

Sally - file on Justices

*Warren E. Burger
(Last address
to ABA)*

Remarks of
WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES
to the
American Bar Association

New York, New York

August 11, 1986

Since this is my final report to you and the termination of more than 17 years working with you, I ask you to hear me out in taking a look forward in terms of the agenda for the years ahead, and I want to focus especially on the future of our profession and then, as is always valuable, to take a look back. Our profession has always been concerned with precedent and guided, even if not controlled, by it.

The historian, H. L. Fisher, said:

"The fact of progress is plain and large on the pages of history; but *progress* is not the law of nature. Often the ground gained by one generation may be lost by the next. The thoughts of man may sometimes flow into the channels which lead into disaster and barbarism."

In 23 years of private practice and now 30 years on the bench, I have seen many desirable changes in our profession. These changes have been brought about, not by regulation from the outside, but by the profession itself—by the organized Bar.

We acknowledge that the practice of law is a monopoly in the sense that only those licensed may lawfully practice. And we know, too, that it is an article of faith in our country that monopolies must be regulated. But regulation of the practice of law, like that of medicine, and of some other professions, has been left largely to the professions—up to now. I am sure we all agree that a profession has an obligation to regulate itself. Regulation from the outside has come about only when there was overstepping of the bounds, and when the public interest required action which the professions themselves failed to take.

It was for this reason that I, along with others, had come to the view that we needed to study the recent trends in our profession and the consequences which might flow from those trends, if we failed to act. The Commission on Professionalism appointed by President John Shepherd to study recent trends has now submitted its report. I have no doubt it will be vigorously discussed during these next few days and the years ahead.

What people think of the legal profession—of the bench and the Bar—is very important to us, and it is important to the system of justice. I was encouraged by the favorable media response to the Stanley Commission study, but plainly this report is only a good first step—a “diagnosis.”

During the last dozen years or so, many of us have had growing concern whether our profession was turning away from traditional values and standards, and becoming more and more like a common trade in the marketplace. Plainly, this distinguished Commission, under the leadership of our former president, Justin Stanley, shares some of those concerns. They should be shared by every member of our profession.

Of course, any reasonable person will recognize that economic and social changes in our time brought on changes in almost every area of life, including the practice of law and the practice of medicine. Small firms grew large and large firms grew larger; branches of law firms proliferated. In some circumstances the sole practitioner is no longer able to cope. The day of lawyer specialization is really here, as it is in medicine, and of course, it will remain.

Some medical authorities tell us that about every seven years there is a complete change in medical knowledge. In short, what was acceptable at the beginning of any seven-year period largely becomes obsolete by the end of that period. Fortunately, for those of us in the law, legal knowledge generally does not become obsolete so swiftly. But since change is one of the laws of nature, clearly adjustments must be made. The question then becomes how we make these adjustments without sacrificing the traditional values which distinguish our profession from a common trade. For my part, I am not ready to cast away the traditional concept that every lawyer is an officer of the court—a quasi-public officer.

We have read of complaints about excessive verdicts rendered by jurors described by critics as irresponsible. We

have read about astronomical punitive damage awards. Some of the appraisals pronounced upon our profession, on the courts and on jurors, may be a bit premature.

These matters should not be the subject of hasty comment, and I make none today. They merit prompt and sustained study by the profession, and particularly by our Association. The American Law Institute is launching a comprehensive study of the whole field of civil jurisprudence, and I am sure the Association will cooperate.

On one matter in the report of the Stanley Commission, I hold strong views, which I have previously expressed. The Report deals with the subject of lawyer solicitation and advertising. Few things have done more serious damage to the standing of the legal profession than the unseemly—indeed shocking—spectacle of open solicitation by a handful of lawyers who dashed off to India to solicit clients after the tragic multiple disaster in Bhopal.

I agree with the Stanley Commission Report on the matter of lawyer advertising—as far as it goes. It is a good first step in the examination of a very grave problem confronting our profession. One need only look at the yellow pages of some of the telephone directories and some of the television advertising by some lawyers, to see that those lawyers have lost sight of the traditional values of our profession.

The proponents of lawyer advertising are very articulate, but I am confident a majority of lawyers do not agree with them. And it is not enough to express your disagreement to your family over the dinner table at home or to your partners in the privacy of your office or in your clubs. This is something that must be dealt with head-on.

I am not addressing the long-accepted practice that began with the sole practitioners, or small firms who placed their names on the office window or in a box announcement in the local paper. The announcement by a law firm of its name, address, and telephone numbers, and perhaps a brief state-

ment that it specializes in probate matters, for example, is not the kind of advertising I am talking about. Every member of this House and every person in this room knows what kind of advertising I am addressing. Some of the advertising would make a used car dealer blush with shame.

Another form of unprofessional and improper advertising is the "bait" used by some lawyers that the first conference will be "free." Of course, it is not unprofessional to give free legal advice, but advertising that the first visit will be free is a bit like a fox telling chickens he will not bite them until they cross the threshold of the henhouse.

Some have argued that advertising is imperative to give uninformed segments of the public proper access to the justice. This, I submit, is pure rationalization. We know it has long been the practice of some bar associations to place a box ad in the local newspaper from time to time announcing a "lawyer referral service." Readers are informed that if they have a legal problem, the referral service, upon finding out the nature of the problem, will submit the names of three lawyers or three law firms. The public interest does not need—indeed no lawyer needs—colorful, self-touting, or deceptive advertising in order to give people access to justice. I hope lawyer referral service programs will be expanded.

Another argument urged to support lawyer advertising—and it comes as a shock to me every time I hear it—is that because the Constitution permits advertising by lawyers, it is therefore ethically acceptable and professionally permissible—in short, the sky is the limit. The lead editorial in a recent national publication condemned the avoidance of admitting that something is wrong simply because that it is not specifically or even inferentially prohibited by the Constitution.*

I am confident that, upon mature reflection, responsible persons will agree that just because the Constitution permits

*Greenfield, *Newsweek*, July 28, 1986, p. 72.

an act, that does not make it ethically acceptable for the privileged profession of the law. A very significant parallel is found in the Speech or Debate Clause of the Constitution, which—as we know—provides that no Member of the House or Senate may be held liable for anything said in a “Speech or Debate” in either House. Surely no Member of Congress—no one in this room—would claim that this clause makes it *ethical* for a Member of Congress to inflict injury on others by making damaging, untruthful statements on the floor of Congress.

Another subject, also in need of careful scrutiny, is contingent fees. So far as I have been able to discover, we are the only country where that practice is accepted. I have said before, and I repeat now, that one of the first duties of a lawyer in dealing with a client, whether in relation to a personal injury or other claim, is to inform the client of the probability of success, as nearly as that can reasonably and fairly be evaluated. Every person in this room knows that in certain kinds of multiple disaster cases there is likely to be little question about liability. In such cases there is no place for contingent fees of the kind now widely practiced.

Many honorable lawyers have recognized this by agreeing to charge a fee not to exceed a fixed percent, with the final charge based upon the time involved and the results obtained. I do not, therefore, suggest that contingent fees be outlawed or abolished, but I do suggest that any study continuing from the excellent Stanley Commission Report should consider whether contingent fee agreements should be made subject to the control of the court having jurisdiction of the claim. That has been the rule everywhere I know of with respect to the claims of minor children. There is nothing new or radical about judicial monitoring of fees, which is well-established in class actions and in other areas. There is very little reason for a contingent fee contract.

Some of the criticisms of the courts and the profession have been too hasty and poorly informed. Study of the issues

raised by the Stanley Report will take time. The American Law Institute's seminal study of the division of jurisdiction between state and federal courts, and the monumental American Bar Association project on criminal justice standards, launched during the presidency of my colleague Lewis F. Powell and chaired by Judge J. Edward Lumbard were not accomplished on a tight time schedule. They took years.

We can dismiss the superficial criticism of lawyers that has been going on ever since Shakespeare put some negative words in the mouth of one of his characters—words invariably quoted out of context—but we cannot lightly write off thoughtful criticism of our profession. Recently, in the lead editorial of a responsible national magazine,* it was stated that “[i]t is time to re-examine the manner in which the nation's judicial system deals with injured parties,” to ensure that we not “turn the courts into a national lottery in which the winning names are the lawyers and certain plaintiffs. . .”

There has also been criticism of the bar for the lack of adequate disciplinary procedures. Our profession, including the Judiciary, must assume responsibility for meaningful disciplinary procedures. Up to this date, we have not done so adequately.

I am well aware that the need for stronger disciplinary measures is by no means limited to practitioners. In recent years, members of the judiciary, both state and federal, have been found guilty of violating criminal statutes. In cases involving federal judges, the Judicial Councils of the Circuits have moved promptly to deal with the problem. The misconduct of a few judges—state and federal—has helped to bring about the present state of public reaction toward the profession as a whole.

I sense that the hostility toward our profession is growing and has grown sharply in the last eight or ten years. One of the consequences is an increasing demand for legislation to

*Zuckerman, *U.S. News & World Report*, January 27, 1986, p. 80.

regulate the profession. For nearly 200 years legislatures have been content to allow us to regulate our profession. In 1969, the Association, not some legislative body, took the initiative in revising the Code of Judicial Ethics, and the more recent Model Rules of Professional Conduct. We must continue this pattern of responsible self-regulation.

Having said these things, some of which are not pleasant to discuss, and no more pleasant to hear, let me turn now to the extraordinary contributions the Association has made to the improvement of justice during the past 30 years and particularly during years while I have been in a position to observe them closely.

(1) At that annual meeting in Dallas just 17 years ago, I spoke at the breakfast of the Institute of Judicial Administration. The title of my remarks told the whole story—*"Court Administrators: Where Would We Find Them?"* At that time, we had 38 trained astronauts—and indeed some had just reached the moon at the time of the Dallas meeting—but qualified observers could identify no more than a handful of people in the United States who could accurately be called qualified court administrators. One of these was Edward McConnell, a disciple of Chief Justice Vanderbilt of New Jersey. Within 90 days, chiefly through the leadership of President Bernard G. Segal, the Institute for Court Management was formed, and in 17 years since then, it has trained hundreds of court administrators—created a whole new profession—and has had an enormous impact on the administration of justice.

(2) Legislation for court administrators in the federal system was strongly supported by the Association, and the new position of Circuit Executive came into being in 1971. I had asked Congress to provide similar court administrators for the metropolitan District Courts, but Congress elected to proceed slowly. Since then, again with the Association's support, Congress authorized court administrative positions for seven large metropolitan District Courts on an experi-

mental basis. With your continued support, I am sure we will ultimately secure such positions for every metropolitan United States District Court.

(3) At the prayer breakfast in Dallas, I spoke of the dismal situation in our prisons. Immediately following the 1969 Dallas Convention, the Association created the Commission on Correctional Facilities and Services, chaired by then Chief Justice Hughes of New Jersey. That Commission's studies continued over the years and were followed by two national conferences. In 1983, a team of 10 American leaders visited Scandinavian prisons, and this in turn generated the National Conference on Corrections, sponsored by George Washington University and the Brookings Institution. Following that conference, George Washington University created the National Center for Innovation in Corrections, which is the first such department of any American university. All this activity can be traced step-by-step to the American Bar Association studies beginning in 1969.

(4) In recent years, the Association, consistent with its N.I.T.A. and C.L.E. programs, has encouraged law schools to add practice-related courses on trial advocacy and professional responsibility. This supplemented the traditional appellate moot court programs. It is now a common practice for both state and federal judges to conduct trials in law school trial courtrooms. These developments have, in turn, led to an increased use of adjunct faculty from the bench and bar, with constant emphasis on ethical standards.

(5) The Association also jointly sponsored the 1971 Conference on the Judiciary at Williamsburg. The National Center for State Courts was born at that meeting, and today its \$3 million headquarters in Williamsburg is a fountain of ideas and material to help to improve state courts. And the Association was a large factor in securing financial support for the Center.

(6) Possibly in the future we may see that one of the Association's great contributions was the so-called Pound Confer-

ence of 1976 which opened in the same room, and indeed at the same lectern, where Roscoe Pound had delivered his powerful indictment of the flaws in our system of justice 70 years earlier. The Pound Conference led to a new addition to the vocabulary of the law: ADR—Alternative Dispute Resolution. Our distinguished colleague, Griffin Bell, was appointed chairman of the Association's committee to pursue study of alternative ways to deliver justice swiftly and at less cost and stress to the American people. As Attorney General, he made this—ADR programs—a major program of the Department of Justice.

(7) When Congress created what came to be known as the Hruska Commission to study the problems of appellate courts, the Association again gave support to this significant study. The fact that some needed improvements urged in this important study have not been accomplished is not the measure of the Association's contribution, even if at times we did not agree fully. Happily, it was only twice by my count that the position of the Association differed from mine. One of these questions was the elimination of diversity jurisdiction, and I freely confess that is a subject on which reasonable people can disagree.

I could go on with a longer list of programs and projects that would not have succeeded without the support and leadership of the Association. It is difficult for me to find words to express my gratitude to the Association and its leaders for support over these 17 busy years, so I will close with a simple "Thank you."

Supreme Court of the United States
Washington, D. C. 20543

*Justices
File*

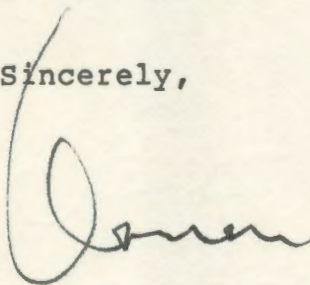
CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

September 30, 1986

Dear Lewis:

I am enclosing a copy of my letter to Frank Dewey, and I confess that the first twenty pages or so are fascinating. Sometime I will give you a look at my unpublished casual after-dinner speech on Jefferson, Marshal, and Burr. However, in deference to your seniority and age, I have some hesitation, as a younger man, in ever sending you any copies of my speeches, although I appreciate copies of yours!

Sincerely,



Justice Powell

Attachment

Supreme Court of the United States
Washington, D. C. 20543

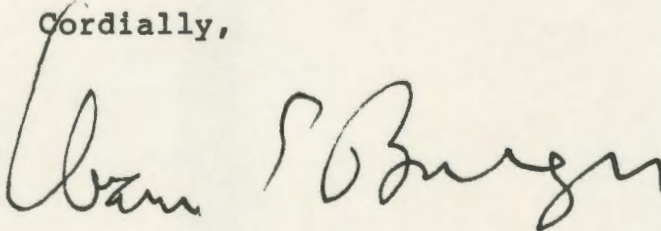
CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

September 30, 1986

Dear Mr. Dewey:

Thank you very much for the copy of your book on Thomas Jefferson LAWYER. I have, not surprisingly, been doing more reading in this general area in the last year--along with a few other things--then in a long time. Jefferson's life has always fascinated me, and I have sensed that he is one of the most complex men in our entire history. I have already started reading your excellent book, and I am grateful to you and Lewis Powell for it.

Cordially,

A handwritten signature in dark ink, appearing to read "Warren E. Burger". The signature is fluid and cursive, with the first name "Warren" written in a smaller, more compact script than the last name "Burger".

Mr. Frank L. Dewey
5819 Williamsburg Landing Drive
Williamsburg, Virginia 23185

CG 13

October 6, 1986

Dear Chief:

My thanks for the copy of your note to my brother-in-law, Frank Dewey. I agree that his little book on Thomas Jefferson as a Lawyer, reflects years of research and scholarship. Frank is a graduate of the Harvard Law School, and has had a fine career as a lawyer and law teacher.

Frank and my sister Eleanor now live in Williamsburg. I hope they have the opportunity to meet you now that you have become the Chancellor of the College of William and Mary.

I would indeed enjoy seeing a copy of your after dinner speech on "Jefferson, Marshall and Burr". On a more important subject, Jo and I like to think of you and Vera at Palm Beach. This is a period of rest you and she have long deserved.

As ever,

Chief Justice Burger

lfp/ss

bc: Mr. and Mrs. Frank L. Dewey

Burger

October 13, 1986

PERSONAL

Dear Chief:

As we have the McCleskey/Hitchcock cases to be argued on Wednesday, I think it is best for me not to attend the Tuesday night dinner in your honor at the Alibi Club.

In view of the vast importance of these cases, and what well may be a close vote among the Justices, I will stay with my "homework" Tuesday evening.

I attended an Alibi Club luncheon on October 3, and there was considerable enthusiasm about the dinner in your honor. I would appreciate your explaining my absence.

I hope you and Vera had the rest at Palm Beach you both long have needed.

As ever,

Chief Justice Burger

lfp/ss

October 23, 1986

PERSONAL

Dear Chief:

Lewis III is Chairman of the Program Committee of The Bar Association of the City of Richmond, and I learned yesterday that he has invited you to speak at one of the monthly luncheon meetings.

I told Lewis that you were heavily committed, and he will understand if you think it best to decline. A great deal of the Bicentennial history was made by Virginia participants. You would find an enthusiastic audience of some 500 or more Virginia lawyers and public officials, including the Governor and Attorney General.

Now that the October arguments are concluded, I can say that all of us missed you a great deal. No one presides over the Court or a meeting quite as well as you do. It is fair, however, to add that our friend and your successor, the new Chief Justice, is performing very well.

Sincerely,

Chief Justice Burger

lfp/ss

December 5, 1986

Dear Chief:

You may recall that our son Lewis III is the Program Chairman for The Association of the Bar of the City of Richmond, and that you have received a warm invitation to speak at one of its luncheon meetings preferably in March but in February if that were more convenient for you.

The March dates that are available include 16th, 19th, 23rd, 25th and 26th. If you should not be able to attend in March, available dates in February include the 12th, 19th, 25th and 26th.

Normally I would not affirmatively support an invitation to you (least of all one submitted by our son) because I know how burdened you are with requests from all over the United States. I do view Richmond as different in the Bicentennial Year. You have visited the John Marshall home there, one of the great legal shrines in our country. You also spoke (indeed, I introduced you) in the Capitol building that was designed by Thomas Jefferson. When Williamsburg became too dangerous a place, the capital of Virginia was moved to Richmond. And, of course, many of the greatest names in our early history are from Virginia: Washington, Jefferson, Madison, Monroe, Mason, Randolph, Patrick Henry, George Wythe (the first professor of law, appointed by Thomas Jefferson), and numerous others.

The audience would include the Governor, Lt. Governor and Attorney General of Virginia, and there would be about 600 lawyers at the luncheon in the John Marshall hotel. Richmond is a two-hour drive. A hotel suite would be available for you, both before and after the meeting, and I would be happy to accompany you, if invited!

The only negative is that Richmond was the capital of the Confederacy, and your grandfather won the Medal of Honor for killing Confederates. If I introduce you, I will be careful not to mention this unhappy historic fact.

As ever,

Chief Justice Burger

lfp/ss

bc: Lewis III

December 19, 1986

Dear Chief:

Your letter to the President supporting substantial increases in judicial salaries is typical of your thoughtfulness. I wish that every federal judge in our country had a copy of your letter, and could know of the efforts you have made over the years to obtain more reasonable compensation for members of the federal bench.

We have missed seeing you and Vera.

As ever,

Hon. Warren E. Burger

lfp/ss