Remarks by the Honorable Frank M. Coffin,
Chief Judge, U. S. Court of Appeals for the First Circuit,
at the Annual Meeting of the Massachusetts Bar Foundation,
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Beyond Competence

A few weeks ago I was going through the attic of our garage, preparing to move the incunabula of my early law practice to a more final resting place when I came across a volume reporting the Maine Bar Association's 1952 August Meeting. A highlight was an address by then Justice Raymond Wilkins comparing appellate burdens in 1952 with conditions in 1912, when he entered law school. Being on the search for a theme for today's remarks, I eagerly read what presumably I had heard 29 years ago. I regret to say that there was nothing transferable. He was concerned about the drop in the appellate case load -- from 388 in 1912 to 236 in 1952; the lowest in 75 years. In Maine there had been a reduction of 50 per cent in the same period and almost a two thirds decrease in New York, occasioning New York Judge Desmond to write an article "Where Have the Litigants Gone?" Justice Wilkins was worried that his court's function "to determine and state the law of the jurisdiction" could not be performed unless there were "representative cases in adequate numbers in every branch of that law". He concluded that the point had not yet been reached where the judicial function had been "substantially impaired by the drop in the number of cases", but rising costs of appeals were ominous, and the Justice plainly contemplated appellate courts going out of business.

This is one problem that need not be addressed -- for the moment at least -- by your Foundation. But Justice Wilkins' lament points up in bold face the changes that have erupted during the past three decades in the work of both lawyers and judges. Every lawyer in the room has seen each new decade of practice outstrip its predecessor in the pace of change. Those in their first decade haven't seen anything yet. Even though all of you live with change, let us try to back off a bit, to see how the landscape of the profession has shifted from low profile to high rise, what hazards are illuminated, and what, if anything, can be done about it.

Practice itself, the taxonomy of the profession, has emulated the development processes of nature -- mundane larvae, often spawned by statutes, seemingly inert for a time in their chrysalis, finally emerge into fully winged, class-actioned, treble damaged, counsel-feed, coruscating butterflies (or gypsy moths) of litigation. Just as the slack in pre-automobile personal injury cases was seen by Justice Wilkins to be taken up by workmen's compensation and motor tort cases, we see the development of new specialties in civil rights (ranging from abortions to zoning), products liability, environment, genetics and health, and all species of consumers' interests. Not only does the substance of practice evolve at a dizzying pace, but the procedure and tactics develop mystiques of their own. Discovery becomes an endless, if not fascinating, jungle.

Management and technology were almost, except for the typewriter and telephone, unknown to lawyers three decades ago. A law office in the 'fifties was not so different from, say, that of the widely respected Theophilus Parsons of Newburyport, almost two centuries earlier. In both, a shelf or a room full of books and practice manuals constituted a manageable universe of law and lore; and the instrument of effectiveness was the oral and written wit and wisdom of the individual lawyer. Today, if one wishes a tour of even a middle-sized firm, he will visit the

library, not solely one of books but of microfiche and microfilm, Lexis and Westlaw, and copiers. While he will be impressed with the arsenal of memory-retaining, word-processing gadgetry and entombed disks of institutional wisdom at the finger tips of every secretary, his respect will be multiplied when he sees a room full of a score of word-processing consoles, with a night shift ready to operate them, electronic mail apparatus, videotape equipment, and various generations of computers. The visitor interested in the software of management will learn about practices and policies that were far from lawyers' minds three decades ago: collective bargaining; affirmative action and the avoidance of sex, age, or racial discrimination in recruiting, paying, and promoting; the uses of paralegals; pensions and retirement plans.

Costs and fees have long since departed the legal ecosystem of thirty years ago. Metropolitan real estate, the equipment necessities of the Cybernetic Age, the salaries and shares of secretaries, librarians, technicians, maintenance workers, paralegals, associates, partners all derive their sustenance from the formidable cornucopia known as "Billable Hours". A client has to have considerable substance before he can afford even the time it takes for his lawyer to bill him. But there are apparently enough clients with that kind of substance. In a visit I made recently to a large firm I learned of a partner who took pride in achieving, year after year, a record 4000 billable hours. The appalling fact is that these hours are honestly recorded for work actually done.

The very structure of the profession, at least in the urban areas, is continually moving toward giantism. Although firms worry about the trend of businesses to rely increasingly on in-house counsel, many managing partners have the opposite concern: that they no longer know how to stabilize their firm's size, given their understandable resolve to guarantee adequate service to major clients. They know only how to ratchet size up. Not only do firms grow only bigger, but merger is quite common. Merger is perhaps even more common as part of a late twentieth century phenomenon, the establishment of the megafirm, today with hundreds, tomorrow with thousands of lawyers, and branches in half a dozen countries and a like number of American cities.

A recent American Bar Association Journal carried an article sounding the notes of economies of scale, the redefinition of contribution by a lawyer to a firm to "focus . . . on behavior that relates closely to profit production", the growth in stature of the office administrator, the requirement -- in the words of the author -- "that the law firm be run as a business". All of these foci of a new era -- the specialization of practice, the increased dependence on technology and management, the spiraling cost-fee syndrome, and the inexorable push to bigness -- come together dramatically in the pages of any issue of the national law newspapers. The lead stories tell what firms are going up, what down, who is doing what to whom, how much firms are bidding for superstars or what now are called "rainmakers;" how most large national firms have started Washington branches, how rents have skyrocketed from $9 or $10 a square foot to $30 or $35 in five years, and how, to quote, "people in even the stuffiest firms here, like Covington, are starting to take the gloves off and go after clients." Almost as illuminating as the lead articles are the advertisements: videotapes and cassettes to teach everything from choosing a jury to making a summation; consultants on law firm mergers, proxy contests and tender offers; computerized equipment to prepare wills, briefs, correspondence, to operate calendar, docket, and conflict-of-interest systems, to organize the most sophisticated litigation support, to record each telephone call under the proper heading for the right client; and temporary research and paralegal help. It almost seems that if one has the clients he can summons the advice, the law and the advocacy by pressing a few buttons.

In this constantly changing lawscape, the legal community has developed a life of its own, far more layered than the simple, convivial gatherings of three decades ago. Reflecting external pressures and internal institutional dynamics (in what proportion I do not know), the bar (and the judiciary) have updated ethical codes and volumes of gloss and opinion, standards, and enforcement mechanisms. Despite this systemic concern with ethics, lawyers, in contrasting today's practice with yesteryear's, will often bemoan the loss of confidence in their adversaries; the law community is no longer of such size and predictable honor that it members know and trust each other. Sometimes even within a law firm there will be rivalries and jealousies to the point where a difference in pay of $1000 or $2000 (perhaps the equivalent of 5 hours' income after taxes) is sought after as the visible hallmark of security and primacy. In any event, there is no dispute over the fact that lawyers work hard at the business of self improvement. Their bar associations have never been more active. Their magazines and bulletins more informative, or their meetings, seminars, workshops, and courses more useful.

This impressionistic snapshot of the legal profession today suggests that the seasoned and successful contemporary lawyer works very hard, all too often to the point of workaholism, to master not only a given specialty in constant flux but to deal with all the problems of management within the firm and with his external obligations to the bar. It does not, in my mind, 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 our 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. Nor can one say that for those in the swim of things the fun has been taken out of the practice of law. Those practitioners with whom I have talked, who are either on their way up or at the zenith of their careers, almost unanimously assure me that they are enjoying their work fully as much as ever. They have obviously relished meeting all the challenges that the changing demands of the law have made on them.

If we leave for another day the increasing incapacity of megalaw to serve the needs of any but the rich or, on a pro bono basis, some of the poor, and look only at the satisfactions realized by the practitioner, something important does seem in danger of being lost in the midst of this procession of constant change toward the new. It is something very old -- call it breadth or depth or reflectiveness . . . or serenity and nobility.

Way back in 1947, an English solicitor named Reginald Hine wrote his "Confessions of an Un-Common Attorney". In it he described his deepest feelings about the lifetime he had spent in a venerable law office in an old English town. He wrote this about the kind of immortality a lawyer could hope for:

> "The lawyer is dead; long live the law. But in a sense the lawyer does not die. Clients will come flocking into his office as of old, feeling somehow that his friendly spirit is still there. His room may be taken by another, but his mantle will have been taken too. The partner will bear the same impressed stamp of office personality. The advice given will be the advice that he would have given. In all confidence, landowners will leave their deeds and cottagers their 'writings' in his strong room, for his clerks will watch over them still."

After little more than three decades, this reads as archaic as a Grecian urn. And when we hear Hine saying that "It should be remembered . . . that we belong to a noble profession", we may nod in unthinking agreement, but we chafe uneasily in hearing him wax eloquent in exorting "lawyers [to be] faithful to their high calling of 'directing the doubtful and instructing the

ignorant'" so that "at the Last Day they [may] render an account of their stewardship . . . ." Old fashioned, Church of England sentiments. Yet beneath the rhetoric a capacious view of a profession, as he writes:

> "Too many solicitors are brought into the world unaware of the traditions of their own profession. It is a pity. They study the laws, but they do not study the lives and works of lawyers. The names of the great exemplars, Bracton, Fortescue, Fitzherbert, Lambarde, Coke, Selden, Hale, wake no echo, arouse no emulation, in their minds."

Not too different, though, from the concept of his profession that New Bedford lawyer Harrison Gray Otis Colby had 140 years ago. Colby, who studied with Theophilus Parsons and whose journal was encapsulated in the March, 1979, Boston Bar Journal by Theodore Chase, wrote that on one day in November, 1838, he read Milton's Comus before breakfast, got to the office at 9, studied Metcalf on Infancy and Abbott on Shipping, and looked up some law on hearsay declarations. In the evening he read Milton again, committing parts to memory. On other days there was time for some French, Ovid, Homer, and Bancroft's History.

In our functional, efficiently cabined cells overlooking the masonry of the great cities of this country, I suspect that there are not many books on subjects removed from the lawyering craft -- nor any time to read them. Nor is there a very long list of "the great exemplars" enjoying the respect and lighting the aspirations of the young.

All of this suggests a subject in which this Foundation might take an interest. The subject is no less than restoring the legal profession to the realm of the humanities. The profession stands in danger of being no higher than a trade if it loses all sense of nobility. There is of course not a thing wrong with performing a needed service with the latest techniques and the most practiced skill. But practicing on such a level does not quite rise to the heights of a Brandeis conceiving himself as lawyer to the situation or, as he came to be called, tribune of the public. Behind many a private company, hospital, or university and many a public institution lie the unheralded works of gifted, farsighted, self contained and magnanimous lawyers whose leadership transcended sheer competence by the breadth, richness, and sensitivity of their resources.

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 the broad view and the <u>long</u> view, looking backward whence we have come and forward where we should go? Cannot this be the focus for conscious self study by the profession? If we can develop useful insights about tax shelters and marketing strategies -- about how to do -- is it unrealistic to hope for insights about how to be and how to grow? Although I suspect that any group of thoughtful lawyers spanning two or three generations could put together a better list of point's for inquiry, here are some starters:

> -- How much quiet lonely desperation is masked by the unremitting pressures of contemporary practice?
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> -- How do lawyers use their time for enrichment? What are their suggestions for a better use of time?
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> -- Is there any way of curbing the tyranny of billable hours?
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> -- Is there any time for serenity, both alone and with colleagues, at the office?
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> -- How can the most senior partners be used to pass on something of the tradition and experience which they have absorbed for so many years?

-- Can firms and bar groups develop meetings and retreats whose object would be more the probing of wellsprings than the cultivation of skills?

-- What would result from a conscious effort to identify role models or exemplars of the "compleat lawyer" for our times?

Karl Llewellyn in his book "The Common Law Tradition" identified appellate judges whose opinions brought them within what he termed "The Grand Manner". A similar amplitude of mind and outlook is badly needed today in our profession both on and off the bench. While my remarks are addressed to a professional group, suggesting a new direction of self study, they spring from our total human predicament, described by Archibald MacLeish in his recent book, "Riders on the Earth". What he says about doctors could be said about us:

> "As specialized, professional training, higher education in the United States today is often magnificent. Young doctors are better and better 'trained' as their specialities become more specialized: so much better that it is now a recommendation in almost any field to say of a young doctor that he is young. Student physicists in the great graduate schools are so notoriously productive at 22 that a professional physicist of 30 regards himself, or is regarded by his juniors, as middle-aged. But the educated man, the man capable, not of providing specialized answers but of asking the great and liberating questions by which humanity makes its way through time, is not more frequently encountered than he was two hundred years ago. On the contrary, he is rarely discovered in public life at all. . . . [W]e must give up the childishness of our present attitude toward science and technology - our constant question where they are taking us - and begin instead to ask how we can manage them 'so that they can help us get where we want to go.' . . .
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> "There is no quarrel between the humanities and the sciences. There is only a need, common to them both, to put the idea of man back where it once stood, at the focus of our lives; to make the end of education the preparation of men to be men, and so to restore to mankind - and above all to this nation of mankind - a conception of humanity with which humanity can live."