The Bar and the Courts: A New Dimension

Address by U.S. Senior Circuit Judge Frank M. Coffin,
New England Bar Association, Newport, Rhode Island,
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A gathering of this regionwide bar association presents a unique occasion for discussing what is at once a critical problem and also a worthy challenge shared by all your members. To set the stage properly requires us to take a brief look at the evolving interests of the organized bar and an impressionistic survey of the current condition of the courts of New England.

I. Evolving Purposes of the Organized Bar

Of course there wasn't much organization in the legal profession in the early days. Connecticut was typical. In the 1750s Peletiah Mills of Windsor was also the principal tavern owner in town; other lawyers doubled as cloth merchants, clergymen, and soldiers.[1] True, Rhode Island was a bit precocious. In 1745, 246 years ago, eight lawyers signed a "Compact" for the noble purpose of assuring themselves adequate fees. They agreed not to sign and distribute blank writs and also refused to represent a client who was being sued by another lawyer for his fee unless three or more colleagues deemed the fee unreasonable.

It took another century before organized bar activity began in earnest. The Association of the Bar of the City of New York was formed in 1870, stemming from a background of court corruption, the savage beating of a prominent lawyer, and a feeling that the profession had lost its independence. Eight years later the American Bar Association was created, with the objectives to "advance the science of jurisprudence, promote the administration of justice and uniformity of legislation...uphold the honor of the profession. . . and encourage cordial intercourse among the members".

To begin, "cordial intercourse" dominated the scene, the New York group acquiring a punch bowl which it filled with nectar fashioned from a special recipe from the neighboring Century Club. Law reform efforts soon followed but, as Professor Friedman describes them, they mainly concerned "ways and means to keep the profession decent, well-liked, and well paid."[2] Up to the 1960s reform aimed at in-house matters -- uniformity, codification, consistency in statutes -- matters that interested bar groups greatly but had "small social returns."[3]

In the meantime, bar organizational structures and procedures were becoming increasingly sophisticated and "professional". Career staff, a widespread committee system, painstakingly planned meetings, polished publications, insurance plans, comprehensive continuing education programs -- all testified to the maturation of organized bar activity. Then, beginning in the 'sixties, the bar found itself challenged by and involved in broad issues extending far beyond the welfare of the profession: civil rights, the war on poverty, environmental issues. . . . Most recently the attention of many bar associations has been directed to the problems of the indigent in gaining access to the courts and the responsibility of the profession.

To sum up, we have seen lawyer communities begin with the narrow aim of self-protection, quickly realize the benefits of social intercourse, broaden their reform objectives to

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[1] All historical references to lawyers and bar association activity are derived from Lawrence M. Friedman's A History of American Law, 1985 (New York: Simon & Schuster, Inc.)

[2] Friedman, note 1 at p. 651.

[3] id. at 676.

include a more logical system of laws, upgrade their own organizational structures and procedures, and, finally, involve themselves in broad societal issues. But while bar associations have from time to time worked on specific issues affecting court organization and the welfare of the judiciary, courts and judicial personnel have not been on the agenda.

II. Courts at Risk: the New England Scene

It is now time to turn our lens to the courts and judiciaries of the states represented here. During the past year or two all of us have been aware of the increasing pressures on courts, together with all other instrumentalities of government, to cut expenses and cut out all unnecessary operations, personnel, and facilities. We have become used to the malaise of recession and grudgingly accept the fact that public services have to suffer.

What we have not realized is that in this era of budgetary stringency, the practices of calling for across-the-board cuts from all agencies and departments and of treating the entire third branch of government as an ordinary agency are placing all of our court systems at risk in a way not shared by the executive and legislative branches. No one can say that the strains on the economy threaten the legislative function; if anything, they impose greater duties on the legislature. While the ability of the executive branch to maintain a full menu of governmental and social service is diminished, we have yet to see the most essential services suspended. But a panoramic look at our New England courts suggests that the budgetary knife has begun to cut into the bone and marrow of the administration of justice.

In Maine our chief justice has reported the results of a two year austerity program: "reduction in work force, maintenance of four judicial vacancies, elimination of out-of-state travel and all judicial and clerical training programs, elimination of substantially all overtime, elimination of any contractual increases for court officers and bailiffs, and reductions in leased space".[4] The Maine Supreme Judicial Court, striving, as Chief Justice McKusick put it, to "do more with still less," instituted a $300 filing fee for any litigant demanding a civil jury trial, thereby provoking a formal protest from the state bar association. Various filing fees and fees for mandatory mediation of family matters have been increased. And last month, in a letter to the governor, the chief justice reported that the current Fiscal Year appropriation for the courts is at virtually the same level as last year, but that some $3 million of additional mandatory, unavoidable expenses are expected to be absorbed. They include over $1 million in debt service on bonds for newly constructed courthouses, over a million dollars for an extra pay period and mandated cost-of-living increases, as well as higher postal and utility rates. His stark conclusion was that [[T]he Third Branch will not be able to live within a $31.7 million appropriation in this current year."[5]

In New Hampshire delays in funding equipment and staff kept the brand new Hillsborough County Courthouse idle for more than a year. The press of criminal cases means that civil cases cannot be tried for from two to five years. Night sessions for some courts have been proposed without providing for additional judicial personnel. The governor proposed that private lawyers pay a yearly $500 fee for the right to practice. Massive increases in filing fees have also been proposed. Vermont has gone beyond charging extra fees to litigants desiring civil jury trials; it has declared a moratorium on them for the last five months of its fiscal year, with the unexpected result of a halt in settlements.[6]

In Massachusetts, Chief Justice Liacos reported the loss through attrition of 675 court

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[4] Letter from Chief Justice McKusick to Governor John R. McKernan, Jr. dated August 15, 1991.

[5] Id.

[6] "Systems Try to Stretch Their Dollars," The National Law Journal, July 1, 1991, p. 25.

employees, with an estimated further loss this year. Payless vacation days and deferring compensation until retirement are some of the heroic measures which have been taken. In a "Meet Your Judges" program this spring the audience gasped when Judge Nancy Dusek-Gomez of the Springfield District Court said that she has to clean her own chambers and that toilets in her courthouse have not been cleaned for a year.[7] Chief Justice Liacos wrote in his First Annual Report concerning his first year and a half in office, "I have spent most of my time fighting to preserve our courts' capacity to function as a separate and coequal branch of government in the face of a continuing statewide fiscal crisis."[8]

In Rhode Island, according to Bob Herold, Deputy State Court Administrator, the courts in calendar year 1989 gave back 10 percent of their funded budget; in the year ending last June 30th, reduced numbers of jurors were called, three district courts were closed, aging computers were not replaced, out-of-state travel was totally eliminated, hiring was frozen, maintenance service was privatized. This last step meant that waste is collected only three nights a week, resulting in a notable increase in the insect population. In short whatever "fat" there was has been squeezed out. There is nothing left to give up ... except justice itself. This is not mere rhetoric. The court system is now understaffed. If two-person offices are to be further reduced, the office must be closed if court is to be held.

In Connecticut, Judge Aaron Ment, the Chief Court Administrator, gave me this report on the recent efforts of the courts to cope with budget cuts. In preparation for this 1991-1992 fiscal year, the central office of the superior court was reorganized, work schedules of adult probation officers were revamped, the child support enforcement system was modernized, a vacancy rate three times that of normal was maintained, and 82 people were laid off. Notwithstanding these retrenchments, the judiciary's requested budget of $143.8 million was cut by the governor to $136 million, not counting additional reductions authorized by the general assembly. Now facing a critical $4.8 million shortfall, Judge Ment reports:

> To address this shortfall, we have already scheduled the suspension of jury trials, eliminated 40 middle management positions, and planned the consolidation of court facilities. Furthermore, we are currently exploring the closing of many probation, family and support enforcement offices and court locations, limiting the time within which clerks' offices will be able to provide assistance to the public, and laying off more than 200 additional employees.

What does all this signify? In my view, we are entering an era of changing relations among the branches of government, compelling us to seek new ways of coping with change while preserving the independence and integrity of each branch. It is an era of institutional vulnerability. Our legislatures face overload of committee assignments and hearings, inadequate staff support, increased constituent demands, escalating campaign costs, pressures of single issue-special interest lobbying, and the distorting effects of media coverage. Our state executives have the awesome initial burden of dealing with a universal budget crunch, heightened by the withdrawal of federal funding across a wide spectrum of social services.

But the judiciary is uniquely vulnerable. It faces ever increasing caseloads, with accompanying stress, a demoralizing disparity between judicial compensation and that of the rest of the legal profession, inadequate support staff, equipment, and space. State court systems generate in fees, fines and penalties a lion's share of their total costs. Their impact on state

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[7] Massachusetts Bar Association Newsletter, June/July 1991, p.9.

[8] Paul J. Liacos, First Annual Report on the State of the Judiciary, Mass. L. Rev., Winter 1990, 142-43.

budgets is minimal. They have responded to repeated across-the-board cuts in the manner expected of a department or agency of the executive branch. They have now reached the point where their very independence and the quality of justice are at stake.

California's Chief Justice, Malcolm M. Lucas, recently described the threat in these words:

> We cannot wait for news from the governor or the legislature that we must cut back 'just like every other state agency.' If we do so, we not only risk losing the money we need, but we also risk undermining the stature of the courts as an independent branch of government and our basic ability to perform the very functions for which we are designed.[9]

III. The Bar's Obligation and Opportunity

Having looked back over the trail of purposes moving the organized bar and the current situation facing our courts, we must ask the next question: why should the bar be bothered? Every bar association -- national, state, regional, county, municipal -- has an overflowing cornucopia of programs and objectives.

I think that Professor Geoffrey Hazard of Yale Law School put the general rationale as succinctly and persuasively as anyone. As you know, his particular interests include legal ethics and the legal profession. This is what he said:

> If we believe in good law properly administered, we have to believe in good courts adequately supported. These are concerns the bar ought to share. Our professional function is, after all, derivative of the judiciary's function. Our professional standing is founded on the judiciary's pedestal. Like a lot of other parts of the social infrastructure, that pedestal has been crumbling. Restoring the judiciary is part of the task of restoring professionalism.[10]

This general statement of obligation can be dissected to reveal several separate sources. First, the quality of service a lawyer can render directly, at some point, stems from the capacity of courts to bring high quality deliberation and decision to their work. Second, the capacity of courts to give prompt access and decision similarly governs counsel's ability to serve a client expeditiously. In the long run no lawyer, whether a plaintiff's or defense attorney, profits from a court system unable to process civil cases. Third, the court environment, consisting of space, equipment, and personnel is the environment in which you spend much of your daytime existence. If it is inadequate, squalid, and crabbed, this cannot fail to cheapen the profession. Finally, obligation to support and protect courts stems from the same principle that makes lawyers officers of the court.

Not only is there obligation. There is also opportunity. I do not need to file a bill of particulars for the proposition that lawyers do not, these days, enjoy a top rating in the eyes of the public. It may well be that lawyers as a class never do. . .only one's own lawyer on whom he relies in an hour of need. Nevertheless, the reality and the appearance of the reality that lawyers as a group are steadily and deeply dedicated to the preservation of adequate courts staffed by judges of independence and high quality cannot fail to enhance the stature of the profession.

It was for substantially these reasons that a historic conference in Denver just two years ago, convened by the National Center for State Courts and the National Conference of State

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[9] Malcolm M. Lucas, Is inadequate funding threatening our system of justice?, Judicature, April-May 1991, p.292.

[10] A crumbling Judicial Base Hurts the Bar, National Law Journal, Nov. 9, 1990, p. 15.

Legislatures, adopted as one of its eight major recommendations the following: "Encourage bar associations to serve as intermediaries between the legislative and judicial branch." (Emphasis in original.)[11]

IV. What Can Be Done

A. Concept of Catalyst. The concept of intermediary is a starting point in thinking about a new court-supporting role for the bar. There is a wide range of issues, particularly those demanding professional and technical expertise, where the understanding, support, and intercession of the bar can be of critical importance. But the bar should not assume that it should always be the exclusive intermediary. It seems to me that on many of the issues likely to arise in the next decade, the most promising and effective role of the bar will be that of catalyst, stimulator, coordinator, and leader, rather than as an exclusive professional spokesman and surrogate. Not only does the crowded agenda of any active bar group caution against taking on a project which bids to be immensely time consuming for many people, but the most dedicated and disinterested efforts of lawyers alone are likely to be dismissed as self seeking and professionally protective.

Moreover, while lawyers are obviously very effective lobbyists for sharply defined and technical objectives, when dealing with broad issues and pitted against other groups representing an aroused segment of the citizenry, they are likely to come in a poor second. Like judges, lawyers do not, as a group, possess any special political clout. Yet they possess another, more enduring commodity, a healthy respect on the part of most community groups and leaders. Finally, the need for broad-based citizen participation, with bar leadership, stems from the fact that the problems are not technical professional ones but profound ones determining the quality of justice for all.

In speaking to the New Hampshire Bar Association last May, I sketched the outlines of the concept of the bar as catalyst. It implied no rigid organizational structure, but rather an enduring commitment, administered flexibly, seeking to motivate other key groups. There would of course have to be responsible leaders within bar associations charged with the mission of keeping a watching brief over present and foreseeable threats to the functioning of the courts and of deciding what issues merit invoking the aid of a broader network. The network of citizens' groups, which I have termed Citizens Caring for Courts, would encompass representatives in public and private education, commerce and industry, labor and farm groups, the media and clergy, public interest and minority and disadvantaged groups. Not all would respond on every issue but they would constitute a sort of community resources bank to draw on when needed. Their activities could range from joining as signatory to a letter or petition, resolutions, testimony, visitations to the executive and legislative branches, and specially scheduled court-awareness events.

I have just been a guest at a meeting of the kind of organization which might be adapted to our needs. In Maine, for thirteen years, there has existed the Maine Development Foundation. It is primarily an organ of the business community, dedicated to the public purpose of stimulating economic development. With 500 corporators, many legislators, and representatives of the executive branch, it seeks to put together public-private coalitions to accomplish specific objectives in general education, in fostering world trade, capital investment, and the provision of technical and scientific counsel. What I am suggesting is a similar organization, although led by lawyers, not businessmen, not to enhance economic development but to protect the necessary functions of the courts.

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[11] Legislative-Judicial Relations; Seeking a New Partnership, Conference Summary Report, p. 22.

B. A Proposal. I am pleased to say that the New Hampshire Bar Association is picking up on the suggestions made at its "Access to the Courts" Conference in May. Its president, John T. Broderick, Jr., in announcing the creation of a committee to improve the flow of court-related information to lawmakers, said:

> It was the strong consensus of the conference that a structure be created to continue the necessary dialogue and exchange of ideas on court funding, court facilities and related issues. The needs of the court system are very real and require immediate and continued review and discussion.[12]

And just this month the new President of the Boston Bar Association, Margaret H. Marshall, was reported as intending "to use her presidency as a bully pulpit for securing adequate funding for the courts and court-related programs."[13]

It now seems to me that this occasion and this group make it ripe to advance our thinking one more step. As I have tried to demonstrate, although on less than a thoroughgoing and systematic study, all of the New England states share the same basic problem of ensuring adequate support for their courts. Each of them has by now acquired relevant and different experience in dealing with the problem. Much can be expected from a carefully planned exchange of views.

Yours is a comprehensive organization. If not exactly an umbrella organization, it nevertheless enjoys access to the bar organizations and knowledgeable staffs of all the New England states. It seems to me that this organization could be a catalyst for catalysts, that it could perform a vital service for the bars in all the states by stimulating, collecting, and coordinating data concerning the needs of the various state court systems, the responses to those needs, the issues where active involvement of the bar may be sufficient, issues which are likely to require broader support, the steps to be taken in organizing citizen support, and the forms which such organization might take. I would also think that in addition to your obvious resources, the executive secretaries of the state bars, allies in this preliminary data gathering and analytical stage would be law schools in the area.

Given the organization of a comprehensive analytical paper going into these matters, I can envisage a fruitful, perhaps seminal, colloquium or workshop involving members of the bar, officials of the bar organizations, representatives of the court systems, and selected community leaders probing the spectrum of problems and suggesting next steps.

Should something of this nature take place, it would be in the highest tradition of the bar, signaling a new and significant stage of civic action in its enlightened self interest.

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[12] "Broad-Based Committee To Focus on Communication With Legislature," New Hampshire Bar News, Vol. 2, No. 2, June 19, 1991, p. 29, 33.

[13] Boston Bar Association, Update. Sept. 1991, p. 2.