# Opening Statement

# Lawyers, Money, Race, and Gender

**by Michael E. Tigar**

**Chair, Section of Litigation**

The profession we have inherited from our fathers we will pass on to our daughters and sons, and to the daughters and sons of those to whom our doors were closed for too long.

Women and people of color are graduating from law schools in great and increasing numbers. When I entered law school, only 877 women were among the 20,776 first-year law students in this country. By 1988, however, the entering class of 42,860 included 18,395 women. The figures for black and Chicano enrollment are also up, but the increases are not far ahead of law school admissions generally.

The younger segment of our profession has thus begun to mirror the diversity of our society. What are we, as older lawyers, doing about this?

Litigators should know better than most how important are the changes in our ranks. If nothing else, increasing diversity will help lawyers communicate. How often have we said, to ourselves or to a younger colleague, "You sound too much like a lawyer! Put away that smarty-pants lingo and those overeducated airs and talk sense to the jury." Justice William J. Brennan, Jr., told me a story at lunch in his chambers that illustrates the point.

In his first criminal trial, the young Mr. Brennan was appointed to defend a vehicular manslaughter case. A police officer who lived near the defendant agreed to be a character witness, but the young Brennan did not know that you may—and should—prepare a witness to testify.

Armed with a manual on evidence, and bereft of formal education in trial practice (Harvard Law School had not offered him any), he rose to examine:

"Sir, are you acquainted with the defendant's reputation for veracity in the vicinage where he resides?"

The elderly Irish cop look puzzled and then volunteered tentatively, "Well, he is a good driver, I'd say."

Shaken but undeterred, Brennan repeated his question word for word. This time, the witness simply stared at him. As the future Justice began a third time, the judge interrupted.

"Officer, do you know the young man over there?" pointing to the defendant.

"Yes, Your Honor."

"Have you ever known him to lie?"

"Why, no, Your Honor."

"Well, that is what Mr. Brennan has been asking you, but he went to the Harvard Law School and has forgotten how to speak English."

All of us have learned, sometimes painfully, that jurors bring all the rich and diverse experiences of their separate backgrounds to the solemn task of judgment. We can influence their deliberations only by rediscovering the human voice that three years of law school beat out of us. Are we not therefore fortunate to have a new generation of trial lawyers whose natural human voices are more diverse, mirroring the diversity of the juries before whom we try cases?

## What Is Going On?

To understand the changes in our profession being sought and wrought by these new lawyers, I have spent much of the past two years speaking, listening, and reading. I have been to bar groups, law schools, law firms, conferences, and colloquia. I have seen programs, policies, and attitudes worthy of discussion and emulation. I have also witnessed a cruel irony: These new lawyers find a profession that sometimes seems increasingly hostile to the aspirations that led them to law school. Let me summarize what I have learned and make some concrete suggestions, to further discussion among our more than 50,000 members.

The great majority of women law graduates (some studies put the figure at 75 percent) eschew private firm law

practice. Many of them no doubt prefer public service and public interest law for laudable reasons of conscience or ideology. Many more, however, express frustration that their desire to integrate family concerns and success at the bar finds only the dimmest of responses in the private sector.

Some businesses, including law firms, have responded by creating a "mommy track." Women on this track receive child-care, flexible hours, and maternity leave concessions, but in this supposedly lower-pressure environment they must settle for less pay and a diminished chance of partnership.

I think the "mommy track" is a mistake. My view is shaped by my experiences as a trial lawyer and as a law teacher, observing the travails of law students with spouses and children. In addition, I am the father of three children and my spouse is a litigator in private practice.

The "mommy track" perpetuates our stereotypes of women. It treats child-care and family concerns as problems of women only. Our response to the new generation of lawyers must be different; we must recognize that today's law graduates are on the average older than graduating classes of two decades ago. Many more already have families. Many, if not most, have been influenced by the women's movement and understand that child and family responsibilities should be shared. In structuring the environment of practice, law firms should therefore address the family needs of all their employees, male and female. They will find cooperative allies among new graduates and in the legal community generally.

I have another concern about the new generation of lawyers. Most readers my age—with more than a couple of decades in law practice—can point to a mentor from whom they learned the rudiments of trial practice and life as a lawyer. Twenty years ago, the law schools weren't teaching this to any significant degree. Reading the jury speeches and cross-examinations of the "greats" simply whetted our appetites to work under someone's tutelage. My own mentor was Edward Bennett Williams; he guided me through a broader range of human experience than simply the practice of law.

The new voices joining our ranks promise new insights; we have much to learn as well as to teach. But these new voices are nonetheless untrained. Knowing this, new lawyers are sensitive and even fearful. They want mentors, too. They would like to see and work with models of forensic success and professionalism who happen to be female, Black, Brown, Native American, or gay.

Like the "mommy track," this issue is broader than any group or collection of groups. All young lawyers need a mentor, but the structure of private practice and legal education is making it harder for them to find one.

Firms today expect more billable hours per lawyer. Tasks in large lawsuits are parceled out among associates and partners so that few young lawyers see how an entire case is shaped. Legal education in law schools is mainly devoted to teaching students how to read cases, not to teaching them how lawyers assemble facts and rules to engage in the art of persuasion.

We reap the consequences of these circumstances, in burnout and alienation among lawyers and in the persistent perception of clients that they are paying more and more for increasingly inefficient legal help. The public perception grows stronger that we are waxing fatter while contributing little or nothing to the quantity or quality of justice.

I suggest these issues—lawyer competence, diversity, professional pride, and public service—have a common theme and point us to a coherent set of responses. Mentoring is the key.

In the law schools, the newly diverse student body needs law teachers who themselves are diverse. Yet many law faculties have been even slower than major law firms to increase the number of women and minorities in their ranks.

## Changing Legal Education

We must also address the quality and nature of legal education in light of the changes I have been discussing. In the law schools, students must have opportunities for training in advocacy, trial and appellate. Such courses provide a stage for the talents of students who may not do as well on the paper and pencil tests that are the dominant evaluative technique. More important, advocacy teaching provides new insights into the legal system and begins the

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process of mentoring.

Most legal education takes place in one of two ways. Students either read casebooks and discuss them in what passes for the Socratic method, or students write and discuss seminar papers.

All of us have read critiques of the case method, and of Socratic instruction. To begin with, few law professors are truly Socratic. They remember the result in People v. Socrates and have no taste for hemlock cocktails.

The case method, while valuable as an introduction to legal reasoning, distorts understanding of law and the legal process. When a lawyer gets a case, she should begin, not by analyzing cases, but by crafting a closing argument, weaving together the legal principles she will invoke with the facts she must prove by witnesses and exhibits. It is likely that the case will eventually be settled, and that closing argument will never be given. Still, preparation of the case and settlement discussions revolve around the probable outcome in the hands of a jury or other trier of fact.

Particularly with a jury, the cold and stark contours of legal rules—the sort of thing the case method focuses on—play a secondary role. Rather, the suppleness of the rules, the ambiguities in the witnesses' accounts, and the spark or flame of justice within the lawyer's case are paramount: These are the elements with which the advocate must deal. Study of decided cases, with appellate recitals of facts distilled and shaded in the service of an appellate result, is only partial preparation. And, unless handled with unusual sagacity, the study of decided cases cannot hammer home the ethical limits on advocacy in the arena of adversary inquiry.

Advocacy teaching is thus a vital element of legal education for *all* students. The newly diverse student bodies have simply begun to focus our attention on the need to foster and expand it. Yet, after a period of growth, many law schools profess difficulty in maintaining and expanding their advocacy and clinical course offerings.

Such courses are expensive. They must be taught in small groups and in a time-intensive way. That, of course, is why they are valuable. Student-run appellate and trial competitions require additional supervision by faculty, only a few of whom may have substantial practice experience.

Litigation Section members can make a decisive difference in supporting and, where necessary, revitalizing, advocacy teaching. In doing so, they can foster the concept of mentoring in the law schools. Find out what courses your alma mater offers, or turn your attention to a law school nearby. Find out if every student who wants an advocacy experience can have one. Find out what intermural competitions the law school competes in; the Litigation Section supports several of them.

## Litigators Can Teach

If the school you examine is lagging behind, urge the faculty to recruit litigators—and judges—as adjunct professors on a low-pay or volunteer basis. They can coach moot court teams and help run advocacy and clinical offerings. For advice on how to intervene most effectively, consult with the Litigation Section staff about committee projects and publications in this area. A cautionary note, however: These efforts in the law schools must be a form of cooperation with the faculty and students. You cannot be an intruder.

The organized bar also has a renewed role in the mentoring process. Think of the last four CLE programs you attended. They may have been so forgettable that you can only conjure up one or two. No matter. Do the best you can. Odds are that the panelists or presenters were white males, perhaps even with a couple of decades of practice experience. In the ABA Litigation Section, we are doing something about this image. When the visible leadership of the bar—its programs, its publications, and its positions of influence—reflects the new diversity of the profession, several good things happen. First, younger lawyers feel more a part of the profession they have chosen. Second, lawyers of all kinds benefit from the indirect mentoring influence of role models with whom they can identify, in the particulars of practice and in the aspirational goals of professionalism.

Third, the bar itself is strengthened as a broader group is impelled to vie for leadership.

State and local bars must address this problem. True, it may be cumbersome to change leadership nomination procedures. But program and publication offerings can be altered right now.

In law firms, there are two principal ways to reproduce and re-create the spirit of mentoring. The first is through advocacy training programs, in-house and through such excellent providers as NITA, the University of Virginia, and the University of Texas.

In-house programs, however, run the risk of being dominated by older lawyers who are mostly white males. To increase diversity, a firm must reach out into its community. A law firm could, for example, run an in-house program jointly with a local legal services office, contributing its resources to the project while providing a broad range of mentors—role models for its young associates.

The greatest teacher of all, as every trial lawyer knows, is the thrill and terror of holding someone's liberty or property in your hands and trying a real lawsuit. Law firms need to reach out and seek pro bono cases for young lawyers to handle. By doing so, they mentor as well as train their associates. They enhance the firm's and the bar's reputation. They add in some small measure to the ration of justice.

Some lawyers are bound to say that pro bono cases take time away from paying work. They will argue that law firms cannot pay high salaries to associates and then let them divert their attention from billable clients.

Having been partner in one fair-sized firm and senior partner in another, I would answer this way: Pro bono helps your bottom line in several demonstrable ways. In the short term, it can take the place of the smaller cases that used to provide a docket for younger lawyers. It helps prevent the burnout, alienation, and related problems that consume younger lawyers a few years out. These problems reflect themselves in defection of highly motivated associates and in diverted attention from work by those who remain. Beyond this, the enthusiasm and goodwill a firm generates by having a pro bono program is a recruitment device at law schools and an essential ingredient in morale among lawyers. Moreover, these cases provide a learning experience in litigation, and in the concerns of those from whom jury panels are drawn.

I have also found that a law firm can orient its pro bono efforts to gain and maintain the sort of image that brings clients in the door and keeps them there. The ABA and the Litigation Section itself help this process by giving awards for pro bono activity. Many bar groups do the same, and newspapers report on pro bono activities.

Clients, even large corporate consumers of legal services, appreciate being represented by a law firm that has a good reputation for trying to do justice and not simply crushing opponents on behalf of whoever is paying the bill.

In sum, we do not own the legal profession. We are only its temporary custodians. When we hand it on to our daughters and our sons, what will they say of our time with it?