

Running to the Fire



Rob Buchanan

In politics, it seems there is little that people across the political spectrum agree on these days. But here's one: the future of our democracy cannot be taken for granted and the rule of law is key to its survival.

The good news is civic apathy is yesterday's news. The bad news is there's passionate disagreement about the evidence, who's to blame, and even what the rule of law means.

The question for attorneys: *What does this moment require of us?*

An email I received on November 17, 2020, at the height of lawsuits challenging the presidential election, prompted the question for me. It read:

The American people have voted in record numbers. Every vote expresses a citizen's voice, and each vote legally cast must be counted. Our democracy is built upon the rule of law, which requires adhering to the laws and regulations established for elections. If there are any remaining,

legitimate concerns about the enforcement or implementation of those laws, courts provide the venue to rule independently and with deliberation on those claims. Once the courts have ruled, individuals have the right to disagree with those decisions, but that disagreement does not affect the validity of the court's decisions. That is the very essence of the rule of law.

The rule of law also prescribes the peaceful transfer of power following an election.

Our institutions of democracy, established by law, once again proved their brilliance, even under the considerable strain of a pandemic and other challenges. The American public, volunteers, public servants, the judiciary, and lawyers all deserve our heartfelt appreciation for their work to ensure the electoral process remains fair and just across our nation.

Instantly, I knew how carefully the writer had crafted the declaration, even in the heat and emotions of the news cycle. Who could disagree with a single word? It is calm, factual, and affirms the principles most relevant to the moment, principles that should be the framework for any serious conversation about the election and what to do.

But as I admired the statement, I wondered how it would land. In these deeply divisive times even the most carefully worded statement can draw ideological fire. Who was the statement trying to persuade and why? What risks or dangers was it attempting to reduce? Answers to such questions are important to me before I speak as president of the State Bar of Michigan or even as a Michigan attorney.

The email declaration just so happened to be from American Bar Association President Trish Refo, who clearly labored over every word, as attorneys do. And for good reason. The ABA brands itself as the "national representative of the legal profession, defending liberty and defending justice." Naming yourself the national representative requires the organization to speak out publicly on major issues deemed critical to liberty and justice.

Unfortunately, the nation is polarized on liberty and justice, and statements perceived as promoting a particular political agenda can alienate members and the public. On the other hand, watered-down, anodyne statements are useless.

Solidarity statements face another problem. In times of great division, we as readers or listeners want to know the "side" the

The views expressed in the President's Page, as well as other expressions of opinions published in the *Bar Journal* from time to time, do not necessarily state or reflect the official position of the State Bar of Michigan, nor does their publication constitute an endorsement of the views expressed. They are the opinions of the authors and are intended not to end discussion, but to stimulate thought about significant issues affecting the legal profession, the making of laws, and the adjudication of disputes.

[T]he future of our democracy cannot be taken for granted and the rule of law is key to its survival.

As attorneys, we are called by duty to run to the fire and help extinguish the flames that can melt public confidence in the rule of law.

speaker associates with before believing a public statement about current events. *Before considering the actual content*, it seems we accept or reject the statement based *only* on the speaker's background or our view of who the person represents. Consequently, the message itself gets hijacked by our feelings about the messenger.

Ask yourselves, does knowing the email statement is from the ABA help or hurt its credibility for you? Does knowing that Refo earned both her bachelor's and law degrees with high honor from the University of Michigan affect credibility? Context is important in judging validity, but shouldn't credibility filters be applied *after* considering the content, not before?

Pondering the email statement, I kept coming back to what this moment in our nation's history requires of us. Here's my conclusion.

When we raised our right hand and took the Lawyer's Oath to be admitted to the bar, we swore to respect the courts of justice and judicial officers. If ever there was a time to promote public understanding and respect for the rule of law in our interactions with other people, this is the moment. We need to refute smears claiming that judges are applying political inclinations to decisions. Our training can help disarm the cynical reactions that short-circuit critical thinking and undermine our democracy and the rule of law.

I urge each of us to commit to two essential solutions going forward:

1) **Use your credibility as an attorney to advance public understanding of the rule of law.** Though our profession is often the butt of jokes, we know from personal experience that friends and family

often turn to us for help in understanding what's going on *because they know we are attorneys*. We must respectfully correct basic misstatements and misunderstandings of law and our legal system when we encounter them in communications, in person, or on social media. Elements of the rule of law often misunderstood by the public are: independence of our judiciary; the processes of neutral factfinding; due process; testing evidence through averse scrutiny; jury of one's peers; availability and limit of appeal; standing; finality; and professional and judicial ethics. In our communications with others, we need to help them understand the rule of law and why it works.

2) **As attorneys, we need to set an example for critical thinking and reasoning about issues of the day in all communications** (yes, including on social media). Critical thinking and reasoning are our stock in trade, but are we setting a good example and exercising discipline and humility in our personal conversations and statements? Do our words to friends, acquaintances, and strangers demonstrate careful thinking and active listening or do they fuel distrust and cynicism? Are we passing along as truth "news" and "facts" that we merely hope are true with no careful evaluation or objective verification?

The State Bar of Michigan and its regulatory agencies also have an important role at this moment. The most obvious is holding to the ethical standards of the legal system upon which public confidence depends. Maintaining high admissions standards and disciplining conduct violating ethical stan-

dards are key. Also important is the State Bar's ongoing public outreach and education, resources for every Michigan attorney educating the public, and seeking access to justice for everyone. No legal system should shut out a person because he or she can't afford it. Pro bono representation and simplifying and streamlining court procedures are critical to public confidence.

The Michigan Supreme Court, State Bar of Michigan, and other collaborators are committed to providing 100 percent access to our civil justice system. The Justice For All Task Force is actively devising improvements and solutions to strengthening public confidence. Our coalition welcomes your thoughts, ideas, and contributions to this groundbreaking work.

It is also important to respect what the SBM cannot do. Statements that predict or suggest what a judicial outcome should be, or that pass judgment on judicial opinions or political actions or statements, are beyond our authority and undermine our credibility.

Knowing what we can and should do is key to being effective in a crisis.

In his address to the Representative Assembly three years ago, then Chair Fred Herrmann, a United States Naval Academy graduate and former Marine officer, spoke to the importance of "running to the fire:"

On a submarine, a fire not immediately extinguished puts everyone in peril, hence one of the first things they teach you is to run toward and not away from a fire, and so it is in our service to the public. Attacking problems quickly and decisively is critical not only in our service to individual clients, but also in our larger collective ability to serve the public.

Attorneys and judges are the corps protecting the public from danger and running to put out the fire by peacefully litigating the legal questions from the election. We can provide support for their vital service by explaining to our family, friends, and acquaintances exactly what they are doing and why our civil legal system works. As attorneys, we are called by duty to run to the fire and help extinguish the flames that can melt public confidence in the rule of law. ■