

MAKING GOOD LAW REQUIRES MORE LAWYERS

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INTRODUCTION

While we lawyers largely think of ourselves as people who “practice” law, the fact is that we “make” law regularly during the course of our work. Lawyers and judges do this by interpreting statutes, resolving litigation, and forging common law as a matter of course.

Lawyers also make law in a rather different setting. Legislative bodies at all levels of government have long been places where the voters sent lawyers to represent them in much greater proportion than the number of lawyers in the population. The contribution of lawyers to legislative deliberations has been a good and important one for the whole of society. We are in danger of losing it.

I. OH, REALLY?

Surely this cannot be so, says the reader, even the lawyer-reader. The legislature is full of lawyers. It used to be so. In fact, at the very first session of the General Assembly, a quarter of the forty members were lawyers.¹ Further, a random review of 1941 legislators who served between 1816 and 1899 showed that 536 were lawyers. By the 1980-81 session of the Indiana General Assembly, the numbers were still substantial. There were twenty-nine lawyers in a total membership of 150 legislators, for a percentage of just under twenty percent. Likewise, the 1990-91 session of the legislature had twenty-three lawyers. While there were still twenty-three lawyers in the General Assembly of 2001-02, we have just experienced a sweeping loss: six of the thirteen lawyers in the House have left or announced they will not seek re-election.

This dramatic drop in the number of lawyers has been masked by the participation of lawyers in very prominent roles. We have now had three lawyers in a row serve as speaker of the House of Representatives, for example.² And the minority leader of the House has recently tended to be a lawyer. These legislators put a lawyer’s face before the public and the profession as representing the legislative body, and we tend to lose track of the declining trend.

Indiana is not unique in experiencing an exodus of lawyer-legislators. For example, the percentage of lawyers in the Maryland legislature has dropped from thirty-eight percent in 1966 to just eleven percent today.³ The same is true in

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1. A BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY 1816-1899, at 437 (Rebecca A. Shepherd et al. eds., 1980) (compiled from biographical sketches of the legislators who were listed as members of the first General Assembly).

2. In reverse order, these were Rep. John R. Gregg (D-Sandborn), Rep. Paul S. Mannweiler (R-Indianapolis), and Rep. Michael Phillips (D-Boonville).

3. See Janet Stidman Eveleth, *Where Have All the Lawyer Legislators Gone?*, MARY. B.J., Nov.-Dec. 2001, at 50.

Wisconsin, where lawyers are only eleven percent of the current Wisconsin legislature.⁴ Similar phenomena exist in a number of other states: Arkansas' legislature is comprised of only fourteen percent lawyers;⁵ Idaho lawyers represent only seven percent of the legislature;⁶ and Kansas has experienced a decline of more than fifty percent in lawyer-legislators over the past forty years.⁷ It appears that this development has not affected the U.S. Congress.⁸

II. WHY IS THIS OCCURRING? TIME AND MONEY

All professions represented in the legislature face the challenge of serving the public and meeting their private obligations to family and vocation. However, there are a unique number of causes for the reduction in the number of lawyers serving. I offer here four that fit my observations of the trend.

A. *Hardly Part-Time*

First, while Indiana continues to hold to the notion that it has a "part-time citizen legislature," the fact is that the time demands on persons serving as legislators are hardly part-time and they grow more consuming by the year. During the legislature as it existed in the 1960s, for example, an elected legislator could expect to spend two months in Indianapolis during a representative's twenty-four month term of office. Since 1971, the General Assembly has met every year, and the sessions run until March 15 in even-numbered years and until April 15 in odd-numbered years. Thus the number of months during a term that a representative should expect to spend largely in Indianapolis has roughly tripled as a result of the decision to hold annual sessions. Moreover, the number of special sessions has grown. A listing of the years in which special sessions have called legislators away from their homes since 1960 tells this story well enough: 1963, 1967, 1977, 1981, 1983, 1987, 1989, 1991, 1993, 1997, and perhaps 2002.

Beyond the commitment of time to session days, members of the General Assembly confront a growing need to go to the capitol for inter-session business. For example, the "2001 Roster of Interim Study Committees and Statutory Commissions and Committees," lists ninety-eight groups examining issues

4. See George C. Brown, *Lawyers as Legislators: With Fewer Lawyer-Legislators Making Wisconsin Laws, Attorneys Involvement in the Legislative Process Is a Must*, WIS. LAW., Sept. 2001, at 3.

5. See Don Hollingsworth, *The Decline of the Lawyer Legislator*, ARK. LAW., Spring 2001, at 5.

6. Tom Moss, *Being a Lawyer Legislator*, ADVOCATE, Dec. 2000, at 18.

7. Paul T. Davis, *The Kansas Legislature Needs You!*, J. KAN. B. ASS'N, May 2000, at 5. The Kansas Bar Association has taken a proactive stance against the dramatic decline in lawyer legislators and actively sought out lawyers to run for office. See *id.*

8. Based upon my research, fifty-two members of the current U.S. Senate have law degrees. See The United States Senate, Senators of 107th Congress, available at <http://www.senate.gov/> (last visited May 13, 2002).

ranging from education to rail corridor safety. By contrast, there were just sixty-five such committees at work in 1985. While the number of such committee assignments is sometimes criticized in the press, what topics should the General Assembly choose not to examine in the relatively more orderly and intense way that study committees have provided. The death penalty? Medicaid? Economic development?

The days consumed by such activities are but one way to assess the overall weight of the task of serving in the General Assembly. Measuring growth in the number and relative complexity of issues on the legislature's agenda by the volume of legislation ultimately passed is another way, though not a particularly sophisticated one. In 1941, the legislature passed enough pages of laws to fill one volume. In 1971, it passed enough law to fill two volumes. By 2001, four volumes were required to capture the work product of the General Assembly.⁹ While we often are blithe to say that the republic would be better off if fewer laws were adopted, the fact is that these measures are most often the product of some level of public demand.

B. Lawyer Hours Not Billed

And, of course, as Abraham Lincoln said, "A lawyer's time and advice are his stock in trade."¹⁰ Time the lawyer spends in Indianapolis hearing citizen testimony or laboring over bills during session is time the lawyer cannot spend billing hours at the law office. This problem is plain enough to see. What is not so plain, as a lawyer in the House recently explained to me, is that clients perceive the lawyer is gone even more often than the lawyer actually is gone. Because something about the legislature is so often in the news even when the body is not in session, citizens figure their lawyer is out of town and, at least, at the margin, call somebody they figure is home to handle their problems.

This aspect of the decline is virtually a reverse of the impulse which once worked to lead some to seek public office. Throughout much of the history of the legal profession, lawyers did not advertise their services, either because the club frowned on the practice or because bar rules or state laws prohibited doing so. Thus, a good way to raise a lawyer's visibility in the community was to run for office. If you won, great. If you did not win but acquitted yourself honorably, then at least your name was on the public's mind the next time a potential client ran down through the Yellow Pages. Of course, the U.S. Supreme Court decided that lawyer advertising would "offer great benefits" to the public, including a potential for "dramatically lower" costs for legal services

9. The pages of adopted laws were 973 for 1941, 2275 for 1971 but probably because of a change in typestyle or format, the 2001 number would only be 2801.

10. *Sterling v. Philadelphia*, 106 A.2d 793, 795 n.2 (1954). The dissent in this case spins an interesting yarn on the authenticity of this quote, claiming its origin is actually from the Allen Smith Company, an Indianapolis plaque manufacturer. *Sterling*, 106 A.2d at 804 (Musmanno, J., dissenting).

and should thus be declared a First Amendment right.¹¹ Thus, lawyers now do all sorts of advertising, and there is hardly a need to run for office in order to place your name on billboards.

Law firm economics also make a difference in whether lawyers can run for office.¹² The level of overhead, a common topic of lament for firms large and small, means that firms can hardly afford learning periods for young associates, let alone carrying one of the partners for the time necessary to campaign and serve in the office.¹³

C. Professional Support

Finally, lawyer-legislators tell me that they receive very little support of any sort from their fellow lawyers. "They call me when they have a client who needs help on legislation," one legislator told me, "but I really cannot count on any substantial support from local lawyers when it comes to election time."¹⁴

III. WHY DOES IT MATTER?

Many among our fellow citizens, if they knew, would doubtless say that this diminution of lawyers in the legislature is not anything worth worrying about. Some might indeed celebrate the trend.

I argue that this trend is bad for two reasons.

First, it is plainly bad for our profession. More than any other segment of society, we lawyers rely on the product of legislative deliberations in the work we do solving people's problems. Laws carefully crafted with the active participation of the legal mind and experience will doubtless be easier for all of us to work with during our daily travails. This joining of authorship and daily use is helpful to all for the same reason that Shirley Shideler once told me that Barnes & Thornburg's trust and estates lawyers believed that the same lawyers who write the instruments should be responsible for their implementation: "We'll always be better writers if we know we will have to live with the documents we prepare."

The dramatic decline in lawyer-legislators means that even in those committees of the legislature in which the lawyer interest is most intense, most

11. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 377 (1977).

12. One out-going member of the Indiana legislature is a partner in the prestigious Chicago law firm of Mayer, Brown, Rowe & Maw. According to the most recent numbers, the average profits per partner at Mayer Brown is \$725,000. See *Four Firms Make Their Debut: The List of the 100 Alphabetically*, AM. LAW., July, 2001, available at http://www.law.com/special/professionals/amlaw/amlaw100/july01/A_to_Z.html (last visited May 13, 2002).

13. See Kyle O'Dowd, *Inflation Blues: The Need for a CJA Rate Hike*, 25 CHAMPION 60 (2001). Citing a 2000 survey, the author states that non-reimbursable average overhead costs are \$65 per hour, or extrapolated over 2000 billable hours, \$130,000. See *id.*

14. Fortunately, there is one form of institutional support—the Indiana State Bar Association's BARPAC, which pays special attention to supporting lawyers who become candidates.

of the policy-makers are not a part of the legal profession. In the 112th General Assembly, for example, the House of Representatives Committee on Courts and Criminal Code has six lawyers and nine non-lawyers. The Judiciary Committee has seven lawyers and six non-lawyers; three of the lawyers are not returning to the General Assembly next year.

Second, the public at large is not well served by this paucity of legal voice. The special contributions of the legal mind to the deliberations of multi-member bodies, our special talent for problem-solving, and our general attitude of commitment to the common good seem to me good arguments for why the end product in public policy, not just in craftsmanship, is better when a good number of our profession are engaged.

IV. WHAT TO DO?

I write here to lift up this development for consideration by our profession. I have only just begun to think about possible solutions.

The variety of causes outlined above do suggest some of the ways by which the profession might make it easier for its members to participate in the public decisions about the future of our state. These ideas flow along lines of economic incentives, time relief, support by fellow lawyers, and public recognition. Before any such ideas can be spelled out in greater detail, we must widen the circle of those interested in working on this problem.