First Person Singular

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The hot topic in legal circles is the decline of professionalism. In this often negative age, it ranks right up there with “What’s wrong with American schools?” and “Where will we live when the ozone is gone?” and “How can we get a handle on drugs?”—all those terrible things.

As I meet with lawyers and judges, singly and in groups, the theme most often sounded is concern about ethics and values. There’s a consensus that the legal profession has changed enormously—which seems undeniable—and a consensus that the change has been for the worse—which seems likely. There is a nearly universal perception that our ethical standards and our values have declined and that we have moved from altruism to commercialism. And that perception goes to the heart of our calling as lawyers.

We may be prospering but there is in most of us a disquiet, an unease about what we have become, not only collectively but also individually. We see the truth about ourselves spoken in jest. There is a recent book titled “Ethics and Other Liabilities.” And then there was the man who, asked if he had been faithful to his wife, replied, “Frequently.” There are too many lawyers who would have to say, “Yes, I’ve been ethical frequently.” All this makes us uneasy.

In my brief two years at Wayne State University Law School, six Detroit lawyers have come to me to discuss their wish to make career changes. Four of them intend to leave the law entirely; two others wish to leave law practice but to utilize their legal training in academic or other settings. To the man (they were all male) they find law practice no longer satisfying. As I visited with them I found myself thinking of that wonderful exchange between the husband and wife on their anniversary. She asked him, “If you had it all to do over again, whom would you marry?” And he said, “You.” She said, “That’s what you think.”

Six is a small sample, but it probably is representative. In 1984 an ABA poll found that 41 percent of all lawyers would choose another profession if they had it to do over. They were satisfied with their incomes but money wasn’t enough. They expressed frustration with paper work, with ungracious and greedy clients, with a slow and adversarial legal system, boredom, overwork, an increasingly bad reputation of the legal profession, and unrealistic expectations coming out of law school. In these few minutes together I’d like you to think with me about some of the changes that give rise to our concerns and then to consider what’s to be done.

As we begin, it’s well to remind ourselves that we’re not alone in experiencing professional ferment. Our medical friends have a host of ethical and moral dilemmas—the right to die, controlled genetic development, the high cost of high tech medicine, and the like. Accountants face increasingly difficult dilemmas in representing clients and protecting the public, a dilemma that most of us would recognize in the legal profession. Even in the ivory tower there currently are heightened ethical concerns. Conferences on the teaching of ethics and values are increasingly common, as we have come to understand that teaching cannot be value-neutral.

Ethics in government is much in the news; I needn’t rehearse those familiar
problems. In business, one thinks of Ivan Boesky and his ilk, industrial pollution, the effect of mergers and acquisitions on the lives of the employees whose jobs are lost. These things pose questions of ethics and values in the business world. I could go on—athletics, for example, both amateur and professional, where the traditional moralism is turned on its head, where the ruling issue is whether you win or lose, not how you played the game. That sounds distressingly familiar to lawyers.

And even as lawyers, we who are mostly Americans, are not alone. The English legal profession is in upheaval as Mrs. Thatcher seeks to have the government license lawyers. Governmental licensing, the barristers argue, threatens everyone's right to have an advocate independent of the state. And, say they, a future government could prevent the fearless representations of unpopular causes by control of the licensing system.

A lot is happening in the English legal profession, but the point I wish to make here is that of Mrs. Thatcher's reforms of English institutions—trade unions, stockbrokers, university professors, and so on—none has touched off such nearly unanimous support as her sweeping plans to reform the legal profession. This must be especially galling to former Chief Justice Burger, who spent so much time extolling the English system and urging it upon us.

In short, American lawyers are not alone in finding themselves in the middle of change. And most of us feel like the man whose fortune cookie read, "A change for the better will be made against you."

Let me remind you of some of the changes in the profession that arguably diminish professionalism. None of these will come as news to you. Indeed, you may be tired of hearing them. But we must continue to look at them afresh lest we become inoculated to the problems and accept, because of familiarity, a legal profession that is so much less than it ought to be.

First, let me mention numbers. We hear a great deal about the overlawyer-ing of America. Although our per capita rate of one lawyer to 420 citizens is by no means the world's highest, it is toward the high end; and we hear again and again the comparison that it is many times higher than Japan's. Harvard's President Bok was only the first of many to suggest that "if more of our best and brightest young people went into productive pursuits like engineering instead of unproductive pursuits like law, we might not be so far behind the Japanese in manufacturing and commerce."

We do have a lot of lawyers—almost 700,000—a figure that has doubled in the last 20 years. More than 80,000 of those, incidentally, are in California; 75,000 of them are in New York; and 27,000 are here in Michigan.

The perception that there are too many lawyers seems strongest among those who are already lawyers. It reminds me of the bumper sticker that says, "Everyone who favors abortion has already been born." It's also like the people who move into a lovely community and don't want anyone else to move there, so that it will remain just as it was when they came.

Let me read you a statement by the Dean of Stanford University Law School:

"We have too many lawyers was Marion Kirkwood, and he was speaking in 1927, when the California Bar numbered 8,000, not 80,000. Contemporary statements of alarm have had their counterparts over the years. The alarm has been sounded periodically, but in each era we have faced the new problems and somehow overcome them.

Well, California has grown, the nation has grown, and we have grown. What has that done to us? Has the enormous growth of the bar been good for our country? That's another speech for another day. I do believe that Americans have more freedom than do the citizens of any other large nation, and I would argue that there is a connection between the fact and the "lawyer-ing" of America. Do we need more lawyers—more of the bright young women and men who are studying in our law schools? That, too, is a speech for another day; but you can infer my answer when I say that there are large numbers of our people who are under served by lawyers, and the challenge is to devise ways of meeting that need.

But what has enormous growth done to us as lawyers? At very least it has made it harder for us to be a profession. When there are more and more of us, we are less and less special. We are less cohesive. Collegiality and self-regulation are more difficult to maintain. Where once low problems and somehow overcome them.

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makes it more difficult to maintain high ethical standards.

A second change in our profession, and related to the number of lawyers, is the growth in the size of many law firms. When I was a young associate at Stinson, Mag in Kansas City, it was the largest firm in town, with 25 lawyers. I doubt that there was a larger firm between there and California. Today, Stinson, Mag has 150 lawyers, and across the country there are 250 firms with more than 115 lawyers. Three firms have more than 900: Baker & McKenzie is the largest with 1,200, and it hired 233 new associates last year alone. Jones, Day is right behind. And Skadden, Arps, with 960 lawyers, has 400 paralegals.

These megafirms have multiple offices, of course, but the mind is boggled by the numbers and by the problems of management and control that they suggest. In such a setting, how do people get to know one another? I remember a New Yorker cartoon of a scene in a law office with one partner seated, another standing, and, disappearing through the door, a young associate with a file under his arm. The one partner says, “How long has young Smythe been with us?” And the other answers, “He’s never been with us. He’s been against us from the beginning.”

Just as in the profession at large, the increase in firm size tends to reduce collegiality, if not destroy it. And it makes it increasingly hard for experienced lawyers to serve as exemplars for the young associates. As the world gets more crowded and complex, we need the family unit more and more to nurture us and to set standards and to transmit values from one generation to another. Similarly, as the legal profession gets more crowded and complex, we need the law firm more and more to nurture us and to set standards and to transmit value from generation to generation. But just as the family finds it increasingly hard to fulfill that responsibility in a messy and changing world, so too the family unit of the profession—the law firm—finds it increasingly hard to fulfill its role as a nurturer of professionalism. There are several reasons for that, of course, but surely the decline of collegiality from large numbers is high among them.

A third change is the increasing dominance of a bottom-line mentality in the management of so many law firms. In 1987 Skadden, Arps had gross revenues of $290 million; Jones, Day had $211 million; and 26 other firms grossed over $100 million. It’s little wonder that in such a setting we seem to be more interested in the law business than in the law practice. The emphasis is on cash flow and efficiency, and the bottom line, often accompanied by a perceived loss of humanity within the firm and, ultimately, within the profession. We forget that, in John Ruskin’s phrase, “The highest reward for a person’s toil is not what he gets for it but what he becomes by it.”

The consequences of emphasis on the bottom line are mostly obvious. First is enormous pressure to produce. At the annual recruitment conference for law teachers last November, I interviewed two young men from east coast firms, one New York, one Washington, both of whom said that last year they had billed more than 3,200 hours. Besides its adverse effects on family and personal life, that kind of schedule diminishes the opportunity for the kind of contact, both formal and informal, between partner and associate that traditionally has been the means of professionalizing the young lawyer.

Emphasis on the bottom line leads to a certain ruthlessness in dealing with older lawyers who, late in their careers, do not draw as much business as they formerly did. Again, we lose a little bit of our humanity.

The bottom line emphasis makes it harder also to carry out the bar’s pro bono obligations since everyone needs to keep the meter running to meet the enormous overhead. It tends to increase the flow of services to that part of society already well-served—the affluent, the business community—and to diminish generally the flow of services to the underserved middle and lower classes. Someone has said that true peace is not merely the absence of war but the presence of justice. Similarly, professionalism is not merely the absence of unethical behavior but the presence of “equal justice under law.”

In this connection, there is a piece of good news: Skadden, Arps, which had the largest gross revenues last year, has funded $4 million of a planned $10 million program to sponsor 50 law graduates a year who want to work in civil legal services programs. These Skadden Fellows will work in organizations that help the poor, homeless, or disabled, and organizations that protect human rights. That, surely is a hopeful development.

Finally, the bottom line emphasis, with annual billings of 2,500 or 3,000 hours or more, tends to eliminate time for reflection on what we are doing. It was Socrates who first said, “The unexamined life is not worth living.” To that I would add, it is also dangerous. If we are so rushed, so pressed, that we cannot stop to think about what we are doing, and why, then the danger is that we will become something that we do not want to be.

One more of the trends that seem to bedevil the profession is the decline
in civility, especially in the litigation arena. I shall not rehearse with you the complaints. They are painfully familiar to every lawyer in the room. Discovery abuse, Rambo tactics (as someone said, “lawyers on steroids”). Incidentally, a Chicago Tribune columnist recently offered this bit of advice that seems especially apt for trial lawyers: “Nobody really likes Alan Alda. Or Rambo. Find a happy medium.”

The list of complaints could be extended, on and on. And the cynic says that today is the tomorrow you worried about yesterday—and now you know why. There is a Woody Allen character who says, “I have seen the future and it is very much like the present, only longer.” As depressing as that may be, it, too, may no longer be true.

The increase in the size of the profession, depersonalization of law offices, commercialization of law practice, incivility among lawyers—each of you has his own catalog of problems in the profession. However you state them, it is clear that we all feel we are losing something valuable, some important component of what it means to be a lawyer. Stating the problems is easy. The hard question, maybe the unanswerable question, is what can we do about them?

The usual first response is to engage in concerted efforts. We hold conferences on legal ethics. We appoint task forces on professionalism. We amend Rule 11. We strengthen the disciplinary machinery. We require that CLE programs include explicit attention to ethical problems. We consider requiring pro bono service, saying, in effect, you will do good. It’s like the legend on your restaurant bill: “A gratuity will be added.” It reminds me of the person who received a Christmas card from his paper boy about two weeks before Christmas: “Merry Christmas, Happy New Year.” The householder did not do anything by way of a gift to the boy. A few days later another card came, saying, “Merry Christmas, second notice.” That’s a species of mandatory pro bono. We also appeal to the law schools to do a better job of teaching ethics and of socializing our students, of introducing them to the profession.

Every one of these efforts is significant, useful—I do not speak disparagingly of them. Indeed, they are necessary and our profession will be the better for them. But there is something missing—something that surely is more important than any of them and, arguably, more important than all of them taken together. I refer to the power of personal example.

We are accountable, each of us, for our own actions. We are judged for our own actions.

Some years ago my wife and I were in Williamsburg for a weekend meeting of the Council of the Litigation Section of the American Bar Association. On Sunday morning we attended church in historic Bruton Parish, in the old part of Williamsburg. I well remember one line from the sermons preached that day by the chaplain of William and Mary. He said, “Judgment and redemption can be spoken of only in the first person singular.”

That phrase has haunted me ever since. “Judgment and redemption can be spoken of only in the first person singular.” We are accountable, each of us, for our own actions. We are judged for our own actions. And redemption must come through you, and me, individually. Only if we are changed, and only if we become instruments of change will the profession be changed.

Your own example is more important than all the committees you might serve on. Offering your example is certainly better than hand-wringing and doom-saying.

If you will take the time to communicate to your younger associates your love for the law and your commitment to the rule of law, both by word and deed, you may well do more for the future of the profession than all the committees you serve on. You should do this intentionally, not merely by happenstance; and you should do it explicitly, though I do not disapprove the importance of subliminal messages also.

We learn from individuals more than from groups. We have all experienced what can be learned from those countless lawyers both famous and unsung who have undertaken unpopular causes at great personal cost—and, on a quieter level, from the example of those whose style of practice reveals thoroughness, skill, honesty, and compassion. Those lives are better lessons than all the ethics lectures ever delivered.

Mentors, exemplars—that is what is needed most. And who better than you who represent the profession’s highest levels of skill and accomplishment? I sincerely believe, principle.

Edwin Hall’s familiar statement comes to mind:

I am only one, but still I am one.
I cannot do everything, but I can do something.
And because I cannot do everything, I will not refuse to do what I can.

I concede that the responsibility of being a teacher, an exemplar, of high values is a daunting one. First, we frequently are unsure of the answers to the ethical and moral questions we face, and our students and our young associates face. When I first taught a course in professional responsibility, I was terribly ill at ease. In my courses in evidence and civil procedure and
trial practice, I thought I knew the answers to the majority of the questions; but in the ethics class there were countless dilemmas that I didn’t know how to resolve. I certainly wasn’t an expert, and I didn’t want the students to think that I was preaching at them.

But then I came to the more mature realization that it’s not the answers that are important. It’s the questions. Deciding what the question is—knowing that there is a question—that’s what’s important.

Indeed, people who are sure of the answers make me very nervous. I recall someone’s observation that the most dangerous thing in the world is a Scotch Presbyterian rising from his knees to do the will of God. My students and I may not agree on the answer to a question about a lawyer’s ethical responsibility in a particular setting, but I have achieved my goal if, first, I can get them to see the question and to understand the competing interests and if, second, I can do so in a way that helps them develop the ability to be sensitive to that kind of question through the many years ahead.

I firmly believe that most unprofessional conduct is less a result of the intentional choice of the low road than it is the progressive loss of sensitivity to the fact that there is even a question. It’s the questions that are important. You may recall the rabbi who was asked, “Teacher, why do you always answer a question with another question?” And he said, “So what’s wrong with asking a question?”

Being an exemplar, a teacher of ethical values is daunting for a second reason. Every one of us is acutely aware of his own shortcomings. Each of us has handled some situations badly. To be perceived as an example of what someone else should be is embarrassing and makes us feel a little hypocritical.

When you feel that reluctance, I suggest that you remember the vision of Isaiah, who saw himself in the temple, where the Lord was sitting upon a throne, attended by the seraphim with six wings which cried out the Sanctus: “Holy, holy, holy is the Lord of hosts; the whole earth is full of his glory.” And in the presence of that holiness, Isaiah was keenly aware of his own shortcomings and of the shortcomings of his people; and he said: “Woe is me, because I am a man of unclean lips, and I dwell in the midst of a people of unclean lips.” But when he heard the voice of the Lord saying, “Whom shall I send? And who will go for us?” Isaiah said, simply, “Here am I. Send me.”

Like Isaiah, like every one of the Hebrew prophets, every single one of us is flawed, a person of unclean lips; and like the ancient Hebrews, our profession is apostate. It has neglected, if not deserted, its principles. And so we are a people of unclean lips.

But the call comes: “Whom shall I send? And who will go for us?” Isaiah didn’t say, “I’ll find someone to work on it.” He didn’t say, “We’ll appoint a task force.” He didn’t say, “How can I as one person, one flawed person, possibly help when the problems are so complex and so interrelated?” He said, simply, “Here am I. Send me.”

Is there a decline in professionalism? It seems undeniable. Are we people of unclean lips? Of course. If so, then “who will go for us?” I hope that you and I—one by one, by one, by one—will say with strong voice and clear eye and firm hand, “Here am I, send me.”