of the public's lack of understanding about the ethical framework under which lawyers work. For example, the public may believe that it is unethical for a defense attorney to remain silent after a client privately confesses to murder because it does not understand the purpose of the attorney-client privilege. Id. at 63.

Id. at 63. Lawyers themselves have debated about "the degree to which the emphasis on more billable hours, partner profits and attorney fees has eroded the traditional notions and ideals of professionalism." Id.

Id. at 62.


R. William Ide III, What the ABA Plans to Do, A.B.A. J., Sept. 1993, at 65, 65. Ide also exhorted the bar to change the public's perception of the legal profession: Without public confidence in lawyers and the profession, the entire justice system is compromised, as is respect for lawyers as advocates with integrity.

... Rather than run from the facts presented in the ... survey, we should view its findings as a challenge for us to reach out to the public and increase the public's understanding about the role of lawyers and the wide range of valuable, but often overlooked, public service activities we perform.

... Just as distinguished lawyers of the past always rose to the occasion and accepted tough challenges, so today we must meet the challenge of restoring the public's faith and respect for our honorable profession. We should carefully
about lawyers stem from how they portray themselves through their advertising.

The American Bar Association's Commission on Advertising, recognizing that the way lawyers promote themselves partly causes the negative perception of lawyers, conducted the "Illinois Experiment," to determine whether advertising by a bar association could positively influence the public's attitudes towards the profession. The Commission successfully tested a television commercial, and concluded that professional and purposeful institutional advertising can aid the image of the legal profession.

In a later survey, the ABA's Commission on Advertising confirmed that both consumers and lawyers prefer "dignified" commercials—that is, advertising that:

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review the survey results, thoughtfully reflect upon the public's negative perception, and actively work to address its concerns.

_Id._

It is unclear whether the ABA will implement Ide's proposals under its new president, George E. Bushnell Jr., who feels that the profession's image problems are "cyclical" and will solve themselves. Edward A. Adams, _ABA Votes to Ease Rules on Out-of-Court Statements_, N.Y. L.J., Aug. 11, 1994, at 1, 6 (reporting that the new ABA leader failed to mention the association's efforts to improve the profession's image in a news conference held on the day he took office).

_COMMISSION ON ADVERTISING, AMERICAN BAR ASS'N, LEGAL ADVERTISING: THE ILLINOIS EXPERIMENT_ 1-2 (1985) (describing the reasons for the ABA's advertising experiment).

The commercial was called _The Justice System Works For You-Revised_ and went like this:

*Voice-over:* Bob Christopher is making the legal system work for him. Bob's business is growing fast.

*Bob:* I was over my head in government red-tape. I'm OK now, but I needed professional help to do it.

*Voice-over:* Susan and Joe found their dream house, but they found they still had questions.

*Joe:* So we had a brief legal consultation that didn't cost much.

*Susan:* You know, we learned to make the legal system work for us.

*Voice-over:* Call your state or local bar association to learn how to make the legal system work for you. A message from the American Bar Association.

*On the Screen:* "ISBA" Illinois State Bar Association (800) 252-8908

_Id._ at 25. The Commission chose two regions with similar demographics, central Illinois and north-central Indiana, to test market the campaign. The commercial aired for 20 weeks in central Illinois. The ABA followed up with surveys in both communities. _Id._ The population's attitudes towards lawyers improved in central Illinois and remained the same in north-central Indiana. _Id._ at 30.

_Id._ at 33. The Commission also concluded that advertising by individual lawyers can be effective if it is tailored to a specific audience, addresses unmet need of the audience, focuses on a key message, and is tested for effectiveness. _Id._ at 34.
• Fosters respect for the advertising lawyer or firm and reflects positively on the legal profession;
• Conveys the message that the advertising lawyer or law firm is competent and can be used with confidence;
• Does not appeal to greed;
• Does not provide unrealistic expectations of what a lawyer can do on a particular legal matter;
• Provides useful information to legal consumers beyond merely promoting the advertising lawyer or firm;
• Encourages the appropriate use of lawyers in seeking the protection of the law;
• Helps consumers make a more intelligent choice of legal services providers;
• Is of high production quality and is not “tacky.”

Tasteful advertising can promote valuable social purposes in addition to generating new clients for lawyers. Besides encouraging attorneys to provide higher quality services, dignified advertising obviates the need for potentially harmful restrictions. Finally, advertising gives those who would otherwise go to an attorney referred by a paid “runner” a choice among different lawyers.

Two past presidents of the American Bar Association cite factors other than advertising for the profession’s bad image. J. Michael McWilliams, Esq., who took office in 1992, believes that much of the dissatisfaction with lawyers arises from such matters as fee disputes or simply failing to communicate. “There are some areas where improvement certainly can be accomplished, and one . . . is client relations . . . . [Lawyers] don’t think about the [effect] that not returning a phone call has on a client.”

Ide, McWilliams’s successor, blames the shortcomings of the legal system itself for the public’s dissatisfaction with the profession. He believes that lawyers must both reform a troubled legal system and better

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273 Id. (noting that the Federal Trade Commission found that restrictions on lawyer advertising increased the cost of legal services, especially those legal services that low-income persons typically need).
274 Id. at 460-61 (noting that prior to legal advertising, poor persons would often go to lawyers recommended by persons paid by the lawyers to refer people to them).
276 Hank Grezlak, New ABA President Seeks Overhaul of Justice System, Legal Intelligencer, Aug. 13, 1993, at 1, 8 (reporting Ide’s call for lawyers to reform the justice system).
educate the public about the role of the bar in society, in addition to improving their personal relations with clients. Before he left office, Ide announced a straightforward program of initiatives that the ABA should undertake to change the profession's image, including: (1) embarking on a new project designed to educate the profession on better client-relations skills; (2) working to ensure that lawyer advertising is both dignified and truthful; (3) reviewing the American justice system and making recommendations to help it better serve the public; (4) addressing the public's perception that lawyers lack caring and compassion by highlighting the profession's pro bono activities; and (5) focusing on client grievance and attorney disciplinary procedures. Whether these initiatives turn out to be merely rhetoric, or a true commitment to change, remains to be seen. The profession's public image could also benefit from greater public acknowledgment of its failures, and a more flexible system of penalties. The American bar has shied away from punishing miscreant attorneys with fines, even though that kind of chastisement has proven to be an effective deterrent in other venues and allows the penalty closely to fit the crime.

Indeed, the ABA's Commission on Evaluation of Disciplinary Enforcement has already issued a report that calls for sweeping changes in the way lawyers are policed. The chairman of the ABA's Standing Committee on Professional Discipline has gone even further, urging regular ethical audits of law firms and more research on keeping completely open records of disciplinary proceedings.

C. Alternative Dispute Resolution

I have always noticed that any time a man can't come and settle with you without bringing his lawyer, why, look out for him.

—Will Rogers

277 Id. ("We must show our clients that we care . . . . We must dedicate ourselves to excellence in client relations.").

278 Ide, supra note 267, at 65.

279 See Adams, supra note 267, at 6 (noting that the current ABA president may not believe that the ABA should actively try to change the image of lawyers).

280 Bené, supra note 120, at 911, 937-38 (arguing that fines are superior to non-monetary sanctions for attorney misconduct).


283 Will Rogers, Slipping the Lariat Over, reprinted in I Will Rogers' Weekly Articles 10, 12 (James Smallwood ed., 1980). More Rogers wisdom: "Of course, people are getting smarter nowadays; they are letting lawyers instead of their con-
The profession doesn’t push the idea, but there are some very good reasons to pause before running to the nearest lawyer at the first mention of contract or blush with confrontation.

Many businessmen insist that they operate more effectively on handshake agreements than on written legal documents. Even where a contract is necessary, or simply judicious, it can frequently be drafted by the parties themselves. Relatively minor arguments over rights, duties, and damages might better be settled after passions have cooled than through a heated “My lawyer will contact you in the morning!” In many cases, all that’s needed is a cool-headed third party, a role that can be played by an attorney, to calm the disputants. Indeed, a trend is developing toward the use of divorce counselors or mediators rather than lawyers in cases in which both spouses seek a peaceful dissolution of their marriage. In short, with lawyers’ hourly fees soaring into the triple digits and their professional image continuing to plummet, more and more Americans with legal problems are wondering if there might be an alternative to seeking an attorney.284

In 1992, participants at an American Bar Association Leadership Forum agreed that significant changes in the delivery of legal services were essential to improve the profession’s image. One way to decrease the time and cost of legal disputes is through the use of alternative dispute resolution—now popularly called ADR.

The ADR field is expanding rapidly, with nonprofit dispute resolution centers already helping to alleviate the overflow of cases in court. Every state and the District of Columbia now has some type of ADR legislation in place; over half of all state and local bar associations have committees on the subject.285 But if ADR is to become a true alternative to litigation, lawyers must use it much more readily as a matter of course.286 The majority of attorneys still seem to prefer litigation—at least as the next course of action should a negotiated settlement fail.287 Most lawyers remain unfamiliar with basic concepts of conciliation and mediation;288

284 Nader, supra note 24, at xii, xiii.
285 Bill Swearer, ADR—Resolving Disputes Efficiently, J. Kan. B. Ass’n, Jan. 1993, at 2, 2 (arguing that developing new ways of resolving disputes may alter the public perception of lawyers).
286 Id. at 2-3.
287 The author, who teaches dispute resolution to law students, was invited recently to make a presentation on how ADR can be useful to lawyers at the annual meeting of the Maryland Bar Association. The talk attracted about 50 attorneys. Across the hall, the convention center’s main ballroom was filled to capacity to hear expert personal-injury litigators discuss the question, “Should a severely disabled plaintiff be presented to the jury before the trial or just before summation?”
few law schools offer ADR as anything more than an upper-level elective. Bar examinations do not test knowledge about alternative methods of dispute resolution.

"I learned to find the better side of human nature," said Mahatma Gandhi, "and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder." Too few lawyers heed those words, or those of Lincoln, who urged his colleagues to "[d]iscourage litigation" and to "compromise whenever you can." "As a peace maker," said Lincoln, "the lawyer has a superior opportunity of being a good man. There will still be business enough."

**Summation**

Lawyers are not as bad as they're made out to be, nor as good as they'd like to think themselves. Although they are no more mercenary than businessmen or other professionals, neither are they more interested in fairness and justice. If perception is reality, however, the image of the profession is its undoing.

The established bar is unable or unwilling to change the adversarial process as it is practiced today in America—nor to educate the public about its inherent contradictions. Moreover, lawyers who speak from a particular perspective on behalf of a client during litigation sometimes betray a more fundamental duty to pursue fairness and justice.

This failing is probably less a matter of corruption or ill will than a reflection of the unpleasant fact that we do not live in a perfect society with universal values. Rather, ours is a pluralistic and sometimes disorganized world, where individuals compete with one another for goals that are often divergent.

Lawyers "are the necessary bearers of that bleak winter's tale, and we hate them for it . . . because they are our own dark reflection." They threaten our need to believe we are a stable and coherent civilization. In reality lawyers are often simply actors lost in the identity of their clients.

These realities may be lost on the lawyers themselves, whose leaders are apt to ascribe their negative image to a more cosmic problem. The American Bar Association suggests that the fault is more with the legal system, which is unable to meet the demands of modern society, and must be reformed along with the profession.

It remains to be seen, however, whether a monolithic institution like the ABA can change the entrenched negative popular perception of prac-

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289 Swearer, supra note 285, at 3.
290 Lincoln, supra note 119, at 432.
291 Post, supra note 21, at 386.
292 R. William Ide III, Rebuilding the Public's Trust, A.B.A. J., Sept. 1993, at 8, 8 (calling for efforts to address both systemic and professional ills).
titioners—many of whom neither belong to the national organization nor subscribe to its goals.

Moreover, there continues to be widely differing views on virtually every aspect of the profession, including American litigiousness, pro bono work, affordable fees, and the impact of economic forces on everyday practitioners.293

From any vantage point, one thing is clear: Members of the bar must come to grips with the need to educate the public better about what they do and why they do it. While the adversarial system by its very nature generates hostile feelings, the indictments of the way lawyers practice their profession are in many respects justified, and will not be easily dismissed.

The evidence is in, and the burden of proof is theirs.

293 See, e.g., Identity Crisis, A.B.A. J., Dec. 1994, at 74, 75 (transcription of a roundtable discussion of these issues); see also MARY ANN GLENDON, A NATION UNDER LAWYERS: How the Crisis in the Legal Profession is Transforming American Society (1994).