

WHAT HAPPENED TO OUR PROFESSION?

Growing up in a small California coastal town in the 1950s and 1960s probably didn't offer me the best vantage point to discern what the big city law practice was really about. Television shows and the movies probably were the greatest contributors to my understanding of legal life. "Perry Mason," which aired from 1957 through 1966, portrayed a justice system in which the intelligence, tenacity and perseverance of one, not particularly warm or fuzzy, practitioner was allowed to shine. Father and son team, Lawrence and Kenneth Preston (portrayed by E.G. Marshall and Robert Reed), weekly tackled controversial issues in "The Defenders," (which aired from 1961 through 1965) such as blacklisting, euthanasia, abortion and civil rights. Courageous, resilient, self-sacrificing, creative, and true believers in justice, the two selflessly worked within the system to produce the right result.

Who could not think highly of the profession after watching Gregory Peck's portrayal of Atticus Finch in "To Kill A Mockingbird" (1962), the tireless single father, heroically taking a stand against racism while teaching his daughter invaluable life lessons? What about Jimmy Stewart's portrayal of Paul Biegler, in "Anatomy of A Murder" (1959), as he takes on the powerhouse lawyers from Lansing while exposing the fallibility of the criminal justice system, and is abused by theatrical advocacy, improper questioning, manipulative witness preparation, and faulty memory - all wrapped in the context of a murder trial of the killer of his wife's rapist.

These were my icons. They were intelligent. They worked hard. They were morally upright. They defended justice. They were somewhat bigger than life. And, they were not altogether different from the many lawyers that I knew growing up in my hometown. Our town's lawyers also possessed a certain mystique, a larger than life personae and a personal power greater than their non-lawyer contemporaries.

Okay, we also got to see the warts on these guys. They experienced a lot more divorces, before divorce became so popular. They also had a higher incidence of alcoholism than other professional populations. But they appeared not to lose any esteem for their flaws. Maybe it was because they brought something more to the table, something not shown by Perry Mason, the Prestons, Atticus Finch or Paul Biegler - they were active contributors to the social fabric of our town. They were the town councilmembers, the Chamber of Commerce presidents, the directors of the philanthropic organizations, and the instigators of community service. And like Perry and the other characters, they were middle-class. Maybe upper-middle-class, but they were middle-class nonetheless. Lawyers then simply were not rich. They didn't particularly aspire to be rich. More often than not, they were pinnacles of the community, doing good and doing well, but not extravagantly.

I may have been naive, but that's what being a lawyer meant to me. A good income, a respected, contributing community member, with the opportunity to exercise the intellect, while serving justice. That's what drew me to this career. And, that's what I believe largely has been lost to the profession since I began my practice. I don't know when or how we veered off course. It was gradual, from all that I can tell. You began to see the evidence of it with the explosion of lawyer jokes, the increasing number of lawyers leaving the practice, the escalating levels of divorce, addiction, and depression. Then we learned that a stunning super-majority of practicing lawyers counseled their children not to practice law. I was one of those counseling parents.



Timothy A. Tosta

Partner

415.356.4623

ttosta@luce.com

www.luce.com/timothytosta

WHAT HAPPENED TO OUR PROFESSION?

But I loved the dream that I had. And there were periods in my almost 38-year career when I felt that I was living that dream. My regret has been that recently there are fewer of those occasions. But, I'm not yet ready to throw in the towel. I'm no Don Quixote, tilting at windmills. It's that the dream held a larger purpose, although I gradually lost sight of what that purpose was. But I knew that I had to reclaim that purpose whatever it was because it was about much more than me. So I began to pursue it - to redefine, reclaim, and restore it, not only for my benefit but for our society as a whole.

When the *American Lawyer* began tracking the metrics of law firm profits, and created their now iconic indices that rank law firms accordingly, the game changed. Or, perhaps more precisely, the alienation accelerated. Steven Brill did not make lawyers avaricious or materialistic. He just provided them with the metric to justify their actions. From a marketing standpoint, it was brilliant. The Am Law 100 represents to the legal industry what *U.S. News & World Report's* ranking of colleges used to mean to academia. From a quality of the practice perspective, it has been devastating.

It's funny how you don't really care as much about income until you make your earnings relative to someone else. The *Am Law 100* fueled the fire of greed by making comparative data widely available. Then, we began to perceive the *Am Law* creep as firms began to cook the books to inflate earnings. But, I have to ask, why is any lawyer worth several million dollars a year? Is any lawyer's true value added contribution that precious? And, why is it that lawyers believe they can raise their rates from year to year without improving their competency or value proposition?

Why is it that law firms assume that they will grow every year, despite overall economic performance? Why is it that law firms think that their lawyer peers are the best business managers and leaders? It appears that, with the recent downturn, our clients have begun to answer these questions for us. And, their answers are showing us that we have demeaned our profession and overvalued our contributions.

I just returned from a meeting in Chicago convened by Akina Corp., a professional service firm that helps lawyers and firms build business development skills. Akina recently initiated a program, named "Generation Generosity," in which it seeks to explore, through contributions to its blog, what generosity in the legal profession looks like and why it is important. Akina recently partnered with Insight Labs, a Chicago nonprofit think tank, to convene a session of about 25 esteemed members of the bar to reimagine the practice of law. Lawyers converged in Chicago on Sept. 16, from all over the country, representing a mix of firm sizes, in house corporate counsel, a senior member of the law publishing industry and others to examine this question. Prior to the meeting, each of us was asked to identify a lawyer who we believed embodied the best of the legal profession and to explain how we made our choice. The answers of the various participants can be found at www.insightlabs.org/interview/findingprecedents.

This lab was not intended to result in a definitive action outcome. It was designed as an exploration. We worked hard. We covered a lot of territory. We had lots of agreement yet found many propositions over which we disagreed. In the end, a big concept congealed. Mind you, I am from California, bringing with me all the left coast language and propensities that go with that territory. But the words that follow are not mine, although I made my contribution.

At the end of the day, we concluded that the role of the legal profession is to protect the social contract under which we function. We developed the shorthand order without guns! Our failure to uphold this obligation (and, I would add, to demean it thoughtlessly) ultimately could result in social disintegration and violence. We are the guardians of the rules and order that allow our society to function. Maybe this outcome

WHAT HAPPENED TO OUR PROFESSION?

is obvious. But the fact that all this talent spent hours to reach it suggests the nature of our plight. The question is: Are we collectively fulfilling our role? More importantly, can we keep our society's trust if our principal goal is, or appears to be, about generating profit? Have we already crossed the line, where our role as protector of that trust is no longer credible? These are very big questions.

How it would feel to bring this trust back, as the focal point of our professional lives? How differently would we treat one another? How differently would we mentor our associates and successors? How, then, would we counsel our children about the profession?

Our work from the lab is far from over. Our conversation will continue and expand. Other conversations will begin. Are you interested in this exploration? Or, are you fine with the way things are?

Timothy Tosta is a partner with Luce Forward's San Francisco office, specializing in land use law. He blogs at www.coachingcounsel.com/blog. He can be contacted at 415.356.4612 or ttosta@luce.com.

Reprinted and/or posted with the permission of Daily Journal Corp. (2011).