

Time for a Second Wind

Address to Cumberland Bar Association
Holiday Inn by the Bay
January 24, 1996

In the few minutes we have together in the middle of a busy day, I thought I would tell you a little bit about what I am doing. Not about judging, of which you probably have heard enough. Although I still do quite a bit of that, both in our First Circuit and in other circuits, as a senior judge I have some time for other ventures.

Recently I was part of a four year undertaking sponsored by a nonprofit research organization of which I am a founding director, the Governance Institute. Working with some seven senior partners of large law firms (150 or more partners) in New York, Washington, Richmond, St. Louis, and Denver, we produced this little volume, The Law Firm and the Public Good, published jointly by our Institute and the Brookings Institution.

This was an effort on the part of insiders to examine the state of pro bono activity in big firms, to challenge assumptions about its necessity, desirability, and efficacy. Bear in mind that these partners had all been responsible for management, paying the overhead, and helping determine distributions. They were not reformers. They began by asking the basic question: why pro bono? why are we different from plumbers and truck drivers? They settled on three answers: the legal profession's bedrock desire for autonomy, the monopoly given to the profession in assuring access to courts, and the consequent commitment of the profession to advance the goals of the adversary system, principally equality before the law.

They surveyed, with the help of Esther Lardent of the American Bar Association, the current state of big firm public service. While an impressive range of activities was reported, they had to confess that often paper claims overstated the reality and that in many cases what passed for a pro bono program were the unsupported, unguided, uncredited, and often maladroit efforts of junior associates.

Turning to a searching cost-benefit analysis, they documented three important findings. The first was that costs of pro bono activity, measured by multiplying hours and regular hourly rates, were grossly overstated. In most firms, most of the time, there is excess capacity. Therefore, the real cost of pro bono work is usually the value of time, staff, and equipment that would lie fallow.

The second finding was the unique benefit to the individual lawyer in an era of declining quality of life. They found that lawyers these days had to lower their expectations concerning tenure and promotion, income, collegiality, and client relations and accept a high degree of isolation, specialization, bureaucratic meetings and reports, and the pressure of billable hours. Pro bono work gave partners and associates a one-on-one relationship with a human being and involvement with the community, reduced the sense of isolation, and engendered a sense of pride in individual accomplishment.

The third finding had to do with a direct benefit to the firm: the development of better lawyers. Although any judgment of lawyer quality is necessarily subjective, the group had the benefit of interviews with both those who had done substantial pro bono work and those who had supervised them. The conclusion was that pro bono work enhanced a lawyer's sensitivity to individuals and the human factor, a feeling for community attitudes and values (relevant to everything from selecting a jury to calculating the public reactions to a client's proposed course

of action), an early assumption of greater responsibilities, with consequent growth in self confidence, ability to manage time, and maturity.

In my summary of our group's work, I called it -- if it catches on with other firms, large and small -- the key to the revitalization, refreshment, and enhanced reputation of the profession.

The question now before the house is whether this has any relevance to you. You may well feel that this is deja vu all over again. For years you have heeded the call. Sixteen hundred Maine attorneys, 70 percent of the bar, have signed up for the Volunteer Lawyers Project. In 1993 and 1994 over 1400 client referrals were made to you. In this county, 25 attorneys were honored for accepting 6 or more cases or reporting 100 hours or more of pro bono work in 1994.

But do these statistics, as with the claims of big firms, overstate reality? While so many lawyers have indicated their willingness to take cases, those who actually do are far fewer as any "Lawyer of the Day" can attest. Some firms have yielded to the pressure to generate income and have dropped any semblance of a pro bono program. Some firms do not give full credit to their lawyers who do pro bono. Some, perhaps many, firms simply do not have the ability to render effective legal service in needed areas. Perhaps family law in all of its facets is the prime example. Not only is this the hot area of law problems for the indigent but it is an increasingly complex, cutting edge field. And not many lawyers are up to speed in it.

Perhaps we all thought that the critical legal needs of the poor had been put behind us with the completion of the comprehensive and penetrating report of the Muskie Commission on Legal Needs. But so many of the recommendations required either federal or state funding or both. Not only has any such help failed to materialize, but the federal roof has literally fallen in.

The Congress has determined to cut to its knees the national Legal Services Corporation, source of most of the funding for Pine Tree Legal Assistance. This means a massive reduction of \$800,000. Over the past three years, Pine Tree, our 27 year old agency to serve the poor, nationally celebrated as one of the best, has had to cut its staff of lawyers and paralegals by 50 percent. With an indigent population of over 230,000, Pine Tree now fields only 6.8 attorneys providing basic services in 6 thinly staffed offices throughout this immense state -- a ratio of one attorney to 34,000 eligible clients. New Hampshire with not much over half of our indigent population has 12 attorneys. But, adding insult to injury, under new legislation, Pine Tree will be shackled; it will no longer be able to take class action suits, represent non-citizens, participate in policy recommending groups, or engage in advocacy before the legislature.

Our 22 year old, equally highly regarded Legal Services for the Elderly organization has been similarly hit. In the past four years it has seen its funding slashed by some \$3 00,000, or 35 percent. Out of an over-60 population of 218,000, some 84,000 live under the 200 percent of poverty line. To serve this clientele, LSE has only three attorneys, plus three full time attorney equivalents attending its hotline. The lawyer-eligible client ratio is 1 to 20,000.

As some of you are aware, the Maine bench and bar did not meekly wave a flag of surrender of their deepest duty to endeavor to ensure equal justice for all. Instead, they have mounted a counter-revolution. On October 11, 1995, at the call of Chief Justice Wathen, the Maine Bar Foundation, and the Maine Bar Association, some 65 lawyers, judges, and legal services providers convened at the State House in Augusta for a Forum on the Future of Legal Services. Out of this emerged a structure to deal not only with the immediate emergency but with longer range planning.

The Justice Action Group, which I chair, consists of the Chief Justice, Justice Dana, Professor Kinvin Wroth, Madeleine Freeman, Vendean Vafiades of the Maine Bar Foundation, Representative Sharon Treat, and Susan Hunter, past President of the Maine Bar Association.

Under our direction is the Legal Services Response Team. David Kennedy, former Pine Tree director and a Regional Court Administrator, chairs this group, composed of two private lawyers and representatives of the providers, Pine Tree, LSE, the Maine Bar Foundation, and the Law School's Legal Aid Clinic. Its major task is to work with and coordinate seven task forces in their effort to improve the delivery of legal services through either existing or new mechanisms.

Finally, the task forces emerging from the fall forum are addressed to the creation of new structures, the improving of delivery of service within existing resources, the expansion and coordination of services of private lawyers and law students, changes in bar rules and in court and administrative processes that may be triggered by the effort to widen access to the courts, and, finally, fundraising and addressing the legislature.

The New Structures Task Force, under Professor Mike Mullane has been the busiest to date. It has supported a proposal of Gerry Pettrucelli that the function of advocacy before the executive and legislative branches, formerly carried on by Pine Tree, be assigned without delay to a new entity, the Equal Justice Project, Inc. The Legal Services Response Team and the Justice Action Group readily agreed, and the Maine Bar Foundation, working to meet an end-of-year deadline, agreed to reallocate some of its monies to fund this new entity. Two former seasoned advocates from Pine Tree, Mary Henderson and Chris Hastedt, are already at work. Part of their responsibility will be to provide administrative support and coordination for a network of lawyers and their firms who are experienced in and committed to carrying the kind of class action litigation that Pine Tree will be barred from undertaking. This network is the idea of Bob Mittel, and has been referred to as a "virtual law firm."

So you can see that there is a great deal of action, reorganization, creation of new organization, devising of new ways of doing things, and involving more people. Underscoring this last activity was Chief Justice Wathen's talk to the Bangor Rotary Club on January 16. He concluded his speech with these words:

Achieving justice through law is too important a goal to leave exclusively to lawyers, litigants, judges and the media. Our rapidly changing world and the increasing problems of our times cry out for citizen understanding and involvement. This year we are going to explore the possibility of using citizens to help neighbors who can't afford trained counsel. Frankly, citizen involvement is an area where we have done far too little and, starting this year, Maine courts will do more.

Where, in view of all this, do you fit in? What I think it all adds up to is that this is that time in a long race when the runner, with luck, gets the second wind that enables him to persevere and win the race. This is the time for your second wind.

This is the time for law firms to reexamine what they are doing, can do, should do -- without overestimating the costs or underestimating the benefits. Key questions are: is there a key partner deeply involved in a firm's pro bono program? Is there a written policy? Are there procedures governing the screening and acceptance of pro bono cases? Is there adequate record keeping? Is full credit given partners and associates for pro bono work? Is there effective training and supervision? If no one is versed in a hot field, such as health, family, or housing law, should there be an effort to repair the lack? Is there a close relationship with the providers -- the law school clinic, Pine Tree, and Legal Services for the Elderly? How has the firm responded to requests from the Volunteer Lawyers Project? Can providers use and can the firm make available lawyers to them for limited times? Can the firm make more of a monetary contribution? Does the firm seek input about what it can do or can do better?

There is one other specific contribution that can be made by some of you. I have mentioned the concept of a network of attorneys sharing the burden of managing class action suits which Pine Tree will no longer be able to handle. They will be in the broad field of public benefits, especially AFDC issues. They will usually not be fact intensive but will involve broad-ranging and penetrating legal research and analysis. The "virtual law firm" is looking for firms, not necessarily only the large ones, which have an interest in helping correct systemic defects which adversely affect the indigent, and which would be able to invest a substantial number of hours on a given case with no certainty of any fee award even if success crowned their efforts. If you feel this is something you would like to do, please get in touch with Bob Mittel. This is a unique opportunity to fill a critical gap in the legal services spectrum.

As the Chief Justice said at Bangor, our tradition is that "in tough times we work together." This is not a winter of discontent; this is a winter of determination. After it snows real hard, we get out and dig.