by Adrian Chaster

In this issue you will again find much discussion on the recommendations of the Justice Reform Committee. In addition to an interview with The Honourable Ted Hughes, Deputy Attorney General, concerning the background to some of the Committee's recommendations, we have published a "Forum on Justice Reform" comprising excerpts from various letters written by TLA members about the Committee's recommendations. Mr. Wilf Klingsat, a well-known court reporter of many years experience, has reviewed the recommendations of the Committee relating to court reporting. We had hoped to publish an interview with the Honourable The Attorney General, Mr. Bud Smith, but publication deadlines and a recurring bout of influenza conspired to prevent us from conducting the interview in time for inclusion in this issue. Hopefully, the next issue of The Verdict will contain considerable detail regarding Mr. Smith's reaction to the recommendations of the Justice Reform Committee and his plans for implementation. He will have heard from Trial Lawyers Association in reaction to the recommendations of the Justice Reform Committee, in the form of a brief in response.

On other fronts, a subcommittee of the Executive continues to consider the proposals made by the Rules Committee concerning compulsory interim payments on application in Chambers. The Priorities and Planning Committee is active in various areas, as discussed by our President, David Stuart, in his column in this issue. Reports of the Committee are published concerning necessary amendments to the Family Compensation Act and to the federal Interest Act (see articles by David Stuart and Ian Alkenhead). All is set for the Association's spring seminar, The Numbers Game. The Executive is considering conducting a series of one day seminars in major centres outside the Lower Mainland. We would very much appreciate hearing from our members as to topics which they would like to see covered in these seminars.

At the Annual General Meeting, to be held in conjunction with the spring seminar, the members of this Association will elect a new Executive for a one year term. Some members of the current Executive will relinquish their posts. To these people, we offer our thanks for their dedication and hard work. For those who will be staying on, keep up the good work.

Judy Brown and her Administrative Assistant, Carla Terzariol, continue their Herculean efforts on behalf of the Association. They enable us to maintain a high level of activity on many fronts, and they respond well to the increasing demands placed on the Association as a result of its high profile as the voice of serious litigators in the justice system. The hard reality is that despite their dedication and hard work, Judy and Carla can scarcely keep up. As we continue to grow, we also expand our activities on behalf of you, our constituents, and through you, on behalf of individuals who come into contact with the justice system. The administrative infrastructure of the Association has grown to the point that, unless we are to curtail our efforts in asserting the interests of you, the trial lawyers of this province, we must have more administrative staff. Unfortunately, that takes money. As usual, our ambitious activities outstrip our ability to fund them. We do not have the luxury of compulsory membership with consequent mandatory fees. Our constitutional mandate prevents us from obtaining the kind of institutional funding which might otherwise be available. It is on our members that we must depend for our financial survival.

Consider, for example, the fact that less than half the cost of publishing and distributing this journal is recovered through advertising revenue. None of the contributors receives payment for articles, editorials, or time spent on the publication.

Most of our Executive members add up the disbursements they have incurred on behalf of the Association at the end of each fiscal period and then write it off as a donation. For many years, a very few members have contributed hundreds of dollars every month over and above their regular membership dues. Without obvious crises on the horizon such as compulsory universal No-Fault coverage and the

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eradication of the tort system, this small group of contributors has been dedicated indeed in maintaining donations.

The Executive of the Association has resolved to embark on a new initiative to raise funds. Each member of the Executive is now making a monthly contribution to the Association completely separate from regular membership dues. We seek to expand this programme of donations to the regular membership. We want to start modestly, and therefore ask that every member of the Association who has been called to the Bar for less than ten years contribute a minimum of $25.00 monthly to the Association. We ask that those who have been called for more than ten years contribute no less than $50.00 monthly. The annual aggregate of these donations amounts to a fraction of the fee you receive in one small case.

Think about it. Ask yourself if it is worth it to you to send to the Association this tiny portion of your monthly income to enable it to continue working on your behalf. Consider the degree to which this Association represents your particular needs as a trial lawyer in lobbying the federal and provincial government for necessary legislative amendments, in pursuing the interests of justice reform, in keeping you apprised of important developments through the pages of The Verdict.

We need your financial support if we are to continue working on your behalf. Please take a moment to complete the monthly contribution card which you will find below, and send it to the Association's head office. We have more credibility than ever before as an Association. If we are to capitalize on that credibility and to continue representing your interests, we must have your monthly donations. Thanks to all of you.

To: Trial Lawyers Association of BC
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beginning______ and each month thereafter, until this authorization is revoked, such cheques to be drawn by and payable to the Trial Lawyers Association of BC and/or the TLA of BC (PAC).

*****

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who has not seen the deceased, who lived in Toronto for 20 years, although they exchange Christmas cards and a telephone call a year would not, in our view, be entitled to any compensation. Undoubtedly, there would be grief and sorrow and a sense of loss but, under the circumstances recited, there would be no loss compensable under the section. This is not to minimize the importance of the section but, as we have stated, the mere fact of the relationship does not, of itself, establish the right to compensation.

I might say parenthetically that the courts in Ontario should resolve the difficult question of measuring the non-pecuniary loss in the way that courts of common law have resolved such issues over the centuries by hearing from the citizens. This new head of damages can only be assessed properly by juries and it is for just such cases that we must retain the right to civil jury trials in British Columbia.

It is the view of our Association that at the very least an amendment should be made to our Act which falls in line with the Ontario legislation.

DAVID STUART is a partner with Swinton & Company in Vancouver.

★ ★ ★

Should Lawyers Be More Critical of Courts?

by Roger J. Miner

The following article first appeared in the October/November 1987 issue of American Judicature and was subsequently reprinted in ATLA's TRIAL magazine. Reported with permission from TRIAL (May '88) Copyright 1988 Association of Trial Lawyers of America and Justice Miner. Ed.

In observing the work of lawyers in the courts in which I have served, as well as in other courts, I have been impressed generally with the service that the bar has rendered in the representation of clients. I have not been quite so impressed with the performance of the bar in the discharge of its duty to society as a whole. It is the willingness to accept this public responsibility that distinguishes the Bar as a profession. The value of the calling is diminished to the extent that any one lawyer shirks his or her professional obligation of service to the community.

There are many duties implicated in the concept of public responsibility - the duty to undertake the representation of indigent clients without charge1 (if more lawyers performed this duty, perhaps the public expense for such representation could be greatly reduced or eliminated); the duty to see that able and honest men and women are appointed or elected as judges2; the duty to aid in the improvement of legal education3; the duty to maintain the competence and integrity of the bar and to disclose violations of the rules of professional conduct; the duty to set an example and maintain public confidence by avoiding even minor violations of law4; the duty to seek legislative and administrative changes to improve the law and the legal system5; and the duty to educate the public6 and to protect it from the unauthorized practice of law.7

In my opinion, one of the most important societal duties of lawyers is the duty to criticize the courts. It is my premise that informed criticism of the courts and their decisions is not merely a right but an ethical obligation imposed upon every member of the bar. I also believe that judges should respond to such criticism, directly or indirectly, since judicial response dampens the enthusiasm of the Bar and deserves the public interest.8

There is a Canon in the Code of Professional Responsibility that instructs lawyers to assist in improving the legal system9. The Ethical Considerations relating to that Canon observe that lawyers are especially qualified to recognize deficiencies in the system and to initiate corrective measures.10 The considerations encourage the legal professional to support changes in the law when existing rules eventuate in unjust results.11

The Preamble to the new Model Rules of Professional Conduct adopted by the American Bar Association urges that lawyers should employ their knowledge to reform the law.12 In my opinion these admonitions speak to a duty on the part of lawyers to identify and discuss incorrect actions by the courts, subject only to the requirement that the criticism be impelled by a good-faith desire for improvement in the law and the legal system.

Malicious or false statements about a judge or disruptive or contemptuous conduct in the courtroom, of course, never can be countenanced. I have kept with me for nearly 30 years a case I read in law school regarding a penalty imposed for behavior of this type. The decision is taken from the ancient English Reports and is one of those collected by Sir James Dyer, sometime Chief Justice of Common Pleas. It is reported as follows:

RICHARDSON, Chief Justice of the C.B. at the assizes at Salisbury in the summer of 1631 was assaulted by a prisoner condemned there for felony, who, after his condemnation threw a brick bat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn...against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court.13

It seems to me that the judge over-reacted somewhat in spite of the provocation. Of course, there are those today who would consider tossing a brick to be "protected expression." I do realize that occasionally it is necessary for a lawyer to bite his or her tongue when in the presence of some particularly arbitrary tyrant in a black robe.

My father, who practiced law for 60 years, held in the highest regard the lawyer who made some intertempate remark during a long and heated argument with a judge. When the judge shouted: "Counselor, you have been showing your contempt of this court," the lawyer responded: "No, your honor, I have been trying to conceal it."

Fear of Reprisal

While lawyers generally feel free to criticize the state of the law in relation to rules of court, statutes, and even the
Constitution itself, there is a noticeable reluctance to criticize judge-made law, specific judicial decisions, or individual judges. Yet, the public-responsibility function of the bar is just as implicated in the latter as in the former. Why the distinction? I think that the answer lies in the unfortunate, but well-grounded, fear on the part of attorneys that affronts to tender judicial sensitivities may result in unnecessary antagonisms, disciplinary action, or worse.

For example, in 1830, Judge James H. Peck of the United States District Court for the District of Missouri disbarred and imprisoned a lawyer for publishing a letter critical of one of his decisions. Although this disgraceful episode led to an impeachment proceeding and caused Congress to curtail the summary contempt power of the federal courts, echoes of the Peck incident were heard in a decision handed down by the Supreme Court in 1985. The decision reversed a six-month suspension from federal practice imposed upon Robert J. Snyder by the Eight Circuit Court of Appeals for conduct said to be prejudicial to the administration of justice and unbecoming a member of the bar.

Snyder’s difficulties stemmed from a letter he wrote to the United States District Court for the District of North Dakota. The letter was written after the circuit court had twice returned his Criminal Justice Act fee application for insufficient documentation. In his correspondence, Snyder refused to provide further information, criticized generally the inadequacy of the fees authorized in similar cases, expressed his disgust at the treatment accorded him by the circuit, and directed that his name be removed from the list of attorneys available for criminal defense assignments. The district court judge, finding nothing offensive in the letter, and perceiving some merit in Snyder’s criticisms, passed the letter on to the circuit. A three-judge panel of the circuit ultimately found that the statements, which Snyder refused to retract, were disrespectful, contentious, and beyond the bounds of proper comment and criticism.

In reversing the panel decision, then Chief Justice Burger wrote: “We do not consider a lawyer’s criticism of the administration of the [Criminal Justice] Act or criticism of inequities in assignment under the Act as cause for discipline or suspension ... Officers of the court may appropriately express criticism on such matters.” The Chief Justice observed that the circuit court had acknowledged the meritorious nature of Snyder’s criticism and, as a result, had instituted a study of the administration of the Criminal Justice Act.

In light of that observation, I believe that the Chief Justice missed an excellent opportunity to comment on the attorney’s duty to criticize the courts and the beneficial purposes served by the performance of that duty. Snyder’s actions were well within the bounds of the public responsibility he assumed when he became a member of the bar. This is so because a lawyer is obliged not only to educate the public about the law, the legal system, and the judges, but to inform the courts as well.

Constant Watchfulness
Justice Jackson once commented that “lawyers are the only group in a community who really know how well judicial work is being done. The public may rightfully look to them to be the first to condemn practices or tendencies which they see departing from the best judicial traditions.” Justice Brewer said: “It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism.”

“I have not patience,” said Chief Justice Harlan F. Stone, “with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.”

Some years ago, in answer to a contention that criticism of the United States Supreme Court and its decisions by the bar was unwise, Raymond Moley, the political analyst, had the following to say:

The bar in this instance is acting in its most significant role. A lawyer is something more than a plain citizen. He is by tradition and law an officer of the court and an agent of the government. To refrain from guidance would be to shirk the bar’s responsibility, as a professional association, to the public and to government.

....

The Court is a responsible, human institution. To elevate it above criticism would be to create a tyranny above the law and above the government of which it is a part.

And so it is that when the Attorney General of the United States publicly criticizes certain decisions of the Supreme Court, as he has done in recent years, he is acting in the highest traditions of the legal profession. By leading serious discussions of constitutional doctrine important to the citizenry and to the courts, he performs the public service encouraged by Moley and by Justices Jackson, Brewer and Stone. It behooves members of the Bar to ridicule and abuse a fellow member of the profession for fostering the robust and uninhibited debate that is the hallmark of a free society.

When Stephen A. Douglas denounced Abraham Lincoln for questioning the validity of the infamous Dred Scott decision, Lincoln replied:

We believe as much as [Mr.] Douglas (perhaps more) in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution, as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this.

Lincoln was a great lawyer who understood the public responsibility of the bar.

It has never been the place of a judge, however, to respond to specific criticism, and I think that it is unseemly for justices of the Supreme Court to engage in public argument with the attorney general or any other lawyer for the purpose of defending the position of the Court on one issue or another. Such discourse not only detracts from the dignity of the Court but also communicates an unwillingness to maintain the openness of mind so essential for the proper performance of the judicial role.

When the judiciary undertakes a point-by-point defense of criticism leveled by members of the bar, it discourages what is
should encourage and protect. Even in the case of unfair and unjust criticism, the bench should remain silent, leaving to the court its ethical obligation to come to the defense of the judiciary in such situations. It has been recognized that judges, "not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism." When Justice Brennan wrote in the Sawyer case that "lawyers are free to criticize the state of the law," he reserved no rebuttal time for the judiciary.

Let me hasten to add that there are numerous matters upon which judges can and should be heard - matters affecting administration of the legal system, improvements in substantive and procedural law and ethical standards. A judge also should teach and write about the law in an expository way, pointing to trends and changes in decisions already written and in legislation already adopted. Judges should encourage debate about controversial constitutional and legal issues.

I have lectured and written about the public accountability of judges - the need for judges to report to the citizenry about developments in the law and the legal system. Others have advocated judicial participation in policymaking where matters affecting the judicial process are concerned. Judge Irving R. Kaufman, my colleague on the Second Circuit Court of Appeals, holds that "judges may not merely express their views on matters within their judicial province, but have an obligation to do so in the public interest." However this may be, there is no reason for judges to argue the merits of their decisions or views directly with their critics. It should always be remembered that judges have an unfair advantage in any debate with lawyers, because judicial decisions - at least until reversed, modified, distinguished, or overruled - are the last word.

The judiciary should ensure the bar that critical comments of all kinds are welcomed. It should heed the message of Justice Frankfurter that "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." The justices of the Supreme Court and of other courts in the land must recognize, as did Justice Frankfurter, that lawyers "are under a special responsibility to exercise fearlessness" in criticizing the courts.

Without question, the judiciary is accountable to the public, just as any other public institution is accountable to the public. If judges are arbitrary, if their behavior is improper, if their decisions are not well-grounded in constitutional and legal principles, if their reasoning is faulty, the bar is in the best position to evaluate the deficiencies, to inform the public, and to suggest corrections. When lawyers engage in criticism of the courts for constructive and positive purposes, grounded in good faith and reason, the judiciary is strengthened, the rule of law is reinforced, and the public duty of the bar is performed.

ROGER J. MINER is a Circuit Court Judge of the U.S. Court of Appeals.

Notes
2. See ABA Model Code EC 8-6; ABA Model Rule 8.2 comment, para. 1.
3. See ABA Model Code EC 1-2; ABA Model Rules Preamble, para. 5.
4. See ABA Model Code Canon 1; ABA Model Rules Preamble, para. 5.
5. See ABA Model Code EC 1-4; DR 1-103(a); ABA Model Rule 8.3(a).
6. See ABA Model Code EC 1-5; ABA Model Rule 8.4 comment, para. 1.
7. See ABA Model Code EC 8-1; ABA Model Rules Preamble, para. 5, Rule 6.1.
8. See ABA Model Code EC 2-1 to 2-2, 8-3; cf. ABA Model Rule 7.2(a) comment, para. 1.
9. See ABA Model Code Canon 3; ABA Model Rule 5.5(b).
10. ABA Model Code Canon 8.
11. Id. at EC 8-1.
12. Id. at EC 8-2.
13. ABA Model Rules Preamble, para. 5.

15. See generally STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1883); Rieger, Lawyers’ Criticism of Judges: Is Freedom of Speech a Figure of Speech? 2 CONST. COMMENTARY 69, 75-76 (1985).
19. In re Snyder, 734 F.2d 334, 337.
20. In re Snyder, 472 U.S. 634, 646.
25. Moley, Criticism of the Court, NEWSWEEK Mar. 16, 1959, at 100.
31. ABA Model Code EC 8-6.
33. See ABA Judicial Code Canon 4 & commentary; see also Advisory Comm. on Judicial Activities, Advisory Op. 50 (1977).
35. See ABA Judicial Code Canon 4 & commentary.
39. In re Sawyer, 360 U.S. 622, 669 (Frankfurter, J., dissenting).

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