

# THE PROFESSION EVERYONE LOVES TO HATE

by James D. Gordon III<sup>1</sup>

I am a member of a profession that the public loves to hate. That's why people are always telling me lawyer jokes. I love lawyer jokes, because I love humor. Proverbs 17:22 says, "A merry heart doeth good like a medicine." Here's a lawyer joke: Suppose you're walking down the beach and you come upon Saddam Hussein and a lawyer buried up to their necks in sand. Who do you kick first? Answer: Saddam Hussein. Business before pleasure. People say that's how copper wire was invented: two lawyers fighting over a penny. And a while ago there was a classified ad in the *National Review* that said: "Hate Lawyers? Curse out a live one. 900/773-8245. \$5/min. 18 or older."<sup>2</sup> • So the public hates lawyers. My first response is: What does the public know? Studies show that one-third of the public suffers from some kind of severe mental disorder. So look at the people on each side of you. If they look normal to you, then you're the one. • The public is not entirely wrong. It's true that some lawyers are dishonest, arrogant, venal, amoral, ruthless buckets of toxic slime. On the other hand, it's unfair to judge the entire profession by five or six hundred thousand bad apples. • Animosity toward lawyers is deeply seated in our tradition. Joseph Smith said that we should "send every lawyer as soon as he repents and obeys the ordinances of heaven, to preach the Gospel to the destitute, without purse or scrip."<sup>3</sup> Brigham Young once described a city in a stake of Zion conducted after the order of Enoch. He asked, "Do you think we shall want any lawyers in our society? No, I think not. Do you not think they will howl around? Yes, you will hear their howls going up morning and evening, bewailing one another. They will howl, 'We can get no lawsuits here; we cannot find anybody that will quarrel with his neighbor. What shall we do?'. . . Not but that lawyers are good in their place; but where is their place? I cannot find it."<sup>4</sup> • Today I will address five complaints that the public makes against lawyers. First, lawyers defend guilty people. Second, as a class lawyers are dishonest and immoral. Third, lawyers are too interested in money.

Illustrations by Robert Neubecker



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Fourth, there are too many lawyers, and they are filing too many lawsuits and ruining our economy. And fifth, the legal system is seriously flawed. Because of these complaints, if you announce that you intend to go to law school, your grandparents might scrape off their bumper sticker that says, "Ask me about my grandchildren." I will address each of these five complaints in turn.

First, lawyers represent guilty people. This raises the issue of how the public knows that the defendant is guilty. Usually, the public makes the decision based on the media reports. Strangely enough, the public also deeply distrusts the media, which creates a puzzling logical conundrum. The framers of the Constitution knew that the public has a tendency to decide guilt or innocence based on media accounts. That's one reason that the framers gave us the Bill of Rights, which provides for a fair trial to decide questions of guilt and innocence, and does not relegate the fate of accused persons to the tribunal of public opinion.

The alternative is that no one should represent guilty people. Or, lawyers should only go through the motions, but not really try to protect the constitutional rights of the accused. The framers decided instead that every person, guilty or innocent, should have the right to counsel. They believed that without counsel accused persons cannot protect themselves against the awesome power of the state, or the prejudices of the majority, who control the machinery of the state. They believed that the effective representation of counsel was essential to the proper working of the criminal justice system. It is part of what makes us a free people.

The history of the Latter-day Saints helps illustrate this point. On June 23, 1843, the Prophet Joseph Smith was arrested in Illinois by Sheriff Reynolds of Jackson County, Missouri, and another person. The charge was treason against the state of Missouri. In the Prophet's words,

[B]oth of them presented cocked pistols to my breast, without showing any writ or serving any process. Reynolds cried out,

"[Expletive deleted], if you stir I'll shoot. . . ." I answered, "I am not afraid of your shooting; I am not afraid to die." I then bared my breast and told them to shoot away. . . .

They then hurried me off, put me in a wagon without serving any process, and were for hurrying me off without letting me see or bid farewell to my family or friends. . . . I then said, "Gentlemen, if you have any legal process, I wish to obtain a writ of habeas corpus," and was answered,—"[Expletive deleted], you shan't have one." They still continued their punching me on both sides with their pistols.

. . . The officers held their pistols with muzzles jamming into my side for more than eight miles, and they only desisted on being reproached by [Stephen] Markham for their cowardice in so brutally ill-treating an unarmed, defenseless prisoner. On arriving at the house of Mr. McKennie, the tavern-keeper, I was thrust into a room and guarded there, without being allowed to see anybody. . . .

I again stated to Reynolds, "I wish to get counsel," when he answered, "[Expletive deleted], you shan't have counsel: one word more, [expletive deleted], and I'll shoot you." . . . I saw a person passing and shouted to him through the window, "I am falsely imprisoned here, and I want a lawyer."<sup>5</sup>

Ultimately Joseph was able to obtain legal counsel, and he obtained a writ of habeas corpus, which resulted in his freedom. One year and four days later the Prophet was murdered by a mob at Carthage Jail. If any people believes in due process of law, in protecting the constitutional rights of accused persons, and in the rule of law instead of mob rule, it should be the Latter-day Saints.

Elder Dallin H. Oaks, who practiced law in Chicago, has said,

I need to tell you that the client who gave me the greatest personal satisfaction was a young Polish boy whom the Supreme Court of Illinois appointed me to represent in his appeal to that court. I lost the appeal seven to nothing and acknowledged the result as just. But I had a great deal more satisfaction in helping that young man have due process of law than

I had representing some prestigious but sometimes quite underhanded corporate clients.<sup>6</sup>

The second criticism is that as a class lawyers are dishonest and immoral. It is said that the phrase "honest lawyer" is an oxymoron—self-contradictory phrase—like the phrases "civil war," "professional wrestling," "family vacation," and "reasonable attorney's fee." People believe that lawyers will argue any side of any question for money. Lawyers also argue in the alternative. My favorite example is the lawyer who told the judge, "Your honor, my client was out of town on the day of the murder. And if he wasn't, he was not at the scene of the crime. And if he was, he didn't pull the trigger. And if he did, he's insane."

In fact, it is not true that all lawyers will argue any side of a question for money. The Model Rules of Professional Conduct make clear that a lawyer should exercise independent judgment;<sup>7</sup> and many clients do come to their lawyers for moral as well as legal advice. Often clients want not merely their lawyers' skill, but also their judgment, and it is my experience that most clients do try to follow their lawyers' moral advice.

Are lawyers less honest than other people? A survey conducted a number of years ago showed that more than a third of Americans believed that most lawyers would engage in unethical or illegal activities to help a client in an important case.<sup>8</sup> However, seven out of eight of those who had used legal services gave their own lawyers high marks for honesty.<sup>9</sup> I think that the difference in responses is significant.

My own experience in law practice led me to conclude that most lawyers are honest. Lawyers face disciplinary action for dishonesty. Elder Oaks has observed, "In our society the members of many groups are notable for lying, but none is punished more severely than lawyers. What is unique about lawyer lying is not that it is more widespread or more important than the lying of members of other groups, but that it is more severely condemned and more severely punished."<sup>10</sup>

In addition, lawyers are repeat players in the legal community. They have to make representations of fact to other lawyers and judges nearly every working day of their lives. In order to get their work done, it is essential that they have a reputation for honesty. If they lie, their reputation for dishonesty will quickly spread among their peers. It comes as a surprise to many people that the legal system depends so heavily on trust, but it is true.

One of my favorite examples of a lawyer's integrity involves Elder Dallin H. Oaks. As a young lawyer he was attending the deposition of an employee of one of his firm's corporate clients. The witness began to lie under oath. Dallin Oaks got on the phone to the man's employer and said, "Either you get somebody down here who is going to tell the truth, or you get yourself another lawyer." Good lawyers have that kind of moral backbone.

According to a public opinion poll, nearly a third of Americans believe that lawyers are too interested in money.<sup>11</sup> Some lawyers are. I believe that seeking wealth is a poor reason to go into law. Let me tell you about an experience that I had. When I was in law practice, my law firm had a car-leasing program in which each person received a very generous allowance for leasing a car. If you chose not to lease an expensive car, you simply forfeited part of the car allowance. So I went out and leased a beautiful sports car.

The car was the nicest toy I ever owned. It was superbly engineered, and it drove like a dream. When the turbo kicked in, the car would flatten your ears back against the headrest. A voice would tell you when the door was open or the fuel level was low. It would say something like, "Left door is ajar, Excellency." The volume control on the stereo went from 1 to 10, and above 10 it had another setting that said: "Liquify Cerebral Cortex." The night I brought the car home, I sat in it until two a.m., trying out all the buttons and gadgets. My wife, Nadine, refused to drive the car; it was too ostentatious.

One year later I left law practice and came to law school to teach. I gave up the sports car and bought a 1970 Valiant. It did not have a turbo-charger; instead, it had a wimpo-charger. There was a picture of my car in the dictionary, next to the definition of "Breach of warranty."



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What surprised me is that I did not miss the sports car at all. Oh sure, the car was fun for a few months. However, after the newness wore off, it was simply transportation. You've all had the experience of wanting a certain material thing. You looked forward to getting it, and it was exciting at first.

After a while, however, the thrill wore off, and you began looking forward to acquiring some other material thing, something that was really going to satisfy you. To borrow an image from C. S. Lewis, wealth is like an onion; when you peel off one layer, you simply discover another layer underneath. This process continues until you realize that at the center of the onion there is nothing at all.

In 2 Nephi 9:51, Jacob taught, "Wherefore, do not spend money for that which is of no worth, nor your labor for that which cannot satisfy." Wealth does not satisfy the deepest hungers of the soul; it does not bring joy. Living the gospel brings joy. Serving and loving others bring joy. One of the deepest secrets of life is that we are not here to be served, but to serve.

On this issue I believe that the legal profession has begun to lose its way. It used to be that lawyers didn't worry as much about money. They considered themselves a profession, not a business. However, recently lawyering has become more of a big business. Law firms have begun emphasizing the bottom line and have increased their billing rates accordingly. Firms now require lawyers to work longer hours and to bring in more clients. As a result of this increased mercantilizing of law practice, the job satisfaction of many lawyers has declined in recent years. This materialistic trend parallels broader trends in our society, which generally is becoming more selfish, more greedy, and more acquisitive.

Things used to be different, at least in degree. For example, when I was a young associate my law firm represented 12 couples who were defrauded in an investment scam. As a result of the scam, each couple had a large second mortgage placed on their home. Our job was to prove that these people had been defrauded and to get the second mortgages removed. The litigation was lengthy and costly, and it reached a point where our clients could not afford to pay us any more. A business whose client cannot pay usually makes

the rational economic decision not to provide services to that client. However, that was not how we saw things. We had made a commitment to these people to represent them, and we were going to do it, whether they could pay us or not. We took the case through trial, and we were able to obtain the relief they needed. We considered ourselves to be engaged not merely in economic activity but in something more. That sense is declining in the profession.

The fourth charge, based on accounts in the media, is that there is a litigation explosion in our country. There are too many lawyers, and they are filing too many frivolous lawsuits. It has been alleged that the United States has 70 percent of the world's lawyers, and that litigation is causing the United States to lose its competitive edge in the world economy. One economist asserts that each lawyer costs the nation one million dollars per year in lost gross national product.<sup>12</sup> One tongue-in-cheek solution might be to pay lawyers not to practice law, just as we pay farmers not to grow crops. For example, we could pay each lawyer about \$800,000 a year to stay home, and everybody would be better off!

As usual, there is a gap between the image and the reality. First, the United States does not have 70 percent of the world's lawyers. Calculating the number of lawyers in various countries is difficult, but one scholar has estimated that the United States actually has only 9.4 percent of the world's lawyers.<sup>13</sup> Second, it is not quite true that people are willing to sue at the drop of a hat. A major study found that only 10 percent of grievances come to the attention of a lawyer, and only 5 percent become filed cases.<sup>14</sup> A Rand Corporation study of people's responses to disabling injuries found that only 2 percent become filed lawsuits.<sup>15</sup>

There has been a significant increase in the past thirty years in the frequency of lawsuits. This might be caused by several factors, including changes in the law, greater awareness of legal rights, increased urbanization and economic activity, a declining sense of community, and a greater belief that

society should aid persons injured in accidents.<sup>16</sup> The National Center for State Courts examined the data and found that although there were substantial increases in litigation rates during the late 1970s, any "litigation explosion" peaked in 1981.<sup>17</sup>

The media also report frivolous cases, like the case a few years ago in which a child sued because there was no prize in her box of Cracker jacks. We also hear about cases in which juries award apparently outrageous sums of money. A jury has been defined as a group of bright and intelligent people who never read newspapers or watch television. Meanwhile, the rest of us seem to pay for these awards through higher taxes, higher insurance premiums, and higher prices for goods and services. There is some truth to these claims. But, as Mark Twain once said about Wagner's music, it's not as bad as it sounds.

Large jury awards certainly exist, especially in the areas of medical malpractice and products liability, and they drive the averages up.<sup>18</sup> However, the data suggest that, adjusted for inflation, median (or typical) jury awards have increased only slightly over time.<sup>19</sup> (At this point it should be remembered, however, that "data" is Latin for "the plural of anecdote.") The media generally do not report the run-of-the-mill cases; they report the strange, bizarre, and tantalizing cases, and the big verdicts. Suppose for a moment that your principal source of information about the traffic system were the 10 o'clock news. You would probably quickly conclude that the system had very little social utility. You would be correct in concluding that the system had serious problems that needed attention, but the image presented would be a distortion of reality.

The public's fifth complaint is that the legal system is flawed. Indeed it is. Dispute resolution is too expensive, too time-consuming, and too influenced by a disparity in the parties' resources. Effective legal representation is simply out of reach for many Americans. Former Chief Justice Burger said, "To rely on the adversary process as the principal means of resolving conflicting

claims is a mistake that must be corrected."<sup>20</sup> He explained, "For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."<sup>21</sup>

Of course, the legal system is not the only institution that is in difficulty. The government, the family, business, health care, education, and other institutions are all experiencing serious challenges. The legal system's problems are complex, and finding real solutions is not easy. Suggestions have been made, and to some degree implemented, like alternative dispute resolution, more legal clinics for low income people, insurance for legal services, requirements to provide pro bono services to the poor, procedural reforms, stricter lawyer discipline, and others. There are many problems, and there is much to be done to improve things.

It's also true that people have positive images of lawyers. For example, people recognize that our nation could not have been founded without the efforts of lawyers like Thomas Jefferson, John Adams, and others. Many of the signers of the Declaration of Independence and about one-half of the signers of the Constitution were lawyers. Abraham Lincoln was a lawyer; Sir Thomas More was a lawyer. Think of some of the lawyers you know, including distinguished people like James E. Faust, Dallin H. Oaks, and Rex E. Lee. Many lawyers serve ably and well; they are clear thinkers and speakers; they stand up for us and speak in our behalf. They also help resolve disputes, and good lawyers do this in a civil, peaceful, and noncontentious manner. These lawyers are to be praised. The Savior said that "he that hath the spirit of contention is not of me."<sup>22</sup> He also said, "Blessed are all the peacemakers, for they shall be called the children of God."<sup>23</sup>

Recently an American Bar Association task force recommended that law schools emphasize the teaching of values.<sup>24</sup> At the J. Reuben Clark Law School we take that responsibility

seriously. Each student is required to take a course in professional ethics, and we make a conscious effort to discuss ethical issues in other classes. We offer professional seminars, which address the integration of religious, moral, and professional values. In the past few years, under the direction of Professor James Backman, we have also established an extensive program in which law students team up with lawyers in the community to provide free legal services to low income, disabled, and elderly people, to Spanish-speaking clients, and to immigrants, as well as to assist with the mediation of disputes outside of court.

Most important is the strong moral compass that our students bring with them, which is the product of powerful and irreplaceable family and religious training. We try to enhance that moral compass while our students are here. As they stay close to the Spirit of the Lord, it will serve them well throughout their lives.

John Tanner<sup>25</sup> has brought to my attention a passage in Chaim Potok's novel, *The Chosen*.<sup>26</sup> In the book, Reb Saunders, a Hasidic rabbi, had a brilliant son named Danny. Danny had "a mind like a jewel," "like a pearl, like a sun." Reb Saunders explained,

[W]hen my Daniel was four years old, I saw him reading a story from a book. And I was frightened. He did not read the story, he swallowed it, as one swallows food or water. . . . It was a story in a Yiddish book about a poor Jew and his struggles. . . . Ah, how that man suffered! And my Daniel enjoyed the story, he enjoyed the last terrible page, because when he finished it he realized for the first time what a memory he had. He looked at me proudly and told me back the story from memory, and I cried inside my heart. . . . "A mind like this I need for a son? A heart I need for a son, a soul I need for a son, compassion I want from my son, righteousness, mercy, strength to suffer and carry pain, that I want from my son, not a mind without a soul."<sup>27</sup>

Reb Saunders feared that Danny would have a cold mind, a cruel

mind—proud, haughty, impatient with less brilliant minds, unable to understand pain, indifferent to suffering. Therefore, he imposed upon his son a regimen of silence—he didn't speak to his son—so that Danny could learn of pain and understand the pain of others. In this manner, Reb Saunders hoped to teach Danny to suffer for his people, to take their pain from them, and to carry it on his own shoulders.

Good lawyers must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders. They must know of pain, and how to help heal it. Lawyers can be healers. Bruce Hafen has observed that like physicians, ministers, and other healers, lawyers are persons to whom people open up their innermost secrets when they have suffered or are threatened with serious injury.<sup>28</sup> People go to them to be healed, to be made whole, and to be protected from harm.<sup>29</sup> These are large and important tasks, and they require all that lawyers have to offer. They require both good minds and good hearts—not only mental acuity and professional skill, but also compassion, righteousness, mercy, and strength to suffer and carry pain. That is what it takes to be a truly good lawyer. And the world desperately needs truly good lawyers.

#### Notes

<sup>1</sup> Professor of Law, J. Reuben Clark Law School, Brigham Young University. This article was presented as a BYU forum address on May 24, 1994. Apologies and thanks to Craig Griffin, Gary Hill, Jay Leno, Dick Selfridge, Jan Vetter, Kevin Worthen, and others.

<sup>2</sup> [So Noted], Cal. Law., April 1992, at 19.

<sup>3</sup> Joseph Smith, VI *History of the Church of Jesus Christ of Latter-day Saints* 206 (1970 ed.).

<sup>4</sup> Brigham Young et al., XV *Journal of Discourses* 224 (1967 ed.).

<sup>5</sup> Joseph Smith, V *History of the Church of Jesus Christ of Latter-day Saints* 340-42 (1970 ed.).

<sup>6</sup> Elder Dallin H. Oaks, *Bridges*, Clark Memo., Fall 1988, at 10, 15.

<sup>7</sup> Model Rule of Professional Conduct 2.1 (1983).

<sup>8</sup> Curran & Spalding, *The Legal Needs of the Public, A Preliminary Report of the ABA Special Committee to Survey Legal Needs* 94, 96 (1974).

<sup>9</sup> American Bar Association Special Committee to Survey Legal Needs, Responses to Questionnaire, Part IV, Question 40.

<sup>10</sup> Elder Dallin H. Oaks, *Gospel Teachings About Lying*, Clark Memo., Spr. 1994, at 13, 15.

<sup>11</sup> *What America Really Thinks About Lawyers*, Nat'l L.J., Aug. 18, 1986, at S-3.

<sup>12</sup> See *An Economist Out To Be Sued*, L.A. Times, Oct. 8, 1990, at D1.

<sup>13</sup> Ray August, *The Mythical Kingdom of Lawyers*, 78 A.B.A. J., Sept. 1992, at 72.

<sup>14</sup> Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525, 544 (1980-81).

<sup>15</sup> Deborah R. Hensler et. al., *Compensation for Accidental Injuries in the United States* 122 (1991).

<sup>16</sup> See Florida Academic Task Force for Review of the Insurance and Tort Systems, *Fact-Finding Report on Insurance and Tort Systems* 263-308 (1988).

<sup>17</sup> National Center for State Courts, *State Court Caseload Statistics: Annual Report, 1984* 173 (1986).

<sup>18</sup> Florida Academic Task Force for Review of the Insurance and Tort Systems, *Fact-Finding Report on Insurance and Tort Systems* 253-54 (1988).

<sup>19</sup> Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 Pa. L. Rev. 1147, 1241-54 (1992).

<sup>20</sup> Warren E. Burger, *The State of Justice*, 70 A.B.A. J., Apr. 1984, at 62, 66.

<sup>21</sup> *Id.*

<sup>22</sup> 3 Ne. 11:29.

<sup>23</sup> 3 Ne. 12:9.

<sup>24</sup> American Bar Association Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development—An Educational Continuum* 233-72 (1992).

<sup>25</sup> John S. Tanner, *Not a Mind Without a Soul*, 45 BYU Today, Mar. 1991, at 26, 44.

<sup>26</sup> Chaim Potok, *The Chosen* (1967).

<sup>27</sup> *Id.* at 264-65.

<sup>28</sup> Bruce C. Hafen, *To Beginning Law Students on "Professionalism"* 5 (unpublished manuscript).

<sup>29</sup> See *id.*