ETHICS AND PROFESSIONALISM IN THE MODERN TRIAL PRACTICE

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I.

SYMPTOMS OF A SYSTEMIC PROBLEM

A. LOSS OF PUBLIC CONFIDENCE

Annually, a national polling organization has taken a cross-sectional pole of the American public to determine status and credibility of various occupations and professions. In the mid-'60s, the three learned professions enjoyed the top three positions as to status and credibility. Today all three professions have slipped badly, for similar reasons. The ministry, whether protestant or catholic, have slipped dramatically due to the televangelist scandals of Jim Bakker and Jimmy Swaggert, frequent criminal cases of child molestation, and civil suits over sexual harassment. The medical profession has suffered from the high cost of medical care, loss of personal relations in HMOs and other managed care, scandals over self-referrals to owned ancillary health care services, fraud in Medicare and Medicare, the general

problem of malpractice, and inability to deal with incompetent migratory doctors. The legal profession has suffered from similar causes. As a consequence, all three professions have fallen in public ranking. The order remains the same, ministry, medicine and law; although, the legal profession has fallen dramatically further than the other two learned professions. The good news is that the legal profession still remains above the ranking of used car salesmen; the bad news is that only five other occupations separate the used car salesmen from the lawyers.

It is well to inquire why this has occurred. First and foremost, have been the scandals in the news media where lawyers have been involved. The biggest was Watergate, where almost everyone was a lawyer from the President, the former attorney general to some of the plumbers and dirty tricksters. Almost every national scandal has had lawyers involved, either from the inception to the cover-up. Lawyers who steal from their clients get front page coverage. Lawyers involved in criminal activity get front page coverage. It appears, that in White Water and its spinoffs, lawyers are involved, either as the investigated or the investigator. As if fact were not bad enough, lawyers are among the stock villains for television, movies and fiction. Even lawyers turned writers can not resist pandering to public perception and showing their lawyer characters as unprofessional and unethical shysters, whether in private practice or public

service. Lawyer lobbyist and the efforts of special interest groups, to influence the public in general and elected representatives in particular, to legislate against the interests of other lawyer groups, have further eroded the credibility of the entire profession.

The general public believes, wrongly, that law schools teach how to lie, cheat, and steal, and that the purpose of lawyers is not to help clients to comply with the law but to avoid the application of the law to their clients, while insisting that others comply with the law where it is to their clients' advantage.

Jurors believe that trial lawyers are there to manipulate them, so that they can be made to believe that night is day and that day is night or that truth is falsehood and falsehood the truth.

Only the rich and the poor can afford a lawyer today. The hourly billing rate to the general public is staggering, and legal representation to be avoided, except in dire circumstances. Everyone has a friend, neighbor or relative, if not themselves, who went through a divorce, which is the primary involvement most of the public will have, either with the profession or courts. The vast majority had a negative experience, either with their own lawyer or opposing counsel, and the size of the legal fees were a major part of such trauma.

The growth of firms, with many staff and associates, impressive office space, and modern office equipment, has eaten up more and more of each dollar taken in as fees, until it easily exceeds half. This increases the pressure on partners to produce fees through billable hours that are backbreaking, in addition to everything else that a lawyer must do. There must be clients to bill, and the pressure to get new clients and to keep old clients happy is enormous. If the overhead rises and a lawyer has to take home more money, then the hourly rate goes up, risking the loss of the clients. Clients who pay, even grudgingly, must be protected, pampered, and humored to prevent their leaving for another law firm, that seeks to lure them away by wining and dining them. Thus, lawyers live in mortal fear of losing important clients. Loss of a client may mean reduction of an income share or worse, that an associate will not make partner or that a partner may be outplaced or retired prematurely as being nonproductive and nolonger a center of profit.

Lawyers become unhappy and disenchanted with their practice and look for a way out of the rat race but find themselves trapped with too much responsibility, as well as liability, to start over and too accustomed to a lifestyle that they can not give up. They become bitter, cynical and unhappy. They loose sight of the challenge in mastering complex problems and the excitement of problem solving. They become self-centered in their unhappiness so

that they can not work effectively with staff, younger lawyers or clients. They see no challenge or pleasure in mentoring a young lawyer or in helping a client.

The public is deluged with lawyer advertising, television, phone book, direct mail and in crisis by direct contact. This adds to the public cynicism that causes the public to see lawyers not as professionals but as tradesmen. Lawyers all too often have acted like tradesmen, seeking only the bottom line. Is it little wonder that lawyer jokes are so popular; they are politically correct but are to the core cruelty jokes.

Society has become so complex that lawyers are considered a necessary evil that must be endured, but not without resentment or complaint. The lawyer becomes the symbol of the loss of the mythical past, that never was, a simple uncomplicated world. The lawyer is the bearer of bad tidings, that the public would like to destroy and make the message go away with the messenger.

The public sees the "O. J. Simpson trial" or other high profile cases hyped by the feeding frenzy of the news media and blames the most visible figure, the lawyer, for all that is wrong with society. High verdicts and acquittals in criminal cases excite the emotions of the public, and they blame the lawyer.

Over the last thirty years, the American society has become disillusioned with all authority figures and institutions, has become cynical, become selfish and self-centered, and extremely

materialistic. Lawyers are members of society and are subject to the same influences, attitudes, values, and pressures, as society in general; therefore, it comes as no surprise that lawyers reflect society. As a profession, ethical and professional aspirations may set one value system of selfless service to truth and humanity; but an individual lawyer's values, as learned from society, may conflict, so that materialism and self-centeredness may have ascendancy over other professional values, which become subordinated. The values espoused by the profession may in practice not be adhered to and in fact be ignored, when they come into conflict with internalized values learned from family, friends, ethnic or cultural groups, religious institutions, or political organizations. A dynamic tension always exists between the values that sets a person aside as a professional and the values of other primary or secondary groups and institutions that the person belongs to and influence the person. It is a rare professional who escapes entirely the influences that may conflict with professional values; a professional, who has successfully cut him or herself from outside influences entirely, lives only in the professional world as a workaholic and can not interact well with non-professionals. A balance, both personally and professionally, must be reached, so that a professional can function well with family, non-professional friends, and society in general, while also maintaining professional standing with other lawyers. This

accommodation is either, conscious or unconscious; it sets priorities between competing values, between professional values and other important values; it subordinates some values to others, to bring a rational consistency to the value-belief system. To the extent that ethical standards and professionally dictated conduct present an irreconcilable conflict with other higher personal values, such standards of the profession will receive only lip-service. The best example of this is that despite an elaborate code of professional conduct very few lawyers will report another lawyer for violation of the disciplinary standards. The reasons are simple and fundamental: no one likes a tattletale (snitch); you do not foul your own nest; what goes around, comes around; don't get mad, get even; I've got to live in this community; you can't fight city hall; everyone else is doing it. Self preservation and conventional wisdom run counter to the imperative of upholding the professional standards; let someone else do it and take the risk of the consequences. Another basic standard is that there exists no attorney-client privilege, when the client reveals that they intend to commit a crime, fraud or perjury; such should be revealed, and the lawyer withdraw from representation; if at trial, reveal to the trial court that the client intends to commit perjury. Rarely, if ever, does any of the professional conduct to protect the integrity of the profession occur.

As a former trial judge, with over seventeen years of experience, I have had a lawyer ask to withdraw at or during trial for undisclosed reasons only on two occasions, although I presided over hundreds of trials, in which I believed that one or more parties or witnesses were perjuring themselves. You may ask why I did not do something about it; I tried; on one occasion, which I could prove, I had the party locked up for criminal contempt; but I found that the district attorney was not interested in attempting to try perjury cases, which were difficult to prove. The State Bar of Georgia would process a complaint but would not act as investigator and prosecutor; only if a complaint was brought by a client would the Bar act to investigate and to prosecute; therefore, the complainant became prosecutor having the burden of proof beyond a reasonable doubt. After filing three complaints, I learned the futility of seeking to uphold standards that the lawyers, who prompted the complaints, refused to seek to enforce.

B. LACK OF CIVILITY AMONG LAWYERS

The public, as well as some lawyers, do not understand the concept of the adversarial system in Anglo-American law or its origins. Barristers are lawyers who have undergone a period of training or tutelage in one of the British Inns of Court, where the

barristers eat, drink and have their chambers. This training involves mentoring by older barristers of the pupil, until they have not only acquired the appropriate skill and knowledge in trial advocacy but also a sense of honor, propriety, and demeanor as a professional. This training is shared in, not only by other members of chambers, but also by all members of the Inn and reinforced by older pupils. At common meals or after hours drinks, the law, cases and conduct are discussed, not only for entertainment, but more importantly for the edification of the pupil. At the core of the barrister system is the concept of being a "gentleman," someone who has honor and who is courteous, dignified, proper, and mannerly. A barrister is not to consider issues of monetary compensation, which could improperly influence the advocacy; the barrister's clerk handles all setting of fees, billing, and collection of fees as a consequence. The solicitor (lawyer) prepares the brief (case for trial) so that the barrister has no contact with witnesses, either directly or indirectly, except in court by way of examination or cross-examination, avoiding influencing the witness' testimony. Leading questions are the practice for both direct and cross to save court time by focusing on the relevant and material issues only and can not be asked unless there exists a factual basis for such question; any form of deception or misdirection of issues is improper conduct. Underlying the whole trial process is the concept of a game played

by gentlemen and sportsmen, where rules of practice and conduct controls. A barrister takes whatever briefs are presented so that a barrister might prosecute, defend or represent either side in a civil or domestic matter and does not develop a partisan bias with a prejudice against the other side.

The adversarial system was taken from this barrister system, where competing sides seek through wit, knowledge, skill, cunning, and preparation to win; it was believed that through such competition of skill and wit that truth would come out and the right party prevail, as in a sporting contest. Fundamental, to the adversarial system, was the basic premise, that everyone would adhere to the rules of conduct, law and procedure; failure to adhere to such rules would give the other side an unconscionable advantage and prevent the outcome being determined by truth. Aggressiveness, force, or intimidation had nothing to do with the adversarial system; instead wit, cunning, finesse, and skill had everything to do with winning the trial contest between equals within the rules.

The public and some lawyers believe that our adversarial system is a contest of power, force, control, domination, deception, manipulation, and intimidation. The adversarial system is seen to encompass the tricks and practices of professional athletes, where winning is everything and getting around the rules is expected; thus, psychological intimidation or deflection are

appropriate; deception and intentional rule infraction are considered common place. The concept of "gentlemen" or "sportsmanship" are considered antiquated and archaic, having no relevance in the modern world. What has occurred in professional sports, the materialism, hyping, raw aggression to intimidate, cheating, intentional hurting, attempt to win by any means, and other unsportsmanlike conduct has become the expected rule instead of the rare exception. Since the adversarial system was modeled upon sporting contests, then is it any wonder that the excesses of professional sports effect the profession; public attitudes toward professional sports reflect the deterioration of general values and may encourage unprofessional legal conduct through the mixed messages that society is sending as to what will be tolerated and what will be unacceptable conduct. The fact that public expectations, as to conduct by lawyers, has changed and may give a mixed message that, while such conduct is expected, it, also, will be accepted, when ,in fact, it is rejected.

There exist a number of reasons why the legal profession faces among lawyers a loss of civility, as well as out right hostility. One very apparent reason is that lawyers have, in part, divided into warring special interest groups that engage in lobbying and political action to advance their clients' position, which entails campaigning against the interests of the opposition and their

clients; such campaigns entail claims and vilification of the other side and their motives, which leave a residual ill-will between some lawyer groups, that is divisive to the profession no matter who is right and who is wrong. Another more fundamental reason is that some persons have entered the legal profession not as a calling to public or private service but as a trade; as a trade, the practice of law provides status, economic opportunity, an opportunity to promote a political agenda, and it seems to hold aggressiveness as a cherished value (it is based upon the adversary system, isn't,"all's fair in love and war!"). Another reason fits into the last reason based upon societal reflected values of materialism and self-centeredness; such societal values causes such lawyer to treat others as a means to an end, money, power, and self importance without regard to the feelings of others; others become depersonalized into things to be manipulated for the benefit of self and treated with contempt. Some clients are the cause of lack of civility among lawyers; the client may be the materialistic, power seeking, self centered type that needs a hostile, aggressive lawyer as an offensive or defensive tool to intimidate and manipulate others or as a status symbol of raw power; lawyers will gladly fill such role for money, power, and status, as well. Other clients may, misguidedly, want their lawyer to engage in unethical or unprofessional conduct for tactical or strategical reasons; a lawyer, to keep from losing the client, may engage in such

inappropriate professional conduct, feeling that if the lawyer does not do it, then some other lawyer will do it and he has lost the client. A final reason, society as reflected through movies, television, books, jokes, songs, sports, driving, radio talk programs, and everyday conduct has become more hostile, uncaring and defensive; lawyer conduct has mirrored the attitude and conduct of the larger society.

The influence of the client to cause the lawyer to deviate from proper professional conduct can easily be seen in litigation. Lawyers bring spurious lawsuits or overreach in seeking excessive damages in valid suits; defense lawyers file dilatory defenses, obfuscate in denying matters that should be admitted, and assert groundless defenses. Discovery becomes a shell game, a delaying tactic, a contest of endurance, stonewalling and an act of concealment and deceit. Trial becomes an exaggerated charade, where each side seeks to make the other out to be liars by quibbling over irrelevant inconsistencies and everyone seeks to manipulate the jury for their own ends.

II.

CAUSE OF DECLINE IN THE DISCIPLINE SYSTEM

When the State Bar became the official disciplinary entity of the Supreme Court, the superior courts were deprived of jurisdiction to discipline lawyers. Trial courts were left with contempt powers only to deal with lawyer misconduct. For the court to have a contempt, the conduct of the lawyer has to directly or indirectly interfere with the orderly administration of justice or to be a disruptive act in court or immediately adjacent to court or an act of contempt directed to the court.

There are two kinds of contempt actions civil, to compel compliance with a court order, and criminal, to punish a prior act. Generally, civil contempt against a lawyer are extremely rare and are to compel the lawyer to surrender matters in the lawyer's possession; criminal contempt is far more common but it entails all statutory and constitutional safeguards of any criminal action, including the burden of proof beyond a reasonable doubt, right to remain silent, right to confront the accuser, right of counsel, notice of the charges with reasonable specificity, and trial by jury. Since the judge who saw the act of contempt is now a witness, then another judge must preside over such proceedings. Judges and prosecutors have too many more serious criminal matters to deal, with so that criminal contempt cases against lawyers are rarely brought. If an act of contempt occurs in court in the presence of the judge, then the judge can deal with it instanter, but the appellate courts do not favor such action. To bring such

action, the trial judge, upon the misconduct must remove the jury, if any from the courtroom, inform the lawyer with as much reasonable specificity as possible, to satisfy the constitutional notice requirement, what conduct constitutes a contempt of court, such conduct must in fact be an act or omission that is a contempt, afford the lawyer and opportunity to instanter explain his conduct and to justify , excuse, or mitigate such conduct, and if the court deems the conduct in fact to be an act of contempt, then to impose punishment at that time; to delay either the hearing or the imposition of punishment, requires that the entire criminal contempt to be heard by another judge and that the judge who was the subject of the contempt appear as a witness. If all of the steps are not properly conducted, then on appeal the finding of contempt must be reversed. Giving notice, with the requisite specificity, making a record of what the act or omission considered as contempt and providing an appropriate hearing to the lawyer, rarely in the heat of the controversy, has been correctly done, so that the contempt will not standup on appeal. Trial judges and trial lawyers both read the advance sheets and know the general futility of such disciplinary procedure.

The existing State Bar disciplinary procedure has two major flaws, as well as a major systemic problem. Georgia, alone among the fifty states, has a beyond a reasonable doubt standard for lawyer discipline; other states use clear and convincing evidence

as the quantum of evidence, as does Georgia in other license discipline cases handled by the executive branch administrative law judges. As a rule, only lawyer discipline cases , which leave a paper trail, receive discipline, i.e. unauthorized use of client funds, failure to pay the client settlement proceeds, allowing the statute of limitation to run, abandonment of a case, and conviction of a criminal charge involving moral turpitude. When a lawyer has sexual intercourse with a client on videotape, this has also been deemed sufficient evidence.

The other major flaw is that, procedurally, the only cases that are investigated and prosecuted by the State Bar are those involving a client; in all other complaints by the trial court, opposing counsel, other lawyers, or the public, the State Bar handles it procedurally, but the matter is inquired into only to determine if probable cause exists for the matter to be heard and is not investigate to prepare a case for prosecution or prosecuted by staff of the State Bar. Any non-client complaint, if probable cause has been found by the State Bar, must be prosecuted by the complainant, which means that they must carry the proof beyond a reasonable doubt and produce all witnesses and documents for the hearing, after investigating the case; obviously, there is a small success rate among such cases. Lawyers and judges do not have the time or resources to carry out such investigation and preparation; the general public certainly lack the skill, desire, and resource

to prosecute such cases. Thus, a substantial group of cases either go unprosecuted or fail in the inadequate effort required.

The basic systemic problem with the existing State Bar disciplinary system is that any complaint filed by a lawyer or judge against a lawyer not only is made known to the lawyer but also the complaint becomes the prosecutor. Anonymous complaints could be abusive and harassing, but this could be remedied much like what is done now to determine if probable cause exists to proceed and thereby, avoid abuse and frivolous complaints. Lawyers and judges do not want to be targeted as filing or prosecuting a complaint; consequently, many matters of a serious nature go unreported. Lawyers and judges become like the three monkeys, "see no evil, hear no evil, speak no evil." The, very professional who are supposed to see that the system works, refuse to act for fear of the consequences to them personally from the lawyer's revenge or their standing among their peers. This conduct is not unique to the legal profession; it occurs in society in general, as well as, in other professions. It is overly idealistic to believe that judges, who must seek re-election, or lawyers, who must practice in the community, will voluntarily turn in a lawyer for misconduct, particularly if the lawyer is popular, powerful, or revengeful. In over thirty years of this disciplinary method, lawyer, judge, and public complaints have been minimal, well below what should be the statistical expectation, which confirms the suspicion, that the

incidents go unreported. Lawyers and judges would respond or testify upon request to any prosecutorial body, because they would be seen as merely preforming their duty under threat of subpoena and not being the focus of the prosecution. Unless and until, there can be a system of anonymous complaints, which are thoroughly investigated prior to official action, and a body to investigate, prepare for prosecution, and prosecute all legitimate complaints, there will be only selective discipline; the entire public sector of lawyer conduct will go unsupervised. What the public sees as lawyer misconduct, as jurors, parties, witnesses, viewers, and readers will remain beyond the scrutiny of the State Bar. This failure breeds cynicism among the public, lawyers, and judges about lawyer misconduct; it may also create a perception among lawyers that such conduct will be tolerated, even if not accepted by the public and the Bar.

There exists no right or wrong answer how this problem should be corrected; whatever method works would be appropriate; the present method works fairly well, when clients are the subject of lawyer misconduct; the system does not work at all, when the complainant is a lawyer, judge or public, because the discipline, procedure in such cases, is premised upon the adversary system, and lawyers and judges refuse to participate in such procedure and the public is not equipped to do so.

III.

SPECIFIC LITIGATION AND TRIAL CONDUCT THAT IS UNPROFESSIONAL IF NOT UNETHICAL

Under both the Civil Practice Act, as well as the Federal Rules of Civil Procedure, responsive pleadings require either an admission or denial or explanation why such plain response can not be given. Rarely is liability admitted, although subsequent trial or appeal establishes beyond question that the liability exists. There are obviously legitimate defenses that can be asserted, but how often are such affirmative defenses without merit either in law or in fact. The lawyer's answer is that in zeal to protect the client any possible defense must be asserted, even at the risk that it can not be subsequently proven. Is such conduct really professional and ethical in face of a statutory mandate to the contrary or is it a mere legal quibble to delay the ultimate liability to the client.

Discovery abuse knows no particular side; both plaintiffs and defendants have engaged in such abuse. The plaintiff most often refuses to answer as to special damages, prior medical history, prior criminal conduct of an impeaching character, persons who have knowledge of the occurrence, and the material facts which constitute the specific acts or omissions. Defendants will

stonewall as to prior similar acts or omissions, persons who have knowledge of the specific acts or omissions, documents that would show prior knowledge or acts or omissions of negligence. Both sides play hide and seek with expert opinion and the factual predicate, assumptions or knowledge of occurrence, and change experts as soon as the other side completes discovery, without timely amending prior discovery response. Boiler plate objections to interrogatories, request to produce, and request to admit are made, which will not be sustained because such conduct delays the trial preparation, may not be taken to the court for determination, and seek to over burden the other side with needless work. Protective orders and motions to quash subpoenas are filed on the most tenuous grounds in a gamesmanship fashion to delay, throw off stride, or hide relevant and material testimony. When depositions are taken, they are unduly long, repetitive, tedious, and abusive. The greatest abuse is heaped upon the trial or appellate judge, who must comb the depositions for relevant and material fact among a see of chaff. Depositions which go on for days particularly illustrate that the examining lawyer is acting in an unprofessional fashion, either in not being properly prepared and focused or in intentionally being excessively repetitive in hopes that some slight and irrelevant discrepancy in the testimony may occur.

A gamesmanship ploy that has carried over from federal court is to move to recuse a trial lawyer from representation for an

alleged conflict of interest or for possible testimony as a witness in the case. Generally, such motion is filed close to a trial or motion to delay and to overburden the opposite side at the last minute. Unfortunately, the uniform court rules have no time limit for filing such motions as in motions to recuse a judge, which must be filed within five days of discovery or ten days prior to trial or be denied as untimely. The court and parties must take time to consider the merits on matters, which, if meritorious, should have been filed early in the proceedings or timely after discovery. If a major conflict does not exist, which is usually the case, or the party objecting lacks standing to raise the conflict, which may have been waived, then the lack of timeliness may provide the court a means to dispose of the issue without delaying the trial. Lawyers insist upon subpoenaing each other over tangential, irrelevant, or issues where other equally competent witnesses or means exist to prove the fact than call of trial counsel. Such conduct is the ultimate in unprofessional conduct.

In urban areas, the motion to recuse the judge has been used with more frequency in inappropriate cases. When the trial court by order or oral pronouncement based on the evidence and proceedings before the court may properly formulate a judicial opinion, which may show a legitimate judicial bias in the case either by lawyer misconduct, evidence, or law. Except in the extraordinary circumstances where the judge has lost all legal

objectivity so that the judge is no longer capable of making fair and impartial rulings on the evidence and law, the judge can not be recused, because a judicial bias, based upon the law and facts where the judge rules objectively as a consequence, is the proper exercise of the judicial judgment and discretion. Such inappropriate motion to recuse is to either cause the judge to recuse voluntarily, because someone has called the judge's integrity into question, or to become overly sensitive about ruling against such movant, so as to be unfair to the other side. Such lawyer conduct would also be the extreme of unprofessionalism, if not unethical, because it is not based upon fact or law. However, it occurs not infrequently.

Most lawyers have the Scarlet O'Hare syndrome, "Fiddly dee, tomorrow is another day!" There are no worst procrastinators than lawyers; they handle, for economic reasons, more cases than they can properly deal with; they believe that with one more calendar that they can be better prepared to try the case. If they can agree among themselves they will put the case off and tell the clients that it was the judge's fault. Getting lawyers to trial is a painful and demanding task for a trial judge, because most lawyers will resist going to trial until the case has gotten old. To avoid trial, some lawyers will actually lie to the court: they are on trial in another court; the case ahead on the lawyer conflict letter has been settled, but the lawyer does not inform

the court; the lawyer or the client has an "unexpected illness", usually a spastic colon or high blood pressure. To these lawyers, this is not lying to the court but trial tactics to protect the client.

Voir dire is a special area for lawyer unprofessional conduct. Both sides are guilty of the same sins. In civil cases both sides frequently violate the Batson rule and do not move for a Batson challenge, because they are equally guilty. Lawyers will ask hypothetical questions of the jury to condition them. In a child dart out case, a lawyer will legitimately ask the jurors if they have ever had a child or pedestrian suddenly appear before them; the next question seeks to have that prospective juror testify as a witness to the rest of the jury to establish a standard of care; did you hit the child or pedestrian? Lawyers will ask questions, that are not related to the case and will not reveal bias or prejudice, that invade the privacy of the juror's life: mental illness, drug and alcohol abuse, sexual orientation, a single woman if she has children, health and disability, and have they committed a crime. It is not unusual for a lawyer to make a joke of a juror's answer so that everyone laughs at the juror. A lawyer will ask a juror if they know the lawyer's friend a high company official, which is a direct put down or a indirect threat. Lawyers take too long in voir dire and do not listen to the answers given by the jurors, because invariably a lawyer will ask the exact same

question that another lawyer earlier asked. From observation, there is probably no other area where the public comes into contact with lawyers, which causes more public resentment: the lawyer acts in a patronizing attitude, attempts to ingratiate him or her self on the jury, attempts to manipulate the jury, argues with jurors about what they mean in their answers, publicly humiliates and embarrass jurors, invades their privacy, laughs at the jurors answer, and wastes the jurors time with seeming pointless questions.

The jurors fear that the lawyer will seek to manipulate and mislead them because that is what popular culture has lead the public to expect from the legal profession. Unfortunately, this expectation is often realized through lawyer conduct. Lawyers will allow their clients to exaggerate or distort the facts of the case: speed, time, size, distance, weight, injury, conduct, and attitude. Any deception plays into the preconception of the jurors. Lawyers act, as if jurors are ignorant, and will ask questions that never have any factual basis; the lawyer does not realize how often the jurors see the obfuscation for what it is, an attempt to divert the juror's attention, because the juror has been alert to detect just such conduct from the lawyer. To impeach a witness by prior conflict or inconsistency in testimony, the inconsistency must not only be relevant and material to the case but also relevant and material to the witness' testimony. Too often, lawyers try a

slight of hand trick; they will seek to make an honest witness out to be a liar by irrelevant and immaterial inconsistencies that are meaningless to the case or by claiming inconsistencies that do not exist in fact; jurors are not fooled and resent such deceitful conduct that seeks to manipulate them into a false analysis of the witness' credibility.

As a trial lawyer I had an abiding faith in the jury system; after over 17 years as a trial judge, I am even more convinced in the basic fairness and wisdom of a jury. They can not be easily fooled and tend to punish those to attempt to do so. Jurors do have prejudices and biases, which the court and lawyers must act to eliminate; when this has been properly done, then most juries seek to be fair. They may not always understand the charge of the trial court or the issues raised by the lawyers, but they seek to find the truth and to do what seems to them right. Consequently, unprofessional conduct will not influence them favorably, unless it reinforces a preexisting bias or prejudice held by the majority of the jury. Most jury verdicts come well within the evidence and within a reasonable expectation by the court.

IV.

SOLUTIONS

Basic to any change in the profession or society in general is the individual. The lawyer must decide what kind of lawyer or person that he or she should be and how to react to unethical or unprofessional conduct. Unethical or unprofessional conduct may actually or appear to afford an advantage to the offender; the lawyer must be willing to concede such advantage, if any, and offset such by wit, skill and preparation. The personal satisfaction in winning or holding down the verdict, despite an unfair advantage, will reinforce the professional conduct. However, the problem comes if the client must be advised and does not believe that any advantage should be given up and wants the lawyer to respond in kind so that the unprofessional or unethical conduct escalates. Some tactical and strategic decisions must be made by the lawyer alone; if the client will not agree, then the lawyer must make the ethical and professional decision, but if the case results in an unfavorable outcome the client will blame the lawyer, and the lawyer may loose the client. If the client wants unethical conduct, then the lawyer should give the client the choice of following the lawyers advice or obtaining other counsel. If the conduct is unprofessional, then the lawyer could approach it in a graduated response; the lawyer would seek to moderate the desired unprofessional conduct as much as possible and seek to persuade the client of the desirability of professional conduct in the long run. The lawyer always has a task of determining his or

her own professional and ethical conduct to be true to self. Then the lawyer must convince the other lawyers working on the case as to the appropriateness of the conduct and finally the client. If the lawyer has a more experienced lawyer to consult about appropriate ethical and professional matters, then such resource should be consulted prior to making any decision. A large firm could establish an ethics and professionalism committee, in house who could assist in deciding such question without risk of violating the attorney-client relationship. Outside the representation, the lawyer has other resources: older lawyers, judges, and law professors.

It would be wise for each local bar association to create and ethics and professionalism committee to assist in answering questions. The committee could not only give ex parte advice to a lawyer how to handle a professional and ethical problem but also advise how to react appropriately to the conduct of others. If such committee had sufficient status and standing in the local legal community, it could bring together each lawyer to discuss the situation and seek to come to an agreement as to what would be appropriate professional conduct and reaction under the circumstances. Peer approval and pressure is the only way that any professionalism change can be brought about or promoted; it can not be by discipline or sanction; it must be by legal community pressure that the lawyer or lawyers sit down face to face and

discuss the concrete problem and have other lawyers suggest what would or would not be appropriate conduct. The lawyers involved probably will not want to come, just like they do not wish to file a Bar complaint; when it has no negative consequences and is under local sponsorship, the lawyers will have a harder time refusing to participate, because nonparticipation could effect how the other members of the legal community perceive them professionally. Such structured committee could handle referrals of complaints from the trial courts or public, which would keep the matter in the local legal community and pressure for a quick resolution. Judges, law professors, or lawyers from another community could be brought in to sit with those concerned and discuss the issues. Noone who participated would be bound by the recommendation; since noone is at fault, then there would be a greater chance to influence behavior, not only in that case but also for the future with such lawyers. The committee could even publish its recommendations on a hypothetical basis to assist the local bar association.

Unless the local lawyers and judges get involved in a way to deal with professional misconduct, nothing will happen. However, no lawyer or judge will become involved, so long as it is believed that the proceedings will punish or stigmatize another local lawyer that they must get along with in the future.

The State Bar disciplinary procedure must change to become more effective and to deal with the vast body of unreported ethical

violations. First, the standard or quantum of evidence to sanction must be changed from beyond a reasonable doubt to clear and convincing evidence. Second, there must be a method to allow anonymous complaints to be filed and a safeguard screening method to determine probable cause. Third, all complaints whether by client, lawyer, judge, or the public ,after a finding of probable cause, the investigated, prepared for hearing, and prosecuted by someone other than the complainants. The respect for the disciplinary system would be enhanced both with the bar, the judiciary, and the public.

V.

CONCLUSION

If anything is to be done, then it must be by you as a lawyer. You and you alone decide how you will practice law and what you wish the profession to be or become. You can lead and bring about change through your conduct and attitude, which can influence other lawyers, clients, the public, and ultimately the profession. There are changes in the profession that have come through societal changes and these may be irreversible. We, as a learned and honorable profession, must recognize what is fundamental and must be preserved and seek to preserve or change to that end. We must

also recognize that which we can not change and have the wisdom to accept or to minimize, as becomes necessary. The legal profession is worth the struggle to preserve it as an honorable calling.