COLORADO TRIAL LAWYERS ASSOCIATION
MAY 7, 2015

Swan Song

John L. Kane

Newspapers and journals are filled with reports that lawyers and judges are dissatisfied with our profession. I understand, and I hope tonight to offer some insight that may be of use to you as you consider your own place and life in this endeavor. Of the million or so lawyers in the United States — more than in any other country — over half are said to be unhappy and seriously considering leaving the practice of law or the bench. A burgeoning industry of coaching, counseling and career change assistance has developed to guide the poor, unhappy wretches to new lives and new opportunities. I have yet to hear that these transitions end in better places, even though those who make the trip are reluctant to admit leaving the law wasn't such a great idea.

While law schools continue to produce more lawyers than the profession can absorb, they insist that a legal education is worth its steep price regardless of whether the graduate intends to practice law or engage in some other pursuit. Given the huge debts of most graduates, I suggest that less income producing callings will not accommodate service of the debts. As such , teaching is not worth the price. Nor is the ministry. Nor civil service. Nor, for that matter, is counseling or coaching — and I doubt there are enough career opportunities in investment banking to fill the gap.

Duke Law School now offers a course called: "Well-Being and the Practice

of Law." The course description reads: "Optimistic and happy people outperform their counterparts on almost every measure of job success with the notable exception of one group: lawyers. Psychological research suggests that on the whole pessimists perform better in law school and in private practice. Since research also shows that pessimism can be a predictor of depression and/or lower feelings of life satisfaction, this raises a question among many academics who study well-being: What do we do about lawyers?"

Duke is not the only law school to offer a course on happiness. In the legal world, attorney well-being and depression are a ubiquitous concern, but no formula or theory has been proposed to guide lawyers who seek well-being as practitioners, or for that matter, as judges. The philosophy of positivism and its progeny, so dominating for so long in the legal academy is one of the root causes that nurtures pessimism. But there is some encouraging news!

Professors Lawrence Krieger of Florida State College of Law and Kennon Sheldon of the Department of Psychological Services at the University of Missouri recently published a paper for which they interviewed thousands of lawyers in a four state area. Their research shows surprising results: prestige and income, law school debt, class rank, law review and law school ranking have <u>little or no correlation</u> with well-being. To the contrary, the group with the <u>lowest</u> incomes and grades in law school, public service and legal aid lawyers, had <u>stronger</u> autonomy and purpose and were <u>happier</u> than those in the most prestigious positions with the highest grades and incomes.

What you may ask, are the law schools missing?

What the law schools are missing, and what provides the foundation for well-being, is serving people. The skill sets law schools teach are tools with no overarching purpose. Satisfaction in law comes from what Harvard legal philosopher Lon Fuller described as "the prevention of indecencies in the use of power." In representing people in the extremities of their experience, you are defending them against the indecencies of power. The pride one feels in the legal profession and the satisfaction obtained from practice are demonstrated in the lives of the people you guide through the exceptional circumstances of their lives.

Consider one of these indecencies. In Colorado, with a population of 3.5 million, there are a mere 48 lawyers engaged full-time in representing the more than 900,000 men, women, and children who live on less than $30,000 per year for a family of four. That is one legal aid lawyer for every 18,750 people. Last year Legal Aid served 12,000 of them in matters relating to the basic necessities of life: food, shelter, medical care and protection from violence and physical abuse. Consider also that Colorado Legal Aid has less than half the staff it did thirty years ago, and over three times as many clients. So much for equal justice under law.

And it isn't just the poor who are subject to the indecencies of power. I am not here tonight intending to seek contributions. That is something I am prohibited from doing. I am here tonight to kindle a sense of resolve and outrage in your hearts. If you feel that outrage, I am sure you will take appropriate action. I want you to know that there is one law firm represented here tonight by a large

contingent in which all of its lawyers, partners and associates alike, pride themselves on each dedicating 25% of their time to *pro bono* cases. They do so and they prosper and they are happy campers.

As lawyers, you seldom see people at their best. You frequently witness injury, oppression and injustice, and you are expected, even demanded, to take action against it. The one thing you cannot do, and still succeed as a lawyer, is to be indifferent to oppression and injustice. To succeed in this profession, to have a sense of well-being, to revel in it, you must have a fire in the belly. Performing legal services in a mechanistic way, measuring success by the billable hour or the size of the fee with no keener value, and ignoring or denying the moral and intellectual justifications for what one does, will turn even the most lucrative law practice into a humorless and moribund job.

The first step in the process of achieving a sense of well-being is to recognize the suffering, the experience, of those who are subjected to injustice. The word "deprivation" in its literal sense is the key to understanding this. To deprive is to "de-privatize." To take away that person's sense of being an individual, a self that is unique. To deprive means to sap a person of his or her individuality, his personhood, his mattering, and to reduce him or her to a number or the product of an algorithm.

This is precisely what happened in the concentration camps when individuals were tattooed with a serial number on the arm; it is what happens when

prisoners are given a number, not a name. It is what happens when a government agency keeps a record of all of your phone calls and emails. Of course not all deprivations are injustices, but all injustices are indeed deprivations. Justice is achieved when an individual's unique value is recognized and his life is restored to balance so that he is not pushed around by indecencies in the use of power. To be just is to recognize that and to know how to create that balance. This takes imagination, effort and skill.

There are fewer and fewer trials in which the advocate can exercise his imagination and skill. This decline augers against the state of well-being in the profession. It is attributed to a number of factors including the excessive costs of discovery, the cavalier acceptance and expense of expert testimony as though it were holy writ, the all-too-frequent use of summary judgment and, to an even greater extent, the shift of judges from being adjudicators to judicial managers. The loss of trials deprives the lawyer.

Just think what plea bargaining and guideline sentencing have done to the practice of criminal law, or the shift from its investigative basis to one dependent on the prevalence of informants, or what arbitration, mediation and confidential settlements have done to the once vigorous adversarial presentation of civil controversies to juries in full public view, reported by an active and knowledgeable press. How can a society govern itself and respond to the dehumanization of values when its controversies and issues are lost in a vortex of sealed documents and depositions? Have we placed too much emphasis on the closing of the law's work to public view and judgment? We do know that justice is something most

people cannot afford and even fewer have experienced it.

Moreover, the decline of jury trials to near extinction is a product of the law itself. Each of you knows more than I do about caps on damages and the devastating effects they have on people who are injured. It is simply not possible to put their lives back into balance when the gates of justice are only half open.

I want to offer you what I think is a fresh insight into this situation. The jury trial is vanishing because to a large measure those exercising power, the legislatures and the higher courts, both state and federal, are distrustful of the judgment of fellow citizens. The jury is the very essence of democratic government; it is truly government by the people, and those in power do not trust jurors to render verdicts that perpetuate the economic domination of special interests.

Every year special interests line up before the state and federal legislatures and ask for more immunities from liability. That is immunity from the verdicts of juries. Verdict, of course, means literally "a true declaration." Take a quick look at the immunities granted to ball parks, ski resorts, reservoir owners, ditch companies, firearm manufacturers, pharmaceutical companies, hospitals, health care providers, and that most archaic and anti-democratic, anti-republican doctrine of all –sovereign immunity. There are also numerous federal provisions that slink in to our jurisprudence under the strangest names: The Public Readiness and Emergency Preparedness Act that is really a ban on claims arising from so-called "covered countermeasures" which means in translation a drug, biological product

or device that the Secretary of Health and Human Services authorizes for emergency use to deal with what she determines to be a public health emergency. This so-called Prep Act provides "as an alternative to litigation," [that] victims may accept payment for death or physical injury from a special fund "if Congress has appropriated money for that purpose." If there is no appropriation, the ban on litigation still exists.

Lurking in the shadows of the statutes dealing with navigable waters is the Oil Pollution Act of 1990 with limits of liability for Offshore Facilities putting a cap on damages for companies such as Exxon and BP and prohibiting liability of any kind for the United States government from or by flood waters at any place. Likewise, there is the National Vaccine Injury Compensation Program providing that no person can bring a civil action for damages in an amount greater than $1,000 against a vaccine administrator or manufacturer in any court without first filing a petition for compensation and obtaining a judgment from the U.S. Court of Federal Claims, which of course does not have juries.

There are courts of appeals that can and do correct errors when juries are not properly instructed or when it is evident that because the trial judge did not do his job competently a jury departs from the law and goes off on a tangent of its own. But the judge or the jury cannot err or even do what is right if the issues can't be submitted for trial in the first place. Not only do those with economic power not want to be exposed to the prospect of financial liability for their wrongdoing, I suggest to you they do not want our society, as represented by their fellow citizens, sitting as a jury, passing judgment on them. It isn't just a matter of money; it is

also a desire to avoid a moral judgment.

Whether trials continue to exist or, perish the thought, the legal system becomes yet another bureaucracy, the value of being a lawyer and the advocate's sense of well-being will not change. When you provide order to families living in chaos, when you afford dignity to those who have been degraded, when you eloquently express the highest aspirations of our culture where otherwise there is greed and corruption, when you take upon yourself the awesome task of ending a person's despair, in sum, when you become another's champion, you succeed.

If you accept these challenges and burdens as the mantle of our profession, you will have no need of a career counselor, a life coach or a career change service.

As a footnote to these remarks, I hope that this is my last public speech. I think it is past time that this torch is handed on to someone younger, who has more relevant things to say. Someone who, unlike me, does not consider the cell phone to be a curse on mankind.

But I consider myself lucky. Any number of people, some much smarter, could have been selected to fill my place on the bench.

My chief regret as a judge is both professional and personal: My attempts to implement a new concept of civil procedure, a new way of trying jury cases in order to lower costs and preserve the jury trial, have not taken root. I preside over significantly fewer jury trials now than even five or ten years ago. We haven't

reached bottom yet, but history teaches us that revolutionary ideas fail when there is no revolutionary class to support them.

The costs of jury trials has made them unavailable to an ever-growing percentage of our population. Class actions, that make trials more accessible for individuals, face increasing restrictions formulated by lobbyists and enacted by Congress. The number of causes of action authorized for trial by jury is decreasing. The number of caps on damages and creation of new immunities is a growth industry. When will society say, "Enough."

I have a foreboding sense that I am playing in the fourth quarter, but even with my failure to stimulate procedural reforms, I am fortunate to preside over the search for justice by lawyers who are dedicated to that effort — and when it happens, it is magic. For that, and because of your efforts, I am the luckiest person I know.

I part with a final bit of advice: When you fight for Justice, Never give up! Never give up!