
Commission on the Status of the Legal Profession

Report and Recommendations
to the New Hampshire Supreme Court

February 2007

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EXECUTIVE SUMMARY

Acting under a Mission Statement provided by Chief Justice John T. Broderick, Jr. (Appendix A), the Commission's work has been directed at two goals: an assessment of the present state of New Hampshire's legal profession and the justice system that it serves; and the development of a ten year "vision" that seeks to address important challenges confronting the profession and the justice system today.

The Commission's findings and recommendations are the result of a two-year study that drew upon reports and surveys of the American Bar Association and the New Hampshire Bar Association; the recently-completed, comprehensive report of New Hampshire's Citizen's Commission on the State Courts; discussions with "focus groups" comprised of practitioners from small, medium and large firms in every type of practice; and individual interviews with court personnel and a large number of state and federal judges.

Based upon insights gained during this assessment process, the Commission has made a series of recommendations. The most important call for:

- adoption of a civil Gideon and the expansion of the profession's pro bono commitment;
- increased staffing for legal aid programs, including the development of a type of legal "Americorps" in return for the reduction or elimination of staggering law school debts;
- integration of New Hampshire's court system through consolidation of the administrative and judicial functions of the superior, district, probate and family court systems; and through the adoption of consistent procedural rules in the various court systems;
- implementation of a magistrate system for case screening;
- a statewide commitment to pretrial diversion, alternative sentencing and rehabilitation programs for criminal defendants and a reversal of the current trend toward mandatory sentencing; and
- a study of the feasibility and advisability of allowing lawyers to engage in multidisciplinary practices in New Hampshire.

It is our hope that these and other recommendations detailed in this report can minimize existing impediments to a balanced, accessible justice system; solidify the profession's traditional role as problem solvers, advocates and counselors; and enhance the sense of value, and satisfaction, that have always drawn people to the practice of law.

INTRODUCTION

Chief Justice John T. Broderick, Jr., appointed the Supreme Court Commission on the Status of the Legal Profession (“Commission”) in January 2005 to assess the present state of the legal profession in New Hampshire. In announcing its formation at the 2005 mid-winter meeting of the New Hampshire Bar Association, the Chief Justice stated:

The courts and the bar need to do a better job serving the needs of our fellow citizens, communicating with one another, staying anchored to high professional expectations and ensuring that the profession of law and the administration of justice are not unwittingly airlifted away from the very people who need them most and from a generation of lawyers yet to come who are relying upon us to tend the flame.

As part of its charge,¹ the Commission was tasked with:

- evaluating whether the legal profession is fulfilling its obligations to the public, the judicial system and the Bar; and
- identifying important trends and challenges facing the profession in the fulfillment of its obligations, and what it, the judicial system and others can do to ensure that, in the face of a changing legal landscape, legal services are available and affordable and that the courts remain accessible.

The Commission is chaired by former Supreme Court Justice William F. Batchelder and Dean and President of Pierce Law, John D. Hutson, and consists of the following members: Gina B. Apicelli; Ellen L. Arnold; Elizabeth J. Baker; Robert J. Bartis; Peter G. Beeson; Stephen E. Borofsky; Randall F. Cooper; Dorcas J. Gordon; Cathy J. Green; Margaret C.W. Hassan; Russell F. Hilliard; Heather E. Krans; Jeannine L. McCoy; Jack B. Middleton; Andrew M. Mierins; George R. Moore; Diane M. Nicolosi; Elizabeth Paine; Alan L. Reische; Ann M. Rice; Ronald F. Rodgers; L. Jonathan Ross; Wilfred L. (Jack) Sanders; Catherine E. Shanelaris; and Gretchen L. Witt.

The Commission wishes to thank the following for their valuable assistance with this project: Hans Baker; Tim Hall; Margaret Haskett; Kathleen St. Louis; and the lawyers throughout the state who participated in the various focus groups the Commission held in the course of its work.

¹ See Appendix A for the full text of the Commission’s Mission Statement.

SUMMARY OF FINDINGS AND VISION

The findings of the Commission were not unexpected. Overall, we found that lawyers hold a disparity of views regarding their personal satisfaction with the profession and their expectations for the future. We also found a widespread concern that neither lawyers nor the judicial system are meeting the needs of the public, as evidenced by the growing percentage of litigants appearing pro se. The primary issues that emerged include:

- The significant burdens imposed on the court system by the rising number of pro se litigants
- The need for greater efficiency in court structure and processes
- The need for improved technology
- The impact of non-lawyer professionals on the practice of law
- The increasing dissatisfaction among lawyers in their professional lives
- The implications of the staggering law school debt burden
- The demands of criminal cases upon the judicial system

Based upon these concerns, the vision we see for the legal profession ten years from now necessarily entails systemic changes that many would consider radical. Only by promoting changes that will eliminate or minimize some of the current impediments to effective, efficient, and accessible practice are lawyers likely to regain their traditional distinction as society's problem solvers and counselors, and enhance the feeling of value and satisfaction that originally brought many into the profession.

METHODS

At its first meeting in February 2005, the Commission identified principal areas of concern upon which to focus its deliberations and divided itself into the following four sub-committees: (1) Law as a Profession; (2) The Business of Law; (3) Professional Satisfaction; and (4) Access to Legal Services. The Commission met on a regular basis, as did the four sub-committees.

To ascertain the current status of the legal profession within the State of New Hampshire, the Commission did not recreate the various studies and surveys that have been conducted in the state in recent years addressing matters of importance to lawyers, their clients, and the court system. Rather, the Commission reviewed and discussed reports prepared by others, including the New Hampshire Bar Association, the Committee on Justice System Needs and Priorities, the American Bar Association's study of the civil Gideon concept, and the recent Citizens Commission on the State Courts. The Commission also reviewed statistics furnished by the New Hampshire Bar Association to gain an understanding of the current composition of its membership and evaluate future trends.

The findings of the Citizens Commission played a particularly important role in this Commission's work. The work and recommendations of the Citizens Commission were directly parallel to, and in some instances intersected with, the work of this Commission. We examined the Citizens Commission recommendations in detail and echo many of them here.

Although relying significantly upon the data and analysis performed by others, this Commission also sought to verify the validity of that information and to explore the future legal landscape with New Hampshire practitioners. Throughout the fall of 2005, the Commission conducted a wide variety of focus groups consisting of lawyers from different areas of the profession. These included lawyers from small, medium, and large firms; lawyers engaged in specific practice areas, including criminal law, transactional law, family law, and civil practice; lawyers from different geographic regions of the state; and lawyers from non-traditional areas, including in-house counsel, lawyers who own businesses, and those who have left the active practice of law. These well-attended sessions provided significant information to the Commission about the current status of the profession, and furnished recommendations for allaying these practitioners' concerns.² In addition, the Commission sought input from the judicial branch by conducting detailed interviews with a large number of state and federal judges and court personnel.

² A summary of the focus group results can be found in Appendix B.

Understanding the demographic trends of New Hampshire's bar membership is crucial to planning for the profession's future. Accordingly, this section summarizes important trends to set a context for this Commission's recommendations. This section then presents the Commission's major findings on lawyers' personal satisfaction with their chosen work and issues of concern within various areas of the profession.

Membership of the New Hampshire Bar

The nature of the Bar in New Hampshire is in flux. Whereas five years ago, most members of the New Hampshire Bar Association lived and worked within the state's boundaries, the recent ability to waive in without taking the bar examination has caused a dramatic shift. Over 25 percent of the New Hampshire Bar's active membership now practice primarily outside of New Hampshire, and the percentage increases every year. Although the influx of out-of-state lawyers may not persist at the same rate, it will continue nonetheless. The courts and the bar must be cognizant of the potential effects that this dramatic increase will have on the practice of law in New Hampshire.

The New Hampshire Bar is also changing with regard to gender and age.³ While five years ago, approximately 25 percent of the Bar was female, the latest New Hampshire Bar Association survey indicated that female membership had risen to more than one-third of the Bar. In addition, five years ago, 31 percent of the Bar membership was over the age of 50, as compared to 40 percent reported in the last survey.

Other statistics of interest to the Commission included the geographic distribution of lawyers within the state. Fifty-seven percent of "active" practitioners⁴ are concentrated in Hillsborough, Merrimack, and Rockingham Counties; the seven rural counties have from a half percent (Coos County) to four percent of the active membership. Twenty-seven percent of the Bar's active membership practices out-of-state.

3 The statistics herein are taken from the demographics database of the New Hampshire Bar Association and from surveys conducted by the New Hampshire Bar Association. See N.H. Bar Association, 2006 Statistical Supplement, available at <http://www.nhbar.org/uploads/pdf/StatisticalSupplement06.pdf>. The charts documenting this information are attached at Appendix C.

4 "Active" membership status denotes those authorized to practice in this state, versus "inactive" members who retain membership but are not currently authorized to practice in New Hampshire.

Perhaps most interesting – given the population’s general perception that lawyers are highly-compensated, wealthy individuals – were the economic figures. Seventy-one percent of the firms in New Hampshire are solo (one person) practices, and sole practitioners comprise 33 percent of the Bar’s membership. Median income for attorneys at one-person firms ranges from \$45,000 to \$60,000. Forty-two percent of solo practitioners in the state report income below \$45,000, with more than half of the attorneys in that group reporting annual incomes of less than \$30,000. Median income moves into the \$60,000 to \$75,000 range for those in firms with two to four lawyers, which comprise 22 percent of New Hampshire firms and 26 percent of New Hampshire practitioners. Still, six percent of this group report income of less than \$30,000. One percent of firms in the state have 20 or more lawyers. Less than 20 percent of New Hampshire lawyers practice in firms of this size, and these attorneys report a median income of \$100,000. Of the entire membership (*i.e.*, including those in “active” and “inactive” membership status), 13 percent report working for the state or federal government and another four percent report working in the not-for-profit sector.

The Profession of Law

At the Commission’s focus groups, some lawyers expressed great satisfaction with their professional choice; however, many expressed the contrary. Much of the dissatisfaction arose from matters beyond individual lawyers’ control, such as an increasing lack of respect for lawyers within society. This lack of respect was also identified as emanating from within the court system. Despite lawyers’ position and responsibilities as officers of the court, many lawyers believe that the court system treats them no differently than members of the public and fails to recognize the value of the services they provide. Another significant concern included increasing competition – whether within a firm for shrinking partnership opportunities or outside the firm for a finite pool of clients. Lawyers are also now competing for business with both non-lawyers and out-of-state lawyers.

Personal satisfaction among legal practitioners has also greatly diminished. Camaraderie among lawyers has deteriorated while pressures on lawyers – professional, personal, and financial – have increased. Moreover, the combative nature of litigation and the need to engage in defensive lawyering has taken its toll on many lawyers. The increasing demands of clients and the work has also taken a significant personal toll. The advent of technology such as e-mail, while a boon in many ways, has isolated lawyers and increased client demands for “24/7” coverage. The amount of human contact between lawyers, and the satisfaction derived from the collegiality and community that develops from human connection, has diminished. Whereas in the past lawyers would meet at court or professional engagements, now their contact is often limited to impersonal electronic transmissions or, at best, telephone conversations.

A significant concern for a number of young lawyers is not being able to engage in emotionally satisfying work, such as in the public sector or non-profit areas, because of the overwhelming burden of law school debt. Similarly, the pressure of the billable hour, the need to make a living, and the struggle to achieve balance between work and personal life impede the willingness and availability of lawyers to engage in pro bono representation of individuals who cannot afford lawyers. This, in turn, diminishes access to legal services by those in need.

The Court System

As demonstrated in the recent Citizens Commission report, frustration with the court system has grown among both lawyers and users of the system. These issues contribute to the overall dissatisfaction within the profession, as frustrated clients have placed greater pressure on lawyers and lawyers feel an increasing lack of control over their work and their lives.

Civil Practice

While recognizing that the overall quality of judicial action and legal representation remain high, the various users of the court system for civil matters identified a multitude of concerns with the system. Many lawyers, particularly those who practice in the transactional or business realm, identified problems with the cost of litigation, lack of control by the courts, and, most importantly, lack of predictability in terms of result and timing once a matter enters the court system. From their perspective, litigation takes too much time and costs too much, forcing them to seek out alternative forms of dispute resolution. In turn, this risks the development of a private system of justice, replacing the courts as the arbiters of justice and even-handed dispute resolution. Lawyers, and thus society, depend upon the public development of law and standards to counsel clients and guide their future actions and behavior. If the current trend of increased reliance upon private dispute resolution continues, however, common law jurisprudence – one of the exalted achievements of our unique justice system – will shrink in importance and influence.

Litigators on all fronts identified hazards and frustrations arising out of the “Balkanized” procedures that exist in New Hampshire’s courts. Almost universally, civil litigators noted the increased costs, which are passed on to clients, associated with having to learn and manage the often disparate procedures and practices associated with each individual court. For example, ascertaining the individual requirements of a district court in one town, as compared to the district court in another, increases the time that a lawyer must spend on a matter and the associated cost for the client.

Because district courts handle the smaller cases, the costs associated with these inefficiencies are of greater significance for the client.

Additionally, practitioners noted that the courts are woefully behind the times with regard to technology. The often archaic filing practices and tracking systems of the various courts were identified as hampering the expedient and efficient processing of cases.

Lawyers also noted, and echoed, their clients' frustration when judges are not conversant with the technical issues in a specialized area of the law. Similarly, jurisdictional thresholds were viewed as unnecessarily sending simple matters to superior court, where they compete with complex cases for scarce judicial resources. Moreover, many expressed that maintaining the myriad courts, with separate staff and facilities, drain the limited resources of the court system, resulting in inefficiencies, delays, and additional costs.

A recurrent theme during the course of the Commission's work was the burden that the proliferation of pro se litigants has placed on the judicial system. A large number of such litigants represent themselves in court because it simply is too costly for them to have representation by a lawyer. Individuals dealing with critical issues, such as parental rights and responsibilities, shelter, and health matters, often feel they have no choice but to appear on their own. Persons who navigate our court system without a lawyer are at a disadvantage, often not receiving the justice that they are due. The basic truth is that litigants who have lawyers are better off than those who do not and that lawyers are integral to a smooth flowing judicial system. The inability to hold pro se litigants to the same standards as lawyers has permitted these benefits to be obscured, leading to substantial problems within the workings of the system.

In addition, judges are put in the position of having to educate pro se litigants, creating the perception, if not the reality, that these parties receive unfairly favorable treatment. Cases involving pro se litigants often take excessive court time, increasing the cost to opposing parties who have counsel. Lawyers are frustrated with the difficulty in achieving prompt and fair hearings for their clients when a pro se litigant is on the other side. Clients are unhappy with the time and costs associated with such litigation, whether frivolous or meritorious. Clerks, already harried with the pressures of their work, must devote increasingly large amounts of time and resources to getting pro se litigants through the system in any kind of meaningful way. While the disparate and frequently permissive treatment of pro se litigants by the courts is a cause of frustration for practicing lawyers, courts will continue to accommodate the truly needy until our profession, private interests, and the government combine to make legal representation affordable in civil matters.

Criminal Practice

Overall, attorneys practicing in the area of criminal law expressed satisfaction with their work. They attributed this to a number of factors, including the small size of the criminal bar, the level of civility between its members, and the sense that the practice was driven by the desire to “do the right thing.”

While there is a general sense of professional satisfaction, attorneys in the criminal bar identified several problems that adversely impact the practice. The most pressing issue is the debt burden experienced by many public interest lawyers, which makes it extremely difficult to recruit and retain skilled criminal law practitioners. New lawyers carrying huge law school loans are reluctant to venture into public interest positions, which are traditionally low paying. Those who do often quickly move on into more lucrative positions in the private sector, simply as a matter of financial survival. As a result, in some sections of the state, there is a serious shortage of qualified defense attorneys willing to take on the defense of an indigent defendant.

Moreover, criminal practitioners expressed concern about the statewide dearth of services aimed at deterring youth from engaging in criminal activity, as well as intervention and rehabilitative services for individuals who have come into contact with the criminal justice system. More specifically, a need exists for statewide alternatives to incarceration, such as diversion programs, substance abuse treatment, the Academy program, intensive community supervision, and electronic monitoring programs. There is also a lack of community support services for individuals who are re-entering the community following a period of incarceration, such as housing and employment assistance and community drug and alcohol treatment programs.

In addition, because of the prevalence of offenders who suffer from mental health and substance abuse issues, attorneys felt that it was important to develop specialized mental health and drug courts, with judges and counsel who are well educated in the problems associated with substance abuse and mental illness. Without a comprehensive system of services focused on individual rehabilitation, our corrections population will continue to expand and it will be difficult to stem the increasing rates of recidivism.

Another commonly voiced concern was the persistent problem of court scheduling. Because there is no coordination in scheduling between the courts, criminal attorneys are frequently scheduled to appear simultaneously in several different courts or courtrooms. Efforts to work with court staff to reschedule or coordinate court appearances are often met with resistance. The mass “call of the list” in the superior courts can result in attorneys waiting for several hours, sometimes for a court conference that may take a

mere three minutes. Although certain courts have attempted to reduce the waiting time, the overall problem continues, which can be costly to clients.

Criminal attorneys also expressed frustration with the inefficiency of mixed dockets in the district courts, when arraignments, probable cause hearings, traffic violations, and criminal trials are all scheduled simultaneously. Not only does such a scheduling practice result in significant attorney time spent waiting, but criminal trials, which are typically heard at the end of the list, are often not reached and thus rescheduled. Moreover, concerns were raised about the allocation of judge time in the district and superior courts. Many courts are allocated only a half-time judge or a single judge, which is insufficient to deal with the court caseload and, more specifically, to ensure that criminal defendants are afforded a speedy trial.

Additionally, lawyers expressed that the lack of uniformity in superior court processes from county to county makes it difficult for those whose practice spans more than one county. For instance, each superior court has its own pre-trial process for monitoring cases, there are different requirements by county as to what needs to be filed for a guilty plea, and courts impose differing rules as to when plea offers must be made and/or notices of intent to plead guilty may be filed. A similar lack of uniformity exists in the district courts, with individual judges imposing their own procedural rules, particularly relating to discovery and plea negotiations. Many advocated for the adoption of rules of criminal procedure, which would lessen the divergence in procedures.

Others, particularly those in the criminal defense bar, expressed concern that the establishment of mandatory sentences and the federal sentencing guidelines deprives a sentencing court of needed discretion to tailor a sentence according to the individual and the nature of the specific offense. In addition, mandatory sentences have the effect of discouraging defendants from exercising their right to a jury trial and instead pleading guilty to a lesser offense simply to avoid the prospect of the mandatory sentence.

Finally, there was a general concern about the current trend to limit the independence of the judiciary, which could lead to the potential politicization of the criminal justice system.

Transactional and Non-Litigation Practice

The most significant concern for attorneys who provide legal services in non-litigation areas is that non-lawyers will continue to make in-roads into those areas of practice and that the practice will be increasingly multi-jurisdictional. The continued erosion of jurisdictional boundaries has created increased competition from nearby metropolitan areas, resulting in consolidation of firms and concentration of less sophisticated work in small

and mid-size firms. New Hampshire lawyers are increasingly competing with lawyers from far beyond New Hampshire's boundaries and with other disciplines that are not held to the same standards of ethics and expertise as the legal profession.

Transactions/Real Estate

Changes in the last twenty years have marginalized lawyers in the delivery of legal services in many areas of the practice. Restructuring of the banking community and the increase in the number and types of consultants and other professionals have eroded the traditional role of the lawyer and reduced much of the work to that of a commodity practice. In the past, most small firms (solo to 10 lawyers) relied upon real estate and small transactions to provide a solid financial basis. With the advent of mortgage companies and title companies (both in-house and national title insurance companies), this work has migrated from lawyers to non-lawyers. Further, while banks used to rely on lawyers to prepare closing documents in real estate and business transactions, now the banks do their own documents for deals both small and large. High-end transactions are still handled by attorneys, but that is changing.

Estate Planning

Although still largely the province of attorneys, other professionals such as financial planners, insurance underwriters, and banking professionals are playing an even larger (and in most cases, appropriate) role. In some instances, these professionals (particularly with high-end financial planners) are becoming the quarterbacks and even assuming a role that puts them between the lawyer and the client in terms of providing direction to the lawyer.

The growth in the number and types of business consultants, brokers, business psychologists, appraisers and others, many of whom add value to the process of providing top professional services to clients, has further marginalized the work of lawyers. Lawyers are prevented from establishing this one-stop type of service for clients because of the ethical rules that prohibit them from joining forces with non-lawyers. Although some strong sentiments were expressed that there should be better enforcement against the unauthorized practice of law, others have indicated that, until this century, many of these areas were not considered solely within the province of lawyers. Moreover, the reality is that it is extraordinarily unlikely that the marketplace would allow what could be viewed as such protectionism to occur.

VISION FOR THE PROFESSION OF LAW

The concerns for the future of the legal profession and its most visible feature, resolution of disputes within the court system, are significant and warrant response. Generally stated, our vision for the practice of law and legal dispute resolution ten years from now consists of:

- A system of providing legal services to parties that:
 - Provides affordable legal services to the neediest in our society by expanding legal services and pro bono representation by all segments of the bar;
 - Ensures that core legal needs of individuals are met by providing a civil Gideon benefit in adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or parental rights and responsibilities;
 - Permits enhanced client services by recognizing the reality of multi-jurisdictional practice through decreased state-promulgated barriers, and by revising the ethical rules to allow multidisciplinary practice; and
 - Supports lawyers' desires to play a positive role, allows them to feel a sense of accomplishment, and honors the core principles of our profession, including independence, competency, civility, public service, and integrity.
- A reconstituted civil court system that better meets the needs of New Hampshire by:
 - Integrating the administrative and judicial functions of the primary court systems (district, probate, and superior courts, including the family division) to permit cost-efficiencies and uniformity in practice;
 - Smoothly and effectively addressing matters through a central intake program that uses a magistrate to resolve, streamline, or redistribute cases quickly and effectively;
 - Providing uniform procedures, both in civil rules and practices, in the various courts to simplify the practice for all;
 - Implementing a cohesive and uniform electronic case management system that permits electronic filing and retrieval of docket entries by all constituencies of the court system, including lawyers, clerks, judges, and the public;
 - Providing opportunities for hearing of cases in specialized courts or by specialized judges; and
 - Recognizing the value of lawyers by treating them with respect and as officers of the court, by providing lawyers to those who need them in matters involving the most basic human needs, and (when affordable

legal representation is available) by holding all who choose to represent themselves in the courts to the standards to which lawyers are held.

- A criminal court system that is better able to diminish recidivism, decrease costs, and increase efficiencies while recognizing the rights of both victims and defendants by:
 - Providing alternatives to incarceration through pretrial diversion, electronic monitoring, and other programs;
 - Providing valuable rehabilitation and substance abuse programs; and
 - Enhancing efficiencies such as by adopting criminal rules of procedure.
- A vital and thriving community of lawyers, including the New Hampshire Bar Association and other formal and informal legal communities in the state, that:
 - Continues its long-standing support of ensuring the public's ability to obtain legal representation, while recognizing that not every lawyer can provide pro bono services within the traditional definition of such services;
 - Supports work-life balance for lawyers;
 - Provides enhanced opportunity for collegiality in recognition that it assists in decreasing the combative and competitive aspects of practice, as well as the isolation that can lead to professional conduct issues;
 - Provides greater opportunities for mentoring new lawyers; and
 - Encourages departure from billable hour billing and the associated pressures.

RECOMMENDATIONS

The Commission's vision of the legal profession ten years from now is obviously that – a vision. Its achievement would require planning, funding, restructuring, and amendments to law and regulation, if not the New Hampshire Constitution. Most of these requirements are beyond the control of this Commission, individual lawyers, or even the Supreme Court. We recognize that realization of the vision will be difficult and that undertaking the steps to achieve that vision is beyond the charge of this Commission.

Nonetheless, based upon our work over the past 24 months as well as the work of others before us, we believe that significant efforts should be made toward the achievement of this vision if the legal profession and the system of justice are to continue their fundamental roles of promoting adherence to the rule of law through effective legal counseling and dispute resolution. The Commission offers the following recommendations to achieve our vision.

Access To Courts and Lawyers

Increasing access to courts and lawyers is imperative and will benefit New Hampshire citizens, lawyers in the state, and the entire justice system, alike. Jury trials, which are increasingly restricted to the richest citizens (or those with insurance), would be available for a broader range of civil litigants. The permissiveness now accorded to pro se litigants could be eliminated. The existing system of private justice through arbitration or mediation would be a matter of choice – and not financial necessity. And the role of courts in the creation of the common law, which will shrink as the number of capably represented litigants declines, will be ensured into the future.

Provision of Lawyers for Essential Civil Matters (Civil Gideon)

A civil Gideon must be established to provide counsel for those who cannot afford it in cases involving shelter, sustenance, safety, health or parental rights and responsibilities. Immediate steps should be taken, in consultation and cooperation with the Judicial Council and the Legislature, to pass laws implementing the Recommendation adopted by the American Bar Association on August 7-8, 2006.⁵ Accordingly, the Commission urges New Hampshire to follow the ABA's recommendation: "to provide legal counsel

⁵ American Bar Association, Recommendation and Report (Aug. 7-8, 2006), available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwelvea.doc>.

as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”⁶

The obvious obstacle to the civil Gideon proposal is the financial burden associated with its implementation. Although significant costs are associated with providing these crucial services, the costs to the State of New Hampshire associated with ignoring these needs is likely higher.

Whether cast as a constitutional imperative or a policy finding compelling a legislative remedy, when litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result.

American Bar Association, Recommendation and Report (Aug. 7-8, 2006), at 9.

Expansion of the Profession’s Commitment to the Provision of Free or Substantially Reduced Fee Legal Services for the Poor

One means of bridging the gap in available legal services for the poor has always been the legal profession’s commitment to pro bono legal services. The professional commitment is found in Rule 6.1 of the Model Rules of Professional Conduct, which states: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” A proposed revision to New Hampshire’s Rule 6.1 – now before the Supreme Court as part of a broader set of proposed changes in the professional rules authored by the Bar Association’s Ethics Committee – would adopt the same clear language. In other ways, however, proposed Rule 6.1 is less forceful than the ABA counterpart.

6 Id. at 1. The ABA resolution defines these basic human needs as follows: “‘Shelter’ includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter; ‘Sustenance’ includes a person or family’s sources of income whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces; ‘Safety’ includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise; ‘Health’ includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise; ‘Child custody’ embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.” Id. at 12-13.

Although New Hampshire is a leader in providing legal services to the poor as compared to other states, the need for pro bono representation in the state still exceeds the services currently provided. At present, less than half of the state's active bar take pro bono cases. The Commission recognizes that this figure is somewhat misleading, given that a quarter of the Bar's active membership practices out-of-state and that many other members, such as those in the public sector, are constrained from taking on pro bono cases by their employment, which prohibits them from the private representation of clients.⁷ Accordingly, the burden for providing pro bono representation falls on a narrow margin of the bar. In addition, many lawyers participate in community activities that do not fit within the traditional definition of "pro bono."

Still, there are numerous, understandable reasons why more lawyers do not participate in pro bono work. A recent national survey conducted by the ABA identified several reasons for resistance to participation, including lack of time, billable hour and revenue expectations, employer discouragement, a lack of the skills required by pro bono clients, cost concerns, and the nature of the pro bono client.⁸ In addition, there is a tendency to look solely to private practitioners, rather than other categories of active lawyers, to fulfill the need for pro bono legal services.

As long as our rules and statutes require legal licensing in order to engage regularly in the representation of clients in litigation, the legal profession will be an essential part of any solution to the increasing number of pro se litigants in New Hampshire's courts. Given the Commission's recommendation that a statutory or constitutional right to counsel be established for the poor in civil cases involving shelter, sustenance, safety, health or parental rights and responsibilities, an expanded commitment to free or substantially-reduced fee legal services by the entire bar is essential. Accordingly, the Commission recommends an expanded commitment to legal services for the poor that includes the following:

- Expansion of legal services available on a sliding-scale basis.
- Amendment of Rule 6.1 of the state's professional conduct rules to include an aspirational goal of 50 hours⁹ of free or substantially reduced fee legal services to persons of limited means or to organizations that address their needs.

⁷ Approximately 17 percent of the Bar's membership work either for the state or federal government or in the non-profit sector. See N.H. Bar Association, 2006 Statistical Supplement, available at <http://www.nhbar.org/uploads/pdf/StatisticalSupplement06.pdf>.

⁸ ABA Standing Committee on Pro Bono and Public Service, "Supporting Justice: A Report on the Pro Bono Work of American's Lawyers," (Aug. 2005).

⁹ The ABA model rule contains a 50 hour aspirational goal. An ongoing review of state pro bono rules by the ABA's Standing Committee on Pro Bono and Public Service reflects that 25 states have adopted rules with hourly goals that range from 20 to 80 hours – or in one case (Virginia) two percent of professional time.

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- Further amendment of Rule 6.1 that would allow lawyers to make financial contributions to the Campaign for Legal Services,¹⁰ in lieu of legal services, to satisfy their professional responsibilities in this area.
 - Enactment of a rule that would allow lawyers to earn credit for mandatory CLE requirements through pro bono work.¹¹
 - Expanded involvement of senior and retired attorneys in pro bono legal work by the development of a Senior Lawyer Standing Committee in the New Hampshire Bar Association, by the development of an Emeritus Attorney Program (California is one example), or by their availability to assist practicing lawyers who take on pro bono cases beyond their areas of expertise.
 - Expanded involvement of government attorneys (local, state, and federal),¹² corporate counsel, and lawyers holding academic positions.
 - Implementation of a voluntary reporting system. An annual report of free and substantially reduced fee legal work by the active bar is the goal. Retired lawyers would not be included.

10 The Campaign for Legal Services is an annual umbrella fundraising project that raises funds for New Hampshire Legal Assistance, the Bar Association's Pro Bono Program, and the Legal Advice & Referral Center.

11 Eight states have considered such rules; six of those states actually adopted a rule.

12 The Commission recognizes that internal regulations of an agency may restrict the type of pro bono or volunteer legal work available to public service and public interest lawyers, and that many are prohibited altogether from providing private legal services to individuals. However, Rule 6.1 applies with equal force to all practicing lawyers, and obligations of government lawyers can be satisfied in a variety of pursuits that do not involve individual representation. Some governmental agencies have developed specific pro bono policies, defining what constitutes pro bono, internal procedures for handling such cases, and the number of suggested hours. *See e.g.* United States Department of Justice Policy Statement on Pro Bono Legal and Volunteer Services, available at <http://www.abanet.org/govpub/DOJ%20pro%20bono%20policy.pdf> (adopting 50 hour goal); New York Attorney General Guidelines for Pro Bono Publico and Bar Association Activities (Jan. 7, 2002), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Pro_Bono/Model_Policies/NYS.Attorney.model.policy.pdf.

Increased Legal Staff for New Hampshire’s Various Legal Aid Programs

New Hampshire Legal Assistance (“NHLA”), through its field offices¹³ and various directed programs,¹⁴ provides a wide array of civil legal services for low-income and elderly citizens. It is a logical organization for furthering the goal of guaranteed counsel for essential civil matters. Other legal aid programs, such as the New Hampshire Disability Rights Center, also will play a vital role.

Increasing the current funding levels and attorney positions for NHLA or other legal aid programs is a major challenge. In addition, the Commission has determined that the debt burden incurred by law students discourages many interested graduates from pursuing work with public interest non-profit or other legal aid programs. If these problems can be addressed, however, the benefits for the justice system would be enormous.

- Funding through pro bono (Rule 6.1) financial contributions.

The Commission, and practitioners generally, are split on whether members of the bar should be able to satisfy their pro bono legal services responsibility through financial contributions. The Commission believes, however, that the option needs to be considered. New Hampshire’s legal profession is increasing in size, and voluntary financial contributions from even a small percentage of that whole could fund legal aid positions, make inroads in New Hampshire’s pro se problem, and move the state toward the goal of guaranteed, capable legal representation for its neediest citizens. Given the wide disparity in lawyer incomes, and the large number of practitioners (including most solo practitioners) for whom the law provides very modest financial returns, financial contributions should be voluntary.

- The law school debt burden.

The Commission recommends that a program be established whereby, upon graduation from law school, lawyers who commit to working in the field of public service or for organizations or agencies that provide legal services to the poor can receive loan forgiveness for a significant portion of their law school debt. The Commission envisions that this program will require a significant commitment of service, perhaps four years. The program would be funded in part by the court system and in part through private

13 Field offices are currently located in Manchester, Nashua, Portsmouth, Claremont, Littleton, and Berlin.

14 These include the Fair Housing Project, Senior Citizens Law Project, Consumer Law Project for Seniors, Domestic Violence Advocacy Project, and Homeless Advocacy Project.

fundraising, and would provide for payment of all or a significant portion of the lawyer's student loan obligation, so long as the lawyer fulfills his or her commitment to low income service. This program would enable those interested in public service to dedicate at least four years to this work and so long as they complete the term of service, their indebtedness during this period would be forgiven.

Civil Court System

The Commission believes that many of the noted problems with the civil court system could be solved or, at minimum, decreased, if the system were restructured by integrating the courts; implementing electronic case management; adopting uniform practice and procedure in all courts; and permitting immediate, streamlined review of cases and redirection to the appropriate court if an early resolution is not possible.

Adoption of an Integrated Court System Using Electronic Case Management and Filing

The Commission recommends that the current superior court, district court, probate court, and family division be integrated by consolidating both the administrative and the judicial functions of these various courts.¹⁵ The integrated court system would include centralized administration with standardized procedures throughout all courts. All judges would sit full time and would be assignable to any court, thus allowing flexibility in balancing caseloads across the courts.

The integration of the court system has many benefits. Most notably, it would facilitate better allocation of the judiciary's limited and valuable resources – judges and administrative staff – by permitting flexibility and cross-over in court staffing. This would allow courts to be staffed minimally and would result in cost savings and increased efficiency. Integrating the courts would also eliminate competition for resources within the judicial branch. Moreover, it would streamline communication and scheduling, thereby removing stress for lawyers and reducing costs for their clients. Finally, standardized training and manuals and standard rules of procedure

¹⁵ The Commission recognizes the progress that has been made to develop a “unified” family division. For this reason, there is not unanimity among us that the family division should be included in these recommendations. The majority of the Commission, however, believes that including it in the integrated court system is logical given the benefits noted above.

would ensure that all courts operate similarly and would promote accountability and consistency in the treatment of litigants.

Other components of the integrated court system include:

- Implementation of uniform electronic case management and filing.

The courts must modernize their computer system and implement advances in technology. Electronic case filing (ECF) and electronic availability of dockets can enhance the effectiveness of judges by increasing access to files, assist lawyers in efficient and cost-saving practices, and enhance uniformity of practice statewide. ECF will also eliminate paper notices and much of the docketing work of the court. While the upfront costs of ECF are significant, its implementation should decrease administrative costs in other areas.

- Adoption of uniform rules of civil procedure to be used in all aspects of the integrated court system.

Given the decision to allow lawyers to waive into our Bar, it is logical to align New Hampshire procedure with the rest of the nation by adopting rules that conform to some degree to the Federal Rules of Civil Procedure. Currently, a revision of the existing New Hampshire Superior Court Rules to bring them into conformity with the procedural approach of the federal rules has been proposed. We urge the adoption of these proposed rules, or a similar version, for use in all New Hampshire trial courts without alteration.

These rules would dissolve the distinction between law and equity. All judges in the integrated court system would thus have both civil and equity jurisdiction.

- Adoption and enforcement of uniformity in forms and administrative requirements throughout the court system.

- Expansion of small claims jurisdiction to at least \$10,000.

- Increasing the constitutional jury entitlement amount in controversy from \$1,500 to \$25,000 in light of the current economic atmosphere. This will eliminate the unreasonable cost of resolving small cases, make the courts more efficient, save money, and demonstrate regard for jurors' time by not relying upon them to resolve "minor" disputes. At the same time, we propose increasing the daily pay for jurors consistent with what New Hampshire citizens actually earn, again to show proper regard for jurors' time in the system.

Establishment of a Magistrate System to Review and Handle Cases Prior to the Involvement of a Judge

The Commission recommends the adoption of a magistrate system to screen all cases filed in the integrated court system.¹⁶ The magistrates, ideally senior lawyers starting to transition out of active practice, would review all filings to:

- Weed out, without the need for judicial intervention, the truly frivolous cases;
- Direct cases that do not warrant judicial oversight and are capable of quick resolution to mediation;
- Streamline and identify the issues in a dispute so that a judge does not have to do so;
- Determine whether a case more appropriately belongs in district court or superior court in the first instance; and
- Identify, and then establish, the level of discovery that a case presumptively warrants in a discovery plan, after consultation with the parties, for prospective consideration by the assigned judge.

The expectation is that such a system would ease the burden placed upon the system by pro se litigants, decrease litigation costs, enhance predictability as to the timing and cost of litigation, and ultimately facilitate the swift and efficient resolution of disputes.

Specifically, the Commission recommends that the magistrate system be established on a pilot basis in two courts for a two-year trial period. The magistrate, who would operate out of the superior court, would meet with all of the attorneys and parties within thirty days of the filing of a complaint and service of process upon the defendant, and would be empowered to take the following actions:

- Attempt to resolve the dispute by agreement, *i.e.*, provide the parties with an opportunity to be heard without consuming scarce judicial resources.
- Dismiss the complaint, with or without prejudice, for failure to state a cause of action. This action may occur before or after the attempt to resolve the dispute by agreement.

¹⁶ Again, there is not unanimity within the Commission as to whether the family division should be included in the magistrate system, given the family division's own development.

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- Assign counsel to a party under applicable guidelines, such as a civil Gideon standard or a New Hampshire Bar Association lawyer referral or reduced fee referral system.
 - Assign the case to formal mediation, establishing the limits and time frame for any permitted discovery.
 - Direct the case to the appropriate court, identifying and setting forth the issues in the case, and establishing the limits and time frame for discovery, both subject to the ultimate approval of the assigned judge.

Creation of Specialized Courts

Within the integrated court system, there should be either specialized courts, such as probate, business, land and land use, and criminal courts, or specialized judges with expertise in technical or complex areas of law. Providing for such specialization within the courts would likely enhance timeliness, effectiveness of decision making, and the certainty of dispute resolution.

The provision of specialized courts or judges is compatible with the concept of “bringing the courts to the people.” Some judges may have to “ride the circuit” to hear particular matters within their identified or developed expertise, but with advances in technology, files will be accessible on-line, preventing any substantial interruption in the delivery of judicial services.

Application of Court Rules to Pro Se Litigants

If an individual chooses to proceed without a lawyer, the courts must apply the same standards and expectations as would apply to represented parties. Judges should not treat pro se litigants more deferentially than they treat others; all parties must abide by rules of evidence, procedure, and courtroom conduct.

In addition, entry fees should be required for all filed actions, except criminal cases and domestic violence petitions. Such fees should only be partially waived if the party demonstrates an inability to pay. Payment of even the de minimis amount of \$5.00 can deflect the filing of a frivolous action that, even if quickly dismissed, places an undue burden on the system.

The Commission expects that the number of pro se litigants will decrease with the adoption of a magistrate system that allows the early dismissal of frivolous suits, the adoption of a civil Gideon for certain critical needs, and the expansion of legal aid and pro bono representation. Similarly, the

structuring and streamlining provided through the magistrate system, along with the efficiencies associated with electronic filing, uniform rules, and consistent procedures in all courts, should enhance the ability of citizens to afford lawyers. Nonetheless, the reality is that, ten years from now, pro se litigants are likely to remain a significant presence in the court system. Therefore, if individuals choose to represent themselves, they must be required to educate themselves about the court system and to adhere to the same rules as the other participants in the system.

Only by holding all participants in the system to the same standards can true fairness for the parties be achieved. Neither a person with a lawyer, nor a person without a lawyer, should be at a disadvantage before the court. By upholding and applying the rules and procedure in a uniform manner, the courts would avoid spreading the unintended message that the cost of a lawyer is unnecessary or without value. This also has the added benefit of enhancing lawyers' respect within the court system.

Revision of Court Rules or Practice to Reduce Litigation Costs

Certain practices by attorneys, litigants, and the court system, alike, unnecessarily drive up the cost of litigation. Numerous national and local studies, including the Commission's own focus groups with practitioners around the state, show that the public is uncomfortable with the cost of legal services, especially the unpredictability associated with hourly billing for legal services. Among other ills, the dominance of the billable hour has been criticized for penalizing the efficient and productive lawyer and encouraging duplication of effort.¹⁷ The Commission noted that effective use of alternative billing methods will depend upon more predictability and efficiency in the court and other administrative systems.

In addition to the recommendations made elsewhere in this report, which the Commission believes will result in savings to litigants, the Commission offers the following suggestions to enhance predictability and efficiency or otherwise reduce litigation costs:

- Assign one judge to preside over cases throughout their entire course.
- Eliminate unnecessary hearings and allow telephonic hearings.
- Rule on motions to dismiss prior to the scheduled trial date.
- Promptly rule on assented-to motions to continue, rather than on

¹⁷ See ABA Commission on Billable Hours, Report (2002), at 5, available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf>.

the day of the scheduled hearing or trial.

- End “cattle calls” and schedule cases for specific times.
- Reduce unnecessary forms and paperwork, particularly in family law, which make matters more complicated and time consuming than necessary.
- Abandon the practice of insisting court forms be picked up only by counsel.
- Ensure that the Rules Committee considers the cost of each new rule prior to adoption, and adopt the rule only if necessary.
- Institute a two-way offer of judgment rule based upon Federal Rule of Civil Procedure 68.
- Institute a “loser pays” rule in appropriate cases. Counsel fees should be imposed against the loser in certain well-defined categories of business litigation.
- Impose sanctions for dilatory practices.

Criminal Court System

Our criminal justice system uses a very significant portion of our judicial resources, with inadequate rehabilitative opportunities resulting in greater rates of recidivism and crime. As such, the Commission recommends the following:

Expansion of Services Available to Individuals Involved in the Criminal Justice System

- Pretrial diversion and alternative sentencing must be instituted. There should be a statewide coordinated effort to explore, evaluate and uniformly implement more programs such as the Academy, pretrial diversion, and drug and mental health courts. This cost-effective approach will reduce the docket and be less costly than incarceration.
- Electronic monitoring of individuals, both pre-trial and post-conviction, should be more available as an alternative to incarceration. It will allow individuals to remain in the community and maintain employment and/or fulfill parental responsibilities,

thereby reducing the ancillary costs associated with a person's incarceration.

- Funding for rehabilitation programs such as substance abuse treatment, vocational training, and job placement should be increased, and the programs should be made available to individuals in all stages of the criminal justice system – as part of diversion programs, as an alternative to incarceration, and as part of an individual's transition back to the community following a period of incarceration. The provision of such services should decrease both the rate of incarceration and the rate of recidivism upon release from incarceration.
- More resources should be committed to probation/parole field services in order to actually aid those supervised in their rehabilitation. A significant portion of those currently in New Hampshire prisons are incarcerated as a result of having violated a condition of parole. The availability of increased parole field services aimed at ensuring that those under supervision are working, participating in necessary rehabilitative services, and remaining of good behavior could significantly reduce the high recidivism rate.
- More resources should be devoted to the development of a comprehensive system of substance abuse treatment. Approximately 80 percent of those currently incarcerated in the prison system have some type of substance abuse problem. Many of the crimes they committed were drug related, either the sale or use of drugs, or crimes committed in order to obtain money to support a drug addiction. Without adequate substance abuse treatment, people will continuously cycle through the system.
- Mandatory sentencing should be discouraged. It limits the discretion of judges to tailor sentences to address the nature of the specific crime and the defendant's background and characteristics. It also discourages defendants from exercising their right to a jury trial, prompting them to plead guilty to a lesser offense in order to avoid the mandatory sentence.

Other Changes to the Criminal Justice System

- The courts should adopt rules of criminal procedure, thereby eliminating the lack of uniformity in court procedures from court to court.
- The assigned counsel rate must be increased. It has not changed since 1992 and has lost at least 30 percent of its value. Many

attorneys who would otherwise be willing to take on the defense of an indigent defendant refrain from doing so simply because the reimbursement rate does not come close to covering the costs of such a defense. Raising the rates should lessen the current shortage of qualified attorneys to provide those needed services.

- The Interbranch Criminal and Juvenile Justice Commission (ICJJC) should be revived. The now defunct ICJJC, which was comprised of high level decision makers involved in the criminal and juvenile justice systems, met regularly to identify and address problems in those systems.
- Judges should be educated on mental health and substance abuse issues. Because so many people involved in the criminal justice system suffer from substance abuse problems or mental health issues, it is imperative that judges have an understanding of the effect of those problems, the types of programs that are clinically appropriate, and the most effective methods for dealing with them.
- Represented defendants should be allowed to waive felony arraignments, thus eliminating an often unnecessary court appearance and reducing the docket.
- Case scheduling times should be staggered rather than scheduled simultaneously, and prosecutors should be allowed to call cases based upon who is ready. This would expedite the case review process for the court and reduce the amount of time that attorneys spend waiting in the courtroom.
- The Court should grant motions to exceed fee cap on appeal in appropriate cases. The current fee structure for assigned counsel on appellate cases is often insufficient to cover the costs of representing an indigent defendant on a complex appeal. As a result, attorneys are reluctant to undertake such assignments, leading to a shortage of qualified attorneys available to provide such services.
- The Court must use its position to positively influence and educate legislators, policy makers, and the public on the need for an independent judiciary and a non-politicized criminal justice system.

Non-Litigation Practice of Law

Consideration of Rules Allowing the Multidisciplinary Practice of Law

If transactional and non-litigation attorneys are to remain vital, then we need to add value to transactions that once were the province of these attorneys and which have now slid into the realms of other professionals. One possible solution is allowing for the multidisciplinary practice of law. Although we recognize that the American Bar Association has rejected this notion, it could preserve and enhance the attorneys' role, particularly within small communities in New Hampshire.

As mentioned earlier, non-attorney professionals now provide, at low cost to consumers, services previously reserved to attorneys. Whether a "small town" lawyer or a member of a large multi-state firm, the business/transactional lawyer was traditionally an integral part of any business transaction. The advice of the lawyer and the proper preparation of the documents were intended to structure the transaction in a manner that achieved the desired result and avoided the necessity of dispute resolution in the future. The better the transaction was handled, the less likelihood for litigation in the future. That was the relevancy of the lawyer to the transaction. As the transactions became more complex, the lawyer could be viewed as the quarterback, engaging the assistance of other professionals whose advice was necessary to achieve those ends.

At some point, with both technology and the billable hour being partially to blame,¹⁸ the transactional lawyer has become viewed as an impediment and adding cost to the transaction, thus being perceived as the deal breaker instead of the deal maker. Other professionals and para-professionals have used this to their advantage, using the incentive of up-front cost savings (such as a reduction in closing costs in a real estate

If we are expected to succeed in saving any of this stuff, we need to do it by adding value to the transaction, a value that the public can see, wants and is willing to pay for The simple answer may be to follow the ABA's MDP Commission recommendations and open the profession to allow lawyers to freely associate with other professionals as equals. At present, no one but attorneys can own any part of a law firm. Why? It is a control issue. Well guess what, the public doesn't understand or care, they only want good service at a fair price and they will go where they feel they can get it.

Robert W. Minto, Jr., "The Future of the Legal Profession and the Organized Bar," *The Advocate* (Feb. 2000).

¹⁸ The inherent conflict in the billable hour system, which rewards the creation of complexity, needs to be acknowledged and addressed by the profession.

transaction) to avoid the use of a transactional lawyer, with limited attention given to the client-specific objectives or future dispute avoidance. As a profession, we have not done a good job of establishing continued relevance in this new climate.

The multidisciplinary practice of law (MDP) permits a lawyer to share fees and join with non-lawyer professionals in a practice that delivers both legal and non-legal professional services. Currently, however, such an arrangement is barred by our rules of professional conduct.¹⁹ MDP was initially recommended by the Commission on Multidisciplinary Practice to the House of Delegates of the American Bar Association in 1999 and 2000. The ABA ultimately rejected this recommendation, based upon a belief that MDP threatens the core values of the legal profession. Instead, the ABA adopted a resolution stating in part:

state bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers; each jurisdiction should reevaluate and refine to the extent necessary the definition of the “practice of law”; and jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.²⁰

We recognize that adoption of MDP would represent a dramatic re-definition of the nature of our profession and its relationship with other professional fields. MDP, however, would point the way to continued relevancy and vitality for the profession. By providing a multidisciplinary approach to problem solving, attorneys could better serve their clients. Clients also could benefit from the increased efficiency in being able to obtain multiple professional services from one entity, thus enhancing availability and affordability of legal services. An example to consider is the Boston Law Collaborative, which regards clients as people who need support above and beyond solutions to legal problems. The firm is formally associated with a psychologist, a workplace consultant, and a financial advisor. Similar arrangements can easily be conceived in the towns of New Hampshire. For instance, in the practice area of land use, collaborative practice between attorneys, land surveyors, and civil engineers would appeal to many clients.

The alternative to MDP is to regulate non-lawyers, such as through the licensure of para-professionals, to ensure that those engaged in the delivery of services previously conducted by attorneys have the requisite skills and competencies necessary to serve the public.²¹ Providing adequate

¹⁹ See N.H. R. Prof. Conduct 5.4.

²⁰ See ABA House of Delegates Recommendation on Multidisciplinary Practice (2000), available at <http://www.abanet.org/cpr/mdp/mdprecom10f.html>.

²¹ A model would be that of the State of Washington Supreme Court’s adoption of General Rule 24, defining the practice of law, and General Rule 25, creating a practice of law board with authority to enforce rules prohibiting the unauthorized practice of law and authority

guarantees of professional competence for such services would protect the public by assuring that clients receive services from only qualified, trained professionals.

MDP is vital to the continued existence of the sole practitioner and small firm, although the issues of multidisciplinary practice are relevant and important to the larger firms as well. Granting lawyers greater flexibility in the delivery of legal services would strengthen their capacity to provide core legal advice, which is more and more tied to ancillary services. Given that 59 percent of New Hampshire lawyers are either sole practitioners or in firms of four or less lawyers, and that these lawyers carry the lion's share of providing legal services to lower and middle income citizens, the adoption of rules that broaden lawyers' scope of work would keep the door to affordable legal advice open to many citizens who cannot afford the fees of a larger firm. The concept of MDP deserves further study and, perhaps, implementation on at least a limited basis within this state.

Professionalism and Morale

Reemphasis by Both Rule and Deed That Lawyers are Officers of the Court and an Integral, Respected, and Necessary Part of the Administration of Justice

Without the courts, as the center of the legal system, visibly recognizing that lawyers are both relevant and appreciated, the public will never do so. Accordingly, the Commission recommends the following:

- Lawyers should be provided with an identification card that will permit lawyers to pass through court security without being searched.

The Commission acknowledges that certain efforts have been made on this front. The Bar Association has begun issuing identification cards to active members. In addition, a pilot project, which will allow attorneys with picture identification to bypass security screening, was launched in Hillsborough County on January 1, 2007. The Commission recommends that the alternative screening process for attorneys be adopted statewide.

to recommend that non-lawyers be authorized to engage in limited legal or law-related activities under the regulation of the Washington Supreme Court.

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- With the consent of clients, continuances should be granted more liberally to allow attorneys to meet other professional and personal demands, taking into account the reason for the request and the effect a continuance will have on the parties.

Support for the New Hampshire Bar Association's Ongoing Efforts to Enhance and Demonstrate the Valued Role that Lawyers Play in the Community

We believe most lawyers became lawyers not to get rich, but to provide justice, *i.e.*, a quick, inexpensive, just, and enforceable result, and are dissatisfied and discouraged because lawyers are now expected to delay, increase expense, manipulate, and confound the result. We need to identify a new system in which lawyers have a positive role to play and which allows them to feel they are accomplishing something by honoring the core principles of our profession, including independence, competency, civility, public service, and integrity to the truth.

In recent years, the New Hampshire Bar Association has pursued efforts to revitalize a feeling of community among lawyers, reaching out to different sectors of the bar and attempting to encourage greater participation in organized bar activities. The Commission encourages the Bar Association to continue these efforts, and urges the Court and members of the profession to support and join in them.

We believe that enhancing a sense of community will lessen the sense of isolation. An enhanced sense of community may also decrease the unnecessarily harsh tone of litigation and legal activity. It is far harder to treat unprofessionally the lawyer with whom you meet regularly than the lawyer whom you know only as a voice on the telephone or as an e-mail address.

Enhancement of the Potential for Lawyers to Pursue Careers in Public Interest Law by Working to Find Ways to Decrease Debt Burden

The greatest stress on young lawyers is the staggering debt burden they carry upon beginning their careers. Time and again, the Commission learned that new lawyers feel compelled to forgo low-paying public service careers to begin the process of paying loans back. Similarly, even when such lawyers pursue such careers just out of law school, the additional financial burdens of family and buying a home drive them quickly to more lucrative practice. We need to make the practice of public interest law

affordable. As discussed above, the Commission recommends that a loan forgiveness program be established for lawyers who commit to working in the field of public service or for organizations or agencies that provide legal services to the poor.

Creation of Meaningful Ways in Which New Attorneys Can Be Mentored

The value of a mentoring program – to the mentors, the mentees, and the entire bar – cannot be overstated. Successful mentoring can help ease the transition from law school to law practice and can accelerate an attorney’s professional development. By exposing them to good lawyering, mentors can better equip new lawyers for the practice of law and the ethical and professional standards expected of them. In addition, mentoring can promote collegiality, foster involvement in the organized bar, and create a sense of pride in the profession. The need for mentoring has never been greater, as our increased dependence upon technology has led to more isolation within the profession.

Although the New Hampshire Bar Association’s New Lawyers Committee offers a mentor program, which has received praise, it may not be enough to serve the needs of the growing bar in this state.²² In addition, the program has faced criticism for the lack of willing mentors, most likely due to the time constraints most lawyers face. The ABA’s Mentor Program Resource Guide recommends a more formal approach to mentoring: a program that is set for a certain length of time, from six months to two years; one that gives step-by-step instructions and guidelines to the participants; and one that includes orientation, goal setting, and evaluation components.²³

At least three states offer such formal mentor programs to their new lawyers.²⁴ The State Bar of Georgia’s “Transition into Law Practice Program” combines mentoring with continuing legal education and is mandatory for newly admitted members.²⁵ Similarly, the Ohio Supreme Court recently launched a statewide pilot mentoring program in which new lawyers can elect to participate as a component of their new lawyer training requirement.²⁶

22 “Over the past nine years, the Mentor Program has helped foster more than 147 mentoring relationships between mentors and associates.” Bruce Felmlly, *New Lawyers Committee: Mentoring – A Great Way to Give Something Back*, N.H. Bar News, Vol. 17, No. 11 (Nov. 17, 2006).

23 The ABA Mentor Program Resource Guide is published by the Senior Lawyers Division of the ABA and is available for purchase on the ABA’s website (www.abanet.org/srlawyers/mentor.html).

24 Georgia, Ohio, and South Carolina.

25 Information on Georgia’s Transition into Law Practice Program can be found at http://www.gabar.org/programs/transition_into_law_practice_program/.

26 Information on Ohio’s Lawyer to Lawyer Mentoring Program can be found at <http://www.ohio.org>.

The court-sponsored program matches new lawyers with pre-approved experienced attorneys for a one-year term, during which they are required to complete a “mentoring plan.” In addition to providing the checklist comprising the mentoring plan, the program offers worksheets to participants, providing further tools and resources to facilitate the discussions between mentor/mentee. Likewise, the South Carolina Supreme Court’s pilot mentoring program requires that the mentor and new lawyer complete activities set forth in a uniform mentoring plan.²⁷ These programs share certain features that may translate into success: they provide guidelines to the participants; they offer training and resources for the mentors; and they offer incentives for participation, such as continuing legal education credit for the mentor or mentee.

The Commission recommends that the Court and the Bar Association use these programs as guides to developing ways in which new lawyers in this state can be mentored in a meaningful manner.

Support a Healthy Balance Between Work and Other Aspects of Life

- Encourage lawyers and their employers to pay attention to, and live by, the New Hampshire Bar Association’s pending Work-Life Creed.
- Support fee alternatives, potentially allowing lawyers to avoid the domination of the billable hour and enhancing the availability of affordable legal services.

In addition to the public’s aversion to the unpredictability associated with hourly billing, various national and local studies and the Commission’s focus groups indicate that (1) billable hour pressures can create expectations for firms, lawyers, and clients that negatively impact a healthy work/life balance; and (2) valuing services through billable hours versus efficiency and outcomes negatively impacts a lawyer’s ability to give back to the community through pro bono and other service. According to the ABA Commission on Billable Hours, the billable hour has had a negative impact on mentoring and collegiality and has resulted in lawyers no longer being recognized for the quality of their work.²⁸ The resulting dissatisfaction, the ABA Commission concluded, has

supremecourtofohio.gov/mentoring/default.asp.

27 Information on South Carolina’s Lawyer Mentoring Pilot Program can be found at <http://www.judicial.state.sc.us/bar/PilotMentoringProgram.htm>.

28 See ABA Commission on Billable Hours, Report (2002), at 5, available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf>.

led to defection from the profession.²⁹ The billable hour is also blamed for the dearth of pro bono representation.³⁰

We need to encourage the use of alternate billing modes, recognizing that, in order to be successful, they must ultimately benefit both the client and the lawyer. Continued reliance on the traditional billable hour creates pressures that benefit no one.

²⁹ *Id.*

³⁰ *Id.*

APPENDIX A

COMMISSION ON THE STATUS OF THE LEGAL PROFESSION

MISSION STATEMENT

The Commission on the Status of the Legal Profession will assess the present state of lawyers and the legal profession in New Hampshire. It will evaluate whether the profession is fulfilling its obligations to the public, the judicial system and the Bar. The Commission shall also identify important trends and challenges facing the profession in the fulfillment of its obligations, and what it, the judicial system and others can do to ensure that in the face of a changing legal landscape legal services are available and affordable and that the courts remain accessible.

REPORT AND RECOMMENDATIONS OF THE PROFESSIONAL SATISFACTION COMMITTEE

INTRODUCTION

We have distilled the views of the participants in the Focus Groups that were held. Our approach has always been not to simply compile a litany of problems, but to try to identify the problems and provide solutions. It is clear from the literature, the September 23-24, 2005, New Hampshire Bar Association Fall Leadership Conference, and from the discussions at the Focus Groups, that there are many, many problems identified with the practice of law, which are well beyond anything that we can fix. Examples include:

- the growing complexity of the law
- growing need for hi-tech facility
- growing non-English speaking population
- staggering stress
- practice moves too fast and no longer deliberative
- the isolation
- the long hours
- little satisfaction
- stress in marketing and advertising
- demands for increased expertise and technology

The suggestions, proposed solutions and wisdom of the participants in the focus groups follows.

DEBT BURDEN

Need to make loan assistance program (which is currently available to NHLA) available to:

- Public Defenders
- Prosecutors
- Attorneys who commit to take certain number of cases

Increase debt forgiveness programs

Develop law school tuition break for those who contract to go into public interest law

Institute a legal AmeriCorps Program whereby law school loans forgiven after a certain amount of time

Support congressional and ABA initiatives for waivers of interest and principal for public service work

PRO BONO/ DELIVERY OF LEGAL SERVICES TO THE POOR

Pro Bono

Need to develop culture to encourage Pro Bono work

Mandatory Pro Bono -supported by Cheshire County, opposed by Criminal Law and Delivery of Legal Services to Poor groups

Need to provide training so attorneys feel competent

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- develop trainings such as Basic Housing Law 101
 - need better training in all areas, make training free

Need more firms to buy into participation

Need to instill in attorneys when first admitted a sense of duty to take pro bono cases

Courts should give preference to Pro Bono cases so attorneys don't have to wait (now often at the end of list)

Should let you pick your cases, now makes you take from top of waiting list

Public Education

Educate public that attorneys donating time

Publish number of hours and how translates into dollars if it were a paying client

Courts need to do a better job providing info on where people can go for legal services

- not clearly posted
- should be more of an effort to educate people
- reduced fee system not well advertised

Court Reforms

Judges need to be more appreciative of Pro Bono attorney efforts

Mandate report of financial/time contribution to legal services to the poor; report to the court

Client issues

There should be some fee (\$5 hour) so client has investment in case.

Attorneys should send client a bill (with zero balance due) so client can see what value they are getting

Institute representation for qualifying cases under new Gideon Standard

Poor people should be entitled to representation if basic and important right involved

- shelter
- parental rights
- basic income
- safety
- access to health care
- guardianship of minors
- custody

PRO SE LITIGANTS

Every court that does family law should have an attorney on staff

Pro Se filer should be required to speak with attorney to make sure they know the issues

Courts should provide more help

- kiosks
- self help center
- forms available in court about what a lawyer can do for them

Encourage culture of unbundled services

Need to hold pro se litigants to same standards as lawyers, control better - level the playing field

Schedule pro se litigants last

Require pro se litigants to take online seminar

Public outreach about benefits of lawyer

Courts need to do a better job providing info on where people can go for legal services

- not clearly posted
- should be more of an effort to educate people
- reduced fee system not well advertised

Rules need to be enforced, treat everyone alike, no priority

CHANGES TO COURTS

General Attitude

Court makes practice more difficult than it needs to be; seems to have forgotten that it exists to serve our clients

Need to publicize good works of attorneys and judges more

Need clerk's offices to be more flexible, responsive to attorneys

Scheduling Issues

Need more meaningful structure/preliminary pretrial conferences

Pre trial conferences waste of time

Cases should be more finely categorized based on complexity for purposes of structuring the extent of discovery and speed of trial dates

Uncontested divorces could be administrative function

More telephonic hearings

Forgo scheduling hearings on Monday mornings

Need better coordination by courts in scheduling

Mixed dockets (arraignment, probable cause hearings, trials, traffic violations) inefficient

Reduce unnecessary review hearings

District court review hearing need to be drastically reduced

End cattle call, schedule for specific times (enormous time wasted for all sitting for 4-5 hours to get case heard)

Courts should fax decisions to counsel

Courts need to have better system for dealing with motion to continue: some courts won't hear until day of trial

Courts should grant continuances more liberally to allow vacations/other quality of life reasons

Courts should act on motions to continue promptly

Use telephonic hearings for discovery battles, motions to consolidate, case structuring conferences

If courts schedule hearing within 10 days of notice, should call attorney's office to advise

Substantive changes

Fee shifting should be utilized more often

Supreme Court needs to allow motions to exceed fee cap in appropriate cases on appeal

Need specialized courts (business court)

Offers of proof not working - participants stretch the concept

Need for intermediate appellate court, including but not limited to, review of administrative agency decisions

Transcript quality has diminished

Judges should remain impartial, not serve on committees such as Domestic Violence

Coordinating council

There should be more opportunities for younger attorneys to try cases

Judges need to be educated on mental health issues

Case Management

Need to get in early

Inordinate delay at getting cases heard and therefore more expenses involved in relatively small matters

Early triage to get final solution quickly

Quasi judicial ADR (e.g. where disputing neighbors can go to get opinion about controversy)

Emulate probate court's success - remove court supervision when not needed, mediation handled by social workers

Use of electronic filing

Form a committee (such as in medical profession) to determine whether there is a claim

No summary judgment motions within 3 months of trial

Reduce forms - makes more expensive

Institute an inquisitional system (vs. adversarial system). Option to opt into a rocket docket to present sides to judge

More things can be decided on pleadings

Have cases assigned to specific judge who becomes personally involved early on

Rules

Rules committee should consider cost of each rule and new rules should be adopted only if really necessary

Rules process - court needs to be more proactive, needs to enlist more Bar participation before changes made

Make practice and procedure uniform among all superior and district courts

Reduce number of rules changes

Courthouse Issues

No dignity in getting frisked - institute bar cards

Abandon practice of insistence that court forms be picked up only by counsel

Discovery

Consider adopting rules similar to federal court/ local rules to limit discovery and provide early intervention by the courts in litigation

By time case comes to court, too late to head off litigation, costly discovery

Impose reasonable limits on discovery in state courts, similar to system in place in federal court

Parties should be able to file stipulated discovery agreements

MEDIATION

Mediation is underutilized

Mediation system should be strengthened and required in superior court

Bar or court should offer more detailed and professional mediation training

Early mediation with sanctions for failure to negotiate in good faith, perhaps going as far as providing for recovery of attorney's fees if award does not equal offer/demand

Encourage attorneys to incorporate alternative dispute resolution into their contracts. To set up deals that are unlikely to result in disputes and provide pre-agreed dispute resolution mechanics in event dispute does arise

BAR ASSOCIATION - STATE AND LOCAL

Meetings perceived to be irrelevant, especially to younger lawyers

Lack of collegiality perceived as problem, need to provide more opportunities for interaction

Bar Association to engage in public service information ad campaign to nurture more positive image of lawyers including providing information about lawyer's pro bono and charitable and civic activities

Need for more active sections and list serves; sections too moribund
Should send out more press releases - publicize good works of lawyers and judges
Bar should work to identify best practices and provide that information
Needs to provide more CLE's at lower cost
Sections should do more CLE's
State Bar should do more to promote local bars, to provide opportunities for social interaction and other positive reinforcement for attorneys
Address the way to make New Hampshire a center for certain kinds of business, which will in the long run change the economic climate of our state - need to become another Delaware
Need to work very hard for more resources for our courts
Law office management courses should begin at very basic level such as how to deal with clients so you don't build unreasonable expectations, how to find the niche for your practice, etc.

CLIENT MANAGEMENT

Attorney needs to form a litigation plan - analysis, budget and frank assessment to be discussed and agreed to at the beginning of a case
Fee structure needs to be analyzed - flat fee v. billable hours
Move from hourly to project billing
Address issues of off-cycle access or extraordinary demands in the engagement letter

FAMILY LAW

Offers of proof - abused; judges need to call attorneys on abuses; make client take oath, Training needs to be required.
Need to make cases less paper heavy - less paper and fewer hearings
Need faster temporary hearings
Takes too long to get Orders of Notice
Marital masters should be more respectful and not degrade attorneys
Temporary hearing abused - should require exchange of witness lists and exhibits prior to hearing
Court needs to enforce rules for both pro se and attorneys
Need to build accountability - but do not favor use of sanctions
Judges need to control hearings - particularly pro se's who go on and on
System way too paper involved; too time consuming and costly to have lawyers fill out forms
As family court system instituted, court needs to involve attorneys in ongoing discussion of what is working and what isn't
Increase mediation
Eliminate fault divorce

ECONOMICS OF LAW/PRACTICE ISSUES

Permit referral fees

Bar should provide consultant or ombudsman to help small firms/solos with business issues

Unionize lawyers

LONG TERM PRACTICE ISSUES

Reform patent/IP law

Chief Justice should be traveling to U. of Virginia, Yale and Harvard and talking up benefits of New Hampshire lawyering (need to convince the best lawyers to come here)

Work towards National Bar Exam and National standard of care from lawyers

Eliminate ethical constraints on multijurisdictional practices and reliance on more fundamental ethical requirement of competent lawyering

Examine whether there is a role for the Bar, DRED, or the courts to engage in an Outreach Program to bring legal work to the state

ACCESS ISSUES

Need to bridge gap between those willing to pay reduced fees and attorneys who are underemployed

Middle class has been pushed out of the market for legal services

- must have combination of value billing and consideration of clients ability to pay

Need to figure out way to attract more attorneys to remote geographic locations

Legal Insurance or prepaid legal plans

Unbundled legal services

Sliding fees

Create subclassifications within the profession (e.g. medical profession - nurse practitioner/physician's assistant)

CRIMINAL LAW

Sentencing

Pretrial diversion and alternative sentencing must be instituted. There should be a statewide coordinated effort to explore, evaluate and implement uniformly more programs such as the Academy, pretrial diversion and drug and mental health courts

- Cost-effective (reduce docket, less costly than incarceration)

Increase availability of electronic monitoring

Increase funding for rehabilitation programs and alternatives to incarceration

More resources should be committed to Probation/Parole field services to actually aid those supervised in their rehabilitation

Provide adequate Substance Abuse Treatment

Mandatory sentencing should be discouraged - limits discretion of judges, places in hands of prosecutors

Rules

Adopt Rules of Criminal Procedure

Assigned counsel rate - hasn't changed since 1992, lost 30% of value at least - needs to be raised

Scheduling (In addition to those suggestions in Changes to Court section)

District court - have notices of intent to plead on misdemeanors

Allow represented defendants charged with felonies to waive arraignment

District court - let prosecutors call the cases based on who is ready

General

Revive ICJJC (interbranch group to meet regularly on criminal justice issues)

Law School - educate law students on drug addiction, mental illness

Court needs to use its power to positively influence and educate legislators, commissioners and the public

NEW LAWYERS

Lack of mentoring opportunities

Expand Practical Skills course (and make it free or low cost)

Provide opportunities for younger lawyer to try cases/second chair

Mandatory mentoring system for new lawyers

Consider apprenticeship requirement (similar to Vermont) to ensure that new lawyers are properly trained before trying to go it alone

APPENDIX C

The following charts are reprinted from the New Hampshire Bar Association, 2006 Statistical Supplement.

In State (New Hampshire) Bar Membership	Percent of Membership	
	<u>2000</u>	<u>2004</u>
Region 1 (Carroll, Coos, Grafton, Sullivan)	9.9%	9.7%
Region 2 (Belknap, Cheshire, Merrimack, Strafford)	38.9%	40.5%
Region 3 (Hillsborough, Rockingham)	51.2%	49.8%
	100.0%	100.0%
Gender		
Male	73.5%	65.0%
Female	26.5%	35.0%
	100.0%	100.0%
Age Group		
Under Age 30	4.7%	3.5%
Ages 31 to 40	28.7%	22.2%
Ages 41 to 50	35.9%	34.0%
Over Age 50	30.7%	40.3%
	100.0%	100.0%

Personal Net Income by Region (Percent of Bar members in the region)	<u>Less</u> <u>than</u> <u>\$30K</u>	<u>\$30K</u> <u>to</u> <u>\$45K</u>	<u>\$45K</u> <u>to</u> <u>\$60K</u>	<u>\$60K</u> <u>to</u> <u>\$75K</u>	<u>\$75K</u> <u>to</u> <u>\$100K</u>	<u>More</u> <u>than</u> <u>\$150K</u>	<u>\$100K</u> <u>to</u> <u>\$150K</u>
Region 1 (Carroll, Coos, Grafton, Sullivan)	15.2	20.2	19.2	11.1	9.1	14.1	11.1
Region 2 (Belknap, Cheshire, Merrimack, Strafford)	9.6	14.8	18	15.8	14.8	15.6	11.4
Region 3 (Hillsborough, Rockingham)	8.9	8.9	16.6	12.6	13.0	19.0	21.1
Out of State	8.0	8.0	9.4	13.6	23.0	15.5	22.5
Total	9.4	11.5	15.9	13.7	15.2	16.8	17.4

Net Income by Size of Organization (%)	I am the only attorney	2 to 5 lawyers	6 to 10 lawyers	11 to 20 lawyers	More than 20 lawyers
Less than \$30K	24	6	3	6	1
\$30K to \$45K	18	11	12	12	6
\$45K to \$60K	18	18	17	19	11
\$60K to \$75K	13	12	16	9	16
\$75K to \$100K	10	19	16	15	16
\$100K to \$150K	9	21	21	20	18
More than \$150K	8	13	17	20	32