Remarks of United States Senior
Circuit Judge Frank M. Coffin
Conference on
Communication Among the Three Branches:
The Bar as Catalyst

Sheraton Tara Wayfarer Inn, Bedford, N.H. May 3, 1991

We begin this ground-breaking conference of bench and bar, the General Court and the executive branch, with high hopes. High hopes of opening new lines of communication addressing ways to improve access to the courts. If the problems and the times seem daunting to us, we should take heart in seeing how far we have come from what was perhaps the first occasion for bench and bar to meet in this state, 110 years ago.

Your celebrated Chief Justice Doe had narrowly missed out on succeeding Maine's Nathan Clifford in the "New England" seat on the U.S. Supreme Court, in December of 1881. He had to face a bar nettled by the absence of any reported opinions from the Doe Court in the past five years. Charles Doe's most recent biographer, Professor Reid,[1] wrote: "The problem was so acute that in December the lawyers of Grafton and Coos counties organized New Hampshire's first bar association, partly to put pressure on the court." He cites a later bar president as saying that the "one great advantage of a bar meeting seemed to be the opportunity it furnished to express something more than friendly criticism of the judges."[2]

Proof of this lay in the speeches of that first meeting. One spokesman fulminated: "I know of no reason for withholding these reports .... The court, with cool indifference, sees the bar struggling . . .and groping in the dark. . . ; complaints fall on deaf ears .... It is without parallel in any of the numerous state and federal courts of the Union . . . ."[3] Warming to the fray, the son of a recently appointed associate justice described a supposedly recently discovered ancient document which recited:

> Many centuries ago, a fellow by the name of Doe was chief Medicine Man in the tribe in which he lived. In this tribe, the educated, well-behaved and virtuous class, (the g.o.p. of moral ideas), were called, as now [,] Republicans, while the low, uncultivated and vicious class were known, as now, as Democrats. Now these wicked and dissolute Democrats had, a few years before, bounced this Doe, who just then was a Republican, from his job as chief Medicine Man, and on his return to power he thirsted for revenge. . . .He determined to kill off as many of this depraved class. . . as he could conveniently. . . .He must write shorter prescriptions and kill more men, so a single word would now often suffice.[4]

The bar had some success from this show of unhappiness. Three volumes of reports came out, but at the 1885 meeting, the problem resurfaced. Chief Justice Doe had the last word; in an opinion published at last in volume 63, he cited a case that appeared in volume 64 . . . two years later. Notwithstanding all this brouhaha, relationships had so improved by 1893 that the Chief Justice wrote the Southern New Hampshire Bar Association in this effulgent prose: "Never

[1] John Phillip Reid, The Chief Justice: The Judicial World of Charles Doe. 374 (Harv. Univ. Press, 1967).
[2] Id.
[3] Id. at 374-75.
[4] Id. at 375.

before has the state had so learned, able, honorable, and trustworthy a bar as now. Instead of ignorance and weakness being introduced by sweeping away the technicalities of pleading, knowledge and strength more and more abound. The legal learning, capacity, and usefulness of our bar is far in advance of what it was forty years ago. The service it renders the community is of incomparably more value."[5]

Well, cursing the court, distrusting it, or trying to make it toe the mark is one level of bench-bar relations. The Maine State Bar Association began its life in 1891 with similar thoughts in mind. The two pieces of legislation it pushed from the very beginning prohibited a Supreme Court justice from sitting in review of his own conduct at trial and required all of a judge's comments at trial to be taken down by the court reporter. Salubrious, indeed. Beginning with this basic focus on rules of fair play, the organized bar has, over the years, added other concerns -- court structure, substantive legislation, professional development through committees, continuing education, and publications, and, most recently, improving the delivery of legal services to the indigent.

Now, as is evidenced by this conference, we begin the exploration of a new dimension of service for the organized bar, a deep concern for the continued ability of the courts to function effectively. We meet in a time when that ability can no longer be taken for granted. Judiciaries in some 30 states are facing deep cutbacks, according to the president of the National Conference of State Court Administrators.[6] Vermont has declared a moratorium on civil jury trials for the last five months of its fiscal year.[7] In Massachusetts, Chief Justice Liacos reported the loss through attrition of 675 court employees, with an estimated further loss this year, the impact of which has been blunted by heroic plans for deferred payment to await retirement and payless vacation days. The Chief Justice stated that, in his first year and a half in office, "I have spent most of my time fighting to preserve our courts' capacity to function as a separate and co-equal branch of government in the face of a continuing statewide fiscal crisis."[8]

In Maine our Chief Justice McKusick has reported cancellation of capital improvements, emergency overtime, and key pilot projects, unfilled judicial vacancies, and increasing backlogs. The Maine Court, in his words striving to "do more with still less," instituted a $300 filing fee for any litigant demanding a civil jury trial, thereby provoking a formal protest from our state bar association.[9] And you are all too aware of the plight of the courts in New Hampshire where the tremendous recent explosion in case filings at a time of budgetary stringency has ushered in an era of unprecedented risk. You have probably not heard the last of such proposals as a license fee for lawyers.

The four topics selected for discussion in the "breakout sessions" of this conference all flow from this underlying time of tension. The goal of all our efforts is to assure to citizens generally as unrestricted and timely access to the courts as is within our powers. In a time of stringency, this poses hard choices and the need for innovative thinking both as to internal issues of court management and as to far reaching legislative issues dealing with court jurisdiction, the criminal law, and alternative dispute resolution. Most specifically, the issue of court funding forces us to think deeply about the role of courts in an ordered society and the extent to which

---

[5] Id. at 385.

[6] State Judicial-System Budgets Face Deficits and Cutbacks, The National Law Journal, March 11, 1991, p. 23.

[7] Id.

[8] Paul J. Liacos, First Annual Report on the State of the Judiciary, Mass. L. Rev./Winter 1990, 142-43.

[9] Portland (Me.) Press Herald, Feb. 27, 1991; Letter to Chief Justice McKusick from Ralph W. Austin, President, Maine State Bar Association, March 4, 1991.

the imposition of special taxes or fees on lawyers and litigants is consistent with the purpose and function of courts. The agenda for these three topics is to a large extent technical and draws upon the expertise of lawyers, judges, and legislators.

The fourth topic, "How to Bridge the Communications Gap," is different. The subject matter is not technical in the sense that any professional group has superior expertise. And it underlies the other three issues. For it asks the broadest of questions: how can the three branches of government work best together to provide the best possible administration of justice? In a very real sense, therefore, this fourth topic of effective communication is the key to success in implementing even the soundest conclusions reached in the other areas. That is why I choose it for this keynote presentation.

In my view, we are entering an era of changing relations among the branches of government, compelling us to seek new ways of coping with the changes while preserving the independence and integrity of each. It is an era of institutional vulnerability at both state and national levels. Our judiciaries face ever increasing caseloads, with accelerating stress, an endemic and demoralizing disparity between judicial compensation and that of other sectors of the profession, frequent inadequacy of support staff, equipment, and space, and often a concomitant diminution of respect. Our legislatures face overload of committee assignments and hearings, inadequate staff support, increased constituent demands, accelerating campaign costs, pressures of single issue, special interest lobbying, and the distorting effects of media coverage. And our state executives have the initial burden of dealing with a universal budget crunch, heightened by a long continued withdrawal of federal funding across a wide spectrum of social services.

Even before the events of this past year, the National Center for State Courts and the National Conference of State Legislatures collaborated in holding a historic conference in Denver in the fall of 1989. Entitled "Legislative-Judicial Relations: Seeking a New Partnership," it attracted over 250 key legislative and judicial officials, including your own Chief Justice, the president of your bar, and a representative from your legislature's appropriations committee.

That conference began the process of looking into formal and informal ways to further constructive communication between the legislative and judicial branches. This state conference is one of the most significant efforts to continue the process. It appropriately widens the focus to include the executive branch. I would like to suggest that we use an even wider lens when we think about communications among the branches relating to the administration of justice.

At the Denver conference, a bifocal lens concept was discussed. Robert Katzmann pointed out that communication with the legislature on institutional or housekeeping issues may best be done by an "in-house" state court administrator or other staff official but that when there are barriers to effective direct communication, as when the court's view may be deemed self-interested, institutional surrogates like state bar associations would be more effective. The Conference subsequently adopted as one of its eight major recommendations: "Encourage bar associations to serve as intermediaries between the legislative and judicial branch."(emphasis in original)[10]

This, I felt, was a good first step toward realizing that something more was needed beyond communication among officials in the three branches. But I had urged, as I do now, a broader concept. I had quoted a letter from U.S. District Judge William Schwarzer, now the

[10] Legislative-Judicial Relations: Seeking a New Partnership. Conference Summary Report, p.22.

Director of the Federal Judicial Center, who had envisioned something like the National Commission of the Public Interest, organized by Paul Volcker with private foundation funding to address the goals of attracting and keeping top quality civil service employees. Judge Schwarzer called for what he called a "National Commission for the Federal Courts, representative of the entire political and philosophical spectrum, with sufficient clout so that it can get in to see the president and that Congress will listen to it. ..." I reported my own suggestion at a Washington meeting of the Federal Judges Association, in May of 1989, that the American Bar Association take the initiative to chart the surrogacy of the future -- "to explore the appropriateness, feasibility, and desirability, as well as the hazards and disadvantages, of a permanent, broad-based coalition or commission of citizens and organizations pledged to support the independence of the Third Branch."

I then suggested that the states were the ideal laboratories to try out the idea of a broad-based citizen surrogate. "State bar associations," I said, "would seem to be a starting point, a catalyst. . . . Informal coalitions of public-spirited citizens have on occasion in the past rallied to the defense of the courts, but what I see as our need for the future is an ongoing structure. To the extent that such a structure makes politically viable legislative action in support of courts' legitimate needs, it also would ease the task of sympathetic legislators and strengthen the fabric of state government itself."

Although the Denver Conference did not recommend the expanded concept of the bar as a catalyst for a coalition of representative citizens and organizations, its report, when it discusses particular problems, recognizes the necessity of lay citizen involvement. For example, a discussion of the important step of changing judicial selection procedures was acknowledged to be, as the Washington State Court Administrator said, "too important to be left solely in the hands of legal profession special interest groups; widespread public debate and active public participation are essential."[11] North Carolina's success in gaining authorization and funding for a program of court-ordered arbitration and custody mediation was in important part attributed to "a conscious plan for building public support."[12] And child support enforcement policies were successfully implemented in several states because of the involvement of professionals and citizens as well as legislative and judicial representatives in broad-based groups.[13]

As I reflect on the potential for the organized bar as a sufficient and exclusive intermediary between the courts and the legislative and executive branches, several reasons occur to me why its more effective role is that of a catalyst, stimulator, coordinator, and leader, rather than as a monolithic, professional spokesman. I think I do not have to tell readers of New Hampshire newspapers that, no matter how highly respected by their colleagues are top bar officials, they are not always warmly received by legislators, a governor, or the media. Sometimes the soundest of positions is discounted as self seeking or professionally protective. Moreover, any state bar association worthy of the name already has an overflowing agenda of committees, projects, programs, and objectives. It is unrealistic to expect the number of lawyers and investment of time necessary to fulfill the court surrogate role all alone.

Even more important, I suspect that we have to face the unflattering fact that, second perhaps only to judges, lawyer organizations, when pitted against other groups representing a large or aroused segment of the citizenry, come in second. In general is it not a fact of life that lawyers need a sympathetic legislature and governor more than vice versa? Yet, though lawyers

---

[11] Legislative-Judicial Relations: Seeking a New Partnership, supra note 10 at 28.
[12] Id. at 32.
[13] Id. at 34.

may lack the commodity known as political clout, they possess another, more enduring commodity, a healthy respect on the part of most of the leaders of a community. It is this asset that should be utilized in designing the future role of the bar as catalyst.

Finally, and most important of all the points, the need for broad citizen participation in the serious problems facing the courts stems ultimately from the fact that those problems are not merely professional problems or inter-branch issues; they are profoundly problems for the citizenry. They are the justice slice of civilized society . . . and a very large slice indeed. Not only are these problems for the citizenry, but any law-making addressed to those problems will very largely be done by the citizenry.

In former times the bar itself could speak to the legislature with confidence that its voice would not only be heard, but understood with sympathy by others sharing the same values, language, and institutional objectives. For lawyers in the legislature were not only fairly numerous but their influence was even greater than their numbers.

I note, for example, that in 1807 Daniel Webster filed a petition with the legislature to charter the Boscawen Religious Society, to enable it to raise money and build a church. He filed it in early June. By June 18, the law was passed. It is perhaps relevant that the Speaker of the House was Charles Cutts, a veteran lawyer and legislator.[14] In my own state, at its centenary commemoration of our bench and bar in 1921, the then President of the Senate, a future revered governor, Percival P. Baxter, had this to say:

> The Legislators who are members of the Bar exert an influence far out of proportion to their numerical strength, and it would be for the public good if a member of the legal profession served on every important committee. If lawyers were eliminated from Legislative Halls there would indeed be a Babel of Laws.[15]

How far those days seem from today when so few lawyers serve in our state legislatures. Particularly is this true in New Hampshire with its strong tradition of a citizen legislature. The corollary is that any serious effort to improve communication with the legislature will depend on building a coalition broadly reflecting the background of this legislature.

In drumming home the message that protecting the independence, quality, and effective functioning of the courts requires sustained support beyond the borders of our legal or even governmental community, I am deeply affected by my own experience in working for the federal judiciary. During the last half of the 1980's, I chaired the Committee on the Judicial Branch of the U.S. Judicial Conference. Our chief mission was the sensitive, vital, and easily misunderstood one of restoring some of the compensation of all three branches that had been lost through inflation for some two decades. We suffered several unavailing efforts, always being held hostage by Congress. For although popular resentment over any pay increase was directed at it, it resisted any effort to treat the judiciary and the executive branch separately. Finally, as you know, moderate success crowned our efforts, mainly through the courage of bipartisan leadership in the House of Representatives.

What is relevant to my theme today is recalling the support the judiciary enjoyed from an informal, broad-based, effective coalition of representative groups. We as judges could claim almost no influence with our lawmakers, who had sponsored us, envied our life tenure, or

---

[14] Alfred S. Konefsky and Andrew J. King., eds., The Papers of Daniel Webster - Legal Papers, Vol. 1 (University Press of New England, 1982), pp. 163-64.

[15] The First Century of the Bench and Bar in Maine, 1820 -1920, Report of the Maine State Bar Association for 1920 & 1921 (1921), p. 215.

disagreed with our opinions, or all three. But a coalition formed that was greater than the sum of its parts -- the Federal Judges Association, organizations of magistrates, bankruptcy judges and administrative law judges, the American Bar Association, the American College of Trial Lawyers, a unique organization of general counsel of corporations - the Corporate Committee for Fair Compensation of the Federal Judiciary, associations of present and former executive branch employees, Common Cause, Paul Volcker's National Commission of the Public Interest, and others. These groups developed their own information banks, kept each other informed, coordinated their activities, and sent material to the media and feedback to Capitol Hill. It is this kind of influential, broadly representative support that can be marshaled on the significant problems facing court systems if the bar has the energy, dedication, and imagination to seize the initiative.

What I have in mind in talking about the bar as catalyst is a rare kind of effort, not easily fitting into an organization chart. It seeks functional consistency without rigid organizational structure. It implies an enduring commitment, flexibly activated. It means doing the difficult job of motivating and working with others than just your own professional colleagues. These others may at times not share your values and priorities. Developing a workable consensus among disparate groups is a task challenging the wisdom of Solomon and the patience of Job.

For a starter, this is how I picture the catalyst role working. In the bar organization there would be a small group of members chosen to think strategically about issues of greatest importance to the court system. They would, of course, draw upon the expertise of all the committee chairs. The leader of this group might be an elder statesman type, such as a former president of the Association. He or she might equally sensibly be a younger lawyer with a passionate commitment to work for a court system of excellence. It would be the dual responsibility of this group to keep a watching brief over conditions in the court system and proposals relating to it, and to develop and maintain channels of communication with a network of citizen groups.

The network would be a sort of contemporary CCC, Citizens Caring for Courts. It would encompass representatives of public school and higher education, chambers of commerce and industry, organized labor and farm-oriented groups, the media, the clergy, public interest groups, ethnic minorities, and, if possible, representatives of the poor, the homeless, and the otherwise disadvantaged. Not all of these would respond on every occasion. The ranks of involved participants would vary with the problem or crisis. But there would have been enough communication with all over time to build a sort of community resources bank from which to draw credit when needed. A rough analogue of this kind of operation is the nationwide citizens' watchdog, Common Cause. Not all of the issues on its agenda are of equal interest to all members, but there is usually a critical mass that can be mobilized on any given issue.

What are the kinds of things that could be done by such a network? The depth of participation would vary from simply joining as a signatory to a letter or petition to the governor or legislative committee or a letter to the editor, to more formal resolutions of member groups, to testimony at hearings, to visits to legislators or the governor, to involvement in specially organized meetings on court system issues.

What are the kinds of issues that might be the proper concern of such a network? Issues of funding are likely to head the list in the foreseeable future, funding of personnel, buildings, modern equipment. The key problem lies in the all-too-common view by budget cutters that the third branch of government is to be assessed under the same criteria as a department of the executive branch. Other issues involve basic or systemic changes, such as those recently

proposed in the Report of the New Hampshire Supreme Court Long-Range Planning Task Force relating to court jurisdiction, juries, alternative dispute resolution. These should be of deep interest to citizen groups, whose members, after all, are the users of the system.

Another issue lies on the horizon -- abolition of federal diversity jurisdiction. Deciding issues of state law, without carrying precedential weight, now constitutes one fourth of the civil caseload of the federal judiciary. Not only does it burden the federal courts, but it is a standing affront to the state judiciaries. The prestigious Federal Courts Study Committee, authorized by Congress to come up with a long range plan for the federal courts, has made abolition of diversity its major recommendation. Historically, this has been resisted by bar groups because of a now generally unsupported fear of local bias toward out-of-state litigants and a perceived difference in the quality of justice administered in various state and federal courts. Should abolition become a realistic possibility, two issues will confront the bar and any citizen network concerned with the well being of the state court system. The first is to do all that is possible to assure the appointment of top quality judicial candidates. The second is to assure sufficient resources to accommodate the shift in caseload.

Such a shift in New Hampshire would amount, according to a recent study,[16] to 238 tort and contract cases a year. This comes to about 10 cases per trial court judge. This is not inconsequential but it ought to be manageable. I would assume that there would be federal funding to assist states to cope with the added burden during a transitional period, but ultimately the state would have to provide whatever personnel and facilities are triggered by taking on the diversity caseload. To obtain these will require the best efforts of the bar and its network of community leadership.

One final function could well be performed by a bar-led citizens' network -- making an input into the kind of "Institutional Forum for Policy-Making" recommended last July by your Supreme Court Long-Range Planning Task Force. In its report it describes "an on-going need for an institutional forum ... to give general and public consideration to issues affecting the administration of justice." It observes that the existing Judicial Council, consisting largely of lawyers and judges, is not "adequate to the task of serving as a general policy forum."[17] Should the legislature act on this recommendation and establish such a forum, this would provide a most useful channel for the kind of bar-inspired group I have described.

There is one final question I want to address. Perhaps it is in the minds of some of you as you've listened to my attempt to lay yet another burden on you. Why us? For a thoughtful and, I think, persuasive answer to this question I quote Professor Geoffrey Hazard of Yale, whose particular vineyard is legal ethics and the legal profession. This is how he puts it:

> If we believe in good law properly administered, we have to believe in good courts adequately supported. These are concerns the bar ought to share. Our professional function is, after all, derivative of the judiciary's function. Our professional standing is founded on the judiciary's pedestal. Like a lot of other parts of the social infrastructure, that pedestal has been crumbling. Restoring the judiciary is part of the task of restoring professionalism.[18]

My theme for this keynote presentation has been "The Bar as Catalyst." "Catalyst" has

---

[16] Flango & Boersema, How Would Proposed Changes in Federal Diversity Jurisdiction Affect State Courts?, National Center for State Courts (April 30, 1989).

[17] As New Hampshire Approaches The Twenty-First Century, Report of the New Hampshire Supreme Court Long-Range Planning Task Force, July 19, 1990, p.28.

[18] A Crumbling Judicial Base Hurts the Bar, Natl. Law Journal, Nov. 9, 1990, p. 15.

been defined as "A substance, usually present in small amounts relative to the reactants, that modifies, especially increases, the rate of a chemical reaction, without being consumed in the process."[19] My belief is that if you indeed succeed as a catalyst for Citizens who Care about Courts, you will not only not be consumed by the process, but will have grown in stature immensely.

[19] Wm. Morris, ed., The American Heritage Dictionary of the English Language, (1973), p. 211.