Department of Justice

LAW DAY ADDRESS

OF

THE HONORABLE GRIFFIN B. BELL

ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

UNIVERSITY OF GEORGIA SCHOOL OF LAW

SATURDAY, APRIL 28, 1979
11:00 A.M.
ATHENS, GEORGIA

Our concept of law may be inseparable from our concept of government in the United States. As long ago as 1835, Alexis de Tocqueville observed: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

So, in a sense, what I am about to say about the law can also be said about government in general in this country. The frustration felt by the private sector and by the average American citizen about the sprawling and seamless web of government regulation is a direct reflection of their concern over a major part of our legal system as well. More specifically, it is my sense that both government and law as reflected in government regulation and litigation are close to losing sight of a very basic goal -- fundamental fairness.

Some of you may recall then-Governor Carter's speech here at Law Day in 1974. In that address, he said his own view of the role of law in society was colored by the philosopher Reinhold Niebuhr, who had written that there is no way to establish or maintain justice without law, that laws are constantly changing to stabilize the conflicting demands of an

ever-changing society, and that law is, in essence, the final expression of government's role and structure. In my own view, law is the guardian of our freedoms and of our most sacred institutions. I am proud to be a part of our nation's legal system, and I take it as a personal challenge, as all lawyers should, to see that the law is itself a fair and just mechanism for society. Indeed, to allow the law to be abused or even warped is to place our liberties in peril.

There is an area of unfairness in the government's legal relations with the public which we must begin to face. Civil litigation of any sort with the government can cost a small -- or even not-so-small -- fortune today. Yet, even if the private litigant prevails and has affirmatively demonstrated that the government took an indefensible position in the civil law suit or agency proceeding, that litigant must still bear much of the cost, including attorney's fees. That result seems unjust, and it is probably the worst feature of the so-called "American rule" on attorney's fees and costs.

The Department of Justice, at my direction, is now examining the possibility of legislation which would cure this defect. This proposal would be based on the recent Supreme Court

opinion in Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978). Under this proposal, the government would be liable for attorney's fees if it acts in a manner that is "arbitrary, frivolous, unreasonable, or groundless." The burden of proof would be on the prevailing party and be subject to a separate motion at the conclusion of the litigation. I believe that such a proposal, if adopted, would do much to curb the growth of any unreasonable or unwarranted governmental civil action or agency proceeding, and would also restore a measure of fundamental fairness in litigation between private persons and government.

As government officials, we do our best to limit our cases to those which are proper and justifiable. But on occasion there may be a case which slips by us, and our error should not be at the cost of those private litigants or defendants who are the subject of this abuse. The object of our attorney's fees legislative proposal would be to give some fair measure of redress to those persons but without imposing a crippling cost to the federal treasury or chilling the vigor of federal attorneys. Again, our goal is to ensure fundamental fairness to all the parties, the government as well as the private persons. Moreover, after a period of experience, it may well be just to extend this approach to unfounded criminal prosecutions.

In the same vein, I call to your attention a rule of procedure often neglected, Rule 11 of the Federal Rules of Civil Procedure. That rule states in pertinent part: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay."

In citing this rule to you, I take note first of the tremendous power exercised each day by lawyers over the affairs of their clients. Whether the client is the government or a private individual or entity, the client must depend upon the lawyer to file such papers as he or she deems necessary and appropriate. My concern in this regard is that, in the interest of advocacy, Rule 11 is too frequently ignored. How often does a lawyer stop -- just for a moment -- to reflect on the presence or absence of "good grounds" for the filing? And how many motions and discovery proceedings are commenced, not in aid of truthseeking, but merely to put off the ultimate day of reckoning in court? Or, in another situation, how many appeals are taken by lawyers who <u>know</u> that there is an absence of "good grounds" for appeal, or that the appeal is "interposed for delay."

I cannot give you precise answers to these questions, but it is my impression as a lawyer, former federal judge, and Attorney General, that Rule 11 is often violated by lawyers. Again, this violates the principle of fundamental fairness: fairness to the client, fairness to the opposing party, and, as importantly, fairness to the legal system. Abusive filings clog the courts and enhance the public misimpression that lawyers foster unnecessary litigation for their own interests. They divert judicial resources from consideration of truly meritorious filings. They obviously increase the costs of dispute resolution.*

And it is important to note here that there is not even a Rule 11 requirement for criminal cases or for appeals.

There is, however, the requirement in the Code of Professional Responsibility that a public prosecutor or government lawyer "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." (DR-7-103(A)). As stated in the

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* Incidentally, I have just read the April 18, 1979 opinion by U.S. District Judge Robert L. Carter in the Southern District of New York, in which the court awarded $50,000 in attorney's fees and expenses to be taxed against a law firm and its client for bringing a "baseless" lawsuit "in bad faith, vexatiously, wantonly and for oppressive reasons" in violation of Federal Rule of Civil Procedure 11. Nemeroff v. Abelson, (77 Civ. 1472, April 18, 1979).

applicable ethical consideration to this rule, "The responsibility of a public prosecutor differs from that of a usual advocate; his duty is to seek justice, not merely to convict." (EC 7-13). In one of my first meetings as Attorney General with the attorneys of the Department of Justice in the Great Hall of the Department, I read to them Mr. Justice Sutherland's admonition in Berger v. United States, 295 U.S. 78, 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." (emphasis supplied)

This Rule 11 problem or lack of a Rule 11 has prompted me to draft an Attorney General's policy that will bind all lawyers within the Justice Department. I intend to hold each and every lawyer responsible for his or her pleadings, and positions taken orally in court. If we determine that a lawyer has knowingly violated the Rule 11 concept, we will take appropriate action against the attorney and, in addition, confession of error or such other judicial disposition of the

offending pleading or position as may appear proper. And we will notify every government agency whom we represent that this policy will be applied to every proposed filing or position in their behalf.

As I have indicated, it is equally important that we approach federal criminal prosecutions with the same sense of fundamental fairness. The Attorney General's policy directive that we are drafting will also ensure that no indictments are recommended by a federal prosecutor unless the evidence presented to a grand jury would be at least likely to produce a conviction. We will not go forward, absent highly unusual circumstances, where we have only enough evidence to withstand a motion to dismiss the prosecution at the close of what would be the government's case at trial. This standard, which is even higher than the "probable cause" standard in the Code of Professional Responsibility, will govern both the decision to prosecute and the selection of specific charges to bring against a defendant. The public will then have greater confidence in the good faith of our prosecutions, and potential defendants will be spared the agony and expense of indictment and trial where the government's case is, at best, only marginal.

Through this new approach, I will be giving notice to the entire government that we will adhere to the principle of fundamental fairness in our dealings with the courts and with the public.

I have often thought that the government's lawyers should set the highest standard of conduct for themselves and for the legal profession. This policy will hopefully set an example for the entire bar, and will enhance credibility and confidence in our legal system.

Moreover, we will be carrying out the spirit of the inscription that is carved on the rotunda of my office in Washington: "The United States wins its point whenever justice is done its citizens in the courts."

The Justice Department is taking the lead in developing these unusual approaches to law practice problems because it is our ethical duty to do so, and because the legal profession requires improvement. We must remember that Canon 8 of the American Bar Association's Code of Professional Responsibility states that <u>every</u> lawyer should assist in improving the legal system. Indeed, paragraph 8.1 of that canon makes this observation:

"By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein; thus, they should participate in proposals and support legislation and programs to improve the system without regard to the general interests and desires of clients and former clients."

Thus, nothing could be more appropriate than that the Attorney General, the chief lawyer for the people, and his assistants, take a leading role in improving our legal system. In fact, President Carter created the Office for Improvements in the Administration of Justice in the Department. This new office is staffed by 20 lawyers and headed by eminent scholars, and its sole task is to develop proposals for enhancing justice. This is one way in which we discharge our ethical duty under Canon 8.

I should also add that improving the system by way of these policies and practices will meet Chief Justice Burger's oft-cited criticisms of the trial bar. The changes I have described are actually the second set of innovations that have the specific aim of improving the quality of legal practice in the federal courts. The first was the expansion of the Attorney General's Advocacy Institute,

which now trains over 600 lawyers a year in the fine art of civil and criminal trial practice. The Institute also gives dozens of advanced courses in specialized fields.

Through the Institute, we are not only training the government lawyers of today but also the private lawyers of tomorrow. Better performance by government attorneys may tend to raise the levels of trial advocacy generally. And as some of these better-trained young lawyers leave government service, they will spread their training and experience throughout the private bar for years to come.

Now in closing, let me turn to history.

The Roman Emperor Caligula posted the laws of his time in small print and in high places so as to keep the populace from knowing the laws. This was an example of the worst kind of legal system. But there is also a Roman example of the best.

Centuries ago, the Roman Emperor Justinian said: "Justice is the earnest and constant will to render to every man his due. The precepts of the law are these: to live honorably, to injure no other man, to render to every man his due." It is my belief that the overwhelming majority of lawyers abide by this injunction of Justinian. That is why we are proud to be lawyers and to be able to serve in a nation whose foundations rest on the rule of law.

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