Remarks to the Akron Bar Association

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REMARKS TO THE AKRON BAR ASSOCIATION*

by

THE HONORABLE FRANK J. BATTISTI**

I appreciate the opportunity to deliver these remarks to the Akron Bar Association's Federal Practice Seminar. I take this opportunity, not to address a particular procedural device or development in federal practice, but rather, to speak about the deep bonds which connect judges and lawyers. In particular, I will examine our association as it applies to the public life and some of its professional or occupational hazards. In a general way, I will discuss whether one who embarks on a public career with conviction and intellectual integrity can pursue his calling, unsullied or without taint, and what standards should be used to judge the person.

First, I proceed from the assumption that all of us as lawyers are indeed public men and women. It is of course the case that not all lawyers are public officials in the strictest sense; not every lawyer holds a position in the government or public institutions. However, lawyers are by their very calling thrust into the public eye. Their work, even when it is in the service of private corporations, involves the structuring of society. Although such structuring is most often incremental (and rightly so), the ultimate consequence of our daily practice is the creation of rules governing the conduct of people and institutions.

It is therefore no accident that lawyers are sought out to hold positions of responsibility and trust in the government and the community. By virtue of the lawyer's training and practice, he enters the public realm. Lawyers examine and invoke public policy, especially when neither the established law nor the facts favor their case. But practitioners know when they raise matters or arguments of policy that they are not futilely playing to an empty gallery. Both judges and lawyers, however, are sensitive to the broader impact of their cases on the world outside. Suffice it to say, that our profession makes us public creatures.

This status not only subjects us to serious responsibilities, that is to say leadership and trust, but also subjects us to great scrutiny. In an earlier time, lawyers and judges may have toiled away, doing their work in anonymity and obscurity. It was not long ago, in such a celebrated case as the Scopes Monkey Trial, that the public might have wondered what Clarence Darrow looked like.

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**Chief Judge, United States District Court, Northern District of Ohio. A.B. 1947, Ohio University; J.D. 1950, Harvard University.

I am grateful to Harsha Murthy, J.D. 1984, Stanford University, and Robin J. Frank, J.D. 1984, New York University, for their assistance in preparing these remarks.
the color of his suspenders or what he did with his time outside the courtroom. Clearly, they never knew. However, what they really remember is his performance. To paraphrase one of my favorites, Piero Calamandrei: the highest compliment a lawyer can receive is that the judge remembers the lawyer’s arguments long after he has forgotten the lawyer’s name and appearance.¹

What has emerged though is that the arguments and issues have been replaced from time to time by “a cult of personality.” It is difficult to identify the causes of such a change in focus. There is no denying that some people have always held a fascination for other people who wield power or influence. But, in recent years, virtually every public official has come under such scrutiny, even those whose lives do not display the flamboyance or eccentricity which usually pique the public imagination.

It is, however, not inaccurate to say that the media has played the primary role in this obsession with personality. Perhaps it was the advent of television which completely brought down the wall separating leaders from their constituents. But it was not new technology alone which eroded the privacy of individuals in the public sphere. Rather, the press also embraced a new attitude, one which emboldened them to examine matters which in an earlier time would have been outside the boundaries of their coverage and propriety. This new attitude culminated in the so-called “celebrity journalism” of the 60’s and 70’s in which, in the true apotheosis of personality, the facts became irrelevant and an interview drew more attention because a particular reporter, local, national or international, was asking the questions or covering the story than what was said or done by the person being interviewed.

Actually, it was the Watergate hearings that truly spawned this atmosphere. It was not unusual at that time to see throngs of reporters following public officials as they left their homes and offices in the morning; and at night they were greeted by reporters who had camped out on their lawns. Such men had their lives totally disrupted, their families and friends pursued and harassed. Some may even say that this treatment is deserved since these men were subjects of investigations and later some were convicted of crimes. At this point I do not wish to consider whether any person “deserves” such treatment. Rather my observation is simply that an environment developed in which such activity could take place without the public claiming an outrage.

The unfortunate fact is that this situation persists today; it can be seen in everything from the Ferraro-Zacarro matter to the amusing coverage of what the First Lady would wear to the inaugural. Once again, my point should not be missed or misconstrued. It is simply that material which was once relegated to the society or gossip columns and journals has become a staple of

our news diet. That which was once considered trivial or only worth burying on the inside pages has surfaced as the lead story on the front page.

I have touched on press coverage momentarily because it is the medium through which our perceptions of people are filtered. Since most of us cannot expect to personally meet our public officials long enough to assess them, we rely on the presentations we get in the media. While it is true that live coverage permits us to see more directly the events of the day without the filter of a reporter's perceptions and analysis, we are still largely the recipients of three to five minute or three to five second "snippets" of tape and voice-overs. We thus are forced to derive opinions and presume ourselves informed without the benefit of context or consideration.

Nor should my remarks be construed to apply only to television. Although it is reported that 75% of all the people in the country get all their news from television, the print media have adopted similar techniques. The increase in advertising copy, the demise of afternoon dailies resulting in more one newspaper towns, and the trend on the part of some papers to adopt a TV-like format to cater to the shorter attention-spans and cravings for excitement in the community, all distract people from the facts. Clearly, then, the entire story is not getting to the public on a multitude of issues.

I am of course not delivering a lecture on the press; that is not my topic today. I have raised it only to identify the press as the medium which creates and reports on events. I use the word "creates" because I have concluded, and this is neither a unique nor new idea, that the press deals essentially with images, with appearances. And this fact is not disturbing in itself; indeed, the press has often given us very beautiful or disturbingly moving images, everything from pictures from space to the liberation of concentration camp survivors, from the release of American hostages to the murder of famous and common men, from soldiers to presidents. No, the danger I see is that we as lawyers and judges, (not simply as professionals with a duty to uphold but like all people interested in the truth), will begin the process of judging others based not on reality but on appearances. This is a dangerous standard.

Clearly, we as lawyers and judges know that our job is not precisely reaching the truth. Without venturing into the world of epistemology and whether the truth can ever be known, it is enough to say that we as judges and lawyers seek to find a civilized and socially accepted means to resolve disputes. Nonetheless, while we may understand our roles as dispute-resolvers, the gloss or perception among the public is that the search for truth and justice is our daily task. I raise this point only to clarify my statement that we are perceived as truth-seekers, not as dispute resolvers; and when we let appearances become the basis for judgment rather than reality, we do a disservice to our profession and the public.

I asked when I began these remarks, by what standards should public men
and women be judged and what can they expect when embarking on a public career. I have already suggested that they can expect to be subjected to a greater degree of scrutiny from the press as to their lives outside the halls and chambers of their office buildings. What I am now addressing is whether such a focus is appropriate. I think not. Earlier I said that judging by appearances was a “dangerous standard.” But in a larger sense the word “standard” is inaccurate; for the real danger in judging men by appearances is that we have no standards at all to guide us.

A recent event will illustrate my point. During the confirmation hearings for Attorney-General Designate Edwin Meese, a Senator from the East made an interesting statement. I will paraphrase his remarks because all of us know from reading depositions just how engrossing transcripts can be. Well, the Senator admitted that he and his colleagues as well as the special prosecutor who had investigated Mr. Meese had found no violation of the law in his conduct. Furthermore, if I am correct, the Senator said he had not found a violation of any ethical canons on the part of Mr. Meese. However, he said, “I have too high a regard for the office of the Attorney General to endorse someone like him.” Insofar as I know, he was not referring to Meese’s qualifications as a lawyer.

Now, I have no doubt the Senator is a sincere man of noble intentions. Indeed, he is expressing an inarticulable but nonetheless closely-held belief shared by millions of people that certain offices, whether the chief executive, certain cabinet officers, federal judges or justices, are imbued with an aura of reverence. But the Senator makes a leap in logic that I find astounding. He says out of his respect for the office, he can and should reject someone who doesn’t fulfill certain unarticulated notions of that office. This is no standard at all. It would have been more useful for the Senator to have said nothing or to have said he simply didn’t like Mr. Meese or that he would vote along party lines, without reason, against Meese’s confirmation. But the Senator implies that there is a criterion which people aspiring to such an office could meet. But what is it? In essence, the Senator is saying that the absence of criminality and ethical impropriety are not enough, given all other qualifications for the office. It’s as if being the president’s friend or crony just isn’t enough!

Now I am not expressing a view on Mr. Meese. He has been confirmed as Attorney General. Certainly, reasonable people can examine his prior public statements made when he was serving in another office and draw their own conclusions. My point is that public officials seek to justify these judgments on ethical grounds when they are simply political or personal in nature.

What I am suggesting is that we are beginning to expect something of the men and women who enter into public life that systemically they will not be able to achieve. That is, we expect them to remain throughout their careers free of any suggestion of taint or even of impropriety. And the systemic feature
which conspires against this is that the press and the public have motives to investigate in such a way that the mere asking of questions and making of allegations is equivalent to a finding of guilt. So we must inquire, are we asking our public servants not simply to be “holier than thou,” but, also, to abandon essential rights which we guarantee to all others? Are they to renounce their friends and their right to association and to speak as well? Certainly, I would hope not.

Public life has always been difficult. Those who are called must grapple with the fundamental questions of our lives and times. Of course, if the questions are worth asking, the particular answers are worth the struggle. Thus, it is to be expected that the battles will be fiercely fought. But good, affirmative, genuine public service is not and cannot be for the thin-skinned; it requires actual courage and true conviction. What troubles me though is that the battles are being fought not over issues but, superficially, over personalities, and that a new tactic has been adopted which is quite disturbing. That is to say, instead of attacking a man’s position, the attack is centered on the man and his motives.

Of course, argument ad hominem is nothing new. It can be seen in the lowly manner in which the physical features of public officials are pejoratively depicted with the intent of disparaging these individuals. These “cosmetic” attacks on appearance are always to be condemned, but I am not referring to that. Rather, I worry over the use of questionable legal and legislative tools, as well as the initiation of publicity campaigns, to discredit, dishonor and perhaps even sanction one’s opponent.

At this point, I should like to note just how closely we as judges and lawyers are linked, where what may be perceived as only a threat to the judiciary is actually a threat to the entire profession. Many of you may have followed the A.H. Robins case in Minnesota. A.H. Robins manufactures a contraceptive device known as the Dalkon Shield. The plaintiffs sued the company for injuries and deaths they claimed were caused through using the Robins Dalkon Shield. The case came before Chief Federal District Judge Miles Lord. Following the settlement, Judge Lord issued a statement from the bench, criticizing A.H. Robins executives for their position. He said to the executives, and I quote, “You are attempting once more to extricate yourselves from the legal consequences of your acts. None of you have faced up to the fact that 9,000 women claim they gave up part of their womanhood so that your company might prosper.” Well, the Judge said a few other things indicating that the character of the company’s conduct was reprehensible and that the executives were unwilling to admit corporate responsibility.

3Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984).
4Interview with Miles Lord, Chief Judge, United States District Court of Minnesota, in “The Prairie Judge,” Transcript of “Sixty Minutes” Broadcast of Nov. 11, 1984 at 12. For additional comments made by Judge Lord to Robins’ executives, see Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1191 n.14 (8th Cir. 1984).
Obviously, such comments from Judge Lord did not ingratiate him with the A.H. Robins executives. But they were not content to walk away from the courtroom, red-faced, with settlement and voluntary dismissal in hand. Instead, they filed a complaint against Judge Lord for “grossly abusing his office, and of methodically destroying their personal and professional reputations.”

The Eighth Circuit Judicial Council took Robins’ complaint and in early November of last year, the Circuit rather harshly criticized the Judge for his comments.

The Eighth Circuit found that Judge Lord’s comments constituted a violation of the executives’ due process rights and exhibited bias and prejudice. What was the upshot of all of this? The case was not remanded to another judge, the settlement remained, and A.H. Robins announced that it would pay for the medical costs nationwide of removing any of the remaining Dalkon Shields. But the ultimate result, given that no executives were vindicated for the conduct on which Judge Lord commented, was that a federal judge was weakened, was disparaged, and, perhaps in the most stinging insult of all, was chastised by his brothers on the circuit court of appeals. Judge Lord’s case illustrates what I fear may become too frequent an occurrence. That is to say, when some lawyers lose a case they not only take an appeal, in which the conduct of the trial judge will necessarily be reviewed for error, but they may also file a complaint against the judge. At the very least, if they have any luck at all, they can expect to muddy the waters enough to divert attention from their client’s liability and shift the focus to the judge’s conduct.

Years ago I saw this trend developing. I criticized it then and I do so today; and this is where we see, clearly, how lawyers and judges are linked. In the early days of my practice, it was not uncommon for powerful interests such as insurance companies and railroads to see to it that from time to time a first-rate personal injury plaintiffs’ lawyer be charged, amid a fanfare of publicity, with some so-called ethical impropriety on the order of that nebulous phrase “unprofessional conduct” and seek to have him disbarred.

In this regard, I recall vividly In re John Ruffalo, Jr., which was a disbarment case I heard twenty years ago. As I look back, the dominant feature of the Ruffalo case was that of the powerful seeking to strike fear in weaker segments of the Bar. In that case, a bar association, with a heavy involvement of the American Railroads Association, filed numerous charges against a plain-

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4Sixty Minutes transcript, supra, at 13.
5For a description of the oral argument heard by the Eight Circuit Judicial Council’s investigatory panel in Robins’ complaint against Judge Lord, see Ranii, A Judge’s Public Battles, National Law Journal, July 23, 1984, at 1, 32, 34-35.
6The Eighth Circuit decision consolidated the complaint against Judge Lord and the A.H. Robins appeal in Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1190, 1192-94 (8th Cir. 1984).
REMARKS TO THE AKRON BAR ASSOCIATION

Battisti: Remarks to the Akron Bar Association

plaintiffs' attorney, John Ruffalo, including the allegation that he had been an “ambulance chaser.” When the railroads and their lawyers could not show that Ruffalo had been a “chaser” they amended their complaint during the course of the disbarment hearing to say that he improperly bought an interest in the lawsuit by lending money to two destitute widows, and that he improperly hired a railroad laborer to assist him in the case (which the railroads saw as “service to two masters”). The Supreme Court of Ohio found only these two charges to be substantial and disbarred Ruffalo. However, I refused to disbar him in the federal district courts finding that he had done no wrong, having only provided living expenses to two starving widows and not having breached any fiduciary duty through the use of a simple laborer. Later, the Supreme Court of the United States also refused to disbar Ruffalo, finding that he had been denied due process of the law. It wasn’t until several years later, after numerous petitions for readmission, that the Supreme Court Of Ohio readmitted Ruffalo to practice.

The tragedy here is that the railroad, through its lawyers succeeded, in Ohio, against a plaintiffs' attorney who had nobly protected two destitute widows, and that this attorney was treated as an unethical scoundrel, being deprived of a substantial portion of his livelihood for a number of years. It is now obvious that the action against Ruffalo was outrageous since both the Supreme Courts of the United States and Ohio now allow lawyers to advertise and make known their willingness to help the injured. There is no longer any need for plaintiffs' lawyers to “chase ambulances” or for defendants' attorneys to chase clients at the country club when one can lawfully advertise and solicit business on television, radio and in print.8

The lesson is that tactics that are used against judges will often be turned against lawyers. The harm done by these attacks on the bar, the judiciary, and the public is self-evident. I will not dwell on it any further except to say a weakened judiciary means a weakened bar; a weakened bar means a weakened judiciary. Since judges and lawyers do not exist for themselves, but to serve litigants, it is the public which ultimately suffers from the weakening of these institutions.

8See Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977) (holding that “advertising by attorneys may not be subject to blanket suppression.”). The Court commented on the irony of the legal profession's methods in attracting clients: “Indeed, cynicism among the public with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.” Id. at 370-71.

It is unlikely that a plaintiffs' lawyer would be disbarred today for loaning funds to an indigent client for living expenses until settlement or resolution of the client's case. Indeed, the ABA Commission on Evaluation of Professional Standards (Kutak Commission) proposed as an amendment to Rule 1.8(e) language explicitly permitting such a loan:

“(1) A lawyer may advance court costs, expenses of litigation, and reasonable and necessary medical and living expenses, the repayment of which may be contingent upon the outcome of the matter;” Model Rules of Professional Conduct Rule 1.8(e) (proposed amendment). reprinted in In re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485, 490n.7 (D.Md. 1982).

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We dare not lose our proper focus in evaluating public men and women. Throughout these remarks I have tried to show how lawyers and judges are being evaluated on what are represented as legitimate standards. In reality they are not standards at all, but merely arbitrary, personal or vague notions.

The essential test is simple and clear: they should be judged on their work. Earlier in these remarks I said lawyers of an earlier time like Clarence Darrow were remembered for their performance. That is what any public man or woman should strive for — to leave a legacy of achievement, of good acts which have in some way improved the community and the lives of its people. I am, of course, not saying that we as public officials are above the law or scrutiny. Indeed, the thrust of my earlier remarks is that we are highly scrutinized by the press and public. And, certainly, if a criminal violation is found, a lawyer or judge should be held to answer. But let us not accuse and convict in the same breath, and let’s be certain about the standards we are using.

What I am also saying today is that increasingly a man’s work is not the object of scrutiny, instead it is his personality. When you evaluate a judge look at that man’s opinions, his rulings. Was he correct on the law and facts? But beyond that and more important: was he fair and just? It is the body of decisions, written and oral, the settlements and resolutions of disputes which we should examine.

We have institutionalized such review in our judiciary. Our brothers and sisters on the circuit courts of appeals are charged to examine those decisions. And if a trial judge is reversed out of a genuine disagreement about what the law is, he will accept that; after all the judicial ego, I would hope, is humble enough to accept that the law is not a static discipline without conflict. But, as was the case with Judge Lord, it is not the law which is at issue. Instead, the councils are applying standards unknown and unannounced beforehand to either the judge or the lawyers.

I fear that, increasingly, the circuit councils will find themselves examining issues of temperament and conduct, of speech and action which are outside the realm of judging in and of itself. It is true that we want our judges to be impartial, but do we want them to be inhumane? Do we want them to be dispassionate at the cost of being uncompassionate? If after review, a judge notes objectionable conduct, should he not, if so inclined, state his feelings and perception of the truth, based on his experiences? It is diversity on the federal bench which not only insures the appropriate measure of independence but makes federal practice interesting and challenging.

My point is the same that I have made earlier in these remarks: there is no standard. If all judges are expected to bite their tongues and not comment in the face of conduct they see as grossly unjust, that standard should be announced. Instead, without standards and armed with hindsight, institutional and personal prejudices, our brothers and sisters through judicial councils may
Weaken men and women earlier confirmed by the Senate; the circuit councils may be conducting nothing less than second confirmation hearings. This is unacceptable. It is not as if new information has suddenly appeared. One’s life becomes an open book upon nomination to the federal judiciary. In the case of Chief Judge Miles Lord, the President of the United States, the Congress of the United States, the American Bar Association, the state and local bar association and the state and federal judiciary knew his beliefs, knew that he was an honorable and concerned public servant, who had been active as Minnesota’s Attorney General and as a United States Attorney. Thus, it was known and should have been expected that he would react as he did. Certainly the words he would speak and the particular case in which he would speak them were not known, but the type of man he was and would be were common knowledge. If there were those, including judges, who didn’t approve of his style, personality, or who didn’t like him, the time for them to have objected was at his confirmation hearings, not years later, after he had been confirmed by the Senate and was exercising his constitutional powers, which Professor Kurland has correctly said, came directly as a gift from the people.

My remarks today have touched on the dangers of public life, the scrutiny, the premature evaluations, the lack of standards and the use of appearances to evaluate public men and women. In preparing my remarks, the writings of Pope Leo XIII came to mind. In an encyclical written in 1890, he wrote: “As to those who mean to take part in public affairs, they should avoid with the very utmost care two criminal excesses: so-called prudence and false courage.” I have already referred to “prudence” in these remarks. It is the kind of prudence caused by intimidation. It seeks to make public officials weak and hesitant, to force them not to act. Such prudence can only benefit one’s opponents because “they are fully conscious that the more faint-hearted those who withstand them become, the more easy it will be to work out their wicked will.” Prudence in the sense that Leo XIII refers to it is essentially cowardice.

What has concerned me even more is “false courage.” As the Pope described, those with false courage display “a false zeal... affecting sentiments which their conduct belies, taking upon themselves to act a part which does not belong to them.” These opponents are the most dangerous because they

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It should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged. It is not in the keeping of the judges to surrender this independence under pressure or voluntarily to give it away. Judicial independence is held in trust for the people and only they should determine whether they would like to exchange some judicial independence for more judicial efficiency.

Hearings, at 276-77.

wish to appear courageous and virtuous but in reality they will use tactics that are not only not virtuous but evil, corrupt and foul. These men and women, however, need to find weak, helpless victims to attack. They cannot appear strong-willed and bent on promoting justice if their foil or victim is as strong and brave, as willing to fight back as they are to ruin. So they seek out seemingly defenseless victims and create false conditions, finding wrong-doing where it never existed. True justice, of course, will come to those of false zeal when they come under the scrutiny to which they subject others and are made to answer for the outrageous offenses they have committed.

To conclude, I once again quote from Pope Leo XIII, “Honor, then, to those who shrink not from entering the arena as often as need calls, believing and being convinced that the violence of injustice will be brought to an end and finally give way to the sanctity of right . . .”

The need is there, the conditions warrant, and thus as a matter of necessity, you are called today to recognize how we as lawyers and judges live in the public eye, and to assume that responsibility with courage. But more importantly, before you judge others, ask yourselves what are the facts and what are the appearances, what are the standards if any and are they attainable and legitimate. Courage in public life means not only the fortitude to withstand criticism and even outrage, but the strength as well to examine one’s conscience and soul and to speak from the truth and conviction that we know lies deep within our hearts.

\[\text{Cf. M. Mott, The Seven Mountains of Thomas Merton XXV (1984). In his preface, Mott makes the following observations:}

If it is true that Mount Purgatory has seven storeys, it is equally true that there are nine circles for sinners in Dante’s \textit{Inferno} and that Hell is paved with good intentions. Whatever happens to good intentions, here on Earth they are judged by results, by their fruit. Hagiographers, whether for the best or worst intentions, wind up in the basement of earthly esteem and may well belong with the lowest of liars in the Inferno. Those who distort for the sake of maliciously tearing down a reputation, rather than building up a false one to confound humanity, the wilful detractors, are hardly much above the hagiographers. Once again, the extremes come close to meeting, as they usually do when the balance is put out. Either way, the human race loses out in a confusion of idols and Aunt Sallies.

A “hagiography” is a biography of saints, particularly one which is idealizing or worshipful in tone.