An Address for Delivery to the Rhode Island State Bar Association,
Newport, R.I., June 22, 1984
by United State Circuit Judge Frank M. Coffin

Looking Ahead at Our Profession

In the early autumn of 1973 I last addressed this association. In a somewhat frivolous spirit I shared with you the contents of a mythical confidential management survey of the courts of Rhode Island. The report contained many recommendations, all designed to use the latest systems and technology. Replacement of amateur jurors by a small stable of professionals, substituting random sampling for appeals as of right and borrowing techniques from Detroit were the most promising innovations. The last named suggestion embraced specialization of functions, assembly line techniques and the use of standard parts. Judges would specialize. Some would be fact writers. Others would be threshold experts in appellate jurisdiction, mootness, standing and standard of review. Still others would be due process judges, First Amendment specialists, and so on. The opinion would start with the facts justice and be handed to the legislative history expert, ending up with the drafter of imaginative remedies. In each chamber a console would contain a memory bank of legal jargon, learned footnotes, and judicial humor to punch in where appropriate. So far, I have observed no effect.

Today my theme is the same: The future and what to do about it. But the approach will be less whimsical. Whether this will be more useful is for you to determine.

Earlier this year, in speaking to the Bar of my own state of Maine I reflected on the incredible changes the legal profession has experienced in the past several decades. In the 1950's, when I was a new lawyer, the practice of the law was not basically different from what it had been in my grandfather's time, or, for that matter, from what it had been during most of the nineteenth century. A great majority of lawyers were solo practitioners. There was only one firm with as many as 10 partners. One built a practice by doing a great deal of work for little or nothing for many clients in the faith that a reasonable number would ultimately prosper and share their prosperity with their life long friend and counselor. Most lawyers were general practitioners, able to draft a will, negotiate a lease, try a case. And most played some role in the civic life of their community.

How quaint that profile appears today. In numbers our profession bids fair to reach a million by the coming millennium- a lawyer for every 250 people. In Rhode Island you are already at the ratio of 1 lawyer for every 334 persons, with some 3000 licensed attorneys. But, if other present trends continue, perhaps only 50 of those 250 people will be able to pay the fees. For along with increased numbers the size of firms is remorselessly increasing to the point where some predict that instead of the 300 lawyer firms of today we shall have firms of thousands of lawyers and paralegals, much like the Big Eight in the accounting profession. Along with size come increased costs. Salaries for beginning lawyers already approach $50,000 a year in some places and the 1982 median income of all lawyers in the nation between the ages of 41 and 65 exceeded $92,000.[1] In addition to salaries there must be added such perquisites as firm-owned limousines for partners, sabbaticals, and safaris to far-off places for firm retreats and meetings. Prime space is already about $60 a square foot in New York, making the positioning of a waste basket something not lightly done. Law firms are now into third and even fourth generation of high technology items -- microcomputers, copiers, electronic mail, and all kinds of software. I

[1] American Bar Association Journal, February 1984, pages 50-51.

understand a fifth generation computer which will read print is in the works. The engine relied on to power this unwieldy vehicle is that late twentieth century high octane turbojet contrivance, the billable hour.

Spiraling costs and fear trigger another characteristic of our profession, at least that part of it on the fast track: increasing competition for the deep pocket client willing and able to pay top dollar for top service. Similarly, the deep pocket client with its more sophisticated house counsel is no longer reliably loyal; it is only too ready and willing to shop around. The result is elaborate planning for what is euphemistically called market development, involving everything from a brochure containing biographies of a firm's lawyers, to Sidley & Austin's thick, gilt-edged historical tome, to elaborate market strategies, and hiring legal headhunters to raid other firms of potential "rainmakers". A current seminar on the marketing of legal services, sponsored by a well known law school includes such tasty items as "Developing Your Self-Image and Positioning Your Firm", "Acquiring, Penetrating and Retaining Clients" and "Building Client Dependency". The subtitle could be: How to stimulate addiction to controlled services.

It is not surprising that such complex, highly technical and intense human groupings no longer run almost by themselves. A firm lunch once a month is no longer a viable form of governance. Cost control, systems and procedures, equipment testing and acquisition, recruiting supervision, in-house training of secretaries and paralegals, continuing education for partners and associates, collective bargaining, monitoring client billing and partners' yearly goal-setting sessions, advertising, managing real estate, even forming an investment pool for partners -- all such chores, anathema to the average lawyer, are now turned over to the new center of power, the business manager, a budding cottage industry.

Some of the forces at work are benign and susceptible to a decision to limit growth. For example, the desires to realize economies of scale, to develop a suitable range of specialties, and to maximize profits may all continue to be realized to a considerable extent even though a decision has been made to keep a firm at a constant size, say, of 30 or 50 lawyers. But other forces, inexorable ones, are at work. The most significant is client pressure. When a firm justifies its continued hiring by citing the need for a cushion to give it flexibility to deal with emergencies, it is really saying, "If our major client wants us to put 20 lawyers into a take-over battle or 30 to launch all-out discovery in a products liability or antitrust case, we have to be able to oblige." Similarly the growth attributable to a desire to accumulate the capital and personnel necessary to form branch offices may really be a recognition of the fact that if a major client wishes to deal with lawyers in Houston, Denver, or Grand Cayman Island, a law firm is well advised to be expansionist.

There is another irresistible force, that of internal dynamics. A law firm hoping to retain a stable of young, energetic, imaginative associates has to hold out a reasonable hope of upward mobility. Yet every effort to fulfill this goal triggers what might be called the ratcheting syndrome. It works this way. A common policy is that for every partner there should be at least two associates -- this on the assumption that there is not a very effective division of labor if one partner cannot keep at least two younger people busy. So if one of the associates is promoted to partner, three vacancies are immediately created: one to replace the position he filled, and two to supply the associates he will need. Even if a firm has only a ratio of one partner to an associate, the promotion of an associate creates two vacancies. And of course if a firm has a 3 to 1 ratio, the promotion of an associate to partner creates four vacancies at one fell swoop. Thus a law firm can only ratchet up in rather large jumps -- stability or standing still is out of the question.

What is the effect of all this on lawyers?

First let me recognize the pluses for lawyers on the fast track. The young lawyer finds himself working with the most highly trained and experienced seniors in the profession on the most exciting and challenging current legal issues for extremely good pay and every likelihood of advancement to greater responsibilities with munificent compensation. This must be a truly heady feeling.

But for many, I think for most, lawyers working in what I call Megalawpolis, the conditions have their somber side. The pressures of large client-dominated practice, of preparing a critical memorandum overnight or of litigating in a six weeks trial, take their toll in hours away from home, family, or recreation. One refugee from a large firm told me that no partner in that firm was any longer performing any kind of community service or civic leadership. One large high tension firm known for its ample distributions to partners, also suffers a considerable number of broken marriages and drinking problems. Recently the National Law Journal ran a two-part article on the problem of "burnout", frequently encountered by lawyers.[2]

Nor does the promise of promotion today accompany every job offer. A partnership is a ship that never reaches port for some aspirants. The very emphasis on competition and running a law practice as a business disenchants others as does the erosion of collegial management. Another element missing in Megalaw is the close personal relationship and fealty that used to exist between lawyer and client. Associates, and even some partners, feeling shut out from policy decisions, feel more like employees. Lawyers are not free to take cases whose likely generation of income is too little to pay their way. A psychiatrist refers to "an impaired sense of autonomy".[3] Specialties are narrower, more intense, and more permanent than ever. For all these reasons, the satisfactions for many of the lawyers in the largest firms lie in their pay checks and the occasional perquisites of life in the fast lane.

These forces and effects are not confined to the big firm. The smallest unit suffers in a different way. The solo practitioner may be going the way of the Dodo bird. Between 1948 and 1980 the national percentage of solo practitioners declined from 61% to 28%. In my own state the decline from 1951 to 1984 was even more dramatic, a drop from 77% to 11%. The young lawyer who aspires to practice alone leaves law school owing some $20,000 to $30,000; he or she then faces a start-up cost of an even larger amount. As one small town practitioner wrote me, "I expect the level of dissatisfaction among solo practitioners and . . . 'small' firms to grow. I suspect that the cost of technology will quite possibly make them less able to compete with larger firms and may relegate them to 'low end' business".

If I were to stop here, I would have merely summarized facts with which you are familiar. What I now propose to do is to indicate what some bar associations are attempting to do by way of dealing with the future. I cannot help but feel that areas with smaller population, smaller cities, smaller law firms -- Minilawpolis, if you will, have more options, more opportunities to shape the conditions and forms of the practice of law in the 21st century than does Megalawpolis. This ought to be particularly true in Rhode Island, where it is still meaningful to speak of a community of lawyers and judges.

In the past few years a number of state bar associations have sponsored studies of the future of the profession within their states. The states include Arkansas, California, Colorado, Connecticut, Massachusetts, Minnesota, Missouri, New Hampshire, Ohio, Oklahoma, and Pennsylvania. The methods pursued have included day-long, freewheeling conferences of lawyers, judges, law professors, and lay people; more structured conferences with workshops on

[2] April 30, 1984, p.13; May 7, 1984, p.14

[3] Id., April 30, 1984, p.14.

specific areas; lawyer interviews; statistical surveys; and essays and reports based on the foregoing.

I would like to report briefly on three efforts that merit your attention for the simple reason they are ongoing processes. That is, they recognize that looking ahead and long range planning are not one-shot endeavors, to be wrapped up neatly in a report and filed away.

The first is a study launched in your neighboring state of Connecticut by the Connecticut Bar Foundation. Professor Quintin Johnstone of Yale Law School conducted some sixty interviews with lawyers covering the spectrum of legal activity. The first result was a thoughtful article, "The Future of the Legal Profession in Connecticut", printed in The Connecticut Bar Journal for August 1981, in volume 55, no. 4, p.256. The article notes the decline in numbers of solo practitioners, the pressures for expansion of firms, the narrowing and intensifying of specialties, the routinization of much work and the growth of use of paralegals, the trend toward lay managers, and what Professor Johnstone calls " a sharp squeeze between rising costs and resistance to increasing fees", a situation that seemed all too likely to become worse. Id. at 271. This cost-income squeeze, together with the present under utilization of lawyers by the "great middleclass", dictates a search for new organizational forms for providing legal services including legal clinics; prepaid insurance plans; judicare; "law stores"; institutional provision of legal service for church members, retirement home occupants, members of tenant organizations, and the like; a large firm's "second office" for lower income clients; and the "one-stop package service" providing legal advice in conjunction with other professional services.

Professor Johnstone concludes his article with a summary of problems facing the profession and writes: "This report proceeds on the assumption that it is better for an occupation to face up to difficulties than to ignore them, and that there can be value to considering problems in context rather than in isolation." Id. at 305. The Connecticut Bar Association has followed up Johnstone's seminal article with task forces that are developing recommendations on the future role of the small firm or sole practitioner, the delivery of legal services to the poor, alternate dispute resolution techniques, and the role of nonlawyers in the delivery of legal services.

A second approach is that of Minnesota. In contrast to Connecticut, which started simply, funding a professor and sixty interviews, Minnesota has launched a massive long range planning program, utilizing sophisticated management planning concepts. One step in this program has been a questionnaire addressed to Minnesota attorneys. Their attitudes and concerns have now been recorded. They foresee a saturation of attorneys and a corresponding decline in entry level employment and opportunities for professional advancement, increasing pressures on small firms, the need to assist middle income groups, the need to develop programs to teach lawyers the better utilization of technology, and the need for preventive legal services. Alternate dispute resolution, public awareness, the judiciary, lawyer competence and discipline are also addressed.

Between Connecticut with its very simplistic beginning and Minnesota, with its full scale "planning process", there is a middle way for the small state -- the approach adopted by my own state of Maine. A long-range planning committee of the state bar association early recognized that problems, attitudes, and issues affecting the future of the legal profession ought to be informed by those who educate, examine, discipline, and regulate lawyers, as well as those who practice in different areas. Therefore a Consortium on a Study of the Future of Maine Legal Profession was put together, consisting of the Board of Bar Examiners, Overseers of the Bar, Legal Services for the Elderly, the state Legal Assistance office, the Maine Trial Lawyers, the Maine Judicial Council, the Attorney General, the University of Maine School of Law, and, of course, the Maine Bar Association.

This representative consortium is launched on a deliberate, two-stage process, which will take some years and involve all of the bar in a penetrating examination of perceived problems, felt values, and feasible alternatives. Phase One is simply -- or, not too simply -- the development of an agenda. The nine institutional members of the consortium are presently submitting what they consider to be the priority issues. A consultant, a social scientist, is helping in constructing a program of going to the grass roots, holding meetings in the counties. Following this widely participatory process, a report will be prepared as well as an application for a foundation grant. Phase Two will consist of framing a questionnaire seeking all relevant data on facts and attitudes, administering and recording the questionnaire, preparing a report evaluating the results, and -- the most difficult chore -- identifying alternative courses of action, and, particularly, the preferred course.

A little more than a month ago I attended the first of four regional meetings, launching the Phase One effort to see what the agenda should be. Lawyers from four counties did what might be called some impressionistic, structured brainstorming, led by a consultant who had obviously done his homework. He first had us all note on a 4" by 6" card the forces and events we thought had shaped the legal profession within the past 5, 10, and 15 years. Then we divided up into a number of small groups to compare notes and develop a consensus. Finally, each group reported in a plenary session and an overview was put on the blackboard. This process was repeated on the question: how do we view the shape of the future of the profession?

Here are some of the predictions: There will be fewer entry level positions; the poorer lawyers will leave; more non-lawyers will do legal work; the delivery system will change. Some of the changes in that delivery system will include a massive reorganization of the old law firm structure; some firms will evolve into what in effect will be legal companies; the trend toward in-house counsel will continue; on the one hand many thought that the lawyer population would concentrate in urban centers, but others felt that the new technology would make decentralization possible -- one could have information at his finger tips anywhere; there would be fewer solos and general practitioners and their key role would be that of a conduit to specialists, thus necessitating a wider resort to referral fees; specialists need not practice only in large firms but would be horizontally integrated through regional and other networks, electronically assisted.

Some of the things our group felt should be found out are: the extent of de facto specialization that already exists; the changes in marketing practices over the past three years; income levels, especially in the smaller towns; assessment of the profession, by lawyers, by the public, and, if possible, by clients; outside civic or pro bono activities of lawyers; how many lawyers no longer practice and why not; non-lawyer involvement in legal questions; what do judges want from a lawyer; how many lawyers are unhappy, why, and what can be done.

What can we expect from all this? I can do no better than to quote the chairman of the Consortium, an able young Portland, Maine, lawyer with an established record of public service, Kermit Lipez. He recognizes that skeptics will say that all self-examination by professionals is self-seeking and hypocritical, that others will predict just another study that "will sit on the shelf and change nothing", and that still others will say that "we will muddle through again without all the fuss."[4] But he concludes in these words:

> "Maybe so. Maybe we are fooling ourselves. Maybe this effort will not achieve all that we hope. Maybe muddling is enough. But we do not think so. We feel that the problems of our profession are real and urgent, that we have a responsibility to address them, that the public has a stake in our addressing them

[4] Vol. 18, No. 2, Bar Bulletin, Maine State Bar Ass'n, March 1984, p.82.

effectively, and that we have the talent at hand in this state to do an exemplary study of national significance."