Second of two addresses delivered at the 1984 Annual Meeting of the Maine State Bar Association, January 20, 1984, by United States Circuit Judge Frank M. Coffin, Holiday Inn, Portland, Maine

Our Search for Shangri-Law

This afternoon I attempted to set the stage for our first venture into the occult art of futurology by looking in on the practice of law in the past at several points between the beginning of this nation and 1951. We remarked at the incredible stability of the ways of a lawyer over that century and half. Against that backdrop of glacial movement, the changes of the past three decades are cataclysmic. And the fact of continuing traumatic change bids fair, as Alvin Toffler has warned us, to usher in the new disorder he calls Future Shock. Following his lead I urged that we learn to use the future as a tool, which is another way of describing the mission of your Consortium on a Study of the Future of the Maine Legal Profession.

Tonight we borrow further from Toffler and look ahead. Our hope is to advance what he calls the "humanization of planning" in a "super-industrial" society by sustaining "a concern for the quality of life". This requires a careful and continuing effort to identify, first, the possible futures in store for us, then to focus on the probable futures, and finally to see which of those futures are the most preferable and what we can do to help bring them to pass. In what follows I am afraid I shall not contribute much by way of illuminating the probable or possible, but we shall at least light a candle to the preferable. To attempt even this, Toffler tells us, we must be willing "to play the fool, to toy with the absurd". Specifically, we must be willing to engage in what he calls "collaborative utopianism" not in the old-fashioned sense of looking backward to older and simpler times but in the sense of looking forward and "ordering men's dreams about alternative futures". Furthermore, we must seek "people willing to subject Utopian ideas to systematic test".

And so it is that we come to Our Search for Shangri-Law. You may recall how Boccaccio explained the genesis of his great book, The Decameron. It was during the dark days of mid-fourteenth century Florence in the depths of the Black Plague. Seven young women and three young men, meeting in the church of Santa Maria Novella, devised the entirely sensible idea of leaving the city and repairing to various country estates for the most sustained and celebrated house party in history, where, each day, they diverted each other by exchanging stories. Well, the same young people are back again. This time they are not fleeing a plague but only seeking their future. The time is a decade or more (or less) from now. They are all graduates and classmates from a New England law school. They have practiced in various cities and firms and now gather for a fifth year class reunion. The dean's speech at their banquet was mercifully short and they retired to the room of one of them for a talkfest.

Pampinia (as always, the take charge person) -- Well here we are. And how nice to end so early. I tell you what I'd like to do. As I look around the room I see some of us who've practiced in great big firms in big cities. I call that Megalawpolis. Others have been in not-so-big firms in smaller cities. That's Minilawpolis. I'd like to know how you like what you're doing . . . because, frankly, although I don't know how all of you feel, I think it's time I made a change. Panfilo, you've been with Skadden, Arps, Sullivan, Cromwell, Davis, Polk, Cleary and Gottlieb for five years now. Are you happy?

Panfilo -- Oh yes . . . Yes . . . I guess so. You know I've been involved in that suit against

Freddie Laker who tried cheap air fares back in the early '80's. It's about to break all records for longevity. Thanks to our firm, we're still in the preliminary stages of discovery. I've taken 1,343 depositions myself. I'm not making too much at the moment, only $200,000, but I think I'm in line for a partnership.

Pampinia -- How big is your firm?

Panfilo -- We have a thousand lawyers and 300 paralegals in New York, not to mention our 25 branches. I'm still amazed as I walk through some of our fifty floors. Why, in our antitrust department we have three floors just for the Stonewalling Strategy Division, and the Discovery Warehouse where I work occupies five floors underground and has its own subway system. As for our equipment, you wouldn't believe the rooms full of computers, word processors, microfiche, videotape, Lexis, Westlaw, and emergency generators in case of power outages. On the roof are our commuting helicopters.

Pampinia -- How do you pay for all this?

Panfilo -- How pay? See this watch? It's not just a watch; it's also a radio transmitter. Every client is coded. I just press it and it transmits my time in seconds to a printer in my office. To justify my $200,000 salary, I have to generate $800,000 of revenue. This means that for a 2,000 hour billable work year I must charge $400 an hour. This is kind of hard to keep up. Sometimes I wish I had more time . . . . I haven't read a book for three years.

Pampinia -- How do all the partners get together? I'll bet their meetings are exciting.

Panfilo -- No. The managers decide most issues. You see, we have a business staff of about 100 headed by the executive director. They sit in and rate our performance each year; they set our goals; they monitor our billing; they determine our marketing strategy, our advertising, recruiting, promotional materials, our presentations to possible clients, the decor of our offices, the training of staff and our own continuing education.

Pampinia -- Well, I suppose that's the price of practice in the fast lane. But at least you have the satisfaction of being an expert and practicing the highest quality of law just as you see fit. After all, a firm like yours has the biggest and best clients there are.

Panfilo -- Pampinia, are you kidding? Our security is a thing of the past. As long ago as 1982 the American Bar Association helped sponsor a study of the Chicago bar.[1] It was dynamite. It showed that lawyers who represented big organizations and those who represented individuals even then lived in different worlds. While the organization lawyer, as you would expect, had the prestige and influence on governments, the person lawyer, surprisingly, enjoyed more independence in his practice. The corporate client was found to dominate the definition of its needs and the way they should be met. The house counsel of corporations are increasingly influential. They call the shots more and more. With chief executive officers moving around so often and house counsel becoming more important, corporate clients no longer have the same loyalty to any one law firm. Work which once would be given to one firm is spread among several. They demand that we prepare budgets and they bargain hard over our fees. In a word, we big firms are basically insecure. That's why we start up so many branches. Not always because we want them or because they'll pay their own way, but because our clients demand them.

This is why we also feel we cannot go in for a lot of pro bono work. Some of our corporate clients really feel that criminal defense work is unseemly. The same goes for divorce work. Believe it or not, this is why we refuse plantiffs' antitrust suits; our solid stable of antitrust defendants would look on this as a breach of good taste. And we can't do plaintiffs' Title 7 work

[1] John P. Heinz and Edward O. Laumann, Chicago Lawyers-The Social Structure of the Bar, N.Y. and Chicago: Russell Sage Foundation and American Bar Foundation. 1982

for fear of making bad law for our paying clients.

I confess I'm beginning to feel shut in. The range of our clients seems to be narrowing. The work I'm doing seems to be narrowing. My career seems to be fixed in concrete with little room for movement.

Pampinia -- Well, that hardly makes me want to rush to Wall Street. How many vote for Megalawpolis? None? Perhaps we ought to hear from other parts. Filomena? You've been practicing in Maine, in Minilawpolis. Surely you have a different story to tell?

Filomena -- Yes. We have no such dinosaur firms as Panfilo . . . yet. But several of our firms have 50 to 100 lawyers and a dozen are between 25 and 50. Some of these aren't local firms. They're really branches of national firms. There are only a handful of solo practitioners. They are either very old, very rich and doing very little, or very poor and doing grubby work handed out by the firms.

Pampinia -- Has the lawyer population in Maine increased?

Filomena -- Oh yes. In the past decade or so we have gone from one lawyer to 500 citizens to one to 250.

Pampinia -- The Maine people must be well served.

Filomena -- Not at all. The paradox exists that many of our younger lawyers have to work at other trades and most of our poor and middle class people aren't able to afford legal services unless they're in big trouble.

Pampinia -- That is bizarre. Tell us, what do you do?

Filomena -- I work in one of those middle sized firms of 25 to 50 lawyers.

Pampinia -- That sounds perfect. Not too big; not too small.

Filomena -- Well it's certainly not as bad as Panfilo's. But . . . . We're so many that already I don't know half the lawyers in the firm. This leads to all sorts of games. Some of my peers make a big thing of being seen in their offices very early and very late; whether they're doing anything useful I haven't the faintest idea. Some of my coworkers have become livid wondering why a senior partner has assigned a piece of work to X rather than him or her. Then cliques form and backbite and plot to control firm policy. It gets so that we are afraid to strike a compromise settlement with another attorney for fear that someone back in our shop will criticize us for being too soft.

More and more I'm afraid that there is only one bottom line -- money. The seniors have to share the blame. They make it only too clear that every hour has four quarters which must be fully accounted for. We juniors get so uptight that we tell our clients what the fee will be even before they have finished telling us their problems. And we launch into complicated discovery without really determining whether it is needed . . . sometimes running up a bill many times what the client can ever hope to recover. We are inclined not to spend much time counseling if there is a prospect of sexy litigation. Somehow we have come to look up to litigation more than to mere counseling.

Money makes us do strange things. Sometimes it means that we turn down people with real problems just because those cases wouldn't justify the time we'd put in. And we wouldn't think of carrying a client for any length of time who couldn't pay when billed. On the other hand we find ourselves moving in and either accepting or demanding "a piece of the action" far more often than we should. Several of our oldsters have told me that they thought the fun had gone out of the practice of law. I don't think this is just sour grapes.

The old timers tell us that they remember when they knew every member of the bar, whom to trust and whom not to. That's no longer the case. I have to assume that all too often an

attorney whom I don't know will try to squirm out of a commitment.

Finally, we don't really have any more independence than Panfilo described. In any big case, we have to take orders from the Boston and New York firms that represent corporate headquarters. And house counsel both in Maine and elsewhere are always looking over our shoulder.

Pampinia -- Anyone want to vote for Minilawpolis? No? Well, if no one wants Megalaw and no one wants Minilaw, is there any alternative? Is there a Shangri-Law?

Filostrato -- Perhaps we should proceed by asking what we think is good and then see how best to achieve it. What do we want?

From various members of the group come nominations:

-- A human sized firm, not too large for close friendship . . . .

-- Reasonable independence as to what causes we take and how we choose to handle them . . . .

-- The resources and continuing development to enable one to practice law at a high level of competence . . . .

-- A sustained and close relationship with clients involving counseling on all their important decisions . . . .

-- The opportunity to contribute as a citizen to community, state, and perhaps nation . . . .

-- A humane work day and week with time for self development and family enrichment.

Then there was unleashed such a spate of talk that the sun had almost risen before weariness overcame our ten young lawyers. I will spare you the details of further conversation and planning, of which there was a great deal, much of it based on the various reports of the now historic Consortium on a Study of the Future of the Maine Legal Profession. This is what they did.

The ten, within two months, had withdrawn from all their firms big and less big and had settled in Portland where they formed a law firm under the rubric of The Decameron Law Group, occupying part of some warehouse facilities formerly used by the Bath Iron Works.

The arrangement was based on a series of principles. Some, like the method of determining compensation, were borrowed from the admirable practices -- and there were some -- that they had observed in some of the firms the members had worked for. Here they are.

-- Compensation was based on the two principles of openness and consensus . . . possible only in a small group of similarly motivated persons of a considerable good will. During the year the members would get a percentage of their previous year's pay. At year's end all would be told how much was available for distribution and what each had received in earlier years. A percentage would be reserved for subsidizing their service to rural areas. Each would fill out a form showing what he or she thought everyone should receive. Then the returns would be collated on a summary sheet and resubmitted to all members. Each would reconsider his judgments. The result would normally approach consensus. A partnership meeting would be held to make final changes. The process was time consuming but, since each knew exactly what the others were doing, no one felt discriminated against or misunderstood;

-- The firm would not expand beyond the ten members and existing secretarial and paralegal staff; any growth of business incapable of being serviced would be dealt with by creating another similar, independent group of lawyers;

-- Time spent on firm business would be limited, absent unusual exigency, to forty hours for each member each week;

-- Fees would be as low as possible and still provide the income necessary for compensation as above noted; credit terms for clients unable to pay at one time would be reasonably liberal; in view of the low profit margin, members could undertake up to five hours a week of pro bono activity in addition to their forty hours, but must present any cause demanding more time to the entire membership for a collective judgment;

-- Each member would spend a given amount of time each year in continuing education in his or her specialty;

-- Each member would make a point of participating in meetings and in informal conversations with other members in order to maintain the broadest possible knowledge and experience base as a foundation for counseling;

-- Each member would seek appropriate occasions for serving as mediator or otherwise engaging in alternative dispute resolution modes.

Some of the members worked only half time. Two such were a husband and wife team; one was a lawyer who also wanted to pursue his talent as a cabinet maker. To fill any gap, the ten somehow seized upon the canny idea of inducing one of the older members of the bar to come in and be the "elder". His function was solely and simply to ask embarrassing questions: Do you really need these documents? Do you really need to ask more than five questions in this interrogatory? Isn't this a case to be settled? Why not go over to her office and talk rather than write? Why not take the shortest distance between two points? Why move for default? Why oppose amendment of the complaint? What's the best deal for all concerned? Do our leases and wills really need all these clauses? Do we really need this 6th generation minicomputer? As you will soon see, such an elder is worth his keep.

The ten realized both that they could not all be generalists and that they could not hope to cover all specialties. So, drawing upon studies of that famous Consortium on the Future of the Maine Legal Profession, they carefully chose some key specialties that were complementary and reasonably comprehensive for most peoples' problems most of the time. They limited and divided up their field in the following way: civil and criminal litigation -3; commercial transactions -2; tax and estate planning -2; domestic relations -1; title and real estate -1; civil rights, environment, and federal non-tax statutes - 2. Bankruptcy, patents, labor, copyright, and other more arcane subjects would be left to others.

Indeed, the ten, foreseeing the necessity of referring such cases and of getting needed help in emergencies, had two types of external arrangements. One was with a large and able firm which agreed to take cases referred to it by the ten which were beyond their capacity. The other arrangement was with several other competent trial lawyers in the state, a sort of network which could be called on if there quickly arose the need for prompt investigation, interrogation of many witnesses, or the simultaneous taking of multiple depositions.

Technology had vastly simplified one of the most formidable of overhead items in earlier days -- the library. A few practice books and services had to be acquired, but 90% of the research needs of the firm could be supplied from its membership in the regional library computer network. The Decameron had access to as rich a data base as the largest firm.

In fulfillment of their collective pledge, the Decameron regularly took turns in riding circuit in rural areas. They maintained a schedule of weekly office hours in three neighboring counties. In this way they brought legal service to people who would never think of "going to town". In the course of this activity they found that on balance the venture more than justified itself, both in new business generated and counseling experience realized.

The Decameron, in fulfilling its continuing education pledge, created a link with the Law

School of the University of Maine. For a modest price it was able to stimulate faculty participation in a series of special practice evenings that were invaluable to firm members. The faculty also seemed to enjoy discussion with lawyers who had real problems on their minds. On occasion the Decameron yielded to the superior wisdom of Academia and paid consulting fees to faculty members. The result was that at no time did the Decameron feel lost as it faced a legal issue, however technical and esoteric it might first appear.

The first few months of existence of the Decameron were pitiable. The Bar in general shook its collective, shaggy head. The old warehouse offices were seldom visited. The conventional wisdom had been challenged and the challenger had better take defeat gracefully. Then one day a grey, bent, grizzled operator of a filling station patronized by Filostrato shuffled in. Filostrato recognized him and invited him to sit down. The filling station operator then gave his story, spiced with redolent expletives, of his attempt to shift sources of fuel supply. His gas company had been increasingly niggardly. He knew that he would be happier with another company. So he wrote his company that he wished to cancel his lease. Since he was an effective operator, his station was a desirable unit for any enterprise. It was not surprising that his supplier was reluctant to lose this outlet. After an exchange of correspondence, the supplier refused to cancel, quoting the "cancel without permission" language of the lease, a 30 page document in fine print.

Filostrato listened with utmost sympathy, but in his heart he knew they were lost. Look at that great document, the lease, drafted by the best super firm that money could buy. Obviously no company in its right mind would permit a lessee to cancel without permission. That is the end of that. But, what the hell, let's give this to our in house elder, Old Timer. This'll teach him that sometimes there are no answers.

Old Timer shambles in and sits down, balancing a chipped cup of coffee on the arm of his chair. He listens. Filostrato noted this. When he talked to his associates or a client or an adversary or a judge, so often he had to face the fact that NOBODY LISTENS. But Old Timer did. And after Filostrato had finished, Old Timer said, "There's one thing you youngsters should never forget. The giant firm is great if you've got to comb through thousands of documents. But in most other things remember that even the biggest of firms is made up of human beings and usually in a big firm the product isn't quite as good as its best lawyer. Often it's a great deal worse. And a document like this lease is no better than the last lawyer to check it."

He said, "Let's read this document". That was a radical suggestion. Nobody had suggested that. Old Timer began: ". . . lessee may not surrender his right to renew or cancel this lease without permission of the lessor" . . . . Old Timer paused. He said, "This sounds pretty negative, doesn't it?" He continued, "Well, listen again. Every time I see a chain of negatives -- may not . . . surrender . . . cancel . . . without permission -- I get suspicious. Do you know what the lease is really saying? That your client <u>has</u> the right to cancel this lease without anybody's permission. It's just that he can't give up this right without permission. This is crazy. Someone being paid $300 an hour to read just goofed. But that's the way it's written."

And that's the way it was. And there were other operators in the state who wanted to cancel. And they brought a class action. Naturally the oil company superfirm in New York and its local counsel followed the time honored tactic of burying plaintiffs in a mountain of discovery requests. But Filostrato, at Old Timer's suggestion, appealed to the trial court to do something courts had been urged to do for years -- to control the discovery monster. The judge agreed, drew a deep breath, and applied sanctions. Following abbreviated discovery, settlement came swiftly. And the counsel fees were generous. And the Decameron was in business. This was the

beginning. The Decameron began to attract other clients, high tech, small business. And it found that more and more of the work it undertook on a pro bono basis qualified under both federal and state statutes for awards of attorney's fees.

The time has come to end this particular flight of fancy. But there remains a basis for dreaming this kind of dream. Perhaps there would be less room for this if we lived in Megalawpolis, where the momentum of giantism in size of firms, costs, fees, specialties, and clients may now control the future. This would be a future of increasing sophistication of legal service for the few, less access for the many, and irritation and frustration for most of the legal profession.

But in places like Maine we cannot yet say that the forces of the future are entirely beyond human guidance. We still have a chance to explore, experiment, and develop ways to combine a high quality continually satisfying practice of law, a quality of life on a still human scale, and increased accessibility to our profession by the non-wealthy segments of our society. In an example of leadership that could well be emulated by other professions, your Bar Association has brought together the broad based Consortium on a Study of the Future of the Maine Legal Profession -- Bar Examiners, Overseers of the Bar, The Maine Trial Lawyers Association, Legal Services for the Elderly, Pine Tree Legal Assistance, The Maine Judicial Council, The Office of the Attorney General, and The University of Maine School of Law.

This will be the vehicle for focused studies asking under what conditions solo practice and small firms can survive and prosper, how more people can make preventive law a part of their lives, how small towns and rural areas can best be served, what new forms of association for both lawyers and clients should be created, what work need not be done by lawyers. Experiments and pilot projects will be stimulated. Changes in laws, regulations, and the professional code of conduct can be expected.

Other states have nibbled at this subject. But their efforts have culminated in a one or two day meeting, much casual and unsupported opinion, and a brief report long since gathering dust on some forgotten shelf. This Consortium properly is gearing up for the long haul. Since the future lies always ahead of us, the task is an ongoing one. The perspective, participation, patience, and imagination already invested in this study promise to give us our most hopeful counter weapon as we enter Orwell's fateful 1984.