MOVING THE ROCK: THE CONSTANT NEED TO RE-INVENT THE PROFESSION USING THE NATION'S JUDICIARY AS LEADERS

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As renewed calls for legal reform reverberate across the country and the legal profession and its customers wrestle with how our profession will function in the new century, I am struck by the image of Sisyphus toiling ceaselessly to roll his rock up the hill, only to begin once again, and again.

Those in our profession who argue earnestly for reform must often feel like the figure of Greek myth. Efforts at reform are frequently hard to begin, sometimes difficult to implement, and often impossible to sustain.

This is not to say there have not been successes and victories, but calls for change persist. The task of moving the rock of reform up the hill never quite seems to be over. We are the brothers and sisters of Sisyphus.

That by itself is not reason for despair. The redesign of human institutions is the way societies evolve, and it is almost always worth the effort. Even modest improvements are usually worth the investment, as frustrating as the pace of the progress may be.

Certainly, it is far more satisfying to effect broad and lasting changes. To make improvements more enduring, we must make full use of all the resources that might be brought to bear. I write here to suggest greater use of a valuable, but often overlooked resource: the nation's judges.

The women and men who make up our country's bench must be central figures in any real, sustainable effort to improve our legal system. In my view, a three-level effort is required. First, we should encourage them to participate in innovative efforts at reform even if their ideas rattle traditional notions of what a judge should do and be. Second, we must make sure a key part of their task is to involve the public stakeholders in the process. Finally, we must enroll judges in institutionalizing efforts at reexamination and reform while still keeping those efforts fresh and invigorating.

I. DEFINING THE PRESENT PROBLEMS

Reformers worth their salt are always on the lookout for handy dragons to slay. Public discontent with the legal system has long been such a reptile. The frequency with which such reformers point to popular dissatisfaction may tend to dull insiders to the reality that there is hard data that supports the existence of this particular dragon.

Our friends at the American Bar Association (the "ABA") waded into the rivers of discontent by asking the people what they thought about law firms. Their 1993 survey showed, for example, that public confidence in law firms had declined substantially since the 1970s.[1] A poll taken in the mid-1970s, when

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1. Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J.,

turmoil linked to the Vietnam War was fresh in the public mind, found that 25% of Americans believed lawyers had high or very high ethical standards. By 1993, Americans who believed attorneys had high ethical standards had dipped to just 16%.[2]

A 1996 study in Florida using telephone surveys and focus groups asked the telephone respondents to identify five problems with the courts and then asked the focus group participants to prioritize them. The problems identified, in order of priority, were: 1) courts are too lenient with criminals; 2) courts do not treat everyone the same; 3) courts take too long; 4) courts are too complicated; and 5) information on the courts is too hard to obtain.[3]

The telephone survey found that 42.3% of respondents replied negatively when asked: "What is the first thing that comes to mind when thinking about the Florida State Courts system?"[4] If we can take any solace in these replies (and we should not take much), it is in the fact that the Florida court system ranked above the federal courts, the Florida legislature, the governor's office, the news media and the public schools when respondents were asked if they had some level of confidence in various public institutions. Only the local police and local county government scored higher.[5]

While it is unclear whether these trends are linked to dissatisfaction with the judicial system in general or lawyers in particular, there are reasons to expect that the public's negative reactions to its encounters with the system will not just vanish. For example, an up tick in the number of pro se litigants has been spotted.[6] Few state or federal court systems feature any kind of organized aid for people who try to solve simple legal problems on their own.[7] While the responses to pro se litigation are controversial, doing nothing is likely to only increase frustration and dissatisfaction among the public. Surely, it will not produce more justice.

Even for those who toil within the system, feelings of dissatisfaction run deep. There is a strong sense that race and gender bias persist. The *ABA Journal* recognized this in a 1999 multi-part story detailing problems with prejudice. In tandem with the *National Bar Association Magazine*, the *ABA Journal* commissioned a poll of black and white lawyers. The results warrant serious consideration. "More than half of black lawyers in the survey . . . , when asked how much racial bias exists in the justice system, answered 'very much.' Nearly

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Sept. 1993, at 60, 63-64.

2. Randall T. Shepard, *Lawyer-Bashing and the Challenge of a Sensible Response*, 27 IND. L. REV. 699, 700 (citing Randall Samborn, *Tracking Trends*, NAT'L L.J., Aug. 9, 1993, at 20).

3. JAY RAYBURN, JUDICIAL MANAGEMENT COUNCIL, REPORT OF FOCUS GROUP RESEARCH 3a (1996) (copy on file with the *Indiana Law Review*).

4. COMMITTEE ON COMMUNICATION & PUBLIC INFORMATION, JUDICIAL MANAGEMENT COUNCIL, FLORIDA STATEWIDE PUBLIC OPINION SURVEY, EXECUTIVE SUMMARY 2 (1996) (copy on file with the *Indiana Law Review*).

5. *See id.* at 9.

6. *See* John Gibeaut, *Turning Pro Se*, A.B.A. J., Jan. 1999, at 28.

7. *See id.*

a third of the white lawyers answered 'very little,' although more than half said there is 'some.'"[8]

If there is this much concern among inside players in the justice system, just imagine how the "customers" feel.

Many problems of this sort have a familiar ring to them. While we lawyers bristle at outside criticisms, we complain to others about the system's problems and frequently agree about what they are. In an article in 1994, I noted that:

> Americans tell us they believe that the judicial process is too slow, too expensive, and too complicated, and we must be more than ready to accept their judgment. Only by seeing ourselves through the public's eyes and taking their criticisms seriously can we alleviate their frustration, improve the legal system and repair our professional image.[9]

Our task is complicated by the seemingly schizophrenic way some members of the public look at our profession. It is reminiscent of the public opinion polls suggesting that citizens hold Congress as an institution in contempt, but like their own member of Congress just fine. As a pair of observers have noted: "The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its vital problems, concurrently it sneers at them as tricksters and quibblers."[10]

Notwithstanding this level of mistrust, we must focus our energy on the causes of discontent instead of the perceptions.[11] There is much at stake, and not just for those of us who draw our bread from this system. As Frances Zemans has observed: "The public will not benefit in the long run if public confidence in the courts continues to decline, as evidence indicates that it is."[12] In their articles suggesting that disclosure of disciplinary sanctions levied against attorneys be included in all legal advertising, Sandra L. DeGraw and Bruce W. Burton put it even more bluntly: "[T]here exists a public policy question concerning the continued effectiveness of the administration of justice in a climate of growing mistrust and hostility toward legal institutions generally and lawyers specifically."[13] It is far from an easy task.

II. WHY USE JUDGES TO EFFECT CHANGE

Some might question using judges to reform a system in which they are so inextricably involved. I say, how can one succeed without using them? Our

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8. Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 43.

9. Shepard, *supra* note 2, at 699.

10. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 36 (1996).

11. *See* Shepard, *supra*, note 2, at 699.

12. Frances Kahn Zemans, *From Chambers to Community*, JUDICATURE, Sept.-Oct. 1996, at 62, 63.

13. Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards A New Ethos*, 72 N.C. L. REV. 351, 367-68 (1994).

nation's trial and appellate judges work daily at the intersection of all the fault lines of a society in the midst of sweeping change—a society that seeks redress and resolution from the court system.

Whether most judges are well-suited to such leadership is a harder question. Many judges are appointed through merit selection and do not acquire the political skills learned in the hurly-burly of a campaign. Others are limited in the ways in which they can conduct their judicial election campaigns. Judges who face retention votes must deal with similar strictures. While this means that some judges are more able reformers than others, as a class they are hardly aloof or unconcerned about the people for whom they labor. Few judges forget the source of their authority. The drafters of some of our most seminal literature knew this long ago. "As early as our nation's founding, the *Federalist Papers* referred to the courts as having neither the power of the purse nor the power of the sword. That means the judiciary relies upon a voluntary grant of authority by the public."[14]

As elected or appointed officials, judges at the trial and appellate level are natural recruits for any effort at reform. To be sure, there is risk of criticism in any decision to step outside classic roles. They will need some help. "If judges are to feel comfortable with a leadership role in promoting public understanding of the courts, a balance must be reached between that role and the need to maintain the appearance and reality of impartiality."[15] A judicial education curriculum developed by the American Judicature Society last year may give judges the means to find that balance.

We are hardly at a loss for examples of judges playing an important role without running into case conflicts or professional barriers. Former Florida Chief Justice Arthur England is widely regarded as the founder of the Interest on Lawyer Trust Accounts ("IOLTA") movement. Judge Judith Billings has been a national leader in the effort to involve judges in pro bono programs. The late Arthur Vanderbilt prompted change across a whole spectrum of topics.

In Indiana, our supreme court appointed fourteen trial judges to lead pro bono efforts across the state under our Voluntary Attorney Pro Bono Plan.[16] The court's decision to select trial judges as the leaders of these efforts was not an accident. An early appointee, Judge David Dreyer of the Marion Superior Court has been able to use the platform of his office to convene meetings attended by representatives from all the pro bono organizations in Central Indiana as well as nearly every bar association from the counties around Indianapolis.[17]

We have had many other instances where Indiana judges have devised creative ways to reach out and into the community. In addition to the normal range of Law Day activities, judges have run "Saturday School" sessions to improve the study habits of juvenile delinquents. Others have held a "Parent

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14. Zemans, *supra* note 12, at 62.

15. Editorial, *Helping Judges Explain the Courts*, JUDICATURE, Sept.-Oct. 1996, at 56.

16. IND. RULES OF PROFESSIONAL CONDUCT Rule 6.5 (1999).

17. *See* Cary Solida, *Pro Bono Councils, Commission Moving Forward*, IND. LAW., Oct. 28-Nov. 10, 1998, at 5.

University" to assist parents in improving decision-making skills. The Noble County bench has sponsored one-day seminars with national speakers that are designed to help the local legal community serve its clients better.[18]

Many have viewed these "out from behind the bench" efforts as vital to the continued strength of the judiciary for, "[i]f judges are truly committed to the rule of law and an independent judiciary, it is their obligation to reach out to the public about these important concepts. If judges do not reach out, no one else is going to do it for them."[19] Although the news media and bar associations can assist a judge's outreach effort, those organizations really won't do any educating from the judge's point of view.[20]

For both judges and lawyers, efforts toward improvement must be systematic. While projects dealing with public perception have their place, it is vital that any reform efforts go right to the root of our problems. The ABA made a concerted effort in the early 1990s to address the public image of attorneys. This particular effort focused on correcting the perceptions, but it was short on addressing the cause of problems within the justice system.[21] Subsequent ABA initiatives have been more focused on substantive matters.[22] The National Summit on Public Trust and Confidence, devised by the Conference of Chief Justices and the ABA has been the most sophisticated effort yet.

Taking concrete steps to reform the discovery process and reduce expensive and unnecessary requests (that are too often tactics used more to wear the opponent down than bids to elicit the facts) is one step that would improve the system itself by making it less costly and confrontational. Encouraging pre-suit mediation and alternative dispute resolution will help convince the public that their disputes will not get lost in a judicial black hole.[23] Opening up the lawyer discipline process, as we have done in Indiana, will instill public confidence because it will help convince the public that we are serious about dealing with professional misconduct.

Professional discipline is a continuing sore spot with clients, though it has had some attention of late. The trend toward more openness in disciplinary systems may help the public make better choices about the lawyers they hire and counter the often haphazard dissemination of information about attorney and judicial discipline. But a new Indiana Admission and Discipline Rule does explicitly require attorneys to tell their existing clients of their disbarment. The rules also require attorneys suspended from the practice of law to notify clients

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18. *See* Randall T. Shepard, Indiana Courts as Servants of Their Communities, Address before the Indiana General Assembly (Jan. 14, 1998) (transcript available from the Indiana Supreme Court).

19. Zemans, *supra* note 12, at 62.

20. *See id.*

21. *See* Shepard, *supra* note 2, at 701.

22. An example of this was the ABA Just Solutions Project. Despite tremendous legwork for it and enthusiasm about it, the project nearly faced extinction before it was even born. In the end, the ABA Just Solutions Project was funded, but just barely. *See* Shepard, *supra* note 2, at 708.

23. *See id.* at 705-07.

of the nature and duration of their suspension.[24]

In an article that advocated taking aggressive steps to regulate the profession while also speaking up when the legal system is unjustly criticized, two authors note that "[t]he response that can give the public confidence in our profession is our own leadership in weeding out the fraudulent and wrongful conduct that the public rightly condemns . . . ."[25]

Other authorities have suggested that we go further than "simply" work to eradicate misconduct. It might even be useful if we address those problems that do not rise to the level of misconduct but which are annoying or uncivil.

> If we can persuade the public that the system we have in place and the roles played by lawyers within that system are the best available, there remain ancillary issues of an ethical nature that do not necessarily involve what happens in the courtroom. We have an obligation, for example, to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal.[26]

Whether it is advocating for openness in the discipline process, helping set up pro bono projects or helping troubled teens through school, judges can be leaders in these efforts with a minimal risk of conflict.

III. INVOLVING THE PUBLIC

Ultimately, any effort at changing the judicial system must involve the people who are served by it. Indiana has taken several steps to involve the public in our processes.

There is now a thirty-year tradition of participation by non-lawyers in the most important institutions of the profession. Since 1970, three members of the seven-member Indiana Judicial Nominating Commission, which regulates the conduct of judges and recruits applicants for the appellate courts, must by law be non-lawyers.[27] More recently, the Indiana Supreme Court has decided that the nine-member Disciplinary Commission, which handles issues of lawyer conduct, must have two non-lawyer members.[28] The membership of the local groups organizing pro bono efforts under our Voluntary Attorney Pro Bono Plan must include two members from the "community-at-large."[29] A group created by the Indiana Judges Association and the Indiana State Bar Association, the Indiana Citizens Commission for the Future of Indiana Courts, is working toward jury system improvement and increasing the public's access to justice. Its membership includes business leaders, educators, community group leaders, and officials from all three branches of government—collectively a sweeping representation of the population. The Indiana Public Trust working group that

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24. IND. ADMIS. & DISC. Rs. 23(26)(a) & (c) (1999).
25. Sotomayor & Gordon, *supra* note 10, at 46.
26. *Id.* at 47.
27. IND. CODE § 33-2.1-4-1(a) (1998).
28. *See* IND. ADMIS. & DISC. R. 23(6)(b) (1999).
29. IND. RULES OF PROFESSIONAL CONDUCT Rule 6.5(f)(1)(C) (1999).

prepared for the May 1999 Public Trust and Confidence effort also included non-lawyer members of the public.

Although our work in this area is not yet done, I think we have embraced the spirit enunciated by ABA President Philip S. Anderson when he wrote about the importance of involving the public in new efforts to improve the system:

> Justice initiatives make the public part of a consultative process through various methods such as citizen conferences, commissions on the future of the courts, and citizen summits. The process produces fresh ideas about how the justice system can be improved . . . . It builds public confidence in the system by demonstrating to the public that judges and lawyers are listening and are willing to respond to public concerns.[30]

It is vital to partner with non-legal groups and begin to see so-called "court watcher" groups as partners in the process of progress instead of as a freelance chorus of critics. "What we should also acknowledge, to broaden the true reach of the law's majesty, is the role that many influences, including the press and lay public, play in contributing to our intricate legal system."[31]

We should also make every effort to involve the members of the Fourth Estate. This will not be an easy task either. In some quarters of the bench and bar mistrust for the media runs quite high. For the judiciary, some of this bad blood begins at the highest court in the land. Legend has it that the U.S. Supreme Court has what has come to be known as the "90-second rule." According to court lore, any law clerk seen talking to a reporter for more than ninety seconds is summarily fired.[32] That this implausible proposition is even a part of internal folk lore is instructive.

In Indiana, the press and bench are working on several joint projects. A group of journalists and judges have been sharing box lunches in informal meetings for about a year now to discuss various issues of common concern. Another group is planning a one-day "Law School for Journalists" that is set for June 1999.[33] Both initiatives may serve each others' interest by getting a better feel for how each side operates.

As I think about each of these Indiana initiatives, I am struck by the extent to which judges have helped make them all happen. Our partners in the bar have been there carrying a large share of the load at virtually every juncture, but judges have a special capacity to build bridges to other parts of the society. We need to use this capacity whenever we can.

IV. MAKING IMPROVEMENTS LAST: LETTING SISYPHUS REST

Even the most earnest of reformers occasionally feel frustrated at times about the slow pace of improvements, or the lack of change. At times, clarion calls for

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30. Philip S. Anderson, *Incremental Steps Toward Justice*, A.B.A. J., Jan. 1999, at 8.

31. Sotomayor & Gordon, *supra* note 10, at 50.

32. *See* Steve France, *A Penchant For Privacy*, A.B.A. J., Dec. 1998, at 38.

33. *See* Scott Olson, *Journalists Will Have the Opportunity to Attend Law School*, IND. LAW., Dec. 23, 1998-Jan. 5, 1999, at 5.

"blue ribbon committees" and "white papers" and "visioning exercises" sometimes seem too commonplace and ring a little hollow.

Fears that any new exercise will simply create a ponderous document stuffed with well-meaning phrases that will disappear onto a dusty shelf or the dark corner of a hard drive must spring up any time a new commission, committee or group is formed to examine change in the legal system. Planners of an upcoming ABA conference on racial and ethnic justice are working to avoid this kind of a result. Last fall, Beverly McQueary-Smith, president of the National Bar Association noted: "We don't want to come up with just another nice, glossy, shiny report. This group wants an action plan."[34]

My guess is that many well-meaning people must have felt that way when details of the 1999 National Conference on Trust and Confidence in the Justice System were first revealed. Sponsored by the Conference of Chief Justices, the ABA, the League of Women Voters and the Conference of State Court Administrators, this May 1999 gathering in Washington plainly will be a cut above the usual. ABA President Philip Anderson, in describing the ABA's aspirations for the meeting explained: "This program will bring together the chief justices, state and federal judges, lawyers and the public to devise a national strategy to strengthen and reinforce public understanding and support of the principle that an independent judiciary is essential to a free society."[35]

My view is that the Public Trust and Confidence Project will have some staying power. An array of very influential groups is behind it. Each state was asked to send a five-person team. Indiana's effort has been led by Indiana Court of Appeals Judge James S. Kirsch. His group worked through most of 1998 to identify what is eroding the public's trust and confidence in the justice system. The Indiana group then devised a set of concrete steps and strategies the courts can take to restore that trust. National organizers of the conference used those issues and strategies to plan the conference and select the presenters. The people who gather in Washington will develop strategies that can be institutionalized in ways that will produce on-going, enduring change.

If we do not work to preserve the public's trust, the future for all of us in this profession may be quite dire. "[I]f the bench and bar of America are unable to shore up their eroding claims to public trust confidence, then the institution that has become most vital to the functioning of a society based on law is called into question. Loss of public trust and confidence eventually could prove to be socially seismic."[36]

Now is the time to put our shoulder to rock alongside Sisyphus and keep pushing onward, no matter how long it takes.

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34. James Podgers, *More Than Just Talk*, A.B.A. J., Nov. 1998, at 92.

35. Anderson, *supra* note 30, at 8.

36. DeGraw & Burton, *supra* note 13, at 369.