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Heart and Soul . . . and Where Should We Go From Here?

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HEART AND SOUL . . . AND WHERE SHOULD WE GO FROM HERE?

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I welcome you all to the joint meeting of the Legal Services Commission and the Legal Education Commission of the State Bar of Wisconsin.[1] This is an historic occasion not only because it marks the conclusion of almost two years of intensive work by both Commissions, but because in my view, these Commissions have made an invaluable contribution to the lawyers of this state and to the future of the legal profession.

The work of these Commissions also significantly advances the mission of the integrated Bar, and forecasts an increased role for the Bar going into the 21st century.

I. WHERE HAVE WE BEEN?

In Wisconsin, of course, we know what it means to fight for the integrated Bar. We have been fighting for it since 1959, when Trayton Lathrop instituted his challenge which ultimately ended up in the United States Supreme Court.[2] But in the last 10 years, our fight has been without interruption, with four separate federal district courts cases,[3] and five straight years of arbitration.

In September, 1986, then President Frank Gimbel asked me to

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* President, State Bar of Wisconsin 1995-96. Mr. Skilton chaired the Commission On The Delivery Of Legal Services Of The State Bar of Wisconsin ("Legal Services Commission"). He received his bachelor's and juris doctor from the University of Wisconsin-Madison in 1966 and 1969 respectively and went on to clerk for the Honorable Thomas E. Fairchild at the U.S. Seventh Circuit Court of Appeals.

1. These remarks were delivered to the joint meeting of the Legal Services Commission and the Legal Education Commission of The State Bar of Wisconsin on March 2, 1996. Both Commissions were appointed in 1994 and were expressly commissioned to study their respective issues and report back to a joint meeting of both Commissions on March 1-3, 1996. At this meeting both Commissions produced draft reports for discussion. These remarks have necessarily been edited and updated to reflect developments since March 3, 1996.

2. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

3. Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd sub nom.*, Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989); Crosetto v. Heffernan, 810 F. Supp. 966 (N.D. Ill. 1992), *aff'd in part, rev'd in part and remanded*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994); Thiel v. State Bar of Wisconsin, No. 93-C-6035 (W.D. Wis. Dec. 1, 1993); Thiel, et al. v. State Bar of Wisconsin, et al., No. 95-C-103-S (W.D. Wis. Sept. 5, 1995).

represent the State Bar in a case brought against it by Steve Levine. I said "sure, why not?"—and thought to myself that at most this would be a case resolved by motion, and over in a year, or two, at the most. But on February 19, 1988, Judge Crabb, applying a different legal test than the one the United States Supreme Court had applied in *Lathrop*, declared the State Bar unconstitutional. Judge Crabb wrote, in part, as follows:

> Although the activities cited by defendants are relevant to the goals of professional responsibility and competence, they are of a quite different nature from those presented to the Supreme Court twenty-seven years ago in *Lathrop*. It is not the Bar but arms of the Wisconsin Supreme Court that are primarily responsible for the "educational and ethical standards" of Wisconsin lawyers; and it is not Bar membership dues that support these arms. The Bar challenged by plaintiff is not the same bar examined in *Lathrop*.[4]

On December 8, 1988, the Seventh Circuit Court of Appeals reversed the district court's decision in *Levine*, stating, in part, as follows:

> In fact, the plurality opinion [in *Lathrop*], in justifying its decision, expressly noted the multifaceted character of the Wisconsin bar . . . . Thus, in our view, the district court overemphasized the importance of the bar's role in the areas of continuing legal education and attorney discipline to the *Lathrop* Court.[5]

Shortly after the Seventh Circuit decided the *Levine* case, the United States Supreme Court granted certiorari in the case of *Keller v. State Bar of California*.[6] In *Keller*, the Court affirmed the continuing viability of *Lathrop*, but sought to distinguish between lawful and unlawful use of "mandatory dues," and to impose appropriate arbitration procedures to permit dissenters to challenge the use of their dues. The Court stated in part:

> [T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State."
>
> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and

4. *Levine*, 679 F. Supp. at 1493.
5. Levine v. Heffernan, 864 F.2d at 462, 462 (7th Cir. 1988).
6. 496 U.S. 1 (1990).

> those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern.[7]

During this same period, and in response to Judge Crabb's decision, the Wisconsin Supreme Court, by order dated May 6, 1988, suspended the mandatory State Bar membership rules. Thus, our Bar remained voluntary until July 1, 1992—a period of over four years. But after a challenge to the Florida integrated bar was turned down by the United States Supreme Court,[8] the State Bar petitioned the Wisconsin Supreme Court to reinstate the integrated Bar in Wisconsin. By order filed June 17, 1992, the Court granted the Bar's petition.[9]

In his concurring opinion in the "reintegration order," Justice Bablitch put his finger on the benefits of the mandatory bar:

> All lawyers have a special responsibility to society. That responsibility involves far more than merely representing a client. Lawyers are the guardians of the rule of law. The rule of law forms the very matrix of our society. Without the rule of law, there is chaos. Lawyers not only have a responsibility to their clients, they have an equal responsibility to the courts in which the rule of law is practiced, and to society as a whole to see that justice is done.
>
> The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent. Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees.[10]

I would like to tell you that the litigation ended with the Supreme Court's reintegration order. But, of course, it did not. After reintegration, the dissenters sued again, now to attack *any* use of Bar funds for any purposes that are not literally within the two purposes expressly identified in *Keller*.

So far they have not succeeded. After the first arbitrator (following reintegration) unduly restricted the use of mandatory dues, the Wisconsin Supreme Court granted the Bar's petition to amend SCR 10.03(5)(b) so as to make it express that the Bar had the right to use

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7. 496 U.S. at 14, 15-16 (citing *Lathrop*, 367 U.S. at 843 (plurality opinion)).
8. Gibson v. Florida Bar, 502 U.S. 104 (1991).
9. In Matter of State Bar of Wisconsin, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).
10. *Id.* at 29, 485 N.W.2d at 227, 228 (Bablitch, J., concurring).

mandatory dues for any purpose within its stated purposes. The new rule also made it clear that if the activity was "political" or "ideological," it had to meet the *Keller* "germaneness" tests or could not be funded from mandatory dues. In a decision dated September 6, 1995, Judge Shabaz rejected a challenge to this new rule, finding it constitutional. This decision, of course, has been appealed. It has now been fully briefed, and is set for argument, by Dan Hildebrand (I am now a defendant) on March 23, 1996. I predict that we will win, and that decision will, effectively, end the litigation.[11]

II. WHERE ARE WE NOW?

I believe that, in the end, we State Bar members have benefitted from these litigations, although this was not the intent of the dissenters. In the process we were forced to embrace our purposes, commit to our mission, find our strengths, and accept our limitations. And we also came out with a little more intestinal fortitude, *i.e.*, committed to the proposition that we would not be silenced by dissenters or intimidated by lawsuits.

A. Benefits Obtained During Our Experience As A Voluntary Bar (1988-92)

No one could have attended the Mid-Winter Meeting of the State Bar in Milwaukee in January (1996) without coming away with a sense of renewed commitment to the organized Bar. Wherever you looked, something exciting was going on—for the benefit of lawyers and the clients they serve. The technology displays and offerings were awesome. The programs and seminars were well attended and right on the money. Total attendance was the highest in 20 years.

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11. On September 3, 1996 (six months after this speech was delivered) the Seventh Circuit affirmed the district court. Thiel v. State Bar of Wisconsin, 94 F.3d 399 (7th Cir. 1996). The Seventh Circuit Court pointedly stated: "This case represents the latest chapter in the seemingly neverending battle between Wisconsin attorneys and the Wisconsin State Bar." *Id.* at 400.

The decision affirmed the district court both on its decision to grant Eleventh Amendment immunity to the State Bar and with respect to its approval of new SCR 10.03(5)(b)(1). Crucially, it held as follows: "Accordingly we hold that the First Amendment does not prohibit the Bar from funding non-ideological, non-germane activities with compelled dues." *Thiel*, 94 F.3d at 405. Two weeks later, on September 17, 1996, the Seventh Circuit affirmed the district court's dismissal of the *Crosetto* case. Crosetto v. State Bar of Wisconsin, 97 F.3d 1454 (7th Cir. 1996) (unpublished table decision), *cert. denied*, 117 S. Ct. 959 (1997). On December 16, 1996, Mr. Crosetto filed a Petition For a Writ of Certiorari in the United States Supreme Court that was subsequently denied. *Id.*

There is no doubt that the State Bar of Wisconsin implemented major changes while it was a voluntary Bar. These changes have been, on the whole, positive. During this four-year period, the Bar took steps to solicit and ensure increased member input, involvement and participation in Bar programs, projects, and activities. These steps included aggressive campaigns to inform members of specific Bar opportunities; recognition of members for their contributions; and increased efforts to provide members with the tools needed to help them practice law more efficiently. Perhaps the most important thing the Bar learned was that if it has an active, informed and well-supported membership, and if it operates with the energy and spirit of a *voluntary* organization, then its potential as a positive force is virtually unlimited.

B. Lessons About Being A Mandatory Bar

SCR 10.02(2) lists the purposes to the State Bar and charges the Bar to improve the administration of justice, to create opportunities for legal education, and "to promote the innovation, development and improvement of means to deliver legal serves to the people of Wisconsin; *to the end that the public responsibility of the legal profession may be more effectively discharged.*"[12] Although these have been our stated purposes since time immemorial, the litigation in combination with the accompanying unrelenting scrutiny of our innards, have focused our attention, energy and interest on pursuing them full force. And so we have.

Watch our Bar work: we take stands, we take risks, we make tough decisions, and we have not shied away from controversy. "Tort reform," you say? The Bar has taken a position. The death penalty? Likewise. But we have also tried to select positions based on the *peculiar knowledge* that lawyers have, and for systemic, institutional reasons. At the same time, we have respected the constitutional implications of taking "political" or "ideological" positions and, accordingly, have carefully accounted for, and deemed "nonchargeable," positions and activities that fall within the penumbras of these concepts.

That, in my opinion, is what the law requires—but no more. It does not gag us. It does not render us impotent.

That our Bar has come a long way in the last ten years was graphically brought home in an ABA meeting of integrated bars that I attended in February in Baltimore. At the meeting, the some thirty-plus integrated bars were asked to report on their "*Keller* status." Surprising-

12. SCR 10.02(2) (1996) (emphasis added).

ly few had been sued. But it soon became quite clear, as each reported, why this was so. The response the vast majority had taken to the *Keller* decision, was to avoid taking any controversial action, *i.e.*, to mimic the ostrich. These bars were not just defensive, they had been rendered innocuous and impotent for fear of suit.

As you might guess, when it came my turn to report, I strongly stated my dissent and noted that the State Bar of Wisconsin had refused—at some cost—to be rendered irrelevant. Indeed, I stated that if this were to become so, I would personally petition the Wisconsin Supreme Court to make the State Bar voluntary.

The point is that, when properly understood, the mandatory bar has both the will and the resources to be a force, a player, in dealing with the problems of the legal system, the profession, and, ultimately, the public. *Indeed, for the reasons articulated by Justice Bablitch, it is far more likely to do this than a voluntary bar, which, of necessity, must concentrate on member service and member retention issues.*

Thus, as President, I have taken the opportunity to formulate and hopefully implement an agenda that would promote the mission of the Bar and be consistent with *Keller*. Integral to this agenda was the formation of these two Commissions, *i.e.*, the Legal Service Commission, whose mission is "to improve access to and the availability of legal services to the citizens of Wisconsin"[13] and the Legal Education Commission, whose mission is "to enhance legal education in Wisconsin and the quality of legal services provided to the public."[14]

III. WHERE SHOULD WE GO FROM HERE?

In my opinion, the reports of these Commissions are solid and will serve to advance the fundamental purposes of the Bar for years to come. Although Dean Eisenberg is a tough act to follow, some remarks by me about the work of each Commission seems appropriate.

A. The Legal Services Commission Report

When the Legal Services Commission was first established, I viewed its mission to be looking for ways to improve legal service delivery to persons of moderate income including the so-called "working poor." This point of concentration followed upon recent ABA studies that had

13. *Commission on the Delivery of Legal Services, Final Report and Recommendations*, 1996 STATE BAR OF WISCONSIN 1 [hereinafter *Commission on the Delivery of Legal Services*].

14. *Commission on Legal Education, Final Report and Recommendations*, 1996 STATE BAR OF WISCONSIN 2 [hereinafter *Commission on Legal Education*].

identified and attempted to quantify unmet legal needs for this group.[15] It was also believed that the in-place, federally-funded legal services delivery system to the poor, as supplemented by *pro bono publico* contributions by the Bar, did not require immediate attention.

But how wrong I was. In November 1994, of course, the power shifted to a Congress bent upon significantly de-funding the Legal Services Corporation. As the Legal Services Commission Report notes, the effect upon our Wisconsin legal services law firms has been immediate and profound.[16] Thus, and necessarily, the scope of our Commission's work was broadened. Hopefully, our recommendations, and, particularly, our pilot projects, will help to alleviate the consequences of these deleterious actions.

Some overarching comments on the Report and its recommendations seem entirely appropriate. First, and most importantly, the Report is premised upon the proposition that all "solutions," in the end, must necessarily depend upon lawyers being involved, if not in traditional ways, at least in supportive and quality-control ways. Thus, all of our recommendations, and the accompanying pilot projects, assume an intimate and material role for lawyers.

Secondly, the Report and recommendations fiercely depend upon the concept of *voluntary*, as distinct from *mandatory*, participation by the Bar. Here it is important to make the distinction between the concept of a mandatory membership in the Bar and mandatory participation in *pro bono*. In point of fact, *pro bono publico* has traditionally depended upon the voluntary, public-spirited *giving* of time (or money) by lawyers. Dean Eisenberg said, and I agree, that mandatory giving is an oxymoron.[17] The Commission's Recommendation No. 8 expressly adopts this position.[18]

Thirdly, the Report and recommendations identify and promote the need for *institutional* response to these seemingly overwhelming problems. Thus, for example, the Commission recommends that the Bar itself increase its institutional role;[19] that law firms increase their institutional role;[20] and that the courts, including the Supreme Court,

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15. *Commission on the Delivery of Legal Services*, *supra* note 13, at 2.
16. *Id.* at 2.
17. *See id.* at 74 (President's Perspective, *Mandatory vs. Voluntary: An Old Refrain*).
18. *Id.* at 38 (Recommendation No. 8).
19. *See, e.g.*, *id.* at 43-44 (Recommendation No. 11); *see also id.* at 51-52 (Pilot Project No. 1).
20. *Id.* at 42 (Recommendation No. 10).

increase their institutional role.[21] What the Commission found, at least in part, was a lack of knowledge about, not to mention coordination of, the significant volunteer time freely given by large numbers of lawyers. The conclusion was inescapable that increased institutional involvement is needed not only to encourage and stimulate *increased* giving, but to synergize and render more efficient *existing* giving.

At the same time, however, the Legal Services Commission Report does not lose sight of the fundamental proposition that the responsibility to provide for legal services for the poor is not only the legal profession's, but the public's as well.[22] Thus, fundamental to the Report—as specifically stated in Recommendations No. 12 and 13[23]—is the need for funding of legal services for the poor *from sources outside of the profession itself.*

Finally, it should be pointed out that the approach taken by our Commission was somewhat different than the approach recommended by the ABA, for example in its "Just Solutions"[24] model. Thus, although we involved the public in the "input" stage,[25] we have not done so in the "design" stage—at least not to this point. This was intentional. It was the Commission's view that to have any real chance of success, lawyers—as they would be the ones most affected—must both design and ultimately subscribe to, the solutions. A related concern was that it would be dangerous, and potentially counter-productive, to create unrealizable expectations of the public.

In the end, the Report and recommendations attempt to be creative while maintaining control even where new or experimental forays are promoted: control by the court and/or lawyers of the legal information and services ultimately "delivered" to the public. This stems from a deep-rooted concern that good intentions and commendable motivations notwithstanding, there is still the potential risk of harm to the public.

The recommendations, and particularly the pilot projects, while being conceptually different, are hoped to work in synergy. They are intended to be interwoven and interdependent, while experimenting with different approaches and concepts. In my opinion, each is important, and each needs to be tried, separately and in combination. But if we find that

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21. *Id.* at 30-34 (Recommendations No. 3, 4, 5); *see also id.* at 53 (Pilot Project No. 2).

22. *See id.* at 76-77 (President's Perspective, *With Friend's Like These*); *see also id.* at 79 (*Our Justice System Can't Afford Cuts To Legal Services For Poor*).

23. *Id.* at 45-48 (Recommendation No. 12, 13).

24. *See Just Solutions Seeking Innovation and Change in the American Justice System*, 1994 A.B.A.

25. *Id.* at 18-22.

some of the solutions don't work, or, worse yet, hurt the public, then they can and should be scrapped.

As Dean Eisenberg pointedly commented, however, none of the recommendations or pilot projects will succeed unless we, the profession, do a better job of legal resource allocation. We must find ways to better match-up underutilized lawyers with unmet legal needs. Indeed, this may be our greatest challenge, and to do this, we will need full commitment by the Bar, the court, the law schools and the lawyers themselves.

B. The Legal Education Commission Report

I turn now to the Report of the Legal Education Commission.[26] Dean Eisenberg and Justice Heffernan have amply described the substance and purpose of the Legal Education Commission's recommendations. Let me turn, then, instead to the point of joinder of the two reports, that being the profession's responsibility to deliver legal services to the poor. As stated in the Legal Education Commission Report: "Unfortunately, for segments of the population, the increasing need for legal services has not been met by an increasing supply of affordable or no cost representation."[27] Accordingly, as part of the value "to promote justice, fairness and morality,"[28] the Report notes the responsibility "to ensure that adequate legal services are provided to those who cannot afford to pay for them; and [to contribute] to the profession's fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice."[29]

The concept of partnership, too, plays loudly in both Reports. The obvious partnerships are expressly identified: between the bar, local bars, the court, court clerks and administrators, law librarians, and the law schools and their faculty. But other potential partnerships are identified and may, in the long run, have even more potential, *i.e.*, with government agencies, public librarians, private foundations, volunteer organizations, and other members of the "public."

The Reports also have in common the willingness to listen to our critics and to the consumers of our services—our clients—and the public. If we listen, we can learn and improve ourselves.

Both Reports also implicitly raise troublesome questions of whether

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26. *See Commission on Legal Education*, supra note 14.
27. *Id.* at 5.
28. *Id.* at 17 (Recommendation No. 1).
29. *Id.*

they go far enough or can really make much difference. In this regard, the most disturbing and disconcerting statement for me in either Report was the following: Many women and minorities in the profession have also questioned whether informal mentoring by experienced practitioners is available to them to the same extent that it is available to white male attorneys at the start of their careers.[30] If this be true—or even if it is just a perception—it must be remedied. For in my mind, and in the end, all of the "formal" educational opportunities so carefully identified and aggressively promoted in the Legal Education Report cannot replace personal mentoring: the kind that occurs late at night on real cases; that tests nerve, ethics, and courage; when something important is really at stake. No set of solutions should presume to replace this kind of personal, hands on, real life, mentoring.[31]

I daresay it is the kind of mentoring that each of us in this room received. And if it is not occurring, then we must remedy this situation. We owe.

CONCLUSION

I would like to conclude these remarks by offering at least one lawyer's perspective on where we as a profession are today and, with this in mind, suggest how these Reports should be read. Said in the negative, in my opinion these Reports should not be misread to infer that our profession is in deep trouble or hopelessly beyond repair.

Yes, the legal profession is under attack. True enough, large numbers of people have voiced concerns about the quality and cost of legal services. And as shown by these Reports, we have listened, and we will respond.

But as we probe and expose our problems, we must not lose our essence or fail to remind the public of what we do, and more to the point, what we must do. We must not ignore our oath nor forget our mission. We must not lose our heart and soul.

I mentioned earlier today that I recently had occasion to reread *To Kill A Mockingbird*.[32] I did so after receiving considerable criticism for inviting Johnnie Cochran to our Bar meeting in Milwaukee. And although I do not strictly compare Johnnie Cochran's role in the O.J. Simpson trial to that of Atticus Finch in *To Kill A Mockingbird*, both

30. *Id.* at 6.
31. *See generally id.*
32. HARPER LEE, TO KILL A MOCKINGBIRD (Lippincott Co. 1960).

roles caused me to reflect on what the "public image" of the legal profession is, or, more accurately, what we really want it to be.

You remember Atticus Finch. In the face of public outrage, risking all, he took a controversial representation—and lost. In my view, the most poignant quote in the book says it all: "'don't see why you touched it in the first place,' Mr. Linkdeas was saying. 'You've got everything to lose from this, Atticus. I mean everything.'"[33] After Atticus tried that case, and lost, he was leaving the courtroom when those who so fervently wished for a different result, and were so bitterly disappointed by the verdict, nevertheless stood up as he passed: "Miss Jean Louise stand up. Your father's passing."[34]

In 1848, Abraham Lincoln took the representation of a fugitive slave owner, seeking, on the slaveowner's behalf, to have a slave returned from Illinois under the Fugitive Slave Act. For his efforts Lincoln was called the "Slave Hound of Illinois." Abraham Lincoln was undoubtedly "the Great Emancipator," but he was a lawyer first!

In 1850, just two short years later, Lincoln authored "Notes On The Practice of Law."[35] He wrote:

> here is a vague popular belief that lawyers are necessarily dishonest. I say *vague*, because when we consider to what *confidence*, and *honors* are reposed in, and conferred upon lawyers by the people, it appears improbable that their *impression* of dishonesty is very distinct and vivid. Yet the impression, is common—almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.[36]

Not fancy, but simply put and right on the mark! Lincoln's point is that honesty is the *sine qua non* of being a lawyer—not liking your client or his issue, *not* popularity, *not* winning, and *not* even being "right." Tough cases. Unpopular positions. Against all odds. The price perhaps being vilification and even contempt. If this is the price we must pay, if our "public image" suffers as a result, then I, for one, say "so be it." In my view, nothing we say or do here today, or state or suggest in these

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33. *Id.* at 135-36.

34. *Id.* at 194.

35. ABRAHAM LINCOLN, *Notes on the Practice of Law*, *in* LINCOLN, SPEECHES, AND WRITINGS 1832-1858 (1989).

36. *Id.* at 246.

Reports, should in any way detract from the role that we, the lawyers, must occasionally play: we cannot throw the baby out with the bathwater.

Is our image worse today that it was 150 years ago? Perhaps. I think these Commissions will help to improve our performance and, perhaps in the process and as a result, our image. But improving our image is not what we set out to do, and, in any event, such an effort would likely fail.

I want to end on this note. I said when Frank Remington won the Goldberg Award that it was up to the next generation to take up the torch in order to pass it on. These Commissions have taken up that torch, and are running as hard as they can—perhaps against the wind.

I am proud to be in your presence. I am honored by your commitment. The Bar has been well served. And most importantly, I am proud to be a lawyer.