

Commencement Address for the
Class of 2008,
University of Maine School of Law
Portland, May 24, 2008
by
U.S. Senior Circuit Judge Frank M. Coffin

Thinking Like a Lawyer

Let me begin by thanking you for inviting me to share this important day with you. In the words of our beloved Dean Godfrey, as he addressed the class of 1995, a law school commencement is "a fairly notable event...celebrating success in three years of genuine intellectual effort, and turning loose a small crowd many of whom will have a good influence on future developments - some time and some where - and become, eventually, commencement speakers. My job today is to try not to disabuse you of that rosy image.

My theme is the familiar mantra, "Thinking Like a Lawyer." My goal is to have a close look at it, identify its usefulness and limitations -and confine the beast to its proper place. Surprisingly, I found this is a lively issue in Academia. The Carnegie Foundation for the Advancement of Teaching recently launched a study of our profession, and last year enshrined its report in a book entitled "Educating Lawyers." It linked the "thinking like" phrase with what it called "the signature pedagogy" of our profession, the case dialogue, as "the legal academy's standardized form of the cognitive apprenticeship." That is a classy way of saying that learning to "think like a lawyer" refers to a very specific kind of law school experience.

It all began with the enterprising Dean of the Harvard Law School in the 1870's, the appropriately named Christopher Columbus Langdell, who discovered that there was another way to teach besides lecturing. According to Arthur Sutherland, Harvard Law historian, he "would first ask a man to ... tell what the facts were, how the litigation developed, what point was at issue, what the court had decided, and the court's reasoning. Then he would ask whether the student agreed with the result, and why; whether the case followed others which the class had read, whether it could be 'distinguished'; and so on."

Of course, there are many variations of the dialogue. In my day, in the fall of 1940, when I was a first year student at Harvard Law School, my property professor was Edward Warren, who had fully earned his nickname, "The Bull." We would dread being called on. Then the fatal day would come to our row and we would blurt out our responses to his questions. White-haired, red faced, and occasionally apoplectic, he would be likely to reply, "Mr. Coffin, I love to take an axe, sharpen it, polish it, and make of it a fine tool, but gentlemen, first give me the axe;" or "Am I supposed to breathe the breath of life into lumps of clay?;" or, if I tried to rephrase an inadequate response, "Mr. Coffin, only a dog returns to his own vomit." You can understand how I and my peers emerged from class as early victims of Post Traumatic Stress.

This vignette shows the sadistic side but there are many hues to the Socratic dialogue. I have witnessed a sunnier side here at our law school a few years ago. I sat in on one of our late Professor David Gregory's classes, and watched him go from student to student, vary the facts slightly, create apparent discrepancies in decisions, and without bullying build up such tension that you could hear a pin drop, then lead a student to unravel the threads. The class was entranced. This is what the Carnegie study describes as a "sort of collective effervescence that burns particular classroom events into the memory, gradually reshaping students into legal

professionals."

What has happened by the end of the year has been to equip the student to recognize and apply the rules, procedures, and boundaries of court-oriented problem solving. This is, of course, a core teaching. But it falls far short of covering today's legal landscape. This accurate but narrow concept of "thinking like a lawyer" is a chilly, antiseptic, value-neutral, procedural one. It distances lawyer from client, ignores other vital ways of thinking, and excludes concerns about the highest ethical and social justice goals of a noble profession.

As soon-to-be graduates of this school, you already know how much else lawyers have to think about. For one of the smallest schools in the country, this law school does an amazing job in making available many of the ways a lawyer needs to think: its inventory of some eighty-six upper class courses, its variety of clinics, and its battery of skills courses. But, even if faculty, courses, and clinics were vastly increased, the school still could not hope to teach its students all the ways of thinking a lawyer will need.

In narrowing the focus, I have borrowed a dualism used in discussing international strategies by former Kennedy School Dean Joseph Nye. He would combine those involving "hard" military power with those relying on "soft attractive power" to create "smart" power. In our profession, I would divide our thoughtways between hard edge and soft edge. The hard edge ones are adversarial and depend on courts for action: research, building a factual record, writing briefs and drafting legal documents, arguing to courts and agencies, and conducting direct and cross examinations of witnesses and arguing to juries. The soft edge ways of thinking, equally important to clients but not involving courts, include these: listening to one's client, counseling, negotiation, mediation, and living up to the highest ethical standards and broad justice goals of our profession.

To these I would add two under-recognized kinds of thinking. They are not peculiar to a lawyer - but are vital to a lawyer's functioning as citizen and as an individual. The first of these is something that I have been living with for over forty years as an appellate judge - affirmative disciplined collegiality, the deliberate building of trust among peers and colleagues to increase the chances of agreement and in any event to minimize disagreeable disagreement. Why do I add this to your agenda? Because many - indeed most of you, I hope - will find yourselves on public and private boards, committees, commissions, legislatures, and groups supporting causes, where collegial ways of thinking, listening, and talking are vital to effective and quiet civic leadership.

My second added area is a big one - your private life, how do you organize it, what do you do with it? A splendid issue of "Maine Law" last fall was dedicated to a subject that Dean Pitegoff referred to as coming to the fore, the issue of life-work balance. Some of your alumni predecessors have shown the way, exploring flex schedules, maternity and paternity leave, and high tech mobile aids to flexibility. * * *

This brings me to my final offering, something I first offered as a gift to the class of 1978, exactly thirty years ago: Justice Louis Dembitz Brandeis. Now I give him to you - as an exemplar of thinking like a complete lawyer. First of all, he was a superb, painstaking craftsman. He had all the hard edge skills. The Brandeis brief in *Muller v. Oregon* became legendary. However, he did not neglect the soft edge. He found that a big part of his craft lay in addressing a controversy, not as a zero sum choice where all wins are offset by losses, but as a problem to be solved. He soon won a reputation as a "lawyer for the situation." Then, mindful of the highest aspirations of the profession, he was moved by a broad sense of duty and even moral outrage as he worked for savings bank life insurance, a fair labor relations protocol for the garment industry, and the cooperative movement. And, finally, he has something to say to us about how

we structure our lives. He made sure of saving time for his family and rest and recreation. He is remembered fondly for his statement that while he could do twelve months' work in eleven, he could not in twelve. "The bow," he said, "must be strung and unstrung." Surely this is even more relevant today than a century ago.

So, as you go about your lives, take heart from this role model of yesteryear. Go forth. Do good work. And a long life of happy thinking like a lawyer - a complete lawyer, citizen, and balanced human being.