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**COMMISSION ON THE STATUS  
OF THE LEGAL PROFESSION**

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**MINORITY REPORT  
OF  
STEPHEN E. BOROFSKY**

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## **INTRODUCTION**

In many respects, I concur with the Report and Recommendations of the Commission. However, I do not think our Report has identified all of our problems; and I would articulate some of the identified problems differently.

An important solution to many of the articulated problems is the Commission's recommendation that we adopt a Civil Gideon. I believe that the adoption of Civil Gideon for New Hampshire is a wonderful aspirational goal, but not a realistic goal. I do not believe the Court will find that the Civil Gideon doctrine has constitutional underpinnings; and, in the current fiscal milieu, I do not believe the Legislature will fund a Civil Gideon approach, absent a constitutional requirement that it do so. Therefore, I respectfully dissent from the recommendation that the Court and the Bar focus their efforts on trying to put Civil Gideon in place in New Hampshire by 2015.

The Commission has also failed to set forth certain of the facts we discovered during our tenure. I believe these facts are necessary to a good understanding of both the Commission's Report and Recommendations and my Minority Report. Ergo, I start by setting forth facts, the consideration of which I believe necessary to a proper understanding of where the administration of justice and the practice of law are today and where we should seek to have them be in ten (10) years.

### **A. SOME ADDITIONAL FACTS AND PREMISES**

- 1a. The total # of New Hampshire lawyers actively practicing law today = 4439
- 1b. The total New Hampshire population today = 1,300,000
- 1c. The # of New Hampshire citizens/New Hampshire lawyer today = 300
  
- 2a. The total # of New Hampshire lawyers actively practicing law circa 1970 = 800
- 2b. The total New Hampshire population circa 1970 = 800,000
- 2c. The # of New Hampshire citizens/New Hampshire lawyer circa 1970 = 1,000
  
3. 27% of New Hampshire lawyers practice out-of-state = 1,200
  
4. 22% of all New Hampshire lawyers work for the Government or charitable NGOs like New Hampshire LA, DRC, etc = 1,000



## **B. CIVIL GIDEON VS. DE-ADVERSARIALIZATION**

Should we have Civil Gideon in New Hampshire? Aspirationally, Yes, of course. Would a Civil Gideon solve many of our problems? Perhaps. But, is a Civil Gideon likely to exist in New Hampshire in the next ten (10) years? Unlikely.

One cannot disagree with the concept of Civil Gideon, in principle. But, I do not think it responsible to recommend a solution without recommending a way to pay for the solution. Our Legislators tell us they will have trouble balancing the budget with no new expense items; and “the polls show that the public views us as a greedy, non-caring aggressive bunch that look out for number one and the working public be damned...”.<sup>3</sup> The majority has recommended a Civil Gideon approach to the solution of our pro se and other problems. So has the Citizen’s Commission (see Recommendations No. 18 and No. 19 of the Citizen’s Commission Report). But I do not think the Commission’s Civil Gideon recommendation is a recommendation that can come to fruition in ten (10) years.

Our courts are overburdened. The pro se tide will not abate. To help unburden the court system and deal with the pro se issue, I propose that we de-adversarialize those areas of the law that can better be handled in a non-adversarial, administrative manner(see Recommendation No. 13 of the Citizen’s Commission Report). I would recommend the de-adversarialization of family law (now 85% pro se on at least one side) and landlord/tenant cases, as a start. These [largely statutory] matters can be better handled via a Social Security-like system, in which the decision-maker has some authority to collect evidence. Turn our Marital Masters into Administrative Law Judges. Allow representation by paralegals (see Recommendation No. 23 of the Citizen’s Commission Report), which paralegals are supervised by the Court. As one of the presenters to our Commission noted,<sup>4</sup> there are “legal” issues which do not take the seven (7) years of education to fathom. Paralegals and perhaps others, with limited education and experience, can help New Hampshire citizens with certain “legal” problems – like they already do, in the public school IEP setting and elsewhere. This will help to leave room in our common law courts to tend to the common law.

## **C. ADOPT A UNIFIED COURT.**

Adopt a Unified Court. We need a Unified Court, because we are too small a state to have anything else. The Commission Report speaks in terms of an “integrated court”, but we should be bolder.

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<sup>3</sup> Robert W. Minto, Jr. “The Future of the Legal Profession and the Organized Bar,” The Advocate (February 2000) at 21.

<sup>4</sup>Tim Hall.

We have 60 +/- decision-makers in the New Hampshire judicial system. We can think of them as a large New Hampshire law office or a small New Hampshire hospital. But it is ridiculous to have all the duplication of effort and cost and inefficiencies created by the current balkanization of jurisdiction, resources, etc. In its discussion of an “integrated court”, the Commission notes many of the advantages of a Unified Court. Other supporting benefits to a Unified Court include:

1. Key to the unification concept is that it would allow us to be ready, fiscally and operationally, to implement new technology, as it become available.
  2. With the advent of many new Superior Court Justices in the next year or two, this is the time to be sure new judicial appointments buy in to the unified court concept.
  3. A unified court system would make judicial specialization easy (much like in a law firm or a medical practice), so that the concerns of the business community and others for knowledgeable and experienced decision-makers can be met. It will also allow for cross-over training at all levels, so that court personnel can be strategically deployed where they are needed most and can help best .
  4. A unified court would also make simple the solution of a multitude of the lawyer complaints that we have fielded, including: balkanization of jurisdiction; individual court idiosyncrasies; continuance problems, scheduling problems, disparate forms, etc.
- . The Legislative and other necessary initiatives can come later. Let us do our part now.

#### **D. MAGISTRATE SYSTEM**

I do like and support the notion of a Magistrate System to triage cases as set forth in the Commission Report. I believe such a Magistrate System could serve to substantially reduce the civil dockets of the Superior and District Courts. While I concur in the notion of a two (2) county pilot program, I would recommend moving to a small pilot program in each county, as I believe the benefits of such a system would quickly become apparent to it users.

## E. PRO BONO

Pro Bono needs more thought. I agree with mandatory Pro Bono, but with a broad definition of what constitutes pro bono work. Given that 27% of New Hampshire attorneys work out-of-state, that 22% of New Hampshire lawyers are government or NGO employees,<sup>5</sup> that X% are academicians, and Y% are corporate counsel (a bunch of whom make more than the average private practitioner), it may well be that we are loading all of the pro bono burden onto less than half of the New Hampshire Bar, a substantial number of whom earn below the median income for the average New Hampshire citizen, and many of whom do pro bono legal work other than the representation of indigent litigants (e.g. advising local charities, litigating for advocacy groups such as the New Hampshire Civil Liberties Union and GLAD and writing Amicus Curiae Briefs to the Court) – not to mention the free legal work that many do for indigent litigants without reporting it through the system.

## F. PROFESSIONALISM AND MORALE: THE ELEPHANT IN THE ROOM

We decry the fact that the practice of law is not as rewarding as it used to be, as it should be. However, we have failed to look at one major issue.

Are there too many lawyers in New Hampshire? That is the “elephant in the room” question. And we did not talk about this elephant.

Minto said it far better than could I:

“Very few – the Bench the Bar or the public – will dispute that we have too many attorneys in private practice for the amount of legitimate legal work available.” Minto, supra at 24.

“We are proliferating at a rate that cannot be absorbed into society and preserve the professional aspects of the practice of law.” Minto, supra at 21.

“There is too little profitable work to go around and attorneys can’t give up the time to be active in their communities...it seems that the standards (Bar Admission and Law School Graduation) have diminished.” Minto, supra at 23.

“It doesn’t take much of a psychic mind to look into the future and see a time when Attorneys in America will be come Barristers. The rest of the traditional practice of

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<sup>5</sup>The government attorneys on the Commission take the position that they cannot represent indigent litigants at all. It would seem that the Court should work with U.S. Attorney’s Office and the heads of other government agencies and NGOs to workshop this issue.

attorneys is slowly being eroded to other perceptibly less expensive professions and business enterprises.” Minto, supra at 22.

No one much disputes that the amount of legal work in New Hampshire has decreased. In addition, over the last 35 years or so, the number of active, practicing New Hampshire lawyers has increased about 500% (five-fold – from 800 to 4500), while the general population of the State has increased about 60% (from about 800,000 to 1,300,000). In the early 1970s there was one (1) lawyer per 1,000 New Hampshire citizens. Today, there is one (1) lawyer for every 300 New Hampshire citizens.

Are there too many lawyers in New Hampshire? If so, what shall we do about it?

### **G. QUALITY CONTROL – FOR THE BENCH AND FOR THE BAR**

Here again, Minto has said it well. He asks: How are we to get it so that lawyers again “add value to the transaction?...How are we to put some public trust and confidence in the equation?” Minto, supra, at 23. Minto articulates a number of important things we must do, but I have another suggestion that I think will also help.

Institute some Quality Control [QC] -- for the Bench and for the Bar. Not the Felmly Report type QC<sup>6</sup> -- real QC. I would suggest Peer Review as one logical way to start. Have judges go around seeing how other judges run their courts - it would be doubly beneficial: the judges being critiqued learn and the critiquing judges learn.

For the lawyers, it is a bit odd that there is no Peer Review process like the accountants (and doctors in hospitals) have. I don't know why the malpractice carriers have not insisted on it, but it seems kind of sensible.

### **A FINAL THOUGHT**

I do not believe the changes required by our analysis and the analysis of the Citizen's Commission can be accomplished by the Supreme Court alone or by the Supreme Court with the help of volunteer attorneys. Accordingly, I recommend the creation and funding of a full time position to work with the various Court constituencies, the Bar and the Legislature to address the changes needed to make the administration of justice be all it can be for the citizens of New Hampshire in 10 years. At our last deliberative session, I suggested that the position be filled by a lawyer of Jack Middleton's stature; and that is what I am recommending to the Court.

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<sup>6</sup>The Felmly Report spoke of disposition rates and the like.

I see a disconnect between the Bench and the Bar, one that has emerged over the last several years, one that appears not to have emerged in Massachusetts. Certainly the aftermath of the *Claremont* decisions and the impeachment proceedings account for some of the disconnect. So does the attitude towards lawyers in certain of the "ethics" decisions handed down by the Court in the recent past. I believe that Judges in general have forgotten that their natural constituency is the Bar - we lawyers; and I believe that judges have turned their countenances away from lawyers and towards the general public in a way has helped to create the disconnect. There are other reasons for the disconnect.

Unless the Bench and the Bar are pulling in the same direction, none of our efforts to improve the administration of justice will go anywhere. The Bench is obligated to bend its backs to undo the disconnect. And so is the Bar.

Respectfully Submitted,

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Chair, Access SubCommittee  
Commission on the Status of the Profession