

Remarks by the Honorable Frank M. Coffin,
Chief Judge, U. S. Court of Appeals for the First Circuit,
at the Judicial Conference of the U. S. Court of Appeals
for the Third Circuit
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Beyond Competence II

When Judge Adams asked me to speak to this conference, I mused momentarily over the rationality, or absence thereof, of exchanging the shores of Casco Bay on the coast of Maine at summer's end for the urban delights of Pittsburgh. What tipped the balance for me was the respect and affection I have for the judges of the Third Circuit.

I am not surprised to find myself in the midst of a thoughtfully planned Judicial Conference in this circuit. It is both within the letter and the spirit of our governing statute -- for the twin purposes of "The business of the courts" and "The administration of justice within [the] circuit" are richly served by your programs on fact finding, opinion writing, judicial discipline, news media and bench impact points, and discussion of changes in rules of procedure. So richly that I feel free to take Judge Adams at his word; he said I could speak on anything I wanted to. I therefore propose to use these few minutes to address a subject that most would say has nothing to do with either the business of the courts or the administration of justice -- our own sense of identity, self image, and serenity.

The subject first occurred to me as appropriate for those of our profession who have not taken the veil -- practicing lawyers. I therefore put together some tentative observations in a talk last June to the Massachusetts Bar Foundation. I say "tentative" because after a decade and a half on the bench, I was no longer confident that I really knew what the life of the practicing lawyer is like today. When the talk was printed in The Massachusetts Lawyers Weekly, I had the editors note that I would be interested in hearing from any reader whether my concern was on or off the mark and what additional thoughts he or she might have. It is the resulting lawyer response that I want to share with you and then to raise the parallel question: do we to any degree have a similar concern?

To set the scene, let me summarize my theme, "Beyond Competence". I began by touching on the kaleidoscopic changes that have, in the past two or three decades, reshaped every facet of the practice of law, adding new facets as well:

- the proliferation of highly specialized practices,
- the sophisticated hardware of management: computers for accounting, conflict of interest systems, litigation support, research; word processing consoles; electronic mail apparatus; videotape equipment;
- the equally wide-ranging domain of the software of management, ranging from elaborate accounting for time to pension plans;
- the trend toward giantism in size and national and global coverage in location of the growing number of megafirms, who know only how to ratchet size up and merge, not to stabilize their size and organization;
- the accelerating escalation of rents, salaries, fringe benefits, other costs and fees, and that Faustian bargain that makes all this possible -- the concept of "billable

hours";

-- the development of the contemporary role model: the rainmaker superstar whose prodigious efforts collect prestigious clients, build firms and spawn offshoots, put together conglomerates, take over businesses, put down the take-overers.

All this suggested to me that the seasoned and surviving contemporary lawyer works very hard, all too often to the point of workaholism, to master a specialty in constant flux, not to mention the expanding parameters of law as a whole, to deal with all the problems of management within his firm and to play his part in an increasingly structured bar. It does not suggest that incompetence is the dominating problem, at least for those in the mainstream of the profession. While the least able or least motivated members of the profession will perhaps always render marginal or poor service, it seems clear to me that as a whole the profession is performing on a wider stage, playing more demanding roles, and mastering more sophisticated techniques than ever before.

But something in this lunar lawscape appeared to me to be missing. I referred to it as "something very old -- call it breadth or depth or reflectiveness . . . or serenity and nobility." It has to do, on the most superficial level, with how others view us. On a deeper plane it has to do with how we view ourselves and how we enjoy our work and life. I referred to lawyers of a century ago who could salt their hard, tight reading on remainder interests and pleading with daily doses of Homer, Ovid, and Bancroft. [I recalled Learned Hand's prescription for the compleat judge as one who had read Plato, Thucydides, and Montaigne.] I ventured the not-so-bold thought that in our functional, efficiently cabined cells overlooking the masonry of the great cities of this country . . . there are not many books on subjects removed from the lawyering craft -- nor any time to read them.

I wound up by suggesting as an area of serious study the subject of restoring the legal profession to the realm of the humanities, observing that "The profession stands in danger of being no higher than a trade if it loses all sense of nobility." [I asked,] "Is it not time to bring once again to center stage the view of the lawyer as the essential humanist in a technologically dominated society, as a centripetal force, helping shape and smooth the contours of change, as a see-er possessed of a broad view and the long view, looking backward whence we have come and forward where we should go?" I asked how they coped with their pressures; how they sought serenity, enrichment, and a sense of continuity with the past; whether they desired to identify new exemplars of "the compleat lawyer" for these times.

Here is how some of my correspondents answered.

A solo practitioner in a small town wrote: "I for one was glad, past midnight tonight, to substitute moments of reflection on your article for another portion of a billable hour . . . My practical suggestion is to continue to act as if there were an audience, since there is and will be, and you may not be alone on stage." [He gave me a quotation from Joseph Henry, the first secretary of the Smithsonian Institution: "Narrow minds think nothing of importance but their own favorite pursuit, but liberal views exclude no branch of science or literature, for they all contribute to sweeten, to adorn, and to embellish life"]

Another, a partner in a mid-size city firm wrote: "I spent part of last weekend . . . reading and reflecting on what you said. Lawyers of my acquaintance do not use their free time for enrichment." He suggests that "the best way to achieve serenity in the office is to schedule an office conference every Friday at 4:00 for an informal meeting, where a discussion must not be about business or law, but instead about personal problems and weekend plans."

One of my most memorable readers was a woman lawyer who was practicing in a private legal clinic. She skeptically asked at the outset, "As to lonely desperation . . . , I wonder if the 'pressures' are not acquired by the practitioner as a way of masking the 'lonely desperation' present in his or her own life." She added that although she respected her colleagues more each day, she felt that "Many tend to be self-destructive, or at the very least, have a low self-image." She had a specific exercise to recommend, both for enhancement of the profession and one's own self esteem: "[S]torytell", as she put it, "to non-lawyers brief examples of where lawyers have functioned to solve or reduce human misery." As for billable hours, she recommends that one decide the number of billable hours needed to satisfy one financially, divide that number by 52 weeks or 12 months and "[t]ry to stay on target. Any work performed over and above that amount is for fun only." Finally, "serenity", for her, "is a two hour lunch hour - with no phones, for everyone who works here. We have time to talk with each other, rest, walk, watch TV whatever."

A young lawyer, a solo practitioner, endorses more time for reflection, especially "because the law touches all aspects of life." He suggests that the title "Counselor at Law" should be used far more than "Attorney" or "Lawyer". He promises to send me further thoughts later.

A senior, much respected partner of a large metropolitan law firm confirms that the subject matter is important, that there is a great deal of lonely desperation, that personal fulfillment and living in many dimensions are essential, both for the better administration of justice and for living a full and complete life. "Many lawyers", he adds, "waste a great deal of their time, much of it in repetitious, often boring actions." He acknowledged that his office was noted for its parties and celebrations but also wrote, "[But] that does not replace complete serenity, nor the 'happy practice of the law' that some of us seek." He concluded by saying that he would like to see an effort made to identify role models or exemplars of "the compleat lawyer" for our times. It is obvious that he and his firm were grappling with the complexities of modern technology. He was candid to add, "Sometimes the efforts have made simple matters more complex."

Finally, one young lawyer in a large metropolitan firm is about to form his own firm with a friend from another large office. While he hopes to carry on the same high standards he has learned in the large firm, both he and his future partner have noted the difficulty of large law firms "in placing the lawyer as 'the essential humanist in a technologically dominated society.'" He adds, "I look forward to seeing whether the demands of running a business and making a living in a small firm make the needed task of reviving the amplitude of mind and outlook, which you describe . . . , more difficult."

So here we have a sampling of lawyers who are interested in probing what they should bring to their profession and their life beyond competence. Some were old, some young. Some were from big firms, some from small firms, others were individual practitioners. Most were men; one was a woman. Some were more concerned about personal enrichment from reading; some looked more to community service; they had diverse views about how to domesticate billable hours so that one could live comfortably with them; they had ideas about using some office time in search of serenity.

It is clear to me that my correspondents felt that a sensitive nerve had been flicked. The question arises: what about us? We judges have left the marketplace and pit. We have life tenure. To an extraordinary degree we are independent; very very seldom is a deadline imposed on us; and, while we can be reversed, no one can command us how to do our work. Indeed, in the public view and in that of the Congress, we are not only secure but free from any external

restraint. The assumed result is that we bring to our work serenity, breadth of vision, richness of wisdom nourished by the security and leisure vouchsafed by our position.

Learned Hand once gave this noble prescription for a judge:

"[I]t is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject." (Hand, *The Spirit of Liberty*, 1952, p. 81.)

Does this have any relevance at all today? Who here has read more than two or three of these authors? Whether or not this list has any special claim on the attention of a liberal mind, who here can assemble any equally significant list of other books read?

Unlike the practicing bar, we are not subject to the tyranny of billable hours; we are free from the anxiety of getting or losing clients; we have a priceless personal disinterest in the outcome of any one case. But we see our cases remorselessly increase in number and complexity. We see, despite the miracles of this cybernetic age, the demands on our time increase. The time each judge must spend on non-judicial work, in keeping records, making reports, filling out questionnaires, interviewing consultants, going to committee meetings, council meetings, circuit and national and functional conferences, seminars, workshops, administering his court or circuit, and participating in the new apparatus of governance, enlarges inexorably year after year.

I might at this point appropriately if immodestly quote a passage from "Ways of a Judge". I had been talking about the experience all too common to all of us of seeing the seed of an idea, after nourishment by a committee, consultants, and a questionnaire, predictably lead to new procedures, guidelines, periodic meetings, a standing committee and permanent reporting and monitoring. I commented:

"To argue against such proposals is, I know, to fight progress. But the drawback is that each new requirement levies on judicial time and further bureaucratizes and centralizes the judiciary, the genius of which has been its independence, its deliberateness, and the quality of its thought." (p. 192)

This quotation may take on greater significance when I reveal that Professor Charles Alan Wright wrote me singling out this passage as perhaps the jewel in the crown of all 249 pages.

Without conscious thought process, more of us than we care to acknowledge have adopted as our role model the workaholic judge who goes to chambers early, brown bags his lunch, works late, takes work home, never travels without a full brief case, and justifies any time off from his chambers and bench by his attendance at a Bar Association Convention or committee meeting. How many of us will ever admit to having a vacation without apologizing?

I see in these conditions of modern judicial life a deep-seated threat not merely to attracting and keeping top quality persons on the bench but, more basically, to having a judiciary with the spaciousness, richness, and resilience of mind, the reflectiveness and openness of disposition, and the serenity of spirit and demeanor that distinguish a court of law and justice at its best. This threat has another side to it, an erosion of our own self image, a diminution of the pride we take in our work and in, at bottom, the joy of judging.

What to do? Assuming I have flicked any sensitive nerve here, one thing I know should

not be done -- form a committee, circulate a questionnaire, and hold conferences resulting in guidelines, reading lists, and quarterly reports. But judges should talk to each other about how they cope, how they recharge their batteries. I would like to see judges write about this. We shouldn't be reluctant to open up what might otherwise be considered too intimate and personal a subject, for this is a zone overlapping both the professional and private parts of our lives.

Perhaps as much as anything else we need to identify other role models. One law professor of my acquaintance recently told me that he wished there were more interiorly credible and revealing biographies of judges. He would want his students to read them. There were precious few. I have just read "Unlikely Heroes" by Jack Bass about our revered colleagues of the Fifth Circuit -- principally Judges Tuttle, Rives, Wisdom, Brown. I personally would have wished to know more of how they lived and worked and kept their sanity, common sense, and good humor during the tense decades of desegregating the South. Similarly, I would give a lot to be able to read more of the Third Circuit's own candidate for a role model I have in mind, its beloved Albert Maris.

Thinking, writing, and talking about this extra dimension of our life and work beyond sheer competence and identifying exemplars reflecting the qualities we seek and need would have two reinforcing effects. We ourselves could not fail to profit by the deliberate pursuit of interior enrichment, calmness, wisdom. And those who judge judges, which is to say the Congress, the press, and the public itself, may in time come to realize that in choosing, praising, or criticizing judges, more than productivity and unremitting toil must go in the balance.

Viewed in this way, what we have been talking about may, after all, have something to do with "the business of the courts" and "the administration of justice".