

The Lawyer's Role

By Joe Jamail

Thank you for asking me to come and visit with you.

Rule of the Universe - abolish arbitration.

It is appropriate that we consider where the trial bar has been and where we are going. Would you, today, advise your son or daughter, standing at the threshold of a career to become a trial lawyer?

Daily we are inundated with complaints that we have over-lawyered our nation. That we have caused a litigation explosion. That we are like a horde of hungry locusts destroying the economy, and the insurance industry, the medical profession and other professions.

That our worst threat is not nuclear winter or even AIDS, it is lawyers and litigation.

The research indicates that much of the mushrooming increase in federal court filings has nothing to do with civil suits, results from appeals to district courts from denials of social security benefits, habeas corpus, criminal and immigration cases.

To those who decry the fact that so many people are seeking redress for wrongs through lawyers in courts, I suggest that this is a cause for rejoicing.

People who bring their grievances to court are saying by their actions -

We are a people who believe in law. We believe our court system has integrity and accessibility and fairness. When we seek help in the legislatures we are powerless for we have no money, no political action committees. The slumbering bureaucracies of government cannot be wakened by our pleas.

Two choices remain to the people, the courts or the streets. If we pursue self help by direct action on the venue of the streets, in some modern form of trial by battle, we will eventually find ourselves in court, with a more serious case.

Our legal system is NOT a failure, and it is not perfect. Our challenge is to find and implement those improvements that will make our litigation system faster and more efficient, without robbing it of its essential genius. The jury trial. We cannot look only backward, rejecting change, for constant reassessment, learning and adaptation are the stuff of life.

In King Alfred's day, the then new fangled form of alternate dispute resolution was an invention called trial by jury. It was sold as a better alternative than trial by combat, or by ordeal of fire, or ordeal of water.

Why should one advise young people to become trial lawyers? To be happy, a creative person must feel that their life's work is contributing meaningfully to the betterment of others. There lurks in all of us a spark of idealism - altruism - which, if kindled and sustained, will warm our lives with excitement to the end. And as we near the end, we should feel that we have left some mark to make the world a better place.

So many people living in a self-centered "me" attitude have not yet discovered the secret. For the secret is to serve a cause bigger than one's self and lose self interest in it.

What do we do. I am paraphrasing Sol Linowitz but I have said this before and I believe it is worth repeating. We, as lawyers, take up other peoples problems relieving anxiety and resolve problems, conflicts and disputes in a peaceful orderly manner.

We enforce the rule of law -

Those of us who look upon our clients as a personal relationship rather than a fee mechanism make legal service not only pleasant but more effective.

During my time as a practicing trial lawyer the fee machine has supplanted the personal hands on. That is an affront to the practice of law - to our professionalism.

To the questions, “Why be a lawyer” and “What monuments do lawyers leave behind?”

Some, of course, build fortunes, and I, of course, have nothing against that. But the merely rich are not remembered much beyond their probates. The great legal technicians - the dotters of “I’s” and crossers of “T’s” - their fame is buried in a mound of commas. Great lawyers are much more than great technicians.

Carl Sandburg suggests the question, “What does a lawyer build?” My answer to that is:

I suggest that a lawyer builds a good name, a jewel beyond price. A lawyer builds a fairer, more free, more open society. A lawyer builds truth and justice. A lawyer named Daniel Webster told us that justice is the greatest concern of man on earth. Other professions erect buildings that fall down, bridges that wash out, planes and ships that rust into obsolescence. Even the steel of a sacred symbol, our Statute of Liberty wore out in 100 years.

Lawyers don’t build of steel or stone, but of sturdier stuff. We build monuments with ink, on paper, of ideas.

Homer never built of rock or steel, nor did Socrates or Plato, or Jesus. They built of more enduring stuff, ideas and inspiration, beauty, fairness and truth.

In one century the steel of the Statue of Liberty wore out. Over two centuries ago, a lawyer, Thomas Jefferson and other lawyers, built with ink, on paper, the Declaration of Independence. It stands strong over 200 years later, a landmark of human progress built of ideas, born of arguments, nurtured by eloquent lawyers like Patrick Henry and Samuel

Adams, and finally a monument, on paper, etched indelibly in the minds of free men and women everywhere.

The attack on our jury system has been insidious, malicious and lying propaganda.

I want to tell you a story about our jury system. *The Crown against Peter Zenger*. The case that established freedom of speech and press, tried before we were a nation. Lawyers must preserve the sanctity of jury trial. The moral, ethical and professional duty of the lawyer is a major part of the privilege to be a lawyer and to fight to protect this valued right, and the rule of law, on behalf of his client, both plaintiff and defendant. I want to tell you the most significant legal case of the last thousand years. It wasn't the Scopes Monkey trial. It wasn't *Brown v. Board of Education*, although the Warren court's opinion changed the face of American society forever. It wasn't *Roe v Wade*, or *Pennzoil v. Texaco*, the largest jury verdict in the history of law which changed the way corporate America conducts its business affairs. The answer, I believe, was a case involving the arrest of a young man more than 340 years ago. The year was 1670, a Sunday. A congregation comes to their church in London, intent on peaceful worship. Their church is barred by iron bars and chains. Soldiers guard the entrance. The soldiers are determined to deny the worshipers access to their church. The claim was these people were dangerous to King Charles II . They were Quakers who believe in love, friendship and universal brotherhood. More importantly, they were pacifists who believe that war is wrong. Such teachings represent a threat to any despot expanding his empire by use of force.

The young leader of the Quakers made his way through the crowd and confronted the captain.

“Friend,” he says, “we beg of you as men of peace to stand aside and allow us to open the house of our Lord that we may properly honor and worship.” His name was William Penn.

Since the church is barred, Penn declares that they will hold their service in front of the meeting house. Penn is charged with preaching treason. At that time, the criminal trial under law requires a jury of lay citizens. Impaneling a jury was simply a matter of constables arresting people at random off the streets.

Edward Bushell is one of the twelve brought to the courtroom in the Old Bailey to sit in judgment of Penn.

Penn then asked under what law he is being prosecuted. The answer, “The indictment is grounded upon the common law.” When Penn asks what common law, the Lord Mayor orders him thrown into the bale dock, a depressed cage below the floor of the Court. The trial continues with Penn in a pit below the floor level with iron bars across the top.

After the third witness testifies that he saw Penn preaching but could not hear what he was saying, the court instructs the jury to retire to the jury room and deliberate its verdict. The men elect Thomas Veer as foreman. After short deliberation, Bushell, a juror, argues innocence, relying on a copy of the Magna Carta he has in his pocket. They have deliberated a little over an hour and thirty minutes when the bailiff knocks at the door. He tells the twelve that the court is growing impatient with their delay and “orders you to come below at once.” Bushell replies that since the jury has no verdict, they cannot come. Eight of the jurors leave the jury room and take their seats in the box. Four others, including Bushell and Veer, remain. Within a short time, the bailiffs are pounding on the door again, demanding that the four follow them down to the Court.

The Judge says.....if the jury does not show respect for this court, you shall all be fined and denied your dinners.

The judges send them back to the jury room and tells them if they do not find a unanimous guilty verdict, they are to be locked up until the next morning, without meat, drink or fire.

Back in the jury room Bushell pleads with the others to stand up in defense of freedom of conscience. The bailiffs are, again, pounding at the door, demanding a verdict. Finally, they agree and return to the courtroom.

The Lord Mayor asks if they are agreed upon a verdict. The jurors say in unison, "We are!"

The Mayor asks, "Who will speak for you?" The group replies, "Our foreman, Thomas Veer."

Veer rises in the crowded courtroom. Enunciating each syllable slowly and distinctly, he says, "Guilty of speaking on Grace Church Street." Finally, a judge says, "Is that all?" Veer replies, "That is all I have in my commission." The judges huddle. Judge Howell stares menacingly at Veer. Howell tries to terrorize the jury by threatening to cut their tongues out. A juror asks for some food since they had not eaten for thirteen hours. The judge tells them that only when the jury has delivered a proper verdict will they be fed. Bushell replies, "We have given a true verdict." The court refuses to hear any more and declares the court in recess until 9:30 that evening.

They wait for the bailiff. At 9:30 they are back in court. The mayor again demands the verdict and asked who will speak for the jury. He is told, "Our foreman, Thomas Veer." Veer rises. The courtroom is quiet and still. He hands the paper to the

clerk, who recites that the jurors have found Penn guilty of speaking to an assembly on August 14, 1670. No treason.

The gallery of onlookers bursts into cheers and roars so that no one can hear the calls for silence from the crier and the Mayor, banging his desk.

“Will you be led by such a silly fellow as Bushell?” screams Judge Starling. Judge Howell tells them that the court will not accept the verdict. They will be locked up without meat, drink, fire and tobacco. “We will have a verdict by the help of God, or you will starve for it.”

Bushell rises to address the court. He reminds them that the jurors are to abide by their oaths and find according to the evidence. There is no power in the Magna Carta to dictate the jury’s verdict. The Lord Mayor replies, “This court has any power it chooses.” Bushell again tries to argue the rights of the Magna Carta. The Judges says, “These rights will starve you.”

After some time, the jury is back. The court inquires whether the jurors agreed. They all respond that they are. The court asks who will announce the verdict. The twelve men say, “Our foreman, Thomas Veer.” The court calls for the verdict. “Is William Penn guilty or not guilty?” Veer musters what little strength he has. He speaks but two words, “Not guilty.”

“You say William Penn is not guilty in manner and form as he stands indicted and so say you all?”

The jurors reply, “we do!” The court polls the jury. Each juror answers to his name and takes responsibility for the verdict. Bushell stands up. “My lords, as the jury now has delivered its verdict and it is recorded, we ask to be released with all deliberate speed as we are all in great want.” The court refuses to excuse them. Instead, for their actions they are fined forty marks and imprisoned until paid. Bushell argues with the

court that the jury has performed its duty in good conscience and has undergone a heavy ordeal. He reminds them that the laws of England require that they be released at once.

“Pay your fines and you shall be discharged. Until you do, you will be taken to Newgate Prison with William Penn, there to remain until your fines are paid.”

Foreman Veers’ daughter can hold back no longer. She descends from the gallery to the pit, berating the judges. She opens her purse and takes out some coins. Others in the audience come up to help her with the fine. Veer speaks feebly, “No daughter, don’t pay it. Let me die in prison than yield to them.” Veer, with his daughter holding him announces again, “not guilty.” Then, he dies.

I can’t make this up - this is the record.

One of the six carrying Veers from the courtroom is fourteen year old Andrew Hamilton. He will carry the memory of this trial all his life. Sixty-five years later, as an aged Philadelphia lawyer, he will, without fee, successfully invoke the precedent of this jury’s stand for religious freedom upon another jury in the trial of New York printer John Peter Zenger to nullify legislation restricting freedom of the press in the United States where he has migrated.

During the nine weeks they remained in Newgate Prison, the obstinate jurors are starved and humiliated. Suddenly, Sir Richard Newdigate, a noted lawyer, hears of it and agrees to become their lawyer. He comes into the prison room.

“Sire Samuel,” one of the judges had gathered the jurors there, “How came you to summon these jurors? You do know you violate the law, there is no legal ground for this inquisition.” He files his writ.

Richard Newdigate, in his role as lawyer, wins their release. The decision of the appellate court is announced. It is an astounding victory. In holding that no juror can be

imprisoned or punished for his verdict, Sir John Vaughn set out words that echo today against those who would abolish juries or limit their independence.

If these brave men believed so strongly in the jury trial as the only protection from injustice, don't you think that the role of the lawyer is to unconditionally defend and promote by jury at least in honor of these brave men.

This is a great part of what our legal system is about.

Almost as long ago a group comprised mostly of lawyers built the Constitution. Forged of the steel of arguments among lawyers. Just ideas - on paper - this living Constitution. Constant building and tending by later generations of lawyers has kept it vital and growing. Today's lawyers must constantly reinforce this great dike, our Constitution, lest little leaks, get through it every day and unleash a flood. Lawyers have contributed much to our nation and our society.

It is lawyers that have nurtured our Constitution and kept it strong, so that when power corrupts and the crunch comes, our refuge is not mere hollow words. Many a nation - without a courageous independent bar - has had its strongly worded Constitution emasculated by those in power. Not here, not yet at least, for here we have the rule of law, thanks to lawyers.

We have a government of laws and not men, thanks to lawyers.

We have a free press, thanks to lawyers.

We have police restrained by due process, thanks to lawyers.

We have judges and juries brave enough to convict an Attorney General and stare down a President until he resigns.

How much we take for granted! How little appreciation lawyers get! Sure, judges get the credit for landmarks in the law because judges write the opinions the keep law growing.

“No idea leaps full blown from a judge’s mind. It may be cultivated there, matured there and harvested there, but it is planted there by someone else.” That someone is a lawyer.

In the time that I have been a lawyer, many sweeping improvements in the quality of justice have been accomplished by lawyers and judges - without legislation.

These include -

Desegregation of schools and much of the rest of society.

One man - one vote

Strict products liability

Virtual elimination of tort immunities - governmental, charitable and family

Rights of the mentally challenged to education

Right to counsel in criminal cases

Rights of illegitimate children

The *Miranda Rule* - our primary protection against police state methods of interrogation and torture that are used every day in most parts of this world.

The *most significant contacts rule* in the law of conflict

Liability for emotional injury

Compensation for the bereaved survivors

The list could go on if time allowed.

All of these landmarks, lawyers have built, and not without purpose or theme.

Overall, the one great theme of law reform in our time has been equality.

Just in my professional lifetime we have seen progress, mainly through lawyers in courts, in building equality. Lawyers build equality.

Equality between races

equality between sexes

equality between citizens and aliens

equality is not a bad thing to build

Have lawyers made a difference in the safety or quality of life in America?

Consider just one specialty, torts.

Not long ago, dangerous conditions were common in our country, but now they are not tolerated. Why not?

Because life is no longer cheap in our country except where the tort reformers have put caps on recovery and assault our legal system for their greed and self interest.

Because juries, as the conscience of the community, have responded to great advocacy by sending a message to governments and to corporate board rooms.

Now, the voice of the safety engineer is heard in city halls and corporate board rooms along with the voice of the politician and the sales manager. A whole new profession of risk analysis and injury prevention has blossomed.

What do lawyers build? A safer land!

Lawyers, applying with vigor the dollar deterrent, the pecuniary prophylaxis, have prevented far, far more injuries than they have litigated.

Why is it that our people are no longer being incinerated in Ford Pintos, or crushed in uncontrollable Corvettes or squashed by roll-over Jeeps or Honda 3-wheelers or damaged by harmful drugs?

If those victims, instead of calling their lawyers, had called their congressman or their bureaucrats, wouldn't they still be trying to get through? Still waiting for action?

Are young women still being killed or sterilized by Dalkon Shields? No. Lawyers got them off the market, but only years after those who ran the *Robins Company* had been warned by their own doctors.

Is all the work for trial lawyers now done, and must you weep like Alexander because there are no more worlds to conquer?

Why become an architect if all the great structures have already been built?

This can be the best of times because there are still great battles ahead.

In spite of all the critics of lawyers, I see many concerned, caring and competent lawyers. These clamorous critics castigating lawyers remind me of Brendan Brehan's remark that a critic is much like an eunuch in a harem. He's never done it himself and never seen it done, can't do it but wants to tell the rest of us how to do it.

The Spanish have a proverb "It is not the same to talk about the bulls as to be in the bullring."

Lawyers place shall never be with those cold and timid souls who know neither victory nor defeat.

Today lawyers are under siege, because just as in Shakespeare's day those who seek to sack freedom know that it is lawyers and judges who guard the bridge between freedom and tyranny.

Freedom. We daily take it for granted. But freedom is a fragile flower. We cannot grow it in our gardens unless we cultivate it in our neighbors gardens. It will not bloom in the stench of political or economic repression.

Clarence Darrow put it straight. He said, "You can't be free if I'm not free."

You can't have freedom yourself unless you're willing constantly to fight for it for others.

The place for that kind of fight, short of revolution, has always been the courtroom, and the warriors that fight have always been trial lawyers. From John Adams defending the hated British soldiers following the Boston massacre to Andrew Hamilton defending Peter Zenger's right to publish pamphlets against the government.

Will there be work tomorrow for trial lawyers seeking a more just society? That is why our bar associations should be aggressively active in promoting even forcing pro bono service to those in need requiring at least two weeks per year or a severe surcharge if not performed.

Perhaps when we have destroyed legal services for the poor then we will need trial lawyers.

Perhaps when we have too long been driven by fear to ignore General Eisenhower's warning against concentrating power in a military industrial complex, when we have sacrificed our people's human needs for military power and when we have invested our souls and our future in *things* that ultimately will rust rather than educating our young and caring for our sick and our elderly, then we will need trial lawyers.

The failure of our law schools and bar associations to teach the human concept of the law is a failure to fully educate students of their responsibility.

And, perhaps, when we have an Attorney General who argues that the Supreme Court should overrule the doctrine of incorporation, which most of the first ten amendments apply regarding the states through the fourteenth amendment due process clause, then we may need trial lawyers

I will leave you with this. From the beginning, even before we entered law school we were told repeatedly over and over that "the law is a jealous mistress". What they failed to tell us was that the law is a nymphomaniac, leaving you wasted, confused,

helpless and exhausted. But it is such a magnet we keep coming back to the courtroom because of desire and dedication. It is, after all, a worthy cause.

And, thus my friends, may I suggest to you amid all the criticisms of trial lawyers, among the din that sounds as if these are the worst of time - indeed these can be the best of times to be a trial lawyer.